

## **SERIOUS CRIME BILL [HL]**

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### **EXPLANATORY NOTES ON COMMONS AMENDMENTS**

#### **INTRODUCTION**

1. These explanatory notes relate to the Commons amendments to the Serious Crime Bill [HL] as brought from the House of Commons on 24th February 2015. They have been prepared by the Home Office in order to assist the reader of the Bill and to help inform the debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The notes refer to Bill 116, the Bill as first printed for the Commons.
3. These notes need to be read in conjunction with the Commons amendments, the text of the Bill and the Explanatory Notes accompanying the Bill. They are not, and are not meant to be, a comprehensive description of the effect of the Commons amendments.
4. With one exception, all Commons amendments were tabled in the name of the Minister. The exception was Commons Amendment 12, which would insert New Clause “*Termination of pregnancy on grounds of sex of foetus*”, on which the Government was neutral.
5. In the following commentary, an asterisk appears in the heading of the paragraph dealing with the non-Government amendment.

#### **COMMENTARY ON COMMONS AMENDMENTS**

##### **Part 1: Proceeds of crime**

##### **Commons Amendment 1: Immunity for money-laundering disclosures**

6. **Commons Amendment 1** would make statutory provision to protect persons (for example, employees of financial institutions or accountants), who report in good faith their suspicion that another person is engaged in money laundering activity (in accordance with the provisions of Part 7 of the Proceeds of Crime Act 2002), from incurring civil liability for doing so.

**Commons Amendments 24, 25, 35, 36 and 37: Giving statutory effect to the Supreme Court's judgment in *R v Waya***

7. **Commons Amendments 35, 36 and 37** would amend sections 6, 92 and 156 of the Proceeds of Crime Act 2002, which relate to the making of confiscation orders in England and Wales, Scotland and Northern Ireland respectively, so that the duty on the court to make a confiscation order for the recoverable amount is qualified where it would be disproportionate to make an order in such terms. In such a case the court must make an order requiring the defendant to pay whatever lesser amount (if any) it thinks would be proportionate. The amendments would place the Supreme Court's judgment in the case of *R v Waya* ([2012] UKSC 51) on a statutory footing as recommended by the Joint Committee on Human Rights in their report on the Bill (Second Report, session 2014/15).

8. **Commons Amendments 24 and 25** are consequential on amendments 36 and 37. They would provide for new paragraphs 31A and 41A of Schedule 4, as inserted by amendments 36 and 37, to be brought into force by the Scottish Ministers and the Department of Justice in Northern Ireland (following consultation with the Home Secretary) respectively.

**Part 4: Seizure and forfeiture of drug-cutting agents**

**Commons Amendment 2: Form of application in Scotland**

9. Under clauses 59, 60, 62 and 63 an application may be made to the appropriate court (in Scotland, a sheriff) for the continued retention of seized substances suspected of being used as drug-cutting agents, for the forfeiture or return of such substances and for compensation where no forfeiture order is made. **Commons Amendment 2** would provide that such applications to a sheriff must be made by summary application (as distinct from other forms of application, such as an initial writ or small claim).

**Part 5: Protection of children and others**

**Commons Amendments 3, 15, 19, 41, 43, 44 and 47: New offence of sexual communication with a child**

10. **Commons Amendment 3** would insert new section 15A into the Sexual Offences Act 2003 which would provide for a new offence where an adult intentionally communicates with a child under 16 (which could, for example, be in the form of an e-mail, text message, written note or orally) for the purpose of obtaining sexual gratification and the communication is sexual or intended to encourage the child to make a communication that is sexual. Scenarios likely to be covered by the offence would include talking sexually to a child via a chatroom or sending sexually explicit text messages to a child as well as inviting a child to communicate sexually (irrespective of whether the invitation is itself sexual). The new offence is designed to ensure that it does not criminalise, for example, ordinary social or educational interactions between children and adults or communications between young people themselves. The new offence would be triable either way with a maximum penalty (on conviction on indictment) of two years' imprisonment (new section 15A(3)).

11. **Commons Amendments 15, 19, 41, 43, 44 and 47** are consequential on amendment 3. **Commons Amendment 15** would make transitional provision so that the maximum penalty on summary conviction for the new offence of sexual communication with a child is six months' imprisonment, rather than 12 months', pending the coming into force of section 154(1) of the Criminal Justice Act 2003.
12. **Commons Amendment 19** would provide that the new clause "*Sexual communication with a child*", as inserted by amendment 3, and New Clause "*Child sexual exploitation*", as inserted by amendment 4, extends to England and Wales only.
13. **Commons Amendment 41** would provide that the definition of "sexual" in section 78 of the Sexual Offences Act 2003 does not apply to new section 15A of that Act as inserted by amendment 43.
14. **Commons Amendment 43** would provide that a conviction for the new offence of sexual communication with a child automatically triggers the notification requirements for sex offenders provided by Part 2 of the Sexual Offences Act 2003.
15. **Commons Amendment 44** would add the new offence of sexual communication with a child to the list of offences in Schedule 15 to the Criminal Justice Act 2003 which specifies offences for the purposes of Chapter 5 of Part 12 of that Act. That Chapter makes provision for extended determinate sentences for dangerous offenders.
16. **Commons Amendment 47** would add the new offence of sexual communication with a child to the list of offences in Schedule 34A to the Criminal Justice Act 2003 which specifies offences to which section 327A of that Act applies. That section provides for the disclosure of information about relevant previous convictions of child sex offenders in specified circumstances. The amendment would also add the new offence of possession of a paedophile manual, as provided for in clause 66 of the Bill, to the list of offences in Schedule 34A to the Criminal Justice Act 2003.

