

## **SERIOUS CRIME BILL [HL]**

---

### **EXPLANATORY NOTES**

#### **INTRODUCTION**

1. These Explanatory Notes relate to the Serious Crime Bill [HL] as introduced into the House of Lords on 5th June 2014. They have been prepared by the Home Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.
3. A glossary of abbreviations and terms used in these Explanatory Notes is contained in Annex A to these Notes.

#### **OVERVIEW**

4. Serious and organised crime includes drug trafficking, human trafficking, organised illegal immigration, child sexual exploitation, high value fraud and other financial crime, counterfeiting, organised acquisitive crime and cyber crime. Organised crime costs the United Kingdom at least £24 billion each year. As at December 2013, there are some 36,600 organised criminals in 5,300 groups currently operating in ways that directly affect the UK<sup>1</sup>. In October 2013, the Government published its Serious and Organised Crime Strategy (Cm 8715)<sup>2</sup>. The aim of the strategy is to reduce substantially the level of serious and organised crime affecting the UK and its interests. The strategy has four components: prosecuting and disrupting people engaging in serious and organised crime (Pursue); preventing people from engaging in such activity (Prevent); increasing protection against serious and organised crime (Protect); and reducing the impact of such criminality where it takes place (Prepare). Under the Pursue strand of the strategy, the document set out proposals to:

---

<sup>1</sup> National Strategic Assessment of Serious and Organised Crime 2014, National Crime Agency, 1 May 2014 (<http://www.nationalcrimeagency.gov.uk/publications/207-nca-strategic-assessment-of-serious-and-organised-crime/file>)

<sup>2</sup> <http://www.official-documents.gov.uk/document/cm87/8715/8715.pdf>

- Strengthen the operation of the asset recovery process by closing loopholes in the Proceeds of Crime Act 2002;
- Better tackle people who actively support, and benefit from, participating in organised crime;
- Create new powers to seize and detain chemical substances suspected of being used as cutting agents for illegal drugs; and
- Amend the Computer Misuse Act 1990 to update the existing offences to cover importing tools for cyber crime (such as data programmes designed for unlawfully accessing a computer system).

5. The principal objective of the Bill is to ensure that law enforcement agencies have effective legal powers to deal with the threat from serious and organised crime. In particular, it gives effect to the above proposals in the Serious and Organised Crime Strategy.

6. The Bill is in six Parts. Part 1 makes further provision in respect of the recovery of property derived from the proceeds of crime. Part 2 makes amendments to the Computer Misuse Act 1990. Part 3 provides for a new offence of participating in the activities of an organised crime group and strengthens the arrangements for protecting the public from serious crime and gang-related activity provided for in Part 1 of the Serious Crime Act 2007 and Part 4 of the Policing and Crime Act 2009 respectively. Part 4 provides for the seizure and forfeiture of substances used as drug-cutting agents. Part 5 amends the criminal law in relation to the offences of child cruelty and female genital mutilation and provides for a new offence of possession of “paedophile manuals”. Part 6 provides for or extends extra-territorial jurisdiction in respect of the offences in sections 5 (preparation of terrorist acts) and 6 (training for terrorism) of the Terrorism Act 2006 and confers parliamentary approval (as required by section 8 of the European Union Act 2011) for two draft Council Decisions under Article 352 of the Treaty on the Functioning of the European Union (“TFEU”). Part 6 also contains minor and consequential amendments to other enactments and general provisions, including provisions about territorial application and commencement.

7. This Bill updates existing law dealing with proceeds of crime, cyber crime, serious crime prevention orders, gang injunctions, child cruelty, female genital mutilation and the commission of certain terrorism offences abroad. The main Acts affected by the Bill are:

- Section 1 of the Children and Young Persons Act 1933 (cruelty to persons under sixteen);
- Computer Misuse Act 1990;
- Proceeds of Crime Act 2002 (“POCA”);

- Female Genital Mutilation Act 2003 and the Prohibition of Female Genital Mutilation (Scotland) Act 2005;
- Chapter 3 of Part 2 of the Serious Organised Crime and Police Act 2005 (“SOCPA”) (financial reporting orders (“FROs”));
- Section 17 of the Terrorism Act 2006 (commission of terrorism offences abroad);
- Part 1 of the Serious Crime Act 2007 (serious crime prevention orders (“SCPOs”)); and
- Part 4 of the Policing and Crime Act 2009 (injunctions: gang-related violence).

### **TERRITORIAL EXTENT**

8. Subject to certain exceptions as described below, the provisions of the Bill extend to England and Wales. In addition, the amendments to Parts 5 (Civil Recovery of the Proceeds etc of Unlawful Conduct), 8 (Investigations) and 11 (Co-operation) of POCA (clauses 17 to 21, 34(1) and 35), the provisions in respect of computer misuse (Part 2), serious crime prevention orders (clauses 42 to 46 and Schedule 1), drug-cutting agents (Part 4), the extension of extra-territorial jurisdiction in respect of the offences in sections 5 and 6 of the Terrorism Act 2006 (clause 65) and the approval of two draft Council Decisions under Article 352 of TFEU (clause 66) extend to the whole of the United Kingdom. The amendments to Part 3 (Confiscation: Scotland) and Chapter 3 of Part 8 (Investigations) of POCA, to section 13 of the Computer Misuse Act 1990 and to the Prohibition of Female Genital Mutilation (Scotland) Act 2005 made by clauses 15, 16, 35(3), 39(6) and (7) and 64(2) apply to Scotland only, whilst those to Part 4 of POCA (Confiscation: Northern Ireland) made by clauses 22 to 33 apply to Northern Ireland only. The new offence of possession of “paedophile manuals” (clause 63) and the amendments made to the Female Genital Mutilation Act 2003 by clause 64(1) extend to England and Wales and Northern Ireland.

9. At introduction this Bill contains provisions that trigger the Sewel Convention. Those provisions relate to the extension to Scotland of the provisions of the Serious Crime Act 2007 in respect of SCPOs, the repeal of provisions relating to FROs in Chapter 3 of Part 2 of the SOCPA and the amendments to the Prohibition of Female Genital Mutilation (Scotland) Act 2005, together with aspects of the amendments to POCA and the Computer Misuse Act 1990. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. Insofar as these provisions relate to devolved matters, the Cabinet Secretary for Justice has confirmed that he will seek the necessary legislative consent motion. If there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

10. The provisions in the Bill in respect of drug-cutting agents (Part 4), the amendments to the Terrorism Act 2006 (clause 65) and that conferring parliamentary approval for the two draft EU Council Decisions (clause 66) also extend to Scotland but relate to reserved matters.

11. In relation to Wales all the provisions of the Bill relate to non-devolved matters.

12. The following provisions of the Bill extend to Northern Ireland and relate, in whole or in part, to transferred matters:

- the amendments to Parts 4, 8 and 11 of POCA;
- the provisions in respect of SCPOs and the repeal of provisions relating to FROs;
- the new offence of possession of paedophile manuals; and
- the amendments to the Female Genital Mutilation Act 2003.

Insofar as these provisions relate to transferred matters, the Northern Ireland Minister of Justice has confirmed that he will seek the necessary legislative consent motion. If amendments are made to the Bill that further trigger a requirement for a legislative consent motion, the consent of the Northern Ireland Assembly will be sought for them.

13. The provisions in the Bill in respect of amendments to the Computer Misuse Act 1990 (Part 2), drug-cutting agents (Part 4), the amendments to the Terrorism Act 2006 (clause 65) and that conferring parliamentary approval for the two draft EU Council Decisions (clause 66) also extend to Northern Ireland but relate solely to excepted or reserved matters.

## **PART 1: PROCEEDS OF CRIME**

### **SUMMARY AND BACKGROUND**

14. POCA provides for four different routes for the recovery of assets acquired as a result of criminal activity, as follows:

- Confiscation orders – following conviction for an offence. Part 2 of POCA makes provision for confiscation in England and Wales, whilst Parts 3 and 4 make broadly analogous provisions for Scotland and Northern Ireland respectively.
- Civil recovery - this is a form of non-conviction based asset recovery that allows for the recovery of property which is, or represents, property obtained through unlawful conduct. A civil recovery order is not a conviction or a sentence, and the action is taken against the property rather than the person. Civil recovery is used when a prosecution is not possible, for example if there is insufficient evidence to create a

realistic prospect of a conviction, or there is no identifiable living suspect. Part 5 of POCA provides for a UK-wide civil recovery regime.

- Seizure and forfeiture of cash - this is a non-conviction based procedure for recovering cash which is the proceeds of, or intended for use in, crime of sums of not less than £1,000. Chapter 3 of Part 5 of POCA provides for a UK-wide regime for the recovery of cash in summary proceedings.
- Criminal Taxation – also a non-conviction based power, but does not result in property being recovered – instead it allows tax to be charged on a person’s income, profits or gains where there are reasonable grounds to suspect that they arise or accrue from criminal conduct on the part of that person or another. Only the National Crime Agency (“NCA”) can exercise the criminal taxation powers under Part 6 of POCA, but Her Majesty’s Revenue and Customs retains all its usual powers in respect of taxation.

15. Confiscation orders are the principal method used by law enforcement agencies for the recovery of assets. Annex B provides an overview of how the confiscation regime operates.

16. £190 million was recovered under POCA in 2013/14.

17. The Serious and Organised Crime Strategy explained that POCA is under sustained legal challenge from criminals who are constantly seeking new ways to avoid its reach and frustrate asset recovery. The Strategy sets out a number of proposals to: strengthen the legislation by, amongst other things, ensuring that criminal assets cannot be hidden with spouses, associates or other third parties; substantially strengthen the prison sentences for failing to pay confiscation orders; enable assets to be frozen more quickly and earlier in investigations; significantly reduce the time that the courts can give offenders to pay confiscation orders; and extend the investigative powers in POCA so that they are available to trace assets once a confiscation order is made. The provisions in Part 1 of the Bill give effect to these and other changes to POCA. In doing so, they also implement two recommendations on asset recovery made by the Joint Committee on the Draft Modern Slavery Bill in their April 2014 report on the draft Bill<sup>3</sup>. Specifically, the Joint Committee recommended that the test for obtaining a restraint order be amended to make it less stringent and indicated that it would welcome stronger sanctions for non-payment of confiscation orders.

---

<sup>3</sup> <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-modern-slavery-bill/>

## **COMMENTARY ON CLAUSES**

### **Chapter 1: England and Wales**

#### **Confiscation: assets held by defendant and other**

##### **Clause 1: Determination of extent of defendant's interest in property**

18. This clause, together with clauses 2 to 4, amends the provisions in Part 2 of POCA in respect of third party interests in assets that may be realised to discharge a confiscation order. Under Part 2 of POCA a confiscation order is made against the defendant for a particular amount, and not against any particular assets held by the defendant, although the court may take into account property held by the defendant when determining the amount of the confiscation order. It is open to the defendant to pay off the order out of whatever assets he or she has available. As such, Part 2 of POCA makes no express provision for the court to deal with any third party interests in any of the property which the court takes account of when determining the amount of a confiscation order.

19. Part 2 of POCA does however make provision for third parties to make representations where they have been affected by the exercise of powers under that Part. In particular, when they have been affected by a restraint order made under section 41 of POCA, or an order for the further detention of property under section 47M of POCA (the latter section is not yet in force).

20. Third parties also have the right to make representations under Part 2 of POCA when an enforcement receiver is appointed by the Crown Court under section 50 of the Act to enforce an unpaid confiscation order. The receiver must give anyone with an interest in the realisable property of the defendant a reasonable opportunity to make representations before the receiver may exercise their powers under section 51(2) of POCA to manage, deal or realise that property, or under section 51(6) to order the third party to make a payment to the receiver in respect of the defendant's beneficial interest in the property.

21. In general, it is most appropriate for third party interests to be dealt with substantively at the enforcement stage of a confiscation order given that the existence of such interests only crystallises against specific property at that stage. However, in some cases waiting until enforcement to determine the extent of a third party's interest in the defendant's property can complicate, lengthen and otherwise frustrate the confiscation process. Clauses 1 to 4 seek to give effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by "ensuring that criminal assets cannot be hidden with spouses, associates or other third parties".

22. This clause inserts a new section 10A into POCA to confer on the Crown Court, when making a confiscation order, a power to make a determination as to the extent of the defendant's interest in particular property (new section 10A(1) and (5)). Given that a

consequence of making such a determination will be to determine the extent, if any, of any third party interest in the property, new section 10A(2) affords third parties who have, or may have, an interest in the property the right to make representations to the court about the extent of their interest. The right to make representations also extends to the defendant. Subject to two exceptions, any determination as to the extent of the defendant's interest in particular property is binding on any court or other person involved in the enforcement of the confiscation order (new section 10A(3)). The exceptions are where it is open to an enforcement receiver to hear representations (see clause 4) or in proceedings before the Court of Appeal or Supreme Court (new section 10A(4)).

23. It is envisaged that the Crown Court would only make such determinations in relatively straightforward cases, that is where the court considers that it can, without too much difficulty, determine the defendant's interest in particular property. In deciding whether to make a determination in any particular case, it is expected that judges will exercise this power to determine the defendant's interest in property only in those cases where their experience (including in respect of matters as regards to property law), the nature of the property, and the likely number and/or complexity of any third party interests allows them to do so.

#### **Clause 2: Provision of information**

24. *Subsection (1)* amends section 16 of POCA, which requires the prosecutor to give the court "a statement of information" detailing the defendant's benefit from criminal conduct. New section 16(6A) requires such statements of information to include any information available to the prosecutor that would be relevant to the court's consideration of whether to make a determination under new section 10A and, if so, the terms of such a determination. Such information may include evidence of the defendant's and any third parties' interest in relevant property. New section 16(6B) empowers the court to require the prosecutor to provide further specified information relevant to the making of a determination. In order to fulfil such a requirement, it may be necessary for the prosecutor to obtain further information. Under section 17 of POCA, the court may require the defendant to respond to every allegation in the statement of information and to indicate to what extent each allegation is accepted. Where an allegation is disputed, the defendant must provide full details of any matters relied on.

25. *Subsection (2)* amends section 18 of POCA, which empowers the court to order the defendant to provide any information it needs to enable it to carry out its confiscation functions. *Subsection (2)(a)* amends section 18(2) to make it clear that the court's confiscation functions include functions under the new section 10A. *Subsection (2)(b)* amends section 18(6) so as to provide that where the prosecution accepts any allegation contained in the information provided by the defendant, the court may treat the acceptance as conclusive for the purpose of deciding whether to make a determination under new section 10A and, if it decides to make such a determination, the form of that determination.

**Clause 3: Appeals**

26. *Subsection (1)* inserts new subsections (4) to (8) into section 31 of POCA (which confers a right of appeal on prosecutors against any confiscation order made by the Crown Court). New subsections (4) to (8) enable the prosecutor, the defendant or a third party to appeal to the Court of Appeal against a determination made under new section 10A. The defendant or a third party may only appeal a determination if it appears to the court that the person is, or may be, a person holding an interest in the property affected by the determination. In the case of the defendant or a third party, the right of appeal then only arises in one of two circumstances, namely where a person with an interest in relevant property was not given a reasonable opportunity to make representations to the Crown Court before it made its determination (new section 31(6)), or where the Court of Appeal considers that the determination made under new section 10A would result in a serious risk of injustice to the appellant (new section 31(7)).

27. The rights of appeal conferred by new section 31(4) are negated where the conditions in new section 31(8) apply. Those conditions are where a receiver has been appointed under section 50 of POCA or where an application has been made by the prosecution for the appointment of a receiver but that application has not been determined, or where the Court of Appeal believes that such an application is to be made. No right of appeal is provided for in such circumstances given that the receiver will be able to reconsider interests in relevant property where there would be a serious risk of injustice if the Crown Court's determination under new section 10A were to be adhered to (see clause 4). Moreover, in cases where the receiver is bound by a Crown Court's determination as to the extent of a defendant's interest in particular property, any person affected by an enforcement order in relation to the property, that is an order to sell it to help satisfy the defendant's confiscation order, would be able to appeal to the Court of Appeal (under section 65 of POCA). When considering any such appeal, the Court of Appeal would not be bound by the Crown Court's determination (see new section 10A(4)(b)).

28. *Subsection (2)* inserts new subsection (2A) into section 32 of POCA, which provides that in determining an appeal under new section 31(4) the Court of Appeal may either confirm the original determination made by the Crown Court under new section 10A or make any other order it considers appropriate. This affords the Court of Appeal the power to make a different determination from that made by the Crown Court as to the extent of the defendant's interest in relevant property.

29. *Subsection (3)* amends section 33, which provides for further appeals to the Supreme Court. *Subsection (3)(a)* enables any party to proceedings in the Court of Appeal on an appeal under new section 31(4) to appeal the outcome to the Supreme Court. *Subsection (3)(b)* inserts new subsection (3A) into section 33 which confers on the Supreme Court broad powers to confirm, quash or vary the decision made by the Court of Appeal.



**Clause 4: Enforcement receivers**

30. This clause amends section 51 of POCA, which sets out the powers a court can confer on an enforcement receiver. Such powers include the power to realise property, but this is accompanied by a requirement to afford persons with an interest in the property a reasonable opportunity to make representations to the court. New section 51(8B) extends this right on third parties to make representations to the court in certain circumstances where a determination has been made under new section 10A. Given that interested third parties will generally have been afforded an opportunity to make representations to the court prior to it making a determination under new section 10A, the amendments to section 51 of POCA do not, as a rule, allow further representations to be made at the enforcement stage. However, new section 51(8B) enables an affected person to make representations to the receiver where he or she was not given a reasonable opportunity to make representations to the Crown Court before it made its determination, or where the court considers that the determination made under new section 10A would result in a serious risk of injustice to the person. This provision affords an opportunity for an interested third party to make representations in circumstances where their interest in the property only came to light after the Crown Court had made its original determination under new section 10A. Subject to the court's consideration of any such representations and to the outcome of any appeal (as provided for in clause 3), a determination made by the court under new section 10A is binding on a receiver.

**Confiscation: other amendments**

**Clause 5: Time for payment**

31. *Subsection (1)* substitutes a new section 11 of POCA, which makes provision for the court to determine how long the defendant has to pay the amount due under a confiscation order. Section 11 currently provides that the amount is to be paid immediately, unless the defendant can demonstrate to the court that he or she needs more time to pay. If the court is satisfied that time to pay is required, it may allow up to six months to pay, and up to a further six months on a later occasion if there are exceptional reasons justifying the extension. In no case, however, will more than 12 months be granted from the day on which the confiscation order is made. The prosecution has the right to make representations to the court before any order extending the time available to pay a compensation order is made. The substituted section 11 seeks to give effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “significantly reducing the time that the courts can give offenders to pay confiscation orders”.

32. New section 11(1) expressly provides that the full amount payable under a confiscation order must be paid once the order is made (unless the court provides otherwise); the existing section 11(1) simply refers to “the amount”, albeit that the effect is that the full amount must be paid on the day the confiscation order is made.

33. New section 11(2) provides that the court may only extend the time to make full payment of the confiscation order if the court is satisfied that the defendant is unable to pay the full amount on the date the order is made. The existing section 11(2) gives the court a

wider discretion to make an order providing more time to pay a confiscation order “if the defendant shows that he needs time to pay the amount ordered to be paid”. The new section 11(2) also provides that the court may require different amounts of time for payment (the “specified period”) of different parts of the amount ordered to be paid. For example, if the full amount is £1 million, the court might order £500,000 to be paid immediately (if the defendant has that amount available in cash), £200,000 within 28 days (if the defendant has shares worth that amount) and £300,000 within three months (if the defendant has property worth that amount).

34. New section 11(3) defines the specified period for the purpose of subsection (2). Whereas the existing section 11(3) sets the maximum length of the specified period at six months, the new section 11(3) reduces this to three months.

35. New section 11(4) enables the court, on application by the defendant, to extend, by order, the specified period (“the extended period”). At present, the court may make such an order if it “believes there are exceptional circumstances”. The new test is that the defendant is unable to pay the amount required within the specified period “despite having made all reasonable efforts”. Where the court is satisfied that this test is met, it has the discretion to specify different time periods for payment of the outstanding sums. So, for example, if the defendant had been ordered to pay £150,000 within 14 days and makes an application to the court for extending that time period, the court may order that £50,000 be paid immediately, provide a further seven days for another £50,000 to be paid over and a further 14 days for the remaining £50,000 to be paid over. Any application by the defendant must be made before the expiry of the specified period.

36. New section 11(5) defines the extended period for the purpose of subsection (4) and, by extension, the maximum duration of the specified period and the extended period when aggregated together. Whereas the existing section 11(5) sets this maximum aggregated period at 12 months, the new section 11(5) reduces this to six months. As now, it would be possible for the court to grant an extended period for payment after the expiry of the specified period, but may not do so more than six months (currently 12 months) after the confiscation order was made (new section 11(6)).

37. New section 11(7) provides that any specified period or extended period must be as short as it can be. There is currently no equivalent provision in the existing section 11.

38. New section 11(8) replicates the existing ability of the prosecution to make representations before any order under new section 11(2) or (4) is made.

39. *Subsection (2)* substitutes a new subsection (3) in section 12 of POCA. Section 12 provides that the defendant must pay interest on a confiscation order that is not paid in full by the time allowed. The rate of interest is that specified in section 17 of the Judgments Act 1838, namely 8%. Any interest due forms part of the amount payable under a confiscation order. At present, interest is not payable during any period where the defendant has made an

application to the court under section 11(4) of POCA to further extend the time allowed for payment and that application has not been determined by the court (provided that 12 months has not elapsed since the making of the order). Under the substituted section 12(3), this maximum period of grace where interest is not payable pending a court's determination of an application under section 11(4) is reduced from 12 months to six months, in line with new section 11(5). In addition, new section 12(3) makes it clear that whilst interest is not payable on the amount in relation to which the defendant has an outstanding application for an extended period, interest would still be payable on any amounts due in respect of an expired specified period, that are not part of the outstanding application for an extended period.

40. *Subsection (3)* makes a consequential amendment to section 87 of POCA which defines when confiscation orders are satisfied and when they are subject to appeal. Subsection (3) inserts a new subsection (1A) into section 87 for the purpose of defining the term "amount payable". This term is used in a number of places in Part 2 of POCA. As section 11 of POCA is currently drafted, the scheme as set out in Part 2 assumes that the amount ordered to be paid would be paid in full at some point, rather than in instalments. Against this background, the term "amount payable" should be read as a reference to the full amount. The definition in new section 87(1A) makes it clear that this term should be read as the amount that remains payable.

