SERIOUS CRIME BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY THE HOME OFFICE AND MINISTRY OF JUSTICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Serious Crime Bill. The memorandum has been prepared by the Home Office and the Ministry of Justice. On introduction of the Bill in the House of Lords, the Minister for Criminal Information (Lord Taylor of Holbeach) has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

Summary

2. The Bill is in six parts:

- Part 1 makes amendments to the Proceeds of Crime Act 2002;
- Part 2 amends the Computer Misuse Act 1990;
- Part 3 provides for a new offence of participating in the activities of an organised crime group and amends the provisions in respect of serious crime prevention orders and gang injunctions;
- Part 4 provides for the seizure and forfeiture of drug-cutting agents;
- Part 5 amends the criminal law in relation to the offences of child cruelty and female genital mutilation and provides for a new offence of possession of paedophile manuals;
- Part 6 amends the Terrorism Act 2006 to provide for or extend extra-territorial jurisdiction in respect of the offences in section 5 (preparation of terrorist acts) and 6 (training for terrorism) of that Act. This Part also confers parliamentary approval for two draft Council Decisions under Article 352 of the Treaty on the Functioning of the European Union in relation to euro-counterfeiting and the repeal of a spent funding programme to support Member States' efforts to prevent, prepare for, and protect people and critical infrastructure against terrorist attacks. This Part also contains minor and consequential amendments to other enactments and general provisions including commencement.

3. The Government considers that clauses of and Schedules to this Bill which are not mentioned in this memorandum do not engage rights protected under the ECHR.

Part 1: Proceeds of crime

Article 6 and Article 1, Protocol 1

4. Part 1 makes provision in relation to the proceeds of crime, and in particular, provisions in the Proceeds of Crime Act 2002 ("POCA") relating to the confiscation of such proceeds. It is well established that the confiscation order regime in POCA may engage Article 6 and Article 1, Protocol 1 ("A1P1") of the ECHR.

5. In *Phillips v UK*[1], the European Court of Human Rights ("ECtHR") considered the ECHR compatibility of the confiscation order regime in the predecessor to POCA (the Drug Trafficking Act 1994), upon which the confiscation order regime in POCA is based. The court held that Article 6(2) was not applicable in confiscation proceedings, and that Article 6(1) did apply, but was not breached in light of the safeguards built in to the statutory regime including the fact that confiscation proceedings are carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. The court also held that whilst A1P1 was engaged by the confiscation regime, it was a proportionate means of combating and deterring drug trafficking and accordingly found no breach.

6. The Supreme Court has also considered the compatibility of the confiscation order regime in POCA and its predecessors with A1P1 on a number of occasions, most recently in *R v Waya*[2]. In that case the court reiterated that the regime was a proportionate means of achieving the legitimate aim of ensuring that criminals (and especially professional criminals engaged in serious organised crime) do not profit from their crimes, and sending a strong deterrent message to that effect – provided that it is "given effect" in accordance with section 3(1) of the Human Rights Act 1998 in a manner which is compliant with the ECHR.

7. Part 1 of the Bill makes a number of changes to the confiscation order regime in POCA including:

- reducing the maximum amount of additional time that a court may allow a defendant to pay amounts owing under a confiscation order;
- changing the test that the court must apply to freeze property that may be subject to a confiscation order from 'reasonable cause to believe' to 'reasonable grounds to suspect';
- providing for longer default sentences of imprisonment for those defendants who do not pay their confiscation orders; and
- giving the Crown Court the power to determine the extent of a defendant's interest in property that may be realised to satisfy a confiscation order.

8. The Government does not consider that any of the changes to the confiscation order regime in POCA provided for in Part 1 of the Bill will affect the compatibility

[1] (2001) 11 BHRC 280

[2] [2012] UKSC 51

of the regime as a whole with Article 6 and A1P1 of the ECHR because the safeguards identified in *Phillips* and *Waya* remain - the proposed legislative changes do not fundamentally weaken or undermine those safeguards.

