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Amendment of the Proceeds of Crime Act 2002 by the Serious Crime Act 2015

Guidance for Stakeholders

Summary and Background

The Serious Crime Act 2015 makes a number of amendments to the Proceeds of Crime Act 2002 (POCA). Significant provisions include:

- A requirement to set out any known details of third party interests in confiscation proceedings;
- Strengthening prison sentences for failing to pay confiscation orders;
- Enabling assets to be frozen more quickly and earlier in investigations;
- Significantly reducing the time that the courts can give offenders to pay confiscation orders, and
- Extending the investigative powers in POCA so that they are available to trace assets once a confiscation order is made.

Part 1 is divided into four chapters:

1. England and Wales
2. Scotland
3. Northern Ireland
4. Disclosures, Investigations, Co-operation and Enforcement

The full list of Part 1 provisions is detailed below.

Purpose of this guidance

This guidance is aimed at those with a practical interest in amendments to POCA and is intended to provide the reader with a concise summary of the provisions contained in Part 1 of the Act. It needs to be read in conjunction with the Act itself as well as the accompanying explanatory notes.

The Act received Royal Assent on 3 March 2015. Unless otherwise indicated, the provisions described will be fully commenced on **1 June 2015**.

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1. Chapter 1 of Part 1: England and Wales

Summary

Chapter 1 of Part 1 makes a number of changes to the confiscation regime in England and Wales. Sections 1-4 amends Part 2 of POCA to make provision in relation to third party interests in assets that may be realised to discharge a confiscation order. Sections 5-14 amend other Part 2 provisions including time for payment, default sentences and absconding defendants. A summary of each provision appears below.

Confiscation: Assets Held by Defendant and Other

Sections 1-4 enable the court to determine the extent of any third party interests in the defendant's property prior to making a confiscation order. They introduce a requirement for prosecutors to set out any known details of third party interests in the statement of information provided to the court at the start of confiscation proceedings. The defendant will then have to detail any known third party interests in their response to the prosecutor's statement. The court will also be able to order a third party to provide any information the court needs to enable it to determine the extent of any third party interests in the defendant's property prior to making the confiscation order. The court's determination of the defendant's and any third party's interests in particular property will be binding, except in exceptional circumstances.

The effect of each section is described below.

Section 1 – Determination of extent of a defendant's interest in property.

This section gives the Crown Court the power to make a determination regarding the extent of the defendant's interest in a particular property¹. Inevitably this will result in a determination of the extent, if any, of third party interest in the property. Third parties who have – or may have – an interest in the property will have the right to make representations to the court about the extent of their interest. This right also extends to the defendant.

The court's determination of the extent of a defendant's interest in particular property is binding on any court or any person involved in the enforcement of a confiscation order. There are two exceptions. One is where it is open to a court which has appointed an enforcement receiver (see section 4), the second is in proceedings before the Court of Appeal or Supreme Court.

It is likely that the Crown Court will only make determinations under new section 10A where the defendant's interest in a particular property can be established without too much difficulty. In more complicated cases, it is anticipated that the defendant's interest in property will be determined as it is now, at the enforcement stage.

¹ New section 10A(1) of POCA inserted by section 1 of the Serious Crime Act 2015

Section 2 – Provision of information.

Currently, a prosecutor is required to give the court a statement of information detailing the defendant's benefit from criminal conduct. Section 2 now requires a statement of information to include any available information that would be relevant to the court's decision to make a determination of the extent of a defendant's interest in property². This section also gives the court the power to require the prosecutor to provide further specified information relevant to the making of such a determination.

The court may also order any third party who may have an interest in the defendant's property to provide any information it needs to make a determination. This power might be used, for example, where it is alleged that a third party owns a part share in a property. The court may draw an inference from any failure to comply with such an order.

Section 3 – Appeals

The prosecutor, defendant or third party may appeal to the Court of Appeal against a determination made by the Crown Court as to the extent of a defendant's interest in property. In the case of a defendant or third party, the appeal may only be brought if a person with an interest in relevant property was not given a reasonable opportunity to make representations to the Crown Court or where the Court of Appeal considers that the determination would result in a serious risk of injustice to the appellant. The defendant or third party must be a person holding an interest in property *affected by a determination*.

An appeal cannot be made where a receiver has been appointed under section 50 of POCA, where the prosecutor has applied for the appointment of a receiver or where the Court of Appeal believes that such an application is to be made.

Section 4 – Enforcement receivers

This section amends section 51 of POCA, which sets out the powers a court can confer on an enforcement receiver. This provision limits the circumstances in which third parties may make representations to the court that appoints the receiver where a determination as to the extent of a defendant's interest in property has been made at the confiscation stage.

