

PROCEEDS OF CRIME ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 7: Money Laundering

Offences

Section 327: Concealing etc.

469. *Section 327* creates one of three principal money laundering offences. The other two are to be found in *sections 328* and *329*. Because of the definition of criminal property at *section 340*, all three principal money laundering offences now apply to the laundering of an offender's own proceeds of crime as well as those of someone else.
470. *Section 327* simplifies and replaces section 49 of the Drug Trafficking Act 1994 and section 93C of the Criminal Justice Act 1988 and the corresponding provisions in Scotland & Northern Ireland (section 14 of the Criminal Justice (International Co-operation) Act 1990 and Article 47 of the Proceeds of Crime (Northern Ireland) Order 1996). Along with *sections 328* and *329*, *section 327* replaces the parallel drug and non-drug crime money laundering offences with single offences that do not distinguish between the proceeds of drug trafficking and the proceeds of other crimes.
471. The *section 327* offence would be committed where a person concealed, disguised, converted, transferred or removed from the jurisdiction criminal property. Criminal property is defined at *section 340(3)* as being property which the alleged offender knows or suspects constitutes or represents benefit from any criminal conduct as defined in *section 340(2)*.
472. The section contains defences against committing the offence. For example, the offence is not committed if an authorised disclosure is made under *section 338* as soon as possible after the transaction has taken place, or if the disclosure is made before the act has taken place and the discloser has obtained the appropriate consent, or there was a reasonable excuse for not making such a disclosure. Additionally, it is not uncommon for the police or other enforcement authorities to take possession of criminal property in the course of their official duties and to convert or transfer it, for example into an interest bearing account pending further investigation. Therefore *subsection (2)(c)* gives them the necessary exemption from the offence.
473. The maximum penalty for the *section 337* offence, and for the other two principal money laundering offences at *sections 328* and *329*, is 14 years imprisonment, as set out at *section 334*.

Section 328: Arrangements

474. *Section 328* simplifies and replaces section 50 of the Drug Trafficking Act 1994 and section 93A of the Criminal Justice Act 1988, section 38 of the Criminal Law (Consolidation) (Scotland) Act 1995 and Article 46 of the Proceeds of Crime (Northern Ireland) Order 1996.

475. To establish an offence under this clause, the prosecutor would need to establish that a person entered into or became concerned in an arrangement which he knew or suspected would make it easier for another person to acquire, retain, use or control criminal property and that the person concerned also knew or suspected that the property constituted or represented benefit from criminal conduct. *Section 328* includes the same defences against committing the offence, as are included in *section 327*.

Section 329: Acquisition, use and possession

476. *Section 329* unifies and replaces section 51 of the Drug Trafficking Act, section 93B of the Criminal Justice Act 1988, section 37 of the Criminal Law (Consolidation) (Scotland) Act 1995 and Article 45 of the Proceeds of Crime (Northern Ireland) Order 1996. As in *sections 327* and *328*, by reason of *section 340*, this offence is only committed where a person knows or suspects that the property which is acquired etc constitutes or represents his own or another's benefit from criminal conduct.
477. Again, the same defences against committing the offence apply as in *sections 327* and *328*. Additionally, the effect of the defence in *subsection (2)(c)* is that persons, such as tradesmen, who are paid for ordinary consumable goods and services in money that comes from crime are not under any obligation to question the source of the money. *Subsection (3)(c)* makes it clear that the provision of goods or services that help a person to carry out criminal conduct would not be a defence. However, *section 329(3)(c)* only negates the defence in *section 329(2)(c)* if the person who provides the goods or services knows or suspects that they will help the recipient to carry out criminal conduct.

Section 330: Failure to disclose: regulated sector

478. *Section 330* replaces section 52 of the Drug Trafficking Act 1994 and creates an obligation to report suspicions of money laundering to the authorities. The equivalent provision in Scotland is section 39 of the Criminal Law (Consolidation)(Scotland) Act 1995 and in Northern Ireland is Article 44 of the Proceeds of Crime (Northern Ireland) Order 1996. *Section 330* widens the scope of the offences that it replaces beyond reporting drug money laundering to reporting the laundering of the proceeds of any criminal conduct. *Subsection (2)(b)* introduces a negligence test which means that the failure to disclose offence would also be committed where a person has reasonable grounds for knowing or suspecting that another person is engaged in money laundering, even if they did not actually know or suspect.
479. The duty to report under *section 330* is, however, restricted to those persons who receive information in the course of a business in the regulated sector, as defined in *Schedule 9* to the Act. This definition closely follows equivalent provisions in the Money Laundering Regulations 1993 (as amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001), which determines the applicability of those Regulations. The definition provides that a business is in the regulated sector to the extent that it carries out the activities listed in *Part 1 of Schedule 9*. The section reflects the fact that persons who are carrying out activities in the regulated sector should be expected to exercise a higher level of diligence in handling transactions than those employed in other businesses. Where a business carries out some activities which are listed in *Schedule 9* and some which are not, then only employees carrying out the listed activities will be caught by the offence.
480. The offence is committed if the "required disclosure" is not made. The "required disclosure" is defined at *subsection (5)* as being a disclosure to a nominated officer, or to a person authorised by the Director General of the National Criminal Intelligence Service, which has been made in the form and manner (if any) prescribed under the order making power at *section 339*. This reflects the policy that disclosures in the regulated sector should be made directly to the National Criminal Intelligence Service (NCIS), rather than through a constable or a customs officer. It gives those in the regulated sector the choice of either disclosing direct to NCIS, which might be appropriate for

sole practitioners, or disclosing to the nominated officer who will operate as a filter for disclosures to NCIS.

