

SERIOUS CRIME BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Serious Crime Bill [HL] as brought from the House of Lords on 10th May 2007. 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.

SUMMARY

Part 1 - Serious Crime Prevention Orders

3. Part 1 creates Serious Crime Prevention Orders, a new civil order aimed at preventing serious crime. These orders will be used against those involved in serious crime and the purpose of their terms will be to protect the public by preventing, restricting or disrupting involvement in serious crime. They will be made on application to the High Court, or the Crown Court upon conviction, and breach of the order will be a criminal offence. The Bill provides for rights of appeal and variation or discharge of the order.

Part 2 - Encouraging or Assisting Crime

4. The Government's policy on the reform of the criminal law on encouraging and assisting crime is based on the Law Commission's Report on *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No. 300, CM 6878, 2006). The Law Commission's Report did not deal with the position in Northern Ireland.
5. The Bill abolishes the common law offence of incitement and in its place creates new offences of intentionally encouraging or assisting crime and encouraging or assisting crime believing that an offence, or one or more offences, will be committed. The Bill contains a defence to the offences in Part 2 (where the encouragement or assistance is considered to be reasonable in the circumstances) and an exemption from liability where the offence encouraged or assisted was created in order to protect a category of people (and the person doing the encouragement or assistance falls into that category).

Part 3 - Other Measures to Prevent or Disrupt Serious and Other Crime

6. Part 3 is divided into 4 chapters. Chapter 1 makes provisions for the prevention of fraud. Chapter 2 makes a number of amendments to the Proceeds of Crime Act 2002 and supporting legislation. These transfer certain functions of the Assets Recovery Agency to the Serious Organised Crime Agency and other persons; extend the powers of civilian financial investigators operating under that Act; provide investigation powers under Part 8 in respect of the cash forfeiture regime under Chapter 3 of Part 5 of that Act and powers in Part 8 to force entry in the execution of search warrants issued and executed in Scotland. Chapter 3 extends certain investigatory powers of officers of Her Majesty's Revenue and Customs to former Inland Revenue matters (which powers are currently limited to former Customs matters). Chapter 4 confers additional search powers on a police constable who has reason to believe that a person is carrying a firearm within a particular area.

Part 4 - General and Final Provisions

7. Part 4 deals with miscellaneous and general provisions within the Bill, including the making of orders under the Bill.

BACKGROUND

8. The Government published the Green Paper 'New Powers Against Organised and Financial Crime' (CM 6875) on 17th July 2006. The Green Paper set out a package of measures to improve the ability of law enforcement agencies to tackle fraud and serious organised crime. The Green Paper can be found at:

<http://www.homeoffice.gov.uk/documents/cons-2006-new-powers-org-crime/>

9. The document summarising the responses that were received to the consultation is available at:

<http://www.homeoffice.gov.uk/documents/powers-against-org-crime.pdf?version=1>

TERRITORIAL EXTENT

10. The majority of the Bill's provisions extend to England and Wales, while certain provisions also extend to Scotland and Northern Ireland. The Bill addresses both reserved and devolved matters. A number of provisions extend to Scotland only or Northern Ireland only. Clause 83 provides detail of the extent of provisions within the Bill.

11. Part 1 (Serious Crime Prevention Orders) and Part 2 (encouraging or assisting crime) mainly extend to England and Wales and Northern Ireland. Clauses 63 to 66 (sharing information with anti-fraud organisations), clause 68 and Schedules 8 and 9 (abolition of Assets Recovery Agency and redistribution of functions etc.), clause 77

and Schedule 12 (regulation of investigatory powers) and clause 78 (power to search for firearms) mainly extend throughout the UK. Clause 67 and Schedule 7 (data matching) make separate provision for England, Wales and Northern Ireland. Clauses 69 to 76 and Schedules 10 and 11 (detained cash investigations, extension of powers of accredited financial investigators and power of forced entry) have the same extent as the provisions which they amend (some of which have a UK extent and some of which have a more limited extent).

12. The Scottish Parliament's consent has been obtained for the provisions in the Bill relating to the creation of an offence of breach of a Serious Crime Prevention Order (with reference to Part 1 of the Bill) and detained cash investigations and power of forced entry (with relation to Part 3 Chapter 2), which trigger the Sewel Convention. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

13. Amendments were made to the Bill at Report stage in the House of Lords, against the advice of the Government, which resulted in the addition to the Bill of clause 78 (power to search for firearms). Depending on the position which is taken on this amendment in the House of Commons, it may be that the consent of the Scottish Parliament will be required in line with the Convention. The consent of the Scottish Parliament would also be required for any future amendments which trigger the Convention.

TERRITORIAL APPLICATION: WALES

14. All of the provisions in Parts 1, 2, 3 and 4 of the Bill will apply to Wales.

COMMENTARY ON CLAUSES

Part 1: Serious Crime Prevention Orders

General

Clause 1: Serious crime prevention orders

15. This clause gives the High Court the power to make a Serious Crime Prevention Order ("an order"). A Serious Crime Prevention Order is a new kind of civil injunctive order which is aimed at preventing serious crime. If a person breaches an order he commits a criminal offence. *Subsection (1)* sets out the test which the High Court in England and Wales must apply to determine whether such an order can be made. It provides that an order may be made if the Court is satisfied that a person has been involved in serious crime, whether that involvement was in England and Wales 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 subject of the order in serious crime in England and Wales. Under the first part

of the test in clause 1(1)(a) a person can be involved in serious crime that has occurred in England and Wales or elsewhere. Under the second part of the test in clause 1(1)(b) the public must be protected from the involvement of a person in serious crime in England and Wales only. Being ‘involved’ in serious crime in England and Wales or elsewhere is defined in clauses 2 and 5. ‘Involvement’ in serious crime in England and Wales is defined in clause 2(3). *Subsection (2)* provides for the same provision for Northern Ireland as is set out for England and Wales in *subsection (1)*. *Subsection (3)* provides that the Court may impose such terms in the order, whether prohibitions, restrictions, requirements or other terms, as it considers appropriate so as to protect the public by preventing, restricting or disrupting the involvement of the subject of the order in serious crime. *Subsection (4)* provides that the powers in clause 1 to make such an order are subject to the safeguards set out in clauses 7 to 16 of the Bill.

16. *Subsection (5)* provides that, for the purposes of Part 1 of the Bill, the term “serious crime prevention order” means either an order under this clause or an order under clause 20. Clause 20 makes provision for the Crown Court, rather than the High Court, to make an order following the conviction of the subject of the order for a serious offence. *Subsection (6)* provides that, in Part 1 of the Bill, any reference to the subject of a serious crime prevention order is a reference to the person from whom the public is to be protected, namely the person who has been involved in serious crime and whose involvement in serious crime is to be prevented, restricted or disrupted.

Clause 2: Involvement in serious crime: England and Wales orders

17. This clause defines what constitutes both having been involved in serious crime in England and Wales and involvement in serious crime in England and Wales, in relation to Part 1 of the Bill. A distinction is drawn between these two phrases because the first part of the test, in clause 1(1)(a), is concerned with a person who has been involved in serious crime in England and Wales or elsewhere, whereas the second part of the test, in clause 1(1)(b), is concerned with future involvement in serious crime in England and Wales only. This distinction is also relevant elsewhere in the Bill, in particular in clause 20(2) which is concerned with orders to be made by the Crown Court. *Subsection (1)* sets out that a person has been involved in serious crime, in relation to the first part of the statutory test in clause 1(1), if he has committed a serious offence in England and Wales, has facilitated the commission by another person of a serious offence in England and Wales or has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in England and Wales (whether or not such an offence was committed). Facilitation here takes its natural meaning of ‘to make easier’.

18. Further to this, *subsection (2)* sets out that a ‘serious offence in England and Wales’ is one 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 Part 1 of Schedule 1 to the Bill, 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 Part 1 of Schedule 1 is not an exhaustive list

and the second part of the test allows the court to treat offences that do not appear in Part 1 of Schedule 1 as being serious offences.

19. *Subsection (3)* defines ‘involvement in serious crime in England and Wales’ for the purposes of the second part of the statutory test contained in clause 1(1)(b). It 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 England and Wales. Involvement in serious crime in England and Wales means one or more of the following: the commission of a serious offence in England and Wales; conduct which facilitates the commission by another person of a serious offence in England or Wales; conduct which is likely to facilitate the commission, by the person whose conduct it is or another person, of a serious offence in England and Wales (whether or not such an offence is committed).

20. *Subsection (4)* defines what is meant by the respondent having been involved in serious crime in a place other than England and Wales for the purposes of Part 1 of the Bill. This is for the purposes of the first part of the statutory test contained in clause 1(1), relating to past action which merits the imposition of an order. *Subsection (4)* makes identical provision to *subsection (1)*, except insofar as this subsection is concerned with serious offences which have occurred elsewhere in the world than in England and Wales.

21. *Subsection (5)* defines a ‘serious offence in a country outside England and Wales’. The court has to apply a three stage test. Firstly, the conduct must be an offence in the place outside England and Wales. Secondly, at the time the court considers the application for an order or the matter in question, the conduct must be an offence in England and Wales if it had been committed in or as regards England and Wales. Thirdly, at that time, the offence would fall within the list of offences, or within a description specified, in Part 1 of Schedule 1 to the Bill if committed in or as regards England and Wales or it is conduct which the court considers is sufficiently serious so as to be treated as if it did so.

22. *Subsection (6)* states that the test set out in *subsection (4)*, rather than the test in clause 3(1), should be used when an England and Wales court is determining whether a person has been involved in serious crime in Northern Ireland for the purposes of an England and Wales order.

23. *Subsection (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.

Clause 3: Involvement in serious crime: Northern Ireland orders

24. This clause defines what constitutes both having been involved in serious crime in Northern Ireland and involvement in serious crime in Northern Ireland, in relation to Part 1 of the Bill. The clause also defines what constitutes having been involved in serious crime elsewhere than in Northern Ireland. The subsections of this clause are the same as that provided for in clause 2 (above) but for Northern Ireland.

Clause 4: Involvement in serious crime: evidence

25. This provision was added to the Bill by a non-government amendment in the House of Lords.

26. It enables covert investigatory material, including intercept material, to be used in connection with making serious crime prevention orders. *Subsection (1)* states that the High Court may consider any evidence already admissible under the Regulation of Investigatory Powers Act 2000. *Subsection (2)* brings into effect Schedule 13 which provides for material obtained from the interception of communications to be used as evidence in certain circumstances.

Schedule 13: Intercept evidence

27. This provision was added to the Bill by a non-government amendment in the House of Lords.

28. Paragraph 1 gives the prosecution the power to apply to a court for permission to admit intercept evidence or communications data in criminal proceedings relating to serious crime and terrorism related offences. The existing prohibition on the use of intercept evidence provided for in the Regulation of Investigatory Powers Act ('RIPA') 2000 will continue to apply until and unless the prosecution makes such an application.

29. Paragraph 2 requires the court, in deciding whether to grant permission, to consider relevant factors including whether disclosure should be withheld on public interest grounds or disallowed due to the material being obtained unlawfully.

30. Paragraph 3 defines the meanings of terms used in the Schedule. The definition of 'communications data' refers to a type of communications data that is already admissible as evidence.

31. Paragraph 4 makes consequential amendments to RIPA to bring into effect the provisions of this Schedule.

Clause 5: Involvement in serious crime: supplementary

32. *Subsection (1)* states that the court, when it is considering whether a person has committed a serious offence, must only decide that he has done so if he has been convicted of the offence and that conviction has not been quashed on appeal nor has he been pardoned of the offence.

33. *Subsection (2)* provides that, when considering whether the proposed subject of the order (“the respondent”) facilitates the commission by another person of a serious offence, the court must ignore any act that the respondent can show to be reasonable in the circumstances. *Subsection (3)* similarly provides for such an act to be ignored when considering whether the respondent conducts himself in a way that is likely to facilitate the commission by himself or another of a serious offence. Subject to this, the court must ignore the intentions and other aspects of the mental state of the respondent at the time of the act in question. This means that it does not matter if the respondent did not, for example, intend to facilitate the commission of a serious offence, or had no knowledge that he was conducting himself in a way that was likely to facilitate serious crime.

34. *Subsection (4)* provides the Secretary of State the power to amend Schedule 1 by order.

Clause 6: Type of provision that may be made by orders

35. This clause contains examples of the types of provisions that a serious crime prevention order might include, but does not limit the flexibility of the court, provided for by clause 1(3), to impose such provisions as it thinks appropriate for the purposes of protecting the public by preventing, restricting or disrupting the subject’s involvement in serious crime. *Subsection (2)* sets out that the order may require that the subject of the order does or does not do something outside England and Wales or Northern Ireland, provided that the provision prevents, restricts or disrupts involvement by the respondent in serious crime in England and Wales or Northern Ireland.

36. *Subsection (3)* sets out examples of possible prohibitions, restrictions or requirements which might be placed on an individual (including partners) by an order. These prohibitions, restrictions or requirements might relate to, for example, a person’s travel, financial dealings or the people with whom he is allowed to associate.

37. *Subsection (4)* provides similar examples of prohibitions, restrictions or requirements which might be imposed on bodies corporate, partnerships and unincorporated associations. These prohibitions, restrictions or requirements might relate to, for example, the provision of goods and services, the way in which that body conducts its financial dealings or its employment of staff.

38. *Subsection (5)* is intended to allow the details of how questions are to be answered, information provided or documents produced to be left by the court to the discretion of a law enforcement officer. The subsection provides that where the terms of an order contain a requirement relating to the answering of questions or the provision of information, a law enforcement officer specified or described in the order may specify the following elements of how that requirement of the order should be complied with: the timing (including within a period or at a frequency); the location, the form and manner; and to which law enforcement officer or description of law enforcement officer that information or answers are to be provided. The same is true

in relation to the production of a document, with the exception of no provision for specifying the form in which it should be produced, as the form of a document will be determined by the way the information it contains is recorded and the provisions of *subsections (7) and (8)*.

39. *Subsection (6)* expressly states that any prohibitions, restrictions or requirements which are imposed as terms of an order on an individual may be in relation to an individual's private dwelling. This would, for example, enable the court to include a term in an order which placed a prohibition, restriction or requirement on where an individual was able to reside. However, such terms would still need both to meet the test in clause 1(1)(b) and to be reasonable in the circumstances for the court to impose them.

40. *Subsection (7)* defines the terms 'document', 'law enforcement officer' and 'premises'. The definition of law enforcement officer includes a reference to a member of the staff of the Serious Organised Crime Agency ("SOCA") who is for the time being designated under section 43 of the Serious Organised Crime and Police Act 2005 (c. 15). Under section 43 a member of the staff of SOCA can be designated with the powers of a constable, the customs powers of an officer of Revenue and Customs or the powers of an immigration officer. Only a member of the staff of SOCA who has been designated with the powers of a constable would be able to exercise these powers because these are not customs powers or immigration officers' powers. Also included within this definition are officers of Her Majesty's Revenue and Customs and members of the Serious Fraud Office. *Subsection (8)* provides that any document which is produced must be rendered in legible form.

General safeguards in relation to orders

Clause 7: Any individual must be 18 or over

41. This clause states that an order must not be imposed on anyone under the age of 18.

Clause 8: Other exceptions

42. This clause provides that the Secretary of State may, by order, expressly exclude the application of serious crime prevention orders to persons falling within a specified description. At the moment an order can be imposed on any person and this includes individuals, bodies corporate, partnerships and unincorporated associations. An order under this clause will be subject to the negative resolution procedure.

Clause 9: Limited class of applicants for orders

43. This clause provides that an order in the case of England and Wales can only be applied for by the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions or the Director of the Serious Fraud Office. It is expected that a Director will decide whether or not to make an application on the basis of information from law enforcement agencies such as the police, Revenue and Customs and SOCA.

In the case of Northern Ireland an order may be applied for by the Director of Public Prosecutions for Northern Ireland.

Clause 10: Right of third parties to make representations

44. This clause provides a safeguard where the making, variation or discharge of an order 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. This clause 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. *Subsection (1)* states that in such a situation, the High Court must, when considering the making of an order, on application by such a person, give the person the opportunity to make representations to the court if it considers that the making of an order would be likely to have a significant adverse effect on that person. *Subsections (2) and (3)* provide that the court must give a person the opportunity to make representations at a variation or discharge hearing if it considers that they are likely to be significantly adversely affected by a decision to vary, discharge or not vary or discharge.

45. *Subsection (4)* imposes a similar requirement on the Crown Court if it is considering making an order under clause 20, or varying an order under its powers in clause 21 or 22, if it considers that the making or variation of an order (or the decision not to vary an order) is likely to have a significant adverse effect on that person.

46. *Subsection (5)* provides that, where a court is considering an appeal in relation to an order, it must, upon application, give a person the opportunity to make representations to the court if that person was given such an opportunity at the original hearing.

