

Crime and Courts Bill

Delegated Powers – Supplementary Memorandum by the Home Office and Ministry of Justice

The Government has tabled further amendments to the Crime and Courts Bill for Commons Report stage. These include two new delegated powers. This supplementary memorandum explains in each case why the power has been taken and the reason for the procedure selected.

New clause “*Restraint orders and legal aid*” – new section 41(5A) of the Proceeds of Crime Act 2002: Power to prescribe restrictions on the circumstances in which relevant legal aid payments may be made in reliance on an exception to a restraint order, and power to prescribe conditions in relation to the legal aid exception.

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

2. Subsection (2) of new clause “*Restraint orders and legal aid*”, amends section 41 of the Proceeds of Crime Act 2002 (POCA) so that a restraint order must be made subject to an exception enabling relevant legal aid payments, defined by reference to obligations arising under regulations made under sections 23 or 24 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Subsection (5) of the new clause inserts a new subsection (5A) in section 41 of POCA that provides that a legal aid exception must be made subject to prescribed restrictions (if any), prescribed conditions (if any) and may be made subject to other conditions imposed by the court making the restraint order. Subsection (6) of the new clause inserts a new section 41(10) into POCA which provides that “prescribed” means prescribed by regulations made by the Secretary of State. Subsection (7) of the new clause amends section 459 of POCA to provide that this new regulation-making power will be subject to the affirmative resolution procedure.

3. At present section 41(4) of POCA prevents the release of monies from a restraint order to pay for legal expenses related to the criminal charge upon which the restraint order is predicated. The Government believes that it is right that payments towards private legal expenses ought to be prohibited in order that restrained assets are not recklessly dissipated. However, the Government also believes that it is right that those who can afford to pay towards their legal aid defence costs do so.

4. Although the new clause provides directly for the principle that there will be an exception for relevant legal aid payments in every case in which a restraint order is made under section 41 of PCOA (to prevent the need to

return to court and vary a restraint order once such an order has been made and the person subject to it has been granted legal aid), these powers are intended to be used, in conjunction with the regulation-making power in new clause "*Restraint orders and legal aid: supplementary*", to prescribe the circumstances in which such a payment might be made, and the conditions which might be placed on its making.

5. The Government's intention is that these powers could be used, for example, to make provision about the point in the criminal proceedings at which a person subject to a restraint order should make a legal aid payment (or restricting payments before or after a certain point in those proceedings); to restrict his or her payment of relevant legal aid payments until such point as he or she has satisfied other obligations; or to provide that he or she should only make a relevant legal aid payment from restrained assets once any other assets have been used first to make such payments. Although regulations under LASPO will determine what a person's legal aid contribution should be in relation to a particular case, this new clause also provides power to restrict the amount of relevant legal aid payments which may be made from restrained assets. The power to prescribe conditions in relation to a legal aid payment could be used to ensure, for example, that a person subject to restraint notifies the prosecuting authorities that such a payment has been made. At present the court has discretionary powers in restraint proceedings to make exceptions to restraint subject to conditions (section 41(3)(c) of POCA) and to make such order as it believes is appropriate for the purpose of ensuring that a restraint order is effective (section 41(7) of POCA). Both of these discretionary powers will apply to the new exception for legal aid payments.

6. This power, and that in new clause "*Restraint orders and legal aid: supplementary*", are intended to support the proper interaction between the legal aid and confiscation regimes and ensure that the right balance is struck between the need to secure legal aid contributions and the deprivation of ill gotten gains. The Government considers that it is only right that we expect defendants with the means to pay a contribution towards legal aid should do so, even where we are seeking to disgorge their benefit. It is also right that we take steps to increase the overall amount of money being taken from criminals. These are both legitimate and proper public policy aims.

7. There are a number of complex operational, legal and financial considerations that require more detailed analysis, and given the complexities of those regimes, the importance of their operation, and the number of potential scenarios it will be necessary to cater for, it is desirable to take a supplementary power to amend POCA to complement those which already exist under LASPO. However, given the effect of a restraint order, and that the exercise of the powers under this new clause will relate to the broader powers under new clause "*Restraint orders and legal aid: supplementary*", the Government accepts that these powers should be subject to the affirmative resolution procedure.

New clause "*Restraint orders and legal aid: supplementary*" : Power to make provision about and in connection with the making of relevant legal aid payments out of property that is the subject of a restraint order under Part 2 of the Proceeds of Crime Act 2002.

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

8. Subsection (1) of new clause "*Restraint orders and legal aid: supplementary*" provides that the Secretary of State may make regulations to make provisions about the making of relevant legal aid payments from property that is subject to a restraint order, and in connection with cases in which such payments are or may be made.

