HOUSE OF COMMONS
LIBRARY

Serious Crime Bill

Bill No 116 of 2014-15

RESEARCH PAPER 14/67 18 December 2014

This Bill would make changes aimed to strengthen the law on the recovery of the proceeds of crime. It would make amendments to the *Computer Misuse Act 1990* to update existing offences. It would also provide for a new offence of participating in the activities of an organised crime group and make changes to Serious Crime Prevention Orders and gang injunctions. The Bill would provide for the seizure and forfeiture of substances used as drug-cutting agents. It would also amend the offence of child cruelty, create a new offence relating to the possession of 'paedophile manuals' and amend the law on Female Genital Mutilation. The Bill would create a new offence of unauthorised possession of a knife or other offensive weapon in prison and confer extra-territorial jurisdiction on the courts in respect of certain terrorism offences.

Jacqueline Beard
Sally Lipscombe
Pat Strickland
John Woodhouse
Gabrielle Garton Grimwood
Sarah Barber
David Hirst

Recent Research Papers

14/57	Taxation of Pensions Bill 2014-15 [Bill 97 of 2014-15]	23.10.14
14/58	Economic Indicators, November 2014	04.11.14
14/59	Childcare Payments Bill [Bill 110 of 2014-15]	06.11.14
14/60	Unemployment by Constituency, November 2014	12.11.14
14/61	Privatisation	18.11.14
14/62	Small Business, Enterprise and Employment Bill: Committee Stage Report	17.11.14
14/63	Counter-Terrorism and Security Bill [Bill 127 of 2014-15]	27.11.14
14/64	Economic Indicators, December 2014	02.12.14
14/65	Infrastructure Bill [HL] [Bill 124 of 2014-15]	04.12.14
14/66	Unemployment by Constituency, December 2014	17.12.14

Research Paper 14/67

Contributing Authors: Jacqueline Beard, proceeds of crime, seizure of drug cutting agents, Home Affairs Section
David Hirst, computer misuse, Science and Environment Section
Pat Strickland, organised crime, SCPOs, gang injunctions, Home Affairs Section
Sally Lipscombe, child cruelty offence, terrorism, Article 352 TFEU (serious crime), Home Affairs Section
John Woodhouse, possession of paedophile manuals, Home Affairs Section
Sarah Barber, female genital mutilation, Science and Environment Section
Gabrielle Garton Grimwood, knives and offensive weapons in prisons, Home Affairs Section

ISSN 1368-8456

Contents

Summary

The stated principal objective of the Bill is to ensure that law enforcement agencies have effective legal powers to deal with serious and organised crime. The Bill would give effect to a number of proposals and commitments made in the Government's *Serious and Organised Crime Strategy* (published in October 2013).

The Bill is in six parts. **Part 1** of the Bill would make changes aimed to strengthen the law on the recovery of the proceeds of crime. It would (amongst other things):

- allow the Crown Court to make a determination on the extent of the defendant's and any third party interests in property when making a confiscation order;
- reduce the maximum time a court could allow a defendant to pay the full amount of a confiscation order;
- provide for the victim surcharge to be paid ahead of any confiscation order
- enable courts to make compliance orders to impose restrictions, prohibitions, or requirements (including a ban on the defendant's travel outside the UK) for the purpose of securing that a confiscation order is effective;
- increase the maximum default sentences imposed where a confiscation order for more than £500,000 remains unpaid past its due date; and
- change the test applied for a restraint order to be made from "reasonable cause to believe" a defendant has benefited from their criminality to "reasonable grounds to suspect".

Part 2 of the Bill would amend the *Computer Misuse Act 1990*. The Bill would update existing offences to ensure sentences for attacks on computer systems deemed to have damaged national security, human welfare, the economy or the environment reflect the damage they cause. It has been introduced following a review designed to ensure existing legislation, such as the *Computer Misuse Act 1990*, remains relevant and effective and transposes the EU Directive on attacks against information systems into UK law.

Part 3 of the Bill would:

- create a new offence of participating in the activities of an organised crime group;
- apply Serious Crime Prevention Orders to Scotland, and allow them to be extended beyond five years or replaced in certain circumstances; and
- broaden the definition of a gang used when making injunctions.

Part 4 would provide new powers to enable law enforcement agencies to enter and search premises for drug-cutting agents, and to seize and detain any chemical substance that is reasonably suspected of being intended for use for such purposes.

Part 5 would make various amendments to the offence of cruelty to children under 16 and make it an offence to be in possession of any item that contains advice or guidance about abusing children sexually. Part 5 would also amend the *Female Genital Mutilation Act 2003* to extend the extra-territorial offences, provide anonymity for victims of the offence, create a new civil protection order and create a new offence of failing to protect a girl from FGM.

Part 6 of the Bill would:

- create an offence of unauthorised possession in a prison of any article that has a blade or is sharply pointed or any other offensive weapon;
- provide for extra-territorial jurisdiction for two offences under the *Terrorism Act 2006*: preparation of terrorist acts and training for terrorism; and
- provide for parliamentary approval of two draft Decisions of the Council of the European Union.

1 Introduction

The *Serious Crime Bill* is due to have its Second Reading in the House of Commons on 5 January 2015.

The Bill was first introduced in the House of Lords as HL Bill 1 of 2014-15 on 5 June 2014 and had its Second Reading on 16 June 2014. Committee stage took place on the 2, 8 and 15 of July 2014 and Report stage on 14 and 28 October 2014. Third Reading took place on 5 November 2014.

Information on the Bill's passage through the Lords is available on the *Serious Crime Bill* pages of the Parliament website. The Government has prepared *Explanatory Notes* and the Home Office website has a series of *Serious Crime Bill* pages which include various impact assessments and fact sheets.

The following committees have scrutinised the Bill:

- Delegated Powers and Regulatory Reform Committee, *Second Report of Session 2014-15*, 27 June 2014

- Joint Committee on Human Rights, Second Report of Session 2014–15, HC 746, 15 October 2014

Details regarding the territorial extent of the provisions of the Bill are given in paragraphs 8 to 13 of the *Explanatory Notes*.

2 Proceeds of crime

2.1 Background

Current law

The *Proceeds of Crime Act 2002* (POCA) sets out the legislative scheme for the recovery of assets acquired as a result of criminal activity. POCA provides for the making of confiscation orders after a conviction has taken place (the most commonly used power) and for other means of recovering the proceeds of crime which do not require a conviction. The Act also provides for a number of investigative powers, such as search and seizure powers and powers to apply for production orders and disclosure orders. POCA also provides for the making of restraint orders to freeze a defendant's assets and prevent dissipation prior to a confiscation order being made.

The Home Office *Fact Sheet: Overview of the Proceeds of Crime Act 2002* provides an explanation of the key provisions of the Act.

Confiscation

Annex B of the *Explanatory Notes* for the Bill provides an overview of the confiscation process under POCA. A brief summary is provided below.

A confiscation order can be made where a defendant is convicted by the Crown Court of an offence or offences from which he or she has benefitted. A Confiscation Order can also be made where the defendant was convicted by the magistrates' court of an offence or offences from which he or she benefited and was committed to the Crown Court for sentencing or for a confiscation order to be made. The Crown Court must proceed to confiscation if the court is asked to by the prosecutor or the court believes it is appropriate to do so.[1] The prosecution prepares a 'statement of information' setting out the prosecution position and detailing the defendant's benefit from criminal conduct.[2] The defendant may then be ordered to indicate which of the allegations in the statement he or she does and does not accept and to give details.[3]

At a confiscation hearing the court first decides whether the defendant has a criminal lifestyle. This depends on the nature of the offence or offences.[4] The court then determines the defendant's benefit from general criminal conduct (if he or she has been found to have a criminal lifestyle) or from particular criminal conduct. Where the benefit is from general criminal conduct, the court must apply certain assumptions to all of the defendant's income and expenditure in the last six years.[5] It is assumed that any property transferred to the defendant over the previous six years was a result of his general criminal conduct (unless the defendant can show an assumption is incorrect or that there would be a serious risk of injustice if an assumption were made).

Once the value of the defendant's benefit has been determined, the court makes an order for either the full value of the benefit, or if the defendant can prove that the value of his assets is less, the available amount. The confiscation order does not itself confiscate any property, but instead requires the defendant to pay the amount specified.

As it is open to the defendant to pay off the confiscation order out of whatever assets he or she has available, there is no express provision for the court to deal with any third party

---

1 Section 6(2) and 6(3) POCA
2 Section 16 POCA
3 Section 17 POCA
4 According to the test in section 75 POCA
5 Section 10 POCA

interests in any of the property which the court takes into account when determining the amount of the confiscation order.

The confiscation order is effectively treated as a fine for the purposes of enforcement and so is enforced by the magistrates' court.[6] The Crown Court must, as with fines, set a default term of imprisonment.[7] Monies collected are shared between the bodies involved in asset recovery (e.g. the Home Office, Police, Crown Prosecution Service and HM Courts Service).

Concerns about the effectiveness of the current law

The Government's *Serious and Organised Crime Strategy*, published in October 2013 stated:

> POCA is under sustained legal challenge from criminals who are constantly seeking new ways to avoid its reach and frustrate asset recovery.[8]

The strategy noted a number of loopholes that it said are being exploited by criminals to delay asset recovery:

> Criminals are exploiting POCA proceedings to delay the asset recovery process, for example by not attending court for the confiscation hearing after the conviction; third party claims are also used to reduce the amount of money that is available for recovery. POCA allows for a default prison sentence where criminals refuse to pay a confiscation order, but criminals may serve the sentence and still refuse to pay, knowing that the option of prison can only be used once.[9]

The strategy said that the Home Office would legislate to close these loopholes and strengthen POCA.

The strategy also noted that there remains a significant gap between the confiscation orders that are made and those that are collected. It said that to close this gap, HM Courts and Tribunal Service (HMCTS), the Crown Prosecution Service (CPS) and National Crime Agency (NCA) would use their powers in concentrated enforcement activity and work together to maximise the assets recovered.

The National Audit Office (NAO) report on Confiscation Orders, published in December 2013, was critical of the Government's implementation of its policy to deny criminals the proceeds of their crimes by confiscating their assets.[10] The Head of the NAO, Amyas Morse, stated that the use of confiscation orders was not providing value for money and was not proving a credible deterrent to crime.[11]

The NAO's key findings were:

- There is no coherent overall strategy for confiscation orders (although the NAO said that the commitment made in the *Serious and Organised Crime Strategy* to more collaboration and a more targeted approach was encouraging);

- A flawed incentive scheme and weak accountability compounds the problem;

---

6 Section 35(2) POCA
7 Section 139 *Powers of Criminal Courts (Sentencing) Act 2000*
8 HM Government, *Serious and Organised Crime Strategy*, Cm 8715, October 2013, para 4.46
9 HM Government, *Serious and Organised Crime Strategy*, Cm 8715, October 2013, para 4.47
10 National Audit Office, *Confiscation Orders*, HC 738, 17 December 2013
11 National Audit Office, Press Release, *Confiscation Orders*, 17 December 2013

- The absence of good performance data or benchmarks across the system weakens decision-making;

- Throughout the criminal justice system there is insufficient awareness of proceeds of crime and its potential impact;

- Enforcement efficiency and effectiveness are hampered by outdated, slow ICT systems, data errors and poor joint working;

- The main sanctions for not paying orders, default prison sentences of up to ten years and additional 8 per cent interest on the amount owed, do not work.[12]

In relation to the final point, the NAO said that HMCTS found that only 2 per cent of offenders paid in full once the default sentence was imposed in 2012 and that most stakeholders expressed concerns about the effectiveness and power of current sanctions. The NAO report noted that the Home Office had recognised some of these weaknesses and was proposing to introduce a more effective sanctions regime.

In January 2014 the Public Accounts Committee took evidence, on the basis of the NAO report, from the Home Office, National Crime Agency, HM Courts and Tribunals Service and the Crown Prosecution Service on the value for money of administration of confiscation orders. The Committee published its report on 21 March 2014.[13] It concluded that:

- Poor implementation of the confiscation order scheme has severely hampered its effectiveness;

- Not enough confiscation orders are imposed;

- Not enough is being done to enforce confiscation orders once they have been made, especially in higher value cases;

- The incentive scheme to encourage the many bodies involved to confiscate proceeds of crime is opaque and ineffective;

- The bodies involved with confiscation orders do not have the information they need to manage the system effectively; and

- The sanctions imposed on offenders for failing to pay confiscation orders do not work.

The Committee made a number of recommendations including that the Criminal Finances Board should develop and implement its improvement plan urgently.

The Government response to the Committee's report was published in June 2014 and included the Criminal Finances Improvement Plan 2014.[14] Objective 2 of the plan committed the Home Office to legislate to strengthen POCA.

The Joint Committee on the Draft Modern Slavery Bill raised concerns about POCA in its April 2014 report and made recommendations on asset recovery.[15] The Government

---

12 National Audit Office, Press Release, *Confiscation Orders*, 17 December 2013, pp6-7

13 Public Accounts Committee, *Confiscation Orders, Forty-ninth Report of Session 2013–14*, HC 942, 21 March 2014

14 HM Treasury, *Government responses on the Forty Fifth to the Fifty First and the Fifty Third to the Fifty Fifth reports from the Committee of Public Accounts: Session 2013-14*, Cm 8871, June 2014, pp21-24

15 Joint Committee on the Draft Modern Slavery Bill, *Draft Modern Slavery Bill Report*, Session 2013–14, HC 1019, 8 April 2014, see section 6

accepted some of these recommendations which have been addressed in the Serious Crime Bill.[16]

2.2 The Bill: Chapter 1 of Part 1 - England and Wales

Chapter 1 of Part 1 would apply in England and Wales.

Third party claims

Clauses 1 to 4 are concerned with third party interests in assets that may be realised to discharge a confiscation order. These clauses seek to give effect to the commitment in the *Serious and Organised Crime Strategy* to legislate to ensure that criminal assets cannot be hidden with spouses, associates or other third parties.

The Home Office *Fact Sheet: Amendments to the Proceeds of Crime Act 2002*, states that the payment of confiscation orders can be delayed by third parties making claims on assets that are part of that order and that third party claims can also reduce the amount of money available for recovery.

Confiscation orders are made against an offender for a particular amount and not against any particular asset held by the defendant. Currently, therefore, there is no express provision for the court to deal with any third party interests in any of the property taken into account when determining the amount of the confiscation order.[17] The *Explanatory Notes* state that, whilst in general it is most appropriate for third party interests to be dealt with substantially at the enforcement stage, in some cases waiting until enforcement to determine the extent of a third party's interest in the defendant's property can "complicate, lengthen and otherwise frustrate the confiscation process".

