



Home Office

Home Office Circular

Amendment of the Proceeds of Crime Act 2002 by:

The Serious Crime Act 2015

The Policing and Crime Act 2009

The Crime and Courts Act 2013

Home Office Circular

**Proceeds of Crime Act 2002
Amendments made by:**

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**Serious Crime Act 2015
Policing and Crime Act 2009
Crime and Courts Act 2013**

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Broad subject: Serious and organised crime, criminal law.

Sub-category: Proceeds of crime.

This circular is addressed to: Lord Chief Justice, Justices of the Supreme Court, President of the Queen’s Bench Division, master of the Rolls, Senior Presiding Judge, Lords Justices of Appeal, Chairman of the Judicial College, High Court Judges, Presiding Judges, Resident Judges, Crown Court Judges, District Judges (Magistrates’ Courts), Chairmen of the Justices, Director of Public Prosecutions, HM Chief Inspector of Constabulary, Chief Officers of Police in England and Wales, Director General of the National Crime Agency, Police and Crime Commissioners in England and Wales, Mayor’s Office for Policing and Crime, College of Policing, HM Revenue and Customs, Chief Crown Prosecutors.

Copies of this circular go to: Council of Circuit Judges, Magistrates’ Association, Association of District Judges, Justices’ Clerks’ Society, Registrar of Criminal Appeals, National Police Chiefs’ Council, Association of Police and Crime Commissioners, Police Superintendents’ Association, Police Federation, the Law Society, the Bar Council, the Criminal Bar Association, Institute of Chartered Accountants of England and Wales, Citizens Advice Bureaux, Chief Probation Officers, Local Government Association.

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ANNEX A: Glossary of abbreviations

Dear Colleague,

1. The Serious Crime Act 2015 (“the 2015 Act”) received Royal Assent on 3 March. The 2015 Act gives effect to a number of legislative proposals set out in the Serious and Organised Crime Strategy published in October 2013 and, in doing so, will ensure that the National Crime Agency, the police and other law enforcement agencies have the powers they need to pursue, disrupt and bring to justice those engaged in organised crime.
2. This circular provides details of those provisions in the 2015 Act (Part 1) which make amendments to the Proceeds of Crime Act 2002 (POCA). It also covers other amendments made to POCA by the Policing and Crime Act 2009 (PCA) and the Crime and Courts Act 2013 (CCA). All amendments detailed in this document are scheduled to come into force on 1 June 2015.
3. This circular will be supported by more detailed operational guidance to the police and others issued by – amongst others – the College of Policing.

**Part 1 of the Serious Crime Act 2015: Proceeds of Crime
(Sections 1-12, 14, 15-37, 39 and 40)
Commencement Date: 01 June 2015**

Sections 1-12, 14:	E. W.
Sections 19 & 23	S
Section 30	NI
Sections 37, 39	E.W.S.NI
Section 40	E.W.NI

Introduction

- Sections 1-12 and 14 are contained in Chapter 1 of Part 1 of the 2015 Act and make amendments to the Proceeds of Crime Act for England and Wales. Sections 15-23, which are contained in Chapter 2 of Part 1, make a number of changes to the civil recovery and confiscation regimes in Scotland. For the most part, these are comparable to the changes made in England and Wales, but two bespoke changes (sections 19 and 23) are featured in this circular. Similarly, sections 24-36 in Chapter 3 make parallel changes to the confiscation regime in Northern Ireland to those made in England and Wales. Important differences are listed under Section 30 which appears in this circular.
- Dates for full commencement of sections 13 and 38 have yet to be confirmed, hence their omission from this circular.

