

SERIOUS CRIME ACT 2015

EXPLANATORY NOTES

TERRITORIAL EXTENT

Part 4: Seizure and Forfeiture of Drug-Cutting Agents

Background

219. Certain chemical substances, some of which may also be used in the manufacture of medicinal products for human or veterinary use, can be used as cutting agents for bulking illegal drugs, thereby maximising criminal profit margins. The “grey market” trade (that is, where it is unclear if there is an apparent legitimate end use) in these substances has become a significant element of the domestic cocaine trade over the last five years, but there are currently no laws or regulations that specifically target the domestic trade in cutting agents. This trade impacts across the UK enabling organised criminals to maximise their profits from the trade in illegal drugs and increases the risks posed to local communities.
220. In the UK, benzocaine, lidocaine and phenacetin are the most common chemicals used to “cut” illegal drugs, especially cocaine. This is because these chemicals mimic some of the effects, as well as resembling the drug in appearance, allowing a significant increase in adulteration of the illicit drug than would be possible with an inert substance such as glucose.
221. In 2013, there were over 75 border seizures of chemicals such as benzocaine, lidocaine and phenacetin, totalling over two tonnes. Law enforcement agencies used existing customs or policing powers to seize cutting agents in these cases, such as where the substances are linked to an ongoing criminal investigation or the substances were imported under false labelling. However, since the current powers do not explicitly target cutting agents, loopholes exist which means that law enforcement agencies cannot always seize suspected cutting agents. The new powers are designed to address this problem.
222. The majority of cocaine available at street level contains one or more adulterants, some of the most common being benzocaine and phenacetin. In 2013, 63% of street level seizures of cocaine hydrochloride (powder cocaine) contained benzocaine, while 91% of street level base cocaine seizures (the majority of which is ‘crack cocaine’) contained phenacetin. Much of this adulteration occurs within the UK; in 2013, the quarterly average purity of cocaine hydrochloride at importation level ranged from 69-71%, while the average purity at user level ranged from 32-38%¹. Importing a kilogram of high-quality cocaine may cost around £45,000, while a kilogram of benzocaine can be bought for £300. It is common for cocaine to be mixed at an initial 1:1 ratio with benzocaine, allowing the resulting product potentially to be sold for £90,000. Cutting agents can therefore significantly increase the criminals’ profits from drug trafficking.
223. The new powers will allow law enforcement agencies to seize any substances reasonably suspected of being intended for use as a cutting agent. These are commonly

¹ ‘Average’ here refers to weighted mean purity. For further details see the NCA ENDORSE 2013 Annual Report

legal to import and sell as bulk chemicals. For example, benzocaine and lidocaine are used within the pharmaceutical industry as active substances in a number of medicinal products. However, they have limited legitimate use in the UK in raw powder form, requiring laboratory processes and licensing for manufacturing into an administrable form. Phenacetin, also legal to import and sell, is an analgesic that is no longer used in legitimate business because of its carcinogenic properties.

224. The Government's Drug Strategy 2010² included a commitment to develop a robust approach to stop criminals profiting from the trade in cutting agents, working with production countries, the legitimate trade and international partners. In May 2013, the Home Office published the consultation document "Introduction of new powers to allow law enforcement agencies to seize and detain chemical substances suspected of being used as drug cutting agents". The response to the consultation was published on 31 March 2014³. Part 4 of the Act confers new powers on law enforcement agencies to seize, detain and destroy chemical substances reasonably suspected of being used as cutting agents for illegal drugs. The provisions are modelled on the police entry, search and seizure powers in Part 2 of Police and Criminal Evidence Act 1984 ("PACE") and the cash seizure and forfeiture powers in Chapter 3 of Part 5 of POCA. The provisions in Part 4 of the Act will be supported by court procedural rules to be made (in the case of magistrates' court rules in England and Wales) by the Lord Chancellor under sections 144 and 145 of the Magistrates' Court Act 1980. Such rules will be analogous to those that apply to the cash seizure and forfeiture powers in Chapter 3 of Part 5 of POCA, namely the [Magistrates' Court \(Detention and Forfeiture of Cash\) Rules 2002 \(SI 2002/2998\)](#), as amended.