#### **Clause 6: Confiscation and victims surcharge orders**

41. This clause amends section 13 of POCA, which makes provision in relation to the effect of a confiscation order on the court's other sentencing powers to make financial orders against the defendant. In particular, it requires a court that has made a confiscation order against a defendant to take account of that order before it imposes a fine or makes a specified financial order against the defendant. The specified financial orders are set out in section 13(3) and expressly exclude a compensation order made under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (that is, an order requiring the offender to pay compensation to the victim of the crime) and an unlawful profits order under section 4 of the Prevention of Social Housing Fraud Act 2013 (that is, an order requiring the offender to pay the landlord an amount representing the profit made by the offender as a result of the conduct that constituted the offence of unlawful sub-letting under section 1 or 2 of that Act).

42. Section 13(5) and (6) of POCA provide that where a defendant has either or both of a compensation order and an unlawful profit order made against him or her, in addition to a confiscation order, and the court believes the defendant will not have sufficient means to satisfy all the orders in full, the court must direct that the compensation and/or amount payable under the unlawful profit order (or both) be paid out of any sums recovered under the confiscation order, with the amount paid being the amount the court believes will not be recoverable because of the insufficiency of the defendant's means. The intention of these provisions is to ensure that, should the defendant have insufficient means to satisfy all the orders against him or her in full, any amounts owed to the victims of crime will take priority over the amounts owed to the government.

43. Section 161A of the Criminal Justice Act 2003 places an obligation on the court sentencing a defendant to order that defendant to pay a surcharge (“the victim surcharge”). The monies raised by this surcharge are used to fund victim services through the Victim and Witness General Fund. Section 161A(3) provides that where a court dealing with an offender considers it to be appropriate to make a compensation order or an unlawful profit order (or both), but is of the view that the defendant has insufficient means to pay both the victim surcharge and the amounts due under such orders, the court must reduce the surcharge accordingly (if necessary to nil). As with section 13(5) and (6) of POCA, the intention is that any amounts owed to the victims of crime will take priority over the amounts owed to the government – even if the money owed to the government is used to support victim services.

44. Whilst section 13(5) and (6) of POCA ensures that compensation orders and unlawful profit orders take priority over a confiscation order when the court believes the defendant will not have sufficient means to satisfy all the orders in full, the confiscation order still currently takes priority over any amounts ordered to be paid as a victim surcharge. The amendments made to section 13 of POCA provide that the victim surcharge is to be treated in the same way as compensation orders and unlawful profit orders, and is therefore to take priority over a confiscation order when the court believes the defendant will not have sufficient means to satisfy all the orders in full. *Subsections (2) to (4)* achieve this by introducing into section 13 the concept of a “priority order” and defining this term so as to include either a compensation order, or the victim surcharge or an unlawful profits order.

**Clause 7: Orders for securing compliance with confiscation order**

45. This clause inserts new sections 13A and 13B into POCA. Section 41(7) of POCA confers on the Crown Court, when making a restraint order, the power to make such order as it believes appropriate for the purposes of ensuring that a restraint order is effective. Such a power has been used to, amongst other things, impose an overseas travel ban on the person subject to a restraint order. New section 13A confers a similar power on the Crown Court to make a “compliance order” when making a confiscation order. The Court is at liberty to impose any restrictions, prohibitions or requirements as part of a compliance order provided they are considered appropriate for the purpose of securing that the confiscation order is effective, but it must consider whether to impose a ban on the defendant’s travel outside the UK (new section 13A(4)). If the court thinks that imposing a travel ban would help in ensuring that the confiscation order is effective then it might, for example, impose a requirement on the defendant to surrender his or her passport. Whilst the duty on the court to consider the imposition of a travel ban only applies to the defendant, it is open to the court to impose a prohibition or restriction on a third party when this is considered appropriate to make the confiscation order effective. Any person affected by a compliance order, that is the defendant or a third party, together with the prosecutor may apply to the court to vary or discharge a compliance order (new section 13A(5)).

46. New section 13B provides for a right of appeal to the Court of Appeal and subsequently to the Supreme Court, by the prosecutor against a decision by the Crown Court not to make a compliance order, or by the prosecutor or person affected by a compliance order

against the decision to make a compliance order (including the terms of such an order). These rights of appeal mirror those in sections 43 and 44 of POCA in respect of restraint orders.

**Clause 8: Variation or discharge**

47. This clause makes further provision for the discharge of confiscation orders. POCA provides for the writing off of confiscation orders in two circumstances. First, section 24 makes provision for an application to the Crown Court by a designated officer in a magistrates' court to have a confiscation order written off if the outstanding amount is under £1,000 and the outstanding amount is a consequence of exchange rate fluctuations or any other reason specified in an order made by the Secretary of State (this order-making power has not been exercised). Second, section 25 provides for an application to the Crown Court to have a confiscation order written off if the outstanding amount is less than £50.

48. *Subsection (2)* inserts new section 25A into POCA to enable the writing off of confiscation orders in a third set of circumstances, namely where the subject of the order has died. When the subject of an order has died, it is still possible to apply to the court to appoint an enforcement receiver under section 50 of POCA to enforce the order against the estate of the defendant. However, there may be cases where the estate has insufficient funds or where the cost of appointing a receiver exceeds the value of the assets that could potentially be recovered. New section 25A(2) enables the court to write off the confiscation order in such cases.

49. *Subsection (3)* provides for new section 25A of POCA to operate not only in relation to confiscation orders made under POCA but those made under the precursor confiscation regimes in the Drug Trafficking Act 1994 and the Criminal Justice Act 1998.

50. Section 23 of POCA enables the defendant or a receiver appointed under section 50 to apply to the Crown Court to vary the terms of a confiscation order where it can be shown that there are insufficient assets to satisfy the order. In the majority of cases no receiver is appointed, accordingly if the defendant dies there is no one who is eligible to apply to vary a confiscation order. *Subsection (1)* amends section 23 so as to add the prosecutor to the list of parties with the power to apply to the court to vary orders.

**Clause 9: Absconding defendants**

51. This clause amends sections 27 and 28 of POCA, which make provision for the making of confiscation orders where the defendant has absconded. Section 28 of POCA applies where a defendant absconds after proceedings for an offence or offences are started against that defendant, but before such proceedings are concluded. Section 27 applies where defendant absconds after he or she —

- is convicted of an offence or offences in proceedings before the Crown Court,
- is committed by a magistrates' court to the Crown Court for sentence in respect of an offence or offences under the provisions of the Powers of Criminal Court (Sentencing) Act 2000 ("the 2000 Act"), or

- is committed to the Crown Court in respect of an offence or offences under section 70 of POCA (which provides for an offender to be committed to the Crown Court for confiscation proceedings following a conviction of an offence in the magistrates' court).

52. These provisions do not, however, cover the situation where a defendant absconds shortly before the conclusion of their trial. In such circumstances it may be possible to complete the trial notwithstanding the absence of the defendant, provided that the defendant's counsel's instructions were sufficient to see the trial through to its conclusion. If the defendant was convicted in his or her absence in such a case, it would not be possible to make a confiscation order against that defendant under section 27. Section 27(2)(a) currently makes it clear that section 27 applies where the defendant absconds after being convicted of an offence, but in this scenario the defendant would have absconded prior to conviction. Nor would section 28 apply as section 28(2)(a) specifies that one of the necessary conditions for that section to apply is that "proceedings for an offence or offences are started against a defendant but are not concluded".

53. *Subsection (1)* substitutes a new subsection (2) of section 27 of POCA so as to provide that a confiscation order may be made against a person who absconds before the conclusion of his or her trial and is subsequently convicted in his or her absence. The new section 27(2) preserves the other circumstances in which a confiscation order may currently be made against a person who absconds post conviction.

54. *Subsection (2)* substitutes a new subsection (6) of section 27 for the existing subsections (6) and (7). New subsection (6) adapts the operation of sections 19 to 21 in relation to a recaptured absconder. Those sections provide for the reconsideration of a decision by a court not to make a confiscation order or, where an order has been made, for the amount payable under the order to be increased. The principle underlying these sections is that the earlier decision of the court should only be open to reconsideration where new evidence comes to light (see sections 19(1)(a), 20(4)(a) and 21(1)(b)). The effect of new subsection (6)(a), (b) and (c) is to make sections 19, 20 and 21 respectively apply, in the case of a recaptured absconder, without the requirement for new evidence.

55. *Subsection (3)* amends section 28 of POCA which deals with absconders who abscond prior to conviction. Section 28(2)(c) provides that the prosecutor must wait for a period of two years from the date that the court believes that the defendant has absconded before they can apply for a confiscation order against that defendant. The original intention of this provision was to provide a reasonable opportunity for the defendant to be found or reappear before a confiscation order could be made against him or her. The amendment reduces the period of time in section 28(2)(c) from two years to three months.

56. *Subsection (4)* substitutes a new subsection (6) of section 28 of POCA so as to further modify the application of section 21 of that Act where a recaptured absconder is dealt with

under section 28. The modification of section 21 is along similar lines to that made by subsection (2)(c) of the clause.

**Clause 10: Default sentences**

57. This clause gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “substantially strengthening the prison sentences for failing to pay confiscation orders so as to prevent offenders choosing to serve prison sentences rather than pay confiscation orders”.

58. *Subsection (1)* amends section 35 of POCA, which enables the Crown Court to set a default sentence for the defendant to serve if he or she fails to pay the amount due under the confiscation order. Section 35 of POCA achieves this outcome by treating an unpaid confiscation order as if it were an unpaid fine thereby attracting the fine enforcement provisions in the 2000 Act and Part 3 of the Magistrates’ Courts Act 1980. The 2000 Act makes provision for the court to fix a term of imprisonment (or detention where the defendant is under 18) for an individual if any sum for which he or she is liable to pay as a fine is not duly paid (a “default sentence”). The maximum default term applicable to a particular confiscation order is determined by a sliding scale based on the amount of the outstanding sum payable, varying from seven days imprisonment for an amount not exceeding £200 to ten years’ imprisonment for an amount exceeding £1 million (as set out in section 139(4) of the 2000 Act). Unlike a fine, serving a default sentence for failure to pay a confiscation order does not relieve the defendant of the obligation to pay the full amount due under the order, plus any interest that has accrued on that amount.

**Default sentences: sliding scale under section 139(4) of the 2000 Act**

An amount not exceeding £200	7 days
An amount exceeding £200 but not exceeding £500	14 days
An amount exceeding £500 but not exceeding £1,000	28 days
An amount exceeding £1,000 but not exceeding £2,500	45 days
An amount exceeding £2,500 but not exceeding £5,000	3 months
An amount exceeding £5,000 but not exceeding £10,000	6 months
An amount exceeding £10,000 but not exceeding £20,000	12 months
An amount exceeding £20,000 but not exceeding £50,000	18 months
An amount exceeding £50,000 but not exceeding £100,000	2 years
An amount exceeding £100,000 but not exceeding £250,000	3 years
An amount exceeding £250,000 but not exceeding £1 million	5 years
An amount exceeding £1 million	10 years

59. Subsection (1) amends section 35 of POCA so as to disapply section 139(4) of the 2000 Act insofar as it relates to confiscation orders and to insert a new subsection (2A) containing a bespoke sliding scale of default sentences applicable to such orders. In providing for a new sliding scale of default sentences, new section 35(2A) makes two substantive changes to the sliding scale provided for in section 139(4) of the 2000 Act.

60. The first change is to simplify the sliding scale, replacing the existing 12 tiers as provided for in section 139(4) of the 2000 Act with four tiers.

61. The second change is to increase the maximum period of imprisonment for defaulting on a confiscation order for an amount exceeding £500,000 but not more than £1 million from five to seven years and for an amount exceeding £1 million from ten to 14 years.

62. New section 35(2C) confers power on the Secretary of State, by order, to amend the table in new section 35(2A) so as to provide for both minimum and maximum terms of



imprisonment, to vary any minimum sentences so introduced, to vary the maximum sentences and to modify the tiers, for example by introducing additional tiers. By virtue of the amendments made to section 459 of POCA by *subsection (2)* this order-making power is subject to the affirmative procedure.

63. *Subsection (3)* inserts new subsections (2B) and (2C) into section 258 of the Criminal Justice Act 2003, which governs the release of persons serving a default sentence under POCA. By virtue of section 258(2) of the Criminal Justice Act 2003 persons serving a default sentence are automatically eligible for release at the half way point of the default sentence. New subsection (2B) of section 258 of the Criminal Justice Act 2003 disapplies subsection (2) of that section where the default sentence relates to the non-payment of a confiscation order of more than £10 million. In such cases, therefore, the person would be required to serve the full default sentence until such time as the confiscation order is discharged on full payment. New subsection (2C) of section 258 of the Criminal Justice Act 2003 confers a power to vary the £10 million figure by order. By virtue of the amendments made to section 330 of the Criminal Justice Act 2003 by *subsection (4)*, this order-making power is subject to the affirmative procedure.

64. As a result of the changes made by this clause, the maximum custodial period that may be served by an offender who defaults on payment of a confiscation order over £10 million will increase from five years (that is, half of the current maximum 10 year sentence) to 14 years.

#### **Clause 11: Conditions for exercise of restraint order powers**

65. This clause amends sections 40 and 41 of POCA, which set out the circumstances under which a restraint order may be made by the Crown Court. A restraint order has the effect of freezing property that may be liable to confiscation following the trial and the making of a confiscation order; breach of a restraint order constitutes a contempt of court. The clause gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “enabling assets to be frozen more quickly and earlier in investigations”.

66. Section 40 of POCA sets out a number of alternative conditions for making a restraint order. The intention is that a restraint order should be available at any time after a criminal investigation has started to minimise the risk of the accused being able to dissipate his or her assets beyond the reach of law enforcement agencies. Section 40(2) of POCA sets out the test in the first condition in the following terms –

- (a) a criminal investigation has been started in England and Wales with regard to an offence, and
- (b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.

The phrase “reasonable cause to believe” in this context is taken to mean that the court thinks that, on the available evidence, it is more likely than not that the defendant has benefited from criminal conduct. This contrasts with the test for the arrest of a person, namely that there is

“reasonable grounds for suspecting” that the person is guilty of an offence that had been or is being committed (see section 24 of the Police and Criminal Evidence Act 1984). The term “suspicion” denotes a degree of satisfaction, not amounting to belief, but at least extending beyond speculation. A test based on suspicion can therefore be more easily satisfied than one based on belief. *Subsection (1)* accordingly amends section 40(2) of POCA so that it provides that a Crown Court may make a restraint order where -

- (a) a criminal investigation has been started in England and Wales with regard to an offence, and
- (b) there *are reasonable grounds to suspect* that the alleged offender has benefited from his criminal conduct.

An advantage of aligning the test for making an arrest and that for the making of a restraint order is that it would be open to the relevant law enforcement agency to apply to the Crown Court for the making of a restraint order and for this to be served in parallel with affecting the arrest of the defendant.

67. *Subsection (2)* inserts new subsections (7A) to (7C) in section 41 of POCA which enable the court to monitor progress with the investigation and, if a decision to charge is not made within a reasonable time, the court may then discharge the restraint order. This safeguard ensures that a defendant does not have his or her assets frozen indefinitely where it becomes evident to the court that insufficient progress is being made with the criminal investigation. What constitutes a “reasonable time” is a matter for the court to determine on the facts of the case. Under section 41, as amended, the court must impose a reporting requirement at the time of making the restraint order (new subsections (7A) and (7B)(a)) unless the court decides not to do so and gives reasons for that decision (new subsection (7C)(a)). The court may decide not to impose a reporting requirement where, for example, the law enforcement agency has informed the court that the suspect is to be arrested and charged within a short period. If a reporting requirement is imposed, the court may, on its own motion, discharge the restraint order (new subsection (7B)(b)). If a reporting requirement has not been imposed, the court may, on its own motion, subsequently impose one (new subsection (7C)(b)) and in such a case the court may, again on its own motion, discharge the restraint order (new subsection (7B)(b)).

#### **Clause 12: Continuation of restraint order after quashed conviction**

68. This clause inserts new subsections (6A) and (6B) into section 42 of POCA to provide for the continuation of a restraint order following the quashing of a conviction but before the start of proceedings for a retrial, so that the defendant is not afforded the opportunity to dissipate any assets that are subject to the restraint order during this interregnum.

69. Section 40 of POCA sets out the conditions that must be satisfied for the Crown Court to make a restraint order. The second condition for making a restraint order (section 40(3) of POCA) is that –

- (a) proceedings for an offence have been started in England and Wales and not concluded, and
- (b) there is reasonable cause to believe that the defendant has benefited from his criminal conduct.

The court is required to discharge any restraint order made in pursuance of this condition at the conclusion of the proceedings (section 42(6) of POCA). Where a person is convicted of an offence and the conviction is subsequently quashed on appeal, the proceedings are deemed to have concluded at the point at which the conviction is quashed (section 85(4) of POCA). These provisions when taken together require any restraint order to be discharged once the conviction has been quashed, irrespective of whether the prosecution intends to re-try the defendant for the offence(s) in question. The prosecution will not be able to apply for a fresh restraint order until the proceedings for the retrial have been commenced.

70. New section 42(6A) of POCA switches off the duty to discharge a restraint order and instead provides for an existing restraint order to continue in force where a conviction has been quashed and either the Court of Appeal has ordered a retrial or the prosecution has applied to the court for the case to be retried. New section 42(6B) provides for the subsequent discharge of such a restraint order if any of three scenarios apply:

- The Court of Appeal refuses to make an order for a retrial following an application by the prosecution;
- The Court of Appeal has made an order for a retrial but there is an undue delay in starting proceedings (under section 8(1) of the Criminal Appeals Act 1968 the proceedings must usually be started within two months, although the Court of Appeal may extend this period); or
- The proceedings for the retrial of the defendant have concluded either as a result of those proceedings being discontinued or as a result of the conviction or acquittal of the defendant following the retrial. Where the retrial results in a conviction, the restraint order can be replaced by a confiscation order.

**Clause 13: Search and seizure powers: “appropriate approval”**

71. Sections 47A to 47S of POCA (as inserted by section 55 of the Policing and Crime Act 2009) provide for search and seizure powers in England and Wales to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. The property may be seized in anticipation of a confiscation order being made. The seizure power is subject to judicial oversight. If a confiscation order is made, the property may be sold in order to satisfy the order. These sections are not yet in force. Section 47A sets out who may exercise the powers. These are an officer of Revenue and Customs, a constable and an accredited financial investigator. The seizure powers (in section 47C) and the search powers (in sections 47D to 47F) may only be exercised with the ‘appropriate approval’ described in section 47G unless, in the circumstances, it is not practicable to obtain such approval in advance. Sections 47G to 47I make provision in relation to this appropriate approval.

Appropriate approval is the prior approval of a justice of the peace or, if that is not practicable, that of a senior officer, as defined in new section 47G(3). NCA officers designated with the powers of a constable, in accordance with the provisions in Schedule 5 to the Crime and Courts Act 2013, may exercise the powers in sections 47A to 47S of POCA.

72. This clause amends section 47G(3) to provide for the Director General of the NCA, or any other NCA officer authorised by the Director General, to confer the appropriate approval where the search or seizure powers are exercised by a designated NCA officer and it is not practicable to get prior approval from a justice of the peace.

#### **Clause 14: Seized money etc**

73. This clause primarily amends section 67 of POCA, which provides magistrates' courts with a power to order any realisable property in the form of money in a bank or building society account to be paid to the designated officer of the court in satisfaction of a confiscation order. The clause gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by providing for the "rapid confiscation of cash held in bank accounts".

74. *Subsections (1) and (2)* inserts new subsections (5) and (5A) into section 67 of POCA in substitution for the existing subsections (4) and (5). New section 67(5) has the effect of narrowing the conditions that must be satisfied before money may be seized from a bank account under section 67. There are currently four such conditions:

- a) a restraint order has effect in relation to money to which section 67 of POCA applies;
- b) a confiscation order is made against the person by whom the money is held;
- c) an enforcement receiver has not been appointed under section 50 of POCA in relation to the money;
- d) any period allowed under section 11 for payment of the amount ordered to be paid under the confiscation order has ended (see clause 5 above).

The new section 67(5) replicates the second and third of these conditions only. The first and fourth conditions are considered unnecessary. New section 67(5A) codifies the current practice whereby the authority making an application to a magistrates' court for a seizure order under section 67 of POCA serves notice of the application on the bank or building society that holds the funds to which the application relates.

75. *Subsection (4)* makes a similar amendment to section 67A of POCA. That section provides that personal property (for example, a car or jewellery) that has been seized by an appropriate officer (for example, a constable or NCA officer) under a relevant seizure power (namely the seizure powers in POCA or PACE), or which has been produced to such an officer in compliance with a production order under section 345 of POCA, may be sold, on the authority of an order made by a magistrates' court, to meet a confiscation order in certain circumstances. Those circumstances currently mirror conditions (b) to (d) set out in the

paragraph above. New section 67A(3) omits the last of these conditions. Section 67A is not yet in force.

76. *Subsection (3)* inserts new subsections (7A) and (7B) into section 67 which confer a power on the Secretary of State to amend, by order, section 67 so as to apply the money seizure power to money held by other financial institutions or other realisable cash or cash-like instruments or products, for example share accounts, pension accounts or “bitcoins”. As section 67 currently only applies to money, any extension of the power in this section to cover a financial instrument or product may need to modify the section to provide for the instrument or product to be realised into cash; new subsection (7B) enables an order to be made to this end. By virtue of the amendment made to section 459 of POCA by *subsection (5)*, this order-making power is subject to the affirmative procedure.

## **Chapter 2: Scotland**

### **Confiscation**

#### **Clause 15: Enforcement of confiscation orders**

77. Section 118 of POCA makes similar provision for Scotland in relation to default sentences as section 35 does for England and Wales. Section 118 enables a court (the High Court of Justiciary or the sheriff) to set a default sentence for the accused to serve if he or she fails to pay the amount due under the confiscation order. It achieves this outcome by treating an unpaid confiscation order as if it were an unpaid fine and applying the fine enforcement provisions in section 221 of the Criminal Procedure (Scotland) Act 1995. Section 221(3) of that Act makes a fine unenforceable once a default sentence has been served. This provision does not apply when an administrator is appointed in relation to a confiscation. Consequently, where a person serves a default sentence following his or her failure to pay the amount due under a confiscation order the offender’s liability to pay this amount is extinguished; this contrasts with the position in England and Wales. *Paragraph (a)* of the clause amends section 118(2)(h) of POCA so as to disapply section 221(3) of the Criminal Procedure (Scotland) Act 1995, as a result an offender will be required to pay the amount due under a confiscation order if he or she defaults on payment and serves a default sentence. *Paragraph (b)* of the clause amends section 118(2)(k) of POCA so as to modify the application of section 224 of the Criminal Procedure (Scotland) Act 1995. That section requires warrants of imprisonment for non-payment of a fine to specify a date for the discharge of the liability to pay the fine (in practice once the default sentence has been served) notwithstanding the fact that it has not been paid. That requirement will no longer operate where an administrator is appointed in relation to the confiscation order in respect of which the default sentence was served.