Clause 1 would insert a new section 10A into POCA to give the Crown Court the power, when making a confiscation order, to make a determination as to the extent of the defendant's interest in particular property. In order to make this determination, the court would also need to determine the extent of any third party interest in the property. Therefore third parties who have, or may have, an interest in the property, would be given the right to make representations to the court about the extent of their interest.

The *Explanatory Notes* state that it is envisaged that the Crown Court would only make such determinations in relatively straightforward cases.[18]

Clause 2(1) would require statements of information (given by the prosecutor to the court detailing the defendant's benefit from criminal conduct) to include any information available to the prosecutor that would be relevant to the court's consideration of a determination made under new section 10A. Clause 2(1) would also empower the court to require the prosecutor to provide further specified information relevant to the making of a determination (under new section 10A).

Clause 2(3), a Government amendment added at Report stage, would provide the court with power to order an interested person, such as a third party making a claim against the defendant's property, to provide the court with any information that the court believes necessary to determine the defendant's interest in the property. Where the third party,

---

16 *The Government response to the Joint Committee on the Draft Modern Slavery Bill Report*, Cm 8889, June 2014, p24

17 There is already provision for third parties to make representations in certain circumstances, for example, where they have been affected by a restraint order or where an enforcement receiver has been appointed enforce an unpaid confiscation order, see *Explanatory Notes* paras 19-20

18 *Explanatory Notes*, para 23

without reasonable excuse, failed to comply the court would be able to draw any inference it believed to be appropriate.

Clause 3 would provide for appeal against a determination made under the power provided by new section 10A. The prosecutor, defendant or a third party would be able to appeal to the Court of Appeal. The defendant or third party would only have a right to appeal where the person with an interest in the relevant property was not given a reasonable opportunity to make representations to the Crown Court before it made the determination, or where the Court of Appeal considers that the determination made would result in a serious risk of injustice to the appellant.

POCA provides that a court can confer various powers on an enforcement receiver including the power to realise property. There would be no right of appeal where a receiver has been appointed or where an application has been made by the prosecution for a receiver to be appointed, or the Court of Appeal believes such an application is to be made.

Clause 4 would enable an affected person to make representation to the enforcement receiver where he or she was not given a reasonable opportunity to make representation 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. The *Explanatory Notes* state that this provision would afford 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.

Time for payment

Clause 5 would reduce the time courts can give offenders to pay confiscation orders, giving effect to the commitment made in the *Serious and Organised Crime Strategy*. Currently the amount is to be paid immediately unless the defendant shows he needs time to pay, in which case the court can allow up to a maximum of 12 months from the date of the confiscation order to meet the order.[19] Up to six months can be allowed initially and then a further six months can be allowed if there are exceptional circumstances.

The Bill would insert a new Section 11 into POCA. It would expressly provide that the full amount is due immediately and would only allow time to pay if the court is satisfied that the defendant is unable to pay the full amount on the date the order is made. The court could then require different amounts of time for payment of different parts of the amount ordered, for example in order to allow funds to be realised from a specific asset. The maximum period of time for payment would be reduced from 12 months to six months. There would be an initial period allowed of up to three months and a further three months could be allowed if the court was satisfied that the defendant is unable to pay, despite having made all reasonable efforts.

Confiscation and the victim surcharge

Clause 6 would amend section 13 of POCA so that the victim surcharge is included in a list of priority orders (which would also include compensation orders and unlawful profit orders) that would take priority over a confiscation order. This would mean that the victim surcharge

[19] Section 11 POCA.

(like the other priority orders) would be paid by the defendant before a confiscation order, if the defendant does not have the means to pay both.[20]

Orders for securing compliance with confiscation orders

Clause 7 would insert new sections 13A and 13B into POCA which would confer on the Crown Court a power to make a compliance order when making a confiscation order. The court would be able to impose any restrictions, prohibitions, or requirements as part of the compliance order, provided they are considered appropriate for the purpose of securing that the confiscation order is effective.

The court would have a duty to consider whether to make a compliance order on the making of a confiscation order and, at any later time (while the confiscation order is still in effect) on the application of the prosecutor.

In considering making a compliance order, the court would have a duty to consider whether to impose a restriction or prohibition on the defendant's travel outside the UK.

Regarding third parties, the *Explanatory Notes* state that:

> 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.[21]

The prosecutor or a person affected by a compliance order (either the defendant or a third party) would be able to apply to vary or discharge the order. New section 13B would provide for a right of appeal (to the Court of Appeal) by the prosecutor (against a decision not to make a compliance order) or the prosecutor or any person affected by a compliance order against the decision to make, vary or discharge a compliance order.

The *Explanatory Notes* state that the power and rights of appeal provided for in this clause mirror those already available where the Crown Court makes a restraint order.[22]

Variation or discharge

Clause 8 would insert a new section 25A into POCA to provide for confiscation orders to be written off where the subject of the order has died and it is not possible or reasonable to seek payment of the order from the defendant's estate.

Absconding defendants

Clause 9 would provide that a confiscation order can be made against a person who absconds before the conclusion of his or her trial and is subsequently convicted in his or her absence. It would also reduce the period a prosecutor must wait to apply for a confiscation order where the defendant has absconded prior to conviction. The period would be reduced from two years from the date the court believes the defendant absconded to three months from that date.

The clause would also allow the criminal lifestyle assumptions to apply to where an absconder returns to the jurisdiction.[23] The Home Office *Fact Sheet: Amendments to the Proceeds of Crime Act 2002* explains the effect of this change:

---

20 Courts must impose an ancillary order that the defendant pay a surcharge, the 'victim surcharge' when sentencing an offender (section 161A of the *Criminal Justice Act 2003*). The revenue raised from the victim surcharge is used to fund victim services through the Victim and Witness General Fund. See, The Sentencing Council, *What is the Victim Surcharge?* [accessed 19 November 2014].

21 *Explanatory Notes*, para 48

22 *Explanatory Notes*, para 49

> This means that the defendant's criminal benefit may be re-calculated to be what the individual received, retained and spent in the six years prior to the start of criminal proceedings. This ensures the whole of the offender's criminal benefit can be removed whilst ensuring they are able to respond to these stringent assumptions.[24]

Default sentences

Clause 10 would increase the maximum default sentences imposed where a confiscation order for more than £500,000 remains unpaid past its due date. The clause provides for a new four tier table of default sentences, replacing the current twelve tiers:[25]

Maximum Term	Amount
6 months	£10,000 or less
5 years	More than £10,000 but no more than £500,000
7 years	More than £500,000 but no more than £1 million
14 years	More than £1 million

Currently, the maximum default sentence, for amounts exceeding £1 million, is 10 years.

The Secretary of State would be given the power to amend the table by order, subject to the affirmative procedure.[26] This power would include amending the table so as to provide for both minimum and maximum terms of imprisonment. The Delegated Powers and Regulatory Reform Committee, in its report on the Bill, considered the power to set minimum terms to be inappropriate, constituting a significant derogation from the powers of a court to exercise its own discretion in deciding the appropriate sentence in a particular case.[27] Lord Bates responded to the Delegated Powers Committee with regard to this clause, stating:

> In the event that the power was exercised to introduce minimum terms, there would still be significant latitude for the courts to determine the appropriate sentence in any given case. The intention would be to set the minimum term for any given tier at the same level as the maximum term for the preceding tier.[28]

The clause would also end automatic release at the half way point for default sentences for non–payment of confiscation orders of more than £10 million. The £10 million figure could be varied by order, subject to the affirmative procedure.

Conditions for exercise of restraint powers

Restraint orders have the effect of 'freezing' property, preventing a person subject to a criminal investigation or criminal proceedings dealing with it, so preventing the dissipation of assets that may be subject to a confiscation order. Section 40 of POCA sets out a number of conditions for making a restraint order, the first of which is that:

---

23 For information on the criminal lifestyle assumption see page 92 of the *Explanatory Notes*

24 Home Office *Fact Sheet: Amendments to the Proceeds of Crime Act 2002*, para 15

25 Details of the current tiers (under section 139(4) of the *Powers of Criminal Courts (Sentencing) Act 2000*) can be found on page 17 of the *Explanatory Notes*

26 New section 35(2C) of POCA

27 Delegated Powers and Regulatory Reform Committee, *2nd Report of Session 2014-15*, 27 June 2014, p6

28 Letter from Lord Bates to the Delegated Powers and Regulatory Reform Committee, 7 October 2014

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

(b) there is a reasonable cause to believe that the alleged offender has benefited from his criminal conduct.

Clause 11 would change the test in (b) from "reasonable cause to believe" to "reasonable grounds to suspect". A test based on suspicion is more easily satisfied than one based on belief. This change would align the test with the one under the *Police and Criminal Evidence Act 1984* for making an arrest.

The Joint Committee on the Draft Modern Slavery Bill approved of this formulation in its consideration of restraint orders.[29] The Joint Committee of Human Rights stated that it was satisfied that the Government had adequately justified the lowering of the threshold for restraint orders and was satisfied that the Government had demonstrated by evidence that the current approach gives rise to real, practical risk that assets will be dissipated or otherwise shielded from possible confiscation orders.[30]

Clause 11(2) would enable the court to monitor the progress of an investigation, and if a decision to charge is not made within a reasonable time, the court would be able to discharge the restraint order.

Continuation of restraint orders after quashed conviction

Currently a restraint order must be discharged once a conviction has been quashed regardless of whether the prosecution intends to re-try the defendant for the offence in question.[31] **Clause 12** would provide for the continuation of a restraint order following the quashing of a conviction, but before the start of proceedings for a retrial (where either the Court of Appeal has ordered a retrial or the prosecution has applied for a retrial), preventing the defendant from dissipating any assets in that period. The restraint order would subsequently be discharged if; the Court of Appeal refuses to make an order for a retrial; the Court of Appeal makes an order for retrial but there is undue delay in starting proceedings, or the proceedings for retrial are concluded.

Search and seizure powers: appropriate approval

Sections 47A to 47S of POCA[32] provide for search and seizure powers (in England and Wales) which allows certain property to be seized to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. These sections are not yet in force.

An appropriate officer may exercise the power to seize property if satisfied that any one of seven conditions, listed in section 47C of POCA, is met. The first condition under which the powers may be used is where: a criminal investigation has been started with regard to an indictable offence; a person has been arrested for the offence; proceedings for the offence have not yet been started against the person; there is reasonable cause to believe that the person has benefited from conduct constituting the offence; and a restraint order is not in force in respect of any realisable property.

---

29 Joint Committee on the Draft Modern Slavery Bill, *Draft Modern Slavery Bill Report*, Session 2013–14, HC 1019, 8 April 2014, para 208

30 Joint Committee on Human Rights, *Second Report of Session 2014–15*, HC 746, 15 October 2014, paras 1.14-1.15

31 See para 95 of the *Explanatory Notes*

32 Inserted by section 55 of the *Policing and Crime Act 2009*

Added at Committee stage following a Government amendment,[33] **clause 13(1)** would change the test under this first condition from "reasonable cause to believe" that the person has benefitted from conduct constituting an indictable offence, to "reasonable grounds to suspect", in line with the change in clause 11 to the test in relation to restraint orders.

These search and seizure powers may be exercised by an officer of Revenue and Customs, a constable and an accredited financial investigator. The powers may only be exercised with "appropriate approval", unless in the circumstances, it is not practicable to obtain approval in advance. If prior approval (from a justice of the peace) is not practicable, approval of a senior officer will be appropriate approval. **Clause 13(2)** would enable the Director General of the National Crime Agency, or any other NCA officer authorised by the Director General, to confer appropriate approval where the powers are being exercised by a designated NCA officer and it is not practicable to get prior approval from a justice of the peace.

Seized money

Section 67 of POCA 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 court in satisfaction of a confiscation order. Currently, there are four conditions that must be satisfied before money may be seized:

1. A restraint order must be in place in relation to the money;

2. A confiscation order is made against the person by whom the money is held;

3. An enforcement receiver has not been appointed in relation to the money; and

4. Any period allowed to pay the amount order under the confiscation order has expired.

Clause 14(1) would remove the first and last of these conditions.

Section 67A (not yet in force) provides a power to magistrates' courts to order the sale of personal property seized by an appropriate officer under a relevant seizure power, to meet a confiscation order in certain circumstances.[34] Currently, any period allowed to pay the amount ordered under the confiscation order has to have expired before this power can be used. **Clause 14(4)** would remove this condition.

Clause 14(2), added at Committee stage following a Government amendment, would provide for a magistrates' court to order payment of funds held in a bank account that is not in the name of the defendant towards the satisfaction of the defendant's confiscation order, in accordance with the court's determination of the defendant's interest in that account (as provided for in clause 1).

Clause 14(3) would confer on the Secretary of State a power to amend section 67 of POCA (subject to the affirmative procedure) 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.

2.3 The Bill: Chapter 2 of Part 1 - Scotland

Part 3 of POCA provides for confiscation and restraint in Scotland and contains similar provisions to those contained in Part 2 of POCA (which relate to England and Wales).

---

33 HL Deb 2 July 2014 c1764

34 Not yet in force

Clauses 15 to 22 would apply to Scotland only and would make amendments to Part 3 of POCA. Clause 23 would apply to the whole of the UK.

At the request of the Scottish Government, the Bill as introduced to the Lords provided for the replication, with regard to Scotland, of a number of the changes relating to the proceeds of crime that would be made by the Bill in relation to England and Wales. At Report stage the Government moved a series of amendments to replicate in Scotland a number of further provisions in the Bill. Further Government amendments were moved which removed certain Scottish provisions. These changes followed requests from the Scottish Government.[35]

Clause 15 would replicate the provisions in clause 6 and provide for the payment of the victim surcharge and the amount due under a restitution order (the equivalent of compensation orders in England and Wales) to have priority call on monies paid under a confiscation order.

Clause 16 and 17 would broadly replicate the provisions in clause 7 of the Bill to enable to courts to make a compliance order, including imposing an overseas travel ban. Unlike in England and Wales, it would not be possible under these provisions to make a compliance order against a third party.

Clause 18 would replicate the provisions in clause 9 to ensure that individuals who abscond before conviction, but are then convicted in their absence, may be subject to confiscation.

Currently in Scotland, 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 contrast with the position in England and Wales. **Clause 19(1)(a)** would amend POCA so that an offender would be required to pay the amount due even if he or she serves a default sentence. **Clause 19(1)(b)** would replicate the part of clause 10 of the Bill that increases the maximum default sentences where offenders do not pay a confiscation order of more than £500,000.

