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The Sexual Risk Order and Sexual Harm Prevention Order: the first two years

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Abstract

The Sexual Risk Order and Sexual Harm Prevention Order: the first two years

We now have two years' experience of the Sexual Risk Order and the Sexual Harm Prevention Order being the two civil orders brought in to replace and consolidate the old Sexual Offences Prevention Orders (SOPO), the Risk of Sexual Harm Orders (RSHO) and the Foreign Travel Order (FTO). This article looks at the background to these orders that have given the police new powers and the process by which the law was changed to bring in the new orders.

Key words:

Sexual Risk Orders, public protection, sexual offenders, civil prevention orders

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Introduction

Sexual Risk Orders (SROs) and Sexual Harm Prevention Orders (SHPOs) were introduced by the Anti-Social Behaviour, Crime and Policing Act 2014 (s.113 and Schedule 5) which had inserted a new s122A-K into the Sexual Offences Act 2003; they were implemented from 8 March 2015. The purpose of this article is to trace the origins of the Sexual Risk Order including a background report on which it was based and the parliamentary procedures and debates that took place. A Sexual Risk Order is a civil preventative order that is wide ranging in its provisions and ‘prohibits the defendant from doing anything described in the order’ (Sexual Offences Act 2003 s122A (7) (a)).

During 2016 the press became much pre-occupied with the story of a man in North Yorkshire who has been made subject to a Sexual Risk Order banning him from having sex unless he tells police 24 hours in advance. He must also provide the police with details of the proposed partner. News of the order and its ‘24 hour’ requirements first broke in January 2016 when an interim Sexual Risk Order was applied for by the North Yorkshire Police and was made at Northallerton magistrates court; the man was not named (BBC News 2016a; Brooke 2016); by 22 September 2016 the 24 hour notice was replaced by the phrase ‘as soon as is reasonably practicable’ and a series of conditions were attached to the order (Finnigan 2016). For the press the story was the ‘extreme’ degree of intrusion that the state could now reasonably make into a person private life.

Civil Preventative Orders

Even before it came to power the Labour Party’s original idea was to have an all-encompassing Community Safety Order that would tackle ‘low level criminality’ or behaviour that was not even criminal (Labour Party 1995). The civil law would thereby edge into areas of non-criminal activity but activity which was considered as ‘anti-social’ and ‘undesirable’. Lawyers warned of the consequences (Ashworth et al 1998) but the ‘two-step’ idea of civil orders was introduced to prohibit certain behaviour with the follow up of criminal sanctions if those prohibitions were ignored (Burney 2005, Simester and von Hirsch 2006). Labour’s one all-encompassing order was deemed not possible but the 1998 Crime

and Disorder Act introduced both the Anti-Social Behaviour Order (ASBO) and the Sex Offender Order (SOO) (Crime and Disorder Act 1998 ss. 1 and 2).

The Sex Offender Order (SOO) was to be applied for by the police from a magistrate's court. The criteria were that the person in question already had a conviction for a sexual offence and was now acting in 'a way as to give reasonable cause to believe that an order under this section is necessary to protect the public in the United Kingdom, or any particular members of that public, from serious harm from him' (1998 Act s.2). An evaluation of Sex Offender Orders found only 170 had been made by June 2002 but the police were generally pleased with their effect (Knock 2002).

Sexual Offences Prevention Orders, Risk of Sexual Harm Orders and Foreign Travel Orders

The Sexual Offences Act 2003 replaced the SOO with three new separate civil preventive orders – the Sexual Offences Prevention Orders, (SOPO) Risk of Sexual Harm Orders (RSHO) and the Foreign Travel Orders (FTO) (Sexual Offences Act 2003 Part Two; see also Home Office 2010). **These Orders appeared to emerge from the growing public concern about sexual offenders at this time and no substantive research had been completed to say whether the evidence existed that the Orders would make a difference.**

i The Sexual Offences Prevention Order (SOPO) was the nearest equivalent to the SOO and was again intended to protect the public from the risk of 'serious sexual harm' posed by known and convicted sex offenders. Risk in this context was said to include reference to

- the likelihood of the offender committing a sexual offence;
- the imminence of that offending; and
- the seriousness of the harm resulting from it (Home Office 2012: 44 and Home Office 2015: 36).