Commentary on Sections

Section 52: Application for search and seizure warrants

225. This section provides for prior judicial authorisation for powers to search premises for drug-cutting agents and to seize any such agents found on the premises. The term "drug-cutting agent" is defined in section 65(1). The definition is such as to cover any substance that may be used to adulterate a controlled drug in connection with the unlawful supply or exportation of the drug. Accordingly, the definition will cover not only the substances most commonly used as cutting agents – namely, benzocaine, lidocaine and phenacetin – but any substance intended for use in this way which may, potentially, be any powder of a similar colour and consistency as the drug in question. *Subsection (1)* provides for a justice of the peace (or, in Scotland, a sheriff – see section 65(5)), on an application of a police or customs officer (*subsection (4)*), to issue a search and seizure warrant. Such a warrant confers authority on a police or customs officer to enter the premises specified in the warrant and search them for substances that appear to be intended for use as drug-cutting agents. To grant such a warrant, the justice of the peace must be satisfied that there are reasonable grounds to suspect that a substance intended for use as a cutting agent is on the relevant premises. In coming to such a judgement, the magistrate would weigh up the information supplied in the application (*subsection (6)*) or in oral evidence (*subsection (7)*). The "reasonable grounds to suspect" test is directed solely to the likely presence on the premises and use of the substance as a drug-cutting agent and not to any specific suspected criminal offence. In determining whether the test is satisfied, the court will apply the civil standard of proof, namely on the balance of probabilities. A police or customs officer is defined in *subsection (2)* and includes an NCA officer.
226. Applications for a warrant may be made without notice to any affected person (for example, the owner or occupier of the premises or the owner of the substances in question) to avoid forewarning such a person of the impending search thereby affording an opportunity to remove or otherwise hide the substances (*subsection (5)*).

² <https://www.gov.uk/government/publications/drug-strategy-2010--2>

³ <https://www.gov.uk/government/consultations/cutting-agents-consultation>

227. As with the provision for search warrants in section 15 of PACE, an application under this section may be for a warrant in relation to a single set of premises (a “specific-premises warrant”) - see *subsection (3)(b)* - or for an “all-premises warrant” - see *subsection (3)(a)* - where it is necessary to search all premises occupied or controlled by an individual, but it is not reasonably practicable to specify all such premises at the time of applying for the warrant. An all-premises warrant will allow access to all premises occupied or controlled by that person, both those which are specified on the application, and those which are not (*subsection (10)*). An application for a warrant must also specify whether the applicant is seeking authorisation for a single entry or multiple entries into the relevant premises (*subsection (9)*). The warrant may authorise entry to and search of premises on more than one occasion if, on the application, the justice of the peace is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which he issues the warrant, for example in the case of the search of a large warehouse.

Section 53: Further provisions about search and seizure warrants

228. *Subsections (1) and (2)* set out the information that must be contained in a search and seizure warrant. *Subsections (3) to (5)* provide for the making of copies. These provisions are analogous to those in section 15(5) to (8) of PACE.

Section 54: Execution of search and seizure warrants

229. *Subsection (1)* gives effect to Schedule 2 which sets out conditions for the search and seizure of premises in pursuance of a warrant. Failure to comply with such conditions would render the entry and search of premises unlawful (*subsection (2)*). *Subsection (3)* enables a police or customs officer to use reasonable force to enter premises. It is an offence to obstruct an officer executing a warrant (*subsection (4)*); the maximum penalty on conviction for such an offence is a level 3 fine (currently £1,000) (*subsection (5)*).