Chapter 1

Summary

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

Confiscation: Assets Held by Defendant and Other

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

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

8. This section gives the Crown Court the power to make a determination regarding the extent of the defendant's interest in a particular property¹. Inevitably this will result in a determination of the extent, if any, of third party interest in the property. Third parties who have – or may have – an interest in the property will have the right to make representations to the court about the extent of their interest. This right also extends to the defendant.
9. The court's determination of the extent of a defendant's interest in particular property is binding on any court or any person involved in the enforcement of a confiscation order. There are two exceptions. One is where it is open to a court which has appointed an enforcement receiver (see section 4), the second is in proceedings before the Court of Appeal or Supreme Court.
10. It is likely that the Crown Court will only make determinations under new section 10A where the defendant's interest in a particular property can be established without too much difficulty. In more complicated cases, it is anticipated that the defendant's interest in property will be determined as it is now, at the enforcement stage.

Section 2: Provision of information

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

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

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

require the prosecutor to provide further specified information relevant to the making of such a determination.

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

Section 3: Appeals

13. The prosecutor, defendant or third party may appeal to the Court of Appeal against a determination made by the Crown Court as to the extent of a defendant's interest in property. In the case of a defendant or third party, the appeal may only be brought if a person with an interest in relevant property was not given a reasonable opportunity to make representations to the Crown Court or where the Court of Appeal considers that the determination would result in a serious risk of injustice to the appellant. The defendant or third party must be a person holding an interest in property *affected by a determination*.
14. An appeal cannot be made where a receiver has been appointed under section 50 of POCA, where the prosecutor has applied for the appointment of a receiver or where the Court of Appeal believes that such an application is to be made.

Section 4: Enforcement receivers

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

Confiscation: other amendments

Section 5: Time for payment

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

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

17. An extension of time to pay will now be limited to circumstances where it is necessary in order to realise funds from a specific asset, for example the sale of a vehicle or house. Accordingly, section 5 makes provision to enable the court to allow different amounts of time (the “specified period”) for payment of different parts of the order⁴.
18. Under the existing time for payment provisions in POCA, the maximum length of a specified period is six months. Section 5 amends POCA to set the maximum length of specified period at **three months**⁵. The court may still extend the specified period, but only if the defendant can demonstrate that he or she is unable to pay the amount required *despite having made all reasonable efforts to do so*. Such an extension would be known as the “extended period”. Any application to extend the specified period must be made before that period has expired. The maximum amount of additional time that a defendant may be allowed to pay a confiscation order has also been reduced from twelve months to six months.

Section 6: Confiscation and Victim Surcharge Orders

19. Section 6 amends that part of POCA⁶ which deals with the effect of a confiscation order on the court’s other sentencing powers to make financial orders against the defendant. Currently, POCA makes it clear that, where there is both a confiscation order and a compensation order, and the defendant does not have the means to pay both, monies collected under the confiscation order should be used first to settle any outstanding compensation to victims.
20. However, while POCA ensures that compensation orders and unlawful profit orders take priority over a confiscation order, the confiscation order still currently takes priority over any amounts ordered to be paid as a victim surcharge. The monies raised by the victim surcharge are used to fund victim services through the Victim and Witness General Fund, which funds services to the victims of crime.
21. Section 6 adds victim surcharge orders to the list of priority orders to ensure contributions to the Victim and Witness General Fund are paid before a confiscation order if the defendant does not have the means to pay both. Section 6 provides this by introducing into section 13 the concept of a “priority order” and defining this term so as to include a compensation order, a victim surcharge order or an unlawful profits order⁷.

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

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

⁶ Section 13 of POCA

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

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

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

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

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

Section 8: Variation or discharge

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

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

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

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

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

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

¹⁰ Section 23 of POCA

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

Section 9: Absconding defendants

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

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

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

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

Section 10: Default sentences

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

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

35. Section 10 increases the maximum default sentence where the confiscation order exceeds £500,000. The maximum sentence increases from five to seven years for orders of more than £500,000 but no more than £1million, and from ten to fourteen years for orders over £1 million. The range of default sentences has also

¹¹ Sections 27 & 28 of POCA

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

been simplified, reducing the current twelve tiers to four as shown in the below table¹³:

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

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

Section 11: Conditions for the exercise of restraint powers

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

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

39. Section 11 also provides that¹⁶ the court will be able to monitor the progress of the investigation and may discharge the restraint order if a decision to charge is

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

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

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

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

not made in a reasonable time. Under certain circumstances, the court might impose a reporting requirement on a law enforcement agency.

