

SERIOUS CRIME ACT 2015

EXPLANATORY NOTES

TERRITORIAL EXTENT

Part 3: Organised, Serious and Gang-Related Crime

Commentary on Sections

Section 46 and Schedule 1: Extension of Part 1 of Serious Crime Act 2007 to Scotland

160. *Section 46* gives effect to Schedule 1 which extend the provisions in respect of SCPOs contained in Part 1 of the 2007 Act to Scotland and, in so doing, make the necessary modifications to that Part to take account of Scots law.
161. *Paragraph 2* of Schedule 1 amends section 1 of the 2007 Act to provide that the Scottish civil courts, namely the Court of Session or a sheriff, may make an SCPO. In England and Wales and in Northern Ireland the equivalent power is conferred on the High Court. The test for making an order in Scotland is the mirror image to that applicable in the other parts of the UK. The court must be satisfied that a person has been involved in serious crime, whether that involvement was in Scotland or elsewhere in the world, and where it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person who is subject to the order in Scotland. The rest of this paragraph make amendments to section 1 which are consequential upon the civil courts in Scotland having the power to make a SCPO.
162. *Paragraph 3* amends subsection (6) of section 2 of the 2007 Act. That subsection provides that the test set out in section 2(4), rather than the test in section 3(1), should be used when a court in England and Wales is determining whether a person has been involved in serious crime in Northern Ireland for the purposes of an England and Wales order. The amendments also modify section 2(6) to refer to the new test (see below) for determining whether a person has been involved in serious crime in Scotland. *Paragraph 5* makes similar amendments to section 3 of the 2007 Act which makes equivalent provision to section 2 for Northern Ireland.
163. *Paragraph 4* inserts new section 2A into the 2007 Act which replicates the provisions in section 2 of that Act for Scotland. New section 2A defines, for the purposes of Part 1, what constitutes both having been involved in serious crime in Scotland or elsewhere, and involvement in serious crime in Scotland. A distinction is drawn between these two phrases because the first part of the test, in new section 1(1A)(a), is concerned with a person who has been involved in serious crime in Scotland or elsewhere, whereas the second part of the test, in new section 1(1A)(b), is concerned with future involvement in serious crime in Scotland only.
164. New section 2A(1) provides that a person has been involved in serious crime in Scotland for the purpose of Part 1 of the 2007 Act, if he or she has committed a serious offence in Scotland, has facilitated the commission by another person of a serious offence in Scotland, or has conducted himself or herself in a way that was likely to facilitate the commission by himself or herself or another person of a serious offence in Scotland

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(whether or not such an offence was committed). Facilitation here takes its natural meaning of “to make easier”.

165. Further to this, new section 2A(2) sets out that a “serious offence in Scotland” is an offence under the law of Scotland which, at the time the court considers the application for an order or the matter in question, is contained in the list set out in new Part 1A of Schedule 1 to the 2007 Act (as inserted by *paragraph 31*), or is an offence which is sufficiently serious that the court considers it should be treated as if it were set out in that list. The list in new Part 1A of Schedule 1 to the 2007 Act is not an exhaustive list. The second part of the test in new section 2A(2)(b) allows the court to treat offences that do not appear in Part 1A of Schedule 1 as being serious offences if, based on the circumstances of the case, the court considers the offence is sufficiently serious to be treated as such.
166. New section 2A(3) defines “involvement in serious crime in Scotland” for the purposes of Part 1 of the 2007 Act. That part of the test sets out the harm from which the public must be protected. The court must have reasonable grounds to believe that the order will prevent, restrict or disrupt the involvement of the respondent in serious crime in Scotland. Involvement in serious crime in Scotland means one or more of the following: the commission of a serious offence in Scotland; conduct which facilitates the commission by another person of a serious offence in Scotland; conduct which is likely to facilitate the commission, by the person whose conduct it is or another person, of a serious offence in Scotland (whether or not such an offence is committed).
167. New section 2A(4) defines what is meant by the respondent having been involved in serious crime in a place other than Scotland for the purposes of Part 1 of the 2007 Act. This is for the purposes of the first part of the statutory test contained in new section 1(1A)(a), relating to past action which merits the imposition of an order. Subsection (4) of new section 2A makes identical provision to subsection (1) of that section, except insofar as this subsection is concerned with serious offences which have occurred in a jurisdiction outside of Scotland.
168. New section 2A(5) defines a “serious offence in a country outside Scotland”. The court has to apply a three stage test when it is considering the application or matter in question. Firstly, the conduct must be an offence under the law of a country outside Scotland. Secondly, the conduct must also be an offence in Scotland if it had been committed in or as regards Scotland. Thirdly, the offence must either fall within the list of offences, or within a description specified, in new Part 1A of Schedule 1 to the 2007 Act if committed in or as regards Scotland or it is conduct which the court considers is sufficiently serious so as to be treated as if it did so.
169. New section 2A(6) states that the test set out in new section 2A(4), rather than the test in sections 2(1) and 3(1), should be used when a Scottish court is determining whether a person has been involved in serious crime in England and Wales or Northern Ireland, as the case may be, for the purposes of a Scottish order.
170. New section 2A(7) provides that, when considering whether conduct is an offence under the law of a country outside the UK, the test will be met however the conduct is described in that law. This means that even if an act is not described as an offence in the law of the country outside the UK it will still be a serious offence under Part 1 of the 2007 Act if the conduct meets the test in new section 2A(5).
171. *Paragraph 6* inserts new subsection (4A) into section 4 of the 2007 Act which confers on the Scottish Ministers a power to amend new Part 1A of Schedule 1 to that Act. This order-making power mirrors the existing powers conferred on the Secretary of State and the Department of Justice in Northern Ireland to amend Parts 1 and 2 respectively. As a result of the amendment made to section 89 of the 2007 Act by *paragraph 29*, any such order is subject to the affirmative procedure in the Scottish Parliament.

