

EXPLANATORY MEMORANDUM TO
THE SERIOUS CRIME ACT 2007 (APPEALS UNDER SECTION 24) ORDER 2008
2008 No. 1863

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Order makes provision for the procedure for appeals in relation to serious crime prevention orders (SCPOs) made or varied (or not made or varied) in the Crown Court and related matters on costs.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 Under sections 19 to 21 of the Serious Crime Act 2007 (“the SCA”) SCPOs can be made or varied by the Crown Court. Section 24 of the SCA provides the rights of appeal against a decision of the Crown Court in relation to a SCPO. Section 24(1) allows the person who is the subject of the SCPO and the relevant applicant authority to appeal. The relevant applicant authority is the person who applied for the making or variation of the SCPO and under section 8 of the SCA will be, in England and Wales, the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions or the Director of the Serious Fraud Office, and, in Northern Ireland, the Director of Public Prosecutions for Northern Ireland. Section 24(2) provides a right of appeal for third parties who are involved in SCPO cases before the Crown Court. Such third parties will become involved under section 9(4) of the SCA. That subsection makes provision for persons who may be significantly adversely affected by the decision of the Crown Court under section 19, 20 or 21 to make representations to the Crown Court.

4.2 Section 24(9) of the SCA allows the Secretary of State to make an Order to provide for the procedure for appeals under the appeal rights from the Crown Court in section 24. This Order is the Order under that enabling power. Appeals will be to the Court of Appeal Criminal Division and so the Order corresponds to provisions in or relating to the Criminal Appeal Act 1968 or the Criminal Appeal (Northern Ireland) Act 1980, which govern appeals in criminal cases. The provisions on costs correspond to provisions in the Prosecution of Offences Act 1985 or the regulations under that Act (the Costs in Criminal Cases (General) Regulations 1986 (SI 1986/1335)).

5. Territorial Extent and Application

5.1 The Order applies to England, Wales and Northern Ireland.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Part 1 of the SCA created SCPOs, proposals for which were put forward in July 2006 in the Government's consultation paper "New Powers Against Organised and Financial Crime" (Cm 6875). Under the legislation the High Court or the Crown Court may through an SCPO impose conditions on individuals or organisations which have been involved in serious crime if there are reasonable grounds for believing that the SCPO would protect the public by reducing involvement by the person or organisation in serious crime. SCPOs are civil injunctive orders but breach is an offence.

7.2 Appeals rights in relation to SCPOs are covered by sections 23 and 24 of the SCA, as well as section 16 of the Senior Courts Act 1981 and section 35 of the Judicature (Northern Ireland) Act 1978. It is important that there is a robust and workable procedure for such appeals. The procedure for appeals from the High Court is already covered by the Civil Procedure Rules but this is not the case for appeals from the Crown Court and this is why it is necessary to make this Order. The Order ensures that the procedure will work for appeals by the subject of the SCPO, the relevant applicant authority and third parties.

7.3 The procedure in the Order corresponds to the procedure that is followed for criminal appeals as these appeals will be heard in the Court of Appeal Criminal Division (see section 24(5) of the SCA) and so it makes sense to provide a procedure with which that Court is already familiar. However, SCPOs will also be made and varied by the High Court and appeals from the High Court will be brought in the Court of Appeal Civil Division. As a result there will be SCPO appeals in both Divisions of the Court of Appeal. Steps have been taken, therefore, to align the basis for allowing an appeal and the powers of the Court of Appeal under this Order with that of the Court of Appeal Civil Division under Part 52 of the Civil Procedure Rules in order to ensure consistency of approach to SCPO appeals.

7.4 The first three parts of the Order relate to appeals in England and Wales. In particular, there is provision for the basis for allowing an appeal, the powers of the Court, the hearing of evidence and steps that may be taken by a single judge or the Registrar of Criminal Appeals. Part 2 covers the Court of Appeal and Part 4 covers the Supreme Court/House of Lords. Part 4 refers to the Supreme Court, which will be the new name for the House of Lords when it is re-named under the Constitutional Reform Act 2005. Articles 43 and 62 contain transitional provisions to cover the period before the House of Lords is re-named.

7.5 Part 3 of the Order makes extensive provision about costs in the Court of Appeal. This is to ensure that costs can be obtained where appropriate. Provision is made for both the subject of the SCPO and a third party who has appealed under section 24(2) to have their costs paid out of central funds and to have costs awards made against them. There is also provision for orders to cover costs that have been incurred due to the unnecessary act or omission of another party; orders for costs against legal representatives; orders for costs against those who are not parties to the proceedings but have caused costs to be

incurred; and orders for the expenses of witnesses including expert witnesses and interpreters. This Part also makes extensive and detailed provision on how costs are to be determined and how they can be challenged.