Clause 20 would make parallel amendments in Scotland to those that would be made by clause 11 in England and Wales regarding the circumstances under which a restraint order can be made.

Clause 21 would replicate the provision in clause 12 regarding the continuation of a restraint order following the quashing of a conviction.

Clause 22 would make amendments regarding search and seizure powers in Scotland similar to those made in England and Wales by clause 13.

Clause 23 concerns civil recovery proceedings in Scotland. Civil recovery is a form of non-conviction based asset recovery that allows for the recovery of property which is, or represents, property obtained though unlawful conduct. The *Explanatory Notes* state that civil recovery is used when a prosecution is not possible, for example if there is insufficient evidence to create a realistic prospect of conviction, or there is no identifiable living suspect.[36]

The Home Office *Factsheet: Amendments to the Proceeds of Crime Act 2002* states:

> Prohibitory Property Orders ("PPOs") are specific orders which can be applied for in the process of the civil recovery of assets in Scotland when a person has acquired

---

35 HL Deb 14 October 2014 c136

36 *Explanatory Notes*, p5

assets through certain unlawful conduct. PPOs prevent a person from dissipating identified assets during the course of a civil investigation.[37]

Clause 23 would introduce a new type of management receiver; a "PPO Receiver". The only function of the PPO Receiver would be to manage property subject to a prohibitory property order. The provisions inserted by this clause would broadly mirror those in sections 245E to 245G of POCA (inserted by section 83 of the *Serious Crime Act 2007*) which provided for management receivers in respect of property freezing orders in England and Wales and Northern Ireland.

2.4 The Bill: Chapter 3 of Part 1 - Northern Ireland

Part 4 of POCA provides for confiscation and restraint in Northern Ireland and contains similar provisions to those contained in Part 2 of POCA (which relate to England and Wales).

Clauses 24-36 would apply to Northern Ireland only and would make amendments to Part 4 of POCA parallel with those made by clauses 1 to 14 in relation to England and Wales.

The Home Office *Factsheet: Amendments to the Proceeds of Crime Act 2002* states that these changes were made at the request of the Northern Ireland Minister for Justice.[38] The *Explanatory Notes* give details as to each of the parallel amendments.

2.5 The Bill: Chapter 4 of Part 1 – Investigations and co-operation etc

Part 8 of POCA provides investigatory powers, empowering a court to make a variety of orders in connection with a number of different types of investigation including confiscation investigations. The various orders can be applied for by an appropriate officer (for example, a constable or National Crime Agency officer). They include a production order, a search and seizure warrant, a disclosure order, a customer information order, and an account monitoring order.

Clause 37 would broaden the definition of a confiscation investigation[39] so that the investigative powers under Part 8 of POCA 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. Currently the investigatory powers of Part 8 are not available for the purpose of assisting in the satisfaction of an order after a confiscation order has been made.

Part 11 of POCA makes provision for co-operation between jurisdictions in relation to freezing and confiscating the proceeds of crime. An external order is type of order made by a court in another jurisdiction which is enabled, by POCA, to be given effect in the UK.[40]

Clause 38 would allow external orders to be used for the recovery of a pecuniary advantage obtained by criminal conduct. Currently these orders can only be used to recover property or sums of money. Clause 38 would also allow for external investigations[41] (by an overseas authority) to be for the purpose of ascertaining whether any pecuniary advantage has been obtained from criminal conduct. Clause 38 would extend to the UK.

Currently confiscation orders may only be made in the Crown Court. Section 97 of the *Serious Organised Crime and Policing Act 2005* gave the Secretary of State power by order

---

37 Home Office *Factsheet: Amendments to the Proceeds of Crime Act 2002*, November 2014, para 21
38 Home Office *Factsheet: Amendments to the Proceeds of Crime Act 2002*, November 2014, para 22
39 In section 341 of POCA
40 Section 447(2) POCA
41 Section 447(3) POCA

(subject to affirmative procedure) to allow for magistrates' courts to make a confiscation order in cases with a value of below £10,000. **Clause 39** would enable the £10,000 threshold to be varied by order (subject to the affirmative procedure). Clause 39 would extend to England and Wales and Northern Ireland.

2.6 Debate in the Lords

Part 1 of the Bill was largely welcomed in the Lords and debate focussed, for the most part, on further ways in which POCA could be amended so as to improve its enforcement and the recovery of criminal assets.

Third party claims

At Committee stage, the Opposition Home Office spokesperson, Baroness Smith of Basildon, confirmed that the Opposition supported many of the measures in the Bill. She said she had tabled clause stand part debates (for clauses 1 and 2) and a number of probing amendments to allow a slightly wider debate as to whether the measures proposed in the Bill were adequate to address the problems that have arisen with regard to enforcement.[42]

Baroness Smith proposed that the Bill "go further" on third-party claims, by bringing forward determination of such claims from after the conviction stage to the restraint stage. She also proposed that alleged offenders, on having their assets frozen, be required to declare any third-party claims on the property within 21 days and that, where serious criminality is alleged, suspects be required to make full disclosure of their assets and the location of those assets with criminal penalties for misleading statements.

Lord Taylor of Holbeach said that the Home Office did not consider it appropriate for determination of third-party interests to be brought back to restraint stage. He noted that not all defendants will be made subject to a restraint order and not all restraint orders lead to confiscation orders. Clauses 1 to 4 were agreed without amendment.

On Report, Lord Bates, for the Home Office, said that having reflected on the Committee debate, the Government was proposing one further step: to provide the court with power to order an interested person, such as a person making a claim against the defendant's property, to provide the court with any information that the court believes necessary to determine the defendant's interest in the property.[43] The clause was agreed and added to the Bill (now clause 2(3)).

Securing compliance with confiscation orders

At Committee stage, Baroness Smith moved (and withdrew) an amendment that would have required a consultation on ways to strengthen confiscation orders.[44] She stated that the areas to be looked at were whether the court should be able to:

- compel a suspect to return to the UK any realisable asset that is located overseas;
- jail or fine someone who sells property that is subject to a confiscation order;
- require a defendant to disclose any interests in property.

Lord Taylor said that the issues raised would be addressed by the measures proposed in the Bill. This was reiterated by Lord Bates on Report in response to further calls from Baroness Smith for a consultation on these and other wider issues.[45]

---

42 HL Deb 2 July 2014 c1722
43 HL Deb 14 October 2014 c121
44 HL Deb 2 July 2014 c1745

Restraint orders – dissipation of assets test

Currently, for a restraint order to be made, the prosecutor must show that there is a risk of dissipation of assets. This test is not statutory, but has been developed in case law.[46]

Lord Taylor noted that the Joint Committee on the Draft Modern Slavery Bill had recommended that the requirement to demonstrate a risk of dissipation be explicitly removed.[47] He said that the Government considered replacing the 'reasonable belief' test with a 'reasonable suspicion' test (clause 11 of the Bill) to be sufficient to ensure that restraint orders are made in appropriate cases, while continuing to provide adequate protection to ensure they are not used inappropriately.[48]

An Opposition amendment proposed requiring the defendant to establish that there is no risk of dissipation, thus changing the onus of proof in the 'risk of dissipation test'. Lord Taylor stated that whilst "the Government are all for toughening up the asset recovery regime", there was a need to "keep the regime proportionate, maintaining a proper balance between depriving criminals of their ill-gotten gains and protecting the rights of persons who, in the early stages of an investigation, have not yet been convicted of any offence".[49] It was therefore, he said, essential that the onus of proof remains on the prosecutor at this early stage. At Report, Lord Bates stated that the Government remained unpersuaded that the requirement to show that the defendant would dissipate his or her assets should be removed, adding that it would be extremely difficult for a defendant to prove a negative to the court, namely that they did not intend to dissipate their assets.[50]

Costs to the CPS

The Opposition tabled probing amendments at Committee stage that sought to limit the level of any costs recovered by defendants when an application for a restraint order was unsuccessful to legal aid rates, rather than the amount the defendant actually spent on their representation. Lord Taylor said that the suggestion of capping was interesting and that he would draw it to the attention of the Ministry of Justice.[51]

At Report stage, Lord Bates said that the Government agreed in principle that any reimbursement of the defendant's costs that arise from a restraint hearing should be capped at legal aid rates. He said new primary legislation would not be required to effect the change and that the Government intended to consult the Criminal Procedure Rule Committee on this matter.[52]

Default sentences: eligibility for automatic release

In probing amendments, the Opposition suggested lowering the threshold for ending eligibility for automatic release at the halfway point of a default sentence for non-payment of a confiscation order to either £1 million or £500,000. Lord Taylor responded that the Government had made a judgment and that the order making powers had been included because it was prudent to test out the proposition (that offenders would be more like to pay a confiscation order of £10 million than face 14 years, rather than the current five, in prison) before going further. He said that it would not be appropriate to lower the threshold until it

---

45 HL Deb 14 October 2014 c 130

46 *R v B [2008] EWCA Crim. 1374*

47 Joint Committee on the Draft Modern Slavery Bill, *Draft Modern Slavery Bill Report*, Session 2013–14, HC 1019, 8 April 2014, para 208

48 HL Deb 2 July 2014 c1751

49 HL Deb 2 July 2014 c1752

50 HL Deb 14 October 2014 c129

51 HL Deb 2 July 2014 c1752

52 HL Deb 14 October 2014 c130

was proven that it resulted in improved payment and was an effective deterrent, and that it was affordable to do so.[53]

3 Computer misuse

Part 2 of the Serious Crime Bill amends the *Computer Misuse Act 1990*. The Bill updates existing offences to ensure sentences for attacks on computer systems deemed to have damaged national security, human welfare, the economy or the environment reflect the damage they cause. It has been introduced following a review designed to ensure existing legislation, such as the *Computer Misuse Act 1990*, remains relevant and effective and transposes the EU Directive on attacks against information systems into UK law.

3.1 Cybercrime

The internet-related market in the UK is now estimated to be worth £82 billion a year and the number of adults who access the internet every day in the UK has more than doubled, from 16 million to 38 million between 2006 and 2014.[54] This increasing reliance on Information and Communication Technologies (ICTs) has been accompanied by the development of a new set of cyber threats. For instance, 12 per cent of European internet users have had their social media or email account hacked and 7 per cent have been the victim of credit card or banking fraud online.[55] Cybercrime currently costs the UK somewhere between £18 billion and £27 billion a year, according to a recent Government report examining the cost of cyber-attacks on business.[56]

On 3 February 2011, the Parliamentary Under-Secretary of State for the Home Department, James Brokenshire MP, commented on the threat of cybercrime as follows:

> "Cybercrime, often carried out by organised criminals, is now a major and growing threat to all sectors of our economy, and we should be in no doubt: online attacks can have a significant real-world impact, from people's bank accounts being emptied to industrial plants and critical infrastructure being disrupted. The risks from cyberspace are now so great that the national security strategy placed the threat as one of the top tier of risks to our national security."[57]

National Security Strategy

In 2010, the National Security Strategy identified hostile attacks on UK cyber space by other states and large scale cybercrime as a 'tier one' threat to national security.[58] In response, the Government established the National Cyber Security Programme (NCSP), to help meet the objectives of the strategy, and in November 2011, published the UK's first Cyber Security Strategy.[59]

The Cyber Security Strategy identified threats and opportunities found in an increasingly connected society, in addition to setting out the Government's vision for UK cyber security in 2015. This included a commitment to "review existing legislation, such as the *Computer Misuse Act 1990*, to ensure that it remains relevant and effective".[60] The *Explanatory Notes*

---

53 HL Deb 2 July 2014 c1759
54 *AT Kearney*, *Internet Economy in the United Kingdom*, 2012
55 *European Cybercrime Centre – one year on*, 10 February 2014
56 BIS, *2014 Information Security Breaches Survey*, 2014
57 *HC Deb 3 Feb 2011* | cc1051-1052
58 HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, October, 2010
59 HM Government, *The UK Cyber Security Strategy: Protecting and promoting the UK in a digital world*, November, 2011
60 HM Government, *The UK Cyber Security Strategy: Protecting and promoting the UK in a digital world*, November 2011 p36

to the Serious Crime Bill states that following that review, Part 2 of the Bill has been brought forward to amend the *Computer Misuse Act 1990*, so that a new offence in respect of unauthorised acts in relation to computers causing serious damage and endangering life.

In February 2013, the National Audit Office (NAO) reviewed the Government's implementation of the cybersecurity strategy. It stated that overall, the:

> …government continues to make good progress in implementing the Programme, which is helping to build capability, mitigate risk and change attitudes. Cyber threats, however, continue to evolve and government must increase the pace of change in some areas to meet its objectives.[61]

The NAO also outlined six key challenges the Government faced implementing its cybersecurity strategy, including tackling cybercrime and enforcing the law at home and abroad.[62]

Computer Misuse Act 1990

UK Government policy has consistently been such that what is illegal offline is also illegal on-line.[63] The *Computer Misuse Act* ("1990 Act"), though, was created to legislate for on-line situations such as hacking and misuse of communications systems.

The 1990 Act sets out the offences associated with interfering with a computer (hacking) and the associated tools (such as malware, viruses and Trojan Horses) that enable computer systems to be breached.

The *1990 Ac*t makes unauthorised access to, or modification of, computer material unlawful. Sections 1 to 3A create four criminal offences to tackle cybercrime:

- Section 1 - unauthorised access to computer material or data (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 (including circulating viruses, deleting files and inserting a "Trojan Horse" to steal data as well as effectively criminalising all forms of distributed denial of service (DDoS) attacks);
- Section 3A - making, adapting, supplying or offering to supply an article intending it to be used to commit, or to assist in the commission of, an offence under sections 1 or 3.

The policy objective of Part 2 of this bill is to amend the *Computer Misuse Act 1990* to ensure that all cyber-attacks that result in serious damage to human welfare national security, the economy or the environment can be prosecuted "with a maximum sentence available that fully reflects the severity of the conduct."[64]

European Directive on attacks against information systems

The EU adopted a Directive on attacks against information systems in August 2013.[65] The aim of the Directive is to establish a set of minimum rules within the EU on offences and

---

61 NAO, *Update on the National Cyber Security Programme*, February 2013
62 NAO, *Update on the National Cyber Security Programme,* February 2013
63 HC Deb 14 July 2008 c117W
64 Home Office, *Fact sheet: computer misuse*, November 2014
65 Directive 2013/40/EU, "on attacks against information systems and replacing Council Framework Decision 2005/222/JHA", 12 August 2013

sanctions relating to attacks against information systems. It also aims to improve cooperation between competent authorities in Member States.