Confiscation: other amendments

Section 5: Time for payment

Section 11 of POCA currently provides that a confiscation order is payable immediately upon the making of the order unless a defendant can show that there are exceptional circumstances why this should not be the case. A maximum of

² New section 16(6A) of POCA inserted by section 2 of the Serious Crime Act 2015

twelve additional months for full payment of the order may be provided by the court. Section 5 amends POCA to expressly provide that the *full* amount payable under a confiscation order must be made on the day the order is made³. The court may only grant an extension of the time to pay if it satisfied that the defendant is unable to comply.

An extension of time to pay will now be limited to circumstances where it is necessary to in order to realise funds from a specific asset, for example the sale of a vehicle or house. Accordingly, section 5 makes provision to enable the court to allow different amounts of time (the “specified period”) for payment of different parts of the order⁴. For example, if the full amount is £1 million, the court might order:

- £500,000 to be paid immediately (if the defendant has that amount available in cash)
- £200,000 within 28 days (if the defendant has shares worth that amount), and
- £300,000 within three months (if the defendant has property worth that amount).

Under the existing time for payment provisions in POCA, the maximum length of a specified period is six months. Section 5 amends POCA to set the maximum length of specified period at **three months**⁵. The court may still extend the specified period, but only if the defendant can demonstrate that he or she is unable to pay the amount required *despite having made all reasonable efforts to do so*. Such an extension would be known as the “extended period”. Any application to extend the specified period must be made before that period has expired. The maximum amount of additional time that a defendant may be allowed to pay a confiscation order has also been reduced from twelve months to six months.

Section 6: Confiscation and Victim Surcharge Orders

Section 6 amends that part of POCA⁶ which deals with the effect of a confiscation order on the court’s other sentencing powers to make financial orders against the defendant. Currently, POCA makes it clear that, where there is both a confiscation order and a compensation order, and the defendant does not have the means to pay both, monies collected under the confiscation order should be used first to settle any outstanding compensation to victims.

³ New section 11(1) of POCA inserted by section 5 of the Serious Crime Act 2015

⁴ New section 11(2) of POCA inserted by section 5 of the Serious Crime Act 2015

⁵ New section 11(3) of POCA inserted by section 5 of the Serious Crime Act 2015

⁶ Section 13 of POCA

However, while POCA ensures that compensation orders and unlawful profit orders take priority over a confiscation order, the confiscation order still currently takes priority over any amounts ordered to be paid as a victim surcharge. The monies raised by the victim surcharge are used to fund victim services through the Victim and Witness General Fund, which funds services to the victims of crime.

Section 6 adds victim surcharge orders to the list of priority orders to ensure contributions to the Victim and Witness General Fund are paid before a confiscation order if the defendant does not have the means to pay both. Section 6 provides this by introducing into section 13 the concept of a “priority order” and defining this term so as to include a compensation order, a victim surcharge order or an unlawful profits order⁷.

Section 7: Orders for securing compliance with a confiscation order (travel bans)

To assist with the enforcement of confiscation orders, section 7 inserts new provisions in POCA that require the Crown Court to consider making a compliance order⁸. The court will be at liberty to impose any restrictions, prohibitions or requirements that it considers appropriate to ensure that a confiscation order is effective. In particular, the court must consider whether to place a restriction or prohibition on the defendant’s overseas travel in order to prevent disposal of assets beyond the reach of the confiscation order.

Imposing a travel ban might require the defendant to surrender his or her passport. It is also open to the court to impose a prohibition or restriction on a third party if it considers it appropriate to do so.

Although a compliance order will normally remain in force until the confiscation order is paid, the crown court may discharge or vary an order on application made by the prosecutor or any person affected by the order.

Section 8: Variation or discharge

Under sections 24 and 25 of POCA, it is currently possible to discharge an outstanding confiscation order in the following two circumstances:

- Where most of the sum due has been paid but there is a small amount (less than £50) outstanding.
- If the outstanding amount is under £1,000 and the outstanding amount is a consequence of exchange rate fluctuations or any other reason specified by the Secretary of State.

⁷ Subsections (2) to (4) of section 13 POCA

⁸ New sections 13A and 13B inserted by section 7 of the Serious Crime Act 2015

Section 8 makes further provision for the discharge of outstanding confiscation orders⁹. It will now be possible to discharge confiscation orders in cases where the defendant has died and it is not feasible to seek further payment of the order from the defendant's estate (for example, if there are no assets remaining in the estate).

