

Combined Regulatory and Race Impact Assessment (RRIA) on the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005

1. Title

The Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 (The Legal Expenses Regulations or Regulations).

2. Purpose and Intended Effect

(i) The objective

To provide a mechanism for assets restrained under the Proceeds of Crime Act 2002 to be released to pay proportionate and justified legal expenses. To ensure that respondents who frequently do not qualify for civil legal aid have legal representation so civil recovery cases can progress.

The Department for Constitutional Affairs carried out a limited consultation on the principles of the scheme to control the release of assets on 21 June 2005. The Department then carried out a further limited consultation on the Regulations on 6 September 2005.

The primary objective of the Legal Expenses Regulations is to provide a means by which restrained assets can be released in a controlled way to meet reasonable legal expenses. The scheme outlined in the Regulations is designed to provide respondents with the means to mount a proportionate legal defence while protecting the interests of the Assets Recovery Agency by ensuring that the assets in question are not dissipated on excessive legal expenses.

(ii) Background

The Proceeds of Crime Act 2002 (POCA) built on earlier legislation, but also created wide new powers in relation to the confiscation of criminal property. Although POCA is essentially concerned with crime and criminal assets, it also created a range of civil procedures in the High Court, Crown Court and magistrates' courts.

POCA created the Assets Recovery Agency (ARA), and authorised it to take civil proceedings in the High Court to recover property and money that had been obtained by unlawful conduct, regardless of whether the owner had been convicted of a criminal offence (Part 5 of POCA). As well as applying for a "recovery order" which determines what should happen to the property, the Agency may apply for an "interim receiving order" which appoints an interim receiver to secure the property.

Originally, the Government decided to prevent access to restrained assets to pay for legal representation in these cases, in order to prevent the purposeful dissipation of the assets in legal fees (as expressed in s.252(4) of POCA as originally enacted). The experience of other countries, and the UK under the previous legislation governing post-conviction confiscation, demonstrated the inevitability of dissipation if stringent safeguards are not put in place.

At the time, the Government's preferred method to ensure representation in these cases was through the civil legal aid scheme. However, operational experience

shows that the current provisions of the scheme are ill-suited to this type of case, partly due to the scope of the scheme, but in particular due to the financial eligibility limits, and the rules surrounding these limits.

The Serious Organised Crime and Police Act 2005 (SOCPA) amended POCA to give ARA an additional power to apply for “a Property Freezing Order” which prohibits dealing with the property. It also amended POCA to allow the High Court to exclude property from a property freezing order or interim receiving order for the purpose of meeting legal expenses (SOCPA, section 98 and Schedule 6). However legal aid will remain available, especially for exceptional cases where the court is unable to release the assets to cover legal costs, for example because of competing third party interests.

The change requires a regulatory framework to safeguard the way assets are released. The provisions introduced by SOCPA specify some of the conditions subject to which assets may be excluded from a property freezing order or interim receiving order, and they give a power for the Lord Chancellor to make Regulations that specify other conditions and limit the amounts that can be paid.

(iii) Devolution

These proposals apply to England, Wales and Northern Ireland.

(iv) Risks

There are two main risks: that respondents will not have legal representation if we do nothing, or that assets are released in an uncontrolled way, if we allow access to them.

First, there is the risk that respondents to civil recovery proceedings will be left without legal representation. This has occurred due to the difficulties in obtaining legal aid where respondents are unwilling to make disclosures about their financial circumstances, or due to respondents being financially ineligible because of living allowances provided to them by the Assets Recovery Agency. Where respondents are unable to obtain legal representation, judges are reluctant to proceed with civil recovery cases, as this is a new area of law. The result is that the respondent's assets remain restrained, and the ARA is unable to recover the proceeds of crime.

Second, there is the risk that restrained assets are released in an uncontrolled way and the restrained assets are dissipated through legal expenses. This is because respondents in civil recovery proceedings lack the normal incentives to limit costs. If a respondent loses the case, the assets will be confiscated anyway and, if the respondent wins the case, the ARA will pay their costs. It is essential that assets are released to meet legal expenses, and that this is controlled so that expenses are only met where they are reasonable and justified.

3. Sectors Affected

The following sectors will be affected:

- Respondents in civil recovery proceedings
- The Assets Recovery Agency
- Solicitors
- Barristers

- The Courts

4. Options

Option 1 – Do Nothing

This option would mean that respondents in civil recovery proceedings would continue to be expected to fund their legal expenses through the grant of civil legal aid. In practice, the majority of respondents do not qualify for legal aid; or, if it appears that they might, the statutory requirement for the Legal Services Commission to investigate an applicant's means gives respondents the opportunity to delay and drag out the process for as long as possible. Both these factors, especially the former, are preventing cases from reaching the Courts.

