LEGISLATIVE CONSENT MEMORANDUM

SERIOUS CRIME BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the relevant provisions of the Serious Crime Bill, introduced in the House of Lords on 5 June 2014, relating to amendments to the Proceeds of Crime Act 2002; amendments to the Computer Misuse Act 1990; amendments to the Serious Crime Act 2007 in respect of serious crime prevention orders; the repeal of provisions within the Serious Organised Crime and Police Act 2005 in respect of financial reporting orders; and the amendments to the Prohibition of Female Genital Mutilation (Scotland) Act 2005 to include habitual UK residents, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9B.3.1(a) of the Parliament’s Standing Orders. The Serious Crime Bill (“the Bill”) was introduced in the House of Lords on 5 June 2014. The latest version of the Bill can be found at:

http://services.parliament.uk/bills/2014-15/seriouscrime.html

Content of the Bill

3. The principal objective of the Bill is to ensure that law enforcement agencies have effective legal powers to deal with the threat from serious organised crime, much of this is achieved by updating existing legislation. Its content also supports implementation of Scotland’s strategy for tackling serious organised crime.

The Bill is in six parts:-

**Part 1** makes further provision in respect of the recovery of property derived from the proceeds of crime. These provisions strengthen the operation of the asset recovery process by closing loopholes in the Proceeds of Crime Act 2002.

**Part 2** makes amendments to the Computer Misuse Act 1990.

**Part 3** amends the Serious Crime Act 2007 in respect of serious crime prevention orders, and repeals the provisions in the Serious Organised Crime and Police Act 2005 which relate to financial reporting orders. In England and Wales, it provides for a new offence of participating in the activities of an organised crime group and strengthens the arrangements for protecting the public from serious crime and gang-related activity.

**Part 4** provides for the seizure and forfeiture of substances used as drug-cutting agents.

**Part 5** extends the extra-territorial jurisdiction in relation to the offence of female genital mutilation. It also amends the criminal law in England and Wales in relation to the offence of child cruelty, and provides for a new offence of possession of a “paedophile manual”.

LCM(S4) 33.1  1  Session 4 (2014)
**Part 6** provides for and extends extra-territorial jurisdiction in respect of the offences in sections 5 (preparation of terrorist acts) and 6 (training for terrorism) of the Terrorism Act 2006, and confers parliamentary approval (as required by section 8 of the European Union Act 2011) for two draft Council Decisions under Article 352 of the Treaty on the Functioning of the European Union (“the TFEU”) relating to serious crime. It also contains minor and consequential amendments to other enactments and general provisions, including provisions on extent and commencement.

4. The Bill contains provisions which extend to Scotland, but relate to matters that are reserved to the UK Parliament under Schedule 5 to the Scotland Act 1998. These are the provisions which relate to drug-cutting agents (Part 4 and Schedule 2), the amendments to the Terrorism Act 2006 (clause 71) and approval of the two draft Council Decisions under Article 352 of the TFEU (clause 72).

5. There are also provisions which do not apply to Scotland, such as the new offences of participating in the activities of an organised crime group (clause 44), injunctions to prevent gang-related violence and drug-dealing activity (clause 50), child cruelty (clause 65), and also possession of a “paedophile manual” (clause 66).

**Provisions which relate to Scotland**

6. The provisions within the Bill which apply to Scotland and require the legislative consent of the Scottish Parliament relate to the amendments to the Proceeds of Crime Act 2002 (“POCA”); the amendments to the Computer Misuse Act 1990 (“CMA”); the amendments to the Serious Crime Act 2007 (“2007 Act”) in respect of serious crime prevention orders (SCPOs); the repeal of provisions in the Serious Organised Crime and Police Act 2005 (“SOCPA”) in respect of financial reporting orders (FROs); and the amendments to the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (“2005 Act”).

7. The following paragraphs provide the policy intent and background in relation to the amendments. **The Annex provides full details of the individual clauses of the Bill that relate to Scotland** for which consent is sought and provides background on their application in Scotland.
Policy intent

8. To strengthen POCA to make the legislation more effective in Scotland, and to ensure that its application in Scotland is more consistent with its application in the rest of the UK in order to improve how serious organised crime can be dealt with. The practical impact of these amendments is that the powers available to both prosecutors and the Civil Recovery Unit at the Crown Office are reinforced through the strengthening of the legislation.

Background

9. Serious organised crime can take place across the different countries of the UK and it is important that a consistent approach in law is adopted as much as possible when our different justice agencies are taking action to tackle such criminal activity. There is extensive existing legislation in this area, including POCA, which sets out the legislative framework for the recovery of criminal assets. There are four main routes for recovery of assets through POCA: criminal confiscation (post-conviction); civil recovery (used where no conviction has taken place); cash seizure and forfeiture; and taxation. POCA also provides for a number of investigative powers, such as search and seizure powers, and powers to apply for production orders and disclosure orders, and allows for the “restraint” of assets to prevent dissipation of assets prior to a confiscation order being made.

10. POCA is an extremely powerful and flexible tool which has resulted in more than £80 million being removed from criminals in Scotland in the last ten years, which otherwise could have been reinvested in criminal enterprises. However, crime evolves and the legislation must evolve with it to maximise opportunities to recover proceeds of crime.

11. The amendments to POCA contain provisions that are specific measures relating only to Scotland and which have been requested by the Scottish Government (clauses 19 and 23). The provisions requested by the Scottish Government will further align Scottish proceeds of crime legislation with the proceeds of crime legislation in the rest of the UK, to help ensure a consistent approach is taken to tackling serious crime that can and does cross borders.