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172. *Paragraph 7* amends section 5 of the 2007 Act which sets out examples of the types of provisions that an SCPO might include. Section 5(2) as amended would state—
- “Examples of prohibitions, restrictions or requirements that may be imposed by serious crime prevention orders in England and Wales, *Scotland* or Northern Ireland include prohibitions, restrictions or requirements in relation to places other than England and Wales, *Scotland* or (as the case may be) Northern Ireland.
173. *Paragraph 8* amends section 7 of the 2007 Act which provides that the Secretary of State and Northern Ireland Department of Justice may, by order, expressly exclude the application of SCPOs to persons falling within a specified description. Under the 2007 Act an order can be imposed on any person and this includes individuals, bodies corporate, partnerships and unincorporated associations. The order-making power has not been exercised. New section 7(1A) confers an equivalent order-making power on the Scottish Ministers. As a result of the amendment to section 89 of the 2007 Act, made by *paragraph 29*, an order under new section 7(1A) will be subject to the negative procedure.
174. *Paragraph 9* amends section 8 of the 2007 Act which sets out who may apply for an SCPO. The amendment provides that in Scotland, an SCPO may only be applied for by the Lord Advocate.
175. *Paragraph 10* amends section 9 of the 2007 Act which gives the High Court the power to allow affected persons to make representations at the hearing in relation to the making, variation or discharge of an SCPO. The amendment confers a similar power on the appropriate court in Scotland. New section 9(4A) provides that the High Court of Justiciary in Scotland (criminal court) must, on an application by a person, give a person an opportunity to make representations in criminal proceedings before this court arising out of section 24B(3) of the 2007 Act if it considers that the making, or variation, of an SCPO is likely to have a significant adverse effect on the person.
176. *Paragraph 11* amends section 10 of the 2007 Act which makes provision for ensuring that the subject of an SCPO has notice of its existence. For the purpose of serving such notice, section 10(3) provides a power for a constable or person authorised by the relevant applicant authority, to enter and search for the person concerned, by force if necessary, any premises where they have reasonable grounds for believing the subject to be. Section 10(4) provides the definition of “the relevant applicant authority”. The effect of the definition is that the relevant applicant authority will be the prosecutor that applied for the order. The amendment modifies the definition of “the relevant applicant authority” to include the Lord Advocate.
177. *Paragraph 12* amends section 12 of the 2007 Act which provides that an SCPO does not override legal professional privilege. New section 12(4A) makes similar provision for Scotland; the equivalent concept in Scotland is “confidentiality of communications”.
178. *Paragraph 13* amends section 13 of the 2007 Act which sets out further safeguards on the operation of the SCPO regime by placing restrictions on the extent to which an order can require the production of excluded material and banking information. In England and Wales “excluded material” is defined by reference to section 11 of the Police and Criminal Evidence Act 1984, the definition covers –
- personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence;
 - human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence; and
 - journalistic material which a person holds in confidence and which consists of documents or of records other than documents.

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There is no equivalent definition of “excluded material” in Scotland so the modification made to section 13 by paragraph 13 adopts the England and Wales definition.

