

CHAPTER 20 – PROCEEDS OF CRIME

20.01 PROCEEDS OF CRIME ACT 2002

The Proceeds of Crime Act 2002 received Royal Assent on 24 July 2002. The bulk of the new powers in relation to civil recovery, investigative powers and money laundering came into effect on 24 February 2003 and criminal confiscation on 24 March 2003. The Proceeds of Crime Act 2002 (POCA) is UK wide legislation setting up a 3-tier system for the recovery of the proceeds of crime. In criminal cases it applies only to offences committed on or after 24 March 2003. Criminal cases with offence dates before 24 March 2003 will continue to be dealt with under the Proceeds of Crime (Scotland) Act 1995 until they are completed.

Under POCA, the 3-tier system for recovering the proceeds of crime is criminal confiscation, civil recovery and taxation. There are 2 specialist units at Crown Office, namely the Proceeds of Crime Unit (POCU), within the National Casework Division (NCD), dealing with the criminal confiscation and the Civil Recovery Unit (CRU) dealing with the civil recovery aspects of POCA. Taxation is the remit of the Assets Recovery Agency set up in England, Northern Ireland and Wales under POCA. Cases suitable for taxation are referred by the Proceeds of Crime Unit to the Civil Recovery Unit and thereafter to the Asset Recovery Agency for taxation purposes, if appropriate.

20.02 POCU RESPONSIBILITIES

The POCU has responsibility for all criminal confiscation proceedings and NCD for money laundering prosecutions under POCA and the purpose of this chapter is to give general guidance only.

20.03 PROCURATOR FISCAL'S ROLE IN RELATION TO CRIMINAL CONFISCATION

The involvement of Procurators Fiscal in the confiscation process is essentially limited to the undernoted stages (the role of Area Resource Deputes is described at paragraph 20.11):-

- (1) Assisting in the identification of cases suitable for criminal confiscation.
- (2) Obtaining production orders, customer information orders, account monitoring orders or search warrants under POCA to assist with the financial profiling of the accused in criminal confiscation cases.
- (3) Assisting with the obtaining of restraint orders in Sheriff Court cases.
- (4) Liaising with the POCU regarding financial information which may be relevant to either the confiscation proceedings or to the prosecution.
- (5) Serving the Prosecutor's Statement of Information on the accused.

20.04 CRIMINAL CONFISCATION OF THE PROCEEDS OF CRIME

The aim of the criminal confiscation provisions of POCA is to allow the court to make a confiscation order requiring an accused to pay a fixed sum of money relating to the benefit obtained from his general criminal conduct in a criminal lifestyle case and from his particular criminal conduct otherwise.

A criminal confiscation order therefore remains an order to pay a fixed sum of money and is entirely separate from forfeiture of items such as cars and cash used in the commission of the crime itself. Criminal confiscation proceedings in terms of Section 92 of POCA are mandatory if certain conditions are satisfied, namely the accused is convicted of an offence or offences either solemn or summary, the court decides to order a disposal in respect of the accused and the prosecutor asks the court to act.

In the case of a *particular criminal conduct case*, the benefit relates directly to the offence or offences before the court. In the case of a *general criminal conduct/criminal lifestyle case*, by the use of statutory assumptions in POCA, the court is entitled to assume that any benefit received over the preceding 6 year period has been obtained in connection with his general criminal conduct unless the accused establishes that it was obtained legitimately. In such criminal lifestyle/general criminal conduct cases, such benefit does not require to be linked to the offence or offences of which the accused is convicted nor to any previous offences. Typically these provisions can be used against career criminals who obviously live beyond their legitimate means. Benefit in a particular criminal conduct case is, on the other hand, strictly limited to that offence and in most of those cases there will be a victim or victims who should either receive criminal compensation or who should pursue a civil claim.

