



Home Office

Lord Bates
Lords Minister
2 Marsham Street
London
SW1P 4DF
www.gov.uk/home-office

Rt Hon Baroness Smith of Basildon
House of Lords
London
SW1A 0PW

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Serious Crime Bill: Government amendments for Lords Report Stage

I am writing to let you have details of the amendments I have tabled today for Report Stage of the Bill, a number of which respond to the debates at Committee Stage.

Amendments to the Proceeds of Crime Act 2002 ("POCA")

Third party claims (amendments to clauses 2 and 25)

Clauses 1 to 4 of the Bill include provisions to ensure that criminal assets cannot be hidden with spouses, associates or other third parties. In particular, it includes provision to enable the courts to make a determination as to the extent of any third party interests in the defendant's property prior to making a confiscation order. We propose to build on these provisions by empowering the court to order a third party to provide any information the court needs to enable it to make such a determination. It is expected that such a power will prove to be particularly useful where a third party has asserted a questionable claim to the defendant's assets, or is simply seeking (in collusion with the defendant) to frustrate the confiscation process. Where a third party fails, without reasonable excuse, to comply with the court order the court will be able to draw the appropriate inference from such a failure. New section 18A of POCA is modelled on section 18, which makes provision for the defendant to supply information to the court in relation to a confiscation order.

Confiscation and the criminal courts charge (amendment to clause 6)

Clause 6 amends section 13 of POCA to provide that where a defendant does not have sufficient resources to satisfy both a confiscation order and any other financial orders made against him or her, priority should be given to the payment of the victim surcharge (along with, as now, any compensation order), before recovered monies are used to discharge the confiscation order. Paragraph 11 of Schedule 8 to the Criminal Justice and Courts Bill includes an amendment to section 13 of POCA to ensure that the court does not take account of any confiscation order before imposing the new criminal courts charge (as provided for in clause 46 of that Bill). We now need to amend this Bill as a consequence of the amendment to section 13 made by the Criminal Justice and Courts Bill. The net effect of these changes will be to preserve the position whereby the court takes no account of any confiscation order when imposing a criminal courts charge, but that payment of a confiscation order takes precedence over payment of the criminal courts charge.

Orders for securing compliance with confiscation order (amendments to clauses 7 and 29)

Clause 7 (and the equivalent provision in clause 29 in respect of Northern Ireland) amends POCA to confer on the courts a power to make an order for the purpose of ensuring that a confiscation order is effective. Such a “compliance order” may, amongst other things, impose a travel ban on the defendant. The clause provides for a right of appeal to the Court of Appeal by the prosecutor against a decision by the Crown Court not to make a compliance order, or by the prosecutor or person affected by a compliance order against the decision to make a compliance order. However, as drafted, the clause does not provide for a right of appeal against a decision of the Crown Court to vary or discharge a compliance order. This is at odds with the existing provision in section 43(2) of POCA (read with section 42(3)) in respect of the variation and discharge of a restraint order (such orders may include provision for the purpose of ensuring compliance with a restraint order). These amendments remedy this omission.

Scottish provisions (new clauses “Orders for securing compliance with confiscation order”, “Compliance orders: appeals by prosecutor”, “Accused persons unlawfully at large” and “Continuation of restraint order after conviction quashed or verdict set aside” and amendments to clauses 16, 19, 20, 22, 23, 71 and 73 and Schedule 4)

Chapter 2 of Part 1 of the Bill replicates for Scotland a number of the changes made by the Bill to the confiscation regime in England and Wales. At the request of the Scottish Government, it is now proposed to replicate further provisions, as follows:

- Enabling the courts to make a “compliance order” imposing overseas travel bans and other restrictions and requirements on an accused person only for the purposes of ensuring that a confiscation order is effective. This generally replicates the provisions in clause 7;
- Ensuring that individuals who abscond before conviction, but are then convicted in their absence may be subject to confiscation. This replicates the provisions in clause 9;

- Increasing the maximum default sentences where offenders fail to pay confiscation orders in respect of amounts over £500,000. This would replicate the provisions in clause 10(1) and (2) (see new section 118(2A) and (2B) of POCA). New section 118(2C) and (2D) provide that where a confiscation order is made by a court in England and Wales or in Northern Ireland, but falls to be enforced in Scotland, the courts in Scotland, when sentencing the defendant for non payment of the order, would apply the default sentences set out in new sections 35(2A) and 185(2A) of POCA (as inserted by clauses 10 and 32), rather than the sentences applicable for non-payment of a fine; and
- Ensuring that a restraint order may be maintained following the quashing of a conviction pending the outcome of a re-trial. This replicates the provisions in clause 12.