Clause 11: Notice requirements in relation to orders

47. This clause makes provision for ensuring that the subject of the order has notice of its existence. An order will not necessarily be made in the presence of the subject of the order. Under the Civil Procedure Rules (with amendments if necessary), if the applicant for the order can satisfy the court that the notice of the application for an order was served on the subject of the order and the court is satisfied that the test for making an order is met, the court will make the order even if the subject of the order has not appeared for the hearing. However, in such a situation the order cannot take effect unless a notice setting out the terms of the order has been served on the subject of the order. *Subsection (1)* states that a person is bound by the terms of an order if he is represented (whether in person or otherwise) at the hearing at which the order, or variation of the terms of the order, is made, or if a notice setting out the terms of the order, or variation, has been served on him. Service may be, as stipulated in *subsection (2)*, either in person or by recorded delivery to the subject at their last known address. *Subsection (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. *Subsection (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.

Information safeguards

Clause 12: Restrictions on oral answers

48. This clause makes clear that these orders will not be used as a means of forcing the subject of an order to answer questions, or provide information, orally. This limits the extent to which a requirement under clause 6(5) can operate.

Clause 13: Restrictions for legal professional privilege

49. This clause provides that an order does not override legal professional privilege. *Subsection (1)* provides that an order cannot require its subject to answer a privileged question, provide privileged information or produce a privileged document. *Subsections (2)–(4)* state that these terms refer to a privilege which the subject would be able to rely on in the High Court. *Subsection (5)* provides that, notwithstanding the protection in subsection (1), an order may require a lawyer to provide the name and address of a client.

Clause 14: Restrictions on excluded material and banking information

50. This clause sets out further safeguards by placing restrictions on the extent to which an order can require the production of excluded material and banking information. *Subsection (1)* provides that an order may not require a person to produce any excluded material. Excluded material in the case of England and Wales is defined with reference to section 11 of the Police and Criminal Evidence Act 1984. Section 11 provides that excluded material means:

- 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.

51. Excluded material in the case of Northern Ireland is defined with reference to article 13 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

52. *Subsections (2) to (4)* are concerned with banking information. *Subsection (2)* provides that an order may not require a person to disclose any information or produce any document which is the subject of a duty of confidence from a banking business, unless either of the conditions contained in *subsections (3) and (4)* are met. The first condition is that the person to whom the duty is owed consents to the disclosure. The second condition contains two alternatives. The first alternative is

that there is specific provision in the order for the disclosure of such information, in other words an express requirement for the production of banking information in general. The second alternative is that there is a specific requirement to disclose specified information or a specified document which amounts to banking information.

Clause 15: Restrictions relating to other enactments

53. This clause makes provision for the interaction between an order and prohibitions on the disclosure of information contained in enactments. *Subsection (1)* provides that an order cannot require a person either to answer any questions, provide any information or produce any documents, if he is prohibited from doing so under any other enactment. *Subsection (2)* contains a number of definitions.

Clause 16: Restrictions on use of information obtained

54. This clause relates to the interaction between the provisions of an order and the need to protect the privilege against self-incrimination. *Subsection (1)* provides that a statement (which by virtue of clause 12 can only be a written statement), provided by a person as a result of a requirement in an order, cannot be used against him in criminal proceedings except if either one of two conditions are met.

55. *Subsection (2)* sets out the first condition, namely that such a statement can be used if the criminal proceedings are in relation to the offence of failing to comply with the order itself, contained in clause 26. The second condition, set out in *subsection (3)*, is that the proceedings relate to an offence other than an offence under clause 26, the person gives evidence in those proceedings, when giving evidence makes a statement which is inconsistent with the statement made in response to the requirement of the order, and in the proceedings evidence relating to the statement made in response to the requirement imposed by the order is adduced, or a question about it is asked, by the person or on his behalf.

Duration, variation and discharge of orders

Clause 17: Duration of orders

56. This clause makes provision for how long an order will be in force and for a requirement to stipulate when its provisions come into force. It provides that an order can last for a maximum of 5 years from the date of its first provision coming into force, but that it can specify that provisions come into force, or cease to have effect, at different times, and these must be specified in the order. A court is able to make a new order replicating an order, or any part of it, which has ended, provided that the statutory test contained in clause 1(1) is still met. This can be done in anticipation of an order ceasing to have effect.

Clause 18: Variation of orders

57. This clause deals with how an order may be varied, either on application by the relevant applicant authority, by the subject of the order or by a third party. *Subsection (1)* for England and Wales and *subsection (2)* for Northern Ireland provide a power to the High Court to vary the terms of an 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 England and Wales (in the case of the High Court in England and Wales) or Northern Ireland (in the case of the High Court in Northern Ireland). This is identical to the second part of the test contained in clause 1(1)(b) and ensures that a varied order must continue to meet that test. Under *subsection (3)*, either the relevant applicant authority, the subject of the order or a third party can apply for variance of the terms of the order.

58. *Subsection (4)* states that the subject of the order can only apply for variance of the terms of the order where the court considers that there has been a change of circumstances affecting the order.

59. *Subsections (5)–(7)* relate to the rights of third parties to apply for variation of the terms of an order. The High Court can only consider an application for variation by a third party if a three stage test, set out in *subsection (5)*, is met. Firstly, a third party must show that they are significantly adversely affected by the order. Secondly, one of two conditions must be met. The first condition relates to when a third party has been given the opportunity to make representations (on an application under clause 10), or has made an application otherwise than under that clause, and there has been a change in circumstances affecting the order (*subsection (6)*). The second condition relates to when the third party has not made an application of any kind in earlier proceedings in relation to the order, but where he can show that it was reasonable in all the circumstances for him not to have been so involved (*subsection (7)*). The third part of the test is that third parties cannot apply for variance of the terms to make them more onerous on the subject of the order.

60. Subject to the fact that an order cannot last for more than 5 years, *subsection (8)* provides that, as a result of an application by the relevant applicant authority, the court may vary an order to increase the length of the order or of any of the provisions contained in it.

Clause 19: Discharge of orders

61. Similarly to clause 18, this clause deals with how an order may be discharged either on application by the relevant prosecuting authority, by the subject of the order or by a third party. *Subsections (3)–(6)* make identical provision to clause 18(4)–(7), with the exception of reference to a third party applying to make an order more onerous, which is not relevant in relation to discharge of an order.

Extension of jurisdiction to Crown Court

Clause 20: Orders by Crown Court on conviction

62. Although the main route for making an order will be an application to the High Court, as provided in clause 1, this clause confers on the Crown Court in England and Wales a civil jurisdiction to be able to impose an order also called a serious crime prevention order (as provided by *subsection (8)*) where a person has been convicted of a serious criminal offence. The Crown Court's powers arise either where a person has been convicted by a magistrates' court and committed to the

Crown Court to be dealt with, or convicted by the Crown Court itself, in relation to a serious offence committed in England and Wales (*subsection (1)*). This replaces the first part of the test in clause 1(1)(a). The meaning of a serious offence committed in England and Wales is to be determined in accordance with clause 2 and Part 1 of Schedule 1.

63. *Subsection (2)* replicates the second part of the test contained in clause 1(1)(b). It states that the Crown Court in England and Wales may impose an order where it 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 England and Wales.

64. *Subsection (3)* confers on the Crown Court in Northern Ireland a civil jurisdiction to be able to impose a serious crime prevention order where a person has been convicted of a serious criminal offence. The Crown Court's powers arise where a person has been convicted by or before the Crown Court of having committed a serious offence in Northern Ireland (*subsection (3)*). This replaces the first part of the test in clause 1(2)(a). The meaning of a serious offence committed in Northern Ireland is to be determined in accordance with clause 3 and Part 2 of Schedule 1.

65. *Subsection (4)* replicates the second part of the test contained in clause 1(2)(b). It states that the Crown Court in Northern Ireland may impose an order where it 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 Northern Ireland.

66. *Subsection (5)* replicates clause 1(3), providing the courts with the flexibility to include such terms in the order as they consider appropriate for this purpose. As with orders before the High Court, clause 6 will apply to orders before the Crown Court.

67. *Subsection (6)* makes clear that the powers of the Crown Court are subject to the same safeguards, contained in clauses 7–16, as the High Court.

68. *Subsection (7)* states that an order can only be made by the Crown Court in addition to a sentence imposed in relation to the offence concerned or in addition to giving a conditional discharge. This makes it clear that an order is not an alternative to sentencing a person for the trigger offence. Once an order has been made by the Crown Court any applications for variation or discharge of the order will be dealt with by the High Court unless clause 21 or clause 22 applies.

69. *Subsection (8)* confirms that such an order made by the Crown Court will also be called a serious crime prevention order.

Clause 21: Powers of the Crown Court to vary orders on conviction

70. This clause, together with clause 22, makes provision for the two cases in which the Crown Court can vary the terms of an order, namely on the conviction for a serious offence of a person already subject to an order (clause 21), or the conviction of a person for breach of an order (clause 22). The Crown Court cannot discharge an order. This can only be done by the High Court. Clause 21 provides the Crown Court with the power to vary an order where the person before it is the subject of an order and has been found guilty of a serious offence in England and Wales, either having been committed from the magistrates' court or having been convicted in the Crown Court (*subsection (1)*). *Subsection (2)* provides that, in such a circumstance, the Crown Court 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 England and Wales.

71. *Subsections (3) and (4)* provide for Northern Ireland the same provisions as set out in *subsections (1) and (2)* for England and Wales, although a person cannot be committed from a magistrates' court to the Crown Court for sentence in Northern Ireland, so this provision is not replicated.

72. *Subsection (5)* states that such variance can only be applied for by the relevant applicant authority.

73. *Subsection (6)* replicates clause 20(7), in that an order can only be varied by the Crown Court in addition to a sentence imposed in relation to the offence concerned or in addition to giving a conditional discharge. Similarly, *subsection (7)* replicates clause 18(8) in that, subject to the fact that an order cannot last for more than 5 years, it is provided that, as a result of an application by the relevant prosecuting authority, the court may vary an order to increase the length of the order or of any of the provisions contained in it.

Clause 22: Powers of Crown Court to vary orders on breach

74. This clause provides the Crown Court, in similar terms to clause 21, with the power to vary an order when it is dealing with a person who has been convicted of breach of an order under the offence set out in clause 26.

Clause 23: Inter-relationship between different types of orders

75. *Subsections (1) and (2)* make it clear that the fact that the High Court has done something in relation to the order does not prevent the Crown Court from doing something in relation to the order (so far as permitted by the Part) and vice versa.

76. *Subsections (3) and (4)* set out that a refusal by the Crown Court to make or vary an order does not preclude an application to the High Court to make or vary an order, in relation to the same offence.

Appeals

Clause 24: Additional right of appeal from High Court

77. This clause adds to the current rights of appeal from the High Court contained in section 16 of the Senior Courts Act 1981 and section 35 of the Judicature (Northern Ireland) Act 1978 and pertains to appeals by third parties. *Subsection (1)* provides that an appeal may be made, by any person who was given leave to make representations at the original proceedings under the provision set out in clause 10, against a decision of the High Court to make an order, to vary or not to vary an order, or not to discharge an order. The relevant applicant authority and the subject of the order have existing rights of appeal under section 16 of the Senior Courts Act 1981 or under section 35 of the Judicature (Northern Ireland) Act 1978 and *subsection (2)* makes it clear that the provisions of *subsection (1)* do not oust or prejudice those rights of appeal. By virtue of paragraph 3 of Schedule 14 to the Bill the reference here to the Senior Courts Act 1981 is to be read as a reference to the Supreme Court Act 1981 until the commencement of paragraph 1(1) of Part 1 of Schedule 11 to the Constitutional Reform Act 2005 (c. 4).

Clause 25: Appeals from Crown Court to Court of Appeal

78. In contrast to the High Court there are no existing rights of appeal against a decision of the Crown Court in relation to the making or variation of an order and as a consequence they must be provided for in this clause. *Subsection (1)* allows the relevant applicant authority and the subject of the order to appeal to the Court of Appeal against a decision of the Crown Court in relation to an order. *Subsection (2)* allows a third party to appeal a decision of the Crown Court to make, vary, or not to vary an order if they made representations in accordance with clause 10. *Subsection (3)* provides that an appeal is allowed only if the Court of Appeal grants leave.

Enforcement

Clause 26: Offence of failing to comply with order

79. This clause provides that an offence is committed where the subject of an order, without reasonable excuse, fails to comply with its terms. *Subsection (2)* sets out the potential penalties which may be imposed on the subject of the order where such an offence is committed. *Subsections (3) and (4)* make technical provision for the difference in maximum sentence for conviction on a summary offence in Northern Ireland and for the fact that a copy of the original order is admissible as evidence of the fact that it was made in proceedings under this clause respectively. Paragraph 4 of Schedule 14 to the Bill provides that, in England and Wales, in relation to an offence committed before the commencement of section 282(1) of the Criminal Justice Act 2003, the reference in *subsection (2)(a)* to 12 months is to be read as 6 months, and the same in relation to Scotland until the commencement of section 45(1) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

Clause 27: Powers of forfeiture in respect of offence

80. This clause confers on the court the power to order forfeiture of any item in the possession of the subject of the order, at the time of an offence under clause 26, which the court considers was involved in the commission of that offence (*subsection*

(1)). *Subsection (2)* provides that, before making such an order, the court must allow any person, in addition to the person who has been convicted, who claims to be the owner of the item in question, or to have an interest in it, to make representations. *Subsection (3)* states that a forfeiture order must not come into force while it is still possible for there to be an appeal to set aside or vary that order (ignoring any power to appeal out of time).

81. *Subsections (4) and (5)* state that as well as being able to make a forfeiture order, the court is able to make any other provision it considers necessary for the forfeiture to be given effect to, including provision relating to the retention, handling, destruction or other disposal of the item in question.

82. *Subsection (6)* sets out that any forfeiture order may be varied at any time by the court which made it.

Clause 28: Powers to wind up companies etc: England and Wales

83. This clause provides the relevant applicant authorities with the power to petition the court for the winding up of a company, partnership or relevant body. *Subsection (1)* states that, in order for the sanction to be available, the company, partnership or relevant body must have been convicted of the offence in clause 26 of breach of an order and the relevant applicant authority must also consider it to be in the public interest for the company, partnership or relevant body to be wound up.

84. *Subsections (2) – (5)* provide that the power to petition for winding up taps into the existing powers to wind up companies and partnerships in the Insolvency Act 1986 (c. 45) (“the 1986 Act”). If a court decides to order the winding up of a company or partnership the provisions of the 1986 Act on how the winding up is to be conducted will apply. *Subsection (2)* provides that, in relation to an application for the winding up of a company, the provisions of the 1986 Act concerning the winding up of companies apply to an application under this clause, as if the application were an application under section 124A of that Act, which is concerned with winding up in the public interest, subject to the following modifications. Firstly, *subsection (3)* provides for the relevant applicant authority to present the petition for winding up, whereas it would normally be the Secretary of State under section 124A of the 1986 Act. Secondly, *subsection (4)* states that the court can only make an order to wind up the company under section 125 of the 1986 Act if the company has been found guilty of the offence in clause 26 and the court considers that it is just and equitable for the company to be wound up.

85. *Subsection (5)* taps into the power to make provision for insolvent partnerships under section 420 of the 1986 Act. Section 420 of the 1986 Act provides that the Lord Chancellor may make an order to the effect that the provisions of the 1986 Act are to apply to insolvent partnerships with such modifications as may be specified. This power is extended for the purposes of clause 28 to all partnerships. *Subsection (6)* provides the Secretary of State with the power to provide, by order, for the Act of 1986 to apply with modifications to a relevant body. By virtue of *subsection (7)* such

an order under *subsections (5) or (6)* must provide that the court will only wind up a partnership or relevant body to which this clause applies if the partnership or relevant body has been convicted of the offence in clause 26 and where it would be just and equitable to do so.

86. *Subsection (8)* makes it clear that no application for winding up may be made, or order for such winding up granted by the court, if an appeal against the conviction under clause 26 has been made but not finally determined, or if the time limit for such an appeal has not yet run out (though *subsection (10)* states that any power to appeal out of time which might exist is to be ignored for the purposes of this subsection).

87. *Subsection (9)* states that no application may be made, or order granted under this clause, if the company, partnership or relevant body is already being wound up by the court.

