



Explanatory Notes to Proceeds Of Crime

Act 2002

2002 Chapter 29

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These notes refer to the Proceeds of Crime Act 2002 (c.29) which received Royal Assent on 24 July 2002

PROCEEDS OF CRIME ACT 2002

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Proceeds of Crime Act 2002, which received Royal Assent on 24 July 2002. They have been prepared by the Home Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So when a section or part of a section does not seem to require any explanation or comments, none is given.

BACKGROUND

Confiscation

3. Powers to confiscate from convicted defendants their benefit from crime were first introduced following the failure to recover funds in a drug trafficking case in 1978 known as Operation Julie. In this case, some £750,000 of drug trafficking proceeds were traced into the hands of the offenders and restrained. These funds had to be released after the House of Lords held that existing powers to forfeit items used in the commission of an offence could not be used "to strip the drug traffickers of the total profits of their unlawful enterprises." The confiscation regime was introduced in England & Wales by the Drug Trafficking Offences Act 1986. A similar regime was introduced in Scotland by the Criminal Justice (Scotland) Act 1987. Although confiscation was initially available only in drug trafficking cases, it was extended by the Criminal Justice Act 1988 and the Criminal Justice (Scotland) Act 1995 to cover non-drug indictable offences and specified summary offences. In Northern Ireland, powers to confiscate both the proceeds of drug trafficking and other crime were introduced in the Criminal Justice (Confiscation) (Northern Ireland) Order 1990. Most of this legislation has been amended since its introduction and, while some has been consolidated (in, for example, the Drug Trafficking Act 1994, the Proceeds of Crime (Scotland) Act 1995 and the Proceeds of Crime (Northern Ireland) Order 1996), much has not.
4. Confiscation orders are available following a conviction. The purpose of confiscation proceedings is to recover the financial benefit that the offender has obtained from his criminal conduct. The court calculates the value of that benefit and orders the offender to pay an equivalent sum (or less where a lower sum is available for

confiscation). Proceedings are conducted according to the civil standard of proof, i.e. on the balance of probabilities. In certain circumstances the court is empowered to assume that the defendant's assets, and his income and expenditure during the period of six years before proceedings were brought, have been derived from criminal conduct and to calculate the confiscation order accordingly. In England, Wales and Northern Ireland the court is required to make this assumption following a conviction for drug trafficking, unless to do so would give rise to a serious risk of injustice.

Cash forfeiture

5. Part III of the Criminal Justice (International Co-operation) Act 1990 introduced a new power for police and Customs officers to seize cash discovered on import or export which is reasonably suspected of being derived from or intended for use in drug trafficking. An application may subsequently be made in a magistrates' court for the forfeiture of the cash. No conviction is required for the forfeiture of the cash to be ordered; cash forfeiture proceedings are civil proceedings and the civil standard of proof applies. These provisions were later consolidated into Part II of the Drug Trafficking Act 1994, which applies on a UK-wide basis.

Money laundering

6. Money laundering is the process by which the proceeds of crime are converted into assets which appear to have a legitimate origin, so that they can be retained permanently or recycled into further criminal enterprises. It was first criminalised in the United Kingdom in respect of the proceeds of drug trafficking, by means of an offence in the Drug Trafficking Offences Act 1986. Further drug money laundering offences were subsequently enacted, together with separate offences relating to the proceeds of other criminal conduct and terrorist funds. At the time of introduction of the Act, there are five sets of money laundering offences in force, each applying to a different range of predicate offences and/or jurisdictions.

Report by the Performance and Innovation Unit

7. In October 1998, the Prime Minister tasked the Performance & Innovation Unit (PIU) of the Cabinet Office with examining asset recovery arrangements with a view to improving the efficiency of the recovery process and increasing the amount of illegally obtained assets recovered. The PIU report was published by the government in June 2000 with a number of legislative and other proposals including:

- the creation of a new agency with lead responsibility for asset recovery and containing a 'centre of excellence' for financial investigation training;
- the consolidation of existing laws on confiscation and money laundering into a single piece of legislation;

- the introduction of new powers to recover criminal assets through civil proceedings, without the need for a criminal conviction;
- gateways for the exchange of information between the new agency and the other authorities;
- enabling the new agency to carry out tax functions in relation to criminal gains; and
- ensuring that all the agencies involved in asset recovery have sufficient trained staff to enable the system to function efficiently.

Publication of draft sections for a Proceeds of Crime Bill

8. In March 2001 the government published for consultation a Command Paper entitled "Proceeds of Crime Bill - Publication of Draft Sections" (Cm 5066). The Bill introduced in October 2001 incorporated substantial revision of some of the sections, and further provisions were added.