At the request of the Scottish Government, clauses 19, 20, 22 and 23 of the Bill make breach of a prohibitory property order and interim administration order a criminal offence. These orders prevent a person from dissipating identified assets during the course of a civil recovery investigation. However, under the existing regime, the focus of these orders is on applying prohibitions on dissipating property rather than on the owners of, or those who control, the property in question. After further consideration and discussion with operational stakeholders, the Scottish Government has concluded that the introduction of these offences would result in a loss of flexibility in the civil recovery regime and has therefore asked for the relevant clauses to be removed from the Bill. Breach of these orders will continue, as now, to be dealt with through contempt of court proceedings.

Variation or discharge of a confiscation order (amendment to clause 30)

Clause 30 makes further provision for the discharge of a confiscation order where the subject of the order has died and it is not possible to recover any assets from the estate of the deceased. This Northern Ireland provision currently empowers the Courts Service in the guise of the 'chief clerk' to apply to the Crown Court for the discharge of a confiscation order in such circumstances. The Northern Ireland Department of Justice has now concluded that this function should rest with the prosecution rather than the Courts Service; this amendment makes the necessary change to clause 30.

Other minor amendments (amendments to Schedule 4)

Schedule 4 to the Bill includes a number of consequential amendments to other provisions in POCA as a result of clause 6 (see above); we have identified the need for one further such amendment - to section 22 of POCA (and to section 107 in relation to Scotland). That section enables the prosecution to go back to the court to have the available amount recalculated, where evidence comes to light that the defendant has more realisable assets than was understood to be the case at the time a confiscation order was made. The amendment will ensure that in deciding whether it is just to vary the confiscation order, the court must take account of any victim surcharge order (or, in Scotland, any restitution order).

The amendment to section 185 of POCA (which applies relevant Northern Ireland legislation in respect of the enforcement of fines to the enforcement of confiscation orders), corrects a drafting error in subsection (3) of that section which erroneously refers to the “Criminal Justice (Northern Ireland) Order 1998” rather than the “Criminal Justice (Children) (Northern Ireland) Order 1998”.

The technical amendment to section 222 of the Criminal Procedure (Scotland) Act 1995 (which relates to the enforcement in Scotland of fines imposed by a court in England and Wales) is consequential upon the provisions in the Bill strengthening the default sentences for non payment of a confiscation order.

Amendments to the Computer Misuse Act 1990 (amendments to clause 40)

Clause 40 of the Bill provides for a new offence of impairing a computer such as to cause serious damage in any country, provided there is a significant link to the UK. The clause provides that the reference to a country includes “the territorial seas adjacent to a country or territory”. In Committee (Hansard, 8 July 2014, columns 123 to 126), Baroness Hamwee queried the meaning of this phrase and whether it would cover, for example, oil rigs outside territorial waters. As Baroness Williams of Trafford indicated in response to Baroness Hamwee’s amendment, the position as to what constitutes the territorial seas of a country is complex and, having looked at the drafting again, we propose to amend the clause so that where the serious damage is to human welfare or to the environment it refers to a “place” rather than a “country”. As a consequence, we no longer need the reference, in new section 3ZA(5)(c)(ii) of the Computer Misuse Act 1990 (inserted by clause 40(2)), to “the territorial seas adjacent to a country or territory”.

Offence of participating in activities of organised crime group (amendment to clause 44)

In Committee, Lord Taylor of Holbeach undertook to consider further your amendment 31N which sought to modify the *mens rea* for the participation offence and the case for a further defence when somebody is acting reasonably (Hansard, 8 July 2014, column 151). In relation to the *mens rea*, concerns were expressed that the offence was drawn too widely and would criminalise the unwitting or naive participant. Under the Bill as drafted, the *mens rea* for the offence is that a person “knows or has reasonable cause to suspect” that he or she was engaging in any activities which are criminal activities of an organised crime group, or will help an organised crime group to carry on criminal activities. To address the concerns, we propose to change the “suspicion” part of the *mens rea* to “reasonably suspects”. This would necessitate the prosecution having to prove both the subjective test that the defendant genuinely suspected and the objective test that that suspicion was reasonable. It would therefore ensure that the naive and unwitting would not be captured as they would not have suspected, even though they had reasonable grounds for doing so.

Having carefully considered the matter further, we have concluded that there is not a compelling case for an additional defence. We consider that a general defence of “acting reasonably” does not offer any additional protection from over-criminalisation beyond that already provided by changing the *mens rea* as outlined above.