Section 8 also amends section 23 of POCA. Previously, only the defendant or a court appointed receiver could make an application to reduce the amount of the confiscation order¹⁰. Now, the prosecutor will also be able to apply to vary orders. This will be particularly relevant where the defendant has died and there is no other person able to make such an application.

It is important to note that new provision can also operate in relation to confiscation orders made under the Drug Trafficking Act 1994 and the Criminal Justice Act 1988.

Section 9: Absconding defendants

Currently, there is some doubt as to whether it is possible to make a confiscation order if an offender absconds before the conclusion of their trial and is convicted in their absence.

Section 9 amends POCA¹¹ to confirm that a confiscation order may be made against a person who absconds before the conclusion of their trial and is subsequently convicted in their absence.

Section 9 also amends the provisions in POCA that enables confiscation proceedings to be commenced against a defendant who absconds prior to conviction. Currently confiscation proceedings may only be brought after two years has elapsed from the date of the defendant's disappearance. The amendments provide for this period of time to be reduced from two years to three months.

In addition, section 9 amends POCA to make it possible to apply criminal lifestyle assumptions to all offenders who abscond but subsequently return to the jurisdiction. This means that the defendant's criminal benefit may be re-calculated to be what the individual received, retained and spent in the six years prior to the date the defendant ceased to be an absconder¹².

Section 10: Default sentences

⁹ New section 25A of POCA inserted by section 8 of the Serious Crime Act 2015

¹⁰ Section 23 of POCA

¹¹ Sections 27 & 28 of POCA

¹² See new subsection (6) of section 27 of POCA as substituted by section 9(2) of the Serious Crime Act 2015.

This section substantially strengthens the default prison sentences that must be served for failing to pay confiscation orders on time. It is intended to prevent offenders choosing to serve prison sentences rather than pay confiscation orders.

POCA provides that a default sentence of imprisonment can be imposed against a defendant if a confiscation order remains unpaid once the time to pay has expired.

Section 10 increases the maximum default sentence where the confiscation order exceeds £500,000. The maximum sentence increases from five to seven years for orders of more than £500,000 but no more than £1million, and from ten to fourteen years for orders over £1 million. The range of default sentences has also been simplified, reducing the current twelve tiers to four as shown in the below table¹³:

Amount	Maximum Term
£10,000 or less	6 months
More than £10,000 but no more than £500,000	5 years
More than £500,000 but no more than £1 million	7 years
More than £1 million	14 years

Section 10 also ends automatic release at the half way point of a default sentence for confiscation orders over £10 million¹⁴.

Section 11: Conditions for the exercise of restraint powers

The effect of a restraint order is to freeze assets so as to prevent them being dissipated before a confiscation order is made. Under POCA, a restraint order may be applied for from the beginning of a criminal investigation. But the current test for restraining assets demands that there is reasonable cause to *believe* that an alleged offender has benefited from criminal conduct. *Belief* is a high threshold which is normally formed in later stages of an investigation. Consequently, many applications are unsuccessful and assets that could be used to satisfy a confiscation order are at risk of being dissipated.

¹³ Section 35(2A) POCA as amended by Section 10(1) of the Serious Crime Act 2015

¹⁴ New sections 258(2B) and (2C) of the Criminal Justice Act 2003 as inserted by section 10(3) of the Serious Crime Act 2015

Section 11 reduces the test to reasonable grounds to *suspect* that an alleged offender has benefited from criminal conduct¹⁵. This reduction in threshold brings the test in line with that needed to effect an arrest.

Section 11 also provides that¹⁶ the court will be able to monitor the progress of the investigation and may discharge the restraint order if a decision to charge is not made in a reasonable time. Under certain circumstances, the court might impose a reporting requirement on a law enforcement agency.

Section 12: Continuation of a restraint order after a quashed conviction

POCA does not currently allow for a restraint order to be maintained in the period between the quashing of a conviction and the start of proceedings for a retrial. Section 12 amends POCA to ensure that a restraint order can be kept in place against a defendant pending the start of proceedings for a retrial¹⁷.

The court can subsequently discharge such a restraint order under certain circumstances, namely if the Court of Appeal refuses to make an order for a retrial, there is an undue delay in starting proceedings or the proceedings for a retrial have concluded¹⁸.

Section 13: Conditions for exercise of search and seizure powers

New powers providing for the search and seizure of property that may be used to satisfy a confiscation order have been inserted into POCA by the Policing and Crime Act 2009. These powers come in force on 1 June 2015 and may only be exercised with appropriate approval. Appropriate approval is normally given by a justice of the peace, but cases of urgency approval may be given by a senior officer. Section 13 of the Serious Crime Act amends POCA to define a senior NCA officer for these purposes.

