



EXPLANATORY NOTES

Serious Crime Act 2015

Chapter 9

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SERIOUS CRIME ACT 2015

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Serious Crime Act 2015, which received Royal Assent on 3rd March 2015. They have been prepared by the Home Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The Notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.
3. A glossary of abbreviations and terms used in these Explanatory Notes is contained in Annex A to these Notes.

OVERVIEW

4. Serious and organised crime includes drug trafficking, human trafficking, organised illegal immigration, child sexual exploitation, high value fraud and other financial crime, counterfeiting, organised acquisitive crime and cyber crime. Organised crime costs the United Kingdom at least £24 billion each year. As at December 2013, there are some 36,600 organised criminals in 5,300 groups currently operating in ways that directly affect the UK¹. In October 2013, the Government published its Serious and Organised Crime Strategy (Cm 8715)². The aim of the Strategy is to reduce substantially the level of serious and organised crime affecting the UK and its interests. The strategy has four components: prosecuting and disrupting people engaging in serious and organised crime (Pursue); preventing people from engaging in such activity (Prevent); increasing protection against serious and organised crime (Protect); and reducing the impact of such criminality where it takes place (Prepare). Under the Pursue strand of the strategy, the document set out proposals to:

- Strengthen the operation of the asset recovery process by closing loopholes in the Proceeds of Crime Act 2002;
- Better tackle people who actively support, and benefit from, participating in organised crime;

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

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

- Create new powers to seize and detain chemical substances suspected of being used as cutting agents for illegal drugs; and
- Amend the Computer Misuse Act 1990 to update the existing offences to cover importing tools for cyber crime (such as data programmes designed for unlawfully accessing a computer system).

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

6. The Act is in six Parts. Part 1 makes further provision in respect of the recovery of property derived from the proceeds of crime. Part 2 makes amendments to the Computer Misuse Act 1990. Part 3 provides for a new offence of participating in the activities of an organised crime group and strengthens the arrangements for protecting the public from serious crime and gang-related activity provided for in Part 1 of the Serious Crime Act 2007 and Part 4 of the Policing and Crime Act 2009 respectively. Part 4 provides for the seizure and forfeiture of substances used as drug-cutting agents. Part 5 amends the criminal law in relation to the offence of child cruelty, provides for new offences in respect of sexual communication with a child and the possession of “paedophile manuals”, amends the Sexual Offences Act 2003 to remove references to child prostitution and child pornography, makes further provision for combating female genital mutilation and provides for new offence in respect of domestic abuse. Part 6 makes provision to strengthen prison security, provides for or extends extra-territorial jurisdiction in respect of the offences in sections 5 (preparation of terrorist acts) and 6 (training for terrorism) of the Terrorism Act 2006, confers parliamentary approval (as required by section 8 of the European Union Act 2011) for two draft Council Decisions under Article 352 of the Treaty on the Functioning of the European Union (“TFEU”), specifies the matters that must be addressed in a code of practice in respect of the exercise of powers under Part 1 of the Regulation of Investigatory Powers Act 2000 and places a duty on the Secretary of State to assess the evidence of abortions taking place on the grounds of the sex of the foetus. Part 6 also contains minor and consequential amendments to other enactments and general provisions, including provisions about territorial application and commencement.

7. This Act updates existing law dealing with proceeds of crime, cyber crime, serious crime prevention orders, gang injunctions, child cruelty, child sexual offences, female genital mutilation, and prison security, the commission of certain terrorism offences abroad and the regulation of investigatory powers. The main enactments affected by the Act are:

- Section 1 of the Children and Young Persons Act 1933 (cruelty to persons under sixteen);
- Prison Act 1952;
- Section 1 of the Street Offences Act 1959 (loitering or soliciting for the purposes of prostitution);
- Computer Misuse Act 1990;

- Regulation of Investigatory Powers Act 2000 (“RIPA”);
- Proceeds of Crime Act 2002 (“POCA”);
- Sexual Offences Act 2003;
- Female Genital Mutilation Act 2003 and the Prohibition of Female Genital Mutilation (Scotland) Act 2005;
- Chapter 3 of Part 2 of the Serious Organised Crime and Police Act 2005 (“SOCPA”) (financial reporting orders (“FROs”));
- Section 17 of the Terrorism Act 2006 (commission of terrorism offences abroad);
- Part 1 of the Serious Crime Act 2007 (serious crime prevention orders (“SCPOs”));
and
- Part 4 of the Policing and Crime Act 2009 (injunctions: gang-related violence).

TERRITORIAL EXTENT

8. Subject to certain exceptions as described below, the provisions of the Act extend to England and Wales. In addition, the amendments to Parts 5 (Civil Recovery of the Proceeds etc of Unlawful Conduct), 8 (Investigations) and 11 (Co-operation) of POCA (sections 23, 37, 38(1) and 39), the provisions in respect of computer misuse (Part 2), serious crime prevention orders (sections 46 to 50 and Schedule 1), drug-cutting agents (Part 4), the extension of extra-territorial jurisdiction in respect of the offences in sections 5 and 6 of the Terrorism Act 2006 (section 81), the approval of two draft Council Decisions under Article 352 of TFEU (section 82) and the amendment to RIPA (section 83) extend to the whole of the United Kingdom. The amendments to Part 3 (Confiscation: Scotland) and Chapter 3 of Part 8 (Investigations) of POCA, to section 13 of the Computer Misuse Act 1990 and to the Prohibition of Female Genital Mutilation (Scotland) Act 2005 made by sections 15 to 22, 38(3), 43(6) and (7) and 70(2) apply to Scotland only, whilst those to Part 4 of POCA (Confiscation: Northern Ireland) made by Chapter 3 of Part 1 apply to Northern Ireland only. The new offence of possession of “paedophile manuals” (section 69 and Schedule 3) and the amendments made to the Female Genital Mutilation Act 2003 by section 70(1), 71, 72 and 73 extend to England and Wales and Northern Ireland. Whilst section 84, which makes provision in respect of the termination of pregnancy on grounds of the sex of the foetus, formally extends to the whole of the UK, its application is limited to England, Wales and Scotland.

9. The provisions in the Act in respect of drug-cutting agents (Part 4), the amendments to the Terrorism Act 2006 (section 81), that conferring parliamentary approval for the two draft EU Council Decisions (section 82), the amendment to RIPA (section 83) and the provision in respect of the termination of pregnancy on grounds of the sex of the foetus (section 84) relate to reserved matters in Scotland.

10. In relation to Wales, in the view of the UK Government all the provisions of the Act relate to non-devolved matters.

11. The provisions in the Act in respect of amendments to the Computer Misuse Act 1990 (Part 2), drug-cutting agents (Part 4), the amendments to the Terrorism Act 2006 (section 81), that conferring parliamentary approval for the two draft EU Council Decisions (section 82) and the amendment to RIPA (section 83) relate solely to excepted or reserved matters in Northern Ireland.

PART 1: PROCEEDS OF CRIME

SUMMARY AND BACKGROUND

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

- Confiscation orders – following conviction for an offence. Part 2 of POCA makes provision for confiscation in England and Wales, whilst Parts 3 and 4 make broadly analogous provisions for Scotland and Northern Ireland respectively.
- Civil recovery - this is a form of non-conviction based asset recovery that allows for the recovery of property which is, or represents, property obtained through unlawful conduct. A civil recovery order is not a conviction or a sentence, and the action is taken against the property rather than the person. Civil recovery is used when a prosecution is not possible, for example if there is insufficient evidence to create a realistic prospect of a conviction, or there is no identifiable living suspect. Part 5 of POCA provides for a UK-wide civil recovery regime.
- Seizure and forfeiture of cash - this is a non-conviction based procedure for recovering cash which is the proceeds of, or intended for use in, crime of sums of not less than £1,000. Chapter 3 of Part 5 of POCA provides for a UK-wide regime for the recovery of cash in summary proceedings.
- Criminal Taxation – also a non-conviction based power, but does not result in property being recovered – instead it allows tax to be charged on a person’s income, profits or gains where there are reasonable grounds to suspect that they arise or accrue from criminal conduct on the part of that person or another. Only the National Crime Agency (“NCA”) can exercise the criminal taxation powers under Part 6 of POCA, but Her Majesty’s Revenue and Customs retains all its usual powers in respect of taxation.

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

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

15. The Serious and Organised Crime Strategy explained that POCA is under sustained legal challenge from criminals who are constantly seeking new ways to avoid its reach and frustrate asset recovery. The Strategy sets out a number of proposals to: strengthen the legislation by, amongst other things, ensuring that criminal assets cannot be hidden with spouses, associates or other third parties; substantially strengthen the prison sentences for

failing to pay confiscation orders; enable assets to be frozen more quickly and earlier in investigations; significantly reduce the time that the courts can give offenders to pay confiscation orders; and extend the investigative powers in POCA so that they are available to trace assets once a confiscation order is made. The provisions in Part 1 of the Act give effect to these and other changes to POCA. In doing so, they also implement two recommendations on asset recovery made by the Joint Committee on the Draft Modern Slavery Bill in their April 2014 report on the draft Bill³. Specifically, the Joint Committee recommended that the test for obtaining a restraint order be amended to make it less stringent and indicated that it would welcome stronger sanctions for non-payment of confiscation orders.

COMMENTARY ON SECTIONS

Chapter 1: England and Wales

Confiscation: assets held by defendant and other

Section 1: Determination of extent of defendant's interest in property

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

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

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

19. In general, it is most appropriate for third party interests to be dealt with substantively at the enforcement stage of a confiscation order given that the existence of such interests only crystallises against specific property at that stage. However, in some cases waiting until enforcement to determine the extent of a third party's interest in the defendant's property can

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

complicate, lengthen and otherwise frustrate the confiscation process. Sections 1 to 4 seek to give effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “ensuring that criminal assets cannot be hidden with spouses, associates or other third parties”.

20. This section inserts a new section 10A into POCA to confer on the Crown Court, when making a confiscation order, a power to make a determination as to the extent of the defendant’s interest in particular property (new section 10A(1) and (5)). Given that a consequence of making such a determination will be to determine the extent, if any, of any third party interest in the property, new section 10A(2) affords third parties who have, or may have, an interest in the property the right to make representations to the court about the extent of their interest. The right to make representations also extends to the defendant. Subject to two exceptions, any determination as to the extent of the defendant’s interest in particular property is binding on any court or other person involved in the enforcement of the confiscation order (new section 10A(3)). The exceptions are where it is open to a court which has appointed an enforcement receiver to hear representations (see section 4) or in proceedings before the Court of Appeal or Supreme Court (new section 10A(4)).

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

Section 2: Provision of information

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

23. *Subsection (2)* amends section 18 of POCA, which empowers the court to order the defendant to provide any information it needs to enable it to carry out its confiscation functions. *Subsection (2)(a)* amends section 18(2) to make it clear that the court’s confiscation functions include functions under the new section 10A. *Subsection (2)(b)* amends section 18(6) so as to provide that where the prosecution accepts any allegation contained in the information provided by the defendant, the court may treat the acceptance as

conclusive for the purpose of deciding whether to make a determination under new section 10A and, if it decides to make such a determination, the form of that determination.

24. *Subsection (3)* inserts new section 18A into POCA. New section 18A empowers the court to order any third party who may have an interest in the defendant's property to provide any information it needs to enable it to carry out its functions in connection with the making of a determination under the new section 10A of POCA. A similar power to order the defendant to provide information to the court is contained in section 18 of POCA. The court might use this power where, for example, the defendant alleges that a third party owns a part share in particular property and the court considers that it requires more information from the relevant third party to verify that claim.

25. Where the interested person fails to comply with the court's order without reasonable excuse, new section 18A(4) allows the court to draw any inference that it believes appropriate. However, new section 18A(5) provides that new section 18A(4) does not detract from any other power the court has to deal with the interested person, in particular the power to punish the interested person for contempt of court for failure to comply with the order.

26. New section 18A(9) provides that no information provided by an interested person in response to a court order is admissible in any criminal proceedings. This protects the interested person against self incrimination. However, it does not prevent an interested person being prosecuted for an offence using evidence which may come to light as a result of any information provided to the court under new section 18A.

Section 3: Appeals

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

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

order in relation to the property, that is an order to sell it to help satisfy the defendant's confiscation order, would be able to appeal to the Court of Appeal (under section 65 of POCA). When considering any such appeal, the Court of Appeal would not be bound by the Crown Court's determination (see new section 10A(4)(b)).

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

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

Section 4: Enforcement receivers

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

Confiscation: other amendments

Section 5: Time for payment

32. *Subsection (1)* substitutes a new section 11 of POCA, which makes provision for the court to determine how long the defendant has to pay the amount due under a confiscation order. Section 11 currently provides that the amount is to be paid immediately, unless the defendant can demonstrate to the court that he or she needs more time to pay. If the court is satisfied that time to pay is required, it may allow up to six months to pay, and up to a further six months on a later occasion if there are exceptional reasons justifying the extension. In no

case, however, will more than 12 months be granted from the day on which the confiscation order is made. The prosecution has the right to make representations to the court before any order extending the time available to pay a compensation order is made. The substituted section 11 seeks to give effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “significantly reducing the time that the courts can give offenders to pay confiscation orders”.

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

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

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

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

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

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

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

40. *Subsection (2)* substitutes a new subsection (3) in section 12 of POCA. Section 12 provides that the defendant must pay interest on a confiscation order that is not paid in full by the time allowed. The rate of interest is that specified in section 17 of the Judgments Act 1838, namely 8%. Any interest due forms part of the amount payable under a confiscation order. At present, interest is not payable during any period where the defendant has made an application to the court under section 11(4) of POCA to further extend the time allowed for payment and that application has not been determined by the court (provided that 12 months has not elapsed since the making of the order). Under the substituted section 12(3), this maximum period of grace where interest is not payable pending a court's determination of an application under section 11(4) is reduced from 12 months to six months, in line with new section 11(5). In addition, new section 12(3) makes it clear that whilst interest is not payable on the amount in relation to which the defendant has an outstanding application for an extended period, interest would still be payable on any amounts due in respect of an expired specified period, that are not part of the outstanding application for an extended period.

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

Section 6: Confiscation and victim surcharge orders

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

43. Section 13(5) and (6) of POCA provide that where a defendant has either or both of a compensation order and an unlawful profit order made against him or her, in addition to a confiscation order, and the court believes the defendant will not have sufficient means to satisfy all the orders in full, the court must direct that the compensation and/or amount payable under the unlawful profit order (or both) be paid out of any sums recovered under the

confiscation order, with the amount paid being the amount the court believes will not be recoverable because of the insufficiency of the defendant's means. The intention of these provisions is to ensure that, should the defendant have insufficient means to satisfy all the orders against him or her in full, any amounts owed to the victims of crime will take priority over the amounts owed to the government.

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

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

Section 7: Orders for securing compliance with confiscation order

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

47. New section 13B provides for a right of appeal to the Court of Appeal and subsequently to the Supreme Court, by the prosecutor against a decision by the Crown Court not to make a compliance order, or by the prosecutor or person affected by a compliance order against the decision to make, vary or discharge a compliance order (including the terms of such an order as made or varied). These rights of appeal mirror those in sections 43 and 44 of POCA in respect of restraint orders.

Section 8: Variation or discharge

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

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

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

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

Section 9: Absconding defendants

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

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

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

53. These provisions do not, however, expressly cover the situation where a defendant absconds shortly before the conclusion of their trial. In such circumstances it may be possible to complete the trial notwithstanding the absence of the defendant, provided that the defendant's counsel's instructions were sufficient to see the trial through to its conclusion. If the defendant was convicted in his or her absence in such a case, the legislation is unclear as to whether it would be possible to make a confiscation order against that defendant under section 27 or 28. Section 27(2)(a) currently makes it clear that section 27 applies where the defendant absconds after being convicted of an offence, but in this scenario the defendant would have absconded prior to conviction. There has also been uncertainty as to whether section 28 would apply as section 28(2)(a) specifies that one of the necessary conditions for that section to apply is that "proceedings for an offence or offences are started against a defendant but are not concluded". However, in May 2014 the Court of Appeal held, in the case of *R v. Charles Okedare* [2014] EWCA Crim 1173⁴, "that an individual who has absconded and subsequently is convicted of a criminal offence in his absence can subsequently be made subject to a confiscation order under POCA at a hearing which he has not attended due to continuation of his absconding. The appropriate provision being section 6 as applied by section 28 of the Act." This section makes the position explicit on the face of POCA.

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

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

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

⁴ <https://www.crimeline.info/case/r-v-okedare-charles>

57. *Subsection (4)* substitutes a new subsection (6) of section 28 of POCA so as to further modify the application of section 21 of that Act where a recaptured absconder is dealt with under section 28. The modification of section 21 is along similar lines to that made by subsection (2)(c) of the section.

Section 10: Default sentences

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

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

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

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

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

61. 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.

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

63. 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. As a result of the amendments made to section 459 of POCA by *subsection (2)* this order-making power is subject to the affirmative procedure.

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

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

Section 11: Conditions for exercise of restraint order powers

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

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

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

The phrase “reasonable cause to believe” in this context is taken to mean that the court thinks that, on the available evidence, it is more likely than not that the defendant has benefited from criminal conduct. This contrasts with the test for the arrest of a person, namely that there is “reasonable grounds for suspecting” that the person is guilty of an offence that had been or is being committed (see section 24 of the Police and Criminal Evidence Act 1984). The term “suspicion” denotes a degree of satisfaction, not amounting to belief, but at least extending beyond speculation. A test based on suspicion can therefore be more easily satisfied than one based on belief. *Subsection (1)* accordingly amends section 40(2) of POCA so that it provides that a Crown Court may make a restraint order where -

- (a) a criminal investigation has been started in England and Wales with regard to an offence, and

(b) there are reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct.

