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The *Crime and Disorder Bill [HL]*, Bill 167 of 1997-98: Anti-social neighbours, sex offenders, racially motivated offences and sentencing drug-dependent offenders

This Paper looks at the new provisions for Anti-Social Behaviour Orders and Sex Offender Orders. It also addresses those provisions of the Bill which create new offences of racially aggravated violence and harassment, and provide for higher sentences for other offences with a racial element. Finally it looks at the proposed Drug Treatment and Testing Order, a new community-based punishment for drug-dependent offenders.

Research Paper 98/43 discusses the provisions of the Bill which deal with youth justice, criminal procedures and sentencing.

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SUMMARY

This Paper looks at four of the substantive provisions proposed in the *Crime and Disorder Bill*. It is intended that each of the four corresponding sections of the Paper should be capable of being free-standing.

Section I: The problem of persistent anti-social behaviour which does not necessarily amount to criminal action is addressed by means of the proposed Anti-Social Behaviour Order in Clauses 2 (England and Wales) and 19 (Scotland) of the Bill. These Orders will be civil orders, but their breach would be a criminal offence.

Section II: Sex Offender Orders (SOO) would likewise be civil orders, breach of which would be a criminal offence. They are intended to deal with past sex offenders who pose a current risk to the community, and are connected to the requirements of the *Sex Offenders Act 1997*. Sentences including an extended period of supervision are proposed for those convicted of sexual or violent offences after the commencement of the Bill, and will be discussed in a later paper. The versions of these proposals for Scotland are slightly different from those for England and Wales but are intended to have broadly the same effect.

Section III: Part IV of the Bill would enable the courts in England, Scotland and Wales to impose community-based Drug Treatment and Testing Orders (DTTOs) on drug-dependent offenders, with the aim of reducing the incidence of drug-related crime. However, courts would not be able to make a DTTO unless the offender indicated that he or she was willing to comply with its requirements. DTTOs would include a requirement for drug testing during the period of the order. The court would carry out a periodic review of the offender's progress at intervals of not less than one month. The Government intends to delay full implementation of DTTOs until pilot programmes have been evaluated.

Section IV: Part II of the Bill implements manifesto commitments to create new offences of racially aggravated assaults and harassment in England and Wales. In Scotland, there is a new offence of racially aggravated conduct. An offence of racially aggravated criminal damage has also been added to the Bill. The new racially aggravated offences are based on existing offences, with enhanced penalties for the racial element. The courts in England, Wales and Scotland are also required to treat a racial element to any crime as an aggravating factor.

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I Anti-social behaviour

A. Existing law

It could be said that all criminal law is intended to deal with anti-social behaviour. However, there are a number of remedies in both the civil and the criminal law, in England and Wales and in Scotland, which attempt to deal more specifically with anti-social behaviour that does not necessarily cause physical injury or damage to property, but which is nevertheless threatening or upsetting to other people. These are set out in detail in Research Paper 96/115, 'Stalking, harassment and intimidation and the *Protection from Harassment Bill*', but a summary is provided below.

1. England and Wales

a. Criminal law

(i) Public order offences, including causing harassment, alarm and distress

Section 4 of the *Public Order Act 1986* provides that a person is guilty of an offence if he:

i) uses towards another person threatening, abusive or insulting words or behaviour, or
ii) distributes or displays to another person any writing, sign or visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another. The offence may be committed in a public or a private place, although no offence is committed where the words or behaviour are used, or the writing, sign or visible representation distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling. A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

The offence of "disorderly conduct", set out in section 5 of the *Public Order Act 1986* applies to threatening, abusive, insulting or disorderly behaviour used, or threatening, abusive or insulting writing, signs and visible representations displayed, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. It does not depend on harassment, alarm or distress actually having been caused in the particular case. A person is guilty of an offence under section 5 only if he intends his words or behaviour to be threatening, abusive or insulting or is aware that it may be so, or if he intends his behaviour to be or is aware that it may be disorderly.[1]

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[1] *Public Order Act 1986* s.6

These provisions replaced the offence of disorderly conduct in section 5 of the *Public Order Act 1936*, which was couched in less specific terms. This section had been used to deal with minor acts of hooliganism, for which the then Government felt the new legislation would be less appropriate, such as:

> hooligans on housing estates causing disturbances in the common parts of blocks of flats, blockading entrances, throwing things down the stairs, banging on doors, peering in at windows, and knocking over dustbins;
>
> groups of youths persistently shouting abuse and obscenities or pestering people waiting to catch public transport or to enter a hall or cinema;
>
> someone turning out the lights in a crowded dance hall, in a way likely to cause panic; rowdy behaviour in the streets late at night which alarms the local residents;
>
> rowdy behaviour in the streets late at night which alarms local residents.[2]

The government felt that control over this type of behaviour was particularly needed when the behaviour is directed at the elderly and others who may feel especially vulnerable. It was pointed out that:

> if a person who causes this type of disturbance is drunk, he may be charged with the offence of being drunk and disorderly; but there is no corresponding offence to cover similar conduct by a person who is not drunk, even thought the nuisance caused is no less, and may be thought more culpable in someone who is sober.[3]

In an attempt to provide protection from this more minor kind of behaviour, section 154 of the *Criminal Justice and Public Order Act 1994* was enacted, which added a new section 4A to the *Public Order Act 1986*. The new section, which came into force on February 3rd 1995, created an offence of "causing intentional harassment, alarm or distress" by using threatening, abusive or insulting words or behaviour or disorderly behaviour, or displaying any writing, sign or other visible representation which is threatening, abusive or insulting. As with section 4 of the *1986 Act*, no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.

(ii) Other public order offences and offences involving harassment

A person who trespasses on land in the open air and does anything which is intended by him to have the effect of intimidating people so as to deter them from engaging in any lawful activity, or of obstructing or disrupting that activity, may be charged with aggravated trespass.[4]

(iii) Arrest for breach of the peace

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[2] *Review of Public Order Law*, Cm. 9510, Home Office and Scottish Office, May 1985, p. 18
[3] *ibid*
[4] *Criminal Justice and Public Order Act 1994*, s. 68

A police constable, or indeed any other person, may make an arrest where a breach of the peace has been committed, is being committed, or where there is reasonable cause to believe that such a breach will be committed or renewed. Actual or apprehended violence is an essential ingredient of a breach of the peace. People who are arrested under these powers whether or not they have been convicted of any substantive offence, may be brought before magistrates, who may bind them over for a set period (often a year) to be of good behaviour and keep the peace.

(iv) The Protection from Harassment Act 1997 - *criminal provisions*

When the Bill which became the *Protection from Harassment Act 1997* was introduced, the then government said that the it was intended 'to put a stop to the fear and misery caused by stalkers, nuisance neighbours and racial abuse'.[5] The application of the Act certainly goes beyond the issue of stalking which originally inspired this legislation but which is nowhere explicitly mentioned in it.

Section 1 of the 1997 Act makes a general declaration prohibiting a course of conduct amounting to harassment which, if carried out, would give rise to a criminal penalty under section 2 and may be the subject of a claim in civil proceedings under section 3 (see below). Section 7 provides that references to harassing a person include alarming the person or causing the person distress, that a 'course of conduct' must involve conduct on at least two occasions, and that 'conduct' includes speech.

Section 4 of the 1997 Act created the more serious, arrestable, criminal offence of carrying out a course of conduct which puts people in fear of violence. If on the trial on indictment of a person charged with an offence under section 4 the jury find him not guilty of the offence charged they may find him guilty of the lesser offence under section 2.[6]

Section 3(3) to (9) of the 1997 Act made it an arrestable criminal offence for a person, without reasonable excuse, to breach an injunction prohibiting harassment issued as part of the civil remedy set out in section 3. However, these subsections of section 3 are not yet in force pending the drafting of new rules of court, and so the general power of imprisonment or fine for contempt of court must be relied upon in the interim for breach of orders.

Section 5 gives a court sentencing or otherwise dealing with a person convicted of an offence under section 2 or section 3 the power, in addition to dealing with him in any other way, to make an order restraining him from pursuing further conduct against the victim, or any other person named in the order, which amounts to harassment, or will cause a fear of violence. The order may have effect for a specified period or until a further order is made. It is an arrestable offence for a defendant to breach such an order without reasonable excuse. Like the offence under section 4 and that under section 3(3) this is an arrestable offence.

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[5] 'New Bill to stop stalkers and intimidating neighbours', *Home Office press notice 375/96*, 5 December 1996
[6] section 4(5) of the 1997 Act

A number of commentators expressed concern about the wide range of conduct or behaviour which could in theory be rendered criminal by virtue of the new offences created by the 1997 Act, and by the lack of a requirement to prove intent, which might otherwise have been used to narrow down these circumstances.

b. Civil law

(i) Injunctions

Ordinary tortious remedies such as injunctions ancillary to proceedings for trespass, trespass to the person, nuisance and personal injury may be relevant to those seeking protection from some types of anti-social behaviour. Normally the ability to seek an injunction would be limited to the person(s) who actually suffered from the nuisance; however, social landlords may apply for an injunction where it can be shown that the tenant in question is in breach of a tenancy condition not to indulge in particular sorts of behaviour (see below). An injunction may be perpetual, ie a final order, or interlocutory, which is an interim order pending the final outcome of the matter. An interlocutory order can, in an emergency, be obtained without the defendant being given notice of the proceedings (*ex parte)*.

No power of arrest may be attached to these injunctions, unless they are made under domestic violence provisions relating to people who live or have lived in the same household as the plaintiff.[7] However, in two recent cases[8] on the use of injunctions involving threatening and abusive behaviour, heard by the courts before the enactment of the *Protection from Harassment Act 1997*, the courts made use of their power to imprison for contempt of court for failure to observe such injunctions. Contempt of court is punishable by committal to prison for a maximum period of two years, sequestration or a fine. Those imprisoned for civil contempt do not thereby gain a criminal record, and are housed separately from other prisoners.

It should be noted that there are considerable difficulties in obtaining injunctive relief in cases where the identity of the perpetrator is unknown to the victim. The police have only a limited role in investigating matters which fall outside the scope of the criminal law and in some cases there may not have been any behaviour which could give rise to criminal prosecution.

(ii) The Protection from Harassment Act 1997 - *civil provisions*

The *Protection from Harassment Act 1997* created a tort in England and Wales against which an order restraining harassment might be sought - but unlike in Scotland[9] there is no provision seeking to create a specific statutory right to be free from harassment (see below). At the time of the passage of the Bill which became the 1997 Act, the Law Society expressed concern about

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[7] Part IV of the *Family Law Act 1996*

[8] *Burris v Azadani* [1996] 1 FLR 266 and *Khorasandjian v Bush* [1993] 2 FLR 66

[9] see section 11

the potentially wide application of a new tort. Victim Support, on the other hand, strongly welcomed the proposal for this new statutory tort of harassment to be widely drafted in order to catch a wider range of activities than those of stalkers alone.

Section 3 allows for a person to take civil proceedings in respect of an actual *or an apprehended* breach of section 1. There is therefore no requirement that any such conduct has already taken place. It is for those alleged to have pursued a course of conduct amounting to harassment under section 1 to prove that their pursuit of the course of conduct was reasonable in the circumstances. As with ordinary injunctions and some domestic violence remedies, interim "non-harassment" orders may be sought by a victim *ex parte* (ie without the appearance of the alleged harasser at court to defend the case made against him).

Section 3(2) provides for damages to be available for "(among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment". The proposal (as yet unimplemented) in section 3(3) to make breach of a civil order a criminal offence (see above) is highly controversial as it would blur the distinctions between the criminal and civil law.

It is not necessary to pursue both civil or criminal remedies - one type alone could be sought. A victim may decide to pursue civil remedies where there is insufficient evidence for a criminal prosecution but perhaps sufficient for the obtaining of a civil order. In criminal cases the matter must be proved *beyond reasonable doubt* but a lower standard of proof applies in civil proceedings where the matter must be proved *on the balance of probabilities*. However, a person may be reluctant to pursue civil remedies where he or she did not qualify for legal aid and did not have sufficient funds available to seek civil remedies. A victim may also be deterred by stress from seeking civil remedies and there is no provision in the Act similar to section 60 of the *Family Law Act 1996* allowing for rules of court to be made so that a third party might act as the victim's representative and seek an order on his or her behalf.

2. Scotland

a. Criminal law

(i) Breach of the peace

In Scotland, the wide-ranging common law offence of breach of the peace has been used by the courts to deal with a variety of conduct which would be likely to come under the general description of "anti-social behaviour". The offence has no equivalent in England and Wales.

Any conduct which is liable to create alarm and annoyance can give rise to a charge of breach of the peace, even though the conduct complained of might in other circumstances be perfectly

innocuous and lawful. It is not necessary for the prosecutor to prove that actual harm was suffered by a third party. Nor is it necessary for the prosecution to establish that an accused person actually intended such a result.

(ii) The Protection from Harassment Act 1997 - *criminal provisions*

Section 8 of the 1997 Act created a new delict or civil wrong relating to harassment and gave civil courts in Scotland the power to make non-harassment orders, but sections 2 and 4 of the Act, which create new offences of harassment and putting people in fear of violence in England and Wales, do not extend to Scotland.

Section 9 of the 1997 Act does, however, provide for a breach of a non-harassment order to be a criminal offence rather than contempt of court. The criticism that has been made in England and Wales of the use of criminal sanctions for breach of a civil order has also been made in relation to Scotland.

Section 11 of the 1997 Act inserted a new section 234A into the *Criminal Procedure (Scotland) Act 1995*. The new provision enables the prosecutor to apply to a court in Scotland which is sentencing a person convicted of "an offence involving harassment of a person" to make a non-harassment order against the offender in addition to any other disposal in relation to the offence. Such an order would require the offender to refrain from specified conduct in relation to the other person for a specified period, which may be an indeterminate period. The court may make such an order if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from further harassment. For the purposes of this provision, "harassment" is to be construed in accordance with section 8 of the 1997 Act[10] which provides that "harassment" of a person includes causing the person alarm and distress. An "offence involving harassment" presumably therefore includes breach of the peace or other offences where the conduct of the offender involved causing alarm and distress to a person, as well as the specific statutory offence of breaching a non-harassment order which was created by section 9 of the Act.

A potential problem with the application of these provisions of the *Protection from Harassment Act 1997* surfaced in the case of *McKinnon*, decided by appeal court judges on 25 February 1998. The court stated that before a non-harassment order could be made following conviction of an offence involving harassment, the accused must be convicted of an offence which itself involved conduct on at least two occasions, and previous convictions could not be used to establish a 'course of conduct'. The government is examining the court's judgment with a view to determining whether there are problems with the law which should be changed.[11]

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[10] Section 234(7) of the 1995 Act

[11] 'McLeish comments on Protection from Harassment Act 1997 - McKinnon case', *Scottish Office press notice 0383/98*, 26 February 1998

b. Civil law

(i) Interdict

Scottish common law offers certain civil remedies to those suffering as a result of anti-social behaviour. When personal molestation or assault is seriously threatened an order for interdict may be sought from the sheriff court or the Court of Session. Breach of an order for interdict or interim interdict is a contempt of court for which the penalties are admonition, censure, fine or a maximum term of imprisonment of two years.

(ii) The Protection from Harassment Act 1997 - *civil provisions*

Section 8(1) of the *Protection from Harassment Act 1997* creates a new legal right to be free from harassment in Scotland. The section goes on to create a new delict of harassment by providing for a prohibition against pursuing a course of conduct which amounts to harassment of another person. This prohibition is couched in slightly different terms from that applying to England and Wales under section 1 of the Act, but by virtue of section 8(3) "conduct", "harassment" and "course of conduct" bear the same meaning as in England and Wales under section 7.

By virtue of section 8(5), in an action of harassment the court may award damages and, as in England and Wales, this could include damages for *any anxiety* caused by the harassment and *any* financial loss resulting from it [section 8(6)]. The court may also grant interdict or interim interdict (ie an order restraining certain types of behaviour). In addition there is provision for the court to grant a *non-harassment order* in an action of harassment "if it is satisfied that it is appropriate to do so in order to protect the person from further harassment" [section 8(5)(b)(ii)]. This new order may specify the type of conduct to be refrained from and the period of the restriction, which could be indeterminate. An interdict and a non-harassment order would not be able to contain the same prohibitions at the same time.

As in England and Wales, section 8 can apply to a wide variety of conduct and not just that amounting to "stalking", and orders may be sought in respect of an actual or an apprehended breach of section 8(1).

B. Remedies available to social landlords

1. England & Wales

Social landlords (local authorities and housing associations/registered social landlords) in England and Wales have a number of powers at their disposal to deal with tenants who exhibit anti-social behaviour. These powers, in particular those of local authorities, were recently extended and strengthened by the *1996 Housing Act.*

a. Introductory tenancies

The *1996 Housing Act* has given local authorities discretion to operate a scheme of introductory tenancies for all new tenants. Where introductory tenancies are used it will be much easier for councils to evict these occupiers if they exhibit anti-social behaviour within the first 12 months of entering into their tenancy agreements.

Reports suggest that many (almost half) local authorities have decided against the use of introductory tenancies on the grounds that they view them as discriminatory or potentially ineffective.[12] However, Manchester City Council carried out the first eviction of an introductory tenant using the new provisions at the end of October 1997.[13]

Only local authorities have the legal right to introduce a scheme of introductory tenancies but housing associations can apply for permission from the Housing Corporation to offer assured shorthold tenancies (with limited security of tenure) to new tenants. Tenants are offered full assured status at the end of 12 months if no problems arise.

b. Evicting the perpetrator

Schedule 2 to the *Housing Act 1985* sets out the grounds upon which a court may grant an order for possession against a secure council or housing association tenant. Ground 2 (as amended by section 144 of the *Housing Act 1996*) provides for the eviction of a tenant or any person residing in the dwelling-house or visiting the dwelling- house who has:

(a) been guilty of conduct which is, or is likely to cause, a nuisance or annoyance to a person residing, visiting or otherwise engaged in lawful activity in the locality, or
(b) who has been convicted of:
  (i) using the dwelling-house or allowing it to be used for immoral or illegal purposes, or
  (ii) an arrestable offence committed in, or in the locality of, the dwelling house.

