

EXPLANATORY MEMORANDUM TO
THE CRIME AND COURTS ACT 2013 (NATIONAL CRIME AGENCY AND
PROCEEDS OF CRIME) (NORTHERN IRELAND) ORDER 2015

2015 No. 798

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

2. Purpose of the instrument

2.1 This Order enables NCA officers designated with the powers and privileges of a constable to have, in Northern Ireland, all the powers and privileges of a Northern Ireland constable. The Order also extends to Northern Ireland certain provisions of the Crime and Courts Act 2013 (“the 2013 Act”) contained in Parts 1 and 2 of Schedule 25 to that Act, which make amendments to the Proceeds of Crime Act 2002 (“POCA”).

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

3.1 None

4. Legislative Context

4.1 The 2013 Act established the National Crime Agency (“the NCA”) as a Crown Body (and in particular with the key characteristics of a non-ministerial department). Part 1 of the 2013 Act sets out the functions of the NCA and makes provision about its operation and the accountability arrangements, the details of which are set out in the Framework Document made under Schedule 2 to Part 1 of the 2013 Act.

4.2 The provisions in Part 1 of the 2013 Act are subject to Schedule 24 which provides that specified “relevant NCA provisions”, listed in paragraph 9, do not extend to Northern Ireland. Notable amongst the relevant NCA provisions is that an NCA officer designated with the powers and privileges of a constable by the Director General under section 10(1)(a) of the 2013 Act does not have (in Northern Ireland) all the powers and privileges of a Northern Ireland constable (under paragraph 11(1)(c) of Schedule 5 to the 2013 Act).

4.3 Paragraph 2 of Schedule 24 to the 2013 Act enables the Secretary of State to provide, by order, that a relevant NCA provision will extend to Northern Ireland. Paragraph 6 of that Schedule provides that such an order requires the consent of the Northern Ireland Assembly so far as it makes transferred provision. Paragraph 3 enables the Secretary of State to make such provision as she considers appropriate, in consequence of, or in connection with a provision in the 2013 Act extending to Northern

Ireland by virtue of an order under paragraph 2. Paragraph 5 enables the Secretary of State to modify the ways in which (a) the NCA's functions are exercised in Northern Ireland; or (b) the exercise of NCA functions in Northern Ireland is planned or supervised. Paragraph 6 provides that any order made under this Schedule which makes transferred provision may only be made with consent of the Northern Ireland Assembly. Paragraph 7 provides that an order under paragraph 2, 3, or 5 may include provision: (a) conferring, removing or otherwise modifying a function (which includes an NCA function and a function of the Secretary of State), or (b) amending, repealing, revoking or otherwise modifying any enactment. This means that any order made under paragraphs 2 to 5 of the Schedule may, in particular, make textual amendments to Part 1 of the 2013 Act to modify its application to Northern Ireland, or modify one or more of the enactments amended in Parts 2 and 3 of Schedule 8 to the 2013 Act.

4.4 Schedule 25 to the 2013 Act modifies the extent of the provisions in sections 48 and 49 and Schedules 18 and 19 so that certain provisions referred to as "relevant civil recovery provisions" (namely section 48(2), (3), (5) and (6) and Schedule 18 and section 48(7), as far as it relates to those provisions and Part 2 of Schedule 18) and "relevant investigation provisions" (namely paragraphs 2 to 13, 25 to 27, 29 and 30 of Schedule 19 and section 49 so far as it relates to those provisions) do not extend to Northern Ireland. Schedule 25 confers power on the Secretary of State to extend by order a "relevant civil recovery provision" and a "relevant investigation provision" to Northern Ireland. It also confers power on the Secretary of State to make provision in consequence of, or in connection with, a provision extending to Northern Ireland. The Secretary of State must secure the consent of the Northern Ireland Assembly before making an order under Schedule 25 which contains provision in respect of transferred matters falling within the legislative competence of the Northern Ireland Assembly.

4.5 The consent of the Northern Ireland Assembly to the making of transferred provision by the Order under Schedule 25 having been secured, the Secretary of State is by this Order extending all of the relevant civil recovery provisions and relevant investigation provisions to Northern Ireland, with some necessary consequential amendments.

4.6 Sections 48 and 49 of, and the Schedules to which those provisions relate, Schedules 18 and 19 to the 2013 Act amend POCA. Section 48 and Schedule 18 affect the position in relation to orders made under Chapter 2 of Part 5 of POCA concerning civil recovery of the proceeds of unlawful conduct. They provide that such orders should reach beyond the jurisdiction of the court and can relate to persons and property not within the jurisdiction, as the proceeds of unlawful conduct are rarely held in one country and are often placed in jurisdictions where recovery is difficult. However, the courts may only deal with cases which have sufficient connection to the United Kingdom (see Schedule 7A to POCA for examples of what will constitute a sufficient connection). These provisions are already in force in Great Britain (with the exception of section 48(6)(a) and Part 1 of Schedule 18). The provisions that are already in force will come into force in relation to Northern Ireland upon the extension of the provisions to Northern Ireland. The

effect of the extension of section 48(7) of the 2013 Act, and article 8(8) of the Order, is that these changes are deemed to always have had effect and so are retrospective.

