

# PROCEEDS OF CRIME ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 8: Investigations** Chapter 3: Scotland

##### *Production orders*

##### *Section 380: Production orders*

534. The power for a sheriff to make a production order is available for all three types of investigations specified in [section 341](#). Similar powers exist at present in section 18 of the Proceeds of Crime (Scotland) Act 1995 and section 31 of the Criminal Law (Consolidation)(Scotland) Act 1995. Under *subsection (1)*, an application for a production order may be made by an appropriate person: [section 412](#) specifies the appropriate person in relation to each type of investigation.

##### *Section 382: Order to grant entry*

535. This power might be used, for example, to enable a proper person, as specified in [section 412](#), to be granted entry to a building in circumstances where a production order has been made in respect of material in a particular office in that building.

##### *Section 385: Government departments*

536. [Section 385](#) extends the scope of a production order to cover material held by an authorised government department and is similar to existing powers in section 20 of the Proceeds of Crime (Scotland) Act 1995 and section 35 of the of the Criminal Law (Consolidation) (Scotland) Act 1995. In addition, in order to reflect the effect of devolution in Scotland under the Scotland Act 1998, provision is made to ensure that the Scottish Administration is, for the purposes of this section, treated as government departments.

##### **Search warrants**

##### *Section 387: Search warrants*

537. Powers to issue warrants derive from the existing powers in section 19 of the Proceeds of Crime (Scotland) Act 1995 and section 32 of the Criminal Law (Consolidation) (Scotland) Act 1995. As in [section 380](#), an application for a warrant may be made by an appropriate person as set out in [section 412](#). A warrant may be issued either if a production order has been made and not complied with and there are reasonable grounds for believing that the material specified in the warrant is on the premises, or if [section 388](#) is satisfied (*subsection (5)*).

***Section 388: Requirements where production order is not available***

538. *Subsection (1)(b)* refers to two sets of conditions for issuing a warrant in the absence of a production order. The first set of conditions (*subsections (3) and (4)*) might be met, for example, where the person who owns the material is abroad and therefore it is not possible to communicate with that person. In such circumstances, it is clear that a production order in respect of that person would have no effect. The second set of conditions (*subsections (5) to (9)*) might be met where it is impossible to describe the material (for the purposes of a production order) and access will not be gained without a warrant (e.g. to the residence of the suspect).

***Section 390: Further provisions: confiscation, civil recovery and money laundering***

539. This section makes additional provisions in respect of warrants issued for confiscation, civil recovery and money laundering investigations. *Subsection (2)* provides that warrants will continue in force for one month from the day on which they were issued. Search warrants will also authorise the person executing it to require that information which is held on computer and which he believes is relevant to the investigation to be produced in a form which it can be taken away and is visible and legible.
540. *Subsection (5)* gives power for a sheriff to make a civil recovery investigation warrant subject to such conditions as he thinks fit. A person executing a civil recovery search warrant will have no automatic right to use reasonable force (in contrast to the position where a constable executes a search warrant). *Subsection (6)* therefore gives a sheriff power to authorise the person executing the civil recovery investigation warrant to use reasonable force if he thinks it is necessary to make the warrant effective.

**Disclosure orders**

***Section 391: Disclosure orders***

541. Under *subsection (1)*, the Lord Advocate may apply to the High Court for a disclosure order in respect of a confiscation investigation and the Scottish Ministers may apply to the Court of Session for a disclosure order in respect of a civil recovery investigation. Because of the necessarily invasive nature of such an order, it is not thought appropriate that such a power should be available for investigations into money laundering offences, although comparable powers exist in the Terrorism Act 2000 in relation to terrorist offences as well as terrorist funding.
542. Once a disclosure order has been made, the Lord Advocate or the Scottish Ministers may use the extensive powers set out in *subsection (4)* throughout the relevant investigation. Thus, unlike the other orders covered by this Part which have to be applied for separately on each occasion, a disclosure order gives the Lord Advocate or the Scottish Ministers continuing powers for the purposes of the relevant investigation. A person may require that evidence of the authority to exercise disclosure powers be provided. Where this happens, it is envisaged that a copy of the disclosure order will be given to the person.

***Section 392: Requirements for making of disclosure order***

543. Because of their intrusive nature, it is not anticipated that disclosure orders will be sought unless other powers, such as production orders, have already been sought or would demonstrably not suffice to enable the required information to be obtained. Indeed, this would be one of the points the High Court or the Court of Session would be expected to consider as part of his consideration of the proportionality test which would apply by virtue of section 6 of the Human Rights Act 1998.

***Section 393: Offences***

544. As the disclosure order obliges persons to comply with certain requirements, sanctions to compel such compliance are required. There is a maximum penalty of six months

imprisonment and/or a level 5 fine (currently £5000) for non-compliance and two years imprisonment and/or an unlimited fine for knowingly or recklessly making a false or misleading statement.

### ***Section 394: Statements***

545. As part of the Government's response to the judgment of the European Court of Human Rights in the case of *Saunders v UK*, Schedule 3 to the Youth Justice and Criminal Evidence Act 1999 amended a number of compulsory disclosure powers in order to prevent a statement obtained under compulsion from a person from being used to incriminate him (subject to exceptions). Similar provision is made in this section.