The upper limit of a confiscation order is the amount of benefit which the accused has made (using the above mentioned statutory assumptions) from his general criminal conduct. This is known as the *recoverable amount*. If, however, the accused can satisfy the court that the available amount (i.e. the realisable property which he or she holds) is less than the recoverable amount, then the confiscation order will be made for the *available amount*. There are also provisions in POCA to review the order or for an order to be granted when no previous application was made if further information comes to light post conviction.

In view of the resource implications of taking confiscation proceedings, such proceedings should not be taken where there are other methods of taking back from the convicted person the benefits which he or she obtained either by compensation or forfeiture.

20.05 IDENTIFICATION OF CASES SUITABLE FOR CRIMINAL CONFISCATION

The POCU will be responsible for deciding in all cases whether a financial investigation should be carried out with a view to obtaining a confiscation order. The Police, Customs and Excise and other agencies are instructed to report directly to the unit on the question of financial investigation. There will, however, be cases where the Procurator Fiscal is of the opinion that the reporting agency has not fully considered the matter. Such cases should be immediately referred to the POCU.

Offences pass the *criminal lifestyle test* on the following grounds:-

- (1) The offence is one which is specified in Schedule 4 of POCA. This schedule covers offences of money laundering, drug trafficking, directing terrorism, people trafficking, arms trafficking, counterfeiting, intellectual property, pimping, brothel keeping and blackmail; or
- (2) The offence constitutes conduct forming part of a course of criminal activity. Section 142 of the Act states that conduct forms part of a course of criminal activity if the accused is convicted of at least 4 charges on one indictment/complaint from which he or she has benefited or in the period of 6 years prior to proceedings being instituted, the accused has been convicted on at least 2 separate occasions of an offence constituting conduct from which he or she has benefited. In both these cases the relevant total benefit must be not less than £5,000; or
- (3) The offence is committed over a period of at least 6 months and, again, the relevant benefit is not less than £5,000.

As can be seen from the above, criminal lifestyle cases are intended to target those accused who are engaged in an activity which is profit making. Once an accused falls into the category of passing the criminal lifestyle test then the statutory assumptions under POCA can be applied and his benefit is calculated from general criminal conduct by a financial analysis of his expenditure and income in the preceding 6 years.

There will also be cases where the accused may not pass the criminal lifestyle test but there is benefit from his particular criminal conduct. Such cases tend to be cases of fraud, tax evasion, embezzlement and robbery, but can also include, e.g. pollution offences and health and safety offences as benefit can include loss avoided or additional profit made as a result of the offence.

Other factors which will be taken into account in the POCU in deciding whether to initiate confiscation proceedings include:-

- (a) The probable amount of the confiscation order, although there is no artificial lower limit.
- (b) The complexity of the financial investigation.
- (c) The prospect of obtaining a conviction, although it should be borne in mind that even if a conviction is not obtained, there is a possibility of recovery of the criminal proceeds either by civil recovery or taxation.
- (d) Other more simple methods of achieving the same end, for example, compensation or forfeiture.

20.06 INVESTIGATION

Initial investigation in criminal confiscation cases will be carried out by the reporting agency, in the majority of cases by the Financial Investigation Unit of the police or Customs and

Excise (*see Appendix 1*). A financial profile will then be submitted to the POCU as the basis for preparing the Prosecutor's Statement of Information.

20.07 INVESTIGATIVE ORDERS

There are 5 types of investigative orders available under POCA for criminal confiscation cases to allow a full financial analysis to take place, namely customer information orders, account monitoring orders, production orders, search warrants and disclosure orders.

Of the 5 orders, production orders and search warrants are familiar from existing legislation, but customer information orders, account monitoring orders and disclosure orders are all new. A disclosure order can only be applied for by the Lord Advocate. The other 4 orders can be obtained in the Sheriff Court in relation to a confiscation investigation by the "appropriate person" [defined in Section 412 as the Procurator Fiscal]. Section 409 provides that a Sheriff may grant any of the four orders in relation to property outwith his area and thereafter it may be executed throughout Scotland without being backed or endorsed by another Sheriff. In practice, therefore, the orders will be obtained from the Sheriff having jurisdiction over the crime.