Schedule 2: Execution of search and seizure warrants

230. This Schedule makes further provision for the execution of warrants and is based on analogous provisions in section 16 of PACE.
231. *Paragraph 1* enables persons to accompany a police or customs officer when executing a warrant. Such a person, for example, a Police Community Support Officer, has the same powers as those the warrant confers on a police or customs officer.
232. Where premises are entered and searched in pursuance of a warrant and such premises are not specified in the warrant, entry must be authorised by a senior officer (*paragraph 3*). Where a warrant authorises multiple entries into a set of premises, any second or subsequent entry must be similarly authorised (*paragraph 4*). A senior officer is defined in *paragraph 12(1)*.
233. *Paragraph 8* confers a power to inspect and test substances found on the premises. The ability to test such a substance, for example to determine whether it is benzocaine, lidocaine or phenacetin, will help avoid unnecessary seizures.
234. *Paragraph 9* requires premises to be made secure on completion of the search. This obligation will be particularly relevant where a police or customs officer has had to force entry onto the premises.

Section 55: Seizure of substances under search and seizure warrant

235. This section enables a police or customs officer searching premises in pursuance of a section 52 warrant to seize any substance found there which is reasonably suspected as being intended for use as a drug-cutting agent.

Section 56: Seizure of substances without search and seizure warrant

236. This section contains a free-standing power to seize, without warrant, a substance reasonably suspected as being intended for use as a drug-cutting agent. This will enable a police or customs officer to seize such substances when they are lawfully on premises for some other purpose, for example, a customs officer undertaking a search for prohibited or restricted goods when operating at port or where an officer is executing a warrant issued under PACE in relation to a non-drug related offence and discovers substances suspected of being used as a drug-cutting agent in the course of the search. The subsequent provisions of this Part in respect of retention and forfeiture will apply in equal measure to substances seized under a search and seizure warrant and to those seized under this free standing power.

Section 57: Notice to be given when substances seized

237. This section makes provision for the issue of a notice, where any substance is seized in accordance with sections 55 or 56, to the person from whom it was seized and, if the officer thinks that the substance may belong to a different person, to that person also. This is to ensure that all persons with an interest in the substance are properly informed.

Section 58: Containers

238. This section contains an ancillary power to seize any containers in which substances reasonably suspected of being used as drug-cutting agents are stored. As most cutting agents are in powder form, they are likely to be stored in some kind of container.

Section 59: Initial retention of seized substances

239. *Subsection (1)* enables any suspected drug-cutting agents seized under section 55 or 56 to be retained for an initial period of 30 days. This period affords the law enforcement agency which seized the substance and the owner of the substance adequate time to gather evidence to support continued detention or to demonstrate that the substance is held legitimately.
240. *Subsection (2)* provides for the detention for up to 30 days of suspected drug-cutting agents where the substance was originally seized under powers conferred under another enactment and the power to retain the substance under that enactment has lapsed. For example, a police officer has a general power of seizure under section 19 of PACE where he or she has reasonable grounds for believing that the thing seized has been obtained in consequence of the commission of an offence or that it is evidence in relation to an offence which he or she is investigating or any other offence. If it is subsequently decided that there is to be no, or no further, criminal investigation, the substance could no longer be retained under PACE. *Subsection (2)* would allow the substance to be retained for up to 30 days following the decision to discontinue the criminal investigation.

Section 60: Continued retention or return of seized substances

241. This section enables a police or customs officer to apply for an order authorising the continued retention of the suspected drug-cutting agents. The order can be made by a magistrates' court or a justice of the peace (in England and Wales), a sheriff (in Scotland) or a court of summary jurisdiction (in Northern Ireland). The court, justice or sheriff may make such an order if satisfied that continued retention of the substance is justified whilst its intended use is further investigated. An order can also be made for continued retention if consideration is being given to the bringing of criminal proceedings, or if such proceedings have been commenced and not concluded. Where criminal proceedings have been initiated an order may authorise continued retention until the conclusion of the proceedings, otherwise the maximum period of retention is 60 days (this includes the initial 30 day period provided for in section 59).