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

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

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

Section 14: Seized money etc

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

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

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

The court will also have the power to order the payment of funds held in a bank account belonging to a third party, for example a company²¹. Any third party

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

¹⁸ See new section 42(6B) of POCA.

¹⁹ Section 67 of POCA.

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

²¹ New section 67(5B) of POCA.

affected would have the opportunity to make representations before such an order is made.

2. Chapter 2 of Part 1: Scotland

Summary

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

Section 19: Enforcement of confiscation orders

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

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

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

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

Section 23: Prohibitory property orders: PPO receivers

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

50. Section 23 provides for a new type of management receiver whose only function will be to manage property subject to a PPO²³. These new PPO receivers will

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

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

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

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

3. Chapter 3 of Part 1: Northern Ireland

Summary

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

Section 30: Variation and discharge

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

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

²⁴ New section 255G(3) of POCA.

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

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

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

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

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

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

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

57. Section 39 amends POCA by extending the ability of the UK to assist overseas authorities in cases where criminal benefit is a pecuniary advantage rather than actual property or money²⁶. An example of a pecuniary advantage would be not paying tax that is lawfully due.

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

Section 40: Confiscation orders by magistrates’ courts

59. Currently, confiscation orders can only be made in the Crown Court. However, provision has been made for magistrates’ courts to be given the power to make a confiscation order in cases with a value below £10,000²⁷. This provision is not yet in force. Work is in hand to commence this power.

60. Section 40 enables the Secretary of State, by order, to vary the £10,000 threshold. It is unlikely that this order making power would be exercised before

²⁶ Section 447 of POCA as amended by section 39 of the Serious Crime Act 2015.

²⁷ Section 97 of the Serious Organised Crime and Police Act 2005.

the impact of the existing £10,000 threshold on magistrates' courts making confiscation orders has been assessed.

5. Minor amendments

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

62. Accordingly, POCA has been amended²⁸ to place the Supreme Court's judgement in *R v Waya* on a statutory footing as recommended by the Joint Committee on Human Rights in their report on the Serious Crime Bill (second report, session 2014/15).

**Amendments to POCA made by the Policing and Crime Act 2009
(Sections 63, 52, 55, 65 & 66)
Commencement Date: 01 June 2015**

Sections 52 & 55

E. W.

Section 63

E. W. S.

Section 65

E. W. S

Section 66

E. W.

²⁸ Sections 6, 92 and 156 (relating to the making of confiscation orders in England and Wales, Scotland and Northern Ireland respectively) of POCA as amended by paragraphs 19, 35 and 46 of the Serious Crime Act 2015.

Sections 52 & 55: Search, seizure and detention of property

63. Confiscation is the means by which criminals are deprived of the proceeds of their crimes. Currently, a defendant's assets can be used to satisfy a confiscation order and those assets may effectively be 'frozen' by a restraint order. But a restraint order does not authorise detention of property, so easily moveable items that might be discovered during a search – for example vehicles, jewellery and electrical equipment – could be disposed of before they are subject to restraint. Consequently, potentially valuable property might not be available to satisfy a future confiscation order.
64. The PCA amends POCA to introduce new powers to prevent the dissipation of property that might be used to satisfy a confiscation order made under POCA²⁹. These powers include "anticipatory seizure", which means that, provided certain conditions are met, an officer may seize property if there are reasonable grounds to suspect that it might otherwise be made unavailable for satisfying a confiscation order. In other words, the new power is designed to prevent defendants from disposing of or concealing property.
65. Subject to certain conditions³⁰, the power to seize property will be available from the start of a criminal investigation in relation to an indictable offence, the point of arrest or the commencement of proceedings. A confiscation order need not be in place before this power is used.
66. Property may be detained for an initial period of 48 hours following seizure. Within this period, an application can be made for continued detention of the property by way of a restraint order (including provisions to authorise the detention) or variation of an existing restraint order (to include detention). A magistrates' court may also, by order, extend the period of detention where no restraint order is in force or no application has been made³¹. The court may grant a restraint order (rather than restraint *and* detention) only, in which case the property would be released to the person, although that person would be prohibited from dealing with it³².
67. The search and seizure powers may be exercised by the appropriate officers, which are:
- An officer of HM Revenue and Customs
 - An immigration officer
 - A constable
68. In addition to the officers listed above, the list of appropriate officers for the detention of property includes:

²⁹ New sections 47A to 47S of POCA inserted by section 55 of the Policing and Crime Act 2009

³⁰ See Code of Practice: Search, Seizure and Detention of Property

³¹ New sections 47K, 47L and 47M of POCA as inserted by section 55 of the Policing and Crime Act 2009

³² New sections 41A and 44A of POCA inserted by section 52 of the Policing and Crime Act 2009, together with sections 47J to 47P of POCA, are concerned with the detention of property.

- A National Crime Agency officer
- A member of staff of the relevant director³³

69. Each of the search and seizure powers may only be exercised with appropriate approval (unless it is not practicable to obtain such approval in advance).

70. The powers to search for, seize and detain property under this provision will not be available to accredited financial investigators until an amendment to the relevant order is made.

71. These new provisions – and the new, accompanying Code of Practice – are applicable in England and Wales only. Practitioners and others should familiarise themselves with the contents of the new Code of Practice as this provides detailed guidance on the correct use of the powers.

Section 63: Cash searches

72. POCA provides powers for the seizure of cash that is suspected to derive from, or intended for use in, unlawful conduct. The amendment of POCA by the PCA gives officers new powers to search a vehicle for cash³⁴.

73. As it currently stands, POCA provides powers to search persons and premises for cash. However, although the definition of ‘premises’ includes vehicles, the current power only allows the search of vehicles if officers have *lawful authority* to be on private premises on which a vehicle is located – for example where a police constable exercises rights of entry to premises under the Police and Criminal Evidence Act 1984³⁵. Consequently, where law enforcement officers (‘officers’) have the power to search a person in a public place (including the roadside), for cash, they do not have the power to enter or search their vehicle.

74. Section 289 of POCA as amended by the PCA now gives officers the power to require a search of a vehicle if they suspect that it contains cash liable to seizure. The power to search a vehicle is civil in nature and exercisable only so far as is reasonably required for the purpose of finding relevant cash. Although an officer can require a person to permit entry to a vehicle for the purpose of searching for cash, there is no power to *force* entry. A refusal by a person to permit a search of their vehicle (or, for that matter, their person or premises) may, in some instances, constitute an offence. This could include wilful obstruction of an officer, but this would be a criminal matter and not an issue for this provision or the relevant Code of Practice.

³³ Section 41A of POCA

³⁴ Section 289 of POCA as amended by section 63 of the Policing and Crime Act 2009

³⁵ Section 316 of POCA provides that the definition of premises has the same meaning as in the Police and Criminal Evidence Act 1984. So ‘premises’ will only include a vehicle located on those premises.

75. It is important to distinguish the new power to search vehicles from that which already exists. Under the existing provision, an appropriate officer would have to have lawful authority to be on private premises already (i.e. property on which a vehicle is situated). Under the new provision, an officer may search a vehicle for cash if a vehicle is in a place to which the public has access, e.g. a street.

76. A revised Code of Practice has been produced to take account of the amended power. This Code provides detailed guidance on the correct use of the new powers as well as providing reassurance to the public that potentially intrusive powers are being used appropriately and responsibly. Once brought into effect on 1 June, the revised Code will apply to the following officers:

- England and Wales only: Constables and accredited financial investigators.
- England, Wales and Scotland: Officers of HM Revenue and Customs and immigration officers.

