

# The Serious Crime Bill 2007

## The demise of the Assets Recovery Agency, serious crime prevention orders and increased HMRC powers

**A**lthough the Serious Crime Bill (the Bill), introduced into the House of Lords on 16 January 2007, is directed primarily at drug traffickers, people traffickers and other organised criminals, the new measures, if enacted, will have dramatic consequences for suspected tax evaders as well. The Bill's introduction was preceded by a Home Office (HO) statement made just five days earlier, which declared the Government's intention to merge the Assets Recovery Agency (ARA) with the Serious Organised Crime Agency (SOCA) from April 2008. The Government believes there are 'significant synergies' in a merger, as 'SOCA builds its understanding of organised crime and widens the toolkit used to tackle it'.

### ARA's demise and the future of civil recovery

ARA is to be afforded a quick burial. Clause 66(1) provides that ARA shall cease to exist on a date appointed by the Home Secretary; at that time, under Part 2 of Schedule 7, civil recovery powers under the Proceeds of Crime Act 2002 (POCA), Part 5 will be transferred to SOCA. Interestingly, powers under Part 5 will also be transferred, as respects England and Wales, to the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions and the Director of the Serious Fraud Office and, as respects Northern Ireland, to the Director of Public Prosecutions for Northern Ireland. The HO believes that the extension of civil recovery powers to prosecuting agencies 'will enable [the Government] to broaden the range of cases where these powers are used, and help [the Government] take performance to the next level'.

Whilst the Government's desire to merge the two bodies is understandable,

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the timing is premature. SOCA was launched less than a year ago (3 April 2006) and the agency needs more time to establish its presence in the fight against organised crime. According to a report in the *Yorkshire Post* (on 25 January 2007), a union representing SOCA employees claims that the agency is pursuing only a small fraction of the drugs cases referred to it by HM Revenue & Customs (HMRC). The Government would be better advised to allow SOCA five years to establish itself before expanding its remit with significant additional responsibilities.

Whether SOCA is the most appropriate body to exercise civil recovery powers is also a moot point. On the one hand, the Home Secretary has directed SOCA to emphasise recovery of the proceeds of crime as one of its key priorities. According to SOCA's Annual Plan for 2006/7, actions to deliver this 'overarching priority' will include 'increased numbers of financial investigators and other staff working on proceeds of crime; ... referral of more cases to ARA; and application of a total confiscation approach, so criminals are unable to profit from their activities'. On the other hand, SOCA is an 'intelligence-led' agency. It was formed from the amalgamation of the intelligence services (National Criminal Squad, National Criminal Intelligence Service, etc) and its primary function, as set out in Serious Organised Crime and Police Act 2005, s 3(1), is 'the function of gathering, storing, analysing

and disseminating information relevant to the prevention, detection, investigation or prosecution of offences, or the reduction of crime in other ways or the mitigation of its consequences'. Although there are circumstances in which SOCA may prosecute, SOCA is not an enforcement agency and it is not equipped to manage large-scale criminal or civil litigation. The Organised Crime Division of the Crown Prosecution Service was formed to deal exclusively with SOCA cases.

Tax lawyers will watch developments at SOCA with interest. Civil recovery proceedings may be brought in tax evasion cases; indeed, ARA's greatest success to date had been achieved in a VAT carousel case (see Jonathan Fisher QC *The Creaven Case*, *The Tax Journal*, Issue 863, 27 November 2006).

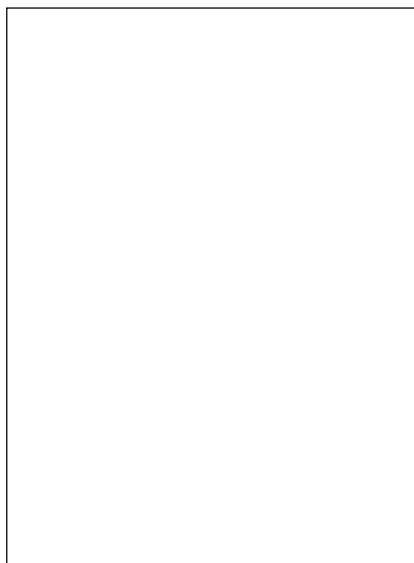
### The prognosis for taxation powers

Tax practitioners will be interested to know that, in addition to the transfer of civil recovery powers to SOCA, Part 3 of Schedule 7 of the Bill stipulates that powers under Part 6 of POCA are to be transferred to SOCA. Part 6 enables the Director of ARA to serve on HMRC a notice that ARA intends to carry out revenue functions. This power has been exercised with increasing frequency and it represents a powerful weapon in ARA's armoury, is capable of deployment with considerable effect. (For articles on the exercise of Part 6 powers, see George Kelly and Keith Hobson, *ARA and the Taxation of the*

*Proceeds of Crime, The Tax Journal*, Issue 862, 20 November 2006; Tamara Solecki, *Khan v The Director of the Assets Recovery Agency, The Tax Journal*, Issue 829, 20 March 2006; Tamara Solecki, *Assets Recovery Agency, The Tax Journal*, Issue 816, 5 December 2005; and Gavin McFarlane, *The Assets Recovery Agency, The Tax Journal*, Issue 716, 10 November 2003).