The UK is compliant with the Directive but for two aspects: tools used for committing offences (Article 7) and jurisdiction (Article 12).[66] Following the Government's decision, on 3 February 2011, to opt-in to the Directive, it has until 4 September 2015 to transpose the Directive into UK law. [67]

3.2 The Bill

Part 2 of the *Serious Crime Bill* contains four clauses amending the 1990 Act to: create a new offence of unauthorised acts causing serious damage; implement the EU Directive on Attacks against Information Systems; and clarify the savings provision for law enforcement. Part 2 of the Bill applies to the whole of the UK.

Clause 40 "Unauthorised acts causing, or creating risk of, serious damage" inserts a new section 3ZA into the 1990 Act which creates a new offence of impairing a computer such as to cause serious damage.[68] The clause defines serious damage as "damage to human welfare, the environment, the economy or national security". The Government's intention is for this offence to address the most serious cyber-attacks, for example those on essential systems controlling power supply, communications, food or fuel distribution.[69] This new offence is more serious than section 3 offences.

As the legislation stands, the maximum sentence under the 1990 Act is for 10 years imprisonment. The Government is of the view that this sentence does not sufficiently reflect the level of personal and economic harm that a major cyber-attack on critical systems could cause.[70] Therefore, this clause will amend the 1990 Act to create a maximum penalty of 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.

Clause 40 also amends the 1990 Act so that it applies to the making of "hacker tools" intended to be used to commit an offence the new section 3ZA.

Clause 41 "Obtaining articles for purposes relating to computer misuse" amends the 1990 Act to transpose the EU Directive on attacks against information systems into UK law. Section 3A of the 1990 Act, in conjunction with sections 1 to 3 of the 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.

This clause extends section 3A of the 1990 Act to include an offence of 'obtaining for use' to cover the event of tools being obtained for personal use to commit offences under section 1, section 3, or the new offence above.[71]

Clause 42 "Territorial scope of computer misuse offence" amends the 1990 Act to fully comply with Article 12 of the EU Directive on attacks against information systems. It does so by extending the existing extra territorial jurisdiction provisions in section 4 and 5 of the 1990 Act to provide a legal basis to prosecute a UK national who commits any 1990 Act offence whilst physically outside the UK, where the offence has no link to the UK other than the

---

66 Home Office, *Fact sheet: computer misuse*, November 2014
67 HC Deb 3 Feb 2011 c1051
68 *Explanatory Notes*
69 Home Office, *Fact sheet: computer misuse*, November 2014
70 *Explanatory Notes*
71 *Explanatory Notes*

offender's nationality, provided also that the offence was an offence in the country where it took place.[72]

Subsections 6 and 7 of clause 42 sets out the criteria for when a sheriff court in Scotland will have jurisdiction to try an offence under 3ZA and 3A of the 1990 Act.[73]

Clause 43 "Savings" is intended to remove any ambiguity for the lawful use of powers to investigate crime and the interaction of those powers with the offences in the 1990 Act.

These four clauses together are intended to meet the three objectives set out by the Government in its impact assessment. Firstly, to implement the EU Directive on attacks against information systems; secondly, to contribute to contribute to the Home Secretary's commitment in the *Serious and Organised Crime Strategy* to relentlessly disrupt organised crime; and thirdly, to reduce the threat and impact of cyber-crime by ensuring UK legislation is up to date.[74]

3.3 Comment on the amendments to the Computer Misuse Act

On 17 October 2014, the Joint Committee on Human Rights (JCHR) published a Report examining the *Serious Crime Bill* amongst others.[75] In this report the JCHR expressed its concern over the Government's proposed amendments to the 1990 Act included in the Serious Crime Bill.

Commenting on Part 2, clause 40 of the Bill, which creates a new criminal offence of unauthorised acts in relation to a computer (computer hacking) causing serious damage to human welfare, the environment, the economy or national security in any country, the committee report stated:

> "We do not doubt the need to ensure that the criminal law provides adequate protection against cyber-attacks on critical infrastructure. We doubt, however, whether the concepts of "damage to the environment", "damage to the economy" or "damage to national security" are sufficiently certain in their meaning to justify their inclusion as an ingredient of a criminal offence carrying maximum sentences of 14 years and life imprisonment. The broad and vague definition of the new offence of computer misuse appears to be without precedent, and the Bill therefore appears to cross a significant line by using these unsatisfactory concepts in the definition of a serious criminal offence carrying a lengthy sentence. We recommend that the Bill be amended to remove these particular elements of the new computer hacking offence."[76]

On 23 October 2014, the *Guardian* reported on the provisions in the Bill relating to the 1990 Act. This report raised concerns that legitimate whistle-blowers could be targeted. The executive director of Open Rights Group, Jim Killock, warned that the legislation was too widely drawn and called for greater protection for potential whistleblowers.[77]

The Government has defended the proposed changes to the 1990 Act. For instance, in an article in *TechWeekEurope*, a Home Official spokesperson was quoted as saying:

---

72 Home Office, *Fact sheet: computer misuse*, November 2014

73 *Explanatory Notes*

74 Home Office, "Impact Assessment – Serious Crime Bill: Amendments to the Computer Misuse Act 1990", 3 March 2014

75 Human Rights Joint Committee, *Legislative Scrutiny: (1) Serious Crime Bill, (2) Criminal Justice and Courts Bill (second Report) and (3) Armed Forces (Service Complaints and Financial Assistance) Bill*, 17 October 2014

76 Ibid

77 Matthew Taylor, "Computer users who damage national security could face jail" *Guardian*, 23 October 2014

> "Serious and organised crime blights lives and causes misery across the UK […] It is a threat to our national security and costs hard-working taxpayers at least £24 billion a year."
>
> "Our reliance on computer systems and the degree to which they are interlinked is ever increasing and a major cyber attack on our critical infrastructure would have grave consequences […] Through this bill we will ensure that in the event of such a serious attack those responsible would face the justice they deserve."[78]

The spokesperson also said that the Government was considering the JCHR report on the Serious Crime Bill and would respond in due course.

4 Organised, serious and gang-related crime

Part 3 of the Bill:

- creates a new offence of participating in the activities of an organised crime group;
- applies Serious Crime Prevention Orders to Scotland, and allows them to be extended beyond five years or replaced in certain circumstances; and
- broadens the definition of a gang used when making injunctions.

4.1 Background

The new participation offence

In 2006 the UK ratified the United Nations *Convention against Transnational Organised Crime*, article 5 of which requires states to criminalise conspiracy and participation in organised crime.[79] In England and Wales, there has long been a common law offence of conspiracy, which was made statutory in 1977. The offence occurs where someone agrees with others to pursue a course of conduct which will necessarily amount to committing a crime (or would do if certain facts hadn't made it impossible).[80]

In its *Serious and Organised Crime Strategy* the Government said that it would bring forward proposals to:

> better tackle people who actively support, and benefit from, participating in organised crime, learning from legislation that is already being used elsewhere in the world.[81]

Serious Crime Prevention Orders

Serious Crime Prevention Orders (SCPOs) were introduced by Part 1 of the *Serious Crime Act 2007*. They are a civil order designed to prevent, restrict or disrupt serious crime through prohibitions, restrictions or requirements. The Crown Court can make an SCPO when sentencing a person who has been convicted of a serious offence. The orders can be made against individuals, bodies corporate, partnerships or unincorporated associations. The power is very broad, with the Act giving non-exhaustive lists of examples of prohibitions, restrictions or requirements.[82] They might cover a person's financial, property or business dealings, their working arrangements, communications, premises and travel. They can

---

78 Tom Jowitt, "Government Defends Life Sentences For 'Serious' Hacks" *TechWeekeurope* (24 October 2014). Accessed online: 7 November 2014.

79 United Nations, 2004

80 Section 1, *Criminal Law Act 1977* as amended

81 HM Government, *Serious and Organised Crime Strategy*, Cm 8715, October 2013, p37

82 Section 5

restrict where a person can live. The order could require a person to answer questions or provide information to the police.

SPCOs can last for a maximum of five years. Breach of an order is a criminal offence.

Background on the introduction of Serious Crime Prevention Orders is given in Library Research Paper 07/52 *The Serious Crime Bill* which was prepared for the Bill's Second Reading in the Commons. The Justice Committee conducted post legislative scrutiny of the 2007 Act, although their report focused on Part 2 rather than SCPOs.[83] However, the Home Office submitted a Memorandum to the Home Affairs Committee and the Justice Committee as part of the scrutiny process, and this contains further background information.[84]

According to the *Explanatory Notes*, between 6 April 2008 (when SCPOs came into force) and 31 March 2014, 317 SCPOs had been granted by the Crown Court and one by the High Court. All have been against individuals rather than bodies corporate.[85] There had been nine convictions for breach of an SCPO.[86]

Gang injunctions

Gang injunctions were introduced by the *Police and Crime Act 2009* from 31 January 2011. The police and local authorities can apply to the county court or High Court for a gang injunction against an individual. The court can then impose a range of prohibitions and positive requirements on the behaviour of a person involved in gang-related violence. For example, they could prohibit the person from being in a particular place, or require them to participate in rehabilitation.

Background on the introduction of gang injunctions is given on pages 33-40 of Library Research 09/97 *Policing and Crime Bill* which was prepared for the Bill's Second Reading.[87] Library Standard Note 5264 *Gangs: A Select Bibliography* gives suggestions for further reading.

The legislation was amended before it came into force by the *Crime and Security Act 2010* to enable gang injunctions to be taken out against those aged between 14 and 17. Then the *Crime and Courts Act 2013* made provision for youth courts to hear applications for gang injunctions for these 14 to 17 year olds rather than county courts. This is not yet in force.

The Government issued statutory guidance on gang injunctions in December 2011.[88] Section 50 of the *Policing and Crime Act 2009* required the Government to publish a review of gang injunctions within three years of their coming into force. This was published in January 2014.[89]

4.2 The Bill

Organised Crime Groups

Clause 44 would create a new offence of participating in activities of an organised crime group. The *Explanatory Notes* say this new offence could be used "to target not only those who head a criminal organisation and who plan, coordinate and manage, but do not always

---

83 Justice Committee, *Post-legislative scrutiny of Part 2 (encouraging or assisting crime) of the Serious Crime Act 2007*, 13 September 2013, HC 639 2013-14

84 *Memorandum to the Home Affairs Committee and Justice Committee Post-legislative Scrutiny of the Serious Crime Act 2007*, Cm 8502, November 2012

85 HL Deb 8 July 2014 c153

86 *Explanatory Notes,*

87 15 January 2009

88 Home Office, *Statutory Guidance: Injunctions to Prevent Gang-Related Violence*, December 2011

89 Home Office, *Review of the operation of injunctions to prevent gang-related violence*, January 2014

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."[90] In other words, the offence is designed to target professional enablers of organised crime.

Serious Crime Prevention Orders

Extending SCPOs to Scotland

SCPOs are available to courts in England, Wales and Northern Ireland, but not in Scotland, although the offence of being in breach of an SCPO does extend to Scotland.

In September 2013, the Scottish Government published a consultation on the extension of SCPOs to Scotland. [91] This notes that when the earlier *Serious Crime Bill 2006-07* was passing through Westminster in 2007, the Scottish Government decided to consider the effectiveness of SCPOs elsewhere in the UK, before deciding whether these orders should be introduced in Scotland. The executive summary on the Scottish Government website states:

> We propose to introduce a civil order to disrupt those engaged in organised crime from operating effectively. The purpose of the order is to impose binding conditions to prevent individuals or organisations facilitating serious crime. These orders have been in force in England & Wales since 2008 and we seek to extend these provisions to cover Scotland.[92]

The Scottish Government published its response to the consultation on 4 April 2014, noting that the overall consensus amongst responders was that "the introduction of SCPOs in Scotland would be welcomed as long as they were proportionate and adhered to the principles of ECHR" (European Convention on Human Rights).[93]

Clause 45 and **Schedule 1** make the necessary amendments to the 2007 Act to extend SCPOs to Scotland.

Other changes

Clause 46 adds various offences to the list of "serious offences" which can trigger SCPOs. **Clause 47** would allow the Crown Court to replace orders on breach. Currently when the court considers variations of an order once it has been breached, it cannot extend it beyond the five year maximum. Under this clause, the court could discharge the original order if there was a breach, so that a new order for up to five years could be imposed. **Clause 48** would allow an order to be extended beyond five years in particular circumstances on an application by the Director of Public Prosecutions, the Director of the Serious Fraud Office or, in Scotland, the Lord Advocate. Where the person has been charged with a serious offence or where the SCPO has been breached, the court could provide that the order would continue in force pending the outcome of the criminal proceedings. **Clause 49** would repeal free-standing Financial Reporting Orders (available under section s 76-78 of the *Serious Organised Crime and Policing Act 2005*) and instead allow financial reporting requirements to be part of the SCPO.

---

90 *Serious Crime Bill Explanatory Notes*, paragraph 142

91 Scottish Government, *Serious Crime Prevention Orders in Scotland: A Consultation Paper*, September 2013

92 Scottish Government webpage,*Serious Crime Prevention Orders in Scotland*, 19 September 2013 (accessed 4 November 2014)

93 Scottish Government, *Serious Crime Prevention Orders in Scotland – Summary of Consultation Responses*, April 2014

A new definition for gang injunctions

Clause 50 of the Bill would substitute a new section for section 24 of the *Policing and Crime Act 2009* (as amended). There are two main changes:

1. The injunctions would cover “drug dealing activity” as well as “gang-related violence”

2. The definition of a “gang” would be made broader.

Under the current law, for a gang injunction to be imposed, the respondent must have engaged in, or assisted or encouraged, "gang-related violence". This is defined as violence connected to the activities of a group that:

a. consists of at least three 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.[94]

In its review of gang injunctions, the Government indicated that there were some problems with this definition:

> The definition of a gang used in the injunction legislation was seen by police officer participants to have some limitations for addressing local gang issues. In addition, courts’ understanding of gangs and the harm gangs could cause was felt to be generally low, and this was seen to make it difficult to convince courts of the necessity for strict prohibitions.[95]

Further details were given in the impact assessment on this part of the Bill:[96]

> 5. Following consultation with practitioners, we have concluded that this definition is unduly restrictive and more importantly, does not reflect the true nature of how gangs operate in .the United Kingdom. In particular:
>
> - Gangs do not always have a name, emblem or colour or other characteristic which enables its members to be identified as a group. Instead, a group of individuals may operate as a group and engage in criminality with some degree of organisation without these features;
>
> - Gangs are increasingly involved in criminality beyond their own areas and can be less associated with a particular area in a firm way. For example, gangs may exploit drugs markets some distance away. Moreover, gang structures change over time such that it is possible for gangs to disappear from certain locations and re-appear in other locations within the United Kingdom relatively quickly. This can be a result of gangs moving to other locations as a result of black market forces or being pushed out by rival gangs.
>
> 6. The particular activity which "gang-related violence" covers is, by virtue of section 34(5), "violence or a threat of violence". Whilst we are content with this definition, gangs tend to be engaged in a wider range of criminality than simply violence. In addition to violence, gangs are commonly involved in drug dealing, which in turn leads to gang violence.

