

SERIOUS CRIME BILL
DELEGATED POWERS MEMORANDUM
MEMORANDUM BY THE HOME OFFICE

Introduction

This Memorandum identifies the provisions of the Serious Crime Bill which confers powers to make delegated legislation, and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

2. The Bill is in six Parts:

- Part 1 makes amendments to the Proceeds of Crime Act 2002;
- Part 2 amends the Computer Misuse Act 1990 (there are no delegated powers in this Part);
- Part 3 provides for a new offence of participating in the activities of an organised crime group and amends the provisions in respect of serious crime prevention orders and gang injunctions;
- Part 4 provides for the seizure and forfeiture of drug-cutting agents (there are no delegated powers in this Part);
- Part 5 amends the criminal law in relation to the offences of child cruelty and female genital mutilation and provides for a new offence of possession of paedophile manuals (there are no delegated powers in this Part);
- Part 6 provides for or extends extra-territorial jurisdiction in relation to the offences in sections 5 (preparation of terrorist acts) and 6 (training for terrorism) of the Terrorism Act 2006 and confers parliamentary approval (as required by section 8 of the European Union Act 2011) for two draft Council Decisions under Article 352 of the Treaty on the Functioning of the European Union. This Part also contains minor and consequential amendments to other enactments and general provisions including commencement.

PART 1: PROCEEDS OF CRIME

Clause 10(1) – new section 35(2C) of the Proceeds of Crime Act 2002: Power to amend default sentences

Clause 10(3) – new section 258(2C) of the Criminal Justice Act 2003: Power to modify threshold at which provisions for automatic early release do not apply

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

Clause 30(1) – new section 185(2B) of the Proceeds of Crime Act 2002: Power to amend default sentences

Power conferred on: Department of Justice in Northern Ireland

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

3. Clause 10 amends section 35 of the Proceeds of Crime Act 2002 (“POCA”) which enables the Crown Court to set a default sentence for the defendant to serve if he or she fails to pay the amount due under the confiscation order. Section 35 of POCA achieves this outcome by treating an unpaid confiscation order as if it were an unpaid fine thereby attracting the fine enforcement provisions in the Powers of Criminal Court (Sentencing) Act 2000 (“the 2000 Act”) and Part 3 of the Magistrates’ Courts Act 1980. The 2000 Act makes provision for the court to fix a term of imprisonment (or detention where the defendant is under 18) for an individual if any sum for which he or she is liable to pay as a fine is not duly paid (a “default sentence”). The maximum default term applicable to a particular confiscation order is determined by a sliding scale based on the amount of the outstanding sum payable, varying from seven days’ imprisonment for an amount not exceeding £200 to ten years’ imprisonment for an amount exceeding £1 million (as set out in section 139(4) of the 2000 Act). Unlike a fine, serving a default sentence for failure to pay a confiscation order does not relieve the defendant of the obligation to pay the full amount due under the order, plus any interest that has accrued on that amount.

4. Clause 10(1) amends section 35 of POCA so as to disapply section 139(4) of the 2000 Act insofar as it relates to confiscation orders and to insert a new subsection (2A) containing a bespoke sliding scale of default sentences applicable to such orders. In providing for a new sliding scale of default sentences, new section 35(2A) makes two substantive changes to the sliding scale provided for in section 139(4) of the 2000 Act.

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

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

7. New section 35(2C) confers power on the Secretary of State, by order, to amend the table in new section 35(2A) so as to provide for both minimum and maximum terms of imprisonment, to vary any minimum sentences so introduced, to vary the maximum sentences and to modify the tiers, for example by introducing additional tiers. By virtue of the amendments made to section 459 of POCA by clause 10(2) this order-making power is subject to the affirmative procedure.

8. Clause 10(3) inserts new subsections (2B) and (2C) into section 258 of the Criminal Justice Act 2003 (“the 2003 Act”). That section governs the release of

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

9. Default sentences act both as a punishment for non-payment of a confiscation order and as an incentive to encourage compliance. The Government, in putting forward these amendments, is primarily concerned with encouraging compliance to ensure that those defendants who have a confiscation order made against them pay the full amount owed under the order. Evidence indicates the default sentences for confiscation orders at the lower end to the spectrum work, but act as less of an incentive in the case of higher value confiscation orders. Some serious and organised criminals are prepared to serve the default sentence instead of paying the confiscation order. There is anecdotal evidence that a defendant will weigh up the costs of more jail time versus paying across their criminal proceeds immediately.

10. It is anticipated that increasing, on the face of the Bill, the default sentence for higher value orders (over £500,000) and removing the unconditional release at the halfway point of a period of imprisonment for offenders with orders over £10 million will encourage the payment of higher value orders. The Government will want, however, to review how these changes lead to a change in offender behaviour. If in the light of that review, there is evidence that increasing the maximum default sentences and/or removing the unconditional release at the halfway point of a period of imprisonment has improved compliance rates, then the Government may consider extending these changes to lower value orders, in order to further incentivise payment. These two order-making powers will provide the means to do so.

