

**EXPLANATORY DOCUMENT TO**  
**THE PUBLIC BODIES (MERGER OF THE DIRECTOR OF PUBLIC**  
**PROSECUTIONS AND THE DIRECTOR OF REVENUE AND CUSTOMS**  
**PROSECUTIONS) ORDER 2014**

**2014 No. [DRAFT]**

1. This explanatory document has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament under section 11(1) of the Public Bodies Act 2011 ('the 2011 Act'). This explanatory document is prepared by MoJ as the Government Department with the lead responsibility for the criminal justice system.
2. **Purpose of the instrument**
  - 2.1 The purpose of this instrument is to give legal effect to the administrative merger of the Crown Prosecution Service ('CPS') and the Revenue and Customs Prosecutions Office ('RCPO'). The schedules to the Order make a number of consequential amendments and repeals of legislation that refer to the CPS or the RCPO.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None.
4. **Legislative Context**
  - 4.1 The Public Bodies Act 2011 provides a legislative framework for the reform of public bodies, giving government ministers powers to enact changes by order to abolish, merge or transfer the functions of the public bodies listed in schedules to the Act.
  - 4.2 The CPS was established by Part 1 of the Prosecution of Offences Act 1985 as an independent prosecution service for police forces in England and Wales, headed by the Director of Public Prosecutions ('DPP'). The Commissioners for Revenue and Customs Act 2005 ('the CRCA 2005') established the RCPO, headed by the Director of Revenue and Customs Prosecutions ('DRCP'), to provide a separate independent prosecution function for HM Revenue and Customs ('HMRC') investigations in England and Wales. Its remit was extended to Serious Organised Crime Agency investigations in the Serious Organised Crime and Police Act 2004. The UK Border Agency ('UKBA') took over investigation of all non-fiscal smuggling offences in December 2009 and similar functions to prosecute such cases in England and Wales were assigned to the DPP and the DRCP at the same time.
  - 4.3 The administrative merger of the CPS and RCPO was implemented on 1 January 2010, when the then DPP was also appointed DRCP. No

legislation was necessary to give effect to the administrative merger of the CPS and RCPO. In effect the DPP, who is now also the DRCP, has been running two offices under one umbrella. Operational measures have, however, been implemented to ensure that full effect continues to be given to the distinct legal regimes governing the two organisations.

- 4.4 The Government is proposing to use the powers in the 2011 Act to merge the DPP and DRCP and formalise the administrative merger of their respective offices. The DRCP is being abolished with its functions being transferred to the DPP as necessary. The draft Order relies in particular on the power to merge under section 2 of the 2011 Act.
- 4.5 Article 3 transfers the functions of the DRCP to the DPP and gives effect to Schedules 1 to 3, which amend primary and secondary legislation in consequence of the merger. Articles 4 to 10 make transitional and saving provision to give effect to the legal merger.
- 4.6 For example, the property, rights and liabilities of the DRCP and RCPO are transferred to the DPP and CPS. This achieves the transfer of information (case files and other electronic records, for example) to the DPP and his office as well as the transfer of rights and liabilities (whether, for example, to sue or be sued). Article 5 makes supplementary provision to secure the validity of acts and continuing effect of acts done by the DRCP and RCPO. In particular, article 5(3) ensures the continuity of legal proceedings being carried on by the DRCP and, on transfer, these will continue without interruption by or in relation to the DPP. Under article 6, the DPP will have the same power to take steps in relation to those proceedings as the DRCP would have had.
- 4.7 Article 7 saves existing appointments of persons conducting proceedings on behalf of the RCPO under section 38 of the CRCA 2005. Article 8 saves the assignment of certain customs-related functions given to the DRCP in 2009.
- 4.8 The purpose of article 9 is to ensure that confidentiality rules in section 40 of the CRCA 2005 apply to information being transferred from RCPO to the CPS by virtue of article 4.
- 4.9 Schedule 1 amends the main legislation which regulates the CPS and RCPO, namely the Prosecution of Offences Act 1985 ('the POA 1985') and the CRCA 2005. For example, it amends section 3 of the POA 1985 to give to the DPP the DRCP's prosecutorial powers to institute and conduct criminal proceedings in England and Wales relating to criminal investigations by HMRC (see draft Order, Schedule 1, paragraph 2). Paragraphs 3 and 4 make consequential provision to sections 5 and 7A of the POA 1985 to deal with equivalent powers in sections 38 and 39 of the CRCA 2005. These provisions relate to the powers of the DRCP to appoint persons to conduct prosecutions on behalf of the RCPO and to designate non-

legal staff to undertake specified proceedings or classes of proceedings (such as bail applications).