#### **Clause 16: Conditions for exercise of restraint order powers**

78. This clause makes parallel amendments to sections 119 and 120 of POCA, which set out the circumstances under which a restraint order may be made in Scotland, to those made

by clause 11 to sections 40 and 41 of POCA, which set out the circumstances under which a restraint order may be made in England and Wales.

## **Civil recovery**

### **Clauses 18 and 21: Offences relating to prohibitory property orders and offences relating to interim administration orders**

79. Part 5 of POCA makes provision for the recovery, through proceedings in the civil courts, of assets (property and cash) that has been obtained through unlawful conduct or, in relation to cash, that is intended to be used in unlawful conduct. Where an enforcement authority in Scotland (namely the Crown Office Civil Recovery Unit acting on behalf of the Scottish Ministers) undertakes civil proceedings under Part 5, it can apply to the Court of Session for a prohibitory property order (“PPO”) under section 255A of POCA. A PPO is an order that specifies or describes property to which it applies, and subject to any exclusions, prohibits any person to whose property the order applies from dealing with the property in any way. The effect of a PPO is to prevent a person from dissipating identified assets during the course of a civil investigation.

80. An enforcement authority in Scotland in undertaking civil proceedings under Part 5 may also apply to the Court of Session for an interim administration order (“IAO”) under section 256 of POCA. An IAO is used for the detention, custody or preservation of property, and the appointment of an interim administrator.

81. A breach of either a PPO or an IAO is dealt with through contempt of court proceedings, punishable by the Court of Session by a term of imprisonment of up to two years or an unlimited fine, or both. Clauses 18(2) and 21(2), which insert new sections 255G and 265A into POCA, make breach of a PPO or an IAO without reasonable excuse a criminal offence punishable by a term of imprisonment of up to five years or an unlimited fine, or both. An offence under new section 255G will be committed by a person if they are specified in the order and they fail to comply with a PPO which applies to their property or property which they hold. An offence under new section 265A will be committed by a person who is specified in an IAO, owns or holds property to which an IAO applies and deals with that property in a way that would prevent the detention, custody or preservation of that property.

82. The equivalent of a PPO and an IAO in England and Wales are property freezing orders (as provided by sections 245A to 245G of POCA) and an interim receiving order (as provided by sections 246 to 247 of POCA) respectively. Breach of a property freezing order and interim receiving order will continue to be dealt with by contempt of court proceedings.

### **Clauses 17 and 20: Notification of making etc. of prohibitory property orders and notification of making etc of interim administration orders**

83. Given that a specified person will commit a criminal offence for breach of a PPO or an IAO (as provided for in clauses 18 and 21), it is necessary to ensure that they are aware that such an order has been made. This is important as an application may be made for a PPO or

an IAO without having to give notice to affected persons. These clauses therefore insert new sections 255BA and 260A into POCA which place a duty on the enforcement authority (namely the Crown Office Civil Recovery Unit acting on behalf of the Scottish Ministers) to serve a copy of the PPO or IAO, as the case may be, on any person specified in the order as being the holder of property to which either order applies. A copy of the order must also be served on any person who is not the holder of such property but who has an interest in the property (for example, a bank where the property is security for a loan). The duty applies where an order is made, varied or recalled (that is, revoked). The procedure for service of an order will be specified in rules of court.

**Clause 19: Prohibitory property orders: PPO receivers**

84. This clause amends POCA to provide, in relation to Scotland, for a new type of management receiver (a “PPO receiver”) in civil recovery proceedings whose only function will be to manage property subject to a PPO. This is distinct from the role of an interim administrator (provided for in sections 256 to 265 of POCA) who has the additional roles of carrying out an investigation of the property which he or she manages and reporting findings to the enforcement authority and the court. The new PPO receiver will have no investigation function and so will have no influence on the progress or final outcome of the case. Accordingly, the role does not need to be independent and therefore can be performed by a member of staff of the enforcement authority that is pursuing the civil recovery case. The provisions in new sections 255H to 255J of POCA, inserted by *subsection (2)*, which provide for PPO receivers broadly mirror those in sections 245E to 245G of POCA (inserted by section 83 of the Serious Crime Act 2007) which make provisions for management receivers in respect of property freezing orders in England and Wales and Northern Ireland.

85. New section 255H of POCA confers on the Court of Session a discretionary power, exercisable on application by the enforcement authority (namely the Crown Office on behalf of the Scottish Ministers), to appoint a PPO receiver in respect of any property to which a PPO applies. Whilst the enforcement authority will generally give notice of an application, new section 255H(3) enables it to make an application without having to give notice in certain circumstances. Such a notice is called an *ex parte* application. An *ex parte* application may be appropriate where management powers are to be sought from the outset of the investigation, where the initial application for the PPO can be heard *ex parte* in chambers to avoid alerting potential parties who might then seek to conceal or dispose of the relevant property. The enforcement authority must nominate, in its application, a suitably qualified person for appointment as a PPO receiver (new section 255H(4)).

86. New section 255I provides for the powers of PPO receivers. Such powers will be determined by the court on a case by case basis, but will generally be any of the powers in paragraph 5 of Schedule 6 to POCA, namely:

- “(1) Power to manage any property to which the order applies.
- (2) Managing property includes—

- (a) selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes,
- (b) where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business,
- (c) incurring capital expenditure in respect of the property.”

In addition, the Court of Session has the discretionary power to authorise or require a PPO receiver to take whatever other steps the court considers to be appropriate in connection with the management of the property (new section 255I(2)(b)).

87. New section 255J confers on the Court of Sessions a discretionary power to give directions as to the exercise of the functions of a PPO receiver (new section 255J(1)) having heard any representations by the persons set out in new section 255J(2). The Court of Session may also vary or recall (that is revoke) any order or directions made under new sections 255H to 255J after again having heard any representations by the persons set out in new section 255J(4).

88. *Subsection (3)* inserts new section 282CA into POCA which makes analogous provision for PPO receivers to that contained in section 282C of that Act. Section 282C of POCA (inserted by paragraph 6 of Schedule 18 to the Crime and Courts Act 2013) makes provision for the enforcement of property freezing orders, interim receiving orders and interim administration orders which have effect in relation to property overseas. In particular, section 282C provides that, where a property freezing order made by the High Court of England and Wales or of Northern Ireland has effect in relation to property, the appointed management receiver may send a request to the Secretary of State for assistance abroad if he or she believes that the property is in a country outside the UK.

### **Chapter 3: Northern Ireland**

#### **Clauses 22 to 25: Confiscation: assets held by defendant and other**

89. Clauses 22 to 25 amend the provisions in Part 4 of POCA in respect of third party interests in assets that may be realised to discharge a confiscation order. These clauses make parallel amendments to Part 4 to those made to Part 2 of POCA by clauses 1 to 4 of the Bill.

#### **Clause 26: Time for payment**

90. Section 161 of POCA makes similar provision in relation to the time allowed to pay the amount due under a confiscation order in Northern Ireland to that contained in section 11 in relation to England and Wales. This clause makes parallel amendments to section 11 of POCA to those made to section 11 by clause 5 of the Bill.

#### **Clause 27: Orders for securing compliance with confiscation order**

91. This clause inserts new sections 163A and 163B into Part 4 of POCA which make parallel provision in respect of Northern Ireland for the making of “compliance orders” by the



courts for securing compliance with confiscation orders to that contained in new sections 13A and 13B, as inserted by clause 7, in relation to England and Wales.

**Clause 28: Variation and discharge**

92. This clause makes parallel provision in relation to Northern Ireland for the discharge of confiscation orders where the defendant has died to that contained in clause 8 in respect of England and Wales.

**Clause 29: Absconding defendants**

93. This clause amends sections 177 and 178 of POCA which make similar provision for Northern Ireland in respect of the making of confiscation orders where the defendant has absconded to that contained in sections 27 and 28 of POCA in relation to England and Wales. The amendments to section 177 and 178 mirror those made to sections 27 and 28 by clause 9 of the Bill.

**Clause 30: Default sentences**

94. This clause makes a parallel amendment to section 185 of POCA in relation to default sentences where a defendant fails to pay the amount due under a confiscation order to that made to the England and Wales provision in section 35 of POCA by clause 10.

**Clause 31: Conditions for exercise of restraint order powers**

95. This clause amends sections 189 and 190 of POCA which make similar provision for Northern Ireland in respect of the conditions for making restraint orders to that contained in sections 40 and 41 of POCA in relation to England and Wales. The amendments to section 189 and 190 mirror those made to sections 40 and 41 by clause 11 of the Bill.

**Clause 32: Continuation of restraint order after quashed conviction**

96. This clause makes a similar amendment to section 191 of POCA to that made to section 42 of the Act by clause 12 to provide for the continuation of a restraint order following the quashing of a conviction until the start of proceedings for a retrial.

**Clause 33: Seized money**

97. This clause makes parallel amendments to sections 215 and 215A of POCA to those made to sections 67 and 67A of the Act by clause 14 in respect of magistrates' courts powers to order any realisable property in the form of money in a bank or building society account to be paid to the designated officer of the court in satisfaction of a confiscation order.

**Chapter 4: Investigations and co-operation etc**

**Clause 34: Confiscation investigations**

98. This clause broadens the definition of a "confiscation investigation" for the purposes of Part 8 of POCA to include investigations after a confiscation order has been made into the extent and whereabouts of property that might be realised to satisfy the order. The clause gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen

POCA by “extending the investigative powers in POCA so that they are available to trace assets once the confiscation order is made (at the moment those powers fall away once the order is made)”.

99. Part 8 of POCA makes provision in relation to investigations under that Act. Section 341 of POCA sets out five different types of investigations in relation to which Part 8 powers might be available. One such type of investigation is a confiscation investigation, which is defined in section 341(1) of POCA as an investigation into:

- a) whether a person has benefitted from his criminal conduct, or
- b) the extent or whereabouts of his benefit from his criminal conduct.

A confiscation investigation enables an appropriate officer, as defined in section 378(1) of POCA (for example, an NCA officer or a constable), to apply to the court for various orders to help achieve the goals of the investigation. These include a production order, an order to grant entry, a search and seizure warrant, a disclosure order, a customer information order and an account monitoring order.

100. In case of *R (Horne & Ors)* [2012] EWHC 1350 (Admin), the court explored the extent of such powers. It confirmed that in principle the powers could still be exercised after a confiscation order has been made – there is nothing in POCA restricting an investigation into the whereabouts of a person's benefit in the period up to the making of the confiscation order. The court also confirmed however, that the investigative powers available after a confiscation order has been made may only be deployed for the purposes of identifying the amount and whereabouts of benefit and not for the purpose of assisting in the satisfaction of a confiscation order once benefit has been identified and calculated.

101. The absence of investigatory powers for the purpose of assisting in the satisfaction of a confiscation order adversely impacts on law enforcement agencies' ability to enforce a confiscation order. Where the defendant has assets that are beyond the reach of the enforcement powers at the time the order is made, for example where they are in another jurisdiction, law enforcement agencies are currently unable to use any of the investigative powers in Part 8 after the confiscation order is made to determine whether any of the assets may subsequently have come within a UK jurisdiction.

102. *Subsection (1)* broadens the definition of “confiscation investigation” in section 341 of POCA so that the investigative powers under Part 8 are exercisable after a confiscation order has been made for the purposes of identifying the extent and whereabouts of realisable property available to help satisfy the order.

103. *Subsection (2) and (3)* makes consequential amendments to sections 353 (which applies to England, Wales and Northern Ireland) and 388 (which applies to Scotland) of POCA. These sections sets out conditions for issuing a search and seizure warrant, including warrants issued as part of a confiscation investigation, in the absence of a production order.

On occasions a production order will not be a suitable tool and so an application for a search and seizure warrant is made instead. This may occur, for example, where the person controlling the required material may be uncontactable or the investigation would be seriously prejudiced if access to the material was not obtained immediately. An individual served with a production order is generally given seven days to provide the requested material.

**Clause 35: External orders and investigations: meaning of “obtaining property”**

104. This clause amends section 447 of POCA which is the interpretation section for Part 11 of the Act; Part 11 of POCA makes provision for co-operation between jurisdictions in relation to freezing and confiscating the proceeds of crime.

105. Part 11 of POCA enables, among other things, requests and orders made by courts in other jurisdictions to be given effect in the United Kingdom. One such type of order is an “external order”, defined in section 447(2) as –

“an order which -

- a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and
- b) is for the recovery of specified property or a specified sum of money.”

106. In limiting the scope of an external order to the recovery of specified property or a specified sum of money, Part 11 as enacted reflected the scope of the then international agreements under which orders could be sent from a foreign court were similarly limited. For example, Article 5(1)(a) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 requires State parties to ‘adopt such measures as may be necessary to enable confiscation of...proceeds derived from [specified] offences ... or property the value of which corresponds to that of such proceeds’.

107. Domestic law, by contrast, recognises that the proceeds of crime can include not just specified money or property, but also a pecuniary advantage, such as not paying tax that is lawfully due. For example, in the context of confiscation orders made under Part 2 of POCA, section 76(5) of POCA provides that, for the purpose of determining a person’s criminal benefit, a person who obtains a pecuniary advantage as a result of or in connection with criminal conduct, is to be taken as obtaining a sum of money equal to the value of the pecuniary advantage.

108. In recent years, the international law relating to the confiscation of the proceeds of crime has adopted a broader approach to what such proceeds might be. For example, the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism defines “proceeds” as any economic advantage, derived from or obtained, directly or indirectly, from criminal offences.

109. New subsection (6A) of section 447 of POCA provides that the value of any pecuniary advantage obtained as a result of criminal conduct is to be treated as if it were a sum of money

to the same value. The effect is to enable external orders to be used for the recovery of a pecuniary advantage obtained by criminal conduct in the same way as such orders can currently be used to recover property or sums of money. Part 11 also provides for “external investigations”, defined in section 447(3) as –

“an investigation by an overseas authority into –

- (a) whether property has been obtained as a result of or in connection with criminal conduct,
- (aa) the extent or whereabouts of property obtained as a result of or in connection with criminal conduct, or
- (b) whether a money laundering offence has been committed.”

New section 447(6A) will also bite on external investigations, accordingly such an investigation could be for the purpose of ascertaining whether any pecuniary advantage has been obtained from criminal conduct and, if so, the extent of such advantage.

### **Clause 36: Confiscation orders by magistrates’ courts**

110. Section 97(1) of SOCPA confers on the Secretary of State power by order (subject to the affirmative procedure) to make provision to allow magistrates’ courts to make confiscation orders under Part 2 of POCA. A similar power is conferred on the Northern Ireland Department of Justice in respect of Part 4 of POCA. Section 97(2) of SOCPA provides that the power for magistrates’ courts to make a confiscation order is subject to a restriction that the amount does not exceed £10,000. Confiscation orders above this amount could only be made in a Crown Court, as now. The intention behind this restriction is that magistrates’ courts should be empowered to make confiscation orders only in less serious cases. No order under section 97(1) of SOCPA has yet been made.

111. *Subsections (2) to (4)* amend section 97 of SOCPA so as to confer power on the Secretary of State and the Department of Justice in Northern Ireland to vary, by order, the £10,000 limit. By virtue of the amendment made to section 172 of SOCPA by *subsection (5)*, any such order is subject to the affirmative procedure.

## **PART 2: COMPUTER MISUSE**

### **SUMMARY AND BACKGROUND**

112. Sections 1 to 3A of the Computer Misuse Act 1990 (“the 1990 Act”) provides for a number of criminal offences to tackle cyber crime, as follows:

- Section 1 - unauthorised access to computer material or data (commonly known as “hacking”);
- Section 2 - unauthorised access with intent to commit or facilitate commission of further offences;

- Section 3 - unauthorised acts with intent to impair the operation of a computer (this offence includes circulating viruses, deleting files and inserting a “Trojan Horse” to steal data as well as effectively criminalising all forms of denial of service attacks in which the attacker denies the victim(s) access to a particular resource, typically by preventing legitimate users of a service accessing that service, for example by overloading an Internet Service Provider of a website with actions, such as emails);
- Section 3A - making, adapting, supplying or offering to supply an article (“hacker tools”) intending it to be used to commit, or to assist in the commission of, an offence under sections 1 or 3; supplying or offering to supply an article believing that it is likely to be used in this way; and obtaining an article with a view to its being supplied for use in this way.

Other provisions of the 1990 Act make limited provision for extra-territorial jurisdiction and a saving for certain law enforcement powers so that relevant conduct by law enforcement agencies does not fall within the section 1 offence.

113. The Government’s UK Cyber Security Strategy<sup>4</sup> included a commitment to “review existing legislation, for example the 1990 Act, to ensure that it remains relevant and effective”. Following that review, this Part introduces a new offence in respect of unauthorised acts in relation to computers causing serious damage.

114. On 12 August 2013, the European Parliament and European Council adopted Directive 2013/40/EU on attacks against information systems<sup>5</sup> (“the Directive”) and replacing Council Framework Decision 2005/222/JHA. The Bill makes two amendments to the 1990 Act to ensure that the UK law is fully compliant with the Directive. The Government announced that it intended to opt in to the Directive in an oral statement on 3 February 2011 (Official Report, House of Commons, columns 1051 to 1058).

## **COMMENTARY ON CLAUSES**

### **Clause 37: Unauthorised acts causing, or creating risk of, serious damage**

115. *Subsection (3)* inserts new section 3ZA into the 1990 Act which creates a new offence of impairing a computer such as to cause serious damage. The existing offence of impairing a computer under section 3 of the 1990 Act carries a maximum penalty of ten years’ imprisonment. This maximum penalty is not considered adequate by the Government in those cases where the impact of the action is to cause serious damage, for example to critical national infrastructure. The new offence addresses that gap in the criminal law.

---

<sup>4</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60961/uk-cyber-security-strategy-final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60961/uk-cyber-security-strategy-final.pdf)

<sup>5</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:218:0008:0014:EN:PDF>

116. New section 3ZA(1) sets out the elements of the offence. The *actus reus* (or conduct element) is that the accused undertakes an unauthorised act in relation to a computer (as in section 3(1)(a) of the 1990 Act) and that act causes, or creates a significant risk of causing, serious damage of a material kind. The *mens rea* (namely the mental elements of the offence) is that the accused, at the time of committing the act, knows that it is unauthorised (as in section 3(1)(b) of the 1990 Act) and intends the act to cause serious damage of a material kind or is reckless as to whether such damage is caused. An unauthorised act is defined in section 17(8) of the 1990 Act as an act where the person doing the act does not have responsibility for the computer in question, which would thereby entitle him or her to determine whether the act is undertaken, and does not have the consent of the person responsible for the computer to commit the act.

117. The term “material kind” is defined in new section 3ZA(2), read with new section 3ZA(3) to (5), as damage to human welfare, the environment, the economy or national security. The other terms used in the definition of a material kind take their normal everyday meaning. It would, in the normal way, be for the jury to determine whether, for example, there had been damage to national security and whether that damage was serious.

118. The offence will be triable on indictment only. By virtue of new section 3ZA(6) and (7) the maximum penalty is life imprisonment in respect of threat to life, loss of life or damage to national security. In respect of damage to the economy or environment, it will be 14 years’ imprisonment.

119. *Subsection (3)* amends section 3A of the 1990 Act. The amendment ensures that the offence provided for in section 3A also applies to the making etc of hacker tools intended to be used to commit the new section 3ZA offence.

**Clause 38: Obtaining articles for purposes relating to computer misuse**

120. Article 7 of the Directive requires Member States to criminalise certain activities in relation to the commission of the substantive offences at Articles 3 to 6 of the Directive (those Articles relate to illegal access to information systems, illegal system interference, illegal data interference and illegal interception). It provides as follows:

**“Tools used for committing offences**

Member States shall take the necessary measures to ensure that the intentional production, sale, procurement for use, import, distribution or otherwise making available, of one of the following tools, without right and with the intention that it be used to commit any of the offences referred to in Articles 3 to 6, is punishable as a criminal offence, at least for cases which are not minor:

- (a) a computer programme, designed or adapted primarily for the purpose of committing any of the offences referred to in Articles 3 to 6;
- (b) a computer password, access code, or similar data by which the whole or any part of an information system is capable of being accessed.”

121. Section 3A of the 1990 Act, in conjunction with sections 1 to 3 of that Act, meets the requirements of Article 7 save in one respect, namely the “procurement for use” of tools used for committing the Article 3 to 6 offences. Under the existing offence, the prosecution is required to show that the individual obtained the tool with a view to its being *supplied* for use to commit, or assist in the commission of an offence under section 1 or 3 of the Act. This clause extends subsection (3) of section 3A of the 1990 Act to include an offence of obtaining a tool for use to commit a Computer Misuse Act offence (including one under the new section 3ZA inserted by clause 37) *regardless* of an *intention to supply* that tool. As amended, that subsection would provide that (additions shown in italics):

“A person is guilty of an offence if he obtains any ~~article with a view to~~ *article –*

*(a) intending to use it to commit, or assist in the commission of, an offence under section 1, 3 or 3ZA, or*

*(b) with a view to its being supplied for use to commit, or assist in the commission of, an offence under section 1 or 3.”*

**Clause 39: Territorial scope of computer misuse offence**

122. Article 12 of Directive provides as follows:

**“Jurisdiction**

1. Member States shall establish their jurisdiction with regard to the offences referred to in Articles 3 to 8 where the offence has been committed:

(a) in whole or in part within their territory; or

(b) by one of their nationals, at least in cases where the act is an offence where it was committed.

2. When establishing jurisdiction in accordance with point (a) of paragraph 1, a Member State shall ensure that it has jurisdiction where:

(a) the offender commits the offence when physically present on its territory, whether or not the offence is against an information system on its territory; or

(b) the offence is against an information system on its territory, whether or not the offender commits the offence when physically present on its territory.....”