88. *Subsection (11)* defines the terms “company” and “the court” for the purposes of this clause. The former takes the same meaning as in Parts 1 to 7 of the 1986 Act, including an unregistered company, unless the unregistered company is a relevant body. Under section 220 of the 1986 Act an unregistered company includes any association and any company but not a company registered in any part of the United Kingdom under the Joint Stock Companies Acts or under the legislation (past or present) relating to companies in Great Britain. “The Joint Stock Companies Acts” means the Joint Stock Companies Act 1856, the Joint Stock Companies Acts 1856, 1857, the Joint Stock Banking Companies Act 1857 and the Act to enable Joint Stock Banking Companies to be formed on the principle of limited liability, or any one or more of those Acts (as the case may require), but does not include the Joint Stock Companies Act 1844 (see section 735 of the Companies Act 1985). Under section 251 of the 1986 Act “company” is given the same meaning as in Part XXVI of the Companies Act 1985. Section 735 of that Act provides that a company means a company formed and registered under that Act, or an existing company. “Existing company” means a company formed and registered under the former Companies Acts, but does not include a company registered under the Joint Stock Companies Acts, the Companies Act 1862 or the Companies (Consolidation) Act 1908 in what was then Ireland. “The former Companies Acts” means the Joint Stock Companies Acts, the Companies Act 1862, the Companies (Consolidation) Act 1908, the Companies Act 1929 and the Companies Acts 1948 to 1983.

89. “Court” is also defined by reference to Parts 1 to 7 of the 1986 Act. For the purposes of the Bill the term does not include a court in Scotland or Northern Ireland. Section 117 of the 1986 Act provides that the High Court has jurisdiction to wind up any company registered in England and Wales and, where the amount of a company's share capital paid up or credited as paid up does not exceed £120,000, then (subject to the other subsections of section 117) the county court of the district in which the company's registered office is situated has concurrent jurisdiction with the High Court to wind up the company.

90. The term “relevant body” for the purposes of the order making power in *subsection (6)* is also defined in *subsection (11)*. Paragraphs (a) to (c) of the definition list a number of specific mutual bodies. Paragraph (d) provides power for the Secretary of State to add other descriptions of bodies to the definition of relevant body by order.

Clause 29: Powers to wind up companies etc: Northern Ireland

91. This clause relates to Northern Ireland and corresponds to clause 28. The provisions are of the same effect as those in clause 28 but they tap into the Insolvency (Northern Ireland) Order 1989 (SI 1989/2405 (N.I. 19)) rather than the Insolvency Act 1986.

Particular types of bodies

Clause 30: Bodies corporate including limited liability partnerships

92. This clause makes certain provisions to enable the application of orders to bodies corporate. *Subsection (1)* sets out that, for the purposes of clause 11, notice of an order is delivered in person to the body corporate if it is delivered to an officer of the body corporate in person. In addition, such an order is deemed to have been sent by recorded delivery to the body corporate at its last known address if it is so sent to an officer at the address of the registered office of that body or at the address of its principal office in the United Kingdom. Finally, this subsection provides that the power set out in clause 11(3), enabling a constable or other authorised person to enter premises, by force if necessary, and search those premises for the subject of the order to deliver the notice to him, applies, in the case of a body corporate, to being able to do so in relation to an officer of the body corporate.

93. *Subsection (2)* applies where there has been a breach of an order, constituting an offence under clause 26. If such a breach has been committed with the consent or connivance of either an officer of the body corporate or someone who purports to be such, then, in addition to the body corporate, that person is guilty of the offence and liable to be proceeded against and punished accordingly.

94. *Subsection (3)* makes it clear that there is nothing to stop there being an order against a body corporate and also a parallel order running alongside against any individual who might be involved or associated with that body corporate, including an officer or employee.

95. *Subsection (4)* defines certain terms – “body corporate”, “director” and “officer of a body corporate” for the purposes of this clause.

Clause 31: Other partnerships

96. This clause makes provision for the operation of orders against partnerships other than limited liability partnerships, which are covered by clause 30. *Subsection (1)* makes clear that an order sought against a partnership must be made in the name

of the partnership and not in the name of any of the constituent partners. *Subsection (2)* provides that an order continues to have effect if the partners change unless all the partners who were partners at the time the order was made leave the partnership. If all the partners at the time the order was made leave the order will cease to have effect.

97. *Subsection (3)* provides a gloss for the meaning of ‘involved in serious crime’ and ‘involvement in serious crime’ when a court is considering an order in relation to a partnership. A partnership is involved in serious crime or an order will prevent its involvement in serious crime if any of the partners is so involved.

98. *Subsection (4)* makes provision for service on a partnership for the purposes of clause 11 of the Bill. Service in person will be effected by service on any partner or senior officer of the partnership in person. Service by recorded delivery will be effected by sending a notice to any partner or any senior officer of the partnership at the principal office of the partnership in the United Kingdom. The power to enter and search in clause 11(3) is to be construed as a power to enter and search for a partner or a senior officer of the partnership.

99. *Subsection (5)* provides that any proceedings for breach of an order under clause 26 should be brought in the name of the partnership. *Subsection (6)* provides that the rules of court relating to the service of documents and certain legislative provisions listed apply as if the partnership were a body corporate. Where a partnership is convicted in such proceedings, *subsection (7)* states that the fine is to be paid out of the partnership’s assets.

100. *Subsection (8)* makes similar provision to clause 30(2). Where an offence under clause 26 is committed with the consent or connivance of a partner or senior officer of the partnership, that person is also guilty of the offence. For the purposes of this subsection, *subsection (9)* makes it clear, firstly, that any references to a partner or senior officer of the partnership include references to any person purporting to act in such a capacity. Secondly, while *subsection (5)* makes clear that any proceedings brought under clause 26 must be brought in the name of the partnership, this does not prejudice the liability of a partner under *subsection (8)* in relation to an offence committed with his consent or connivance.

101. *Subsection (10)* makes similar provision to clause 30(3), making clear that nothing in this clause prevents an order being made against an individual who is involved or associated in any way with the partnership.

102. *Subsection (11)* defines the terms “senior officer of a partnership” and “partnership”.

Clause 32: Unincorporated associations

103. This clause makes provision for the operation of orders against unincorporated associations. *Subsection (1)* provides that an order against an unincorporated association must be made in the name of the association and not in the name of any of

its members. *Subsection (2)* provides that an order continues to have effect if the members of an association change unless all the members who were members at the time the order was made leave the association. If all the members at the time the order was made leave the order will cease to have effect.

104. *Subsection (3)* makes provision for service on an unincorporated association for the purposes of clause 11 of the Bill. Service in person will be effected by service on an officer of the association in person. Service by recorded delivery will be effected by sending a notice to an officer of the association at the principal office of the association in the United Kingdom. The power to enter and search in clause 11(3) is to be construed as a power to enter and search for an officer of the association.

105. *Subsection (4)* provides that any proceedings for breach of an order under clause 26 should be brought in the name of the association and not any of its members. *Subsection (5)* provides that the rules of court relating to the service of documents and certain legislative provisions listed apply as if the association were a body corporate. Where an association is convicted in such proceedings, *subsection (6)* states that the fine is to be paid out of the association's funds.

106. *Subsection (7)* makes similar provision to clause 30(2). Where an offence under clause 26 is committed with the consent or connivance of an officer of the association, that person is also guilty of the offence. For the purposes of this subsection, *subsection (8)* makes it clear, firstly, that any references to an officer of an association include references to any person purporting to act in such a capacity. Secondly, while *subsection (4)* makes clear that any proceedings brought under clause 26 must be brought in the name of the association, this does not prejudice the liability of an officer of an association under *subsection (7)* in relation to an offence committed with his consent or connivance.

107. *Subsection (9)* makes similar provision to clause 30(3), making clear that nothing in this clause prevents an order being made against an individual who is involved or associated in any way with the association.

108. *Subsection (10)* defines the terms "officer of an unincorporated association" and "unincorporated association".

Clause 33: Overseas bodies

109. This clause provides an order-making power for the Secretary of State to modify any provision contained in clause 30, 31 or 32 in its application to a body which is formed under law having effect outside the United Kingdom. This provision is included to take account of the possibility that special provision may be needed to enable orders to be made against, and function in relation to, overseas bodies.

Supplementary

Clause 34: Proceedings in the High Court

110. This clause sets out certain issues relating to proceedings in the High Court. *Subsection (1)* states that proceedings in relation to a serious crime prevention order before the High Court will be civil in nature. This classification will be effective for domestic law purposes. It is also intended that proceedings for an order will be classified as civil rather than criminal for the purposes of Articles 6 and 7 of the European Convention on Human Rights. A consequence of *subsection (1)*, as set out in *subsection (2)*, is that the standard of proof applied by the High Court will be the civil standard. This is only one consequence of the proceedings being classified as civil. There will be other consequences which are not specified in the Bill, for example, hearsay evidence will be admissible in the proceedings. In the case of R (McCann) v. Crown Court at Manchester [2003] 1 AC 787, the leading case on anti-social behaviour orders, the House of Lords held that although the civil standard of proof would apply in relation to an application for an anti-social behaviour order the standard is a flexible one ranging from proof on the balance of probabilities, at the lowest level, to beyond reasonable doubt, at the highest. The House of Lords stated that they would expect a high standard of proof to be applied in relation to anti-social behaviour applications and the same principle is likely to apply in relation to applications for serious crime prevention orders.

Clause 35: Proceedings in the Crown Court

111. This clause sets out certain issues relating to proceedings in the Crown Court. *Subsection (1)* provides that the Crown Court will exercise a civil jurisdiction in hearing proceedings arising from clause 20, 21 or 22. This is to make it clear that, although the Crown Court is normally a court of criminal jurisdiction, when it is exercising its powers to make or vary an order it is acting as a court of civil jurisdiction. As with proceedings before the High Court, it is intended that the proceedings will be civil rather than criminal for ECHR purposes. *Subsection (2)* records that the applicable standard of proof will be the civil one. *Subsection (3)* records that the court can take into account evidence beyond that which would have been admissible in the criminal proceedings during which the proposed subject of the order was convicted. This would include hearsay evidence. The subsection also records that the court may adjourn proceedings, even after sentencing. The consequences set out in *subsections (2) and (3)* are just three consequences of the proceedings being civil. There will be others that are not specified in the Bill.

112. *Subsections (4) and (5)* provide that the rule making power under section 1 of, and Schedule 1 to, the Civil Procedure Act 1997 is exercisable in relation to the Crown Court's jurisdiction to make or vary orders and that such rules as are made may make similar provision to those in relation to proceedings in the High Court. This is to take account of the fact that because the Crown Court will be exercising a civil jurisdiction in relation to an order the normal criminal procedure rules will not be appropriate and so something needs to be put in their place. However, because the

Crown Court is not normally a court of civil jurisdiction the Civil Procedure Rules will not apply without something express.

113. *Subsections (6) and (7)* provide that serious crime prevention orders may be made or varied by the Crown Court in spite of sections 12 and 14 of the Powers of Criminal Courts (Sentencing) Act 2000 or the corresponding provisions in Northern Ireland, which relate to discharging a person absolutely or conditionally. This means that a person who is given an absolute or conditional discharge can still have an order made in relation to him or have his existing order varied by the Crown Court. Express provision is needed in the Bill because the effect of sections 12 and 14 of the 2000 Act is that a person who is given an absolute or conditional discharge is not sentenced for the offence and is not treated as having a conviction for the offence. The effect of these sections needs to be altered in relation to serious crime prevention orders because the Crown Court only has jurisdiction to make or vary such an order if there has been a conviction for a serious offence and an order is made in addition to sentence.

Clause 36 and Schedule 2: Functions of applicant authorities

114. This clause gives effect to Schedule 2 which provides for the functions of the applicant authorities that can make applications for orders (Director of Public Prosecutions, Director of Revenue and Customs Prosecutions, Director of the Serious Fraud Office and Director of Public Prosecutions for Northern Ireland). These functions include applying for serious crime prevention orders, or the variation or discharge of an order; appearing on applications by others for the variation or discharge of an order; having the conduct of or appearing in any other proceedings about a serious crime prevention order; providing advice about any proceedings or possible proceedings in connection with a serious crime prevention order; or anything for the purposes of, or in connection with, these functions. Special provision has to be made because functions in relation to serious crime prevention orders fall outside the usual prosecutorial functions of the Directors.

115. Paragraphs 1 to 5 of Schedule 2 list the functions of the Director of Public Prosecutions under Part 1 of the Bill and provide that he can delegate his functions to a Crown Prosecutor (paragraph 2). Paragraphs 6 to 11 of this Schedule list the functions of the Director of Revenue and Customs Prosecutions under Part 1 of the Bill and provide that he can delegate his functions to a Revenue and Customs Prosecutor (paragraph 7). Paragraphs 12 to 15 of this Schedule list the functions of the Director of the Serious Fraud Office under Part 1 of the Bill and provide that he can delegate his functions to a member of the Serious Fraud Office (paragraph 13). The powers to delegate alter the usual position in relation to the carrying out of functions on behalf of the Directors by their staff. A Director must expressly delegate his functions rather than it occurring automatically. This is intended to ensure that the exercise of the powers is kept under tight control by the Directors.

116. Paragraphs 3, 8 and 14 provide that the functions of the Directors are exercisable under the superintendence of the Attorney General.

117. Paragraphs 16 to 19 of this Schedule list the functions of the Director of Public Prosecutions for Northern Ireland under Part 1 of the Bill.

Clause 37: Disclosure of information in accordance with orders

118. This clause provides a protection for a person subject to an order when the terms of an order require him to answer a question, provide information or produce a document. In such a situation, he will not be in breach of any obligation of confidence or any other restriction on disclosing the information concerned when he discloses such information in compliance with the terms of an order. *Subsection (2)* reminds the reader that any such requirements contained in an order relating to the provision of information are subject to the safeguards set out in clauses 12 to 15.

Clause 38: Powers of law enforcement officers to retain documents

119. This clause provides law enforcement officers with powers to take copies of and retain documents. This power is needed in light of the possibility that an order will contain a condition requiring a person to produce documents as set out in clause 6(5). *Subsection (1)* provides that the officer may take and retain copies of, or extracts from, documents which are produced under the terms of an order, and that he may retain the documents themselves for as long as he considers necessary for the purposes for which they were obtained. *Subsection (2)* provides that a law enforcement officer may retain documents until the conclusion of any legal proceedings if he has reasonable grounds to believe that the documents may have to be produced in the proceedings, and that they might not be available for those proceedings if he did not retain them.

Clause 39: Interpretation: Part 1

120. This clause provides definitions for some of the terminology used in Part 1 of the Bill, including the terms “act”, “conduct”, “country” and “the public”.

Clause 40: Index of defined expressions: Part 1

121. This clause contains an index of expressions which have a meaning given to them, or are to be interpreted in accordance with, other provisions in the Bill.

Part 2: Encouraging or Assisting Crime

Inchoate offences

Clause 41: Intentionally encouraging or assisting an offence

122. This clause creates a new offence of intentionally encouraging or assisting an offence.

123. *Subsection (1)* sets out what a person must do to commit the offence. He must do an act capable of encouraging or assisting the commission of an offence and intend to encourage or assist its commission.

124. *Subsection (2)* provides further definition as to what is meant by “intention” in this clause, making it clear that foresight of consequences is not sufficient to establish intention.

Clause 42: Encouraging or assisting an offence believing it will be committed

125. This clause creates a new offence of encouraging or assisting an offence believing it will be committed. The person commits the offence if he does an act capable of encouraging or assisting an offence and he believes both that the offence will be committed and that his act will encourage or assist its commission.

Clause 43: Encouraging or assisting offences believing one or more will be committed

126. This clause creates a new offence of encouraging or assisting offences believing that one or more will be committed.

127. *Subsection (1)* sets out what a person must do to commit the offence. He must do an act capable of encouraging or assisting one or more offences believing that one or more offences will be committed and that his act will encourage or assist one or more of them.

128. *Subsection (2)* provides that it is not necessary for a person to have a belief as to which offence will be encouraged or assisted.

129. *Subsection (3)* requires an indictment for this offence to specify a number of the offences that it is alleged the accused believed might be committed. For example, if D lends a van to P believing that one of robbery or arson will be committed, the indictment must specify robbery and arson. However this does not mean that every offence that could have been encouraged or assisted must be specified (*subsection (3)(b)*).

Clause 44: Proving an offence under this Part

130. This clause sets out what needs to be proved to establish guilt for each of the offences in clauses 41, 42 and 43.

131. *Subsections (2) to (4)* set out that in order to establish that a person did an act capable of encouraging or assisting an offence under Part 2, it is sufficient to demonstrate that he did an act intending to encourage or assist an act which would amount to the commission of an offence, or believing that an act would be done which would amount to the commission of an offence.

132. *Subsection (5)* sets out what must be proved under clauses 41, 42 and 43 if the offence that it is alleged a person intended or believed would be encouraged or

assisted requires proof of fault, circumstances or consequences. In such cases, it must be proved that the person who provided encouragement or assistance either believed that, were another person to do the act, that person would have the necessary fault (*subsection (5)(a)(i)*) or he was reckless as to whether or not another person would have the necessary fault (*subsection (5)(a)(ii)*) or he himself would have the necessary fault (if he were to do the act himself) (*subsection (5)(a)(iii)*).