**Commons Amendments 4, 13, 33, 38, 40, 42, 45, 46, 47, 48 and 52: Child prostitution and pornography**

17. **Commons Amendment 4** insert a new clause ("*Child sexual exploitation*"), subsections (1) to (6) of which would amend sections 48 to 51 of the Sexual Offences Act 2003 which contain offences in relation to the sexual exploitation of children. The amendments to those sections would replace references to child prostitution and child pornography with references to the sexual exploitation of children, but do not alter the scope of the relevant offences. Subsection (7) of the new clause would amend section 1 of the Street Offences Act 1959 so that the offence of loitering or soliciting for the purposes of prostitution only applies to persons aged 18 or over.
18. **Commons Amendments 13, 33, 38, 40, 42, 45, 46, 47, 48 and 52** are consequential on amendment 4. **Commons Amendment 13** would provide that the restriction of the offence

of loitering or soliciting for the purposes of prostitution to persons aged 18 or over does not apply where proceedings for such an offence have started prior to commencement of subsection (7) of New Clause “*Child sexual exploitation*”.

19. **Commons Amendment 33** would make consequential amendments to the Street Offences Act 1959 as a result of the restriction of the offence of loitering or soliciting for the purposes of prostitution to persons aged 18 or over, as provided for in subsection (7) of New Clause “*Child sexual exploitation*”.

20. **Commons Amendments 38, 42, 45, 46, 47, 48 and 52** would carry through to other legislative provisions the changes to the nomenclature used in the offences in sections 48 to 50 of the Sexual Offences Act 2003, as amended by Commons Amendment 4.

21. **Commons Amendment 40** would amend section 54 of the Sexual Offences Act 2003 so as to preserve the existing definitions of “prostitute” and “payment” for the purposes of sections 51A to 53A of that Act.

#### **Commons Amendments 5, 6, 20 and 39: Mandatory reporting of FGM and statutory guidance**

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

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

24. **Commons Amendment 6** would insert a new section 5C into the Female Genital Mutilation Act 2003 which would confer a power on the Secretary of State to issue, and from time to time revise, guidance about the effect of any provision of that Act or about other matters relating to female genital mutilation (new section 5C(1) and (6)). In preparing such guidance, the Secretary of State would be under a duty to consult the Welsh Ministers so far as the guidance is to a body exercising devolved Welsh functions, and such other persons as he or she considers appropriate (new section 5C(4) and (5)). Persons exercising public

functions to whom the guidance is given would be under a duty to have regard to the guidance when exercising such functions (new section 5C(2)).

25. **Commons Amendments 20 and 39** are consequential on amendments 5 and 6. They would provide that the new clauses inserted into the Bill by those amendments and the new sections they insert into the Female Genital Mutilation Act 2003 extend to England and Wales only.

**Commons Amendments 7, 8, 17 and 21: New offence of controlling or coercive behaviour in an intimate or family relationship**

26. **Commons Amendment 7** inserts a new clause which would provide for a new offence criminalising controlling or coercive behaviour in an intimate or family relationship where the behaviour has a serious effect on the victim (subsection (1)). The new offence would not apply where the behaviour in question is perpetrated by a parent, or a person who has parental responsibility, against a child under 16 (subsection (3)). This is because the criminal law, in particular the child cruelty offence in section 1 of the Children and Young Persons Act 1933 as amended by clause 65 of the Bill, already covers such behaviour. Subsections (8) to (10) of the new clause would provide for a limited defence where the accused believes he or she was acting in the best interests of the victim and can show that in the particular circumstances their behaviour was objectively reasonable. The defence would not be available where a victim has been caused to fear violence (as opposed to being seriously alarmed or distressed). This defence is intended to cover, for example, circumstances where a person was a carer for a mentally ill spouse, and by virtue of his or her medical condition, he or she had to be kept at home or compelled to take medication, for his or her own protection or in his or her own best interests. In this context, the person's behaviour might be considered controlling, but would be reasonable under the circumstances. The new offence would be triable either way with a maximum penalty (on conviction on indictment) of five years' imprisonment (subsection (11)).

27. **Commons Amendment 8** would confers a power on the Secretary of State to issue, and revise, guidance about the investigation of offences under New Clause "*Controlling or coercive behaviour in an intimate or family relationship*".

28. **Commons Amendment 17** is consequential on amendment 7. It would make transitional provision so that the maximum penalty on summary conviction for the new offence of controlling or coercive behaviour in an intimate or family relationship is six months' imprisonment, rather than 12 months', pending the coming into force of section 154(1) of the Criminal Justice Act 2003.