123. Sections 4 and 5 of the 1990 Act already provide for limited extra-territorial jurisdiction in relation to the offences in sections 1 and 3 of that Act. Under those provisions, it is possible to prosecute a person in this country for an act committed abroad which would constitute an offence under section 1 or 3 provided that there was a “significant link” to the appropriate jurisdiction in the UK. *Subsection (2)* amends section 4 of the 1990 Act to apply such extra-territorial jurisdiction to the offence in new section 3ZA inserted by clause 37; *subsection (5)* amends section 5 of the 1990 Act to define what constitutes a “significant link” in the context of the new offence. A significant link is established if the accused was in the

UK at the time of the offence, or if the affected computer or the intended affected computer was in the UK. Accordingly, it would, for example, be possible under the current law to prosecute a French national resident in England and Wales who hacked into a computer system in France or a UK national who hacked into a computer system in the UK whilst temporarily resident in France (but who subsequently returned to the UK). *Subsection (3)* inserts new subsection (4A) into section 4 of the 1990 Act, the effect of which is to apply extra-territorial jurisdiction to the offence under section 3A of the 1990 Act. *Subsection (4)* amends section 5 of the 1990 Act to extend the current extra-territorial jurisdiction in order to fully comply with Article 12; the effect of new section 5(1A) and (1B) is to permit prosecutions of a UK national for all offences under the 1990 Act even where the conduct concerned has no other significant link to the UK, provided also that the offence was an offence in the country where it took place.

124. *Subsections (6) and (7)* amend section 13 of the 1990 Act. Subsection (6) sets out the criteria for when a sheriff court in Scotland will have jurisdiction to try an offence under section 3A of the 1990 Act. A sheriff court will have jurisdiction if a person who commits an offence under section 3A is in the sheriffdom at the time they carry out any of the acts set out in section 13(2A)(a). If a person was not in the sheriffdom, new section 13(2A)(b) provides the sheriff court will have jurisdiction to try the offence if the computer in relation to which the offence was carried out was located in the sheriffdom at the time of the offence. Subsection (7) provides that where a person commits an offence under section 1, 3 or 3A of the 1990 Act outwith Scotland, he or she may be tried in any sheriff court district in which the person is apprehended or in custody, or in such sheriff court district as the Lord Advocate may direct, as if the offence had been committed there.

**Clause 40: Savings**

125. Section 10 of the 1990 Act contains a saving provision. It provides that the offence at section 1(1) of the 1990 Act has effect without prejudice to the operation in England and Wales of any enactment relating to powers of inspection, search or seizure; and in Scotland of any enactment or rule of law relating to powers of examination, search or seizure. The amendment to section 10 of the 1990 Act made by this clause is a clarifying amendment. It is designed to remove any ambiguity over the interaction between the lawful exercise of powers (wherever exercised) conferred under or by virtue of any enactment (and in Scotland, rule of law) and the offence provisions. “Enactment” is expressly defined to provide certainty as to what this term includes. The title of section 10 of the 1990 Act has also been changed to remove the reference to “certain law enforcement powers” (see paragraph 7 of Schedule 4). This is to avoid any ambiguity between the title and the substance of the section.



## **PART 3: ORGANISED, SERIOUS AND GANG-RELATED CRIME**

### **SUMMARY AND BACKGROUND**

#### **Organised crime groups**

126. In the Serious and Organised Crime Strategy, the Government undertook to bring forward proposals to “better tackle people who actively support, and benefit from, participating in organised crime, learning from legislation that is already being used elsewhere in the world<sup>6</sup>” (paragraph 4.60).

127. In 2006, the UK ratified the UN Convention against Transnational Organised Crime<sup>7</sup>. Article 5(1) of the Convention (criminalisation of participation in an organized criminal group) provides -

“(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organising, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.”

128. Article 5 of the Convention therefore provides for either a conspiracy offence or a participation offence, or both, to be implemented into domestic law. The elements of the offence specified in Article 5(1)(a)(i) are based on a conspiracy offence. The requirements of

---

<sup>6</sup> Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations Office on Drugs and Crime 2004) [http://www.unodc.org/pdf/crime/legislative\\_guides/02%20Legislative%20guide\\_TOC%20Convention.pdf](http://www.unodc.org/pdf/crime/legislative_guides/02%20Legislative%20guide_TOC%20Convention.pdf)

<sup>7</sup> <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

this offence include the intentional agreement with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to obtaining a financial or other material benefit. This requirement criminalises the mere agreement to commit serious crime for the purpose of obtaining a financial or other material benefit, irrespective of whether that agreement is acted upon. In England and Wales, section 1 of the Criminal Justice Act 1977 provides for the offence of conspiracy in the following terms –

“(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—  
(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or  
(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,  
he is guilty of conspiracy to commit the offence or offences in question.”

129. The elements of the offence specified in Article 5(1)(a)(ii) are based on active participation. This type of offence was initially considered more suitable for civil law jurisdictions whose laws do not recognise conspiracy or do not allow criminalisation of a mere agreement to commit a crime, but increasingly Governments are adopting a combined approach. For example, sections 71 and 72 of the Republic of Ireland’s Criminal Justice Act 2006<sup>8</sup> provide for an offence of conspiracy and of participation in a criminal organisation.

130. Serious organised crime is often carried out by groups of individuals working together to maximise the benefits they derive from their criminal activity. By acting in combination it allows individuals to obtain a greater benefit from their criminal conduct than they might do if working alone and outside an established criminal group. Working through an organised criminal group can also provide protection for those at the very top of such groups who can instruct or direct others to carry out activity on their behalf but who do not themselves carry out criminal acts and therefore prove difficult to prosecute.

131. The new participation offence in England and Wales is intended to provide a new means by which the NCA, the police and prosecutors can tackle serious organised crime. The new offence can be used to target not only those who head a criminal organisation and who plan, coordinate and manage, but do not always directly participate in the commission of the final criminal acts; but also the other members of the group and associates who participate in activities such as the provision of materials, services, infrastructure and information that contribute to the overall criminal capacity and capability of the organised crime group.

---

<sup>8</sup> <http://www.irishstatutebook.ie/2006/en/act/pub/0026/index.html>

## **Serious crime prevention orders**

132. Part 1 of the Serious Crime Act 2007 (“the 2007 Act”) makes provision for Serious Crime Prevention Orders (“SCPOs”). SCPOs are a form of civil order aimed at preventing serious crime. These orders are intended to be used against those involved in serious crime, with the terms attached to an order designed to protect the public by preventing, restricting or disrupting involvement in serious crime.

133. An SCPO may be made by the Crown Court where it is sentencing a person who has been convicted of a serious offence (including when sentencing a person convicted of such an offence in the magistrates’ court but committed to the Crown Court for sentencing). Orders may also be made by the High Court where it is satisfied that a person has been involved in serious crime, whether that involvement was in England, Wales, Northern Ireland or elsewhere, and where it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in England, Wales and Northern Ireland. A serious offence in England and Wales and Northern Ireland is one which is listed in Schedule 1 to the 2007 Act, or an offence which is sufficiently serious that the court considers it should be treated as it were part of the list. Clause 43 extends the list of trigger offences in Schedule 1 to the 2007 Act.

134. The 2007 Act allows for SCPOs to be made against individuals (aged 18 or over), bodies corporate, partnerships or unincorporated associations. SCPOs may contain such prohibitions, restrictions, or requirements or such other terms that the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting serious crime. Section 5 of the 2007 Act contains an illustrative list of the type of prohibitions, restrictions, or requirements that may be attached to an order. For example, these might relate to a person’s travel, financial dealings or the people with whom he or she is allowed to associate. Orders can last for up to five years. Breach of the order is a criminal offence, subject to a maximum sentence of five years’ imprisonment or an unlimited fine, or both.

135. Sections 6 to 15 of the 2007 Act contain a number of safeguards, including conferring rights on affected third parties to make representations during any proceedings and protection for information subject to legal professional privilege. By virtue of section 8 of the 2007 Act a SCPO may be made only on an application by the Director of Public Prosecutions (or Director of Public Prosecutions for Northern Ireland) or the Director of the Serious Fraud Office.

136. SCPOs were brought into force on 6 April 2008. As at 31st March 2013, 317 SCPOs have been granted by the Crown Court and one by the High Court<sup>9</sup>. There have been nine

---

<sup>9</sup> These figures represent those SCPOs known to the National Crime Agency and its predecessor the Serious Organised Crime Agency. Other SCPOs may have been granted which were not reported to the NCA or SOCA.

convictions for breach of an SCPO. Further details of the implementation of the SCPO are contained in a memorandum by the Home Office submitted to the Home Affairs Select Committee and Justice Select Committee in November 2012 in relation to the post-legislative scrutiny of the 2007 Act<sup>10</sup>.

137. The provisions in Part 1 of the 2007 Act broadly apply only to England and Wales and Northern Ireland, although the offence of breaching a SCPO is UK-wide<sup>11</sup>. The then Scottish Government decided to consider the effectiveness of SCPOs elsewhere in the UK before deciding whether these orders should be introduced in Scotland. In September 2013, the Scottish Government published a consultation on the extension of SCPOs to Scotland<sup>12</sup>. The Scottish Government published its response to the consultation on 4th April 2014<sup>13</sup>, and has indicated that it would ask the UK Government to bring forward the necessary amendments to the 2007 Act in order that there was a single UK-wide regime for SCPOs. Clause 42 and Schedule 1 make the necessary amendments to the 2007 Act to this end.

138. Chapter 3 of Part 2 (sections 76 to 81) of SOCPA makes provision for Financial Reporting Orders (“FROs”). FROs enable the court to require a person who has been convicted of certain offences (including, fraud, obtaining services dishonestly, conspiracy to defraud, false accounting, an offence specified as a “lifestyle offence” in Schedule 2 to POCA, an offence under the Bribery Act 2010, offences under the Drug Trafficking Act 1994, fund-raising for the purposes of terrorism and various tax evasion offences) to make reports to law enforcement agencies regarding their financial affairs, where the court is satisfied that the risk of the defendant (or accused in Scotland) committing another such offence is “sufficiently high” so as to justify the making of an order. In making an FRO, the court will specify: the duration of the order and the frequency of reports; what financial details and supporting documents should be in or accompany each report; and who the reports should be made to and the deadline for providing them. Failure to comply with the requirement of an order or, without reasonable excuse, making false or misleading statements is a summary offence subject to a maximum penalty of six months imprisonment in England and Wales and Northern Ireland and 12 months imprisonment in Scotland.

139. As at 31st March 2014, the NCA (and its predecessor, the Serious Organised Crime Agency) has obtained 119 FROs. This is substantially less than the original expectation of some 1,500 a year and a number of deficiencies have been identified. In particular, as breach of an order is only triable summarily this both limits the investigative powers available to law

---

<sup>10</sup> <http://www.official-documents.gov.uk/document/cm85/8502/8502.pdf>

<sup>11</sup> The Scottish Parliament adopted a legislative consent motion in relation to this aspect of the Bill on 8 March 2007 - <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16199.aspx>

<sup>12</sup> <http://www.scotland.gov.uk/Publications/2013/09/9917/downloads>

<sup>13</sup> <http://www.scotland.gov.uk/Resource/0044/00447665.pdf>

enforcement agencies under the Police and Criminal Evidence Act 1984 and places a six month time limit on mounting a prosecution for non-compliance (by virtue of the restriction imposed by section 127 of the Magistrates' Courts Act 1980). By consolidating the FRO within the SCPO, non-compliance would become an indictable offence and thereby overcome these drawbacks.

## **Gang injunctions**

140. Part 4 of the Policing and Crime Act 2009 ("the 2009 Act") makes provision for injunctions to prevent gang-related violence ("gang injunctions"). Gang injunctions are a preventative civil order that enable the police or a local authority to apply to a county court<sup>14</sup>, or the High Court, for an injunction against an individual to prevent gang-related violence. Gang injunctions allow courts to place a range of prohibitions and requirements (including supportive, positive requirements) on the behaviour and activities of a person (aged 14 or over) involved in gang-related violence. These conditions could include prohibiting someone from being in a particular place or requiring them to participate in rehabilitative activities.

141. The 25 out of 33 Ending Gang and Youth Violence priority areas<sup>15</sup> that returned data in response to a Home Office survey reported that, between January 2011 (when the provisions in Part 4 of the 2009 Act were brought into force) and January 2014, 108 gang injunctions had been put in place.

142. The Serious and Organised Crime Strategy pointed to the link between urban street gangs and organised crime. At paragraph 2.7, the Strategy stated that "there are connections between gangs and organised crime: urban gang members may engage in street drug dealing on behalf of organised criminals and some gangs aspire to and may become organised crime groups in their own right". A review of the operation of gang injunctions was published by the Home Office in January 2014<sup>16</sup>. Amongst other things, the review found that the definition of a gang used in Part 4 of the 2009 Act was seen by police officers to have some limitations for addressing local gang issues. In response to this finding, the Government undertook to consult interested parties to explore whether the definition of a gang within the legislation should be changed to reflect the evolving nature of street gang activity across the country and ensure that gang injunctions can be used to target the right individuals. Clause 47 makes resulting changes to Part 4 of the 2009 Act.

---

<sup>14</sup> Section 18 of the Crime and Courts Act 2013 provides for youth courts to have jurisdiction to grant gang injunctions in respect of persons under 18 years, that section is not yet in force.

<sup>15</sup> Barking and Dagenham, Birmingham, Bradford, Brent, Camden, Croydon, Derby, Ealing, Enfield, Greenwich, Hackney, Hammersmith and Fulham, Haringey, Islington, Knowsley, Lambeth, Leeds, Lewisham, Liverpool, Manchester, Merton, Newham, Nottingham, Oldham, Salford, Sandwell, Sheffield, Southwark, Tower Hamlets, Waltham Forest, Wandsworth, Westminster and Wolverhampton.

<sup>16</sup> <https://www.gov.uk/government/publications/review-of-the-operation-of-injunctions-to-prevent-gang-related-violence>

## COMMENTARY ON CLAUSES

### **Clause 41: Offence of participating in activities of organised crime group**

143. *Subsection (1)* provides for the offence of participating in activities of an organised criminal group.

144. The conduct (*actus reus*) and mental (*mens rea*) elements of the offence are set out in *subsection (2)*. The conduct element is satisfied if a person takes part in any activities which are criminal activities of an organised crime group, or will help an organised crime group to carry on criminal activities. The mental element of the offence is satisfied if it can be shown that the person knew or had reasonable cause to suspect that he or she was engaging in such activities. The term “criminal activities” is defined in *subsections (3) to (5)*. The definition is such as to capture participation in only serious criminal conduct which is determined as an offence attracting a sentence of imprisonment of at least seven years. The reference therein to obtaining “any gain or benefit” should be interpreted broadly so as to include crimes with tangible but non-monetary objectives, for example, when the predominant motivation is sexual gratification, such as the receipt of or trade in images of child sex abuse. An “organised crime group” is defined in *subsections (6) and (7)*. The offence will be triable on indictment only and subject to a maximum penalty of five years imprisonment (*subsection (9)*).

145. *Subsection (8)* provides for a defence where a person’s participation in the activities of an organised crime group was necessary for the purposes of the prevention or detection of crime. Such a defence would, in particular, be relevant to a police or NCA officer engaging in activities as part of an investigation into an organised crime group.

### **Clause 42 and Schedule 1: Extension of Part 1 of Serious Crime Act 2007 to Scotland**

146. Clause 42 gives effect to Schedule 1 which extend the provisions in respect of SCPOs contained in Part 1 of the 2007 Act to Scotland and, in so doing, make the necessary modifications to that Part to take account of Scots law.

147. *Paragraph 2* of Schedule 1 amends section 1 of the 2007 Act to provide that the Scottish civil courts, namely the Court of Session or a sheriff, may make an SCPO. In England and Wales and in Northern Ireland the equivalent power is conferred on the High Court. The test for making an order in Scotland is the mirror image to that applicable in the other parts of the UK. The court must be satisfied that a person has been involved in serious crime, whether that involvement was in Scotland or elsewhere in the world, and where it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person who is subject to the order in Scotland. The rest of this paragraph make amendments to section 1 which are consequential upon the civil courts in Scotland having the power to make a SCPO.

148. *Paragraph 3* amends subsection (6) of section 2 of the 2007 Act. That subsection provides that the test set out in section 2(4), rather than the test in section 3(1), should be used

when a court in England and Wales is determining whether a person has been involved in serious crime in Northern Ireland for the purposes of an England and Wales order. The amendments also modify section 2(6) to refer to the new test (see below) for determining whether a person has been involved in serious crime in Scotland. *Paragraph 5* makes similar amendments to section 3 of the 2006 Act which makes equivalent provision to section 2 for Northern Ireland.

149. *Paragraph 4* inserts new section 2A into the 2007 Act which replicates the provisions in section 2 of that Act for Scotland. New section 2A defines for the purposes of Part 1 what constitutes both having been involved in serious crime in Scotland or elsewhere, and involvement in serious crime in Scotland. A distinction is drawn between these two phrases because the first part of the test, in new section 1(1A)(a), is concerned with a person who has been involved in serious crime in Scotland or elsewhere, whereas the second part of the test, in new section 1(1A)(b), is concerned with future involvement in serious crime in Scotland only.

150. New section 2A(1) provides that a person has been involved in serious crime in Scotland for the purpose of Part 1 of the 2007 Act, if he or she has committed a serious offence in Scotland, has facilitated the commission by another person of a serious offence in Scotland, or has conducted himself or herself in a way that was likely to facilitate the commission by himself or herself or another person of a serious offence in Scotland (whether or not such an offence was committed). Facilitation here takes its natural meaning of “to make easier”.

151. Further to this, new section 2A(2) sets out that a “serious offence in Scotland” is an offence under the law of Scotland which, at the time the court considers the application for an order or the matter in question, is contained in the list set out in new Part 1A of Schedule 1 to the 2007 Act (as inserted by *paragraph 29*), or is an offence which is sufficiently serious that the court considers it should be treated as if it were set out in that list. The list in new Part 1A of Schedule 1 to the 2007 Act is not an exhaustive list. The second part of the test in new section 2A(2)(b) allows the court to treat offences that do not appear in Part 1A of Schedule 1 as being serious offences if, based on the circumstances of the case, the court considers the offence is sufficiently serious to be treated as such.

152. New section 2A(3) defines “involvement in serious crime in Scotland” for the purposes of Part 1 of the 2007 Act. That part of the test sets out the harm from which the public must be protected. The court must have reasonable grounds to believe that the order will prevent, restrict or disrupt the involvement of the respondent in serious crime in Scotland. Involvement in serious crime in Scotland means one or more of the following: the commission of a serious offence in Scotland; conduct which facilitates the commission by another person of a serious offence in Scotland; conduct which is likely to facilitate the commission, by the person whose conduct it is or another person, of a serious offence in Scotland (whether or not such an offence is committed).

153. New section 2A(4) defines what is meant by the respondent having been involved in serious crime in a place other than Scotland for the purposes of Part 1 of the 2007 Act. This is for the purposes of the first part of the statutory test contained in new section 1(1A)(a), relating to past action which merits the imposition of an order. Subsection (4) of new section 2A makes identical provision to subsection (1) of that section, except insofar as this subsection is concerned with serious offences which have occurred in a jurisdiction outside of Scotland.

154. New section 2A(5) defines a “serious offence in a country outside Scotland”. The court has to apply a three stage test when it is considering the application or matter in question. Firstly, the conduct must be an offence under the law of a country place outside Scotland. Secondly, the conduct must also be an offence in Scotland if it had been committed in or as regards Scotland. Thirdly, the offence must either fall within the list of offences, or within a description specified, in new Part 1A of Schedule 1 to the 2007 Act if committed in or as regards Scotland or it is conduct which the court considers is sufficiently serious so as to be treated as if it did so.

155. New section 2A(6) states that the test set out in new section 2A(4), rather than the test in sections 2(1) and 3(1), should be used when a Scottish court is determining whether a person has been involved in serious crime in England and Wales or Northern Ireland, as the case may be, for the purposes of a Scottish order.

156. New section 2A(7) provides that, when considering whether conduct is an offence under the law of a country outside the UK, the test will be met however the conduct is described in that law. This means that even if an act is not described as an offence in the law of the country outside the UK it will still be a serious offence under Part 1 of the 2007 Act if the conduct meets the test in new section 2A(5).

157. *Paragraph 6* inserts new subsection (4A) into section 4 of the 2007 Act which confers on the Scottish Ministers a power to amend new Part 1A of Schedule 1 to that Act. This order-making power mirrors the existing powers conferred on the Secretary of State and the Department of Justice in Northern Ireland to amend Parts 1 and 2 respectively. By virtue of the amendment made to section 89 of the 2007 Act by *paragraph 27*, any such order is subject to the affirmative procedure in the Scottish Parliament.

158. *Paragraph 7* amends section 5 of the 2007 Act which sets out examples of the types of provisions that an SCPO might include. Section 5(2) as amended would state—

“Examples of prohibitions, restrictions or requirements that may be imposed by serious crime prevention orders in England and Wales, *Scotland* or Northern Ireland include prohibitions, restrictions or requirements in relation to places other than England and Wales, *Scotland* or (as the case may be) Northern Ireland.”



159. *Paragraph 8* amends section 7 of the 2007 Act which provides that the Secretary of State and Northern Ireland Department of Justice may, by order, expressly exclude the application of SCPOs to persons falling within a specified description. Under the 2007 Act an order can be imposed on any person and this includes individuals, bodies corporate, partnerships and unincorporated associations. The order-making power has not been exercised. New section 7(1A) confers an equivalent order-making power on the Scottish Ministers. By virtue of the amendment to section 89 of the 2007 Act, made by *paragraph 27*, an order under new section 7(1A) will be subject to the negative procedure.

160. *Paragraph 9* amends section 8 of the 2007 Act which sets out who may apply for an SCPO. The amendment provides that in Scotland, an SCPO may only be applied for by the Lord Advocate.

161. *Paragraph 10* amends section 9 of the 2007 Act which gives the High Court the power to allow affected persons to make representations at the hearing in relation to the making, variation or discharge of an SCPO. The amendment confers a similar power on the appropriate court in Scotland. New section 9(4A) provides that the High Court of Justiciary in Scotland (criminal court) must, on an application by a person, give a person an opportunity to make representations in criminal proceedings before this court arising out of section 24B(3) of the 2007 Act if it considers that the making, or variation, of an SCPO is likely to have a significant adverse effect on the person.

