

SERIOUS ORGANISED CRIME AND POLICE ACT 2005

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Chapter 6: Proceeds of Crime

Section 97: Confiscation orders by magistrates' courts

217. [Section 97](#) gives the Secretary of State power by order to make provision to allow magistrates' courts to make confiscation orders under Part 2 or 4 of the Proceeds of Crime Act 2002 (POCA). *Subsection (3)* allows for the order to make amendments to the confiscation provisions in POCA and related legislation to ensure that the magistrates' courts have the powers to make confiscation orders. *Subsection (2)* provides that the power for magistrates' courts to make a confiscation order is subject to a restriction that the amount does not exceed £10,000. Orders above this amount could only be made in a Crown Court.

Section 98: Civil recovery: freezing orders

218. The Proceeds of Crime Act 2002 makes provision for the Director of the Assets Recovery Agency (ARA) to be able to apply to the High Court for a property freezing order in civil recovery cases under Part 5 of that Act. The effect of section 246(2) and (7) of that Act is that an interim receiver had to be appointed in every case. Section 98 has the effect of allowing the Director of the ARA in England, Wales and Northern Ireland to be able to apply for a property freezing order as an alternative to an order appointing a receiver, and makes similar provision for Scotland for the Scottish Ministers to apply for a prohibitory property order.
219. Except in Scotland, this section and the associated amendments in Schedule 6 also have the effect of enabling defendants who are subject to civil proceedings to have access to their frozen assets in order to fund the cost of their legal representation. Schedule 6 amends section 252(4) of POCA which prevents defendants in England, Wales and Northern Ireland from being able to fund their legal defence in this way and allows for "reasonable" living expenses to be drawn down from frozen assets named in an order. The amounts able to be drawn down are controlled to avoid dissipation of assets. This can be achieved by prior assessment from the court in accordance with any regulations made by the Lord Chancellor for the purpose and the agreement of the enforcement authority. In Scotland, respondents to an action for civil recovery will continue to be prevented from using frozen assets to fund the cost of legal representation. The intention is that legal aid will continue to be available to them where eligible. The amendment for Scotland still allows, as before, access to funds to meet "reasonable" living expenses or in order to carry on any trade, business, profession or occupation.

Section 99: Civil recovery: interim receivers' expenses etc.

220. **Section 99** has the effect of allowing the Director of the ARA to meet the remuneration and expenses of a receiver in England, Wales and Northern Ireland from recovered sums after payments referred to in section 280(2) of the Proceeds of Crime Act 2002 have been made. The Director may meet the costs of an appointed interim receiver from sums received from civil recovery proceedings in a manner that directly mirrors that of the criminal provisions in Parts 2 and 4 of the Act. Similar provision is made in respect of interim administrators' fees and expenses in Scotland.

Section 100: Detention of seized cash: meaning of "48 hours"

221. The Proceeds of Crime Act 2002 gives powers to the police and HM Revenue and Customs to seize cash derived from or intended for use in crime, and to secure its forfeiture in civil magistrates' or sheriff court proceedings. A constable or an officer of Revenue and Customs can seize and detain cash. However cash may not be detained for a period of more than 48 hours except by order of a magistrate (or a sheriff in Scotland). Previously the calculation of the 48 hour period included all bank holidays and weekends.
222. **Section 100** requires any calculation of the 48 hour period to leave out of account Saturdays, Sundays, Christmas Day and Good Friday (which are public holidays) and any day that is a bank holiday in the part of the United Kingdom in which the cash was seized and, in Scotland, any sheriff court holiday.

Section 101: Appeal in proceedings for forfeiture of cash

223. **Section 101** has the effect of giving a right of appeal to police and customs officers in all cash forfeiture applications where a court dismisses an application for cash forfeiture. In Scotland, this right is given to the Scottish Ministers as it is they who make cash forfeiture applications. This is in addition to the right of appeal given to a person aggrieved by the making of an order for the forfeiture of cash. The section also has the effect of allowing the appeal court, the Crown Court, to hear an appeal in an appropriate way, for example by way of a rehearing or on a point of law. The section also changes the route of appeal in Scotland: rather than by way of rehearing at the Court of Session, the appeal will be instead to the Sheriff Principal.

Section 102: Money laundering: defence where overseas conduct is legal under local law

224. **Section 102** amends the three principal money laundering offences in sections 327-329 of the Proceeds of Crime Act 2002 and the offences of failure to disclose money laundering in sections 330-332. The amendments provide a defence to these offences where the person knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a country or territory outside the United Kingdom, and where the criminal conduct was not unlawful under the criminal law applying in that country or territory at the time it occurred. This defence will not apply where the relevant conduct is of a type described by an order made by the Secretary of State.

