

## **POLICY NOTE**

### **THE SERIOUS CRIME ACT 2015 (COMMENCEMENT No. 1 AND SAVING PROVISION) (SCOTLAND) REGULATIONS 2016**

#### **SSI 2016/11 (C. 1)**

1. The above instrument is made in exercise of the powers conferred by section 88(2) and (9) of the Serious Crime Act 2015 (“the 2015 Act”). It is not subject to any parliamentary procedure.

#### **Policy Objectives**

2. These Regulations bring into force, on 1 March 2016, certain provisions of the 2015 Act concerning the confiscation of proceeds of crime in Scotland. They also make related saving provision.

3. The 2015 Act contains various provisions to ensure that law enforcement agencies have effective legal powers to deal with the threat from serious organized crime. Much of this has been achieved by updating existing legislation, including the Proceeds of Crime Act 2002 (“POCA”), although the content of the Act also supports implementation of Scotland’s strategy for tackling serious organized crime.

4. The Bill for the 2015 Act was introduced in the House of Lords on 5 June 2014 and received Royal Assent on 3 March 2015. Certain provisions came into force on 3 March 2015, whilst some came into force on 3 May 2015. Various provisions have since been brought into force, in relation to other parts of the United Kingdom as well as Scotland, by commencement regulations made before the date of these Regulations.

5. These Regulations therefore form part of an implementation package for the 2015 Act, which is being commenced in stages. They are the first commencement regulations made under the 2015 Act by the Scottish Ministers, who have responsibility for commencing the amendments to POCA which relate to Scottish confiscation proceedings. However, section 15 (which makes provision in relation to restitution orders and victim surcharge), and the related consequential amendments in Schedule 4, will be commenced at a later date.

6. A summary of the various provisions of the 2015 Act being commenced by these Regulations is given below.

#### **Section 16 – Orders for securing compliance with confiscation order**

7. Section 16 amends POCA to make provision in relation to the making of compliance orders, breach of compliance orders, and appeals against compliance orders or against variation or discharge of such orders respectively.

8. Compliance orders are intended as measures to enforce confiscation orders, allowing further restrictions or requirements to be imposed as considered appropriate. For example, they may be used to prevent an individual subject to a confiscation order from travelling outside the UK and dissipating assets that could be used to enforce the order.

9. The criminal courts in Scotland will only be able to impose a compliance order on an accused person, not on third parties. For the purposes of any appeal or review, a compliance order in Scotland will be treated as a sentence. Section 86(3) of the 2015 Act provides that a compliance order may be made in respect of any confiscation order that is made on or after the day on which section 16 comes into force (1 March 2016).

### **Section 17 – Compliance orders: appeals by prosecutor**

10. Section 17 amends the Criminal Procedure (Scotland) Act 1995 so as to confer on prosecutors a right of appeal against any refusal to make a compliance order, or against the terms of a compliance order if these are considered unduly lenient. Prosecutors also have certain rights of appeal against the court's decision in relation to an application to vary or discharge a compliance order.

### **Section 18 – Accused persons unlawfully at large**

11. Section 18 amends POCA to provide explicitly that a confiscation order may be made against an accused person who becomes unlawfully at large before the conclusion of the trial and is subsequently convicted in his or her absence. This amendment makes it clear that the court may proceed to make a confiscation order in respect of an accused who is unlawfully at large, regardless of whether he or she became so before or after conviction.

12. It also amends POCA to reduce the period of time (from two years to three months) that a prosecutor must wait before applying to the court for a confiscation order to be made against an accused person who becomes unlawfully at large before criminal proceedings are concluded. It is considered that three months provides sufficient opportunity for the accused to be found or re-appear before a confiscation order is made against him or her.

13. Section 18 further amends POCA so as to make it easier for the courts to reconsider cases in relation to an accused who was, but is no longer, unlawfully at large. This may involve reconsideration of a case where no confiscation order has been made, reconsideration of benefit when no confiscation order has been made, or reconsideration of benefit when a confiscation order has been made (as the case may be).

### **Section 19 and related provisions in Schedule 4 – Enforcement of confiscation orders**

14. Section 19 amends POCA to increase the maximum periods of imprisonment that may be imposed in default of payment of a confiscation order. These are consistent across the UK, although the Scottish Ministers will have the power to modify the maximum periods and also provide for minimum periods of imprisonment.