---

94 in section 34(5) of the *Policing and Crime Act 2009*

95 Ibid p5

96 Home Office, *Amendments to gang injunctions impact assessment*, 14 May 2014

Under **clause 50**, the key features of a gang under the new section would be a group which:

a. consists of at least three people;

b. has one or more characteristics which enable its members to be identified by others as a group; and

c. engages in gang-related violence or is involved in the illegal drug market

4.3 Debate in the Lords

Organised Crime Groups

There was some debate in the Lords about what is now **clause 44**, which would introduce the new offence of participating in activities of organised crime groups. At Second Reading, Home Office minister Lord Taylor said that the clause's target was "those who are either knowingly Nelsonian in their view of what is going on or who deliberately choose to aid a client or some other person in this way."[97] Labour's Baroness Smith of Basildon dubbed it the "Al Capone" clause, and asked whether housing associations, local authorities or private landlords who found their property being used by a drug gang would be liable for prosecution.[98]

A number of peers raised the concerns of accountancy and legal professions about this clause at Second Reading. For example the Institute of Chartered Accountants said when the Bill was first published said that the Bill would have a number of serious unintended consequences, including reducing authorities' access to intelligence.[99] The Law Society commented that the Bill was not clear about how far professionals would need to go to satisfy themselves that their services were not assisting criminal activities down the line somewhere.[100] Similar points were raised during the Committee stage, when the Liberal Democrat peer Baroness Hamwee moved an amendment to restrict "participation" to taking an active part, and pointed out it would catch people who did not actually suspect criminal activity.[101] Lord Taylor said the Government was talking to representatives of professional bodies, and emphasised that the offence would require active participation.[102] However, he said he would "reflect further".[103] The amendment was withdrawn.

At Report stage, Home Office Minister Lord Bates moved a Government amendment to replace the phrase "has reasonable cause to suspect" with "reasonably suspects", and this was welcomed by Baroness Smith and Baroness Hamwee. The amendment was agreed without division.[104]

Serious Crime Prevention Orders

There was little debate on what are now clauses 45 to 49 in the Lords. **Clause 45** (to extend the orders to Scotland) was agreed to without debate at Committee stage, although some

---

97 HL Deb 16 June 2014 c646

98 Ibid c650

99 See for example Institute of Chartered Accountants in England and Wales, *Flawed Serious Crime Bill won't make it easier to convict 'crooked' professionals* and "ICEAW criticises crooked accountants bill", *Economia*, 16 June 2014

100 Law Society, *Government announces Serious Crime Bill*, 25 June 2014

101 HL Deb 8 July 2014 c139

102 Ibid c148

103 Ibid c151

104 HL Deb 14 October 2014 c143-145

technical Government amendments were made to schedule 1.[105] Clauses 46-49 were all agreed to without debate at Committee stage.[106]

Gang injunctions

The Crossbench peer Baroness Meacher moved a new clause at Committee stage which would have introduced "dissuasion panels" to assess the personal circumstances which could have led a person to engage in gang-related violence or gang-related drug dealing activity. For the Government, Lord Taylor said that this was "unnecessary" because an individual's personal circumstances were already taken into account as part of the process of obtaining a gang injunction.[107]

Baroness Meacher had also tabled a series of probing amendments, one of which would have changed the standard of proof when deciding if a person has engaged in gang-related violence or drug dealing from the "balance of probabilities" to "beyond reasonable doubt" (i.e. from the civil to the criminal standard). Lord Taylor said that the fact the proceedings were civil was important because courts had to consider a wide variety of evidence, including from professional witnesses. It would, he said, "be iniquitous to apply the criminal burden of proof to what are civil proceedings."[108] Baroness Meacher withdrew the lead amendment.[109]

Labour's Lord Howarth of Newport returned to the issue of the standard of proof in the debate on whether or not the clause should stand part of the Bill. He argued that the injunctions could draw children aged 14 and over into the criminal justice system without the safeguards that the criminal law provides of statutory defences and the criminal standard of proof. The powers, he noted, were "completely open-ended" and he questioned who the front line professionals were, who had found the current injunctions too prescriptive. Lord Taylor reiterated that the changes followed consultation with practitioners and explained why the definition was being widened:

> Gangs do not always have a name, emblem or colour or other characteristic which enables their members to be identified as a group. Instead, individuals may operate as a group and engage in criminality with some degree of organisation without these features. Although gangs are traditionally associated with particular territories, they are now increasingly involved in criminality beyond their own areas and can be less associated with a particular area. Gang structures are now seen to change over time—they are morphing—such that it is possible for gangs to disappear from certain locations and reappear in other locations relatively quickly. Gangs may move to other locations as a result of black market forces or being pushed out by rival gangs.[110]

He also explained why the injunction was being extended to cover drug-dealing:

> In addition, evidence from police and local authorities shows that urban street gangs often 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. That is why we are expanding the activity in relation to which gang injunctions can be imposed to involvement in the drugs market. This will allow gang injunctions to be used to prevent individuals from engaging in drug-dealing and to protect people from being further

---

105 HL Deb 8 July 2014 c153
106 Ibid, c156
107 HL Deb 8 July 2014 c165
108 Ibid
109 Ibid c168
110 Ibid c174

> drawn into illegal drug-dealing, which is particularly important for vulnerable people, in particular teenage children, of whom we spoke earlier.[111]

5 Seizure and forfeiture of drug cutting agents

5.1 Background

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.[112]

The Home Office *Factsheet: Powers to seize, detain and destroy drug cutting agents*, notes there are currently no laws or regulations that specifically target the domestic trade in cutting agents and gives details of the powers currently available to law enforcement agencies:

> Law enforcement agencies currently use existing powers to seize cutting agents, such as those under the Police and Criminal Evidence Act 1984. However, there are no explicit powers for tackling the domestic trade in cutting agents. This means loopholes exist which can prevent law enforcement from seizing suspected cutting agents. Unless a successful prosecution can be brought, for instance for conspiracy to supply Class A drugs or assisting in the commission of an offence under the Serious Crime Act 2007, law enforcement are limited in the options available for restricting the supply of cutting agents.[113]

Further detail about current enforcement practice is provided in the impact assessment produced for these measures.[114]

The Government's *Drug strategy 2010: 'Reducing demand, restricting supply, building recovery: supporting people to live a drug-free life'* included a commitment to develop a robust approach to stop criminals profiting from trade in cutting agents.[115]

In May 2013, the Home Office published an online consultation, *Introduction of new powers to allow law enforcement agencies to seize and detain chemical substances suspected of being used as drug cutting agents*. It identified the Government's preferred option as being the introduction of new powers to allow law enforcement agencies to seize and detain specified chemical substances that are reasonably suspected of being intended for use in unlawful conduct.

The response to the consultation was published on 31 March 2014. It concluded that, in the light of concerns raised by respondents, rather than specifying the chemical substances that could be seized, law enforcement agencies would be given powers to seize any chemical they suspected of being used as a cutting agent:

> There were 24 responses to the consultation, the majority of which were supportive of the proposals. The main concern from respondents was that the market in cutting agents would shift to new substances. With these concerns in mind, we have amended the proposals such that law enforcement will have the power to seize any chemical they suspect of being used as a cutting agent, rather than only those listed in

---

111 Ibid c175

112 Home Office, *Introduction of new powers to allow law enforcement agencies to seize and detain chemical substances suspected of being used as drug cutting agents*, p3

113 Home Office, *Factsheet: Powers to seize, detain and destroy drug cutting agents*, November 2014, para 3

114 Home Office, *Impact Assessment: New powers to allow law enforcement agencies to seize and detain drug cutting agents*, 7 February 2014, paras 19-22

115 HM Government, *Drug strategy 2010: 'Reducing demand, restricting supply, building recovery: supporting people to live a drug-free life'*, p16

> secondary legislation. The next steps will be to introduce these new powers through primary legislation. We will do this as soon as parliamentary time allows.[116]

5.2 The Bill

Part 4 would extend to the whole of the UK.

Part 4 of the Bill would introduce new powers for law enforcement agencies to seize, detain and destroy chemical substances reasonably suspected of being used as cutting agents for illegal drugs. The *Explanatory Notes* state that the provisions are modelled on the police entry, search and seizure powers in Part 2 of *Police and Criminal Evidence Act 1984* ("PACE") and the cash seizure and forfeiture powers in Chapter 3 of Part 5 of POCA.[117] The powers would be available to UK police forces, the Border Force and the National Crime Agency.[118]

Clause 51 would provide for prior judicial authorisation for powers to search premises for drug-cutting agents and to seize any such agents found on the premises. **Clause 64** states that a substance is used as a drug-cutting agent if it is added to a controlled drug in connection with the unlawful supply or exportation of the drug.

To grant a search and seizure warrant on an application from a police or customs officer, a justice of the peace (or in Scotland, a sheriff) would have to be satisfied that there were reasonable grounds to suspect that a substance intended for use as a cutting agent is on the relevant premises. In determining this, the civil standard of proof (the balance of probabilities) would apply.

A warrant would confer 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.

Clause 52 would make provision about the information that must be contained in a warrant and the making of copies.

The conditions for the search and seizure in pursuance of a warrant would be set out in **Schedule 2** of the Bill and be based on analogous provisions in section 16 of PACE. Failure to comply with the conditions would make the entry and search of premises unlawful (**clause 53(2)**).

Clause 53(3) would provide that a police or customs officer is able to use reasonable force, if necessary, to enter premises to execute a search and seizure warrant. It would be an offence to obstruct an officer executing a warrant (**clause 53(4)**).

Clause 54 would enable a police or customs officer searching premises under a search and seizure warrant to seize any substance found there which the officer has reasonable grounds for suspecting is intended for use as a drug-cutting agent.

Clause 55 would provide a free-standing power to seize, without warrant, a substance reasonably suspected to be a drug cutting agent. The *Explanatory Notes* state that this power would enable a police or customs officer to seize such substances when they are lawfully on the premises for some other purpose.

---

116 HM Government, *Introduction of new powers to allow law enforcement agencies to seize, detain and destroy chemical substances suspected of being used as drug cutting agents. Consultation response*, p3

117 *Explanatory Notes*, para 221

118 Home Office, *Factsheet: Powers to seize, detain and destroy drug cutting agents*, November 2014

Clause 56 would make provision for the issue of a notice to a person from whom any substance was seized in accordance with clauses 54 or 55, and if the officer thinks that the substance may belong to a different person, to that person also.

Clause 57 would provide an ancillary power to seize any containers in which substances reasonably suspected of being used as drug-cutting agents are stored.

Law enforcement agencies would be able to retain suspected drug-cutting agents seized under clause 54 or 55 for an initial period of 30 days under **Clause 58**. **Clause 59** would enable a police or customs officer to apply for an order authorising their continued retention. The order would be made by a magistrates' court or a justice of the peace in England and Wales (or a Sheriff in Scotland, or a court of summary jurisdiction in Northern Ireland) if satisfied that continued retention of the substance is justified whilst its intended use is investigated. An order could also be made while consideration is given to bringing criminal proceedings, or if such proceedings have been commenced but have not yet concluded.

Where criminal proceedings have been initiated an order would be able to continue retention until the conclusion of proceedings, otherwise the maximum period of retention would be 60 days.

Clause 60 would enable a magistrates' court in England and Wales (or Sherriff in Scotland, or a court of summary jurisdiction in Northern Ireland), on application by a police or customs officer to order forfeiture of a substance if the court is satisfied that it is intended for use as a drug-cutting agent. The civil standard of proof (the balance of probabilities) would apply. **Clause 61** would provide a right of appeal against a decision under **clause 60**.[119]

Clause 62 would provide for the seized substance to be returned to the person entitled to it where a court determined that it was not intended for use as a drug cutting agent. **Clause 63** would enable the owner of a substance seized but nor forfeited to apply to the relevant court or sheriff for compensation. The court or sheriff would be able to order compensation to be paid if satisfied that the applicant has suffered loss as a result of the retention of the substance. Compensation would normally be ordered at whatever proportion of the value of the substance that the court/ sheriff thought reasonable. In exceptional cases the amount may be higher than the market value of the substance.

5.3 Debate in the Lords

At Committee stage, Baroness Hanwee moved an amendment querying why the Bill provided (in what was then clause 56, now clause 59) that, when the court has authorised the continuing retention of a substance, notice is given only to a person entitled to the substance and not also to the person from who the substance was seized.

At Report stage, the Government agreed that her suggested amendment would strengthen the Bill and introduced amendments extending the notice provision in the particular clause identified and in other clauses where the Bill had originally required notice to be given to a person entitled to the substance.[120]

6 Child cruelty

Clause 65 of the Bill would make various amendments to section 1 of the *Children and Young Persons Act 1933*, which sets out the offence of cruelty to children under 16. Full

---

[119] In England and Wales to the Crown Court, in Scotland to the Sheriff Appeal Court and in Northern Ireland to a county court (clause 61(3))

[120] HL Deb 14 October 2014 c150

background on this issue is set out in Library Standard Note 6372 *Calls for reform of the criminal law on child neglect*.

6.1 Background

Under section 1 of the *Children and Young Persons Act 1933*, any person aged 16 or over who has responsibility for a child under that age commits an offence if he wilfully assaults, ill-treats, neglects, abandons or exposes that child (or causes or procures him to be so treated) in a manner likely to cause him unnecessary suffering or injury to health.

The Act goes on to provide that a person will be deemed to have neglected a child in the following two scenarios:

- where a parent, legal guardian or other person legally liable to maintain a child fails to provide adequate food, clothing, medical aid or lodging for him (or fails to take steps to procure it to be proved under relevant legislation); and

- where it is proved that the death of an infant under three years of age was caused by suffocation (not caused by disease or the presence of any foreign body in the infant's throat or air passages) while he was in bed with some other person aged 16 or over, and that other person was under the influence of drink when he went to bed.