162. *Paragraph 11* amends section 10 of the 2007 Act which makes provision for ensuring that the subject of an SCPO has notice of its existence. For the purpose of serving such notice, section 10(3) provides a power for a constable or person authorised by the relevant applicant authority, to enter and search for the person concerned, by force if necessary, any premises where they have reasonable grounds for believing the subject to be. Section 10(4) provides the definition of “the relevant applicant authority”. The effect of the definition is that the relevant applicant authority will be the prosecutor that applied for the order. The amendment modifies the definition of “the relevant applicant authority” to include the Lord Advocate or the chief constable of the Police Service of Scotland.

163. *Paragraph 12* amends section 12 of the 2007 Act which provides that an SCPO does not override legal professional privilege. New section 12(4A) makes similar provision for Scotland; the equivalent concept in Scotland is “confidentiality of communications”.

164. *Paragraph 13* amends section 13 of the 2007 Act which sets out further safeguards on the operation of the SCPO regime by placing restrictions on the extent to which an order can require the production of excluded material and banking information. In England and Wales “excluded material” is defined by reference to section 11 of the Police and Criminal Evidence Act 1984, the definition covers –

- personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence;
- human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence; and
- journalistic material which a person holds in confidence and which consists of documents or of records other than documents.

There is no equivalent definition of “excluded material” in Scotland so the modification made to section 13 by paragraph 13 adopts the England and Wales definition.

165. *Paragraph 14* amends section 17 of the 2007 Act which deals with how an SCPO may be varied, either on application by the relevant applicant authority, by the subject of the order or by a third party. New subsection (1A) of section 17, inserted by paragraph 14(2), provides a power to the appropriate court in Scotland to vary the terms of an SCPO where it has reasonable grounds to believe that the new terms of the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in Scotland.

166. *Paragraph 15* amends section 18 of the 2007 Act which makes provision for the discharge of an SCPO either on application by the relevant applicant authority, by the subject of the order or by a third party. The amendment confers on the appropriate court in Scotland the power to discharge an SCPO in Scotland.

167. *Paragraph 16* amends the title of section 22 of the 2007 Act (which deals with the inter-relationship between SCPOs made in the High Court and Crown Court) to make it clear that that section relates to orders made in England and Wales or Northern Ireland.

168. *Paragraph 17* inserts new sections 22A to 22D into the 2007 Act which broadly mirror sections 19 to 22 of the 2007 Act which provide for SCPOs on conviction.

169. New section 22A confers on the High Court of Justiciary and the sheriff a civil jurisdiction to be able to impose an SCPO where a person has been convicted of a serious criminal offence. The High Court’s powers arise either where a person has been convicted by a sheriff and remitted to the High Court to be dealt with, or convicted by the High Court itself, in relation to a serious offence committed in Scotland (new section 22A(1)). The meaning of a serious offence committed in Scotland is to be determined in accordance with Part 1A of Schedule 1 to the 2007 Act.

170. New section 22A(2) replicates the second part of the test contained in new section 1(1A)(b). It provides that the High Court or sheriff may impose an SCPO where the court or sheriff has reasonable grounds to believe that the terms of the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in Scotland.

171. New section 22A(3) replicates section 1(3) of the 2007 Act, providing the courts with the flexibility to include such terms in the SCPO as they consider appropriate for this purpose. New section 22A(4) provides that the powers of the High Court and sheriff under new section 22A are subject to the same safeguards contained in sections 6 to 15 of the 2007 Act as apply to an SCPO made under section 1 to the 2007 Act.

172. New section 22B, together with new section 22C, makes provision for the two cases in which the High Court of Justiciary or sheriff can vary the terms of an SCPO, namely on the conviction for a serious offence of a person already subject to an SCPO (new section 22B), or the conviction of a person for breach of an SCPO (section 22C). New section 22B provides the High Court of Justiciary or sheriff with the power to vary an SCPO where the person before it is the subject of an SCPO and has been found guilty of a serious offence in Scotland (new section 22B(1)). New section 22B(2) provides that, in such a circumstance, the High Court or sheriff may vary the terms of that order where it has reasonable grounds to believe that the new terms of the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in Scotland.

173. New section 22B(3) provides that such a variation can only be applied for by the Lord Advocate. New section 22B(4) provides that an SCPO can only be varied by the High Court or sheriff in addition to a sentence imposed in relation to the offence concerned. New section 22B(5) provides that, subject to the limitation that an SCPO cannot last for more than five years, the High Court or sheriff may vary an order to increase the length of the order or of any of the provisions contained in it.

174. New section 22C provides the High Court or sheriff with the power, in terms similar to new section 22B, to vary or replace an SCPO when it is dealing with a person who has been convicted of the breach of an order under the offence set out in section 25 of the 2007 Act.

175. New section 22D deals with the inter-relationship between SCPOs made in the Scottish civil courts under new section 1(1A) and those made in the criminal courts under new section 22A. New section 22D(1) enables the Scottish criminal courts, in the circumstances provided for in new sections 22B and 22C, to vary an SCPO made by the civil courts under section 1(1A). The fact that an SCPO has been varied by the Scottish criminal courts does not prevent the order being further varied or discharged by the civil courts (new section 22D(2)). New section 22D(3) and (4) provides that a refusal by the High Court or sheriff to make or vary an SCPO on conviction does not preclude an application to the civil courts to make or vary an SCPO under section 1(1A) in relation to the same offence.

176. *Paragraph 18* inserts new sections 24A and 24B into the 2007 Act which broadly replicate the appeal provisions in sections 23 and 24 of that Act which apply to England and Wales.

177. New section 24A(1) provides that an appeal may be made to the Inner House of the Court of Session (equivalent to the Court of Appeal in England and Wales) by any person who was given an opportunity to make representations at the original proceedings under the provision set out in section 9 of the 2007 Act, against a decision of the Outer House of the Court of Session (equivalent to the High Court in England and Wales) to make an SCPO, to vary or not to vary an order, or to discharge or not to discharge an order. The relevant applicant authority and the subject of the SCPO have existing rights of appeal under section 28 of the Court of Session Act 1988 and new section 24A(2) makes it clear that the provision of new section 24A(1) does not oust or prejudice that right of appeal.

178. New section 24B of the 2007 Act provides for appeals against SCPOs made, varied or discharged on conviction. New section 24B(1), by treating the making, variation or discharge of an SCPO on conviction as part of the sentence, has the effect of conferring on the subject of an order a right of appeal under the provisions of the Criminal Procedure (Scotland) Act 1995. New section 24B(2) enables the Lord Advocate to appeal against a refusal to grant an SCPO on conviction. New section 24B(3) confers a right of appeal on third parties against the making, variation or discharge of an SCPO on conviction.

179. *Paragraph 19* amends section 27 of the 2007 which makes provision for the winding-up of companies, partnerships or relevant bodies in England Wales and Scotland so as to limit its application to England and Wales.

180. *Paragraph 20* amends section 31 of the 2007 Act which makes provision for the operation of SCPOs against partnerships other than limited liability partnerships, which are covered by section 30 of the 2007 Act. Section 31(3) provides a gloss for the meaning of “involved in serious crime in England and Wales, Northern Ireland or elsewhere” and “involvement in serious crime in England and Wales or Northern Ireland” when a court is considering an order in relation to a partnership. A partnership is involved in serious crime if any of the partners is so involved. *Paragraph 20(2)* expands this gloss to cover Scotland.

181. Section 31(6) provides that the rules of court relating to the service of documents and certain legislative provisions listed – including sections 70 and 143 of the Criminal Procedure (Scotland) Act 1995 - apply as if the partnership were a body corporate. *Paragraph 22(3)* repeals the entry in relation to the Criminal Procedure (Scotland) Act 1995. Section 70 of that Act has been amended by the Criminal Justice and Licensing (Scotland) Act 2010 and the Partnerships (Prosecution) Scotland Act 2013 so as to make specific provision for service of an indictment on a partnership, as such, it is no longer necessary to gloss the operation of section 70 so as to treat a partnership as if it were a body corporate. *Paragraph 21* makes a similar amendment to section 32 of the 2007 Act which makes provision for the operation of orders against unincorporated associations.

182. *Paragraph 22* amends section 34 of the 2007 Act which makes provision to ensure that Part 1 of that Act complies with the provisions set out in the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of

information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce). As a result of that Directive, there are certain conditions on what terms can be imposed on a service provider established in a state in the European Economic Area (this is the European Union plus Iceland, Liechtenstein and Norway) other than the UK and certain protections for intermediary service providers. Section 34(1) provides that an order may not include terms which restrict the freedom of an information service provider established in a European Economic Area state other than the UK to provide information society services in relation to a European Economic Area state unless certain conditions, contained in section 34(2) and (3), are met. The conditions in section 34(2) are that the court concerned considers that the terms: (a) are necessary for the objective of protecting the public by preventing, restricting or disrupting involvement in serious crime in England and Wales or Northern Ireland, as the case may be; (b) relate to an information society service which prejudices that objective or presents a serious and grave risk of prejudice to it; and (c) are proportionate to that objective. Paragraph 24 amends section 34(2) so that it operates in relation to SCPOs made in Scotland.

183. *Paragraph 23* inserts new section 36A into the 2007 Act, this provides for the civil standard of proof, that is on the balance of probabilities, to apply to any proceedings in relation to an SCPO before the High Court of Justiciary and the sheriff court. This mirrors the position in England and Wales and Northern Ireland as provided for in sections 35 and 36 of the 2007 Act.

184. *Paragraph 24* amends section 39 of the 2007 Act which makes provision for the inclusion of a term in an SCPO made against a body corporate, partnership or unincorporated association authorising a “law enforcement agency” to appoint a person to monitor whether the order is being complied with. Paragraph 24 amends the definition of a “law enforcement agency” in section 24(10) to include a reference to the chief constable of the Police Service of Scotland.

185. *Paragraph 25* amends section 40 of the 2007 Act which deals with the means by which the costs of authorised monitors will be determined. Section 40(1) and (2) enables the “appropriate authority” to provide, by order, the practice and procedure (including provision about appeals) which must be followed for determining the amount of costs or interest. Section 40(3) provides that where the costs of the monitor have not been paid by the organisation within the period specified in the order under section 39(5)(a) the law enforcement body must take reasonable steps to recover them. Section 40(4) provides that the appropriate authority must, by order, set out what those steps are. Section 40(5) goes on to provide that, after taking such steps, if the costs have still not been paid, they are recoverable as if due to the law enforcement agency concerned by virtue of a civil order or judgment. Paragraph 25(2) and (3) narrow the operation of section 40(5) to England and Wales and Northern Ireland and then make equivalent provision for Scotland. Section 40(6) provides for interest to be payable on the unpaid costs and for this to be calculated in accordance with the provision in section 17 of the Judgments Act 1838 (that is at 8% per year). That Act does not extend to Scotland and paragraph 25(4) inserts new section 40(6A) to make analogous

provision for Scotland. Paragraph 25(5) amends section 40(9) to provide that, in relation to SCPOs in Scotland, the Scottish Ministers are the appropriate authority. Orders made under section 40 are subject to the negative resolution procedure.

186. *Paragraph 26* inserts appropriate additions to the index of defined expressions in Part 1 of the 2007 Act.

187. *Paragraph 27* amends section 89 of the 2007 Act which provides for the making of orders under that Act. The amendments to section 89(2) extend to the Scottish Ministers the power to make orders making different provision for different cases, descriptions of cases, or purposes and containing supplementary, incidental, consequential, transitional, transitory or saving provision.

188. *Paragraph 28* amends section 93 of the 2007 Act which provides for the extent of that Act. The amendment to section 93(2), read with section 93(7), will provide for Part 1 of the 2007 Act to extend to Scotland as well as, as now, England and Wales and Northern Ireland.

**Clause 43: Serious crime prevention orders: meaning of “serious offence”**

189. Schedule 1 to the 2007 Act lists the serious offences conviction for which, or involvement in which, can trigger the making of a SCPO. *Subsections (1) to (4)* of this clause adds various specified firearms offences, offences under the Computer Misuse Act 1990 and the offence in section 6 of the Misuse of Drugs Act 1971 (cultivation of cannabis plants) in Part 1 of Schedule 1 (which relates to England and Wales) to that Act. *Subsections (5) to (8)* adds the equivalent offences to Part 2 of Schedule 1 to the 2007 Act (which relates to Northern Ireland).

**Clause 44: Powers of Crown Court to replace orders on breach**

190. By virtue of section 16(2) of the 2007 Act, the maximum duration of an SCPO is five years. This overall limit constrains a court’s powers to extend the duration of an order, including when considering the variation of an order on breach under section 21 of the 2007 Act (see subsection (7) of that section). This clause amends section 21 of the 2007 Act to enable the court, following the conviction of a person for breach of an SCPO, to discharge the existing SCPO and make a new order for up to five years. The amendments to section 21 preserve the option of varying the existing SCPO, including by extending its duration subject to the overall five-year limit running from the date the order was activated.

**Clause 45: Extension of order where person charged**

191. This clause inserts new section 22E into the 2007 Act which provides for the duration of an SCPO to extend beyond five years in specified circumstances. New section 22E provides for an SCPO to continue in force where the subject of an SCPO has been charged with a serious offence (namely one of those specified in Schedule 1 to the 2007 Act) or with breach of an SCPO. On an application by the Director of Public Prosecution or Director of the Serious Fraud Office (or, in Scotland, the Lord Advocate), a court may provide that an SCPO continues in force pending the outcome of the criminal proceedings in respect of the

offence for which the subject of an SCPO has been charged. In deciding whether to grant an application to extend the duration of an SCPO under new section 22E, the court is required to apply the same test that applies to the grant or variation of an order, namely that the court has reasonable grounds for believing that an extension of the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime. Where a person subject of an SCPO is convicted of a serious offence, it will be open to the court to vary the existing SCPO (exercising the powers in section 20 of the 2007 Act) or make a fresh one (exercising the powers in section 19 of the 2007 Act). Where a person subject of an SCPO is convicted of breach of the order, it will be open to the court to vary the existing SCPO or make a fresh one in accordance with section 21 of the 2007 Act, as amended by clause 44. The court to whom a relevant applicant authority applies to is set out in new section 22E(2).

**Clause 46: Serious crime prevention orders and financial reporting etc**

192. *Subsection (1)* repeals sections 76, 77 and 78 of SOCPA which provide for the making of FROs in England and Wales, Scotland and Northern Ireland respectively. As a result, instead of a sentencing court making a stand-alone FRO under the provisions of that Act, the High Court or Crown Court (in Scotland, the High Court of Justiciary or sheriff) could, on an application by the Director of Public Prosecutions or Director of the Serious Fraud Office or, in Scotland, the Lord Advocate, attach financial reporting requirements as part of an SCPO.

193. *Subsection (2)* inserts new section 5A into the 2007 Act which provides for a disclosure gateway similar to that contained in section 81 of SOCPA. New section 5A makes provision for the law enforcement officer to whom reports will be made under the terms of an information requirement imposed as part of a SCPO to disclose the information to another person for the purposes of checking the accuracy of the information provided or discovering the true position (new section 5A(2)). Such a disclosure might, for example, be made to a bank or other financial institution with which the subject of the SCPO holds an account. The normal duty of confidence a bank may have in relation to one of its clients is waived by virtue of new section 5A(5). Similarly, any other person may disclose information to the law enforcement officer or a person to whom the law enforcement officer has disclosed information (new section 5A(3)). A law enforcement officer may also make disclosures of such information for the purpose of preventing, detecting, investigating or prosecuting criminal offences (new section 5A(4)). This disclosure gateway applies to any information supplied by the subject of a SCPO in accordance with an information requirement contained in the order; whilst this will usually relate to financial information the gateway is not restricted to such information.

**Clause 47: Injunctions to prevent gang-related violence and drug-dealing activity**

194. This clause replaces the existing section 34 of the 2009 Act which sets out the circumstances in which a court may grant a gang injunction. Two conditions must currently be satisfied. The first condition is that the respondent has engaged in, or assisted or encouraged, “gang-related violence”. Once this condition is satisfied, the court may grant an

injunction if a second condition is satisfied, namely that it thinks it is necessary to do so in order “to prevent the respondent from engaging in, or encouraging or assisting, gang-related violence” (section 34(3)(a)) or “to protect the respondent from gang-related violence” (section 34(3)(b)). Section 34(5) of the 2009 Act defines gang-related violence as:

“Violence or a threat of violence which occurs in the course of, or is otherwise related to, the activities of a group that:

- a) consists of at least 3 people;
- b) uses a name, emblem or colour or has any other characteristic that enables its members to be identified by others as a group; and
- c) is associated with a particular area.”

195. This definition is now considered by front line professionals to be unduly restrictive and fails to reflect the true nature of how gangs operate. In particular, a gang does not always have a name, emblem, colour or other characteristic which enables its members to be identified as a group. Instead, a collection of individuals may operate as a group and engage in criminality with some degree of organisation without such common identifying features. In addition, gangs are increasingly involved in criminality, particularly drug-related criminality, beyond their own areas or may operate in a manner that does not associate the group with a given area. In recognition of this, the revised section 34 of the 2009 Act recasts the key features of a gang to be a group which:

- Consists of at least three people (revised section 34(5)(a));
- Has one or more characteristics that enable its members to be identified by others as a group (revised section 34(5)(b)); and
- Engages in gang-related violence or is involved in the illegal drug market (revised section 34(2) read with revised section 34(6) and (7)).

196. The identifying characteristics of a gang may, but need not, relate to any of the following:

- The use by the group of a common name, emblem or colour;
- The group’s leadership or command structure;
- The group’s association with a particular area;
- The group’s involvement with a particular unlawful activity.



197. As now, the court will be able to attach prohibitions or requirements to an injunction (revised section 34(4)). Such prohibitions or requirements may, for example, bar the respondent from going to a particular place or area or from associating with and/or contacting a specified person or persons, or requiring him or her to participate in set activities on specified days.

## **PART 4: SEIZURE AND FORFEITURE OF DRUG-CUTTING AGENTS**

### **BACKGROUND**

198. Certain chemical substances, some of which may also be used in the manufacture of medicinal products for human or veterinary use, can be used as cutting agents for bulking illegal drugs, thereby maximising criminal profit margins. The ‘grey market’ trade (that is, where it is unclear if there is an apparent legitimate end use) in these substances has become a significant element of the domestic cocaine trade over the last five years, but there are currently no laws or regulations that specifically target the domestic trade in cutting agents. This trade impacts across the UK enabling organised criminals to maximise their profits from the trade in illegal drugs and increases the risks posed to local communities.

199. In the UK, benzocaine, lidocaine and phenacetin are the most common chemicals used to ‘cut’ illegal drugs, especially cocaine. This is because these chemicals mimic some of the effects, as well as resembling the drug in appearance, allowing a significant increase in adulteration of the illicit drug than would be possible with an inert substance such as glucose.

200. In 2013, there were over 75 border seizures of chemicals such as benzocaine, lidocaine and phenacetin, totalling over 2 tonnes. Law enforcement agencies used existing customs or policing powers to seize cutting agents in these cases, such as where the substances are linked to an ongoing criminal investigation or the substances were imported under false labelling. However, since the current powers do not explicitly target cutting agents, loopholes exist which means that law enforcement agencies cannot always seize suspected cutting agents. The new powers are designed to address this problem.

201. The majority of cocaine available at street level contains one or more adulterants, some of the most common being benzocaine and phenacetin. In 2013, 63% of street level seizures of cocaine hydrochloride (powder cocaine) contained benzocaine, while 91% of street level base cocaine seizures (the majority of which is ‘crack cocaine’) contained phenacetin. Much of this adulteration occurs within the UK; in 2013, the quarterly average purity of cocaine hydrochloride at importation level ranged from 69-71%, while the average purity at user level ranged from 32-38%<sup>17</sup>. Importing a kilogram of high-quality cocaine may cost around £45,000, while a kilogram of benzocaine can be bought for £300. It is common for cocaine to be mixed at an initial 1:1 ratio with benzocaine, allowing the resulting product

---

<sup>17</sup> ‘Average’ here refers to weighted mean purity. For further details see the NCA ENDORSE 2013 Annual Report

potentially to be sold for £90,000. Cutting agents can therefore significantly increase the criminals' profits from drug trafficking.

202. The new powers will allow law enforcement agencies to seize any substances reasonably suspected of being intended for use as a cutting agent. These are commonly legal to import and sell as bulk chemicals. For example, benzocaine and lidocaine are used within the pharmaceutical industry as active substances in a number of medicinal products. However, they have limited legitimate use in the UK in raw powder form, requiring laboratory processes and licensing for manufacturing into an administrable form. Phenacetin, also legal to import and sell, is an analgesic that is no longer used in legitimate business because of its carcinogenic properties.

203. The Government's Drug Strategy 2010<sup>18</sup> included a commitment to develop a robust approach to stop criminals profiting from the trade in cutting agents, working with production countries, the legitimate trade and international partners. In May 2013, the Home Office published the consultation document "Introduction of new powers to allow law enforcement agencies to seize and detain chemical substances suspected of being used as drug cutting agents". The response to the consultation was published on 31st March 2014<sup>19</sup>. Part 4 of the Bill confers new powers on law enforcement agencies to seize, detain and destroy chemical substances reasonably suspected of being used as cutting agents for illegal drugs. The provisions are modelled on the police entry, search and seizure powers in Part 2 of Police and Criminal Evidence Act 1984 ("PACE") and the cash seizure and forfeiture powers in Chapter 3 of Part 5 of POCA. The provisions in Part 4 of the Bill will be supported by court procedural rules to be made (in the case of magistrates' court rules in England and Wales) by the Lord Chancellor under sections 144 and 145 of the Magistrates' Court Act 1980. Such rules will be analogous to those that apply to the cash seizure and forfeiture powers in Chapter 3 of Part 5 of POCA, namely the Magistrates' Court (Detention and Forfeiture of Cash) Rules 2002 (SI 2002/2998), as amended.

