

REPORT FOR 2016 - 2017

OF

THE APPOINTED PERSON FOR NORTHERN IRELAND

UNDER

SECTIONS 195I AND 291 OF THE PROCEEDS OF CRIME ACT 2002

AND

**ARTICLE 103H 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 Department of Justice, pursuant to sections 195I(1) and 290(8)(c) of the Proceeds of Crime Act 2002 ('the Act') and article 103H(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 195H(5) of the Act and article 103G(5) of the Order must not be employed under or for the purposes of any government department including any Northern Ireland department.

The original role of the Appointed Person was to provide independent oversight of the exercise, without prior judicial approval, of the powers to search for cash conferred by section 289 of the Act. In March 2016 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 195C, 195D, 195E, and 195F of that Act.¹ In August 2016 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 approval.^{2 3}

Sections 195I and 291 of the Act and article 103H 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 Department of Justice who must arrange for it to be laid before the Northern Ireland Assembly. 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 Overview⁴

Sections 289 to 303 of the Act make provision for the recovery of cash in civil proceedings.

¹ Policing and Crime Act 2009 (Commencement No 11 and Transitional Provisions and Savings) Order 2016 article 3

² Proceeds of Crime Act 2002 (External Requests and Orders)(Amendment) Order 2016 articles 1 and 27

³ 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.'

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

Section 289 of the Act empowers officers of Revenue and Customs, immigration officers,⁵ accredited financial investigators and constables, in prescribed circumstances, to search property, vehicles and persons for cash.⁶ The powers may also be exercised by officers of the National Crime Agency (“the NCA”) who are either designated to have the powers and privileges of a constable or are accredited financial investigators.⁷ Cash is widely defined in the section.

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 lay magistrate⁸ 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,⁹ as being equivalent to that rank. In relation to accredited financial investigators it means an accredited financial investigator who falls within a description specified in an order made by the Secretary of State. There is, however, no express provision as to the designation of the senior officer where a search is carried out by an NCA officer who can exercise powers.

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 Codes of Practice, made under sections 292¹⁰ and 293A,¹¹ 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 judicial order, for a period of up to six months. Further orders may be made extending the total period of detention up to a

⁵ 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

⁶ The power was extended to the search of vehicles by the commencement of section 9 of the Policing and Crime Act 2009 on 1 March 2016 by article 3 of the Policing and Crime Act 2009 (Commencement No. 11 and Transitional Provisions and Savings) Order 2016

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

⁸ Although section 290(8)(c) of the Act provides that this function is to be exercised by a justice of the peace it was, by section 10(1) of the Justice (Northern Ireland) Act 2002, transferred to a lay magistrate

⁹ UK Borders Act 2007 section 24(2)(c)

¹⁰ Code of Practice issued under section 292 of the Proceeds of Crime Act 2002 Recovery of Cash: Search Powers paragraph 54

¹¹ Code of Practice issued under section 293A of the Proceeds of Crime Act 2002: Recovery of Cash: Search Powers (Northern Ireland) paragraph 46

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 195A to 195S of the Act make provision for the search and seizure of realisable property as defined in section 231 of the Act.

Sections 195C provides for the seizure of property whilst sections 195D, 195E and 195F 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, an accredited financial investigator or a constable.¹² The powers may also be exercised by officers of the NCA designated to have the powers and privileges of a constable.¹³

Section 195G 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 lay magistrate 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 accredited financial investigators it means an accredited financial investigator who falls within a description specified in an order made by the Secretary of State whilst in relation to NCA officers it means the Director General or any other NCA officer authorised by the Director General for this purpose.

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 judicial approval. The Codes of Practice, made under sections 195S and 195T, provide that the report must be made as soon as practicable and in all cases within 14 days of the search.¹⁴

Sections 195K, 195L and 195M provide for the detention of seized property for more than the initial 48 hours. Such further detention can take place only where judicial approval has been given or is pending.

Sections 195S provides that the Secretary of State must make a code of practice in connection with the carrying out of the functions under these sections by officers of

¹² Section 195A of the Act

¹³ Designated by the Director General of the NCA under section 10(1)(a) of the Crime and Courts Act 2013

¹⁴ Paragraphs 51 and 49

Revenue and Customs, immigration officers and NCA officers.¹⁵ Section 195T requires the Department of Justice to make a code of practice in connection with the carrying out of these functions by constables and accredited financial investigators.¹⁶

Articles 103A to 103L of the Order largely mirror the provisions of sections 195A to 195S of the Act in respect of the search and seizure of realisable property connected to an external request.

Articles 103A and 103B make provision for the seizure of such property whilst articles 103C, 103D and 103E 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 195C to 195F of the Act.

Article 103G 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 lay magistrate or, if that is not practicable, by a senior officer. The meaning of senior officer for this purpose is the same as in section 195G 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. The Codes of Practice, made under section 195S and 195T of the Act and applied to the exercise of these powers by article 103L of the Order, provide that the report must be made as soon as practicable and in all cases within 14 days of the search.

Article 103I provides for the initial detention of seized property for up to 48 hours whilst article 103J makes provision for its further detention subject to judicial approval.

Circumstances and manner in which powers exercised

During the year I received no reports. In previous reports I have opined that this should not be regarded as unusual. That remains my view. I am satisfied that the Police Service of Northern Ireland and the agencies whose officers are empowered to exercise the relevant powers, other than Home Office Immigration Enforcement, have taken adequate action to

¹⁵Code of Practice issued under section 195S(3) of the Proceeds of Crime Act 2002 Search, Seizure and Detention of Property (Northern Ireland) came into operation on 1 March 2016

¹⁶Code of Practice issued under section 195T of the Proceeds of Crime Act 2002: Search, Seizure and Detention of Property (Northern Ireland) came into operation on 1 March 2016

secure that their officers are aware of their duty, in prescribed circumstances, to make a written report to the Appointed Person.

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, who are either designated to have the powers and privileges of a constable or are accredited financial investigators, 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 195C to 195F of the Act and under articles 103A to 103E of the Order.

Home Office Immigration Enforcement have advised me that it continues to be the case that their immigration officers do not exercise the powers under sections 195C to 195F or the equivalent provisions that apply in England and Wales and in Scotland 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 103A to 103E of the Order.

Although the judicial approval function under section 290(3) of the Act has been transferred from a justice of the peace to a lay magistrate the text has not been amended.¹⁷ The reference to a justice of the peace is inconsistent with the text of the equivalent provisions in section 195G of the Act and article 103G of the Order. The divergence between the text of section 290(3) and the reality of the judicial officer who exercises the function has the potential to cause confusion particularly for those unfamiliar with the intricacies of criminal justice legislation in Northern Ireland.

Recommendations

I recommend that consideration be given to:

1. The legal position with regard to the designation of the senior officer in relation to searches under section 289 of the Act carried out by NCA officers who can exercise these powers;
2. Whether there is a continuing need for immigration officers to be empowered to exercise the powers in sections 195C to 195F and 289 of the Act; and

¹⁷ The function was transferred to a lay magistrate by section 10(1) of the Justice (Northern Ireland) Act 2002

3. Requesting the Lord Chancellor to consider exercising his power, under paragraph 5 of schedule 4 to the Justice Northern Ireland) Act 2002, to amend section 290(3) of the Act to provide that in Northern Ireland judicial officer means a lay magistrate.

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

Douglas Bain CBE TD Advocate

Belfast 31 July 2017