

# **Serious Crime Act 2015**

## **Fact sheet: Amendments to the Proceeds of Crime Act 2002**

### **Background**

1. The Proceeds of Crime Act 2002 (“POCA”) sets out the legislative framework for the recovery of criminal assets. There are four main routes for recovery of assets:
  - Criminal confiscation (post conviction);
  - Civil Recovery (used where no conviction has taken place);
  - Cash seizure and forfeiture;
  - Taxation.

Criminal confiscation is the most commonly used power.

2. POCA also provides for a number of investigative powers, such as search and seizure, and powers to apply for production orders and disclosure orders. Furthermore, POCA allows for the “restraint” or “freezing” of assets to prevent dissipation of assets prior to a confiscation order being made.
3. Between April 2010 and December 2014, £891 million has been confiscated from offenders and £110 million has been returned to victims, and assets worth hundreds of millions of pounds more have been frozen to put them beyond the reach of criminals.
4. POCA remains an effective piece of legislation, but the sums confiscated are small when compared with the scale and cost of serious and organised crime to the UK economy. Moreover, POCA is under sustained legal challenge from criminals seeking to avoid its reach and frustrate asset recovery.
5. The Serious and Organised Crime Strategy, published in October 2013, committed to attack criminal finances, by making it harder to move, hide and use the proceeds of crime. In line with this objective, the Strategy set out proposals to close various loopholes in the legislation. Part 1 of the Serious Crime Act gives effect to these changes.

### **Chapter 1 of Part 1: England and Wales**

#### **Third party claims**

6. The payment of confiscation orders can be delayed by third parties making claims on assets that are part of an order. This is particularly so at the enforcement end of the process. Third party claims also reduce the amount of money available for recovery. Sections 1 to 4 introduce a requirement for prosecutors to set out any known details of third party

interests in their “statement of information” provided to the court, which is served at the start of confiscation proceedings. The defendant will then have to detail any known third party claims in their response to the prosecutor’s statement. The court will also be able to order a third party to provide any information the court needs to enable it to determine the extent of any third party interests in the defendant’s property prior to making the confiscation order. The court’s determination will then be binding (save in limited exceptional circumstances). This should speed up the confiscation process, and help the enforcement stage to proceed more efficiently.

**Default sentences**

7. POCA provides that if a confiscation order remains unpaid past its due date, a default sentence of imprisonment can be imposed against the defendant. Whilst lower value confiscation orders have a high rate of successful enforcement, a significant number of higher value orders go unpaid. In order to incentivise further payment of such higher value orders, section 10 of the Act increases the maximum default sentences where the confiscation order is for more than £500,000. The maximum sentence increases from 5 to 7 years for orders of more than £500,000 but no more than £1 million; and from 10 to 14 years for orders over £1 million. The range of default sentences have also been simplified, reducing the current 12 tiers down to four, as follows:

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

As a further incentive to pay, section 10 also ends the automatic release at the half way point of a default sentence for confiscation orders over £10 million. The Act includes a power to lower this £10 million threshold though secondary legislation. A further order-making power allows for minimum default sentences to be introduced in the future.

## **Time to pay**

8. POCA currently provides that a confiscation order is payable immediately upon the making of the order, unless a defendant can show that there are exceptional circumstances why this should not be the case. A maximum of 12 additional months for full payment of the order may be provided by the court. Section 5 makes it absolutely clear that the full amount ordered to be paid under a confiscation order must be paid on the day on which the order is made, unless the court is satisfied the defendant is unable to do so. Section 5 also includes a restriction on the circumstances under which an extension to the time to pay can be granted, limiting it only to circumstances where additional time is necessary in order to realise funds from a specific asset, for example for the sale of a vehicle or house. The maximum amount of additional time that a defendant may be allowed to pay a confiscation order has also been reduced from 12 months to six months.

## **Travel bans**

9. To assist with the enforcement of confiscation orders, section 7 provides that in every confiscation case, the court will be required to consider making any order (a “compliance order”) it considers appropriate to ensure that a confiscation order is paid. In particular, the court must consider whether to place a restriction or prohibition on the defendant’s overseas travel, so as to prevent a defendant from travelling abroad in order to dispose of his or her assets, thus removing those assets from the reach of the confiscation order. Any compliance order will remain in force until the confiscation order is paid. The prosecutor and the defendant will have the power to apply to the court to have the order varied or discharged so long as the order is in force.