Ground 1 of schedule 2 to the 1985 Act provides for the granting of a court order where an obligation of the tenancy has been broken or not performed. Councils may insert additional terms into tenancy agreements that, if breached, can give rise to eviction proceedings. Many authorities have included an obligation to refrain from racial harassment in their tenancy agreements so that eviction action under Ground 1 can be pursued against perpetrators should the need arise. Before granting a possession order under Grounds 1 or 2 the court must be satisfied not only that the alleged breach has occurred, but also that it is reasonable to grant the order.

Similar grounds for eviction of assured tenants of housing associations are contained in Schedule 2 to the *1988 Housing Act.*

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[12]'Councils reject new tenancies', *Housing Today,* 6 November 1997
[13]'A testing time for tenants', *Housing Today,* 13 November 1997

c. Injunctions

Several social landlords, including the Hackney Council and Manchester City Council, have successfully sought injunctions against some of their tenants in an attempt to tackle vandalism, violence, noise, harassment, threatening and un-neighbourly behaviour on their estates.

The *1996 Housing Act* strengthened the powers of local housing authorities to obtain injunctions against the perpetrators of anti-social behaviour, including allowing a power of arrest to be attached to injunctions where there is actual or threatened violence.[14] Sections 152, 153, 154 155(1) and (2), 157 and 158 of the 1996 Act (applications for injunctions to restrain anti-social behaviour) were brought into force on 1 September 1997.[15] Manchester City Council has reportedly used these new powers that enable the immediate arrest of 'nuisance neighbours' if they break a court injunction.[16]

Local authorities may also rely on their general power to institute proceedings leading to an injunction under section 222 of the *Local Government Act 1972*. This enables an authority where it considers it expedient to promote or protect the interests of inhabitants of its area, to prosecute, defend or appear in legal proceedings. Coventry City Council reportedly used section 222 to obtain an order excluding two brothers from their mother's home following a series of burglaries on her estate.[17]

d. Mediation

A number of local authorities and housing associations have developed their own in-house mediation services and others have used the services of independent organisations such as Mediation UK. Several reasons are advanced in favour of using mediation to resolve neighbour disputes:

- mediation can prevent a dispute from escalating into a more serious disturbance that may require court action;
- officers of an independent organisation are seen as impartial;
- residents feel that their complaints are being taken more seriously as the dispute handler can devote more time to the problem; and
- legal remedies are not appropriate for all cases.

e. Moving the perpetrator or the victim

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[14]Sections 152-158

[15]SI 1997/1851

[16]'New nuisance neighbour laws used for first time by Manchester', *Manchester Evening News*, 10 November 1997

[17]'Anti-social antidotes', *Roof*, July/ August 1995

Some social landlords have traditionally adopted a "management transfer" approach to neighbour disputes under which either the victim or the alleged perpetrator is moved to another property. In England and Wales these moves can only take place with the consent of the tenant involved, although in Scotland it is possible to enforce a transfer. This has been criticised as a "nuisance pays" approach to harassment, particularly if the household that has been moved has been a victim of racial harassment. However, landlords may prefer this method to eviction proceedings as it is quicker, cheaper and produces a more predictable result.

f. Use of bye-laws

District councils and London borough councils have a general power to make bye-laws under section 235 of the *Local Government Act 1972*. Bye-laws may lay down provisions for controlling the use of public open spaces and thus attempt to remove causes of friction between citizens, eg by requiring that all dogs be restrained. In addition, housing authorities may, under section 23(1) of the *Housing Act 1985*, "make bye-laws for the management, use and regulation of their houses."

Breach of a bye-law will amount to a criminal offence; thus, an authority must be able to prove its case beyond reasonable doubt. It seems that few authorities make use of their bye-laws other than in relation to non-residential parts of estates.[18]

g. Use of covenants on right to buy properties

If a serious dispute arises between a council tenant and an occupier who has exercised their right to buy the council has no powers to evict the owner-occupier. Several local authorities use covenants on 'right-to-buy' sales as a means of demonstrating both to buyers and their tenant neighbours that expectations about behaviour are the same for owners as for tenants.

Typical clauses which authorities include in covenants will prohibit:

- the use of properties for illegal or immoral purposes;
- creating a nuisance, annoyance or inconvenience to neighbours;
- failing to keep the garden tidy;
- keeping animals without permission.

2. Scotland

As in England and Wales, the ultimate sanction available to Scottish councils to deal with anti-social tenants is to evict the "nuisance" tenant by establishing to the court's satisfaction that the

[18]Chartered Institute of Housing, *Neighbour Disputes: Responses by Social Landlords,* 1993, p.132

tenant's behaviour falls within Ground 7 of Schedule 3 to the *Housing (Scotland) Act 1987*, which states that:

> the tenant of the house or any person residing or lodging with him or any sub-tenant of his who has been guilty of conduct in or in the vicinity of the house which is a nuisance or annoyance and it is not reasonable in all circumstances that the landlord should be required to make other accommodation available to him.

Before a court will grant an order under Ground 7 it is likely to require substantial evidence of the act(s) constituting a nuisance. As there are considerable difficulties in proving a case, in marshalling evidence and in persuading witnesses to appear because of fear of retaliation, possession actions against tenants under Ground 7 are therefore relatively rare. A number of landlords have attempted to overcome this by inserting specific clauses in tenancy agreements prohibiting certain types of conduct, e.g. racial harassment.

Scottish authorities also have the option of using Ground 8 which provides for the eviction of tenants where there is "nuisance or annoyance where the landlord considers it is appropriate that the tenant should be required to move to other accommodation". This is a management ground which means that the landlord must establish that suitable alternative accommodation will be available when the order takes effect. Ground 8 is intended to deal with less serious nuisance, and is effectively a compulsory transfer.

As with authorities in England and Wales, Scottish authorities have developed various initiatives in an effort to combat anti-social behaviour by tenants. These initiatives range from the use of mediation services[19] to the rather more controversial development of special housing units for families evicted because of their behaviour.[20]

Social landlords in Scotland may also use interdicts against tenants to prohibit particular sorts of behaviour or to require action to avoid a nuisance being caused.[21] As a preventative measure some authorities have employed security personnel to patrol their problem estates.[22]

The Government recently stated its intention to introduce similar provisions in Scotland to those brought in by the *1996 Housing Act* in order to extend powers of eviction in the event of criminal activity within the vicinity of tenanted properties and to facilitate the use of professional witnesses.[23] A government amendment to the *Crime and Disorder Bill*, moved and agreed to during the Third Reading of the Bill in the House of Lords, is intended to have this effect.[24] Proposals to make it possible for Scottish social landlords to offer probationary (introductory) tenancies to new tenants and prevent tenants from frustrating eviction action for anti-social

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[19] *Inside Housing* 4.11.94 "Peace making process for neighbours at war"

[20] *Scotsman* 23.1.95 "Row over plan to fence in anti-social tenants" & *Housing Association Weekly* 3.3.95 "Dundee presses ahead with scheme for evicted families"

[21] *The Guardian* 12.6.93 "Hackney's terror estate finding a civil cure"

[22] *Roof* Nov/Dec 1994 "To boldly go on patrol" & *Roof* May/June 1994 "Crime prevention pays..."

[23] Scottish Office Draft Circular, *Housing and Neighbour Problems,* March 1998

[24] Clause 23, which is intended to amend the *Housing (Scotland) Act 1987* and the *Housing (Scotland) Act 1988* - discussed at HL Deb vol. 587, col. 682-6

behaviour by exercising their right to buy were mooted at the same time,[25] but do not appear in the Bill.

C. Noise legislation

The *Environmental Protection Act 1990* (EPA) made it possible for an Environmental Health Officer to declare a situation concerning noise a statutory nuisance and thereby serve an abatement notice to the responsible person, or even just by attaching the notice to the premises in question. The *Noise Act 1996* then made it possible to deal with one-off noisy events which were inadequately dealt with using the route of statutory nuisance.

The statutory nuisance provisions of the EPA were initially not extended to Scotland, where the very similar provisions of the *Control of Pollution Act 1974*, which the 1990 Act replaced, were retained for noise control, and the *Public Health (Scotland) Act 1897* was retained for other statutory nuisances.

Two main differences arose from the different statutory provisions in Scotland. First, Scottish local authorities did not have a duty under the 1974 Act to investigate noise complaints, and the maximum fines were much smaller. However, section 107 and schedule 17 of the *Environment Act 1995* have extended the English and Welsh statutory nuisance system, including the noise controls, to Scotland.

Second, in Scotland the police are empowered to tackle some noise problems, whereas in England and Wales they are not. This important additional control available in Scotland operates under section 54 of the *Civic Government (Scotland) Act 1982* whereby it is an offence not to stop making certain noises (such as singing or playing a hi-fi) which are giving reasonable cause for annoyance, when asked to do so by the police. If the noise maker fails to stop he can then be arrested and charged, although evidence shows that many people making noise normally stop when asked to do so by a uniformed constable. Moreover, the police have powers under common law to remove articles suspected of being used in the commission of an offence, so they can seize equipment following a failure to desist from making noise under the 1982 Act.

This Scottish power was influential in the decision of the Noise Working Party to recommend the consideration of a new noise offence for England and Wales in an effort to provide swifter remedies for night time noise disturbance[26].

The *Noise Act 1996* provided similar powers of seizure to the police in England and Wales. This extension of powers made it easier to deal with one-off noisy events that were inadequately dealt with by the statutory nuisance mechanism.

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[25] Scottish Office Draft Circular, *Housing and Neighbour Problems*, March 1998

[26] Neighbour Noise Working Party Review of the effectiveness of neighbour noise controls: conclusions and recommendations. DoE, WO and SO March 1995 para.5.1

Clause 24 and Schedule 1 to the *Crime and Disorder Bill* are designed to confirm the right of police to seize equipment in legislation. It is intended that the equipment may be seized and kept for as long as criminal proceedings are taking place, or for a maximum of 28 days. These provisions were introduced through a government amendment, debated at HL Deb vol. 587, col. 686-8

D. A Community Safety Order?

When in opposition, the Labour Party set out its ideas for dealing with the problem of anti-social neighbours in a consultation paper called *A quiet life: tough action on criminal neighbours* (1995). It saw the main problems with the existing law as being:

1. a lack of criminal sanctions designed to curb chronic and persistent anti-social criminal behaviour;
2. the resulting reliance on perhaps inappropriate administrative actions or civil remedies which are not available in all cases and may be expensive; and
3. a lack of co-ordination between the police, local authorities, housing associations and other agencies.

The consultation paper proposed four main reforms:

1. a new Community Safety Order;
2. new and wider witness protection, including the use of 'professional witnesses' such as council officials or private detectives, to reduce the risk of witness intimidation;
3. the availability of a 'composite charge' for a series of linked incidents of anti-social behaviour or harassment, which would allow the courts to impose an 'appropriate' level of punishment; and
4. increased use of mediation and conciliation for relatively minor disputes.

Labour proposed that the Community Safety Order should be available on application by the police or a local authority to a magistrate's court or, in certain circumstances, the county court. It suggested that the rules of civil evidence would apply at that stage, but as the breach of an order would be a criminal offence rather than civil contempt of court, actions in relation to a breach would be within the framework of the criminal law and the rules of criminal evidence.

It also felt that such an order could be sought when there was evidence of 'chronic anti-social behaviour', which could include:

> a) multiple convictions - say, five or more - by the respondents and which are related to the area;
> b) evidence of the commission of such multiple offences, even where there had not been a conviction;
> c) other evidence of unlawful acts by an individual or members of his or her household likely to interfere with the peace and comfort of a residential occupier.

> In this connection, 'unlawful acts' would include a criminal offence of civil wrongs such as tort, nuisance, trespass, assault, interference with goods, etc. The courts would have to take account, in determining whether to make a community safety order, of the seriousness of the case and the inadequacy of existing remedies. [27]

The consultation paper suggested that a Community Safety Order could include curfews, exclusion from a particular area, restraints on approaching individuals, uttering threats and desisting from racist behaviour - and could impose conditions on parents in respect of their minor children. It also proposed that a power of arrest would be attached to any Community Safety Order.

The following year, the Labour Party published an updated version of its proposals, taking into account the responses to the earlier consultation paper and the passing of the *Housing Act 1996* (see above). The paper, entitled *Protecting our communities: Labour's plans for tackling criminal, anti-social behaviour in neighbourhoods* (1996) highlighted the issues it was attempting to address:

> Across Britain there are hundreds of thousands of people whose lives are being made a misery by those living nearby. A gang of youths, a group intent on racial harassment or a single household may act so selfishly, and without regard for others, as effectively to terrorise the neighbourhood. Burglaries, thefts from and of vehicles, and intimidation in the form of threats, abuse, assaults, loud noise or the use of aggressive dogs may occur. Neighbours may well be at their wits' end, and so often are the police. To get the cases to court they require hard information within the rules of criminal evidence. But witnesses - other neighbours - are often intimidated into silence. And even where cases get to court, the charges and the punishments may rarely fit the crime. [page 3]

Protecting our communities made few changes to the proposed Community Safety Orders, but stressed the need for guidance and a Code of Practice to ensure that the Orders did not lead to malicious or vexatious complaints (for example against racial or other minority groups) or to stigmatisation of particular individuals (for example of people with a serious mental illness).

After the election, the new government published its consultation paper on the proposed Community Safety Orders.[28] Its terms were drawn from the proposals made whilst in opposition, and are discussed below in the analysis of the Bill.

The proposals for Scotland were very similar - Henry McLeish MP, the Scottish Home Affairs Minister, said:

> As we currently see it the [Community Safety] Orders will impose curfews on named individuals or exclude them from a particular area, or restrict their harassing or even

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[27] *A quiet life: tough action on criminal neighbours* (1995), p. 9

[28] *Community Safety Order: a Consultation Paper*, Home Office, September 1997.

> approaching individuals. Applications would be made by the police or by the local authority and breach of an Order could lead to imprisonment.[29]

A separate consultation paper was issued by the Scottish Office on 12 September 1997.

E. Anti-social Behaviour Orders (ASBOs)

1. England and Wales

Clause 2 of the *Crime and Disorder Bill*, in the words of the explanatory memorandum to the Bill, is intended to enable 'local authorities and the police to apply for an anti-social behaviour order for any person aged 10 or over who has acted in an anti-social manner likely to cause harassment, alarm or distress and is likely to do so again in the local government area, prohibiting that person from doing anything described in the order'. It sets out the proposed minimum duration of these orders and the powers of variation and discharge, as well as the penalties for conviction of the proposed criminal offence of breach of an order. The proposed procedures for appeals against ASBOs (and Sex Offender Orders - see below) are set out in Clause 5.

'Anti-social behaviour' is not described in the Bill, beyond the explanation in Clause 2(1)(a) that acting 'in an anti-social manner' would mean 'in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself'. Clause 2(5), which was inserted by a Government amendment,[30] is intended to provide that such behaviour would not be considered anti-social if the defendant can show it was reasonable in the circumstances - but this leaves the onus of proving reasonableness on the defendant. Unlike the public order offences under the *Public Order Act 1986*, there is no requirement in the Bill for the defendant to have intended that his actions cause harassment, alarm or distress. The consultation paper had suggested that the statute would set out the conduct which would trigger consideration of an application, and that this would include conduct which:

> - causes harassment to a community;
> - amounts to anti-social conduct or is otherwise anti-social;
> - disrupts the peaceful and quiet enjoyment of a neighbourhood by others;
> - intimidates a community or a section of it.[31]

It also suggested that there would be a provision in the statute 'requiring local authorities and the police not to exercise their functions in a way which discriminates against people on

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[29] 'McLeish calls for crime to be tackled as a community issue', *Scottish Office press notice 0746/97*, 18 June 1997

[30] HL Deb vol. 585, col. 564

[31] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 2

grounds of race, religion, disability, sex or sexual orientation',[32] but this has not yet found its way into the Bill.

Lord Rodgers of Quarry Bank 'found "anti-social behaviour" a dangerous catch-all description',[33] and warned against introducing 'powers which can be used against anyone who does not conform to a standard pattern of respectable behaviour or a lifestyle which is acceptable'.[34] Lord Goodhart also felt that the definition was too wide, and suggested a requirement that the behaviour must be 'such as would cause alarm and distress to reasonable people'.[35] However, Lord Watson of Invergowrie felt the definition was satisfactory because 'those who suffer anti-social behaviour do not need to have it defined; they know what it is and experience it daily'.[36]

The words 'harassment, alarm or distress' originally appeared in the *Public Order Act 1986* - but the behaviour triggering an application for an ASBO need not amount to an offence under the 1986 Act, nor need it have the element of intent required under that Act. Lord Mishcon, when commenting on this during the Committee stage in the House of Lords, referred to the difficulty of prosecuting offences under the existing racial incitement legislation because of the need to prove intent.[37] Lord Goodhart said that he accepted that intent is not a necessary requirement of anti-social behaviour, but that there should nevertheless be a restriction in the form of a threshold of seriousness of conduct before it is possible to make an ASBO.[38] Lord Goodhart, however, moved an amendment during the Report stage which was intended to introduce the requirement that the acts should be 'motivated by an intention to harass or cause alarm or distress to other persons [or] likely to cause serious and justified alarm or distress to other persons'.[39] Following a statement by the Solicitor-General Lord Falconer of Thoroton that 'we believe that it is the heedless, careless antisocial actions that the order needs to target, not just those with deliberate intent',[40] and that he considered that there will be sufficient protections to prevent applications being made where the behaviour is trivial,[41] Lord Goodhart's amendment was defeated on a division by 131 votes to 43.[42]

Clause 2 would not be retrospective - the phrase 'since the commencement date' in Clause 2(1)(a) was inserted during the Committee stage in the House of Lords,[43] and is intended to ensure that acts committed before the date of commencement of the clause[44] cannot be used as the basis of an application for an ASBO. However, the Minister, Lord Williams of Mostyn

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[32] *ibid*
[33] HL Deb vol. 584, col. 544
[34] HL Deb vol. 584, col. 545
[35] HL Deb vol. 584, col. 586 and HL Deb vol. 585, col. 533-5
[36] HL Deb vol. 584, col. 550
[37] HL Deb vol. 585, col. 541
[38] HL Deb vol. 585, col. 542
[39] HL Deb vol. 587, col. 579
[40] HL Deb vol. 587, col. 584
[41] HL Deb vol. 587, col. 585
[42] HL Deb vol. 587, col. 586
[43] HL Deb vol. 585, col. 508
[44] Clause 2(12)

considered that 'where there has been behaviour before the commencement which may help to explain why the act has caused, or is likely to cause, harassment, this [will be] admissible as supporting evidence'.[45]

The Bill originally required 'two or more' people to be affected by the anti-social behaviour, in order to make clear the distinction between these provisions and those of the *Protection from Harassment Act 1997*.[46] However, the debate on an amendment moved by Lord Henley during the Committee stage,[47] which was later withdrawn, highlighted the fact that this provision would mean that remedies available to a couple would not be available if one of the partners subsequently died. When Lord Henley moved the same amendment on Report, Lord Williams of Mostyn this time accepted it, referring to the more general validity of the remedy if amended in this way.[48] The amendment was accepted at this stage without a division.