Article 8

9. Clause 7 provides the court with a new general power to make such order as it considers appropriate to ensure that a confiscation order is effective. New section 13A(4) of POCA, as inserted by clause 7, places an obligation on the court to consider in every case in which it makes a confiscation order, whether an order restricting the defendant's travel outside the UK would be appropriate to ensure that the confiscation order is effective. Paragraph 20 of Schedule 4 amends section 41 of POCA to place a similar duty on the court when considering whether to make a restraint order.

10. The Government considers that an order that restricts a defendant's travel would likely interfere with that defendant's rights under Article 8. As such an order can only be made for the legitimate aim of ensuring that a confiscation order (or restraint order) is effective, and would be made by a court that will be obliged under the Human Rights Act 1998 to exercise their functions compatibly with the ECHR, the Government considers the new power to be compatible with the ECHR.

Part 2: Computer misuse

Unauthorised acts causing serious damage

11. Clause 37 inserts a new offence into the Computer Misuse Act 1990 ("the 1990 Act") of unauthorised acts causing serious damage to human welfare, the environment, the economy or national security. It is an aggravated offence designed to deal with cyber attacks which result in the most serious types of damage, including loss of life. Whilst the concept of 'human welfare' is defined, 'national security', 'the economy' and 'the environment' are not. This does raise an issue under Article 7 relating to legal certainty. However, these terms have been used numerous times in legislation without definition, so the Government is satisfied that they are capable of being applied with a sufficient degree of certainty in this context. While the courts have tended to leave the determination of whether something endangers national security largely for the executive to determine (*Secretary of State for the Home Department v. Rehman* [2001] UKHL 47) it is considered that the term is sufficiently well-understood that a properly instructed jury should be able to grapple with this.

12. The *mens rea* for this offence is two fold. The accused must do an unauthorised act to a computer, which he or she knows is unauthorised. That act must either create a significant risk of, or cause (whether directly or indirectly) the particular damage described. The accused must by doing the act in question either intend or be reckless as to whether such damage is caused. The penalties for this offence will be split. For damage to national security or injury or loss of life, the

penalty will be a maximum of life imprisonment. For damage to the economy, property or the environment, the maximum penalty will be 14 years' imprisonment. This is to provide consistency with analogous offences and proportionality. The offence will extend to the whole of the United Kingdom. The prosecution will have to prove every element of the offence and thus the Government believes that no issue under Article 6 arises.

Part 3: Organised, serious and gang-related crime

Offence of participating in the activities of an organised crime group

13. Clause 41 contains a new participation offence. The purpose of this offence is to plug a gap in the ability of law enforcement agencies to target the wider criminal group and beyond who provide the materials, services, infrastructure and information which enable organised criminal groups to function. The new offence is triable only on indictment and subject to a maximum sentence of five years' imprisonment. A person is guilty of the offence if he or she participates in the criminal activities of an organised crime group knowing or having reasonable cause to suspect that: (a) the activities are criminal activities of an organised crime group; or (b) their participation will help an organised criminal group carry on their criminal activities.

14. 'Criminal activities' are defined as is 'organised crime group'. The Government believes that the offence is sufficiently clear to meet the requirement of legal certainty in Article 7.

15. It is a defence for a person charged with an offence under this section to prove that the person's participation was necessary for a purpose related to the prevention or detection of crime. Article 6(2) provides that everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law. However, the Strasbourg Court has recognised that it is not necessarily contrary to Article 6(2) to place a burden on the accused to prove a defence. Such a burden must be fair in all the circumstances and be within reasonable limits. Factors that may be taken into account include whether the matters that the defence must prove are within the particular knowledge of the accused. The Government believes that the defence meets the requirements of Article 6(2).

Serious Crime Prevention Orders

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

17. Subsections (1) to (4) of clause 43 add various specified firearms offences, offences under the Computer Misuse Act 1990 and the offence in section 6 of the Misuse of Drugs Act 1971 (cultivation of cannabis plants) to Part 1 of Schedule 1 (which relates to England and Wales) to the 2007. Subsections (5) to (8) add the equivalent offences to Part 2 of Schedule 1 to the 2007 Act (which relates to Northern Ireland).