133. *Subsection (5)(b)* sets out what must be proved under clauses 41, 42 and 43 if the offence that it is alleged a person intended or believed would be encouraged or assisted requires proof of particular circumstances or consequences. In such cases, it will also be necessary to demonstrate that a person who provides encouragement or assistance either believed, or was reckless as to whether, were another person to do the act, that person would do so in those circumstances or with those consequences.

134. Requiring some degree of belief in relation to circumstances ensures that a person would not be guilty of an offence of encouraging or assisting a strict liability offence unless he believes or is reckless as to whether those circumstances exist. For example, D asks P to drive him home from the pub as he has had too much to drink. P is insured to drive D's car but unknown to D and P, P was disqualified from driving the day before. P is committing the principal offence of driving whilst disqualified, despite the fact he is not aware that he is disqualified, as this is an offence of strict liability. However it would not be fair to hold D liable in such circumstances.

135. Requiring some degree of belief in relation to consequences ensures that a person would not be guilty of an offence that requires certain consequences to arise for it to be committed, unless he believes or is reckless as to whether those consequences should arise. For example, D gives P a baseball bat and intends P to use it to inflict minor bodily harm on V. P however uses the bat to attack V and intentionally kills V. It would not be fair to hold D liable for encouraging and assisting murder, unless he also believes that, or is reckless as to whether, V will be killed.

136. *Subsection (6)* makes it clear that where *subsection (5)(a)(iii)* is relied upon (i.e. where fault required for conviction for offences is established because the person who has done an act capable of providing encouragement or assistance has the necessary fault element for commission of the offence himself), a person cannot escape liability purely because it is impossible for him/her to commit the offence.

137. For example, D (a woman) encourages P to penetrate V with his penis (rape) and believes that if P were to do so, it would be without V's consent. P reasonably believes that V does consent so does not have the mental element required for conviction of rape. Therefore, D's fault is determined under clause 44(5)(a)(iii) in that if she were to commit the act, she would do it with the fault required. However it is not possible for a woman to commit the act of penetration with a penis so were it not for this subsection, D would escape liability.

138. *Subsection (7)(a)* makes it clear that, in relation to clause 41 a reference to circumstances or consequences that a person believes includes circumstances or consequences that a person intends. *Subsection (7)(b)* clarifies what is meant by the word 'intent' in this regard.

139. *Subsection (8)* provides further definition as to what is meant by the phrase 'doing an act'.

140. *Subsection (9)* provides further definition as to what is meant by the phrase 'anticipated offence' in relation to clauses 41 and 42.

Clause 45: Proving an offence under section 43

141. This clause provides further rules in relation to what needs to be proved to establish guilt for an offence under clause 43.

142. *Subsection (2)* makes it clear that it is sufficient to establish that a person who provides encouragement or assistance had the required belief or recklessness as to fault, consequences and/or circumstances (as required by clause 44(5)) in relation to one offence only.

143. *Subsection (3)* provides that the offence for which the elements mentioned in clause 44(5) are proved must be one of those specified in the indictment. But this is subject to those rules which permit a person accused of one offence to be convicted of another and in particular to clause 53 (alternative verdicts and guilty pleas).

Clause 46: Supplemental provisions

144. *Subsection (1)* sets out that the offences can be committed regardless of whether or not the encouragement or assistance has the effect which the defendant intended or believed it would have.

145. *Subsection (2)* sets out that if a person's act is capable of encouraging or assisting a number of criminal offences, and he either intends or believes that each of those offences will happen, he can be prosecuted and convicted in relation to every offence that he intends to encourage or assist, or believes will be encouraged or assisted.

146. For example, if D lends P a knife and intends P to use it to enter three different properties as a trespasser (burglary) and to attack V (assault) (and intends or believes that minor harm will result), D can be prosecuted for encouraging and assisting three burglaries and an assault under clause 41. Likewise if D lends P a knife and believes he will use it to enter three different properties as a trespasser (burglary) and to attack V (assault) (and believes that minor harm will result), D can be prosecuted for encouraging or assisting three burglaries and an assault under clause 42.

147. *Subsection (3)* sets out that a person may, in relation to the same act, commit an offence under more than one provision of Part 2.

148. For example, D lends P a knife and believes that he will enter one property as a trespasser (burglary). He also believes that P will use it to commit another offence which will either be to enter another property as a trespasser or to attack V (assault) (and minor harm would result). D could be convicted under clause 42 of encouraging and assisting burglary. He could also be prosecuted and convicted under clause 43 of encouraging and assisting burglary or assault.

149. *Subsections (4) and (5)* set out that a person cannot be guilty of encouraging or assisting an offence under clause 42 or 43 believing that an offence under clause 41, 42 or 43 or one of those offences listed in Schedule 3 will happen. The offences listed in Schedule 3 are generally statutory forms of incitement.

150. This means it will not be an offence to encourage or assist another person believing that that person will commit the offence of encouraging or assisting another to commit an offence. For example, D does an act capable of assisting P to encourage or assist X to commit robbery and D believes that P will encourage or assist X to commit robbery. It matters not whether P intends or believes that X will commit robbery. However if D intended to encourage or assist P to encourage or assist X to commit robbery, D would be guilty of an offence under clause 41.

151. *Subsection (6)* confers power on the Secretary of State to amend Schedule 3.

152. *Subsection (7)* sets out that the requirement that a person believes that a criminal offence, or a number of criminal offences, be committed is satisfied if he believes that the criminal offence, or that one or more criminal offences, would be done if certain conditions are met.

153. For example, D gives P some money and tells him to give it to X to persuade X to lend them his car. However D tells P that if X will not lend them the car, P should take it anyway. In this situation D believes that a criminal act will be done if certain conditions are met (i.e. if X will not lend them his car).

Reasonableness defence

Clause 47: Defence of acting reasonably

154. This clause sets out that it will be a defence to the offences in Part 2 if the person charged with those offences acted reasonably, that is that in the circumstances he was aware of, or in the circumstances he reasonably believed existed, it was reasonable for him to act as he did.

155. *Subsection (3)* sets out a number of factors that the court could consider when determining whether an act was reasonable in the circumstances. This list is not exhaustive.

Limitation on Liability

Clause 48: Protective offences: victims not liable

156. This clause sets out in statute the common law exemption from liability established in the case of *Tyrell* [1894].

157. A person cannot be guilty of the offences in clauses 41, 42 and 43 if, in relation to an offence that is a “protective” offence (defined in *subsection (2)*), the person who does the act capable of encouraging or assisting that offence falls within the category of persons that offence was designed to protect and would be considered as the victim.

158. For example, D is a 12 year old girl and encourages P, a 40 year old man to have sex with her. P does not attempt to have sex with D. D cannot be liable of encouraging or assisting child rape despite the fact it is her intent that P have sexual intercourse with a child under 13 (child rape) because she would be considered the “victim” of that offence had it taken place and the offence of child rape was enacted to protect children under the age of 13.

Jurisdiction and Procedure

Clause 49: Jurisdiction and Schedule 4

159. This clause and Schedule 4 set out the rules that will govern jurisdiction for the offences in Part 2.

160. *Subsection (1)*, together with *subsection (3)*, sets out that a person may be convicted of the offences in Part 2, regardless of his own location, if he knew or believed that the act which would amount to the commission of an offence would take place, at least in part, in England and Wales or Northern Ireland.

161. For example, D in Belgium sends a number of emails to P in London, encouraging him to plant a bomb on the tube. D can be prosecuted in England and Wales or Northern Ireland despite the fact he was outside the jurisdiction when he did his act.

162. *Subsection (2)* sets out that if it is not possible to establish the circumstances required for jurisdiction to arise under *subsection (1)*, it may be possible to convict a person of an offence under Part 2 if the facts of the case fall within paragraph 1, 2 or 3 of Schedule 4.

163. Schedule 4, paragraph 1 provides jurisdiction where a person does an act in England and Wales, capable of encouraging or assisting an offence, and knows or believes that what he anticipates might take place outside England and Wales but the offence is one for which a perpetrator could be tried in England and Wales if the anticipated offence were committed outside England and Wales, or relevant conditions exist that would make it so triable.

164. For example, the offence of murder is triable within England, Wales or Northern Ireland regardless of where it is committed if the defendant is “a subject of Her Majesty” so jurisdiction could fall within paragraph 1 in the following situation (subject to the Attorney General’s consent (clause 50)): D (a British citizen) in England sends a parcel of poison to P (a British citizen), in France encouraging him to use it to murder V (also in France). It would be possible to try D in England because, as P is a British citizen, the anticipated principal offence (murder) is one which could be tried in England, Wales or Northern Ireland.

165. Schedule 4, paragraph 2 provides jurisdiction where a person does an act in England and Wales, capable of encouraging or assisting an offence, and knows or believes that what he anticipates might take place in a country outside England and Wales but what he anticipates is also an offence under the law in force in that country.

166. For example, the offence of theft is an offence in England, Wales and Northern Ireland and also in Spain so jurisdiction could fall within paragraph 2 in the following situation (subject to the Attorney General’s consent (clause 50)): D in England sends an email to P in Spain containing details of how to disarm an alarm system used by a bank in Madrid. D intends to assist P to rob the bank.

167. *Sub-paragraph (2)* provides a mechanism whereby the defence can challenge an assertion that what a person anticipates is an offence in the relevant country. *Sub-paragraphs (3) to (5)* provide further guidance on how that challenge should operate.

168. Schedule 4, paragraph 3 provides jurisdiction where a person does an act outside England and Wales, capable of encouraging or assisting an offence, and knows or believes that what he anticipates might take place outside England and Wales but the offence is one for which it would be possible to prosecute the person who provides encouragement or assistance in England and Wales if he were to commit the offence as a principal in that place.

169. For example, murder is an offence for which a perpetrator who is a British citizen could be tried in England and Wales or Northern Ireland regardless of where it is committed so jurisdiction could fall within paragraph 3 in the following situation (subject to the Attorney General’s consent (clause 50)): D (a British citizen) in Canada sends a parcel of poison to P in France encouraging him to use it to murder V (also in France). It would be possible to try D in England because he is a British citizen and the anticipated principal offence (murder) is one which could be tried in England, Wales or Northern Ireland as it would be committed by a British citizen.

170. *Subsection (4)* sets out that references in this clause and in Schedule 4 to England and Wales should be read as if they were references to Northern Ireland in their application to Northern Ireland.

Clause 50: Prosecution of offences triable by reason of Schedule 4

171. This clause sets out that where jurisdiction does not fall within clause 49 (and therefore comes within the provisions set out in Schedule 4), the Attorney General must give his consent to a prosecution in England and Wales. In Northern Ireland, the Advocate General must give his consent before any prosecution falling under this Schedule.

Clause 51: Mode of trial

172. *Subsection (1)* sets out that the mode of trial for an offence under clauses 41 and 42 will be determined as if the person had been charged with committing the anticipated offence as a principal.

173. *Subsection (2)* sets out that an offence under clause 43 will be tried on indictment.

Clause 52: Persons who may be perpetrators or encouragers etc

174. This clause sets out that if an anticipated offence has been committed and it cannot be proved whether a person has either encouraged or assisted the offence on the one hand, or committed the offence as a principal on the other, he can be convicted of an offence in clause 41, 42 or 43.

Clause 53: Alternative verdicts and guilty pleas

175. Clause 53 sets out the offences in relation to which a person may be found guilty as an alternative where he has been prosecuted for an offence under clauses 41, 42 and 43. The effect is to parallel the rules in relation to alternative verdicts in relation to a trial on indictment for the offences encouraged or assisted.

176. *Subsection (1)* provides that a person may be found guilty of the offences of encouraging or assisting contained in clauses 41 and 42 in relation to an alternative offence.

177. *Subsection (2)* sets out a similar rule in relation to an offence under clause 43. Where a person is charged with that offence, and the jury find him not guilty in relation to one of the specified offences, he may nevertheless be found guilty of an alternative offence.

178. *Subsection (3)* makes it clear that if under clause 43 a person is found guilty in relation to one or more of the specified offences, it would also be possible to find him guilty in relation to an alternative offence. The penalty will depend on which of the offences is the more serious.

179. *Subsection (4)* sets out what is meant by the term 'alternative offence'. The general rule, which is set out in section 6(3) Criminal Law Act 1967, is that an alternative verdict can be returned for another offence if the offence charged amounts to or includes an allegation of the other offence. Similarly under *subsection (4)* an alternative verdict can be returned if: (a) it is an offence for which an accused could

be found guilty on trial on indictment for the other offence (for example, on a trial for murder, a verdict can be returned of manslaughter, GBH with intent or infanticide) or (b) it is an indictable offence or one to which section 40 Criminal Justice Act 1988 applies (this allows the inclusion on an indictment of an offence of common assault) and the condition in *subsection (5)* is met.

180. The condition in *subsection (5)* is that the allegations in the indictment must amount to, or include, an allegation of the commission of the Part 2 offence by reference to the alternative offence. *Subsection (7)* sets out that in relation to an offence under clause 41, a reference to the allegations in the indictment includes a reference to an attempt to commit a specified offence.

181. For example, D gives P a baseball bat. The prosecution charge D with an offence under clause 42 alleging that D believed that P would use the bat to commit grievous bodily harm against V. The jury decide that they do not accept that D believed grievous bodily harm would be committed. However they are satisfied that D believed that actual bodily harm would be committed. Just as it would be possible, on a charge of GBH, to find an accused guilty of ABH instead, the jury could convict, as an alternative to the offence of encouraging or assisting GBH, of encouraging or assisting ABH.

182. *Subsection (8)* ensures that an offence which would be an alternative offence to one of the offences listed in Schedule 3 is to be disregarded in the same way as the substantive offences listed in Schedule 3 when prosecuting under clauses 42 or 43. This means that in the same way as the offences in Schedule 3 cannot be considered for a prosecution under clauses 42 or 43, neither can an offence which would be an alternative offence to one of these offences.

183. *Subsection (10)* sets out that person may plead guilty to an offence which would be encompassed by the offence with which he was charged.

184. For example, D is charged with encouraging or assisting P to rob X. D denies this but says he did realise that P was planning to steal something from X and therefore is prepared to plead guilty to assisting theft.

Clause 54: Penalties

185. This clause sets out the penalties that will apply to the offences created in Part 2.

186. *Subsection (2)* sets out that the maximum penalty for encouraging and assisting an offence of murder will be imprisonment for life.

187. *Subsection (3)* sets out the general rule that the maximum penalty available for an offence under clauses 41, 42 or 43 will be the same as the maximum available on conviction for the relevant anticipated or reference offence. In relation to clause 43

this applies where a person has been found guilty in relation to one offence only (*subsection (1)(b)*).

188. For example D lends P a van, false number plates and a gun. The prosecution argue that he believed that either burglary or murder would be committed. The jury find D guilty in relation to burglary but not guilty in relation to murder. The maximum sentence available for the conviction under clause 43 will be the maximum sentence available for the offence of burglary (14 years).

189. *Subsections (5) to (7)* set out the rules that apply to determining the penalty where a conviction under clause 43 is in relation to more than one offence.

190. *Subsection (5)* sets out that where one of the reference offences is murder, the maximum available penalty is imprisonment for life.

191. *Subsection (6)* sets out that where none of the reference offences is murder, but one or more of them is punishable by imprisonment, the maximum penalty available will be limited to that applicable to the offence that carries the highest penalty.

192. For example, D asks P to make him a van with a false panel at the back which would be capable of concealing 5 people. D makes the van and believes that it will be used for people smuggling but could also be used for theft. If D is found guilty of encouraging or assisting both of those offences, the maximum sentence available would be limited to the maximum sentence for people smuggling as it is the higher penalty of the offences D was prepared to assist.

193. *Subsection (7)* sets out that if none of the offences is punishable by imprisonment then the maximum sentence will be a fine.

Consequential alterations of the law

Clause 55: Abolition of common law replaced by this Part

194. This clause abolishes the common law offence of incitement.

Clause 56: Amendments relating to service law

195. This clause brings into effect the amendments to service law which are set out in Schedule 5. The amendments are necessary because of the abolition of the common law offence of inciting the commission of another offence (clause 55), and the replacement of that offence with the three new statutory offences provided for in clauses 41 – 43.

Clause 57: Repeal of offence of enabling unauthorised access to computer material

196. This clause amends the Police and Justice Act 2006 to allow for computer misuse enabling offences to be dealt with instead by the new offences included in Part 2 of the Bill.

Clause 58: Consequential amendments: Part 2

197. This clause is consequential and provides that references in existing legislation to the common law offence of incitement (this is set out in Part 1 of Schedule 6) are to be read as references to the offences in clauses 41, 42 and 43. *Subsection (3)* allows this list to be amended.