The phrase 'not of the same household' as the defendant appears to be intended to distinguish ASBOs from the remedies against domestic violence contained in Part IV of the *Family Law Act 1996*.

Clause 2(1)(a) seeks to provide that it would be enough that the behaviour was 'likely to' cause harassment, alarm or distress to a hypothetical person. According to the Notes on Clauses, this provision was included in order to allow the use of professional witnesses, such as local authority staff, to observe the events and then testify to the likelihood of the behaviour causing harassment to anyone subject to it, which would mean that those directly affected by the behaviour need not give evidence.[49] However, the wording could be considered to have rather broader implications, as it does not actually require any person to have been caused harassment, alarm or distress. Clause 2(1)(b) seeks to restrict the circumstances in which ASBOs may be made to those where such an order is 'necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by [the defendant]'.

It is intended that only a local authority or the police should be able to apply for such an order. This is apparently to emphasise the 'community' nature of the order, and to distinguish it further from the 'personal' remedies in the *Protection from Harassment Act 1997*. Under Clause 2(2), if a local authority wishes to make an application it will be required to consult the chief officer of police for the area concerned before doing so, and *vice versa*. The consultation paper suggested that:

> The general circumstances in which each agency would take the lead in making an application for an Order would be discussed and agreed locally within the framework of the proposed statutory partnerships to prevent crime [50]

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[45] HL Deb vol. 585, col. 508
[46] HL Deb vol. 585, col. 518; HL Deb vol. 585, col. 539; and HL Deb vol. 585, col. 545
[47] HL Deb vol. 585, col. 542-9
[48] HL Deb vol. 587, col. 578-9
[49] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 2
[50] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 1

Lord Falconer of Thoroton, the Solicitor-General, confirmed this and stated that 'it would be the intention to issue guidance from the Secretary of State'.[51]

Clause 2(3) is designed to give magistrates' courts the power to hear applications for ASBOs. The magistrates' courts were chosen as the forum for considering applications for ASBOs[52] after discussion on whether they or the County Court would be the more appropriate.[53] The County Court would not automatically have the power to enforce orders under the proposals for breach to be a criminal offence; but the orders themselves would be civil orders, and the County Court already deals with similar injunctions under the *Protection from Harassment Act 1997*. Magistrates' courts do have some civil powers[54], and the government considered the fact that most proceedings would be dealt with summarily and that the police and local authorities are used to dealing with the structures and procedures of magistrates' courts made a case for giving magistrates' courts the power to grant ASBOs.[55]

Clause 2(4) seeks to give the court the discretion rather than the duty to grant an ASBO if it is proved that the defendant has acted in an anti-social manner. Both the plaintiff and the defendant will have a right of appeal to the Crown Court against the decision of the magistrate to grant, or not to grant, an ASBO [Clause 5(1)]. It is intended, however, that the decision of the court will remain in force pending the outcome of the appeal. Under Clause 5(2) the Crown Court will be able to make orders or incidental or consequential orders in order to give effect to its decision.

ASBOs are designed to be civil orders[56] (although they have been described by some as 'quasi-civil'[57] or even 'quasi-criminal'[58]), and therefore the applicant would only have to prove his case 'on the balance of probabilities', which is a lower standard of proof than that which applies in criminal proceedings of 'beyond reasonable doubt'. The government's reason for this is that one of the biggest problems with enforcing the existing criminal legislation in the same area is the difficulty of proving the matter to the criminal standard. It has suggested that where the behaviour can be proved to a criminal standard, a criminal prosecution should be brought, but that where it can only be proved to the civil law standard, an application for an ASBO could be made.[59] Lord Williams of Mostyn mentioned that in civil cases the courts accept that 'the more serious the allegation the more important it is to have a high standard of proof'.[60] This was in response to an unsuccessful amendment moved by Lord Henley which was intended to ensure

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[51] HL Deb vol. 585, col. 555

[52] where a juvenile aged 10 to 17 years old is concerned, it is proposed that the relevant youth court will hear the application, according to the Notes on Clauses.

[53] The matter was debated again during the Committee stage in the House of Lords - HL Deb vol. 585, col. 539

[54] for example in enforcing regulations covering noise, and in family proceedings

[55] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 3

[56] the inclusion of the phrase 'by complaint' in Clause 2(3) is to allow the magistrate's court to act in its civil capacity, according to the Notes on Clauses

[57] Lord Renton, HL Deb vol. 585, col. 558

[58] Lord Goodhart, HL Deb vol. 585, col. 577

[59] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 4

[60] HL Deb vol. 585, col. 560

that the defendant's actions should be proved 'beyond reasonable doubt' in an application for an ASBO.[61]

If an order is granted, Clause 2(6) is designed to limit the prohibitions imposed to those 'necessary for the purpose of protecting persons in the local government area from further anti-social acts by the defendant'. The order will therefore not be limited to the actual behaviour, or even the type of behaviour, which triggered the application. Lord Goodhart moved an amendment designed to limit the prohibitions in this way,[62] but withdrew it following assurances from Lord Williams of Mostyn that 'we would generally expect the prohibitions in the order to reflect the defendant's current behaviour'.[63] The Government did not feel that the amendment would be appropriate as there might be some circumstances where it 'could be too limiting and lead to endless argument about what is a "similar" act'.[64] Guidance is expected to explain the type of prohibitions that would be appropriate in various circumstances, but the consultation paper envisaged that the court's powers 'would include the power to impose a curfew on a defendant, or exclusion orders (in relation to a specified address or area) where such action is appropriate'.[65]

Under Clause 2(7) it is intended that ASBOs should be imposed for a minimum of two years, but that there should be no statutory maximum and no provision for interim orders (unlike the proposed provisions for Scotland - see below). The government's explanation for this is that the duration of the Order should not reflect the nature of the conduct itself, but the period of time necessary to protect the community.[66] The necessity of impressing upon the authorities that an ASBO should only be sought when the conduct complained of is sufficiently serious to merit one was also stressed.[67] A series of amendments designed to test this provision (and the related one on minimum time limits for Sex Offender Orders - see below) was moved but each was withdrawn.[68]

Clause 2(8) is intended to provide that the person subject to an order, or the person who sought it, should be able to apply to have the order varied or discharged. However, under Clause 2(9) an order will only be discharged before two years have passed with the consent both the person who sought the order (ie. the local authority or the police) and the person subject to it. It is nevertheless intended that the court may vary an order within two years without any such consent. The Order would stay in force pending the resolution of an application for variation or discharge.

Lord Goodhart felt that this gave the local authority or the police a veto over the discharge of any ASBO within two years of its being made, and proposed an amendment (which was later

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[61] HL Deb vol. 585, col. 557-61
[62] HL Deb vol. 585, col. 561
[63] HL Deb vol. 585, col. 563
[64] HL Deb vol. 585, col. 563
[65] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 2
[66] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 2
[67] by Lord Williams of Mostyn, HL Deb vol. 585, col. 571-2
[68] HL Deb vol. 585, col. 569, HL Deb vol. 587, col. 587 and HL Deb vol. 588, col. 172-3

withdrawn) designed to remove this provision.[69] He considered it to be more appropriate for the applicants to, and the subjects of, an order to be 'free to put forward the case for or against discharge in exactly the same way as they were free to put forward their case for or against the making of the original order'.[70] He also felt that there would be a problem in giving the local authority or the police a power of veto, because their duty to consider whether to consent to the discharge of an order would be subject to judicial review which was not, in his view, in the interests of the police.[71] The same arguments, he suggested, also applied to the equivalent proposals for discharge of Sex Offender Orders.[72]

Clause 2(10) is designed to make breach of an order a criminal offence, subject to a maximum sentence on summary conviction of six months' imprisonment or a fine of up to five thousand pounds; and on indictment of five years imprisonment or an unlimited fine. In the words of the consultation paper, 'it is to be hoped that the greater penalties which will be available to the courts to deal with breaches, over and above those which would normally apply to the conduct which led to the breach, will act as a deterrent . . . it should be regarded as a particularly serious matter that the terms of the Order have been breached whatever the conduct that led to the breach'.[73] Clause 2(11) is intended to ensure that the courts will not be able to grant a conditional discharge for breach of an order, as the government considers an ASBO to be already comparable to a conditional discharge for a crime.[74]

The provisions of s. 1A of the *Criminal Justice Act 1982* mean that a custodial sentence would not be available against a child under the age of 15 for breach of an ASBO, and therefore a 'suitable community penalty'[75] would have to be applied. However, where juveniles aged 10 to 17 years old are concerned, Clause 9 of the Bill proposes that parenting orders may also be applied, and under Clause 12 of the Bill, it is proposed that a magistrates' court would be able to make a child safety order in respect of a child under 10 who is behaving in an anti-social manner.

The actions prohibited by an ASBO need not amount to criminal offences in themselves - but if the person subject to the order is proved simply to have carried them out, he would be deemed to have committed a crime. The fact of the breach would have to be proved beyond reasonable doubt (as is the case where contempt proceedings for breach of an injunction are taken), but there would be no requirement to show that the defendant intended the original behaviour which prompted the order to cause harassment, alarm or distress, or that he intended to breach the order - still less that any breach caused harassment, alarm or distress. It is not clear on the face of the legislation whether an order would be unaffected by a term of

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[69] HL Deb vol. 585, col. 573. His later amendment on the same issue (HL Deb vol. 587, col. 589) was defeated by 120 votes to 40 on a division.
[70] HL Deb vol. 585, col. 574
[71] HL Deb vol. 585, col. 574
[72] HL Deb vol. 585, col. 620
[73] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, pp. 3-4
[74] Lord Williams of Mostyn, HL Deb vol. 585, col. 605-6
[75] *Community Safety Order: a Consultation Paper*, Home Office, September 1997, p. 4

imprisonment imposed for its breach, or whether its effect would suspended for the duration of the custodial term.

This proposed scheme mirrors that first used in the *Protection from Harassment Act 1997*, which, as has already been mentioned, was heavily criticised at the time by some commentators. However, under the 1997 Act, the harassment which prompts an application for a civil order would also be capable of being a criminal offence. In addition, the sections of that Act which create the criminal offence of breaching a 'non-harassment' order are not yet in force, and so breaches of such orders are currently only punishable as contempt of court.

The proposals for making the breach of an order a criminal offence were described by Lord Goodhart as creating a 'personal criminal law' under which the defendant is being punished 'not for breaking the law of the land but for breaking a law which applies to him personally'.[76] It has been suggested that the scheme would provide for 'a huge transfer to local officials of the power effectively to criminalise conduct . . . by stealth'.[77] Professor Andrew Ashworth, the editor of the *Criminal Law Review*, feared that it is a 'Trojan Horse' use of the civil law.[78]

Lord Thomas of Gresford moved an amendment intended to make breaches of ASBOs punishable not as criminal offences but as civil contempt of court.[79] He considered this to be a more appropriate and flexible method of dealing with such circumstances.

A paper published in *Criminal Justice*, the journal of the Howard League for Penal Reform, by six leading academics[80] suggested that ASBOs would breach the European Convention on Human Rights. It argues that because the proceedings could lead to imprisonment, they must be treated as criminal and not civil. This was explained in the accompanying press notice as follows:[81]

> Human rights law will be contravened because -
> a) the orders will be made under the civil law burden of a "balance of probabilities" rather than under the criminal law burden of proof of "beyond reasonable doubt" even though the person subject to the order could go to prison;[82] and
> b) there will be no "right" to cross-examine prosecution witnesses.[83]

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[76] HL Deb vol. 585, col. 533

[77] 'Neighbouring on the Oppressive', by Andrew Ashworth. John Gardner, Rod Morgan, A.T.H. Smith, Andrew von Hirsch and Martin Wasik, *Criminal Justice vol. 16 no. 1*, February 1998, pp. 7-14 at p. 9

[78] quoted in 'A Bill to be tough on crime', *New Law Journal* 9 January 1998, p. 13

[79] HL Deb vol. 585, col. 597

[80] 'Neighbouring on the Oppressive', by Andrew Ashworth. John Gardner, Rod Morgan, A.T.H. Smith, Andrew von Hirsch and Martin Wasik, *Criminal Justice vol. 16 no. 1*, February 1998, pp. 7-14

[81] 'Government proposals on anti-social behaviour will breach human rights law', *Howard League press notice*, 3 February 1998

[82] Article 6(2) of the Convention provides that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law', which has been interpreted as requiring proof beyond reasonable doubt for criminal charges.

[83] Article 6(3)(c) of the Convention states that everyone charged with a criminal offence has the right '. . . to defend himself in person or through legal assistance of his own choosing . . .'

The civil liberties group Liberty has also suggested that the provisions may violate the right to a fair trial, as the combination of civil and criminal procedure 'fails to provide the traditional safeguards against wrongful conviction'.[84]

Lord Goodhart[85] and Lord Thomas of Gresford[86] both felt that it was difficult to imagine circumstances where a penalty of five years' imprisonment would be appropriate and where the defendant could not have been tried instead for a criminal offence under existing law. Lord Thomas also highlighted the fact that the maximum sentence for the offence of causing intentional harassment, alarm or distress under the *Criminal Justice and Public Order Act 1994* is six month's imprisonment.[87] Lord Williams of Mostyn justified the proposed maximum sentence for breach of an order by comparing it to the penalty for breach of an injunction granted under the *Protection from Harassment Act 1997*, passed under the previous government, and by pointing out that it is a maximum penalty that need not be applied by the courts.[88]

The Howard League article suggested that there is a danger the legislation will function as an 'Undesirable Persons Act':[89]

> Unfortunately, the government's latest legislative proposal is neither sensible nor carefully targeted. It takes sweepingly defined conduct within its ambit, grants local agencies virtually unlimited discretion to seek highly restrictive orders, jettisons fundamental legal protections for the grant of those orders, and authorises potentially draconian and wholly disproportionate penalties for violations of them.[90]

The Director of the Howard League, Frances Crook, said:[91]

> These proposals are potentially the most insidious attack on civil liberties this century. This legislation could be used in a highly discriminatory way against anyone who is different or non-conformist.
>
> The Government should instead have built on its measures in the Bill which give local authorities a responsibility to prevent crime by setting up local arbitration schemes to solve problems.

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[84] 'Crime and Disorder', *Liberty*, Spring 1998 p. 1 at p. 2
[85] HL Deb vol. 585, col. 533 and HL Deb vol. 587, col. 598
[86] HL Deb vol. 585, col. 599 and HL Deb vol. 587, col. 600-1
[87] HL Deb vol. 585, col. 600
[88] HL Deb vol. 587, col. 601
[89] 'Neighbouring on the Oppressive', by Andrew Ashworth. John Gardner, Rod Morgan, A.T.H. Smith, Andrew von Hirsch and Martin Wasik, *Criminal Justice vol. 16 no. 1*, February 1998, pp. 7-14 at p. 12
[90] 'Neighbouring on the Oppressive', by Andrew Ashworth. John Gardner, Rod Morgan, A.T.H. Smith, Andrew von Hirsch and Martin Wasik, *Criminal Justice vol. 16 no. 1*, February 1998, pp. 7-14 at p. 7
[91] 'Government proposals on anti-social behaviour will breach human rights law', *Howard League press notice*, 3 February 1998

2. Scotland

Clause 19 of the Bill is intended to provide an additional mechanism for local authorities to control anti-social behaviour in their areas, through applying to the sheriff for Anti-Social Behaviour Orders (ASBOs) against individuals who have acted in an anti-social manner or pursued a course of anti-social conduct. Clause 21 is designed to deal with the procedure for making, variation and revocation of on ASBO, and Clause 22 provides for the proposed consequences of a breach of an ASBO. These proposals are designed as the equivalent of those for England and Wales, and therefore much of the discussion above is also relevant here. This part of the Paper will therefore only address issues specific to Scotland, and highlight the main differences from the English and Welsh provisions.

The wording of Clause 19(1) is slightly different from that in Clause 2(1) in that it refers not only to a person who has 'acted in an anti-social manner' but also to one who has 'pursued a course of anti-social conduct'. (A letter from Lord Hardie, the Lord Advocate, to Lord Mackay of Drumadoon stated that ASBOs would be available against an individual who 'has committed no crime, and on the other hand may not have committed any civil wrong'.[92]) If either of these 'caused or was likely to cause alarm or distress' (the term 'harassment' is not included here) to one[93] or more persons not of the same household as that person, it is intended that it should be possible for an ASBO to be sought if it is necessary to prevent people in the area from 'further anti-social acts or conduct' by him. Clause 19(7) goes on to clarify that in this context, 'conduct' is to include speech, and 'course of conduct' must involve conduct on at least two occasions;[94] also that the clause does not apply to acts or conduct before its commencement.[95] A Government amendment resulted in the insertion of Clause 19(4), which is intended to allow the sheriff to disregard acts which the person in respect of whom the application has been made shows were reasonable in the circumstances.[96]

Clause 19(1) is designed to ensure that the power to apply for ASBOs should only be available in respect of people who are aged 16 or over. This is because children under 16 would be dealt with separately under the children's hearing system. The Earl of Mar and Kellie moved a probing amendment on this provision suggesting that ASBOs should be available for people aged 12 or over,[97] as he felt the powers available to a children's hearing were not sufficient to deal with the problem of anti-social children.[98] This amendment was, however, defeated by 107 votes to 45 on a division.[99] There are no proposals for a Scottish equivalent of the parenting orders proposed for England and Wales in Clause 9 of the Bill, as

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[92] HL Deb vol. 585, col. 1042

[93] This Clause originally referred to 'two or more persons', but was amended by a Government amendment to 'one or more persons' in line with the amendment to the equivalent provision for England and Wales - HL Deb vol. 587, col. 662.