- 4.10 Paragraphs 5 to 15 of Schedule 1 make consequential and supplementary provision to the CRCA 2005. Section 21 for example is amended to substitute the DPP for the DRCP as the relevant prosecuting authority. Section 40 is modified to apply confidentiality rules to the CPS in respect of information disclosed to the DPP by HMRC for use in connection with a Revenue and Customs function of the DPP, as defined.
- 4.11 Schedules 2 and 3 amend primary and secondary legislation in consequence of the transfer of functions from DRCP to DPP. This includes substituting the DPP for the DRCP in certain provisions where consent is required for the bringing of a prosecution (see, for example, Schedule 2, paragraph 2), otherwise substituting references to the DRCP or RCPO as necessary and deleting references where no longer appropriate. Consequential provision is also made to the Land Registration Rules 2003 in light of the consultation response of HM Land Registry (Schedule 3, paragraphs 3 to 5).
- 4.12 Nothing in the draft Order requires the consent of a devolved administration under section 9 of the 2011 Act. As required by section 10 of the 2011 Act the Government consulted as appropriate, in this case through a full public consultation.

## **5. Territorial Extent and Application**

- 5.1 As the DRCP is an office established by a provision with United Kingdom extent, this instrument extends to the United Kingdom. Any amendments, repeals and revocations made by the Schedules to the Order have the same extent as the enactment to which they relate.

## **6. European Convention on Human Rights**

- 6.1 The Minister of State for Policing, Criminal Justice and Victims (Damian Green) has made the following statement regarding Human Rights:

In my view the provisions of the Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014 are compatible with the Convention rights.

## **7. Policy background**

*What is being done and why*

- 7.1 The merger of the CPS and RCPO was announced on 2 April 2009 by the then Attorney General, Baroness Scotland, and work to consolidate the merger took place throughout the remainder of 2009. The main aspects of the merger were implemented on 1 January 2010, when the then DPP was also appointed DRCP. Since that date there has been a

single management structure and cases investigated by HMRC are now prosecuted by a specialist fraud division of the CPS. However, work is being done to determine whether all HMRC cases should continue to be ring-fenced in the longer term, taking account of considerations of economy, capacity, location and expertise. The intentions of giving legal effect to the administrative merger are to make clear the Coalition Government's confidence in the change, strengthen the identity of the new organisation and clarify the role of the CPS.

7.2 The decision in 2009 to merge the CPS and RCPO was taken in order to create a strengthened prosecution service and to safeguard and improve the work done in both organisations on serious and complex cases. It took place in response to the increase in criminals operating across both functional and national boundaries and the need for prosecutors to be able to operate collaboratively and internationally. Additionally, it was considered that merger of the organisations would deliver enhanced value for money and provide efficiency savings. The administrative merger that took place has safeguarded and improved the high quality work done in both services on serious and complex cases and has provided an enhanced international capability. It also delivered increased value for money through improved efficiency.

7.3 The savings resulting from the merger of RCPO and the CPS were all Programme savings, as RCPO did not hold any Administrative resources. CPS took on the activities of RCPO and successfully absorbed the reduced baseline budgets, and all the former functions of RCPO were fully integrated into the structure of the CPS. The legislative changes now sought would not lead to the future transfer out or loss of staff. The breakdown of the Programme costs and savings is provided in the table below. There were some up-front IT and accommodation costs in 2009/10 and 2010/11 respectively to enable the merger. Savings have been realised in Payroll and from RCPO prosecution costs, as well as savings across the rest of the Spending Review period in accommodation and IT. The merger is estimated to have saved over £6 million annually by 2012/13, rising to almost £10 million by 2014/15.

#### SR10 Period

Year-on-year	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Payroll	1,282,774	1,643,677	2,718,238	3,569,700	4,019,455	4,440,770
Accommodation	0	-137,419	0	908,405	3,633,619	3,633,619
IT	-2,722,361	11,725	1,233,748	1,267,311	1,286,660	1,286,660
Pros Costs	0	109,609	266,179	438,435	438,435	438,435
<b>Total</b>	<b>1,439,586</b>	<b>1,627,592</b>	<b>4,218,165</b>	<b>6,183,850</b>	<b>9,378,169</b>	<b>9,799,484</b>
<b>Cumulative</b>						
Payroll		1,643,677	4,361,915	7,931,615	11,951,071	16,391,841
Accommodation		-137,419	-137,419	770,986	4,404,605	8,038,224
IT		11,725	1,245,473	2,512,784	3,799,444	5,086,104
Pros Costs		109,609	375,788	814,222	1,252,657	1,691,091
<b>Total</b>		<b>1,627,592</b>	<b>5,845,756</b>	<b>12,029,607</b>	<b>21,407,776</b>	<b>31,207,260</b>

- 7.4 The Coalition Government believes that the decision taken by the previous administration to merge these two organisations was consistent with its own wider approach to public bodies, as set out in the Public Bodies Act 2011. By placing the merger on a statutory basis, the Government makes clear its confidence in the soundness of the change. Although the administrative merger of the CPS and RCPO was consistent with existing law, the continuing existence of two legally distinct organisations under one administrative umbrella is inherently unsatisfactory in that it casts doubt on the intended permanence of the change. It would, in principle, still be possible now to reverse the administrative merger without the need for legislation. By leaving the two organisations in place legally, RCPO would continue to have a separate identity alongside the CPS. The Order underlines the permanence of the merger. Additionally, the continuing existence of the two organisations has practical implications for how the administratively merged organisations work. Greater efficiency and effectiveness would be achieved through a legal merger.