SUMMARY

9. The Act is in twelve parts.

- Part 1: creates an Assets Recovery Agency (ARA).
- Part 2: makes provision for confiscation in England and Wales, replacing separate drug trafficking and criminal justice legislation with a consolidated and updated set of provisions. Restraint, confiscation, receivership and related matters are covered.
- Parts 3 & 4: make similar provision for Scotland and Northern Ireland respectively.
- Part 5: sets out new provisions for the recovery in the United Kingdom in civil proceedings of property which has been obtained through unlawful conduct or property which represents property obtained through unlawful conduct; and provisions for the search and seizure of cash which is reasonably suspected of having been obtained through unlawful conduct or of being intended for use in such conduct, and for the forfeiture of such cash in proceedings before a magistrates' court, sheriff or justice of the peace.
- Part 6: empowers the Director of ARA to exercise functions of the Inland Revenue in relation to income, gains and profits arising or accruing as a result of criminal conduct.

- Part 7: consolidates, updates and reforms the criminal law in the United Kingdom with regard to money laundering.
- Part 8: sets out powers for use in criminal confiscation, civil recovery and money laundering investigations.
- Part 9: deals with the relationship between confiscation and insolvency proceedings.
- Part 10: provides for the disclosure of information to and by the Director of ARA and the Scottish Ministers. It also allows the exchange of information between the Scottish Ministers and the Lord Advocate.
- Part 11: provides for co-operation in investigation and enforcement between the jurisdictions of the United Kingdom and with overseas authorities.
- Part 12: deals with miscellaneous and general matters.

THE ACT

Explanatory Notes for the Proceeds of Crime Act 2002

10. The explanatory notes are divided into parts reflecting the structure of the Act. The commentary on sections is set out in number order, with the commentary on the various Schedules following on from the Part to which they relate.

COMMENTARY ON SECTIONS

Part 1: Assets Recovery Agency

Section 1: The Agency and its Director

11. This section establishes the Assets Recovery Agency (ARA) to be headed by a new office-holder, the Director, who will be appointed by the Secretary of State. In practice, functions of the Secretary of State relating to the Agency will be carried out by the Home Secretary, in consultation with the Secretary of State for Northern Ireland and the Scottish Ministers (for the Director's revenue functions in Scotland) as necessary. The section enables the Director to employ staff to assist him in carrying out his functions, and to enter into contractual arrangements for this purpose. It also enables the Director to delegate the exercise of his functions to his staff and to others working on a contractual basis for him. The effect of providing that the Director is a corporation sole (*subsection (3)*) is that the office of the Director has legal personality and the Director (in his capacity as office-holder) can hold property, bring legal proceedings and employ staff. The Agency will be a Non-Ministerial Department (NMD); it is normal for the Minister for the Civil Service to have a formal role in determining the number of staff employed by such bodies, and this is provided for at *subsection (5)*.

Schedule 1: Assets Recovery Agency

12. *Paragraphs 1 and 2* concern the terms of appointment of the Director. The effect of *paragraph 3* is that the Director must appoint a deputy, and also an assistant director to have specific responsibility for his functions in Northern Ireland. Before the latter is appointed, the Director must consult the relevant Secretary of State i.e. the Secretary of State for Northern Ireland.

13. *Paragraph 5* requires the Agency to be funded directly by Parliament, as is normal for a NMD. Subject to specific exceptions in the Act (e.g. *section 57*), monies received by the Director in the course of carrying out his functions must be paid into the Consolidated Fund. As an NMD, the Agency will automatically be subject to Government accounting rules.

14. *Paragraph 6* sets out what the Director will be required to include in his annual plan, which will be subject to the approval of the Secretary of State. Express provision is made for the inclusion of details as to how the Director will carry out his functions in Northern Ireland.

15. *Paragraph 7* imposes a duty on the Director to prepare an annual report on his activities over the previous year and to submit it to the Secretary of State who, in turn, is required to lay it before Parliament and arrange for it to be published.

Section 2: Director's functions: general

16. *Subsection (1)* requires the Director to exercise his functions in the way he considers best calculated to contribute to the reduction of crime. In considering this matter, the Director must have regard to any guidance given to him by the Secretary of State (*subsection (5)*). The guidance must indicate that the reduction in crime is in general best secured by criminal investigations and prosecutions (*subsection (6)*). *Subsection (2)* requires him to exercise his functions efficiently and effectively. In doing so he must have regard to his current annual plan, which under *Schedule 1* has to be approved by the Secretary of State.

17. *Subsection (3)* empowers the Director to carry out investigations, and take any other steps, which he considers appropriate for facilitating, or incidental or conducive to, the exercise of his functions, such as negotiating Memoranda of Understanding with other agencies or arranging publicity in the field of asset recovery. The Director's functions are set out in other sections of the Act, the principal ones being the recovery of criminal assets through confiscation, civil recovery, the exercise of Revenue functions and the accreditation and training of financial investigators.