11. Whilst not an exact parallel, there is existing precedent for delegated legislation to make changes to the operation of release arrangements for offenders: see for example the power to amend release provisions in section 267 of the 2003 Act to provide that a prisoner should serve a greater or lesser proportion of their sentence in prison and the power in section 269 of the 2003 Act to amend Schedule 21 to that Act to provide that a prisoner given a life sentence should serve a longer period in prison. Moreover, the principle of ending early release for offenders serving default sentences will have been established in primary legislation.

12. A further consideration is that with default sentences, unlike sentences imposed on conviction for an offence, it is in the offenders' hands whether the sentence is served. The court will not make a confiscation order that the defendant has insufficient means to satisfy. If the offender fully discharges his or her confiscation order he or she will not be liable to serve a default sentence. Moreover, if such a sentence is activated following non-payment, an offender may secure his or her own release from custody by complying with the terms of the confiscation order. That being the case, a power to vary default sentences and the release arrangements by secondary legislation is considered

appropriate in this context with the affirmative procedure providing an appropriate level of parliamentary scrutiny.

13. Clause 30 makes equivalent provision for Northern Ireland in respect of the first of these delegated powers.

Clause 14(3) – new section 67(7A) and (7B) of the Proceeds of Crime Act 2002: Power to amend section 67

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

Clause 33(3) – new section 215(7A) and (7B) of the Proceeds of Crime Act 2002: Power to amend section 215

Power conferred on: Department of Justice in Northern Ireland

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

14. Clause 14 amends section 67 of POCA which provides magistrates' courts with a power to order any realisable property in the form of money in a bank or building society account to be paid to the designated officer of the court in satisfaction of a confiscation order.

15. The power to seize money under section 67 of POCA only applies where the money is held in a bank or building society account by a defendant who is the subject of a confiscation order, or money which has been seized from a defendant, under the provisions of the Police and Criminal Evidence Act 1984, as evidence and subsequently paid into a bank account of the police or the Commissioners of Revenue and Customs.

16. It is the Government's policy that accounts containing easily realisable cash or cash-like financial instruments, not just money held in an account with a bank or building society, should be capable of being the subject of orders by the magistrates' court under section 67 of POCA. To this end, clause 14(3) inserts new subsections (7A) and (7B) into section 67 which confers a power on the Secretary of State to amend, by order, section 67 so as to apply the money seizure power to money held by other specified financial institutions or other realisable financial instruments or products of a specified kind, for example share accounts, pension accounts or 'bitcoins'. Given the wide range of potential financial institutions and, more particularly, of products provided by the financial services industry, together with the constantly evolving nature of such products, it is considered that these are matters more appropriately left to secondary legislation. As section 67 currently only applies to money, any extension of the power in this section to cover a financial instrument

or product may need to modify the section to provide for the instrument or product to be realised into cash; new subsection (7B) enables an order to be made to this end. By virtue of the amendment made to section 459 of POCA by clause 14(5), this order-making power is subject to the affirmative procedure as befitting a Henry VIII power of this kind.

17. Clause 33 makes parallel provision for Northern Ireland in Part 4 of POCA.

Clause 17 and 20 – new section 255BA(3) and 260A(3) of the Proceeds of Crime Act 2002: Power to make provision about how a property prohibitory order and interim administration order are to be served

Power conferred on: Court of Session in Scotland

Power exercisable by: Scottish statutory instrument

Parliamentary procedure: No procedure

18. New section 255G(1) of POCA, as inserted by clause 18 of the Bill, provides that certain persons will commit an offence by breaching a property prohibitory order (“PPO”) which applies to their property or property which they hold. Clause 17 inserts new section 255B into POCA which provides that if a PPO is made or varied by the Court of Session, the enforcement authority must serve a copy of the PPO on any person who is specified in that order, if the order applies to their property or they hold property to which that order applies. The enforcement authority must serve a copy of the PPO on any other parties who are specified in the PPO as having an interest in the property. A copy of the interlocutor recalling a PPO must also be served on all of these persons.

19. New section 265A(1) of POCA, inserted by clause 21 of the Bill, provides that a person who owns or holds property to which an interim administration order (“IAO”) applies will commit an offence if he or she deals in any way with the property so as to prevent the detention, custody or preservation of the property for which the order is granted. Clause 20 inserts new section 260A into POCA which provides that if an IAO is made or varied by the Court of Session, the enforcement authority must serve a copy of the IAO on any person who is specified in the order, if that order applies to their property or they hold property to which the order applies. The enforcement authority must also serve a copy of the IAO on any other parties who are specified in the order as having an interest in the property. A copy of the interlocutor recalling an IAO must also be served on all of these persons.