29. **Commons Amendment 21** would provides that New Clauses "*Controlling or coercive behaviour in intimate or family relationship*" and "*Guidance*" extend to England and Wales only.

## **Part 6: Miscellaneous and general**

### **Commons Amendments 9, 16 and 22: Throwing articles into prison**

30. **Commons Amendment 9** would insert new section 40CB into the Prison Act 1952 which would provide for a new offence of throwing any article or substance into a prison without authorisation (new section 40CB(1) of the Prison Act 1952). The offence would not apply where the article or substance in question was one specified in List A (which covers controlled drugs, explosives, firearms, ammunition or any other offensive weapon), List B (alcohol, mobile phones, cameras and sound recording devices) or List C (tobacco, money, clothing, food, drink, letters, paper, books, tools and information technology equipment). Under sections 40A to 40C of the Prison Act 1952 it is already an offence for a person without authorisation to convey List A, B or C articles into a prison (which includes throwing them into prison). Articles or substances that may be caught by the new offence would include new psychoactive substances not already controlled under the Misuse of Drugs Act 1971 and other non-controlled drugs frequently abused by prisoners. The offence would be triable either way with a maximum penalty (on conviction on indictment) of two years' imprisonment (new section 40CB(4)).

31. Under subsection (1) of new section 40CB, the offence would only be committed where a person throws any article or substances into a prison "without authorisation". New section 40CB(5) would apply the provisions in section 40E(1) to (3) of the Prison Act 1952 which defines "authorisation" for the purposes of the offences relating to prison security in section 40D of that Act. Section 40E(1) to (3) of the Prison Act 1952 provides that authorisation for the purposes of section 40D means authorisation given in relation to all prisons or prisons of a specified description by Prison Rules or administratively the Secretary of State or, in relation to a particular prison, by the Secretary of State or the governor, director of the prison or by a person authorised by the governor or director for this purpose. Examples where authorisation might be given would include contractors doing building works where it may be necessary to throw articles into prison.

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

33. **Commons Amendments 16 and 22** are consequential on New Clause "*Throwing articles into prison*", inserted by Commons Amendment 9. **Commons Amendment 16** would make transitional provision so that the maximum penalty on summary conviction for the new offence is six months' imprisonment, rather than 12 months', pending the coming into force of section 154(1) of the Criminal Justice Act 2003. **Commons Amendment 22** would provide that New Clause "*Throwing articles into prison*" extends to England and Wales only.

**Commons Amendments 10, 23 and 28: Prevention or restriction of use of communication devices by prisoners**

34. **Commons Amendments 10** would insert New Clause “*Prevention or restriction of use of communication devices by prisoners etc*” which would enable the Secretary of State and the Scottish Ministers to make regulations, subject to the affirmative procedure, conferring power on the civil courts to make a telecommunications restriction order. The effect of such an order would be to require the relevant communications provider(s) to blacklist unauthorised mobile phone handsets and block SIM cards in prison (or other custodial institutions, namely (in England and Wales) young offender institutions, secure training centres and secure colleges). Applications for such orders could be made by any person specified in regulations (for example, the National Offender Management Service), following the identification of unauthorised phones and SIM cards that are in use in a particular prison. Subsection (3) of the new clause sets out the matters that must be addressed in any regulations, including provision conferring rights on persons to make representations and provision about appeals. Subsection (4) of the new clause identifies further matters which may be provided for in any regulations, for example provision about the enforcement of orders (it would not be necessary to make provision about contempt of court).

35. **Commons Amendment 23** is consequential on New Clause “*Prevention or restriction of use of communication devices by prisoners etc*”, inserted by amendment 10. It would provide that the new clause extends to England and Wales and Scotland.

36. The effect of **Commons Amendment 28** would be that the New Clause “*Prevention or restriction of use of communication devices by prisoners etc*”, inserted by amendment 10, would come into force on the day on which the Bill receives Royal Assent.

**Commons Amendments 11, 14, 30 and 34: Codes of practice about regulatory powers – journalistic sources**

37. **Commons Amendment 11** would insert new subsection (2A) into section 71 of the Regulation of Investigatory Powers Act 2000 (RIPA). Section 71 of RIPA requires the Secretary of State to issue one or more codes of practice relating to the exercise and performance of, amongst other things, the powers and duties conferred under that Act. Part 1 of RIPA makes provision in respect of the interception of communications (Chapter 1 of Part 1) and the acquisition and use of communications data (Chapter 2 of Part 1). The amendment would require a code of practice made under section 71 of RIPA in connection with the exercise of powers in Part 1 of that Act in relation to the prevention or detection of serious crime to include provision to protect the public interest in the confidentiality of journalistic sources. The amendment would further require the Secretary of State to consult the Interception of Communications Commissioner and to have regard to any relevant reports which he has made.