Section 3: Accreditation and training

18. *Section 3* requires the Director to establish a system for the accreditation of financial investigators. Certain accredited financial investigators will have powers to

apply in England, Wales and Northern Ireland for restraint orders and certain ancillary orders under Parts 2 and 4, and for certain investigation orders under Part 8. *Subsections (3) and (4)* provide that the Director may provide different classes of accreditation for different purposes. *Subsection (7)* requires the Director to make provision for the training of persons both in financial investigation and in the operation of the provisions of the Act. The section does not require that the training should be delivered directly by ARA, but the Director must ensure that training is made available.

Section 4: Co-operation

19. *Section 4* requires the Director and other persons with investigation or prosecution functions to co-operate with each other in the exercise of their functions under the Act. Such persons would include police officers, officers of HM Customs & Excise and members of the Crown Prosecution Service and the National Criminal Intelligence Service.

Section 5: Advice and assistance

20. *Section 5* requires the Director to give such advice and assistance to the Secretary of State as he may reasonably require, in relation to the matters set out in *section 5(a)* and *5(b)*. The Director might, for example, if required to do so, propose amendments to the Government's strategy and targets for recovering the proceeds of crime. He might also be required to advise and assist the Secretary of State on matters connected with his own functions.

Part 2: Confiscation: England and Wales

Confiscation orders

Section 6: Making of order

21. *Section 6* sets out the circumstances in which confiscation orders under Part 2 of the Act can be made. Confiscation orders may only be made in the Crown Court; the limited power of the magistrates' court under earlier confiscation legislation to make a confiscation order is abolished. Under the Act, a confiscation order may be made following any conviction in the Crown Court or the magistrates' court. Where the conviction takes place in the magistrates' court, a confiscation order can only be made if the defendant is either committed to the Crown Court for sentence or committed to the Crown Court for sentence and confiscation under the new power created in the Act (see *section 70*). The confiscation procedures are mandatory: the Crown Court must go through them where asked to do so by the prosecutor or the Director of the new Agency.

22. *Section 6* also makes clear the nature of a confiscation order under the Act. It is an order to a convicted defendant to pay a sum of money representing the defendant's benefit from crime. The approach of the Act to confiscation therefore reflects that adopted by the existing legislation.

23. *Section 6* also makes it clear that Part 2 provides for confiscation of the defendant's benefit from either his "general criminal conduct" or his "particular criminal conduct". General criminal conduct means any criminal conduct of the defendant's, whenever the conduct occurred (see *section 76*) and whether or not it has ever formed the subject of any criminal prosecution. Particular criminal conduct means the offences of which the defendant has been convicted in the current proceedings, together with any taken into consideration by the court in passing sentence (again, see *section 76*). So general criminal conduct includes particular criminal conduct.

24. Confiscation is by reference to the defendant's benefit from his general criminal conduct where he is identified by the court on conviction as having a criminal lifestyle. This is determined by reference to the nature of the offence or offences of which he has been convicted in the current proceedings or certain previous proceedings. The offences in question are specified in *section 75*, read in conjunction with *Schedule 2*. If the court decides that the defendant does not have a criminal lifestyle, confiscation is by reference to his benefit from his particular criminal conduct.

Section 7: Recoverable amount

25. *Section 7* specifies how the amount recoverable under a confiscation order is to be calculated. The method of calculation is much the same as in the existing confiscation statutes. The amount is the amount of the defendant's benefit from either his general criminal conduct or his particular criminal conduct (as the case may be), unless the amount available for confiscation is considered by the court and found to be less than the benefit in question, in which case the order must be made in that lesser amount. The amount available for confiscation is described as the available amount (equivalent to the term "the amount that might be realised" in the earlier confiscation legislation) and the amount actually ordered to be confiscated as the recoverable amount (equivalent to "the amount to be recovered" in the earlier confiscation legislation). *Subsection (2)* affirms a line of case law to the effect that the burden is on the defendant to show that the available amount is less than the benefit and to show the extent of the available amount. Where the court decides the available amount (and it will only do so at the defendant's request), *subsection (5)* requires it to include a statement of its calculations in the confiscation order. This is intended to assist enforcement by alerting the enforcing authorities to the property available for confiscation.