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

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

Section 12: Continuation of restraint order after quashed conviction

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

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

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

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

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

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

Section 13: Conditions for exercise of search and seizure powers

72. Sections 47A to 47S of POCA (as inserted by section 55 of the Policing and Crime Act 2009) provide for search and seizure powers in England and Wales to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. The property may be seized in anticipation of a confiscation order being made. The seizure power is subject to judicial oversight. If a confiscation order is made, the property may be sold in order to satisfy the order. These sections are not yet in force. Section 47A sets out who may exercise the powers. These are an officer of Revenue and Customs, a constable and an accredited financial investigator. There are a number of pre-conditions for the exercise of these powers. In relation to the power to seize property (in section 47C), these pre-conditions are set out in section 47B and cover the situation where an individual is arrested or proceedings are begun against him or her for an indictable offence and there is reasonable cause to believe that he or she has benefited from the offence. In line with the change to the test for the grant of a restraint order made by section 11, *subsection (1)* of section 13 replaces the “reasonable cause to believe” test with a “reasonable grounds to suspect” test.

73. The seizure powers (in section 47C) and the search powers (in sections 47D to 47F) may only be exercised with the ‘appropriate approval’ described in section 47G unless, in the circumstances, it is not practicable to obtain such approval in advance. Sections 47G to 47I make provision in relation to this appropriate approval. Appropriate approval is the prior approval of a justice of the peace or, if that is not practicable, that of a senior officer, as defined in new section 47G(3). NCA officers designated with the powers of a constable, in accordance with the provisions in Schedule 5 to the Crime and Courts Act 2013, may exercise the powers in sections 47A to 47S of POCA.

74. *Subsection (2)* amends section 47G(3) to provide for the Director General of the NCA, or any other NCA officer authorised by the Director General, to confer the appropriate approval where the search or seizure powers are exercised by a designated NCA officer and it is not practicable to get prior approval from a justice of the peace.

Section 14: Seized money etc

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

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

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

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

77. New section 67(5B) takes account of the provisions in new section 10A of POCA, as inserted by section 1 of the Act, which enable a court to make a determination as to the extent of the defendant's interest in property. New section 67(5B) will enable a magistrates' court to order the payment of funds, held in a bank or building society account of a third party (or parties) and subject to a determination by the court under new section 10A, towards the satisfaction of a confiscation order. This will enable funds held in a bank or building society account to be confiscated more rapidly where the account is not held in the name of the defendant, for example a company account. Any third parties affected would have the opportunity to make representations before such a determination is made.

78. *Subsection (4)* makes a similar amendment to section 67A of POCA to that made to section 67 by subsection (1). Section 67A provides that personal property (for example, a car or jewellery) that has been seized by an appropriate officer (for example, a constable or NCA officer) under a relevant seizure power (namely the seizure powers in POCA or PACE), or which has been produced to such an officer in compliance with a production order under section 345 of POCA, may be sold, on the authority of an order made by a magistrates' court, to meet a confiscation order in certain circumstances. Those circumstances currently mirror conditions (b) to (d) set out in paragraph 77. New section 67A(3) omits the last of these conditions. Section 67A is not yet in force.

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

Chapter 2: Scotland

Confiscation

Section 15: Restitution order and victim surcharge

80. This section makes similar provision for Scotland in Part 3 of POCA to that made for England and Wales by the amendments to section 13 of POCA by section 6. The effect is to provide for the payment of the victim surcharge and the amount due under a restitution order to have priority call on monies paid under a confiscation order. A restitution order can be made under section 253A of the Criminal Procedure (Scotland) Act 1995 (this section is not yet in force) by the criminal courts in Scotland when a person has been convicted of an offence under section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (police assaults etc) and the court considers it is appropriate that the accused pays a sum into a Restitution Fund (which is used to provide support services to the victims of this particular offence). A victim surcharge order is made under section 253F of the Criminal Procedure Act 1995 by the criminal courts in Scotland in certain circumstances and requires the accused to pay an amount into the Victim Surcharge Fund (which is used to provide support services to the victims of crime). The intention of these provisions is to ensure that, should the accused have insufficient means to satisfy all the financial orders against him or her in full, any amounts owed to the victims of crime will take priority over the amounts owed to the government.

Section 16: Orders for securing compliance with confiscation order

81. This section inserts new sections 97B to 97D into Part 3 of POCA which make similar provision in respect of Scotland for the making of “compliance orders” by the courts for securing compliance with confiscation orders to that contained in new sections 13A and 13B, as inserted by section 7, in relation to England and Wales. The criminal courts in Scotland will only be able to impose a compliance order on an accused person and will not be able to impose such an order on third parties. New section 97B(6) of POCA provides that for the purposes of any appeal or review, a compliance order in Scotland will be treated as a sentence.

Section 17: Compliance orders: appeals by prosecutor

82. This section makes amendments to the Criminal Procedure (Scotland) Act 1995 consequential on the provisions in section 16. The amendments confer on the Lord Advocate and procurator fiscal (as the prosecutor) a right of appeal against the decision of a court to make or not to make a compliance order and a right of appeal against the terms of a compliance order if these are considered to be too lenient.

Section 18: Accused persons unlawfully at large

83. This section amends sections 111 and 112 of POCA which make similar provision for Scotland in respect of the making of confiscation orders where the defendant has absconded to that contained in sections 27 and 28 of POCA in relation to England and Wales. The amendments to section 111 and 112 have similar effect to those made to sections 27 and 28 by section 9 of the Act.

Section 19: Enforcement of confiscation orders

84. Section 118 of POCA makes similar provision for Scotland in relation to default sentences as section 35 does for England and Wales. Section 118 enables a court (the High Court of Justiciary or the sheriff) to set a default sentence for the accused to serve if he or she fails to pay the amount due under the confiscation order. It achieves this outcome by treating an unpaid confiscation order as if it were an unpaid fine and applying the fine enforcement provisions in section 221 of the Criminal Procedure (Scotland) Act 1995. Section 221(3) of that Act makes a fine unenforceable once a default sentence has been served. This provision does not apply when an administrator is appointed in relation to a confiscation. Consequently, where a person serves a default sentence following his or her failure to pay the amount due under a confiscation order the offender's liability to pay this amount is extinguished; this contrasts with the position in England and Wales. *Subsection (1)(a)* amends section 118(2)(h) of POCA so as to disapply section 221(3) of the Criminal Procedure (Scotland) Act 1995. As a result an offender will be required to pay the amount due under a confiscation order if he or she defaults on payment and serves a default sentence. Accordingly, the liability of the accused to pay the amount due under a confiscation order will no longer be extinguished by serving a prison sentence for defaulting on payment.

85. *Paragraph 42 of Schedule 4* makes a consequential repeal of section 118(2)(k) of POCA so as to disapply section 224 of the Criminal Procedure (Scotland) Act 1995. That section requires warrants of imprisonment for non-payment of a fine to specify a date for the discharge of the liability to pay the fine (in practice once the default sentence has been served) notwithstanding the fact that it has not been paid. That requirement will no longer operate in relation to default sentences for the non-payment of a confiscation order. *Paragraph 45 of Schedule 4* makes a further consequential repeal of section 153(1)(b) of POCA, which provides that a confiscation order is satisfied where the accused against whom it was made has served a default sentence for non payment of the order.

86. *Subsection (1)(b)* makes similar amendments to section 118 of POCA in relation to default sentences to that made to the England and Wales provision in section 35 of POCA by section 10(1) and (2) (see new section 118(2A) and (2B)). *Subsection (1)(b)* also inserts new subsections (2C) and (2D) into section 118 to provide that where a confiscation order is made by a court in England and Wales or in Northern Ireland but falls to be enforced in Scotland, the criminal courts in Scotland, when sentencing the person for non payment of the confiscation order, would apply the respective default sentences set out in new sections 35(2A) and 185(2A) of POCA (as inserted by sections 10 and 32).

87. *Subsection (2)* makes consequential amendments to section 459 of POCA as a result of the new order-making power provided for in new section 118(2B) of POCA as inserted by subsection (1)(b). Paragraph (a) disapplies, for the purposes of the new order-making power, section 459(3) of POCA which provides for any power under POCA to make subordinate legislation to be exercisable by statutory instrument. The power conferred on the Scottish

Ministers to make an order under new section 118(2B) will be exercisable by Scottish statutory instrument in accordance with the provisions of the Interpretative and Legislative Reform (Scotland) Act 2010. Paragraphs (b) and (c) amend section 459 of POCA so as to provide that the new order-making power is subject to the affirmative procedure in the Scottish Parliament.

88. *Subsection (3)* makes a consequential amendment to section 219(8) of the Criminal Procedure (Scotland) Act 1995 which requires a sheriff to remit a case to the High Court for sentencing where he or she considers that the default sentence appropriate for that case is beyond his or her normal sentencing powers (namely, a maximum sentence of five years' imprisonment).

Section 20: Conditions for exercise of restraint order powers

89. This section makes parallel amendments to sections 119 and 120 of POCA, which set out the circumstances under which a restraint order may be made in Scotland, to those made by section 11 to sections 40 and 41 of POCA, which set out the circumstances under which a restraint order may be made in England and Wales.

Section 21: Continuation of restraint order after quashed conviction

90. This section makes a similar amendment to section 121 of POCA to that made to section 42 of that Act by section 12 to provide for the continuation of a restraint order following the quashing of a conviction until the start of proceedings for a retrial.

Section 22: Conditions for exercise of search and seizure powers

91. This section makes similar amendments to the search and seizure powers in sections 127B and 127G of POCA to those made by section 13 to sections 47B and 47G of that Act.

Civil recovery

Section 23: Prohibitory property orders: PPO receivers

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

93. New section 255G of POCA confers on the Court of Session a discretionary power, exercisable on application by the enforcement authority (namely the Crown Office on behalf of the Scottish Ministers), to appoint a PPO receiver in respect of any property to which a

PPO applies. Whilst the enforcement authority will generally give notice of an application, new section 255G(3) enables it to make an application without having to give notice in certain circumstances. Such a notice is called an ex parte application. An ex parte application may be appropriate where management powers are to be sought from the outset of the investigation, where the initial application for the PPO can be heard ex parte in chambers to avoid alerting potential parties who might then seek to conceal or dispose of the relevant property. The enforcement authority must nominate, in its application, a suitably qualified person for appointment as a PPO receiver (new section 255G(4)).

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

“(1) Power to manage any property to which the order applies.

(2) Managing property includes—

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

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

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

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

Chapter 3: Northern Ireland

Sections 24 to 27: Confiscation: assets held by defendant and other

97. Sections 24 to 27 amend the provisions in Part 4 of POCA in respect of third party interests in assets that may be realised to discharge a confiscation order. These sections make parallel amendments to Part 4 to those made to Part 2 of POCA by sections 1 to 4 of the Act.

Section 28: Time for payment

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

Section 29: Orders for securing compliance with confiscation order

99. This section inserts new sections 163A and 163B into Part 4 of POCA which make parallel provision in respect of Northern Ireland for the making of “compliance orders” by the courts for securing compliance with confiscation orders to that contained in new sections 13A and 13B, as inserted by section 7, in relation to England and Wales.

Section 30: Variation and discharge

100. This section makes broadly analogous provision in relation to Northern Ireland for the discharge of confiscation orders where the defendant has died to that contained in section 8 in respect of England and Wales. Whereas, under section 8, an application to the Crown Court for the discharge of a confiscation order is made by the designated officer for a magistrates’ court, under this section such application will be made by the prosecutor.

Section 31: Absconding defendants

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

Section 32: Default sentences

102. This section makes a parallel amendment to section 185 of POCA in relation to default sentences where a defendant fails to pay the amount due under a confiscation order to that made to the England and Wales provision in section 35 of POCA by section 10(1) and (2). There is no equivalent in this section to the provisions in subsections (3) and (4) of section 10 as such provision is unnecessary in the Northern Ireland context. In Northern Ireland section 13 of the Prison Act (Northern Ireland) 1953 enables prison rules to be made to allow for the early release of a person serving a sentence on grounds of good conduct. Rule 30 of the Prison and Young Offenders Centres Rules (Northern Ireland) 1995 then provides for early release on such grounds. The maximum remission that may be granted under Rule 30 is 50% of the actual term. The Department of Justice in Northern Ireland can exercise the rule-making power in section 13 of the Prison Act (Northern Ireland) 1953 so as to remove the eligibility for early release in cases where a person is serving a default sentence for non-payment of a confiscation order over £10 million. In this way, the same outcome can be achieved as that provided for by section 10(3) in relation to England and Wales.

Section 33: Conditions for exercise of restraint order powers

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

Section 34: Continuation of restraint order after quashed conviction

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

Section 35: Conditions for exercise of search and seizure powers

105. This section makes similar amendments to the search and seizure powers in sections 195B and 195G of POCA to those made by section 13 to sections 47B and 47G of that Act.

Section 36: Seized money

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

Chapter 4: Investigations and co-operation etc

Section 37: Exemption from civil liability for money-laundering disclosures

107. Part 7 of POCA obliges an individual to report to the NCA where there are reasonable grounds to know or suspect that a person is engaged in money laundering. Although this requirement to submit "Suspicious Activity Reports" ("SARs") applies to any individual, SARs are mostly made by businesses in the "regulated sector" such as banks, other financial institutions and accountants.

108. The submission of a SAR removes the risk of prosecution for an offence in relation to money laundering. A reporter can also remove the risk to them of committing a money-laundering offence by seeking the consent of the NCA, under section 335 of POCA, to conduct a transaction or activity about which they have suspicions. The NCA has seven days to respond.

109. Whilst the reporter awaits the NCA's decision on consent, the activity or transaction must not proceed. Furthermore, the reporter cannot disclose to the customer the fact that a SAR has been submitted, or any other information that may prejudice the NCA's investigation into the reported activity or transaction, as doing so would constitute a "tipping off" offence under section 333A of POCA. This can place the reporter in a difficult position in not informing the customer of the reasons for suspension of their requested activity or transaction, and could result in the collapse of a financial or commercial deal.

110. Failing to carry out a customer's instructions whilst waiting for authorisation can therefore expose financial institutions and others to the risk of civil litigation. The courts (see *Shah and others v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 3) have, however, held that whilst customers can require such institutions to prove that the suspicion that gave rise to the SAR was reasonable, provided the suspicion is so proved, the institution cannot be held

liable for loss suffered by the customer as a consequence of the institution's failure to carry out promptly the customer's instructions.

111. This section amends section 338 of POCA to make express statutory provision in relation to the UK's obligation under the third EU Anti-Money Laundering Directive (Directive 2005/60/EC) to ensure that persons who make disclosures to relevant authorities in good faith must be protected from civil liability for doing so.

Section 38: Confiscation investigations

112. This section broadens the definition of a "confiscation investigation" for the purposes of Part 8 of POCA to include investigations after a confiscation order has been made into the extent and whereabouts of property that might be realised to satisfy the order. The section gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by "extending the investigative powers in POCA so that they are available to trace assets once the confiscation order is made (at the moment those powers fall away once the order is made)".

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

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

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

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

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

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

117. *Subsection (2) and (3)* makes consequential amendments to sections 353 (which applies to England, Wales and Northern Ireland) and 388 (which applies to Scotland) of POCA. These sections sets out conditions for issuing a search and seizure warrant, including warrants issued as part of a confiscation investigation, in the absence of a production order. On occasions a production order will not be a suitable tool and so an application for a search and seizure warrant is made instead. This may occur, for example, where the person controlling the required material may be uncontactable or the investigation would be seriously prejudiced if access to the material was not obtained immediately. An individual served with a production order is generally given seven days to provide the requested material.

Section 39: External orders and investigations: meaning of “obtaining property”

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

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

“an order which -

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

120. In limiting the scope of an external order to the recovery of specified property or a specified sum of money, Part 11 as enacted reflected the scope of the then international agreements under which orders could be sent from a foreign court were similarly limited. For example, Article 5(1)(a) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988⁵ requires State parties to “adopt such measures as may be necessary to enable confiscation of... proceeds derived from [specified] offences... or property the value of which corresponds to that of such proceeds”.

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

⁵ https://www.unodc.org/pdf/convention_1988_en.pdf

122. In recent years, the international law relating to the confiscation of the proceeds of crime has adopted a broader approach to what such proceeds might be. For example, the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism⁶ defines “proceeds” as any economic advantage, derived from or obtained, directly or indirectly, from criminal offences.

123. New subsection (6A) of section 447 of POCA provides that the value of any pecuniary advantage obtained as a result of criminal conduct is to be treated as if it were a sum of money to the same value. The effect is to enable external orders to be used for the recovery of a pecuniary advantage obtained by criminal conduct in the same way as such orders can currently be used to recover property or sums of money. Part 11 also provides for “external investigations”, defined in section 447(3) as –

“an investigation by an overseas authority into –

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

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

Section 40: Confiscation orders by magistrates’ courts

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

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

⁶ <http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm>

PART 2: COMPUTER MISUSE

SUMMARY AND BACKGROUND

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

- Section 1 - unauthorised access to computer material or data (commonly known as “hacking”);
- Section 2 - unauthorised access with intent to commit or facilitate commission of further offences;
- Section 3 - unauthorised acts with intent to impair the operation of a computer (this offence includes circulating viruses, deleting files and inserting a “Trojan Horse” to steal data as well as effectively criminalising all forms of denial of service attacks in which the attacker denies the victim(s) access to a particular resource, typically by preventing legitimate users of a service accessing that service, for example by overloading an Internet Service Provider of a website with actions, such as emails);
- Section 3A - making, adapting, supplying or offering to supply an article (“hacker tools”) intending it to be used to commit, or to assist in the commission of, an offence under sections 1 or 3; supplying or offering to supply an article believing that it is likely to be used in this way; and obtaining an article with a view to its being supplied for use in this way.

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

127. The Government’s UK Cyber Security Strategy⁷ included a commitment to “review existing legislation, for example the 1990 Act, to ensure that it remains relevant and effective”. Following that review, this Part introduces a new offence in respect of unauthorised acts in relation to computers causing serious damage.