38. The amendment responds, in part, to a report, published on 4th February 2015, by the Interception of Communications Commissioner of his inquiry into the police access to communications data of journalists. The report recommended that “judicial authorisation must

be obtained in cases where communications data is sought to determine the source of journalistic information”. Pending further legislation in the next Parliament, the Secretary of State intends to revise the code of practice under section 71 of RIPA to require law enforcement agencies (that is, the police, the National Crime Agency and HM Revenue and Customs) to use production orders, which are judicially authorised, under the Police and Criminal Evidence Act 1984 (or the equivalents in Scotland and Northern Ireland) for applications for communications data to determine journalistic sources.

39. **Commons Amendments 14, 30 and 34** are consequential on amendment 11. **Commons Amendment 14** would ensure that New Clause “*Codes of practice about investigatory powers: journalistic sources*”, inserted by amendment 11, applies only to a new or newly-revised code of practice under section 71 of the Regulation of Investigatory Powers Act 2000.

40. **Commons Amendment 30** would provide that that New Clause “*Codes of practice about investigatory powers: journalistic sources*” comes into force on Royal Assent.

41. **Commons Amendment 34** would ensure that the new section 71(2A) of RIPA applies not just to a new code of practice but also to a revised code.

#### **Commons Amendment 12\*: Termination of pregnancy on the grounds of the sex of the foetus**

42. **Commons Amendment 12\*** would impose two duties on the Secretary of State (in practice the Health Secretary) in relation to the termination of pregnancy on the grounds of the sex of the foetus. First, the Secretary of State would be required to arrange for an assessment to be made of the evidence of termination of pregnancy on such grounds and to publish the outcome of such an assessment within six months of Royal Assent. The second duty would be to consider the assessment and either to determine and publish a strategic plan to tackle substantiated concerns identified in the assessment, or publish a statement and explanation as to why such a plan is not required. Where the Secretary of State determines that a strategic plan is needed he or she would have a further six months to lay a copy of the plan before Parliament. Although the new clause inserted by Commons Amendment 12 would extend to the whole of the United Kingdom, by virtue of clause 76(6), subsection (1) of the new clause effectively restricts its application to England, Wales and Scotland, reflecting the territorial extent of the Abortion Act 1967.

#### **Commons Amendments 49 to 51: Legal aid in connection with FGM protection orders**

43. **Commons Amendment 49** is a drafting amendment and would make it clear that the amendments made by paragraph 73 of Schedule 4 to the Bill are to Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

44. **Commons Amendments 50 and 51** would amend Parts 1 and 3 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to provide for legal aid to be

made available for civil legal services, including advocacy, provided in relation to female genital mutilation protection orders (as provided for in clause 70 of the Bill).

**Commons Amendment 18: Transitional provisions**

45. This amendment would provide for a transitional provision in respect of the maximum fine that may be imposed on summary conviction in respect of new offences created by the Bill. Pending the coming into force of section 85(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the maximum fine in such cases would be the current statutory maximum (£5,000) rather than an unlimited amount.

**Commons Amendments 26, 27, 29 and 31: Commencement**

46. **Commons Amendments 26, 27 and 29** would provide that clause 72 of the Bill, and a related consequential amendment in Schedule 4, come into force on the day on which the Bill receives Royal Assent rather than two months after Royal Assent as clause 77 currently provides. Clause 72 provides for, or extends, extra-territorial jurisdiction in respect of the offences in sections 5 (preparation of terrorist acts) and 6 (training for terrorism) of the Terrorism Act 2006.

47. **Commons Amendment 31** would provide that the obligation on the Secretary of State to consult the Scottish Ministers and Northern Ireland Department of Justice, and vice versa, before bringing into force certain provisions of the Bill, as required by clause 77, may be complied with before the Bill receives Royal Assent.

**Commons Amendment 32: Privilege**

48. This amendment would remove subsection (2) of clause 78 inserted by the Lords to avoid questions of privilege.

**Commons Amendments 53 to 58: Title**

49. These amendments make consequential amendments to the Bill's long title as a result of the new provisions added to the Bill by amendments 3, 4 and 7 to 11.

**FINANCIAL EFFECTS OF THE LORDS AMENDMENTS**

50. Commons Amendment 3 would provide for a new offence of sexual communication with a child. The estimated average annual criminal justice system (CJS) costs (including those to the police) will be approximately £4 million per year. For breaches of the subsequent notification requirements it is estimated that there will be average annual costs to the CJS of approximately £0.4 million per year; these do not include police costs as these are non-monetised for breaches.

51. Commons Amendment 7 would provide for a new offence of controlling or coercive behaviour in an intimate or family relationship. The estimated annual cost to the police from additional investigations would be £2.2 million and to other criminal justice agencies arising from additional proceedings would be £11.6 million. If, as a result of the new offence, the

prevalence of domestic abuse was reduced by 0.1%, these costs would be recuperated through savings to the wider economy.

52. Commons Amendment 10 would enable the Secretary of State and the Scottish Ministers to make regulations conferring power on the civil courts to make a telecommunications restriction order. The estimated cost over the three years following commencement for the Home Office and Ministry of Justice is £1.31 million.