18. When SCPOs were introduced in the 2007, an extensive ECHR analysis was done and the then Government considered that they met the requirements of Articles 6, 7, 8, 10, 11 and A1P1. In particular:

- it was the then Government's view that, applying the principles set out in the case law, orders should be characterised as civil rather than criminal for the purposes of the right to a fair trial under Article 6(1);
- the requirements of Article 7 were met; and
- whilst an order may interfere with a person's rights under Articles 8, 10, 11 or A1P1, any order would be in pursuit of a legitimate aim, or in the case of A1P1 in the general interest; and necessary in a democratic society, in that the action that interfered with the right would meet a pressing social needs and be proportionate to the legitimate aim relied on.

19. The addition of the offences specified above, or the extension to Scotland of SCPOs by clause 42 and Schedule 1, do not alter that analysis.

Financial reporting

20. Subsection (1) of clause 46 provides for the repeal of the Financial Reporting Order regime in Chapter 3 of Part 2 of the Serious Organised Crime and Police Act 2005 ("the 2005 Act"). It is intended that SCPOs be used to require offenders to report on their financial circumstances, instead of having a separate, bespoke financial reporting regime.

21. To that end, subsection (2) of clause 46 makes equivalent provision to section 81 of the 2005 Act and so enables financial information reported by the offender in accordance with an SCPO to be disclosed by law enforcement officers for the purpose of verifying the information, discovering the true position, or for preventing, detecting, investigating or prosecuting crime.

22. Disclosing financial information reported by the offender potentially engages Article 8. As such disclosure would be for a legitimate aim, and would be done by law enforcement officers obliged to exercise the power compatibly with the ECHR, it is the Government's view that these amendments are compatible with Article 8. The analysis pertaining to section 81 of the 2005 Act undertaken by the then Government is directly applicable to the regime that will apply under clause 46.

Gang injunctions

23. Clause 47 substitutes a new section 34 in the Policing and Crime Act 2009 ("the 2009 Act"). The effect is, firstly, to expand the range of activity in relation to which a gang injunction under Part 4 of that Act can be obtained. Currently, the activity in relation to which an injunction can be obtained is "gang-related violence". Clause 47 expands this to include "gang-related drug-dealing activity". Secondly, the term "gang-related" is given a broader meaning.

24. As is currently the case, under clause 47, a court may grant an injunction only once a two-stage test has been satisfied. By virtue of section 49 of the 2009 Act, "court" means the High Court or a county court[3]. The Government considers that Article 6 rights are fully respected by the civil court proceedings as they provide for a fair and public hearing by an independent court. As is currently the case, clause 47 makes it clear that the standard of proof, in relation to the first stage of the test (whether the respondent has engaged in, encouraged or assisted gang-related violence or gang-related drug-dealing activity) is the civil balance of probabilities. The Government considers that since the injunction is a civil order, granted in the civil courts, breach of which is a civil contempt of court, the appropriate burden of proof to be applied is the civil burden of proof. In the case of *Birmingham City Council v James* [2013] EWCA Civ 552, the Court of Appeal, when considering the burden of proof set out in the 2009 Act, noted that Part 4 of that Act represented Parliament's "considered response" to the particular problem of gang-related violence.

25. Section 35 and 36 of the 2009 Act set out details of the contents, including the types of prohibitions and requirements, of the injunction. Any of the prohibitions and requirements has the potential to engage Articles 8, 9, 10 and 11 (and the parallel rights in Articles 13 to 16 of the UN Convention on the Rights of the Child). These are qualified rights. The injunction is aimed at preventing gang-related violence and gang-related drug-dealing activity which constitute legitimate aims, namely the prevention of disorder and crime and safeguarding the rights and freedoms of others. Since the court can only impose a prohibition or requirement that is necessary in order to prevent gang-related violence or gang-related drug-dealing activity, or to protect the person against whom the injunction is granted from gang-related violence or gang-related drug-dealing activity, the Government is satisfied that any restriction will be proportionate and therefore compliant with Articles 8(2), 10(2) and 11(2). Indeed, in the case of *James*, the Court of Appeal found that that in the particular circumstances of that case, the injunction respected the respondent's Article 8 rights. The injunction in that case prevented the respondent from entering a certain area or associating with certain persons. The decision as to what prohibitions or requirements to attach to an injunction will be made by the court who, as a public authority, in exercising that function will need to act compatibly with ECHR rights in any event.