12. Initially, the Bill contained provisions for a statutory offence of breach of prohibitory property orders and interim administrator orders. However, at the request of the Scottish Government, these particular clauses were removed at Lords Report on 14 October 2014 following careful consideration and discussion with stakeholders.

13. There are also provisions in the Bill proposed by the UK Government which the Scottish Government agrees strengthen the operation of the asset recovery process. Consequently, the Scottish Government was content that equivalent provision should be made for Scotland. The relevant provisions are contained in clauses 15, 20, 22, 37 and 38, and in the confiscation-related amendments (detailed in the Annex) that were introduced at Report Stage in the House of Lords on 14 October 2014.
Part 2: Computer Misuse

Clauses 40 - 43 – Amendments to the Computer Misuse Act 1990

Policy intent

14. To implement the EU Directive on attacks against information systems (2013/40/EU)\(^1\) (“the EU Directive”) and to reduce the threat and impact of cybercrime by ensuring legislation is robust and consistent with other parts of the UK.

Background

15. The CMA is UK-wide legislation that makes provision for the protection of computer material against unauthorised access or modification. Criminal activity against computer systems can often take place in one country of the UK, but affect other parts of the UK as well as other countries in the world. Accordingly, it is important to ensure that cybercrime is tackled consistently across the UK and to avoid any loopholes capable of being exploited.

16. The EU Directive replaces the Council Framework Decision on attacks against information systems (2005/222/JHA). It was formally adopted on 12 August 2013 with the UK having opted-in to this Directive in December 2010. The aim of the EU Directive is to establish a set of minimum rules within the European Union on offences and sanctions relating to attacks against information systems. It also aims to improve cooperation between competent authorities in the Member States. The UK has until 4 September 2015 to transpose the EU Directive into UK law.

Part 3: Organised, Serious and Gang-related Crime

Clauses 45, 48 and 49 and Schedule 1 - Amendments to the Serious Crime Act 2007 in respect of Serious Crime Prevention Orders and repeal of Financial Reporting Orders

Policy intent

17. To amend Part 1 of the 2007 Act, to extend SCPOs to Scotland. This amendment is at the request of the Scottish Government and will strengthen legislation in Scotland to protect the public by preventing, restricting or disrupting involvement in serious organised crime in Scotland. The practical impact of SCPOs is that law enforcement agencies are afforded an additional tool for tackling serious organised crime.

Background

18. SCPOs were introduced in England, Wales and Northern Ireland by the 2007 Act. They are civil orders designed to prevent and detect serious crime. Their purpose is to place a restriction or obligation on an individual or organisation; such restrictions or obligations may relate to travel or financial, property or business dealings, or to the

\(^1\) http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0040&rid=2
means by which an individual communicates or associates with others i.e. limited mobile phone usage. Terms of an order can cover virtually any area of activity, and are designed to be preventative rather than punitive. For example, an order may require advanced notification of travel plans and purpose. SCPOs are not penalties but preventative measures to reduce criminal behaviour.

19. During the passage of the 2007 Act, the then Scottish Executive opted-out of making provision for SCPOs in Scotland. A decision was made at the time to wait and see the effectiveness of the Orders once implemented elsewhere in the UK. The provisions currently in Part 1 of the 2007 Act broadly apply only to England and Wales and Northern Ireland, although the offence of breaching an SCPO is UK-wide, the Scottish Parliament having adopted a legislative consent motion in relation to this on 8 March 2007.

20. Having had the time to consider the effectiveness of SCPOs, the Scottish Government now wishes to extend the provisions to Scotland. SCPOs will assist in deterring those about to embark in organised crime, and disrupt those who are already involved.

21. As there is a substantial overlap between FROs and SCPOs, the FRO regime will be repealed. The policy intention is that financial reporting requirements will now be imposed through an SCPO.

Part 5: Protection of Children etc

Clause 67 – Amendment to the Prohibition of Female Genital Mutilation (Scotland) Act 2005

Policy intent

22. To extend the extra-territorial reach of the offences in the 2005 Act so that they apply to habitual, as well as permanent, UK residents. The practical impact of this amendment is the closure of an existing legal loophole.

Background

23. Under existing law it is not possible to prosecute a habitual UK resident in Scotland for an offence under the 2005 Act when that offence has taken place outside Scotland. The Act allows prosecution in Scotland in respect of certain acts committed outside the UK, but prosecution can only take place where the individual is a UK national or permanent UK resident. The latter excludes, in particular, any person who is resident in the UK in breach of immigration law. A similar restriction applies in the equivalent UK Act, the Female Genital Mutilation Act 2003 (“2003 Act”). This clause amends both the 2005 Act and the 2003 Act so that the offences apply to UK residents (defined as individuals who are habitually resident in the UK), as well as to UK nationals.
Part 6: Miscellaneous and General

Clauses 73 - 77 and Schedule 4

24. Clauses 73 to 77 and Schedule 4 make provision in relation to minor and consequential amendments, transitional and saving provisions, extent of the provisions, commencement and short title.

Reasons for seeking a Legislative Consent Motion

25. The Bill makes provision applying to Scotland for certain purposes which are within the legislative competence of the Scottish Parliament. It also makes provision which alters the executive competence of the Scottish Ministers. This makes it a “relevant” Bill under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently requiring of the consent of the Scottish Parliament.