## **Customer information orders**

### ***Section 397: Customer information orders***

546. A customer information order would require all (or a targeted sample of) banks and other financial institutions to provide details of any accounts held by the person who is the subject of a confiscation or money laundering investigation. The order can also apply to persons who appear to hold a property which is subject to a civil recovery investigation. Under *subsection (1)* an application for a customer information will be made to the sheriff court by the appropriate person as defined in *section 412*. As with disclosure orders, a person may require the person serving the order to demonstrate that they have the authority they claim. Again, it is envisaged that a copy of the original customer information order will be provided.

### ***Section 398: Meaning of customer information***

547. *Section 398* sets out the definition of "customer information" for individuals and for companies and partnerships. *Subsections (2)(f) and (3)(i)* require financial institutions to produce evidence of identity obtained in compliance with the relevant existing legislation, currently the [Money Laundering Regulations 1993 \[SI 1993 No.1933\]](#). By virtue of *section 459(6)*, any order made by the Scottish Ministers under *subsection (4)* to extend the meaning of "customer information" will have to be laid before and approved by a resolution of the Scottish Parliament.

### ***Section 400: Offences***

548. As with the disclosure order, there are two offences connected with customer information orders. As the sanctions are directed at non-compliant institutions rather than an individual they are solely financial. The maximum penalties are a level 5 fine (currently £5000) for non-compliance and an unlimited fine for knowingly or recklessly making a false or misleading statement.

### ***Section 401: Statements***

549. Like the disclosure order, the customer information order requires an institution to divulge information. *Section 401* sets out the standard conditions on the use of such information to prevent information obtained under compulsion from being used against the financial institution in criminal proceedings against it (subject to certain limited exceptions) (see *section 394*).

## **Account monitoring orders**

### ***Section 404: Account monitoring orders***

550. *Section 404* has the effect of requiring a financial institution to provide specified information in relation to an account (for example, details of all transactions passing through the account) during a specified period up to a maximum of 90 days. The information would normally be provided in the form of a bank statement. An account

monitoring order may be obtained in respect of all three types of investigation specified in [section 341](#) and can be applied for by an appropriate person as specified in [section 412](#).

#### ***Section 405: Requirements for making of account monitoring order***

551. As part of his consideration of the proportionality test that he must apply by virtue of section 6 of the Human Rights Act 1998, the sheriff might want to satisfy himself that an order of this type (rather than a production order) is necessary for the purpose of the investigation.

#### ***Section 406: Statements***

552. As with the disclosure and customer information orders, an account monitoring order compels an institution to divulge information. Similar to the provisions for disclosure orders and customer information orders, [section 400](#) sets out the standard conditions on the use of such information to prevent self-incriminatory information being used as evidence in criminal proceedings against the financial institutions (subject to certain limited exceptions).

#### ***Section 408: Supplementary***

553. [Subsection \(4\)](#) allows application to be made to discharge or vary an account monitoring order.

### **General**

#### ***Section 409: Jurisdiction of sheriff***

554. [Section 409](#) gives the sheriff jurisdiction to grant a production order, search warrant, customer information order, or account monitoring order in respect of property which is located anywhere in Scotland, [Subsection \(2\)](#) provides for the execution of any such order throughout Scotland without the necessity of endorsement or backing by the sheriff of the sheriffdom where the property or information is located.

#### ***Section 410: Code of practice***

555. [Section 410](#) provides a code of practice relating to the operation of the powers set out in Chapter 3 of Part 8 in the same way that [section 377](#) does for Chapter 2. The code will be published in draft for consultation and laid before the Scottish Parliament for approval by resolution of the Parliament (see [section 459](#)).

#### ***Section 411: Performance of functions of Scottish Ministers by constables in Scotland***

556. [Schedule 8](#) of the Act amends the Police (Scotland) Act 1967 to enable constables to undertake temporary service with the Scottish Ministers in connection with their functions under Part 5 (civil recovery) or Part 8 (investigations) of the Act. On secondment, a constable will not bring with him his police powers. There are, however, certain of the functions bestowed by Part 8 on Scottish Ministers that it would not be appropriate for seconded constables to exercise. These are set out in [section 411](#) and concern the making of applications to the court in connection with the various investigatory orders contained in Part 8. Such functions will be carried out by lawyers.

#### ***Section 412: Interpretation***

557. In Chapter 3, the various sections provide that the appropriate person will apply to the court for the relevant production order, search warrant, customer information order, or account monitoring order. [Section 412](#) defines appropriate person as being a procurator fiscal in relation to confiscation or money laundering investigations and the Scottish

*These notes refer to the Proceeds of Crime Act 2002  
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Ministers in relation to a civil recovery investigation. Similarly, the various sections provide that the relevant orders will be executed by a proper person. [Section 412](#) defines a proper person as being a constable (which is further defined as including a customs officer) in relation to confiscation or money laundering investigations and the Scottish Ministers or a person named by them, in relation to a civil recovery investigation.