## **COMMENTARY ON CLAUSES**

### **Clause 48: Applications for search and seizure warrants**

204. This clause provides for prior judicial authorisation for powers to search premises for drug-cutting agents and to seize any such agents found on the premises. The term "drug-cutting agent" is defined in clause 61(1). The definition is such as to cover any substance that may be used to adulterate a controlled drug in connection with the unlawful supply or exportation of the drug. Accordingly, the definition will cover not only the substances most commonly used as cutting agents – namely, benzocaine, lidocaine and phenacetin – but any substance intended for use in this way which may, potentially, be any powder of a similar colour and consistency as the drug in question. *Subsection (1)* provides for a magistrate (or, in

---

<sup>18</sup> <https://www.gov.uk/government/publications/drug-strategy-2010--2>

<sup>19</sup> <https://www.gov.uk/government/consultations/cutting-agents-consultation>

Scotland, a sheriff – see clause 61(4)), on an application of a police or customs officer (*subsection (4)*), to issue a search and seizure warrant. Such a warrant confers authority on a police or customs officer to enter the premises specified in the warrant and search them for substances that appear to be intended for use as drug-cutting agents. To grant such a warrant, the justice of the peace must be satisfied that there are reasonable grounds to suspect that a substance intended for use as a cutting agent is on the relevant premises. In coming to such a judgement, the magistrate would weigh up the information supplied in the application (*subsection (6)*) or in oral evidence (*subsection (7)*). The “reasonable grounds to suspect” test is directed solely to the likely presence on the premises and use of the substance as a drug-cutting agent and not to any specific suspected criminal offence. In determining whether the test is satisfied, the court will apply the civil standard of proof, namely on the balance of probabilities. A police or customs officer is defined in *subsection (2)* and includes an NCA officer.

205. Applications for a warrant may be made without notice to any affected person (for example, the owner or occupier of the premises or the owner of the substances in question) to avoid forewarning such a person of the impending search thereby affording an opportunity to remove or otherwise hide the substances (*subsection (5)*).

206. As with the provision for search warrants in section 15 of PACE, an application under this clause may be for a warrant in relation to a single set of premises (a “specific-premises warrant” – see *subsection (3)(b)*) or for an “all-premises warrant” (see *subsection (3)(a)*) where it is necessary to search all premises occupied or controlled by an individual, but it is not reasonably practicable to specify all such premises at the time of applying for the warrant. An all-premises warrant will allow access to all premises occupied or controlled by that person, both those which are specified on the application, and those which are not (*subsection (10)*). An application for a warrant must also specify whether the applicant is seeking authorisation for a single entry or multiple entries into the relevant premises (*subsection (9)*). The warrant may authorise entry to and search of premises on more than one occasion if, on the application, the justice of the peace is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which he issues the warrant, for example in the case of the search of a large warehouse.

#### **Clause 49: Further provisions about search and seizure warrants**

207. *Subsections (1) and (2)* set out the information that must be contained in a search and seizure warrant. *Subsections (3) to (5)* provide for the making of copies. These provisions are analogous to those in section 15(5) to (8) of PACE.

#### **Clause 50: Execution of search and seizure warrants**

208. *Subsection (1)* gives effect to Schedule 2 which sets out conditions for the search and seizure of premises in pursuance of a warrant. Failure to comply with such conditions would render the entry and search of premises unlawful (*subsection (2)*). *Subsection (3)* enables a police or customs officer to use reasonable force to enter premises. It is an offence to obstruct

an officer executing a warrant (*subsection (4)*); the maximum penalty on conviction for such an offence is a level 3 fine (currently £1,000) (*subsection (5)*).

## **Schedule 2: Execution of search and seizure warrants**

209. This Schedule makes further provision for the execution of warrants and is based on analogous provisions in section 16 of PACE.

210. *Paragraph 1* enables persons to accompany a police or customs officer when executing a warrant. Such a person, for example, a Police Community Support Officer, has the same powers as those the warrant confers on a police or customs officer.

211. Where premises are entered and searched in pursuance of a warrant and such premises are not specified in the warrant, entry must be authorised by a senior officer (*paragraph 3*). Where a warrant authorises multiple entries into a set of premises, any second or subsequent entry must be similarly authorised (*paragraph 4*). A senior officer is defined in *paragraph 12(1)*.

212. *Paragraph 8* confers a power to inspect and test substances found on the premises. The ability to test such a substance, for example to determine whether it is benzocaine, lidocaine or phenacetin, will help avoid unnecessary seizures.

213. *Paragraph 9* requires premises to be made secure on completion of the search. This obligation will be particularly relevant where a police or customs officer has had to force entry onto the premises.

### **Clause 51: Seizure of substances under search and seizure warrant**

214. This clause enables a police or customs officer searching premises in pursuance of a clause 48 warrant to seize any substance found there which is reasonably suspected as being intended for use as a drug-cutting agent.

### **Clause 52: Seizure of substances without search and seizure warrant**

215. This clause contains a free-standing power to seize, without warrant, a substance reasonably suspected as being intended for use as a drug-cutting agent. This will enable a police or customs officer to seize such substances when they are lawfully on premises for some other purpose, for example, a customs officer undertaking a search for prohibited or restricted goods when operating at port or where an officer is executing a warrant issued under PACE in relation to a non-drug related offence and discovers substances suspected of being used as a drug-cutting agent in the course of the search. The subsequent provisions of this Part in respect of retention and forfeiture will apply in equal measure to substances seized under a search and seizure warrant and to those seized under this free standing power.

### **Clause 53: Notice to be given when substances seized**

216. This clause makes provision for the issue of a notice to a person who had possession of or who owned any substances seized in accordance with clauses 51 or 52.

**Clause 54: Containers**

217. This clause contains an ancillary power to seize any containers in which substances reasonably suspected of being used as drug-cutting agents are stored. As most cutting agents are in powder form, they are likely to be stored in some kind of container.

**Clause 55: Initial retention of seized substances**

218. *Subsection (1)* enables any suspected drug-cutting agents seized under clause 51 or 52 to be retained for an initial period of 30 days. This period affords the law enforcement agency which seized the substance and the owner of the substance adequate time to gather evidence to support continued detention or to demonstrate that the substance is held legitimately.

219. *Subsection (2)* provides for the detention for up to 30 days of suspected drug-cutting agents where the substance was originally seized under powers conferred under another enactment and the power to retain the substance under that enactment has lapsed. For example, a police officer has a general power of seizure under section 19 of PACE where he or she has reasonable grounds for believing that the thing seized has been obtained in consequence of the commission of an offence or that it is evidence in relation to an offence which he or she is investigating or any other offence. If it is subsequently decided that there is to be no, or no further, criminal investigation, the substance could no longer be retained under PACE. *Subsection (2)* would allow the substance to be retained for up to 30 days following the decision to discontinue the criminal investigation.

**Clause 56: Continued retention or return of seized substances**

220. This clause enables a police or customs officer to apply for an order authorising the continued retention of the suspected drug-cutting agents. The order can be made by a magistrates' court or a justice of the peace (in England and Wales), a sheriff (in Scotland) or a court of summary jurisdiction (in Northern Ireland). The court, justice or sheriff may make such an order if satisfied that continued retention of the substance is justified whilst its intended use is further investigated. An order can also be made for continued retention if consideration is being given to the bringing of criminal proceedings, or if such proceedings have been commenced and not concluded. Where criminal proceedings have been initiated an order may authorise continued retention until the conclusion of the proceedings, otherwise the maximum period of retention is 60 days (this includes the initial 30 day period provided for in clause 55).

221. Where the court, justice or sheriff concludes that none of the grounds for continued retention of the substance have been satisfied, the substance must be returned to the person from whom it was seized or, if different, the owner.

**Clause 57: Forfeiture and disposal, or return, of seized substances**

222. This clause enables a magistrates' court (in England and Wales), a sheriff (in Scotland) or a court of summary jurisdiction (in Northern Ireland), on application by a police or customs officer (*subsection (1)*) to order the forfeiture of a substance if the court is satisfied that it is intended for use as a drug-cutting agent (*subsection (3)*). The civil standard of proof,

namely on the balance of probabilities, will apply to such proceedings. It is expected that court procedure rules would provide that it is open to both the applicant and any person with an interest in the substance to make oral representations to the court at a forfeiture hearing. Where the court is so satisfied it is for the applicant to arrange for the disposal of the forfeited substance (*subsection (4)*), although any action to dispose of the substance is to be stayed pending the outcome of any appeal (*subsection (5)*). The clause also makes further provision authorising the continued retention of a substance pending the outcome of an application for forfeiture or any appeal against a decision by the court to order the substance to be returned to the person from whom it was seized or the owner of the substance (*subsections (2) and (7)*).

**Clause 58: Appeal against decision under section 57**

223. This clause confers a right of appeal (see *subsection (3)* as to the appropriate higher court in each jurisdiction) against a decision under clause 57 either to order the forfeiture of a substance or to order its return to the person entitled to it. An appeal must be lodged within 30 days of the decision by the lower court (*subsection (4)*). The parties to the original proceedings and any person entitled to the substance – if not present or represented at the original hearing – will be entitled to be heard at the appeal. On hearing the appeal, the court will determine the question afresh.

**Clause 59: Return of substance to person entitled to it, or disposal if return impracticable**

224. Where a court determines that the seized substance is not intended for use as a drug-cutting agent, this clause provides for the return of the substance to the person entitled to it; if necessary the relevant court (or the sheriff) may make an order to this end (*subsection (1)(b)*). In any case where it proves impossible to find the owner, or impracticable for some reason to return the substance (for example, because the owner refuses to accept receipt), *subsection (4)* allows for the substance to be disposed of by the police or customs officer.

**Clause 60: Compensation**

225. This clause provides that where no forfeiture order is made following the seizure of a suspected drug-cutting agent, the owner of the substance may apply to the relevant court (or the sheriff) for compensation. There is no right for the person from whom the substance was seized – where that person is different from the owner – to claim compensation. Compensation is only payable where the court is satisfied that the applicant has suffered loss during the period the substance was held by the relevant law enforcement agency. Normally, the level of compensation would be less than the market value of the substance (*subsection (3)*), although the amount may be higher in exceptional circumstances (*subsection (4)*). Compensation may be payable, for example, if the owner lost a contract as a result of the seizure and retention of the substance. The rule requiring that the amount of compensation should normally be less than 100% of the value of the substance is predicated on the fact that once the substance is returned to the owner it may continue to have some value which could then be realised by the owner.

**Clause 61: Interpretation**

226. This clause defines terms used in Part 4 of the Bill.

**PART 5: PROTECTION OF CHILDREN ETC**

**BACKGROUND**

227. Section 1 of the Children and Young Persons Act 1933 (“the 1933 Act”) provides for an offence of child cruelty. The offence is committed where a person over the age of 16, who has responsibility for a child under that age, wilfully assaults, ill-treats, abandons, exposes or neglects that child, in a manner likely to cause unnecessary suffering or injury to health.

228. In April 2012 the charity, Action for Children, launched a campaign calling for a reform of section 1 of the 1933 Act. It published a report, ‘Keeping children safe: The case for reforming the law on child neglect’<sup>20</sup>, which argued that the criminal law on child cruelty was out of date and failed adequately to protect children. In particular, Action for Children argued that the existing offence, as interpreted by front line professionals, only covered physical and not psychological harm.

229. In support of the campaign, the late Paul Goggins MP tabled a new clause for debate at Committee stage of the Crime and Courts Bill on 12 February 2013 (Public Bill Committee, Official Report, column 444 to 456). In response to that debate, the Minister for Policing and Criminal Justice, Damian Green, undertook to consider evidence that the current law is not working. Subsequent to this, Mark Williams MP introduced a Private Member’s Bill – the Child Maltreatment Bill<sup>21</sup> – in June 2013, but the Bill made no further progress. In October 2013, the Ministry of Justice undertook a targeted engagement exercise seeking views from a range of professionals. In the light of that exercise, the Government accepts that the offence could be more clearly expressed so as to include psychological suffering or injury. Clause 62 amends section 1 of the 1933 Act to this end.

230. The Female Genital Mutilation Act 2003 (“the 2003 Act”), which extends to England and Wales and Northern Ireland, and the Prohibition of Female Genital Mutilation (Scotland) Act 2005, which applies to Scotland, and before them the Prohibition of Female Circumcision Act 1985, provide for an offence of female genital mutilation (“FGM”). FGM involves procedures which include the partial or total removal of the external female genital organs for non-medical reasons. The practice is medically unnecessary, extremely painful and has serious health consequences, both at the time when the mutilation is carried out, and in later life. Section 4 of the 2003 Act provides that the section 1 offence of FGM (and the related offences, in sections 2 and 3 of the 2003 Act, of helping a girl to perform FGM on herself and

---

<sup>20</sup> <http://resourcecentre.savethechildren.se/sites/default/files/documents/5896.pdf>

<sup>21</sup> <http://services.parliament.uk/bills/2013-14/childmaltreatment.html>

of assisting a non-UK person to perform FGM overseas) extend to acts done outside of the UK by UK nationals or permanent UK residents. On 21st March 2014, the Director of Public Prosecutions announced the first prosecution for FGM<sup>22</sup>.

231. On 18th December 2013, the Home Affairs Select Committee launched an inquiry into FGM, including the effectiveness of the current legislative framework. The Committee published the written evidence it had received on 25th February 2014<sup>23</sup>. That evidence included separate submissions from the Director of Public Prosecutions, Association of Chief Police Officers and Metropolitan Police which argued for, amongst other things, a change in the law to enable prosecutions under the 2003 Act of non-permanent UK residents.

232. On 6th February 2014, the Government announced a range of measures to combat FGM to mark the International Day of Zero Tolerance<sup>24</sup>. Those measures included a commitment to consider any recommendation from the Crown Prosecution Service to strengthen the criminal law on FGM. Clause 64 amends the 2003 Act (and the Prohibition of Female Genital Mutilation (Scotland) Act 2005) to extend extra-territorial jurisdiction for the offences under that Act to persons habitually resident in the UK.

233. The Government has indicated that it will consider other proposals for amending the criminal law in this area as recommended by the Home Affairs Select Committee and is also examining how a civil protection order might operate alongside the criminal law to protect potential victims of FGM.

## COMMENTARY ON CLAUSES

### **Clause 62: Child cruelty offence**

234. This clause makes two changes to the offence of child cruelty in section 1(1) of the 1933 Act. *Subsection (2)* makes it explicit on the face of section 1 what is already implicit, namely that the section 1 offence applies regardless of whether the suffering or injury caused to a child as a result of one or more acts of abuse or neglect was physical or psychological in nature. At the same time, the amendment made by this subsection removes the non-exhaustive list of the type of injury which the conduct must be likely to cause (on the grounds that “injury to or loss of sight, or hearing, or limb, or organ of the body” all self-evidently amount to physical harm) and the reference to “mental derangement” (on the grounds that the term is archaic and rendered redundant by the express reference to psychological suffering or injury).

---

<sup>22</sup> [http://cps.gov.uk/news/latest\\_news/first\\_prosecutions\\_for\\_female\\_genital\\_mutilation/index.html](http://cps.gov.uk/news/latest_news/first_prosecutions_for_female_genital_mutilation/index.html)

<sup>23</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/140225-fgm-memos/>

<sup>24</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/295056/HMG\\_FGM\\_Declaration.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/295056/HMG_FGM_Declaration.pdf)



235. *Subsection (3)* replaces the outdated reference in section 1(1) of the 1933 Act to “a misdemeanour” with a reference to “an offence”; section 1 of the Criminal Law Act 1967 abolished the then distinction between a felony (a term applied to more serious crimes) and a misdemeanour.

236. Section 1 of the 1933 Act as amended will read as follows (additions in italics) –  
“(1) If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (~~including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement~~) (*whether the suffering or injury is of a physical or psychological nature*), that person shall be guilty of ~~a misdemeanour~~ *an offence*, and shall be liable—

(a) on conviction on indictment, to a fine or alternatively, or in addition thereto, to imprisonment for any term not exceeding ten years;

(b) on summary conviction, to a fine not exceeding the prescribed sum, or alternatively, or in addition thereto, to imprisonment for any term not exceeding six months.

(2) For the purposes of this section—

(a) a parent or other person legally liable to maintain a child or young person, or the legal guardian of a child or young person, shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf;

(b) where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant) while the infant was in bed with some other person who has attained the age of sixteen years, that other person shall, if he was, when he went to bed, under the influence of drink, be deemed to have neglected the infant in a manner likely to cause injury to its health.

(3) A person may be convicted of an offence under this section—

(a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;

(b) notwithstanding the death of the child or young person in question.”

### **Clause 63 and Schedule 3: Possession of paedophile manual**

237. This clause creates a new offence of possession of a paedophile manual, that is any item containing advice or guidance about abusing children sexually (*subsection (1)*). There are already a number of criminal offences that seek to prevent the possession, creation and distribution of indecent images of children, and the dissemination of obscene material. In particular:

- section 2 of the Obscene Publications Act 1959 makes it an offence to publish (for gain or otherwise) or to possess for publication for gain an obscene article;
- section 1 of the Protection of Children Act 1978 makes it an offence for a person to take, permit to be taken, make, distribute or show, or have in his or her possession with a view to showing or distributing any indecent photograph or pseudo-photograph of a child;
- section 160 of the Criminal Justice Act 1988 makes it an offence to possess an indecent photograph or pseudo-photograph of a child;
- section 63 of the Criminal Justice and Immigration Act 2008 makes it an offence to possess extreme pornographic images; and
- section 62 of the Coroners and Justice Act 2009 makes it an offence to possess a prohibited image of a child.

These existing offences do not criminalise mere possession of material containing advice and guidance about grooming and abusing a child sexually. The new offence plugs this gap in the law.

238. *Subsection (8)* defines the terms “item”, “prohibited item” and “abusing children sexually”. The term “item” has a wide meaning and includes both physical and electronic documents (for example, emails or information downloaded to a computer).

239. *Subsection (2)* sets out a series of defences to the offence of possession of a paedophile manual. They are the same as for other comparable offences, for example, the possession of indecent images of children under section 160(2) of the Criminal Justice Act 1988 and for the possession of extreme pornographic images under section 63 of the Criminal Justice and Immigration Act 2008 (see section 65 of that Act). They are:

- that the person had a legitimate reason for being in possession of the item; this would be a question of fact for the jury to decide on the individual circumstances of a case. It could cover, for example, those who can demonstrate that they have a legitimate work reason for possessing the item;
- that the person had not seen (or listened to) the item in their possession and therefore neither knew, nor had cause to suspect, that it contained advice or guidance about abusing children sexually; and

- that the person had not asked for the item - it having been sent without request - and that he or she had not kept it for an unreasonable period of time; this will cover those who are sent unsolicited material and who act quickly to delete it or otherwise get rid of it.

The standard of proof in making out the defence is the balance of probabilities.

240. By virtue of *subsection (3)* and the transitional provision in clause 68(10), the maximum penalty on summary conviction of the offence in England and Wales and Northern Ireland will be six months' imprisonment. On the commencement of section 154(1) of the Criminal Justice Act 2003, the maximum sentence on summary conviction in England and Wales will rise to 12 months. On conviction on indictment, the maximum sentence is imprisonment for three years.

241. *Subsection (4)* requires proceedings to be instituted by or with the consent of the Director of Public Prosecutions.

242. *Subsection (5)* applies, in relation to England and Wales, the entry, search, seizure and forfeiture powers in section 4 of and the Schedule to the Protection of Children Act 1978 to paedophile manuals. *Subsection (6)* makes equivalent provision for Northern Ireland.

243. *Subsection (7)* introduces *Schedule 3* to the Bill which is designed to ensure that the provisions outlined above which make it an offence to possess a paedophile manual are consistent with the UK's obligations under the E-Commerce Directive<sup>25</sup>.

244. Under *Schedule 3* providers of information society services who are established in England and Wales or Northern Ireland are covered by the new offence even when they are operating in other European Economic Area states. Paragraphs 3 to 5 of the Schedule provide exemptions for internet service providers from the offence of possession of a paedophile manual in limited circumstances, such as where they are acting as mere conduits for such material or are storing it as caches or hosts.

**Clause 64: Offence of female genital mutilation: extra-territorial acts**

245. Section 3 of the 2003 Act provides that aiding, abetting, counselling or procuring a person who is not a UK national or permanent UK resident to do a relevant act of female genital mutilation outside the UK in relation to a UK national or permanent resident is an offence. Section 4 of the 2003 Act provides that sections 1 to 3 extend to acts done outside the UK by UK nationals or permanent UK residents.

---

<sup>25</sup> [http://ec.europa.eu/internal\\_market/e-commerce/directive/index\\_en.htm](http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm)

246. Section 6(3) of the 2003 Act defines a “permanent UK resident” as an individual who is settled in the UK within the meaning of the Immigration Act 1971. Section 33(2A) of the Immigration Act 1971 provides for when a person is to be regarded as settled in the UK. It states:

“Subject to section 8(5) above, references to a person being settled in the United Kingdom are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain.”

Section 33(2) explains when a person is to be treated as ordinarily resident and states that:

“Except as otherwise provided a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or in any of the Islands at a time when he is there in breach of the immigration laws.”

247. *Subsection (1)(a) and (b)* amends both sections 3 and 4 of the 2003 Act so that they apply to UK nationals and residents rather than, as now UK nationals and permanent UK residents. *Subsection (1)(c)* replaces the definition of a permanent UK resident in section 6(3) of the 2003 Act with a definition of a UK resident; that definition provides that a UK resident is someone who is habitually resident in the UK. The term habitually resident covers a person’s ordinary residence, as opposed to a short, temporary stay in a country. To be habitually resident in the UK it may not be necessary for all, or any, of the period of residence here to be lawful<sup>26</sup>. Whether a person is habitually resident in the UK will be determined on the facts of a given case. Taken together, paragraphs (a) to (c) of subsection (1) have the effect of broadening the extra-territorial jurisdiction provided for in the 2003 Act so that it will now be possible to prosecute a non-UK national for an offence under sections 1 to 3 of that Act where that person is habitually resident in this country, rather than permanently resident as now. Correspondingly, the section 3 offence will now cover situations where the victim of the FGM procedure is habitually resident. All the offences will continue to apply to UK nationals as is currently the case.

248. The Prohibition of Female Genital Mutilation (Scotland) Act 2005 makes similar provision to the 2003 Act. *Subsection (2)* makes similar amendments as subsection (1) to sections 3, 4 and 6 of that Act.