*Satisfying the requirements of section 8(1) of the 2011 Act*

- 7.5 In line with the requirements of the 2011 Act (section 8(1)), a Minister may only make an Order under section 2 of the Act merging a group of bodies or offices if the Minister considers that the Order serves the purpose of improving the exercise of public functions. In considering this, the Minister must have regard to efficiency, effectiveness, economy and securing appropriate accountability to Ministers.
- 7.6 The Minister considers that the instrument serves the purpose in section 8(1) of the 2011 Act for the following reasons:
- i. Efficiency: The administrative merger has delivered a more efficient and flexible prosecution service, particularly in respect of its handling of serious and complex cases. The single management structure in the specialist fraud division oversees the prosecution of HMRC cases as well as other serious and complex fraud prosecuted by the CPS. All RCPO prosecutors have been designated Crown Prosecutors, and are therefore able to undertake the full range of CPS prosecutions, providing the CPS with greater capacity and expertise in prosecuting its serious and complex cases. However, pending a legal merger, the confidentiality of HMRC material has been protected by confining HMRC casework to a limited number of designated RCPO prosecutors. The need for designation under section 37 of the CRCA 2005 causes a number of practical problems. Obtaining the personal consent of the DRCP (which is required for a non-designated prosecutor to make charging decisions in a HMRC prosecution) is time-consuming and inefficient in resource terms, and failure to obtain it may put at risk the validity of the criminal proceedings (with a consequential risk of costs and of reputational damage); and unavailability of a

designated prosecutor for a hearing (as does occur and often at short notice) can lead to delays at court and the postponing of HMRC cases.

The Order effecting legal merger will resolve these practical difficulties. It allows any Crown Prosecutor to give advice on HMRC-investigated cases and to institute and conduct related proceedings, thus permitting the deployment of lawyers nationwide to conduct HMRC work, and protects the confidentiality of HMRC material by bringing such prosecutors within the ambit of the unauthorised disclosure offence in the CRCA 2005. The Order will thus provide greater flexibility in the allocation of resources, and thereby promote greater efficiency.

- ii. Effectiveness: Placing the merger on a statutory basis will consolidate the improvements to the high-quality work on serious and complex cases that have been achieved, and the increased value for money that derives from minimising duplication and making economies of scale. In particular, the ability for all CPS prosecutors to conduct HMRC cases, which can be complex, will develop the capacity and expertise of those prosecutors to prosecute complex cases more generally. This will lead to increased effectiveness of those working in the CPS. Moreover, the benefits that come from legislating to make the CPS and RCPO the same legal entity, and the greater effectiveness that will come from this, will contribute more widely to the Government's anti-crime agenda. In particular, more effective CPS prosecutors will be more readily able to adapt to the changing demands of criminal justice enforcement, including the prosecution of cases generated by the creation of the National Crime Agency.
- iii. Economy: Simplifying the legal regime will help the combined organisation to operate more flexibly, encouraging further gains in addition to those that are already being derived (see paragraph 7.3 above) from minimising duplication and making economies of scale.
- iv. Securing appropriate accountability to Ministers: The increased effectiveness that will result through the combined organisations will not lead to any reduction in the accountability to Ministers. The DPP will continue to account to the Attorney General and via him to Parliament. Giving legislative effect to the administrative merger that has already taken place will make it clearer where responsibility lies for casework formerly dealt with by the RCPO, and so enhance public accountability.

7.7 The Minister considers that the conditions in section 8(2) of the Act are satisfied, both in respect of the CPS and RCPO. The merger has taken

place at administrative level and, by pursuing a statutory basis for the merger, the Government makes clear its commitment to merge the body on a legal setting. The merger does not affect the exercise of any legal rights or freedoms either directly or indirectly, nor does it remove any necessary protections. It enables legal proceedings to continue; it transfers any rights and liabilities of the DRCP to the DPP; it continues to protect HMRC information and nothing in the draft Order affects the prosecutorial independence of the DPP or the CPS.

- 7.8 During passage of the Public Bodies Act 2011 (then the Public Bodies Bill) an amendment was tabled at Lords Committee stage by Lord Christopher which sought to remove both bodies from Schedule 2 of the Bill. If passed, this amendment would have had the effect of removing the power in the Bill to provide the legal underpinning for the merger. Lord Christopher subsequently withdrew the amendment. There were no further amendments or debate concerning the merger during the passage of the Bill.

