

SERIOUS CRIME ACT 2015

EXPLANATORY NOTES

TERRITORIAL EXTENT

Part 1: Proceeds of Crime

Summary and Background

12. POCA provides for four different routes for the recovery of assets acquired as a result of criminal activity, as follows:
 - Confiscation orders – following conviction for an offence. Part 2 of POCA makes provision for confiscation in England and Wales, whilst Parts 3 and 4 make broadly analogous provisions for Scotland and Northern Ireland respectively.
 - Civil recovery - this is a form of non-conviction based asset recovery that allows for the recovery of property which is, or represents, property obtained through unlawful conduct. A civil recovery order is not a conviction or a sentence, and the action is taken against the property rather than the person. Civil recovery is used when a prosecution is not possible, for example if there is insufficient evidence to create a realistic prospect of a conviction, or there is no identifiable living suspect. Part 5 of POCA provides for a UK-wide civil recovery regime.
 - Seizure and forfeiture of cash - this is a non-conviction based procedure for recovering cash which is the proceeds of, or intended for use in, crime of sums of not less than £1,000. Chapter 3 of Part 5 of POCA provides for a UK-wide regime for the recovery of cash in summary proceedings.
 - Criminal Taxation – also a non-conviction based power, but does not result in property being recovered – instead it allows tax to be charged on a person’s income, profits or gains where there are reasonable grounds to suspect that they arise or accrue from criminal conduct on the part of that person or another. Only the National Crime Agency (“NCA”) can exercise the criminal taxation powers under Part 6 of POCA, but Her Majesty’s Revenue and Customs retains all its usual powers in respect of taxation.
13. Confiscation orders are the principal method used by law enforcement agencies for the recovery of assets. Annex B provides an overview of how the confiscation regime operates.
14. £190 million was recovered under POCA in 2013/14.
15. The Serious and Organised Crime Strategy explained that POCA is under sustained legal challenge from criminals who are constantly seeking new ways to avoid its reach and frustrate asset recovery. The Strategy sets out a number of proposals to: strengthen the legislation by, amongst other things, ensuring that criminal assets cannot be hidden with spouses, associates or other third parties; substantially strengthen the prison sentences for failing to pay confiscation orders; enable assets to be frozen more quickly and earlier in investigations; significantly reduce the time that the courts can give offenders to pay confiscation orders; and extend the investigative powers in

POCA so that they are available to trace assets once a confiscation order is made. The provisions in Part 1 of the Act give effect to these and other changes to POCA. In doing so, they also implement two recommendations on asset recovery made by the Joint Committee on the Draft Modern Slavery Bill in their April 2014 report on the draft Bill¹. Specifically, the Joint Committee recommended that the test for obtaining a restraint order be amended to make it less stringent and indicated that it would welcome stronger sanctions for non-payment of confiscation orders.

Commentary on Sections

Chapter 1: England and Wales

Confiscation: assets held by defendant and other

Section 1: Determination of extent of defendant's interest in property

16. This section, together with sections 2 to 4, amends the provisions in Part 2 of POCA in respect of third party interests in assets that may be realised to discharge a confiscation order. Under Part 2 of POCA a confiscation order is made against the defendant for a particular amount, and not against any particular assets held by the defendant, although the court may take into account property held by the defendant when determining the amount of the confiscation order. It is open to the defendant to pay off the order out of whatever assets he or she has available. As such, Part 2 of POCA makes no express provision for the court to deal with any third party interests in any of the property which the court takes account of when determining the amount of a confiscation order.
17. Part 2 of POCA does however make provision for third parties to make representations where they have been affected by the exercise of powers under that Part -- in particular, when they have been affected by a restraint order made under section 41 of POCA, or an order for the further detention of property under section 47M of POCA (the latter section is not yet in force).
18. Third parties also have the right to make representations under Part 2 of POCA when an enforcement receiver is appointed by the Crown Court under section 50 of the Act to enforce an unpaid confiscation order. The court must give anyone with an interest in the realisable property of the defendant a reasonable opportunity to make representations before the receiver may exercise their powers under section 51(2) of POCA to manage, deal or realise that property, or under section 51(6) to order the third party to make a payment to the receiver in respect of the defendant's beneficial interest in the property.
19. In general, it is most appropriate for third party interests to be dealt with substantively at the enforcement stage of a confiscation order given that the existence of such interests only crystallises against specific property at that stage. However, in some cases waiting until enforcement to determine the extent of a third party's interest in the defendant's property can complicate, lengthen and otherwise frustrate the confiscation process. Sections 1 to 4 seek to give effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by "ensuring that criminal assets cannot be hidden with spouses, associates or other third parties".
20. This section inserts a new section 10A into POCA to confer on the Crown Court, when making a confiscation order, a power to make a determination as to the extent of the defendant's interest in particular property (new section 10A(1) and (5)). Given that a consequence of making such a determination will be to determine the extent, if any, of any third party interest in the property, new section 10A(2) affords third parties who have, or may have, an interest in the property the right to make representations to the court about the extent of their interest. The right to make representations also extends to the defendant. Subject to two exceptions, any determination as to the extent of the defendant's interest in particular property is binding on any court or other

¹ <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-modern-slavery-bill/>

person involved in the enforcement of the confiscation order (new section 10A(3)). The exceptions are where it is open to a court which has appointed an enforcement receiver to hear representations (see section 4) or in proceedings before the Court of Appeal or Supreme Court (new section 10A(4)).

21. It is envisaged that the Crown Court would only make such determinations in relatively straightforward cases, that is where the court considers that it can, without too much difficulty, determine the defendant's interest in particular property. In deciding whether to make a determination in any particular case, it is expected that judges will exercise this power to determine the defendant's interest in property only in those cases where their experience (including in respect of matters as regards to property law), the nature of the property, and the likely number and/or complexity of any third party interests allows them to do so.

Section 2: Provision of information

22. *Subsection (1)* amends section 16 of POCA, which requires the prosecutor to give the court "a statement of information" detailing the defendant's benefit from criminal conduct. New section 16(6A) requires such statements of information to include any information available to the prosecutor that would be relevant to the court's consideration of whether to make a determination under new section 10A and, if so, the terms of such a determination. Such information may include evidence of the defendant's and any third parties' interest in relevant property. New section 16(6B) empowers the court to require the prosecutor to provide further specified information relevant to the making of a determination. In order to fulfil such a requirement, it may be necessary for the prosecutor to obtain further information. Under section 17 of POCA, the court may require the defendant to respond to every allegation in the statement of information and to indicate to what extent each allegation is accepted. Where an allegation is disputed, the defendant must provide full details of any matters relied on.
23. *Subsection (2)* amends section 18 of POCA, which empowers the court to order the defendant to provide any information it needs to enable it to carry out its confiscation functions. *Subsection (2)(a)* amends section 18(2) to make it clear that the court's confiscation functions include functions under the new section 10A. *Subsection (2)(b)* amends section 18(6) so as to provide that where the prosecution accepts any allegation contained in the information provided by the defendant, the court may treat the acceptance as conclusive for the purpose of deciding whether to make a determination under new section 10A and, if it decides to make such a determination, the form of that determination.
24. *Subsection (3)* inserts new section 18A into POCA. New section 18A empowers the court to order any third party who may have an interest in the defendant's property to provide any information it needs to enable it to carry out its functions in connection with the making of a determination under the new section 10A of POCA. A similar power to order the defendant to provide information to the court is contained in section 18 of POCA. The court might use this power where, for example, the defendant alleges that a third party owns a part share in particular property and the court considers that it requires more information from the relevant third party to verify that claim.
25. Where the interested person fails to comply with the court's order without reasonable excuse, new section 18A(4) allows the court to draw any inference that it believes appropriate. However, new section 18A(5) provides that new section 18A(4) does not detract from any other power the court has to deal with the interested person, in particular the power to punish the interested person for contempt of court for failure to comply with the order.
26. New section 18A(9) provides that no information provided by an interested person in response to a court order is admissible in any criminal proceedings. This protects the interested person against self incrimination. However, it does not prevent an interested

person being prosecuted for an offence using evidence which may come to light as a result of any information provided to the court under new section 18A.