6.2 Calls for reform

In April 2012, the charity Action for Children launched a campaign calling for a review of the law on child neglect.[121] It published a report which argued that the Act sought only to protect children's very basic physical needs and failed to reflect their emotional and developmental needs or the current recognition of children as individuals with rights.[122]

In February 2013 the charity published a further report, *The criminal law and child neglect: an independent analysis and proposals for reform*, which was produced by a group of independent experts convened by Action for Children. The group proposed a new, alternative offence of child maltreatment to replace the offence under section 1 of the 1933 Act.

The offence would have been committed where a person with responsibility for a child intentionally or recklessly subjected the child (or allowed the child to be subjected to) maltreatment and that child suffered, or was likely to suffer, significant harm. Maltreatment would have included neglect, physical abuse, sexual abuse, exploitation and emotional abuse. Harm would have covered impairment of physical or mental health or physical, intellectual, emotional, social or behavioural development.[123]

6.3 The Government's position

In an opposition day debate on safeguarding children on 13 June 2012, Tim Loughton (then Parliamentary Under-Secretary of State for Education) said that changing the law was unnecessary as it was already being interpreted in a contemporary way by the courts and children's services.[124]

---

121 Action for Children news release, *Action for Children calls for law change on neglect*, 23 April 2012

122 Action for Children, *Keeping Children Safe: The case for reforming the law on child neglect,* April 2012

123 Action for Children, *The criminal law and child neglect: an independent analysis and proposals for reform*, February 2013, p10

124 HC Deb 13 June 2012 c408

However, in October 2013 Damian Green stated that he had asked officials to undertake a targeted consultation with the relevant experts to explore the adequacy of the existing offence of child cruelty and report to him before the end of the year.[125]

On 4 June 2014, the Queen's Speech included an announcement that the Government would legislate to "clarify" the 1933 Act to "help protect the most vulnerable children, by ensuring the offence of child cruelty includes the most serious cases of emotional neglect and psychological harm".[126]

6.4 The Bill

Clause 65 would amend section 1 of the 1933 Act to explicitly state that "ill-treatment" could be either physical or non-physical,[127] and that "unnecessary suffering or injury to health" covered both physical and psychological harm.

It would also amend the provisions of the 1933 Act that deem the suffocation of a child under three years when the child is in bed with a drunken person to constitute child neglect.

Clause 65(5) would extend this deeming provision to persons under the influence of prohibited drugs, as well as those under the influence of drink.[128] This new provision would not apply where a person had taken prescribed medication in accordance with a doctor's instructions.[129] It would also extend the provision to persons who were not under the influence of drink or drugs when they first got into bed, but became so before falling asleep.

Clause 65(6)[130] would extend the deeming provision to cover situations where the adult and child are lying on any kind of furniture or surface being used for the purpose of sleeping, not just beds.

6.5 Debate in the Lords

Clause 65 was welcomed in principle, although a number of Members queried whether the clause could go further in updating the law on child cruelty.

Government amendments

At Committee stage, Baroness Butler-Sloss spoke to an amendment that would have replaced the current wording of "ill-treats, neglects" with "physically or emotionally ill-treats, physically or emotionally neglects". It would also have replaced "unnecessary suffering" with "serious harm".[131] She described this as "modern wording" that would bring the offence in line with other child-related legislation.

In response, Home Office minister Lord Taylor of Holbeach said that replacing "unnecessary suffering" with "serious harm" might have the impact of raising the threshold for the offence, which might undermine its effectiveness and make prosecutions harder to secure. However, he was more receptive to the proposal regarding physical and emotional ill-treatment or

---

125 HC Deb 28 October 2013 c355W

126 Gov.uk website, *Queen's Speech 2014* [accessed 20 November 2014] and Prime Minister's Office press notice, *Queen's Speech 2014 – background briefing notes*, 4 June 2014, p71

127 Government amendment added at Report: HL Deb 14 October 2014 c152

128 Government amendment added at Report: HL Deb 14 October 2014 c152

129 This new provision would not apply where a person had taken prescribed medication in accordance with a doctor's instructions: Explanatory Notes, paragraph 256

130 Government amendment added at Report: HL Deb 14 October 2014 c152

131 HL Deb 14 October 2014 c514

neglect, and indicated that the Government would consider this matter further before Report.[132]

On Report, the Lords agreed a Government amendment to clarify that the behaviour needed to meet the ill-treatment element of the offence could be either physical or non-physical. No equivalent amendment was proposed for the neglect element of the offence, as Lord Bates said the Government considered that "a failure to provide for a child's emotional needs is beyond the neglect element of the offence" as a result of case law.[133]

The Lords agreed Government amendments relating to liability for the offence in circumstances where a child under the age of three is suffocated while in bed with a drunken person. Lord Bates said the amendment would "modernise" the existing provisions by extending them to situations involving prohibited drugs, and to suffocations that occur elsewhere than in a bed.[134]

Other areas of debate

There was also detailed debate on the age of the victim, and whether the appropriate mental element for the offence was wilfulness or recklessness. However, no amendments to the Bill were made as a result.

At present, the section 1 offence can only be committed against children aged under 16. A number of Members spoke to amendments that would have extended the scope of the section 1 offence to cover 16 and 17 year old victims. Lord Ponsonby drew attention to the number of children aged over 16 who had been identified as "in need" because of abuse or neglect, or who were recognised as children at risk of significant harm. He said that widening the scope of the offence would "send a signal that 16 to 18 year-olds should be protected in the same way" as those aged under 16.[135]

In response, the Minister commented that young people aged 16 and 17 were generally deemed capable of living independently of their parents, and that those under 16 were generally more vulnerable and dependent upon their carers. For that reason, the Government's view was that the offence should focus on protecting those aged under 16.[136]

The Lords also considered a number of amendments that would have captured "reckless" conduct, as well as "wilful" conduct. Baroness Walmsley said that "wilfully" was considered "difficult to interpret because it is unclear whether it applies to someone's action or failure to act, or to their failure to foresee future consequences of their action or inaction".[137] She added that "recklessly" would also "protect parents and carers where there is any doubt that their action or inaction was due to mental incapacity or excusable ignorance of parenting skills".[138]

In response, the Minister said that "wilful" was a widely understood legal term: "It clearly provides, among other things, that the term "wilful" already implies an intentional or reckless state of mind". He considered that ensuring the concept was understood and appropriately applied by front-line professionals was a matter best left to guidance, rather than the Bill.[139]

---

132 HL Deb 15 July 2014 cc522-3
133 HL Deb 14 October 2014 c152. The amendment appears in the Bill as clause 65(2).
134 HL Deb 14 October 2014 c152. The amendments appear in the Bill as clause 65(5) and (6).
135 HL Deb 15 July 2014 cc514-5
136 HL Deb 15 July 2014 c522
137 HL Deb 15 July 2014 c512
138 Ibid
139 HL Deb 15 July 2014 c522

7 Possession of paedophile manuals

7.1 Background

In April 2014, the Prime Minister said that the Government would make it a criminal offence to possess written material – "paedophile manuals" - that give advice on how to groom and sexually abuse children.[140] According to press reports, the Government decided to take action after GCHQ and the National Crime Agency found examples of the manuals on the internet.[141]

There are a number of existing offences that could apply to the possession of a "paedophile manual" *if* it was illustrated with indecent images or photographs of children[142]:

- section 1 of the *Protection of Children Act 1978* makes it an offence to take, permit to be taken, make, distribute or show, or possess 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 any indecent photograph (or pseudo-photograph) of a child

- section 62 of the *Coroners and Justice Act 2009* makes it an offence to possess "prohibited images" of children – which covers non-photographic visual depictions of child sexual abuse, including 'Hentai' cartoons and computer-generated images of child abuse.

However there is a potential gap in the law in relation to possessing purely written material that gives advice on grooming and sexually abusing children. 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. The Government therefore believes that the 1959 Act would cover the publication (online or offline) of paedophile manuals as well as possessing them for gain.[143] However the 1959 Act would not criminalise the simple possession of written material.[144]

7.2 The Bill

Clause 66 (1) of the Bill would make it an offence "to be in possession of any item that contains advice or guidance about abusing children sexually."

Clause 66(2) sets out three defences for a person charged with the offence:

- that they had a "legitimate reason" for being in possession of the item - this would be a question of fact for a jury to decide on the individual circumstances of a case and could cover, for example, those who have a legitimate work reason for possessing the item[145]

---

140 Christopher Hope, "Cameron to close legal loophole that lets paedophiles download child grooming manuals", *Telegraph*, 27 April 2014

141 Ibid

142 Baroness Williams of Trafford, Government Whip in the Lords, made this point when the *Serious Crime Bill (HL)* was considered in Committee on 15 July 2014 cc543-4; see also Home Office/Ministry of Justice, *Serious Crime Bill – overarching impact assessment*, 2 June 2014 (updated 3 November 2014), which states that "paedophile manuals" have usually been found in collections of material which it is already illegal to possess (p21)

143 Ministry of Justice, *Serious Crime Bill Fact sheet: Offence of possession of paedophile manuals*, November 2014, p1

144 Ibid, p2

145 Explanatory Notes to Bill 116 2014-15, para 261

- that they had not read, viewed or (as appropriate) listened to the item in their possession and did not know, and had no reason to suspect, that it contained advice or guidance about sexually abusing children

- that they had not asked for the item and did not keep it for an "unreasonable time" – this would cover those receiving unsolicited material and who quickly got rid of it[146]

These defences are the same as for other comparable offences - such as the possession of indecent images under the *Criminal Justice Act 1988* and the possession of extreme pornographic images under the *Criminal Justice and Immigration Act 2008*.[147]

The maximum penalty on summary conviction in England and Wales and Northern Ireland would be six months imprisonment.[148] A person convicted on indictment would be liable to a three year maximum prison sentence. The offence would not extend to Scotland.

7.3 Debate in the Lords

At Committee stage Lord Dholakia moved amendment 40BZF on behalf of Lady Hamwee (Liberal Democrat). The amendment sought to replace the legitimate reason defence for possessing a paedophile manual with a narrower one allowing possession only where it was necessary for the prevention or detection of crime.[149]

Replying for the Government, Baroness Williams of Trafford said that the legitimate reason defence was "long-established" in this "sensitive area" of the law and that there was "no reason" to narrow the protection that the defence would provide.[150]

The amendment was withdrawn.

8 Female genital mutilation

Part 5 of the Serious Crime Bill contains a number of provisions on child protection. **Clauses 67-70** are related to female genital mutilation (FGM). The Bill amends the *Female Genital Mutilation Act 2003* to extend the extra-territorial offences, provide anonymity for victims of the offence, create a new civil protection order and create a new offence of failing to protect a girl from FGM.

8.1 Background and the current law

Female genital mutilation is the term used to describe all procedures that involve removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.[151] There are numerous short and long term and often serious risks to health following FGM.

The *Prohibition of Female Circumcision Act 1985* first made FGM a specific criminal offence in the UK.

This was later replaced by *Female Genital Mutilation Act 2003*[152]. The 2003 Act created new offences of assisting a girl to carry out FGM on herself and extra-territorial offences to deter

146 Ibid, para 261
147 Ibid, para 261
148 Section 154 of the *Criminal Justice Act 2003* would allow this to rise to 12 months if commenced; *Explanatory Notes*, para 262
149 HL Deb 15 July 2014 c543
150 HL Deb 15 July 2014 c544
151 WHO, *Female genital mutilation factsheet*, February 2014
152 *Female Genital Mutilation Act 2003*

people from taking girls abroad for FGM. It also increased the penalties for the offence to 14 years imprisonment. The *Female Genital Mutilation Act 2003* applies in England, Wales and Northern Ireland. The *Prohibition of Female Genital Mutilation (Scotland) Act 2005* applies in Scotland and made similar changes to the 1985 Act that previously applied there.

Since its introduction, there have been no successful prosecutions brought under the *Female Genital Mutilation Act 2003*. The first prosecutions under the 2003 Act were announced by the Crown Prosecution Service in March 2014.[153]

In July 2014, the UK Government and UNICEF hosted the first Girl Summit aimed at coordinating international efforts to tackle FGM. A package of measures seeking to eradicate FGM were announced by the Home Secretary at this time.[154] This included a number of new statutory provisions.

A consultation was launched at the Girl Summit on the introduction of a specific civil law measure to provide protection orders for those at risk of FGM.[155] 85% of the responses to this consultation were in favour of the introduction of a civil protection order for girls at risk from FGM and that the forced marriage protection order (FMPO) was a good model for this. 64% of respondents thought that a civil protection order could protect those women and girls who have been victims of FGM.[156] In its response to the consultation the Government announced that it would include a provision for a protection order similar to the FMPO in the group of provisions to be added to the *Serious Crime Bill.*

8.2 The Bill

Clause 67 amends section 4 the *Female Genital Mutilation Act 2003* to extend the extra-territorial jurisdiction. Prohibited acts performed outside the UK by a UK national or a person who is resident in the UK will be covered by the Act.

The clause also amends section 3 of the same Act to extend the offence of assisting a non-UK national to perform FGM so it covers acts done to a person who is a UK national or a person who is resident in the UK. The clause also amends the *Prohibition of Female Genital Mutilation (Scotland) Act 2005* in a similar way.

Clause 68 introduces lifelong anonymity for the alleged victims of FGM. It amends the *Female Genital Mutilation Act 2003* to prohibit the publication of any information which may identify an alleged victim of this offence. The provisions are modelled on those within the *Sexual Offences (Amendment) Act 1992* which provides anonymity for alleged rape victims. The maximum penalty for contravening this prohibition is an unlimited fine in England and Wales.

Clause 69 provides for a new offence of failing to protect a girl from the risk of FGM. If FGM is committed on a girl, any person who has a responsibility for her will be liable for this offence. This clause inserts a new section to provide for this in *the Female Genital Mutilation Act 2003.* The maximum penalty for this offence will be seven years imprisonment.