As with the SOO the order prohibits the offender from doing anything described in the order. The decision of the Court of Appeal in *R v Smith and others [2011] EWCA Crim 1772* makes the point that the SOPO needs to be tailored to the exact requirements of the case.

ii The Risk of Sexual Harm Order (RSHO) was meant to tackle the perceived problem of 'grooming' children for sexual activities; the RSHO could be placed on an individual whether or not he or she had a previous conviction, to prohibit his or her perceived activities whether

this 'grooming' was face to face or online. The sort of activities the law wanted to prohibit included:

- engaging in sexual activity involving a child or in the presence of a child;
- causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;
- giving a child anything that relates to sexual activity or contains a reference to such activity; and
- communicating with a child, where any part of the communication is sexual. (Sexual Offences Act 2003 s.123 (3))

Critics pointed out that the first two of these acts were crimes in themselves and that if the evidence existed for a civil order perhaps the acts ought to be prosecuted as a crime rather than made the subject of civil orders (see Craven et al 2006 and 2007).

iii Foreign Travel Orders (FTO) were to prevent people going abroad if it was thought they intended to cause 'serious sexual harm' to children; the person concerned must already have a conviction for a sexual offence against a child and his or her behaviour must give concern and reasonable cause to believe that it is necessary for such an order to be made.

The police applying for any of these orders were reminded that the application should be proportionate:

The civil preventative orders in Part 2 of the 2003 Act are public protection tools. Any interference with the offender's right to a private and family life (under Article 8 of the ECHR) must be necessary and proportionate to the prevention or detection of crime, the rights and freedoms of others or the protection of health or morals (Home Office 2012: para9; see also Home Office 2016: 27-8).

Proportionate or not the over-riding criticism of all these orders has been the lack of orders actually being made (see e.g. Davies Review 2013: paras.4.1- 4.43; MoJ 2013:13).

The Davies Review

The then Association of Chief Constables (ACPO) (now the National Police Chiefs' Council (NPCC)) commissioned a review of civil prevention orders made under the Sexual Offences Act 2003 in early 2013; in general terms the police were getting a good deal of criticism for their handling of sexual offences and the lack of civil orders being applied for (Davies Review 2013: paras 4.1-4.43). The report was with them by May 2013 and was referred to as

the Davies Review after the chair of the working party Hugh Davies QC (Davies Review 2013).

The Davies Review concluded that the existing statutory regime ‘presents unnecessary and unreasonable obstruction to the objective of preventing sexual abuse of children’ (para.2.1) and should therefore ‘be simplified so as (i) to create a single, and straightforward, evidence-led test justifying a prevention order without other pre-conditions, and (ii) that the range of applicants should be extended’ (para.2.4). The Review also recommended removal of the word ‘serious’ from the law; the Home Office had previously given ‘official’ guidance on what might be considered ‘serious’ in terms of sexual harm:

“Serious sexual harm”: definition:

By virtue of section 106(3) of the [Sexual Offences] Act, the expression “serious sexual harm” means protecting the public in the United Kingdom or any particular members of the public from serious physical or psychological harm, caused by the defendant committing one or more offences listed in [Sexual Offences Act] Schedule 3. Paragraph 94 of Schedule 3 ensures that a reference to an offence in Schedule 3 includes a reference to an attempt, conspiracy or incitement to commit an offence and a reference to aiding, abetting, counselling or procuring the commission of that offence (Home Office 2012 Annex G para.3).

The Davies Review argued that the word ‘serious’ was not necessary:

We resist the term ‘serious’, borrowed from existing legislation, since it pre-supposes that there is some category of sexual harm that may be caused to a child that is not intrinsically serious or that is not worthy of prevention (Davies Review 2013: para 2.6)

They recommended a new single order given the name of a ‘Child Sexual Offences Prevention Order’ in the following terms:

On the application of a qualifying person [Chief Officer of Police or other qualified person [CEOP/SOCA/NCA/CPS, etc.]], or on conviction for a qualifying offence, a court may make a child sexual offences prevention order in respect of any person if it is satisfied that it is necessary to make such an order for the purpose of protecting a person of under 18 years’ from [serious] sexual harm from the defendant/respondent (ibid: para.2.5)

Apart from removing the word ‘serious’ the Davies Review also considered a prior qualifying sexual offence (that was required for the existing Sexual Offences Prevention Order and Foreign Travel Order) should no longer be required; in the case of the FTO the existing need

for a demonstrable change in conduct would also be removed (ibid: para. 2.8). Such requirements were dismissed as ‘artificial pre-requisites’ (ibid: para.3.28). On the national policing front they argued for ‘a permanent national resource [to] actively promote the protection of children internationally from sexual abuse by UK Nationals’ (ibid: para 2.15).