Section 3: Appeals

27. *Subsection (1)* inserts new subsections (4) to (8) into section 31 of POCA (which confers a right of appeal on prosecutors against any confiscation order made by the Crown Court). New subsections (4) to (8) enable the prosecutor, the defendant or a third party to appeal to the Court of Appeal against a determination made under new section 10A. The defendant or a third party may only appeal a determination if it appears to the court that the person is, or may be, a person holding an interest in the property affected by the determination. In the case of the defendant or a third party, the right of appeal then only arises in one of two circumstances, namely where a person with an interest in relevant property was not given a reasonable opportunity to make representations to the Crown Court before it made its determination (new section 31(6)), or where the Court of Appeal considers that the determination made under new section 10A would result in a serious risk of injustice to the appellant (new section 31(7)). This does not impact on the defendant's existing right to appeal a confiscation order to the Court of Appeal.
28. The rights of appeal conferred by new section 31(4) are negated where the conditions in new section 31(8) apply. Those conditions are where a receiver has been appointed under section 50 of POCA or where an application has been made by the prosecution for the appointment of a receiver but that application has not been determined, or where the Court of Appeal believes that such an application is to be made. No right of appeal is provided for in such circumstances given that the court appointing a receiver will be able to reconsider interests in relevant property where there would be a serious risk of injustice if the Crown Court's determination under new section 10A were to be adhered to (see section 4). Moreover, in cases where the receiver is bound by a Crown Court's determination as to the extent of a defendant's interest in particular property, any person affected by an enforcement order in relation to the property, that is an order to sell it to help satisfy the defendant's confiscation order, would be able to appeal to the Court of Appeal (under section 65 of POCA). When considering any such appeal, the Court of Appeal would not be bound by the Crown Court's determination (see new section 10A(4)(b)).
29. *Subsection (2)* inserts new subsection (2A) into section 32 of POCA, which provides that in determining an appeal under new section 31(4) the Court of Appeal may either confirm the original determination made by the Crown Court under new section 10A or make any other order it considers appropriate (including an order quashing the original determination). This affords the Court of Appeal the power to make a different determination from that made by the Crown Court as to the extent of the defendant's interest in relevant property.
30. *Subsection (3)* amends section 33 of POCA, which provides for further appeals to the Supreme Court. *Subsection (3)(a)* enables any party to proceedings in the Court of Appeal on an appeal under new section 31(4) to appeal the outcome to the Supreme Court. *Subsection (3)(b)* inserts new subsection (3A) into section 33 which confers on the Supreme Court broad powers to confirm, quash or vary the decision made by the Court of Appeal.

Section 4: Enforcement receivers

31. This section amends section 51 of POCA, which sets out the powers a court can confer on an enforcement receiver. Such powers include the power to realise property, but this is accompanied by a requirement to afford persons with an interest in the property a reasonable opportunity to make representations to the court. New section 51(8B) extends this right on third parties to make representations to the court in certain circumstances where a determination has been made under new section 10A. Given that interested third parties will generally have been afforded an opportunity to make

representations to the court prior to it making a determination under new section 10A, the amendments to section 51 of POCA do not, as a rule, allow further representations to be made at the enforcement stage. However, new section 51(8B) enables an affected person to make representations to the court which appointed the receiver where he or she was not given a reasonable opportunity to make representations to the Crown Court before it made its determination, or where the court considers that the determination made under new section 10A would result in a serious risk of injustice to the person. This provision affords an opportunity for an interested third party to make representations in circumstances where their interest in the property only came to light after the Crown Court had made its original determination under new section 10A. Subject to the court's consideration of any such representations and to the outcome of any appeal (as provided for in section 3), a determination made by the court under new section 10A is binding on a receiver.

Confiscation: other amendments

Section 5: Time for payment

32. *Subsection (1)* substitutes a new section 11 of POCA, which makes provision for the court to determine how long the defendant has to pay the amount due under a confiscation order. Section 11 currently provides that the amount is to be paid immediately, unless the defendant can demonstrate to the court that he or she needs more time to pay. If the court is satisfied that time to pay is required, it may allow up to six months to pay, and up to a further six months on a later occasion if there are exceptional reasons justifying the extension. In no case, however, will more than 12 months be granted from the day on which the confiscation order is made. The prosecution has the right to make representations to the court before any order extending the time available to pay a compensation order is made. The substituted section 11 seeks to give effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “significantly reducing the time that the courts can give offenders to pay confiscation orders”.
33. New section 11(1) expressly provides that the full amount payable under a confiscation order must be paid once the order is made (unless the court provides otherwise); the existing section 11(1) simply refers to “the amount”, albeit that the effect is that the full amount must be paid on the day the confiscation order is made.
34. New section 11(2) provides that the court may only extend the time to make full payment of the confiscation order if the court is satisfied that the defendant is unable to pay the full amount on the date the order is made. The existing section 11(2) gives the court a wider discretion to make an order providing more time to pay a confiscation order “if the defendant shows that he needs time to pay the amount ordered to be paid”. The new section 11(2) also provides that the court may require different amounts of time for payment (the “specified period”) of different parts of the amount ordered to be paid. 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).
35. New section 11(3) defines the specified period for the purpose of subsection (2). Whereas the existing section 11(3) sets the maximum length of the specified period at six months, the new section 11(3) reduces this to three months.
36. New section 11(4) enables the court, on application by the defendant, to extend, by order, the specified period (“the extended period”). At present, the court may make such an order if it “believes there are exceptional circumstances”. The new test is that the defendant is unable to pay the amount required within the specified period “despite having made all reasonable efforts”. Where the court is satisfied that this test is met, it has the discretion to specify different time periods for payment of the outstanding sums.

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

So, for example, if the defendant had been ordered to pay £150,000 within 14 days and makes an application to the court for extending that time period, the court may order that £50,000 be paid immediately, provide a further seven days for another £50,000 to be paid over and a further 14 days for the remaining £50,000 to be paid over. Any application by the defendant must be made before the expiry of the specified period.

37. New section 11(5) defines the extended period for the purpose of subsection (4) and, by extension, the maximum duration of the specified period and the extended period when aggregated together. Whereas the existing section 11(5) sets this maximum aggregated period at 12 months, the new section 11(5) reduces this to six months. As now, it would be possible for the court to grant an extended period for payment after the expiry of the specified period, but may not do so more than six months (currently 12 months) after the confiscation order was made (new section 11(6)).
38. New section 11(7) provides that any specified period or extended period must be as short as it can be. There is currently no equivalent provision in the existing section 11.
39. New section 11(8) replicates the existing ability of the prosecution to make representations before any order under new section 11(2) or (4) is made.
40. *Subsection (2)* substitutes a new subsection (3) in section 12 of POCA. Section 12 provides that the defendant must pay interest on a confiscation order that is not paid in full by the time allowed. The rate of interest is that specified in section 17 of the Judgments Act 1838, namely 8%. Any interest due forms part of the amount payable under a confiscation order. At present, interest is not payable during any period where the defendant has made an application to the court under section 11(4) of POCA to further extend the time allowed for payment and that application has not been determined by the court (provided that 12 months has not elapsed since the making of the order). Under the substituted section 12(3), this maximum period of grace where interest is not payable pending a court's determination of an application under section 11(4) is reduced from 12 months to six months, in line with new section 11(5). In addition, new section 12(3) makes it clear that whilst interest is not payable on the amount in relation to which the defendant has an outstanding application for an extended period, interest would still be payable on any amounts due in respect of an expired specified period, that are not part of the outstanding application for an extended period.
41. *Subsection (3)* makes a consequential amendment to section 87 of POCA which defines when confiscation orders are satisfied and when they are subject to appeal. Subsection (3) inserts a new subsection (1A) into section 87 for the purpose of defining the term "amount payable". This term is used in a number of places in Part 2 of POCA. As section 11 of POCA is currently drafted, the scheme as set out in Part 2 assumes that the amount ordered to be paid would be paid in full at some point, rather than in instalments. Against this background, the term "amount payable" should be read as a reference to the full amount. The definition in new section 87(1A) makes it clear that this term should be read as the amount that remains payable.

