

## **CORONERS AND JUSTICE ACT 2009**

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### **EXPLANATORY NOTES**

#### **THE ACT**

##### *Commentary on Sections*

##### **Part 7 - Criminal Memoirs etc**

##### **Section 155: Exploitation proceeds orders**

706. *Subsection (1)* provides the High Court (or the Court of Session in Scotland) with the power to make an exploitation proceeds order. This is an order made in relation to a qualifying offender who has obtained exploitation proceeds from a relevant offence. The effect of an order is to require the offender (called the “respondent”) to pay a sum of money to the enforcement authority in respect of those proceeds.
707. *Subsection (3)* explains that a person obtains exploitation proceeds from a relevant offence if he or she derives a benefit from the exploitation of any material relating to the offence or any steps taken with a view to such exploitation. So, for example, a person who receives payment for writing a book, or giving a television interview, about their crime will have obtained exploitation proceeds. A person will also have derived a benefit if he or she receives a payment but the book is not published or the interview does not go ahead.
708. *Subsection (4)* explains that an order must specify a recoverable amount and identify the benefits derived by respondent to which the order relates. *Subsection (6)* provides that if the respondent does not pay the recoverable amount by the required time he or she must pay interest at the appropriate rate for the period that the amount is unpaid. The appropriate interest rate is defined in *subsection (8)* as that specified in section 17 of the Judgments Act 1838 or, in the case of an order made in Scotland, the rate payable under a decree of the Court of Session.

##### **Section 156: Qualifying offenders**

709. An exploitation proceeds order can only be made in respect of a person who is a qualifying offender and this section sets out who is a “qualifying offender” for the purposes of the provisions. A person is a qualifying offender if they have been convicted of an offence in a United Kingdom court, have been found not guilty by such a court by reason of insanity or have been found by such a court to be suffering from a disability and to have done the act charged (*subsection (2)*). In addition, under *subsection (3)* a United Kingdom national, resident or person resident in the United Kingdom at the time of an offence will be a qualifying offender if they have been convicted by a court outside the United Kingdom of a foreign offence or if that court makes a finding equivalent to a finding that the person was not guilty by reason of insanity or equivalent to a finding that the person was under a disability and did the act charged. *Subsection (4)*, in conjunction with *subsection (6)*, defines a foreign offence as an act or omission, amounting to an offence under the law in force in the foreign country that, at the time it was committed, would have been an offence if committed in the United Kingdom and which would

be an offence if done in the United Kingdom at the time that the application for an exploitation proceeds order is made.

***Section 157: Qualifying offenders: service offences***

710. This section makes supplementary provision to section 156 in respect of service offences under UK and foreign service law.

***Section 158: Qualifying offenders: supplementary***

711. This section ensures that the Rehabilitation of Offenders Act 1974 does not prevent account being taken of a conviction for the purposes of this Part, and makes equivalent provision for Northern Ireland. It also disapplies provisions which provide that an offence is not treated as a conviction where an offender is given an absolute or conditional discharge in respect of it.

***Section 159: Relevant offences***

712. This section sets out what is a “relevant offence” for the purposes of section 155. A relevant offence is a serious offence committed by a person as a result of which that person falls within the definition of a qualifying offender, a serious offence taken into consideration by a court when sentencing a person for the offence which results in the person being a qualifying offender, or a serious offence committed by a third party which is associated with the offence which results in a person being a qualifying offender (or it is associated with an offence which is taken into consideration by the court when sentencing a person for an offence which results in the person being a qualifying offender). *Subsections (3) and (4)* set out when an offence will amount to an “associated offence”. Offences are associated with each other if they are committed in the context of the same joint criminal venture or if one of the offences is on the list of offences at subsection (4).
713. Subsection (2) defines a “serious” offence as one that is triable only on indictment or, in the case of a foreign offence, an offence that would be so triable had it been committed in the United Kingdom at the time that the application for the order is made. Subsections (6) and (7) make equivalent provision in relation to UK and foreign service offences.