242. Where the court, justice or sheriff concludes that none of the grounds for continued retention of the substance have been satisfied, the substance must be returned to the person from whom it was seized or, if different, the owner. Where an order is made under this section and no person entitled to the substance was present or represented at the hearing then the responsible officer must make reasonable efforts to give written notice to the person from whom the substance was seized and, if the officer thinks that it may belong to a different person, to that person also. This is to ensure that all persons with an interest in the substance are properly informed.

Section 61: Forfeiture and disposal, or return, of seized substances

243. This section enables a magistrates' court (in England and Wales), a sheriff (in Scotland) or a court of summary jurisdiction (in Northern Ireland), on application by a police or customs officer (*subsection (1)*) to order the forfeiture of a substance if the court is satisfied that it is intended for use as a drug-cutting agent (*subsection (3)*). The civil standard of proof, namely on the balance of probabilities, will apply to such proceedings. It is expected that court procedure rules would provide that it is open to both the applicant and any person with an interest in the substance to make oral representations to the court at a forfeiture hearing. Where the court is so satisfied it is for the applicant to arrange for the disposal of the forfeited substance (*subsection (4)*), although any action to dispose of the substance is to be stayed pending the outcome of any appeal (*subsection (5)*). The section also makes further provision authorising the continued retention of a substance pending the outcome of an application for forfeiture or any appeal against a decision by the court to order the substance to be returned to the person from whom it was seized or the owner of the substance (*subsections (2) and (7)*).

Section 62: Appeal against decision under section 61

244. This section confers a right of appeal (see *subsection (3)* as to the appropriate higher court in each jurisdiction) against a decision under section 61 either to order the forfeiture of a substance or to order its return to the person entitled to it. Where an appeal is brought under this section and no person entitled to the substance was a party to the original proceedings then the responsible office must make reasonable efforts to give written notice to the person from whom it was seized and, if the officer thinks that the substance may belong to a different person, to that person also (*subsection (2)*). This is to ensure that all persons with an interest in the substance are properly informed. An appeal must be lodged within 30 days of the decision by the lower court (*subsection (4)*). The parties to the original proceedings and any person entitled to the substance – if not present or represented at the original hearing – will be entitled to be heard at the appeal. On hearing the appeal, the court will determine the question afresh.

Section 63: Return of substance to person entitled to it, or disposal if return impracticable

245. Where a court determines that the seized substance is not intended for use as a drug-cutting agent, this section provides for the return of the substance to the person entitled to it; if necessary the relevant court (or the sheriff) may make an order to this end (*subsection (1)(b)*). In any case where it proves impossible to find the owner, or impracticable for some reason to return the substance (for example, because the owner refuses to accept receipt), *subsection (4)* allows for the substance to be disposed of by the police or customs officer.

Section 64: Compensation

246. This section provides that where no forfeiture order is made following the seizure of a suspected drug-cutting agent, the owner of the substance may apply to the relevant court (or the sheriff) for compensation. There is no right for the person from whom the substance was seized – where that person is different from the owner – to claim compensation. Compensation is only payable where the court is satisfied that the

*These notes refer to the Serious Crime Act 2015 (c.9)
which received Royal Assent on 3rd March 2015*

applicant has suffered loss during the period the substance was held by the relevant law enforcement agency. Normally, the level of compensation would be less than the market value of the substance (*subsection (3)*), although the amount may be higher in exceptional circumstances (*subsection (4)*). Compensation may be payable, for example, if the owner lost a contract as a result of the seizure and retention of the substance. The rule requiring that the amount of compensation should normally be less than 100% of the value of the substance is predicated on the fact that once the substance is returned to the owner it may continue to have some value which could then be realised by the owner.

Section 65: Interpretation

247. This section defines terms used in Part 4 of the Act.