

POLICING AND CRIME ACT 2009

EXPLANATORY NOTES

TERRITORIAL EXTENT AND APPLICATION

Part 5 – Proceeds of Crime

Confiscation

Section 51 Recovery of expenses etc:

279. Sections 48 and 50 of the Proceeds of Crime Act 2002 (POCA) provide for the appointment of management and enforcement receivers respectively. Management receivers manage property which is subject to a restraint order; enforcement receivers dispose of property to satisfy a confiscation order. Under section 55 of POCA, following the making of a confiscation order the remuneration and expenses of management and enforcement receivers, who are appointed by the courts in England and Wales, are payable from sums recovered in satisfaction of the confiscation order. Previously receivers from the Crown Prosecution Service and Revenue and Customs Prosecutions Office were excluded from benefiting from these provisions by virtue of section 55(7) of POCA. Section 51 amends section 55 and enables members of staff of these organisations, along with accredited financial investigators and members of staff of other departments and public bodies specified in new subsection (8), to deduct their expenses from recovered sums when they are appointed as receivers. They may not deduct their remuneration costs, as these are already met from public funds.
280. Sections 196 and 198 of POCA make provision for the appointment of management and enforcement receivers in Northern Ireland. Section 51 amends section 203 of POCA to make similar provision for Northern Ireland as regards recovery of expenses as the amendments to section 55 do for England and Wales.
281. New section 55(10) provides that an accredited financial investigator under these provisions means one who falls within a description specified in an order made by the Secretary of State under section 453 of POCA.

Section 52 Power to retain seized property: England and Wales

282. Under POCA, a restraint order has the effect of freezing property that may be liable to confiscation. A confiscation order is a court order requiring a person to pay an amount equal to the financial benefit of what they have obtained from their crimes or criminal lifestyle. A restraint order provides that any persons who know of the order are prohibited from dealing with or disposing of specified property, but without this amendment, it does not provide for a general power to retain property.
283. *Section 52* amends the restraint order provisions of POCA to provide that an appropriate officer (as defined in new section 41A(3)) can continue to retain property that has been or may be seized under a specified seizure power if that property is also subject to a restraint order. Property which was seized, for example, as evidence, and which is subject to a restraint order may therefore continue to be retained even when the evidential purpose for retention no longer exists.

284. The specified seizure powers are those contained in Parts 2 and 3 of the Police and Criminal Evidence Act 1984 (PACE), and certain POCA powers. By way of example, one of the most commonly used general powers of seizure for police constables in this context is section 19 of PACE. By virtue of an order under section 114(2) of that Act this power also applies to officers of HM Revenue and Customs. It allows for seizure of property which the officer has reasonable grounds for believing has been obtained in consequence of the commission of an offence or is evidence in relation to an offence under investigation.
285. Once property has been seized under section 19 of PACE it may be retained under section 22 of PACE for “so long as is necessary in all the circumstances”. Such property should be returned to its owner once it is no longer required for the purposes set out in section 22, which include for use as evidence. Property which is retained under section 22 for use as evidence at a criminal trial or for forensic examination or criminal investigation should also be returned where a photograph or copy of the seized property would be sufficient for those purposes. Without this amendment, there would be no specific power to continue to retain property that could be required to satisfy a confiscation order following conviction.
286. The new section 41A of POCA, inserted by section 52 also provides for the authorisation to retain property which was seized under two POCA seizure powers. These are section 47C (seizure to prevent property being made unavailable to satisfy a confiscation order, inserted by new section 55), and section 352 (search and seizure warrants) of POCA. The authorisation may also extend to property which is produced in compliance with a production order under section 345 of POCA.
287. The Secretary of State may by order amend the list of relevant seizure powers.
288. If a restraint order is discharged or varied so that property is no longer detained, the relevant law enforcement agency or prosecutor can appeal that decision. New section 44A provides for the continued detention of property while an appeal under section 43 or 44 of POCA is pending or remains possible.

Section 53 Power to retain seized property: Scotland

289. **Section 53** provides comparable provisions for Scotland to those set out in section 52 for England and Wales. The definition of “appropriate officer” is different, as is the definition of “relevant seizure power”.

Section 54 Power to retain seized property: Northern Ireland

290. **Section 54** provides comparable provisions for Northern Ireland to those set out in section 52 for England and Wales. The definition of “relevant seizure power” is slightly different.