53. The other Commons amendments would not be expected to have significant financial effects.

## **DEVOLUTION**

54. Since the Bill's introduction in the House of Commons, the Scottish Parliament has adopted legislative consent motions in respect of those provisions that triggered the Sewel Convention. (The Sewel Convention provides that Westminster will not normally legislate with regard to matters which apply to Scotland and have a devolved purpose or alter the executive competence of the Scottish Ministers, without the consent of the Scottish Parliament.) A legislative consent motion was adopted on 6th January 2015 in respect of the provisions relating 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 the 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. A second legislative consent motion was adopted on 17th February 2015 in respect of the provision in **Commons Amendment 10** relating to the prevention or restriction of use of communications devices by prisoners so far as these matters fall within the legislative competence of the Scottish Parliament.

55. The Northern Ireland Assembly adopted a legislative consent motion on 8th December 2014 in respect of the provisions dealing with the proceeds of crime as contained in chapters 3 and 4 of Part 1 of the Bill, proposed changes to the Serious Crime Act 2007 as contained in clauses 45 to 49, the possession of paedophile manuals in clause 66, and female genital mutilation in clauses 67 to 70 and the provision in **Commons Amendment 37** to make explicit in statute common law safeguards (*R v Waya* [2012] UKSC 51) in relation to the exercise of confiscation order powers under the Proceeds of Crime Act 2002.

56. In the UK Government's view all the provisions in the Bill and the new provisions that would be inserted into the Bill by the Commons amendments relate to non-devolved matters in Wales. Nonetheless, the National Assembly for Wales adopted a legislative consent motion on 9th December 2014 in respect of the provisions relating to child cruelty, on 28th January 2015 in respect of the new offence of controlling or coercive behaviour in intimate or family relationships (as inserted by **Commons Amendment 7**) and on 10th February 2015 in

respect of the new offence of sexual communication with a child (as inserted by **Commons Amendment 3**). The Welsh Government has also tabled a supplementary legislative consent memorandum in respect of **Commons Amendments 4** (child sexual exploitation), **5** (duty to notify police of female genital mutilation) and **6** (guidance about female genital mutilation).

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

57. Supplementary memorandums on the European Convention on Human Rights were prepared in respect of the following Commons amendments:

- Commons Amendment 1 (exemption from civil liability for money-laundering disclosures);
- Commons Amendments 35 to 37 (proceeds of crime – *R v Waya*);
- Commons Amendment 3 (sexual communication with a child);
- Commons Amendment 7 (controlling or coercive behaviour in an intimate or family relationship);
- Commons Amendment 10 (restriction of use of mobile phones by prisoners);
- Commons Amendments 26, 27 and 29 (preparation or training abroad for terrorism);
- Commons Amendment 5 (duty to notify the police of female genital mutilation).

58. These are attached at Annexes A and B.

## SERIOUS CRIME BILL

### EUROPEAN CONVENTION ON HUMAN RIGHTS

#### SUPPLEMENTAL MEMORANDUM BY THE HOME OFFICE

##### Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to Government amendments to the Serious Crime Bill tabled for Commons Committee stage. The memorandum has been prepared by the Home Office and Ministry of Justice.

##### Proceeds of crime – *R v Waya*

2. In paragraphs 10 to 35 of the majority judgment in *R v Waya*<sup>[1]</sup>, the Supreme Court considered the effect of the Human Rights Act 1998 on the confiscation regime in the Proceeds of Crime Act 2002 (“POCA”). In particular, at paragraph 16 the majority state, “*It is plainly possible to read [section 6(5)(b) of POCA] as subject to the qualification ‘except insofar as such an order would be disproportionate and thus a breach of art 1, Protocol 1’. It is necessary to do so in order to ensure that the statute remains Convention-compliant, as Parliament must, by s 3 of HRA, be taken to have intended that it should. Thus read, POCA can be ‘given effect’ in a manner which is compliant with the Convention right. The judge should, if confronted by an application for an order which would be disproportionate, refuse to make it but accede only to an application for such sum as would be proportionate.*”

3. In their report on the Bill, the Joint Committee on Human Rights (“JCHR”) has taken the view that it would be desirable to bring greater legal certainty to the legal regime governing the proceeds of crime by inserting into the statutory framework express language which would give clear effect to the judgment of the Supreme Court in *Waya*. The Government has accepted the JCHR’s recommendation that the Bill be amended to give clear statutory force to the qualification on the court’s duty to make a confiscation order. The amendment to section 6 of POCA (which extends to England and Wales), to be made by new paragraph 16A of Schedule 4 to the Bill, has this effect. Identical amendments are made to sections 92 and 156 of POCA which extend to Scotland and Northern Ireland respectively.

4. As these amendments amend POCA to expressly provide that court only has the obligation to make a confiscation order if, and to the extent that, the order would be

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<sup>[1]</sup> [2012] UKSC 51

proportionate for the purposes of the ECHR, the Government considers the amendments to be compatible with the ECHR.

### **Exemption from civil liability for money-laundering disclosures**

5. New Clause “*Exemption from civil liability for money-laundering disclosures*” amends POCA to make express statutory provision to protect persons, who report in good faith their suspicion that another person is engaged in money laundering activity, from incurring civil liability for doing so. The United Kingdom is obliged under Article 26 of the EU Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Directive 2005/60/EC) to provide such protection.