[94] These definitions match those in section 7(3) and (4) of the *Protection from Harassment Act 1997*

[95] Clause 19(5)

[96] HL Deb vol. 585, col. 1032

[97] HL Deb vol. 585, col. 1001

[98] HL Deb vol. 585, col. 1004

[99] HL Deb vol. 585, col. 1008

the Government is of the opinion that this would run counter to a fundamental principle of Scots law that a parent should not be held responsible for the actions of his or her child, and that the children's hearing system deals with parents appropriately.[100]

Responses to the Scottish Office consultation paper generally agreed that local authorities rather than the police should be able to apply for ASBOs,[101] as it is unprecedented for the police to apply direct to the courts in Scotland. The Lord Advocate, Lord Hardie, stated that 'the justification for the police making such applications is not sufficiently overwhelming to override the normal arrangement'.[102] However, Clause 21(1) is intended to provide that the local authority must consult the relevant chief constable[103] before making an application for an anti-social behaviour order or to vary or revoke an existing order. The power of local authorities under these proposals will not be limited to their own tenants.[104]

The Sheriff Court was chosen as the appropriate forum for hearing applications for these orders, as it already has civil as well as criminal competencies. Clause 19(3) is designed to give the sheriff the discretion to impose whatever conditions he thought appropriate in the circumstances to an ASBO, as long as they were necessary to protect the community from further anti-social acts or conduct. Lord Mackay of Drumadoon feared that this would entitle a court to exclude a person from his home, a power which he felt might be in breach of the European Convention on Human Rights.[105]

Under Clause 21(7)(a), it is proposed that the sheriff may impose ASBOs for any specified length of time, or indefinitely. This is in contrast to the provisions for England, which state that ASBOs should be imposed for a minimum of two years.[106] The corollary of this is that it is proposed that in Scotland ASBOs may be varied or revoked at any time on application from the local authority or the person subject to the order.[107] There is no provision for interim orders to be granted in relation to anti-social behaviour,[108] although there interim orders may be sought against sex offenders under Clause 20(4)(a). Nor does the Bill provide for a power of arrest for breach of an ASBO, as it does for Sex Offender Orders in Clause 20(8), as the Government is of the opinion that:

> where the behaviour which constitutes a breach is sufficiently serious to justify arrest, it will almost certainly constitute a criminal offence; for example a breach of the peace. The powers

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[100] Lord Hardie, the Lord Advocate - HL Deb vol. 585, col. 1006-7

[101] 'Reducing crime and anti-social behaviour is at the top of McLeish agenda', *Scottish Office press notice 1473/97*, 14 October 1997

[102] HL Deb vol. 585, col. 1043

[103] defined in Clause 21(3)

[104] HL Deb vol. 585, col. 1043

[105] HL Deb vol. 584, col. 582. Article 8(1) of the Convention refers to the right to respect for a person's private and family life and his home, but Article 8(2) states that this is subject to the need to prevent disorder and crime or to protect the rights and freedoms of others.

[106] Clause 2(7)

[107] Clause 21(7)

[108] Lord Mackay of Drumadoon moved an amendment during the Report stage in the House of Lords in an attempt to allow such interim orders, but it was defeated on a division by 76 votes to 20 - HL Deb vol. 587, col. 667-71

> of arrest relating to that offence would then apply. That is very different from a breach of a sex offender order.[109]

As appeals may be made in the first instant to the sheriff principal in any summary proceedings unless there is a statutory prohibition against that, there is no specific provision in the Bill for appeals against the decision of a sheriff following an application for an ASBO or Sex Offender Order. Clause 21(10) is, however, intended to provide that the sheriff's decision would continue to have effect pending an appeal, and that a sheriff may determine an application to vary or revoke an ASBO or SOO even where an appeal against the original order has been lodged.[110]

An amendment tabled by Lord Mackay of Drumadoon during the Report stage in the House of Lords, which sought to introduce a power of arrest without warrant for breach of an ASBO, was defeated on a division by 70 votes to 18.[111]

Clause 22(1) is intended to provide that breach of an ASBO would be an offence subject to the same penalties as in England and Wales (see above). However, subsections (2) to (5) of Clause 22 (which do not have an equivalent in the proposed provisions for England and Wales) are designed to deal with the situation where a breach of an ASBO constitutes a separate criminal offence. If the person is charged with that offence, no proceedings for breach of the ASBO are to be brought - but it is intended that that breach and any previous breach should be taken into account in determining the sentence for the separate offence.

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[109] Lord Hardie, the Lord Advocate - HL Deb vol. 585, col. 1035

[110] this latter part of clause 21(10) was inserted by a government amendment during the Third Reading stage - HL Deb. vol. 588, col. 199-200

[111] HL Deb vol. 587, col. 672-5

II Sex offenders

A. Background

The perceived likelihood that certain sex offenders will re-offend means that they are considered to be an on-going risk to the public. However, as controversy over the release of some current offenders illustrates, the need to protect those to whom these offenders may pose a risk must be balanced with need to respect the civil liberties of the offenders. There are indeed some people convicted of particular 'sexual offences' such as consensual homosexual intercourse who pose no harm to the public. Ensuring that the rules for supervising sex offenders provide adequate protection without infringing rights unnecessarily requires a large degree of co-ordination between the many different organisations and authorities which have a role to play. There are already many laws and practices which can be used to protect the public from dangerous sex offenders, but there has been a perceived need for further supervision and control of those released from prison.

If a police officer in England or Wales has reasonable grounds to believe that a person will cause physical injury to himself or others, or if he has reasonable grounds to believe that arrest is necessary to protect a child or other vulnerable person, he may exercise his power of arrest under Section 25 of the *Police and Criminal Evidence Act 1984*. Under this provision, the police may arrest people for offences even where the offences are not in themselves arrestable. In Scotland any conduct which is liable to create alarm and annoyance can give rise to a charge of breach of the peace, even though the conduct complained of might in other circumstances be perfectly innocuous and lawful. It is not necessary for the prosecutor to prove that actual harm was suffered by a third party. Nor is it necessary for the prosecution to establish that an accused person actually intended such a result. These powers may often be relevant were sex offenders are involved.

In life sentence cases and other cases involving serious sexual or violent offences, the probation service will get in touch with the victims within two months of the sentence being passed to ask if they want to be told about any plans for releasing the prisoner. When release is being considered, the probation service will take into account the victim's concerns, which may lead to conditions being attached to the release.

Authorities have in the past told schools and parents if convicted sex offenders have moved into their area,[112] but there were no uniform guidelines on how best to deal with this information. This has led in one instance to the suspension of a housing officer in Birmingham who told a group of parents that a convicted sex offender would be living in their estate.[113] In a number of instances, vigilante groups have harassed people whom they

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[112] The case of *Hellewell v Chief Constable of Derbyshire* [1995]1 WLR 805 firmly upheld the powers of the police to disclose records of past convictions at their discretion to third parties where it would aid the prevention and detection of crime.

[113] *The Herald*, 10 January 1997

believe to be sex offenders who have moved into the locality, and in Scotland a convicted sex offender, Lawrence Leydon, was murdered following such action.[114]

The *Sex Offenders Act 1997*, which came into force on 1 September 1997, imposes a requirement on certain sex offenders to notify the police of their name and address, and any changes to these, for a set period of years (the period varies with the sentence, from five years to indefinite). Breach of the requirements could result in up to six months imprisonment or a £5000 fine, or both. However, the Act does not apply to those released from prison before the Act came into force, nor does it include any requirements for the offender to modify his behaviour, as it is primarily intended to be an administrative reform to ensure that the information on sex offenders held by the police is kept fully up to date. For further detail on the background to and provisions of that Act, see Research Paper 97/11.[115]

Initial guidelines on disclosure of information obtained under the 1997 Act was issued to the police by the Home Office[116] and by the Scottish Office[117] in the autumn of last year. More detailed inter-agency guidance will be issued in due course.[118] The guidelines state that the over-riding priority is to protect the public, particularly children, but that disclosure of personal information about individual offenders should nevertheless be seen as an exception to a general policy of confidentiality. The guidelines describe the general law applicable to disclosure decisions, and note that the exact balance between protecting the public and protecting the offender's legal rights will be determined by the courts.[119]

The guidance permits the police to pass information to third parties, after an assessment of the risk of harm on a case-by-case basis (in consultation with designated officials in other child protection agencies if appropriate). The assessment must take into account a number of factors outlined in the guidance. When disclosure takes place, the guidelines state that it should usually be to an identified individual (or individuals) directly affected by the risk of harm or with responsibilities towards others for the prevention of harm. This could be, for example, a senior manager at the offender's workplace, a housing manager, a head teacher, play group leader, church authority or parent. However, the guidelines state that disclosure to a member of the general public will very much be the exception to the rule and will remain a matter for the professional judgement of the police. The extent of any disclosure should be limited and confidential, and the police should be prepared to give advice and guidance on

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[114] see 'Rights and wrongs', *The Guardian*, 15 January 1997

[115] 'The *Sex Offenders Bill* [Bill 66 of 1996-97]', 24 January 1997

[116] Home Office Circular 39/1997, 1 September 1997

[117] Scottish Office Police Circulars 11/1997 and 12/1997, 11 August 1997 and HD Circular No 12/1997, 8 August 1997

[118] HC Deb vol. 308 c. 514 W, 16 March 1998 (England and Wales) and 'McLeish stresses vital role of risk assessment in social work criminal justice system', *Scottish Office press notice 0171/98*, 2 February 1998 (Scotland)

[119] In the case of *R v Chief Constable of North Wales Police and Others, ex p. Thorpe and another* (The Times, 23 March 1998) the Court of Appeal held that, in the light of the Home Office guidance, the police should disclose the identity of former paedophile offenders to the public only when there was a pressing need to do so.

how the third party should respond to the information, as well as on restricting the use of the information disclosed.

Responses to a joint Home Office/Scottish Office consultation paper issued in 1996 are currently being considered. It had proposed that it should be an offence for those convicted of certain offences against children to apply for work that would give them access to children. The *Children (Protection from Offenders) (Miscellaneous Amendments) Regulations 1997*, which came into force on 17 October 1997, provide that information about criminal convictions must be obtained before employing any person at a children's home in a position involving contact with children. The 1997 Regulations are also intended to ensure that those with convictions for serious offences against children do not adopt or foster children.

1. Sex Offender Orders

A Home Office consultation paper explaining the Government's proposals for this type of order in England and Wales, which was originally to be called a "Community Protection Order", was published in November 1997.[120] It explained that the government had intended that offenders of this type would be caught by the proposed Community Safety Orders (now included in the *Crime and Disorder Bill* as Anti-Social Behaviour Orders) -

> but for a court to make a Community Safety Order it will need evidence that the defendant had committed acts which had an anti-social effect on the community and the main effect of the order will be to prohibit the defendant from carrying out further anti-social acts. The deterrent would be that, for most conduct, there is a higher penalty available for breach of the Order than for the substantive act itself. In the case of sex offenders, however, we are considering their potential risk to the community and the provisions of the Order will be primarily focused on protecting the community by putting measures in place which the defendant would be expected to follow. It would be necessary for Orders relating to sex offenders to be long term orders, whereas Community Safety Orders will, we expect, be discharged if they are not breached within a suitable period of time. We therefore propose that we take forward the policy for dealing with sex offenders who pose a risk to a community through a different kind of order - the Community Protection order. [121]

The government's proposals are now contained in Clauses 3 to 5 of the *Crime and Disorder Bill*.

Clause 3 of the Bill is designed to enable a chief officer of police to apply to a magistrates' court for a Sex Offender Order ('SOO') to be imposed on a sex offender who has, since the commencement of that clause, acted in such a way as to give reasonable cause to believe an order is necessary to the public from serious harm from him.

The proposed definition of 'sex offender' is given in Clause 4(1), as a person who has been convicted of a sexual offence to which the registration provisions of the *Sex Offenders Act*

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[120] *Community Protection Order: A Consultation Paper*, Home Office, November 1997
[121] *ibid*, p.1

1997 apply. The definition also includes those found not guilty of such an offence by reason of insanity or found to be under a disability and to have done the act charged against him, [Clause 4(1)(b)]; cautioned for such an offence following an admission that he had committed it [Clause 4(1)(c)]; convicted of equivalent offences abroad [Clause 4(1)(d)]; or reprimanded or warned for such an offence as a child or young person [Clause 4(4)].

These definitions seem to imply that sexual offences committed at any time in the past are intended to be relevant for the purposes of an SOO. If this were the case, SOOs would be available against those who were convicted before the provisions of Clause 3 came into force. Lord Goodhart feared that this would contravene the provisions of Article 7 of the *European Convention on Human Rights*, which concerns retrospective legislation.[122] However, the phrase 'since the relevant date' in Clause 3(1)(b) is designed to ensure that an application for an SOO could only be made if an act giving rise to concern has occurred since the date of commencement of Clause 3 (or since the latest date on which the person has been convicted, found, cautioned or punished of a sexual offence, if this is after the commencement of the clause).[123]

A question of whether the *Rehabilitation of Offenders Act 1974* applied to sexual offences arose during the Committee stage in the House of Lords, [124] and indeed Lord Goodhart moved an amendment designed to find out the Government's view on whether a 'spent' conviction could be used as the basis for an application for an SOO.[125] Lord Williams stated that the 1974 Act would not be relevant to applications for SOOs.[126]

The consultation paper explained that:

> The details of a defendant's previous convictions (or the conduct which led to a caution) would be admissible in these proceedings as evidence for the need to make an Order. For example; if a person had been convicted in the past of sexual offences against children committed in or near school grounds, then evidence that the defendant was loitering near schools, without reasonable excuse, could be linked back to his previous offending behaviour to help justify the imposition of an Order. However, it is important to emphasise that it is the current risk the defendant poses to the community, not the past conviction, which would justify the imposition of the Order . . . [127]

The use of cautions as a trigger for SOOs (as well as for registration under the *Sex Offenders Act 1997*) has been criticised on several grounds.[128] Lord Goodhart felt that cautioning only applied to less serious offences and that nothing short of a conviction should justify the application for an SOO.[129] However, the Solicitor-General, Lord Falconer of Thoroton, stated

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[122] HL Deb vol. 584, col. 586
[123] This definition of 'relevant date' is given in Clause 4(2)
[124] HL Deb vol. 585, col. 616
[125] HL Deb vol. 585, col. 624
[126] HL Deb vol. 585, col. 618 and HL Deb vol. 585, col. 627
[127] *Community Protection Order: A Consultation Paper*, Home Office, November 1997, p. 2
[128] See Research Paper 97/11, 'The *Sex Offenders Bill* [Bill 66 of 1996-97]', Mary Baber, 24 January 1997, p. 13
[129] HL Deb vol. 585, col. 625 and HL Deb vol. 587, col. 602-4

that 'how the offender was dealt with at the time of the original offence is not a material factor in the subsequent assessment of risk'.[130] Soothill, Francis and Sanderson[131] have highlighted the 'dramatic' fall in the cautioning rate for sexual offences since 1993, and felt that the inclusion of 'cautioned' sex offenders in the registration provisions of the 1997 Act was likely to result in turbulence in the cautioning rate. They considered that there was likely to be increased scrutiny of and challenge to the use of cautions which would be a disincentive to the police - but on the other hand that there would be other sorts of pressures to make *more* use of cautioning.[132]

According to the Notes on Clauses, the use of the phrase 'reasonable cause to believe' in Clause 3(1)(b) is designed to ensure that a report from 'those against whom the behaviour is not targeted' (for instance, a psychiatrist, probation officer, housing officer or social worker[133]) that a person's conduct or statements indicated a threat of serious harm[134] to the community, could trigger an application. However, the use of that phrase would also mean that it would not have to be proved that the defendant had committed specific acts which had a harmful effect on the relevant community.

Clause 3(3) is designed to leave the determination of the contents of an SOO to the discretion of the courts, who might, for example, prohibit the person concerned from loitering near schools or playgrounds. However, Clause 3(4) is intended to provide that the conditions would have to be necessary for the protection of the public from serious harm from the defendant. It is not intended for SOOs to be punitive or to impose positive obligations, other than the requirement proposed in Clause 3(5) for the person to be subject to the registration requirements of the *Sex Offenders Act 1997* for the duration of the order (if he was not already covered by its terms). Early proposals that breach of a SOO should lead to compulsory treatment or supervision have not been included in the *Crime and Disorder Bill*. The government nevertheless feels that voluntary supervision should be encouraged and all relevant kinds of assistance made available to such offenders even before a breach.

Clause 3(5) is intended to ensure that these orders would initially be imposed for a minimum of five years, although according to Clause 3(6) and (7) they could be discharged within that time if both the police and the person to whom it applied consented.[135] Under Clause 3(6), an SOO could be varied at any time. The proposed provisions in Clause 5 for appeals against the decision of the magistrate's court following an application for an SOO are the same as for an ASBO.

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[130] HL Deb vol. 587, col. 603-4

[131] 'A Cautionary Tale: the Sex Offenders Act 1997, the Police and Cautions', *Criminal Law Review [1997]* pp. 482-90

[132] *ibid*, p. 489

[133] *Community Protection Order: A Consultation Paper*, Home Office, November 1997, p.1

[134] The provisions for ASBOs contained in the Bill do not contain the qualification 'serious'.

[135] Various amendments relating to these provisions were tabled, using the same arguments as for the proposals on ASBOs - HL Deb vol. 585, col. 620. The Government's responses were similar in both cases - HL Deb vol. 585, col. 621

Clause 3(8) proposes that breach of an SOO (which, like ASBOs, are intended to be civil orders applied for 'by complaint'[136] to the magistrate's court) without reasonable excuse would be a criminal offence punishable by up to five years imprisonment and/or an unlimited fine.[137] As with the proposals for ASBOs, Clause 3(9) is designed to ensure that the court would not be able to make a conditional discharge for a breach of an order.

