

SERIOUS CRIME BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTAL MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to Government amendments to the Serious Crime Bill tabled for Commons Committee stage. The memorandum has been prepared by the Home Office and Ministry of Justice.

Proceeds of crime – *R v Waya*

2. In paragraphs 10 through 35 of the majority judgment in *R v Waya*^[1], the Supreme Court considered the effect of the Human Rights Act 1998 on the confiscation regime in the Proceeds of Crime Act 2002 (“POCA”). In particular, at paragraph 16 the majority state, *“It is plainly possible to read [section 6(5)(b) of POCA] as subject to the qualification “except insofar as such an order would be disproportionate and thus a breach of art 1, Protocol 1.” It is necessary to do so in order to ensure that the statute remains Convention-compliant, as Parliament must, by s 3 of HRA, be taken to have intended that it should. Thus read, POCA can be “given effect” in a manner which is compliant with the Convention right. The judge should, if confronted by an application for an order which would be disproportionate, refuse to make it but accede only to an application for such sum as would be proportionate.”.*
3. In their report on the Bill, the Joint Committee on Human Rights (“JCHR”) has taken the view that it would be desirable to bring greater legal certainty to the legal regime governing the proceeds of crime by inserting into the statutory framework express language which would give clear effect to the judgment of the Supreme Court in *Waya*. The Government has accepted the JCHR’s recommendation that the Bill be amended to give clear statutory force to the qualification on the court’s duty to make a confiscation order. The amendment to section 6 of POCA (which extends to England and Wales), to be made by new paragraph 16A of Schedule 4 to the Bill, has this effect. Identical amendments are made to sections 92 and 156 of POCA which extend to Scotland and Northern Ireland respectively.
4. As these amendments amend POCA to expressly provide that court only has the obligation to make a confiscation order if, and to the extent that, the order would be proportionate for the purposes of the ECHR, the Government considers the amendments to be compatible with the ECHR.

^[1] [2012] UKSC 51

Exemption from civil liability for money-laundering disclosures

5. New clause “*Exemption from civil liability for money-laundering disclosures*” amends POCA to make express statutory provision to protect persons, who report in good faith their suspicion that another person is engaged in money laundering activity, from incurring civil liability for doing so. We are obliged under Article 26 of the EU Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Directive 2005/60/EC) to provide such protection.
6. Protecting persons who report in good faith their suspicion that another person is engaged in money laundering activity from civil liability potentially has the effect of removing from the person about whom the report is made a cause of action in the civil courts. To the extent that so removing a cause of action engages Article 1, Protocol 1 of the ECHR, the Government considers any interference with the rights provided for in Article 1, Protocol 1 to be lawful (and indeed positively required under European law), pursuant to a legitimate aim, and proportionate to that aim.

New offence of sexual communication with a child

7. New clause “*Sexual communication with a child*”, which extends to England and Wales, will insert into the Sexual Offences Act 2003 (“the 2003 Act”) a new offence of sexual communication with a child. The offence can only be committed by an adult who, for the purpose of obtaining sexual gratification, communicates with a child under 16 where the communication is either itself sexual or is one which is intended to encourage the child to make a communication which is sexual. The offence is not committed if the defendant reasonably believed the child to be aged 16 or over. The offence is triable either way with a maximum penalty on indictment of two years’ imprisonment.
8. The Government considers that the ambit of the offence is sufficiently certain to satisfy the requirements of Article 7. Whether particular behaviour falls within the ambit of the offence would be a question of fact for the court to determine. Such an approach is compatible with the requirement of legal certainty provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity (see *O’Carroll v United Kingdom* (2005) 41 E.H.R.R. SE1, where leaving to the jury the question of whether an image was ‘indecent’ was held to be compatible with Article 7). The new offence will sit alongside other child sexual offences in the 2003 Act and shares many common elements with those offences, which are already well understood. The meanings of all the elements of the offence are therefore sufficiently clear on their face or by reference to statute and common law.
9. Since the new offence is concerned with the protection of children from those who seek sexual gratification by communicating with them it is arguable that Article 10 does not apply, by virtue of the exclusion in Article 17 of the Convention. However to the extent that Article 10 does apply the Government accepts that the restriction would be likely to engage Article 10 (see *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737, where Article 10 applied to material considered by the domestic courts to be obscene and a potential encouragement to commit criminal offences).