128. On 12 August 2013, the European Parliament and European Council adopted Directive 2013/40/EU on attacks against information systems⁸ (“the Directive”) and replacing Council Framework Decision 2005/222/JHA. The Act makes two amendments to the 1990 Act to ensure that the UK law is fully compliant with the Directive. The Government announced that it intended to opt in to the Directive in an oral statement on 3 February 2011 (Official Report, House of Commons, columns 1051 to 1058).

⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60961/uk-cyber-security-strategy-final.pdf

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:218:0008:0014:EN:PDF>

COMMENTARY ON SECTIONS

Section 41: Unauthorised acts causing, or creating risk of, serious damage

129. *Subsection (2)* inserts new section 3ZA into the 1990 Act which creates a new offence of impairing a computer such as to cause serious damage. The existing offence of impairing a computer under section 3 of the 1990 Act carries a maximum penalty of ten years' imprisonment. This maximum penalty is not considered adequate by the Government in those cases where the impact of the action is to cause serious damage, for example to critical national infrastructure. The new offence addresses that gap in the criminal law.

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

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

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

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

Section 42: Obtaining articles for purposes relating to computer misuse

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

"Tools used for committing offences

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

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

135. Section 3A of the 1990 Act, in conjunction with sections 1 to 3 of that Act, meets the requirements of Article 7 save in one respect, namely the “procurement for use” of tools used for committing the Article 3 to 6 offences. Under the existing offence, the prosecution is required to show that the individual obtained the tool with a view to its being *supplied* for use to commit, or assist in the commission of an offence under section 1 or 3 of the Act. This section extends subsection (3) of section 3A of the 1990 Act to include an offence of obtaining a tool for use to commit a Computer Misuse Act offence (including one under the new section 3ZA inserted by section 41) *regardless* of an *intention to supply* that tool. As amended, that subsection would provide that (additions shown in italics):

- “A person is guilty of an offence if he obtains any ~~article with a view to~~ *article –*
- (a) *intending to use it to commit, or assist in the commission of, an offence under section 1, 3 or 3ZA, or*
 - (b) *with a view to its being supplied for use to commit, or assist in the commission of, an offence under section 1 or 3.*”

Section 43: Territorial scope of computer misuse offence

136. Article 12 of Directive provides as follows:

“Jurisdiction

1. Member States shall establish their jurisdiction with regard to the offences referred to in Articles 3 to 8 where the offence has been committed:
 - (a) in whole or in part within their territory; or
 - (b) by one of their nationals, at least in cases where the act is an offence where it was committed.
2. When establishing jurisdiction in accordance with point (a) of paragraph 1, a Member State shall ensure that it has jurisdiction where:
 - (a) the offender commits the offence when physically present on its territory, whether or not the offence is against an information system on its territory; or
 - (b) the offence is against an information system on its territory, whether or not the offender commits the offence when physically present on its territory.....”

137. Sections 4 and 5 of the 1990 Act already provide for limited extra-territorial jurisdiction in relation to the offences in sections 1 and 3 of that Act. Under those provisions, it is possible to prosecute a person in this country for an act committed abroad which would constitute an offence under section 1 or 3 provided that there was a “significant link” to the appropriate jurisdiction in the UK. *Subsection (2)* amends section 4 of the 1990 Act to apply such extra-territorial jurisdiction to the offence in new section 3ZA inserted by section 41; *subsection (5)* amends section 5 of the 1990 Act to define what constitutes a “significant

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

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

Section 44: Savings

139. Section 10 of the 1990 Act contains a saving provision. It provides that the offence at section 1(1) of the 1990 Act has effect without prejudice to the operation in England and Wales of any enactment relating to powers of inspection, search or seizure; and in Scotland of any enactment or rule of law relating to powers of examination, search or seizure. The amendment to section 10 of the 1990 Act made by this section is a clarifying amendment. It is designed to remove any ambiguity over the interaction between the lawful exercise of powers (wherever exercised) conferred under or by virtue of any enactment (and in Scotland, rule of law) and the offence provisions. “Enactment” is expressly defined to provide certainty as to what this term includes. The title of section 10 of the 1990 Act has also been changed to remove the reference to “certain law enforcement powers” (see paragraph 12 of Schedule 4). This is to avoid any ambiguity between the title and the substance of that section.

PART 3: ORGANISED, SERIOUS AND GANG-RELATED CRIME

SUMMARY AND BACKGROUND

Organised crime groups

140. In the Serious and Organised Crime Strategy, the Government undertook to bring forward proposals to “better tackle people who actively support, and benefit from, participating in organised crime, learning from legislation that is already being used elsewhere in the world⁹” (paragraph 4.60).

141. In 2006, the UK ratified the UN Convention against Transnational Organised Crime¹⁰. Article 5(1) of the Convention (criminalisation of participation in an organized criminal group) provides -

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

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

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

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

a. Criminal activities of the organized criminal group;

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

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

142. Article 5 of the Convention therefore provides for either a conspiracy offence or a participation offence, or both, to be implemented into domestic law. The elements of the offence specified in Article 5(1)(a)(i) are based on a conspiracy offence. The requirements of this offence include the intentional agreement with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to obtaining a financial or other material benefit. This requirement criminalises the mere agreement to commit serious crime for the purpose of obtaining a financial or other material benefit, irrespective of whether that

⁹ Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations Office on Drugs and Crime 2004)
http://www.unodc.org/pdf/crime/legislative_guides/02%20Legislative%20guide_TOC%20Convention.pdf

¹⁰ <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

agreement is acted upon. In England and Wales, section 1 of the Criminal Justice Act 1977 provides for the offence of conspiracy in the following terms –

“(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.”

143. The elements of the offence specified in Article 5(1)(a)(ii) are based on active participation. This type of offence was initially considered more suitable for civil law jurisdictions whose laws do not recognise conspiracy or do not allow criminalisation of a mere agreement to commit a crime, but increasingly Governments are adopting a combined approach. For example, sections 71 and 72 of the Republic of Ireland’s Criminal Justice Act 2006¹¹ provide for an offence of conspiracy and of participation in a criminal organisation.

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

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

Serious crime prevention orders

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

147. An SCPO may be made by the Crown Court where it is sentencing a person who has been convicted of a serious offence (including when sentencing a person convicted of such an offence in the magistrates’ court but committed to the Crown Court for sentencing). Orders

¹¹ <http://www.irishstatutebook.ie/2006/en/act/pub/0026/index.html>

may also be made by the High Court where it is satisfied that a person has been involved in serious crime, whether that involvement was in England, Wales, Northern Ireland or elsewhere, and where it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in England, Wales and Northern Ireland. A serious offence in England and Wales and Northern Ireland is one which is listed in Schedule 1 to the 2007 Act, or an offence which is sufficiently serious that the court considers it should be treated as it were part of the list. Section 47 extends the list of trigger offences in Schedule 1 to the 2007 Act.

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

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

150. SCPOs were brought into force on 6 April 2008. As at 31 March 2014, 317 SCPOs have been granted by the Crown Court and one by the High Court¹². There have been nine convictions for breach of an SCPO. Further details of the implementation of the SCPO are contained in a memorandum by the Home Office submitted to the Home Affairs Select Committee and Justice Select Committee in November 2012 in relation to the post-legislative scrutiny of the 2007 Act¹³.

151. The provisions in Part 1 of the 2007 Act broadly apply only to England and Wales and Northern Ireland, although the offence of breaching a SCPO is UK-wide¹⁴. The then Scottish Government decided to consider the effectiveness of SCPOs elsewhere in the UK before deciding whether these orders should be introduced in Scotland. In September 2013, the Scottish Government published a consultation on the extension of SCPOs to Scotland¹⁵. The Scottish Government published its response to the consultation on 4 April 2014¹⁶, and

¹² These figures represent those SCPOs known to the National Crime Agency and its predecessor the Serious Organised Crime Agency. Other SCPOs may have been granted which were not reported to the NCA or SOCA.

¹³ <http://www.official-documents.gov.uk/document/cm85/8502/8502.pdf>

¹⁴ The Scottish Parliament adopted a legislative consent motion in relation to this aspect of the Bill for the 2007 Act on 8 March 2007 - <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16199.aspx>

¹⁵ <http://www.scotland.gov.uk/Publications/2013/09/9917/downloads>

¹⁶ <http://www.scotland.gov.uk/Resource/0044/00447665.pdf>

indicated that it would ask the UK Government to bring forward the necessary amendments to the 2007 Act in order that there was a single UK-wide regime for SCPOs. Section 46 and Schedule 1 make the necessary amendments to the 2007 Act to this end.

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

153. As at 31 March 2014, the NCA (and its predecessor, the Serious Organised Crime Agency) has obtained 119 FROs. This is substantially less than the original expectation of some 1,500 a year and a number of deficiencies have been identified. In particular, as breach of an order is only triable summarily this both limits the investigative powers available to law enforcement agencies under the Police and Criminal Evidence Act 1984 and places a six month time limit on mounting a prosecution for non-compliance (by virtue of the restriction imposed by section 127 of the Magistrates’ Courts Act 1980). By consolidating the FRO within the SCPO, non-compliance would become an indictable offence and thereby overcome these drawbacks.

Gang injunctions

154. Part 4 of the Policing and Crime Act 2009 (“the 2009 Act”) makes provision for injunctions to prevent gang-related violence (“gang injunctions”). Gang injunctions are a preventative civil order that enable the police or a local authority to apply to a county court¹⁷, or the High Court, for an injunction against an individual to prevent gang-related violence. Gang injunctions allow courts to place a range of prohibitions and requirements (including supportive, positive requirements) on the behaviour and activities of a person (aged 14 or over) involved in gang-related violence. These conditions could include prohibiting someone from being in a particular place or requiring them to participate in rehabilitative activities.

¹⁷ Section 18 of the Crime and Courts Act 2013 provides for youth courts to have jurisdiction to grant gang injunctions in respect of persons under 18 years, that section is not yet in force.

155. The 25 out of then 33 Ending Gang and Youth Violence priority areas¹⁸ that returned data in response to a Home Office survey reported that, between January 2011 (when the provisions in Part 4 of the 2009 Act were brought into force) and January 2014, 108 gang injunctions had been put in place.

156. The Serious and Organised Crime Strategy pointed to the link between urban street gangs and organised crime. At paragraph 2.7, the Strategy stated that “there are connections between gangs and organised crime: urban gang members may engage in street drug dealing on behalf of organised criminals and some gangs aspire to and may become organised crime groups in their own right”. A review of the operation of gang injunctions was published by the Home Office in January 2014¹⁹. Amongst other things, the review found that the definition of a gang used in Part 4 of the 2009 Act was seen by police officers to have some limitations for addressing local gang issues. In response to this finding, the Government undertook to consult interested parties to explore whether the definition of a gang within the legislation should be changed to reflect the evolving nature of street gang activity across the country and ensure that gang injunctions can be used to target the right individuals. Section 51 makes resulting changes to Part 4 of the 2009 Act.

COMMENTARY ON SECTIONS

Section 45: Offence of participating in activities of organised crime group

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

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

¹⁸ Barking and Dagenham, Birmingham, Bradford, Brent, Camden, Croydon, Derby, Ealing, Enfield, Greenwich, Hackney, Hammersmith and Fulham, Haringey, Islington, Knowsley, Lambeth, Leeds, Lewisham, Liverpool, Manchester, Merton, Newham, Nottingham, Oldham, Salford, Sandwell, Sheffield, Southwark, Tower Hamlets, Waltham Forest, Wandsworth, Westminster and Wolverhampton. Ten new areas were added in October 2014: Barnet, Bromley, Havering, Hillingdon, Kensington and Chelsea, Luton, Ipswich, Thanet, Stoke-on-Trent and Tendring.

¹⁹ <https://www.gov.uk/government/publications/review-of-the-operation-of-injunctions-to-prevent-gang-related-violence>

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

Section 46 and Schedule 1: Extension of Part 1 of Serious Crime Act 2007 to Scotland

160. Section 46 gives effect to Schedule 1 which extend the provisions in respect of SCPOs contained in Part 1 of the 2007 Act to Scotland and, in so doing, make the necessary modifications to that Part to take account of Scots law.

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

162. *Paragraph 3* amends subsection (6) of section 2 of the 2007 Act. That subsection provides that the test set out in section 2(4), rather than the test in section 3(1), should be used when a court in England and Wales is determining whether a person has been involved in serious crime in Northern Ireland for the purposes of an England and Wales order. The amendments also modify section 2(6) to refer to the new test (see below) for determining whether a person has been involved in serious crime in Scotland. *Paragraph 5* makes similar amendments to section 3 of the 2007 Act which makes equivalent provision to section 2 for Northern Ireland.

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

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

165. Further to this, new section 2A(2) sets out that a “serious offence in Scotland” is an offence under the law of Scotland which, at the time the court considers the application for an order or the matter in question, is contained in the list set out in new Part 1A of Schedule 1 to the 2007 Act (as inserted by *paragraph 31*), or is an offence which is sufficiently serious that the court considers it should be treated as if it were set out in that list. The list in new Part 1A of Schedule 1 to the 2007 Act is not an exhaustive list. The second part of the test in new section 2A(2)(b) allows the court to treat offences that do not appear in Part 1A of Schedule 1 as being serious offences if, based on the circumstances of the case, the court considers the offence is sufficiently serious to be treated as such.

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

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

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

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

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

171. *Paragraph 6* inserts new subsection (4A) into section 4 of the 2007 Act which confers on the Scottish Ministers a power to amend new Part 1A of Schedule 1 to that Act. This order-making power mirrors the existing powers conferred on the Secretary of State and the Department of Justice in Northern Ireland to amend Parts 1 and 2 respectively. As a result of the amendment made to section 89 of the 2007 Act by *paragraph 29*, any such order is subject to the affirmative procedure in the Scottish Parliament.

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

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

173. *Paragraph 8* amends section 7 of the 2007 Act which provides that the Secretary of State and Northern Ireland Department of Justice may, by order, expressly exclude the application of SCPOs to persons falling within a specified description. Under the 2007 Act an order can be imposed on any person and this includes individuals, bodies corporate, partnerships and unincorporated associations. The order-making power has not been exercised. New section 7(1A) confers an equivalent order-making power on the Scottish Ministers. As a result of the amendment to section 89 of the 2007 Act, made by *paragraph 29*, an order under new section 7(1A) will be subject to the negative procedure.

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

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

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

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

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

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

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

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

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

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

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

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

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

185. New section 22A(4) replicates section 1(3) of the 2007 Act, providing the courts with the flexibility to include such terms in the SCPO as they consider appropriate for this purpose. New section 22A(5) provides that the powers of the High Court and sheriff under new section 22A are subject to the same safeguards contained in sections 6 to 15 of the 2007 Act as those that apply to an SCPO made under section 1 of the 2007 Act.

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

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

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

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

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

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

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

193. *Paragraph 19* amends section 27 of the 2007 which makes provision for the winding-up of companies, partnerships or relevant bodies in England and Wales and Scotland so as to limit its application to England and Wales. *Paragraph 20* then inserts new section 27A into the 2007 Act which makes such provision for Scotland.

194. New section 27A provides the Scottish Ministers with the power to petition the court for the winding up of a company, partnership or relevant body (as defined in new section 27A(12)). New section 27A(1) provides that, in order for the sanction to be available, the company, partnership or relevant body must have been convicted of the offence in section 25 of the 2007 Act of breach of an SCPO and the Scottish Ministers must also consider it to be in the public interest for the company, partnership or relevant body to be wound up.

195. New section 27A(2) to (4) provides that the power to petition for winding up taps into the existing powers to wind up companies in the Insolvency Act 1986 (“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. New section 27A(2) provides that, in relation to an application for the winding up of a company or the company’s winding up, the provisions of the 1986 Act concerning the winding up of companies apply, 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, new section 27A(3) provides for the Scottish Ministers to present the petition for winding up, whereas it would normally be the Secretary of State under section 124A of the 1986 Act. Secondly, new section 27A(4) provides 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 section 25 of the 2007 Act and the court considers that it is just and equitable for the company to be wound up.

196. New section 27A(5) and (6) taps into the power to dissolve a partnership in the Partnership Act 1890.

197. New section 27A(7) provides the appropriate Minister (as defined in new section 27A(12)) with the power to provide, by order, for the 1986 Act to apply with modifications to a relevant body. As a result of new section 27A(8) an order under new section 27A(7) must provide that the court will only wind up a partnership or relevant body to which this section applies if the partnership or relevant body has been convicted of the offence in section 25 of the 2007 Act and where it would be just and equitable to do so.

198. New section 27A(9) provides 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 section 25 of the 2007 Act has been made but not finally determined, or if the time limit for such an appeal has not yet expired (although new section 27A(11) provides that any power to appeal out of time which might exist is to be ignored for the purposes of section 27A(9)).

199. New section 27A(10) provides that no application may be made, or order granted under this section, if the company, partnership or relevant body is already being wound up by the court.

200. *Paragraph 21* makes amendments to section 29 of the 2007 Act consequential upon the insertion of new section 27A. Section 29 contains three order-making powers. The first power, in subsection (1), enables the Secretary of State to make an order making such modifications as he or she considers appropriate to the application of the Insolvency Act 1986 (the relevant parts of which extend to Scotland), or as the case may be, the Insolvency (Northern Ireland) Order 1989, by virtue of sections 27(2) and 28(2). The second power, in subsection (3), enables the Secretary of State to make an order to apply, with any necessary modifications, any other enactment in connection with the provisions in section 27(2) to (4) and 28(2) to (4). The third power, in subsection (4), enables the Secretary of State to make supplementary and consequential application of enactments in connection with the exercise of the order-making powers in sections 27(5) and 28(5) (winding up of partnerships) and 27(6) and 28(6) (winding up of a relevant body). The consequential amendments to section 29 ensure that each of these order-making powers will also operate in relation to the power to wind up companies, partnerships and other relevant bodies in new section 27A.

201. *Paragraph 22* amends section 31 of the 2007 Act which makes provision for the operation of SCPOs against partnerships other than limited liability partnerships, which are covered by section 30 of the 2007 Act. Section 31(3) provides a gloss for the meaning of “involved in serious crime in England and Wales, Northern Ireland or elsewhere” and “involvement in serious crime in England and Wales or Northern Ireland” when a court is considering an order in relation to a partnership. A partnership is involved in serious crime if any of the partners is so involved. *Paragraph 22(2)* expands this gloss to cover Scotland.