On the specific concerns raised in Committee, we consider that participation to which a law enforcement agency has agreed or which is closely related to activity to which consent has been given under the POCA regime, would likely fall within the defence currently in clause 44 (namely that the activity was for a purpose related to the prevention and detection of crime). Moreover, a prosecution in these circumstances is likely to constitute an abuse of process and unlikely to be in the public interest.

Serious Crime Prevention Orders (amendments to Schedule 1 and clause 49)

Clause 45 of and Schedule 1 to the Bill amend Part 1 of the Serious Crime Act 2007 ("the 2007 Act") so as to extend to Scotland the provisions contained there in respect of serious crime prevention orders ("SCPO").

Paragraph 11 of Schedule 1 amends section 10 of the 2007 Act which makes provision for ensuring that the subject of an SCPO has notice of its existence. For the purpose of serving such notice, section 10(3) provides a power for a constable or person authorised by the relevant applicant authority, to enter and search for the person concerned, by force if necessary, in any premises where they have reasonable grounds for believing the subject to be. Section 10(4) provides the definition of "the relevant applicant authority". The effect of the definition is that the relevant applicant authority will be the prosecutor that applied for the order. Paragraph 11 of Schedule 1 accordingly amends the definition of the relevant applicant authority to include the Lord Advocate, but erroneously also refers to the Chief Constable of the Police Service of Scotland; the amendment to paragraph 11 removes this reference.

The drafting amendment to paragraph 17 of Schedule 1 ensures that subsection (3) of new section 22A of the 2007 Act (which provides for SCPOs on conviction) properly refers to "The High Court" rather than "A court".

The technical amendment to paragraph 29 of Schedule 1 in turn amends section 89(1) of the 2007 Act so as to remove the provision whereby any power conferred on Scottish Ministers to make orders under the 2007 Act is exercisable by statutory instrument. Such provision is no longer required given that the Interpretation and Legislative Reform (Scotland) Act 2010 now makes generic provision in respect of the making of orders by Scottish Ministers.

The drafting amendment to clause 49 deletes the definition of a "law enforcement officer" for the purposes of new section 5A of the Serious Crime Act 2007. This provision in new section 5A(7) is unnecessary given that section 5(7) of the 2007 Act defines expressions for the purposes of Part 1 of that Act.

Drug-cutting agents (amendments to clauses 56, 59, 61 and 64)

Part 4 of the Bill provides for the seizure and forfeiture of substances used as drug-cutting agents. Clause 59 allows a police or customs officer to apply to a court for continued retention of the suspected drug-cutting agents, beyond the initial 30 day detention period. In the event that the court authorises the further retention of the substance, but the owner is not present, the responsible officer must make reasonable efforts to give written notice to the person who the officer thinks may be entitled to the substance. In Committee (Hansard, 8 July 2014, columns 187 to 189), Baroness Hamwee queried whether such notice should also be given to the person from whom the substance was seized, if different to the person “entitled” to the substance. Baroness Williams of Trafford undertook to consider this point further. On reflection, we agree that the requirement to give notice only to a person “entitled” to the substance, both in clause 59 and elsewhere in Part 4, is too narrowly drawn and these amendments accordingly require notice to be given both to the person from whom the substance was seized and, if different, to the person to whom the substance belongs.

Offence of child cruelty (amendments to clauses 65 and 71)

Clause 65 clarifies the offence of child cruelty in section 1 of the Children and Young Persons Act 1933, in particular by making it clear that the offence covers cruelty likely to cause physical or psychological suffering or harm to a child. In Committee a number of Peers argued in favour of making further changes to section 1. Lord Taylor undertook to reflect further on the points raised in the debate (Hansard, 15 July 2014, columns 520 to 524). Having done so, we propose to make two further changes to section 1 of the 1933 Act.

The first is to clarify that the behaviour necessary to establish the ill-treatment limb of the offence can be non-physical. In Committee, Baroness Butler-Sloss argued that, as well as clarifying that the offence can be committed where the consequences of the behaviour in question are psychological, further amendments should be made to clarify that the offence can be committed by way of non-physical (for example, emotional) ill-treatment and neglect. The Government’s view is that a failure to provide for a child’s emotional needs is beyond the neglect element of the offence as a result of the House of Lords judgment in *R v Sheppard*. However, we consider that the ill-treatment limb of the offence can relate to non-physical cruelty and the new subsection (1A) of clause 65 makes this explicit.