Section 6: Confiscation and victim surcharge orders

42. This section amends section 13 of POCA, which makes provision in relation to the effect of a confiscation order on the court's other sentencing powers to make financial orders against the defendant. In particular, it requires a court that has made a confiscation order against a defendant to take account of that order before it imposes a fine or makes a specified financial order against the defendant. The specified financial orders are set out in section 13(3) and expressly exclude a compensation order made under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (that is, an order requiring the offender to pay compensation to the victim of the crime) and an unlawful profits order under section 4 of the Prevention of Social Housing Fraud Act 2013 (that is, an order requiring the offender to pay the landlord an amount representing the profit made by the

offender as a result of the conduct that constituted the offence of unlawful sub-letting under section 1 or 2 of that Act).

43. Section 13(5) and (6) of POCA provide that where a defendant has either or both of a compensation order and an unlawful profit order made against him or her, in addition to a confiscation order, and the court believes the defendant will not have sufficient means to satisfy all the orders in full, the court must direct that the compensation and/or amount payable under the unlawful profit order (or both) be paid out of any sums recovered under the confiscation order, with the amount paid being the amount the court believes will not be recoverable because of the insufficiency of the defendant's means. The intention of these provisions is to ensure that, should the defendant have insufficient means to satisfy all the orders against him or her in full, any amounts owed to the victims of crime will take priority over the amounts owed to the government.
44. Section 161A of the Criminal Justice Act 2003 places an obligation on the court sentencing a defendant to order that defendant to pay a surcharge ("the victim surcharge"). The monies raised by this surcharge are used to fund victim services through the Victim and Witness General Fund. Section 161A(3) provides that where a court dealing with an offender considers it to be appropriate to make a compensation order or an unlawful profit order (or both), but is of the view that the defendant has insufficient means to pay both the victim surcharge and the amounts due under such orders, the court must reduce the surcharge accordingly (if necessary to nil). As with section 13(5) and (6) of POCA, the intention is that any amounts owed to the victims of crime will take priority over the amounts owed to the government – even if the money owed to the government is used to support victim services.
45. Whilst section 13(5) and (6) of POCA ensures that compensation orders and unlawful profit orders take priority over a confiscation order when the court believes the defendant will not have sufficient means to satisfy all the orders in full, the confiscation order still currently takes priority over any amounts ordered to be paid as a victim surcharge. The amendments made to section 13 of POCA provide that the victim surcharge is to be treated in the same way as compensation orders and unlawful profit orders, and is therefore to take priority over a confiscation order when the court believes the defendant will not have sufficient means to satisfy all the orders in full. *Subsections (2) to (4)* achieve this by introducing into section 13 the concept of a "priority order" and defining this term so as to include either a compensation order or the victim surcharge or an unlawful profits order.

Section 7: Orders for securing compliance with confiscation order

46. This section inserts new sections 13A and 13B into POCA. Section 41(7) of POCA confers on the Crown Court, when making a restraint order, the power to make such order as it believes appropriate for the purposes of ensuring that a restraint order is effective. Such a power has been used to, amongst other things, impose an overseas travel ban on the person subject to a restraint order. New section 13A confers a similar power on the Crown Court to make a "compliance order" when making a confiscation order. The Court is at liberty to impose any restrictions, prohibitions or requirements as part of a compliance order provided they are considered appropriate for the purpose of securing that the confiscation order is effective, but it must consider whether to impose a ban on the defendant's travel outside the UK (new section 13A(4)). If the court thinks that imposing a travel ban would help in ensuring that the confiscation order is effective then it might, for example, impose a requirement on the defendant to surrender his or her passport. Whilst the duty on the court to consider the imposition of a travel ban only applies to the defendant, it is open to the court to impose a prohibition or restriction on a third party when this is considered appropriate to make the confiscation order effective. Any person affected by a compliance order, that is the defendant or a third party, together with the prosecutor may apply to the court to vary or discharge a compliance order (new section 13A(5)).

47. New section 13B provides for a right of appeal to the Court of Appeal and subsequently to the Supreme Court, by the prosecutor against a decision by the Crown Court not to make a compliance order, or by the prosecutor or person affected by a compliance order against the decision to make, vary or discharge a compliance order (including the terms of such an order as made or varied). These rights of appeal mirror those in sections 43 and 44 of POCA in respect of restraint orders.

Section 8: Variation or discharge

48. This section makes further provision for the discharge of confiscation orders. POCA provides for the writing off of confiscation orders in two circumstances. First, section 24 makes provision for an application to the Crown Court by a designated officer in a magistrates' court to have a confiscation order written off if the outstanding amount is under £1,000 and the outstanding amount is a consequence of exchange rate fluctuations or any other reason specified in an order made by the Secretary of State (this order-making power has not been exercised). Second, section 25 provides for an application to the Crown Court to have a confiscation order written off if the outstanding amount is less than £50.
49. *Subsection (2)* inserts new section 25A into POCA to enable the writing off of confiscation orders in a third set of circumstances, namely where the subject of the order has died. When the subject of an order has died, it is still possible to apply to the court to appoint an enforcement receiver under section 50 of POCA to enforce the order against the estate of the defendant. However, there may be cases where the estate has insufficient funds or where the cost of appointing a receiver exceeds the value of the assets that could potentially be recovered. New section 25A(2) enables the court to write off the confiscation order in such cases.
50. *Subsection (3)* provides for new section 25A of POCA to operate not only in relation to confiscation orders made under POCA but those made under the precursor confiscation regimes in the Drug Trafficking Act 1994 and the Criminal Justice Act 1998.
51. Section 23 of POCA enables the defendant or a receiver appointed under section 50 to apply to the Crown Court to vary the terms of a confiscation order where it can be shown that there are insufficient assets to satisfy the order. In the majority of cases no receiver is appointed, accordingly if the defendant dies there is no one who is eligible to apply to vary a confiscation order. *Subsection (1)* amends section 23 so as to add the prosecutor to the list of parties with the power to apply to the court to vary orders.