6. Protecting persons who report in good faith their suspicion that another person is engaged in money laundering activity from civil liability potentially has the effect of removing from the person about whom the report is made a cause of action in the civil courts. To the extent that so removing a cause of action engages Article 1, Protocol 1 of the ECHR, the Government considers any interference with the rights provided for in Article 1, Protocol 1 to be lawful (and indeed positively required under European law), pursuant to a legitimate aim, and proportionate to that aim.

### **New offence of sexual communication with a child**

7. New Clause “*Sexual communication with a child*”, which extends to England and Wales, will insert into the Sexual Offences Act 2003 (“the 2003 Act”) a new offence of sexual communication with a child. The offence can only be committed by an adult who, for the purpose of obtaining sexual gratification, communicates with a child under 16 where the communication is either itself sexual or is one which is intended to encourage the child to make a communication which is sexual. The offence is not committed if the defendant reasonably believed the child to be aged 16 or over. The offence is triable either way with a maximum penalty on indictment of two years’ imprisonment.

8. The Government considers that the ambit of the offence is sufficiently certain to satisfy the requirements of Article 7. Whether particular behaviour falls within the ambit of the offence would be a question of fact for the court to determine. Such an approach is compatible 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 new offence will sit alongside other child sexual offences in the 2003 Act and shares many common elements with those offences, which are already well understood. The meanings of all the elements of the offence are therefore sufficiently clear on their face or by reference to statute and common law.

9. Since the new offence is concerned with the protection of children from those who seek sexual gratification by communicating with them it is arguable that Article 10 does not apply, by virtue of the exclusion in Article 17 of the Convention. However to the extent that Article 10 does apply the Government accepts that the restriction would be likely to engage Article 10 (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).

10. However, the Government considers (for the reasons set out above in relation to Article 7) that the interference is prescribed by law. The Government also considers that the provisions are justified by reference to the following aims set out in Article 10(2): the prevention of crime; the protection of health and morals and the protection of the rights of others. It is clearly established that the criminal law can act to control communications where it is necessary to do so for the protection of the rights of others (*R v Connolly* [2007] EWHC 237). Moreover both the domestic courts (see *R v Smethurst* [2001] EWCA Crim 772 in the context of the prohibition on making indecent photographs of children) and the European Court of Human Rights (see *Handyside* above in the context of obscene material) have upheld criminal law restrictions on the use of offensive material as being necessary for the protection of children.

11. This new offence adds to the existing suite of sexual offences which seek to protect children from those who prey on them both directly, by seeking to engage children in sexual activity, and indirectly by exposing them to it or planning it. The new offence is intended to enhance that protection by ensuring that appropriate criminal law sanctions are available where adults exploit children by seeking sexual pleasure through engaging them in inappropriate communication. The offence will also enhance the protection available to children by ensuring that criminal justice agencies can intervene to tackle sexual behaviour relating to children at an early stage. It will not affect ordinary social or educational interactions between children and adults. As such the Government considers it to be a necessary and proportionate response to the pressing social need to protect children from sexual abuse and well within the margin of appreciation given to member States in the regulation of matters relating to the protection of morals (see *Handyside* paragraph 48).

12. To the extent that Article 8 is engaged any interference with those rights is justified for the reasons set out above in relation to Article 10.

13. Furthermore, in *Stubbing v UK* (1996) 23 EHRR 213 at paragraph 26 the European Court of Human Rights reiterated the need for individuals to be protected from sexual abuse by the criminal law. In particular the court stated that “children...are entitled to state protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives.” As explained above, this offence enhances the criminal justice response available where adults seek sexual gratification from children through their communications with them and as such can be seen as a measure which enhances the protection available to children in respect of their Article 8 rights.

14. A person convicted of this offence will be subject to the notification requirements under Part 2 of the Sexual Offences Act 2002 (see new paragraph 24A of Schedule 3 to the 2003 Act inserted into that Schedule by an amendment to Schedule 4 to the Bill). The Government considers that such a requirement is commensurate with the seriousness of the offence. Any resultant interference with the offender's Article 8 rights is necessary and justified in the interests of the prevention of crime and the protection of the rights and freedoms of others.

#### **New offence of controlling or coercive behaviour in intimate or family relationship**

15. New Clause "*Controlling or coercive behaviour in an intimate or family relationship*", which extends to England and Wales, provides for a new domestic abuse offence. It might be argued that the criminalisation of patterns of behaviour in intimate relationships and family life constitutes an interference by the State into the right to respect for private life in relation to the private dynamics and internal workings of private relationships, given that the concept of private life encompasses the idea of a private sphere which is free from state intervention.

16. However, the Government's view is that the right to respect for private life does not confer the right to knowingly engage in repeated coercive or controlling behaviour which has a serious adverse effect on a partner or a family member, and therefore the new criminal offence does not in fact engage the right to respect for private life.