2. Extended sentences

Clauses 55 and 56 of the Bill are intended to allow the courts to impose sentences including an extended period of supervision following release from prison. These provisions are intended to replace sections 10-26 of the *Crime (Sentences) Act 1997* on extended sentences, The Government decided not to implement other provisions in the 1997 abolishing the current arrangements for automatic early release and parole and felt that the arrangements for extended sentences under the Act could not be brought in independently of these other arrangements. The Government also considered that the provisions for extended sentences under the 1997 Act were 'unnecessarily complicated'.[138] For details of those provisions, see Research Paper 96/99, which was prepared for the second reading of the Bill which became the 1997 Act.

Clause 55 is designed to give courts powers to impose sentences on those who have committed sexual or violent offences[139], which will include extended periods of post-release supervision. A court will be able to impose an extended sentence where it considers that the period of supervision which an offender would otherwise receive would not be long enough to prevent the commission by the offender of further offences and secure hi rehabilitation. An extended sentence would be calculated as the aggregate of the sentence which the court would currently impose under the *Criminal Justice Act 1991* (the "custodial term")with the addition of whatever period of extended supervision is considered appropriate (the "extension period"). Any extended sentence will, however, remain within the maximum penalty available for the particular offence.. The option of imposing an extended sentence will be available for sex offenders who receive a term of imprisonment of whatever length, whereas where violent offenders are concerned the provision will only apply to those whose custodial term is of 4 years or more. The Clause also provides that, for sex offenders, the period of extended supervision can be anything up to 10 years, and for violent offenders, the maximum is 5 years, although the Home Secretary will have powers to change, by order the maximum period for violent offenders to up to 10 years. Any such order will have to be approved by both Houses of Parliament under the affirmative procedure.

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[136] Clause 3(2)

[137] for conviction on indictment only [Clause 3(8)(b)] - the maximum penalty for summary conviction would be six months imprisonment and/or a £5,000 fine [Clause 3(8)(a)]

[138] HC Deb. vol. 299, col. 778

[139] "sexual offence" and "violent offence" is defined as having the same meaning as under Part I of the *Criminal Justice Act 1991*

It is expected that a Paper on sex offenders generally will be published in the near future. This is likely to contain discussion of the powers to impose extended sentences which are proposed in the current Bill.

B. Scotland

Sex offenders imprisoned in Scotland are largely concentrated in HM Prison Invernettie, Peterhead, but following an initiative from the group 'Peterhead Campaign against Paedophiles', the Scottish Prison Service has agreed to move them to other Scottish jails near the end of their sentence, in order to reduce the likelihood of their settling in the area upon release[140].

The Scottish Office Chief Inspector of Social Work, Angus Skinner has produced its first report on the supervision of sex offenders, entitled *A Commitment to Protect - Supervising Sex Offenders: Proposals for More Effective Practice* ("the Skinner report"). He had been instructed in February 1997 by the then Secretary of State for Scotland to conduct a review, with the assistance of police, housing, health and other officials, of the present supervision arrangements and to make recommendations for improvements where such needs were identified.[141] A second report is expected this year.

All the main recommendations of the Skinner report have been accepted in principle by the government.[142] One recommendation was the establishment of an Expert Panel on Sex Offending to co-ordinate strategies and facilitate collaboration between the various agencies involved. This has now been set up under Lady Cosgrove, Scotland's only female Supreme Court judge, and held its first meeting on 16 March. Its members have a wide range of expertise in the area of sex offending, and its remit is to: take forward work on recommendations of the report; advise the Secretary of State on any other relevant issues relating to sex offenders; provide, for the Secretary of Sate, an annual summary of its past and planned future work; and conclude its work three years after its first meeting.[143]

At present, sex offenders in Scotland may be subject to supervision in three circumstances: as part of a probation order, on release from prison after a sentence of fewer than four years, or under a supervision and treatment order. *A Commitment to Protect* concluded that the current system was inadequate, and argued that supervision orders were not being used to maximum effect. It recommended that, rather than introducing new types of orders or licences, supervision should be extended to include more sex offenders and for longer periods of supervision. It also felt that the courts should make more use of the existing provisions both

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[140] *Scotland on Sunday,* 20 April 1997

[141] 'Michael Forsyth announces review of supervision arrangements for sex offenders', *Scottish Office Press Notice 0312/97,* 28 February 1997

[142] 'McLeish Accepts Recommendations of Major Sex Offender Report', *Scottish Office press notice 2045/97,* 16 December 1997

[143] 'Lady Cosgrove's expert panel on sex offending - membership and remit announced', *Scottish Office Press Notice 0513/98,* 16 March 1998

for attaching additional requirements to probation orders (which can regulate contact with victims, their families or children in general; prohibit visits to parks, playgrounds, swimming pools and so on; and require the offender to participate in treatment or 'personal change programmes') and for imposing discretionary life sentences (which would allow for lifelong supervision even after a release from custody). However, the report would like the courts to have the option of committing the offender for treatment within an indeterminate sentence, and reviewing the sentence on completion of the treatment.

A Commitment to Protect identified several steps which it said could help social workers to strengthen supervision and increase its effectiveness. This follows the murder of nine-year-old Scott Simpson by Steven Leisk, who at the time was under the supervision of a social worker on his release from prison after being convicted of sex offences against children. Aberdeen City Council commissioned an independent investigation into the affair from Dr James McManus of Dundee University, who agreed to keep the Chief Inspector of Social Work at the Scottish Office fully informed of his findings. The completion of this investigation was announced on 13 January 1998; it recommended that social workers work in teams, and highlighted five issues which Aberdeen's director of social work has identified as being of national significance:

- appropriateness of sentence;
- suitability for supervised release order;
- availability of supervised accommodation;
- difficulties caused by employment of supervisee; and
- co-working arrangements.[144]

Draft practice guidance and an assessment framework have recently been prepared to help take forward the process of risk assessment in criminal justice social work services in Scotland.[145]

A Commitment to Protect noted that the problems involved in supervising offenders were often exacerbated when the offender is not placed in supervised accommodation following release. It recommended that the provision of supervised accommodation should be planned, funded and utilised on a strategic national basis.

1. Sex Offender Orders

Commenting on the proposals for Sex Offender Orders contained in the *Crime and Disorder Bill*, the Scottish Home Affairs Minister Henry McLeish said:

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[144] 'Duped by a manipulator', *The Herald*, 14 January 1998

[145] 'McLeish stresses vital role of risk assessment in social work criminal justice system', *Scottish Office press notice 0171/98*, 2 February 1998

> Recent cases have caused concern that the protection afforded to the public, particularly to children, from convicted sex offenders needs to be strengthened. [146]

The Scottish Office consultation paper on the proposals for Sex Offender Orders[147] (previously known as Community Protection Orders) had also made the point that:

> there is considerable concern about what is thought to be a small number of people with previous convictions for serious sex offences whose behaviour suggests that they may pose a continued threat to the community but who are not subject to any supervision or registration requirement.[148]

Clause 20 of the *Crime and Disorder Bill* proposes that Sex Offender Orders ('SOO's) should be available on application by the police to the sheriff to protect the public from serious harm from a person with a previous conviction for a sex offence at home or abroad, whose current behaviour is giving cause for concern about the safety of the community. An SOO would prohibit the offender from certain behaviour, and breach of such an order would be a criminal offence. This is very similar to the proposals for England and Wales discussed above, and therefore this section will only discuss those provisions are specific to Scotland.

The Bill as it was originally drafted provided that either the police or a local authority may apply for an SOO, but Clause 20(1) and (2) as it now stands is the result a government amendment made in the light of the responses to the consultation paper.[149] The clause is designed to allow only the police, and not local authorities, to apply for an SOO if it appears to them that the relevant conditions are fulfilled, despite the fact that it would be unprecedented for the police to apply for a civil order. This was based on the duty of the police to ensure the safety of the public, and to prevent criminal behaviour.[150] It was also considered that the police would be in a better position than local authorities to know about previous offending history and current behaviour, and that these orders would be sufficiently different from ASBOs to warrant the different procedure.[151] According to Clause 21(2), however, the police will have to consult the local authority before applying for an SOO,[152] although according to Clause 21(4) if an order had been made without such consultation, its validity will not be affected.[153]

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[146] 'Protecting the public at heart of new law proposals published today', *Scottish Office press notice 1914/97*, 3 December 1997

[147] *Crime and Disorder Bill: Scottish consultation paper on Community Protection Orders*, Scottish Office, November 1997

[148] *ibid*, para. 2

[149] HL Deb vol. 585, col. 1036-44

[150] Lord Hardie, the Lord Advocate - HL Deb vol. 585, col. 1040-1

[151] Lord Mackay of Drumadoon also felt that it would be difficult for local authorities to obtain all the relevant information for deciding whether to apply for an SOO - HL Deb vol. 584, col. 582

[152] Clause 21(2)

[153] Lord Hardie, the Lord Advocate, considered that this provision only applied to validity for the purposes of prosecuting for a breach, and that 'it would be open to the person against whom an order had been made to lodge an appeal against the order on the grounds that the necessary steps had not been completed before the application was made' - HL Deb vol. 585, col. 1041

Clause 20(3) is intended to define the conditions under which an SOO may be sought. Firstly, the person will have to be aged 16 or over, as those under 16 will be dealt with under the children's hearing system.[154] Secondly, the person must be a sex offender, which is given the same definition as under the English and Welsh provisions[155] of being the offences to which the registration requirements of the *Sex Offenders Act 1997* apply.[156] Thirdly, the person will have to have acted since the last date of his conviction, etc., of a sex offence (or since the commencement of Clause 20 if later)[157] in such a way as to give reasonable cause to believe that an order is necessary to protect the public from serious harm from him.

The reference to 'summary application' in Clause 20(3) is intended to provide for the sheriff to be acting in his civil capacity when hearing applications for SOOs. Under Clause 20(4), the sheriff, like his counterparts in the magistrates' courts of England and Wales, will have discretion over the prohibitions to be imposed by an SOO. The only mandatory condition is that which would be imposed by Clause 20(6), namely that for the duration of an SOO, the person will be subject to the registration requirements of the *Sex Offenders Act 1997.* Clause 20(5) proposes that any prohibitions imposed by an order may only be those necessary to protect the community from 'serious harm' from the person in respect of whom the order is sought. The phrase 'serious harm' is not defined in the Bill as the government did not wish to be too prescriptive.[158] Clause 20(4)(a) is designed to give the sheriff the explicit power to make interim orders, which is not provided for in England and Wales.

It is intended that the police be given the power to arrest without warrant anyone suspected of doing, or having done, anything in breach of an SOO or interim order [Clause 20(8)]. This would require the police to be fully conversant with the particular prohibitions of each individual SOO in force in their area, because, in the words of Lord Hardie, the Lord Advocate, 'the behaviour prohibited by an order may..…be relatively innocuous and certainly non-criminal'.[159]

Clause 21(7)(a), in contrast to the provisions for England and Wales, is intended to provide that the duration of an SOO in Scotland would be for the sheriff to decide. There is no proposal for a minimum period of five years. As with ASBOs, therefore, it is proposed in Clause 21(7)(b) that SOOs in Scotland could be varied or discharged at any time.

Clause 22(1) is designed to make breach of an SOO, or of an interim order,[160] a criminal offence, with the same penalties as in England and Wales. However, Clause 22 also contains proposals for dealing with 'criminal' breaches of SOOs in Scotland which do not appear in the

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[154] according to the Notes on Clauses

[155] in Clause 4

[156] It should be noted that under Scots law there is no provision for cautioning for offences.

[157] This is the proposed definition of 'relevant date' in Clause 4(2), as applied to Clause 20(1)(b) by Clause 20(7)(b)

[158] HL Deb vol. 585, col. 1044-5

[159] HL Deb vol. 585, col. 1035

[160] following the acceptance of government amendments during the Report stage in the House of Lords - HL Deb vol. 587, col. 677-8 and 682

equivalent English and Welsh clauses.[161] The Notes on Clauses explain the proposed effects of these as follows:

> Breaching a sex offender order in the course of committing a separate criminal offence (e.g. indecent assault of a child which took place in a playground which the accused had been prohibited by order from entering) is to be an aggravating factor to be taken into account in the sentence for that criminal offence.

There have been criticisms from the Law Society of Scotland over how Sex Offender Orders will work in practice, a particular concern being how offenders covered by an order would be identified.[162]

2. Extended sentences

The most serious common law sexual offences already carry a possible life sentence, as do some statutory offences. The majority of offences have a maximum penalty of two years, but tougher sentences for certain sex offences against girls under the age of 16 were introduced by the *Crime and Punishment (Scotland) Act 1997*. Since 1 August 1997 the maximum sentence for these offences has been 10 years' imprisonment.

The government decided not to implement those provisions of the *Crime and Punishment (Scotland) Act 1997* which would have brought in a version of the English 'two strikes and you're out' sentencing for repeat serious sex offenders. *The Scotsman* quoted Henry McLeish, the Scottish Office minister for home affairs, as saying that, in the Government's view, the provision had been weakened by a Liberal Democrat amendment and therefore would only apply to about 30 offenders per year[163].

The introduction of extended post-release supervision for sexual and violent offenders, which could last for up to ten years after release from prison, is proposed in Clause 79 and 80 of the *Crime and Disorder Bill*. This is in response to a feeling amongst judges that Supervised Release Orders (see above) could be more stringent than parole conditions - but because these are not available if the sentence given was more than four years, judges pass lighter sentences than they would wish in order to be able impose such orders.[164] It is expected that a Paper on sex offenders generally will be published in the near future, which would contain a discussion of the Government's current proposals for extended sentencing for sexual and violent offenders.

Clause 79 of the *Crime and Disorder Bill* is designed to insert a new section 210A into the *Criminal Procedure (Scotland) Act 1995* giving the courts in Scotland which impose sentences on sexual or violent offenders power to include periods of post-release supervision.

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[161] Clause 22(6) and (7) of are designed to apply the provisions of Clause 22 to SOOs.
[162] *The Herald*, 17 October 1997
[163] 'Court clampdown on sex offenders was 'long overdue' ', *The Scotsman*, 6 August 1997
[164] *The Scotsman*, 4 December 1997

As with the provisions for extended sentences in England and Wales under Clauses 55 and 56, the maximum extension period in the case of a sex offender will be ten years, while the maximum for violent offenders will be five years, with the possibility that this might be extended to up to ten years by an order made by the Secretary of State under the affirmative procedure.

Clause 79 also provides for the early release, release on licence, recall and return to custody of offenders on extended sentences. Provisions concerning the licensing arrangements, including release on licence, setting of licence conditions, revocation of licences and return to custody are set out in Clause 80.

It is expected that a Paper on sex offenders generally will be published in the near future, which would be likely to contain a discussion of the Government's current proposals for extended sentencing for sexual and violent offenders.

III Racial violence and harassment

A. The problem

The matter of racially motivated attacks and harassment has been specifically addressed by the Home Affairs Committee on four separate occasions, in 1982, 1986, 1989 and 1994. In 1986, the Committee described racial attacks and harassment as "the most shameful and dispiriting aspect of race relations in Britain".[165] In 1994, the Committee stated that not only were racial attacks against the law but "they are also socially divisive and morally repugnant…. We believe that if racism is allowed to grow unchecked it will begin to corrode the fabric of our open and tolerant society".[166]

The Home Affairs Committee perceived two main difficulties in establishing an objective view of the extent and nature of the problem

- the difficulty clearly and objectively of defining a racial incident and
- the fact that racial incidents were, more than most other crimes, widely under- reported to the police.

However, in 1986 a definition put forward by ACPO was accepted by all police forces in England and Wales and is also used in Scotland; it has been recommended by the Commission for Racial Equality and by the Inter Departmental Racial Attacks Group. Racial incidents are recorded by the police as all incidents reported to them where any party suspects or alleges racial motivation:

> "Any incident in which it appears to the reporting or investigating officer that the complaint involves an element of racial motivation or any incident which includes an allegation of racial motivation made by any person".

While this definition was seen by the Home Affairs Committee as imperfect because it depends on a subjective judgment by the victim or police officer and does not distinguish between incidents of harassment and violent assaults, they saw no point in trying to improve on it.

There are various sources of information: the racial incidents reported to the police, anecdotal and local evidence and the British Crime Survey, together with the Crown Prosecution Service's racial incident monitoring scheme, which began in 1995 partly in response to the Home Affairs Committee Report. There are difficulties about the interpretation of statistics, particularly the question of under-reporting where the rate may not have remained constant over the years; greater emphasis on the need to deal with racially motivated attacks and

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[165] Third Report 1985-86 HC 409, para. 1
[166] 1993-94 HC 71-I para. 4

improved record keeping may mean that victims have become more willing to report such incidents. As Home Office Minister Alun Michael commented in a written answer on 26 January 1998:

It is difficult to be precise about the extent to which rising figures may be partly due to the increasing willingness among ethnic minority communities to report these incidents and an increasing confidence that the police take these matters seriously. Police forces are also taking steps to increase the reporting rate of racial incidents taking place and to discover when and where they are taking place and on whom. Such developments are also likely to be influencing both public confidence and the number of offenders reported.[167]

The 1994 Home Affairs Committee Report also points out that "crude statistics giving simply the number of reported racial incidents tell one nothing about the nature of incidents, their local distribution, or the ethnic origin of the victim or the offender".[168] Some analysis of more serious incidents is now being added to the basic statistics, however:[169]

Mr. Mike O'Brien: The total number of racial incidents recorded by the police in England and Wales for the last five years were:

	Number
1992	7,734
1993-94	11,006
1994-95	11,878
1995-96	12,222
1996-97	13,151

These are incidents recorded under the Association of Chief Police Officers' definition of a racial incidents:

"any incident in which it appears to the reporting or investigating officer that the complaint involves an element of racial motivation, or any incident which includes an allegation of racial motivation made by any person".