7.6 Parts 5 and 6 contain very similar provision to Parts 1 and 3 but in relation to Northern Ireland.

7.7 The Order has been drawn up in consultation with the Ministry of Justice, HM Courts of Service, the Northern Ireland Office and Master Venne, the Registrar of Criminal Appeals.

7.8 There is unlikely to be any public interest in the Order. It is technical and will affect a very small number of persons.

8. Impact

8.1 A Regulatory Impact Assessment was prepared for the Serious Crime Bill and the relevant extract relating to SCPOs is attached. The figures remain current.

8.2 The impact on the public sector is covered in the attached Regulatory Impact Assessment.

9. Contact

Richard Rhodes at the Home Office Tel: 0207 035 1570 or email: Richard.rhodes@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.

EXTRACT FROM SERIOUS CRIME BILL REGULATORY IMPACT ASSESSMENT

SERIOUS CRIME PREVENTION ORDERS

Objective

97. To reduce the harm caused by serious crime, through the prevention and disruption of criminal activities.

Background

98. Considerable progress has been made in the fight against serious crime recently. The Serious Organised Crime Agency (SOCA) came into being on 1 April 2006, and major steps have been taken to improve the police response to regional (level 2) serious crime.

99. Nevertheless, law enforcement has fewer levers against serious criminals than, for example, against white collar criminals, or regulators have against businesses in their sector.

100. The widest range of such tools, covering administrative, civil and criminal remedies, tends to rest in the hands of some of the newer agencies like the Financial Services Authority. This wide range of potential disposals gives considerable flexibility and arguably increases the likelihood of voluntary settlement with those subjected to investigation. The purpose of the disposals includes preventing future harms and redressing past ones

101. This approach reflects a general trend in regulation, exemplified in the Hampton Review, which stressed the importance of a risk based approach, targeting the more invasive regulatory tools in the areas where breaches are most likely.

102. In a parallel process, successive Governments over recent years have introduced new categories of civil orders against individuals for harm or crime prevention purposes. There are a range of such orders, covering areas like anti-social behaviour, sexual offences, restraining orders and football banning orders.

103. The consultation paper *New Powers Against Organised and Financial Crime* set out the case for new civil prevention orders.

Rationale for Government Intervention

104. Government has a duty to reduce the harm caused by serious crime, providing the powers necessary to prevent such crimes from occurring. Only government can introduce new powers of this kind.

Options

- 1) Do nothing
- 2) Introduce the Serious Crime Prevention Order

105. The Serious Crime Prevention Order is a civil order and would impose conditions on an individual or an organisation. It would generally require a High Court hearing (but will also be available to the Crown Court, exercising a civil jurisdiction, upon conviction for a serious crime), and be appealable to the Court of Appeal. The court will be able to impose an order if:

- it is satisfied that a person has been involved in serious crime (whether in England and Wales or elsewhere); and
- 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 England and Wales.

106. The types of conditions that could be imposed are varied and include, but are not limited to, restrictions on the subject's financial dealings – the consultation paper *New Powers Against Organised and Financial Crime* contains case studies of further types of conditions. The intention of the orders would be to prevent harm and they will not be punitive.

107. Orders could be aimed at companies or other organisations which had been involved in serious crime. In terms of scope, the courts will have the flexibility to include such terms as they consider appropriate for protecting the public from the harm caused by serious crime. They might include restrictions on how an enterprise carries out its business, or could require the removal of certain directors or office holders.

Benefits

Option 1 – Do Nothing

108. Serious crime causes huge harm every year. The abuse of Class A drugs, produced, or smuggled into the country, by serious criminals, causes economic and social costs of around £15 billion per year. Further billions of pounds of indirect tax fraud is committed by serious criminals each year, and serious immigration crime incurs economic and social costs of an estimated £2bn annually.

109. Serious criminals are also heavily involved in fraud against the private sector; the true scale of this is unknown, but is certainly well over £1bn per year, and may run into several billions of pounds.

110. Little is known about trends in the scale of serious crime activities, making it very difficult to predict what would happen in future without further government intervention. But the nature of serious crime groups means that they are always on the look out for new criminal opportunities, making it likely that harms would increase over time. If the government is to stay ahead, it must be proactive in identifying measures which can prevent or disrupt serious crime activities.

Option 2 – Introduce the Serious Crime Prevention Order (SCPO)

111. The objective of the orders is to reduce harm by preventing and disrupting serious crime. They will provide law enforcement with a flexible means of tackling serious criminals, including those who facilitate serious crime. This flexibility will enable an approach which allows law enforcement to tackle all levels of serious criminality. It will mean that there is significant harm reduction downstream by tackling the catalysts, at the head of serious criminal organisations for much of the criminal activity. It will also mean that it will be less easy for more junior members to simply pick up where others have left off when a major player has an order placed upon them or is prosecuted.