202. Section 31(6) provides that the rules of court relating to the service of documents and certain legislative provisions listed – including sections 70 and 143 of the Criminal Procedure (Scotland) Act 1995 - apply as if the partnership were a body corporate. *Paragraph 22(3)* repeals the entry in relation to the Criminal Procedure (Scotland) Act 1995. Section 70 of that Act has been amended by the Criminal Justice and Licensing (Scotland) Act 2010 and the Partnerships (Prosecution) Scotland Act 2013 so as to make specific provision for service of an indictment on a partnership, as such, it is no longer necessary to gloss the operation of section 70 so as to treat a partnership as if it were a body corporate. *Paragraph 23* makes a similar amendment to section 32 of the 2007 Act which makes provision for the operation of orders against unincorporated associations.

203. *Paragraph 24* amends section 34 of the 2007 Act which makes provision to ensure that Part 1 of that Act complies with the provisions set out in the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce). As a result of that Directive, there are certain conditions on what terms can be imposed on a service provider established in a state in the European Economic Area (this is the European Union plus Iceland, Liechtenstein and Norway) other than the UK and certain protections for intermediary service providers. Section 34(1) provides that an order may not include terms which restrict the freedom of an information service provider established in a European Economic Area state other than the UK to provide information society services in relation to a European Economic Area state unless certain conditions, contained in section 34(2) and (3), are met. The conditions in section 34(2) are that the court concerned considers that the terms: (a) are necessary for the objective of protecting the public by preventing, restricting or disrupting involvement in serious crime in England and Wales or Northern Ireland, as the case may be; (b) relate to an information society service which prejudices that objective or presents a serious and grave risk of prejudice to it; and (c) are proportionate to that objective. Paragraph 24 amends section 34(2) so that it operates in relation to SCPOs made in Scotland.

204. *Paragraph 25* inserts new section 36A into the 2007 Act, this provides for the civil standard of proof, that is on the balance of probabilities, to apply to any proceedings under sections 22A, 22B, 22C or 22E of the 2007 Act in relation to an SCPO before the High Court of Justiciary and the sheriff court. This mirrors the position in England and Wales and Northern Ireland as provided for in sections 35 and 36 of the 2007 Act.

205. *Paragraph 26* amends section 39 of the 2007 Act which makes provision for the inclusion of a term in an SCPO made against a body corporate, partnership or unincorporated association authorising a “law enforcement agency” to appoint a person to monitor whether the order is being complied with. Paragraph 26 amends the definition of a “law enforcement agency” in section 24(10) to include a reference to the chief constable of the Police Service of Scotland.

206. *Paragraph 27* amends section 40 of the 2007 Act which deals with the means by which the costs of authorised monitors will be determined. Section 40(1) and (2) enables the “appropriate authority” to provide, by order, the practice and procedure (including provision about appeals) which must be followed for determining the amount of costs or interest. Section 40(3) provides that where the costs of the monitor have not been paid by the organisation within the period specified in the order under section 39(5)(a) the law enforcement body must take reasonable steps to recover them. Section 40(4) provides that the appropriate authority must, by order, set out what those steps are. Section 40(5) goes on to provide that, after taking such steps, if the costs have still not been paid, they are recoverable as if due to the law enforcement agency concerned as a consequence of a civil order or judgment. Paragraph 27(2) and (3) narrow the operation of section 40(5) to England and Wales and Northern Ireland and then make equivalent provision for Scotland. Section 40(6) provides for interest to be payable on the unpaid costs and for this to be calculated in accordance with the provision in section 17 of the Judgments Act 1838 (that is at 8% per year). That Act does not extend to Scotland and paragraph 27(4) inserts new section 40(6A) to make analogous provision for Scotland. Paragraph 27(5) amends section 40(9) to provide that, in relation to SCPOs in Scotland, the Scottish Ministers are the appropriate authority. Orders made under section 40 are subject to the negative resolution procedure.

207. *Paragraph 28* inserts appropriate additions to the index of defined expressions in Part 1 of the 2007 Act.

208. *Paragraph 29* amends section 89 of the 2007 Act which provides for the making of orders under that Act. The amendments to section 89(2) extend to the Scottish Ministers the power to make orders making different provision for different cases, descriptions of cases, or purposes and containing supplementary, incidental, consequential, transitional, transitory or saving provision.

209. *Paragraph 30* amends section 93 of the 2007 Act which provides for the extent of that Act. The amendment to section 93(2), read with section 93(7), will provide for Part 1 of the 2007 Act to extend to Scotland as well as, as now, England and Wales and Northern Ireland.

Section 47: Serious crime prevention orders: meaning of “serious offence”

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

Section 48: Powers of Crown Court to replace orders on breach

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

Section 49: Extension of order where person charged

212. This section inserts new section 22E into the 2007 Act which provides for the duration of an SCPO to extend beyond five years in specified circumstances. New section 22E provides for an SCPO to continue in force where the subject of an SCPO has been charged with a serious offence (namely one of those specified in Schedule 1 to the 2007 Act) or with breach of an SCPO. On an application by the Director of Public Prosecution or Director of the Serious Fraud Office (or, in Scotland, the Lord Advocate), a court may provide that an SCPO continues in force pending the outcome of the criminal proceedings in respect of the offence for which the subject of an SCPO has been charged. In deciding whether to grant an application to extend the duration of an SCPO under new section 22E, the court is required to apply the same test that applies to the grant or variation of an order, namely that the court has reasonable grounds for believing that an extension of the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime. Where a person subject of an SCPO is convicted of a serious offence, it will be open to the court to vary the existing SCPO (exercising the powers in section 20 of the 2007 Act) or make a fresh one (exercising the powers in section 19 of the 2007 Act). Where a person subject of an SCPO is convicted of breach of the order, it will be

open to the court to vary the existing SCPO or make a fresh one in accordance with section 21 of the 2007 Act, as amended by section 48. The court to whom a relevant applicant authority applies to is set out in new section 22E(2).

Section 50: Serious crime prevention orders and financial reporting etc

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

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

Section 51: Injunctions to prevent gang-related violence and drug-dealing activity

215. This section replaces the existing section 34 of the 2009 Act which sets out the circumstances in which a court may grant a gang injunction. Two conditions must currently be satisfied. The first condition is that the respondent has engaged in, or assisted or encouraged, “gang-related violence”. Once this condition is satisfied, the court may grant an injunction if a second condition is satisfied, namely that it thinks it is necessary to do so in order “to prevent the respondent from engaging in, or encouraging or assisting, gang-related violence” (section 34(3)(a)) or “to protect the respondent from gang-related violence” (section 34(3)(b)). Section 34(5) of the 2009 Act defines gang-related violence as:

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

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

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

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

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

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

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

PART 4: SEIZURE AND FORFEITURE OF DRUG-CUTTING AGENTS

BACKGROUND

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

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

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

222. The majority of cocaine available at street level contains one or more adulterants, some of the most common being benzocaine and phenacetin. In 2013, 63% of street level seizures of cocaine hydrochloride (powder cocaine) contained benzocaine, while 91% of street level base cocaine seizures (the majority of which is ‘crack cocaine’) contained phenacetin. Much of this adulteration occurs within the UK; in 2013, the quarterly average purity of cocaine hydrochloride at importation level ranged from 69-71%, while the average purity at user level ranged from 32-38%²⁰. Importing a kilogram of high-quality cocaine may cost around £45,000, while a kilogram of benzocaine can be bought for £300. It is common for cocaine to be mixed at an initial 1:1 ratio with benzocaine, allowing the resulting product potentially to be sold for £90,000. Cutting agents can therefore significantly increase the criminals’ profits from drug trafficking.

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

224. The Government’s Drug Strategy 2010²¹ included a commitment to develop a robust approach to stop criminals profiting from the trade in cutting agents, working with production countries, the legitimate trade and international partners. In May 2013, the Home Office published the consultation document “Introduction of new powers to allow law enforcement agencies to seize and detain chemical substances suspected of being used as drug cutting agents”. The response to the consultation was published on 31 March 2014²². Part 4 of the Act confers new powers on law enforcement agencies to seize, detain and destroy chemical substances reasonably suspected of being used as cutting agents for illegal drugs. The provisions are modelled on the police entry, search and seizure powers in Part 2 of Police and Criminal Evidence Act 1984 (“PACE”) and the cash seizure and forfeiture powers in Chapter

²⁰ ‘Average’ here refers to weighted mean purity. For further details see the NCA ENDORSE 2013 Annual Report

²¹ <https://www.gov.uk/government/publications/drug-strategy-2010--2>

²² <https://www.gov.uk/government/consultations/cutting-agents-consultation>

3 of Part 5 of POCA. The provisions in Part 4 of the Act will be supported by court procedural rules to be made (in the case of magistrates' court rules in England and Wales) by the Lord Chancellor under sections 144 and 145 of the Magistrates' Court Act 1980. Such rules will be analogous to those that apply to the cash seizure and forfeiture powers in Chapter 3 of Part 5 of POCA, namely the Magistrates' Court (Detention and Forfeiture of Cash) Rules 2002 (SI 2002/2998), as amended.

COMMENTARY ON SECTIONS

Section 52: Application for search and seizure warrants

225. This section provides for prior judicial authorisation for powers to search premises for drug-cutting agents and to seize any such agents found on the premises. The term "drug-cutting agent" is defined in section 65(1). The definition is such as to cover any substance that may be used to adulterate a controlled drug in connection with the unlawful supply or exportation of the drug. Accordingly, the definition will cover not only the substances most commonly used as cutting agents – namely, benzocaine, lidocaine and phenacetin – but any substance intended for use in this way which may, potentially, be any powder of a similar colour and consistency as the drug in question. *Subsection (1)* provides for a justice of the peace (or, in Scotland, a sheriff – see section 65(5)), on an application of a police or customs officer (*subsection (4)*), to issue a search and seizure warrant. Such a warrant confers authority on a police or customs officer to enter the premises specified in the warrant and search them for substances that appear to be intended for use as drug-cutting agents. To grant such a warrant, the justice of the peace must be satisfied that there are reasonable grounds to suspect that a substance intended for use as a cutting agent is on the relevant premises. In coming to such a judgement, the magistrate would weigh up the information supplied in the application (*subsection (6)*) or in oral evidence (*subsection (7)*). The "reasonable grounds to suspect" test is directed solely to the likely presence on the premises and use of the substance as a drug-cutting agent and not to any specific suspected criminal offence. In determining whether the test is satisfied, the court will apply the civil standard of proof, namely on the balance of probabilities. A police or customs officer is defined in *subsection (2)* and includes an NCA officer.

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

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

entries in order to achieve the purpose for which he issues the warrant, for example in the case of the search of a large warehouse.

Section 53: Further provisions about search and seizure warrants

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

Section 54: Execution of search and seizure warrants

229. *Subsection (1)* gives effect to Schedule 2 which sets out conditions for the search and seizure of premises in pursuance of a warrant. Failure to comply with such conditions would render the entry and search of premises unlawful (*subsection (2)*). *Subsection (3)* enables a police or customs officer to use reasonable force to enter premises. It is an offence to obstruct an officer executing a warrant (*subsection (4)*); the maximum penalty on conviction for such an offence is a level 3 fine (currently £1,000) (*subsection (5)*).

Schedule 2: Execution of search and seizure warrants

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

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

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

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

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

Section 55: Seizure of substances under search and seizure warrant

235. This section enables a police or customs officer searching premises in pursuance of a section 52 warrant to seize any substance found there which is reasonably suspected as being intended for use as a drug-cutting agent.

Section 56: Seizure of substances without search and seizure warrant

236. This section contains a free-standing power to seize, without warrant, a substance reasonably suspected as being intended for use as a drug-cutting agent. This will enable a police or customs officer to seize such substances when they are lawfully on premises for some other purpose, for example, a customs officer undertaking a search for prohibited or restricted goods when operating at port or where an officer is executing a warrant issued

under PACE in relation to a non-drug related offence and discovers substances suspected of being used as a drug-cutting agent in the course of the search. The subsequent provisions of this Part in respect of retention and forfeiture will apply in equal measure to substances seized under a search and seizure warrant and to those seized under this free standing power.

Section 57: Notice to be given when substances seized

237. This section makes provision for the issue of a notice, where any substance is seized in accordance with sections 55 or 56, to the person from whom it was seized and, if the officer thinks that the substance may belong to a different person, to that person also. This is to ensure that all persons with an interest in the substance are properly informed.

Section 58: Containers

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

Section 59: Initial retention of seized substances

239. *Subsection (1)* enables any suspected drug-cutting agents seized under section 55 or 56 to be retained for an initial period of 30 days. This period affords the law enforcement agency which seized the substance and the owner of the substance adequate time to gather evidence to support continued detention or to demonstrate that the substance is held legitimately.

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

Section 60: Continued retention or return of seized substances

241. This section enables a police or customs officer to apply for an order authorising the continued retention of the suspected drug-cutting agents. The order can be made by a magistrates' court or a justice of the peace (in England and Wales), a sheriff (in Scotland) or a court of summary jurisdiction (in Northern Ireland). The court, justice or sheriff may make such an order if satisfied that continued retention of the substance is justified whilst its intended use is further investigated. An order can also be made for continued retention if consideration is being given to the bringing of criminal proceedings, or if such proceedings have been commenced and not concluded. Where criminal proceedings have been initiated an order may authorise continued retention until the conclusion of the proceedings, otherwise the maximum period of retention is 60 days (this includes the initial 30 day period provided for in section 59).

242. Where the court, justice or sheriff concludes that none of the grounds for continued retention of the substance have been satisfied, the substance must be returned to the person from whom it was seized or, if different, the owner. Where an order is made under this section and no person entitled to the substance was present or represented at the hearing then the responsible officer must make reasonable efforts to give written notice to the person from whom the substance was seized and, if the officer thinks that it may belong to a different person, to that person also. This is to ensure that all persons with an interest in the substance are properly informed.

Section 61: Forfeiture and disposal, or return, of seized substances

243. This section enables a magistrates' court (in England and Wales), a sheriff (in Scotland) or a court of summary jurisdiction (in Northern Ireland), on application by a police or customs officer (*subsection (1)*) to order the forfeiture of a substance if the court is satisfied that it is intended for use as a drug-cutting agent (*subsection (3)*). The civil standard of proof, namely on the balance of probabilities, will apply to such proceedings. It is expected that court procedure rules would provide that it is open to both the applicant and any person with an interest in the substance to make oral representations to the court at a forfeiture hearing. Where the court is so satisfied it is for the applicant to arrange for the disposal of the forfeited substance (*subsection (4)*), although any action to dispose of the substance is to be stayed pending the outcome of any appeal (*subsection (5)*). The section also makes further provision authorising the continued retention of a substance pending the outcome of an application for forfeiture or any appeal against a decision by the court to order the substance to be returned to the person from whom it was seized or the owner of the substance (*subsections (2) and (7)*).

Section 62: Appeal against decision under section 61

244. This section confers a right of appeal (see *subsection (3)* as to the appropriate higher court in each jurisdiction) against a decision under section 61 either to order the forfeiture of a substance or to order its return to the person entitled to it. Where an appeal is brought under this section and no person entitled to the substance was a party to the original proceedings then the responsible office must make reasonable efforts to give written notice to the person from whom it was seized and, if the officer thinks that the substance may belong to a different person, to that person also (*subsection (2)*). This is to ensure that all persons with an interest in the substance are properly informed. An appeal must be lodged within 30 days of the decision by the lower court (*subsection (4)*). The parties to the original proceedings and any person entitled to the substance – if not present or represented at the original hearing – will be entitled to be heard at the appeal. On hearing the appeal, the court will determine the question afresh.

Section 63: Return of substance to person entitled to it, or disposal if return impracticable

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

Section 64: Compensation

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

Section 65: Interpretation

247. This section defines terms used in Part 4 of the Act.

PART 5: PROTECTION OF CHILDREN AND OTHERS

BACKGROUND

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

249. In April 2012 the charity, Action for Children, launched a campaign calling for a reform of section 1 of the 1933 Act. It published a report, “Keeping children safe: The case for reforming the law on child neglect”²³, which argued that the criminal law on child cruelty was out of date and failed adequately to protect children. In particular, Action for Children argued that the existing offence, as interpreted by front line professionals, only covered physical and not psychological harm.

250. In support of the campaign, the late Paul Goggins MP tabled a new clause for debate at Committee stage of the Crime and Courts Bill on 12 February 2013 (Public Bill Committee, Official Report, column 444 to 456). In response to that debate, the then Minister for Policing and Criminal Justice, Damian Green MP, undertook to consider evidence that the current law is not working. Subsequent to this, Mark Williams MP introduced a Private Member’s Bill – the Child Maltreatment Bill²⁴ – in June 2013, but the Bill made no further progress. In October 2013, the Ministry of Justice undertook a targeted engagement exercise seeking views from a range of professionals. In the light of that exercise, the Government accepted that the offence could be more clearly expressed so as to include psychological suffering or injury. Section 66 amends section 1 of the 1933 Act to this end. The section also updates the deeming provision in section 1(2) of the 1933 Act which relates to the suffocation of an infant under three years when the child is in bed with a drunken person.

²³ <http://resourcecentre.savethechildren.se/sites/default/files/documents/5896.pdf>

²⁴ <http://services.parliament.uk/bills/2013-14/childmaltreatment.html>

251. At Lords Third Reading, the Home Office Minister, Lord Bates, undertook to consider further an amendment tabled by Lord Harris of Haringey which sought to enhance the protection of children by creating a new offence to criminalise adults who communicate sexually with children (Hansard, 5 November 2014, columns 1621-1633). Lord Harris's amendment was prompted by the "Flaw in the Law" campaign by the National Society for the Prevention of Cruelty to Children which argued that a new offence was needed to capture those who communicate sexually with a child or who invite a child to communicate sexually with them.