Under data collection requirements agreed by member states within Europe, figures giving details of the numbers of serious racial incidents have been submitted to the European Union for 1994-95 and 1995-96. The 1994-95 figures showed that, of the 11,878 racial incidents recorded by the police, 564 were in respect of serious crime. Of these, four were murders; three were attempted murders; 161 were attacks involving explosives/arson and 396 were serious assaults. In 1995-96, of the 12,222 racial incidents recorded by the police, 440 were in respect of serious crime. Of these, two were murders, 163 were attacks involving explosives/arson; and 275 were serious assaults.

In the calendar year 1989 the number of racial incidents reported to each police force in England and Wales was 5,044.[170]

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[167] HC Deb. 305, c.39W
[168] loc cit para. 11
[169] 22.12.97; HC Deb. c.548W
[170] 26.1.98; HC Deb. 305 c.39W

The following table shows recorded racial incidents in Scotland 1989 to 1995-96:

Recorded racial incidents Scotland: 1989 to 1995/96

1989	1990	1991	1992	1993	1994	1995-96 [(a)]
376	636	678	663	756	791	832

a) Fifteen month period from Jan 1995 to Mar 1996.

Source: Scottish Office *Race, gender and the criminal justice system, 1995* (pub. 1997).

It is believed that the apparent increase in racial incidents reflects, in large part, an increased willingness among ethnic minorities to report incidents to the police and to describe their experience as racially-motivated.

The British Crime Survey (BCS) is a large sample survey which estimates the extent of crimes and serious threats committed against individuals and their households. Since 1988 it has boosted its sample of Afro-Caribbean and Asian respondents and has asked whether victims believed incidents to have been racially-motivated. A report on *Ethnic minorities, victimisation and racial harassment*[171] found that the BCS provided no evidence to support the rise of 77% in racial incidents for England and Wales between 1988 and 1992 suggested by the police figures. The key points which emerged are summarised as follows:

- Ethnic minorities are more likely to be victims of crimes and serious threats than whites. The main reasons for this are their age structure. their socio-economic characteristics and the type of area they live in.

- In general, minority victims in all groups are no less likely than whites to report offences to the police; and in some cases they are actually more likely to do so. However, minority victims are much less satisfied with the police response.

- The proportion of *all* minority respondents in the BCS who had been victims of racially motivated incidents in the preceding year was four per cent for Afro-Caribbeans, five per cent for Indians and eight per cent for Pakistanis.

- Nearly a third of Pakistani victims said that incidents were racially motivated and this rose to 70% in the case of threats. The average figure for Indians was lower, at just under a fifth; for Afro-Caribbean victims it was 14%.

- Racially motivated incidents are more likely to be reported to the police by Indians than other types of crime; but both Afro-Caribbeans and Pakistanis are less inclined to report these incidents. Victims are even less satisfied with the police response to the racial incidents they report than with the police response to other types of crimes and threats.

[171] Home Office Research and Statistics Directorate: Research Findings No. 39, August 1996

- Fear of crime is higher among the Asian groups than whites even when allowance is made for other relevant factors.

- In areas where racial attacks are *perceived* as a problem, both minority and white respondents tend to have higher levels of fear of crime.

- The BCS provides no evidence of the large rise in racial incidents between 1988 and 1992 suggested by police figures. But it shows a large gap between the number of racial incidents *reported* to the police and the number they actually *recorded* over that period

The CPS Racial Incident Monitoring Scheme report on the year ending 31 March 1997 gathers information on prosecution decisions and outcomes in all cases identified by the police or CPS as a racial incident. In the year in question, the police identified 37% of the cases as meeting the ACPO definition whereas the CPS identified 63%.

Public Order Act offences were predominant:

3.1 There was a total of 2074 charges put by the police during the reporting period. The table below shows a breakdown of the charges into offence category.

Public Order	Assaults	Criminal Damage	Theft	Homicide	Other
1008	554	284	5	5	137
48.5%	26.75%	13.75%	0.5%	0.5%	6.5%

3.2 Public Order Act offences were predominant with over 48% of charges. There were five charges of homicide during the year, four involving one prosecution from Central Casework, and one single prosecution from CPS London (which was in fact an attempt).

On the extent to which racial motivation was brought to the courts' attention and whether this resulted in an aggravated sentence, the report comments:

7.1 It is the responsibility of the prosecutor to draw to the court's attention any admissible evidence of racial motivation. Racial motivation is an aggravating feature which the Court of Appeal has stated should be taken into consideration when sentencing.

7.2 During the period 1015 cases were prosecuted which contained admissible evidence of racial motivation. The RIDS record that in 857 (84.5%) cases the evidence was specifically brought to the court's attention.

7.3 In the remaining 158 cases (15.5%) the prosecutor either failed to draw the admissible evidence to the court's attention or there is no record of this having being done.

7.4 There are cases in which there is no admissible evidence of racial motivation, but in which there is background information which may properly be brought to the court's attention to enable it to draw an inference that a case is racially motivated. Although not direct evidence of racial motivation, it will consist of factors which it is proper to refer to in presenting the case so the court may make

a judgement on whether the case might be racially motivated and in which it would therefore be proper to impose an increase in sentence.

7.5 During the period there were 191 such cases, 168 of which were prosecuted. The court was informed of some racial element in 87 of the cases.

7.6 In total, there were 937 cases in which the defendant either pleaded guilty or was found guilty, and in which the racial element in the case was specifically highlighted to the court. However in only 181 of these cases did the court indicate that the sentence was increased as a result of its being given this information.

7.7 Work is progressing to identify the type of courts in which there appears to be a greater reluctance to state openly that the sentence reflects the racial element in the case.

The Police Research Group conducted a national survey of all 43 police forces in England and Wales to obtain basic information about the types of crime and methods of disposal for racially motivated incidents recorded in 1996/97. The results of this survey revealed:[172]

a large degree of variation between forces in the information on racial incidents that is recorded and counted. A number of forces were unable to provide us with all of the data we requested, and others retained it in different ways. In addition, each force has developed its own form(s) for recording racially motivated incidents.

large variations between forces in the rate of recorded racially motivated incidents per 1000 ethnic minority population which are difficult to explain without reference to consistency in recording procedures. These findings rather support the view that the current ACPO definition of a racial incident allows for a wide range of interpretations at force, divisional or even individual officer level.

that the bulk of racially motivated incidents are accounted for by less serious types of crime: 58% of incidents in our survey were either damage to property or verbal harassment.

Officers who had received specific training in how to handle racially motivated incidents were more aware of the available legislation, particularly section 4A of the Public Order Act.

Very few officers were completely aware of the provisions of section 4A of the Public Order Act, many being confused about what it could be used to deal with.

Half the officers thought that a new offence of racially motivated violence would be a good thing, half that it would not and that current powers in dealing with violent crime were sufficient.

It was recommended inter alia that

- a standard form should be introduced

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[172] Home Office Press notice, 24.11.1997

- ACPO and the Home Office should consider clarifying the definitive of a racially motivated incident

- more training should be considered to explain existing legislation and to foster multi-cultural awareness

- consideration should be given to revising current guidance on S.4A of the *Public Order Act*

- any new offence of racially motivated violence should address two sources of anxiety among officers interviewed: that the difficulty of proving motivation should not provide an opportunity for the case to be lost and that prosecutions must be seen to be able to be brought where the victims are white.

1. Existing remedies (England and Wales)

Crimes of violence against the person are mainly prosecuted under the *Offences Against the Person Act 1861*, proposed changes to which have already been announced.[173] Part III of the *Public Order Act 1986* creates offences of incitement to racial hatred, but the Act also includes provisions to deal with harassment which are not specific to racially motivated incidents. S.4 of the 1986 Act provides a summary offence concerned with fear or provocation or violence. A person is guilty of an offence if he:

(i) uses towards another person threatening, abusive or insulting words or behaviour or
(ii) distributes or displays to another person any writing, sign or other visible representation which is threatening abusive or insulting, with intent to cause that person to believe that immediate unlawful violence will be used against him or another, or whose unlawful violence is likely to be provoked.

The offence carries a maximum penalty of six months' imprisonment or a £5,000 fine or both.

Section 5 of the 1986 Act deals with non-violent disorderly behaviour. A person is guilty of an offence if he

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

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[173] Home Office: *Reforming the Offences Against the Person Act 1861*, February 1998

A constable may arrest without warrant anyone who continues to engage in disorderly conduct after a warning to desist. The offence carries a maximum penalty of a level 3 fine, currently £1,000.

Various amendments to the *Public Order Act 1986* were proposed by the Home Affairs Committee in 1994 who also recommended the creation of a new offence of racially motivated violence:[174]

> We recommend the creation of a new offence of racially-motivated violence. We further recommend (i) that whenever there **is** a count (or charge) of violent assault and there is sufficient evidence that the violence was occasioned on the grounds of colour, race, nationality, or ethnic or national origins, a separate count should be added to the indictment, and the jury (or magistrates) should be invited to decide in the alternative which offence (common assault, ABH, wounding with intent, GBH or manslaughter or racially-motivated common assault, ABH, wounding with intent, GBH or manslaughter), if any, has been made out; and (ii) that if the offence of racial violence is proved an additional and consecutive sentence should be imposed on the offender of up to five years imprisonment for the racial element in that offence. (Para 82)

Amendments were tabled to the *Criminal Justice and Public Order Bill* of that year, which were not successful, but in response the Government introduced an amendment to provide a new S.4A to the 1986 Act. This creates the offence of causing *intentional* harassment and is intended to deal with cases of serious racial harassment, particularly where the offending behaviour is persistent. It also applies to behaviour which is not racially motivated. Under S.4A, a person is guilty of an offence if with intent to cause a person harassment, alarm or distress, he

(i) uses threatening, abusive, or insulting words or behaviour or disorderly behaviour, or
(ii) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

thereby causing that or another person harassment, alarm or distress.

The offence is committed only if there is an identifiable victim and there was intention to cause harassment, etc. The maximum penalty is six months imprisonment or a level 5 fine (currently £5,000) or both.

The *Protection from Harassment Act 1997* also provides a remedy for racial harassment - though it is again non-specific. Section 1 of the Act states that a person must not pursue a course of conduct which amounts to harassment of another and (a) which he knows amounts to harassment or (b) which he ought to know amounts to harassment. The perpetrator "ought to know" that the course of conduct amounts to harassment if a reasonable person in possession of the same information would think that it did. It is not necessary to prove an

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[174] loc cit p.xxxix

intention to cause harassment. This is not defined in the Act, other than in S.7 which states that harassing a person includes alarming them or causing them distress. Conduct includes speech, and "course of conduct" means conduct on at least two occasions, although the conduct need not be the same on each occasion.

Section 2 makes it an offence to pursue a course of conduct prohibited under Section 1. The main penalties on summary conviction are six months' imprisonment, or a fine of £5,000 or both.

Section 4 creates the more serious offence of causing fear of violence, which carries a maximum sentence of 5 years' imprisonment, or a fine or both. Again the victim must have been put in fear of violence on at least two occasions and it must be shown that the perpetrator knew or ought to have known that fear would be caused.

Section 5 provides that a criminal court may make a restraining order to protect the victim or any other person from further harassment or fear of violence. This is in addition to any sentence, and breach of a restraining order is a further criminal offence which carries a sentence of up to five years' imprisonment or a fine.

Section 3 provides victims with a civil remedy with criminal sanctions. This is not yet fully in force, but enables a victim to bring a civil action for damages and to seek an injunction restraining the defendant from any conduct which amounts to harassment.

2. Scotland

In their consultation paper,[175] the Scottish Office Home Department described how most offences involving violence or harassment, whether racially motivated or not, are prosecuted under common law:

> At present in Scotland most conduct involving harassment or violence, whether or not there is a 'racial element', is prosecuted under the common law as breach of the peace, threats, or as one of the various types of assault. There are also statutory offences in the Public Order Act 1986 which apply to Scotland dealing with acts intended or likely to stir up racial hatred.
>
> The common law crime of breach of the peace covers a wide range of behaviour, including various types of harassment. All that is required to be proved for a successful prosecution is that the conduct caused, or was likely to cause, alarm or annoyance. It is not necessary for the court to concern itself with the intended result of the action or even the actual effect, or the number of occasions on which the conduct occurred.
>
> Similarly most violent crime which falls short of homicide is prosecuted under the common law of assault, or other more specific common law offences such as indecent assault, rape, etc.

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[175] *New Offences of racial harassment and racially motivated violence* September 1997

Under the common law the penalties available to the sentencing sheriff or judge are limited only by the powers of the court which hears the case. In deciding which court should deal with a particular case the Lord Advocate, or the procurator fiscal on his behalf, takes into account the gravity of the charges. The most serious cases are beard by the High Court. Approximately 75 cases of breach of the peace each year and 750 cases of assault are successfully prosecuted on indictment i.e. before a sheriff and jury or before the High Court, where the maximum custodial penalties are 3 years and life, respectively.

Crimes of harassment or violence have long been successfully prosecuted under the existing common law of Scotland. The common law is flexible, and capable of dealing with various kinds of behaviour. The courts may interpret common law offences, such as breach of the peace, to embrace new ways of causing alarm or annoyance. This is one of the principal advantages of relying on the common law. The charges will include details of the precise nature of the acts committed, and may, if there is evidence of a racial element, refer specifically to this. But another advantage of the common law is that if part of the charge is disputed and cannot be proved and is therefore struck out, the prospect of conviction for the basic offence is not necessarily endangered. In other words the racial element, whatever it is, may be placed before the court but does not require to be proved to secure the conviction. The same flexibility could not of course apply in relation to a statutory offence where the 'racial' element was a G essential' element i.e. where failure to prove it would necessarily result in acquittal of the statutory offence. It is essential to take fully into account such practicalities of prosecution when considering whether or not to create a new statutory offence.

There are, however, no specific offences of racial harassment or racially-motivated violence available under the common law. Prosecutors in Scotland already do bring to the attention of the courts evidence of a racial element in connection with any crime, not just in the context of harassment and violence. And if that evidence establishes a racial element to the court's satisfaction, the court in turn can and will take into account any and all relevant factors in deciding what sentence to pass. But in the absence of specific offences it may be felt, particularly by victims, that such matters are not being treated appropriately or with the specific attention that they require.

The offence of intentional harassment introduced as S.4A *Public Order Act 1986* by the *Criminal Justice and Public Order Act 1994* does not apply in Scotland.

Section 8 of the *Protection from Harassment Act 1997*, which applies only in Scotland, states that "every individual has a right to be free from harassment", and prohibits a course of conduct which amounts to harassment of another which is intended to amount to harassment or which occurs in circumstances where it would appear to a reasonable person that it would amount to harassment.

Victims or potential victims can bring a civil "action of harassment". The court can award damages and can also grant an interdict or interim interdict, or "non-harassment order" but not both. A non-harassment order requires the defendant to refrain from specified conduct for a specified (or indeterminate) period. Under Section 9 a breach of a non-harassment order is a criminal offence punishable with up to five years' imprisonment and/or a fine. A court will make a non-harassment order to restrain the perpetrator from specified conduct in relation to the victim if the court is satisfied, on the balance of probabilities, that it is appropriate to make such an order in order to protect the victim from further harassment.

The criminal court is also able to make a non-harassment order after a person has been convicted for an offence involving harassment. A non-harassment order made by the criminal court is treated as part of the sentence.

3. The Consultation Exercise

The Home Office published its consultation paper on how to implement the Government's manifesto commitment to create new offences of racially motivated violence and racial harassment on 2 October 1997. The paper made a distinction between racial violence, generally understood to mean violence against the person, and racial harassment, particularly low level, persistent victimisation. An annex sets out a new set of racial crimes to correspond to the existing main offences which deal with violence against the person - eg. racial common assault, occasioning actual bodily harm and racial malicious wounding, (but not those which carry a maximum sentence of life imprisonment) and harassment, eg. Public Order Act Offences, with increased penalties for the racially motivated equivalent. The Paper explained how the element of racial motivation was to be tested:

> 8.2 Ministers recognise that the creation of offences which required the prosecution to prove that the offence was motivated on racial grounds would create a difficult hurdle to be overcome by the prosecutors. The prosecution would need to distinguish a racial motive from other possible motives, and would have to demonstrate the degree to which a person had been influenced by various motives: there may be a whole range of different circumstances and motives at work in such cases, and this may put a conviction in doubt for all but the most overtly racist incidents.
>
> 8.3 The Government intends that the new offences should cover cases where the prosecution is able to show racial motivation but it believes that for most racial incidents of violence and harassment a much more realistic test will be necessary.
>
> 8.4 It proposes therefore that the new offences should be committed where it is shown to the usual standard of proof in criminal cases that the offender demonstrated racial hostility at or around the time of the basic offence, or that the motivation for committing that offence was racial hostility.
>
> 8.5 This sets the threshold for the new offences at a level which is likely to catch all cases where there is any evidence of racism.

The consultation paper also sought views on whether the list of offences should be extended to cover racial criminal damage. It set out the practical developments already in place and intended to assist the courts in giving full consideration to the racial element in sentencing:

> 7.5 There have been a number of practical developments which are intended to assist the courts in giving full consideration to the racial element in sentencing:
>
> • the racial element of any crime is flagged up on police papers which are forwarded to the Crown Prosecution Service;

- the Code for Crown Prosecutors states that "a clear racial motivation will be regarded as an aggravating feature when assessing whether prosecution is required in the public interest"; and

- the Magistrates' Association has issued guidelines to its members making it clear that a racial motivation to a violent or harassment offence should be considered an aggravating factor justifying a more severe sentence.

7.6 The Government welcomes these practical initiatives and believes that they should be built on by providing an explicit statutory framework to reflect the racial element.

7.7 The Government believes that specific racial offences will assist the police, prosecutors and courts in taking this factor into consideration.

It also proposed, however, that explicit statutory expression should be given to the judgment in *R v Ribbans, Duggan and Ridley* (1995) 16 Cr App R(S) 698, where the Lord Chief Justice increased by two years the sentence of each offender, stating that a proven racial element should be taken into account as an aggravating factor when sentencing.