***Section 160: Deriving a benefit***

714. This section sets out what amounts to “deriving a benefit” for the purposes of section 155. *Subsection (2)* explains what amounts to “exploitation” and provides that exploitation can be by any means including publishing material in written or electronic form, using any media from which visual images, words or sounds can be produced and live entertainment, representation or interview.
715. *Subsection (3)* provides that the offender will be deemed to have derived a benefit if he or she secures the benefit for himself or herself or secures the benefit for another person. This ensures that a qualifying offender cannot circumvent the scheme by arranging for exploitation proceeds to be paid directly to a third party.
716. The effect of *subsection (4)* is that it is irrelevant whether the benefit is derived, or the exploitation takes place, in the United Kingdom or before or after conviction for the relevant offence. This would be relevant, for example, where an offender is paid for the story of his crime while he was standing trial and is subsequently convicted. However, where the relevant offence is an offence committed by a third party, the respondent must have committed the associated offence before deriving the benefit.
717. *Subsection (5)(a)* ensures that the scheme does not apply retrospectively. The scheme applies to offences whenever committed, but benefits derived before the provisions are commenced will not be recoverable under the new scheme.

### ***Section 161: Applications***

718. This section provides that the court may only make an exploitation proceeds order on the application of an enforcement authority. *Subsection (2)* explains that the enforcement authority in relation to England and Wales and Northern Ireland is the Serious Organised Crime Agency or a person prescribed by order made by the Secretary of State. The Scottish Ministers are the enforcement authority for Scotland.
719. *Subsection (3)* provides that an enforcement authority in England and Wales may only apply for an exploitation proceeds order with the consent of the Attorney General. An enforcement authority in Northern Ireland may apply for such an order only with the consent of the Advocate General for Northern Ireland (which, under paragraph 45 of Schedule 22 is to be read as a reference to the Attorney General for Northern Ireland until the relevant sections of the Justice (Northern Ireland) Act 2002 come into force).

### ***Section 162: Determination of applications***

720. This section sets out a range of factors that the court must take into consideration when deciding whether to make exploitation proceeds order in respect of any benefit and, if it makes an order, the recoverable amount to be specified in the order. *Subsection (3)* lists the specific matters that the court must take into account but the list is not exhaustive and the court may take into account any other matters it considers relevant.

### ***Section 163: Limits on recoverable amount***

721. This section places a limit on the amount that the court can order a person to pay (known as the “recoverable amount”). The “recoverable amount” cannot exceed the total value of the benefits derived by the offender (including those secured for a third party) in respect of which the order is made. The order must identify the benefits it relates to. Also the recoverable amount cannot exceed the funds available to the offender (the “available amount”). *Subsection (2)* also provides that the recoverable amount may be a nominal amount.
722. *Subsection (3)* provides that the order may include benefits derived by the offender up until the time the court makes its determination. But it cannot seek to include benefits that have already been subject to a previous order.
723. Where the offender receives a benefit in kind rather than cash, *subsections (4) and (5)* set out how the value of the benefit is determined. *Subsection (4)* provides that where the benefit is a benefit in kind rather than cash the value of the benefit is the market value at the time the benefit is received minus anything that the respondent (or in the case of a benefit secured for a third person, that person) paid for it. If a particular benefit has no market value, *subsection (5)* provides that the court can attribute to the benefit such value as is just and reasonable.
724. There may be circumstances where an offender receives payment from a publisher, but only a small part of the payment directly relates to material pertaining to a relevant offence. This could arise, for example, where a criminal is paid to write a series of magazine articles about his life, but only one article in the series relates to the relevant offence. *Subsection (6)* gives the court the discretion to decide what proportion of the benefit it is just and reasonable to attribute to the exploitation of material pertaining to the relevant offence.

### ***Section 164: The available amount***

725. This section defines the “available amount”. This is the sum which, if lower than the total value of the benefits from exploitation included in the order, will be the maximum that a respondent can be ordered to pay. The available amount is the total value of the respondent’s assets, any benefits secured by the respondent for a third party (for example where the respondent has asked the publisher to pay proceeds from a book to

a family member) and the value of any relevant gifts that the court considers it just and reasonable to take into account. *Subsection (2)* defines the value of the respondent's assets as the value of all the free property held by the respondent, less the total amount payable in respect of obligations that have priority. *Subsection (3)* sets out that property is free unless it is subject to certain types of forfeiture, deprivation and other types of orders. *Subsection (4)* defines priority obligations. Such obligations will include court fines and liabilities such as mortgages. A relevant gift is defined in *subsection (6)* as a gift made on or after the time the respondent derived any of the benefits identified in the order. A gift includes transaction at a significant undervalue.

