

SERIOUS CRIME ACT 2015

EXPLANATORY NOTES

TERRITORIAL EXTENT

Part 1: Proceeds of Crime

Commentary on Sections

Chapter 2: Scotland

Confiscation

Section 15: Restitution order and victim surcharge

80. This section makes similar provision for Scotland in Part 3 of POCA to that made for England and Wales by the amendments to section 13 of POCA by section 6. The effect is to provide for the payment of the victim surcharge and the amount due under a restitution order to have priority call on monies paid under a confiscation order. A restitution order can be made under section 253A of the Criminal Procedure (Scotland) Act 1995 (this section is not yet in force) by the criminal courts in Scotland when a person has been convicted of an offence under section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (police assaults etc) and the court considers it is appropriate that the accused pays a sum into a Restitution Fund (which is used to provide support services to the victims of this particular offence). A victim surcharge order is made under section 253F of the Criminal Procedure Act 1995 by the criminal courts in Scotland in certain circumstances and requires the accused to pay an amount into the Victim Surcharge Fund (which is used to provide support services to the victims of crime). The intention of these provisions is to ensure that, should the accused have insufficient means to satisfy all the financial orders against him or her in full, any amounts owed to the victims of crime will take priority over the amounts owed to the government.

Section 16: Orders for securing compliance with confiscation order

81. This section inserts new sections 97B to 97D into Part 3 of POCA which make similar provision in respect of Scotland for the making of “compliance orders” by the courts for securing compliance with confiscation orders to that contained in new sections 13A and 13B, as inserted by section 7, in relation to England and Wales. The criminal courts in Scotland will only be able to impose a compliance order on an accused person and will not be able to impose such an order on third parties. New section 97B(6) of POCA provides that for the purposes of any appeal or review, a compliance order in Scotland will be treated as a sentence.

Section 17: Compliance orders: appeals by prosecutor

82. This section makes amendments to the Criminal Procedure (Scotland) Act 1995 consequential on the provisions in section 16. The amendments confer on the Lord Advocate and procurator fiscal (as the prosecutor) a right of appeal against the decision

of a court to make or not to make a compliance order and a right of appeal against the terms of a compliance order if these are considered to be too lenient.

Section 18: Accused persons unlawfully at large

83. This section amends sections 111 and 112 of POCA which make similar provision for Scotland in respect of the making of confiscation orders where the defendant has absconded to that contained in sections 27 and 28 of POCA in relation to England and Wales. The amendments to section 111 and 112 have similar effect to those made to sections 27 and 28 by section 9 of the Act.

Section 19: Enforcement of confiscation orders

84. Section 118 of POCA makes similar provision for Scotland in relation to default sentences as section 35 does for England and Wales. Section 118 enables a court (the High Court of Justiciary or the sheriff) to set a default sentence for the accused to serve if he or she fails to pay the amount due under the confiscation order. It achieves this outcome by treating an unpaid confiscation order as if it were an unpaid fine and applying the fine enforcement provisions in section 221 of the Criminal Procedure (Scotland) Act 1995. Section 221(3) of that Act makes a fine unenforceable once a default sentence has been served. This provision does not apply when an administrator is appointed in relation to a confiscation. Consequently, where a person serves a default sentence following his or her failure to pay the amount due under a confiscation order the offender's liability to pay this amount is extinguished; this contrasts with the position in England and Wales. *Subsection (1)(a)* amends section 118(2)(h) of POCA so as to disapply section 221(3) of the Criminal Procedure (Scotland) Act 1995. As a result an offender will be required to pay the amount due under a confiscation order if he or she defaults on payment and serves a default sentence. Accordingly, the liability of the accused to pay the amount due under a confiscation order will no longer be extinguished by serving a prison sentence for defaulting on payment.
85. *Paragraph 42 of Schedule 4* makes a consequential repeal of section 118(2)(k) of POCA so as to disapply section 224 of the Criminal Procedure (Scotland) Act 1995. That section requires warrants of imprisonment for non-payment of a fine to specify a date for the discharge of the liability to pay the fine (in practice once the default sentence has been served) notwithstanding the fact that it has not been paid. That requirement will no longer operate in relation to default sentences for the non-payment of a confiscation order. *Paragraph 45 of Schedule 4* makes a further consequential repeal of section 153(1)(b) of POCA, which provides that a confiscation order is satisfied where the accused against whom it was made has served a default sentence for non payment of the order.
86. *Subsection (1)(b)* makes similar amendments to section 118 of POCA in relation to default sentences to that made to the England and Wales provision in section 35 of POCA by section 10(1) and (2) (see new section 118(2A) and (2B)). *Subsection (1)(b)* also inserts new subsections (2C) and (2D) into section 118 to provide that where a confiscation order is made by a court in England and Wales or in Northern Ireland but falls to be enforced in Scotland, the criminal courts in Scotland, when sentencing the person for non payment of the confiscation order, would apply the respective default sentences set out in new sections 35(2A) and 185(2A) of POCA (as inserted by sections 10 and 32).
87. *Subsection (2)* makes consequential amendments to section 459 of POCA as a result of the new order-making power provided for in new section 118(2B) of POCA as inserted by subsection (1)(b). Paragraph (a) disapplies, for the purposes of the new order-making power, section 459(3) of POCA which provides for any power under POCA to make subordinate legislation to be exercisable by statutory instrument. The power conferred on the Scottish Ministers to make an order under new section 118(2B) will be exercisable by Scottish statutory instrument in accordance with the provisions

of the Interpretative and Legislative Reform (Scotland) Act 2010. Paragraphs (b) and (c) amend section 459 of POCA so as to provide that the new order-making power is subject to the affirmative procedure in the Scottish Parliament.