4.7 Section 49 and Schedule 19 amend Part 8 of POCA (which concerns the investigations permitted by POCA). The main changes are changes to the definition of a civil recovery investigation to clarify that the focus of an investigation can be a person or property and also to clarify that there can be an investigation into property that has not yet been clearly identified. New sections 375A and 375B are also inserted into POCA, and these make provision for evidence to be obtained from a court, tribunal, government or authority outside the United Kingdom (“receiving country”) if a person or property is subject to certain types of investigation. These provisions are not yet in force in Great Britain, and the effect of the extension of the provisions to Northern Ireland is that the provisions will be commenced by way of commencement order under the 2013 Act at a later date (and the same applies to section 48(6)(a) and Part 1 of Schedule 18, which are also not yet in force in Great Britain).

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Minister for Modern Slavery and Organised Crime, Karen Bradley, has made the following statement regarding Human Rights:

In my view the provisions of the Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015 are compatible with the Convention rights.

7. Policy background

7.1 During the Parliamentary stages of the Bill that became the 2013 Act it became clear that the Northern Ireland Assembly would not pass a Legislative Consent Motion in respect of provisions relating to the operation of the NCA in Northern Ireland, and the granting and extension of certain functions under POCA. In light of this, the Bill was amended to provide that those provisions would not extend to Northern Ireland. The Bill was also amended to create mechanisms to extend those provisions to Northern Ireland at a later date once consent had been achieved, with any necessary modifications.

7.2 A motion was tabled before the Northern Ireland Assembly on 27 January 2015. [The text of the motion reads: ‘That this Assembly consents to the making of the draft Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015, laid before Parliament on 29 January 2015.’]

7.3 The Order extends some “relevant NCA provisions”, (as defined in Schedule 24 to the 2013 Act), and all of the “relevant civil recovery provisions” and “relevant investigation provisions” (as defined in Schedule 25 to the 2013 Act) to Northern Ireland. The Order also makes modifications to the way “relevant NCA provisions” will be exercised in Northern Ireland. Those modifications are consistent with the terms of the motion tabled before the Northern Ireland Assembly and the discussions led by David Ford MLA, the Northern Ireland Justice Minister, about the terms on which consent would be agreed.

7.4 Article 3 of the Order provides that an initial tranche of “relevant NCA provisions” specified in that Article will extend to Northern Ireland. These provisions will come into force on the day after the order is made. These provisions must come into force first as some of them are necessary to enable certain preparatory work to be done before NCA officers can exercise the powers and privileges of a Northern Ireland constable. Those provisions include:

- The requirement for the Secretary of State to consult strategic partners in Northern Ireland before setting strategic priorities for the NCA in Northern Ireland (section 3(2)(a) of the 2013 Act).
- The requirement for the Director General of the NCA to consult strategic partners in Northern Ireland when preparing an annual plan (section 4(6)(a) of the 2013 Act), including the Department of Justice in Northern Ireland (section 4(7)(b) of that Act) and obtain the consent of the Department of Justice in Northern Ireland before issuing any annual plan (section 4(8)(c)).
- The requirement for the Secretary of State to consult the Department of Justice in Northern Ireland before appointing a person to be Director General (paragraph 7(1)(b) of Schedule 1 to the 2013 Act) and the requirement to consult the Department of Justice in Northern Ireland before calling upon the Director General to resign or retire (paragraph 8(3)(b) of Schedule 1).
- The requirements that the Secretary of State must consult the Department of Justice in Northern Ireland before issuing or revising a framework document (paragraph 5(b) of Schedule 2 to the 2013 Act) and send a copy of the framework document to the Department of Justice in Northern Ireland (paragraph 6(2)(b)(ii) of Schedule 2).
- The requirement that the Department of Justice in Northern Ireland must lay a copy of the framework document before the Northern Ireland Assembly (paragraph 6(4) of Schedule 2 to the 2013 Act) and providing that the framework document should be treated as a statutory document for the purposes of laying before the Northern Ireland Assembly (paragraph 6(5) of Schedule 2).
- The requirement that the Department of Justice in Northern Ireland must lay a copy of the annual report before the Northern Ireland Assembly (paragraph 8(4) of Schedule 2 to the 2013 Act) and providing that the annual report should be treated as a statutory document for the purposes of laying before the Northern Ireland Assembly (paragraph 8(5) of Schedule 2).

