

**Report for 2016 – 2017 of the  
Appointed Person for Scotland  
under sections 127I and 291  
of the Proceeds of Crime Act  
2002 and Article 65H of the  
Proceeds of Crime Act 2002  
(external requests and orders)  
Order 2005**

## The Appointed Person

This is my final report as the Appointed Person appointed by the Scottish Ministers pursuant to sections 127I(1) and 290(8)(b) of the Proceeds of Crime Act 2002 ('the Act') and article 65H(1) of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 ("the Order"). It covers the year ended 31 March 2017.

The Appointed Person is independent of government and by virtue of sections 290(9) and 127H(5) of the Act and article 65G(5) of the Order must not be employed under or for the purposes of any government department or of the Scottish Administration.

The original role of the Appointed Person was to provide independent oversight of the exercise, without prior judicial authority, of the powers to search for cash conferred by section 289 of the Act. In June 2015 the role was extended to the oversight, in prescribed circumstances, of the exercise of the new powers to seize and search for realisable property conferred by sections 127C, 127D, 127E, and 127F of that Act.<sup>1</sup> In November 2015 the role was further extended to cover the oversight of the circumstances and manner in which broadly equivalent powers of search and seizure in respect of external requests and orders were exercised without prior judicial authority.<sup>2 3</sup>

Sections 127I and 291 of the Act and article 65H of the Order provide 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*' these provisions '*are being exercised*' in cases where prior judicial approval for the seizure or search was not obtained and either nothing was seized or anything that was seized was not detained for more than 48 hours. The report may also set out any recommendations the Appointed Person considers appropriate.

## Statutory Provisions Overview<sup>4</sup>

Sections 289 to 303 of the Act make provision for the recovery of cash in civil proceedings. Section 289 of the Act empowers officers of Revenue and Customs, immigration officers<sup>5</sup> and constables, in prescribed circumstances, to search property, vehicles and persons for cash.<sup>6</sup> The powers may also be exercised by officers of the National Crime Agency ("the NCA") designated to have the powers and privileges of a constable.<sup>7</sup> Cash is widely defined in the section.

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<sup>1</sup> Policing and Crime Act 2009 (Commencement No.10 and Transitional Provision and Savings) Order 2015 article 2(1), 2(2)(a)

<sup>2</sup> Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2015 articles 1 and 11

<sup>3</sup> Section 447(1) of the Act provides that 'An external request is a request by an overseas authority to prohibit dealing with relevant property which is identified in the request.' Section 447(2) provides that 'An external order is an order which--

(a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and

(b) is for the recovery of specified property or a specified sum of money.'

<sup>4</sup> Unless the context otherwise requires, statutory references are to the law in force on 31 March 2017

<sup>5</sup> Section 24 of the UK Borders Act 2007 provides that Chapter 3 of Part 5 POCA (recovery of cash in summary proceedings) applies to an immigration officer as it applies in relation to a constable.

<sup>6</sup> The power was extended to the search of vehicles by the commencement of section 9 of the Policing and Crime Act 2009 on 1 June 2015

<sup>7</sup> Designated by the Director General of the NCA under section 10(1)(a) of the Crime and Courts Act 2013

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<sup>8</sup>, as being equivalent to that rank. There is, however, no express provision as to the designation of the senior officer where a search is carried out by an NCA officer.

The section provides that where any search is carried out without prior judicial approval 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 judicial approval. The Code of Practice, made under section 293, provides that the report must be made as soon as practicable and in all cases within 14 days of the search.<sup>9</sup>

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 judicial order, 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.

Sections 127A to 127S of the Act make provision for the search and seizure of realisable property as defined in section 149 of the Act.

Section 127C provides for the seizure of property whilst sections 127D, 127E and 127F confer powers to search premises, people and vehicles, in closely defined circumstances, for such property. These powers are exercisable by an officer of Revenue and Customs, an immigration officer or a constable.<sup>10</sup> The powers may also be exercised by officers of the NCA designated to have the powers and privileges of a constable.<sup>11</sup>

Section 127G provides that appropriate prior approval must be obtained for any such seizure or 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 as equivalent to that rank. In relation to NCA officers it means the Director General or any other NCA officer authorised by the Director General for this purpose.

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<sup>8</sup> UK Borders Act 2007 section 24(2)(c)

<sup>9</sup> Code of Practice for Constables in Scotland issued under Section 293 of the Proceeds of Crime Act 2002 paragraph 21. The Code of Practice issued under section 292 of the Proceeds of Crime Act 2002 Recovery of Cash: Search Powers, which relates to the exercise of the section 289 powers in Scotland by officers of Revenue and Customs and by immigration officers, also provides at paragraph 54 that reports should be made as soon as possible and always within 14 days.