252. There are a number of existing offences that could be prosecuted in relation to this kind of behaviour, depending on the circumstances. For example:

- Sections 8 and 10 of the Sexual Offences Act 2003 make it an offence to cause or incite a child under 13 or 16 respectively to engage in sexual activity. These offences could apply where a communication with a child (whether sexual or not) could be shown to have caused or incited some kind of sexual activity by the child including, for example, naked or semi-naked posing.
- Section 127 of the Communications Act 2003 makes it an offence to send a message by means of a public electronic communications network (including the internet) if its content is grossly offensive, indecent, obscene or menacing. Depending on the content of the message, this offence could apply where sexual messages or messages seeking a sexual response are sent to a child by some form of electronic communication, such as text, e-mail or phone (although it would not cover non-electronic written messages or verbal communication, or electronic messages sent by a private network such as a school intranet).
- The publication of sexual material to a child or children may amount to an offence under the Obscene Publications Act 1959.

These existing offences are, however, unlikely to apply if a communication (for example in the form of an e-mail or a text message) sent to a child contains sexual content but does not in any way ask the child to engage in sexual activity and does not contain grossly offensive, indecent, obscene or menacing content. In addition, a conviction for an offence under section 127 of the Communications Act 2003 or under the Obscene Publications Act 1959 does not automatically trigger the notification requirements in Part 2 of the Sexual Offences Act 2003 (that is, to sign on the "sex offenders' register").

253. The Prime Minister announced at the 'WeProtect' Summit²⁵ on 11 December 2014 that the Government would bring forward an amendment to the Bill that became this Act to provide for a new offence of sexual communication with a child. Section 67 provides for such an offence.

254. The Female Genital Mutilation Act 2003 ("the 2003 Act"), which extends to England and Wales and Northern Ireland, and the Prohibition of Female Genital Mutilation (Scotland) Act 2005, which extends to Scotland, and before them the Prohibition of Female Circumcision Act 1985, provide for an offence of female genital mutilation ("FGM"). FGM

²⁵ <https://www.gov.uk/government/speeches/weprotect-children-online-global-summit-prime-ministers-speech>

involves procedures which include the partial or total removal of the external female genital organs for non-medical reasons. The practice is medically unnecessary, extremely painful and has serious health consequences, both at the time when the mutilation is carried out, and in later life. Section 4 of the 2003 Act provides that the section 1 offence of FGM (and the related offences, in sections 2 and 3 of the 2003 Act, of helping a girl to perform FGM on herself and of assisting a non-UK person to perform FGM overseas) extend to acts done outside of the UK by UK nationals or permanent UK residents. There has not yet been a conviction under the 2003 Act.

255. On 18 December 2013, the Home Affairs Select Committee launched an inquiry into FGM, including the effectiveness of the current legislative framework. The Committee published the written evidence it had received on 25 February 2014²⁶. That evidence included separate submissions from the Director of Public Prosecutions, Association of Chief Police Officers and Metropolitan Police which argued for, amongst other things, a change in the law to enable prosecutions under the 2003 Act of non-permanent UK residents.

256. On 6 February 2014, the Government announced a range of measures to combat FGM to mark the International Day of Zero Tolerance²⁷. Those measures included a commitment to consider any recommendation from the Crown Prosecution Service to strengthen the criminal law on FGM. Section 70 amends the 2003 Act (and the Prohibition of Female Genital Mutilation (Scotland) Act 2005) to extend extra-territorial jurisdiction for the offences under that Act to persons habitually resident in the UK.

257. The Government announced further measures to tackle FGM at the “Girl Summit” on 22 July 2014, including granting victims of FGM lifelong anonymity from the time an allegation is made, a new offence so that parents can be prosecuted if they fail to prevent girls being subjected to FGM and, subject to consultation, a new civil protection order and the introduction of a duty on certain professionals to report “known” cases of FGM. The Ministry of Justice launched a consultation on the day of the Girl Summit on whether and how a civil protection order could work alongside the criminal legislation to protect potential victims of FGM. The consultation closed on 19 August 2014; 88 responses were received²⁸. The Home Office launched a second consultation on 5 December 2014 on how to introduce mandatory reporting for FGM. The consultation closed on 12 January 2015; 147 responses were received²⁹. Sections 71 to 75 give effect to these further proposals.

²⁶ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/140225-fgm-memos/>. The Home Affairs Select Committee subsequently published its report on the conclusion of its inquiry – “Female genital mutilation: the case for a national action plan”, Second Report of Session 2014-15 (HC 201). The Government response was published in December 2014 (Cm 8979).

²⁷

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/295056/HMG_FGM_Declaration.pdf

²⁸ The consultation and summary of responses is available at: https://consult.justice.gov.uk/digital-communications/female-genital-mutilation-proposal-to-introduce-a/consult_view

²⁹ A summary of the responses to the consultation is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380125/MultiAgencyPracticeGuidelinesNov14.pdf

258. The Home Office launched a consultation on 20 August 2014 seeking views on whether the law on domestic abuse needs to be strengthened. The consultation closed on 15 October 2014; 757 responses were received³⁰. On 18 December 2014, the Home Secretary announced in a written ministerial statement (Hansard, columns 132WS-133WS) that the Government would be tabling amendments to the Bill that became this Act to strengthen the protection afforded to the victims of domestic abuse. Section 76 provides for a new domestic abuse offence.

COMMENTARY ON SECTIONS

Section 66: Child cruelty offence

259. This section makes four changes to the offence of child cruelty in section 1 of the 1933 Act.

260. *Subsection (2)* clarifies that the ill-treatment limb of the offence is engaged whether the ill-treatment is physical or non-physical in nature.

261. *Subsection (3)* makes it explicit on the face of section 1 what is already implicit, namely that the section 1 offence applies regardless of whether the suffering or injury caused to a child as a result of one or more acts of abuse or neglect was physical or psychological in nature. At the same time, the amendment made by this subsection removes the non-exhaustive list of the type of injury which the conduct must be likely to cause (on the grounds that “injury to or loss of sight, or hearing, or limb, or organ of the body” all self-evidently amount to physical harm) and the reference to “mental derangement” (on the grounds that the term is archaic and rendered redundant by the express reference to psychological suffering or injury).

262. *Subsection (4)* replaces the outdated reference in section 1(1) of the 1933 Act to “a misdemeanour” with a reference to “an offence”; section 1 of the Criminal Law Act 1967 abolished the then distinction between a felony (a term applied to more serious crimes) and a misdemeanour.

263. *Subsection (5)* amends subsection (2)(b) of section 1 of the 1933 Act, which deals with the suffocation of a child under three years when the child is in bed with a drunken person. The origin of subsection (2)(b) was concern about mothers becoming drunk on gin. Where it is proved that a child has died of suffocation whilst sharing a bed with a person who went to bed under the influence of drink, subsection (2)(b) deems that person to have neglected the child in a manner likely to cause injury to its health under subsection (1). Subsection (5) amends section 1(2)(b) of the 1933 Act to extend the circumstances under which the death of an infant under three occurs so that the deeming provision also applies where the infant was sleeping with a person aged 16 or over who was under the influence of a prohibited drug. New subsection (2B) of section 1 of the 1933 Act (as inserted by *subsection (6)*) defines a prohibited drug as a drug the possession of which immediately before taking it constituted an offence under section 5(2) of the Misuse of Drugs Act 1971 (“the 1971 Act”); that provision makes it an offence for a person to have a controlled drug in their possession,

³⁰ The consultation response is available at: <https://www.gov.uk/government/consultations/strengthening-the-law-on-domestic-abuse>

subject to any defence in section 28 of the 1971 Act or exceptions prescribed in regulations made under section 7 of that Act. The Misuse of Drugs Regulations 2001 (SI 2001/3998) provide, amongst other things, that a person may lawfully possess a controlled drug for administration for medical, dental or veterinary purposes in accordance with the directions of the prescriber (unless the drug was obtained by fraud). Accordingly, the modified deeming provision would not apply where a person had taken prescribed medication in accordance with his or her doctor's instructions.

264. Subsections (5) and (6) also amend section 1(2)(b) of the 1933 Act so that it covers circumstances where an infant suffocates whilst an adult is lying next to him or her on any kind of furniture or surface being used for the purpose of sleeping. It also has effect where the adult in question went to sleep under the influence of the relevant substance (drink or a prohibited drug) irrespective of the state the adult was in when they and the child first occupied the furniture or other location where they were sleeping together.

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

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

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

(2) For the purposes of this section—

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

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

(2A) The reference in subsection (2)(b) to the infant being “in bed” with another (“the adult”) includes a reference to the infant lying next to the adult in or on any kind of furniture or surface being used by the adult for the purpose of sleeping (and the reference to the time when the adult “went to bed” is to be read accordingly).

(2B) A drug is a prohibited drug for the purposes of subsection (2)(b) in relation to a person if the person’s possession of the drug immediately before taking it constituted an offence under section 5(2) of the Misuse of Drugs Act 1971.

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

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

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

Section 67: Sexual communication with a child

266. This section inserts a new section 15A into the Sexual Offences Act 2003 which provides for an offence of sexual communication with a child. The offence criminalises conduct where an adult intentionally communicates (for example, by e-mail, text message, written note or orally) with a child under 16 (whom the adult does not reasonably believe to be aged 16 or over) for the purpose of obtaining sexual gratification if the communication is sexual or intended to encourage the child to make a communication that is sexual (new section 15A(1) and (2)). Scenarios likely to be covered by the offence include talking sexually to a child via a chatroom or sending sexually explicit text messages to a child as well as inviting a child to communicate sexually (irrespective of whether the invitation is itself sexual). The new offence is designed to ensure that it does not criminalise, for example, ordinary social or educational interactions between children and adults or communications between young people themselves. The term “sexual gratification” is already used in the context of the offences at sections 11 and 12 of the Sexual Offences Act 2003 which prohibit engaging in sexual activity in the presence of a child and causing a child to watch a sexual act respectively. It is clear from case law in relation to the section 12 offence that this wording would support a successful prosecution where either a defendant made a relevant communication in order to obtain immediate sexual gratification or the obtaining of such gratification was part of a longer term plan or both. The case law also confirms that the term has a wide meaning, stating that the sexual gratification which is alleged may take any of the myriad forms which sexual pleasure or indulgence may take. It is expected that the courts will interpret the reference to sexual gratification in the sexual communication with a child offence in the same way.

267. By virtue of new section 15A(3), and the transitional provision in section 86(14), the maximum penalty on summary conviction of the offence will be six months’ imprisonment. On the commencement of section 154(1) of the Criminal Justice Act 2003, the maximum sentence on summary conviction will rise to 12 months. The maximum penalty on conviction on indictment is two years’ imprisonment.

Section 68: Child sexual exploitation

268. *Subsections (1) to (6)* amend the Sexual Offences Act 2003 to remove anachronistic references to “child prostitute”, “child prostitution” and “child pornography”. These terms appear in the titles of sections 48 (causing or inciting child prostitution or pornography), 49 (controlling a child prostitute or a child involved in pornography) and 50 (arranging or facilitating child prostitution or pornography) of the Sexual Offences Act 2003, while the terms “prostitute”, “prostitution” or “pornography” also appear in the body of those sections (and also in section 51, which defines those terms). The amendments to those sections replace these terms with references to the sexual exploitation of children (and so recognising children as victims), but do not alter the scope of the relevant offences.

269. *Subsection (7)* amends section 1 of the Street Offences Act 1959 so that the offence of loitering or soliciting for the purposes of prostitution applies only to persons aged 18 and over. It, in effect, decriminalises under-18s selling sex in the street and in doing so again recognises children as victims in such circumstances rather than consenting participants (buying sex from an under-18 in any circumstances would remain illegal).

Section 69 and Schedule 3: Possession of paedophile manual

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

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

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

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

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

- that the person had a legitimate reason for being in possession of the item; this would be a question of fact for the jury to decide on the individual circumstances of a case. It could cover, for example, those who can demonstrate that they have a legitimate work reason for possessing the item;
- that the person had not seen (or listened to) the item in his or her possession and therefore neither knew, nor had cause to suspect, that it contained advice or guidance about abusing children sexually; and
- that the person had not asked for the item - it having been sent without request - and that he or she had not kept it for an unreasonable period of time; this will cover those who are sent unsolicited material and who act quickly to delete it or otherwise get rid of it.

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

273. As a result of *subsection (3)* and the transitional provision in section 86(14)(b), the maximum penalty on summary conviction of the offence in England and Wales and Northern Ireland will be six months' imprisonment. On the commencement of section 154(1) of the Criminal Justice Act 2003, the maximum sentence on summary conviction in England and Wales will rise to 12 months. On conviction on indictment, the maximum sentence is three years' imprisonment.

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

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

276. *Subsection (7)* introduces *Schedule 3* to the Act which is designed to ensure that the provisions outlined above which make it an offence to possess a paedophile manual are consistent with the UK's obligations under the E-Commerce Directive³¹.

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

³¹ http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm

Section 70: Offence of female genital mutilation: extra-territorial acts

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

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

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

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

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

280. *Subsection (1)(a) and (b)* amends both sections 3 and 4 of the 2003 Act so that they apply to UK nationals and residents rather than, as now UK nationals and permanent UK residents. *Subsection (1)(c)* replaces the definition of a permanent UK resident in section 6(3) of the 2003 Act with a definition of a UK resident; that definition provides that a UK resident is someone who is habitually resident in the UK. The term habitually resident covers a person’s ordinary residence, as opposed to a short, temporary stay in a country. To be habitually resident in the UK it may not be necessary for all, or any, of the period of residence here to be lawful³². Whether a person is habitually resident in the UK will be determined on the facts of a given case. Taken together, paragraphs (a) to (c) of subsection (1) have the effect of broadening the extra-territorial jurisdiction provided for in the 2003 Act so that it will now be possible to prosecute a non-UK national for an offence under sections 1 to 3 of that Act where that person is habitually resident in this country, rather than permanently resident as now. Correspondingly, the section 3 offence will now cover situations where the victim of the FGM procedure is habitually resident. All the offences will continue to apply to UK nationals as is currently the case.

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

Section 71: Anonymity for victims of female genital mutilation

282. This section inserts a new section 4A and Schedule 1 into the 2003 Act which make provision for the anonymity of victims of FGM. The provisions are modelled on those in the Sexual Offences (Amendment) Act 1992 which provides for a scheme to protect the anonymity of victims of certain sexual offences, such as rape. Paragraph 1 of new Schedule 1 to the 2003 Act prohibits the publication of any matter that would be likely to lead members

³² See *Mark v Mark* [2005] UKHL 42

of the public to identify a person as the alleged victim of an offence under the 2003 Act (including the new offence provided for in section 72, as well as aiding, abetting, counselling and procuring the “principal offence”). The prohibition lasts for the lifetime of the alleged victim. The prohibition covers not just more immediate identifying information, such as the name and address or a photograph of the alleged victim, but any other information which, whether on its own or pieced together with other information, would help identify the alleged victim. “Publication” is given a broad meaning (see paragraph 9(1) of new Schedule 1) and would include traditional print media, broadcasting and social media such as Twitter or Facebook.

283. Paragraph 1(4) to (8) of new Schedule 1 makes provision for a trial judge to disapply the restrictions on publication. The power to waive the restrictions is limited, in effect, to the circumstances necessary to allow a court to ensure that a defendant receives a fair trial in accordance with Article 6 of the ECHR or to safeguard freedom of expression in accordance with Article 10 of the ECHR.

284. Paragraph 2 of new Schedule 1 makes it a summary offence to contravene the prohibition on publication. The maximum penalty in England and Wales is an unlimited fine (or a level 5 fine (currently £5,000) in Northern Ireland). This is a strict liability offence so it will not be necessary for the prosecution to show that the defendant intended to identify the victim. In relation to newspapers or other periodicals (whether in print form or online editions) and radio and television programmes, the offence is directed at proprietors, editors, publishers or broadcasters rather than individual journalists. Any prosecution for the offence requires the consent of the Attorney General or the Director of Public Prosecutions for Northern Ireland as the case may be.

285. Paragraph 3 of new Schedule 1 provides for two defences. The first is where the defendant had no knowledge of the content of the publication or of the allegation. The second is where the victim (where aged 16 or over) had freely given written consent to the publication. These defences impose a reverse burden on the defendant, that is, it is for the defendant to prove that the defence is made out on a balance of probabilities, rather than imposing a requirement on the prosecution to show, beyond reasonable doubt, that the defence does not apply. The policy aim behind the offence is to encourage victims to report FGM offences committed against them, and to increase the number of prosecutions for FGM, by helping to ensure the victim feels safe in their anonymity if they report a crime against them. There is a strong public interest in achieving this. The reverse burden imposed invites the defendant in a particular case to justify their publication of matter identifying the alleged victim of FGM on the basis that they were not aware and did not suspect or have reason to suspect that an allegation had been made or that the publication contained matter likely to lead members of the public to identify the alleged victim. These matters to be proved on the balance of probabilities are matters within the knowledge of the defendant.

286. Paragraphs 4 to 8 of new Schedule 1 are designed to ensure that the offence provided for in paragraph 2 of the Schedule is consistent with the UK’s obligations under the E-Commerce Directive³³. Under paragraphs 4 to 8 providers of information society services who are established in England and Wales or Northern Ireland are covered by the new offence even when they are operating in other European Economic Area states. Paragraphs 6 to 8 of

³³ http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm

the new Schedule provide exemptions for internet service providers from the offence in limited circumstances, such as where they are acting as mere conduits for prohibited material or are storing it as caches or hosts.