10. However, the Government considers (for the reasons set out above in relation to Article 7) that the interference is prescribed by law. The Government also considers that the provisions are justified by reference to the following aims set out in Article 10(2): the prevention of crime; the protection of health and morals and the protection of the rights of others. It is clearly established that the criminal law can act to control communications where it is necessary to do so for the protection of the rights of others (*R v Connolly* [2007] EWHC 237). Moreover both the domestic courts (see *R v Smethurst* [2001] EWCA Crim 772 in the context of the prohibition on making indecent photographs of children) and the European Court of Human Rights (see *Handyside* above in the context of obscene material) have upheld criminal law restrictions on the use of offensive material as being necessary for the protection of children.
11. This new offence adds to the existing suite of sexual offences which seek to protect children from those who prey on them both directly, by seeking to engage children in sexual activity, and indirectly by exposing them to it or planning it. The new offence is intended to enhance that protection by ensuring that appropriate criminal law sanctions are available where adults exploit children by seeking sexual pleasure through engaging them in inappropriate communication. The offence will also enhance the protection available to children by ensuring that criminal justice agencies can intervene to tackle sexual behaviour relating to children at an early stage. It will not affect ordinary social or educational interactions between children and adults. As such the Government considers it to be a necessary and proportionate response to the pressing social need to protect children from sexual abuse and well within the margin of appreciation given to Member States in the regulation of matters relating to the protection of morals (see *Handyside* paragraph 48).
12. To the extent that Article 8 is engaged any interference with those rights is justified for the reasons set out above in relation to Article 10.
13. Furthermore, in *Stubbing v UK* (1996) 23 EHRR 213 at paragraph 26 the European Court of Human Rights reiterated the need for individuals to be protected from sexual abuse by the criminal law. In particular the court stated that “children...are entitled to state protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives.” As explained above, this offence enhances the criminal justice response available where adults seek sexual gratification from children through their communications with them and as such can be seen as a measure which enhances the protection available to children in respect of their Article 8 rights.
14. A person convicted of this offence will be subject to the notification requirements under Part 2 of the Sexual Offences Act 2002 (see new paragraph 24A of Schedule 3 to the 2003 Act inserted into that Schedule by an amendment to Schedule 4 to the Bill). The Government considers that such a requirement is commensurate with the seriousness of the offence. Any resultant interference with the offender’s Article 8 rights is necessary and justified in the interests of the prevention of crime and the protection of the rights and freedoms of others.

New offence of controlling or coercive behaviour in intimate or family relationship

15. New clause “*Controlling or coercive behaviour in an intimate or family relationship*”, which extends to England and Wales, provides for a new domestic abuse offence. It might be argued that the criminalisation of patterns of behaviour in intimate relationships and family life constitutes an interference by the State into the right to respect for private life in relation to the private dynamics and internal workings of private relationships, given that the concept of private life encompasses the idea of a private sphere which is free from state intervention.
16. However, the Government’s view is that the right to respect for private life does not confer the right to knowingly engage in repeated coercive or controlling behaviour which has a serious adverse effect on a partner or a family member, and therefore the new criminal offence does not in fact engage the right to respect for private life.
17. However, on the assumption that the right to respect for private life is engaged, the Government’s position is that any interference will be in accordance with the law, given that the new offence is to be clearly circumscribed on the face of primary legislation.
18. Further, any interference is in pursuit of a legitimate aim; namely the prevention of crime and the protection of the rights and freedoms of “others”, meaning partners or family members who are the victims of domestic abuse. The rights and freedoms of domestic abuse victims include the right to respect for private life, which encompasses respect for psychological integrity, and the right to self-determination, given that a person’s ability to shape who they are through personal choices may be seriously undermined by the coercive behaviour of a partner or family member.
19. The Government’s position is that the criminalisation of coercive and controlling behaviour in intimate or family relationships is both necessary and justified. Firstly, this is due to the wide-ranging nature of the problem that domestic abuse poses to all sectors of society, and the serious emotional harm that it causes to victims. Secondly, this is due to the compelling representations received from several voluntary sector organisations pertaining to a perceived gap in the current law and its enforcement in relation to non-violent coercive and controlling behaviours.
20. The Government’s view is that any interference with the right to respect for private life is proportionate for the following reasons:
 - a) The offence is tightly drafted to require that the behaviour in question must be repeated or continuous, rather than encompassing isolated incidents;
 - b) The test for the impact on the victim ensures a minimum level of severity in the perpetrator’s conduct and the harm caused to the victim. The conduct must have a serious effect on the victim, meaning that it either causes them to fear on at least two occasions that violence will be used against them, or it causes them serious alarm or distress which has a substantial adverse effect on their daily activities;
 - c) The mental element is framed so that the defendant must either know or ought to have known (according to an objective, reasonable person test) that their behaviour would have a serious effect on the victim.

- d) It is a defence for the alleged perpetrator to demonstrate that their behaviour was in the best interests of the victim and objectively reasonable under the particular circumstances, which acts as an additional safeguard. This would offer protection in the event that apparently controlling or coercive behaviour was actually reasonable and justified in a particular case, since it was rooted in a desire to protect the best interests/personal safety/medical needs of the apparent victim.
- e) The new offence is triable either way; therefore there is scope for less serious forms of behaviour to be treated in a lighter touch way via a summary prosecution and non-custodial disposal, where appropriate.