The POCU has responsibility for all confiscation investigations and before a Procurator Fiscal can make application for any of the four new investigative orders the POCU must have designated the case as an active confiscation investigation (in practice this will cover cases both where proceedings have already commenced and pro-active investigations).

The Scottish Executive has published a [Code of Practice](#) under section 410 of POCA to cover exercise by proper persons of the investigative powers they have under Chapter 3 of Part 8 of POCA in relation to confiscation ("Proper person" is defined in section 412 of POCA as being a police constable or customs officer). The Code of Practice is intended to ensure that the responsibilities of a proper person are set out clearly and it includes a requirement for the proper person to ensure that a record is kept of the exercise of the relevant powers.

(a) Customer Information Order

Sections 397 to 403 of POCA provide for the obtaining of customer information orders. A customer information order is an order that a financial institution must [on being required to do so by a notice in writing by a proper person] provide any customer information that it has relating to the person specified in the order. In order to obtain a customer information order there must be reasonable grounds for suspecting that in a confiscation investigation the specified person has benefited from his or her criminal conduct. There must also be reasonable grounds for believing that the customer information which may be provided in compliance with the order is likely to be of substantial value to the investigation for which it is sought and for believing that it is in the public interest for the customer information to be provided having regard to the benefit likely to accrue to the investigation if the information is obtained.

The application to obtain a customer information order is obtained *ex parte* from the Sheriff in Chambers (in a similar way to the obtaining of a search warrant). There is provision in section 403 for any person affected by the order to make application to the sheriff to discharge or vary the order.

Once a customer information order has been received then the financial institution covered by the order must be given written notice by the Procurator Fiscal detailing the terms of the order. If the financial institution requires production of evidence of authority to give the notice this must also be provided but a copy of the customer information order would amount to evidence of the authority for the written notice.

Offences

Section 400 provides for offences if a financial institution fails to comply with a requirement imposed under a Customer Information Order and further for knowing or recklessly making a false or misleading statement. The maximum penalty for non-compliance is a level 5 fine and for making a false or misleading statement an unlimited fine on indictment. These sanctions are solely financial because they are directed at non-compliant institutions rather than individuals.

(b) Account Monitoring Orders

Sections 404 to 408 of POCA provide for the obtaining of account monitoring orders.

Section 404 has the effect of requiring a financial institution to provide specified information in relation to an account (for example details of all transactions passing through the account) during the specified period and for up to a maximum of 90 days. Information should be provided in a manner and at or by the time or times stated in the order and it is expected the information would normally be provided in the form of a bank statement. An account monitoring order may only be obtained in a confiscation investigation when there are reasonable grounds to suspect that the specified person has benefited from his criminal conduct.

There must also be reasonable grounds for believing that the account information which may be provided in compliance with the order is likely to be of substantial value (whether or not by itself) to the investigation for which it is sought.

An application for an account monitoring order is obtained *ex parte* from the sheriff in chambers. Section 408 provides for variation and discharge similar to a customer information order.

(c) Disclosure Order

The new investigative power provided by a disclosure order is contained in sections 391 to 396 of POCA. To obtain a disclosure order the Lord Advocate may apply to the High Court. A disclosure order is only available in respect of a confiscation investigation. It is not available for investigations into money laundering (or indeed any other matter) because of the necessarily invasive nature of the order.

Once a disclosure order has been made the Lord Advocate may use the extensive powers throughout the investigation. The powers authorise the Lord Advocate to give notice in writing to any person that the Lord Advocate considers has relevant information and to thereafter require them to do any or all of the following, namely:

- (i) answer questions at a time specified in the notice or at once at a place specified and/or
- (ii) provide information specified in the notice by the time and in a manner so specified and/or
- (iii) produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified.

In order to obtain a disclosure order there must be reasonable grounds for suspecting that in a confiscation investigation the person specified in the application for the order has benefited from his criminal conduct, and that the information which may be provided in compliance with the requirement imposed under the order is likely to be of substantial value to the investigation for the purposes for which the order is sought. There must also be reasonable grounds for believing that it is in the public interest for the information to be provided having regard to the benefit likely to accrue to the investigation if the information is obtained.