Furthermore, lack of representation before the High Court for respondents who can neither access their assets, nor qualify for civil legal aid, means a potentially fatal challenge to the Civil Recovery Scheme under Article 6 ECHR is extremely likely. A similar challenge to the civil legal aid eligibility limits is also likely.

Option 2 – Waive the civil legal aid eligibility limits

It is theoretically possible to create a power to waive the means test in these cases. However, non-means tested civil legal aid is only available to the most vulnerable in society to protect fundamental rights – for example, in special Children Act cases or for Mental Health Review Tribunals. The Government does not consider that civil recovery respondents fall into this category.

Option 3 – Introduce a scheme to allow the controlled release of restrained assets to pay for legal expenses

The SOCPA 2005 created a power to allow the High Court to exclude property from a Property Freezing Order or Interim Receiving Order for the purpose of meeting legal expenses. The provisions introduced by SOCPA specify some of the conditions subject to which assets may be excluded from a property freezing order or interim receiving order i.e. that the exclusion relates to reasonable legal expenses that the person has reasonably incurred or that he reasonably incurs; and that it specifies the total amount that may be released for legal expenses in pursuance of the exclusion.

SOCPA also provides a power for the Lord Chancellor to make regulations that specify other conditions and limit the amounts that can be paid for legal expenses. The Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 are those regulations. The Legal Expenses Regulations provide a framework to control the release of restrained assets which is already authorised under the SOCPA amendments.

How the Scheme Will Work

The ARA will apply to the court for a property freezing order or interim receiving order. The court will then make an exclusion from the restrained assets, either on its own motion, or on the application of a party to the proceedings. Exclusions will specify the amount that may be released for taking certain steps in the case. Exclusions will be subject to the required conditions as to how and when funds can be released under the exclusion, which will be set out in Part 2 of the Legal Expenses Regulations. In effect, the exclusion acts as a budget for some or all of the stages of the case.

The court will usually order an 'initial' exclusion of up to £3000 for legal advice where Property Freezing Orders or Interim Receiving Orders are served without notice. For the substantive proceedings, the court may order a single exclusion to cover all of the proceedings, or may order exclusions in stages. We envisage that the Court will normally make a series of exclusions to cover different stages in the proceedings, as more information becomes available. Before the court orders a substantive exclusion, it will require the respondent to provide a signed statement of their means. This will allow the court to decide if an exclusion from the frozen assets is necessary, or whether the respondent has other assets which can be used to pay for legal expenses. The recommended procedure for courts will be set out in the Civil Recovery Proceedings Practice Direction.

After the exclusion is made, the respondent will then incur the expenses under the exclusion (i.e. the respondent's lawyers do the work to which the exclusion relates). Then the respondent submits a claim for funds to be released to pay those expenses, up to once every two months, to ARA, as set out in Part 3 of the Regulations. If ARA agrees to pay the bill, it is paid in full. If ARA objects to the bill, the solicitors will be paid 65% of the bill (the same as they might expect from a detailed assessment), or a figure between 65-100% as agreed by ARA. Expenses which are claimed should be those which the court has already agreed and made provision for by way of an exclusion.

Thus the scheme differentiates between the initial making of an **exclusion** to cover legal costs, and the subsequent **release** of frozen assets to pay for the legal costs incurred pursuant to the exclusion. Although an exclusion may be made to cover both past and future costs, it is intended that the court will normally make exclusions before costs have been incurred, and that assets should only be released in respect of those costs after they have been incurred. All expenses paid will be subject to final assessment by the courts as set out in Part 4 and 5 of the Regulations.

For this kind of work, two fixed payment bands have been set out in the Legal Expenses Regulations. The first, standard rate is for those civil recovery proceedings which are relatively straight-forward. The higher rate is for cases which are, in the eyes of the court, exceptionally important, complex or difficult. These rates are lower than the SCCO guideline rates, but higher than civil legal aid rates. We have also included an uplift of 10-20% for London-based practitioners. We think that this level of remuneration strikes the right balance between ensuring access to justice and preserving the proceeds of crime for recovery.

If the Court has made a recovery order before funds are released, then the respondent will still apply for the release of funds to ARA in the first instance, so long as the recovery order made provision for the payment of legal expenses (with minor modifications to the procedure to take account of the fact that the relevant assets will now be vested in the trustee for civil recovery).

The Regulations will also apply in cases where the ARA seeks a recovery order pursuant to the registration of an external order (i.e. an equivalent order made by a foreign court). The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181), made under section 444 of POCA, makes provision for these cases. The provisions relating to exclusions are the same as in domestic cases.