A Critique of the Davies Review

The over-arching criticism of the Davies Review has been the priority given to civil measures over criminal. The difficulties of bringing cases to the criminal courts have resulted in recourse to the civil approach with less rigorous criminal procedures being marginalised. The civil orders require only proof on the ‘balance of probabilities’ rather than ‘beyond all reasonable doubt’. If the civil order is breached then criminal procedures may be introduced base only on the need to prove breach.

The working party chaired by Davies has been referred to as ‘independent’. In the House of Commons **one** MP described the Review as ‘*written independently* by Hugh Davies QC and a team of experts’ (*Hansard House of Commons 14 October 2013 col.482* emphasis added). In a later interview Davies himself called the Review ‘a well-researched (*multi-agency independent report*)’ (Hugh Davies cited on the website of Parents against Child Sexual Exploitation <http://www.paceuk.info/changes-sexual-risk-order-system-opportunity-empower-parents-part-1/> accessed 26 October 2015 emphasis added).

The question might reasonably be asked as to who it is independent of when the committee writing was either serving police officers or people with links to the police. Similarly the description of the Review as ‘multi-agency’ **might also be questioned**, when most of the working party had policing backgrounds and there were no magistrates, probation officers, social workers, psychologists, doctors or health visitors amongst the members.

The Davies Review itself is written with an emphasis on everything being ‘common sense’ and ‘self-evident’; the term ‘self-evident’ crops up at regular intervals and presumable means the authors do not have to explain in detail what they mean (see Davies Review 2013: paragraphs 2.4; 4.19i; 4.40; 6.6.2; 11.2.4 and 11.2.5). The Review might also be said to be quite anecdotal and lacking in real research; the Review does partially admit this to be the case (see e.g. para. 8.2.13). The following are examples from the Review which arguably illustrate its lack of rigour; emphasis has been added:

The issues raised in this report are well-documented. An urgent response is needed. The sexual harm to children is immediate, *extensive and serious* (ibid: para.1.2).

... preventable sexual abuse of children is occurring on a *significant (if unquantifiable) scale* (ibid: para.2.1)

No informed party would dispute either (i) that the sexual exploitation of children is an endemic problem internationally; or (ii) that there is a combination of factors that is promoting an expansion, rather than reduction, in such abuse being conducted extra-territorially by UK (and other) Nationals (ibid: para.3.1)

Whilst there is a wealth of literature and data available (originating from international organisations such as United Nations; individual countries; and the NGO community) the intrinsic nature of the offending (covert; much under-reported; in jurisdictions with highly variable systems of policing and criminal enforcement and/or different cultural norms as to child protection) is such that *hard quantitative data is, and will remain, elusive* (ibid: para3.2).

It is, and remains, a well-documented problem. *The scale of it is intrinsically difficult to quantify but on any view the figures are both staggering and appalling* (ibid: para. 3.10).

None of this documentation is actually cited. Elsewhere statistics (or the lack of them) are treated in cavalier fashion:

It begs the obvious question: what proportion of this offending could have been prevented by a different prevention order regime? *The fact the data is so intrinsically unsatisfactory does not avoid the inevitable conclusions* (i) that it is a high proportion (in any event, in this context, any proportion is a significant proportion); and (ii) that the figures outlined are likely to represent a very small fraction of the whole (ibid: para.4.43)

A survey was conducted of individual forces across the UK. *Not every such force responded*, which may of itself tend to illustrate the lack of a specialist capacity in these forces in terms of civil prevention orders. *We are satisfied that the responses we received provide a sufficient empirical basis to draw wider conclusions* (ibid: para 1.3).

The numbers – inadequate as they are in terms of data collection – do not lie (ibid: para.8.3.1).

The Review does not tell us how many forces responded or on what basis they drew their ‘satisfaction’ that their responses provided them with ‘a sufficient empirical base’. We do know that if they disagreed with a response they were quite capable of simply dismissing it:

a significant number of local forces were resistant to a national, and nationally resourced, police unit directed at international offending against children on the purported basis that it would “remove developmental opportunities” from local forces. *We reject this approach as insular and myopic.* (ibid: para.10.2.5)

The proposed 'Child Sexual Offences Prevention Order' would take its place as a new form of pre-emptive policing to prevent criminal behaviour. Such policing it might be argued demands more preliminary safeguards rather than less as the Davies Review argues. And although they argue that simplifying the law will make for easier applications for orders they also admit that sometimes in the past the low numbers of applications have just been a result of de-motivated police officers (ibid: para.10.2.1) and chief officers with limited resources (ibid: para. 7.6.2).