481. The maximum penalty for committing the offence, as set out at [section 334](#), is 5 years imprisonment.
482. *Subsection (6)* provides a defence for a person who has a reasonable excuse for not disclosing the information and also for a lawyer, where the information came to him in privileged circumstances. There is also a defence for staff who have not had adequate training concerning the identification of transactions which may be indicative of money laundering. In order to use this defence successfully, the defendant would have to show that he did not actually know or suspect that another person was engaged in money laundering and that, in his case, his employer had not complied with requirements to provide employees with such training as is specified by the Secretary of State by order.
483. Guidance Notes on Money Laundering have been produced and issued since 1990 to regulated institutions by the industry's Joint Money Laundering Steering Group, which operates under the auspices of the British Bankers' Association. [Section 330\(8\)](#) recognises the potential value of such guidance and provides that the court must take any guidance issued by a supervisory authority (as listed in *Part 2* of [Schedule 6](#)) or any other appropriate body (as defined at [section 330\(13\)](#)) into account when determining whether an offence has been committed. The court would only be obliged to take into account guidance, the content and manner of publication of which has been approved by the Treasury (in its capacity as the Government department which has overall lead responsibility for money laundering policy in the regulated sector). As at present, the industry itself will draw up relevant guidance, and it will be for the industry bodies to decide whether they wish to seek Treasury approval, and make use of this additional safeguard.
484. The scope of [section 330](#) extends to inchoate offences such as conspiracy by reason of the definition of money laundering in [section 340\(11\)](#).

Section 331: Failure to disclose: nominated officers in the regulated sector

485. [Section 331](#) creates an offence where a nominated officer who receives a report under section 330 (the failure to disclose offence) which causes him to know or suspect or gives reasonable grounds for knowledge or suspicion, that money laundering is taking place, does not disclose that report as soon as practicable after the information comes to him. *Subsection (5)* specifies that the "required disclosure" which a nominated officer must make, has to be made to the National Criminal Intelligence Service, in the form and manner (if any) prescribed by the order making power at [section 339](#).

Section 332: Failure to disclose: other nominated officers

486. [Section 332](#) creates an offence where a nominated officer who receives a report under [section 337](#) or [338](#) (in other words, a disclosure in relation to one of the principal money laundering offences or a voluntary disclosure) which causes him to know or suspect that money laundering is taking place does not disclose that report as soon as practicable after the information comes to him. The nominated officer is required to disclose to the National Criminal Intelligence Service in the form prescribed by section 339. This clause applies to nominated officers both in the regulated sector and outside the regulated sector.

Section 333: Tipping off

487. [Section 333](#) creates the offence of making a disclosure likely to prejudice a money laundering investigation being undertaken or which may be undertaken by law enforcement authorities. Together with [section 342](#) (offence of prejudicing an investigation), these new offences replace section 53 of the Drug Trafficking Offences Act 1994 and section 93D of the Criminal Justice Act 1988. The equivalent provision

in Scotland is section 40 of the Criminal Law (Consolidation) (Scotland) Act 1995; in Northern Ireland it is Article 48 of the Proceeds of Crime (Northern Ireland) Order 1996.

488. As for [sections 327\(2\)\(c\), 328\(2\)\(c\) and 329\(2\)\(c\)](#), there is protection from the offence for law enforcement officers who may need to make a prohibited disclosure in the course of their official duties, and there is an additional defence if a person did not know or suspect that the disclosure would prejudice an investigation. As for [section 330](#), [section 333](#) also extends to inchoate offences, for the same reason. The maximum penalty for the offence, as set out at [section 334](#), is 5 years imprisonment.

Consent

Section 335: Appropriate consent

489. [Section 335](#) defines the parameters of "appropriate consent" for the purposes of the authorised disclosure provisions. A key element of this section is the specification of time limits within which a constable or customs officer must respond to suspicious transaction reports in circumstances where a consent decision is required. It specifies that consent decisions must be made within 7 working days. If nothing is heard within that time, then the discloser can go ahead with an otherwise prohibited act without an offence being committed. If consent is withheld within the 7 working days, then the constable or customs officer has a further 31 calendar days in which to take further action such as seeking a court order to restrain the assets in question. Again if nothing further is heard after the end of the 31-day period, then the discloser can proceed with the transaction with no risk of committing an offence.