[3] Section 18 of the Crime and Courts Act 2013 makes amendments to provide for applications for gang-related injunctions for 14 to 17 year olds to be heard in the youth court, sitting in a civil capacity, rather than in the county court (or High Court). As the Explanatory Notes to that Act state, "The effect of this measure will be to allow the courts with the most appropriate facilities and expertise in dealing with young people to consider these matters". Section 18 of the Crime and Courts Act 2013 is not yet in force.

26. There are further safeguards in relation to the imposition of an injunction which help to ensure that the exercise of discretion to grant an injunction remains compatible with Convention rights. These include that the court may set review hearings and that the respondent or the applicant can apply for the injunction to be varied or discharged (section 42 of the 2009 Act*)*. Moreover, decisions of the court can be appealed against to a higher court.

27. Under clause 47, the definition of "gang-related" is made more flexible, so that the current requirements that, in order for activity to be "gang-related", a group of at least three people must use "a name, emblem or colour or has any other characteristic that enables its members" and be "associated with a particular area", is dispensed with. These requirements are replaced by a requirement that the group of at least three people "has one or more characteristics that enable its members to be identified by others as a group". This change does not affect the analysis above because the legitimate aims of the prevention of disorder and crime and safeguarding the rights and freedoms of others remain the rationale for the injunction. Rather, clause 47 makes the injunction more effective in these aims, by adopting a less rigid definition of activity which is "gang-related", which takes into account the fact that criminal gangs can take many different forms.

28. The Government is satisfied that this clause is compliant with the ECHR and UN Convention on the Rights of the Child.

Part 4: Seizure and forfeiture of drug-cutting agents

29. These provisions create two new powers: (a) to search for and seize suspected drug cutting agents pursuant to a search warrant specific to that purpose; and (b) a free standing power for a constable or customs officer, when lawfully on any premises, to seize any substance which he or she reasonably suspects to be a drug cutting agent.

30. These provisions potentially engage rights under Articles 6, 8 and A1P1.

Article 6

31. These powers provide that a police or customs officer (defined to include a National Crime Agency officer) must apply to a magistrates' court after the initial period of seizure of 30 days either: (a) to further detain the seized substance while its intended use is further investigated or while linked criminal proceedings for any offence take place; or (b) to apply for an order of forfeiture of the substance. This period applies whether the cutting agents were seized under warrant or without warrant (where the officer was lawfully on the premises). The initial period of 30 days is permitted to allow initial investigation of the nature, provenance and intended use of the substance. This specific time period contrasts with Police and Criminal Evidence Act 1984 powers to seize and retain evidence where no such time limit applies. Furthermore, under these provisions, the officer who seizes the substance must make reasonable efforts to give notice of the seizure and detention of the substance to a person from whom it was

seized or who owns it. Any person who asserts lawful ownership of the substance has a right to be heard by the court when it considers the further detention or forfeiture application and the court may also order the return of the substance if satisfied by any claim of lawful ownership. Given these safeguards, the determination of the issue of detention and forfeiture of cutting agents is in accordance with Article 6.

Article 8

32. These new powers potentially engage Article 8 because they will involve the search under warrant of private premises. In most cases the premises searched are likely to be private commercial premises rather than residential premises. Any interference with a person's rights to a private and family life as a result of these powers of search, seizure and forfeiture will need to be justified under Article 8(2). The new powers will meet the tests of being "in accordance with the law" because the scheme will be clearly prescribed in primary legislation. Seizure of cutting agents pursues the legitimate aim of preventing crime; these powers will be used by police and customs officers to seize and forfeit drug cutting agents before they are used in crime to cut (that is, reduce) the purity of controlled drugs. Any interference will meet the proportionality test for the same reasons as those set out below in respect of A1P1.