Preparation or training abroad for terrorism

- 21. Clause 72 provides for extra-territorial jurisdiction (“ETJ”) for two offences under the Terrorism Act 2006: preparation of terrorist acts and training for terrorism. As a result, a person who does anything outside of the UK which would constitute an offence under section 5 or 6 could be tried in the UK courts were they to return to this country. The ETJ provisions were included in the Bill with a view to enhancing the prosecution possibilities available in respect of, in particular, individuals travelling from the UK to Syria and Iraq to engage in jihad, and who may return to the UK equipped with the intention and wherewithal to commit acts of terrorism.
- 22. The amendments to clause 77(4) and (5) (Commencement) provide that the extension of ETJ for these offences comes into force immediately upon, rather than on the date which is 2 months after, Royal Assent. The policy reason for the amendments is that since the introduction of the Bill in the House of Lords in June 2014, the concern regarding those who travel to Syria and Iraq to engage in jihad has intensified. The Government considers that it is necessary and appropriate to commence clause 72 immediately as this will enhance the ability of the prosecuting authorities to take action against people who might return to the UK and who might otherwise remain at liberty to engage in terrorism in this country. It cannot be assessed with any certainty how many people could not be prosecuted if the ETJ provisions were not commenced early but given the possible consequences of not being able to prosecute even a single person because of this gap in the law, there is, in the Home Office’s, operational colleagues’ and the Crown Prosecution Service’s views, a strong case for early commencement to rule out that possibility.
- 23. Article 7 provides that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.” In order to ensure Article 7 compliance, clause 75(10)(d) of the Bill provides that the amendments made by, inter alia, clause 72 apply only in cases where every act or other event proof of which is required for conviction of the offence in question takes place after the provision comes into force. However, early commencement of these provisions would bring about a change in the scope of criminal liability under sections 5 and 6 without the usual minimum two month period during which the public could become aware of the change before it came into force. This therefore raises issues of legal certainty and legitimate expectations (if not issues of Article 7 compliance). However, the Government considers that there is an overriding need to remedy the gap in the criminal law in order to be able adequately to address the risk of terrorism in the UK. Further, it is suggested that since

the ETJ provisions have been in the public domain since June 2014, when the Bill was introduced, the general public have had sufficient warning that this change to the criminal law is pending (subject to Parliament's approval). The amendments to the Bill to provide for commencement on Royal Assent were announced by the Home Secretary at Second Reading on 5 January (Hansard, column 64). On this basis, it is not thought that early commencement would give rise to significant unfairness or generate a significant degree of legal uncertainty.

Restriction of use of mobile phones by prisoners

24. New clause "*Prevention or restriction of use of communication devices by prisoners etc*" confers on the Secretary of State (in relation to England and Wales) and the Scottish Ministers (in relation to Scotland) a regulation-making power which provides that regulations may make provision conferring power on a court to make a telecommunications restriction order. This is an order which will require a communications provider to take whatever action the order specifies for the purpose of preventing or restricting the use of a mobile phone (or other communication device) in a prison where the use of the phone is unauthorised. The new clause sets out what regulations must make provision about and what they may make provision about. It also defines certain terms, such as 'communications provider'. Regulations will be subject to the affirmative procedure.
25. The Government considers that the regulation-making power itself does not engage the ECHR. However, any regulations made there under may engage Articles 6, 8 and Article 1 of Protocol 1.
26. Insofar as Article 6 is engaged (which is debatable, given that a prisoner has no right to possess or use a mobile phone in prison without authorisation - this constitutes an offence under section 40D of the Prison Act 1952 and the phone is subject to confiscation under the Prison Rules 1999 (rule 43(5)), the matter would be dealt with in the County Court (in England and Wales) or the Sheriff Court (in Scotland). The court would need to be satisfied to the civil standard of proof that the phone is in use without authorisation before it can make an order requiring a communications provider to disconnect the phone. Whilst in many cases it is not possible to identify the user of the phone (if it were, the phone would be confiscated), regulations must make provision about giving notice of applications and confer rights on persons to make representations. Hearings and judgment will be given publicly save where there is a need to exclude the public to safeguard sensitive material or otherwise in the public interest.
27. In relation to Article 1 of Protocol 1 a court order requiring a phone to be disconnected would constitute a control on the use of property rather than depriving someone of their property. That control would be prescribed by law (namely a court order made in accordance with regulations) and would be proportionate to the legitimate aims of reducing crime and promoting good order and discipline within prison estate.
28. To the extent that Article 8 is engaged, again, the disconnection of the phone would be in consequence of a court order made in accordance with regulations and thus would be prescribed by law and would be proportionate to the legitimate aims of reducing crime and promoting good order and discipline within prison estate; that it would strike the

appropriate balance between the public interest in having secure prisons and any Article 8 rights of the prisoner.

29. The Government therefore considers that the new clause is ECHR compliant.

Home Office/Ministry of Justice
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