77. There is a separate Code of Practice for constables in Scotland made by the Scottish ministers. Commencement of the amendment in Northern Ireland is being dealt with separately, and the existing Code will continue to apply there until the amendment is commenced.

Section 65: Administrative forfeiture of cash

78. Currently, once cash is seized, officers have 48 hours to detain cash for investigation. Cash cannot be detained after this point without the authority of a magistrates' court³⁶. The court order to further detain the cash must be granted within the initial 48 hour period. Detention may be granted for a period of up to six months at a time and this process can be repeated up to a maximum of two years' detention beginning with the date of the first order. If a decision is made to apply for forfeiture of the cash, an application is made to the court and served on all interested parties³⁷.

79. Under existing provisions, the court - upon receipt of an application for forfeiture - will set a date for a directions hearing and – if the application is contested – fix directions relating to the management of the proceedings. The court will also set the date and venue of the forfeiture hearing itself. The court is permitted to decide the application at the directions hearing if the person from whom the cash was seized (or any person affected by the seizure) does not seek to contest the application. Respondents are normally warned of this fact at the time of application.

80. A considerable number of forfeiture cases are uncontested. New provisions inserted into POCA by the PCA provide – on the application of a senior officer – the power to forfeit cash³⁸ without a court hearing³⁹. The senior officer would be required to serve a

³⁶ Section 295(2) of POCA.

³⁷ Section 298(1) of POCA

³⁸ Cash must be subject to detention under section 295(2) of POCA.

³⁹ New sections 297A-297G of POCA inserted by section 65 of the Policing and Crime Act 2009.

forfeiture notice on every person who received notice of the most recent detention order⁴⁰. For the purposes of this provision, a senior officer means:

- An officer of Revenue and Customs designated by the Commissioners for HM Revenue and Customs as equivalent to that of a senior police officer;
- An immigration officer of a rank designated by the Secretary of State as equivalent to that of a senior police officer⁴¹;
- A senior police officer of at least the rank of inspector;
- An accredited financial investigator.

81. The cash may be forfeited under this provision unless an objection to the application had been received within the specified period. The period for lodging an objection to the proposed forfeiture must be at least thirty days from the date after the notice was given. If no objection is received within that period, and the notice has not lapsed, the cash is forfeited without the need for any additional court process.

82. If an objection is made, the notice lapses and the current court procedure would apply.

83. If pre-existing detention has expired during the period specified for objecting to the proposed forfeiture and an objection is made, the cash may be detained for a further period of up to 48 hours to allow either an application for further detention or for forfeiture to be lodged. If neither application is made, the cash must be released.

84. These new provisions also provide for the detention of cash following the issue of a forfeiture notice. This means that the cash can be detained until the cash is forfeited, the notice lapses or the cash is released.

85. New section 297A(3) of POCA stipulates that the Secretary of State must make regulations about how a forfeiture notice is to be given. A forfeiture notice informs the recipient of the senior officer's intention to forfeit cash without a hearing before a magistrates' court. The regulations cover the following:

- Persons to whom a forfeiture notice must be given;
- The manner in which a forfeiture notice is to be given;
- Requirements for giving a forfeiture notice by post or electronic communication, and
- Requirements for giving a forfeiture notice to a person known to be a child or a protected person.

⁴⁰ Or any person who has been identified as being affected by the most recent order.

⁴¹ See section 55 of and Schedule 21 to the Crime and Courts Act 2013.

86. It is essential that those exercising the power to forfeit detained cash without a hearing are familiar with the requirements of the appropriate regulations⁴².

Section 66: Investigations: Transfer of jurisdiction

87. POCA specifies which court is responsible for hearing applications to use certain powers of investigation, depending on which type of investigation is concerned. Currently, the Crown Court will only hear applications – including applications for production orders and search and seizure warrants – relating to confiscation and money laundering investigations.