17. However, on the assumption that the right to respect for private life is engaged, the Government's position is that any interference will be in accordance with the law, given that the new offence is to be clearly circumscribed on the face of primary legislation.

18. Further, any interference is in pursuit of a legitimate aim: namely the prevention of crime and the protection of the rights and freedoms of "others", meaning partners or family members who are the victims of domestic abuse. The rights and freedoms of domestic abuse victims include the right to respect for private life, which encompasses respect for psychological integrity, and the right to self-determination, given that a person's ability to shape who they are through personal choices may be seriously undermined by the coercive behaviour of a partner or family member.

19. The Government's position is that the criminalisation of coercive and controlling behaviour in intimate or family relationships is both necessary and justified. Firstly, this is due to the wide-ranging nature of the problem that domestic abuse poses to all sectors of society, and the serious emotional harm that it causes to victims. Secondly, this is due to the compelling representations received from several voluntary sector organisations pertaining to a perceived gap in the current law and its enforcement in relation to non-violent coercive and controlling behaviours.

20. The Government's view is that any interference with the right to respect for private life is proportionate for the following reasons:

- a) The offence is tightly drafted to require that the behaviour in question must be repeated or continuous, rather than encompassing isolated incidents;
- b) The test for the impact on the victim ensures a minimum level of severity in the perpetrator's conduct and the harm caused to the victim. The conduct must have a serious effect on the victim, meaning that it either causes them to fear on at least two occasions that violence will be used against them, or it causes them serious alarm or distress which has a substantial adverse effect on their daily activities;
- c) The mental element is framed so that the defendant must either know or ought to have known (according to an objective, reasonable person test) that their behaviour would have a serious effect on the victim.
- d) It is a defence for the alleged perpetrator to demonstrate that their behaviour was in the best interests of the victim and objectively reasonable under the particular circumstances, which acts as an additional safeguard. This would offer protection in the event that apparently controlling or coercive behaviour was actually reasonable and justified in a particular case, since it was rooted in a desire to protect the best interests, personal safety or medical needs of the apparent victim.
- e) The new offence is triable either way; therefore there is scope for less serious forms of behaviour to be treated in a lighter touch way via a summary prosecution and non-custodial disposal, where appropriate.

### **Preparation or training abroad for terrorism**

21. Clause 72 provides for extra-territorial jurisdiction ("ETJ") for two offences under the Terrorism Act 2006: preparation of terrorist acts and training for terrorism. As a result, a person who does anything outside of the UK which would constitute an offence under section 5 or 6 could be tried in the UK courts were they to return to this country. The ETJ provisions were included in the Bill with a view to enhancing the prosecution possibilities available in respect of, in particular, individuals travelling from the UK to Syria and Iraq to engage in jihad, and who may return to the UK equipped with the intention and wherewithal to commit acts of terrorism.

22. The amendments to clause 77(4) and (5) (commencement) provide that the extension of ETJ for these offences comes into force immediately upon, rather than on the date which is 2 months after, Royal Assent. The policy reason for the amendments is that since the introduction of the Bill in the House of Lords in June 2014, the concern regarding those who travel to Syria and Iraq to engage in jihad has intensified. The Government considers that it is necessary and appropriate to commence clause 72 immediately as this will enhance the ability of the prosecuting authorities to take action against people who might return to the UK and who might otherwise remain at liberty to engage in terrorism in this country. It cannot be

assessed with any certainty how many people could not be prosecuted if the ETJ provisions were not commenced early but given the possible consequences of not being able to prosecute even a single person because of this gap in the law, there is, in the Home Office's, operational colleagues' and the Crown Prosecution Service's views, a strong case for early commencement to rule out that possibility.

23. Article 7 provides that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed." In order to ensure Article 7 compliance, clause 75(10)(d) of the Bill provides that the amendments made by, inter alia, clause 72 apply only in cases where every act or other event proof of which is required for conviction of the offence in question takes place after the provision comes into force. However, early commencement of these provisions would bring about a change in the scope of criminal liability under sections 5 and 6 without the usual minimum two month period during which the public could become aware of the change before it came into force. This therefore raises issues of legal certainty and legitimate expectations (if not issues of Article 7 compliance). However, the Government considers that there is an overriding need to remedy the gap in the criminal law in order to be able adequately to address the risk of terrorism in the UK. Further, it is suggested that since the ETJ provisions have been in the public domain since June 2014, when the Bill was introduced, the general public have had sufficient warning that this change to the criminal law is pending (subject to Parliament's approval). The amendments to the Bill to provide for commencement on Royal Assent were announced by the Home Secretary at Second Reading on 5th January (Hansard, column 64). On this basis, it is not thought that early commencement would give rise to significant unfairness or generate a significant degree of legal uncertainty.

### **Restriction of use of mobile phones by prisoners**

24. New Clause "*Prevention or restriction of use of communication devices by prisoners etc*" confers on the Secretary of State (in relation to England and Wales) and the Scottish Ministers (in relation to Scotland) a regulation-making power which provides that regulations may make provision conferring power on a court to make a telecommunications restriction order. This is an order which will require a communications provider to take whatever action the order specifies for the purpose of preventing or restricting the use of a mobile phone (or other communication device) in a prison where the use of the phone is unauthorised. The new clause sets out what regulations must make provision about and what they may make provision about. It also defines certain terms, such as "communications provider". Regulations will be subject to the affirmative procedure.

