

Report for 2015 - 2016 of the Appointed Person for Scotland under Sections 127I and 291 of the Proceeds of Crime Act 2002

August 2016



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The Appointed Person

This is my fourth report as the Appointed Person appointed by the Scottish Ministers, pursuant to section 290(8)(b) of the Proceeds of Crime Act 2002 ('the Act') and my first in respect of my appointment under section 127H(4) of that Act. It covers the year ended 31 March 2016.

The Appointed Person is independent of the Scottish Government and by virtue of sections 290(9) and 127H(5) of the Act must not be employed under or for the purposes of any Scottish department.

The original role of the Appointed Person was to provide independent oversight, in prescribed circumstances, of the exercise of the powers to search for cash conferred by section 289 of the Act. On 1 March 2016, just one month before the end of the reporting year, the role was extended to the oversight, in prescribed circumstances, of the exercise of the new powers to search for and seize realisable property conferred by sections 127C, 127D, 127E, 127D and 127F of that Act. These sections were brought into effect by the commencement of section 56 of the Policing and Crime Act 2009.

Section 291 of the Act provides that as soon as practicable after 31 March each year the Appointed Person must make a report and send a copy of it to the Scottish Ministers who must arrange for it to be laid before the Scottish Parliament. In that report the Appointed Person must *'give his opinion as to the circumstances and manner in which the powers conferred by section 289 are being exercised'* in cases where prior approval for the search was not obtained from a sheriff and either no cash was seized or any cash that was seized was not detained for more than 48 hours. The report may also set out any recommendations the Appointed Person considers appropriate.

Section 127I of the Act mirrors section 291 in respect of the exercise of the powers conferred by sections 127C to 127F. It provides that as soon as practicable after 31 March each year the Appointed Person must make a report and send a copy of it to the Scottish Ministers who must arrange for it to be laid before the Scottish Parliament. In that report the Appointed Person must *'give his opinion as to the circumstances and manner in which the powers conferred by sections 127C, 127D, 127E and 127F are being exercised'* in the circumstances specified in section 127H(1) and (2). The report may also set out any recommendations the Appointed Person considers appropriate.

Relevant Statutory Provisions

Sections 289 to 303 of the Act make provision for the recovery of cash in civil proceedings. These provisions, which have been revised extensively since coming into operation in 2002, were further amended during the year by the commencement of section 63 of the Policing and Crime Act 2009.

Section 289 of the Act empowers officers of Revenue and Customs, immigration officers and constables, in prescribed circumstances, to search property and persons for cash. Cash is widely defined in the section. With the commencement of section 63 of the Policing and Crime Act 2009, the search power of constables and officers of Revenue and Customs, and immigration officers was extended to the search of vehicles.

Section 290 provides that appropriate prior approval must be obtained for any such search unless it is impracticable to do so. Appropriate approval can be given only by a sheriff or, if that is not practicable, by a senior officer. A senior officer for this purpose means a police officer not below the rank of inspector or an officer of a rank designated by the Commissioners of HM Revenue and Customs for their staff or by the Secretary of State in the case of immigration officers.

The section provides that where any search is carried out without the prior approval of a sheriff, and either no cash is seized or any cash seized is not detained for more than 48 hours, a report must be made to the Appointed Person.

Any such report must be made in writing by the officer who carried out the search. It must set out the circumstances that led the officer to believe that the powers were exercisable and why it was not practicable to obtain prior approval from a sheriff. The Codes of Practice, made under sections 292 and 293, provide that the report must be made as soon as practicable and in all cases within 14 days of the search.

Although not directly relevant to the role of the Appointed Person, it should be noted that section 294 provides for the seizure of cash found as a result of a search whilst section 295 makes provision for the detention of seized cash, by order of a sheriff, for a period of up to six months. Further orders may be made extending the total period of detention up to a maximum of two years from the date of the first order. Accordingly, there is judicial oversight of the detention of any cash seized without prior judicial approval and held for more than 48 hours.

Section 298 makes provision for the judicial forfeiture of detained cash.

The 'Code of Practice for Constables in Scotland', issued under section 293 of the Act, makes provision regarding the exercise by constables of the section 289 search power. The 'Code of Practice Recovery of Cash Search Powers', issued under section 292 of the Act, makes equivalent provision for officers of Revenue and Customs and immigration officers. Both Codes replaced the previous Code on 1 March 2016.

Sections 127C makes provision for the seizure of realisable property whilst sections 127D, 127E and 127F confer powers to search premises, persons and vehicles in closely defined circumstances. Section 127H requires that where property is seized under section 127C without the prior approval of a sheriff but is not detained for more than 48 hours a written report must be given to the Appointed Person. It further provides that a report must be made to the Appointed Person where a search without

prior shrieval approval is conducted under section 127D, 127E or 127F and either no property is seized under section 127C or any property that is seized is not detained for more than 48 hours. Such reports must set out the particulars of the circumstances which led the officer who conducted the search or made the seizure to believe that the powers were exercisable and why it was not practicable to obtain prior approval from a sheriff.

Sections 127K, 127I and 127M provide for the detention of property for more than the initial 48 hours. Such further detention can take place only where judicial approval has been given or is pending.

Section 127R provides that the Lord Advocate may issue guidance in connection with the exercise of these search and seizure powers. No such guidance has yet been issued.