7.5 Article 4 of the Order provides that a second tranche of “relevant NCA functions” specified in that Article will extend to Northern Ireland. These provisions will come into force two months after the order is made. Those provisions include:

- Section 11(8) of the 2013 Act, which provides for the establishment of procedures for the investigation of complaints about NCA officers by the Police Ombudsman.
- A duty on a member of the PSNI or any other person operating in Northern Ireland charged with the duty of investigating organised crime or serious crime to co-operate with NCA officers in the discharge of NCA functions (paragraph 1(2) of Schedule 3 to the 2013 Act).
- A duty on the Chief Constable of the PSNI to keep the Director General informed of any information held by the PSNI which is relevant to the NCA’s functions (paragraph 3 of Schedule 3 to the 2013 Act).
- The ability for the Department of Justice in Northern Ireland, with the consent of the Secretary of State) to direct the Director General and the Northern Ireland Policing Board to make arrangements for the NCA to use PSNI facilities (paragraph 25 of Schedule 3 to the 2013 Act). Arrangements made under such a direction cannot be terminated without the consent of the Department of Justice in Northern Ireland (paragraph 26(3)(b) of Schedule 3).
- Paragraph 11(1)(c) of Schedule 5 to the 2013 Act, which provides that NCA officers designated with the powers and privileges of a constable have all the powers and privileges of a Northern Ireland constable in Northern Ireland and the adjacent UK waters. Those powers can only be exercised where a Northern Ireland general authorisation is in place and the powers are exercised in accordance with that authorisation; or a general authorisation and an operational authorisation are in place and the powers are exercised in accordance with the operational authorisation (paragraph 11(6) to (8) of that Schedule).
- Paragraph 13 of Schedule 5, which provides that NCA officers designated with police powers may exercise any power or privilege of a constable authorised by a warrant.
- Paragraph 19 of Schedule 6, which provides that the Police Ombudsman may make reports to the Secretary of State on matters relating to the Ombudsman’s functions in relation to the NCA. Those reports can be made either on the request of the Secretary of State or of the Ombudsman’s own motion.

7.6 Article 5 of the Order provides that Articles 4 and 5 of the National Crime Agency (Limitation of Extension to Northern Ireland) order 2013 are revoked. The effect of this revocation is to remove the limitations placed on the NCA in relation to carrying out its civil recovery function in relation to transferred matters in Northern Ireland.

7.7 Article 6 and Schedule 3 to the order modify the application of the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE(NI)”). These modifications enable NCA officers designated with police powers in Northern Ireland to exercise PACE(NI) powers. The PACE(NI) powers available to NCA officers with police powers will include powers of arrest, search and seizure, and the ability to take fingerprints and

samples. References to police ranks are substituted with references to the equivalent NCA Grades. The modifications provide that the Department of Justice in Northern Ireland may issue Codes of Practice in connection with the exercise of PACE(NI) powers by NCA officers, and NCA officers must have regard to any Codes issued.

7.8 Schedule 1 to the Order makes consequential and connected provision relating to the extension of “relevant NCA functions” to Northern Ireland.

- Paragraph 1 provides that the Director General of the NCA must supply the Police Ombudsman with such information as the Ombudsman may require for the purposes of, or in connection with, the exercise of any of the Ombudsman’s functions.
- Paragraph 2 of the Schedule replaces the provisions about general and operational authorisations with new provision. The order provides that an NCA officer may only exercise the powers and privileges of a Northern Ireland constable if a general authorisation is in force, the powers are exercised in accordance with that authorisation and either i) the NCA officer has the agreement of the Chief Constable or ii) the powers are being exercised in relation to the conduct of a police officer. The latter is in place to deal with circumstances where the NCA is investigating corruption and seeking the agreement of the Chief Constable would prejudice the prevention or detection of crime, the apprehension of offenders or the prosecution of offences, or might jeopardise the safety of any person. It is not intended to take precedence over the role of the Police Ombudsman in investigating complaints about police officers. The Chief Constable may delegate the agreement of the exercise of powers and privileges to someone at superintendent level or above.

7.9 Schedule 2 makes amendments to legislation relating to NCA functions:

- Paragraph 2 provides that the Northern Ireland Policing Board must monitor the exercise of the NCA’s functions in Northern Ireland and assess the level of public satisfaction with the performance of the NCA in exercising its functions. Paragraph 6 requires the Board to report on these matters.
- Paragraph 3 confers a duty on NCA officers exercising NCA functions in Northern Ireland to do so with the aim of securing the support of, and act in co-operation with, the local community when exercising police powers.
- Paragraph 4 imposes a duty on the Director General to provide the Northern Ireland Policing Board with information and documents.
- Paragraph 5 provides that NCA officers exercising functions in Northern Ireland must read and understand the PSNI Code of Ethics and that the provisions of the Code must, as far as practicable, be reflected in NCA disciplinary procedures relating to the exercise of functions in Northern Ireland.
- Paragraph 7 provides that the Director General must, when requested to do so, submit a report to the Northern Ireland Policing Board on any matter connected with the performance of the NCA as it relates to Northern Ireland. The Northern Ireland Policing Board must consult the Secretary of State before requesting the Director General submit a report.