Proceeds of Crime

26. The Scottish Government has undertaken to strengthen proceeds of crime legislation in this Parliament. The Scottish Government therefore recommends that the Scottish Parliament gives consent for the UK Parliament to consider the proposed amendments to POCA that apply to Scotland. The proposed changes are aimed at improving the recovery of criminal assets and, since POCA is a UK-wide regime, they can be most efficiently and effectively made on a UK basis by this Bill.

27. Although the criminal and civil law are generally devolved, POCA provides for the confiscation and civil recovery of the proceeds of reserved crime (e.g. drug trafficking and money laundering the proceeds of drug trafficking) as well as devolved crime. As POCA concerns a complex mix of both reserved and devolved matters, it is appropriate for the proposed amendments to be made through the UK Parliament. Accordingly, to the extent that the proposed amendments make provision in relation to the confiscation or civil recovery of the proceeds of devolved crime, they are within the Scottish Parliament’s legislative competence and require its consent.

Computer Misuse

28. It is recommended that the Scottish Parliament agrees to the UK Parliament considering the proposed changes to the CMA as it applies in, or as regards, Scotland. The criminal law relating to computer crime is generally a devolved matter. However, clause 40 introduces a new offence (concerning unauthorised acts causing, or creating risk of, serious damage), which relates to both reserved (e.g. national security) and devolved matters.

29. Computer crime is by its nature trans-national and can often cross borders. The existing legislation was developed with this in mind following a Law Commission report in 1989 which expressed the view that it would be desirable that the rules of the criminal law in relation to unauthorised access to computers should be uniform throughout the United Kingdom. This remains a desirable objective. In the interests of legislative consistency, the Scottish Government considers that it is appropriate for the relevant provisions on computer misuse to be included in the Bill.
30. There is also merit in allowing the UK Parliament to legislate in this devolved area, as it presents the most efficient and effective way of transposing the EU Directive’s requirements in or as regards Scotland. Making use of UK legislation is appropriate in the circumstances in order to be able to comply within the appropriate timescales.

31. To the extent that the proposed amendments to the CMA are for a devolved purpose, they are within the Scottish Parliament’s legislative competence and require its consent (the Scottish Parliament having previously agreed to a legislation consent motion on 4 May 2006 in respect of changes to the CMA).

**Serious Crime Prevention Orders and Financial Reporting Orders**

32. It is recommended that the Scottish Parliament agrees to the UK Parliament considering the proposed amendments to the 2007 Act, as it applies in or as regards Scotland. By using this Bill to extend Part 1 of the 2007 Act to Scotland, it ensures that SCPOs in Scotland will have the full range of coverage that exists in the rest of the UK. This coverage includes areas where the Scottish Parliament does not currently have the appropriate legislative competence, for example areas such as drug trafficking, money laundering the proceeds of drug trafficking, counterfeiting and arms trafficking. Accordingly, since the SCPO regime will be UK-wide, the Scottish Government considers it appropriate that this Bill should also repeal the FRO regime (as financial reporting requirements, where necessary, will now be imposed under an SCPO).

33. To the extent that the proposed amendments to, or repeal of, provisions in the 2007 Act are for the devolved purpose of preventing and combating crime in Scotland, they are within the legislative competence of the Scottish Parliament and require its consent.

**Female Genital Mutilation**

34. It is recommended that the Scottish Parliament gives consent for the UK Parliament to consider closing the residency loophole in the FGM legislation in Scotland. Although FGM is a devolved matter, and therefore the proposed changes are within the Scottish Parliament’s legislative competence, this Bill offers the quickest way of making this important technical change. Offences of FGM often cross borders. This is not a new policy but rather the amendment ensures the policy previously agreed by the Scottish Parliament for the 2005 Act is strengthened. Making sure that such a change in legislation is made quickly and at the same time across all of the UK is practical and ensures that a consistent message of protection is put forward to those at risk.

**Executive Competence**

35. The Bill confers on the Scottish Ministers the power to make subordinate legislation in relation to commencement of certain provisions of the Act (clause 73), and in relation to the POCA regime (Chapter 2) and the SCPO regime (clause 45 and Schedule 1). It also requires the Secretary of State to consult with the Scottish Ministers before exercising certain subordinate legislation-making powers in relation to Scotland (clauses 70 and 73). The Bill confers other functions on the Scottish Ministers in relation to SCPOs, for instance the power to petition the court for the winding up of a company or relevant body, or the dissolution of a partnership, following a conviction for breach of a SCPO (Schedule 1). As these provisions alter the Scottish Ministers’
executive competence, they require the Scottish Parliament’s consent in order to be considered by the UK Parliament.

Consultation

36. Scottish Government officials have considered the legal and policy implications of all aspects of the Bill, and have sought the views of relevant stakeholders during consideration of the Scottish provisions. For provisions relating to POCA, consultation has been undertaken with the Serious and Organised Crime Division and the Civil Recovery Unit from the Crown Office and Procurator Fiscal Service. A public consultation was taken forward to seek views on the proposal to introduce serious crime prevention orders in Scotland, and nine responses were received, including from Police Scotland, the Faculty of Advocates, HM Inspectorate of Constabulary for Scotland, the Scottish Environment Protection Agency, Scottish Families Affected by Alcohol and Drugs, and the Law Society for Scotland. The respondents were generally in favour of the proposals and a common theme was that the orders must be proportionate and necessary for the prevention of crime if they were to be taken forward. For provisions in the Serious Crime Bill relating to Female Genital Mutilation, no separate consultation was undertaken, since this seeks to close an existing loophole as quickly as possible, although stakeholders are aware of and are supportive of this.