Section 336: Nominated officer: consent

490. [Section 336](#) provides that a nominated officer must not give appropriate consent unless he has authorisation from the National Criminal Intelligence Service or the time limits specified in [subsections \(7\) to \(9\)](#) have expired. These time limits mirror the limits in [section 335](#) for the giving of consent to an otherwise prohibited act by a customs officer or constable. [Section 335\(5\)](#) makes it an offence for a nominated officer to consent to an otherwise prohibited act except as outlined above. A nominated officer does not commit an offence under this section if he gives consent to a transaction taking place, if he genuinely does not know or suspect that money laundering is taking place.

Disclosures

Section 337: Protected disclosures

491. [Section 337](#) exempts a person who receives information in the course of his trade, profession, business or employment from any legal or other obligations that would otherwise prevent him from making disclosures to the authorities. The protection extends not just to the regulated sector which is required to make disclosures in order to avoid committing an offence under [section 330](#), but also to those carrying out any trade, profession, business or employment, even if this is not in the regulated sector, who voluntarily make disclosures about money laundering to the police. This includes those exercising a profession in a voluntary capacity such as accountants or solicitors giving free advice. It does not, however, mean that they become subject to the failure to disclose offence at [section 330](#). Although it should be noted that if they are a nominated officer working outside the regulated sector, they will be subject to the offence of "Failure to disclose: other nominated officers" at [section 332](#).
492. The protection provided by [section 337](#) is very wide, consistent with the United Kingdom's obligations under Article 9 of the 1991 European Community Directive on prevention of the use of the financial system for the purpose of money laundering.

Section 338: Authorised disclosures

493. *Section 338* sets out the circumstances in which a disclosure will be ‘authorised’ for the purposes of affording a defence to the principal money laundering offences in *sections 327 to 329*. Where a disclosure is ‘authorised’ for these purposes, then it is not to be taken to breach any rule which would otherwise restrict that disclosure.
494. This is necessary because, in the course of their business, those working inside or outside the regulated sector may need to complete a transaction that they know or suspect could constitute one of the three principal money laundering offences. This section gives them the means of obtaining the authorisation necessary to complete the transaction, if the disclosure is made before a transaction is completed; or provides a defence against the failure to disclose offence if the disclosure is made as soon as possible after the transaction has taken place and there was a good reason not to make it before.

Section 339: Form and manner of disclosures

495. This section provides an order making power that enables the Secretary of State to prescribe the form and manner in which a disclosure must be made under *sections 330, 331, 332 and 338*.
496. The prescribed form may include a request to the person making the disclosure to provide additional information in support of the disclosure/suspicious transaction report. The information requested, by virtue of *subsection (3)* must be information that would be necessary to enable the authorities to decide whether to start a money laundering investigation. Additionally, by virtue of *subsection (4)* any information supplied is given immunity from any restriction on the disclosure of information such as confidentiality clauses in contracts and the law of confidence. It is important to note that no offence is committed if the person making the disclosure does not supply the additional information.

Interpretation

Section 340: Interpretation

497. *Subsection (12)* ensures that where Part 7 permits disclosure to a nominated officer, (under *sections 330, 337 and 338*) not only employees, but people exercising functions in relation to an organisation who are not technically employees, will also be able to disclose to a nominated officer, if the organisation has set one up. Directors, partners and volunteers for example will be able to make a report to a nominated officer, if their organisation has one. The liability for reporting to NCIS or a constable, if appropriate, then falls on the nominated officer by virtue of *sections 331 and 332*.
498. *Subsection (13)* extends the definition of a constable (as used in this Part only) to a person authorised by the Director General of the National Criminal Intelligence Service. This is for the purpose of facilitating the handling of suspicious transaction reports by civilian staff employed by NCIS.

Schedule 9: Regulated sector and supervisory authorities

499. *Part 1* of this Schedule defines what is or is not a business in the regulated sector for the purpose of *section 330(3)*. It is broadly based on Article 4 of the [Money Laundering Regulations 1993 \(SI 1933/1993\)](#) as amended by article 439 of the [Financial Services and Markets Act 2000 \(Consequential Amendments and Repeals\) Order 2001 \[SI 3649/2001\]](#). A business that engages in activities listed in paragraph 1, in addition to other non-regulated activities, is only in the regulated sector to the extent that it carries on the listed activities. This ensures that people working in businesses which conduct both regulated and unregulated activities would only be caught by the failure to disclose

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

offence at [section 330](#) whilst actually carrying out the regulated activities and not in the course of other non-regulated activities.

500. [Part 2 of Schedule 9](#) lists supervisory authorities for the purpose of [section 330\(8\)\(a\)](#), and is consistent with Article 15 of the 1993 Money Laundering Regulations (as amended by the [Money Laundering Regulations 2001, SI 3641/2001](#)).
501. [Part 3 of Schedule 9](#) provides that the Treasury may by Order amend the definitions in Part 1 and 2 of the Schedule.