EXECUTIVE NOTE

DRAFT : THE PROCEEDS OF CRIME ACT 2002 AMENDMENT (SCOTLAND) ORDER 2011

Introduction

1. This Order is made in exercise of the powers conferred by section 142(6) and (7) of the Proceeds of Crime Act 2002 ("the Act"). The instrument is subject to affirmative resolution procedure.

Background

2. Part 3 of the Act allows a court to determine that a person convicted of an offence has a criminal lifestyle. When an offender is deemed to have a criminal lifestyle the court has the power to assume their assets over the previous six years have been obtained from criminal activity and calculate the value of any confiscation order made under the Act accordingly.

3. There are three tests designed to identify offenders who may be regarded as having a criminal lifestyle and an offender will be deemed to have such a lifestyle if they satisfy one or more of those tests (set out in section 142 of the Act). They are:

> (a) the person is convicted of an offence specified in Schedule 4 (section 142(1)(a));
> (b) the person's offence constitutes conduct forming part of a course of criminal activity (section 142(1)(b)); or
> (c) the person's offence is an offence committed over a period of at least 6 months and the accused has benefited from the conduct that constitutes the offence (section 142(1)(c)).

4. Under the first test this Order extends the range of offences that are considered criminal lifestyle offences. Where an offender is convicted of a single offence covered by Schedule 4 the court is entitled to assume that any benefit derived over the previous 6 years has been obtained from the offenders criminal lifestyle. The court can then take steps to recover such criminal benefit as part of the offenders general criminal conduct, unless the offender can show such benefit has been obtained from legitimate means.

5. The other two tests, in contrast, also require the court to be satisfied that the offender has obtained a benefit from all of his or her known criminal conduct of at least £5000.

Policy Objective

6. The Act is a complex mix of reserved and devolved powers and the Scottish Ministers are determined to maximise its effectiveness and use the powers that are available to them. Scottish Ministers may by order amend Schedule 4 and the criminal benefit amount for the purposes of section 142(1)(b) and (c). The aim of these amendments is to provide law enforcement and the Crown Office and Procurator Fiscal Service with additional tools to help tackle serious organised crime and other criminality by disrupting criminal activity and denying criminals of their criminally obtained assets and the funding they can use to engage in further criminal activity.

7. The Order will amend Schedule 4 by adding further offences that are indicative of a criminal lifestyle. The order will also reduce the criminal benefit amount in relation to the non-Schedule 4 tests. This latter amendment in particular will allow the Act to be used to tackle all levels of criminality, (for example lower level but high volume criminality such as those involved in organised shoplifting). This will help to address the recommendation made in the Joint Inspectorate of Prosecution and Inspectorate of Constabulary Report into the Proceeds of Crime Act that the legislation is used to redress the financial benefits of crime at all levels and that all confiscation opportunities are considered.

Consultation

8. The Scottish Government issued a consultation on its proposals which was sent to groups it believed had an interest in the individual offences being listed and also the organisations who would be affected by the proposals. It listed offences we suggested were clearly suitable for inclusion in Schedule 4 along with a short list of possible offences for inclusion on which we wished further comment before taking a final view on their suitability for inclusion.

9. There was general agreement from the respondents to the consultation that the offences listed in the Order should be added to Schedule 4 and that the criminal benefit amount should be reduced from £5000 to £1000.

Content of the Order

10. The Order adds to the offences that are specified in Schedule 4. A conviction of any of these added offences will now be sufficient on its own to establish a criminal lifestyle. The court can then take steps to recover any criminal benefit over the previous six years, as part of the offender's general criminal conduct, unless the offender can show such benefit has been obtained from legitimate means or that making the order would lead to a serious risk of injustice.

11. The offences being added to Schedule 4 are:

- an offence under section 296ZB of the Copyright, Designs and Patents 1988 (devices and services designed to circumvent technological measures);
- an offence under section 11(4) of the Criminal Law (Consolidation) (Scotland) Act 1995 (aiding, abetting or compelling prostitution for gain);
- an offence under section 39(1) of the Consumer Credit Act 1974 (illegal money lending);
- an offence under section 51(2) of the Civic Government (Scotland) Act 1982 (selling and distribution of obscene material);
- an offence under section 9(1) of the Video Recordings Act 1984 (supplying video recordings of unclassified work);
- an offence under section 10(1) of that Act (possession of video recording of unclassified work for the purposes of supply);
- an offence under section 5(1) of the Private Security Industry Act 2001 (using an unlicensed security operative);
- an offence under section 28(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (involvement in serious organised crime);
- an offence under section 30(1) or (2) of that Act (directing serious organised crime);
- an offence to which Section 29(1) that Act applies (offences aggravated by connection with serious organised crime); and
- an attempt to commit any of the offences specified in Schedule 4.

12. The Order also reduces the amount specified in section 142(3) of the Act from £5000 to £1000. This will mean that an offender may be found to have a criminal lifestyle under section 142(1)(b) or (c) only where he or she has obtained at least £1000 from his or her known criminal conduct.

Financial Effects

13. The instrument has no effect on local authorities, the voluntary sector or the private sector.

14. It is difficult to accurately gauge the increase in the amount of confiscation orders these proposals will produce and the estimate of the likely costs of doing so. Over the last 2 years there have been around 75 confiscation orders a year.

15. The cost of an average confiscation order is very difficult to estimate for a variety of reasons. For example, every financial investigation can vary markedly in terms of complexity, length and subsequent cost. It is not unusual for a confiscation order to take up to two years to investigate, while some confiscation orders can simply involve an investigation into an individual and one bank account taking around a week. In addition it may also be the case that despite these additional offences being added to Schedule 4, confiscation orders might otherwise have been taken anyway against individuals for offences already covered in Schedule 4 i.e drugs offences.

16. The Scottish Government themselves do not centrally hold the costs of confiscation orders. However, we have sought financial assessments from the police service, Crown Office and Procurator Fiscal Service and the Scottish Legal Aid Board and whilst it is difficult to accurately predict the precise financial implications of these changes, the organisations we have contacted have not indicated that they expect these proposals to create a significant additional financial burden. These amendments will provide additional tools to tackle serious organised crime and other criminality in order to help disrupt further criminal activity. It is an operational matter for law enforcement and Crown Office and Procurator Fiscal Service to decide how to target these groups.

17. The Scottish Government intend to monitor the financial impact on the relevant agencies.

Directorate for Safer Communities
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