## **Confiscation and the victim surcharge**

10. POCA makes it clear that, where there is both a confiscation order and a compensation order, monies collected under the confiscation order should be used first to settle any outstanding compensation to victims, if the defendant does not have the means to pay both orders. Section 6 adds victim surcharge orders to the list of priority orders to ensure contributions from the defendant to the Victim and Witness General Fund, which funds services to victims of crime, are paid before a confiscation order, if the defendant does not have the means to pay both orders. The Serious Crime Act ensures that while the court takes no account of any confiscation order when imposing the new Criminal Courts Charge, payment of a confiscation order will take precedence over payment of the Criminal Courts Charge.

## **Conditions for exercise of restraint powers**

11. POCA provides for the making of a restraint order, the effect of which is to “freeze” assets so as to prevent them from being dissipated in advance of a confiscation order being made. A restraint order can be applied for as

soon as a criminal investigation has commenced. However, the current test to restrain assets – that there is “reasonable cause to believe” a defendant has benefited from their criminality can be difficult to meet in the early stages of an investigation. Section 11 reduces that test to “reasonable grounds to suspect” that a defendant has benefited from their criminality. This is in line with the test for effecting an arrest of a person under the Police and Criminal Evidence Act 1984.

### **Continuation of a restraint order after a quashed conviction**

12. POCA does not currently allow for a restraint order to be maintained if a defendant’s conviction is quashed, but it is intended that the defendant will be retried for the offence(s). This means that until the retrial proceedings are commenced (and consequently a new application for a restraint order could be made), the defendant’s assets are at risk of being dissipated.
13. Section 12 closes this loophole to ensure that a restraint order can be kept in place against a defendant for a reasonable period between the quashing of a conviction and the start of the proceedings for the retrial.

### **Writing off confiscation orders where defendant has died**

14. Under section 25 of POCA, it is possible to discharge a confiscation order where most of the sum due has been paid but there is a small amount (less than £50) outstanding. Section 8 provides that it will now be possible to discharge confiscation orders in cases where the defendant has died and it is not feasible to seek further payment of the order from the defendant’s estate (for example, because there are no assets remaining in the estate). Any applications to discharge orders in this way will be made to a court, so there will be judicial oversight.
15. Previously, only the defendant or the court appointed enforcement receiver could make an application to reduce the amount of the confiscation order. The prosecutor will now be able to apply to vary orders. This will be particularly relevant where the defendant has died and, as such, there is no other person able to make such an application.

### **Absconding defendants**

16. At present, if an offender absconded before the conclusion of their trial, and is then convicted in their absence, it is not possible to make a confiscation order; in such cases, criminals could retain the benefits of their crimes. Section 9 closes that loophole.
17. When a defendant absconds prior to conviction, POCA enables confiscation proceedings to be commenced against the person but only once two years has elapsed from the date of the defendant’s disappearance. Section 9 reduces this period to three months. In addition, it is now possible to apply criminal lifestyle assumptions to all offenders who abscond but subsequently return to the jurisdiction. This means that

the defendant's criminal benefit may be re-calculated to be what the individual received, retained and spent in the six years prior to the start of criminal proceedings. This ensures the whole of the offender's criminal benefit can be removed whilst ensuring they are able to respond to these stringent assumptions.

### **Seized money**

18. Under section 67 of POCA a magistrates' court can issue an order to a bank to pay over funds held in the defendant's account to satisfy a confiscation order. However, this power is currently only available where there is a restraint order in place and the time to pay allowed by the court has expired. Section 14 removes these restrictions so that cash held in bank accounts can be seized quickly to satisfy a confiscation order. The court will also be able to order the payment of funds held in a bank account of a third party where the account is not in the name of the defendant, for example a company account.

### **NCA officers**

19. National Crime Agency (NCA) officers designated with the powers of a constable or an officer of Revenue and Customs (under the provisions in section 10 of the Crime and Courts Act 2013) are able to exercise the search and seizure powers in sections 47A to 47S. These powers are designed to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. These powers may only be exercisable with the appropriate approval. Normally this is by a justice of the peace, but in cases of urgency approval may be given by a senior officer. Section 13 defines a senior NCA officer for these purposes.

### **Chapter 2 of Part 1: Scotland**

20. At the request of the Scottish Government, Chapter 2 of Part 1 makes a number of analogous changes to the confiscation regime in Scotland (Part 3 of POCA) to those made to the regime in England and Wales (Part 2 of POCA) by Chapter 1 of Part 1. In addition, Chapter 2 of Part 1 makes two bespoke changes to the confiscation and civil recovery regimes in Scotland.