The second change is to amend section 1(2)(b) of the 1933 Act, which makes specific provision about liability for the child cruelty offence in circumstances where a child under the age of three is suffocated whilst in bed with a drunken person. We consider that this provision continues to have some utility, accordingly we propose to modernise the provision rather than simply repeal it. Our changes will extend the provision to cover circumstances where the person is under the influence of illegal drugs. The amendments also gloss the reference to the suffocation occurring in a bed so that the provision also covers circumstances where an adult suffocates an infant whilst lying next to him or her on any kind of furniture or surface.

The amendment to clause 71 provides that the changes to section 1 of the 1933 act do not have retrospective effect.

I attach a version of section 1 of the 1933 Act incorporating these further proposed changes.

After further consideration, for the reasons set out by Lord Taylor in response to the Committee Stage debate, we remain unpersuaded of the case for: extending the scope of the offence to cover cruelty to young persons aged 16 or 17; replacing or expanding on the test of wilfulness; and for repealing the reference to “unnecessary” suffering or injury.

Extent and commencement (amendments to clauses 72 and 73)

The amendment to clause 72(2) provides that Schedule 3 extends to Northern Ireland, as well as to England and Wales, in the same way as clause 66 (possession of paedophile manuals).

The amendments to clause 73(2) and (3) provide for various minor and consequential amendments made by Schedule 4 to the Bill to be commenced by the Scottish Ministers or the Department of Justice in Northern Ireland, as appropriate; the minor and consequential amendments in question relate to legislation which extends only to Scotland or Northern Ireland. Before making commencement regulations, Scottish Ministers and the Department of Justice in Northern Ireland will be required to consult the Secretary of State.

The amendment to clause 73(7)(d) requires the Secretary of State to consult the Department of Justice in Northern Ireland before commencing Schedule 3 in Northern Ireland (that Schedule relates to the new offence of possession of a paedophile manual provided for in clause 66).

Possession of knives and other offensive weapons in the secure estate (new clause “*Knives and offensive weapons in prisons*” and amendments to clauses 71 and 72 and to the long title)

Assaults and violence are a particular problem within the prison environment. If left unchecked, they can quickly destabilise a prison and threaten the safety of both staff and prisoners. Whilst assaults without weapons are more common, assaults with weapons are increasing and can inflict life-changing injuries on both staff and other prisoners.

It is not currently a criminal offence to possess an offensive weapon within prison. The offences of having an article with blade or point (or offensive weapon), in section 1 of the Prevention of Crime Act 1953 and sections 139 and 139A of the Criminal Justice Act 1988, are confined to public places or schools. Under section 139(7), the term “public place” includes any place to which the public have, or are permitted access. A prison would not fall within the definition of a public place in section 139(7) and possession of such a weapon is not therefore a criminal offence.

Whilst the possession offence for an offensive weapon is currently dealt with as a disciplinary offence within prison (for possession of an unauthorised item), the maximum penalty for the internal disciplinary offence is 42 added days served in prison compared to the four years' maximum for the equivalent offence in the community. As such the disparity in the deterrent effect is considerable.

The new clause inserts new section 40CA into the Prison Act 1952 and provides for a new offence of unauthorised possession within prison (including Young Offender Institutes) of a bladed or pointed article or other offensive weapon (as defined in section 1(9) of the Police and Criminal Evidence Act 1984, namely any article made or adapted for causing injury to persons or intended by the person having it with him for such use by him or some other person).

The new offence extends to England and Wales (see amendment to clause 72). The amendment to clause 71 contains a standard transitional provision in respect of the maximum sentence on summary conviction.

I have attached supplementary delegated powers and ECHR memorandums in respect of relevant amendments.

I am copying this letter to those Peers who spoke during Committee Stage debates, Lord Laming, Baroness Thomas of Winchester (Chairman, Delegated Powers and Regulatory Reform Committee), Keith Vaz (Chair, Home Affairs Select Committee), Sir Alan Beith (Chair, Justice Select Committee), Dr Hywel Francis (Chair, Joint Committee on Human Rights), Yvette Cooper and Emily Thornberry. I am also placing a copy in the Library of the House and on the Bill page of the Government website.

Justin Widdows,
Minister

Lord Bates

**SECTION 1 OF THE CHILDREN AND YOUNG PERSONS ACT 1933 AS AMENDED BY
CLAUSE 65 AND GOVERNMENT AMENDMENTS FOR REPORT**

1 Cruelty to persons under sixteen.

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

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

(b) on summary conviction, to a fine not exceeding £400 pounds, or alternatively, or in addition thereto, to imprisonment for any term not exceeding six months.

(2) For the purposes of this section—

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

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

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

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

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

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

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