Section 55 Search and seizure of property: England and Wales

291. **Section 55** inserts new sections 47A to 47S into POCA. These new sections provide for search and seizure powers in England and Wales to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. The property may be seized in anticipation of a confiscation order being made. The seizure power is subject to oversight. If a confiscation order is made, the property may be sold in order to satisfy the order.
292. New section 47A of POCA sets out who may exercise the powers. These are an officer of Revenue and Customs, a constable and an accredited financial investigator. An accredited financial investigator is an investigator who has been trained and accredited under section 3 of POCA, and an order made under section 453 of POCA may specify the type of accredited financial investigators who can exercise these powers.

*These notes refer to the Policing and Crime Act 2009
(c.26) which received Royal Assent on 12 November 2009*

293. There are a number of pre-conditions for the exercise of these powers. These are set out in section 47B and cover the situation in which an individual is arrested or proceedings are begun against him or her for an indictable offence, and there is reasonable cause to believe that he or she has benefited from the offence. They also cover the situation where an application in respect of further confiscation proceedings has been made or is to be made.
294. The property may be seized if there are reasonable grounds to suspect that it may otherwise be made unavailable for satisfying a confiscation order or that the value of the property may be diminished. The seizure power applies to 'realisable property'. The definition of this term is found in section 83 of POCA and covers any free property held by the defendant or by the recipient of a tainted gift. ('Free property' is property not subject to the forfeiture, detention and other orders specified in section 82 of POCA and 'tainted gift' is defined in section 77 of POCA). Section 47C(2) however provides that cash and exempt property may not be seized. Section 47C(4) defines exempt property and includes items necessary for the defendant's personal use in his or her business, employment or vocation, and clothing, bedding, furniture, household equipment and other provision necessary for satisfying the basic domestic needs of the defendant and his or her family. Cash may not be seized under this power because there is already a separate regime for the seizure of cash in Chapter 3 of Part 5 of POCA.
295. New sections 47D to 47I provide the search powers necessary to support the power to seize property and set out safeguards.
296. The search power for premises is only exercisable on private premises where the officer has lawful authority to be present. This could be, for example, when a constable is exercising his powers of entry under the Police and Criminal Evidence Act 1984 or when an officer of Revenue and Customs is exercising such powers under the Customs and Excise Management Act 1979. An officer could also be lawfully present on private premises if he is there at the invitation of the owner. The officer may carry out a search of the premises if he has reasonable grounds for suspecting that property may be found there which the officer intends to seize under section 47C. This means that the officer has to have reasonable grounds for suspecting that the property may otherwise not be available for satisfying a confiscation order or that the value of the property may be diminished.
297. By virtue of new section 47E, the search powers include the power to search a person. However, this power does not extend to requiring a person to undergo a strip search (subsection (5)). The officer may carry out a search of a person if he has reasonable grounds for suspecting that the person is carrying property that may be seized under section 47C.
298. New section 47F provides the power to search vehicles. The provision does not contain a power of entry; rather it allows the officer to require the person who it appears to him is in control of the vehicle to permit entry to and a search of the vehicle. This power applies, in brief, where the vehicle is in a public place or within the environs of a dwelling that the person does not reside in and the vehicle is there without the permission of another person who resides there. Failure to permit a search may amount to an offence of obstruction. The officer may carry out a search of a vehicle if he has reasonable grounds for suspecting that the vehicle contains property that may be seized under section 47C. New section 47F(5) provides that the vehicle may be detained for so long as is necessary for the officer to exercise the search power.
299. Each of the search powers in new sections 47D to 47F and the seizure power in new section 47C may only be exercised with the 'appropriate approval' described in new section 47G unless, in the circumstances, it is not practicable to obtain such approval in advance. New sections 47G to 47I make provision in relation to this appropriate approval. Appropriate approval is the prior approval of a justice of the peace or, if that is not practicable, that of a senior officer (as defined in new section 47G(3)). If judicial approval is not obtained prior to a search and no property is seized, or any seized

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property is not detained for more than 48 hours, an appropriate officer must prepare a written report and submit it to an independent person appointed by the Secretary of State (the “appointed person”). The report must detail why the officer considered that he had the power to carry out the search and why it was not practicable to obtain judicial approval of the search. In all cases if the property is detained for more than 48 hours, it will be subject to judicial oversight.