21. At present in Scotland, if a person serves a default sentence for failing to pay the sum due under a confiscation order this extinguishes their liability to pay the sum due under a confiscation order. Section 19 changes this position by providing that the liability to pay the sum due remains until it is paid. This brings the legislation in line with the position in the rest of the UK.

22. Prohibitory Property Orders ("PPOs") are specific orders which can be applied for in the process of the civil recovery of assets in Scotland when a person has acquired assets through certain unlawful conduct. PPOs

prevent a person from dissipating identified assets during the course of a civil investigation. Section 23 provides for a new type of management receiver in Scotland to allow the active management and preservation of property which has been acquired unlawfully and which is subject to a PPO. These new PPO receivers will have broadly similar powers and functions to those of management receivers in England and Wales and Northern Ireland.

### **Chapter 3 of Part 1: Northern Ireland**

23. At the request of the Northern Ireland Minister for Justice, Chapter 3 of Part 1 makes parallel changes to the confiscation regime in Northern Ireland (Part 4 of POCA) to those made to the regime in England and Wales (Part 2 of POCA) by Chapter 1 of Part 1.

### **Chapter 4 of Part 1: Investigations and co-operation etc**

#### **Exemption from civil liability for money-laundering disclosures**

24. To counter the risk of money laundering, Part 7 of POCA places obligations on the “regulated sector”, such as banks, to submit Suspicious Activity Reports to the NCA. This is to alert the Agency that certain client activity is suspicious and might indicate money laundering.

25. Under section 335 of POCA, a person or business may seek the consent of the NCA to proceed with the transaction, in order to avail themselves of a defence against a money laundering charge. The NCA has seven working days to respond. While the reporter awaits the NCA’s decision on consent, the transaction must not proceed. The consequences for a customer whose request or transaction is delayed in this way may lead to financial loss. A customer may then seek to take legal action to recover any losses or make a claim for damages.

26. However, where a person or business has suspicions regarding a transaction, and reports these to law enforcement authorities in good faith – as required by the law - that person or business should not be liable for civil claims for damages. While case law currently provides such protection, placing this immunity on a statutory footing would provide greater legal certainty. Section 37 is directed to that end.

#### **Confiscation investigations**

27. Section 38 broadens the definition of a “confiscation investigation” for the purposes of Part 8 of POCA to make the investigative powers available to appropriate officers (for example, police and NCA officers) under that Part available for the purposes of enforcing a confiscation order, and in particular, identifying realisable property available to help satisfy the order. Previously there were no investigation powers available to investigate the amount and whereabouts of assets after a confiscation order had been made but remained unpaid. This change will enable law enforcement

agencies to trace assets to facilitate the payment of confiscation orders, including where the amount of a confiscation order is revisited where the available amount has been satisfied but the original full benefit has not been paid.

### **External orders and investigations: meaning of “obtaining property”**

28. Section 39 extends the ability of the UK to assist overseas authorities in cases where the criminal benefit is a pecuniary advantage rather than actually property. An example would be to enable the UK to assist an overseas authority where the defendant has evaded a tax liability through fraud.

### **Confiscation orders in magistrates’ court**

29. Currently confiscation orders may only be made in the Crown Court. However, section 97 of the Serious Organised Crime and Police Act 2005 makes provision for magistrates’ courts to be given the power to make a confiscation order in cases with a value of below £10,000. Work is in hand to bring this provision into force. Section 40 enables this £10,000 threshold to be varied by secondary legislation.

### **Duty on the Crown Court to make a confiscation order for the recoverable amount**

30. Under the provisions of POCA, the Crown Court is obliged to make a confiscation order for what is termed the recoverable amount. This is the sum of money equal to the defendant’s benefit from the relevant criminal conduct, up-rated for inflation.

31. In the case of *R v Waya*, the Supreme Court ruled that the obligation on a Crown Court to make a confiscation order for the full recoverable amount should be qualified so as not to apply where to do so would be disproportionate under Article 1, Protocol 1 of the European Convention on Human Rights – which provides for the right to the peaceful enjoyment of property. The court would then be able to make an order requiring the defendant to pay whatever lesser amount it thought was proportionate.

32. In its report on the Serious Crime Bill, the Joint Committee on Human Rights recommended putting the judgment of the Supreme Court in *Waya* on a statutory footing in order to “bring greater legal certainty.” The Act (paragraphs 19, 35 and 46 of Schedule 4) therefore makes the necessary amendments to POCA to give statutory force to the judgment.