Article 1 Protocol 1

33. By reason of the fact that these new powers involve search, seizure and potential forfeiture of suspected cutting agents, they will interfere with property rights and thus engage A1P1. Nevertheless A1P1 permits such interference where it is in accordance with "the public interest and subject to the conditions provided for by law". These new powers meet these tests. These new powers provide a coherent legal framework by which the powers to search for cutting agents under a search warrant, to seize them and detain them for an initial 30 days, to detain them further pending further investigation and to forfeit them are subject to independent court scrutiny at every stage. Initial seizure may only take place where the relevant substances are suspected cutting agents. The framework also provides that any claimant owner's interest may be advanced and tested by the court either on the further detention application or the forfeiture application. Therefore the new powers make adequate provision for the balancing of the public interest in combating crime against any legitimate or potentially legitimate private ownership interest.

34. It is the Government's view that the provisions in Part 4 are compatible with Articles 6 and 8 and A1P1.

Part 5: Protection of children etc

Child cruelty

35. Clause 62 amends section 1 of the Children and Young Persons Act 1933 ("the 1933 Act"). Section 1 currently makes it an offence for a person over the age of

sixteen, who has responsibility for a child under that age, to wilfully assault, ill-treat, neglect, abandon or expose that child in a manner which is likely to cause unnecessary suffering or injury to health. The amendments are intended to clarify that cruelty likely to cause unnecessary psychological suffering or injury to a child, amounts to an offence under section 1 of the 1933 Act. It is the Government's view that such conduct already amounts to an offence under section 1, however the amendments are intended to put the position beyond doubt.

36. Although clause 62 is not intended to make substantive changes to the current law, the Government has nevertheless considered whether section 1 as amended will be compatible with the Convention rights. The Government is satisfied that the provision is compatible with Article 8 on the basis that a parent's right to respect for family life is not affected by the imposition of criminal law sanctions for harming their child (see *Seven Individuals v Sweden, App. No 8811/79*).

37. The Government has also considered whether the concept of 'unnecessary suffering' (and, in particular, 'psychological suffering') is sufficiently clear and precise to meet the requirement of Article 7 that an individual must know in advance whether their conduct will make them criminally liable. In the Government's view, it is. The scope of 'unnecessary suffering' has been subject to a settled line of judicial interpretation over a long period of time. In *R v Whibley* (1938) 26 Cr. App R. 184, for example, the Court of Appeal gave guidance as to the scope of the term, by holding that it must be read by reference to the purpose of Part 1 of the 1933 Act, which concerns the 'prevention of cruelty and exposure to moral and physical danger'. A case involving 'some small mental suffering or anxiety' would not therefore fall within the scope of section 1. *Whibley* also makes clear that mental (or 'psychological') suffering is already covered by section 1. There is nothing in the existing law to suggest the offence is insufficiently precise and there is nothing in the amendment to undermine that analysis.

Possession of paedophile manuals

38. Clause 63(1) makes it an offence to be in possession of an item containing advice or guidance about abusing children sexually. Clause 63(2) provides three defences to possession of the prohibited item. They are modelled on existing defences to comparable possession offences (for example, possession of indecent images of children - section 160(2) of the Criminal Justice Act 1988) and relate, broadly, to: (a) the reason for the defendant's possession; (b) the knowledge that the defendant had about the nature of the information in his possession, and; (c) the circumstances in which the defendant came into possession and disposed of the prohibited material. The proposal raises issues in respect of Articles 6, 7, 8 and 10.

Article 7

39. The Government considers that the ambit of the offence is sufficiently certain to satisfy the requirements of Article 7. The offence is focussed on information that amounts to advice or guidance about abusing children sexually; that is, doing anything that constitutes an offence under the provisions listed in subsection (8) of clause 63 (or doing anything outside England, Wales or Northern Ireland that would constitute such an offence if done in those places). It would be a question of fact for the jury to determine whether the information fell within the ambit of the offence. Conferring such discretion on a jury does not call into question the compatibility of an offence with the requirement of legal certainty, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity (see *O'Carroll v United Kingdom* (2005) 41 E.H.R.R. SE1, where leaving to the jury the question of whether an image was 'indecent' was held to be compatible with Article 7). The meanings of the terms employed in clause 63(1) are either clear on their face or readily discernible by reference to statute and common law. In the Government's view, they are therefore sufficiently clear for a jury to apply.