198. Part 2 of Schedule 6 contains other minor amendments to existing legislation.

Interpretation: Part 2

Clause 59: Encouraging or assisting the commission of an offence

199. This clause makes it clear that references to encouraging or assisting offences in this Part should be read in conjunction with clause 44.

Clause 60: Being capable of encouraging or assisting

200. While the Bill does not contain a definition of conduct which is capable of encouraging or assisting, clause 60 ensures that certain acts about which doubt may arise as to whether they fall within the ordinary meaning of that phrase are to be included. This includes omissions where the omission is a failure to take reasonable steps to discharge a duty.

Clause 61: Indirectly encouraging or assisting

201. This clause sets out that if a person (A) arranges for another (B) to do an act capable of encouraging or assisting another (C) to commit an offence, then A can be regarded as having done B's act.

202. This covers, for example, a gang leader (A) who instructs a member of his gang (B) to encourage another person (C) to kill X.

Clause 62: Course of conduct

203. This clause makes it clear that an "act" includes a course of conduct.

Part 3: Other Measures to Prevent or Disrupt Serious and Other Crime

Chapter 1: Prevention of Fraud

Sharing information with anti-fraud organisations

Clause 63: Disclosure of information to prevent fraud

204. *Subsection (1)* confers power on a public authority (defined in *subsection (8)*) to disclose information as a member of a specified anti-fraud organisation or otherwise in accordance with arrangements made by such an organisation (also defined in *subsection (8)*) for the purposes of preventing fraud. *Subsection (2)* provides that the information that may be so disclosed can be of any kind (*subsection 2(a)*) and identifies the persons to whom it can be disclosed (*subsection (2)(b)*). *Subsection (3)* provides that such disclosure does not breach any obligation of

confidence owed by the public authority, or any other restrictions on the disclosure of the information. *Subsection (4)* provides that the clause does not authorise any disclosure in breach of the Data Protection Act 1998 or which is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 (which regulates the interception of communications). *Subsection (5)* provides that nothing in the section authorises disclosure by a relevant public authority of information which relates to matters devolved to Scotland. *Subsection (6)* defines ‘relevant public authority’ for this purpose by reference to the Scotland Act 1998. *Subsection (7)* provides that the clause does not limit the circumstances in which information may be disclosed apart from the power in the clause (for example, disclosure by virtue of the common law). *Subsection (8)* defines ‘an anti-fraud organisation’ (that is, one which enables or facilitates sharing of information to prevent fraud); ‘information’; ‘public authority’ (which means any public authority under section 6 of the Human Rights Act 1998) and ‘specified’ (which means specified by an order by the Secretary of State: see clause 79 for further provision about such orders).

Clause 64: Offence for certain further disclosures of information

205. *Subsection (1)* makes it an offence to further disclose protected information in the circumstances set out in that subsection. *Subsection (2)* provides exemptions from the offence. *Subsection (3)* excludes from the offence cases where the information has been disclosed by a relevant public authority and the subject matter of it is within the legislative competence of the Scottish Parliament. *Subsection (4)* provides a defence to the offence if the person reasonably believed the disclosure was lawful or that the information had already and lawfully been made public. *Subsection (5)* defines ‘protected information’ as ‘revenue and customs information’ which reveals the identity of the person to whom it relates and any ‘specified information’ disclosed by a ‘specified public authority’ (these expressions are defined in *subsection (7)*). *Subsection (6)* defines revenue and customs information for the purpose of this clause. *Subsection (7)* defines ‘Commissioners of Revenue and Customs’; ‘enactment’; ‘public authority’ (by reference to the definition in clause 63); ‘Revenue and Customs’; ‘specified anti-fraud organisation’ (by reference to the definition in clause 63); ‘specified information’ (that is, information specified or described in an order made by the Secretary of State) and ‘specified public authority’ (that is, a public authority specified in an order made by the Secretary of State). See clause 79 for further provisions about such orders.

Clause 65: Penalty and prosecution for offence under clause 64

206. *Subsection (1)* provides that the maximum penalty for a person found guilty of the offence under clause 64 is (a) on conviction on indictment, two years’ imprisonment, a fine, or both; or (b) on summary conviction, 12 months, a fine not exceeding the statutory maximum, or both. Under the transitional provision in paragraph 7 of Schedule 14, the period of 12 months is reduced to 6 months pending commencement in England and Wales and Scotland of provisions referred to in that paragraph. *Subsection (2)* provides that in England and Wales prosecutions for such an offence may only be begun with the consent of the Director of Public Prosecutors or, in the case of revenue and customs information disclosed by Revenue and Customs, by the Director of Revenue and Customs Prosecutions (established by

section 34 of the Commissioners for Revenue and Customs Act 2005). *Subsection (3)* makes provision for prosecutions in Northern Ireland which are similar to those in England and Wales. *Subsection (4)* extends liability to certain officers of a body corporate and partners and senior officers of a partnership where the offence in clause 64 is committed by a body corporate or a partnership (as the case may be). *Subsection (5)* reduces the maximum penalty for summary conviction of the offence in Northern Ireland from 12 months to 6 months. *Subsection (6)* defines terms used in the clause.

Clause 66: Data protection rules

207. This clause inserts a new paragraph in Schedule 3 to the Data Protection Act 1998 to allow processing of sensitive personal data through an anti-fraud organisation. The processing must be necessary for the purposes of preventing fraud. Schedule 3 to that Act sets out additional conditions, one of which must be satisfied where the personal data that is being processed is sensitive personal data (as defined by section 2 of that Act). That expression includes information as to the commission or alleged commission of an offence by the data subject. Sub-paragraph (2) defines “anti-fraud organisation” for the purposes of this paragraph. The new paragraph is not limited to sensitive personal data that is processed pursuant to clause 63 and includes disclosure of information under common law or other powers. The anti-fraud organisation does not need to be specified under that clause.

Clause 67: Data matching and Schedule 7: Data matching

208. This clause provides for Schedule 7. Schedule 7 is divided into three Parts dealing with England, Wales and Northern Ireland. Paragraph 1 of Part 1 inserts a new Part 2A into the Audit Commission Act 1998.

209. *Subsection (1)* of new section 32A (as so inserted) provides for the Audit Commission to carry out data matching exercises or to arrange for another organisation to do this on their behalf. *Subsection (2)* defines what a data matching exercise is. It involves the comparison of sets of data. For example, taking two local authority payroll databases and matching them. Matches should not occur but if they do, fraudulent activity may be highlighted. *Subsection (3)* defines the purposes for which the powers in subsection (1) can be exercised. These purposes are assisting in the prevention and detection of fraud. *Subsection (4)* provides that such assistance may, but need not, form part of an audit. *Subsection (5)* provides that data matching may not be used to identify patterns and trends in an individual’s characteristics or behaviour which suggest nothing more than his potential to commit fraud in future. This is designed to prevent the Audit Commission from creating individual “profiles” of future fraudsters. *Subsection (6)* provides that in succeeding provisions of Part 2A, reference to a data matching exercise is to an exercise conducted or arranged to be conducted under section 32A.

210. *Subsection (1)* of new section 32B sets out the bodies who may be required to provide information to the Commission in order to conduct a data matching exercise. Paragraph (a) provides for any body as mentioned in *subsection (2)*. Paragraph (b) provides for any officer or member of that body. *Subsection (2)* sets out which bodies

may be required to provide data under subsection (1). They are (a) those bodies subject to audit, (b) English best value authorities (not subject to audit). *Subsection (3)* creates an offence and accompanying penalty for non-compliance with subsection (1)(b). *Subsection (4)* provides for the Audit Commission to recover any expenses they incur in connection with proceedings for an offence under *subsection (3)* from the body concerned. *Subsection (5)* explains which bodies are covered by the term ‘English best value authority’.

211. *Subsection (1)* of new section 32C provides that where the Audit Commission think it appropriate, they may conduct a data matching exercise using data held by or on behalf of bodies not subject to new section 32B. It also provides that such a body may disclose data to the Commission for those purposes. This could include central government departments and some private sector bodies such as mortgage providers. There is no compulsion on any of these bodies to take part in a data matching exercise. *Subsection (2)* provides that the disclosure of information does not breach (a) any obligation of confidence owed by a person making the disclosure or (b) any other restriction on the disclosure of information however imposed. *Subsection (3)* provides that nothing relating to voluntary provision of data authorises any disclosure which (a) contravenes the Data Protection Act 1998 or (b) is prohibited by Part 1 of RIPA 2000. *Subsection (4)* restricts disclosure under subsection (1) if the data comprise or include patient data. *Subsection (5)* provides a definition of patient data. *Subsection (6)* provides that this section does not limit the circumstances in which data may be disclosed apart from this section. *Subsection (7)* provides that data matching exercises may include data provided by a body or person outside England and Wales.

212. *Subsection (1)* of new section 32D explains which information this section applies to. That is, information obtained for a data matching exercise and the result of any such exercise. *Subsections (2)-(4)* provide the circumstances in which information may be disclosed by or on behalf of the Commission. *Subsection (5)* imposes restrictions on the disclosure of information if it includes patient data (as defined in *subsection (6)*). *Subsection (7)* places restrictions on the further disclosure of information disclosed under *subsection (2)*. *Subsection (8)* creates an offence of disclosing information to which this section applies except as authorised by *subsections (2) and (7)* and sets out the penalty. *Subsection (9)* disapplies section 49 from information to which this section applies. *Subsection (10)* makes it clear that “body” will include office-holders for the purposes of section 32D.

213. *Subsection (1)* of new section 32E makes clear that the Audit Commission will be able to publish a report on its data matching exercises, notwithstanding the limits on disclosure under section 32D. *Subsection (2)* provides that a report that is published under section 32E may not include information relating to a particular body or person if (a) the body or person is the subject of any data included in the data matching exercise; and (b) the body or person can be identified from the information; and (c) the information is not otherwise in the public domain. *Subsection (3)* provides that the Audit Commission may publish a report in such a manner as the Audit

Commission considers appropriate for bringing it to the attention of those members of the public who may be interested. *Subsection (4)* disapplies section 51 of the Audit Commission Act 1998 (which contains general powers for the Audit Commission to publish information). *Subsection (5)* preserves the existing powers of the appointed auditor to publish information under Part 2.

214. *Subsection (1)* of new section 32F sets out the duty on the Commission to prescribe a scale (or scales) of fees in respect of the data matching exercises it conducts. *Subsection (2)* provides that bodies referred to in new section 32B(1) must pay the Commission according to the scales in subsection (1). *Subsection (3)* provides for circumstances where the work involved in a data matching exercise is substantially more or less than the Commission originally envisaged. The Commission can charge the body a fee which can be larger or smaller than that referred to in *subsection (2)*. *Subsection (4)* sets out requirements on the Audit Commission before they prescribe a scale of fees. This includes the Commission consulting bodies mentioned in new section 32B(2). It also includes the Commission consulting other bodies or persons as they think appropriate. *Subsections (5) and (6)* set out powers of the Secretary of State in relation to fee scales. *Subsection (7)* provides that the Audit Commission may charge a fee to other bodies providing information or receiving results for data matching (in addition to the power under *subsection (2)*) and the terms under which such a fee are payable. The Audit Commission will collect these fees to recover the costs of carrying out data matching exercises.

215. *Subsection (1)* of new section 32G provides that the Commission must prepare and keep under review a code of data matching practice. *Subsection (2)* sets out that all those bodies and other persons involved in this process must have regard to the code of data matching practice. *Subsection (3)* requires the Commission to consult all bodies identified in new section 32B(2), the Information Commissioner, and such other bodies as the Audit Commission thinks appropriate before preparing or altering the code of data matching. *Subsection (4)* places a duty on the Audit Commission: (a) to send a copy of the code (and any alterations made to it) to the Secretary of State, who must lay it before Parliament; and (b) to publish the code from time to time.

216. *Subsection (1)* of new section 32H provides for the Secretary of State to extend by order the purposes of data matching exercises (as set out in new section 32A(3)) beyond fraud and to modify the application of this Part accordingly. *Subsection (2)* defines those purposes. *Subsection (3)* provides for the Secretary of State to add public bodies to those listed in new section 32B(2) by order. The Secretary of State may also modify the application of Part 2A to any body so added, and may remove bodies from section 32B(2). *Subsection (4)* provides that any order made under section 32H can include any incidental, consequential, supplemental or transitional provision the Secretary of State may see fit. *Subsection (5)* defines the meaning of public body.

217. Paragraph 3 of Schedule 7 inserts new subsection (1A) into section 52 of the Audit Commission Act 1998. This provides that any orders made under section 32H must be approved by affirmative resolution of both Houses of Parliament.

218. Paragraph 4 of Schedule 7 inserts a new Part 3A into the Public Audit (Wales) Act 2004. This gives the Auditor General for Wales data matching functions corresponding to the functions given to the Audit Commission under new Part 2A of the Audit Commission Act 1998. The data matching functions of the Auditor General for Wales will apply in or with respect to Wales. The Secretary of State will have similar order-making powers to extend the purposes for which data matching may be carried out in Wales, and to add to the list of bodies which may be required to participate in data matching in Wales, subject to prior consultation with the Auditor General for Wales.

219. Paragraph 5 of Schedule 7 amends paragraph 9 of Schedule 8 to the Government of Wales Act 2006 to allow the Auditor General for Wales to retain income from data matching fees, rather than paying it into the Welsh Consolidated Fund. The income covered by the amendment is confined to fees charged to local government bodies in Wales.

220. Paragraph 6 of Schedule 7 inserts new articles into the Audit and Accountability (Northern Ireland) Order 2003. The new articles give the Comptroller and Auditor General for Northern Ireland data matching functions corresponding to the data matching functions of the Audit Commission and the Auditor General for Wales. The functions may be used, among other things, to assist the Comptroller and Auditor General for Northern Ireland and local government auditors in the exercise of their respective audit functions. The power to extend the purposes for which data matching may be carried out in Northern Ireland, and to add to the list of bodies which may be required to participate, will rest with the Department of Finance and Personnel in Northern Ireland.

221. Paragraph 7 of Schedule 7 inserts a reference to data matching in Article 6(5) of the Audit (Northern Ireland) Order 1987. This will ensure that any liability incurred by the Comptroller and Auditor General for Northern Ireland in relation to his data matching functions is charged on the Consolidated Fund of Northern Ireland.

Chapter 2: Proceeds of Crime

Assets Recovery Agency

Clause 68: Abolition of Assets Recovery Agency and redistribution of functions etc.

222. On such day as an order under clause 68(1) provides, the Assets Recovery Agency (which is established by section 1 of, and Schedule 1 to, the Proceeds of Crime Act 2002 ('POCA')), and the corporation sole that is its Director, will cease to exist. Such an order is to be made by statutory instrument but is not subject to any

parliamentary procedure (see clause 79). Clause 68(2) introduces Schedule 8 and clause 68(3) introduces Schedule 9.

Schedule 8: Abolition of Assets Recovery Agency and its Director

223. Schedule 8 amends POCA and other relevant legislation to repeal or transfer functions currently conferred on the Assets Recovery Agency ('ARA') and its Director.

224. Under Part 1 of the Schedule, the role of the Director of ARA under Parts 2 and 4 of POCA in respect of confiscation and restraint orders in England and Wales and Northern Ireland, respectively, is repealed. A confiscation order is an order served by the court following conviction for a defendant to pay proceeds of his crimes. References to receivers of the Director under Parts 2 (for example sections 52 and 53) and 4 of POCA are also repealed. Part 1 of the Schedule also makes consequential amendments to Part 9 of POCA (which concerns the relationship between confiscation and insolvency).

225. Under Part 2 of Schedule 8, the powers of the Director of ARA under Chapter 2 of Part 5 of POCA to bring civil recovery proceedings in the High Court in England and Wales and Northern Ireland are transferred to SOCA. These powers are also transferred, as respects England and Wales, to the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions and the Director of the Serious Fraud Office and, as respects Northern Ireland, to the Director of Public Prosecutions for Northern Ireland and the Director of the Serious Fraud Office (see the amendment made by paragraph 89 of Schedule 8).

226. Under Part 3 of Schedule 8, the powers under Part 6 of POCA are transferred to SOCA. Part 6 enables the Director of ARA to serve on HM Revenue & Customs a notice that she intends to carry out certain Revenue functions. Paragraph 100 of Schedule 8 creates a power for the Secretary of State to repeal by order Part 6 of POCA (as amended by Schedule 8). Such an order is subject to the affirmative resolution procedure (see clause 79(3)).

227. Under Part 4 of Schedule 8, powers under Part 8 of POCA are transferred from ARA to SOCA. Part 8 enables the Director of ARA to apply for various orders to investigate confiscation cases and civil recovery cases.