## **8. Consultation outcome**

- 8.1 In July 2011 MoJ launched a public consultation on a number of proposals contained within the Public Bodies Bill (*Consultation on reforms proposed in the Public Bodies Bill: Reforming the public bodies of the Ministry of Justice – Command 8116*). The consultation document indicated that separate consultation would take place in relation to the intention to give legal effect to the administrative merger of the offices of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions.
- 8.2 A consultation paper *Public Bodies Act 2011: Consultation on an order to give legal effect to the administrative merger of the Crown Prosecution Service and Revenue and Customs Prosecutions Office* was subsequently published on 28 February 2012. This consultation was undertaken separately from the earlier one because of the different nature of the merger. The earlier consultation sought views on the merger and/or abolition of various public bodies. However, an administrative merger of the CPS and RCPO took place some time prior to the introduction of the legislation and the primary aim of the consultation was to seek views on whether legal effect should be given to the administrative merger, and whether the proposed approach would achieve the desired effect.
- 8.3 A total of eight responses to the consultation paper were received, from the Crown Prosecution Service, HM Revenue and Customs, the Land Registry, Mr Justice Calvert-Smith, the Magistrates' Association, the Criminal Bar Association, the Chief Constable of Essex, and a member of the public, Mr Simon Cramp.
- 8.4 All respondents who commented on the proposal either supported or did not object to the proposal to give legal effect to the administrative merger. One response expressed the hope that special investigative

powers enjoyed by HMRC should not be transferred to non-revenue prosecutions; another, that the specialist expertise of the RCPO should not be lost and that high standards in prosecuting should not be reduced. Some comments, including suggestions about how the savings accrued by the actual merger might be used, went outside the narrow terms of the consultation.

- 8.5 In its response to consultation, the Government confirmed that there is no intention or risk of HMRC investigative powers transferring to the police or any other investigator as a result of the Order. The response also confirmed that the cases investigated by HMRC are handled by a specialist casework division within the CPS which also has a national remit to prosecute the most complex and serious police-investigated fraud and corruption cases. The response further indicated that the CPS is keeping this under review.
- 8.6 The Government's response to the consultation was published in August 2012 and can be found, along with the consultation document itself and the responses, on the Ministry of Justice website at: <https://consult.justice.gov.uk/digital-communications/cps-rcpo-merger>.
- 8.7 The Government's decision, after considering the responses to the consultation, is that an Order should be laid to give legal effect to the merger.

## **9 Guidance**

- 9.1 The nature of this Order makes it unnecessary to publish guidance in relation to it.

## **10 Impact**

- 10.1 An Impact Assessment was published alongside the consultation paper and has been updated for publication alongside the draft Order. The assessment deals with the impacts associated with the implementation of the Order only; it does not address the impacts associated with the earlier administrative merger of the CPS and RCPO. Given that the administrative merger has already taken place, any potential further costs will be negligible and are likely to be outweighed by the benefits arising from the further efficiencies described at paragraph 7.6 above.

### *The Order*

- 10.2 The Order will mean that the existing offence of unlawful disclosure which applies to RCPO staff (under section 40(3) of the CRCA 2005) will continue to apply but to CPS staff, in relation to information provided by HMRC for use in connection with one of the DPP's revenue and customs functions. The maximum penalty for this offence is two years' imprisonment. This offence is currently applicable to about 600 staff. Once the Order is in force, the offence will apply to approximately 6,500 staff as a necessary consequence of the bigger organisation. However, no charges under section 40(3) of the 2005 Act

have been brought to date. Amending the non-disclosure provision so that it applies to CPS staff is expected to have a negligible impact on the justice sector.

10.3 An Equality Impact Assessment was undertaken in 2009 on the administrative merger and found that there were unlikely to be any adverse equality impacts for staff. A further initial Equality Impact Assessment screening was provided alongside the consultation paper, which included a specific equalities question. None of the responses identified any negative equalities impacts.

10.4 The Impact Assessment and Equality Impact Assessment screening documents can be found on the Ministry of Justice website at: <https://consult.justice.gov.uk/digital-communications/cps-repo-merger>.

## **11. Regulating small businesses**

11.1 The legislation does not apply to small business.

## **12. Monitoring and review**

12.1 Her Majesty's Crown Prosecution Service Inspectorate conducts independent inspection and assessment of prosecution services, and is well placed to ensure that the CPS continues to deliver an effective service.

## **13. Contact**

13.1 Richard Chown at the Ministry of Justice (tel: 020 3334 6077 or e-mail: [Richard.Chown@justice.gsi.gov.uk](mailto:Richard.Chown@justice.gsi.gov.uk)) can answer any queries regarding the instrument.