

Proceeds of Crime Act 2002: Report of the Appointed Person for Scotland for 2021/22

March 2023

Report of the Appointed Person for Scotland under sections 127I, 291 and 303F of the Proceeds of Crime Act 2002 and under article 65H of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 for the period 01.04.21 until 31.03.22.

The Proceeds of Crime Act 2002 (PoCA)

This legislation was enacted to empower police and other law enforcement agencies to investigate, search and seize the apparent assets obtained by persons and organisations by criminal activity. Assets include cash, realisable property and “listed assets” (e.g., precious metals). Recovery procedures include, *inter alia*, confiscation upon a criminal conviction, forfeiture, freezing of accounts and real property, taxation and civil recovery from persons not convicted in the courts. The Act includes anti-money laundering legislation.

PoCA 2002 (External Requests and Orders) Order 2005

This Statutory Order was made under sections 444 and 459(2) of PoCA. Generally, it provides powers for the freezing of property which may be needed to satisfy requests from other countries for the recovery of criminal assets. It also enables registration and enforcement of overseas confiscation orders. The powers and obligations are similar to those for search and seizure for domestic investigations.

The Appointed Person¹

This is the person who has been appointed to oversee those circumstances where the exercise of these powers by appropriate officers has been carried out without judicial authority, even though a superior officer gave approval. The Appointed Person must be independent and not be employed under or for the purposes of any government department.

Such an appropriate officer must file a written report to the Appointed Person where assets are seized but not detained for more than 48 hours and where no assets are seized, setting out why they believed the powers were exercisable and why it was not practicable to obtain prior judicial approval². In accordance with the Guidance published by the Lord Advocate³, the report should be made as soon as practicable and, in all cases, within 14 days.

The Appointed Person must file an annual report with the Scottish Ministers, giving their opinion as to the circumstances and manner in which these powers were exercised without judicial approval. The report may make any recommendations the Appointed Person considers appropriate⁴.

¹ Proceeds of Crime Act 2002 Ss127H-I, 290-291 and 303E-F

² Proceeds of Crime Act 2002 Ss 127I, 290 and 303E

³ Proceeds of Crime Act 2002 Ss 127R, 292 and 303G

⁴ Proceeds of Crime Act 2002 Ss 127I, 291 and 303F

Searches and seizures

The act sets out very detailed requirements before an appropriate officer can carry out searches for and seizures of assets. It has been amended and added to on many occasions since 2002 by widening and strengthening the powers afforded to such officers. The original Act provided for search and seizure of cash (which is widely defined)⁵ but now includes defined realisable property⁶ and listed assets⁷. It excludes items required by the owner for work or domestic living purposes. Searches may be of a person, on premises or, under strict conditions, a vehicle.

Searches must be authorised in advance by a sheriff or, if such is not available, by a senior officer of a specific rank above that of the searching officer. However, as stated above, circumstances may arise in an investigation where, practicably, neither authority can be obtained.

Similar provisions are contained in articles 65A - 65S of the Statutory Order for external requests.

If apparent assets are seized and are to be detained, with or without judicial approval for the search, an application must be brought before a court for continued detention within 48 hours of the seizure. Consequently, there is judicial oversight thereafter for a maximum of two years.

Appropriate Officers

These are defined under section 127A (for realisable property) as an officer of HM Revenue and Customs, an immigration officer and a constable. Officers of the National Crime Agency who are, under certain circumstances, designated to have the powers of one or more of a constable, officer of HMRC, immigration officer or general customs official are also included⁸.

Sections 289 and 291 (for recovery of cash) and sections 303C and 303J (for listed assets) authorise those same officers, except immigration officers, to exercise the powers of search and seizure. Although not called "appropriate officers" in those sections, this report will use that term for convenience.

The provisions of sections 303B-J came into force on 20.07.18, having been enacted by the Criminal Finances Act 2017.

External Requests and orders

Provisions are made for similar search and seizure powers and reporting to the Appointed Person under the Statutory Order mentioned above. Immigration officers are excluded.

⁵ Proceeds of Crime Act 2002 Ss289-293

⁶ Proceeds of Crime Act 2002 Ss 127B-F

⁷ Proceeds of Crime Act 2002 Ss 303B-F

⁸ Crime and Courts Act 2013 S10(1)(a)

Reports received during 01.04.21 until 31.03.22

I received no reports of a search under sections 289 and 290 during this period.

Commentary

It may appear unusual that there were no reports in this year. However, it must be borne in mind that almost all searches under PoCA will be well prepared in advance and based on sound evidence, information and intelligence. Such planned searches, some of which may not have prior judicial approval because of urgency, will usually result in seizures which are notified to the court within 48 hours. They do not need to be reported to the Appointed Person as the assets seized will be decided upon by the Court.

In addition, police and other agencies can often use the provisions of the Criminal Justice (Scotland) Act 2016, the Misuse of Drugs Act 1971 (section 23) and common law powers to search for evidence which they may seize if it is relevant to the investigation and to retain it.

Greg McCourt, Appointed Person
31st August 2022



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