To be responsible under the new section there are two cases which may apply. In the first case, where the child is under 16 a responsible person will have parental responsibility and have frequent contact with her. In the second case, where the girl is over 18, a responsible person has assumed and not relinquished responsibility for caring for the girl in the manner of a parent. It is a defence to this offence where:

---

153 CPS News brief, *CPS announces first prosecutions for female genital mutilation*, 21 March 2014
154 Home Office, *Home Secretary speech at Girl Summit 2014*, 22 July 2014
155 Gov.uk, *Female genital mutilation: proposal to introduce a civil protection order*, 20 October 2014
156 Ministry of Justice, *Female Genital Mutilation: Proposal to Introduce a Civil Protection Order*, October 2014

- the defendant did not think that there was a significant risk of FGM being committed against the girl at this time, and could not reasonably be expected to be aware

- the defendant took steps to as they could reasonable have been expected to take to protect the girl from FGM

Clause 70 provides for FGM protection orders which can be used to protect a girl who may be at risk of an FGM offence or a girl against whom FGM has been committed. These protection orders are very similar to the forced marriage protection orders in the Family Law Act 1996. The *Female Genital Mutilation Act 2003* is amended to include this, a new Schedule 2 will provide for the making of the orders.

The orders may contain any restrictions or prohibitions which may be needed to protect a girl from FGM, or protect a girl who has already been a victim of FGM. Breach of an order would be a criminal offence with a maximum penalty of five years imprisonment.

8.3 Debate in the Lords

There was widespread support for strengthening the law on FGM during all stages of Bill in the House of Lords. Peers expressed a commitment to implement measures that would lead to more prosecutions for this offence. The main areas that were subject to debate are outlined here.

Assisting or encouraging the promotion of the practice of FGM

The Crossbench Peer, Baroness Meacher tabled an amendment to create a new offence of assisting or encouraging the promotion of FGM. At Report stage of the Bill she explained that the amendment aimed to tackle FGM at its heart. This amendment had support from the National Society for the Prevention of Cruelty to Children (NSPCC) and the Local Government Association. The purpose of the proposed offence would be to bring cases against those promoting FGM in order to prevent it happening:

> Currently, under Sections 44 to 46 of the Serious Crime Act 2007, anyone inciting or carrying out FGM in a particular case can be prosecuted for incitement. The LGA argues, quite rightly, that it is not possible under current law to prosecute someone who in general terms says that there are religious, health or other grounds for carrying out FGM. That is the whole point of this amendment and the whole point of referring to the plural: if somebody preaches to "another or others" that FGM is important to their religion, they are committing an offence. This amendment should make it much easier to bring cases against those who promote this practice. Inhibiting the preaching or promotion of this practice is much better than action ex post. That is what we are all working for: to try to prevent this thing ever happening in the first place. A lot of the focus has been on prosecuting people after they have practised FGM and that is just not good enough.[157]

Baroness Williams of Trafford responded to the debate on the proposed amendment. She said that the Government's new offence of failing to protect a girl from the risk of FGM focuses on those who do not protect their daughters from this practice rather than on those who may only encourage them to do so. She agreed with Baroness Hamwee that the encouragement of FGM would constitute an offence under the provisions of Part 2 of the *Serious Crime Act 2007* on encouraging or assisting crime.[158] Baroness Williams said that

---

[157] HL Deb 28 October 2014 c 1103
[158] HL Deb 28 October 2014 c1109

the Government were not persuaded that creating a specific offence on this was "*necessary or appropriate*.[159]" The amendment was withdrawn.

Baroness Meacher spoke again about the creation of an offence of encouragement of FGM at the Third Reading of the Bill in the Lords. She said that the Government had agreed to have further discussions on this amendment and that she hoped they would table this or a similar amendment during one of the later stages of the Bill. Baroness Williams responded that the Government still needed to be convinced of the need of this new offence. She also expressed concern about a potential conflict of such an offence with Article 10 of the European Convention on Human Rights:

> Finally, we have real concerns about the necessity and proportionality of an offence of encouraging the promotion of FGM, given that it would engage Article 10 of the European Convention on Human Rights which protects freedom of expression. None of us would condone such statements, but it does mean that we have to tread carefully before introducing what amounts to a speech crime. The noble Baroness has briefly touched on these points and has referred to the advice she has recently received from Dexter Dias QC. I am ready and willing to meet both the noble Baroness and Dexter Dias to discuss these issues further. I hope that the offer of a further meeting will go some way to reassure the noble Baroness that we will continue to explore the issues she has raised, although I hope she will understand that I cannot offer her any commitment to bring forward a government amendment on this matter during the remaining stages of the Bill.

The definition of FGM

The Labour Peer, Baroness Smith of Basildon spoke to amendments 44 and 44A at the Report stage of the Bill. These amendments provided for anonymity of alleged victims of FGM, and FGM protection orders, in a very similar way to the Government amendments. However, one of the significant difference between the amendments was the definition of FGM used in amendment 44A.

Baroness Smith set out several concerns with the current definition of FGM in the Female *Genital Mutilation Act 2003.* The main one was that the practice of reinfibulation was not covered here.

Infibulation is described by the World Health Organisation as follows:

> ..narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner, or outer, labia, with or without removal of the clitoris.

During childbirth the covering of the vagina has to be removed to allow the woman to give birth. The practice of reinfibulation refers to when the tissue is re-stitched to reseal the area. Baroness Smith stated that the Bar Human Rights Committee and Doughty Street Chambers' lawyers had drawn the conclusion that the definition of reinfibulation in the 2003 Act is *"inadequate and confusing*."[160]

She also highlighted the recommendations of House of Commons Home Affairs Select Committee report on FGM. The Committee reported that a number of submissions to its Inquiry had reported there was a lack of clarity as to whether reinfibulation was covered in

---

[159] HL Deb 28 October 2014 c1109
[160] HL Deb 28 October 2014 c1088

the 2003 Act.[161] The Committee recommended that the Government amend the *Female Genital Mutilation Act 2003* to include reinfibulation.

Baroness Smith reported that problems with legal technicalities has led to different interpretations of the legislation:

> Part of the problem is legal technicalities. Reinfibulation does not necessarily mean the cutting of healthy genital tissue; instead, it involves recreating that seal over the vagina. The CPS has interpreted the FGM Act as prohibiting reinfibulation, but health professionals have come to different conclusions about the position in law. The Royal College of Obstetricians and Gynaecologists, along with the Royal College of Midwives, the Royal College of Nursing and others, have interpreted the law's silence to mean that the procedure is not covered by law because it does not involve cutting away additional tissue.[162]

The amendments tabled by Baroness Smith used the World Health Organisation definition of FGM. She explained that this would ensure that the law would be consistent with international understanding of these practices and clarify the confusion around issues such as reinfibulation.

In response to the debate on these amendments, Baroness Williams of Trafford confirmed that in the Government's view, reinfibulation is covered by the 2003 Act. She said that this was on the basis that if infibulation is an offence, then reinfibulation is equally an offence.[163] The multi-agency guidelines on FGM[164] make clear that this is the case. Amendment 44 was withdrawn and amendment 44A was not moved.

The issue was again debated at the Third Reading stage in the House of Lords. Baroness Williams reiterated the Government's view that reinfibulation was covered by the wording in the 2003 Act but said that there may be a need to communicate this point better to practitioners:

> I have tried to persuade the noble Baroness of the Government's firm view, which I set out on Report and reiterate today, that reinfibulation is already covered by the wording of the 2003 Act. As infibulation is an offence under that Act, so is reinfibulation. That reinfibulation or resuturing is an offence is clearly stated in the multi-agency practice guidelines on FGM and in the guidance of almost all of the relevant royal colleges. There may of course be a need to communicate this point to practitioners more effectively—I think there will be—but we do not accept that there is currently any need to clarify the law.[165]

Since the Third Reading of the Bill in the House of Lords, the Government response to the House of Commons Home Affairs Select Committee report has been published.[166] On the issue of reinfibulation, the Government state that its view is that this practice is covered by the *Female Genital Mutilation Act 2003.* The response highlights that the first prosecutions under this legislation, announced in March 2014 involve a case of reinfibulation, and that there should be some guidance from the courts on this issue in due course.

---

161 Home Affairs Select Committee, Female genital mutilation: the case for a national action plan, 25 June 2014
162 HL Deb 28 October 2014 C1086
163 HL Deb 28 October 2014 C1096
164 HM Government, *Multi-Agency Practice Guidelines on FGM*, 2014
165 HL Deb 5 November 2014 c1639
166 *Government Response to the Second Report from the Home Affairs Select Committee Session 2014-15 HC 201: Female Genital Mutilation: the Case for a National Action Plan*, Cm 8979, December 2014

FGM protection orders

Baroness Smith of Basildon also tabled an amendment very similar to that tabled by the Government at Report stage on FGM protection orders. The main difference was that this amendment provides for FGM protection orders in family law instead of criminal law. The opposition amendment sought to amend the *Family Law Act 1996* and not the *Female Genital Mutilation Act 2003.* Baroness Smith said there were a number of benefits to these orders being provided under family law as opposed to criminal law:

> There is an opportunity to better protect the child by amending the Family Law Act, both in terms of the remedies available and the enforcement of the legislation. We have seen already with the existing 2003 legislation that that is quite difficult. I appreciate that the Government have a consequential amendment, Amendment 50A, that in effect links these provisions to the family law, but I hope that the Minister can help on this. I am curious as to why the Government have chosen that route. It is not the route that was used in other cases. I am convinced that we are seeking the same outcome but we want to be convinced that the Government's approach will still ensure that the joined-up approach to child protection, which is so vital in these cases, will be there. We do not disagree with the Government at all on the intention and the principle. We just want to ensure that we have the right route. We prefer—and our evidence backs this—the route through family law as a better approach than amending the 2003 legislation.[167]

Baroness Butler-Sloss commented on this amendment. She said that, as former president of the Family Division, she did not think it made any difference where the protection orders sat in law, so long as the consideration of FGM cases was done in the single family court and heard by High Court judges or circuit judges.[168]

Responding to the debate, Baroness Williams of Trafford outlined that the provisions on FGM protection orders closely model the forced marriage protection orders provided for in the *Family Law Act 1996.* She said the Government did not feel that the court's powers were undermined by the provisions being in the criminal law:

> The noble Baroness, Lady Smith, questioned whether putting FGM protection order provisions in the FGM Act 2003 undermines the court's powers, compared to putting them in the Family Law Act 1996. We do not think that that is so. The proceedings would be in the family court, with the full range of powers of the court, and expressly without prejudice to any other protective powers that the court may have. The location of the provisions does not affect this. Indeed, it would be helpful to practitioners to have all FGM-related provisions in one statute. The noble and learned Baroness, Lady Butler-Sloss, made that point. She also stressed the point about the proceedings going to the family court. I point noble Lords to paragraph 17(1) of new Schedule 2, which makes it clear that the proceedings are in the family court.[169]

At the Third Reading of the *Serious Crime Bill 2014*, Baroness Williams reported that the Government remained of the view that it is sensible to have all the provisions relating to this area of law in one place.[170]

Legal aid

The issue of whether legal aid would be available for FGM protection orders was raised by Baroness Smith of Basildon during the Third Reading stage in the House of Lords. Baroness

---

167 HL Deb 28 October 2014 c1087
168 HL Deb 28 October 2014 c1091
169 HL Deb 28 October 2014 c 1097
170 HL Deb 5 November 2014 c 1638

Williams of Trafford responded that the Government were giving this consideration and would clarify its position in due course.[171]

Following the Third Reading of the Bill, there have been Parliamentary questions enquiring about the provision of legal aid. In a question for short debate on FGM in the Lords, Baroness Smith reported that a specific provision had to be included in the *Legal Aid, Sentencing and Punishment of offenders Act 2012* to allow for legal aid funding for forced marriage protection orders. This had not been the case so far with FGM protection orders:

> During the passage of the LASPO Bill, because of the changes made to legal aid by the Government, there was a specific provision was made for forced marriage orders, in paragraph 16 to Schedule 1. No such provision has yet been made for FGM orders. I find it strange that the Government would consider bringing in such orders without providing these young girls or those acting on their behalf to prevent them being mutilated with the ability to bring something before the courts and have legal aid. Are the Government intending to make legal aid available? If not, or if the position remains unclear, how does the Minister expect the orders to be obtained and how many does he think that there will be?[172]

The response to these has been that the Government is still considering this issue.[173]

9 Knives and offensive weapons in prisons

9.1 Background and policy

Section 40A of the *Prison Act 1952* (as amended) sets out three lists of those articles which may not be brought into a prison without authorisation. List A articles are: a controlled drug; an explosive; any firearm or ammunition, and any other offensive weapon.[174] List B articles are alcohol; a mobile telephone; a camera; and a sound recording device. A List C article is any article or substance prescribed for this purpose by the prison rules.[175] Knives are not identified separately on List A or B.

Relevant policy on conveyance and possession of prohibited items is set out in *Prison Service Instruction 10/2012* and various authorisations under the existing regime are given in Annex 2 to that instruction.[176] The Home Office supplementary briefing on this aspect of the Bill also offers some examples:

> For example, in relation to the existing offence of unauthorised conveyance into or out of a prison of an offensive weapon, paragraphs 7 to 11 of Annex 2 to Prison Service Instructions 10/2012 confers authorisation on a number of specified classes of person, namely Sikh members of the Chaplaincy carrying the Kirpan, delivery drivers conveying into a prison knives, tools or other items that might be deemed offensive and police officers carrying an extendable baton or items of personal protection equipment.[177]

---

171 HL Deb 5 November 2014 c1639

172 HL Deb 11 December 2014 GC533

173 HL Deb 11 December 2014 GC535

174 As defined in section 1(9) of the *Police and Criminal Evidence Act 1984*; that is, any article made or adapted for use for causing injury to persons; or intended by the person having it with him for such use by him or by some other person.

175 *The Prison Rules 1999*, SI 1999/728, as consolidated in January 2010.

176 Ministry of Justice/National Offender Management Service *Prison Service Instruction 20/2012: Conveyance and Possession of Prohibited Items and Other Related Offences*, 26 March 2012

177 Home Office, *Serious Crime Bill: Delegated Powers – Supplementary Memorandum by the Home Office*, 7 October 2014: paragraph 8

A reply to a PQ in July 2014 indicated that the number of knives or other weapons found in prisons was not recorded as a discrete category:

> Prisons deploy a comprehensive range of robust searching and security techniques to detect, deter and disrupt the supply of unauthorised items, including weapons, both at the point of entry to the prison or concealed within the prison.
>
> The number of incidents recorded of knives or other weapons being confiscated by staff, and how many prisoners have been found in possession of knives or other weapons, in each prison in England and Wales in each year between 2011 and 2013 is recorded on a central incident reporting system, but not in a discrete category. (…)[178]

9.2 The Bill: new clause agreed in the Lords

On the second day of Report in the Lords, a Government amendment (amendment 48) was tabled, which would add a new section 40CA to the *Prison Act 1952* and would create an offence of unauthorised possession in a prison of any article that has a blade or is sharply pointed or any other offensive weapon.[179] The clause would provide for defences where proceedings were being taken for an offence.