300. Section 47I provides that the appointed person to whom the reports are submitted is under an obligation to submit an annual report to the Secretary of State drawing general conclusions about the matters reported to him or her and making any appropriate recommendations. This report will be laid before Parliament and be published.
301. Section 47J provides that the initial detention of seized property is for 48 hours (not including weekends, Christmas Day, Good Friday or bank holidays).
302. Section 47K provides for the further detention of the property pending the making of a restraint order which authorises the detention or pending the exhaustion of any related avenue of appeal. Section 47L provides for the subsequent detention of seized property in cases where the property is already subject to a restraint order but the restraint order does not include provision authorising detention of the property. In these cases, new section 47L allows the property to be detained if an application is made for the variation of the restraint order to include such provision within 48 hours of seizure (or such longer period as may be authorised under new section 47M). Applications to vary restraint orders are made to the Crown Court.
303. If the seized property is not subject to a restraint order, and no application has been made for a restraint order authorising its detention, section 47M provides that a magistrates’ court may by order authorise the further detention of the property. The magistrates’ court may make such an order if satisfied of the matters listed in subsection (2). Section 47N allows the law enforcement agency, or any person affected by the order (including any third party claiming to have an interest in the property) to apply to the magistrates’ court for the discharge or variation of the detention order. Section 47O provides a right of appeal to the Crown Court to the law enforcement agency against a decision of the magistrates’ court not to make a detention order. It also provides a right of appeal to that agency or any person affected by the order against the decision of the magistrates’ court on an application to vary or discharge a detention order.
304. In cases where the property is subject to a restraint order any person affected by the continued detention may apply for a variation or discharge of the order under section 42(3) of POCA. An appeal may be made against the decision of the Crown Court to the Court of Appeal under section 43.
305. Section 47P provides for the continued detention of property while an appeal by the law enforcement agency under section 47O is pending or remains possible.
306. Section 47Q provides that hearsay evidence is admissible in proceedings relating to the detention of property before a magistrates’ court. Section 46 of POCA already provides for hearsay evidence to be admissible in restraint proceedings.
307. Section 47R imposes an obligation on an appropriate officer to release detained property if he or she is satisfied that the conditions for the seizure no longer apply. Property can be seized if, for example, an individual has been arrested or proceedings have begun against him or her and there is reasonable cause to believe that he or she has benefited from the offence. In every case, the officer must also have reasonable grounds to suspect that the property may be made unavailable for satisfying a confiscation order or that the value of that property may be diminished. If these conditions cease to be met at any time during the detention of the property, the property must be released unless there is another power (perhaps under other legislation) authorising its continued detention
308. Section 47S requires the Secretary of State to publish a Code of Practice setting out how the powers are to be exercised.

Section 56 Search and seizure of property: Scotland

309. **Section 56** provides comparable provisions for Scotland to those set out in section 55 for England and Wales. The persons who may exercise the powers are an officer of Revenue and Customs and a constable. In place of a Code of Practice, section 127R provides that the Lord Advocate may issue guidance on the exercise of the powers.

Section 57 Search and seizure of property: Northern Ireland

310. **Section 57** provides comparable provisions for Northern Ireland to those set out in section 55 for England and Wales.