<sup>10</sup> Section 127A of the Act

<sup>11</sup> Designated by the Director General of the NCA under section 10(1)(a) of the Crime and Courts Act 2013

The section provides that where any property is seized without the prior judicial approval or any search is carried out and either no property is seized or any property 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.

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

Section 127R provides that the Lord Advocate may issue guidance in connection with the carrying out of the functions under these sections.<sup>12</sup>

Articles 65A to 65S of the Order largely mirror the provisions of sections 127A to 127S of the Act in respect of the search and seizure of realisable property connected to an external request.

Article 65C makes provision for the seizure of such property whilst articles 65D, 65E and 65F confer powers to search premises, people and vehicles in closely defined circumstances for such property. These powers are exercisable by those, except immigration officers, empowered to exercise the powers in sections 127C to 127F of the Act.

Article 65G provides that appropriate prior approval must be obtained for any such seizure or 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. The meaning of senior officer for this purpose is the same as in section 127G of the Act.

The article provides that where any property is seized without the prior judicial approval or any search is carried out and either no property is seized or any property 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 judicial approval.

Articles 65K, 65L and 65M provide for the detention of seized property for more than the initial 48 hours. Such further detention can take place only where judicial authority has been given or is pending.

Article 65S provides that the Lord Advocate may issue guidance in relation to the exercise of these powers and that any such guidance must be published. No guidance has been issued.

### **Circumstances and manner in which powers exercised**

During the year I received three reports all of which were from Police Scotland. Two of these searches were carried out at Glasgow Airport whilst the third took place in Glasgow

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<sup>12</sup> Lord Advocate's Guidance issued under Section 127R of the Proceeds of Crime Act was published on 24 February 2017

city centre. I am satisfied that in each case the powers were exercised in an appropriate manner, that it was not practicable to obtain prior judicial approval and the officers complied with the provisions of the Code of Practice.

### **Other considerations**

The absence of an express provision as to the designation of the senior officer in relation to searches under section 289 of the Act carried out by NCA officers is undesirable and could restrict the use by them of their powers when it has not been practicable to obtain the prior approval of a justice of the peace. Such provision is made in respect of the exercise by NCA officers of their powers under sections 127C to 127F of the Act and under articles 65C to 65F of the Order.

Home Office Immigration Enforcement have again advised me that it continues to be the case that their immigration officers do not exercise the powers under sections 127C to 127F, or the equivalent provisions for England and Wales and Northern Ireland or under section 289 of the Act and that they rely instead on other statutory powers available to them. Consequently no action was taken during the year to remind their officers of their duty, in prescribed circumstances, to make a report to the Appointed Person. As I have noted immigration officers are not empowered to exercise the powers in articles 65C to 65F of the Order.

In previous reports I have opined that the low number of reports to the Appointed Person should not be regarded as unusual. That remains my view. I am satisfied that all departments and agencies whose officers are empowered to exercise the relevant powers, other than Home Office Immigration Enforcement, have taken adequate action to secure that their officers are aware of their duty, in prescribed circumstances, to make a written report to the Appointed Person.

It is some 19 months since the provisions of articles 65C to 65F of the Order came into force. The absence of guidance by the Lord Advocate on the exercise of these powers is concerning. It is in stark contrast with the position both in England and Wales and in Northern Ireland where guidance, in the form of the codes of practice issued under sections 47S, 195S and 195T of the Act, applied to the corresponding provisions from the date they came into force. Although I have been informed that there are, in practice, few external requests and that those from inside the European Union are dealt with under other legislation, I believe that it is unfair both to those charged with exercising these powers and to those who may be subject to them that guidance, similar to the guidance published under section 127R of the Act, has not yet been given. These persons should have clarity on the manner in which the powers should be exercised. For example, the action required when the powers are exercised without the prior approval of a sheriff and the time within which a report to the Appointed Person under article 65G must be submitted should be clear. Such guidance should be available at all police stations for consultation by the police and members of the public.

## Recommendations

I recommend that consideration be given to:

1. the legal position in relation to the designation of the senior officer in relation to searches under section 289 of the Act carried out by NCA officers;
2. whether there is a continuing need for immigration officers to be empowered to exercise the powers in sections 127C to 127F and 289 of the Act; and
3. the issuing of guidance by the Lord Advocate under article 65L of the Order.

A handwritten signature in black ink, appearing to read 'DB', with a long horizontal stroke extending to the right.

**Douglas Bain CBE TD Advocate**  
Belfast 5 July 2017



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