

**EXPLANATORY MEMORANDUM TO
THE PROCEEDS OF CRIME ACT 2002 (LEGAL EXPENSES IN CIVIL RECOVERY
PROCEEDINGS) REGULATIONS 2005**

2005 No. 3382

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

- 2.1 These Regulations make provision to control the extent to which property which is the subject of civil recovery proceedings may be used to pay legal expenses. They specify the “required conditions” which must apply where the High Court makes an “exclusion” to enable a person whose property has been frozen in civil recovery proceedings to meet his reasonable legal expenses. They also set out the procedure for obtaining an interim payment of legal expenses out of the frozen property while the civil recovery proceedings are continuing, and make provision for the final determination of the amount which should be paid in respect of such expenses at the end of the proceedings.

- 2.2 The Regulations are made under sections 286A, 286B and 459(2) of the Proceeds of Crime Act 2002 (for the purpose of domestic civil recovery proceedings) and under articles 198, 199 and 5(2) of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (which confer identical powers for the purpose of civil recovery proceedings which are brought to give effect to orders made by overseas courts). The Regulations will come into force on 1st January 2006.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None.

4. **Legislative Background**

- 4.1 Under Part 5 of the Proceeds of Crime Act 2002 (“POCA”), the Assets Recovery Agency (“ARA”) may bring proceedings in the High Court to recover property that has been obtained by unlawful conduct. As well as bringing proceedings for a “recovery order” in relation to the property, ARA may apply for an “interim receiving order” which appoints an interim receiver to secure the property pending the outcome of the recovery proceedings. And from 1st January 2006, amendments to POCA made by the Serious Organised Crime and Police Act 2005 (“SOCPA”) enable ARA to apply for a “property freezing order” which prohibits any dealing with the property.

- 4.2 As originally enacted, section 252 of POCA provided that the High Court could make an “exclusion” from an interim receiving order, e.g. to enable a person to use the frozen property to meet his living expenses. However, it prohibited the Court from making an exclusion to enable a person to meet his legal expenses in the civil recovery proceedings. SOCPA amends section 252 to remove this prohibition, but places a number of restrictions on the court’s power to make such an exclusion (and the new section 245C places the same restrictions on exclusions from property freezing orders).
- 4.3 The amended provisions of POCA provide that any exclusion made to enable a person to meet his reasonable legal expenses in civil recovery proceedings must be subject to “the required conditions”. Section 286A (also introduced by SOCPA) gives the Lord Chancellor the power to make Regulations specifying the required conditions, which may include conditions that sums shall only be released with the agreement of ARA or after assessment by the Court. Part 2 of the Regulations specifies a number of general required conditions, and Part 3 specifies additional conditions relating to the release of frozen property to make interim payments of legal expenses during the civil recovery proceedings.
- 4.4 SOCPA inserts a number of other provisions into POCA from 1st January 2006. New section 266(8A) of POCA means that, where the Court makes a recovery order, the order may provide that the trustee for civil recovery is to pay a person’s reasonable legal expenses out of the recovered property before paying the proceeds to ARA (see also section 280(2)(aa)). New section 266(8B) means that the trustee for civil recovery is only required to pay those legal expenses out of the recovered property if either ARA agrees to the payment or the Court has assessed the amount to be paid. Section 286B gives the Lord Chancellor the power to make Regulations for the purpose of section 266(8B), and Parts 4 and 5 of the Regulations make provision for that purpose.
- 4.5 Under section 444 of POCA, an Order in Council may make provision for realising property within the UK for the purpose of giving effect to an “external order” (i.e. an order of an overseas court which recognises that property was obtained through criminal conduct). This may include making provision corresponding to the civil recovery provisions in Part 5 of POCA. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (“the Order in Council”) has been made under section 444 and comes into force on 1st January 2006. It contains provisions which are in all material respects identical to the provisions of POCA described above, and the Regulations are made under the relevant provisions of the Order in Council as well as under POCA.

5. Extent

- 5.1 This instrument applies to England & Wales and Northern Ireland.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 The Proceeds of Crime Act 2002 created the Assets Recovery Agency. Part 5 of POCA authorised ARA to take civil proceedings in the High Court to recover property and cash that had been obtained by unlawful conduct, regardless of whether the owner had been convicted of a criminal offence. It also allowed ARA to apply for an interim receiving order; and SOCPA has inserted an additional power to apply for a property freezing order.
- 7.2 When introducing POCA, the Government decided to prevent access to restrained assets to pay for legal representation in these cases, in order to prevent the purposeful dissipation of the assets in legal fees. The experience of other countries, and of the UK under the previous legislation governing post-conviction confiscation, demonstrated the inevitability of dissipation if stringent safeguards are not put in place.
- 7.3 At the time, the Government's preferred method to ensure representation in these cases was through the civil legal aid scheme. However, operational experience shows that the current provisions of the scheme are ill-suited to this type of case, partly due to the scope of the scheme, but in particular due to the financial eligibility limits, and the rules surrounding these limits.
- 7.4 Furthermore, it is almost inevitable that respondents in these cases have complex financial affairs. The statutory requirement for the Legal Services Commission (which administers legal aid) to investigate an applicant's means has given defendants the opportunity to delay the legal aid process, and thus to hold up and frustrate the intention of POCA.
- 7.5 It is theoretically possible to create a power to waive the means test in these cases. However, non-means tested legal aid is only available to the most vulnerable in society to protect fundamental rights – for example, in special Children Act cases or cases before the Mental Health Review Tribunal. The Government does not consider that civil recovery respondents fall into this category.
- 7.6 Allowing defendants access to their frozen assets to pay for their own legal costs is consistent with the Government's wider approach to legal aid, as set out, for example, in the Criminal Defence Service Bill: namely, that those who can pay for their legal costs, should pay. SOCPA therefore amended POCA to allow the High Court to exclude property from a property freezing order or interim receiving order for the purpose of meeting legal expenses (see above). However legal aid will remain available in exceptional cases where the court is unable to release the assets to cover legal costs, for example because of competing third party interests.
- 7.7 The change requires a regulatory framework to safeguard the way assets are released. The provisions introduced by SOCPA specify that exclusions must be limited to reasonable legal expenses, must specify the total amount that may be released for legal expenses in pursuance of the exclusion, and must be