228. Under Part 5 of Schedule 8, the role of the ARA to train, accredit and monitor performance of financial investigators under section 3 of POCA is transferred to the National Policing Improvement Agency. This Agency was established under Part 1 of the Police and Justice Act 2006 with the function of training and developing police officers.

229. Part 6 of Schedule 8 makes other amendments to POCA. Under a new section (section 2A), which paragraph 119 of Schedule 8 inserts in POCA, SOCA and the Directors referred to in paragraph 225 above are required to exercise their functions

under POCA in the way best calculated to contribute to the reduction of crime. In doing so they must have regard to guidance issued under section 2A; that guidance must in particular indicate that such reduction is in general best secured by means of criminal investigations and proceedings. Paragraph 126 of Schedule 8 repeals the provisions in sections 435-438 of POCA on the use and disclosure of information by or to the Director of ARA. Broadly equivalent provisions are included in respect of SOCA and the Revenue and Customs Prosecutions Office in the provisions referred to in paragraph 230 below.

230. Part 7 of Schedule 8 makes amendments to other legislation. These include amendments to section 33 of the Serious Organised Crime and Police Act 2005 (disclosure of information by SOCA) by paragraph 157 of Schedule 8 to extend the circumstances when disclosure may be made to reflect types of disclosure which are authorised by section 438 of POCA but would otherwise not be authorised by section 33. Similar amendments are made to section 40 of the Commissioners for Revenue and Customs Act 2005 by paragraph 153 of Schedule 8 in relation to the disclosure of information by the Revenue and Customs Prosecutions Office.

Schedule 9: Transfers to SOCA or NPIA

231. Schedule 9 enables the Secretary of State to make a scheme to provide for the transfer of the Director and staff of the ARA together with its property, rights, liabilities and other matters to SOCA or the National Policing Improvement Agency ('NPIA') established by section 1 of the Police and Justice Act 2006.

Clause 69: Use of production orders for detained cash investigations

232. This clause enables the production order provisions under Part 8 of POCA to be used for investigating the provenance or intended destination of cash seized under Chapter 3 of Part 5 of POCA (which provides for the recovery of cash in summary proceedings). The amendments made by this clause create a new type of investigation, namely a detained cash investigation. This is additional to the existing investigation powers, namely a confiscation investigation, civil recovery investigation and money laundering investigation. These new investigation powers will assist in the preparation of a case for forfeiting the cash before the magistrates' court in England and Wales and Northern Ireland or the Sheriff in Scotland.

Clause 70: Use of search warrants etc. for detained cash investigations

233. Similar to clause 69, clause 70 allows for the search and seizure provisions under Part 8 of POCA to be used for investigating the provenance or intended destination of cash seized under Chapter 3 of Part 5 of POCA ('a detained cash investigation'). The existing safeguards for warrants will apply equally to those sought for a detained cash investigation.

Clause 71: Further provision about detained cash investigations

234. This clause gives effect to Schedule 10 which makes further provision about the use of production orders and search and seizure warrants for detained cash investigations.

235. Schedule 10, in particular, makes amendments to POCA to add the new power of a detained cash investigation to relevant provisions and safeguards within Part 8 of that Act.

Clauses 72 to 75: Extension of powers of accredited financial investigators

236. An accredited financial investigator is an investigator who has been trained and accredited under section 3 of the POCA to undertake certain investigation, restraint and search and seizure functions under the Act. The persons trained can be investigators who are not constables or officers of HMRC in respect of cash forfeiture powers under Chapter 3 of Part 5 of POCA, investigation powers under Part 8 and other search and seizure powers. Constables and officers of HMRC have access to these powers without the need for accreditation.

237. Clause 72 amends section 45 of POCA (and section 194 which is the equivalent provision in Northern Ireland) to enable accredited financial investigators to exercise the powers conferred by those sections. Sections 45 and 194 currently allow a constable or officer of HMRC to seize any property subject to a restraint order to prevent its removal from England and Wales or Northern Ireland, respectively. Such an order is designed to freeze property to prevent its dissipation in advance of the making of a confiscation order. The amendments made by this clause enable financial investigators to have this power of seizure if they fall within a description of investigator specified for this purpose by an order made by the Secretary of State under section 453 of POCA. Such an order is likely to relate to the training that the investigator has had to exercise powers of seizure.

238. Clause 73 gives effect to Schedule 11 which makes provision for accredited financial investigators to seize and seek the forfeiture of cash under Chapter 3 of Part 5 of POCA. That Chapter already allows a constable or officer of HMRC to seize, detain and apply for the forfeiture of cash that is suspected of being the proceeds of unlawful conduct or intended for use in such conduct. These are civil proceedings against the cash; there is no prosecution or sanction against an individual. Schedule 11 extends these powers to those accredited financial investigators who have been accredited under the Act to perform these functions. The accredited financial investigator will be able to search for cash on a person or premises and seize such cash if he suspects that it is the proceeds of unlawful conduct or intended for use in such conduct. The accredited financial investigator will also be able to apply for the detention of the cash and apply for its forfeiture before the magistrates' court. The safeguards which apply to constables and officers of HMRC will similarly apply to accredited financial investigators, namely safeguards attached to the search power regarding approval and reporting to an independent person. The code of practice under section 292 will be amended to apply to accredited financial investigators to

provide guidelines on the operation of their search powers. Paragraph 12 of Schedule 11 inserts section 303A which provides that a reference to an accredited financial investigator under these provisions is a reference to one who falls within a description specified in an order made by the Secretary of State under section 453 of POCA.

239. Accredited financial investigators can currently apply for a search and seizure warrant under section 352 of POCA, but such warrants have to be executed by a constable or officer of HMRC. Clause 74 amends sections 352 and 353 to allow an accredited financial investigator who falls within a description specified by order made by the Secretary of State to execute a warrant.

240. Section 453 of POCA enables the Secretary of State to specify by order a description of the type of accredited financial investigators who may exercise restraint powers under Part 2 or investigation powers under Part 8. Clause 75(1) amends section 453 to provide that the Secretary of State can by order require relevant accredited financial investigators to have been satisfactorily trained to perform the relevant functions.

241. As accredited financial investigators will be undertaking invasive powers, offences of assaulting, resisting or wilfully obstructing them in the course of their duties are created by the new section inserted by clause 75(2) into POCA. An accredited financial investigator will not have the power of arrest. A person found guilty of any of these offences will be liable to a term of imprisonment not exceeding 51 weeks or a fine or both. The maximum sentence in Northern Ireland is 6 months which is also the maximum in England and Wales pending commencement of section 281(5) of the Criminal Justice Act 2003.

Clause 76: Use of force in executing search warrants: Scotland

242. This clause makes it explicit that a proper person (as defined in section 412 of the Proceeds of Crime Act 2002) can use reasonable force to execute a search warrant under section 387 of the Proceeds of Crime Act 2002. This is a search warrant used in investigations under Part 8 of POCA. There is no need for an equivalent provision in respect of search and seizure warrants issued in England, Wales and Northern Ireland as the power to use reasonable force is implicit.

Chapter 3: Regulation of Investigatory Powers

Clause 77: Extension of powers of Revenue and Customs

243. This clause gives effect to Schedule 12 which will make the various criminal investigation powers apply consistently throughout officers of Her Majesty's Revenue and Customs.

244. Paragraph 1 of Schedule 12 amends section 93 of the Police Act 1997 (c.50) so that references to an officer of Her Majesty's Customs and Excise (HMCE) are changed to an officer of Her Majesty's Revenue and Customs (HMRC). Section 93 allows an 'authorising officer' to authorise action to interfere with property (for

example, entering a property to place a listening device) or take action in respect of wireless telegraphy where he believes it to be necessary to tackle serious crime and to be proportionate to the intended results. The effect of the changes made by paragraph 1 is to allow action to be authorised under section 93 when it relates to an ex-Revenue matter, at the moment the section only applies to ex-HMCE matters. There is no change to the tests that have to be passed before the authority can be given or to the role of the independent Office of Surveillance Commissioners who oversee the use of these powers and must approve certain authorisations.

245. Section 93(4) of the Police Act 1997 defines what is meant by ‘serious crime’. The subsection also restricts the authorisations which can be made by an officer of Revenue and Customs to those relating to ‘an assigned matter within the meaning of section 1(1) of the Customs and Excise Management Act 1979’. The reference to ‘an assigned matter’ is not amended by this Schedule as, following the amendments made to the definition by the Commissioners for Revenue and Customs Act 2005, it applies to all HMRC’s responsibilities, not just ex-HMCE ones.

246. Paragraph 2 of this Schedule makes a consequential amendment to section 94 of the Police Act 1997 which concerns authorisations in the absence of an authorising officer.

247. Paragraph 3 of this Schedule makes a consequential amendment to section 107 of the Police Act 1997 concerning matters that the Prime Minister may, after consultation with the Chief Commissioner and Scottish Ministers, exclude from the copy of the Chief Surveillance Commissioner’s annual report laid before each House of Parliament. The amendment provides that matters prejudicial to the discharge of the duties of the Commissioners for HMRC may be so excluded (section 107 currently refers to Commissioners of HMCE).

248. Paragraph 4 of this Schedule amends section 108 of the Police Act 1997 which concerns interpretation to remove the definition of ‘customs officer’ which is no longer necessary. The new phrase ‘officer of Revenue and Customs’ is defined by section 5 and Schedule 1 to the Interpretation Act 1978 and does not need a separate definition in the Police Act 1997.

249. Paragraph 5 of this Schedule provides for the Regulation of Investigatory Powers Act 2000 (RIPA) to be amended. Any reference in this part of the notes to a numbered section is to that section of RIPA.

250. Paragraph 6 of this Schedule amends the list of persons who can apply for an interception warrant in section 6(2) of RIPA to substitute a reference to the Commissioners for HMRC for a reference to the Commissioners of Customs and Excise. An interception warrant can authorise certain conduct, including the interception of communications in the course of their transmission by means of a postal service or telecommunications system (section 5(1)). A warrant may be issued by the Home Secretary, or the First Minister in Scotland, or Secretary of State for

Northern Ireland where he believes that the conduct authorised by the warrant is proportionate to the results intended and is necessary:

- in the interests of national security,
- for tackling serious crime,
- for safeguarding the economic well-being of the UK, or
- for the purpose of giving effect to any international mutual assistance agreement and tackling serious crime.

251. The effect of the amendment made by paragraph 6 is to allow the Commissioners for HMRC to apply for an interception warrant in connection with any of HMRC's responsibilities. At the moment an application could only be made in respect of an ex-HMCE matter. There is no change to the conditions that have to be met before a warrant can be issued or the safeguards provided by RIPA in respect of the intercepted material.

252. Part I Chapter II of RIPA concerns the acquisition and disclosure of 'communications data' which is defined at section 21(4). The acquisition of this data is lawful where conducted by a person authorised or required to engage in that activity by an authorisation or notice granted or given under Chapter II of Part I and provided the conduct is in accordance with, or in pursuance of, the authorisation or requirement (section 21(2)). Where a 'designated person' believes it is necessary to obtain communications data and the relevant tests are passed he can:

- grant an authorisation for persons in the same public authority to engage in the relevant conduct (section 22(3)), and
- by notice require a postal or telecommunications operator to obtain the data and disclose it to him (section 22(4)).

253. The 'designated persons' are individuals holding certain positions with 'relevant public authorities'. The detail of who is a designated person, and the grounds on which they can obtain communications data, is set out in The Regulation of Investigatory Powers (Communications Data) Order 2003 (SI 2003/3172). The Commissioners of Customs and Excise and the Commissioners of Inland Revenue were both 'relevant public authorities'. For both ex-HMCE and ex-Revenue matters communications data can be obtained by HMRC where it is believed necessary for either tackling crime or preventing disorder, or assessing or collecting tax (section 22(2) and article 6 of SI 2003/3172). In addition communications data can only be sought where that is believed to be proportionate to the result sought (section 25(5)) and where the grounds are to assess or collect tax the only data that can be obtained is 'subscriber data' as defined at section 21(4)(c) (article 7 of SI 2003/3172).

254. The only difference at the moment between HMRC's powers under Part I Chapter II of RIPA for ex-HMCE and ex-Revenue matters concerns the data that can be obtained when action is believed necessary to tackle crime or prevent disorder. Where 'traffic data' (as defined at section 21(4)(a)) is sought on these grounds in

relation to an ex-Revenue matter only data relating to a postal service can be obtained, data relating to a telecommunications system cannot be sought. For ex-HMCE matters data relating to either a postal service or a telecommunications system can be sought. This restriction for ex-revenue matters is imposed by article 10 of SI 2003/3172, there is no difference in the treatment of ex-HMCE and ex-Revenue matters in RIPA itself. Because of this the changes being made by the Schedule do not of themselves change HMRC's powers, they simply up-date references to the old departments. However, when SI 2003/3172 (The Regulation of Investigatory Powers (Communications Data) Order 2003) is amended the intention is to remove this restriction in article 10 relating to ex-Revenue matters. Once that is done HMRC will be able to obtain traffic data relating to both postal services and telecommunications systems where that is believed necessary, and proportionate, for tackling crime or preventing disorder.

255. Paragraph 7 of this Schedule makes a consequential amendment to section 21(5) of RIPA to substitute a reference to 'officers of Revenue and Customs' for a reference to 'customs officers' when referring to Part III of the Police Act 1997. This is to reflect the changes being made to the Police Act 1997, as detailed above.

256. Paragraph 8 of this Schedule amends section 25(1) of RIPA to substitute a reference to HMRC for references to HMCE and Inland Revenue in the definition of 'relevant public authority'.

257. Part II of RIPA deals with directed surveillance, intrusive surveillance and the conduct and use of covert human intelligence sources. These three types of activity are defined at section 26(2) to (11). The Schedule makes no change to the RIPA procedures for authorising directed surveillance and the use of covert human intelligence sources. The changes being made in respect of intrusive surveillance are detailed below.

258. Paragraph 9 of this Schedule makes a consequential amendment to section 27(4) to substitute a reference to 'officers of Revenue and Customs' for a reference to 'customs officers' when referring to Part III of the Police Act 1997. This is to reflect the changes being made to the Police Act 1997, as detailed above.

259. Section 32 of RIPA deals with the authorisation of intrusive surveillance (such as using listening devices in residential premises). Intrusive surveillance can be authorised where it is believed to be proportionate to the intended results and is necessary:

- in the interests of national security,
- for tackling serious crime, or
- in the interests of the economic well-being of the UK.

260. Usually authorisations for intrusive surveillance do not take effect until they have been approved by an independent Surveillance Commissioner (section 36). At

the moment HMRC can use intrusive surveillance for ex-HMCE matters but not for ex-Revenue matters. The Schedule changes this, as detailed below, so that it can be used for ex-Revenue matters as well. The conditions that have to be met and authorisations granted are not altered.

261. Paragraph 10 of this Schedule amends the definition of ‘senior authorising officer’ at section 32(6). The reference to a customs officer is changed to an officer of Revenue and Customs designated for that purpose by the Commissioners for HMRC. The “senior authorising officer” is the officer who can authorise intrusive surveillance and this change will allow authorisations to be made in respect of all HMRC’s responsibilities, including ex-Revenue ones (subject to paragraph 32(2) of the Schedule – see below), not just ex-HMCE matters.

262. Paragraph 11 of this Schedule makes consequential amendments to section 33 (police and customs authorisations) to change references to HMCE and its officers to HMRC and its officers. The rule which prevents an officer granting an authorisation except on an application by another officer of the department is retained in an updated form.

263. Paragraphs 12 to 18 make consequential amendments to change references to HMCE and its officers to HMRC and its officers in the remainder of Part II of RIPA.

264. Part III has yet to come into force as a day has not yet been appointed under section 83(2). Once it is in force section 49 of RIPA provides a power to enable persons with the ‘appropriate permission’ to serve notices on individuals or bodies requiring the disclosure of protected (for example encrypted) information which they lawfully hold, or are likely to, in an intelligible form. The power under section 49 can be used where the conditions set out at subsection (2) are met. The Schedule makes various amendments to Part III so it will apply consistently to HMRC when it does come into force in the way it would apply now to HMCE.

265. Section 49 of RIPA limits the information to which the power to serve notices applies by defining the various means by which the protected information in question has been, or is likely to be, obtained at subsection (1)(a) to (e). HMRC could already issue notices in respect of the information specified in subsections (1) (a) to (d) whether they related to ex-HMCE or ex-Revenue matters. However, HMRC could issue a notice in respect of information it holds which falls within section 49(1)(e) only where it relates to an ex-HMCE matter and not where it relates to an ex-Revenue matter. Subsection (1)(e) covers information that has come into (or is likely to come into) the possession of the customs and excise by any lawful means not involving the exercise of statutory powers and not covered by subsections (1)(a) to (d).