Section 9: Absconding defendants

52. This section amends sections 27 and 28 of POCA, which make provision for the making of confiscation orders where the defendant has absconded. Section 28 of POCA applies where a defendant absconds after proceedings for an offence or offences are started against that defendant, but before such proceedings are concluded. Section 27 applies where defendant absconds after he or she —
- is convicted of an offence or offences in proceedings before the Crown Court,
 - is committed by a magistrates' court to the Crown Court for sentence in respect of an offence or offences under the provisions of the Powers of Criminal Court (Sentencing) Act 2000 ("the 2000 Act"), or
 - is committed to the Crown Court in respect of an offence or offences under section 70 of POCA (which provides for an offender to be committed to the Crown Court for confiscation proceedings following a conviction of an offence in the magistrates' court).
53. These provisions do not, however, expressly cover the situation where a defendant absconds shortly before the conclusion of their trial. In such circumstances it may be possible to complete the trial notwithstanding the absence of the defendant, provided

that the defendant's counsel's instructions were sufficient to see the trial through to its conclusion. If the defendant was convicted in his or her absence in such a case, the legislation is unclear as to whether it would be possible to make a confiscation order against that defendant under section 27 or 28. Section 27(2)(a) currently makes it clear that section 27 applies where the defendant absconds after being convicted of an offence, but in this scenario the defendant would have absconded prior to conviction. There has also been uncertainty as to whether section 28 would apply as section 28(2)(a) specifies that one of the necessary conditions for that section to apply is that "proceedings for an offence or offences are started against a defendant but are not concluded". However, in May 2014 the Court of Appeal held, in the case of *R v. Charles Okedare* [2014] EWCA Crim 1173², "that an individual who has absconded and subsequently is convicted of a criminal offence in his absence can subsequently be made subject to a confiscation order under POCA at a hearing which he has not attended due to continuation of his absconding. The appropriate provision being section 6 as applied by section 28 of the Act." This section makes the position explicit on the face of POCA.

54. *Subsection (1)* substitutes a new subsection (2) of section 27 of POCA so as to provide expressly that a confiscation order may be made against a person who absconds before the conclusion of his or her trial and is subsequently convicted in his or her absence. The new section 27(2) preserves the other circumstances in which a confiscation order may currently be made against a person who absconds post conviction.
55. *Subsection (2)* substitutes a new subsection (6) of section 27 for the existing subsections (6) and (7). New subsection (6) adapts the operation of sections 19 to 21 in relation to a recaptured absconder. Those sections provide for the reconsideration of a decision by a court not to make a confiscation order or, where an order has been made, for the amount payable under the order to be increased. The principle underlying these sections is that the earlier decision of the court should only be open to reconsideration where new evidence comes to light (see sections 19(1)(a), 20(4)(a) and 21(1)(b)). The effect of new subsection (6)(a), (b) and (c) is to make sections 19, 20 and 21 respectively apply, in the case of a recaptured absconder, without the requirement for new evidence.
56. *Subsection (3)* amends section 28 of POCA which deals with absconders who abscond prior to conviction. Section 28(2)(c) provides that the prosecutor must wait for a period of two years from the date that the court believes that the defendant has absconded before they can apply for a confiscation order against that defendant. The original intention of this provision was to provide a reasonable opportunity for the defendant to be found or reappear before a confiscation order could be made against him or her. The amendment reduces the period of time in section 28(2)(c) from two years to three months.
57. *Subsection (4)* substitutes a new subsection (6) of section 28 of POCA so as to further modify the application of section 21 of that Act where a recaptured absconder is dealt with under section 28. The modification of section 21 is along similar lines to that made by subsection (2)(c) of the section.

Section 10: Default sentences

58. This section gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by "substantially strengthening the prison sentences for failing to pay confiscation orders so as to prevent offenders choosing to serve prison sentences rather than pay confiscation orders".
59. *Subsection (1)* amends section 35 of POCA, which enables the Crown Court to set a default sentence for the defendant to serve if he or she fails to pay the amount due under the confiscation order. Section 35 of POCA achieves this outcome by treating an unpaid confiscation order as if it were an unpaid fine thereby attracting the fine enforcement

2 <https://www.crimeline.info/case/r-v-okedare-charles>

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

provisions in the 2000 Act and Part 3 of the Magistrates’ Courts Act 1980. The 2000 Act makes provision for the court to fix a term of imprisonment (or detention where the defendant is under 18) for an individual if any sum for which he or she is liable to pay as a fine is not duly paid (a “default sentence”). The maximum default term applicable to a particular confiscation order is determined by a sliding scale based on the amount of the outstanding sum payable, varying from seven days’ imprisonment for an amount not exceeding £200 to ten years’ imprisonment for an amount exceeding £1 million (as set out in section 139(4) of the 2000 Act). Unlike a fine, serving a default sentence for failure to pay a confiscation order does not relieve the defendant of the obligation to pay the full amount due under the order, plus any interest that has accrued on that amount.

DEFAULT SENTENCES: SLIDING SCALE
UNDER SECTION 139(4) OF THE 2000 ACT

An amount not exceeding £200	7 days
An amount exceeding £200 but not exceeding £500	14 days
An amount exceeding £500 but not exceeding £1,000	28 days
An amount exceeding £1,000 but not exceeding £2,500	45 days
An amount exceeding £2,500 but not exceeding £5,000	3 months
An amount exceeding £5,000 but not exceeding £10,000	6 months
An amount exceeding £10,000 but not exceeding £20,000	12 months
An amount exceeding £20,000 but not exceeding £50,000	18 months
An amount exceeding £50,000 but not exceeding £100,000	2 years
An amount exceeding £100,000 but not exceeding £250,000	3 years
An amount exceeding £250,000 but not exceeding £1 million	5 years
An amount exceeding £1 million	10 years

60. Subsection (1) amends section 35 of POCA so as to disapply section 139(4) of the 2000 Act insofar as it relates to confiscation orders and to insert a new subsection (2A) containing a bespoke sliding scale of default sentences applicable to such orders. In providing for a new sliding scale of default sentences, new section 35(2A) makes two substantive changes to the sliding scale provided for in section 139(4) of the 2000 Act.
61. The first change is to simplify the sliding scale, replacing the existing 12 tiers as provided for in section 139(4) of the 2000 Act with four tiers.
62. The second change is to increase the maximum period of imprisonment for defaulting on a confiscation order for an amount exceeding £500,000 but not more than £1 million from five to seven years and for an amount exceeding £1 million from ten to 14 years.
63. New section 35(2C) confers power on the Secretary of State, by order, to amend the table in new section 35(2A) so as to provide for both minimum and maximum terms of imprisonment, to vary any minimum sentences so introduced, to vary the maximum sentences and to modify the tiers, for example by introducing additional tiers. As a result of the amendments made to section 459 of POCA by *subsection (2)* this order-making power is subject to the affirmative procedure.
64. *Subsection (3)* inserts new subsections (2B) and (2C) into section 258 of the Criminal Justice Act 2003, which governs the release of persons serving a default sentence under POCA. By virtue of section 258(2) of the Criminal Justice Act 2003 persons serving a default sentence are automatically eligible for release at the half way point of the default sentence. New subsection (2B) of section 258 of the Criminal Justice Act 2003 disapplies subsection (2) of that section where the default sentence relates to the non-

payment of a confiscation order of more than £10 million. In such cases, therefore, the person would be required to serve the full default sentence until such time as the confiscation order is discharged on full payment. New subsection (2C) of section 258 of the Criminal Justice Act 2003 confers a power to vary the £10 million figure by order. As a result of the amendments made to section 330 of the Criminal Justice Act 2003 by *subsection (4)*, this order-making power is subject to the affirmative procedure.

65. As a result of the changes made by this section, the maximum custodial period that may be served by an offender who defaults on payment of a confiscation order over £10 million will increase from five years (that is, half of the current maximum 10 year sentence) to 14 years.

Section 11: Conditions for exercise of restraint order powers

66. This section amends sections 40 and 41 of POCA, which set out the circumstances under which a restraint order may be made by the Crown Court. A restraint order has the effect of freezing property that may be liable to confiscation following the trial and the making of a confiscation order; breach of a restraint order constitutes a contempt of court. The section gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “enabling assets to be frozen more quickly and earlier in investigations”.
67. Section 40 of POCA sets out a number of alternative conditions for making a restraint order. The intention is that a restraint order should be available at any time after a criminal investigation has started to minimise the risk of the accused being able to dissipate his or her assets beyond the reach of law enforcement agencies. Section 40(2) of POCA sets out the test in the first condition in the following terms –
- (a) a criminal investigation has been started in England and Wales with regard to an offence, and
 - (b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.