The Scottish Office Home Department published a separate document which identified three main "components" to be incorporated into the two new statutory offences proposed in the Scottish manifesto: racial harassment and racially motivated violence. These three elements to be defined were 'harassment' 'violence' and 'racial', each of which were discussed in the paper. This posed three main questions:

The main questions on which the Government now invite views are:

(a) whether respondents consider that the protection afforded by the current range of common law and statutory offences to deal with racial crime would be improved by the introduction of new statutory offences;

(b) if so, how best the scope and scale of new statutory offences might be defined in a way that would improve on the existing law, in terms both of ease of prosecution and protection for victims, and what maximum penalties should be specified; or

(c) if not, whether a statutory requirement should be placed on courts to consider a racial element as an aggravation of an offence and take it into account when sentencing.

A summary of responses to the consultation in England and Wales is available in the Library as Deposited Paper 3/5761, and appears to record a welcome for the proposed new offences and the incorporation of the *Ribbans* judgment. Various consultees advocated extension of the protection to religion, disability and sexual orientation. For Scotland, it has been decided to introduce only a new offence of racially aggravated harassment, as well as the general statutory requirement to take racial aggravation, where proved in respect of any of offence, into account in determining the appropriate sentence.

B. Race and the Crime and Disorder Bill HL 1997-98

1. Offences

Part I of Bill 167[176] creates new anti-social behaviour orders (see section I) to prohibit behaviour which could cause harassment, alarm or distress. They will also be available in Scotland and will, it is thought, also provide some remedy for harassment on racial grounds. Part II of the Bill creates the promised new racially aggravated offences, described as follows by Lord Williams of Mostyn on 2nd reading:[177]

> The third manifesto theme embodied in the Bill is protection against racist crime. These crimes are particularly odious, damaging, as they do, not just the victim but the very fabric of the multi-racial society in which we live. Part II of the Bill introduces new racially aggravated offences parallel to the main existing offences of violence and harassment under the Offences Against the Person Act 1861, the Public Order Act 1986 and the Protection from Harassment Act 1997. For each new offence, if the racial element is proved, significantly greater maximum penalties will be available. An offence will be held to be racially aggravated if either the offender demonstrates racial hostility towards the victim at or around the time of the offence, or the offence itself is motivated by racial hostility.
>
> Clause 68 makes clear that, in general, racial aggravation in connection with an offence is an aggravating factor, meriting a stiffer sentence. This confirms in statute the 1995 judgment in the case of R. v. Ribbans, Duggan and Ridley.
>
> For Scotland, the Bill will provide for a new offence of racially aggravated harassment and require that a proved racist element in any crime should be taken into account by the court when sentencing.

The Notes on Clauses and the Consultation Paper include a table which usefully sets out penalties for existing offences and the proposed maxima for the racially aggravated equivalents:

Existing offence	Maximum penalty	Proposed maximum penalty for racial equivalent	Powers of arrest
Common assault	6 months and/or a level 5 fine (£5,000)	2 years imprisonment and/or an unlimited fine	None
Assault occasioning actual bodily harm	5 years imp.	7 years imp.	Section 24 PACE
Malicious Wounding	5 years imp.	7 years imp.	Section 24 PACE
Section 5 Public Order Act 1986 "POA disorderly behaviour"	Level 3 fine (£1,000)	Level 4 fine (£2,500)	Section 5A(4) POA
S.4A POA: intentional harassment	6 months and/or level 5 fine (£5,000)	2 years and/or an unlimited fine	Section 4(4) POA
S.4A POA: threatening behaviour	6 months and/or level 5 fine (£5,000)	2 years and/or an unlimited fine	Section 4(4) POA
Section 2 Protection from Harassment Act 1997: Harassment	6 months and/or level 5 fine (£5,000)	2 years and/or unlimited fine	Section 24(2) PACE

[176] Brought from the Lords, 1 April 1998

[177] 16.12.97, HL Deb. 584 c.534

This table does not include the penalties for the newly added offence of racially motivated criminal damage - see below, clause 27.

Clause 25 defines the meaning of "racially aggravated" for the purpose of the offences created by clauses 26-29. There are two parts to the test of whether one of these offences is racially aggravated. The prosecution will be required to prove, beyond reasonable doubt, *either* the existence of racial hostility at or around the time the offence was committed, *or* that the offence was motivated by racial hostility. Evidence to meet either aspect of the test will be sufficient to make the offence a racially aggravated one leading to the possibility of a larger sentence or higher fine.

The Notes on Clauses describe subsection 1(a): "demonstration of: racial hostility" as "the first strand" of the racial aggravation test. The hostility may occur at the time the offence is committed or immediately before or after it. The "immediately" qualification is required to maintain a link between the hostility and the offence, and statements made in the past unconnected with the offence charged will be unlikely to be admissible or relevant. This part of the test is designed to cover, for example, the use during an assault of racist abuse which is likely to indicate hostility but does not necessarily constitute the motivation for the attack. The Notes explain that the clause includes "association with members of a racial group", as well as actual membership of such a group, to cover cases where a person is attacked because of a relationship with a member or members of a racial group. Thus the white boyfriend of a black woman may be the victim of a racially aggravated attack if the offender was motivated by the victim's association with his girlfriend.

Subsection(1)(b) defines racist motivation and covers cases where the prosecution can show beyond reasonable doubt that the basic offence was committed as a result of hostility towards members of a racial group. Thus either the underlying motive for the offence or evidence of hostile behaviour on racial grounds at the time of its commission may make the offence racially aggravated.

The definition of 'racial group' in Subsection 2 is the same as is used in the *Race Relations Act 1976* and the *Public Order Act 1986*. It does not include religion, though religion may be an element in what constitutes an ethnic group, such as Jews or Sikhs.

Clause 26 creates four new offences of racially aggravated assaults, incorporating some of the existing offences of assault under the *Offences Against the Person Act 1861*. One of the new offences is committed if the act amounts to an offence under the 1861 Act and there is evidence to meet the racial aggravation test in Clause 25. The new offences are racially aggravated malicious wounding or grievous bodily harm, racially aggravated actual bodily harm and racially aggravated common assault. Offences such as murder, manslaughter or grievous bodily harm with intent are not included, since they already carry maximum sentences of life imprisonment.

The consultation paper had set out the Government's belief that the new offences should permit alternative verdicts so that the courts could convict on the substantive offence if the racial element is unproven. The Notes on Clauses explain that there is no need for alternative

verdicts here, since offences under the 1861 Act, being triable by jury, are covered by existing provisions under S.6(3) of the *Criminal Law Act 1967*, or, in the case of common assault, by S.40 of the *Criminal Justice Act 1988*. These would apply where the defendant was acquitted by the jury of a racially aggravated offence. Alternative verdicts are set out in the *Offences against the person charging standard*, agreed by the police and the CPS, 26 April 1996.

Clause 27 creates the offence of racially motivated criminal damage: i.e. the offence created by S.1(1) of the *Criminal Damage Act 1971*[178] but which is racially aggravated. The Government had given undertakings in response to amendments proposed earlier in debates on the Bill that they would accept the creation of a new offence. This was introduced on third reading on 31 March 1998 by Lord Falconer of Thoroton, the Solicitor General, who explained the sentencing provisions:[179]

> This new clause will create a new offence of racially aggravated criminal damage based on the existing offence contained in Section 1(1) of the Criminal Damage Act 1971. The new offence will carry a maximum sentence of 14 years' imprisonment.
>
> The maximum has been set at 14 years not 12 years for two reasons. First, as the current offence carries a 10-year maximum, the next scale in the normal sentencing ladder is 14 years. We do not normally create offences which carry a 12-year maximum. Secondly, as the noble Viscount, Lord Colville, indicated during Report, if the case is a serious one and the offender is under 18 then unless the maximum sentence is 14 years the offender cannot be dealt with under Section 53 of the Children and Young Persons Act 1963.
>
> The other potential problem with this offence was reconciling the victim of the offence with the victim of the racial hostility. To take the example cited in earlier debates, in cases where racial hostility was demonstrated to tenants of a house which was damaged, there had been doubts about whether the tenants could always be said to be victims of the damage itself.
>
> The definition of those to whom damaged property belongs for the purposes of the 1971 Act is, however, wide enough to cover all those who have custody, control, a proprietary interest, or a charge over property that is destroyed or damaged. This is the definition that is adopted in subsection (3) of the new clause.

Clause 28 creates three racially aggravated public order offences based on those contained in sections 4, 4A and 5 of the *Public Order Act 1986* (see p. 50). They are racially aggravated versions of causing fear of provocation of violence, intentional harassment alarm or distress and causing harassment, alarm or distress.

Subsection (6) provides for alternative verdicts for offences under subsections (1)(a) or (b) to allow a jury to find the defendant guilty of the basic offence under the 1986 Act, which is otherwise only triable in the magistrates' court if the racial aggravation is not proved.

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[178] destroying or damaging property belonging to another

[179] HL Deb. 588, c.202

Subsection (1)(c) is not included here because the (1)(c) offence is only triable in the Magistrates' Court where there are currently no provisions for alternative verdicts.

Subsection (7) alters the test in clause 25 to take account of the requirements of the basic offence under section 5 of the *Public Order Act 1986*. Section 5 of the 1986 Act states that the defendant's actions will be an offence only when it is directed at a person who is "likely to be caused harassment, alarm or distress". This subsection equates such a person with the "victim" described in clause 22.

Clause 29 incorporates the existing offences in the *Protection from Harassment Act 1997* to create two new offences of racially aggravated harassment. These are the equivalents of the existing basic harassment under S.2 of the 1997 Act (see p.50) and the more serious offence of putting people in fear of violence. Alternative verdicts are provided for.

Clause 30 inserts a new S.50(A) into the *Criminal Law (Consolidation) (Scotland) Act 1995* to create an offence of racially aggravated harassment.

Subsection (1) of new section 50A provides that a person is guilty of an offence if he (a) pursues a racially aggravated course of conduct which amounts to harassment of a person and (i) is intended to amount to harassment of that person; or (ii) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person; or (b) acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.

The test of racial aggravation is worded slightly differently from that set out in clause 25 which relates to England and Wales, in that it uses the phrase "malice and ill will" instead of "hostility".

A course of conduct or an action will be racially aggravated if (a) immediately before, during or immediately after carrying out the course of conduct or action the offender evinces towards the person affected malice or ill-will based on that person's membership of, or association with members of a racial group; or (b) the course of conduct or action is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group.

Subsection (3) of new section 50A provides that a person who is guilty of an offence under this section shall (a) on summary conviction, be liable to a fine not exceeding the statutory maximum (£5,000) or imprisonment for a period not exceeding six months, or both such a fine and such imprisonment; and (b) on conviction on indictment, be liable to a fine or to imprisonment for a period not exceeding seven years, or both such fine and such imprisonment.

Subsection (4) of new section 50A provides that "conduct" includes speech; "harassment" of a person includes causing the person alarm or distress, "racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins, and a course of conduct must involve conduct on a least two occasions.

2. Sentencing

The new racially aggravated offences each carry their own increased penalty, but there are also clauses which provide for a racist element in the commission of a crime to be an aggravating factor meriting an increased sentence. The new provisions are not aimed simply at achieving tougher sentences for those found guilty of racially motivated harassment or attacks. The Home Office Consultation Paper stressed that new statutory offences were necessary to emphasise the unacceptability of such crime:

> 2.4 The Government is convinced that the introduction of specific racial offences will send a strong message to society at large that such crime is unacceptable and that it will be dealt with very seriously by the police and the courts. They will also ensure that a higher priority is given to the identification of the racial element of the crime in the gathering of evidence, thus preventing the racial aspect from being overlooked in sentencing.

On 12 February 1998, in answer to criticism from Lord Henley on the Opposition front bench, and others, that adequate powers already existed, Lord Falconer of Thoroton, the Solicitor General, explained the Government's view that establishing criminal liability was not simply a matter of sentencing:[180]

> First, the way the statute works for England is that Clauses 22 and 23 create a number of new criminal offences where, if there is a racially-aggravating feature, it is a new criminal offence. The offences which are created are three kinds of assault case to which racial aggravation is added, thereby creating the new criminal offence. The Government believe, in my view quite correctly, that it is not sufficient simply to say that racial aggravation is a factor which goes to sentence. It is in certain cases something which, when added to other matters, should itself create criminal liability.
>
> We believe that that gives a much stronger message than simply the important matter of adding to the sentence if an offence is racially aggravated. We of course accept that that is an important matter in itself.

As foreseen in the consultation paper, Clause 77 gives statutory expression to the decision of the Lord Chief Justice in the *Ribbans* case (see p.53). Subsection 1 makes it clear that this clause applies to all offences other than those contained in clauses 26-29.

Subsection (2)(a) sets out that where there was evidence of racial aggravation in the offence, then the judge whilst sentencing would be required to consider this as an aggravating factor and impose a higher sentence within the maximum available.

Subsection (2)(b) requires the court to state, in open court, that the offence is racially aggravated.

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[180] HL Deb. 585, c.1272

Subsection (3). The racial aggravation test in clause 25 applies to this clause, so that the aggravating factor must be shown to amount to racial motivation or evidence of racial hostility.

Clause 88 applies to Scotland, and provides that where racial aggravation is proved in respect of any offence the court shall, on conviction, take the aggravation into account in determining the appropriate sentence. The test of racial aggravation is the same as that set out in clause 30, requiring evidence of malice and ill will. On 19 March, on report stage, the Lord Advocate Lord Hardie moved certain amendments to this clause to clarify the standard of proof to be applied to racial aggravation. Amendment no. 139A added the provision that "evidence from a single source shall be sufficient evidence to establish, for the purposes of this section, that an offence is racially aggravated: Lord Hardie explained:[181]

> It is clear from the amendment that I tabled that the charge and the complaint in the indictment would require to be established to the normal criminal standard of proof; namely, proof beyond reasonable doubt. But in the amendment I also made clear that the aggravation would not require corroborated evidence. That is entirely fair and appropriate and consistent with our rules of evidence in other crimes in relation to aggravations.
>
> The Government had always intended that the racial aggravation should not require corroboration. Arguably, that is the effect of the clause as it stands, but in view of the concerns raised by the noble and learned Lord, we think it preferable to put the matter beyond doubt by means of Amendment No. 139A. However, the amendment moved by the noble and learned Lord, Lord Mackay of Drumadoon, would remove (or specify) that the offence was racially aggravated. It would also leave the decision on sufficiency of evidence to the judge, notwithstanding the views of the jury, with which I dealt a few moments ago.

[181] HL Deb. 587, c.930

IV Sentencing Drug-Dependent Offenders

A. Background: 'Drug Courts'

British politicians and professionals involved in the fight against drugs have shown considerable interest in the American experience of Drug Courts. Nevertheless, as Philip Bean, Professor of Criminology at Loughborough University, has pointed out,

> the term has become widely used and is applied to an equally wide set of circumstances. It can mean anything from a few magistrates and probation officers taking an interest in the drugs problem, to the local treatment agencies offering to take more offenders into treatment, to the more full-blown version often referred to as the Miami Drug Court.[182]

Bean's description of the Miami Drug Court, and his appraisal of its effectiveness, is reproduced below.

> The distinguishing feature of the Miami system, which sets it apart from all others (and which from now on will for these purposes be called Drug Courts), is that it is a slow track treatment system run by the judiciary. That is to say, Drug Courts do not allocate drug offenders to other agencies for treatment. Nor do Drug Courts sentence offenders when on the treatment programme to be punished or treated elsewhere i.e. to the probation service. They retain the offender within their control. They allocate the offender to the treatment agencies, which are directed and controlled by the Courts, and they provide the sanctions or the rewards thought to be necessary. Sanctions can involve periodic spells in custody, some as long as 3 months but mostly up to 7 days, and rewards involve fewer attendances at the Court for treatment. The treatment programmes offered in Drug Court vary from detoxification to group or individual therapy. Most also provide acupuncture. All treatment programmes are backed by frequent urine analysis with the results available to the Court within the hour.
>
> Drug Court is a judge-based movement. It did not arise from the treatment agencies or from within the criminal justice system, i.e. the probation service or the prison service. It came from judges frustrated by the failure of existing programmes and by the limitations imposed upon them by the 'Three strikes....' legislation. And because it is judge driven there has been influential backing. The Attorney General Janet Reno, an early supporter of Drug Court when she was in Florida, has continued that support, so has the current Drug Czar General B. McCaffrey. Funding from the Federal Government has been available-$12 million for training for this year alone. Of course, being a judge-based movement does not of itself produce the necessary impetus for growth; more than that is required. Drug Court has to demonstrate its success in terms of the same indicators used to evaluate other criminal justice agencies i.e. reconviction rates, cost, and in this case, a reduction in levels of addiction. As it turns out, all three are shown to be successful; reconviction rates are down, the cost is such that for every $1.00 spent on Drug Courts the State saves $7.00, and addiction rates are reduced dramatically. Small wonder that Drug Court is now a social movement which has spread to almost every State, where

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[182] "Transplanting the USA's Drug Courts to Britain" in *Drugs: education, prevention and policy*, Vol 5, No 1, March 1988, p101

> support comes from the highest political level, and the NADCP[183] expects some 2000 delegates at its next annual conference.
>
> Drug Court is not a soft option but for some offenders it helps them avoid the Three strikes sentencing which can lead to up to 30 years imprisonment. Criteria for allocation to Drug Court varies from State to State and from court to court, some will not take offenders with a conviction for violence, some will only take first offenders, some will not take offenders convicted of supplying drugs, and so on. The Public Defender and Prosecutor have to agree to the Drug Court programme and must work within its framework. Their influence on the style of the Court and the type of offenders accepted into Drug Court is critical. Once into the programme an offender would expect to report for treatment as required by the treatment providers, and attend Court for urine analysis at regular intervals, once or twice a week to begin with but once a month if successful- and success means having a favourable report from the treatment agencies and not testing 'dirty'. Failure could, and often does, involve spells in prison-rarely does Drug Court give up on an offender recognising that addiction is a chronic condition where lapses are to be expected [pp101-2].