Offences

As a disclosure order obliges persons to comply with certain requirements there are sanctions to compel such compliance. There is a maximum penalty of six months' imprisonment and/or a level 5 fine for non-compliance and/or an unlimited fine for knowingly and recklessly making a false or misleading statement.

(d) Production Orders

Sections 380 to 386 of POCA provide for the obtaining of production orders.

A production order is an order which requires the person specified in the order as appearing to be in possession or control of the material to produce it to either a constable or Customs and Excise officer to take away, or to give either a constable or a Customs and Excise officer access to it within the period stated in the order (seven days unless a sheriff decides a longer or shorter period is appropriate). A production order can be obtained in respect of various organisations, financial institutions such as banks and building societies, solicitor's offices or government departments, requiring the production of documents and records. It does not compel a person to produce or give access to materials subject to legal privilege.

In order to obtain a production order there must be reasonable grounds for suspecting that in a confiscation investigation the specified person has benefited from his or her criminal conduct. There must also be reasonable grounds for believing that the person the application has specified as being in possession or control of the material is in possession or control of it and the material is likely to be of substantial value to the investigation for which it is sought. It should be noted that the application must state that the person specified is subject to a confiscation investigation, that the order is sought for the purpose of investigation and in relation to material specified in the application and further that a person specified in the order appears to be in possession or control of the material.

A production order cannot require the production of or grant access to material that is subject to legal privilege. If in any doubt about legal privilege, advice should be obtained from the POCU.

A production order does not automatically give a right of entry on to premises, but if that is required by section 382 it can be included in the application. An application for a production order is made *ex parte* to the Sheriff in chambers.

(e) Search Warrants

Sections 387 to 390 provide for the obtaining of search warrants under POCA in certain circumstances, namely:

- (i) if a production order has not been complied with and there are reasonable grounds for believing that the material is on specified premises or
- (ii) one of two sets of conditions in section 388 applies and there are reasonable grounds to suspect in the case of a confiscation investigation the person specified has benefited from his criminal conduct.

Search warrants obtained under POCA continue in force until the end of the period of one month starting on the day on which the warrant was issued.

Style applications for investigative orders, namely customer information orders, account monitoring orders, production orders and search warrants are on SOSVI.

20.08 RESTRAINT ORDERS

Restraint orders are powers under POCA to interdict an accused and other specified persons from dealing with their realisable property in order to ensure that such assets are still available at the time criminal confiscation proceedings are being considered.

Restraint orders in respect of High Court cases are obtained in the Court of Session and applications are made by petition at the instance of the Lord Advocate. All such restraint orders are prepared by the POCU. Restraint orders in respect of Sheriff Court cases are obtained in the Sheriff Court and applications are made by summary application lodged with the Sheriff Clerk. The instance of a summary application runs in the name of the Procurator Fiscal, but again all summary applications are prepared by the POCU and forwarded to the local Procurator Fiscal's Office together with a copy of the letter of instruction to Sheriff Officers. Thereafter, a principal summary application should be lodged with the Sheriff Clerk and a hearing should be fixed in chambers as a matter of urgency. It is imperative that restraint orders are in place as soon as possible to prevent the accused disposing of his assets. The POCU will always provide full instructions to a Depute being asked to obtain a restraint order on their behalf.

In both the Court of Session and the Sheriff Court, restraint orders are obtained *ex parte*.

20.09 PLEA NEGOTIATION

The law officers have decided that criminal confiscation should **not** be included in plea negotiation.

20.10 IMPACT ON CRIMINAL PROCEEDINGS

The court must **not** take account of the confiscation order when determining the appropriate sentence except when imposing a fine or making any other order involving payment by the accused. The court may on the motion of the prosecutor proceed to sentence the accused in respect of the conviction, but shall not impose a fine or make any other order involving payment by the accused until such time as the confiscation order is made.

