

PROCEEDS OF CRIME ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Civil Recovery of the Proceeds etc. of Unlawful Conduct

Chapter 1: Introductory

Section 240: General purpose of this Part

287. *Subsection (1)* explains that this Part of the Act has two purposes. One is to enable the enforcement authority to bring civil proceedings in the High Court or Court of Session to recover property that is or represents property obtained through unlawful conduct (civil recovery). This is an entirely new right of action, and is reserved to the enforcement authority. The civil recovery scheme is set out in *sections 243* to *288*. *Section 316(1)* explains that the enforcement authority means the Director of the ARA, except in Scotland where it means the Scottish Ministers. Except as specifically provided by the sections, court proceedings in the High Court will be governed in the usual way in England and Wales by the Civil Procedure Rules or in Northern Ireland by similar rules of court referred to as Rules of the Supreme Court; and in the Court of Session in Scotland by Petition Rules.
288. The second purpose of Part 5 is to enable cash which is or represents property obtained through unlawful conduct, or is intended to be used in such conduct, to be forfeited in civil proceedings before a magistrates' court or (in Scotland) the sheriff (cash forfeiture). This power replaces, with an extended scheme, the existing provision, in Part II of the 1994 Drug Trafficking Act, for the forfeiture of cash discovered on export or import which is suspected to be derived from or intended for use in drug trafficking. The cash forfeiture scheme is set out in *sections 289* to *303*.
289. The key components introduced in this section are individually explained in later sections. The meaning of 'property' is explained in *section 316(4)*; 'unlawful conduct' at *section 241*; 'property obtained through unlawful conduct' in *section 242*; and 'recoverable property' at *sections 304* to *310*.
290. *Subsection (2)* makes clear that civil recovery and cash forfeiture proceedings may be brought whether or not proceedings have been brought for an offence in connection with the property. Cases where criminal proceedings have not been brought would include cases where there are insufficient grounds for prosecution, or where the person suspected of the offence is outside the jurisdiction or has died. Cases where criminal proceedings have been brought may include cases where a defendant has been acquitted, or where a conviction did not result in a confiscation order. However, *section 308* makes clear that property is not recoverable if it has been taken into account in deciding the amount to be paid under a confiscation order.

Section 241: "Unlawful conduct"

291. *Subsection (1)* defines conduct occurring in the UK as unlawful if it is unlawful under the criminal law of the part of the UK in which it occurred.

292. *Subsection (2)* extends the definition of 'unlawful conduct' to include conduct which occurs outside the United Kingdom and is unlawful under the criminal law of that country, and would be unlawful if it occurred in any part of the United Kingdom. The effect of this provision is to enable property which has been obtained through conduct abroad to be recovered, or cash which has been so obtained to be forfeited, if the conduct was unlawful where it took place and would be unlawful in at least one part of the United Kingdom; and to enable cash which is intended for use abroad to be forfeited if the conduct for which it is intended would be unlawful both in at least one part of the United Kingdom and in the country where it was intended to occur.
293. *Subsection (3)* makes clear that the test the court or sheriff must use in determining whether matters alleged to constitute unlawful conduct have occurred or whether any person intended to use cash for unlawful conduct is the balance of probabilities. That is the normal standard of proof applicable in civil proceedings. The criminal standard of proof, under which matters must be proved beyond reasonable doubt, does not therefore apply in civil recovery or cash forfeiture proceedings.

Section 242: "Property obtained through unlawful conduct"

294. *Subsection (1)* explains what it means to obtain property through unlawful conduct. A person will obtain property through unlawful conduct if he obtains it:
- by the conduct – for example by stealing it, or by obtaining it by means of dealing in illicit drugs, or
 - in return for the conduct – for example by being paid to commit murder or arson, or taking a bribe to give false evidence or corruptly award a contract.
295. The purpose of *subsection (2)(a)* is to ensure that property counts as having been obtained through unlawful conduct regardless of any investment in that conduct. So if a person buys illicit drugs with honestly come by money, and sells them at a profit, the whole of the proceeds of the sale will count as having been obtained through unlawful conduct, and not just the profit.
296. *Subsection (2)(b)* provides that it is not necessary to show that property was obtained through a particular kind of unlawful conduct, so long as it can be shown to have been obtained through unlawful conduct of one kind or another. So it will not matter, for example, that it cannot be established whether certain funds are attributable to drug dealing, money laundering, brothel-keeping or other unlawful activities, provided it can be shown that they are attributable to one or other of these in the alternative, or perhaps some combination.