Financial Implications

37. No significant additional costs to the Scottish Government or any significant additional direct costs to the Scottish Criminal Justice Sector are envisaged as a result of the provisions within the Bill.

38. In relation to POCA there is potential that the amendments could result in a net benefit of POCA receipts which return to the Scottish Consolidated Fund.

Conclusion

39. Extending the relevant provisions of the Bill to Scotland will help ensure that the Scottish Government’s aim of increasing the tools available in Scotland which enable an efficient and effective law enforcement response to serious organised crime, economic crime, cyber-enabled crime and female genital mutilation is progressed. The Scottish Government recognises that these are all crimes that have no respect for borders or boundaries and must be tackled across multiple jurisdictions. The proposals in the Serious Crime Bill seeks both to provide measures and to update existing measures to address these acts of criminality.

40. It is the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the relevant provisions as outlined above which alter the executive competence of Scottish Ministers or fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

Scottish Government
October 2014
Provisions which relate to Scotland

1. The following paragraphs describe the specific provisions which apply to Scotland and for which consent is sought in terms of the Legislative Consent Motion. Clause numbers refer to clauses in the Bill following Lords Report on 14 October 2014.

Part 1: Proceeds of Crime
Chapter 2: Scotland
Confiscation

Clause 15: Restitution order and victim surcharge

2. This clause amends section 97 of POCA, and inserts a new section 97A, to make provision in relation to restitution orders and victim surcharges. These are to be used to fund victim support services through the Restitution Fund and the Victim Surcharge Fund, once the relevant provisions of the Victims and Witnesses (Scotland) Act 2014 are brought into force.

3. While restitution orders and victim surcharges must be satisfied before a court fine is paid, there is currently no provision to cover the situation where both a confiscation order and a victim surcharge or restitution order are made. This amendment caters for the situation where a confiscation order is imposed alongside either the victim surcharge or a restitution order, and for the situation where a confiscation order is imposed alongside a compensation order and either the victim surcharge or a restitution order. The effect of the new clause is that where the court is aware of the accused's limited means, some of the monies recovered under the confiscation order can be used to meet these other financial penalties thus ensuring that compensatory financial penalties are given precedence to a certain degree. Clause 15 therefore seeks to ensure that the payment of amounts due under the victim surcharge or a restitution order is not adversely affected by the imposition of a confiscation order.

Clause 19: Enforcement of confiscation orders

4. Clause 19 amends section 118 of POCA by providing that serving a default term of imprisonment does not prevent the sum due under a confiscation order from being collected. This clause has been requested by the Scottish Government as some individuals in Scotland choose not to pay their confiscation orders and serve a period of imprisonment (“default sentence”) instead. Under existing law the serving of a default sentence extinguishes their liability to pay the sum due under a confiscation order and this can result in assets still being available to them after they have served their sentence. This provision brings the law in Scotland in line with the law in the rest of the UK, and should encourage more individuals to realise assets and pay their confiscation orders rather than seeking to spend a period in custody.
5. A further amendment to Clause 19 was introduced in the House of Lords on 14 October 2014, providing for a new sliding scale of default sentences applicable to confiscation orders, reflecting the scale which is being introduced in the rest of the UK. The Scottish Ministers will have the power to modify the maximum periods of imprisonment that may be imposed, as well as to provide for minimum periods of imprisonment. This may be done by order, subject to the affirmative procedure.

Clause 20: Conditions for exercise of restraint order powers

6. POCA provides for the making of a restraint order, the effect of which is to “freeze” assets so as to prevent them from being dissipated in advance of a confiscation order being made. A restraint order can be applied for as soon as a criminal investigation has commenced. This clause amends section 119 of POCA by lowering the test for the grant of a restraint order at the pre-arrest stage from “reasonable cause to believe” to “reasonable grounds to suspect” that the alleged offender has benefited from the criminal conduct under investigation. It will enable assets to be restrained more quickly and earlier in investigations, and reduce the opportunity for the dissipation of assets.

7. This clause also amends section 120 of POCA to provide certain safeguards. It allows the court when a restraint order is in place, to monitor progress with the investigation by imposing a reporting requirement on the applicant for the order. If proceedings for the offence(s) concerned are not instituted within a reasonable time, the court must then recall the restraint order.

Clause 22: Conditions for exercise of search and seizure powers

8. Clause 22 amends section 127B of POCA, regarding the conditions for the exercise by a constable of certain search and seizure powers in relation to property and premises. The first condition is that: 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. The amendment lowers the test concerning benefit from criminal conduct from “there is reasonable cause to believe” to “there are reasonable grounds to suspect” (consistent with the amendment made by clause 20). Lowering of this test will enable the use of such powers more quickly and earlier in investigations which will reduce scope for the dissipation of assets.
Further amendments to POCA

9. The following 3 amendments to the Bill, proposing further amendments to POCA, were introduced in the House of Lords on 14 October 2014. These make similar provision to clauses 7, 9 and 12 in or as regards Scotland.

Clauses 16 & 17: Orders for securing compliance with confiscation order

10. POCA allows a court making a restraint order, the power to make such order as it believes appropriate for the purpose of ensuring that the restraint order is effective. This amendment confers a similar power on the court to make a “compliance order” when making a confiscation order.

