EXPLANATORY MEMORANDUM TO

THE MAGISTRATES' COURTS (DETENTION AND FORFEITURE OF TERRORIST ASSETS) RULES 2017

2017 No. 1296 (L. 26)

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to create court rules to underpin paragraphs 10A – 10P in Part 4A of Schedule 1 to the Anti-Terrorism, Crime and Security Act 2001 ("ATCSA") which make provision for the seizure, detention and forfeiture of certain items of personal or moveable property which are derived from or intended for terrorist activity ("terrorist assets"). These provisions build on existing powers in Part 1-4 of Schedule 1 to ATCSA to seize and forfeit "terrorist cash". A more detailed description of the legislation is set out below.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 Section 144 of the Magistrates' Courts Act 1980 (c. 43) provides for rules regulating and prescribing the practice and procedure of magistrates' courts, except in relation to any criminal cause or matter, or family proceedings, to be made by the Lord Chief Justice with the concurrence of the Lord Chancellor. Since proceedings in relation to detention and forfeiture of terrorist assets are neither criminal nor family proceedings, these Rules are made under section 144.

4.2 New Part 4A was inserted into Schedule 1 to ATCSA by section 39 of and Schedule 3 to the Criminal Finances Act 2017 (c. 22) and makes provision for the seizure, detention and forfeiture of terrorist assets which are (a) items of property which come within the definition of a listed asset and (b) are reasonably suspected of being derived from or intended to be used for the purposes of terrorism. The provisions build on and partly mirror existing powers in Parts 1-4 to recover "terrorist cash".

4.3 Applications for orders under Part 4A of Schedule 1 to ATCSA will be heard in the magistrates' court. Accordingly, these Rules are based on the existing procedure for applications in relation to terrorist cash in the magistrates' court, and are intended to provide the procedure by which these powers will operate.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application is England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 Prior to the amendments made by the Criminal Finances Act 2017, property could only be forfeited under Schedule 4 to the Terrorism Act 2000 (TACT) following a conviction under sections 15-18 of that Act. In the absence of a conviction, there was no formal mechanism for seizing property derived from or intended to be used for the purposes of terrorism. However, there is evidence that certain items of personal (or moveable) property are used by criminals in lieu of cash to move or store terrorist resources, both domestically and across international borders. The following items of property are defined in paragraph 10A to Schedule 1 of ATCSA as "listed assets": precious metals; precious stones; watches; artistic works; face-value vouchers; postage stamps.

7.2 The aim of these powers is to ensure that such activity can be disrupted where it is a means of moving terrorist assets or of storing their value, and to create a procedure to allow for the recovery of such assets via a summary procedure in the magistrates' court. Accordingly, ATCSA has been amended to create new powers to seize, detain and forfeit terrorist assets.

7.3 These powers are based on the existing cash forfeiture powers in ATCSA (see S.I. 2001/4013), and similarly do not specify a minimum amount below which the powers are unavailable.

7.4 Unlike the cash forfeiture regime, there is no provision made in legislation for the administrative forfeiture of terrorist assets. The relevant parts of the forfeiture procedure in respect of which magistrates' court rules are required are set out below. All paragraph references are to Schedule 1 to ATCSA.

Initial detention of seized property

7.5 Paragraph 10B(1) provides that, if there are reasonable grounds for suspecting that it is a listed asset and is derived from or intended to be used for the purposes of terrorism, an authorised officer may seize any item of property. Under sub-paragraph 10B(2), an authorised officer may also seize a listed asset if there are reasonable grounds for suspecting that part of it derived from or intended to be used for the purposes of terrorism and it is not reasonably practicable to seize only that part. The seized terrorist asset may be detained for an initial period of 48 hours, providing there continues to be reasonable grounds for suspecting it is a terrorist asset.

7.6 Paragraph 10C provides that a terrorist asset seized under paragraph 10B by an authorised officer may be detained for an initial period of 48 hours, providing there continues to be reasonable grounds for suspecting it is a terrorist asset.

Applications for further detention of seized property

7.7 Paragraph 10D provides that the period for which property seized under paragraph 10B may be detained can be extended by the magistrates' court or justice of the peace, on application by an authorised officer or the Commissioners for HMRC, for a period of six months (up to an overall maximum of two years from the first order) if satisfied that the property is a listed asset and certain conditions are met. These conditions are, in summary: (a) that there are reasonable grounds for suspecting the property is derived from or intended to be used for terrorist purposes; (b) that its continued detention is justified whilst: (i) investigations are made into its derivation/intended use or (ii) consideration is given to bringing proceedings against any person for an offence with which the property is connected; or (c) proceedings for an offence with which the property is connected have been started and have not been concluded.

7.8 Paragraph 10D(4) provides that the first application to extend the period of detention may be made and heard without notice, and may be heard and determined in private in the absence of any persons (or their legal representative) affected by the application.

Applications for the release of detained property

7.9 Paragraph 10F makes provision for the magistrates' court, on an application by the person from whom the property was seized, to order the release of detained property (or any part thereof) if satisfied that the conditions for detention under paragraphs 10C or 10D are no longer met. If satisfied that the detention is no longer justified, an authorised officer may, after notifying the magistrates' court or justice of the peace under whose order the property is being detained, release all or any part of the detained property.