The phrase “reasonable cause to believe” in this context is taken to mean that the court thinks that, on the available evidence, it is more likely than not that the defendant has benefited from criminal conduct. This contrasts with the test for the arrest of a person, namely that there is “reasonable grounds for suspecting” that the person is guilty of an offence that had been or is being committed (see section 24 of the Police and Criminal Evidence Act 1984). The term “suspicion” denotes a degree of satisfaction, not amounting to belief, but at least extending beyond speculation. A test based on suspicion can therefore be more easily satisfied than one based on belief. *Subsection (1)* accordingly amends section 40(2) of POCA so that it provides that a Crown Court may make a restraint order where -

- (a) a criminal investigation has been started in England and Wales with regard to an offence, and
- (b) there *are reasonable grounds to suspect* that the alleged offender has benefited from his criminal conduct.

An advantage of aligning the test for making an arrest and that for the making of a restraint order is that it would be open to the relevant law enforcement agency to apply to the Crown Court for the making of a restraint order and for this to be served in parallel with affecting the arrest of the defendant.

68. *Subsection (2)* inserts new subsections (7A) to (7C) in section 41 of POCA which enable the court to monitor progress with the investigation and, if a decision to charge is not made within a reasonable time, the court may then discharge the restraint order. This safeguard ensures that a defendant does not have his or her assets frozen indefinitely where it becomes evident to the court that insufficient progress is being made with the

criminal investigation. What constitutes a “reasonable time” is a matter for the court to determine on the facts of the case. Under section 41, as amended, the court must impose a reporting requirement at the time of making the restraint order (new subsections (7A) and (7B)(a)) unless the court decides not to do so and gives reasons for that decision (new subsection (7C)(a)). The court may decide not to impose a reporting requirement where, for example, the law enforcement agency has informed the court that the suspect is to be arrested and charged within a short period. If a reporting requirement is imposed, the court may, on its own motion, discharge the restraint order (new subsection (7B)(b)). If a reporting requirement has not been imposed, the court may, on its own motion, subsequently impose one (new subsection (7C)(b)) and in such a case the court may, again on its own motion, discharge the restraint order (new subsection (7B)(b)).

Section 12: Continuation of restraint order after quashed conviction

69. This section inserts new subsections (6A) and (6B) into section 42 of POCA to provide for the continuation of a restraint order following the quashing of a conviction but before the start of proceedings for a retrial, so that the defendant is not afforded the opportunity to dissipate any assets that are subject to the restraint order during this interregnum.
70. Section 40 of POCA sets out the conditions that must be satisfied for the Crown Court to make a restraint order. The second condition for making a restraint order (section 40(3) of POCA) is that –
- (a) proceedings for an offence have been started in England and Wales and not concluded, and
 - (b) there is reasonable cause to believe that the defendant has benefited from his criminal conduct.

The court is required to discharge any restraint order made in pursuance of this condition at the conclusion of the proceedings (section 42(6) of POCA). Where a person is convicted of an offence and the conviction is subsequently quashed on appeal, the proceedings are deemed to have concluded at the point at which the conviction is quashed (section 85(4) of POCA). These provisions when taken together require any restraint order to be discharged once the conviction has been quashed, irrespective of whether the prosecution intends to re-try the defendant for the offence(s) in question. The prosecution will not be able to apply for a fresh restraint order until the proceedings for the retrial have been commenced.

71. New section 42(6A) of POCA switches off the duty to discharge a restraint order and instead provides for an existing restraint order to continue in force 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. New section 42(6B) provides for the subsequent discharge of such a restraint order if any of three scenarios apply:
- The Court of Appeal refuses to make an order for a retrial following an application by the prosecution;
 - The Court of Appeal has made an order for a retrial but there is an undue delay in starting proceedings (under section 8(1) of the Criminal Appeals Act 1968 the proceedings must usually be started within two months, although the Court of Appeal may extend this period); or
 - The proceedings for the retrial of the defendant have concluded either as a result of those proceedings being discontinued or as a result of the conviction or acquittal of the defendant following the retrial. Where the retrial results in a conviction, the restraint order can be replaced by a confiscation order.

Section 13: Conditions for exercise of search and seizure powers

72. Sections 47A to 47S of POCA (as inserted by section 55 of the Policing and Crime Act 2009) provide for search and seizure powers in England and Wales to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. The property may be seized in anticipation of a confiscation order being made. The seizure power is subject to judicial oversight. If a confiscation order is made, the property may be sold in order to satisfy the order. These sections are not yet in force. Section 47A sets out who may exercise the powers. These are an officer of Revenue and Customs, a constable and an accredited financial investigator. There are a number of pre-conditions for the exercise of these powers. In relation to the power to seize property (in section 47C), these pre-conditions are set out in section 47B and cover the situation where an individual is arrested or proceedings are begun against him or her for an indictable offence and there is reasonable cause to believe that he or she has benefited from the offence. In line with the change to the test for the grant of a restraint order made by section 11, *subsection (1)* of section 13 replaces the “reasonable cause to believe” test with a “reasonable grounds to suspect” test.
73. The seizure powers (in section 47C) and the search powers (in sections 47D to 47F) may only be exercised with the ‘appropriate approval’ described in section 47G unless, in the circumstances, it is not practicable to obtain such approval in advance. Sections 47G to 47I make provision in relation to this appropriate approval. Appropriate approval is the prior approval of a justice of the peace or, if that is not practicable, that of a senior officer, as defined in new section 47G(3). NCA officers designated with the powers of a constable, in accordance with the provisions in Schedule 5 to the Crime and Courts Act 2013, may exercise the powers in sections 47A to 47S of POCA.
74. *Subsection (2)* amends section 47G(3) to provide for the Director General of the NCA, or any other NCA officer authorised by the Director General, to confer the appropriate approval where the search or seizure powers are exercised by a designated NCA officer and it is not practicable to get prior approval from a justice of the peace.

Section 14: Seized money etc

75. This section primarily amends section 67 of POCA, which provides magistrates’ courts with a power to order any realisable property in the form of money in a bank or building society account to be paid to the designated officer of the court in satisfaction of a confiscation order. The section gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by providing for the “rapid confiscation of cash held in bank accounts”.
76. *Subsections (1) and (2)* inserts new subsections (5) to (5B) into section 67 of POCA in substitution for the existing subsections (4) and (5). New section 67(5) has the effect of narrowing the conditions that must be satisfied before money may be seized from a bank or building society account under section 67. There are currently four such conditions:
- a) a restraint order has effect in relation to money to which section 67 of POCA applies;
 - b) a confiscation order is made against the person by whom the money is held;
 - c) an enforcement receiver has not been appointed under section 50 of POCA in relation to the money;
 - d) any period allowed under section 11 for payment of the amount ordered to be paid under the confiscation order has ended (see section 5 above).

The new section 67(5) replicates the second and third of these conditions only. The first and fourth conditions are considered unnecessary. New section 67(5A) introduces a requirement whereby the authority making an application to a magistrates’ court for

a seizure order under section 67 of POCA must serve notice of the application on the bank or building society that holds the funds to which the application relates.