88. An amendment to POCA by the PCA transfers jurisdiction for applications for production orders and search and seizure warrants in detained cash investigations from the High Court to the Crown Court⁴³. The Crown Court can now hear such applications alongside those made in respect of confiscation and money laundering investigations.

**Amendments to POCA made by the Crime and Courts Act 2013
(Paragraph 2 of Schedule 19 & section 46)
Commencement Date: 01 June 2015**

Paragraph 2 of Schedule 19: Investigations: civil recovery

89. Civil recovery is a form of non-conviction based asset forfeiture which allows for the recovery (in civil proceedings) of property which derives from, or is associated with, unlawful conduct. Currently, an investigation is defined as an investigation into ownership of that property and its extent and whereabouts.

90. The definition of a civil recovery investigation in POCA has been widened by the CCA to clarify that the focus of an investigation can be a person or property⁴⁴. As a result, an investigation might begin with a person and become an investigation into property if recoverable property is identified during the course of the enquiry. Equally, an investigation might begin with property and, as more information about its ownership emerges, be extended to cover persons who hold or have held that property.

91. A revised Code of Practice has been made to take account of the changes in the definition of a civil recovery investigation and the change in jurisdiction in detained cash investigations. With regard to the exercise of functions under Chapter 2 of Part 8 of POCA (permitted investigations), the Code of Practice applies to the following:

- The Director General of the National Crime Agency

⁴² The Administrative Forfeiture of Cash (Forfeiture Notices) (England and Wales) Regulations 2015.

⁴³ Section 344 of POCA as amended by section 66 of the Policing and Crime Act 2009.

⁴⁴ Section 341(2) of POCA as amended by paragraph 2 of Schedule 19 to the Crime and Courts Act 2013.

- National Crime Agency officers
- Accredited financial investigators
- Constables
- Officers of HM Revenue and Customs
- Immigration Officers

92. Chapter 2 of Part 8 of POCA applies to England and Wales and Northern Ireland. However, the revised Code applies to England and Wales only. The previous version of the Code will continue to apply in Northern Ireland as commencement of the CCA amendments for that jurisdiction is being dealt with separately.

Section 46: Legal aid payments from restraint orders

93. Restraint orders, which can be made from the beginning of a criminal investigation, prohibit specified persons from dealing with property held by them. The effect of a restraint order is to preserve assets so that they are available to meet a confiscation order.

94. Currently, where a defendant is in receipt of legal aid, he or she cannot use property subject to a restraint order to satisfy any obligation to contribute to the cost of their defence. This can mean that some defendants still owe money for the cost of their defence when they receive a confiscation order. This could also be the case after the confiscation order has been paid in full.

95. Some defendants will still have assets subject to a restraint order, even though they have satisfied a confiscation order in full. Under the current provisions, a restraint order must be discharged once a confiscation order is settled. This gives defendants the opportunity to dissipate their assets before they pay any money owed for their defence.

96. To prevent this from happening, POCA has been amended by the CCA to provide that every restraint order must include an exception that allows legal aid payments to be made out of restrained assets⁴⁵. Where a defendant has an outstanding obligation to make legal aid payments, the restraint order will remain in place after the confiscation order has been satisfied until either the obligation to make legal aid payments has been satisfied or the restraint order has been discharged. Regulations setting out the circumstances in which legal aid payments may be made out of restrained assets will come into force on 1 June 2015⁴⁶.

97. The relationship between prosecutors and the Legal Aid Agency in these cases will be governed by an agreed memorandum of understanding.

⁴⁵ Section 41 of POCA as amended by section 46 of the Crime and Courts Act 2013.

⁴⁶ The Restraint Orders (Legal Aid Exception and Relevant Legal Aid Payments) Regulations 2015.

GLOSSARY

2015 Act	Serious Crime Act 2015
PCA	Policing and Crime Act 2009
CCA	Crime and Courts Act 2013
POCA	Proceed of Crime Act 2002
E.W.S.NI	England, Wales, Scotland and Northern Ireland