Section 72: Offence of failing to protect girl from risk of genital mutilation

287. *Subsection (2)* inserts a new section 3A into the 2003 Act which creates a new offence of failing to protect a girl under the age of 16 from risk of genital mutilation. A person is liable for the offence if they are responsible for a girl at the time when an offence under section 1, 2 or 3 of the 2003 Act is committed against the girl (and genital mutilation has actually occurred) (new section 3A(1)). The term “responsible” is defined in new section 3A(2) to (4) and (7). It covers two classes of person. First, a person who has parental responsibility for the girl and has frequent contact with her. Parental responsibility is defined in section 2 of the Children Act 1989 (in the case of England and Wales) and includes the mother and father of a child where they were married at the time of the child’s birth, the mother of a child where she was not married to the father at the time of the child’s birth, and the father of a child where he was not married to the mother at the time of the child’s birth but had subsequently acquired parental responsibility in accordance with the provisions of the Children Act 1989. More than one person may have parental responsibility for the same child at any one time so, for example, both birth parents could be liable for the offence. A person with parental responsibility for a girl would not be liable for the offence if that person did not have frequent contact with the girl. So, for example, where the parents of a girl were separated and lived apart with one parent having little or no contact with the daughter, that parent would not be liable for the offence. It would be for the courts to determine on the facts of the case whether the level of contact amounted to “frequent contact”.

288. The second class of person who may be held to be responsible for a girl who has been subject to genital mutilation is any adult who has assumed responsibility for caring for the girl in the manner of a parent. This might include, for example, grandparents where the girl has gone to stay with them for an extended summer holiday. In such circumstances those persons with parental responsibility for the girl would continue to be liable for the offence as a result of new section 3A(7). Conversely, a babysitter who was looking after a girl overnight could not be said to have assumed responsibility for the girl in the manner of a parent.

289. New section 3A(5) and (6) provide for two defences. The first defence is that the defendant did not think that there was a significant risk of the girl being subject to FGM and could not reasonably have been expected to be aware that there was any such risk. What constitutes a “significant” risk will take its ordinary meaning. The second defence is that the defendant took reasonable steps to protect the girl from being the victim of FGM. What would constitute reasonable steps would depend on the circumstances of the case. It would be for the magistrate or the jury to decide, as the case may be, whether the risk was “significant” or whether any steps taken to prevent FGM taking place were reasonable. The evidential burden will apply to the defence, that is, it will be enough for a defendant to produce sufficient evidence for the matter to be considered by the jury; it would then be for the prosecution to demonstrate to the criminal standard of proof, namely beyond reasonable doubt, that the defence has not been made out.

290. *Subsection (3)* amends section 4 of the 2003 Act so that the new offence has extra-territorial application.

291. *Subsection (4)* amends section 5 of the 2003 Act so as to provide for the penalties for the new offence. The new offence will be triable either way. As a result of new section 5(2) of the 2003 Act and the transitional provision in section 86(14)(c), the maximum penalty on summary conviction of the offence in England and Wales and Northern Ireland will be six months' imprisonment. On the commencement of section 154(1) of the Criminal Justice Act 2003, the maximum sentence on summary conviction in England and Wales will rise to 12 months. On conviction on indictment, the maximum sentence is seven years' imprisonment.

Section 73: Female genital mutilation protection orders

292. *Subsection (1)* inserts new section 5A into the 2003 Act which introduces new Schedule 2 to the 2003 Act (as provided for in *subsection (2)*) which makes provision for FGM protection orders in England and Wales (Part 1 of new Schedule 2) and Northern Ireland (Part 2 of new Schedule 2).

293. Paragraph 1(1) of new Schedule 2 to the 2003 Act provides that the High Court or the family court in England and Wales may make an order (an "FGM protection order") for the purposes of protecting a girl against the commission of a genital mutilation offence (that is, an offence under sections 1 to 3 of the 2003 Act) or protecting a girl against whom such an offence has been committed (sub-paragraph (1)). An order can be made either to protect a girl at risk of FGM or to protect a girl against whom FGM has been committed. In deciding whether to make an order the court must have regard to all the circumstances including the need to secure the health, safety, and well being of the girl to be protected (sub-paragraph (2)). A 'girl' is defined in section 6(1) of the 2003 Act to include a woman.

294. An FGM protection order may contain such prohibitions, restrictions or requirements and such other terms as the court considers appropriate to protect the girl in question (sub-paragraph (3)). This would ensure that the power to make an FGM protection order is broad and flexible and enables the court to include whatever terms it considers necessary to protect the girl. Such terms might include, for example, provisions requiring a person to surrender his or her passport or any other travel document and/or the passport of the girl the order is intended to protect, and prohibiting specified persons from entering into any arrangements, in the UK or abroad, for FGM to be performed on the person to be protected. Such terms may relate to: conduct within and outside England and Wales; to respondents who commit or attempt to commit an FGM offence against a girl; and to others who may become involved in other respects (sub-paragraph (4)). Paragraph 1(5) provides examples of involvement in other respects to include aiding, abetting, counselling, procuring, encouraging or assisting another person to commit, or attempt to commit, a genital mutilation offence or conspiring to commit or attempt to commit such an offence.

295. Paragraph 1(6) provides that an FGM protection order may be made for a specified period or to continue indefinitely until varied or discharged (in accordance with the provisions in paragraph 6). This would help to ensure that long-term protection from mutilation remains in place, for example, where the girl to be protected is very young.

296. Paragraph 2 provides that the court may make an FGM protection order on an application by the person to be protected (the victim), a "relevant third party" (a person, or someone within a class of persons, specified by regulations (subject to the negative resolution procedure by the Lord Chancellor) without needing the leave of the court. The court may also make an FGM protection order on an application by 'any other person' with the leave of the

court. This paragraph also provides for the court to make an order without an application being made to it, in certain other family proceedings before that court.

297. Paragraph 3 makes provision for a court before which there are criminal proceedings for a genital mutilation offence to make an FGM protection order, without an application being made to it, if a person who would be a respondent to any proceedings for an FGM protection order is a defendant in the criminal proceedings. This would ensure protection for a victim or potential victim of FGM where a defendant is not convicted of the offence but it has emerged that there is a risk of action by the defendant to carry out, procure, abet or assist FGM against the victim (or a person other than the victim); or the defendant is convicted and there is such a risk. An FGM protection order can be made in criminal proceedings to protect a girl at risk, whether or not the girl is the victim of the offence in relation to the criminal proceedings. For example, the younger sister of the victim of a genital mutilation offence could also be protected by the court in criminal proceedings.

298. Paragraph 4 provides that breach of an FGM protection order would be a criminal offence subject to a maximum penalty of five years' imprisonment on conviction on indictment or a maximum of six months' imprisonment on summary conviction (rising to 12 months' imprisonment on commencement of section 154(1) of the Criminal Justice Act 2003 (see the transitional provision in section 86(14)(d)). As an alternative to a prosecution, a breach of an FGM protection order may be dealt with by the civil route as a contempt of court punishable by up to two years' imprisonment (sub-paragraph (4)).

299. Paragraph 5 provides for ex-parte orders so to allow for the making of an FGM protection order without notice of the proceedings having been given to the respondent, where the court considers it just and convenient to do so. Such an order without notice may be appropriate where there is reason to believe that a respondent may seek to harm a potential victim or remove her from the jurisdiction if given notice of such a hearing or before an on notice hearing could be listed. If an order is made without notice, the respondent must be given an opportunity as soon as just and convenient, to make representations about the order at a return hearing on notice.

300. Paragraph 6 makes provision for the variation and discharge of FGM protection orders. An order may be varied or discharged on an application by any party to the order; the girl being protected by the order; or any other person affected by the order. The court may also vary or discharge an order on its own initiative.

301. Paragraph 7 makes provisions for arrest under warrant. It provides for an interested party to apply to the relevant judge (as defined in paragraph 17(1)) for the issue of a warrant for the arrest of the person if the interested party considers that the person has failed to comply with an FGM protection order; or is otherwise in contempt of court in relation to such an order. This paragraph defines an interested party as the girl being protected by the order; the person who applied for the order or any other person (with leave).

302. Paragraph 8 makes provision about remand of someone arrested as described in paragraph 7. Paragraph 9 makes provision about medical examination and report under remand of such a person. Paragraphs 10 to 14 make further provision for remand.

303. Paragraph 15 provides that the powers of the court in relation to contempt of court arising out of a person's failure to comply with an FGM protection order, or otherwise in connection with such an order, may be exercised by the relevant judge (defined in paragraph 17(1)).

304. Paragraph 16 makes it clear that nothing in Part 1 of new Schedule 2 to the 2003 Act affects any other protection or assistance available to a girl who is or may become a victim of an FGM offence. For example, there will be occasions where it is appropriate to have prohibited steps orders, non-molestation orders or other protective orders in relation to children in place, alongside FGM protection orders.

305. Paragraph 17 deals with interpretation of the terms in relation to FGM protection orders.

306. Part 2 of new Schedule 2 to the 2003 Act makes equivalent provision, with appropriate modifications, for FGM protection orders in Northern Ireland. In Northern Ireland, the relevant court for making FGM protection orders is either the High Court or a county court (paragraph 24(1)). This is subject to any provision made by virtue of sub-paragraphs (4) or (5) of paragraph 24. Those sub-paragraphs apply, with modifications, the provisions of Article 34(3) to (10) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 (SI 1998/1071) which enable the Department of Justice in Northern Ireland, after consultation with the Lord Chief Justice, to specify, by order (subject to the negative resolution procedure), proceedings which may only be commenced in a specified level of court, a court which falls within a specified class of court, or a particular court determined in accordance with, or specified in, the order. This order-making power would therefore enable the Department of Justice to ensure that proceedings in relation to FGM protection orders are heard in the most appropriate court.

307. Paragraph 25(1) confers a power on the Department of Justice in Northern Ireland, after consultation with the Lord Chief Justice, to enable courts of summary jurisdiction to hear proceedings in respect of FGM protection orders. An order made under paragraph 25(1) may, in particular, make provision in relation to courts of summary jurisdiction corresponding to that made in the Family Homes and Domestic Violence (Northern Ireland) Order 1998, where courts of summary jurisdiction are relevant courts for the purposes of proceedings under that Order (see paragraph 25(2)). Paragraph 25(3) of new Schedule 2 enables an order to make necessary modifications to Part 2 of new Schedule 2 or any other enactment as a consequence of conferring jurisdiction on courts of summary jurisdiction. The order-making power is subject to the affirmative procedure (see paragraph 29(3)).

308. Paragraph 27 makes provision for appeals from the county courts to the High Court. Paragraph 28 confers an order-making power (subject to the negative procedure) on the Department of Justice, after consultation with the Lord Chief Justice, to specify the circumstances in which appeals may be made against decisions to transfer, or propose to transfer, proceedings as a result of an order made under Article 34(5) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998, as applied by paragraph 24(4) and (5) of new Schedule 2 to the 2003 Act.

Section 74: Duty to notify police of female genital mutilation

309. This section inserts a new section 5B into the 2003 Act. The new section would place a duty on persons who work in a “regulated profession” in England and Wales, namely healthcare professionals, teachers and social care workers, to notify the police when, in the course of their work, they discover that an act of female genital mutilation appears to have been carried out on a girl who is under 18 (new section 5B(1), (2) and (5)). The duty would not apply where a previous notification has been made by someone in the same profession in respect of a victim (new section 5B(6)). The term “discovers” in this context would cover circumstances either where the victim specifically discloses to the regulated professional that she has been the subject of FGM, or where the regulated professional has observed the physical signs of FGM (new section 5B(3) and (4)). A notification made under new section 5B would not breach any duty of confidence or other restriction on the disclosure of information (new section 5B(7)).

310. New section 5B(8) to (10) provides for a regulation-making power (subject to the affirmative procedure) to enable the Secretary of State to add to, remove from, or otherwise alter, the description of persons regarded as working in a “regulated profession”.

Section 75: Guidance about female genital mutilation

311. This section inserts new section 5C into the 2003 Act which confers a power on the Secretary of State to issue, and from time to time revise, guidance about the effect of any provision of that Act or about other matters relating to FGM (new section 5C(1) and (6)). In preparing such guidance, the Secretary of State is required to consult the Welsh Ministers so far as the guidance is to a body exercising devolved Welsh functions, and such other persons as he or she considers appropriate (new section 5C(4) and (5)). Persons exercising public functions to whom the guidance is given would be under a duty to have regard to the guidance when exercising such functions (new section 5C(2)).

Section 76: Controlling or coercive behaviour in an intimate or family relationship

312. This section provides for a new offence criminalising controlling or coercive behaviour in an intimate or family relationship where the behaviour has a serious effect on the victim (*subsection (1)*). The new offence would not apply where the behaviour in question is perpetrated by a parent, or a person who has parental responsibility, against a child under 16 (*subsection (3)*). This is because the criminal law, in particular the child cruelty offence in section 1 of the Children and Young Persons Act 1933 as amended by section 66 of the Act, already covers such behaviour. *Subsections (8) to (10)* provide for a limited defence where the accused believes he or she was acting in the best interests of the victim and can show that in the particular circumstances their behaviour was objectively reasonable. The defence would not be available where a victim has been caused to fear violence (as opposed to being seriously alarmed or distressed). This defence is intended to cover, for example, circumstances where a person was a carer for a mentally ill spouse, and by virtue of his or her medical condition, he or she had to be kept at home or compelled to take medication, for his or her own protection or in his or her own best interests. In this context, the person’s behaviour might be considered controlling, but would be reasonable under the circumstances. The evidential burden will apply to the defence, that is, it will be enough for a defendant to produce sufficient evidence for the matter to be considered by the jury; it would then be for the prosecution to demonstrate to the criminal standard of proof, namely beyond reasonable doubt, that the defence has not been made out. By virtue of *subsection (11)*, and the transitional provision in section 86(14)(e), the maximum penalty on summary conviction of the offence will be six months’ imprisonment. On the commencement of section 154(1) of the

Criminal Justice Act 2003, the maximum sentence on summary conviction will rise to 12 months. The maximum penalty on conviction on indictment is five years' imprisonment.

Section 77; Guidance about investigation of offences under section 76

313. This section confers a power on the Secretary of State to issue, and revise, guidance about the investigation of offences under section 76.

PART 6: MISCELLANEOUS AND GENERAL

COMMENTARY ON SECTIONS

Section 78: Knives and offensive weapons in prison

314. It is not currently a criminal offence to possess an offensive weapon within prison. The offence of having an article with blade or point (or offensive weapon) in section 1 of the Prevention of Crime Act 1953 and section 139 and 139A of the Criminal Justice Act 1988 is confined to public places or schools. The term "public place" is defined in section 1(4) of the Prevention of Crime Act 1953 and section 139(7) of the Criminal Justice Act 1988 to include any place to which the public have, or are permitted to have access. A prison does not fall within the definition of a public place and possession of a weapon there is not therefore a criminal offence.

315. Whilst the possession of an offensive weapon is currently dealt with as a disciplinary offence within prison (for possession of an unauthorised article – see Rule 51(12)(a) of the Prison Rules 1999 (SI 1999/728)) the maximum penalty for the internal disciplinary offence is 42 added days served in prison (Rule 55(1) of the Prison Rules 1999) compared to the four years' maximum for the equivalent offence in the community.

316. This section inserts a new section 40CA into the Prison Act 1952 to provide for a new offence of unauthorised possession in prison of a knife or any other offensive weapon. Liability for the offence arises where a person has in his or her possession any article in prison that has a blade or is sharply pointed or any other offensive weapon (as defined in section 1(9) of the Police and Criminal Evidence Act 1984, namely any article made or adapted for causing injury to persons or intended by the person having it with him for such use by him or some other person). The term "possession" goes wider than a person having a relevant prohibited article with him or her, and also covers, for example, circumstances where a prisoner has hidden a knife in his or her cell. As a result of section 43(5) and (5A) of the Prison Act 1952, the offence also applies to possession of such articles in a young offender institution or secure training centre.

317. Under subsection (1) of new section 40CA, the offence is only committed where a person possesses a knife or other offensive weapon "without authorisation". New section 40CA(5) applies the provisions in section 40E(1) to (3) of the Prison Act 1952 which defines "authorisation" for the purposes of the offences relating to prison security in section 40D of that Act. Section 40E(1) to (3) of the Prison Act 1952 provides that authorisation for the purposes of section 40D means authorisation given in relation to all prisons or prisons of a specified description by Prison Rules or administratively by the Secretary of State or, in relation to a particular prison, by the Secretary of State or the governor, director of the prison or by a person authorised by the governor or director for this purpose. No provision in respect

of authorisations under section 40E is currently made in Prison Rules. Annex 2 to Prison Service Instruction 10/2012³⁴ sets out authorisations given by the Secretary of State under sections 40B (which relates to the conveyance of unauthorised articles into and out of prison) and 40E of the Prison Act 1952. In relation to the conveyance of offensive weapons into and out of prison, Annex 2 authorises, amongst other things, Sikh members of the Chaplaincy carrying the Kirpan and police officers carrying extendable batons. It is envisaged that a Prison Service Instruction will authorise the possession of knives and other sharply pointed articles in a limited range of circumstances, including for the preparation of food and for use in workshops.

318. New section 40CA(3) provides for a defence where the accused individual reasonably believes that he or she had authorisation to possess the article or that there was an overriding public interest which justified possession of the article; the latter defence would cover, for example, where a prisoner takes a knife from a fellow inmate to prevent him or her using it.

319. New section 40CA(4) provides for the maximum penalty for the offence, namely four years' imprisonment or a fine, or both, on conviction on indictment and 12 months' imprisonment or a fine, or both, on summary conviction. Section 86(14)(f) reduces the maximum custodial sentence available on summary conviction to six months' imprisonment until such time as magistrates' courts sentencing powers are increased on the coming into force of section 154(1) of the Criminal Justice Act 2003.