---

<sup>26</sup> See *Mark v Mark* [2005] UKHL 42

## **PART 6: MISCELLANEOUS AND GENERAL**

### **COMMENTARY ON CLAUSES**

#### **Clause 65: Preparation or training abroad for terrorism**

249. Section 5 of the 2006 Act makes it an offence to engage in any conduct in preparation for giving effect to an intention to commit, or assist another to commit, one or more acts of terrorism. Section 6 of the 2006 Act makes it an offence to provide or receive training for terrorism. The maximum penalty for these offences is life imprisonment and 10 years imprisonment respectively. Section 17 of the 2006 Act provides for extra-territorial jurisdiction (that is, the offence may be tried in this country in respect of acts committed abroad) in respect of certain other offences under that Act, namely the offences in sections 1 (encouragement of terrorism), 6 (training for terrorism), 8 (attendance at a place used for terrorism training) and 9 to 11 (offences involving radioactive devices and materials and nuclear facilities) of the 2006 Act, and sections 11 (membership of proscribed organisations) and 54 (weapons training) of the Terrorism Act 2000. However, in the case of the section 1 and 6 offences, the extra-territoriality is limited in that it only applies insofar as those offences are committed in relation to the commission, preparation, or instigation of one or more “Convention offences”. “Convention offences” are those to which EU Member States are required to extend extra-territorial jurisdiction by virtue of Article 14 of the EU Convention on the Prevention of Terrorism (May 2005); the relevant offences are set out in Schedule 1 to the 2006 Act. In the case of the section 5 offence, there is no extra-territorial jurisdiction.

250. This clause (together with the consequential amendment in paragraph 42 of Schedule 4) amends section 17(2) to provide for extra-territorial jurisdiction for the section 5 offence and to extend the existing extra-territorial jurisdiction for the section 6 offence. As a result, a person who does anything outside of the UK which would constitute an offence under section 5 or 6 (whether in relation to a Convention offence or terrorism more widely) could be tried in the UK courts were they to return to this country. Extra-territorial jurisdiction is appropriate for these offences because the places where training or preparation for terrorism are taking place are increasingly likely to be located abroad. Extending the territorial jurisdiction in respect of these offences may allow for prosecutions of people preparing or training more generally for terrorism who have, for example, travelled from the UK to fight in Syria, where various terrorist groups, including Al-Qaida affiliated groups, are involved in the conflict.

#### **Clause 66: Approval of draft decisions under Article 352 of TFEU relating to serious crime**

251. This clause provides, for the purposes of section 8 of the European Union Act 2011, for the approval of two draft Decisions of the Council of the European Union under Article 352 of the Treaty on the Functioning of the European Union (“TFEU”).

252. Section 8 of the European Union Act 2011 sets out that a Minister of the Crown may not support an Article 352 Decision unless one of subsections (3) to (5) is complied with in relation to the draft Decision. Subsection (3) is complied with if the draft Decision is

approved by Act of Parliament. Neither subsection (4) (urgent approval) nor (5) (exempt purposes) is applicable to the draft Decisions which are the subject of this clause. Therefore, an Act of Parliament is required before the UK may vote in favour of either Decision in the Council of the European Union. Article 352 of the TFEU is a legal base for measures that are in line with the objectives set out in the Treaties, but for which the Treaties have not explicitly provided the necessary powers. Article 352 requires unanimity in the Council of the European Council and the consent of the European Parliament.

253. *Subsection (2)(a)* provides for the approval of the draft Decision to repeal Council Decision 2007/124/EC, Euratom<sup>27</sup> (“the 2007 Decision”). The 2007 Decision established, for the period 2007 to 2013, an EU funding programme to protect people and critical infrastructure against terrorist attacks and other security-related incidents. As the period covered by this programme has now expired, the 2007 Decision is due to be repealed; it is the draft Council Decision<sup>28</sup> effecting that repeal which is the subject of subsection (2)(a). The funding programme provided for by the 2007 Decision has been replaced by the Internal Security Fund (Police) which will shortly be adopted by the Council. The Internal Security Fund (Police) will continue to fund many of the activities foreseen by the 2007 Decision including the protection of people and critical infrastructure and the management of security-related risks and crises. The UK has not opted in to the Internal Security Fund (Police) measure pre-adoption; no decision has been taken by the Government on whether to do so post-adoption.

254. The Commission published the draft Council Decision on 8 September 2013 (document number 15187/13). The European Parliament gave its consent to the repeal on 4 December 2013. The next step will be for the Council to act unanimously to adopt the text. The Council will only vote after all Member States have completed their domestic procedures and are in a position to vote in favour of repeal.

255. The House of Commons European Scrutiny Committee considered this draft Decision in their 17th, 23rd and 33rd Reports of Session 2013/14. The draft Decision has now cleared scrutiny. The House of Lords European Union Committee cleared the draft Decision in their report Progress of Scrutiny 5th Edition Session 2013/14.

256. *Subsection (2)(b)* provides for the approval of the draft Decision of the Council of the European Union relating to the “Pericles 2020” programme. Council Regulation 1338/2001 established a harmonised framework for protecting the Euro against counterfeiting. The effects of that Regulation were extended to those Member States which had not adopted the Euro by Council Regulation 1339/2001. Those Regulations were supplemented by Council Decision 2001/923, which established a detailed action programme for the protection of the

---

<sup>27</sup>

[http://www.biiicl.org/files/4276\\_decision\\_2007-124-ec\\_est\\_spec\\_prog\\_on\\_prevention\\_preparedness\\_and\\_consequence\\_mgmt\\_of\\_terrorism.pdf](http://www.biiicl.org/files/4276_decision_2007-124-ec_est_spec_prog_on_prevention_preparedness_and_consequence_mgmt_of_terrorism.pdf)

<sup>28</sup> <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015187%202013%20INIT>

Euro against counterfeiting (“the Pericles Programme”). Council Decision 2001/924 extended the effect of Decision 2001/923 to those Member States that had not adopted the Euro. In 2011, the European Commission concluded that the Pericles Programme should be renewed. The renewed programme (“the Pericles 2020 programme”) runs from 1st January 2014 to 31st December 2020 and is established by Council Regulation 331/2014<sup>29</sup>. The legal basis for this Regulation is Article 133 of the TFEU. This provides that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the measures necessary for the use of the euro as the single currency”. In the same way as the effect of Council Regulation 1338/2001 and Council Decision 2001/923 was extended to those Member States which had not adopted the Euro, the effect of Council Regulation 331/2014 will be extended to those same Member States. That will be done by way of a measure the legal basis for which is Article 352 of the TFEU. The Council agreed the text of the draft Regulation on 29th November 2013 (document number 16616/13)<sup>30</sup>. The European Parliament gave its consent to the draft Regulation on 12th March 2014. The Council will vote on the final Regulation by unanimity once all Member States have completed their domestic procedures and are in a position to vote in favour.

257. The House of Commons European Scrutiny Committee considered the draft Regulation in its 56th Report of Session 2010/12 and 2nd Report of Session 2012/13. The draft Regulation has not yet cleared scrutiny by that Committee. The House of Lords European Union Committee has cleared the document<sup>31</sup>.

#### **Clause 67: Minor and consequential amendments**

258. *Subsection (1)* introduces Schedule 4 which contains minor and consequential amendments to other enactments.

259. *Subsections (2) to (7)* enable the Secretary of State, by regulations, to make provision consequential upon the Bill, including consequential amendments to other enactments. Any such regulations which amends primary legislation is be subject to the affirmative resolution procedure, otherwise the negative resolution procedure applies.

#### **Schedule 4: Minor and consequential amendments**

260. *Paragraph 1* amends section 50 of the Criminal Appeal Act 1968 consequential on clause 3. The effect is to disapply a defendant’s appeals rights under that Act against a determination made under new section 10A of POCA given that such appeal rights are separately provided for in clause 3. *Paragraph 2* makes a similar amendment to the Criminal Appeal (Northern Ireland) Act 1980 consequential on clause 24.

---

<sup>29</sup>

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0331&qid=1399564678498&from=EN>

<sup>30</sup>

[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/cls/cons\\_cons%282013%2916616/\\_cons\\_cons%282013%2916616\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cls/cons_cons%282013%2916616/_cons_cons%282013%2916616_en.pdf)

<sup>31</sup> *Progress of Scrutiny* 1st Edition Session 2012/13

261. *Paragraph 3(1)* amends the Civil Jurisdiction and Judgments Act 1982 consequential upon the provisions in clause 19. *Paragraph 3(1)* amends section 18(6A) of the Civil Jurisdiction and Judgments Act 1982. Section 18 of that Act provides for the enforcement of UK judgments in other parts of the UK. Section 18(5)(d) make it explicit that section 18 applies to “an interim order made in connection with the civil recovery of proceeds of unlawful conduct”; this expression is defined in section 18(6A). The effect of these provisions is that, among other things, an order appointing a receiver in connection with property freezing orders (made under section 245E of POCA) can be enforced in all parts of the UK. *Paragraph 2(1)* amends section 18(6A) of the Civil Jurisdiction and Judgments Act 1982 so as to adds orders relating to PPO receivers. *Paragraph 3(2)* enables the amendments made to the Civil Jurisdiction and Judgments Act 1982 by paragraph 2(1) to be extended to the Channel Islands, Isle of Man and British overseas territories by order made under section 52(2) of that Act.

262. *Paragraph 4* amends sections 1 to 3A of the 1990 Act to make it explicit on the fact of that Act that the maximum penalty on summary conviction in Scotland for any of the offences provided for in those sections is 12 months. When the 1990 Act was originally enacted the maximum sentence for these offences on summary conviction in Scotland was six months and the text of the Act still provides as such. However, section 45(2) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 glossed all either way offences that were on the statute book before 18th January 2007 so that they carry a maximum penalty of 12 months instead of a lesser penalty of, in this case, six months. This paragraph now makes textual amendments to the 1990 Act to reflect this glossing provision. In doing so, it will ensure that the maximum penalty of 12 months applies to any summary conviction for an offence under section 3A of the 1990 Act as amended by clause 38 of the Bill.

263. *Paragraph 5* makes a consequential amendment to the heading of section 3A of the 1990 Act arising from the provisions in clause 37.

264. *Paragraphs 6 to 8* make consequential amendments to the 1990 Act arising from the provisions in clause 39. In particular, the amendments to section 6 of that Act apply the extended extra-territorial jurisdiction provided for in clause 40 to inchoate offences related to the offences under the 1990 Act (that is, the offences of conspiracy to commit or attempting to commit a 1990 Act offence).

265. *Paragraph 9* amends the heading of section 10 of the 1990 Act consequential upon clause 40.

266. *Paragraphs 10 and 11* make consequential amendments to the Criminal Procedure (Scotland) Act 1995. Paragraph 10 amends section 108 of that Act to enable the Lord Advocate to appeal against the refusal of a court to make an SCPO following the conviction of a person on indictment. Paragraph 11 amends section 175 of that Act to confer on the prosecution in summary proceedings a similar right to appeal against the refusal by a sheriff court to make an SCPO on conviction.



267. *Paragraphs 12 to 17, 19 and 20* make amendments to sections 12, 14, 15, 19, 20, 21, 32 and 33 of POCA consequential upon clause 6 so that victim surcharge orders are treated on a similar basis to compensation orders and unlawful profits orders in the context of those sections.

268. *Paragraph 18* amends section 31 of POCA consequential on clause 3. *Paragraph 18(2)* amends the title of section 31 in recognition of the fact that that section no longer deals solely with appeals by prosecutors.

269. *Paragraph 18(3)* amends section 31(3), the effect of which is to provide that a prosecutor may not appeal under section 31 a decision of a Crown Court not to make a determination under new section 10A or the form of such a determination where made. The right of appeal for a prosecutor in such cases is instead provided for in new section 31(4) of POCA.

270. *Paragraph 21* amends section 35 of POCA consequential on clause 10. The effect is to disapply the application of section 139(4) of the 2000 Act (which sets out the tariff for default sentences for failure to pay a fine) to the enforcement of unpaid confiscation orders given that clause 10 now makes bespoke provision for default sentences in such cases.

271. *Paragraph 22* amends section 41 of POCA, which provides for restraint orders, consequential upon clause 11. New section 41(7A) requires the court when making a restraint order to consider whether to impose a ban on the defendant's travel outside of the UK.

272. *Paragraph 23* amends section 42 of POCA to address an anomaly in the drafting of that section. Section 42(6) and (7) set out circumstances where the Crown Court must discharge a restraint order. Subsection (6) deals with the circumstances where a restraint order was made following the commencement of proceedings for an offence or was made following an application under any of sections 19 to 22, 27 or 28 of POCA (which relate to the reconsideration of a confiscation order or the decision not to make such an order and with the making of a confiscation order where the defendant absconds). In such cases, the Crown Court is required to discharge the restraint order on the conclusion of the criminal proceedings or on the determination of the application. Subsection (7) then deals with the circumstances where a restraint order was made after the start of an investigation into an offence but before charges are brought or where an application under any of sections 19 to 22, 27 or 28 of POCA was to be made. In such cases, the Crown Court is required to discharge the restraint order if within a reasonable time proceedings for the offence are not started or the application is not made. But where proceedings are started or an application is made within a reasonable time, subsection (7) places no duty on the court, akin to that in subsection (6), to discharge the restraint order on the conclusion of the proceedings or application. Paragraph 23 substitutes new section 42(7) and (8) for the existing section 42(7) and in so doing addresses this anomaly. The criminal proceedings in this context will only be concluded when the offender complies fully with the terms of the confiscation order (see section 85(5)(a) of POCA).

273. *Paragraph 24* amends section 55 of POCA consequential upon clause 6. Section 55 sets out how the designated officer responsible for fine enforcement in the magistrates' court must dispose of monies received in satisfaction of a confiscation order. The amendment ensures that all priority orders, as defined in clause 6, have third call on such monies after meeting any expenses of an insolvency practitioner or receiver where one or other has been appointed.

274. *Paragraph 25* amends section 89 of POCA consequential on clause 3. Section 89 establishes the general rules that apply to any appeal to the Court of Appeal under Part 2 of POCA. Section 89(4) makes provision for the award of costs at the discretion of the court. The new section 89(4)(za), inserted by paragraph 23, enables the Court of Appeal to award costs in respect of appeals against a determination under new section 10A.

275. *Paragraphs 26 to 30* make like amendments to Part 4 of POCA to those made by paragraphs 12, 18, 21, 22 and 23.

276. *Paragraphs 31 and 32* make consequential amendments to sections 273 and 277 of POCA as a result of the provisions in clause 19. Section 273 of POCA makes provision about recoverable property consisting of rights under a pension scheme. Section 273(4) allows a recovery order covering rights under a pension scheme to provide for the scheme's trustees or managers to recover costs incurred by them in: (a) complying with a recovery order; or (b) providing information, prior to the making of the order, to the enforcement authority, receiver appointed under section 245E of POCA, interim receiver or interim administrator – the amendment made by paragraph 31 adds PPO receivers to this list. Section 277 of POCA makes further provision in relation to recoverable property which includes rights under a pension scheme, where a consent order has been made in relation to such property. A consent order stays (or in Scotland, sists) the proceedings of a recovery order where agreement is reached for the disposal of the recoverable property, and each person to whose property either the agreement or the proceedings relate is a party to both the proceedings and the agreement. Section 277(7) of POCA makes like provision to section 273(4) described above and paragraph 32 effects the same consequential amendment.

277. *Paragraph 33*, which is consequential upon clause 19, adds a reference to a PPO receiver to the general interpretation section in Part 5 of POCA.

278. *Paragraph 35* amends section 416 of POCA, which defines terms used in Part 8 of POCA, so that the terms "realisable property" and "confiscation order" as used in Part 8, by virtue of the amendments made by clause 34, attract the appropriate definitions of those terms contained in Parts 2 (England and Wales), 3 (Scotland) and 4 (Northern Ireland) of the Act.

279. *Paragraph 37*, which is consequential upon clause 19, amends paragraph 1 of Schedule 10 to POCA. That paragraph disapplies sections 75 and 77 of the Taxes Management Act 1970 in relation to receivers and administrators appointed under POCA – including management receivers, interim receivers and interim administrators in civil

recovery proceedings. This exempts such receivers and administrators from having to pay any income tax or capital gains tax due on any property in respect of which they are appointed. The amendment to paragraph 1 of Schedule 10 to POCA adds a reference to a PPO receiver.

280. *Paragraph 39* amends Schedule 3 to the Sexual Offences Act 2003 consequential on clause 63. The effect is to subject a person convicted of the offence of possession of a paedophile manual to the notification requirements in Part 2 of the Sexual Offences Act 2003, if the person was aged 18 or over when convicted or was sentenced to at least 12 months' imprisonment. The notification requirements are to notify the police of their name and address and any subsequent changes to that information (that is, sign on the "sex offenders' register").

281. *Paragraphs 41 to 43* amend Chapter 3 of Part 2 of SOCPA as a consequence of the abolition of FROs by clause 46.

282. *Paragraphs 46 to 52* make consequential amendments to the 2007 Act arising from the provisions in clauses 42 to 46.

283. *Paragraph 46* makes an amendment to section 9 of the 2007 Act consequential upon clause 45. Section 9 of the 2007 Act provides a safeguard where the making, variation or discharge of an SCPO or not making a variation to an order or discharging it would be likely to have a significant adverse effect on someone who is not the subject of the order. Section 9 gives the court the power to allow such persons to make representations at the hearing in relation to the making, variation or discharge of an order. The amendment made to section 9(4) by this paragraph extends that right to make representations where the Crown Court is considering an application (under new section 22E) to extend the duration of an SCPO pending the outcome of criminal proceedings where the subject of an order has been charged with a serious offence or an offence of breach of an SCPO.

284. *Paragraphs 47 to 50* amend sections 16, 19, 21 and 36 of the 2007 Act to take account of new section 22E, inserted by clause 45, which disapplies in the circumstances specified in that new section the five year limit on the duration of an SCPO or on a provision in an SCPO.

285. *Paragraphs 51 and 52* make consequential amendments to the 2007 Act arising from clause 41. *Paragraph 51* adds the new participation offence as provided for in clause 41 to the list of serious offences in Part 1 of Schedule 1 to the 2007 Act; this is the list of trigger offences for an SCPO in England and Wales. *Paragraph 52* adds the new participation offence to the "listed offences" in Part 2 of Schedule 3 to the 2007 Act; a person cannot be guilty of encouraging or assisting an offence under section 45 or 46 of that Act believing that one of the offences listed in Schedule 3 will happen.

286. *Paragraphs 53 to 55* make consequential amendments to Part 4 of the 2009 Act arising from clause 47 to reflect the extension of gang injunctions to cover drug-dealing

activity as well as gang-related violence. *Paragraph 56* makes a consequential repeal of section 34 of the Crime and Security Act 2010 which is now spent; that section amended section 34 of the 2009 Act so as to lower the minimum age for a gang injunction from 18 to 14 years. *Paragraph 57* makes a consequential amendment to paragraph 38 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which relates to the provision of civil legal aid in relation to gang injunctions.

287. *Paragraph 58* repeals consequential amendments made by the Prevention of Social Housing Fraud Act 2013 to sections 13 and 55 of POCA which are now spent as a result of the amendments to those sections by clause 6 and paragraph 22 of Schedule 4.

#### **Clause 68: Transitional and saving provisions**

288. This clause contains various transitional provisions.

289. *Subsections (1) and (3)* provide that a compliance order, as provided for in new sections 13A and 163A of POCA, may only be made in respect of confiscation orders made after commencement of clauses 7 and 27.

290. *Subsection (2)* provides that the increase in default sentences where someone fails to satisfy a confiscation order, as provided for in clause 10, does not have retrospective effect.

291. *Subsections (4), (5) and (9)* ensure that the modifications to existing criminal offences made by the Bill do not have retrospective effect.

292. *Subsections (6), (7) and (8)* provide that the repeal of sections 76, 77 and 78 of SOCPA, which provide for FROs, does not affect FROs made before commencement.

#### **Clause 69: Extent**

293. This section sets out the extent of the provisions in the Bill (see paragraphs 8 to 13 for further details).

#### **Clause 70: Commencement**

294. This clause provides for commencement (see paragraph 296 for further details).

295. *Subsection (8)* enables the Secretary of State, the Scottish Ministers and the Department of Justice in Northern Ireland by regulations, to make transitional, transitory or saving provisions in connection with the coming into force of the provisions of the Bill. Such regulations are not subject to any parliamentary procedure.

#### **COMMENCEMENT**

296. Clauses 66 (approval of draft Decisions under Article 352 of TFEU relating to serious crime), 67(2) to (7) and 68 to 71 (general) of the Bill come into force on Royal Assent.

Clauses 65, which extends extra-territorial jurisdiction in relation to female genital mutilation offences, and 65 (and the associated consequential provisions in paragraph 44 of Schedule 4), which provides for or extends extra-territorial jurisdiction for the offences in sections 5 and 6 of the Terrorism Act 2006, comes into force two months after Royal Assent. All other provisions will be brought into force by means of commencement orders made by the Secretary of State or, in the case of the provisions in clauses 15, 16 and 34(3), by the Scottish Ministers, or, in the case of the provisions in Chapter 3 of Part 1, by the Northern Ireland Department of Justice. The Scottish Ministers and the Northern Ireland Department of Justice are required to consult the Secretary of State before bringing provisions of the Bill into force. There is a reciprocal requirement on the Secretary of State to consult the Scottish Ministers and the Northern Ireland Department of Justice before bringing provisions into force in Scotland and Northern Ireland respectively which relate, in part, to devolved matters.

## **FINANCIAL EFFECTS OF THE BILL**

297. The main financial implications of the Bill for the public sector lie in the following areas. The figures set out in the paragraphs below, which relate to England and Wales, are based on a number of assumptions about implementation which are subject to change. Further details of the costs and benefits of individual provisions are set out in the impact assessments published alongside the Bill.

### **Part 1: Proceeds of crime**

298. Clause 10 provides for an increase in default sentences where an offender fails to pay a confiscation order. The maximum sentence for orders valued between £500,000 and £1 million will rise from 5 years to 7 years and from 10 years to 14 years for orders in excess of £1 million. The clause also provides for the ending of automatic early release in cases where a confiscation order exceeds £10 million. If these provisions were to result in no change in offender behaviour, it is estimated that the increase in default sentences will result in an increased prison population of 50 by 2026. The ending of early release for orders over £10 million will result in an estimated increase of the prison population of 10 by 2033. The estimated cost of these additional prison places will be £1.78 million per year from 2033. This estimate is based on year-on-year increases in costs until 2033, at which point they remain level. It is, however, expected that the increase in default sentences will lead to an increase in the number of offenders paying their confiscation orders. If payments for orders over £500,000 increase by 10%, the corresponding increase in confiscation receipts would total £2.25 million.