40. Clause 63(2)(a) (the defence of 'legitimate reason') would be a matter of fact for the jury to decide upon. The Government's view is that a defence of legitimate reason satisfies the principle of legal certainty. It is broadly similar in nature to the defence of 'reasonable excuse', which is available to a person who possesses information of a kind likely to be useful to a person committing or preparing an act of terrorism (as proscribed by section 58 of the Terrorism Act 2000). In *Jobe v United Kingdom* (2011) 53 E.H.R.R. SE17, the ECtHR rejected the claimant's argument that the defence of 'reasonable excuse' under section 58 was too uncertain for the purposes of Article 7. As set out above, the conferral of discretion on a jury is not inconsistent with the requirements of the Convention. It also recognised that the concept of 'reasonable excuse' was not new in English law, and could be found in other English statutes. The concept of 'legitimate reason' is similarly well established, for example, as a defence to the possession of indecent images of children under section 160(2)(a) of the Criminal Justice Act 1988 and possession of extreme pornographic images under section 65(2)(a) of the Criminal Justice and Immigration Act 2008.

Article 6

41. Clause 63(2) places a legal burden on the defendant to establish on the balance of probabilities that a defence is made out. This is also the position, for example, under section 160(2) of the Criminal Justice Act 1988 and other comparable possession offences. The Government's view is that clause 63(2) strikes a fair balance between the demands of the general interest of the community and the protection of the individual's fundamental rights (as per Lord Hope in *R v DPP ex. parte Kebilene* [2000] 2 A.C. 326, p.384). The underlying purpose of the provision is to combat the commission of sexual offences against children, a particularly serious type of offending, which material caught by clause 63(1) could reasonably be expected to assist or facilitate. The matters that must be proved by a defendant in order to make out a defence to possession of such material (for example, the reason for possession, or a failure to appreciate the nature of the material) will be within the defendant's own knowledge and, as such, should not

be onerous to prove. The Government therefore considers the provision to be compatible with the presumption of innocence under Article 6(2).

Article 10

42. It is arguable that Article 10 does not apply to material of this nature, by virtue of the exclusion in Article 17 of the Convention. However, if Article 10 does apply, the Government considers that the material caught by the offence would be likely to fall within its scope (see *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737, where Article 10 applied to material considered by the domestic courts to be obscene and a potential encouragement to commit criminal offences). To the extent that it does fall within its scope, criminalising possession of this material would amount to an interference with Article 10. However, that interference is (for the reasons given above) prescribed by law and clearly justified by reference to a number of legitimate aims in Article 10(2), namely: the prevention of crime, the protection of health or morals and the protection of the rights of others. The Government considers that clause 63 is a proportionate means of meeting those legitimate aims, in view of the fact that the provision is focussed on a very specific type of material relating to the commission of serious crime, does not impose a blanket ban on its possession, and only makes it an offence to possess the material without legitimate reason or in the absence of the other circumstances set out in clause 63(2).

Article 8

43. Insofar as similar issues arise under Article 8(1) as under Article 10, the Government's view is that the measure is justified under Article 8(2) for the same reasons as set out above.

44. A person who was over the age of 18 when convicted, or who was sentenced to a term of at least 12 months' imprisonment, in respect of this offence will be subject to the notification requirements under Part 2 of the Sexual Offences Act 2003 (see paragraph 37 of Schedule 4). The Government considers that such a requirement is commensurate with the seriousness of the offence. Any resultant interference with the offender's right to private life is necessary and justified in the interests of the prevention of crime and the protection of the rights and freedoms of others.

United Nations Convention on the Rights of the Child

45. Insofar as this measure targets material that is capable of assisting and facilitating the sexual abuse of children, it supports the United Kingdom's commitments under Article 34 of the United Nations Convention on the Rights of the Child.

Home Office/Ministry of Justice
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