5. Benefits

The main benefit of the Legal Expenses Regulations will be to ensure that where assets are the proceeds of criminal conduct, as much of those assets as possible are preserved for payment to the Consolidated Fund. In addition, the Regulations will help to ensure that Court time is not wasted dealing with proceedings which cannot progress due to funding difficulties.

Legal Aid Impact Test

These changes will shift the burden of funding away from the civil legal aid budget to the restrained assets themselves, allowing the civil legal aid budget to focus on social exclusion cases. We anticipate savings to the civil legal aid fund in the region of £3m per year.

6. Costs

(i) Compliance costs

There are no compliance costs on small businesses, the voluntary sector or on charities.

(ii) Other costs

There are no other non-negligible costs.

7. Issues of equity and fairness

Race Equality Impact Assessment

These proposals should not disproportionately effect any ethnic group or groups. Respondents to civil recovery proceedings are not selected on the basis of ethnicity. These measures allow controlled access to restrained assets to help to ensure that respondents have adequate legal representation. This will be of equal relevance to all ethnic groups if they are respondents in civil recovery proceedings.

8. Consultation with small business: the Small Firms' Impact Test

We have consulted with the Small Business Service (SBS) and the Office of Fair Trading who did not anticipate that these proposals would have a significant impact on business. We have also consulted thoroughly with the professions to make the scheme as effective as possible: they do not think these proposals will have a negative impact. The work covered by this scheme is currently being carried out at civil legal aid rates. The rates we are proposing in the Regulations are higher than those rates, so we do not anticipate any negative impact on small businesses, such as solicitor's firms.

9 . Competition assessment

The market for civil recovery legal work is not dominated by any particular firm or NfP organisation. The scheme to control the release of restrained assets will not have a disproportionate effect on costs for small and large firms. New firms entering the market will not be unfairly penalised. There are no rapid technological changes in the market.

The scheme will impose price restrictions on solicitors and barristers. The Legal Expenses Regulations set the maximum hourly rates which can be charged for the kind of civil recovery work in question. These rates are slightly below the Supreme Court Costs Office's guideline rates for civil work, however, currently the work covered by the Regulations is only carried out at the prescribed civil legal aid rates, which are lower than the rates specified in the Regulations. Suppliers of legal services can charge less than the maximum rates specified – in the same way as they will often charge less than SCCO guideline rates - so competition is still possible for those respondents who are keen to preserve the assets that are in question.

The effect on competition will be neutral.

10 . Enforcement and sanctions

The procedures set out in the Regulations are embedded in the Civil Procedure Rules (in the Civil Recovery Practice Direction) which govern the way that cases should be managed by the courts.

11. Monitoring and Review

The ARA, the Home Office and DCA will monitor the effectiveness of the new scheme.

12. Consultation

(i) Within government

Officials have primarily liaised with colleagues in the Department for Constitutional Affairs, the Home Office, and the Assets Recovery Agency. We have also consulted with colleagues in: the Northern Ireland Court Service; the Attorney General's Office; the Crown Prosecution Service; the Serious Fraud Office; the Legal Services Commission; the Small Business Service; Treasury Solicitors; and the Office of Fair Trading.

(ii) Public consultation

We carried out a limited consultation on the principles of the Regulations on 21 June 2005. We received helpful responses received from the Law Society, Bar Council, Legal Aid Practitioners' Group (LAPG), Assets Recovery Agency, several individual firms of solicitors and members of the judiciary, including the Senior Costs Judge. We carried out a further consultation on the Regulations themselves on 5 September 2005, and again, on 10 November 2005, following revisions in the light of consultation responses. We have also had constructive meetings with the Law Society, LAPG, ARA, the Bar Council and representatives of the judiciary.

13. Summary and recommendation

The SOCPA 2005 introduced a power for the High Court to exclude certain restrained assets from a property freezing or interim receiving order. Such an exclusion must relate to reasonable legal expenses that the person has reasonably incurred or that he reasonably incurs; and it must specify the total amount that may be released for legal expenses in pursuance of the exclusion.

The Legal Expenses Regulations introduce further conditions on the exclusion of restrained assets. These exclusions provide for a framework whereby exclusions are

made on the basis of an agreed case plan, the release of assets for payment occurs in stages, and the rates for the work are capped. These Regulations will help to ensure that restrained assets are only excluded and released where appropriate and proportionate. The introduction of these Regulations will help to ensure that respondents to civil recovery orders are adequately represented, that restrained assets are protected from dissipation, and will deliver savings to the civil legal aid fund. Therefore we recommend Option 3.

14. Declaration

I have read the Regulatory and Race Impact Assessment and I am satisfied that the benefits justify the costs.

Signed **BRIDGET PRENTICE MP**

Date 03.12.05

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