15. In addition, section 19 also ends the rule that precludes recovery by civil diligence after a default sentence has been served. This is linked to paragraphs 42 and 45 of Schedule 4, which amend POCA so that serving a default sentence no longer prevents the sum due under the confiscation order from being collected. Under existing law, serving a default sentence removes a person's liability to pay the sum due under a confiscation order and this can result in assets still being available for use in further criminal activity. The new provisions should encourage more individuals to realize assets and pay their confiscation orders rather than opting to spend a period in custody.

16. The Regulations make the necessary saving provision in order to comply with Article 7(1) of the European Convention on Human Rights, which prohibits the retrospective

imposition of a heavier penalty than the one applying at the time of the offence. This ensures that the new, stricter, enforcement provisions being introduced by section 19 and paragraphs 42 and 45 of Schedule 4 will apply only in relation to confiscation orders made in respect of offences committed on or after the day on which those provisions come into force (1 March 2016).

### **Section 20 – Conditions for exercise of restraint order powers**

17. Section 20 amends POCA to lower the test for the grant of a restraint order (to “freeze” assets) at the criminal investigation stage, from “reasonable cause to believe” to “reasonable grounds to suspect” that the alleged offender has benefited from the criminal conduct under investigation. This brings it more in line with the test applicable to a constable’s power of arrest.

18. It also provides for certain safeguards. It allows the court to monitor the progress of the investigation when the restraint order is in place, by imposing a reporting requirement on the applicant for the order. If proceedings for the offence(s) concerned are not instituted within a reasonable time, the court must then recall the restraint order.

### **Section 21 – Continuation of restraint order after conviction quashed or verdict set aside**

19. Section 21 amends POCA so that an existing restraint order can continue in force where a conviction has been quashed, or a verdict set aside, and either the High Court of Justiciary has granted authority to bring a new prosecution, or the prosecutor has asked the court to grant such authority. Currently, where an accused is convicted in proceedings for an offence and that conviction is quashed prior to a confiscation order being made, the court is required to recall any restraint order which was granted in connection with those proceedings. The intention of this new provision is to ensure that an accused cannot dissipate any assets that are subject to the restraint order whilst awaiting retrial.

### **Section 22 – Conditions for exercise of search and seizure powers**

20. Section 22 amends POCA with regards to the conditions for the exercise by a constable of certain search and seizure powers in relation to realisable property. The first condition is that: a criminal investigation has been started with regard to an indictable offence; a person has been arrested for the offence; proceedings for the offence have not yet been started against the person; there is reasonable cause to believe that the person has benefited from conduct constituting the offence, and a restraint order is not in force in respect of any realisable property. The amendment lowers the test concerning benefit from criminal conduct from “there is reasonable cause to believe” to “there are reasonable grounds to suspect” (consistent with the amendment made by section 20). Lowering the test will enable the use of such powers earlier in investigations, which will reduce scope for the dissipation of assets.

### **Section 38(3) – Confiscation investigations**

21. Section 38(1) broadens the definition of a “confiscation investigation” for the purposes of Part 8 (investigations) of POCA. This gives effect to the commitment in the Serious and Organized 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.)” The absence of such

investigatory powers for the purpose of assisting in the satisfaction of a confiscation order adversely impacts upon law enforcement agencies' abilities to enforce a confiscation order.

22. Section 38(3) makes a consequential amendment to POCA to enable a search warrant to be obtained for the purpose of obtaining material relating to the extent or whereabouts of realisable property available for satisfying a confiscation order.

### **Consultation**

23. The Secretary of State has been consulted in accordance with section 88(2) of the 2015 Act. The Scottish Government has not undertaken any formal public consultation in relation to these Regulations. However, during the Bill's parliamentary passage, it consulted key stakeholders such as the Crown Office & Procurator Fiscal Service, the Office of the Lord President of the Court of Session and the Scottish Courts and Tribunals Service, whose views were taken into account in finalizing the provisions outlined above and in determining the timetable for implementation.

### **Impact Assessment**

24. There are no equality, children's, privacy or environmental issues arising from these Regulations. The UK Government undertook Impact Assessments during the progress of the original Bill in 2014. These can be found at – <http://services.parliament.uk/bills/2014-15/seriouscrime/documents.html>

### **Financial Effects**

25. The Cabinet Secretary for Justice confirms that no Business & Regulatory Impact Assessment (BRIA) is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government  
Safer Communities Directorate

12 January 2016