The engagement between the exercise of taxation powers and SOCA's remit is less obvious, and it would be more sensible to transfer the powers under Part 6 to HMRC, since taxation expertise is more likely to be found in HMRC than in SOCA. Intriguingly, the proposed legislation will empower the Home Secretary to take a more dramatic step in the fullness of time. For para 85 of Schedule 7 creates a power for the Home Secretary to repeal by order Part 6 of POCA (as amended by Schedule 7). Such an order is subject to the affirmative resolution procedure (see clause 76(3)). HMRC has power to raise an individual tax assessment against almost all individuals and companies operating within the UK, including criminal businesses generating substantial income from untaxed assets. But from the Government's perspective, little has changed since the Cabinet Office recommended that a separate agency would be better placed to pursue the criminal fraternity who engaged in tax evasion (*Recovering the Proceeds of Crime*, 2000, chapter 10). The Cabinet Office noted that HMRC has no incentive to pursue criminals, since they are often more difficult and costly to pursue than mainstream tax evaders, and HMRC's traditional measure of success (total yield balanced against investigation cost) does not capture the externalised benefits of taxing crime.

What is more, there are considerable sums of money at stake. In Australia, a multi-agency initiative during 1999 and 2000 raised tax assessments on organised criminal networks to the value of Aus \$150 million, with an additional Aus \$66 million being 'voluntarily' paid by individuals resulting from the deterrent impact of an investigation into organised tax evasion in the construction industry. Similarly, in 1998 the Irish Criminal Assets Bureau laid tax orders against organised tax targets for Ir £10 million. Against this background, it is surprising to learn that the abolition of Part 6 powers has crept onto the Government's agenda.



**Jonathan Fisher**

**Serious crime prevention orders**

Most controversially, the Bill proposes the introduction of a new civil order aimed at preventing serious crime. The purpose of the order will be to protect the public by preventing, restricting or disrupting involvement in serious crime. The order will be made on application to the High Court, or the Crown Court upon conviction, and it may remain in force for a period of up to five years. Breach will constitute a criminal offence punishable by a maximum term of five years' imprisonment.

Serious tax evasion will constitute 'serious crime' for the purposes of triggering the operation of these new powers. Under clause 2(2) of the Bill:

'a "serious offence in England and Wales" means an offence under the law of England and Wales which, at the time when the court is considering the application or matter in question

'(a) is specified, or falls within a description specified, in Part 1 of Schedule 1; or

'(b) is one which, in the particular circumstances of the case, the court considers to be sufficiently serious to be treated for the purposes of the application or matter as if it were so specified'.

Although Schedule 1 does not include revenue offences, tax evasion will be covered where the conduct constituted the predicate offence in a money laundering case (Schedule 1, paragraph 5), or where the conduct gave rise to other specified offences, such as an offence under the Fraud Act 2006, or conspiracy to defraud at common law (Schedule 1, para 6). Moreover, a Court

would be able to designate a tax offence to be regarded as 'sufficiently serious to be treated ... as if it were so specified' in Schedule 1 where a significant sum of money or a sustained course of conduct is involved.

In these circumstances it is hardly accidental that the applicant for a serious crime prevention order is not limited to the Director of Public Prosecutions and the Director of the Serious Fraud Office but also includes the Director of Revenue and Customs Prosecutions (clause 8).

Conviction of a tax offence would not be a necessary precondition for an order to be made. Under clause 2(1) of the Bill, it will be sufficient if a person:

'(a) has committed a serious offence in England and Wales;

'(b) has facilitated the commission by another person of a serious offence in England and Wales; or

'(c) has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in England and Wales (whether or not such an offence was committed)'.

If the Bill is passed in its present form, an interesting jurisprudence will develop on the meaning of clause 2(1)(c).

The order may contain, in the language of clause 1(3), 'such prohibitions, restrictions or requirements, and such other terms, as the court considers appropriate for the purpose'. Clause 5 gives examples of the type of provision that may be made by a serious crime prevention order:

'(3) Examples of prohibitions, restrictions or requirements that may be imposed on individuals (including partners in a partnership) by serious crime prevention orders include prohibitions or restrictions on, or requirements in relation to

'(a) an individual's financial, property or business dealings or holdings;

'(b) an individual's working arrangements;

'(c) the means by which an individual communicates or associates with others, or the persons with whom he communicates or associates;

'(d) the premises to which an individual has access;

'(e) the use of any premises or item by an individual;

'(f) an individual's travel (whether within the United Kingdom, between the United Kingdom and other places or otherwise).

'(4) Examples of prohibitions, restrictions or requirements that may be imposed on bodies corporate, partnerships and unincorporated associations by serious crime prevention orders include prohibitions or restrictions on, or requirements in relation to

'(a) financial, property or business dealings or holdings of such persons;

'(b) the types of agreements to which such persons may be a party;

'(c) the provision of goods or services by such persons;

'(d) the premises to which such persons have access;

'(e) the use of any premises or item by such persons;

'(f) the employment of staff by such persons.