The clause would provide too for the authorisation of possession of knives and offensive weapons according to section 40E (1) to (3) of the *Prison Act 1952*. A supplementary briefing by the Home Office describes how authorisations might be granted:

> 7. (…) The intention is that, consistent with current practice under section 40E, the Secretary of State will continue to issue authorisations in respect of all prisons, or prisons of a specified description, through Prison Service Instructions, and authorisations in respect of individual prisons will be issued where appropriate by governors or directors or a person working at a prison who is authorised by the governor or director. [180]

In introducing the amendment, Baroness Williams of Trafford argued that it was wrong that, unlike in public places and schools, the possession of weapons in prison was not a criminal offence and so there was a disparity in available penalties. The amendment would (she said) "put that right". The authorisation framework would, she went on, recognise the reality:

> There are of course legitimate circumstances in which persons in prison, including prisoners, may need to have sharp items or other articles in their possession. For example, a prisoner may need to use a bladed tool in a carpentry session, or may use kitchen knives when preparing meals.

The amendment was **agreed**.[181] It now forms clause 71 of the Bill as brought from the Lords (HC Bill 116).

10 Preparation or training abroad for terrorism

Clause 72 of the Bill would provide for extra-territorial jurisdiction for two offences under the *Terrorism Act 2006*: preparation of terrorist acts and training for terrorism. The clause was not subject to any detailed debate in the Lords.

---

178 HC Deb 7 July 2014 c85W

179 Again, as defined in section 1(9) of the *Police and Criminal Evidence Act 1984*

180 Home Office, *Serious Crime Bill: Delegated Powers – Supplementary Memorandum by the Home Office*, 7 October 2014

181 HL Deb 28 October 2014 cc1144-5

10.1 Background

Under section 5 of the *Terrorism Act 2006*, it is 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.

Section 17 of the 2006 Act provides for extra-territorial jurisdiction for certain offences under the 2006 Act, meaning that those offences may be tried in this country in respect of acts committed abroad. At present, the section 5 offence is not covered by section 17 and so is not subject to extra-territorial jurisdiction. The section 6 offence is only covered by section 17 to the extent that the conduct involved involves training for a "Convention offence". A "Convention offence" is an offence to which EU Member States are required to extend extra-territorial jurisdiction as a result of Article 14 of the *EU Convention on the Prevention of Terrorism*. These are listed in Schedule 1 to the 2006 Act and include offences relating to explosives, biological weapons, hostage-taking, hijacking, and nuclear or chemical weapons.

10.2 The Bill

Clause 72 of the Bill would bring section 5 and section 6 of the 2006 Act fully within the scope of section 17, so that extra-territorial jurisdiction would apply to both offences. The Explanatory Notes state:

> 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 were 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.[182]

10.3 Debate in the Lords

During the clause stand part debate, Lord Rosser asked the Minister to give some examples of the kind of prosecutions that would be made possible by clause 65, which were not possible under existing legislation. He also queried what impact clause 65 would actually have on increasing criminal prosecutions:

> In respect of people coming back from Syria, how is it envisaged that it will in practical terms be possible to gather evidence for a prosecution which relates to what the individual has done in Syria that can be pursued in open court? If the evidence to pursue a prosecution under Clause 65 cannot be used in open court, will a terrorism prevention and investigation measures order be sought, which would enable, for example, intercept evidence and the evidence of informers to be used, albeit it would be to obtain the appropriate order rather than to seek a conviction?
>
> (…)
>
> …it is not clear what the actual impact of Clause 65 will be as much of the evidence that becomes available is, if I have understood the situation correctly, unlikely to be able to be presented in open court and could be used only in seeking a TPIM order.[183]

---

182 Explanatory Notes, para 305
183 HL Deb 15 July 2014 c559

In response, Lord Taylor of Holbeach gave the example of Mashudur Choudhury, who was convicted under section 5 of the 2006 Act of preparing for terrorism in the UK after he travelled from the UK to Syria (via a flight from Gatwick to Turkey).[184] Lord Taylor said that had Choudhury made his preparations outside the UK, it would not have been possible to prosecute him.[185]

He went on to say that "evidence gathering which involves other countries is inherently more challenging than if it were confined to the UK, but this does not mean that prosecution is impossible".[186]

11 Approval of two draft Decisions of the Council of the European Union

Clause 73 of the Bill provides for parliamentary approval of two draft Decisions of the Council of the European Union. Clause 73 was not subject to any debate or amendment in the Lords.

11.1 Background

Clause 73 of the Bill concerns two draft Decisions of the Council of the European Union. The first draft Decision deals with the repeal of a 2007 Decision on EU funding to protect people and critical infrastructure from terrorist attacks and other security-related incidents.[187] The second deals with the renewal of the "Pericles programme", which sets out a harmonised framework for protecting the euro against counterfeiting.[188] Both measures have been cleared by the European Scrutiny Committee and the House of Lords European Union Committee.[189] More detailed background on the content of these draft Decisions is set out in paragraphs 308 to 312 of the *Explanatory Notes*.

The legal basis for both draft Decisions is Article 352 of the *Treaty on the Functioning of the European Union* (TFEU), which 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".[190] Measures based on Article 352 must have the consent of the European Parliament and the unanimous approval of the Council of the European Union.[191]

Under section 8 of the *European Union Act 2011*, a Minister voting on behalf of the UK at the Council of the European Union may only vote in favour of a measure based on Article 352 if:

- the measure has been approved by Act of Parliament;

---

184 See, for example, "First British conviction for Syria-related terror offence", *Guardian*, 20 May 2014

185 HL Deb 15 July 2014 c560

186 HL Deb 15 July 2014 c561

187 *Council Decision repealing Decision 2007/124/EC, Euratom establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme 'Prevention, Preparedness and Consequence Management of Terrorism and other Security related risks'*, Council of the European Union, 15187/13, 12 November 2013

188 *Council Regulation extending to the non-participating Member States the application of Regulation (EU) No …/2012 establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting (the 'Pericles 2020' programme)*, Council of the European Union, 16616/13, 29 November 2013

189 In respect of the first draft Decision, see European Scrutiny Committee, *17th Report of Session 2013-14*, HC 83-xvi; *23rd Report of Session 2013-14*, HC 83-xxi; and *33rd Report of Session 2013-14*, HC 83-xxx; and House of Lords European Union Committee, *Progress of Scrutiny 5th Edition Session 2013-14*. In respect of the second draft Decision, see European Scrutiny Committee, *56th Report of Session 2010-12*, HC 428-li; *2nd Report of Session 2012-13*, HC 86-ii; and *1st Report of Session 2014-15*, HC 219-i; and House of Lords European Union Committee, *Progress of Scrutiny 1st Edition Session 2012-13*.

190 Explanatory Notes, para 307

191 For full background on Article 352, please see section 3.6 of Library Research Paper 10/79 *European Union Bill*

- urgent approval has been given by means of a motion in each House that the Government may support a measure; or

- the measure satisfies certain exemption criteria (which essentially cover measures that are in substance the same as previous Article 352 measures to which the UK has agreed).

Neither the urgent approval nor exemption criteria provisions apply to the two draft Decisions concerned in this case. The measures must therefore be approved by Act of Parliament before the UK is able to vote in favour of them at the Council of the European Union.

11.2 The Bill

Clause 73 of the Bill makes straightforward provision for the two draft Decisions to be approved for the purposes of section 8 of the *European Union Act 2011*.

The clause was not subject to any debate or amendment in the Lords.

12 Protection of children from sexual communications

Although not yet included in the Bill, on 11 December 2014 the Prime Minister announced that the Government would make it illegal for an adult to send a "sexual communication" to a child:

> (…) We've seen an increasing and alarming phenomenon of paedophiles contacting children online over the internet or on their mobile phone. And there can be no grey areas here. If you ask a child to take their clothes off and send you a picture, you are as guilty as if you did that in person. So we're going to change the law. Just as it is illegal to produce and possess images of child abuse, now we're making it illegal for an adult to send a sexual communication to a child. This law will make it clear this is a crime and you will be arrested and prosecuted if you take part in it.[192]

On 9 December 2014, in answer to a PQ to the Ministry of Justice, Mike Penning had said that the Government would complete its consideration of the case for a new offence to prohibit an adult in England and Wales sending a message with sexual content to a child in good time to enable an amendment to be tabled to the Serious Crime Bill in the House of Commons should the Government decide to do so.[193]

12.1 Background

The NSPCC has been campaigning for the Government to use the *Serious Crime Bill* to make it an offence for someone aged over 18 to send a sexual message to a child.[194]

At Report stage, Lord Harris of Haringey (Labour) moved an amendment to make it an offence for an adult to engage in a "sexual communication" with a child or where an adult seeks to elicit a sexual communication in response from a child.[195] Lord Harris said the current law that might apply to these issues was "fragmented and confused", largely pre-dated the widespread use of social networking sites, and did not recognise the nature of the behaviour under consideration.[196]

---

192 Gov.UK, *Prime Minister's speech at #WeProtect Children Online Global Summit*, 11 December 2014

193 PQ 215133 [on sexting], 9 December 2014

194 NSPCC website, *Flaw in the Law: Make it illegal for adults to send sexual messages to children* [accessed 16 December 2014

195 HL Deb 28 October 2014 c1109-1110

196 HL Deb 28 October 2014 c1110

Lord Harris praised the work of the NSPCC in this area. He also said that Childline had reported an increase of 168% in sexual communications with children in the last year.[197]

The Home Office Minister Lord Bates said the Government's "preliminary view"[198] was that the behaviour targeted by Lord Harris was already covered by legislation such as the *Sexual Offences Act 2003*, the *Malicious Communications Act 1988* and the *Communications Act 2003*.[199] However he did say that the Crown Prosecution Service and the police were still considering the issue and that Lord Harris and others could join the discussions.[200] Lord Harris agreed to withdraw his amendment.[201]

At Third Reading, Lord Harris questioned whether the existing legislation was satisfactory and again moved an amendment to make the law on sending sexual communications to children "crystal clear".[202] Replying for the Government, Lord Bates said that despite the legislation that was in place, there was a gap that "needs to be filled":

> (…) In particular, we need to explore further how best to deal with contact between a predatory individual and his victim where the messages are sexual in nature but where the victim is not being asked to respond in any particular way.[203]

Lord Bates thanked the NSPCC for bringing the issue to the Government's attention.[204] Lord Harris withdrew his amendment.[205]

13 Coercive control: definition of domestic violence

The Government announced on 18 December 2014 that it would include a new offence of domestic abuse as an amendment to the Bill, to be introduced at Commons Committee stage. In a summary of responses to a consultation on strengthening the law on domestic abuse, the Home Office said:

> The amendment to the Serious Crime Bill will explicitly criminalise patterns of coercive and controlling behaviour where they are perpetrated against an intimate partner or family member. Like stalking this behaviour may appear innocent, but the cumulative impact on the victim's every-day life will be significant, causing the victim to feel fear, alarm or distress. The emphasis will be on the control that those in abusive intimate relationships (both partners and family members) experience.[206]

There had been press speculation that the Government might amend the Bill to deal with the problem of coercive control in domestic violence. On 20 August 2014 the Home Secretary, Theresa May, launched an 8 week consultation on strengthening current laws on domestic violence. The document, *Strengthening the law on domestic – a consultation* summarised the arguments for and against as follows:

> There are arguments for and against making a specific domestic abuse offence. Victims of domestic abuse often fear the consequences of reporting their abuse for their families and even their perpetrators. Accessing the criminal justice system can be

---

197 HL Deb 28 October 2014 c1110
198 HL Deb 28 October 2014 c1117
199 Lord Bates also referred to the *Protection of Children Act 1978* and the *Criminal Justice Act 1988*
200 HL Deb 28 October 2014 c1119
201 HL Deb 28 October 2014 c1121
202 HL Deb 5 November 2014 c1621-5
203 HL Deb 5 November 2014 c1631
204 HL Deb 5 November 2014 c1632
205 HL Deb 5 November 2014 c1633
206 Home Office, *Strengthening the Law on Domestic Abuse Consultation- Summary of Responses*, December 2014, p11

> intimidating, particularly where a victim is likely to remain emotionally involved with their perpetrator. In making new laws we must carefully consider the concerns victims may have about accessing the criminal justice system. Creating a new offence may also be seen as duplicating existing legislation relating to stalking and harassment, and distracting frontline agencies from the fundamental operational changes that are urgently needed to use the existing framework effectively.
>
> Conversely, the HMIC report on domestic abuse makes clear that the police fail to see domestic abuse, particularly in its non-violent form, as a serious crime. Acts that are clearly criminal are not referred for prosecution and arrest rate varies widely. Creating a specific offence of domestic abuse may send a clear, consistent message to frontline agencies that non-violent control in an intimate relationship is criminal. Explicitly capturing this in legislation may also help victims identify the behaviour they are suffering as wrong and encourage them to report it, and cause perpetrators to rethink their controlling behaviour.
>
> The Government is seeking views on whether the law needs to be strengthened by creating a specific offence that criminalises coercive and controlling behaviour in intimate relationships, in line with the existing non-statutory definition. [207]

In response, the Labour Shadow Home Secretary, Yvette Cooper, said that Labour were committed to new legislation in the first Queen's Speech of a Labour Government and to national standards for police, prosecution and support services, as well as a Commissioner for Domestic and Sexual Violence.[208]

Further details are available from a speech made by Ms Cooper on 28 July 2014:

> A Labour government that would make tackling violence against women and girls a top priority, with legislation ready for the first Queen's Speech, new national standards and a commissioner to ensure they are enforced. And compulsory sex and relationship education to teach zero tolerance of violence in relationships.[209]

The subject was debated in the Lords on 28 October 2014 when Lord Wigley spoke to a probing amendment on the definition of domestic violence as a serious crime.[210] In response, Lord Bates, for the Government, said that the results of the consultation were being awaited, with over 700 responses to be considered. The amendment was not moved.[211]

---

207 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344674/Strengthening_the_law_on_Domestic_Abuse_-_A_Consultation_WEB.PDF

208 Labour Press "19 August 2014 Response to Home Office Consultation on Domestic Violence"

209 Labour Press 28 July 2014 "The Choice on Police and Crime: Yvette Cooper's speech" See also "Labour vows action on rape and abuse as shadow Home Secretary announces 'women's champion' to tackle domestic and sexual violence" 22 September 2013 *Independent on Sunday*

210 HL Deb 28 October 2014 c1139

211 HL Deb 28 October 2014 c1154