At my appearance at the Justice Committee yesterday (2 December), I agreed to provide you with further information in relation to several questions asked by Committee members.

The impact of amendments to POCA on the COPFS workload

Margaret Mitchell had noted the practical impact of amendments to strengthen powers available to prosecutors, the Civil Recovery Unit (CRU) and other law enforcement agencies in Scotland, and had asked whether these were likely to increase the workload of the Crown Office and Procurator Fiscal Service.

Regarding the proposed amendments to the conditions for exercise of restraint order powers, officials in COPFS have commented that there may be an initial increase in workload, but that they expect this to reduce in time. As criminal confiscation is dependent on the cases that come before the prosecutor and the courts, it is not possible at this point to quantify what the increased workload would look like.

For the proposed amendment to introduce the role of PPO receivers, CRU officials have commented that it is not possible to be specific as to whether there will be an increased workload, because the powers will only be relevant for specific circumstances that may not arise until the right referral comes in. Depending on the case, there may be an increased resource requirement of only a few hours in a single week, or the requirement may be far more considerable. It will be entirely dependent on each case. Colleagues in the CRU view the proposed changes as very positive, though, regardless of the potential impact on workload.

It may be helpful to set out for the record that colleagues in the Crown Office and the CRU are fully supportive of the proposed POCA amendments within the Serious Crime Bill, which were developed in full consultation with their operational and policy officials.
The impact of SCPOs on third parties

John Finnie had commented on the response to the public consultation on serious crime prevention orders (SCPOs) and had asked for reassurance that the impact of SCPOs on third parties would be monitored.

As the Committee will be aware, the Serious Crime Bill seeks to extend the use of SCPOs to Scotland, and, as such, seeks to insert provisions for Scotland into the Serious Crime Act 2007 (SCA). The SCA provides the legal framework for the making of SCPOs, and takes account of the potential impact on third parties. Section 9 of the SCA sets out the rights of third parties to make representations. A court must take the interests of a third party into account before making an SCPO, particularly since the application for an SCPO will contain details of the potential impact of the proposed order upon third parties. Schedule 1 of the Serious Crime Bill amends sections 9 (right of third parties to make representations) to include provisions for to Scotland.

For the ongoing monitoring of whether third party interests are taken into account, the Crown Office appeals unit will be able to gather information on whether third party interests are not being considered.

Computer Misuse

Clause 40 of the Serious Crime Bill amends the Computer Misuse Act 1990 (CMA) and inserts a section for unauthorised acts causing, or creating risk of, serious damage. The provision creates a new indictable offence of committing an unauthorised act in relation to a computer that results, either directly or indirectly, in serious damage to the economy, the environment, national security or human welfare, or creates a significant risk of damage.

The new offence is an aggravating offence. For it to take effect there must always be an unauthorised act in relation to a computer. Section 17(8) of the CMA describes an act as being unauthorised if the person undertaking the act or causing it to be done does not have responsibility for the computer, is not entitled to determine whether the act may be done, and does not have consent to the act from someone who is responsible. The policy intention of this offence is that the unauthorised act is a cause of the serious damage. It does not need to be the only cause, or even the principal or substantial cause, nor does it need to directly result in the damage concerned (there may be a domino effect, for example, with the final act resulting in the damage). In other words, there must be a deliberate act that is undertaken with wilful intention or recklessness, which results (directly or indirectly) in serious damage of a material kind.

Committee members were concerned that someone might be indirectly liable for any serious damage caused if they were to create software that then accidentally caused serious damage (such as through a traffic control system), or the software was altered by a third party which then resulted in serious damage.

As already mentioned, the offence rests on a person doing any unauthorised act in relation to a computer. In the event of a person creating software that subsequently (accidentally) causes serious damage, then assuming that there has been no unauthorised act in relation to a computer, as described above, then the offence would not apply. The offence does not cover genuine IT failures, which, depending on the source and cause, may be subject to other legislation and associated liabilities.
If a person created software that was subsequently altered by a third party and as a result of alteration, resulted in serious damage, then assuming that the third party committed the unauthorised act in relation to a computer, the third party would be committing the offence, not the original creator of the software.

If software was developed and supplied to a third party for the specific intention of interfering with a computer, then the software developer would be committing a section 3A offence (making, supplying or obtaining articles for use in offence under section 1 or 3) under the CMA.

I will ask colleagues in the Crown Office to send the Committee information regarding cases in which this legislation may have applied or they have not been able to prosecute in the past, but which they could do under the proposed amendments.

At this point in time, I am unable to provide detail about financial resource impacts of policing extraterritorial offences and of how we will work with colleagues in the UK and across Europe, to help the Committee with its deliberations, but will endeavour to respond on this over the next few days.

I hope that you find the information in this letter helpful.

Kind regards

PAUL WHEELHOUSE