subject to the other “required conditions” specified in Regulations. A required condition may, for example, restrict who may receive sums released in pursuance of the exclusion; control the amount of any sum released in respect of an item of expenditure; or provide for sums to be released only with the agreement of ARA or if the court has assessed the amount allowed.

- 7.8 Parts 2 and 3 of the Regulations make provision for these purposes. In particular, Part 3 prescribes the procedure for obtaining interim payments of legal expenses during the civil recovery proceedings. The person who has incurred the expenses must make a request to ARA, giving details of the expenses incurred (reg. 8), and ARA must respond stating whether it agrees to the release of an interim payment in respect of those expenses (reg. 9). The amount which may be released is either 65% of the amount claimed, or the amount which ARA agrees, whichever is the greater. Funds may only be released to the person’s current or former solicitor (reg. 10).
- 7.9 If, at the end of the proceedings, ARA obtains a recovery order which provides for the payment of the person’s legal expenses out of the recovered property, that person’s total legal expenses must be either agreed by ARA or assessed by the court, even if interim payments have already been made during the proceedings (reg. 6).
- 7.10 Part 4 of the Regulations applies where the High Court makes a recovery order which includes provision for the payment of a person’s reasonable legal expenses out of the recovered property. The person will normally seek to agree the expenses with ARA, in which case the amount payable is the amount which ARA agrees (reg. 12). If ARA’s agreement is not obtained, the person must commence proceedings for the expenses to be assessed by the Court in accordance with the applicable rules of court, and the amount which is payable will be the amount which the Court allows (reg. 13). Whether the costs are agreed or assessed, the amounts of any interim payments made pursuant to an exclusion will be deducted (and if the interim payments exceed the amount which is agreed or allowed, the difference must be repaid to the trustee for civil recovery) (reg. 14).
- 7.11 Under section 286B, the Regulations may in particular limit the allowable amount of remuneration in certain ways. Part 5 of the Regulations provides that the Court will assess expenses on the “standard basis” as defined in the relevant rules of court, which means that any doubt as to whether the costs were reasonably incurred or reasonable in amount will be resolved against the person who incurred the expenses (reg. 16). Rates of remuneration for legal representatives are specified, with different rates for different categories of fee earner, higher rates for cases which raise “substantial novel or complex issues of law or fact” and increases for firms whose offices are in London (reg. 17).
- 7.12 The intention of this scheme is to allow civil recovery cases to proceed with proper representation for respondents, while maintaining effective control over legal expenses so as to minimise the risk of dissipation of assets.
- 7.13 The Lord Chancellor is required to consult “such persons as he considers appropriate” before making Regulations under sections 286A and 286B of POCA and articles 198 and 199 of the Order in Council.

- 7.14 The Department for Constitutional Affairs carried out a limited consultation on the principles of the Regulations from 21 June to 1 August 2005. Helpful responses were received from the Law Society, Bar Council, Legal Aid Practitioners' Group (LAPG), ARA, several individual firms of solicitors and members of the judiciary, including the Senior Costs Judge. DCA carried out a further consultation on a first draft of the Regulations from 6 September to 3 October 2005, and then circulated a revised draft of the Regulations to consultees on 10 November 2005, inviting any final comments by 25 November 2005. DCA officials have also had constructive meetings with the Law Society, LAPG, ARA, the Bar Council and representatives of the judiciary. Parallel consultations have been carried out by the Northern Ireland Court Service.
- 7.15 On the whole, respondents engaged constructively and many of their suggestions were adopted in the final scheme. Both the Law Society and Bar Council felt that the rates of remuneration offered were too low and that normal private rates should be available. While we felt that the risk of dissipation was real, and we had a responsibility to preserve frozen funds for recovery, we accepted their argument that some of these cases had the potential to be complex. In response, we have set out two rates in the regulations; a standard hourly rate, and a higher rate which the court can grant for those cases which involve substantial novel or complex issues of law or fact. We also revised the scheme to allow for full payment of agreed expenses with the Asset Recovery Agency's approval, or 65% of the claimed expenses if they object, to allow legal representatives to receive interim payments. The scheme was further improved by a number of other amendments which were suggested by consultees and subsequently adopted.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

9. Contact

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