Note: Commencement of this provision requires the relevant Code of Practice to be updated. Consequently, a date for full commencement of section 13 has yet to be confirmed.

¹⁵ Sections 40 and 41 of POCA as amended by section 11 of the Serious Crime Act 2015.

¹⁶ New subsections 7A and 7C in section 41 of POCA as inserted by section 11(2) of the Serious Crime Act 2015.

¹⁷ New subsections 6A and 6B inserted into section 42 of POCA by section 12 of the Serious Crime Act 2015. The duty to discharge a restraint order is switched off where a conviction has been quashed and either the Court of Appeal has ordered a retrial or the prosecution has applied to the court for the case to be retried.

¹⁸ See new section 42(6B) of POCA.

Section 14: Seized money etc

Currently, a magistrates' court has the power¹⁹ to order a bank to pay over funds held by a defendant in order to satisfy a confiscation order. But this power is only available when a restraint order is in place and the time allowed to pay the confiscation order has expired.

Section 14 amends POCA to simplify the process for confiscating cash held in bank accounts. It does this by removing the requirement to have a restraint order in place before a bank can be ordered to pay over funds. It also removes the existing time to pay condition. There are now only two conditions²⁰ that must be satisfied before money can be seized from an account with a bank or building society, namely:

- A confiscation order is made against the person against the person by whom the money is held, and
- An enforcement receiver has not been appointed under section 50 of POCA in relation to the money.

The court will also have the power to order the payment of funds held in a bank account belonging to a third party, for example a company²¹. Any third party affected would have the opportunity to make representations before such an order is made.

2. Chapter 2 of Part 1: Scotland

Summary

Chapter 2 of Part 1 makes a number of changes to the confiscation and civil recovery regimes in Scotland. For the most part these changes are comparable to the changes made in England and Wales as set out above, but particular note should be made of two bespoke changes relating to the confiscation (default sentences) and civil recovery (prohibitory property orders) regimes in Scotland. The two notable changes are detailed below.

Section 19: Enforcement of confiscation orders

Currently, a defendant who serves a default sentence in Scotland (for failing to pay a confiscation order) is no longer liable to pay the sum due. This is because an unpaid confiscation order is treated as an unpaid fine – applying the relevant provisions in Scotland makes the unpaid fine or confiscation order unenforceable after the default sentence has been served.

¹⁹ Section 67 of POCA.

²⁰ New section 67(5) of POCA inserted by section 14(1) and (2) of the Serious Crime Act 2015

²¹ New section 67(5B) of POCA.

This contrasts with the position in England and Wales, where serving a default sentence does not extinguish liability to pay off a confiscation order.

Section 19 now disapplies the fine enforcement provisions that extinguish a defendant's liability to pay²². As a result, a defendant will be required to pay the amount due under a confiscation order, even if he or she serves a default sentence. This brings the legislation into line with the rest of the UK.

In addition, section 19 also amends POCA to provide that a Scottish court will apply the new default sentences (see section 10 of the Serious Crime Act 2015) when enforcing confiscation orders made in England and Wales and Northern Ireland.

Section 23: Prohibitory property orders: PPO receivers

Prohibitory Property Orders are orders which can be applied for in the process of the civil recovery of assets in Scotland. PPOs, which can be sought when a person has acquired assets through unlawful conduct, can prevent the dissipation of assets identified during a civil investigation.

Section 23 provides for a new type of management receiver whose only function will be to manage property subject to a PPO²³. These new PPO receivers will have similar powers to those of management receivers (in respect of property freezing orders) in England and Wales and Northern Ireland. However, as the PPO receiver will have no investigative function, he or she does not need to be independent and the role can be assumed by a member of staff of the enforcement authority that is pursuing the civil recovery case.

As a rule, the enforcement authority applying for a PPO will give notice of the application. However, *ex parte* applications can be made in certain circumstances²⁴. These include seeking an order at the beginning of an investigation in order to prevent concealment or disposal of property.

3. Chapter 3 of Part 1: Northern Ireland

Summary

This chapter (sections 24-36) makes parallel changes to the confiscation regime in Northern Ireland to those made in England and Wales (see the provisions described under chapter 1, above). However, the following dissimilarities should be noted:

²² Section 221(3) Criminal Procedure (Scotland) Act 1995 disapplied by section 118(20(h)) of POCA as amended by section 19(1) (a) of the Serious Crime Act 2015.