179. *Paragraph 14* amends section 17 of the 2007 Act which deals with how an SCPO may be varied, either on application by the relevant applicant authority, by the subject of the order or by a third party. New subsection (1A) of section 17, inserted by paragraph 14(2), provides a power to the appropriate court in Scotland to vary the terms of an SCPO where it has reasonable grounds to believe that the new terms of the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in Scotland.
180. *Paragraph 15* amends section 18 of the 2007 Act which makes provision for the discharge of an SCPO either on application by the relevant applicant authority, by the subject of the order or by a third party. The amendment confers on the appropriate court in Scotland the power to discharge an SCPO in Scotland.
181. *Paragraph 16* amends the title of section 22 of the 2007 Act (which deals with the inter-relationship between SCPOs made in the High Court and Crown Court) to make it clear that that section relates to orders made in England and Wales or Northern Ireland.
182. *Paragraph 17* inserts new sections 22A to 22D into the 2007 Act which broadly mirror sections 19 to 22 of the 2007 Act which provide for SCPOs on conviction.
183. New section 22A confers on the High Court of Justiciary and the sheriff a civil jurisdiction to be able to impose an SCPO where a person has been convicted of a serious criminal offence. The High Court’s powers arise either where a person has been convicted by a sheriff and remitted to the High Court to be dealt with, or convicted by the High Court itself, in relation to a serious offence committed in Scotland (new section 22A(1)). The meaning of a serious offence committed in Scotland is to be determined in accordance with new Part 1A of Schedule 1 to the 2007 Act.
184. New section 22A(2) replicates the second part of the test contained in new section 1(1A) (b). It provides that the High Court or sheriff may impose an SCPO where the court or sheriff has reasonable grounds to believe that the terms of the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in Scotland.
185. New section 22A(4) replicates section 1(3) of the 2007 Act, providing the courts with the flexibility to include such terms in the SCPO as they consider appropriate for this purpose. New section 22A(5) provides that the powers of the High Court and sheriff under new section 22A are subject to the same safeguards contained in sections 6 to 15 of the 2007 Act as those that apply to an SCPO made under section 1 of the 2007 Act.
186. New section 22B, together with new section 22C, makes provision for the two cases in which the High Court of Justiciary or sheriff can vary the terms of an SCPO, namely on the conviction for a serious offence of a person already subject to an SCPO (new section 22B), or the conviction of a person for breach of an SCPO (section 22C). New section 22B provides the High Court of Justiciary or sheriff with the power to vary an SCPO where the person before it is the subject of an SCPO and has been found guilty of a serious offence in Scotland (new section 22B(1)). New section 22B(2) provides that, in such a circumstance, the High Court or sheriff may vary the terms of that order where it has reasonable grounds to believe that the new terms of the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in Scotland.
187. New section 22B(3) provides that such a variation can only be applied for by the Lord Advocate. New section 22B(4) provides that an SCPO can only be varied by the High Court or sheriff in addition to a sentence imposed in relation to the offence concerned. New section 22B(5) provides that, subject to the limitation that an SCPO cannot last

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for more than five years, the High Court or sheriff may vary an order to increase the length of the order or of any of the provisions contained in it.

188. New section 22C provides the High Court or sheriff with the power, in terms similar to new section 22B, to vary or replace an SCPO when it is dealing with a person who has been convicted of the breach of an order under the offence set out in section 25 of the 2007 Act.
189. New section 22D deals with the inter-relationship between SCPOs made in the Scottish civil courts under new section 1(1A) and those made in the criminal courts under new section 22A. New section 22D(1) enables the Scottish criminal courts, in the circumstances provided for in new sections 22B and 22C, to vary an SCPO made by the civil courts under section 1(1A). The fact that an SCPO has been varied by the Scottish criminal courts does not prevent the order being further varied or discharged by the civil courts (new section 22D(2)). New section 22D(3) and (4) provides that a refusal by the High Court or sheriff to make or vary an SCPO on conviction does not preclude an application to the civil courts to make or vary an SCPO under section 1(1A) in relation to the same offence.
190. *Paragraph 18* inserts new sections 24A and 24B into the 2007 Act which broadly replicate the appeal provisions in sections 23 and 24 of that Act which apply to England and Wales.
191. New section 24A(1) provides that an appeal may be made to the Inner House of the Court of Session (equivalent to the Court of Appeal in England and Wales) by any person who was given an opportunity to make representations at the original proceedings under the provision set out in section 9 of the 2007 Act, against a decision of the Outer House of the Court of Session (equivalent to the High Court in England and Wales) to make an SCPO, to vary or not to vary an order, or to discharge or not to discharge an order. The relevant applicant authority and the subject of the SCPO have existing rights of appeal under section 28 of the Court of Session Act 1988 and new section 24A(2) makes it clear that the provision of new section 24A(1) does not oust or prejudice that right of appeal.
192. New section 24B of the 2007 Act provides for appeals against SCPOs made, varied or discharged on conviction. New section 24B(1), by treating the making, variation or discharge of an SCPO on conviction as part of the sentence, has the effect of conferring on the subject of an order a right of appeal under the provisions of the Criminal Procedure (Scotland) Act 1995. New section 24B(2) enables the Lord Advocate to appeal against a refusal to grant an SCPO on conviction. New section 24B(3) confers a right of appeal on third parties against the making, variation or discharge of an SCPO on conviction.
193. *Paragraph 19* amends section 27 of the 2007 which makes provision for the winding-up of companies, partnerships or relevant bodies in England and Wales and Scotland so as to limit its application to England and Wales. *Paragraph 20* then inserts new section 27A into the 2007 Act which makes such provision for Scotland.
194. New section 27A provides the Scottish Ministers with the power to petition the court for the winding up of a company, partnership or relevant body (as defined in new section 27A(12)). New section 27A(1) provides that, in order for the sanction to be available, the company, partnership or relevant body must have been convicted of the offence in section 25 of the 2007 Act of breach of an SCPO and the Scottish Ministers must also consider it to be in the public interest for the company, partnership or relevant body to be wound up.
195. New section 27A(2) to (4) provides that the power to petition for winding up taps into the existing powers to wind up companies in the Insolvency Act 1986 (“the 1986 Act”). If a court decides to order the winding up of a company or partnership the provisions of the 1986 Act on how the winding up is to be conducted will apply. New section 27A(2)