266. Paragraph 19 of this Schedule amends section 49(1)(e) of RIPA so it applies to information which has come into the possession of HMRC, rather than HMCE. This

*These notes refer to the Serious Crime Bill [HL]
as brought from the House of Lords on 10th May 2007 [Bill 103]*

will allow HMRC to issue a notice under section 49 in respect of this information whether it relates to an ex-Revenue or an ex-HMCE matter.

267. Paragraph 20 of this Schedule makes consequential amendments to section 51 of RIPA to substitute references to HMRC for references to HMCE. This section sets out the extra tests to be fulfilled if a key (such as a password or decryption key – see definition at section 56(1)) is required to be disclosed rather than the disclosure of protected information in an intelligible form.

268. Paragraph 21 of this Schedule amends section 54 of RIPA to substitute a reference to HMRC for a reference to HMCE. This section allows a section 49 notice to contain a provision requiring the recipient, or anybody else who becomes aware of it, to keep it secret. This can be done only where the protected information it relates to has been obtained by means which it is reasonable to keep secret from a particular person to maintain the effectiveness of any investigation or investigatory technique, or in the interests of any person's safety or well-being. At the moment HMRC can only impose a requirement under section 54 in connection with ex-HMCE matters. Changing the reference to HMCE to HMRC will allow a requirement to be imposed whenever the conditions are met, whether an ex-HMCE or ex-Revenue matter is involved.

269. Paragraph 22 of this Schedule amends section 55 of RIPA to substitute reference to HMRC for reference to HMCE. This section places a duty on various people to safeguard the use of disclosed keys and describes the safeguards that must be in place. The change made by paragraph 23 ensures that these safeguards apply to all keys HMRC may obtain, not just to keys relating to ex-HMCE matters.

270. Paragraph 23 of this Schedule makes a consequential amendment to section 56 by removing the definition of 'the customs and excise'.

271. Paragraphs 24 and 25 of this Schedule make consequential amendments to sections 65 and 71 of RIPA (the Tribunal and Codes of Practice respectively) to substitute references to HMRC for references to HMCE.

272. Paragraphs 26 and 27 of this Schedule make consequential amendments to sections 76A and 81 of RIPA (Foreign Surveillance Operations and General Interpretation respectively) to up-date a reference to a 'customs officer' and remove the definition of that term which is no longer necessary.

273. Paragraph 28 of this Schedule makes a consequential amendment to Part I of Schedule 1 to substitute a reference to HMRC for references to HMCE and the Inland Revenue. Part 1 defines relevant authorities for the purposes of sections 28 and 29 - authorisation of directed surveillance and covert human intelligence sources.

274. Only a person with the 'appropriate permission' under Schedule 2 may issue a notice under section 49 (section 49(2)) requiring the disclosure of protected (for

example encrypted) information. At the moment where an ex-Revenue matter is involved a judge's permission (sheriff in Scotland) under paragraph 1 of Schedule 2 is always required before an officer can have the appropriate permission. In certain circumstances an officer of HMRC can have the appropriate permission in respect of an ex-HMCE matter without obtaining a judge's permission. A judge's permission is not required in relation to ex-HMCE matters in two circumstances, as detailed below:

- Under paragraph 2 of Schedule 2 where certain protected information was obtained under a warrant issued by the Secretary of State, or a person holding judicial office, or an authorisation under Part III of the Police Act 1997 and the warrant or authorisation gave permission for the section 49 notice to be given. Alternatively, written permission could be obtained from the 'relevant authority' (as defined at paragraph 2(6) of Schedule 2) for the issue of the notice after the issue of the warrant or authorisation.
- Under paragraph 4 of Schedule 2 where unintelligible information is, or is likely to be, obtained under statutory powers but without a warrant issued by the Secretary of State or a person holding judicial office, or an authorisation under Part III of the Police Act 1997.

275. For an officer of HMRC to have the appropriate permission in respect of an ex-HMCE matter the Commissioners for HMRC, or an officer of or above such level as they may designate for the purpose, must give permission for the section 49 notice to be issued in relation to that protected information (paragraph 6(4) of Schedule 2). This is not a requirement in respect of ex-Revenue matters at the moment.

276. Paragraph 29 of this Schedule amends Schedule 2 to substitute references to HMRC for references to HMCE. The effect of this is to make Schedule 2 apply to HMRC as a whole in the same way it currently applies to ex-HMCE matters as explained above. The rules on who has the "appropriate permission" to issue a section 49 notice will apply in future to all information HMRC obtains in the way they currently apply to information relating to ex-HMCE matters.

277. Paragraph 30 amends Schedule 2 to the Commissioners for Revenue and Customs Act 2005 (CRCA) to provide that paragraphs 1 (in respect of the Wireless and Telegraphy Act 2006 (WTA)) and 11 (in respect of Regulation of Investigation Powers Act 2000) shall cease to have effect. Those paragraphs prevent HMRC using the following powers in respect of ex-Revenue matters:

- Paragraph 1 WTA (c.36), s48 and
- Paragraph 11 RIPA relating to interception, intrusive surveillance and certain of those for the investigation of electronic data protected by encryption.

*These notes refer to the Serious Crime Bill [HL]
as brought from the House of Lords on 10th May 2007 [Bill 103]*

278. The substantive changes being made to those powers are described above. Paragraph 30 removes the rule currently preventing the powers being used by HMRC for ex-Revenue matters.

279. Paragraph 31 of this Schedule confirms that sections 6 and 7 CRCA do not restrict the functions in connection with which officers can exercise a power amended by this Schedule. Normally sections 6 and 7 CRCA would prevent a power or duty conferred on an officer of HMCE being exercised in connection with an ex-Revenue matter and require a power conferred in connection with an ex-Revenue matter to be used only for an ex-Revenue matter.

280. Once the Schedule is in force intrusive surveillance could generally be used by HMRC, once the relevant conditions are met, irrespective of whether an ex-Revenue or ex-Customs matter is involved.

281. The Commissioners for Revenue and Customs Act 2005 (CRCA 2005) created the new department of HM Revenue and Customs (HMRC) and carried forward the statutory powers of the former Inland Revenue and HM Customs and Excise. But it ring-fenced them to constrain the use of the powers to their original purposes.

282. At the moment HMRC can use certain RIPA powers for both ex-HMCE and ex-Revenue matters while, as detailed above, other powers are only available for ex-HMCE matters. The powers provided by the WTA and Police Act 1997 are currently available only in relation to ex-HMCE matters.

283. Most of the powers covered by this measure are only for use when investigating suspected crime. Stringent conditions apply to their authorisation and use and they are also subject to external scrutiny, for example by the Office of Surveillance Commissioners and Interception Commissioner. The powers provide a framework of proportionate surveillance powers that are generally available to law enforcement agencies for their investigations. Having inconsistent powers for HMRC depending on whether the matter being considered used to be dealt with by HMCE or the Revenue can restrict HMRC's ability to investigate crime effectively and cause confusion and operational problems. It also means that crimes of a similar nature and seriousness are treated differently simply because of which predecessor department was responsible for them.

284. The change made by this Schedule will make the various powers apply consistently to HMRC. This will make the surveillance powers available whether an ex-HMCE or ex-Revenue matter is involved.

Chapter 4: Other Measures to Disrupt Serious Crime

Clause 78: Power to search for firearms

285. This provision was added to the Bill by a non-government amendment in the House of Lords.

286. At present, an officer at least of the rank of inspector can give an authorisation in the circumstances set out in section 60 of the Criminal Justice and Public Order Act 1994, following which people and vehicles within the specified locality can be stopped and searched.

287. This clause confers additional powers on a police constable who has reason to believe that someone is carrying a firearm within a particular area. In these circumstances, the provision gives a constable the power, on his own authority, immediately to arrange for the area to be sealed and for people or vehicles in that area to be searched by any means. This search could include, but is not limited to, the use of technical equipment such as search arches or wands, or by personal searches.

288. The geographical area to be sealed off is not limited under this provision; nor is the period of time during which an area may be sealed off.

Part 4: General and Final Provisions

Clause 79: Orders of the Secretary of State and the Scottish Ministers

289. *Subsection (1)* of this clause ensures that orders made by the Secretary of State or the Scottish Ministers are made by statutory instrument. *Subsection (2)* enables the power to make orders to be exercised to make different provision for different cases, descriptions of cases, or purposes. An order may also make supplementary, incidental, consequential, transitional, transitory and saving provision. *Subsection (3)* sets out the orders which are subject to the affirmative resolution procedure. *Subsections (5) and (6)* set out the orders which are subject to the negative resolution procedure.

Clause 80: Supplementary, incidental or consequential provision

290. *Subsection (1)* of this clause confers on the Secretary of State a power by order to make supplementary, incidental or consequential provision. The effect of *subsection (3)* is that the power does not extend to matters that are devolved under the Scotland Act 1998. Where such an order amends or repeals any provision of an Act, it is subject to the affirmative resolution procedure under clause 79(3); otherwise it is subject to the negative resolution procedure (see clause 79(4) and (5)).

Clause 81 and Schedule 14: Transitional and transitory provisions and savings

291. *Subsection (1)* of this clause gives effect to Schedule 14. *Subsection (2)* provides for the Secretary of State to make, by order, appropriate transitional, transitory or saving provisions in connection with the coming into force of any

provision of the Bill other than the provisions specified in clause 84(4). The power in respect of these provisions is exercisable by the Scottish Ministers.

Clause 82 and Schedule 15: Repeals and revocations

292. This clause gives effect to Schedule 15 which sets out legislation to be repealed or revoked by the Bill.

Clause 83: Extent

293. This clause sets out the extent of the Bill. *Subsection (1)* lists the clauses of the Bill that only apply to England and Wales. *Subsection (2)* lists the clauses that apply to England, Wales and Northern Ireland. *Subsection (3)* lists those clauses that apply to Scotland only. *Subsection (4)* lists the clauses that extend to Northern Ireland only. *Subsection (6)* provides that any amendment, repeal or revocation in Schedule 5, 8, 10 or 15 has the same extent as the enactment amended, repealed or revoked. *Subsection (7)* provides that, subject to the limitations contained in subsections (1) to (6), the Bill extends throughout the United Kingdom.

Clause 84: Commencement

294. This clause provides for commencement. *Subsection (1)* provides that the provisions of the Bill will be brought into force by means of commencement orders made by the Secretary of State, with the exception of the clauses listed in that subsection and clauses 84 and 85, which will come into force on Royal Assent, and the provisions listed in *subsection (4)*, which are to be brought into force by Scottish Ministers. *Subsection (2)* requires the Secretary of State to consult the Scottish Ministers before making an order under subsection (1), in relation to clause 69(1), paragraph 2 of Schedule 10 or paragraph 24 of that Schedule. *Subsections (3) and (4)* provide that the provisions listed in subsection (4) will be brought into force by orders made by Scottish Ministers.

Clause 85: Short title

295. This clause sets out the short title of the Bill.

FINANCIAL EFFECTS OF THE BILL

296. A full Regulatory Impact Assessment has been conducted and can be viewed at <http://www.homeoffice.gov.uk/documents/Serious-Crime-Bill-RIA.pdf>.

297. The financial case for the Bill is based upon the need to protect all citizens, including the tax payer, from the impact and cost of serious crime, including in particular fraud. The key financial impact of the Bill will come from the data matching and data sharing provisions. The potential savings from the data matching provisions, in addition to the savings made by the current exercise, are an estimated £22.2 million per National Fraud Initiative cycle of 2 years. The estimated fraud savings for the public purse from the data sharing provisions are between £137 - £273 million per year. There will also be additional benefits to the private sector. If the

membership of CIFAS (the UK's Fraud Prevention Service) option is taken, total subscription costs of membership would be up to £250,000 per year, plus one off joining fees of up to £125,000.

298. On the other areas of the Bill, in order to address the problems with the criminal law around encouraging and assisting crime identified by the Law Commission, including where a person provides assistance to a serious criminal group, the estimated cost is £950,000 - £1.59 million. The introduction of Serious Crime Prevention Orders will provide law enforcement with a flexible means of preventing the harm caused by serious criminals. We estimate a total cost for applying for these orders of about £318,000 - £353,000 per year.

299. The merging of the Assets Recovery Agency with the Serious Organised Crime Agency and other measures in the Bill designed to improve the asset recovery regime will help to deliver the Government's target of doubling asset recovery receipts to £250m by 2009-10. There are expected to be savings achieved from the merger, which will also enable better financial management of the fluctuations of income from taking cases through the courts. It is expected that the short term costs of the merger will be more than outweighed by these efficiency savings. Finally, in relation to the extension of surveillance powers for Her Majesty's Revenue and Customs to investigations into serious crime, irrespective of whether it is an ex-Customs or an ex-Revenue matter, the costs will be covered from existing budgets.

EFFECTS OF THE BILL ON PUBLIC SECTOR MANPOWER

300. Serious Crime Prevention Orders will provide a new tool for law enforcement. However, as it is anticipated that orders will be highly targeted and used on a relatively small number of individuals / organisations, we do not believe this will place additional burdens on public sector manpower. SCPOs will have some impact on Courts Service manpower, however, we believe that this will be minimal as it is likely to be largely offset by the preventative nature of the orders.

301. It is not anticipated that the merger of ARA and SOCA will require any job losses or additional manpower resource.

302. The power given to public authorities to share information with a designated anti-fraud organisation will be used voluntarily by organisations who wish to become members of that organisation. Therefore, effects on manpower are likely to be assessed by individual authorities as part of their cost-benefit analysis of membership.

303. Placing the National Fraud Initiative (NFI) on a statutory footing is unlikely to have a noticeable effect on public sector manpower as audited bodies already engage with the NFI process. There will be no compulsion for other bodies to join except bodies subject to inspection but not audit by the Audit Commission. There will be

minor manpower implications for them resulting from mandatory participation in the NFI.

SUMMARY OF REGULATORY IMPACT ASSESSMENT

304. The RIA is available on <http://www.homeoffice.gsi.gov.uk/>. The RIA provides a cost-benefit analysis of the impact of the Bill in respect of equity, fairness, enforcement, sanctions, monitoring, review and consultation.

305. Vernon Coaker MP, Parliamentary Under Secretary of State for Policing, Security and Community Safety, has signed a statement to the effect that he is satisfied the benefits of the measures for which the RIA has been published with the Bill justify the costs.

COMMENCEMENT

306. Clause 84 of the Bill provides for commencement.

EUROPEAN CONVENTION ON HUMAN RIGHTS

307. Clauses 1 and 20 confer a power on the High Court or, following conviction for a serious offence, the Crown Court to make a serious crime prevention order. The Department has considered whether such an order is a criminal charge or a criminal penalty for the purposes of Article 6 and Article 7 of the ECHR. The Department has concluded that an order is not a criminal charge or penalty for the purposes of those Articles for the following reasons:

- the second part of the test in clause 1(1) and the test in 20(2) make it clear that an order can only be made if it will prevent serious crime;
- the conditions that an order can impose must be aimed at preventing serious crime;
- in determining whether the test for making an order is met the court must ignore an intention or other aspect of the mental state of the subject of the order;
- clauses 34(1) and 35(1) specifically state that proceedings for an order will be civil proceedings;
- breach of an order is a criminal offence.

The majority of orders will be made by the High Court which is a court of civil jurisdiction.

*These notes refer to the Serious Crime Bill [HL]
as brought from the House of Lords on 10th May 2007 [Bill 103]*

308. As a consequence, it is the Department's view that the additional protections in Article 6(2) and 6(3) and the prohibition on retrospective criminal penalties in Article 7 will not apply in relation to applications for serious crime prevention orders.

309. An application for an order must comply with Article 6(1). It is the Department's view that the procedure that has been devised for applying for an order will comply with the right to a fair trial in Article 6(1) because an application must be made to the High Court or the Crown Court and the normal rules of civil procedure will apply.

310. It is the Department's view that Article 6(1) will require legal aid to be made available in certain circumstances in relation to proceedings for orders.

311. It is the Department's view that an order may be made which engages a person's rights under one or several of the following Articles: Article 8, Article 10, Article 11 and Article 1 of the First Protocol. Interference with any of those Articles of the Convention can be justified if it meets the three stage test of being in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.

312. The power to make the orders will be set out in the Bill, which meets the first limb of the test for justification. The purpose of the orders is to prevent serious crime which is a legitimate aim for the purposes of the second part of the test for justification. The final limb of the test will be met by the court ensuring that any order that is imposed meets a pressing social need and is proportionate to the legitimate aim pursued. The court must balance the interference with the individual's rights and freedoms against the need to protect society from the harm caused by serious crime. The court is a public authority for the purposes of the Human Rights Act 1998 and it must, therefore, act compatibly with the Convention rights as required by section 6 of the Human Rights Act 1998. The Bill also contains a number of safeguards in clauses 7 to 16 which limit the scope of the orders. This includes express provisions to ensure that third parties that may be significantly adversely affected by an order can make representations to the court and if necessary applications for variation and discharge in clauses 10, 18 and 19.