²³ New sections 255G to 255I of POCA as inserted by section 23(2) of the Serious Crime Act 2015.

²⁴ New section 255G(3) of POCA.

Section 30: Variation and discharge

This section makes broadly similar provision for the discharge of confiscation orders where the defendant has died to that contained in section 8 for England and Wales. However, in England and Wales an application to the Crown Court for discharge of a confiscation order is made by the designated officer for a magistrates' court. Under the amendments to POCA made by section 30, such an application will be made in Northern Ireland by the prosecutor.

- With regard to default sentences, eligibility for early release for non-payment of a confiscation order over £10 million can be removed by the Department of Justice in Northern Ireland under existing legislation²⁵. There is therefore no equivalent of the amendments made in England and Wales by section 10(3) and (4) of the Serious Crime Act.
- The provisions relating to victim surcharge in England and Wales and Scotland (sections 6 and 15 respectively) are not replicated in Chapter 3.

4. Chapter 4 of Part 1: Disclosures, Investigations, Co-operation and Enforcement

Section 37: Exemption from civil liability for money-laundering disclosures

The “regulated sector”, which includes banks and legal, are obliged to submit Suspicious Activity Reports (SARs) under Part 7 of POCA. The purpose of SARs is to alert enforcement bodies of suspicious activity that could indicate money laundering.

A person or business must seek the consent of the National Crime Agency before proceeding with a suspicious transaction. The NCA has seven days to respond to a consent request, and the transaction must not proceed during this time. Under these circumstances, it is possible that the reporter's client may seek to take legal action to recover losses or make a claim for damages.

Section 37 of the Serious Crime Act provides the reporting person or business with protection against civil liability if it makes a SAR in good faith.

Section 38: Confiscation investigations

A confiscation investigation is currently defined as an investigation into the whereabouts and extent of a defendant's criminal benefit.

Although investigative powers can still be exercised after a confiscation order has been made, they can only be used to identify the *criminal benefit* that might be used

²⁵ Section 13 of the Prison Act (Northern Ireland) 1953.

to satisfy a confiscation order. The powers cannot be used to identify *all* of a defendant's property that could be used to satisfy an order.

Section 38 broadens the definition of "confiscation investigation" so that investigative powers are available for identifying the extent and whereabouts of realisable property that could be used to satisfy an order. These powers can also be used when available amounts have been satisfied but the original full benefit has not been made²⁶.

Note: Commencement of this provision requires the relevant Code of Practice to be updated. Consequently, a date for full commencement of section 38 has yet to be confirmed.

Section 39: External orders and investigations: meaning of "obtaining property."

Section 39 amends POCA by extending the ability of the UK to assist overseas authorities in cases where criminal benefit is a pecuniary advantage rather than actual property or money²⁷. An example of a pecuniary advantage would be not paying tax that is lawfully due.

Prior to this amendment, the scope of an external order was limited to the recovery of specified money or property. This reflected the limits contained within earlier international agreements. However, in recent years international law has adopted a broader approach as to what the proceeds of crime might be. Any economic advantage obtained directly or indirectly from criminal offences can now be considered to be the proceeds of crime.

Section 40: Confiscation orders by magistrates' courts

Currently, confiscation orders can only be made in the Crown Court. However, provision has been made for magistrates' courts to be given the power to make a confiscation order in cases with a value below £10,000²⁸. This provision is not yet in force. Work is in hand to commence this power.

Section 40 enables the Secretary of State, by order, to vary the £10,000 threshold. It is unlikely that this order making power would be exercised before the impact of the existing £10,000 threshold on magistrates' courts making confiscation orders has been assessed.

²⁶ Revisits under section 22 of POCA 2002.

²⁷ Section 447 of POCA as amended by section 39 of the Serious Crime Act 2015.

²⁸ Section 97 of the Serious Organised Crime and Police Act 2005.

5. Minor amendments

The Supreme Court has held that section 3 of the Human Rights Act 1998 requires the court to refuse to make a confiscation order for the recoverable amount where it would be disproportionate to do so. In such a case the court must make an order requiring the defendant to pay whatever lesser amount (if any) it thinks would be proportionate.

Accordingly, POCA has been amended²⁹ to place the Supreme Court's judgement in *R v Waya* on a statutory footing as recommended by the Joint Committee on Human Rights in their report on the Serious Crime Bill (second report, session 2014/15).

²⁹ Sections 6, 92 and 156 (relating to the making of confiscation orders in England and Wales, Scotland and Northern Ireland respectively) of POCA as amended by paragraphs 19, 35 and 46 of the Serious Crime Act 2015.