77. New section 67(5B) takes account of the provisions in new section 10A of POCA, as inserted by section 1 of the Act, which enable a court to make a determination as to the extent of the defendant's interest in property. New section 67(5B) will enable a magistrates' court to order the payment of funds, held in a bank or building society account of a third party (or parties) and subject to a determination by the court under new section 10A, towards the satisfaction of a confiscation order. This will enable funds held in a bank or building society account to be confiscated more rapidly where the account is not held in the name of the defendant, for example a company account. Any third parties affected would have the opportunity to make representations before such a determination is made.
78. *Subsection (4)* makes a similar amendment to section 67A of POCA to that made to section 67 by subsection (1). Section 67A provides that personal property (for example, a car or jewellery) that has been seized by an appropriate officer (for example, a constable or NCA officer) under a relevant seizure power (namely the seizure powers in POCA or PACE), or which has been produced to such an officer in compliance with a production order under section 345 of POCA, may be sold, on the authority of an order made by a magistrates' court, to meet a confiscation order in certain circumstances. Those circumstances currently mirror conditions (b) to (d) set out in paragraph 77. New section 67A(3) omits the last of these conditions. Section 67A is not yet in force.
79. *Subsection (3)* inserts new subsections (7A) and (7B) into section 67 which confer a power on the Secretary of State to amend, by order, section 67 so as to apply the money seizure power to money held by other financial institutions or other realisable cash or cash-like instruments or products, for example share accounts, pension accounts or "bitcoins". As section 67 currently only applies to money, any extension of the power in this section to cover a financial instrument or product may need to modify the section to provide for the instrument or product to be realised into cash; new subsection (7B) enables an order to be made to this end. As a result of the amendment made to section 459 of POCA by *subsection (5)*, this order-making power is subject to the affirmative procedure.

Chapter 2: Scotland

Confiscation

Section 15: Restitution order and victim surcharge

80. This section makes similar provision for Scotland in Part 3 of POCA to that made for England and Wales by the amendments to section 13 of POCA by section 6. The effect is to provide for the payment of the victim surcharge and the amount due under a restitution order to have priority call on monies paid under a confiscation order. A restitution order can be made under section 253A of the Criminal Procedure (Scotland) Act 1995 (this section is not yet in force) by the criminal courts in Scotland when a person has been convicted of an offence under section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (police assaults etc) and the court considers it is appropriate that the accused pays a sum into a Restitution Fund (which is used to provide support services to the victims of this particular offence). A victim surcharge order is made under section 253F of the Criminal Procedure Act 1995 by the criminal courts in Scotland in certain circumstances and requires the accused to pay an amount into the Victim Surcharge Fund (which is used to provide support services to the victims of crime). The intention of these provisions is to ensure that, should the accused have insufficient means to satisfy all the financial orders against him or her in full, any amounts owed to the victims of crime will take priority over the amounts owed to the government.

Section 16: Orders for securing compliance with confiscation order

81. This section inserts new sections 97B to 97D into Part 3 of POCA which make similar provision in respect of Scotland for the making of “compliance orders” by the courts for securing compliance with confiscation orders to that contained in new sections 13A and 13B, as inserted by section 7, in relation to England and Wales. The criminal courts in Scotland will only be able to impose a compliance order on an accused person and will not be able to impose such an order on third parties. New section 97B(6) of POCA provides that for the purposes of any appeal or review, a compliance order in Scotland will be treated as a sentence.

Section 17: Compliance orders: appeals by prosecutor

82. This section makes amendments to the Criminal Procedure (Scotland) Act 1995 consequential on the provisions in section 16. The amendments confer on the Lord Advocate and procurator fiscal (as the prosecutor) a right of appeal against the decision of a court to make or not to make a compliance order and a right of appeal against the terms of a compliance order if these are considered to be too lenient.

Section 18: Accused persons unlawfully at large

83. This section amends sections 111 and 112 of POCA which make similar provision for Scotland in respect of the making of confiscation orders where the defendant has absconded to that contained in sections 27 and 28 of POCA in relation to England and Wales. The amendments to section 111 and 112 have similar effect to those made to sections 27 and 28 by section 9 of the Act.

Section 19: Enforcement of confiscation orders

84. Section 118 of POCA makes similar provision for Scotland in relation to default sentences as section 35 does for England and Wales. Section 118 enables a court (the High Court of Justiciary or the sheriff) to set a default sentence for the accused to serve if he or she fails to pay the amount due under the confiscation order. It achieves this outcome by treating an unpaid confiscation order as if it were an unpaid fine and applying the fine enforcement provisions in section 221 of the Criminal Procedure (Scotland) Act 1995. Section 221(3) of that Act makes a fine unenforceable once a default sentence has been served. This provision does not apply when an administrator is appointed in relation to a confiscation. Consequently, where a person serves a default sentence following his or her failure to pay the amount due under a confiscation order the offender’s liability to pay this amount is extinguished; this contrasts with the position in England and Wales. *Subsection (1)(a)* amends section 118(2)(h) of POCA so as to disapply section 221(3) of the Criminal Procedure (Scotland) Act 1995. As a result an offender will be required to pay the amount due under a confiscation order if he or she defaults on payment and serves a default sentence. Accordingly, the liability of the accused to pay the amount due under a confiscation order will no longer be extinguished by serving a prison sentence for defaulting on payment.
85. *Paragraph 42 of Schedule 4* makes a consequential repeal of section 118(2)(k) of POCA so as to disapply section 224 of the Criminal Procedure (Scotland) Act 1995. That section requires warrants of imprisonment for non-payment of a fine to specify a date for the discharge of the liability to pay the fine (in practice once the default sentence has been served) notwithstanding the fact that it has not been paid. That requirement will no longer operate in relation to default sentences for the non-payment of a confiscation order. *Paragraph 45 of Schedule 4* makes a further consequential repeal of section 153(1)(b) of POCA, which provides that a confiscation order is satisfied where the accused against whom it was made has served a default sentence for non payment of the order.
86. *Subsection (1)(b)* makes similar amendments to section 118 of POCA in relation to default sentences to that made to the England and Wales provision in section 35 of

POCA by section 10(1) and (2) (see new section 118(2A) and (2B). Subsection (1)(b) also inserts new subsections (2C) and (2D) into section 118 to provide that where a confiscation order is made by a court in England and Wales or in Northern Ireland but falls to be enforced in Scotland, the criminal courts in Scotland, when sentencing the person for non payment of the confiscation order, would apply the respective default sentences set out in new sections 35(2A) and 185(2A) of POCA (as inserted by sections 10 and 32).

87. *Subsection (2)* makes consequential amendments to section 459 of POCA as a result of the new order-making power provided for in new section 118(2B) of POCA as inserted by subsection (1)(b). Paragraph (a) disapplies, for the purposes of the new order-making power, section 459(3) of POCA which provides for any power under POCA to make subordinate legislation to be exercisable by statutory instrument. The power conferred on the Scottish Ministers to make an order under new section 118(2B) will be exercisable by Scottish statutory instrument in accordance with the provisions of the Interpretative and Legislative Reform (Scotland) Act 2010. Paragraphs (b) and (c) amend section 459 of POCA so as to provide that the new order-making power is subject to the affirmative procedure in the Scottish Parliament.
88. *Subsection (3)* makes a consequential amendment to section 219(8) of the Criminal Procedure (Scotland) Act 1995 which requires a sheriff to remit a case to the High Court for sentencing where he or she considers that the default sentence appropriate for that case is beyond his or her normal sentencing powers (namely, a maximum sentence of five years' imprisonment).

Section 20: Conditions for exercise of restraint order powers

89. This section makes parallel amendments to sections 119 and 120 of POCA, which set out the circumstances under which a restraint order may be made in Scotland, to those made by section 11 to sections 40 and 41 of POCA, which set out the circumstances under which a restraint order may be made in England and Wales.

Section 21: Continuation of restraint order after quashed conviction

90. This section makes a similar amendment to section 121 of POCA to that made to section 42 of that Act by section 12 to provide for the continuation of a restraint order following the quashing of a conviction until the start of proceedings for a retrial.