Circumstances and manner in which sections 127C to 127F and 289 powers exercised

As the Appointed Person my remit in relation to cash is restricted to the circumstances and manner in which the section 289 search powers are exercised without prior judicial approval and either no cash is seized or any cash that is seized is not detained for more than 48 hours. Any such exercise of the powers should result in a report to the Appointed Person in accordance with section 290.

I received one report in respect of a section 289 search during the year.

The Police Scotland constable who conducted a section 289 search at Glasgow airport on 3 July 2015 reported that he had exercised his power under that section to search a passenger booked on an outbound international flight. Although a substantial sum in cash was found he was satisfied with the explanation given by the passenger and nothing was seized. I am satisfied from the information provided in the report that the officer acted in an entirely appropriate manner.

My role in relation to realisable property is restricted to the circumstances and manner in which the section 127C search powers and the seizure powers in sections 127D to 127F are exercised without prior judicial approval and either no property is seized or any property that is seized is not detained for more than 48 hours. Any such exercise of the powers should result in a report to the Appointed Person in accordance with section 127H.

In the ten months that they were available these new powers were not exercised in circumstances which required the submission of a report to me.

Other considerations

As I observed in my previous reports the low number of reports in respect of searches for cash should not be regarded as unusual. It reflects well on the effort made to obtain prior judicial approval, on the approach of the shrieval bench to dealing with urgent applications and on the action taken by Police Scotland and HMRC to ensure that their officers are aware of the relevant provisions of the Act and of the Code of Practice. For the same reasons the absence of reports in respect of searches for realisable property will, I suspect, be the norm.

Police Scotland advised me that Financial Investigators embedded within each territorial division continued to provide regular training inputs and act as subject matter experts for divisional officers on those parts of the 2002 Act relevant to my role. I have been informed that in addition it is planned to hold a number of seminars dealing with the changes to the law, the new codes of practice, any guidance issued by the Lord Advocate under section 127R and the duties of officers in respect of reports to the Appointed Person.

Although officers of Revenue and Customs did not exercise any of the relevant powers in circumstances requiring that a report be made to the Appointed Person, HMRC has again been very active in ensuring that their officers are aware of all their powers and duties relevant to my role. In May 2015 an article was published in the HMRC Criminal Justice Procedure manual drawing attention to the new POCA provisions being commenced on 1 June. That article explained that the new provisions to search for and seize property were not being adopted by HMRC at that time; that the new POCA search power to search a vehicle for cash and the new cash search code of practice only applied to England and Wales and Scotland until further notice; and reminded officers of the existing provisions of section 289 and the requirement for a report to the Appointed Person in the appropriate circumstances. That article was also published in the June 2015 edition of the HMRC Continuous Professional Development (CPD) bulletin. The CPD bulletin, which provides details of legislative changes and other matters, is mandatory reading for HMRC criminal justice professionals.

An article entitled 'Searching for cash under POCA section 289 – Prior approval and reports to the Appointed Person' was included in March 2016 CPD bulletin. That article covered, in detail, the requirements for prior judicial approval and to report to the appointed person in the appropriate circumstances. It contained links to the Appointed Person's reports on the internet and to the December 2015 draft of the Code of Practice for Recovery of Cash: Search Powers for England and Wales, Scotland and Northern Ireland (the final version had not been published at the time).

A short feature in the June 2016 CPD bulletin highlighted the new Code of Practice issued under section 292 of the Act. It reminded HMRC officers of the provisions regarding prior judicial approval and reports to the Appointed Person and referred them to the March 2016 CPD bulletin article for further details.

I have been advised that HMRC are currently considering adopting the powers under sections 127C to 127F (and the equivalent provisions in the other jurisdictions). I have been assured that if these powers are adopted the provisions regarding prior judicial approval for both search and seizure of property and the need to submit a report to the Appointed Person in the appropriate circumstances will be included in the training and guidance.

In previous reports I noted that immigration officers in Border Force and Home Office Immigration Enforcement did not, in practice, exercise their powers under section 289 but relied instead on other powers available to them. That continues to be the case.

The National Crime Agency ('the NCA'), through the Proceeds of Crime Centre, has developed a pre-read package and test mechanism which its officers will have to complete successfully before they are permitted to exercise the powers in sections 127C to 127F. That package covers fully the requirement to submit a report to the Appointed Person in the specified circumstances. NCA officers maintain their competence in respect of the circumstances in which a report must be submitted under section 291 through the recognised CPD activities and monitoring conducted by the Proceeds of Crime Centre. In addition, the NCA runs 'financial investigation community' awareness days, normally quarterly, at which the provisions of the various codes of practice are amongst the topics discussed.

I am satisfied that adequate measures have been put in place by all these organisations to secure, insofar as reasonably practicable, that reports to the Appointed Person under section 290(6) of the Act will be submitted when required and that appropriate action will be taken regarding awareness of section 127H(1) and (2)..

The new codes of practice on cash searches represent a significant improvement for all those who have to conduct or who are subject to a section 289 search. It is, however, unfortunate that although the powers to search for and seize realisable property have been in force since 1 March 2016 no guidance under section 127R has yet been issued by the Lord Advocate to those charged with exercising them. I have been advised that the relevant guidance is likely to be published in summer 2016.

Recommendations

I make no recommendations this year.

Douglas Bain
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Belfast 28 June 2016



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