Section 79: Throwing articles into prisons

320. This section inserts new section 40CB into the Prison Act 1952 which provides for a new offence of throwing any article or substance into a prison without authorisation (new section 40CB(1) of the Prison Act 1952). The offence would not apply where the article or substance in question was one specified in List A (which covers controlled drugs, explosives, firearms, ammunition or any other offensive weapon), List B (alcohol, mobile phones, cameras and sound recording devices) or List C (tobacco, money, clothing, food, drink, letters, paper, books, tools and information technology equipment). Under sections 40A to 40C of the Prison Act 1952 it is already an offence for a person without authorisation to convey List A, B or C articles into a prison (which includes throwing them into prison). Articles or substances that may be caught by the new offence would include new psychoactive substances not already controlled under the Misuse of Drugs Act 1971 and other non-controlled drugs frequently abused by prisoners. By virtue of new section 40CB(4), and the transitional provision in section 86(14)(g), the maximum penalty on summary conviction of the offence will be six months' imprisonment. On the commencement of section 154(1) of the Criminal Justice Act 2003, the maximum sentence on summary conviction will rise to 12 months. The maximum penalty on conviction on indictment is two years' imprisonment.

321. Under subsection (1) of new section 40CB, the offence would only be committed where a person throws any article or substances into a prison "without authorisation". New section 40CB(5) would apply the provisions in section 40E(1) to (3) of the Prison Act 1952 which defines "authorisation" for the purposes of the offences relating to prison security in section 40D of that Act. Section 40E(1) to (3) of the Prison Act 1952 provides that authorisation for the purposes of section 40D means authorisation given in relation to all prisons or prisons of a specified description by Prison Rules or administratively the Secretary

³⁴ <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2012/psi-10-2012-conveyance-prohibited.doc>

of State or, in relation to a particular prison, by the Secretary of State or the governor, director of the prison or by a person authorised by the governor or director for this purpose. Examples where authorisation might be given would include contractors doing building works where it may be necessary to throw articles into prison.

322. New section 40CB(3) provides for a defence where the accused individual reasonably believes that he or she had authorisation to throw the article or substance into prison or that there was an overriding public interest which justified the act.

Section 80: Prevention or restriction of use of communication devices by prisoners etc

323. Under section 40D(3A) of the Prison Act 1952 it is an offence to possess a mobile phone in prison without authorisation. Unauthorised mobile phones in prisons enable organised criminals to carry on offending from prison, and can facilitate a range of other activity such as radicalisation, harassment or drug dealing. The National Offender Management Service takes a range of approaches to tackle this problem including measures to stop phones getting into prisons and measures to find and seize phones in prisons (in 2013/14 over 7,400 SIM cards and phones were seized in prisons in England and Wales). This section provides a further mechanism to deal with this problem.

324. *Subsection (1)* confers on the Secretary of State and the Scottish Ministers a power to make regulations, subject to the affirmative procedure (*subsection (7)*), which would, in turn, confer power on the civil courts to make a telecommunications restriction order. The effect of such an order would be to require the relevant communications provider(s) to blacklist unauthorised mobile phone handsets and block SIM cards in prison (or other custodial institutions, namely (in England and Wales) young offender institutions, secure training centres and secure colleges). Applications for such orders could be made by any person specified in regulations (for example, the National Offender Management Service), following the identification of unauthorised phones and SIM cards that are in use in a particular prison. *Subsection (3)* sets out the matters that must be addressed in any regulations, including provision conferring rights on persons to make representations and provision about appeals. *Subsection (4)* identifies further matters which may be provided for in any regulations, for example provision about the enforcement of orders (it would not be necessary to make provision about contempt of court).

Section 81: Preparation or training abroad for terrorism

325. Section 5 of the Terrorism Act 2006 makes it an offence to engage in any conduct in preparation for giving effect to an intention to commit, or assist another to commit, one or more acts of terrorism. Section 6 of the 2006 Act makes it an offence to provide or receive training for terrorism. The maximum penalty for these offences is life imprisonment and 10 years' imprisonment respectively³⁵. Section 17 of the 2006 Act provides for extra-territorial jurisdiction (that is, the offence may be tried in this country in respect of acts committed abroad) in respect of certain other offences under that Act, namely the offences in sections 1 (encouragement of terrorism), 6 (training for terrorism), 8 (attendance at a place used for terrorism training) and 9 to 11 (offences involving radioactive devices and materials and nuclear facilities) of the 2006 Act, and sections 11 (membership of proscribed organisations) and 54 (weapons training) of the Terrorism Act 2000. However, in the case of the section 1

³⁵ Section 1(3) of the Criminal Justice and Courts Act 2015 increases the maximum penalty for the offence in section 6 of the 2006 Act to life imprisonment (this provision is not yet in force).

and 6 offences, the extra-territoriality is limited in that it only applies insofar as those offences are committed in relation to the commission, preparation, or instigation of one or more “Convention offences”. “Convention offences” are those to which EU Member States are required to extend extra-territorial jurisdiction as a result of Article 14 of the Council of Europe Convention on the Prevention of Terrorism (May 2005); the relevant offences are set out in Schedule 1 to the 2006 Act. In the case of the section 5 offence, there is no extra-territorial jurisdiction.

326. This section (together with the consequential amendments in paragraph 74 of Schedule 4) amends section 17(2) to provide for extra-territorial jurisdiction for the section 5 offence and to extend the existing extra-territorial jurisdiction for the section 6 offence. As a result, a person who does anything outside of the UK which would constitute an offence under section 5 or 6 (whether in relation to a Convention offence or terrorism more widely) could be tried in the UK courts were they to return to this country. Extra-territorial jurisdiction is appropriate for these offences because the places where training or preparation for terrorism are taking place are increasingly likely to be located abroad. Extending the territorial jurisdiction in respect of these offences may allow for prosecutions of people preparing or training more generally for terrorism who have, for example, travelled from the UK to fight in Syria, where various terrorist groups, including Al-Qaida affiliated groups, are involved in the conflict.

Section 82: Approval of draft decisions under Article 352 of TFEU relating to serious crime

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

328. Section 8 of the European Union Act 2011 sets out that a Minister of the Crown may not support an Article 352 Decision unless one of subsections (3) to (5) is complied with in relation to the draft Decision. Subsection (3) is complied with if the draft Decision is approved by Act of Parliament. Neither subsection (4) (urgent approval) nor (5) (exempt purposes) is applicable to the draft Decisions which are the subject of this section. Therefore, an Act of Parliament is required before the UK may vote in favour of either Decision in the Council of the European Union. Article 352 of the TFEU is a legal base for measures that are in line with the objectives set out in the Treaties, but for which the Treaties have not explicitly provided the necessary powers. Article 352 requires unanimity in the Council of the European Council and the consent of the European Parliament.

329. *Subsection (2)(a)* provides for the approval of the draft Decision to repeal Council Decision 2007/124/EC, Euratom³⁶ (“the 2007 Decision”). The 2007 Decision established, for the period 2007 to 2013, an EU funding programme to protect people and critical infrastructure against terrorist attacks and other security-related incidents. As the period covered by this programme has now expired, the 2007 Decision is due to be repealed; it is the draft Council Decision³⁷ effecting that repeal which is the subject of subsection (2)(a). The funding programme provided for by the 2007 Decision has been replaced by the Internal

³⁶ http://www.biicl.org/files/4276_decision_2007-124-ec_est_spec_prog_on_prevention_preparedness_and_consequence_mgmt_of_terrorism.pdf

³⁷ <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015187%202013%20INIT>

Security Fund (Police)³⁸. The Internal Security Fund (Police) will continue to fund many of the activities foreseen by the 2007 Decision including the protection of people and critical infrastructure and the management of security-related risks and crises. The UK has not opted in to the Internal Security Fund (Police) measure pre-adoption; no decision has been taken by the Government on whether to do so post-adoption.

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

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

332. *Subsection (2)(b)* provides for the approval of the draft Decision of the Council of the European Union relating to the “Pericles 2020” programme. Council Regulation 1338/2001 established a harmonised framework for protecting the euro against counterfeiting. The effects of that Regulation were extended to those Member States which had not adopted the euro by Council Regulation 1339/2001. Those Regulations were supplemented by Council Decision 2001/923, which established a detailed action programme for the protection of the Euro against counterfeiting (“the Pericles Programme”). Council Decision 2001/924 extended the effect of Decision 2001/923 to those Member States that had not adopted the euro. In 2011, the European Commission concluded that the Pericles Programme should be renewed. The renewed programme (“the Pericles 2020 programme”) runs from 1 January 2014 to 31 December 2020 and is established by Council Regulation 331/2014³⁹. The legal basis for this Regulation is Article 133 of the TFEU. This provides that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the measures necessary for the use of the euro as the single currency”. In the same way as the effect of Council Regulation 1338/2001 and Council Decision 2001/923 was extended to those Member States which had not adopted the Euro, the effect of Council Regulation 331/2014 will be extended to those same Member States. That will be done by way of a measure the legal basis for which is Article 352 of the TFEU. The Council agreed the text of the draft Regulation on 29 November 2013 (document number 16616/13)⁴⁰. The European Parliament gave its consent to the draft Regulation on 12 March 2014. The Council will vote

³⁸ Regulation (EU) No 513/2014 of the European Parliament and of the Council of 16 April 2014
http://ec.europa.eu/dgs/home-affairs/financing/fundings/pdf/overview/regulation_eu_no_5132014_of_the_european_parliament_and_of_the_council_en.pdf

³⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0331&qid=1399564678498&from=EN>

⁴⁰

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cls/cons_cons%282013%2916616/_cons_cons%282013%2916616_en.pdf

on the final Regulation by unanimity once all Member States have completed their domestic procedures and are in a position to vote in favour.

333. The House of Commons European Scrutiny Committee considered the draft Regulation in its 56th Report of Session 2010-12, 2nd Report of Session 2012-13 and 1st Report of Session 2014-15. The draft Regulation has now cleared scrutiny by that Committee. The House of Lords European Union Committee has also cleared the document⁴¹.

Section 83: Codes of practice about investigatory powers: journalistic sources

334. This section inserts new subsection (2A) into section 71 of RIPA. Section 71 of RIPA requires the Secretary of State (in practice, the Home Secretary) to issue one or more codes of practice relating to the exercise and performance of, amongst other things, the powers and duties conferred under Part 1 of that Act. Part 1 of RIPA makes provision in respect of the interception of communications (Chapter 1 of Part 1) and the acquisition and use of communications data (Chapter 2 of Part 1). Communications data is the “who, where, when and how” of a communication but not its content. New section 71(2A) requires that a code of practice in connection with the exercise of powers in Part 1 of RIPA in relation to the prevention or detection of serious crime must include provision to protect the public interest in the confidentiality of journalistic sources. Under RIPA, a serious crime is one for which an adult with no previous convictions could expect to receive a custodial sentence of three years or more. New section 71(2A) further requires the Secretary of State to consult the Interception of Communications Commissioner and to have regard to any relevant reports which he or she has made.

335. The section responds, in part, to a report, published on 4 February 2015, by the Interception of Communications Commissioner of his inquiry into the police access to communications data of journalists⁴². The report recommended that “judicial authorisation must be obtained in cases where communications data is sought to determine the source of journalistic information”. Pending possible further legislation in the next Parliament, the Home Secretary intends to revise the code of practice under section 71 of RIPA to require law enforcement agencies (such as, the police, the NCA and HM Revenue and Customs) to use production orders, which are judicially authorised, under the Police and Criminal Evidence Act 1984 (or the equivalents in Scotland and Northern Ireland) for applications for communications data to determine journalistic sources.

Section 84: Termination of pregnancy on grounds of sex of foetus

336. Section 1 of the Abortion Act 1967 sets out the grounds for an abortion and, in so doing, provides a defence to the abortion offences in sections 58 and 59 of the Offences against the Person Act 1861. The Government’s view is that the Abortion Act 1967 does not allow a pregnancy to be terminated on the grounds of the sex of the foetus alone. In response to concerns that abortions may be taking place solely on such grounds, this section imposes two duties on the Secretary of State (in practice, the Health Secretary). First, the Secretary of

⁴¹ *Progress of Scrutiny* 1st Edition Session 2012-13

⁴² <http://iocco-uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf>

State is required to arrange for an assessment to be made of the evidence of termination of pregnancy on the grounds of the sex of the foetus and to publish the outcome of such an assessment within six months of Royal Assent (that is, by 3 September 2015). The second duty is to consider the assessment and either determine and publish a strategic plan to tackle substantiated concerns identified in the assessment, or publish a statement and explanation as to why such a plan is not required. Where the Secretary of State determines that a strategic plan is needed he or she has a further six months (from the date of the publication of the assessment) to lay a copy of the plan before Parliament.

Section 85: Minor and consequential amendments

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

338. *Subsections (2) to (7)* enable the Secretary of State, by regulations, to make further provision consequential upon the Act, including consequential amendments to other enactments. Any such regulations which amend, repeal, revoke or otherwise modify provision in primary legislation are to be subject to the affirmative resolution procedure, otherwise the negative resolution procedure applies.

Schedule 4: Minor and consequential amendments

339. *Paragraph 1* amends the Schedule to the Visiting Forces Act 1952 which defines “offences against the person” for the purposes of section 3 of that Act. Section 3 provides that a member of a visiting force charged with certain offences, including an offence against the person, shall not be tried in a UK court if the person against whom the alleged offence was committed had an association with the visiting force of the accused or another visiting force from the same country as the accused. Paragraph (1)(b)(xi) of Schedule 1 to the Visiting Forces Act 1952 lists offences under the Female Genital Mutilation Act 2003. The amendment to paragraph (1)(b)(xi) provides that it includes only the existing offences in the 2003 Act (that is, sections 1, 2 and 3) and not the new offences inserted into the 2003 Act by sections 72 and 73.

340. *Paragraph 2* make consequential amendments to the Street Offences Act 1959 as a result of the restriction of the offence of loitering or soliciting for the purposes of prostitution to persons aged 18 or over, as provided for in subsection (7) of section 68.

341. *Paragraph 3* amends section 50 of the Criminal Appeal Act 1968 consequential on section 3. The effect is to disapply a defendant’s appeals rights under that Act against a determination made under new section 10A of POCA given that such appeal rights are separately provided for in section 3. *Paragraph 4* makes a similar amendment to the Criminal Appeal (Northern Ireland) Act 1980 consequential on section 26.

342. *Paragraph 5* adds all proceedings in respect of an FGM protection order to the list of proceedings allocated to the Family Division of the High Court as listed in paragraph 3 of Schedule 1 to the Senior Courts Act 1981.

343. *Paragraph 6(1)* amends the Civil Jurisdiction and Judgments Act 1982 consequential upon the provisions in section 23. *Paragraph 6(1)* amends section 18(6A) of the Civil Jurisdiction and Judgments Act 1982. Section 18 of that Act provides for the enforcement of UK judgments in other parts of the UK. Section 18(5)(d) make it explicit that section 18

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

344. *Paragraph 7* amends sections 1 to 3A of the 1990 Act to make it explicit on the face of that Act that the maximum penalty on summary conviction in Scotland for any of the offences provided for in those sections is 12 months. When the 1990 Act was originally enacted the maximum sentence for these offences on summary conviction in Scotland was six months and the text of the Act still provides as such. However, section 45(2) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 glossed all either way offences that were on the statute book before 18 January 2007 so that they carry a maximum penalty of 12 months instead of a lesser penalty of, in this case, six months. This paragraph now makes textual amendments to the 1990 Act to reflect this glossing provision. In doing so, it will ensure that the maximum penalty of 12 months applies to any summary conviction for an offence under section 3A of the 1990 Act as amended by section 42 of the Act.

345. *Paragraph 8* makes a consequential amendment to the heading of section 3A of the 1990 Act arising from the provisions in section 42.

346. *Paragraphs 9 to 11* make consequential amendments to the 1990 Act arising from the provisions in section 41. In particular, the amendments to section 6 of that Act apply the extended extra-territorial jurisdiction provided for in section 43 to inchoate offences related to the offences under the 1990 Act (that is, the offences of conspiracy to commit or attempting to commit a 1990 Act offence).

347. *Paragraph 12* amends the heading of section 10 of the 1990 Act consequential upon section 44.

348. *Paragraph 13* amends section 58A of the Courts and Legal Services Act 1990 to add proceedings in respect of FGM protection orders to the list of family proceedings that cannot be the subject of an enforceable conditional fee agreement. Such agreements allow clients to agree with their lawyers that the lawyer will not receive all or part of his or her usual fees or expenses if the case is lost; but that, if it is won, the client will pay an uplift to the solicitor in addition to the usual fee.

349. *Paragraphs 14 to 16* make consequential amendments to the Criminal Procedure (Scotland) Act 1995. Paragraph 14 amends section 108 of that Act to enable the Lord Advocate to appeal against the refusal of a court to make an SCPO following the conviction of a person on indictment. Paragraph 15 amends section 175 of that Act to confer on the prosecution in summary proceedings a similar right to appeal against the refusal by a sheriff court to make an SCPO on conviction. Paragraph 16 amends section 222 of that Act (which relates to the enforcement in Scotland of fines imposed by a court in England and Wales) and

is consequential upon the provisions in sections 10 and 32 increasing the default sentences for non payment of a confiscation order.

350. *Paragraph 17* amends section 63 of the Family Law Act 1996, which defines “family proceedings” for the purposes of that Act, so as to provide that proceedings in respect of an FGM protection order (other than orders made in the course of criminal proceedings for an offence under the 2003 Act) are to be categorised as family proceedings.

351. *Paragraph 18* provides that the new section 71(2A) of RIPA, inserted by section 83, applies not just to a new code of practice but also to a revised code.

352. *Paragraphs 19, 35 and 46* amend sections 6, 92 and 156 of POCA, which relate to the making of confiscation orders in England and Wales, Scotland and Northern Ireland respectively, so that the duty on the court to make a confiscation order for the recoverable amount is qualified where it would be disproportionate to make an order in such terms. In such a case the court must make an order requiring the defendant to pay whatever lesser amount (if any) it thinks would be proportionate. The amendments to POCA place the Supreme Court’s judgment in the case of *R v Waya* ([2012] UKSC 51) on a statutory footing as recommended by the Joint Committee on Human Rights in their report on the Serious Crime Bill (Second Report, session 2014/15).

353. *Paragraphs 209 to 26, 28 and 29* make amendments to sections 12, 14, 15, 19, 20, 21, 22, 32 and 33 of POCA consequential upon section 6 so that victim surcharge orders are treated on a similar basis to compensation orders and unlawful profits orders in the context of those sections.