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provides that, in relation to an application for the winding up of a company or the company's winding up, the provisions of the 1986 Act concerning the winding up of companies apply, as if the application were an application under section 124A of that Act, which is concerned with winding up in the public interest, subject to the following modifications. Firstly, new section 27A(3) provides for the Scottish Ministers to present the petition for winding up, whereas it would normally be the Secretary of State under section 124A of the 1986 Act. Secondly, new section 27A(4) provides that the court can only make an order to wind up the company under section 125 of the 1986 Act if the company has been found guilty of the offence in section 25 of the 2007 Act and the court considers that it is just and equitable for the company to be wound up.

196. New section 27A(5) and (6) taps into the power to dissolve a partnership in the Partnership Act 1890.
197. New section 27A(7) provides the appropriate Minister (as defined in new section 27A(12)) with the power to provide, by order, for the 1986 Act to apply with modifications to a relevant body. As a result of new section 27A(8) an order under new section 27A(7) must provide that the court will only wind up a partnership or relevant body to which this section applies if the partnership or relevant body has been convicted of the offence in section 25 of the 2007 Act and where it would be just and equitable to do so.
198. New section 27A(9) provides that no application for winding up may be made, or order for such winding up granted by the court, if an appeal against the conviction under section 25 of the 2007 Act has been made but not finally determined, or if the time limit for such an appeal has not yet expired (although new section 27A(11) provides that any power to appeal out of time which might exist is to be ignored for the purposes of section 27A(9)).
199. New section 27A(10) provides that no application may be made, or order granted under this section, if the company, partnership or relevant body is already being wound up by the court.
200. *Paragraph 21* makes amendments to section 29 of the 2007 Act consequential upon the insertion of new section 27A. Section 29 contains three order-making powers. The first power, in subsection (1), enables the Secretary of State to make an order making such modifications as he or she considers appropriate to the application of the Insolvency Act 1986 (the relevant parts of which extend to Scotland), or as the case may be, the Insolvency (Northern Ireland) Order 1989, by virtue of sections 27(2) and 28(2). The second power, in subsection (3), enables the Secretary of State to make an order to apply, with any necessary modifications, any other enactment in connection with the provisions in section 27(2) to (4) and 28(2) to (4). The third power, in subsection (4), enables the Secretary of State to make supplementary and consequential application of enactments in connection with the exercise of the order-making powers in sections 27(5) and 28(5) (winding up of partnerships) and 27(6) and 28(6) (winding up of a relevant body). The consequential amendments to section 29 ensure that each of these order-making powers will also operate in relation to the power to wind up companies, partnerships and other relevant bodies in new section 27A.
201. *Paragraph 22* amends section 31 of the 2007 Act which makes provision for the operation of SCPOs against partnerships other than limited liability partnerships, which are covered by section 30 of the 2007 Act. Section 31(3) provides a gloss for the meaning of "involved in serious crime in England and Wales, Northern Ireland or elsewhere" and "involvement in serious crime in England and Wales or Northern Ireland" when a court is considering an order in relation to a partnership. A partnership is involved in serious crime if any of the partners is so involved. Paragraph 22(2) expands this gloss to cover Scotland.
202. *Section 31(6)* provides that the rules of court relating to the service of documents and certain legislative provisions listed – including sections 70 and 143 of the Criminal