20. Detailed provision will need to be made about the service of a PPO and an IAO. In addition, different provision may need to be made to address different circumstances (for example, serving a copy of an order on a person who lives in Scotland and those who may live overseas). The Government considers that it is appropriate for this level of detail to be set out rules of court, as opposed to on the

face of the Bill. Provision about the service of other documents in sections 155 of POCA is already made by Act of Sederunt. New sections 255BA(3) and 260A(3) of POCA achieve consistency with those provisions.

21. Acts of Sederunt are made by the Court of Session in Scotland under section 5 of the Court of Session Act 1988. Section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“the 2010 ASP”) provides that an Act of Sederunt is a Scottish Statutory Instrument. Acts of Sederunt which prescribe matters which relate to the practice and procedure of the Court of Session are not subject to parliamentary scrutiny. Accordingly, the Government considers that it is not necessary to make this Act of Sederunt subject to parliamentary procedure. Section 30 of the 2010 ASP provides that a Scottish Statutory instrument which is not subject to parliamentary procedure must still be laid before the Scottish Parliament as soon as is practicable after it is made.

Clause 36 – new section 97(1ZB) and (2A) of the Serious Organised Crime and Police Act 2005: Power to modify threshold for confiscation orders that may be made by magistrates’ courts

Power conferred on: Secretary of State and Northern Ireland
Department of Justice

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

22. Section 97(1) of the Serious Organised Crime and Police Act 2005 (“SOCPA”) confers on the Secretary of State the power, by order, to make provision to allow magistrates’ courts to make confiscation orders under Part 2 of POCA. A similar power is conferred on the Northern Ireland Department of Justice in respect of Part 4 of POCA. Section 97(2) of SOCPA provides that the power for magistrates’ courts to make a confiscation order is subject to a restriction that the amount of the order does not exceed £10,000. Confiscation orders above this amount could only be made in a Crown Court, as now. The intention behind this restriction is that magistrates’ courts should be empowered to make confiscation orders only in less serious cases.

23. Whilst an order under section 97(1) of SOCPA has yet been made, work is under way to do so in England and Wales. Once a scheme to enable magistrates’ courts to make confiscation orders up to the value of £10,000 has been brought into force it will be kept under regular review. If successful, there may be a case for increasing the £10,000 threshold. The £10,000 threshold is considered to be something a blunt instrument. Whilst it is important that magistrates’ courts only make confiscation orders in less serious and complex cases, we see little value in needlessly requiring straightforward cases in which the defendant has been convicted in the magistrates’ court to be transferred to the Crown Court for the making of a confiscation order, simply because the recoverable amount under the order exceeds this £10,000 limit. Accordingly, new section 97(1ZB) confers on the Secretary of State the power to increase the £10,000 threshold through secondary

legislation (new section 97(2A) confers a similar power on the Northern Ireland Department of Justice). This will enable the outcome of a review of the scheme that is under development in England and Wales to be implemented quickly. Whilst there is no restriction on the sum that may be specified in lieu of the current £10,000 threshold, the principle that magistrates' courts should be empowered to make confiscation orders only in less serious case is, in practice, preserved as only less serious acquisitive crimes would be tried in the magistrates' court (the policy intention is that magistrates' courts would only be empowered to make confiscation orders in respect of offenders convicted in that court).

24. By virtue of the amendments made to section 172 of SOCPA by clause 36(5), orders under new section 97(1ZB) and (2A) will be subject to the affirmative procedure (as are orders under section 97(1) and (1A)). As the principle that magistrates' courts should be able to make confiscation orders only in less serious cases is preserved by these amendments, the Government considers that the affirmative procedure continues to provide an appropriate level of parliamentary scrutiny.

PART 3: ORGANISED, SERIOUS AND GANG-RELATED CRIME

Schedule 1: Amendments of Serious Crime Act 2007: Scotland

25. Schedule 1 to the Bill amends Part 1 of the Serious Crime Act 2007 ("the 2007 Act") so as to extend to Scotland the provisions contained therein in respect of serious crime prevention orders ("SCPOs"). In making the necessary modifications to Part 1 of the 2007 Act, the Schedule replicates for Scotland a number of the delegated powers set out in that Part, as such these are not wholly new powers. The provisions of the then Serious Crime Bill were considered by the Delegated Powers and Regulatory Reform Committee in their Fifth Report of Session 2006/07.