Section 22: Conditions for exercise of search and seizure powers

91. This section makes similar amendments to the search and seizure powers in sections 127B and 127G of POCA to those made by section 13 to sections 47B and 47G of that Act.

Civil recovery

Section 23: Prohibitory property orders: PPO receivers

92. This section amends POCA to provide, in relation to Scotland, for a new type of management receiver (a "PPO receiver") in civil recovery proceedings whose only function will be to manage property subject to a prohibitory property order ("PPO"). This is distinct from the role of an interim administrator (provided for in sections 256 to 265 of POCA) who has the additional roles of carrying out an investigation of the property which he or she manages and reporting findings to the enforcement authority and the court. The new PPO receiver will have no investigation function and so will have no influence on the progress or final outcome of the case. Accordingly, the role does not need to be independent and therefore can be performed by a member of staff of the enforcement authority that is pursuing the civil recovery case. The provisions in new sections 255G to 255I of POCA, inserted by *subsection (2)*, which provide for PPO receivers broadly mirror those in sections 245E to 245G of POCA (inserted by

section 83 of the Serious Crime Act 2007) which make provisions for management receivers in respect of property freezing orders in England and Wales and Northern Ireland.

93. New section 255G of POCA confers on the Court of Session a discretionary power, exercisable on application by the enforcement authority (namely the Crown Office on behalf of the Scottish Ministers), to appoint a PPO receiver in respect of any property to which a PPO applies. Whilst the enforcement authority will generally give notice of an application, new section 255G(3) enables it to make an application without having to give notice in certain circumstances. Such a notice is called an *ex parte* application. An *ex parte* application may be appropriate where management powers are to be sought from the outset of the investigation, where the initial application for the PPO can be heard *ex parte* in chambers to avoid alerting potential parties who might then seek to conceal or dispose of the relevant property. The enforcement authority must nominate, in its application, a suitably qualified person for appointment as a PPO receiver (new section 255G(4)).
94. New section 255H provides for the powers of PPO receivers. Such powers will be determined by the court on a case by case basis, but will generally be any of the powers in paragraph 5 of Schedule 6 to POCA, namely:
- “(1) Power to manage any property to which the order applies.
- (2) Managing property includes—
- (a) selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes,
 - (b) where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business,
 - (c) incurring capital expenditure in respect of the property.

In addition, the Court of Session has the discretionary power to authorise or require a PPO receiver to take whatever other steps the court considers to be appropriate in connection with the management of the property (new section 255I(2)(b)).

95. New section 255I confers on the Court of Session a discretionary power to give directions as to the exercise of the functions of a PPO receiver (new section 255I(1)) having heard any representations by the persons set out in new section 255I(2). The Court of Session may also vary or recall (that is revoke) any order or directions made under new sections 255G to 255I after again having heard any representations by the persons set out in new section 255I(4).
96. *Subsection (3)* inserts new section 282CA into POCA which makes analogous provision for PPO receivers to that contained in section 282C of that Act. Section 282C of POCA (inserted by paragraph 6 of Schedule 18 to the Crime and Courts Act 2013) makes provision for the enforcement of property freezing orders, interim receiving orders and interim administration orders which have effect in relation to property overseas. In particular, section 282C provides that, where a property freezing order made by the High Court of England and Wales or of Northern Ireland has effect in relation to property, the appointed management receiver may send a request to the Secretary of State for assistance abroad if he or she believes that the property is in a country outside the UK.

Chapter 3: Northern Ireland

Sections 24 to 27: Confiscation: assets held by defendant and other

97. [Sections 24 to 27](#) amend the provisions in Part 4 of POCA in respect of third party interests in assets that may be realised to discharge a confiscation order. These sections make parallel amendments to Part 4 to those made to Part 2 of POCA by sections 1 to 4 of the Act.

Section 28: Time for payment

98. Section 161 of POCA makes similar provision in relation to the time allowed to pay the amount due under a confiscation order in Northern Ireland to that contained in section 11 in relation to England and Wales. This section makes parallel amendments to section 161 of POCA to those made to section 11 by section 5 of the Act.

Section 29: Orders for securing compliance with confiscation order

99. This section inserts new sections 163A and 163B into Part 4 of POCA which make parallel provision in respect of Northern Ireland for the making of “compliance orders” by the courts for securing compliance with confiscation orders to that contained in new sections 13A and 13B, as inserted by section 7, in relation to England and Wales.

Section 30: Variation and discharge

100. This section makes broadly analogous provision in relation to Northern Ireland for the discharge of confiscation orders where the defendant has died to that contained in section 8 in respect of England and Wales. Whereas, under section 8, an application to the Crown Court for the discharge of a confiscation order is made by the designated officer for a magistrates’ court, under this section such application will be made by the prosecutor.

Section 31: Absconding defendants

101. This section amends sections 177 and 178 of POCA which make similar provision for Northern Ireland in respect of the making of confiscation orders where the defendant has absconded to that contained in sections 27 and 28 of POCA in relation to England and Wales. The amendments to section 177 and 178 mirror those made to sections 27 and 28 by section 9 of the Act.

Section 32: Default sentences

102. This section makes a parallel amendment to section 185 of POCA in relation to default sentences where a defendant fails to pay the amount due under a confiscation order to that made to the England and Wales provision in section 35 of POCA by section 10(1) and (2). There is no equivalent in this section to the provisions in subsections (3) and (4) of section 10 as such provision is unnecessary in the Northern Ireland context. In Northern Ireland section 13 of the Prison Act (Northern Ireland) 1953 enables prison rules to be made to allow for the early release of a person serving a sentence on grounds of good conduct. Rule 30 of the Prison and Young Offenders Centres Rules (Northern Ireland) 1995 then provides for early release on such grounds. The maximum remission that may be granted under Rule 30 is 50% of the actual term. The Department of Justice in Northern Ireland can exercise the rule-making power in section 13 of the Prison Act (Northern Ireland) 1953 so as to remove the eligibility for early release in cases where a person is serving a default sentence for non-payment of a confiscation order over £10 million. In this way, the same outcome can be achieved as that provided for by section 10(3) in relation to England and Wales.

Section 33: Conditions for exercise of restraint order powers

103. This section amends sections 189 and 190 of POCA which make similar provision for Northern Ireland in respect of the conditions for making restraint orders to that contained in sections 40 and 41 of POCA in relation to England and Wales. The amendments to sections 189 and 190 mirror those made to sections 40 and 41 by section 11 of the Act.

Section 34: Continuation of restraint order after quashed conviction

104. This section makes a similar amendment to section 191 of POCA to that made to section 42 of that Act by section 12 to provide for the continuation of a restraint order following the quashing of a conviction until the start of proceedings for a retrial.

Section 35: Conditions for exercise of search and seizure powers

105. This section makes similar amendments to the search and seizure powers in sections 195B and 195G of POCA to those made by section 13 to sections 47B and 47G of that Act.

Section 36: Seized money

106. This section makes parallel amendments to sections 215 and 215A of POCA to those made to sections 67 and 67A of that Act by section 14 in respect of magistrates' courts powers to order any realisable property in the form of money in a bank or building society account to be paid to the designated officer of the court in satisfaction of a confiscation order.