25. The Government considers that the regulation-making power itself does not engage the ECHR. However, any regulations made thereunder may engage Articles 6, 8 and Article 1 of Protocol 1.

26. Insofar as Article 6 is engaged (which is debatable, given that a prisoner has no right to possess or use a mobile phone in prison without authorisation - this constitutes an offence under section 40D of the Prison Act 1952 and the phone is subject to confiscation under the Prison Rules 1999 (rule 43(5)), the matter would be dealt with in the County Court (in England and Wales) or the Sheriff Court (in Scotland). The court would need to be satisfied to the civil standard of proof that the phone is in use without authorisation before it could make an order requiring a communications provider to disconnect the phone. Whilst in many cases it is not possible to identify the user of the phone (if it were, the phone would be confiscated), regulations must make provision about giving notice of applications and confer rights on persons to make representations. Hearings and judgment will be given publicly save where there is a need to exclude the public to safeguard sensitive material or otherwise in the public interest.

27. In relation to Article 1 of Protocol 1 a court order requiring a phone to be disconnected would constitute a control on the use of property rather than depriving someone of their property. That control would be prescribed by law (namely a court order made in accordance with regulations) and would be proportionate to the legitimate aims of reducing crime and promoting good order and discipline within prison estate.

28. To the extent that Article 8 is engaged, again, the disconnection of the phone would be in consequence of a court order made in accordance with regulations and thus would be prescribed by law and would be proportionate to the legitimate aims of reducing crime and promoting good order and discipline within prison estate; the Government's view is that it would strike the appropriate balance between the public interest in having secure prisons and any Article 8 rights of the prisoner.

29. The Government therefore considers that the new clause is ECHR compliant.

**Home Office/Ministry of Justice  
8 January 2015**

**ANNEX B**

**SERIOUS CRIME BILL**

**EUROPEAN CONVENTION ON HUMAN RIGHTS**

**SUPPLEMENTAL MEMORANDUM BY THE HOME OFFICE**

**Introduction**

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to Government amendments to the Serious Crime Bill tabled for Commons Report stage. The memorandum has been prepared by the Home Office.

**Female genital mutilation**

2. New Clause “*Duty to notify police of female genital mutilation*”, which extends to England and Wales, will insert into the Female Genital Mutilation Act 2003 (“the 2003 Act”) a new duty on certain regulated professionals to make a notification to the police if, in the course of his or her work, the professional discovers that an act of female genital mutilation appears to have been carried out on a girl who is aged under 18. The new clause specifically provides that any such notification made will not breach any obligation of confidence or other restriction on the disclosure of information owed by the person making the notification.

3. The requirement to notify the police where an act of female genital mutilation is discovered constitutes an interference by the State into the right to respect for the private life and family of the children who have been subjected to female genital mutilation. In particular, children may wish to disclose this to a doctor, other healthcare professional, teacher or social worker in confidence. Children may fear that a disclosure will result in police action against their parents and hence be deterred from making that disclosure or seeking medical treatment for related or unrelated matters. It is not the case that any of the professionals to whom the duty will apply are currently legally obliged to keep private a disclosure made by a child that she has been subject to female genital mutilation. Currently such professionals can further disclose any such information given to them without breaching any duty of confidence or other restriction on disclosure of information if they are acting in such a way as they consider to be in the public interest or to protect the child in question. The new duty is designed to make clear to professionals that they must notify the police upon discovery of an act of female genital mutilation so that there can be no doubt about whether or not they should do so.

4. The Government considers that any interference with Article 8 pursues the legitimate aims set out in Article 8(2): public safety, the prevention of crime, the protection of health and the protection of the rights and freedoms of others.

5. This new duty is part of a number of provisions in the Serious Crime Bill to amend the 2003 Act to strengthen the protection which is afforded to children who have been and who are at risk of female genital mutilation. The Government considers it to be a necessary and proportionate response to the pressing social need to protect children from female genital mutilation and well within the margin of appreciation given to Member States in the regulation of matters relating to the prevention of crime, the protection of health and the protection of the rights and freedoms of others.

6. Furthermore, the Government considers that children who have suffered or are at risk of suffering female genital mutilation have had, or are at risk of having, their Article 8 rights breached by the carrying out of such an act; these measures are designed, along with the other related clauses, to enhance the protection available to children in respect of their Article 8 rights to be protected from this form of abuse.

7. The Government therefore considers that the new clause is ECHR compliant.

**Home Office**  
**12 February 2015**

**SERIOUS CRIME BILL [HL]**

**EXPLANATORY NOTES**

**ON COMMONS AMENDMENTS**

*These notes refer to the Serious Crime Bill [HL]  
as brought from the House of Commons on 24th February 2015  
[HL Bill 96]*

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*Ordered to be Printed,  
24th February 2015*

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