Section 8: Defendant's benefit

26. This section describes how the court must work out whether the defendant has benefited from criminal conduct and what the value of that benefit is. *Subsection 2* explains that the court must regard the defendant as having benefited by the value of any property obtained by him from criminal conduct up to the time the court makes its decision. *Subsections (3) to (8)* deal with the situation where the court is holding a confiscation proceeding in respect of the defendant's general criminal conduct, and a previous confiscation order or orders has been made against the defendant in respect of such conduct. General criminal conduct means all the defendant's criminal conduct at any

time, so a court making a general criminal conduct confiscation order could confiscate the same benefit twice, unless the legislation prevented it. Section 8 prevents double counting of the same benefit by providing (broadly) that, once the court has calculated the defendant's benefit from his or her general criminal conduct, it must deduct the amount ordered to be paid under the last general criminal conduct confiscation order previously made against the defendant. Sub-section (4) ensures that a calculation of benefit once made in relation to an offence will apply for the purposes of any subsequent calculation of benefit in respect of general criminal conduct. The provision is not required for particular criminal conduct because the same offences cannot be subject to a second conviction, or taken into consideration for sentencing purposes twice, and therefore there is no risk of confiscating the same benefit from particular criminal conduct twice.

Section 9: Available amount

27. *Section 9* explains how the available amount is to be calculated. It is calculated in the same way as "the amount that might be realised" in the earlier confiscation legislation. The available amount is the value of all the defendant's property, minus certain prior obligations of the defendant's such as earlier fines, plus the value of all tainted gifts made by the defendant. Tainted gifts are described in *section 77*.

Section 10: Assumptions to be made in case of criminal lifestyle

28. *Section 10* applies where the court has decided that the defendant has a criminal lifestyle and it is, accordingly, considering the defendant's benefit from general criminal conduct. The section requires the court to make certain specified assumptions to establish whether the defendant has benefited from general criminal conduct, and, if so, by how much. The court is not, however, permitted to make an assumption in relation to particular property or expenditure if it is shown to be incorrect or there would be a serious risk of injustice if it were made. Where for any reason the court does not make any of the assumptions specified in the legislation, it must nevertheless continue to decide whether the defendant has benefited from general criminal conduct and decide the recoverable amount, albeit without the assistance of the assumptions.

29. The earlier confiscation legislation provides for similar assumptions to be made. They are mandatory in confiscation proceedings following a conviction for a drug trafficking offence, but discretionary in all other confiscation cases (and, in the latter case, other criteria must be satisfied before they can be made). *Section 11* creates a single scheme under which the assumptions are mandatory in all cases where a person has a criminal lifestyle (defined in *section 75*).

Section 11: Time for payment

30. *Section 11* indicates how long the court may allow the defendant to pay the amount due under the confiscation order. At present, there is no limit on the time that may be allowed. *Section 11* provides that the amount is to be paid immediately, unless the defendant can demonstrate to the court that he needs more time to pay. The prosecutor

and Director will have the right to be heard at any application by the defendant for time to pay, or an extension of time to pay. If the court is satisfied that time to pay is required, it may allow up to six months to pay, and up to a further six months on a later occasion if there are exceptional reasons justifying the extension. In no case, however, will more than 12 months be granted from the day on which the confiscation order is made.

Section 12: Interest on unpaid sums

31. *Section 12* makes it clear that the defendant must pay interest on a confiscation order that is not paid in full by the time allowed. It leaves no room for doubt that the payment of interest is mandatory in all cases (the existing legislation is framed in terms of a "liability" to pay interest and it has been suggested occasionally that this implies a discretion as to whether or not interest is added to a particular unpaid order).

Section 13: Effect of order on court's other powers

32. *Section 13* requires the court to have regard to the confiscation order before imposing a fine or other order involving payment on the defendant, except for a compensation order, but otherwise to leave the confiscation order out of account in sentencing the defendant. It reproduces the effect of existing legislation.

Procedural matters

Section 14: Postponement

33. *Section 14* enables the court to postpone the confiscation proceedings on one or more occasions for up to a total of two years from the defendant's conviction, or three months from the date on which any appeal against conviction is disposed of, if the three months ends more than two years after the date of conviction. There is no limit to the period of postponement where there are exceptional circumstances. The provision extends the period of postponement permitted under the earlier confiscation legislation, which is normally only up to six months. Where the court does not postpone confiscation proceedings, it must make a confiscation order before it sentences the defendant.

34. *Section 14* allows proceedings to be postponed for any reason. This enables a postponement to be made if it is required, for example, because a judge is ill. Under earlier confiscation legislation, a postponement can only be made so that the court can obtain further information about the defendant's benefit or the realisable property.

35. *Section 14(8)* is not found in earlier confiscation legislation. It provides that if an application for extension is made before the end of the period of postponement, it does not matter if the court makes a decision on the application after the end of the period of postponement. This deals with the situation where an application is made in time but, because of listing difficulties, the court cannot hear and make a decision on the application before the existing period of postponement expires.

36. *Section 14(11)* prevents a confiscation order from being quashed, merely because there has been some procedural irregularity in the operation of the postponement procedures. But *subsection (12)* disapplies the provision if the court imposes a fine or other specified order, and then attempts to make a confiscation order subsequently.