11. The amendment will enable the court to impose any restrictions, prohibitions or requirements as part of a compliance order, provided they are considered appropriate for the purpose of securing that the confiscation order is effective. The court in considering whether to make a compliance order, must consider whether any restriction or prohibition on the accused’s travel outside the UK ought to be imposed to ensure that the confiscation order is effective. It will have the power to consider an alleged failure to comply with the order and, where appropriate, to sentence the accused in respect of any such non-compliance (in the same way that it would deal with a breach of community payback order, for example). The court may also discharge or vary a compliance order on an application made by the prosecutor or by the accused.

12. The appeal provisions for compliance orders are similar to those in POCA in respect of confiscation orders. They are treated as a sentence for the purpose of any appeal or review. Accordingly, this allows the accused to appeal against the making of a compliance order, and the prosecutor to appeal against a court’s decision not to make a compliance order or against the making of a compliance order which appears to be unduly lenient. The accused and the prosecutor also have certain rights of appeal against the court’s decision in relation to an application to vary or discharge a compliance order.

13. Compliance orders are intended to act as measures to enforce confiscation orders, and may be used to prevent an individual subject to a confiscation order from travelling outside the UK and dissipating assets that could be used to enforce the order or from absconding, thereby making enforcement of the order difficult.

Clause 18: Confiscation proceedings relating to accused persons unlawfully at large

14. This amendment to the Bill amends section 111 of POCA by closing a loophole that prevents accused persons who abscond before the conclusion of their trial, and are convicted in their absence, from having a confiscation order made against them. Currently, a confiscation order can only be made against an accused who is unlawfully at large after he is convicted. This amendment will cover the situation where an accused is unlawfully at large before conviction. Scottish criminal law allows the court both summarily and on indictment to continue to deal with a case where an accused is unlawfully at large. This amendment provides that the court may proceed to make a confiscation order in respect of an accused who is unlawfully at large before or after he is convicted.
15. It further amends section 111 of POCA by making more effective provision for reconsideration of cases in relation to an accused who was, but is no longer, unlawfully at large. It does so by applying, with the necessary modifications, section 104, 105 or (as the case may be) 106 of POCA to enable reconsideration of a case where no confiscation order has been made, reconsideration of benefit when no confiscation order is made, or reconsideration of benefit when a confiscation order has been made.

16. This amendment also amends section 112 of POCA which provides for confiscation proceedings where an accused is unlawfully at large but the proceedings have not concluded (i.e. the accused has not been convicted or acquitted). The current period before which the prosecutor can apply to the court for it to proceed to consider making a confiscation order is two years. The new provision amends the period to three months instead of two years. It is considered that three months provides sufficient opportunity for the accused to be found or reappear before a confiscation order is made against him/her. Similar to section 111, section 112 is further amended to make more effective provision for the reconsideration of benefit where a confiscation order has been made against a person who was, but is no longer, unlawfully at large.

Clause 21: Continuation of restraint orders after quashed conviction

17. Currently, where an accused is convicted in proceedings for an offence and the conviction is quashed before a confiscation order is made, the court is required to recall a restraint order which was granted in connection with those proceedings. This is because the quashing of a conviction concludes the proceedings, irrespective of whether or not the prosecution has applied for or been granted permission to re-try the accused for the offences in question. This amendment to the Bill amends section 121 of POCA, to switch off the duty to recall the restraint order and instead provide for the existing restraint order to continue in force where a conviction has been quashed and either the High Court of Justiciary has granted authority to bring a new prosecution or the prosecutor has asked the court to grant such authority. The intention of this provision is to ensure that an accused cannot dissipate any assets that are subject to the restraint order in the gap between the two trials.

Civil recovery

Clause 23: Prohibitory property orders: PPO receivers

18. This clause was requested by the Scottish Government. It amends Part 5 of POCA to provide for a new type of management receiver (a “PPO receiver”) in civil recovery proceedings, whose only function will be to manage property subject to a prohibitory property order (PPO). This type of receiver already exists elsewhere in the UK. It is distinct from the role of an interim administrator, who has the additional functions of investigation of the property which he or she manages and reporting findings to the enforcement authority and the court. The new PPO receiver will have no investigation function and so will have no influence on the progress or final outcome of the case. Accordingly, the role does not need to be independent and therefore can be performed by a member of staff of the Civil Recovery Unit (which exercises functions on behalf of the Scottish Ministers under Part 5 of POCA). This is much more cost-effective than appointing an interim administrator to manage the property. Further provision is made in relation to a PPO receiver’s powers, supervision of a PPO receiver and the court’s power to vary or recall an order appointing a PPO receiver, etc.
19. PPOs can also have effect over property overseas. Clause 23 therefore makes provision for the appointed PPO receiver to send a request to the Secretary of State for assistance abroad, if the PPO receiver believes that the property in respect of which he or she is appointed is in a country outside the UK.

Chapter 4: Investigations and Co-operation etc

Clause 37: Confiscation Investigations

20. This clause amends section 341 of POCA by broadening the definition of “confiscation investigation” to make investigative powers available for the purposes of enforcing a confiscation order, and identifying realisable property available to help satisfy the order. Currently, the investigative powers may only be used for the purpose of identifying the amount and whereabouts of a person’s benefit from criminal conduct, and not for the purpose of assisting in the enforcement of a confiscation order.

21. It also amends section 388 of POCA which sets out the conditions for issuing a search warrant, including warrants issued as part of a confiscation investigation, in the absence of a production order. On occasions a production order will not be a suitable tool and so an application for a search warrant is made instead. This may occur when an investigation would be seriously prejudiced if access to the material was not obtained immediately. An individual served with a production order is generally given seven days to provide the requested material. This amendment enables a search warrant to be obtained for the purpose of obtaining material relating to the extent or whereabouts of realisable property available for satisfying a confiscation order, to further assist in its enforcement.