313. Clause 11(3) provides a power of entry and search for the purposes of serving a serious crime prevention order. If the power is exercised Article 8, which protects the right to private and family life, will be engaged. It is considered that any interference with that right can be justified. The power appears in the Bill so it will be in accordance with the law. The power will pursue the legitimate aim of the prevention of crime because it will allow the order to take effect and the purpose of the order is to prevent crime. It is considered that the exercise of the power will be proportionate because the power can only be exercised by a constable or a person authorised by the relevant applicant authority; the power only arises once a serious crime prevention order has been made or varied by the court and the subject of the order was not represented at the proceedings; a set of premises can only be entered if

there are reasonable grounds for believing that the subject of the order can be found there; a set of premises can be only be searched for the purposes of finding the subject of the order; and force can only be used if it is necessary to do so.

314. The right to a fair trial under Article 6 includes the right of a person charged with a criminal offence to remain silent and not to incriminate himself. The order cannot require a person to answer questions orally (see clause 12) but a person could be required to provide documentary information or to answer questions in writing and it is conceivable that such information could be incriminating. As a consequence, clause 16 places restrictions on the use to which such information can be put. The clause does not place an absolute prohibition on the use of such information because the privilege against self-incrimination is not absolute and can be interfered with in certain proportionate circumstances (*Brown v. Stott* [2001] 1 WLR 662).

315. Clause 26 provides that a person who breaches the terms of his SCPO commits a criminal offence but the person will not be guilty of the offence if there was a reasonable excuse for his actions. It is the Department's intention that it will be for the defendant to prove that he had a reasonable excuse. It is the Department's view that it is fair and reasonable to place such a legal burden on the defendant for the following reasons:

- it will be for the prosecution to show that the defendant had breached the terms of the order;
- the reason for the breach of the order is a matter that is within the particular knowledge of the defendant;
- the orders are aimed at tackling a serious problem, namely, serious crime.

316. Clause 27 allows the court on convicting a person of an offence under clause 26 to order the forfeiture of anything in the possession of that person at the time of the offence which the court considers to be have been involved in the offence. This will engage Article 1 of the First Protocol but it is the Department's view that any interference can be justified. A forfeiture order will be in accordance with the law because the power to make it will appear in the Bill. A forfeiture order will be in the general interest because it is aimed at preventing serious crime and is made in connection with criminal proceedings. A forfeiture order will be proportionate and be subject to suitable procedural safeguards for the following reasons:

- a person must be convicted of an offence before items can be forfeited;
- the decision in relation to forfeiture must be made by a court;
- the court must give all those who claim to be an owner of an item, including the convicted person, the opportunity to make representations;
- the decision of the court can be appealed;
- the measures will contribute to the prevention of serious crime.

317. Clause 28 gives the applicant for an order the power to present a petition to the courts for the winding up of certain bodies if that body has been convicted of a breach of an order and the applicant considers that it would be in the public interest for the body to be wound up. The court may make an order for winding up if it is satisfied that the body has been convicted of a breach of an order and it is just and equitable for the body to be wound up. This clause will engage Article 1 of the First Protocol because the body concerned will be dissolved and its assets will be handled and dealt with by the liquidator on the order of the court. It is the Department's view that any interference can be justified. A winding up order will be in accordance with the law because the power to make such an order appears in the Bill. The interference is in the general or public interest because the relevant applicant authority can only present a petition if it is in the public interest and there has been a conviction for breach of an order.

318. It is the Department's view that the interference made by clause 28 is proportionate for the following reasons:

- the relevant body must be convicted of an offence of breach of an order and it must be in the public interest before a winding up petition can be presented;
- the decision as to whether winding up should occur must be made by a court;
- the court must be satisfied that the body has been convicted of breach and the winding up is just and equitable before it can make an order for winding up;
- a petition cannot be presented before any appeal against conviction has been determined;
- the measures will contribute to the prevention of serious crime.

319. Clause 63(1) enables a public authority to disclose information as a member of an anti-fraud organisation which has been specified for the purpose by order made by the Secretary of State (definition of "specified" in *subsection (8)*). "Public authority" means any public authority within the meaning of the Human Rights Act 1998. The information may be disclosed to the organisation itself, to any members of it or to any other person to whom disclosure is permitted under the arrangements made by the organisation.

320. The information disclosed is likely to include sensitive personal data. As such, the rights guaranteed by Article 8.1 of the ECHR (right to respect for private and family life) will be engaged. However, the disclosures which can be made pursuant to clause 63 are justified under Article 8.2 as being necessary for the prevention of crime. Research commissioned by the Home Office, which was published in 2000, estimated the cost of all fraud at over £14bn. This was thought likely to be an under estimate at the time and the figure is likely to be considerably higher. At the level at which these proposals would apply the UK's Fraud Prevention Service, CIFAS, which could be an anti-fraud organisation as envisaged by the legislation, reported savings of £682m to its members in 2005 as a result of its database. If public sector bodies were to participate in CIFAS savings are estimated

to be up to £275m. The measure has the potential to enable data sharing which would reduce fraud significantly and create substantial savings.

321. The requirement in section 6 of the Human Rights Act 1998 on public authorities to act in accordance with the Convention rights provides a safeguard against a disclosure in breach of Article 8. Furthermore, any disclosure under clause 63 needs to be consistent with the Data Protection Act 1998 (see clause 63(4)).

322. Clause 66 amends Schedule 3 to the Data Protection Act 1998 Act which provides specific protection for the processing of sensitive personal data (as defined by section 2 of that Act). At least one of the conditions in Schedule 3 must be met if the processing of such data is to be fair and lawful (see paragraph 1 of Schedule 1 to that Act). The amendment inserts a new condition in respect of the disclosure of such data as a member of an anti-fraud organisation (as defined in that condition). As such, the new condition is wider than disclosures made under clause 63 and includes disclosures pursuant to common law and other powers. Furthermore, the organisation does not need to have been specified under clause 63. The new condition will apply only if the processing is necessary for the purposes of preventing fraud or a particular kind of fraud. Such disclosures would engage ECHR Article 8.1. However, it is submitted that the necessity test sufficiently protects persons from contravention of this right and reflects the exception in Article 8.2 in respect of the prevention of crime.

323. Clause 67 brings Schedule 7 into effect which enables the Audit Commission to conduct data matching exercises for the purpose of assisting in the prevention and detection of fraud. This puts onto a statutory footing and extends the data matching exercise that Commission auditors have conducted for several years as part of the statutory audit of local government and the health service (known as the National Fraud Initiative). The exercise differs from the data sharing clauses in that data matching takes existing data sets from different organisations and compares them to identify potential fraud. Matches are then disclosed to the organisations concerned for investigation. For example, by matching pay-roll data against housing benefit those who have wrongly claimed housing benefit can be identified. If the match turns out to be fraudulent, the body concerned may wish to share that information with others under the data sharing provisions. The clause and schedule also replicates these provisions for the relevant audit bodies in Wales and Northern Ireland.

324. The Audit Commission will have powers to require the production of data sets it considers relevant from all bodies that fall within its remit, that is, bodies which it audits (principally local government and the health service) and other best value authorities. It will be an offence to fail to provide such data without reasonable excuse. The Audit Commission is given power to disclose the result of matches provided this is in connection with a purpose for which the exercise was conducted.

325. The provisions extend the current data matching exercises as they enable the Audit Commission to conduct data matching of data held by organisations which are

not within its remit if it considers it appropriate to do so. This would for example allow matching of data held by a mortgage institution against local authority housing benefit data, as there is evidence of significant numbers of landlords with mortgages who claim housing benefit. Such bodies will participate on a purely voluntary basis. A statutory gateway is provided allowing disclosure of data sets voluntarily to the Audit Commission for data matching, which over-rides other restrictions on disclosure other than those imposed by the Data Protection Act 1998 or the Regulation of Investigatory Powers Act 2000. The gateway is without prejudice to existing powers to disclose.

326. The Audit Commission may prescribe a scale of fees for this exercise in respect of bodies it can compel to provide data sets. It is enabled to charge a fee to be agreed with other bodies participating on a voluntary basis. The Commission will be under a duty to prepare and keep under review a code of data matching practice to which all participating bodies as well as the Commission itself will be obliged to have regard.

327. The Secretary of State will have the power by order to add to the purposes for which data matching can be conducted to include assisting in the prevention or detection of crime (other than fraud), in the apprehension and prosecution of offenders, or in the recovery of debt owing to public bodies.

328. The information disclosed is unlikely to include sensitive personal data, as it is made clear that data matches only identify potential fraud, and no assumption about fraud can be made until the match is investigated further by the participating body. It should be noted that information might include sensitive personal data in the future if an order is made extending the purpose of matching as described above.

329. Information disclosed under these provisions will include personal data and the rights guaranteed by Article 8.1 of the ECHR (right to respect for private and family life) will be engaged. However, the disclosures which can be made pursuant to these provisions are justified under Article 8.2 as being necessary for the prevention of crime. Audit Commission figures show that the value of fraud and overpayments detected by almost 1300 public bodies taking part in the National Fraud Initiative in 2004/05 exceeded £111m, an increase of 33% on 2002/03. The aggregate figure for fraud and overpayments detected since the exercise began are now just over £300m. The proposed extension of data sharing has the potential to increase the level of fraud and overpayments detected considerably, leading to significant savings to the public purse as well as to private sector organisations.

330. The requirement in section 6 of the Human Rights Act 1998 on public authorities to act in accordance with Convention rights provides a safeguard against a disclosure in breach of Article 8. Furthermore, any disclosure under these provisions must be consistent with the Data Protection Act 1998.

331. It is made a criminal offence for any person or body to disclose data provided to the Audit Commission for matching, or the results of data matches provided to the participating organisations, except for a purpose authorised by these provisions. This offence provides further safeguards in respect of information obtained. The obligation for the exercise to be conducted in accordance with a code of practice will also provide added safeguards as it will set good practice standards for security of data and requirements for fair collection and disclosure.

332. Clause 68, together with Schedules 8 and 9, transfer certain functions and staff of the Director of the Assets Recovery Agency (“the ARA”) to the Serious Organised Crime Agency (“SOCA”) established under Part 1 of the Serious Organised Crime and Police Act 2005 and other persons. The Director and the ARA were established by section 1 of, and Schedule 1 to, the Proceeds of Crime Act 2002 (“POCA”) with the functions conferred by that Act.

333. The amendments to Chapter 2 of Part 5 of POCA and to Part 8 of POCA enable SOCA to apply for various orders under those Parts. As respects Chapter 2 of Part 5 of POCA, the prosecuting authorities listed in paragraph 225 above may bring civil recovery proceedings in addition to SOCA. Some of the orders under Parts 5 and 8 of POCA engage Article 1 of the First Protocol (protection of property); others might engage Article 8 (right for respect for private and family life). In each case, however, the relevant order needs to be made by a court. The court needs to be satisfied that the order requested is consistent with the Convention rights, irrespective of the applicant for it.

334. To the extent that the Bill transfers functions of the Director of the ARA to SOCA, it also has the effect of extending the scope of the information that SOCA receives, uses or may disclose under sections 32 to 35 of the 2005 Act (together with the amendment to section 33 made by paragraph 157 of Schedule 8 to the Bill). This engages Article 8. It is submitted that any interference with the rights guaranteed by Article 8.1 is justified, having regard to Article 8.2, and SOCA’s functions relating to the prevention of crime.

335. Clauses 69 to 71, together with Schedule 10, amend Part 8 of POCA to allow for investigations into cash detained under Chapter 3 of Part 5 of that Act. Chapter 3 of Part 5 provides for the search, seizure and detention of cash which is reasonably suspected of having been obtained through unlawful conduct or of being intended for use in such conduct, and for the forfeiture of such cash in proceedings before a magistrates’ court or sheriff (in Scotland). Part 8 of POCA sets out powers for use in criminal confiscation, civil recovery and money laundering investigations. Part 8 is amended to create a new category of investigation (a “detained cash investigation”) to investigate the origins or intended use of cash detained under Chapter 3 of Part 5. The amendments allow applications to be made for production orders and search and seizure warrants in respect of such investigations. An application for such an order or warrant must be made to a High Court judge or a Sheriff in Scotland.

336. There are at present no powers in POCA to investigate the provenance or intended use of detained cash; police and officers of HMRC are dependent on material provided by respondents in the case. This prevents them from fully investigating cases, in particular testing credibility, and also leads to delays in their investigations. The availability of investigative powers will result in forfeiture applications being made at an earlier stage.

337. Production orders and search and seizure warrants have the potential to infringe Article 8 (right to respect for private and family life). However, an application for such an order or warrant must be made to a High Court judge or a Sheriff in Scotland. Such a judge would only grant the application if the order or warrant would be compatible with the Convention rights.

338. Clauses 72 to 75, together with Schedule 11, amend various provisions in POCA to extend powers which are currently conferred on constables and officers of Revenue and Customs by those provisions to accredited financial investigators. An accredited financial investigator is an investigator who is accredited under a system established under section 3 of POCA.

339. The provisions to be amended by clauses 72 and 73, together with Schedule 11, are those relating to restraint orders in England and Wales and Northern Ireland and those relating to seizure of cash there under Chapter 3 of Part 5 of POCA. Under the amendments made by clause 74, accredited financial investigators may be authorised to execute a search and seizure warrant under sections 352 and 353 of POCA.

340. These amendments engage Article 1 of the First Protocol to the ECHR (protection of property); Article 8 (right to respect for private and family life) may also be engaged. However, the amendments do not create new interferences with those rights; in each case, they extend powers which are currently conferred on constables and officers of Revenue and Customs. Furthermore, in each case, the investigator on whom the powers are conferred must fall within a description specified in an order made for these purposes by the Secretary of State under section 453 of POCA. This power will be exercised to require that the investigators have had the necessary training. The powers in question fall within ECHR Article 8.2 by virtue of being necessary for the prevention of crime and accredited financial investigators have functions in the prevention of crime.

341. Clause 77 and Schedule 12 amend provisions of the Police Act 1997 and the Regulation of Investigatory Powers Act 2000 (RIPA) so that the surveillance regimes established by those provisions apply not only to former Customs matters but also to former Inland Revenue matters. In addition the surveillance power in section 48 of the Wireless Telegraphy Act 2006 is also applied not only to former Customs matters but also to former Inland Revenue matters by removing the provision preventing that in the Commissioners for Revenue and Customs Act 2005. It is the Department's

view that the amendments made meet the three stage test of being in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.

342. The surveillance powers established by the enactments mentioned in paragraph 341 above engage Article 8 ECHR (respect for family & private life). Article 8 applies to both a person's home and business premises. It is the Department's view that interference with the Article 8 right to privacy is justified on the basis that the interference is in accordance with UK law, namely the 1997, 2000 and 2006 Acts. The main purpose of RIPA, which replaced the Interception of Communications Act 1985, was to ensure that the investigatory powers established by RIPA are compatible with ECHR. So, for example, section 32 of RIPA empowers senior authorising officers of prescribed authorities to grant authorisations to carry out intrusive surveillance. Section 32(2), reflecting Article 8(2) ECHR, precludes the grant of an authorisation unless it is necessary in the interests of national security, for the purpose of preventing/detecting crime or in the interests of the economic well being of the United Kingdom. A warrant cannot take effect unless it has been approved by a Surveillance Commissioner (s.36 RIPA). (To be eligible to hold a post of Surveillance Commissioner the incumbent must have held high judicial office.) The conditions for the grant of an authorisation will be the same whether the matter was one administered by the former Inland Revenue Commissioners or the former Commissioners of Customs and Excise and the safeguards in section 35 RIPA applying to authorisations will apply equally.

343. No substantive change to the RIPA surveillance regimes will be made by the amended provisions - apart from extending the range of HMRC matters covered by the regimes.

344. The surveillance powers in section 48 of the Wireless Telegraphy Act being amended by the Schedule were previously in section 5 of the Wireless Telegraphy Act 1949 and were amended by s. 73 RIPA to ensure ECHR compliance. Section 93 of the Police Act was similarly amended by section 75 RIPA. Again, no substantive change is being made to this legislation.

SERIOUS CRIME BILL [HL]

EXPLANATORY NOTES

*These notes refer to the Serious Crime Bill [HL]
as brought from the House of Lords on 10th May, 2007 [Bill 103]*

*Ordered, by The House of Commons, to be
Printed, 10th May, 2007.*

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LONDON: THE STATIONERY OFFICE

Printed in the United Kingdom by
The Stationery Office Limited

£x.00