The Parliamentary Process

The Davies Review was directly referred to in the Commons debate (see *Hansard House of Commons 14 October 2013 cols 478 and 482*). In parliament two new Orders were proposed known as the Sexual Risk Orders and Sexual Harm Prevention Orders. Both went further than the Davies Review recommendations which had focussed on children as potential victims; the new orders were applicable to any age of victim.

Home Secretary at the time Theresa May gave notice of the amendments on 8 October 2013 and by the 14 October they were in the Anti-Social Behaviour, Crime and Policing Bill. A new Clause 14 introduced the two new orders. The government did support an amendment by a backbench MP to put a 'Child Sexual Abuse Prevention Order' into the Bill as a new Clause 5 – this does appear to have been based far more on the Davies Review 'Child Sexual Offences Prevention Order'; the amendment was, however, eventually withdrawn.

The police noted the amendments in positive fashion and noted their own contribution to them:

The new Sexual Harm Prevention Orders proposed by the Policing Minister Damien Green MP build upon the findings of [the Davies] report and amendments to the Crime and Policing Bill tabled by Nicola Blackwood MP.

These new orders are potentially a very powerful, very useful new tool in the hands of law enforcement to prevent harm to children at the earliest opportunity (NPCC 2013).

As stated earlier the main argument for change has been that the existing orders are ineffective, too difficult to obtain and therefore very underused. The police had acknowledged the need for change because they found the existing 'orders were too complex and ineffective in protecting children' (NPCC 2013). Whilst Foreign Travel Orders to stop

sex offenders travelling abroad, for example, could be numbered in single figures, similar Orders to stop travelling football hooligans had been made in their thousands. The logic follows that - because this is child abuse - far from grappling with their complexity - or presumably not needing these orders at all - we must make them easier for the police to understand and to obtain.

The prime movers for change have been the people charged with obtaining the orders – the police via the Davies Review. They have been assisted by backbench MP Nicola Blackwood and the pressure group ECPAT.

There were human rights and civil liberties implications in these amendments to the Anti-Social Behaviour, Crime and Policing Bill and they should have been considered by the House of Commons and House of Lords Joint Select Committee on Human Rights. Such scrutiny, however, seems to have been avoided. The Joint Committee has reported on the Bill generally but had to state:

On 8 October...the eve of our agreeing this Report, the Government tabled amendments to the Bill to reform the civil orders under the Sexual Offences Act 2003. We were ... given no warning in advance that the Government intended to introduce such amendments which clearly have human rights implications. We are pursuing with the Leader of the House of Commons our concerns about the recurring inadequacy of the time available to scrutinise the human rights compatibility of significant Government amendments to Bills (House of Commons/House of Lords 2013: para.9).

The New Orders

The Sexual Risk Order and the Sexual Harm Prevention Orders are now in the Sexual Offences Act 2003 (Sexual Offences Act 2003 ss103A-K and 122A-K being an amendment from the Anti-Social Behaviour, Crime and Policing Act 2014 Part 9) and became law from 8 March 2015.

In applying for a SRO the Home Office recommends the following as an indication, of the behaviour that might cause concern:

1. Those specified acts that were set out for the purposes of the previous Risk of Sexual Harm Order which included:
 - engaging in sexual activity involving a child or in the presence of a child
 - causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual

- giving a child anything that relates to sexual activity or contains a reference to such activity
- communicating with a child, where any part of the communication is sexual (Home Office 2016: 45)

This is all child related rather than adult and as already noted above include criteria that makes some of these activities an offence in themselves.

Sexual Harm Prevention Orders (SHPO) could be made by a court in respect of an individual who *does* have a conviction, or police caution for a relevant offence and who poses a risk of sexual harm to the public in the UK or children or vulnerable adults abroad. Sexual harm replaces *serious* sexual harm and:

A SHPO may impose any restriction the court deems necessary for the purpose of protecting the public from sexual harm, and makes the offender subject to the notification requirements for the duration of the order. SHPOs are available to the court at the time of sentencing for a relevant offence, or on free-standing application to the magistrates' court by the police after the time of the conviction or caution (Home Office 2016: 4).