Clause 38: External orders and investigations: meaning of “obtaining property”

22. This clause amends section 447 of POCA to make provision for co-operation between jurisdictions in relation to the investigation and confiscation of any pecuniary advantage obtained by criminal conduct. Currently, pecuniary advantage cases (i.e. those in which a financial advantage has been dishonestly obtained by deception) cannot be dealt with by the UK on behalf of other jurisdictions. For example, the UK is unable to assist in tax cases where the criminal benefit is a pecuniary advantage. This clause provides that the value of any pecuniary advantage obtained as a result of the criminal conduct is to be treated as if it were a sum of money to the same value. Making this amendment improves the ability of Scotland and the rest of the UK to assist overseas authorities with these types of cases.

Part 2: Computer Misuse

Clause 40: Unauthorised acts causing, or creating risk of, serious damage

23. This clause amends the CMA by inserting a section into the Act which creates a new indictable offence of committing an unauthorised act in relation to a computer that results, either directly or indirectly, in serious damage to the economy, the environment, national security or human welfare, or that creates a significant risk of such damage. The offence will carry a maximum sentence of life imprisonment where it causes, or creates a significant risk of, serious damage to human welfare (i.e. loss of life or illness
or injury) or to national security. Otherwise, it will be 14 years’ imprisonment. This clause will apply UK-wide. The Scottish Government supports the policy underpinning this offence, which is to strengthen the criminal law to deal more adequately with cases which concern serious damage to human welfare or to critical national infrastructure, and considers it is important that a consistent approach is taken across the UK in tackling and deterring cyber-crime.

24. Clauses 41 and 42 contain amendments to the CMA which are required to implement the EU Directive on attacks against information systems.

Clause 41: Obtaining articles for purposes relating to computer misuse

25. Clause 41 amends section 3A of the CMA which provides for offences of making, supplying or obtaining articles for use in a CMA offence. Articles can be tools for illegally accessing or interfering with a computer system. Under the existing ‘obtaining for use’ offence, the prosecution is required to show that the individual obtained the tool with a view to its being supplied for use to commit, or assist in the commission of, a CMA offence. To meet the requirements of the EU Directive, this clause extends the offence to include obtaining a tool for use in committing a CMA offence regardless of an intention to supply that tool for use in a CMA offence.

Clause 42: Territorial scope of computer misuse offence

26. Clause 42 extends the extra-territorial jurisdiction of the offences so that CMA offences committed outside the UK can be prosecuted in the UK, including Scotland, where there is a significant link with domestic jurisdiction. This clause amends section 5 of the CMA, which sets out what the significant links with domestic jurisdiction are. It extends these to provide for a link if an accused was a UK national at that time of the act constituting the offence and the act constituted an offence under the law of the country in which it occurred. Currently, extra-territorial jurisdiction can only be exercised where a significant link to the UK can be shown i.e. that the accused, or the affected computer, was in the UK at the time of the offence. In the future, crimes committed outside the UK by a UK national will be able to be prosecuted in the UK even where the offence itself did not have any impact on the UK.

27. This clause also amends section 13 of the CMA, to make provision for the sheriff court’s jurisdiction in respect of the new offence introduced by clause 40, and the section 3A offence as amended by clause 41, and any CMA offence committed outside Scotland.

Clause 43: Savings

28. This clause amends section 10 of the CMA. It is a clarifying amendment intended to ensure that activity lawfully carried out by law enforcement authorities when investigating potential CMA offences are excluded from the scope of the offences.

Part 3: Organised, Serious and Gang-Related Crime

Serious Crime Prevention Orders

Clause 45: Extension of Part 1 of Serious Crime Act 2007 to Scotland
Schedule 1: Amendments of Serious Crime Act 2007: Scotland

29. Clause 45 gives effect to Schedule 1 of the Bill, which extends (with the necessary modifications) the provisions in respect of SCPOs in Part 1 of the 2007 Act to Scotland. SCPOs are civil orders which can be made in both the Scottish civil courts and criminal courts.

30. Schedule 1 amends the 2007 Act to provide that the Scottish civil courts, namely the Court of Session or a sheriff, may make or vary an SCPO, and that only the Lord Advocate in Scotland may apply for one. The test for making or varying an order in Scotland is the mirror image of that applicable in the other parts of the UK, namely that the court making an SCPO is satisfied that a person has been involved in serious crime, whether in Scotland or elsewhere in the world, and it has reasonable grounds to believe that the making (or, as the case may be, the varying) of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in Scotland. An SCPO may contain such prohibitions, restrictions, requirements or other terms as the court considers appropriate for that purpose (examples of which are set out in section 5 to the 2007 Act). Failure to comply with an SCPO without reasonable excuse is an offence. It is punishable, on summary conviction, by up to 12 months’ imprisonment or a fine not exceeding the statutory maximum (or both) and, on conviction on indictment, by up to 5 years’ imprisonment or an unlimited fine (or both).

31. A person has been involved in serious crime, if he has committed a serious offence, has facilitated the commission by another person of a serious offence, or has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence (whether or not such an offence was committed).

