

EXPLANATORY MEMORANDUM TO
THE CRIMINAL LEGAL AID (CONTRIBUTION ORDERS) (AMENDMENT)
REGULATIONS 2015

2015 No. 710

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 These Regulations make amendments to the Criminal Legal Aid (Contribution Orders) Regulations 2013 (S.I. 2013/483) (the “Contribution Orders Regulations”) to implement a policy that will enable assets restrained under Part 2 of the Proceeds of Crime Act 2002 (“POCA”) to be taken into account when calculating criminal legal aid contributions.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Context**
 - 4.1 Under section 16 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 the Director of Legal Aid Casework (“the Director”) may determine that an individual is eligible for representation for criminal proceedings in the Crown Court (“representation”). Under the Contribution Orders Regulations the Director must determine whether an individual in receipt of such representation must make a contribution towards the cost of the individual’s representation from the individual’s income and/or capital. Under regulation 28 of the Contribution Orders Regulations the Director must determine the value of an individual’s specified capital. Specified capital is defined in regulation 2 of the Contribution Orders Regulations and covers any interest in real property; money in a bank or building society account; money in a National Savings Bank account; national savings certificates; Premium Savings Bonds; property in an account to which the Individual Savings Account Regulations 1998 (S.I. 1998/1870) apply; property in a personal equity plan; property in a unit trust scheme; any other lump sum investment; shares and stock.
 - 4.2 At present, under regulation 28(3) of the Contribution Orders Regulations the Director must not take account of assets that are subject to a restraint order when determining the value of an individual’s specified capital. These regulations will amend regulation 28 of the Contribution Orders Regulations to provide that the Director may take account of assets that are the subject of a restraint order under

POCA. These regulations amend the Contribution Orders Regulations to provide that a payment out of restrained assets is only due once a confiscation order under Part 2 of POCA has been discharged or satisfied.

4.3 These regulations are one of two instruments that are needed to implement the policy of taking capital contributions from restrained assets. The other instrument is the Restraint Orders (Legal Aid Exception and Relevant Legal Aid Payments) Regulations 2015 (laid before Parliament by the Home Office on 2 February 2015 and subject to Parliamentary approval) (the “Restraint Order Regulations”). A restraint order under section 41 of POCA prohibits a specified person from dealing with realisable property held by that person, subject to certain exceptions. Section 46 of the Crime and Courts Act 2013 (“CCA”) amends section 41 of POCA to require that all restraint orders contain a legal aid exception, which enables relevant legal aid payments (in essence, payments which are required to be made under the Contribution Orders Regulations in relation to representation provided to an individual for an offence to which the restraint order is related) to be made out of restrained assets, subject to any restrictions prescribed by the Secretary of State. The Restraint Order Regulations prescribe such a restriction.

4.4 Section 47 of the CCA confers on the Secretary of State the power, by regulations, to make provision about the making of relevant legal aid payments, including the power to modify a function and modify provisions made by or under any enactment. Part 3 of the Restraint Order Regulations makes such provision. In particular, it provides that in specified circumstances, a restraint order will remain in place after a confiscation order made under Part 2 of POCA has been discharged or satisfied to enable relevant legal aid payments to be collected from such restrained assets.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 Part 2 of POCA provides for the restraint and subsequent confiscation of the proceeds of crime in England and Wales. A confiscation order may be made following a criminal conviction for an amount equal to the defendant’s benefit from their crimes. In order to preserve assets so they are available to meet a confiscation order, the court can make a restraint order against some or all of a

defendant's property. A restraint order can be made from the beginning of a criminal investigation.

- 7.2 Since the implementation of POCA it has not been possible to use restrained assets for legal expenses related to the offence to which the restraint order is connected. As a consequence representation is funded by criminal legal aid and there is no requirement to make a contribution from income or capital from restrained assets. This has led to a public perception of unfairness in the system as seemingly wealthy defendants are provided with legal aid without a contribution and this has attracted significant media attention. While it is often overlooked that legal aid is granted because the defendant is initially prevented from using any assets placed under restraint by a court and, if convicted, is stripped of those assets under a confiscation order, it is clear that any person who can make legal aid payments should be required to do so.
- 7.3 The ongoing legal aid reform programme supports the objective of ensuring that the criminal legal aid system is credible. To address this perceived unfairness Sections 46 and 47 of the CCA were introduced to enable repayment of legal aid from restrained assets.
- 7.4 The amendments in these regulations to the Contribution Orders Regulations will allow the Director to take account of restrained assets when deciding on the amount of a person's capital assets. Only the rules on calculating assets for a capital contribution order are amended. The rules on contributions from income remain the same. Only assets that are subject to a restraint order under POCA can be taken into account and not assets that are restrained in any other way. Thus, restraint orders under legislation that pre-dates POCA are not included in this policy change.
- 7.5 If a capital contribution order requires payment from restrained capital that payment will only be due under the amendments made by these regulations if (a) the individual concerned is the subject of a confiscation order under Part 2 of POCA and (b) that confiscation order has been discharged or satisfied. This provision on payment is intended to marry up with the conditions set out in Part 2 of the Restraint Order Regulations. Those conditions are that the a confiscation order has been made against the person in proceedings for an offence to which the relevant legal aid payment relates, and the confiscation order has been discharged or satisfied.
- 7.6 To further improve the Director's ability to collect contributions from POCA restrained assets the Restraint Order Regulations provide that the restraint order will remain in place if certain conditions are satisfied. These conditions are that a restraint order with a legal aid exception has been imposed; a confiscation order has been made against the person specified in the restraint order and has been satisfied or discharged; that both the restraint order and the confiscation order are imposed entirely or partly for the same offence ("the relevant offence"); there is

realisable property remaining under the restraint order when the confiscation order has been satisfied; and finally a capital contribution order has been issued against the person specified in the restraint order in connection with legal aid services provided entirely or partly in relation to the relevant offence.

- 7.7 While it is clear that it is right that legal aid contributions are made by those that can afford to pay them it is also clear that that these payments should not be made before a victim is compensated, nor should it be paid before a confiscation order has been satisfied or discharged as it would then simply be reducing the amount that can eventually be confiscated.

- ***Consolidation***

- 7.8 While these regulations are not the first set of amendments to the Contribution Order Regulations, the Department does not consider that there is a case for consolidation at the present time.

8. Consultation outcome

- 8.1 There has been no public consultation on this subject. This is because the Regulations do not seek to introduce any new regulatory burdens and makes a straightforward amendment to current practice. The Home Office, the Attorney General's Office, the Crown Prosecution Service and Serious Fraud Office have been closely involved in developing this policy. There is therefore no need to consult further.

9. Guidance

- 9.1 There is no separate guidance needed on this issue. There will be a Memorandum of Understanding drafted and agreed between prosecutors and the Legal Aid Agency to put in place the process for handling restraint orders which extend beyond the end of the confiscation order as a result of the amendments and modification made by these Regulations and the Restraint Order Regulations.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is nil.
- 10.2 The impact on the public sector is nil. While priorities and resources may have to be rearranged and committed there will be no extra funding for this work.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to small business.

11.2 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3 The instrument does not impose any additional regulatory burdens on small firms.

12. Monitoring & review

12.1 The monitoring of, and expenditure on, the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency. The Ministry of Justice will conduct a post implementation review of this instrument between two to four years after commencement on 1st June 2015.

13. Contact

13.1 Ann McLaughlin at the Ministry of Justice (Tel: 020 3334 6079 or email ann.mclaughlin@justice.gsi.gov.uk) can answer any queries regarding this instrument.