EXPLANATORY MEMORANDUM TO

THE RESTRAINT ORDERS (LEGAL AID EXCEPTION AND RELEVANT LEGAL AID PAYMENTS) REGULATIONS 2015

2015 No. 868

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of these instruments

2.1 This instrument supports a policy proposal that will enable assets restrained under Part 2 of the Proceeds of Crime Act 2002 (POCA) to be used to pay outstanding legal aid contributions. The Restraint Orders (Legal Aid Exception and Relevant Legal Aid Payments) Regulations 2015 sets out the circumstances in which it will be possible to make a legal aid payment out of restrained assets and modifies the application of Part 2 of POCA in such circumstances, which will enable such payments to be made.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 A restraint order made under section 41 of POCA prohibits a specified person from dealing with realisable property held by him, subject to certain exceptions. Section 46 of the Crime and Courts Act 2013 (CCA) amends section 41 of POCA to require that all restraint orders contain a legal aid exception, which enables relevant legal aid payments to be made out of the restrained assets, subject to any restrictions prescribed by the Secretary of State. Part 2 of this instrument prescribes such a restriction.

4.2 Section 47 of the CCA confers on the Secretary of State the power, by regulations, to make provision about the making of relevant legal aid payments, including the power to modify a function and modify provisions made by or under any enactment. Part 3 of this instrument makes such provision. In particular, it provides that in specified circumstances, a restraint order will remain in place after a confiscation order made under Part 2 of POCA has been discharged or satisfied. Relevant legal aid payments can then be made out of the restrained assets.

4.3 The enabling powers for the regulations (found in sections 46 and 47 of the CCA) are not yet in force. It is our intention to commence sections 46 and 47 before the regulations are made, but after they have been laid in draft and debated by both Houses of Parliament.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Minister for Modern Slavery and Organised Crime has made the following statement regarding Human Rights:

In my view the provisions of the Restraint Orders (Legal Aid Exception and Relevant Legal Aid Payments) Regulations 2015 are compatible with the Convention rights.

7. Policy background

7.1 Part 2 of POCA provides that following a criminal conviction, a confiscation order may be made for an amount equal to the defendant's benefit from their crimes. In order to preserve assets so they are available to meet a confiscation order, the court can make a restraint order against some or all of a defendant's property. A restraint order can be made from the beginning of a criminal investigation

7.2 Where a defendant in criminal proceedings is in receipt of legal aid, property subject to a restraint order cannot be used by the defendant to satisfy any obligation that they might be under to contribute to the cost of their defence. This is to ensure that should the proceedings result in a confiscation order being made against the defendant, there will be assets available that can be used to satisfy the order. This can mean however that some defendants still owe money in respect of the cost of their criminal defence at the time they are made subject to a confiscation order, and indeed after that confiscation order has been satisfied.

7.3 Analysis by the Ministry of Justice has concluded that some of these defendants will still have assets that are subject to a restraint order following the satisfaction of their confiscation order. Under Part 2 of POCA however, once a confiscation order is settled, the restraint order must be discharged. This gives the defendant an opportunity to dissipate their assets before they pay off the money they owe in respect of the cost of their criminal defence, and makes it less likely that that money will ever be paid back.

7.4 To prevent this from happening, our policy is that where a person subject to a confiscation order has an outstanding obligation to make legal aid payments, and still has assets subject to restraint at the time their confiscation order is paid off (or if the confiscation order is discharged), the restraint order will remain in place until either the obligation to make legal aid payments has been satisfied, or until the restraint order is discharged by the court.

7.5 The amendments made to section 41 of POCA by section 46 of the CCA provide that every restraint order must include an exception that allows legal aid payments to be made out of the restrained assets. This will enable a defendant, who is otherwise prohibited from dealing with an asset by the terms of their restraint order, to deal with that asset for the purposes of making a legal aid payment. If the defendant is not willing to voluntarily make the legal aid payments, the continuation of the restraint order in accordance with these Regulations will prevent the assets from being dissipated whilst the Legal Aid Agency make arrangements to collect the money that is owed.

8. Consultation outcome

8.1 No formal public consultation has been carried out.

9. Guidance

9.1 No guidance will be issued in relation to this instrument, however there will be a memorandum of understanding issued between the prosecution agencies and the Legal Aid Agency relating to the handling of restraint orders that remain in force after the satisfaction or discharge of the confiscation order in accordance with these Regulations.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

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

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 There are no plans to monitor or review this instrument.

13. Contact

Stephen Goadby at the Home Office Tel: 020 7035 1559 or email: stephen.goadby@homeoffice.x.gsi.gov.uk can answer any queries regarding the instrument.