32. Part 1A of Schedule 1 to the 2007 Act (inserted by Schedule 1 to the Bill) sets out a list of what constitutes a “serious offence” in Scotland. This list mirrors the offences applicable in the rest of the UK and includes offences such as drug trafficking, money laundering the proceeds of drug trafficking, counterfeiting and arms trafficking which are all reserved matters. This list is not exhaustive as the court is allowed to treat offences which are not within the list as being serious offences if it considers them to be sufficiently serious. The Scottish Ministers have the power to amend by order the list of serious offences in Part 1A of Schedule 1. However, they cannot do so in relation to an offence which relates to a reserved matter (within the meaning of the Scotland Act 1998) without the consent of the Secretary of State. Any such order made by Scottish Ministers is subject to the affirmative procedure.

33. For a “serious offence in a country outside Scotland” the court has to apply a three stage test. Firstly, the conduct must be an offence under the law of the country concerned. Secondly, at the time the court considers the application for an order or the matter in question, the conduct would be an offence in Scotland if committed in or as regards Scotland. Thirdly, at that time, the offence would fall within the list of serious offences in Part 1A of Schedule 1 or it is conduct which the court considers is sufficiently serious for it to be treated as if it did. When considering whether conduct is an offence under the law of a country outside the UK, the test will be met however the conduct is described in that country’s law.

34. General safeguards apply in relation SCPOs such as, affected persons can make representations at a hearing in relation to the making, variation or discharge of an
SCPO; there is provision ensuring that the subject of an SCPO has notice of its existence; an SCPO may not require a person to breach any duty of confidentiality of communications which the person could not be required to breach in proceedings before court; and there are restrictions on the extent to which an order can require the production of excluded material, such as personal records and banking information.

35. The Court of Session or a sheriff can discharge an SCPO either on application by the Lord Advocate, by the subject of the order or by a third party. There is also a right of appeal to the Inner House of the Court of Session in relation to an Outer House decision to make an SCPO, to vary (or not to vary) an SCPO, or to discharge (or not to discharge) an SCPO.

36. The provisions also confer on the High Court of Justiciary and a sheriff a civil jurisdiction to be able to impose an SCPO where a person has been convicted of a serious criminal offence. The High Court’s powers arise either where a person has been convicted by a sheriff and remitted to the High Court for sentencing, or convicted by the High Court itself, in relation to a serious offence committed in Scotland. The ability to impose an SCPO is in addition to dealing with the person in relation to the offence, and is subject to the same safeguards as apply in respect of SCPOs made in the civil courts. The court may make an SCPO if it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in Scotland. The SCPO may contain such prohibitions, restrictions, requirements or other terms as the court considers appropriate for that purpose. If a new SCPO is being made, any existing order must be discharged. The civil standard of proof, the balance of probabilities, applies to any proceedings in relation to an SCPO before the High Court of Justiciary and the sheriff court. This mirrors the position in England and Wales and Northern Ireland.

37. There are two cases in which the High Court of Justiciary and sheriff can vary the terms of an SCPO, namely on the conviction for a serious offence of a person already subject to an SCPO, or the conviction of a person for breach of an SCPO. In such circumstances, the High Court or sheriff may vary the terms of that order (or, in the latter case, replace the order) where it has reasonable grounds to believe that the new terms of the order (or, as the case may be, the new order) would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in Scotland. An SCPO can only be varied by the High Court or sheriff in addition to a sentence imposed in relation to the offence concerned. Subject to the limitation that an SCPO cannot last for more than five years, the High Court or sheriff may vary an order to increase the duration of the order or of any of the provisions contained in it.

38. The Bill allows for an inter-relationship between SCPOs made in the Scottish civil courts and those made in the criminal courts. The Scottish criminal courts can vary an SCPO made by the civil courts when dealing with the types of cases mentioned in the previous paragraph. The fact that an SCPO has been varied by the Scottish criminal courts does not prevent the order being further varied or discharged by the civil courts. Also, a refusal by the High Court or sheriff to make or vary an SCPO on conviction does not preclude an application to the civil courts to make or vary an SCPO in relation to the same offence.

39. The making, variation or discharge of an SCPO by the criminal courts is deemed to be a sentence for the purpose of an appeal. Accordingly, the subject of an order has a right of appeal against an SCPO under the Criminal Procedure (Scotland) Act 1995.
The Lord Advocate has the right to appeal against a refusal to grant an SCPO where he considers this to be inappropriate, and third parties have the right of appeal against a criminal court’s decision to make or vary (or not to vary) an SCPO.

40. An SCPO can be imposed on individuals (aged 18 or over), bodies corporate, partnerships and unincorporated associations. The Scottish Ministers have an order-making power to expressly exclude the application of SCPOs to persons falling within a specified description. Such an order is subject to the negative procedure.

41. The Scottish Ministers will also have the power to present a petition to the court for the winding up of a company, relevant body or dissolution of a partnership if the company, relevant body or partnership has been convicted of an offence under section 25, breach of an SCPO, and the Scottish Ministers consider it would be in the public interest for the company or relevant body to be wound up or the partnership dissolved. The new provisions apply the Insolvency Act 1986 for the purpose of winding up a company, and the Partnership Act 1890 for the purpose of dissolving a partnership. The Scottish Ministers may by order specify an additional description of person that constitutes a relevant body, and provide for the Insolvency Act 1986 to apply (with such modifications as appropriate) for the purpose of winding up certain relevant bodies. Such orders are subject to the negative procedure.