Section 58 Power to sell seized personal property: England and Wales

311. **Section 58** inserts new sections 67A to 67D of POCA. New section 67A provides that property that has been seized in England and Wales by an appropriate officer under a relevant seizure power, or which has been produced to such an officer in compliance with a production order under section 345 of POCA, may be sold to meet a confiscation order in certain circumstances. The definition of an appropriate officer is set out in new section 41A(3) (as inserted by section 52 of the Act). The definition of a relevant seizure power is set out in new section 41A(4). The magistrates' court may authorise an appropriate officer to sell the seized property to satisfy a confiscation order, if the seized property belongs to a person against whom a confiscation order has been made, the time to pay that order has expired, and provided that an enforcement receiver has not been appointed in relation to the property.
312. The new section 67A uses the terminology "personal property" rather than "property" as used elsewhere in related provisions. The reference to "personal property" excludes cash that has been seized under section 19 of PACE (see new section 41A(4)(c) of POCA, as inserted by section 52, which provides that section 19 PACE will be a relevant seizure power for the purposes of the new provisions). Cash seized under section 19 of PACE can be dealt with under section 67 of POCA.
313. New section 67B enables the appropriate officer to claim the costs of storing and selling the property from the sums paid in satisfaction of a confiscation order. The amount to be paid in relation to these costs will be determined by the magistrates' court.
314. New section 67C introduces a right of appeal to the Crown Court against a magistrates' court's order authorising the sale of the property. The right of appeal is available to third parties affected by the order but not to the person against whom the confiscation order is made. There is also a right of appeal for an appropriate officer to appeal against a magistrates' court's decision not to authorise the sale of the property. In addition the officer may appeal against a decision by the magistrates' court not to award costs or against the amount of costs awarded under new section 67B.
315. New section 67D specifies how sums from the sale of the property authorised under new section 67A are to be disposed of by the appropriate officer. Firstly, they must meet the expenses of an insolvency practitioner that are payable under section 432 of POCA. They must then be used to meet any payments directed by the court and the remainder must be remitted to the designated officer of the magistrates' court responsible for enforcing the confiscation order. Where the confiscation order has been fully paid and the officer has any sums remaining, new section 67D(3) requires him to distribute that money as directed by the court.
316. **Section 58(5)** amends section 55(4) of POCA to provide for the payment to an appropriate officer of the costs of storage and sale, as directed by the court under new section 67B, to be paid from sums received by the designated officer on account of the amount payable under a confiscation order.

Section 59 Power to sell seized personal property: Scotland

317. [Section 59](#) provides comparable provisions for Scotland to those set out in section 58 for England and Wales.

Section 60 Power to sell seized personal property: Northern Ireland

318. [Section 60](#) provides comparable provisions for Northern Ireland to those set out in section 58 for England and Wales.

Section 61 Payment of compensation

319. Section 72 of POCA provides for compensation to be paid to a person whose property has been affected by the enforcement of confiscation legislation. Compensation is only payable where an investigation is started but proceedings are never brought, or the defendant is not convicted of an offence, or the conviction is quashed, or the defendant is pardoned. In all cases there must have been a serious default on the part of one or more of the enforcement authorities specified in section 72(9) for compensation to be payable. Section 61 amends sections 72(9) of POCA, and the corresponding provisions for Scotland and Northern Ireland: sections 139(9), and 220(9) of POCA to add SOCA to the list of enforcement authorities that are liable to pay compensation. It also amends section 72(9) and 220(9) to add to the list certain bodies that have accredited financial investigators on their staff.

Civil recovery

Section 62 Limitation

320. [Section 62](#) provides for the limitation period for actions for the civil recovery of property obtained through unlawful conduct under Chapter 2 of Part 5 of POCA to be extended from 12 years to 20 years by amendment of section 27A(2) of the Limitation Act 1980 which applies in England and Wales. The new limitation period will apply to causes of action which accrued before the commencement of this section, but not if those causes of action were time-barred by the previous 12 year limitation period.
321. [Section 62](#) makes equivalent provision to the legislation applicable to Scotland and Northern Ireland.

Section 63 Power to search vehicles

322. Chapter 3 of Part 5 of the Proceeds of Crime Act 2002 (POCA) is concerned with the recovery of cash in summary proceedings. Section 294 of POCA enables a customs officer, a constable or an accredited financial investigator to seize cash if he has reasonable grounds for suspecting that the cash is recoverable property (property obtained through unlawful conduct) or intended for use in unlawful conduct. The cash must not be less than the “minimum amount” which is defined at section 303. It is currently set at £1000 (see [The Proceeds of Crime Act 2002 \(Recovery of Cash in Summary Proceedings: Minimum Amount\) Order 2006 \(SI 2006 No. 1699\)](#)).
323. In order to support the powers to seize cash, section 289 of POCA provides a power to search persons and premises for cash. The power to search premises is only exercisable where the officer has lawful authority to be present under other legislation or is present with the occupier’s or owner’s permission. In respect of a constable, he could be exercising his powers of entry under the Police and Criminal Evidence Act 1984. Section 289 of POCA does not include a power to forcibly enter premises or to demand entry from the owner or occupier.
324. The definition of “premises” for this search power includes “vehicle” – see section 316 of POCA read with section 23 of the Police and Criminal Evidence Act 1984. An officer therefore has no power to force entry into a vehicle. Section 63 inserts provisions into

section 289 of POCA so that an officer can require the search of a vehicle if he has reasonable grounds for suspecting there is cash in the vehicle which is recoverable property or intended for use in unlawful conduct and that it is not less than the minimum amount. The power to search can only be exercised where there is an identifiable person in control of the vehicle and that person (the suspect) is in or in the vicinity of the vehicle.