The Sexual Risk Order does not require any previous convictions and does not automatically make the subject of an order liable to the notification requirements for registered sex offenders. It does, however, still require the individual to notify to the police:

- Their name
- Their home address

This information must be notified within three days of the order being made or whenever the information changes (ibid: 48). This appears to be almost the start of a separate register for people without necessarily any convictions or cautions but whose behaviour has now caught them up in civil preventive orders including those where no offence has been committed.

Superintendent Nigel Costello, Head of Protecting Vulnerable People, with the North Yorkshire Police let it be known that officers from his force had worked with the Home Office in preparing the detail of the two orders and that they were the first force in the country to use them:

Our Criminal and Civil Orders officer worked extremely hard with the Home Office to develop the guidance and processes surrounding these orders and I am pleased that we have been able to already secure two of these orders, and that we are the first force in the country to use them (North Yorkshire Police 2015).

Press reports suggest that in total the police in England and Wales have made over 50 SROs since their introduction; the Metropolitan Police lead the way with seven SROs and North Yorkshire Police come second with six; ten forces have not applied for any (Sky News 2016).

Discussion

When the government set out to reform the law on sexual offences in 2000 it produced a preliminary discussion document. The document set out its two guiding principles. The first said that the law should consider what was harmful to victims (Home Office 2000 para.6).

The second said that it did not want the state to be too intrusive into people's private lives:

... the criminal law should not intrude unnecessarily into the private life of adults. Applying the principle of harm means that most consensual activity between adults in private should be their own affair, and not that of the criminal law (ibid: para.7).

Interviewed on the BBC 2 Victoria Derbyshire programme (19 July 2016) (available at <http://www.bbc.co.uk/news/uk-england-york-north-yorkshire-36833018> accessed 4 March 2017) the man from North Yorkshire subject to the SRO requiring him to give notice of sexual activity to the police described his preference for sexual activity with sado-masochistic tendencies. He explained how this could be done in safety with an agreed code word to stop if either partner was not comfortable. The man said he had told doctors and others about this preference but felt that they had taken it at face value and missed the words about there being safety devices built in; they had decided he was a dangerous person.

Largely on the basis of this evidence the magistrates decided that an Order was necessary and that the evidence was sufficient to fulfil the criteria. The question remains as to how we have arrived at a position in England and Wales where the North Yorkshire Police could ask for a man to report to them any intention to engage in sexual activity some 24 hours in advance of when it might take place and for details of the proposed partner to be passed to them. A position that magistrates have been happy to confirm in a court order even though they have also declared the position to be 'disproportionate and frankly unpoliceable' (quoted in Parveen 2016). On 22 September 2016 the order was amended and the 24 hour requirement replaced by the wording 'as soon as is practicable' along with other conditions (BBC News 2016).

The Order itself is one of prohibition:

An order, whether full, or interim, can only contain restrictions on the behaviour of the defendant, i.e. it can only require them not to do something. It cannot require them to comply with conditions requiring positive action (Home Office 2016: 33).

Some might argue that reporting to the police about intended activity is a 'positive' action rather than a prohibition. What the police are meant to do with the details of the proposed partner remains uncertain. Challenges that this breaches Article 8 (the right to privacy) of the European Convention on Human Rights look certain to be made if this becomes a regular part of the police's armoury around the country.

The result appears to be the police ability to write what they want into these new orders and the magistrate's inability to question them. The North Yorkshire man describes the outcome as 'Kafkaesque' while others describe it as being 'what tyranny looks like' when the state tries to intervene in private matters (O'Neil 2016). The North Yorkshire police have said:

By the court imposing a Sexual Risk Order until further order and granting the prohibitions applied for, this recognises that North Yorkshire Police have taken the correct course of action to safeguard and protect the public from the risk that the Court has acknowledged Mr O.[abbreviated] poses to the public (North Yorkshire Police 2016).

Another way of looking at it is that the man in question could be jailed for simply having a sexual relationship without informing the authorities in advance.

The trend towards using civil orders in cases of sexual offending has also to be seen in the context of low criminal prosecution and conviction rates. Apart from having no robust evidence base that these civil orders work we could end up with the new easier to obtain civil orders on sex offenders making the police's job easier when we should be prosecuting and convicting these offenders. There is the added legal complication here in that if you have had to defend yourself against the civil orders in the civil courts any prosecutions that do follow will be unfair because your defence will be known in advance and the ethical complication of the arguably covert introduction of a new register with added notification requirements for people with no previous convictions or cautions to their name

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