42. There is provision for the inclusion of a term in an SCPO to be made against a body corporate, partnership or unincorporated association authorising a “law enforcement agency” which includes the chief constable of the Police Service of Scotland to appoint a person to monitor whether the order is being complied with. There is also provision which deals with the means by which the costs of authorised monitors will be determined and recovered. The Scottish Ministers may, by order, make provision about the practice and procedure for determining the amount of costs (and any interest) payable in relation to authorised monitors. Such an order is subject to the negative procedure.

Clause 48: Extension of order where person charged

43. This clause inserts a new section into the 2007 Act which provides for the duration of an SCPO to extend beyond five years where the subject of an order has been charged with a serious offence or with breach of an SCPO. On an application by the Lord Advocate, the High Court of Justiciary or the sheriff may vary the SCPO so that it continues in force pending the outcome of the criminal proceedings concerned (if the order would otherwise cease to have effect before then). The court must have reasonable grounds for believing that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime. If the person subject to the SCPO is convicted of a serious offence, or of breach of the order, it will be open to the court to vary the existing SCPO or make a new one.

Clause 49: Serious crime prevention orders and financial reporting etc

44. This clause repeals section 77 of SOCPA which provides for the making of financial reporting orders (FROs) in Scotland. The court can impose such an order to require an accused convicted of a specific offence (i.e. common law fraud, an offence under section 1, 2 or 6 of the Bribery Act 2010, or a criminal lifestyle offence under Schedule 4 to POCA) to provide details of his or her financial affairs, if the court believes there is a significantly high risk of the accused committing another such
offence. The repeal is considered appropriate as there is an overlap between FROs and SCPOs: the majority of the qualifying offences are the same; they can both be used to impose financial reporting requirements, and they are both used post-conviction. Another reason for the repeal is that non-compliance with an SCPO is an offence which may be prosecuted either summarily or on indictment, whereas non-compliance with an FRO is an offence triable summarily only. So, instead of a sentencing court making a stand-alone FRO, the High Court of Justiciary or the sheriff may, on the application of the Lord Advocate, make an SCPO which contains financial reporting requirements.

45. This clause also inserts a new section into the 2007 Act which provides for a disclosure gateway, similar to that provided in respect of FROs by section 81 of SOCPA (repealed by Schedule 4 to the Bill). It enables a law enforcement officer (e.g. a constable) to disclose the information that he or she receives in response to an information requirement imposed by an SCPO for the purpose of verifying that information. For example, the information might be disclosed to a bank in which the person subject to an SCPO holds an account. Provision is made so that any disclosure under the new section does not breach any duty of confidence owed (say, by a bank to its customers) or any other restriction on disclosure (subject to the requirements of the Data Protection Act 1998). A law enforcement officer may also disclose the information for the purposes of the prevention, detection, investigation or prosecution of criminal offences (whether in the UK or elsewhere).

Part 5: Protection of Children etc.

Clause 67 offence of female genital mutilation:

46. This clause amends the 2005 Act by extending the extra-territorial jurisdiction provided for under that Act. Section 3 of the 2005 Act makes it an offence to aid, abet, counsel, procure or incite a person who is not a UK national or permanent UK resident to carry out a prohibited act of female genital mutilation (“FGM”) outside the UK. Section 4 of the 2005 Act provides that the offences under sections 1 and 3 of the Act apply to acts done outside the UK by UK nationals or permanent UK residents. The definition of “permanent UK resident” (as an individual who is settled in the UK within the meaning of the Immigration Act 1971) means that the FGM offences do not apply to any person who is resident in the UK in breach of immigration law. Accordingly, the amendment provides for the FGM offences to refer and apply to UK nationals and UK residents instead. A “UK resident” is defined as someone who is habitually resident in the UK. The term habitually resident covers a person’s ordinary residence, as opposed to a short, temporary stay in a country. To be habitually resident in the UK it may not be necessary for all, or any, of the period of residence here to be lawful. Whether a person is habitually resident in the UK will be determined on the facts of a given case. The practical effect of the clause is that persons who commit FGM offences while abroad, who are habitually resident in the UK, could be prosecuted in the UK, irrespective of whether they have permanent residency.

Part 6: Miscellaneous and General

Clause 73 and Schedule 4 Minor and consequential amendments

47. Clause 73(1) gives effect to Schedule 4, which makes minor and consequential amendments to a number of enactments. In particular, it amends the Computer Misuse Act 1990, to clarify that the maximum penalty on summary conviction in Scotland for
offences under sections 1 to 3A is 12 months imprisonment (rather than continue to rely on the general glossing modification in section 45 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007). There are also consequential amendments to the Criminal Procedure (Scotland) Act 1995, in relation to rights of appeal and fine enforcement in so far as they are applied in relation to POCA.

48. This clause also confers ancillary regulation-making powers on the Secretary of State, who must consult with the Scottish Ministers before exercising those powers in relation to matters which would fall within the Scottish Parliament’s legislative competence.

Clause 75 Transitional and saving provisions

49. Clause 75 contains transitional and saving provisions. In particular, it provides that the repeal of sections 77 and 79 to 81 of SOCPA does not affect FROs made before the date of commencement.

Clause 76 Extent
Clause 77 Commencement

50. Clause 76 sets out the extent of the provisions.

51. Clause 77 provides for commencement of the Act. This clause confers on the Scottish Ministers the power to appoint by regulations the day or days on which certain provisions relating to Scottish confiscation proceedings come into force, after consulting the Secretary of State. Certain provisions (clauses 23 and 37(1), Part 2 and clauses 45 to 49) may not be brought into force, so far as they extend to Scotland, unless the Secretary of State has consulted the Scottish Ministers.