20.11 AREA RESOURCE DEPUTES

Area Procurators Fiscal have appointed Area Resource Deputes to provide advice and assistance in confiscation proceedings at local level. Apart from obtaining confiscation investigative orders and restraint orders and attending notional diets, all other confiscation work and, in particular, confiscation proofs in the Sheriff Court, will be conducted by Deputes from the POCU. The Area Resource Depute will be notified of all cases where such a decision has been taken in relation to cases to be prosecuted within his or her area.

20.12 FINANCIAL INFORMATION RELEVANT TO THE PROSECUTION

The financial investigation into the accused's affairs may be of assistance to the prosecution of the case. However, there may well be some information within the financial profile (in particular the current state of the accused's assets) that may be relevant evidence at the trial.

20.13 ABANDONING OR DELAYING CONFISCATION PROCEEDINGS

It may well be that after a case has been identified and the police have carried out initial enquiries regarding the assets of the accused, that there are no assets available or the assets are insufficient to justify confiscation proceedings or forfeiture would be a more appropriate disposal. In this case if the POCU decides that the case is not suitable for confiscation, the police and the local Procurator Fiscal's Office will be advised immediately.

On other occasions there may be insufficient initial information to make a decision upon confiscation - for example when it is not immediately clear to whom traced assets belong, or where there are grounds to believe that there are more assets which have yet to be located, or where there are known or suspected to be assets abroad and foreign enquiries will require to be carried out to establish whether this is in fact the case. The POCU will pursue these enquiries before a final decision is made as to suitability for confiscation.

20.14 STATEMENT OF INFORMATION BY THE PROSECUTOR AND THE STATUTORY ASSUMPTIONS

The task of proving that the convicted person has benefited from his criminal conduct is made easier by the provisions relating to, firstly, the Statement of Information by the Prosecutor in Section 101 of POCA and, secondly, in criminal lifestyle cases, the statutory assumptions in Section 96 of POCA. The Statement of Information by the Prosecutor is prepared by POCU

and forwarded to either the High Court or the Sheriff Court in order that it can be served on the accused and lodged with the Clerk of Court as soon as the accused has been convicted. The Statement of Information contains matters relevant to the court's consideration of criminal confiscation proceedings in deciding the *recoverable amount*, namely (a) whether the accused has a criminal lifestyle; and (b) the amount of his benefit from either his particular criminal conduct or general criminal conduct. The Statement of Information by the Prosecutor will also contain information about the accused's available assets (the *available amount*) in order to assist the court in ascertaining the exact amount of the confiscation order to be made. It should be noted, however, under POCA it is the accused's responsibility to satisfy the court of the available amount of assets.

Once a Statement of Information by the Prosecutor has been lodged with the court, the accused is required to indicate, within such period as the court may specify, the extent to which he or she accepts the allegations in the Statement or, if he or she does not, to indicate the basis of such non-acceptance. If he or she fails to comply with this requirement, then he or she may be treated as accepting the allegations in the Statement.

As indicated above, in criminal lifestyle cases the Crown is also assisted by assumptions under Section 96. This allows the Crown to calculate over a 6 year period the total known income of the accused. This is then deducted from the calculated expenditure (based on the net increase in assets and withdrawals from any accounts with financial institutions). The balance constitutes expenditure which cannot be explained by legitimate transactions and, using the Section 96 assumptions, is then deemed to be the amount of benefit that the accused has obtained from his general criminal conduct/criminal lifestyle.

In all criminal confiscation cases, full instructions will be provided by the POCU to any Depute in court at the point of conviction when the Statement of Information requires to be served.

In High Court cases a letter of instruction will be forwarded both to the Advocate Depute and to the High Court Unit manager.

It should be noted that if an accused is acquitted in a criminal confiscation case, the POCU must be informed immediately as the restraint order will require to be recalled and the papers considered for referral to the Civil Recovery Unit.