Financial Costs

112. The following types of financial costs may be incurred:

- Legal aid costs associated with pursuing the civil order and any breaches;
- Court costs associated with pursuing the civil order and any breaches
- Monitoring compliance of orders;
- Potentially, costs of criminal sanctions if the order is breached.

113. In total we expect about 30 SCPOs to be applied for annually. Allowing for the fact that most people facing SCPOs will not be on legal aid (we assume 25% will be), we estimate that this will incur **£81,000** in civil legal aid costs. This includes legal aid costs associated with third parties, failed applications, appeals and variation applications, and prosecutions for breach. (We assume a breach rate of 20%).

114. Civil prosecution costs are estimated to total about **£200,000**.

115. Criminal court costs are very low. A guilty plea incurs costs of £356, suggesting total costs of under **£2,000**. Convictions for breaches are likely to require about 1-2 prison spaces, at a cost of about **£35k - £70k**.

116. This suggests a total cost of applying for orders of about **£318,000 - £353,000** per year.

117. Estimating the cost impact of monitoring compliance is not possible. Law enforcement may be monitoring those subject to these orders in which case there will be little in the way of extra costs.

118. There may be cost savings attached to these orders if they result in fewer criminal prosecutions in the future through a deterrent or preventative effect. The cost estimates above do not take any potential savings into account.

Non-financial Costs

119. With any orders of this kind there is a risk that an order could be lawfully obtained against an individual or organisation who it is subsequently shown was not involved in the suspected activities which led to the order. In this scenario the applicant would not be liable to compensate the subject of the order, although the subject may incur some cost themselves; in particular, if they are a business there may be damage to their reputation. In the event of an order being obtained unlawfully or in bad faith, the applicant may be liable to pay compensation to the subject of the order.

Potential impact on legitimate business

120. We expect the impact to be low. We envisage that the majority of orders will be sought against individuals and that these will be highly targeted. Where an order is sought against an organisation of any kind, the applicant authority will have to demonstrate that the order complies with the test as described above.
121. Where an organisation was involved with serious crime through unknowing or unintended facilitation, law enforcement would use an SCPO against the organisation only having engaged with it to seek to resolve the situation without resorting to the courts, or it would seek an order against the individuals involved instead.
122. In addition, there are strong provisions contained in the Bill to protect third parties and to give them the right to apply for variation or discharge of an order where they are significantly adversely affected by it. The applicant authorities will also have to bring to the attention of the courts the potential impact of any order on third parties – allowing the courts to make fully informed decisions as to what terms of an order might be reasonable and appropriate. All of these provisions will help to ensure that any impact of the orders on legitimate business will be minimal and, where there is an impact, reasonable.

Small firms

123. This proposal was included in the green paper 'New Powers Against Organised and Financial Crime'. This consultation lasted for 3 months and generated more than 110 responses, a large number of which were from the financial sector, other businesses and bodies representing the interests of small businesses. The majority of respondents were in favour of the proposals within the green paper and saw the benefits of the new measures.
124. The Home Office has contacted the Small Business Service who were given the opportunity to comment on these measures.
125. We do not anticipate that these proposals will have a disproportionately negative impact on small firms.

Competition Assessment

126. There should be no financial costs to uninvolved third parties, except in a small number of cases where the subjects of orders may be precluded from doing business with third parties that they would otherwise have done. There will be no obligation on businesses to check whether their customers are subject to prevention orders and therefore potentially restricted from doing business.
127. Businesses which act as a legitimate "front" for illegal activities have an unfair advantage over wholly legitimate businesses, through making more profits, potentially being less likely to comply with regulations and enjoying greater access to capital. Serious crime prevention orders may help reduce this unfair advantage.

Enforcement and Sanctions

128. It is proposed that it will be the responsibility of the applicant to ensure the order is complied with. Breaching the orders would be a criminal offence, punishable by a fine, a community sentence, or imprisonment.

Post-Implementation Review

129. The policy will be evaluated against the number of orders made, and its effectiveness as a new tool for law enforcement agencies. Monitoring compliance could range from 'passive' monitoring, occasional 'mystery shopping' style checks to ensure certain types of business are being duly reported, to full scale surveillance. It will be for law enforcement to decide on a case by case basis whether a prevention order or some other tool is the most effective harm reduction method against any given target.

Consultation

130. We have consulted the following:

Association of Chief Police Officers
Attorney General's Office
Department for Communities and Local Government
Department for Constitutional Affairs
Government Communications Headquarters
Her Majesty's Revenue and Customs
Her Majesty's Treasury
Police forces
Scottish Office
Serious and Organised Crime Agency

Recommendation

131. That the Serious Crime Prevention Order is introduced.

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