325. The new provision does not contain a power to force entry into a vehicle; rather, new section 289(1D) provides that the officer can require the person accompanying the vehicle to permit entry and allow a search of that vehicle.
326. New section 289(1C) provides that the power is not exercisable where the vehicle is on certain categories of private property.

Section 64 Detention of Seized Cash

327. Once cash has been seized under section 294 of POCA, it may be detained initially for a period of 48 hours (section 295(1)). A magistrate (or a sheriff in Scotland) may make an order for continued detention of the cash if satisfied that there are reasonable grounds for the officer's suspicion and that the continued detention is justified for the purposes of investigating its origin or intended use. The magistrate may also make an order for continued detention if consideration is being given to bringing criminal proceedings, or if such proceedings have been commenced and not concluded. Section 295(2)(a) of POCA originally provided that the magistrate could order the detention of seized cash for a three month period. Section 64 amends this by providing that the period of detention may be extended for six months. The maximum period during which seized cash may be detained remains at two years from the date of the first order.

Section 65 Forfeiture of detained cash

328. POCA gives powers to the police, officers of HM Revenue and Customs and certain accredited financial investigators to seize and detain cash derived from or intended for use in unlawful conduct and to secure its forfeiture by order of the magistrates' court, or sheriff in Scotland. Section 66 introduces new provisions to enable law enforcement agencies to forfeit detained cash without a court order in uncontested cases.
329. **Section 65** inserts new sections 297A -297G into POCA. Where a cash detention order has been made under section 295(2) of POCA, new section 297A(2) provides for a senior officer to give a forfeiture notice to any person.
330. Subsection (3) provides that the Secretary of State must make regulations about how a notice is to be given. Subsections (6) and (7) provide a definition of a senior officer. Subsection (8) provides that the notice for these purposes is to be referred to as a forfeiture notice.
331. New section 297B deals with the content of a forfeiture notice. Subsection (1) sets out what must be contained in a forfeiture notice. It also requires the notice to specify a period for objecting and an address for objections.
332. Subsection (2) provides that the period for lodging a objection to the proposed forfeiture must be at least 30 days from the date after the notice was given.
333. New section 297C sets out the effect of giving a forfeiture notice. Once a notice is given subsection (2) provides for the cash to be detained until it is forfeited under the section, or the notice lapses, or the cash is released. The notice lapses if an objection is made within the period for objecting. If no objection is made within that period, and the notice has not lapsed, the cash is forfeited, without the need for any additional court process.
334. New section 297D makes provision for the further detention or the release of cash following the lapse of a forfeiture notice.

335. Under section 297E, a person aggrieved by forfeiture under this procedure has the right to apply to the magistrates' court to set aside the forfeiture of the cash or any part of it. Such an application must be made within 30 days of the day on which the period for objecting ended, although an out of time application may be given permission by the court in exceptional circumstances.

Detained cash investigations

Section 66 Transfer of jurisdiction to Crown Court

336. Sections 75 to 77 of, and Schedule 10 to, the Serious Crime Act 2007 enabled the production order and search and seizure warrant provisions in Part 8 of POCA to be used for investigating the provenance or intended destination of cash seized under Chapter 3 of Part 5 of POCA (which provides for the recovery of cash in summary proceedings). The amendments created a new type of investigation, namely a detained cash investigation. This was additional to the other types of investigation under POCA, namely a confiscation investigation, civil recovery investigation and money laundering investigation. Detained cash investigation powers assist in the preparation of a case for forfeiting the cash before the magistrates' court in England and Wales and Northern Ireland or the Sheriff in Scotland.
337. Applications for a production order and a search and seizure warrant for a detained cash investigation in England, Wales and Northern Ireland are made to a judge of the High Court (section 343 of POCA, as amended by paragraph 3 of Schedule 10 to the Serious Crime Act).
338. Section 66 transfers the jurisdiction for applications relating to detained cash investigations from a judge of the High Court to a judge entitled to exercise the jurisdiction of the Crown Court in England and Wales, which includes Circuit judges, Recorders and High Court judges in their Crown Court capacity. In Northern Ireland a Crown Court judge will hear such applications. The jurisdiction will remain with the sheriff in Scotland.