### **Part 2: Computer misuse**

299. Clause 37 provides for a new aggravated offence of impairing a computer. On the assumption of one case every other year it is estimated that the total cost for criminal justice agencies over a ten year period of £1 million.

### **Part 3: Organised, serious and gang-related crime**

300. Clause 41 provides for a new offence of participation in an organised crime group. Based on 100 to 200 additional proceedings per year for the new offence, the best estimate for the total annual cost for criminal justice agencies of this provision is £6.6 million.

301. Clauses 43 to 46 make changes to the SCPO. On the basis of these changes leading to an additional 60 additional SCPOs imposed in the Crown Court per year and four additional prosecutions for breach per year, the additional annual average cost to criminal justice agencies will be £0.15 million.

302. Clause 47 extends the circumstances in which a gang injunction may be granted. On the basis of this change leading to an additional 85 gang injunctions per year, the additional annual average cost to criminal justice agencies will be £1.1 million.

### **Part 4: Seizure and forfeiture of drug-cutting agents**

303. Part 4 of the Bill confers powers on law enforcement agencies to seize, detain and destroy chemical substances suspected of being used as cutting agents for illegal drugs. Based on 50 proceedings being brought per year under the new powers, the annual cost to Her Majesty's Courts and Tribunals Service and the Crown Prosecution Service (and their equivalents in Scotland and Northern Ireland) are estimated to be between £26,000 and £121,000, with a best estimate of £74,000. The provisions are expected to result in storage cost savings for law enforcement agencies, principally the NCA, of approximately £1.1 million per year.

### **Part 5: Protection of children etc**

304. Clause 63 provides for an offence of possession of a paedophile manual. The number of prosecutions per year is expected to be low. The estimated cost to criminal justice agencies per prosecution will be up to £11,000.

305. Clause 64 extends extra-territorial jurisdiction for the offences in the Female Genital Mutilation Act 2003. The CPS announced the first prosecutions for FGM in March 2014. Based on an estimated additional two prosecutions per year, the estimated annual cost to criminal justice agencies (the CPS, legal aid, HM Courts and Tribunals Service and prison and probation services) would be approximately £300,000 in steady state (reached in year six after implementation).

### **Part 6: Miscellaneous and general**

306. Clause 65 provides for or extends existing extra-territorial jurisdiction for the UK courts in respect of the offences in section 5 (preparation for terrorist acts) and 6 (training for terrorism) of the Terrorism Act 2006. These provisions are expected to be cost neutral to the criminal justice system in the long term. If the individuals were not prosecuted at an early stage, they could go on to commit terrorist attacks (at much greater cost to the criminal justice system). The estimated costs per defendant to criminal justice agencies for section 5 and 6 are estimated to be between £950,000 - £1.5 million and £850,000 - £1.45 million respectively.

307. The other provisions in the Bill are not expected to have a material financial impact on public sector bodies.

#### **EFFECTS OF THE BILL ON PUBLIC SECTOR MANPOWER**

308. The provisions in the Bill are not expected to have an impact on public sector manpower.

#### **SUMMARY OF IMPACT ASSESSMENT**

309. The Bill is accompanied by an overarching impact assessment. A further eight impact assessments are available on individual provisions. The impact assessments are available on the Government website. The individual impact assessments deal with the following provisions:

- Amendments to the Proceeds of Crime Act 2002 (Part 1 of the Bill);
- Amendments to the Computer Misuse Act 1990 to provide for a new aggravated offence of impairing a computer (clause 37);
- Amendments to the Computer Misuse Act 1990 to give full effect to the EU Directive on attacks against information systems (clauses 38 and 39);
- New offence of participating in organised crime (clause 41);
- Amendments to Part 1 of the Serious Crime Act 2007 (SCPOs) (clauses 43 to 46);
- Amendments to Part 4 of the Policing and Crime Act 2009 (Injunctions: gang-related violence) (clause 47);
- New powers to allow law enforcement agencies to seize, detain and destroy drug-cutting agents (Part 4); and
- Amendment to the Terrorism Act 2006 to provide for the UK courts to have extra-territorial jurisdiction in respect of the offence in section 5 (preparation of terrorist acts) and extend the scope of the existing jurisdiction in respect of the offence in section 6 (training for terrorism) (clause 65).

310. The provisions of the Bill impact mainly on the public sector, in particular: the NCA, police forces (in the United Kingdom), local authorities, the Crown Prosecution Service (in England and Wales), the Crown Office and Procurator Fiscal Service (in Scotland), the Public Prosecution Service for Northern Ireland, the courts (in the UK) and prison and probation

services (in the UK). The provisions in Part 1 may also impact on financial institutions as a result of the extension of the investigation powers under POCA.

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

311. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The Parliamentary Under Secretary of State for Criminal Information, Lord Taylor of Holbeach, has made the following statement:

“In my view the provisions of the Serious Crime Bill [HL] are compatible with the Convention rights.”

312. The Government has published a separate ECHR memorandum with its assessment of compatibility of the Bill’s provisions with the Convention rights: this memorandum is available on the Government website.



## ANNEX A

### GLOSSARY

1933 Act	Children and Young Persons Act 1933
1986 Act	Insolvency Act 1986
1990 Act	Computer Misuse Act 1990
2000 Act	Powers of Criminal Court (Sentencing) Act 2000
2003 Act	Female Genital Mutilation Act 2003
2006 Act	Terrorism Act 2006
2007 Act	Serious Crime Act 2007
2009 Act	Policing and Crime Act 2009
Affirmative procedure	Statutory instrument that are subject to the “affirmative procedure” must be approved by both the House of Commons and the House of Lords to become law.
CPS	Crown Prosecution Service
FGM	Female Genital Mutilation
The Directive	Directive 2013/40/EU on attacks against information systems
FRO	Financial Reporting Order
IAO	Interim Administration Order
NCA	National Crime Agency
Negative procedure	Statutory instruments that are subject to the “negative procedure” automatically become law unless there is an objection from the House of Commons or the

*These notes refer to the Serious Crime Bill [HL]  
as introduced in the House of Lords on 5th June 2014 [HL Bill 1]*

	House of Lords.
PACE	Police and Criminal Evidence Act 1984
POCA	Proceeds of Crime Act 2002
PPO	Prohibitory Property Order
SCPO	Serious Crime Prevention Order
SOCPA	Serious Organised Crime and Police Act 2005
TFEU	Treaty on the Functioning of the European Union

## **ANNEX B**

### **OVERVIEW OF THE CONFISCATION PROCESS UNDER POCA**

#### **1. Confiscation**

##### **1.1 Basic concepts**

Confiscation is the process used by the courts to take away the proceeds of criminal conduct. The trigger that sets this process in motion is a conviction for a criminal offence (or offences) from which the defendant has benefited. A confiscation order will be made against the defendant for a sum of money, not specific property. A confiscation order can presently only be made by the Crown Court, although there are provisions in SOCPA for the Secretary of State, by order, to make provision that would enable a magistrates' court in England and Wales to make a confiscation order.

##### **1.2 Benefit**

An offender benefits from criminal conduct if he or she obtains property as a result of that conduct or in connection with it. The benefit is the value of the property obtained. It is important to note that the benefit is not the profit made from the conduct, but the total value of property obtained. For example, an offender acquired heroin with a street value of £10,000, the offender's benefit is £10,000 – even if the heroin was seized by police before the offender was able to sell it and realise any profit.

##### **1.3 Obtaining an order**

Under POCA, the confiscation procedure is mandatory and the court must proceed to confiscation if the defendant:

- is convicted of an offence or offences (from which they have benefited) in proceedings before the Crown Court,
- is convicted of an offence or offences (from which they have benefited) in proceedings before a magistrates' court and is committed to the Crown Court for sentencing, or
- is convicted of an offence or offences in proceedings before a magistrates' court and is committed to the Crown Court with a view to a confiscation order being made,

and the court is asked to proceed by the prosecutor or the court believes it is appropriate to do so.

The Crown Court is under a duty to proceed with confiscation unless the court believes that a victim has begun, or intends to begin, civil proceedings against the defendant, in which case the Court has discretion to determine whether or not to proceed.

##### **1.4. The court process**

When the prosecutor indicates to the court that they wish to proceed to confiscation, an order under section 18 may be served on the defendant. This requires the defendant to declare all

assets in which he or she has an interest. Once the section 18 response has been received, the prosecutor will prepare a statement of information (a “section 16 statement”). The section 16 statement sets out the prosecution position and details the defendant’s benefit from criminal conduct.

The defence will respond to the section 16 statement with a statement of information (under section 17 of POCA). The statement of information procedure is designed to provide a quick and effective method of identifying the extent of the defendant’s benefit.

At the confiscation hearing the court must decide whether the defendant has a criminal lifestyle or has benefited from particular criminal conduct (see below). When assessing the defendant’s benefit at the hearing the court must take account of conduct occurring, and property acquired, up to the time it makes its decision.

The court must always deal with the issue of confiscation upon conviction and prior to sentence. The proceedings can, however, be postponed:

- on application by the defendant;
- on application by the prosecutor; or
- if the court believes it is appropriate.

If either the prosecutor or defence require time to present their case in relation to confiscation proceedings, the court may set a date for the confiscation hearing and specify dates by which the prosecutor’s statements and defence responses are to be served. Proceedings may not be postponed for more than two years from the date of conviction unless, in the view of the court, there are exceptional circumstances.

A confiscation order is payable as soon as the order is made unless the defendant can show the court that he or she needs time to pay. If this is the case, the court may extend the time to pay for up to six months from the date the order is made. If the court believes there are exceptional circumstances then it may extend the period in which payment is due to a maximum of 12 months. The defendant may apply to the court under this provision at any time after the confiscation order is made, but not after the six month period has elapsed. Time to pay should not be granted unless the prosecutor has been given the opportunity to make representations.

### **1.5. Criminal conduct**

Criminal conduct is defined as:

“Conduct that constitutes an offence in any part of the UK or, if the conduct occurred elsewhere, would constitute an offence in any part of the UK if it occurred there”.

Criminal conduct can be either “particular” or “general”. This affects the way a confiscation case proceeds and can lead to distinct confiscation regimes: particular criminal conduct or general criminal conduct (criminal lifestyle).

#### Particular criminal conduct

Particular criminal conduct refers to offences that the defendant has been convicted of in the current (confiscation) proceedings and all other offences taken into consideration.

#### Example of “particular criminal conduct”

An example would be where the court is considering a confiscation order in relation to a defendant who is convicted of a single offence of theft (say, a watch valued at £800) from a jeweller’s and asks the court to take a similar offence (of obtaining a shirt valued at £50) into consideration. The benefit in this case totals £850 and the court can make a confiscation order in this amount.

#### General Criminal Conduct

“General criminal conduct” means the defendant’s criminal conduct, whenever the conduct occurred and whether or not it has ever formed the subject of any criminal prosecution. “General criminal conduct” therefore would include any “particular criminal conduct”. This regime depends on the concept of “criminal lifestyle”. The court must apply the assumptions to all of the defendant’s income and expenditure in the previous six years if the court decides the defendant’s benefit to be from general criminal conduct.

The following assumptions may be applied, unless it is found to be incorrect or there is a serious risk of injustice:

- that any property transferred to the defendant at any time after the relevant date,
- any property held by the defendant at any time after conviction,
- any expenditure incurred by the defendant after the relevant date, for instance luxury holidays,

is tainted or obtained by criminality

- and the defendant obtained the property free from any other interests.

If the prosecution is alleging general criminal conduct, it is suggesting that the defendant has been a career criminal and that assets obtained or enjoyed by him or her are tainted or obtained by criminality.

Section 75 of POCA sets out a number of tests that are applied. A person has a criminal lifestyle if one or more tests are met, including whether the defendant has committed specific offences under Schedule 2 to POCA (for example, drug trafficking).

It is assumed that the defendant's entire income over the previous six years represents the proceeds of crime. With general, or "lifestyle" offences, the prosecution can look at a defendant's benefit for a period going back six years from the "relevant date". The relevant date is the day when the proceedings started, usually the date of charge.

### **1.6. Recoverable amount**

Once the defendant's benefit has been determined the court must decide the available and recoverable amounts and to make an order requiring the defendant to pay that amount. The "recoverable amount" is a sum of money equal to the defendant's benefit from the conduct concerned allowing for the change in the value of money. The court will endeavour to recover the full value of a defendant's benefit from criminal conduct, whether particular or general. Where this is not possible, for example where the defendant's personal wealth is now less than the benefit obtained, the court will determine the available amount. This is a sum of money due to be paid immediately and comprises:

- the total value of all the defendant's free property<sup>32</sup> at the time the confiscation order is made (that is, the total value of all their property minus any priority obligations<sup>33</sup>); plus
- the value of any tainted gifts.

The court will adopt a staged approach and attempt to recover:

- the full value of the benefit, or
- if the defendant's assets are less, the available amount, or
- if less, a "nominal amount" – for example £1.

An example of how the recoverable amount is calculated is provided at Appendix (i).

Once a confiscation order has been made, the court must specify the sentence to be served in default, that is should the defendant fail to pay. This is the additional prison sentence that the defendant must serve if the order is not satisfied within the time allowed by the court. The maximum period of imprisonment depends upon the amount due and currently ranges from seven days to 10 years.

The court must have regard to the confiscation order before imposing a fine or other order involving payment on the defendant, except for a compensation order, but otherwise to leave the confiscation order out of account in sentencing the defendant.

---

<sup>32</sup> Property is all free property wherever situated and includes money, all forms of real or personal property and other intangible property. Property is free unless there is a pre-existing court order in respect of it (section 8).

<sup>33</sup> Priority obligations include fines or other court orders made prior to the confiscation order.

## **1.7. Enforcement**

The magistrates' court ("enforcement authority") has the ultimate responsibility for enforcing a confiscation order and it will enforce the order as if it were a fine. Once the payment period has expired, the enforcement authority can use its own powers to issue a distress warrant for bailiffs to realise assets. This is usually a two-stage process: initial distress warrants are only for known assets. If the order is not satisfied by the recovery (realisation) of those assets, a further warrant may be issued specifying the value to be realised without listing individual assets. However, in cases where there are assets outside the jurisdiction, existing restraint orders, property held in names of third parties and involving real property or appointing receivers, the enforcer will normally be the Crown Prosecution Service, the National Crime Agency or the Serious Fraud Office. In these matters both enforcement and prosecution authorities will work closely together to achieve the payment of confiscation orders.

It is the defendant's responsibility to apply for a variation or discharge of the order where the assets are not sufficient to satisfy the confiscation order. In the cases where assets have been realised, but have generated lower than estimated values and no further assets exist, the prosecution may consent to the variation or discharge being sought.

The defendant (or receiver, if appropriate) may apply to the court for the amount of an order to be reduced if the available amount is insufficient for full payment. This is dealt with under section 23 of POCA which provides that the court "may substitute such smaller amount as the court believes is just". The defendant must show that there is good reason why they no longer have sufficient assets to pay the order.

A confiscation order must be paid immediately unless it is shown that the defendant requires time to pay. The magistrates' court will impose the default sentence (previously determined by the Crown Court) if the defendant fails to pay, but serving the sentence does not remove the debt. Any default sentence will run consecutively (in addition) to the substantive sentence. Interest is payable on any outstanding amount once the time to pay has expired.

## **2. Restraint**

### **2.1 Basic concepts**

Effectively a restraint order freezes a defendant's assets so that they may be used to satisfy a confiscation order and prohibits a specified person(s) from dealing with any realisable property held by them. These specified persons can include third parties holding property. A restraint order may apply to all realisable property held by the defendant wherever it is in the world. This includes cash and any realisable property transferred to the defendant after the order is made and any other property which the defendant may hold but which the investigator is unaware of. Subject to the precise terms of the restraint order, the defendant may be responsible for returning all property held abroad to the jurisdiction of the court. Anyone who holds property jointly with the defendant or on their behalf may be specifically restrained from dealing with such property or property deemed to be a tainted gift. The court can make any order it believes is appropriate to ensure that a restraint order is effective.

An order cannot restrain property of greater value than the alleged benefit of the criminal conduct.

The court must discharge the restraint order if criminal proceedings do not commence within a reasonable time, an application by the prosecutor for reconsideration of the case or benefit has not been made, an application for confiscation where the defendant has absconded has not been made or upon conclusion of any proceedings. The court must also discharge the restraint order when a confiscation order is not made or the order is satisfied.

## **2.2 Applying for a Restraint Order**

A restraint order may be obtained where there is reasonable cause to believe that that an alleged offender has benefited from their criminal conduct, and at any time after:

- a criminal investigation has started with regard to an offence,
- proceedings have been started for an offence but not concluded,
- an application has been made by the prosecutor for reconsideration of a case, benefit or available amount, or
- an application for confiscation has been made where the defendant has absconded.

A restraint order may also be obtained when:

- an application has been, or is likely to be, made by the prosecutor for reconsideration of benefit where a confiscation order has already been made,
- an application has been, or is likely to be, made by the prosecutor for reconsideration of the available amount where a confiscation order has already been made.

Applications for a restraint order may be made without the subject of the order being notified (to avoid the subject taking action to hide or dissipate the assets) to a Crown Court judge by:

- the prosecutor; or
- an accredited financial investigator.

An application for a restraint order will take the form of a written statement by a financial investigator giving details of the case and the defendant's benefit and property (including any tainted gifts).

## **2.3 Serving a Restraint Order**

The investigator is responsible for serving the restraint order on the defendant (and any other affected parties) as soon as possible after the court grants it. The defendant must be served with the restraint order together with the copy of the investigator's witness statement.



### **3. Investigation**

Part 8 of POCA provides investigation powers for confiscation and other investigations under the Act. A confiscation investigation is an investigation for the purposes of determining whether a person has benefited from criminal conduct. These investigation tools include: production orders, search and seizure warrants, disclosure orders, customer information orders and account monitoring orders. Applications for these investigative tools may only be made to a court by an appropriate officer and may be sought before, after or at the same time as an application for a restraint order. The granting of an order is dependent on appropriate statutory requirements being met.

### Production Orders

These allow appropriate officers to obtain information about the financial affairs of a person subject to a confiscation, money laundering or civil recovery investigation, most usually in relation to his or her bank accounts. A production order requires the person in possession or control of the material (for example, a bank or building society) to produce it to an appropriate officer to take away, or give an appropriate officer access to it within the period stated in the order.

### Search and Seizure Warrants

A search and seizure warrant authorises an appropriate officer to enter and search specified premises and to seize and retain any material found which is likely to be of substantial value (whether or not by itself) to a money laundering, confiscation, detained cash, civil recovery or exploitation proceeds investigation.

### Disclosure Orders

A disclosure order is an order authorising an appropriate officer to give notice to any person requiring him or her to answer questions, to provide information or to produce documents relating to any matter relevant to the investigation. This order gives extensive powers throughout a confiscation or civil recovery investigation. Thus, unlike other orders, it does not have to be applied for separately on each occasion. It is not available for money laundering investigations.

### Customer Information Orders

These are court orders requiring financial institutions to identify whether the person under investigation holds or has held an account at the financial institution and to provide specified information about the customer. This may be useful where, for example, it is suspected that a person has substantial assets lodged with various unknown banks in a particular area or lodged in different names. The order allows the investigator to send written notice to all banks in the area requiring them to search for accounts held by the person under investigation. The bank may be required to search for all names known to be used by the person under investigation. Customer Information Orders are available for money laundering, exploitation proceeds and confiscation or civil recovery investigations.

### Account Monitoring Orders

These allow appropriate officers to obtain account information (including transaction details) over a defined period from a financial institution for up to 90 days at a time. The order is available for confiscation, money laundering and exploitation proceeds investigations.

## **Appendix (i)**

### **Example Calculation of Benefit (Particular Criminal Conduct)**

#### **Summary of offences charged**

Following a house break in, cash to the value of £50,000 was stolen. The defendant was subsequently charged with a single offence of burglary contrary to section 9(1)(b) of the Theft Act 1968.

The defendant was found guilty of the above offence and asked for one further offence, relating to the theft of £1,000 from a neighbour of the principal victim to be taken into consideration.

#### **Personal History/Lifestyle**

The defendant owns a property which he inherited from his mother and is currently valued at £240,000.

The defendant claimed, when arrested, that he had spent the money he stole gambling. Enquiries indicate that he recently lost £40,000 in a local casino. Since the offence, the defendant also purchased a vehicle for £10,000. The defendant still has possession of this vehicle.

The defendant has been convicted of one previous offence of dishonesty.

The defendant's wife does not work and has been claiming benefits.

#### **Extent of Benefit**

##### Particular Criminal Conduct

Benefit derived as a result of the offences as charged:	£50,000
Benefit derived as a result of the offences taken into consideration:	£1,000
Total benefit:	£51,000

In accordance with section 80(2)(a) of POCA, the value of monies obtained should be adjusted to take account of the changes in the value of money. Using the Retail Prices Index, additional benefit as at the date of the confiscation hearing would be calculated.

Monies obtained from particular criminal conduct	£51,000
Change in value of money	£983
<b>Total benefit from particular criminal conduct</b>	<b>£51,983</b>

### **Confiscation order**

If the court accepts that the defendant has benefited from the proceeds of crime to the extent of £51,983 then the court should declare the benefit in that amount, or in any other amount in respect of which the court finds the defendant has benefited.

The recoverable amount is an amount equal to the defendant's benefit from the conduct concerned. If the defendant shows that the available amount is less than the benefit, the court should make a confiscation order in that sum.

The onus is on the defendant to provide the court with full details of all his free property, including full valuations for any houses he has an interest in. He will also need to supply the court with details of the likely costs that will be incurred in realising the property.

In this example, the defendant has property valued at £240,000 and a vehicle now valued at £6,000. The available amount is therefore £246,000. As the available amount is higher than the recoverable amount, the confiscation order should be made in the sum of £51,983.

# SERIOUS CRIME BILL [HL]

## EXPLANATORY NOTES

*These notes refer to the Serious Crime Bill [HL]  
as introduced in the House of Lords on 5th June 2014  
[HL Bill 1]*

---

*Ordered to be Printed,  
5th June 2014*

---

© Parliamentary copyright 2014

This publication may be reproduced under the terms of the Open Parliament Licence, which is published at [www.parliament.uk/site-information/copyright](http://www.parliament.uk/site-information/copyright).

PUBLISHED BY AUTHORITY OF THE HOUSE OF LORDS  
LONDON – THE STATIONERY OFFICE LIMITED  
Printed in the United Kingdom by The Stationery Office Limited

£x.00