'(5) Examples of requirements that may be imposed on any persons by serious crime prevention orders include requirements to answer questions, provide information or produce documents to law enforcement officers.'

The provision in clause 5(5) has particular resonance in the case of a person who 'has conducted himself in a way that was likely to facilitate the commission by himself or another person' of a tax offence since, by virtue of clause 5(8)(c), a 'law enforcement officer' is specified to include an officer of HMRC. The standard of proof is the civil standard (clause 33).

### Missing trader frauds

Incontrovertibly, if the Bill passes into law, HMRC will be afforded swinging new powers which some might regard as a blistering attack on civil liberty in the context of a taxpayer's freedom to conduct his business affairs. Consideration of Case Study C in the Home Office's Consultation Paper 'New Powers Against Organised and Financial Crime', published in July 2006, demonstrates the point:

'D has recently been identified as a leading Missing Trader Intracommunity (MTIC) fraudster, laundering the proceeds through an offshore financial centre. An urgent investigation has been launched by HMRC. The case is likely to take over a year to get to trial, and in the meantime D is thought to be linked to a number of ongoing fraudulent companies. HMRC applies in the interim for a control order, prohibiting D, his wife and a list of known associates from being involved in certain industry sectors, from benefiting from VAT refunds, requiring all business activity

to be notified to HMRC in advance, and requiring all overseas travel to be notified in advance, with travel to a series of named countries with major offshore financial centres prohibited altogether.'

Yet suppose the suspected missing trader happens to be innocent? If the trial process is designed to determine a person's guilt or innocence, even in the brave new world of non-jury trials which the Government advocates, there will still remain a possibility that the suspect might be acquitted. Then what? There is no provision in the Bill similar to POCA, s 72, enabling an innocent person to apply for compensation where there has been a serious default on the part of an investigating officer and the criminal investigation/proceedings would not have been started or continued if the default had not occurred.

### HMRC extended powers

Finally, Schedule 11 of the Bill provides that the various criminal investigation powers will apply consistently to all officers of HMRC. The Government is keen to stress in the Explanatory Notes to the Bill that most of the powers covered by this measure are only for use when investigating suspected crime, that stringent conditions apply to their authorisation and use and they are also subject to external scrutiny, for example by the Office of Surveillance Commissioners and Interception Commissioner. The Government also points out that the powers will provide a framework of proportionate surveillance powers that are generally available to law enforcement agencies for their investigations. 'Having inconsistent powers for HMRC depending on whether the matter being considered used to be dealt with by HM Customs and Excise (HMCE) or the Revenue can restrict HMRC's ability to investigate crime effectively and cause confusion and operational problems. It also means that crimes of a similar nature and seriousness are treated differently simply because of which predecessor department was responsible for them.'

As an example of the proposed extension of powers, Schedule 11, para 1 will amend Police Act 1997, s 93 (interference with wireless telegraphy) so that references to an officer of HMCE will be changed to an officer of HMRC. The effect of the change will allow action to be authorised under s 93 when it relates to an ex-Revenue matter; at the moment the section only applies to ex-HMCE matters.

### Conclusion

It will be interesting to monitor the progress of the Bill. The Law Society has indicated that it does not agree with the concept of serious crime prevention orders, considering them to be completely unnecessary. The Law Society is also 'extremely concerned' about the powers to compulsorily purchase businesses or property, or otherwise to require individuals to divest ownership of certain possessions used to facilitate serious crime (*Law Society's Response to the Home Office Consultation Paper*, October 2006). The House of Lords Constitution Committee takes a similar view, noting that the proposed orders 'represent an incursion into the liberty of the subject and constitute a form of punishment that cannot be justified in the absence of a criminal conviction' (HL 41, 2006-07, para 17). Interestingly, the Fraud Advisory Panel has been less strident in its response. The Panel acknowledges that 'there may be a role for serious crime prevention orders to limit movement or individuals ... or the movement of funds'; however, before legislation is introduced, the Panel recommends that a pilot study is undertaken to determine the potential effectiveness of such orders in disrupting criminal activity. The Panel is mindful of the research into Anti-Social Behaviour Orders, which suggests that 36% of individuals breached their order within a year of the date when the order was made.

Meanwhile, the Chartered Institute of Taxation has expressed concern about the extension of HMRC powers in general. Responding to the HMRC's consultation paper 'Modernising Criminal Investigation Powers', the Institute warns that an increase in HMRC's powers would alter the relationship between the taxpayer and the tax administrator. 'It is important that HMRC retain their role as a tax collector and administrator of civil law as opposed to tax law becoming part of the criminal justice system.'

Even if the Bill passes into law in its present form, inevitably there will be challenges under the Human Rights Act 1998. Previous experience with control orders (*A and others v Secretary of State for the Home Department*, 2004) demonstrates that a Government minister's certificate that the provisions of the legislation are compatible with the European Convention on Human Rights is hardly conclusive.