20.15 PROOF/ENFORCEMENT

Preparation for and conduct of the proof of the Statement of Information by the Prosecutor in criminal confiscation cases will be the responsibility of the POCU. Once a confiscation order has been made, it falls to be enforced by the Sheriff Clerk. Should the accused fail to pay the amount specified in a confiscation order within the time period, the Sheriff Clerk will fix a means court. Means court hearings will generally be covered by the POCU or Area Resource deputies. POCA gives Procurators Fiscal the right to be heard at a means court hearing. If the local Procurator Fiscal is requested by the POCU to attend at any such means enquiry court on their behalf, a full letter of instruction will be provided. It should be noted that there are provisions within the Act for the appointment of an administrator on the application of the prosecutor to realise assets to satisfy the confiscation order if the accused fails to realise assets voluntarily.

20.16 MONEY LAUNDERING

POCA created new money laundering offences. The investigation and prosecution of all money laundering cases under POCA will be undertaken by the NCD. Police and Customs and Excise have been instructed to report such cases direct to the NCD. If any such money laundering report under POCA is received by a local Procurator Fiscal, it should be forwarded to the NCD. In those cases where the main offences are general crime and the money laundering offences are less in nature, the case will be reported to the local Procurator Fiscal. Any such report should be copied to the National Casework Division. In such joint cases, the investigation of the criminal case will be undertaken by the Procurator Fiscal with the NCD providing assistance, including investigation in relation to the money laundering aspects only. It will be the responsibility of the NCD to liaise with the local Procurator Fiscal in those cases.

POCA Part 7 provides for a single set of money laundering offences applicable throughout the United Kingdom with effect from 24 February 2003. There are now 3 principal money laundering offences under POCA, namely Section 327 (concealing criminal property), Section 328 (arrangements in relation to criminal property) and Section 329 (acquisition, use and possession of criminal property). These offences apply to laundering of an accused's own proceeds of crime as well as someone else's. Criminal property is defined in POCA Section 340 as being property which constitutes a person's benefit from criminal conduct or represents such a benefit and the alleged offender knows or suspects that it constitutes or represents such a benefit. Criminal conduct in the same section is defined as conduct which constitutes an offence in any part of the United Kingdom or would constitute an offence in any part of the United Kingdom if it occurred there. As a result of these definitions, the prosecutor now only has to prove that the property the accused handled was the proceeds of criminal conduct, not that it came from a specific crime. Money laundering is the process by which criminals attempt to conceal the true origin and ownership of the proceeds of their criminal activity and ultimately to provide a legitimate cover for their source of income. There is no one method of laundering money, but there are 3 recognisable stages to the process which may comprise numerous transactions, namely:

- (a) placement - the movement of criminal funds into the economy;
- (b) layering - the undertaking of transactions to hide the origins of the funds; and
- (c) integration – creating the appearance that the funds have come from a legitimate source or have legitimate appearance.

Part 7 of POCA also places additional administrative requirements on persons and firms operating within the financial sector in relation to the disclosure of suspicious transactions in order to ascertain the presence of criminal funds at an early stage. In order to follow the financial trail fully in relation to criminal funds within the financial sector at the 3 above-mentioned stages, Part 8 of POCA provides that the same special investigative powers are available to the prosecution for use in money laundering investigations as are available in confiscation investigations, namely customer information orders, account monitoring orders, production orders and search warrants. The obtaining of these investigative orders is the responsibility of NCD.

Money Laundering Regulations 2007

The Money Laundering Regulations 1993, 2001 and 2005 have been revised and replaced by the Money Laundering Regulations 2007 which came into force on 15 December 2007. The purpose of the new regulations is to provide more detailed and enhanced obligations regarding customer due diligence for firms in the regulated sector, including lawyers, accountants, estate agents, high value goods dealers, etc. The regulations impose requirements of training, anti-money laundering systems, identity checks and procedures. It is an offence to fail to comply with the regulations.

Any enquiries in relation to money laundering matters under POCA or the 2007 regulations should be referred to the NCD.