88. *Subsection (3)* makes a consequential amendment to section 219(8) of the Criminal Procedure (Scotland) Act 1995 which requires a sheriff to remit a case to the High Court for sentencing where he or she considers that the default sentence appropriate for that case is beyond his or her normal sentencing powers (namely, a maximum sentence of five years' imprisonment).

Section 20: Conditions for exercise of restraint order powers

89. This section makes parallel amendments to sections 119 and 120 of POCA, which set out the circumstances under which a restraint order may be made in Scotland, to those made by section 11 to sections 40 and 41 of POCA, which set out the circumstances under which a restraint order may be made in England and Wales.

Section 21: Continuation of restraint order after quashed conviction

90. This section makes a similar amendment to section 121 of POCA to that made to section 42 of that Act by section 12 to provide for the continuation of a restraint order following the quashing of a conviction until the start of proceedings for a retrial.

Section 22: Conditions for exercise of search and seizure powers

91. This section makes similar amendments to the search and seizure powers in sections 127B and 127G of POCA to those made by section 13 to sections 47B and 47G of that Act.

Civil recovery

Section 23: Prohibitory property orders: PPO receivers

92. This section amends POCA to provide, in relation to Scotland, for a new type of management receiver (a "PPO receiver") in civil recovery proceedings whose only function will be to manage property subject to a prohibitory property order ("PPO"). This is distinct from the role of an interim administrator (provided for in sections 256 to 265 of POCA) who has the additional roles of carrying out an investigation of the property which he or she manages and reporting findings to the enforcement authority and the court. The new PPO receiver will have no investigation function and so will have no influence on the progress or final outcome of the case. Accordingly, the role does not need to be independent and therefore can be performed by a member of staff of the enforcement authority that is pursuing the civil recovery case. The provisions in new sections 255G to 255I of POCA, inserted by *subsection (2)*, which provide for PPO receivers broadly mirror those in sections 245E to 245G of POCA (inserted by section 83 of the Serious Crime Act 2007) which make provisions for management receivers in respect of property freezing orders in England and Wales and Northern Ireland.
93. New section 255G of POCA confers on the Court of Session a discretionary power, exercisable on application by the enforcement authority (namely the Crown Office on behalf of the Scottish Ministers), to appoint a PPO receiver in respect of any property to which a PPO applies. Whilst the enforcement authority will generally give notice of an application, new section 255G(3) enables it to make an application without having to give notice in certain circumstances. Such a notice is called an *ex parte* application. An *ex parte* application may be appropriate where management powers are to be sought from the outset of the investigation, where the initial application for the PPO can be heard *ex parte* in chambers to avoid alerting potential parties who might then seek to conceal or dispose of the relevant property. The enforcement authority must nominate,

*These notes refer to the Serious Crime Act 2015 (c.9)
which received Royal Assent on 3rd March 2015*

in its application, a suitably qualified person for appointment as a PPO receiver (new section 255G(4)).

94. New section 255H provides for the powers of PPO receivers. Such powers will be determined by the court on a case by case basis, but will generally be any of the powers in paragraph 5 of Schedule 6 to POCA, namely:

- “(1) Power to manage any property to which the order applies.
- (2) Managing property includes—
 - (a) selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes,
 - (b) where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business,
 - (c) incurring capital expenditure in respect of the property.

In addition, the Court of Session has the discretionary power to authorise or require a PPO receiver to take whatever other steps the court considers to be appropriate in connection with the management of the property (new section 255I(2)(b)).

95. New section 255I confers on the Court of Session a discretionary power to give directions as to the exercise of the functions of a PPO receiver (new section 255I(1)) having heard any representations by the persons set out in new section 255I(2). The Court of Session may also vary or recall (that is revoke) any order or directions made under new sections 255G to 255I after again having heard any representations by the persons set out in new section 255I(4).

96. *Subsection (3)* inserts new section 282CA into POCA which makes analogous provision for PPO receivers to that contained in section 282C of that Act. Section 282C of POCA (inserted by paragraph 6 of Schedule 18 to the Crime and Courts Act 2013) makes provision for the enforcement of property freezing orders, interim receiving orders and interim administration orders which have effect in relation to property overseas. In particular, section 282C provides that, where a property freezing order made by the High Court of England and Wales or of Northern Ireland has effect in relation to property, the appointed management receiver may send a request to the Secretary of State for assistance abroad if he or she believes that the property is in a country outside the UK.