7.10 However, property is not to be released under paragraph 10F:

- if an application for its release is made by a victim under paragraph 10O, until any related proceedings are concluded; or
- until the conclusion of any proceedings (in the UK or elsewhere) against any person for an offence with which the property is connected

7.11 Paragraph 10O (victims) provides that any person who claims to own any property (of part thereof) detained under Part 4A may apply to the magistrates' court for the property to be released. The magistrates' court may order the release of the property if satisfied that the property belongs to the applicant who was derived of it by criminal conduct and the property was not involved in criminal conduct before the applicant was deprived of it. Paragraphs 10O(5)–(7) make provision for the release of property to a victim who is not the person from whom the property was seized.

Application for forfeiture of detained property

7.12 Paragraph 10G provides that the magistrates' court may, on an application by an authorised officer or the Commissioners for HMRC, order the forfeiture of property (or any part of it) if satisfied that the property is a terrorist asset. The order for forfeiture may also provide for the payment of reasonable legal expenses that have or may be reasonably incurred in the forfeiture or related Part 4A proceedings. However, per paragraph 10G(6), the power of the magistrates' court to order forfeiture ceases to apply, on the transfer of an application for forfeiture under paragraph 10G to the High Court.

Associated and Joint Property

7.13 Paragraphs 10H to 10J make provision in the context of an application for forfeiture under paragraph 10G for dealing with 'associated' and jointly held property.

7.14 These terms are defined in paragraph 10H but, in essence, they relate to interests in property detained under Part 4A which do not attract the necessary reasonable suspicion to make those interests susceptible to a forfeiture order (such as, where they were obtained legitimately by a third party).

7.15 Where agreement is reached between the person applying for forfeiture and the person who holds the associated property (or who is the excepted joint owner) on how to apportion the property, paragraph 10I(1) allows the magistrates' court to order the person who holds associated property or who is an excepted joint owner to pay the applicant under paragraph 10G a sum equivalent to the value of the forfeitable share of the property. Paragraph 10I(3) provides that the amount to be paid may be reduced if it is agreed that the person who holds the associated property (or who is the excepted joint owner) has suffered loss as result of the seizure and detention of the property. An order under paragraph 10O(1) may also:

(a), if necessary to give effect to the agreement between the parties, include provisions for vesting, creating or extinguishing any interest in the property (see paragraph 10I(5)), and

(b) make provision for the payment of legal expenses that a person has or may reasonably incur in these proceedings or related Part 4A proceedings (see paragraph 10I(6)).

7.16 Paragraph 10J(1) provides that, where there is no agreement regarding associated or joint property, the magistrates' court: (a) must transfer an application for forfeiture under paragraph 10G to the High Court if satisfied that the value of the forfeitable property is £10,000 or more, or (b) may transfer the application to the High Court if satisfied that the value if less than £10,000.

7.17 Paragraphs 10J(7)–(13) provide that, where the magistrates' court does not transfer the application to the High Court, it may if it thinks it just and equitable to do so: order forfeiture of the associated property; order the excepted joint owner's interest be extinguished; or order the severance of the joint owner's interest. If the court makes such an order, it must provide for the payment of an amount to the person who holds the associated property or who is the excepted joint owner, having regard to the value to that person of the property – including non-monetary value – as well as the interests of the applicant for forfeiture. The magistrates' court may also, if satisfied that the person who holds the associated property or who is the excepted joint owner has suffered loss as a result of the seizure and detention of the property and the circumstances are exceptional, order the payment of an amount of compensation which the court thinks is reasonable, considering the loss suffered and any other relevant circumstances.

Appeals

7.18 Paragraph 10K provides that any party to proceedings for a forfeiture order under paragraph 10G may appeal against: the making of a forfeiture order; the decision not to make a forfeiture order; the decision to include, or not to include, provision for reasonable legal expenses in an order under paragraph 10I (the parties to the proceedings under paragraph 10I may also appeal).

7.19 Paragraph 10L provides that there is an extended time to appeal in cases where a deproscription order has been made.

Application for compensation

7.20 Paragraph 10P provides that where no order for forfeiture is made under Part 4A, the person from whom the property was seized or to whom the cash belongs may apply to the magistrates' court for compensation. The court may, if satisfied that the applicant has suffered loss as a result of the detention and the circumstances are exceptional, order that an amount of compensation it thinks reasonable (having regard to the loss suffered and any other relevant circumstances) be paid to the applicant. Paragraphs 10P(5)–(8) specify which bodies are to pay the compensation.

Notice

7.21 The Rules make provision as to how applications, notices and documents in connection with these court procedures are to be given.

Procedure at hearings

7.22 Paragraph 10Z(9) provides a power for prosecutors to appear in proceedings on behalf of: constables; CTFIs; the Commissioners for HMRC; Revenue and Customs officers and immigration officers, if requested to do so and if they consider it appropriate to do so.

Consolidation

7.23 No consolidation of the rules is planned at present.

8. Consultation Outcome

8.1 The Home Office consulted with relevant stakeholders on the provisions themselves, inviting and reviewing suggestions and observations amongst the groups potentially affected by this legislative change. No consultation has been undertaken with regard to these rules specifically, although they have been reviewed by persons experienced in magistrates' courts procedure in non-criminal matters (some technical amendments being made in response to comments received as part of that process).

9. Guidance

9.1 Guidance exists in the form of a Code of Practice for Officers acting under Schedule 1 to ATCSA on the use of these provisions. There is no guidance planned with regard to the use of these Rules specifically.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Home Office will monitor the use of these powers. Any reports of the operation of these powers can be gathered by Her Majesty's Courts and Tribunal Service and reported to the Home Office.

13. Contact

13.1 Amrita Dhaliwal can answer any queries regarding this instrument (Telephone: 0203 334 6306 or email: amrita.dhaliwal@justice.gov.uk).