Paragraph 6 of Schedule 1 – new section 4(4A) of the 2007 Act: Power to amend new Part 1A of Schedule 1 to the 2007 Act (list of serious offences)

Power conferred on: *The Scottish Ministers*

Power exercisable by: *Order made by Scottish statutory instrument*

Parliamentary procedure: *Affirmative procedure in the Scottish Parliament*

26. The power to make an SCPO is based on a person having been involved in serious crime and the aim of such an order is to prevent, restrict or disrupt that person's involvement in serious crime. The phrases "involved in serious crime" and "involvement in serious crime" are both defined in section 2 (for England and Wales), section 3 (for Northern Ireland) and section 4 (for England and Wales and Northern Ireland) of the 2007 Act.

27. The definition includes reference to the commission or facilitation of a serious offence in England and Wales or, as the case may be, Northern Ireland and, in the

exercised. New section 7(1A), inserted by paragraph 6 of Schedule 1 to the Bill, confers an equivalent order-making power on the Scottish Ministers. By virtue of new section 89(6B) of the 2007 Act, as inserted by paragraph 27(b), an order under new section 7(1A) will be subject to the negative procedure (in the Scottish Parliament) in the same way as the existing order-making powers in section 7. The negative procedure is commonly applied to powers to make exceptions to a statutory regime, as here.

Paragraph 25 of Schedule 1 – revised section 40 of the 2007 Act: Power to make provision in respect of the determination and recovery of the costs of an authorised monitor

Power conferred on: *The Scottish Ministers*

Power exercisable by: *Order made by Scottish statutory instrument*

Parliamentary procedure: *Negative procedure in the Scottish Parliament*

30. Section 39 of the 2007 Act enables the court to include in an SCPO made against a body corporate, partnership or unincorporated association a term authorising the appointment of a person to monitor whether an order is being complied with (“an authorised monitor”). Section 40 deals with the means by which the costs of authorised monitors will be determined. In particular, the section confers on the “appropriate authority” two order-making powers. First, subsection (1) enables an order to make provision about the practice and procedure which must be followed for determining the amount of costs or interest. This includes, as set out in subsection (2), provision about an appeals mechanism. Second, subsection (4) provides that the appropriate authority must, by order, set out what the reasonable steps the relevant law enforcement agency must take to recover the costs from the organisation subject to the SCPO. Subsection (9) defines the appropriate authority as the Secretary of State, in relation to SCPOs made in England and Wales, and the Northern Ireland Department of Justice, in relation to SCPOs made in Northern Ireland. Both order-making powers are subject to the negative resolution procedure by virtue of section 89(6) and (11) of the 2007 Act. Paragraph 25(5) of Schedule 1 to the Bill amends section 40(9) so as to provide that, in relation to SCPOs made in Scotland, the appropriate authority is the Scottish Ministers. The amendment to section 89 of the 2007 Act, made by paragraph 27 of Schedule 1 to the Bill, provides that any orders made under section 40 by the Scottish Ministers are subject to the negative procedure in the Scottish Parliament. As the scope of the order-making power is not altered by the amendments to section 40, the Government considers that the negative procedure continues to provide an appropriate level of scrutiny.

PART 6: MISCELLANEOUS AND GENERAL

Clause 67(2): Power to make consequential amendments to enactments

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution*

31. Clause 67(2) confers power on the Secretary of State to make such consequential provision as he or she considers appropriate for the purposes of the Bill. The powers conferred by this clause are wide but they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on provisions in the Bill. But there are various precedents for such provisions including section 113 of the Protection of Freedoms Act 2012, section 59 of the Crime and Courts Act 2013 and section 181 of the Anti-social Behaviour, Crime and Policing Act 2014. There are significant changes to existing powers to tackle serious and organised crime made by the Bill and it is possible that not all of the consequences of them have been identified in the Bill's preparation. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation. If regulations under this clause do not amend primary legislation it will be subject to the negative resolution procedure (by virtue of subsection (6)). If regulations under this clause do amend primary legislation it will be subject to the affirmative resolution procedure (by virtue of subsection (5)). It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 70(1) to (3): Commencement power.

Power conferred on: *Secretary of State, the Scottish Ministers and the Northern Ireland Department of Justice*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *None*

32. Subsections (1) to (3) of clause 70 contain a standard power for the Secretary of State, the Scottish Ministers and the Northern Ireland Department of Justice respectively to bring provisions of the Bill into force by commencement regulations. As usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by order enables the provisions to be brought into force at a convenient time.

33. Subsection (8) confers power on the Secretary of State, the Scottish Ministers and Northern Ireland Department of Justice to make such saving, transitional or transitory provisions as he, she or they considers appropriate in connection with the coming into force of the provisions in the Bill. This is a standard power to enable the changes made by the Bill to be implemented in an orderly manner. Such powers are often included, as here, as part of the power to make commencement orders (for example, section 185 of the Anti-social Behaviour, Crime and Policing Act 2014) and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them.

Home Office
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