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Procedure (Scotland) Act 1995 - apply as if the partnership were a body corporate. Paragraph 22(3) repeals the entry in relation to the Criminal Procedure (Scotland) Act 1995. Section 70 of that Act has been amended by the Criminal Justice and Licensing (Scotland) Act 2010 and the Partnerships (Prosecution) Scotland Act 2013 so as to make specific provision for service of an indictment on a partnership, as such, it is no longer necessary to gloss the operation of section 70 so as to treat a partnership as if it were a body corporate. *Paragraph 23* makes a similar amendment to section 32 of the 2007 Act which makes provision for the operation of orders against unincorporated associations.

203. *Paragraph 24* amends section 34 of the 2007 Act which makes provision to ensure that Part 1 of that Act complies with the provisions set out in the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce). As a result of that Directive, there are certain conditions on what terms can be imposed on a service provider established in a state in the European Economic Area (this is the European Union plus Iceland, Liechtenstein and Norway) other than the UK and certain protections for intermediary service providers. Section 34(1) provides that an order may not include terms which restrict the freedom of an information service provider established in a European Economic Area state other than the UK to provide information society services in relation to a European Economic Area state unless certain conditions, contained in section 34(2) and (3), are met. The conditions in section 34(2) are that the court concerned considers that the terms: (a) are necessary for the objective of protecting the public by preventing, restricting or disrupting involvement in serious crime in England and Wales or Northern Ireland, as the case may be; (b) relate to an information society service which prejudices that objective or presents a serious and grave risk of prejudice to it; and (c) are proportionate to that objective. Paragraph 24 amends section 34(2) so that it operates in relation to SCPOs made in Scotland.
204. *Paragraph 25* inserts new section 36A into the 2007 Act, this provides for the civil standard of proof, that is on the balance of probabilities, to apply to any proceedings under sections 22A, 22B, 22C or 22E of the 2007 Act in relation to an SCPO before the High Court of Justiciary and the sheriff court. This mirrors the position in England and Wales and Northern Ireland as provided for in sections 35 and 36 of the 2007 Act.
205. *Paragraph 26* amends section 39 of the 2007 Act which makes provision for the inclusion of a term in an SCPO made against a body corporate, partnership or unincorporated association authorising a “law enforcement agency” to appoint a person to monitor whether the order is being complied with. Paragraph 26 amends the definition of a “law enforcement agency” in section 24(10) to include a reference to the chief constable of the Police Service of Scotland.
206. *Paragraph 27* amends section 40 of the 2007 Act which deals with the means by which the costs of authorised monitors will be determined. Section 40(1) and (2) enables the “appropriate authority” to provide, by order, the practice and procedure (including provision about appeals) which must be followed for determining the amount of costs or interest. Section 40(3) provides that where the costs of the monitor have not been paid by the organisation within the period specified in the order under section 39(5)(a) the law enforcement body must take reasonable steps to recover them. Section 40(4) provides that the appropriate authority must, by order, set out what those steps are. Section 40(5) goes on to provide that, after taking such steps, if the costs have still not been paid, they are recoverable as if due to the law enforcement agency concerned as a consequence of a civil order or judgment. Paragraph 27(2) and (3) narrow the operation of section 40(5) to England and Wales and Northern Ireland and then make equivalent provision for Scotland. Section 40(6) provides for interest to be payable on the unpaid costs and for this to be calculated in accordance with the provision in section 17 of the Judgments Act 1838 (that is at 8% per year). That Act does not extend to Scotland and paragraph 27(4) inserts new section 40(6A) to make analogous provision for Scotland. Paragraph 27(5) amends section 40(9) to provide that, in relation to SCPOs in Scotland,

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the Scottish Ministers are the appropriate authority. Orders made under section 40 are subject to the negative resolution procedure.

207. *Paragraph 28* inserts appropriate additions to the index of defined expressions in Part 1 of the 2007 Act.
208. *Paragraph 29* amends section 89 of the 2007 Act which provides for the making of orders under that Act. The amendments to section 89(2) extend to the Scottish Ministers the power to make orders making different provision for different cases, descriptions of cases, or purposes and containing supplementary, incidental, consequential, transitional, transitory or saving provision.
209. *Paragraph 30* amends section 93 of the 2007 Act which provides for the extent of that Act. The amendment to section 93(2), read with section 93(7), will provide for Part 1 of the 2007 Act to extend to Scotland as well as, as now, England and Wales and Northern Ireland.