A recent review of American studies of the effectiveness of compulsory treatment for heroin-dependent property offenders suggested that

> the evidence gives qualified support for some forms of legally coerced drug treatment, provided that these programmes are well resourced, carefully implemented, and their performance is monitored to ensure that they provide a humane and effective alternative to imprisonment. Expectations about what these programmes can achieve also need to be realistic.[184]

As pointed out above, various forms of drug courts have been advocated in the UK. In August 1997 the Chief Constable of Bedfordshire, Michael O'Byrne, called for a system of drugs courts to be established,

> where the magistrates and judges have in-depth knowledge of the drugs scene, and a range of possible treatments and punishments likely to be successful in any particular circumstance. For that to work, there must be support and treatment available to users. We must increase the number and range of treatment centres and the staffing of support services most likely to contain drugs use and improve the effectiveness of treatment.[185]

In June 1996 the then Home Office Minister, Tom Sackville, floated the idea of "following the example of some American cities and [establishing] drug courts which would link sentencing policy to treatment".[186] On the same day the then Liberal Democrat Home Affairs spokesman Alex Carlile, called for drug courts to be piloted in the UK:[187]

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[183] National Association of Drug Court Professionals

[184] Wayne Hall, "The role of legal coercion in the treatment of offenders with alcohol and heroin problems", *The Australian and New Zealand Journal of Criminology* (1997) 30, p103

[185] "Cold turkey time" and "Rethink drugs war - police chief", *The Guardian*, 18.8.97

[186] "Partnership can beat the drugs menace - Sackville", *Home Office Press Notice 182/96*, 19.6.96

[187] "Government urged to try US-style 'Drug Courts', *Press Association*, 19.6.96

> Statistics and anecdotal evidence from the US schemes were 'encouraging', Mr Carlile told journalists at Westminster. The scheme could be effective in combating drug re-offending, reducing overall crime, tackling prison overcrowding and reducing pressure on a clogged court system, said Mr Carlile. Costings suggested that a limited drug court programme cost about one sixth or one seventh of the amount needed to keep someone in prison for a year, while an intensive programme could save at least a third. The savings could be greater in Britain, he said, because statutory agencies already existed and their services would not have to be bought, as in America, and British prison costs were higher.

The Labour Party's October 1996 policy document *Breaking the Vicious Circle* contained proposals designed to tackle drug-related crime by introducing Treatment and Testing Orders. By treating the drug dependency which lay behind a large proportion of crimes this would, if successful, "significantly reduce repeat offending and the very considerable costs, both social and financial, associated with this type of crime" [p1]. A similar proposal was included in Labour's 1997 manifesto. In response to the Chief Constable of Bedfordshire's endorsement of drug courts in August 1997 the Home Office Minister, George Howarth, is reported to have said that the Government's policy incorporated the "best principles" of US drug courts.[188]

The Sunday Telegraph of 23 November 1997 reported on an experimental project based on the drug courts idea due to commence in Wakefield and Pontefract in April 1998:[189]

> Offenders will be subjected to a three-stage programme of detoxification, intensive work to prevent relapses and advice and help in finding permanent employment. Failure to comply with the strict conditions of the programme will land them swiftly back in court. The aim is to cut drug-related crime that nets many millions of pounds a year. A project leader, Supt John Binns, said: 'We've examples of habits costing up to £300 a day, 365 days a year, which can only be maintained by one-man crime waves.'

B. Drug Treatment and Testing Orders

1. The Consultation Paper

In November 1997 the Government published a consultation paper[190] based on the outline proposals in the Labour Party document *Breaking the Vicious Circle.* The paper noted that the *Criminal Justice Act 1991* gave courts the power to impose treatment for drugs and alcohol dependency as part of a probation-based sentence,[191] but relatively little use had been made of this power. The following reasons for this were suggested:

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[188] "Ministers plan drugs courts", *The Guardian,* 19.8.97

[189] "Drug courts offer help to break cycle of crime"

[190] *Drug Treatment and Testing Order: Background and Issues for Consultation,* Home Office, 17.11.97

[191] The 1991 Act inserted a new Schedule 1A into the *Powers of Criminal Courts Act 1973*

- A lack of guidance and information for sentencers on the use of compulsory treatment programmes
- A consensus among probation officers that coerced treatment is unlikely to be effective
- A perceived lack of enthusiasm on the part of treatment providers to operate mandatory programmes
- Difficulties in getting the cost of treatment programmes (especially residential programmes) met by local authorities under the existing community care arrangements and a lack of any specific probation budget.

To solve these problems in the case of serious drug misusers, the Government proposed to make stronger powers available to the courts to make an Order, with the offender's consent, requiring the offender to undergo treatment for their drug problem either as part of or in association with an existing community sentence. The objective would be to reduce the amount of crime committed to fund a drug habit. The consultation paper suggested two crucial differences between this new order and the present option:

1. the court would have to review the offender's progress on the order regularly; and
2. drug testing would be mandatory.

The consultation paper suggested that the success of the new orders would depend on:

1. the availability of treatment;
2. the availability of funding for treatment; and
3. the resolution of cultural differences between the criminal justice system and treatment providers, underpinned by strong interagency arrangements.

To combat the funding problems which have restricted the use of the existing powers, the Home Office would fund the probation service to purchase treatment directly.

2. The Bill

Clauses 57 to 60 of the current Bill make provision for Drug Treatment and Testing Orders (DTTOs) in England and Wales. **Clauses 81 to 87** make similar provision for Scotland by amending the *Criminal Procedure (Scotland) Act 1995*. In England and Wales, DTTOs can be made by magistrates' courts, crown courts or the High Court. In Scotland, they can be made by the district court, the sheriff court or the High Court.

Under **Clause 57**[192], anyone aged 16 or over who was eligible for a community sentence would also be eligible to receive a DTTO of between 6 months and 3 years' duration. Thus if the law required a mandatory custodial sentence to be imposed the offender would not be eligible to be given a DTTO. Drug Treatment and Testing Orders would constitute a

[192] Scottish equivalent: Clause 81

community order for the purposes of Part I of the *Criminal Justice Act 1991* and the court would be subject to the same restrictions and procedural requirements which apply in the case of other community orders under sections 6 and 7 of the 1991 Act.[193] The court would have to obtain and consider a pre-sentence report from the Probation Service before making a DTTO unless, in the circumstances of the case, it was of the opinion that this was unnecessary. Under Schedule 2 of the 1991 Act (as amended), if the offender breached a DTTO the court would be able to resentence him as though he had just been convicted of the offence for which the order was made. It would also be able to impose an additional punishment. In addition the offender or his or her probation officer would be able to apply to the court for an amendment of the DTTO. The necessary amendments to Schedule 2 of the 1991 Act are contained in Schedule 4 of the current Bill.

Before making a DTTO the court would have to be satisfied that the subject of a DTTO was dependent on drugs or misused them; and that his or her behaviour was "such as requires and may be susceptible to treatment" (**Clause 57(5)**). The court would be able to use pre-sentence drug testing to assist in making this decision, subject to the consent of the offender. The *Notes on Clauses* for the Bill states that there is no necessity to establish a link between the offence under consideration by the court and the offender's drug misuse.

A DTTO would specify whether residential or non-residential treatment was required, the place where it would occur and (if non-residential) the frequency of the treatment (**Clause 58**[194]). It would also have to include a requirement for drug testing during the period of the order. The manner and frequency of the tests would be specified by the agency providing treatment, but the court would specify a minimum number of tests per month. The consultation paper suggests that the offender should be tested **at least** on a weekly basis [para 11]. Other aspects of the treatment would be left to the agency responsible for carrying it out. *Notes on Clauses* observes that this will ensure that the treatment is enforceable but will "not require the court to involve itself in considerations that are without its expertise".

Under **Clause 59**[195] the court would carry out a periodic review of the offender's progress at intervals of not less than one month, assisted by written reports prepared by a probation officer appointed for this purpose under **Clause 58**.[196] These reports would include the results of the drug tests required by the DTTO and the views of the agency providing treatment.

The court would have the power to amend the order at a review hearing, subject to confirmation from the offender that he or she was willing to comply with the new

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[193] Other community orders include probation orders, community service orders, curfew orders, etc

[194] Scottish equivalent: Clause 82

[195] Scottish equivalent: Clause 84

[196] The probation officer would only supervise the offender to the extent necessary to assist the court in monitoring the offender's progress. *Notes on Clauses* points out that if further supervision was necessary this would have to be carried out under a parallel community order.

requirements (**Clause 59(2) and (3)**. If this was not forthcoming the court would be able to revoke the DTTO and resentence the offender as though he or she had just been convicted of the offence for which the order was made. In doing so the court would have to take into account the extent to which the offender had complied with the terms of the DTTO up to that point. The court would be able to impose a custodial sentence, notwithstanding the requirement in section 1(2) of the *Criminal Justice Act 1991* that the offence (alone or in combination with other offences associated with it) "was so serious that only [a custodial sentence] can be justified" for it or that (if the offence is of a sexual or violent nature) only a custodial sentence would be adequate to protect the public. If a 16 or 17 year old breached the terms of a DTTO imposed by a magistrates' court in relation to an offence which in the case of an adult would have been triable only on indictment, the court would be able to impose a fine of up to £5,000 or up to six months' imprisonment.

These arrangements for testing and reviews, etc, seek to establish the best balance between involving the courts and leaving the detail of the treatment to the professional competence of the agency providing the treatment. The consultation paper states [paras 13-14]:

> Current arrangements have led to the making of unclear orders which are not enforced properly. Evidence from the UK and USA also seems to show that the court can have a positive role in reinforcing the offenders' sense of the seriousness of their position. In the Government's view, the regular involvement of the sentencer is central to the effectiveness of the order and it therefore wishes the court to undertake reviews on a more structured basis.
>
> For the order to be enforceable, the court needs clearly to define its terms. The sentencer's pronouncement and, most importantly, the wording that appears on the order itself are therefore crucial. The Government believes that the court should be required to specify in the order the location (residential or non-residential), length/frequency, and provider of the treatment, after consultation with the probation service and treatment provider, though not its precise nature.

Nevertheless the approach taken in the Bill seems to give the courts less control over the treatment of drug-misusing offenders than the court-led treatment programmes which have been a feature of drug courts in Miami and some other American states.

Under **Clause 60**[197] the court, before making a DTTO, would have to explain to the offender in ordinary language:

- the effect and meaning of the requirements in the order (including the requirement for periodic review by the court);
- the consequences of failure to comply with the order; and
- the powers of the court to review the order at the offender's or his probation officer's request.

[197] Scottish equivalent: Clause 83

The consultation paper asks whether each court should be encouraged to use prepared wording in sentence pronouncements and court orders and the probation service to do the same in pre-sentence reports.

The court would not be able to make a DTTO unless the offender indicated that he or she was willing to comply with its requirements. Copies of a DTTO would have to be given to the offender, the agency carrying out the treatment and the probation officer assigned to report back to the court.

As explained above, **Clauses 81 to 87** make provision for DTTOs in Scotland by amending the *Criminal Procedure (Scotland) Act 1995*. The English and Welsh provisions rely in part on amending existing provision for community orders in the *Criminal Justice Act 1991*. Since equivalent provision does not exist in Scotland, Part IV Chapter II of the current Bill contains additional provisions relating to matters such as the consequences of breaching a DTTO (**Clause 85**); the possibility of DTTOs and probation orders running concurrently (**Clause 86**); and the ability of the offender or his or her probation order to apply to the court for an amendment to a DTTO (**Clause 84**).

Clause 57(3) of the Bill states that "a court shall not make a drug treatment and testing order unless it has been notified by the Secretary of State that arrangements for implementing such orders are available in the area proposed to be specified in the order". **Clause 81(3)** makes similar provision in relation to Scotland. This form of words is designed to enable to the Government to delay full implementation until pilot programmes have been evaluated. Arrangements for piloting and subsequently phasing in the power for courts to require electronic tagging were made under section 13 of the *Criminal Justice Act 1991* (as amended by para 41, Schedule 9 of the *Criminal Justice and Public Order Act 1994*). The use of electronic monitoring under section 13 of the 1991 Act has yet to be introduced on a nation-wide basis.

The consultation paper states that it is as yet unclear how many or widespread the pilot schemes will be. It suggests that letting the pilot run for two years to allow a full evaluation to take place would seem sensible [para 28]. The *Financial Memorandum to the Bill* states that the costs of the local pilot projects are expected to be in the region of £1million and the eventual cost to the probation service of commissioning DTTOs will be around £40 million per annum.

3. Reactions to the Bill and Lords Stages

In January 1998 the Home Office published a summary of responses to the November 1997 consultation paper.[198] All of the Drug Action Teams[199] which responded gave broad support to the proposals for a new Drug Treatment and Testing Order. The Association of Chief Officers of Probation welcomed the proposals, but the summary noted ACOP's warning that

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[198] Drug Treatment and Testing Order Consultation Paper: Summary of responses. Dep 5893 (3S)

[199] Local teams of senior representatives from the police, probation and prison services, local authorities and health authorities

"It would be important to avoid the trap of just a small number of fully funded pilots". The National Association of Probation Officers, on the other hand, rejected the proposals as currently set out as confusing and impractical: [ibid]

> Several important issues of legality and civil liberties have not been adequately addressed. Such an order could only operate effectively when made in conjunction with an order for supervision in the community. Most drug misusers who persistently offend have a range of problems which require active intervention under supervision to assist them to comply with treatment. NAPO has real concerns about the suggestion of using an order on an individual unless he/she has currently committed an offence which is directly related to drug misuse. Should police "intelligence" stand up to a test of evidence, or is it acceptable for police to pass on hearsay, impressions and to risk discrimination on the basis of unhelpful stereotypes within different communities? It has long been recognised that probation service assessments prior to conviction are wasteful of valuable and scarce resources, and have proved ineffective in making a thorough assessment of the offender's situation.
>
> Much indirectly drug related crime is acquisitive without being violent and would not necessarily attract imprisonment, although it may be persistent. If the sanctions for this order were less severe, it would be possible to avoid the dilemma of testing prior to making the order, and to use consent and motivation as the principle indicators for making an order. The proposals confuse the role of the sentencer with the role of the probation service and this confusion will undermine both probation officers and clinicians.

Eight responses were received from individual probation services: all gave broad support but a number of possible practical difficulties were highlighted. South West London Probation Service noted that "offenders knowing they face custody will generally agree to almost any community based alternative" [ibid]. Most of the responses received from individuals and other organisations supported the introduction of DTTOs.

Professor Philip Bean's article in the March 1998 edition of the journal *Drugs: education, prevention and policy* observed that attempts to graft certain features of the American drug courts on to the British criminal justice system "will be seen as failing the meet the single most important point upon which Drug Courts operate; that is to say treatment provided by outside agencies without the Courts' direct control cannot of itself produce the same levels of success as produced by the Drug Court programme. …Handing over the offender to outside treatment agencies, whether to the probation service or others cannot, according to Drug Courts, produce the necessary control which makes programmes successful".[200] It is not clear whether the article was written before or after the publication of the Government's consultation paper, but the provisions for DTTOs contained in the Bill certainly avoid giving the courts detailed control over the nature of the treatment.

Professor Bean also went on to say that he suspected that few drug treatment agencies would willingly give up their independence to work for the courts,

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[200] "Transplanting the USA's Drug Courts to Britain", op cit, p103

> But even if they did, a restructuring of the services with a corresponding increase in court administrative staff would be necessary. Alongside this would be the need for urine-testing facilities and urine analysis able to produce rapid results for the court. None of this would be cheap, and we in Britain today tend to try to do things on the cheap.

The introduction of drug treatment and testing orders was broadly welcomed by the other two main parties during the Lords Stages of the current Bill.[201]

On Second Reading the Earl of Mar and Kellie, speaking to the provisions for DTTOs in Scotland, said that there would be

> a clear need for sufficient resources to be made available to fulfil the orders - in social work, health and housing provision. I am concerned that the level of supervision offered by the local authority will be minimal, and will be restricted by statute to the needs of reporting for monthly reviews, reporting any failure of compliance, and the need for variation or revocation of the order.[202]

During the Committee Stage Lord Henley, on behalf of the Conservative Party, tabled an amendment which would have required the court to obtain, without exception, a pre-sentence report before making a DTTO.[203] A similar amendment was suggested by the Standing Conference on Drug Abuse (SCODA).[204] In reply the Solicitor General, Lord Falconer of Thoroton, said that the Government's expectation was that a pre-sentence report assessment would be made in the vast majority of cases, and that guidance to sentencers would set out the need to obtain a PSR in all but the most exceptional circumstances.[205] Under **Clause 81(3)(b)** courts in Scotland will not be able to make a DTTO without obtaining a pre-sentence report from the local authority.

Lord Henley also raised concerns expressed by SCODA in relation to the possible use of DTTOs on 16 and 17 year olds [c635-6]. SCODA's briefing on the Bill suggests that the provision of drug treatment services for under-18s with adults goes against the spirit of the *Children Act 1989* and (if residential treatment was proposed) would contravene Article 37(c) of the *UN Convention on the Rights of the Child*. In addition, SCODA argue that patterns of drug abuse in young people differ from those of adults and a different approach is therefore needed.[206] Replying for the Government, Lord Falconer rejected the claim that DTTOs for under-18s would be inconsistent with the Children Act or the UN Convention.[207] He said that the courts would be able to consider

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[201] HL Deb Vol 584, 16.12.97, c588; Vol 586, 24.2.98, c634
[202] HL Deb Vol 584, 16.12.97, c564
[203] HL Deb Vol 586, 24.2.98, c634
[204] an independent forum for drug services, etc, which "seeks to reduce the harmful effects of drug use through informed debate, and through the promotion of best practice and effective, comprehensive services"
[205] HL Deb Vol 586, 24.2.98, c637
[206] Briefing on Proposed Amendments To Crime and Disorder Bill, SCODA, January 1998
[207] HL Deb Vol 586, 24.2.98, c638

> whether or not in relation to the facts of a particular case the drug treatment and testing order is an appropriate order to make. …We know all too well that those aged between 16 and 18 are very often just the sort of people who would benefit from an early intervention in relation to drug treatment and testing to perhaps get them out of the sorts of habits that led them into crime.

Lord Mackay of Drumadoon moved an amendment to the Scottish provisions which would have required offenders on DTTOs to attend regular drug counselling sessions, in addition to whatever other forms of treatment might be specified by the agency carrying out the order.[208] Replying for the Government the Lord Advocate, Lord Hardie, said that the amendment went against one of the central principles of the orders: "namely, that we should not ask the courts to prescribe the appropriate treatment for each offender" [c644].

[208] HL Deb Vol 586, 24.2.98, c644