9. Under subsections (1) and (3) of the new clause, the regulation-making power includes power to amend, repeal, revoke or otherwise modify provision made by or under any enactment, including Part 2 and Chapter 1, 2 or 4 of Part 8 of POCA and extending to provision inserted into that Act by this Bill.

10. The Government acknowledges that this is a broad power to amend primary legislation, and accepts, for this reason and those set out above, that the power should be subject to the affirmative resolution procedure, so that Parliament will be able appropriately to scrutinise its exercise. The Government notes, however, that although this is a broad power to amend existing legislation, the exercise of the powers is limited to making provision about, or in connection with, relevant legal aid payments out of restrained assets. So the powers can only be exercised in connection with the relatively limited situation whereby a legal aid payment is or may be made in reliance on the exception to a restraint order which will be inserted into POCA under new clause "*Restraint orders and legal aid*".

11. As set out above, in order to ensure the exception to restraint for the purpose of legal aid payments operates effectively, the Government believes that it will be necessary to make complex and detailed provision about the making of such payments. The detailed operation of the legal aid contributions regime is already a matter of secondary legislation under LASPO. Given the complexity and detail of the provisions likely to be required, and the interdependency of the provisions, the Government considers it desirable to work that through and make all the necessary amendments to both regimes in secondary legislation at the same time, including, where necessary by amending POCA itself.

11. Subsection (2) of this new clause sets out in further detail the types of provision which it is envisaged might be made under the regulation-making power.

12. Subsection (2)(a) permits provision to be made about how much property may be subject a restraint order under POCA, including by reference to the actual and estimated amount of relevant legal aid payments. At present the court seeks to restrain a defendant's assets to the value by which the court believes that he or she has benefited from criminal conduct. Given that the amendments to section 41 of POCA enable an exception to a restraint order for a legal aid payment to be made, and subsection (2)(b) provides power to extend restraint for legal aid purposes, it is important to provide for the possibility for provision that the amount restrained takes into account not only criminal benefit, but also potential legal aid liability.

13. Subsection (2)(b) would allow provision to be made that would extend the period of restraint until legal aid payments have been made, including after any confiscation order had been satisfied. Under section 42 of POCA, a restraint order must be discharged at the conclusion of proceedings, which includes when a confiscation order has been satisfied or discharged (section 85(5) of POCA). Extending restraint for legal aid purposes may be necessary to prevent the dissipation of assets in cases where the defendant has satisfied their other obligations but has outstanding legal aid contributions. Provision would need to be made subject to appropriate safeguards, including that the court could use its existing discretionary power to discharge the restraint order.

14. Subsection (2)(c) would allow provision to be made about powers of investigation to identify property that might be used to make a legal aid payment. Use of these powers may be required to trace further assets for legal aid purposes, particularly if legal aid payments are to be made after a confiscation order has been satisfied. This is in line with the aim of ensuring that wherever possible we take more money from criminals by ensuring that the obligation an individual would have to pay legal aid contributions, if a restraint order was not otherwise in place, can be met.

15. Subsection (2)(d) would allow provision to be made about the order in which a defendant's obligations are to be met in cases in which there is or has been a restraint order. This power is necessary to ensure the right balance is struck between ensuring that those who have assets contribute to their legal aid defence costs, and ensuring that assets are also available for confiscation and, where there are identifiable victims, for compensation. This power would also enable provision to be made in relation to the priority of payments in the event that there are insufficient assets, for example for other sums to be met from a confiscation order.

16. Subsection (2)(e) would allow provision to be made about powers of entry, search and seizure in relation to obligations to make a legal aid payment. This would include situations where assets with high value but are liquid or easily dissipated can be seized in advance of the possibility of an application for restraint order being made.

17. Subsection (2)(f) would allow provision to be made about the payment of compensation by the Lord Chancellor. It is envisaged that this provision

might be used to amend section 72 of POCA, which provides for compensation in the event of serious default on the part of those presently listed in section 72(9) who operate the confiscation regime. It is envisaged that should serious default be legal aid related, the Lord Chancellor should be responsible for payment of any compensation payable as a result.

18. Subsection (2)(g) would allow provision to be made about the disclosure and sharing of information. It may be necessary to exercise this power to provide that information is appropriately shared, with appropriate safeguards, for the purpose of ensuring that the exception to restraint for legal aid purposes operates properly, and that the court is provided with full information in relation to that exception and payments made in reliance on it, when those who operate restraint, including the Crown Prosecution Service and others, appear in restraint proceedings.

Home Office/Ministry of Justice
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