### ***Section 165: Property***

726. This section defines the meaning of property for the purposes of section 164.

### ***Section 166: Effect of conviction being quashed***

727. This section addresses the situation where the court has made an exploitation proceeds order and a conviction relevant to the order is quashed. The effect of *subsection (1)(a)* is that, where the relevant offence is within section 159(1)(a) (a serious offence that results in the respondent being a qualifying offender) and the conviction for that offence is quashed, the order ceases to have effect. The effect of *subsection (1)(b)* is that, where the relevant offence is within section 159(1)(b) (a serious offence taken into consideration by a court when determining the sentence for an offence that results in the respondent being a qualifying offender) or section 159(1)(c) (a serious offence committed by a third person associated with the offence that results in the respondent being a qualifying offender or taken into consideration when determining the sentence for such an offence) and the respondent's conviction or convictions that result in the relevant offence being within section 159(1)(b) or (c) is (or are) quashed, the order ceases to have effect. If the order is made in respect of more than one offence and subsections (1)(a) or (b) applies in relation to each, the order ceases to have effect. On an application by the respondent, the court must order the Secretary of State (in Scotland, the Scottish Ministers) to repay to the respondent the sum that the respondent paid to satisfy the order (excluding any amount paid in respect of interest for late payment), known as "the recovered amount", together with interest at a rate to be determined by the court. *Subsection (4)* addresses the situation where one, but not all, such convictions are quashed or where an associated conviction mentioned in section 159(1)(c) is quashed. In such cases, on application by the respondent, the court has the discretion to decide that the order should cease to have effect; to reduce the recoverable amount by such amount as it considers is just and reasonable; or to leave the order in place without alteration. If the court determines that the order should cease to have effect, the court must order the Secretary of State to repay the recovered amount together with interest at a rate to be determined by the court. If the court decides to reduce the recoverable amount and the offender has already paid a sum in excess of the new amount, the court must order the Secretary of State to repay the difference (with interest at a rate to be determined by the court).

### ***Section 167: Powers of court on repeat applications***

728. This section confers on the court certain powers where an application for an exploitation proceeds order is made in relation to a person and the court has previously made an exploitation proceeds order in respect of that person. This may arise, for example, where an offender publishes a new edition of the autobiography that led to the original order being imposed and receives a further payment for the new edition. Under this section, the court can adopt any finding of fact made by the court in connection with the earlier order. If both orders relate to benefits derived from the same source, the court must also have regard to its previous determination of the recoverable amount specified in the earlier order.

***Section 168: Additional proceeds reporting orders***

729. This section provides that a court making an exploitation proceeds order can also make an additional proceeds reporting order if it believes that the likelihood of the respondent obtaining further exploitation proceeds is so high as to justify making such an order. An additional proceeds reporting order works in the same way as a financial reporting order in sections 76 to 81 of the 2005 Act. The effect is that a person subject to such an order is required to report on specified particulars of his or her financial affairs at specified periods. The period for such an order must not exceed 20 years. This type of order might be considered appropriate, for example, where a publisher has agreed to pay the offender in instalments or where royalties from a particular publication flow into the offender's account over a lengthy period.

***Section 169 and Schedule 19: Exploitation proceeds investigations***

730. [Section 168](#) and [Schedule 19](#) amend Part 8 of POCA so as to extend the provisions relating to investigations to include exploitation proceeds investigations. This means, for example, that the enforcement authority carrying out an exploitation proceeds investigation is able to apply to a judge for a production order or search and seizure warrant.

***Section 170: Functions of Serious Organised Crime Agency***

731. This section makes consequential changes to the functions of the Serious Organised Crime Agency.

***Section 171: Limitation***

732. *Subsection (1)* inserts a new section 27C into the Limitation Act 1980. *Subsections (1) to (3)* have the effect that an application for an exploitation proceeds order may not be made more than six years after the enforcement authority's cause of action accrued. *Subsection (4)* provides that a cause of action will accrue from the time that the enforcement authority has actual knowledge that a person has obtained exploitation proceeds from a relevant offence.
733. *Subsection (2)* inserts new section 72C into the [Limitation \(Northern Ireland\) Order \(SI 1989/1339\)](#) which makes similar provision for Northern Ireland.
734. *Subsection (3)* inserts a new section 19C into the Prescription and Limitation (Scotland) Act 1973. This makes similar provision for Scotland, although in that case the limitation period is five rather than six years, in line with other provision made by that Act.

***Section 172: Interpretation of Part 7***

735. This section sets out the meaning of terms used in this Part of the Act.