Chapter 4: Investigations and co-operation etc

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

107. Part 7 of POCA obliges an individual to report to the NCA where there are reasonable grounds to know or suspect that a person is engaged in money laundering. Although this requirement to submit "Suspicious Activity Reports" ("SARs") applies to any individual, SARs are mostly made by businesses in the "regulated sector" such as banks, other financial institutions and accountants.
108. The submission of a SAR removes the risk of prosecution for an offence in relation to money laundering. A reporter can also remove the risk to them of committing a money-laundering offence by seeking the consent of the NCA, under section 335 of POCA, to conduct a transaction or activity about which they have suspicions. The NCA has seven days to respond.
109. Whilst the reporter awaits the NCA's decision on consent, the activity or transaction must not proceed. Furthermore, the reporter cannot disclose to the customer the fact that a SAR has been submitted, or any other information that may prejudice the NCA's investigation into the reported activity or transaction, as doing so would constitute a "tipping off" offence under section 333A of POCA. This can place the reporter in a difficult position in not informing the customer of the reasons for suspension of their requested activity or transaction, and could result in the collapse of a financial or commercial deal.
110. Failing to carry out a customer's instructions whilst waiting for authorisation can therefore expose financial institutions and others to the risk of civil litigation. The courts (see *Shah and others v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 3) have, however, held that whilst customers can require such institutions to prove that the suspicion that gave rise to the SAR was reasonable, provided the suspicion is so proved, the institution cannot be held liable for loss suffered by the customer as a consequence of the institution's failure to carry out promptly the customer's instructions.
111. This section amends section 338 of POCA to make express statutory provision in relation to the UK's obligation under the third EU Anti-Money Laundering Directive (Directive 2005/60/EC) to ensure that persons who make disclosures to relevant authorities in good faith must be protected from civil liability for doing so.

Section 38: Confiscation investigations

112. This section broadens the definition of a “confiscation investigation” for the purposes of Part 8 of POCA to include investigations after a confiscation order has been made into the extent and whereabouts of property that might be realised to satisfy the order. The section gives effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA by “extending the investigative powers in POCA so that they are available to trace assets once the confiscation order is made (at the moment those powers fall away once the order is made)”.

113. Part 8 of POCA makes provision in relation to investigations under that Act. Section 341 of POCA sets out five different types of investigations in relation to which Part 8 powers might be available. One such type of investigation is a confiscation investigation, which is defined in section 341(1) of POCA as an investigation into:

- whether a person has benefitted from his criminal conduct, or
- the extent or whereabouts of his benefit from his criminal conduct.

A confiscation investigation enables an appropriate officer, as defined in section 378(1) of POCA (for example, an NCA officer or a constable), to apply to the court for various orders to help achieve the goals of the investigation. These include a production order, an order to grant entry, a search and seizure warrant, a disclosure order, a customer information order and an account monitoring order.

114. In case of *R (Horne & Ors)* [2012] EWHC 1350 (Admin), the court explored the extent of such powers. It confirmed that in principle the powers could still be exercised after a confiscation order has been made – there is nothing in POCA restricting an investigation into the whereabouts of a person's benefit in the period up to the making of the confiscation order. The court also confirmed however, that the investigative powers available after a confiscation order has been made may be deployed only for the purposes of identifying the amount and whereabouts of benefit and not for the purpose of assisting in the satisfaction of a confiscation order once benefit has been identified and calculated.

115. The absence of investigatory powers for the purpose of assisting in the satisfaction of a confiscation order adversely impacts on law enforcement agencies’ ability to enforce a confiscation order. Where the defendant has assets that are beyond the reach of the enforcement powers at the time the order is made, for example where they are in another jurisdiction, law enforcement agencies are currently unable to use any of the investigative powers in Part 8 after the confiscation order is made to determine whether any of the assets may subsequently have come within a UK jurisdiction.

116. *Subsection (1)* broadens the definition of “confiscation investigation” in section 341 of POCA so that the investigative powers under Part 8 are exercisable after a confiscation order has been made for the purposes of identifying the extent and whereabouts of realisable property available to help satisfy the order.

117. *Subsection (2) and (3)* makes consequential amendments to sections 353 (which applies to England, Wales and Northern Ireland) and 388 (which applies to Scotland) of POCA. These sections sets out conditions for issuing a search and seizure warrant, including warrants issued as part of a confiscation investigation, in the absence of a production order. On occasions a production order will not be a suitable tool and so an application for a search and seizure warrant is made instead. This may occur, for example, where the person controlling the required material may be uncontactable or the investigation would be seriously prejudiced if access to the material was not obtained immediately. An individual served with a production order is generally given seven days to provide the requested material.

Section 39: External orders and investigations: meaning of “obtaining property”

118. This section amends section 447 of POCA which is the interpretation section for Part 11 of that Act; Part 11 of POCA makes provision for co-operation between jurisdictions in relation to freezing and confiscating the proceeds of crime.
119. Part 11 of POCA enables, among other things, requests and orders made by courts in other jurisdictions to be given effect in the United Kingdom. One such type of order is an “external order”, defined in section 447(2) as –
- “an order which -
- (a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and
 - (b) is for the recovery of specified property or a specified sum of money.
120. In limiting the scope of an external order to the recovery of specified property or a specified sum of money, Part 11 as enacted reflected the scope of the then international agreements under which orders could be sent from a foreign court were similarly limited. For example, Article 5(1)(a) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988³ requires State parties to “adopt such measures as may be necessary to enable confiscation of... proceeds derived from [specified] offences... or property the value of which corresponds to that of such proceeds”.
121. Domestic law, by contrast, recognises that the proceeds of crime can include not just specified money or property, but also a pecuniary advantage, such as not paying tax that is lawfully due. For example, in the context of confiscation orders made under Part 2 of POCA, section 76(5) of POCA provides that, for the purpose of determining a person’s criminal benefit, a person who obtains a pecuniary advantage as a result of or in connection with criminal conduct, is to be taken as obtaining a sum of money equal to the value of the pecuniary advantage.
122. In recent years, the international law relating to the confiscation of the proceeds of crime has adopted a broader approach to what such proceeds might be. For example, the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism⁴ defines “proceeds” as any economic advantage, derived from or obtained, directly or indirectly, from criminal offences.
123. New subsection (6A) of section 447 of POCA provides that the value of any pecuniary advantage obtained as a result of criminal conduct is to be treated as if it were a sum of money to the same value. The effect is to enable external orders to be used for the recovery of a pecuniary advantage obtained by criminal conduct in the same way as such orders can currently be used to recover property or sums of money. Part 11 also provides for “external investigations”, defined in section 447(3) as –
- “an investigation by an overseas authority into –
- (a) whether property has been obtained as a result of or in connection with criminal conduct,
 - (aa) the extent or whereabouts of property obtained as a result of or in connection with criminal conduct, or
 - (b) whether a money laundering offence has been committed.
- New section 447(6A) will also bite on external investigations, accordingly such an investigation could be for the purpose of ascertaining whether any pecuniary advantage has been obtained from criminal conduct and, if so, the extent of such advantage.

3 https://www.unodc.org/pdf/convention_1988_en.pdf

4 <http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm>

Section 40: Confiscation orders by magistrates' courts

124. Section 97(1) of SOCPA confers on the Secretary of State power by order (subject to the affirmative procedure) to make provision to allow magistrates' courts to make confiscation orders under Part 2 of POCA. A similar power is conferred on the Northern Ireland Department of Justice in respect of Part 4 of POCA. Section 97(2) of SOCPA 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. Confiscation orders above this amount could only be made in a Crown Court, as now. The intention behind this restriction is that magistrates' courts should be empowered to make confiscation orders only in less serious cases. No order under section 97(1) of SOCPA has yet been made.
125. *Subsections (2) to (4)* amend section 97 of SOCPA so as to confer power on the Secretary of State and the Department of Justice in Northern Ireland to vary, by order, the £10,000 limit. As a result of the amendment made to section 172 of SOCPA by *subsection (5)*, any such order is subject to the affirmative procedure.