Section 103: Money laundering: threshold amounts

225. **Section 103** amends the three principal money laundering offences in sections 327-329 of the Proceeds of Crime Act 2002 (POCA), and inserts a new section 339A on threshold amounts. Under section 327(1)(d) of POCA, a bank or other deposit-taking body would need to make a disclosure to obtain consent before proceeding with any transaction which was suspected of involving criminal property. These amendments would, in certain circumstances, allow deposit-taking bodies to continue to operate accounts without the need to seek consent in each case. They do not apply to the duty to make a disclosure in respect of the initial opening of an account or, as the case may be, the time when the deposit taking body first suspects that the property is criminal property

(see section 338(2A) of POCA, as inserted by section 106(5)). A bank or other deposit-taking body would not commit an offence in operating an account of a person suspected of money laundering when the amount of money concerned in the transaction is below £250 or such higher threshold amount as may be specified by a constable or an officer of Revenue and Customs, or by a person authorised by the Director General of NCIS (or, in future, authorised by the Director General of SOCA). Where a deposit-taking body requests a threshold amount higher than the £250 default threshold, one may be specified. The £250 default threshold can be varied by order of the Secretary of State. Where a threshold amount (above the £250 default level) has been specified for an account, the specified amount may be varied by any of the officers who could have specified it. Different thresholds may be specified in relation to the operation of the same account (for example, a threshold could be specified for deposits that is higher than the threshold specified for withdrawals).

226. *Subsection (6)* provides a definition of deposit-taking body in section 340 of POCA.

Section 104: Money laundering: disclosures to identify persons and property

227. **Section 104** amends the failure-to-disclose provisions in sections 330-332 of the Proceeds of Crime Act 2002. The obligation to disclose suspicions of money laundering will apply only if: the person required to make a disclosure knows the identity of the person engaged in the money-laundering offence or the whereabouts of any of the laundered property; or the information which would have to be reported discloses, or may assist in uncovering, the identity of the person engaged in that offence or the whereabouts of any of the laundered property.
228. Laundered property is defined in the new subsection (5A) of sections 330-332.

Section 105: Money laundering: form and manner of disclosures

229. **Section 105** replaces subsections (2) and (3) of section 339 of the Proceeds of Crime Act 2002, under subsection (1) of which the Secretary of State has the power to prescribe by order the form and manner in which disclosures about money laundering should be made.
230. *Subsection (2)* amends sections 330(9)(b), 337(5)(b) and 338(5)(b) of the Act by omitting the requirement to follow the employer's procedures when making a disclosure to a nominated officer. Under *subsection (3)* the penalty for failure to make a disclosure in the prescribed form and manner is modified to become punishable by a fine not exceeding level 5 on the standard scale. *Subsection (5)* (which inserts new subsections (1A) to (3) into section 339 of the 2002 Act) provides that a person commits an offence if he makes a disclosure otherwise than in the form and manner prescribed, unless he has a reasonable excuse for not so doing. It also includes the power to request from the person making the disclosure that the person provide information specified or described in the form if that has not been done in making the disclosure. New section 339(3) of POCA makes it clear that there is no obligation to comply with such a request.

Section 106: Money laundering: miscellaneous amendments

231. **Section 106(2)** amends section 330 of the Proceeds of Crime Act 2002 so that the nominated officer advising a professional legal adviser in a firm of solicitors is not obliged to make a disclosure where the professional legal adviser, who has information that came to him/her in privileged circumstances, has made a report to the nominated officer for the purposes of seeking his/her advice about whether the facts known to him/her give rise to a need to make a formal disclosure.
232. *Subsection (5)* amends section 338 by adding a further condition to the circumstances in which a disclosure will be "authorised" for the purpose of affording a defence to the principal money laundering offences in the Act. This covers the circumstances when

the person required to make a disclosure does not initially suspect that the property is criminal property.

Section 107: Money laundering offences

233. **Section 107** amends sections 364 and 415 of the Proceeds of Crime Act 2002 and widens the meaning of money laundering offences so that it includes the principal money laundering offences under legislation in force before the 2002 Act. This will enable the investigation powers in Part 8 of the Act to be used in investigating old money laundering offences.

Section 108: International co-operation

234. **Section 108(4)** amends section 447(3) of the Proceeds of Crime Act 2002 to extend the meaning of an external investigation to include the extent and whereabouts of criminal property. Section 445 of the Act gives power to enable assistance to be given in the UK for the purposes of external investigations.

Section 109: Minor and consequential amendments relating to Chapter 6

235. This section gives effect to Schedule 6 which makes further minor and consequential amendments to POCA.