- Paragraph 8 provides that after considering a report made under Paragraph 7, the Board may, following consultation with the Director General and Secretary of State, instruct that an inquiry be held into the matter because of its gravity or exceptional circumstances. Although the Director General will remain accountable to the Secretary of State and through her to Parliament, as set out in the Framework Document made under Schedule 2, to Part 1 of the 2013 Act. .
- Paragraph 9 provides that the Director General must attend a meeting of the Northern Ireland Policing Board if given a reasonable period of notice.
- Paragraph 11 provides for inspections by the Chief Inspector of Criminal Justice in Northern Ireland. Those inspections must relate to NCA officers exercising NCA functions in Northern Ireland. Paragraph 12 provides that the Chief Inspector must consult the Secretary of State if his planned inspection programme covers the NCA and that the Department of Justice must consult the Secretary of State before requiring the Chief Inspector to carry out an inspection relating to the NCA.
- Paragraph 14 provides that the Secretary of State must consult the Department of Justice in Northern Ireland before asking HMIC to carry out an inspection that relates specifically to NCA activity in Northern Ireland. It further provides that the Department of Justice Northern Ireland may request HMIC carry out an inspection of a particular matter that relates to the exercise of NCA functions in Northern Ireland following consent from the Secretary of State.
- Paragraph 15 provides that the agreement of the Chief Constable of the PSNI must be obtained before the exercise of investigatory powers under Part II of the Regulation of Investigatory Powers Act 2000 or Part III of the Police Act 1997 except where the exercise of the powers relates to the conduct of a police officer. These powers include directed and intrusive surveillance powers, the use of Covert Human Intelligence Sources and property interference. The exemption from the need to seek agreement before exercising these powers is in place to deal with circumstances where the NCA is investigating corruption and seeking the agreement of the Chief Constable would prejudice the prevention or detection of crime, the apprehension of offenders or the prosecution of offences, or might jeopardise the safety of any person. The Chief Constable may delegate the giving of such agreement to someone at superintendent level or above.

7.10 Article 7 of this Order provides for all of the relevant civil recovery provisions and all of the relevant investigation provisions to extend to Northern Ireland. Articles 8 and 9 of this Order amend provisions extended to Northern Ireland by article 7. These amendments are intended to ensure that the wording of the provisions reflects their extension to Northern Ireland.

8. Consultation outcome

8.1 There has been no public consultation on the provisions of this Order. However, the Northern Ireland Justice Minister has led discussions with members of the Northern Ireland Assembly on the terms on which consent to the extension of “relevant NCA provisions”, “relevant civil recovery provisions” and “relevant investigation provisions” could be agreed. The Order reflects the terms of those discussions and the motion laid before the Northern Ireland Assembly.

9. Guidance

9.1 Provisions in the Order will need to be underpinned by administrative arrangements in Memoranda of Understanding, and revisions to the framework document issued under Schedule 2 to the 2013 Act. These will, in particular, deal with the ways in which the new duties conferred on NCA officers will operate. The intention is that these Memoranda will be in place before the “relevant NCA provisions” in Article 4 are extended to Northern Ireland.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is minimal. NCA officers in Northern Ireland are currently engaged in activity that does not require them to exercise the powers and privileges of a Northern Ireland constable. However, once they are able to exercise the powers and privileges of a Northern Ireland constable, there should be a more efficient and effective operational response to serious and organised crime in Northern Ireland and the rest of the UK.

10.3 An Impact Assessment has not been prepared for this instrument. However, Impact Assessments covering the NCA’s operation in Northern Ireland and the amendments to civil recovery powers were prepared during the passage of the Bill that became the 2013 Act.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 The Order contains provision for the monitoring of the exercise of NCA functions in Northern Ireland by the Northern Ireland Policing Board. Additionally, paragraph 7 of Schedule 2 to the 2013 Act requires the Director General of the NCA to issue a report each year on the exercise of the NCA’s functions, including an assessment of the extent to which the annual plan for that year has been carried out. Each annual report must be laid before Parliament, the Scottish Parliament and the Northern Ireland Assembly.

13. Contact

Caroline Mersey at the Home Office Tel: 020 7035 5772 or email:
NCAOUconf@homeoffice.x.gsi.gov.uk can answer any queries regarding the instrument.