354. *Paragraph 27* amends section 31 of POCA consequential on section 3. *Paragraph 27(2)* amends the title of section 31 in recognition of the fact that that section no longer deals solely with appeals by prosecutors.

355. *Paragraph 27(3)* amends section 31(3) of POCA, the effect of which is to provide that a prosecutor may not appeal under section 31 a decision of a Crown Court not to make a determination under new section 10A or the form of such a determination where made. The right of appeal for a prosecutor in such cases is instead provided for in new section 31(4) of POCA.

356. *Paragraph 30* amends section 35 of POCA consequential on section 10. The effect is to disapply the application of section 139(4) of the 2000 Act (which sets out the tariff for default sentences for failure to pay a fine) to the enforcement of unpaid confiscation orders given that section 10 now makes bespoke provision for default sentences in such cases.

357. *Paragraph 31* amends section 41 of POCA, which provides for restraint orders, consequential upon section 11. New section 41(7D) requires the court when making a restraint order to consider whether to impose a ban on the defendant’s travel outside of the UK.

358. *Paragraph 32* amends section 42 of POCA to address an anomaly in the drafting of that section. Section 42(6) and (7) set out circumstances where the Crown Court must discharge a restraint order. Subsection (6) deals with the circumstances where a restraint

order was made following the commencement of proceedings for an offence or was made following an application under any of sections 19 to 22, 27 or 28 of POCA (which relate to the reconsideration of a confiscation order or the decision not to make such an order and with the making of a confiscation order where the defendant absconds). In such cases, the Crown Court is required to discharge the restraint order on the conclusion of the criminal proceedings or on the determination of the application. Subsection (7) then deals with the circumstances where a restraint order was made after the start of an investigation into an offence but before charges are brought or where an application under any of sections 19 to 22, 27 or 28 of POCA was to be made. In such cases, the Crown Court is required to discharge the restraint order if within a reasonable time proceedings for the offence are not started or the application is not made. But where proceedings are started or an application is made within a reasonable time, subsection (7) places no duty on the court, akin to that in subsection (6), to discharge the restraint order on the conclusion of the proceedings or application. Paragraph 32 substitutes new section 42(7) and (8) for the existing section 42(7) and in so doing addresses this anomaly. The criminal proceedings in this context will only be concluded when the offender complies fully with the terms of the confiscation order (see section 85(5)(a) of POCA).

359. *Paragraph 33* amends section 55 of POCA consequential upon section 6. Section 55 sets out how the designated officer responsible for fine enforcement in the magistrates' court must dispose of monies received in satisfaction of a confiscation order. The amendment ensures that all priority orders, as defined in section 6, have third call on such monies after meeting any expenses of an insolvency practitioner or receiver where one or other has been appointed.

360. *Paragraph 34* amends section 89 of POCA consequential on section 3. Section 89 establishes the general rules that apply to any appeal to the Court of Appeal under Part 2 of POCA. Section 89(4) makes provision for the award of costs at the discretion of the court. The new section 89(4)(za), inserted by paragraph 34, enables the Court of Appeal to award costs in respect of appeals against a determination under new section 10A.

361. *Paragraphs 36 to 43* make like amendments to Part 3 of POCA (Confiscation: Scotland) to those made by paragraphs 21 to 26, 30 and 32.

362. *Paragraph 44* makes a similar amendment to section 131 of POCA to that made to section 55 of that Act by paragraph 33.

363. *Paragraphs 47 to 51* make like amendments to Part 4 of POCA (confiscation: Northern Ireland) to those made by paragraphs 20, 27, 30, 31 and 32.

364. *Paragraphs 52 and 53* make consequential amendments to sections 273 and 277 of POCA as a result of the provisions in section 23. Section 273 of POCA makes provision about recoverable property consisting of rights under a pension scheme. Section 273(4) allows a recovery order covering rights under a pension scheme to provide for the scheme's trustees or managers to recover costs incurred by them in: (a) complying with a recovery order; or (b) providing information, prior to the making of the order, to the enforcement authority, receiver appointed under section 245E of POCA, interim receiver or interim administrator – the amendment made by paragraph 52 adds PPO receivers to this list. Section 277 of POCA makes further provision in relation to recoverable property which includes

rights under a pension scheme, where a consent order has been made in relation to such property. A consent order stays (or in Scotland, sists) the proceedings of a recovery order where agreement is reached for the disposal of the recoverable property, and each person to whose property either the agreement or the proceedings relate is a party to both the proceedings and the agreement. Section 277(7) of POCA makes like provision to section 273(4) described above and paragraph 53 effects the same consequential amendment.

365. *Paragraph 54*, which is consequential upon section 23, adds a reference to a PPO receiver to the general interpretation section in Part 5 of POCA.

366. *Paragraph 56* amends section 416 of POCA, which defines terms used in Part 8 of POCA, so that the terms “realisable property” and “confiscation order” as used in Part 8, as a result of the amendments made by section 38, attract the appropriate definitions of those terms contained in Parts 2 (England and Wales), 3 (Scotland) and 4 (Northern Ireland) of the Act.

367. *Paragraphs 58, 64, 65, 68(3) to (5), 69, 70(3) and 90* carry through to other legislative provisions the changes to the nomenclature used in the offences in sections 48 to 50 of the Sexual Offences Act 2003, as amended by section 68.

368. *Paragraph 59*, which is consequential upon section 23, amends paragraph 1 of Schedule 10 to POCA. That paragraph disapplies sections 75 and 77 of the Taxes Management Act 1970 in relation to receivers and administrators appointed under POCA – including management receivers, interim receivers and interim administrators in civil recovery proceedings. This exempts such receivers and administrators from having to pay any income tax or capital gains tax due on any property in respect of which they are appointed. The amendment to paragraph 1 of Schedule 10 to POCA adds a reference to a PPO receiver.

369. *Paragraph 60* provides that new sections 5B and 5C of the 2003 Act, inserted by sections 74 and 75 of the Act, extend to England and Wales only.

370. *Paragraph 62* is consequential on section 68; it amends section 54 of the Sexual Offences Act 2003 so as to preserve the existing definitions of “prostitute” and “payment” for the purposes of sections 51A to 53A of that Act.

371. *Paragraph 63* provides that the definition of “sexual” in section 78 of the Sexual Offences Act 2003 does not apply to new section 15A of that Act as inserted by section 67.

372. *Paragraph 66* amends Schedule 3 to the Sexual Offences Act 2003 consequential on sections 67 and 69. The effect is to subject a person convicted of the offence of sexual communication with a child or of possession of a paedophile manual to the notification requirements in Part 2 of the Sexual Offences Act 2003. In the latter case, the notification requirement will only be invoked if the offender was aged 18 or over when convicted or was sentenced to at least 12 months’ imprisonment. The notification requirements are to notify the police of their name and address and any subsequent changes to that information (that is, sign on the “sex offenders’ register”).

373. *Paragraph 68(2)* adds the new offence of sexual communication with a child to the list of offences in Schedule 15 to the Criminal Justice Act 2003 which specifies offences for the purposes of Chapter 5 of Part 12 of that Act. That Chapter makes provision for extended determinate sentences for dangerous offenders.

374. *Paragraph 70(2) and (4)* adds the new offences of sexual communication with a child and possession of a paedophile manual to the list of offences in Schedule 34A to the Criminal Justice Act 2003 which specifies offences to which section 327A of that Act applies. That section provides for the disclosure of information about relevant previous convictions of child sex offenders in specified circumstances.

375. *Paragraphs 71 to 73* amend Chapter 3 of Part 2 of SOCPA as a consequence of the abolition of FROs by section 50.

376. *Paragraphs 76 to 82* make consequential amendments to the 2007 Act arising from the provisions in sections 46 to 50.

377. *Paragraph 76* makes an amendment to section 9 of the 2007 Act consequential upon section 49. Section 9 of the 2007 Act provides a safeguard where the making, variation or discharge of an SCPO or not making a variation to an order or discharging it would be likely to have a significant adverse effect on someone who is not the subject of the order. Section 9 gives the court the power to allow such persons to make representations at the hearing in relation to the making, variation or discharge of an order. The amendment made to section 9(4) by this paragraph extends that right to make representations where the Crown Court is considering an application (under new section 22E) to extend the duration of an SCPO pending the outcome of criminal proceedings where the subject of an order has been charged with a serious offence or an offence of breach of an SCPO.

378. *Paragraphs 77 to 80* amend sections 16, 19, 21 and 36 of the 2007 Act to take account of new section 22E, inserted by section 49, which disapplies in the circumstances specified in that new section the five year limit on the duration of an SCPO or on a provision in an SCPO.

379. *Paragraphs 81 and 82* make consequential amendments to the 2007 Act arising from section 45. *Paragraph 81(3)* adds the new participation offence as provided for in section 45 to the list of serious offences in Part 1 of Schedule 1 to the 2007 Act; this is the list of trigger offences for an SCPO in England and Wales. *Paragraph 82* adds the new participation offence to the “listed offences” in Part 2 of Schedule 3 to the 2007 Act; a person cannot be guilty of encouraging or assisting an offence under section 45 or 46 of that Act believing that one of the offences listed in Schedule 3 will happen.

380. *Paragraphs 83 to 85* make consequential amendments to Part 4 of the 2009 Act arising from section 51 to reflect the extension of gang injunctions to cover drug-dealing activity as well as gang-related violence. *Paragraph 86* makes a consequential repeal of section 34 of the Crime and Security Act 2010 which is now spent; that section amended section 34 of the 2009 Act so as to lower the minimum age for a gang injunction from 18 to 14 years.

381. *Paragraphs 87(2) and 88* amend Parts 1 and 3 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to provide for legal aid to be made available for civil legal services, including certain advocacy services, provided in relation to FGM protection orders (as provided for in section 73).

382. *Paragraph 87(3) and (4)* makes consequential amendments to paragraph 38 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which relates to the provision of civil legal aid in relation to gang injunctions.

383. *Paragraph 89* repeals consequential amendments made by the Prevention of Social Housing Fraud Act 2013 to sections 13 and 55 of POCA which are now spent as a result of the amendments to those sections by section 6 and paragraph 33 of Schedule 4.

Section 86: Transitional and saving provisions

384. This section contains various transitional provisions.

385. *Subsections (1), (3) and (4)* provide that a compliance order, as provided for in new sections 13A, 97B and 163A of POCA, may only be made in respect of confiscation orders made after commencement of sections 7, 16 and 29.

386. *Subsection (2)* provides that the ending of automatic early release for persons serving a default sentence in respect of the non-payment of a confiscation order of more than £10 million, as provided for in section 10(3), does not have retrospective effect.

387. *Subsections (5), (6) and (10)* ensure that the modifications to existing criminal offences made by the Act do not have retrospective effect.

Subsections (7), (8) and (9) provide that the repeal of sections 76, 77 and 78 of SOCPA, which provide for FROs, does not affect FROs made before commencement.

388. *Subsection (11)* provides that the restriction of the offence of loitering or soliciting for the purposes of prostitution to persons aged 18 or over does not apply where proceedings for such an offence have started prior to commencement of section 68(7). *Subsection (12)* ensures that section 83 applies only to a new or newly-revised code of practice under section 71 of RIPA.

389. *Subsection (13)* provides that prior to the commencement of the relevant provisions of Courts Reform (Scotland) Act 2014, the avenue of appeal in Scotland under section 62 will be to the sheriff principal rather than to the Sheriff Appeal Court.

390. *Subsection (16)* provides that the new offence of failure to protect a girl from risk of FGM does not have retrospective effect. The effect of *subsection (17)* is that the defendant is not placed under a duty before commencement to take reasonable steps to try to prevent FGM taking place.

Section 87: Extent

391. This section sets out the extent of the provisions in the Act (see paragraphs 8 to 11 for further details).

Section 88: Commencement

392. This section provides for commencement (see paragraph 394 for further details).

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

COMMENCEMENT

394. Sections 80 (prevention or restriction of use of communications devices by prisoners etc), 81 (preparation and training abroad for terrorism) (and the associated consequential provisions in paragraph 74 of Schedule 4), 82 (approval of draft Decisions under Article 352 of TFEU relating to serious crime), 83 (codes of practice about investigatory powers: journalistic sources), 85(2) to (7) and 86 to 89 (general) of the Act come into force on Royal Assent. Sections 70 to 72, which make amendments to the 2003 Act and the Prohibition of Female Genital Mutilation (Scotland) Act 2005 come into force two months after Royal Assent. All other provisions will be brought into force by means of commencement regulations made by the Secretary of State or, in the case of the provisions in sections 15 to 22 and 38(3) (and certain consequential amendments in Schedule 4), by the Scottish Ministers, or, in the case of the provisions in Chapter 3 of Part 1 (and certain consequential amendments in Schedule 4), by the Northern Ireland Department of Justice. The Scottish Ministers and the Northern Ireland Department of Justice are required to consult the Secretary of State before bringing provisions of the Act into force. There is a reciprocal requirement on the Secretary of State to consult the Scottish Ministers and the Northern Ireland Department of Justice before bringing provisions into force in Scotland and Northern Ireland respectively which relate, at least in part, to devolved matters. Such consultation may take place prior to Royal Assent (*subsection (8)* of section 80).

HANSARD REFERENCES

395. The table below sets out the dates and Hansard references for each stage of the Bill's passage through Parliament.

Stage	Date	Hansard reference
House of Lords		
Introduction	5 June 2014	Vol. 754 Col. 21
Second Reading	16 June 2014	Vol. 754 Cols. 643-699
Committee	2 July 2014 8 July 2014 15 July 2014	Vol. 754 Cols. 1721-1770 Vol. 755 Cols. 119-189 Vol. 755 Cols. 511-563
Report	14 October 2014 28 October 2014	Vol. 756 Cols. 119-165 Vol. 756 Cols. 1069-1171
Third Reading	5 November 2014	Vol. 756 Cols. 1621-1641
House of Commons		
Introduction	6 November 2014	
Second Reading	5 January 2015	Vol. 590 Cols. 54-124
Committee	13 January 2015 15 January 2015 20 January 2015 22 January 2015	Official Report, Public Bill Committee
Report and Third Reading	23 February 2014	Vol. 593 Cols. 50-162
Ping Pong		
Lords Consideration of Commons Amendments	2 March 2015	Vol. 760 Cols. 44-86
Royal Assent	3 March 2015	Vol. 760 Col. 87 (Lords) Vol. 593 Col. 811 (Commons)

ANNEX A

GLOSSARY

1933 Act	Children and Young Persons Act 1933
1971 Act	Misuse of Drugs Act 1971
1986 Act	Insolvency Act 1986
1990 Act	Computer Misuse Act 1990
2000 Act	Powers of Criminal Court (Sentencing) Act 2000
2003 Act	Female Genital Mutilation Act 2003
2006 Act	Terrorism Act 2006
2007 Act	Serious Crime Act 2007
2009 Act	Policing and Crime Act 2009
Affirmative procedure	Statutory instrument that are subject to the “affirmative procedure” must be approved by both the House of Commons and the House of Lords to become law.
CPS	Crown Prosecution Service
ECHR	European Convention on Human Rights
FGM	Female Genital Mutilation
The Directive	Directive 2013/40/EU on attacks against information systems
FRO	Financial Reporting Order
NCA	National Crime Agency
Negative procedure	Statutory instruments that are subject to the “negative procedure” automatically become law unless there is an objection from the House of Commons or the House of Lords.

*These notes refer to the Serious Crime Act 2015 (c. 9)
which received Royal Assent on 3rd March 2015*

PACE	Police and Criminal Evidence Act 1984
POCA	Proceeds of Crime Act 2002
PPO	Prohibitory Property Order
RIPA	Regulation of Investigatory Powers Act 2000
SAR	Suspicious Activity Report
SCPO	Serious Crime Prevention Order
SOCPA	Serious Organised Crime and Police Act 2005
TFEU	Treaty on the Functioning of the European Union

ANNEX B

OVERVIEW OF THE CONFISCATION PROCESS UNDER POCA

1. Confiscation

1.1 Basic concepts

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

1.2 Benefit

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

1.3 Obtaining an order

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

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

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

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

1.4. The court process

When the prosecutor indicates to the court that they wish to proceed to confiscation, an order under section 18 of POCA may be served on the defendant. This requires the defendant to declare all assets in which he or she has an interest. Once the section 18 response has been received, the prosecutor will prepare a statement of information (a “section 16 statement”). The section 16 statement sets out the prosecution position and details the defendant’s benefit from criminal conduct.

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

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

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

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

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

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

1.5. Criminal conduct

Criminal conduct is defined as:

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

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

Particular criminal conduct

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

Example of “particular criminal conduct”

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

General Criminal Conduct

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

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

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

is tainted or obtained by criminality

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

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

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

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

1.6. Recoverable amount

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

- the total value of all the defendant's free property⁴³ at the time the confiscation order is made (that is, the total value of all their property minus any priority obligations⁴⁴); plus
- the value of any tainted gifts.

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

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

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

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

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

⁴³ Property is all free property wherever situated and includes money, all forms of real or personal property and other intangible property. Property is free unless there is a pre-existing court order in respect of it (section 8).

⁴⁴ Priority obligations include fines or other court orders made prior to the confiscation order.

1.7. Enforcement

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

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

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

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

2. Restraint

2.1 Basic concepts

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

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

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

2.2 Applying for a Restraint Order

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

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

A restraint order may also be obtained when:

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

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

- the prosecutor; or
- an accredited financial investigator.

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

2.3 Serving a Restraint Order

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

3. Investigation

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

Production Orders

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

Search and Seizure Warrants

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

Disclosure Orders

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

Customer Information Orders

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

Account Monitoring Orders

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

Appendix (i)

Example Calculation of Benefit (Particular Criminal Conduct)

Summary of offences charged

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

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

Personal History/Lifestyle

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

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

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

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

Extent of Benefit

Particular Criminal Conduct

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

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

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

Confiscation order

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

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

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

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

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