

# PROCEEDS OF CRIME ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 4: Confiscation: Northern Ireland**

#### **Confiscation orders; Procedural matters**

#### *Sections 156-168: Confiscation orders; Procedural matters*

232. These sections set out some of the basic principles of the Act. These sections will establish essentially the same procedure for the obtaining of confiscation orders in Northern Ireland as the Act proposes elsewhere for England and Wales. However, while all confiscation orders will be made in the Crown Court, in Northern Ireland confiscation orders may only be made in the Crown Court in two circumstances. These are either following conviction in the Crown Court or where a defendant convicted in the magistrates' court is committed to the Crown Court for confiscation under a new power for this purpose created in the Act by *section 221*. This difference from the proposed procedure for England and Wales is a consequence of the lack of power currently in Northern Ireland for a magistrates court to commit for sentence to the Crown Court a person convicted in the magistrates' court. This power introduced in England and Wales by the Criminal Procedure and Investigations Act 1996 did not extend to Northern Ireland.
233. The only other differences in text are as a result of references to Northern Ireland legislation equivalent to the legislation referred to in the sections for England and Wales.

#### **Reconsideration**

#### *Sections 169-171: Reconsideration*

234. *Sections 169-171* reproduce, with some changes, provision in the current legislation in Northern Ireland found at Articles 17 to 20 of the Proceeds of Crime (Northern Ireland) Order 1996. The sections enable a confiscation order to be made where none was made in the original proceedings, and a confiscation order, once made, to be increased.
235. Currently Article 20 of the 1996 Order allows a court, when reconsidering the benefit obtained by a defendant, to apply similar assumptions to those that appear in *section 163* of the Act in relation to property held by or transferred to a defendant on or after the date of conviction. Equally Article 20(4) provides that a court could take into account any payment or other reward received by a defendant on or after the date of conviction, original determination or current assessment but only where it represents the defendant's benefit from relevant criminal conduct or were received in connection with drug trafficking carried on or before the date of the court decision.
236. New provision has been required primarily to take account of the new role of the Assets Recovery Agency (ARA) in criminal confiscation. Either the prosecutor or the Director

may apply to the court for a reconsideration of the assessment of benefit from criminal conduct under these sections.

237. The principle underlying *sections 19, 20, 172 and 173* is that reconsideration should only be applied for where new evidence comes to light. It is inappropriate for an authority to have evidence at the time of the earlier proceedings, yet not to apply for a confiscation order on that occasion but to apply for reconsideration at a later date. The provision included in these sections reflects this principle.

***Sections 172 & 173: Order made: reconsideration of available amount; Inadequacy of available amount: variation of order***

238. These sections correspond to those for England and Wales at *sections 22 and 23* save that the comparable references to other sections in this Act reflect the numbering adopted for this part of the Act.

***Section 174: Inadequacy of available amount: discharge of order***

239. As in England and Wales under current legislation, there is no provision for writing off a confiscation order. The same practical difficulties outlined elsewhere in the explanatory notes clearly equally apply in Northern Ireland. However there are no justices' chief executives in Northern Ireland nor are Crown Court orders enforced through the magistrates' courts. Accordingly the section is drafted to reflect the operational circumstances in Northern Ireland.
240. *Section 174* therefore provides that, the prosecutor enforcing a confiscation order, may apply to the Crown Court to write the order off if the outstanding sum is under £1,000 and the reason for the shortfall is a fluctuation in exchange rates or some other factor specified in secondary legislation, or some combination of the two. No similar provision is available where the Director is enforcing a confiscation order because enforcement by the Director will always involve the appointment of a receiver, who will be able to apply to the Crown Court under *section 173*.

***Section 175: Small amount outstanding: discharge of order***

241. *Section 175* deals with the situation where a confiscation order has been satisfied almost in its entirety, but a sum of £50 or less is outstanding. Under these circumstances, a chief clerk may apply to the Crown Court for the order to be written off. In all other respects the section is the same as *section 25*.

***Section 176: Information***

242. *Section 176* contains provision ancillary to *sections 169-170*. Its purpose is to make it clear that *sections 166-168* on statements of information and the provision of information by the defendant apply to reconsideration proceedings as they apply to confiscation proceedings immediately following a conviction.

**Defendant absconds**

***Section 177-180: Absconded defendant convicted or committed; Defendant neither convicted nor acquitted; Variation and discharge of orders***

243. *Sections 177 to 180* are sections dealing with confiscation orders against absconders. Under the current legislation in Northern Ireland, the High Court may make a confiscation order against an absconder convicted of one or more offences to which the Proceeds of Crime (Northern Ireland) Order 1996 applies. Article 2(4) of the Order defines the Offences to which the Order applies. These include all indictable offences, i.e. any offence capable of being tried in the Crown Court. Certain terrorist offences are excluded and certain summary offences are included. The Act transfers jurisdiction

to the Crown Court to make a confiscation order against an absconder convicted of, or charged with, any crime.

244. *Section 177* deals with the situation where a defendant is convicted either in the Crown Court or in the magistrates' court, and then absconds. In the case of a conviction in the magistrates' court, the defendant must have been committed to the Crown Court for confiscation before absconding. Either the prosecutor or the Director may apply to the Crown Court for a confiscation order to be made under this section.
245. The sections as currently drafted will apply in Northern Ireland in the same way as in England and Wales. These sections provide that none of the reconsideration sections, namely *sections 169-171*, apply where a person is still an absconder pre- or post-conviction and that they do all apply where an absconder returns. *Sections 179* and *180* reproduce existing ancillary provision for unconvicted absconders, except that the functions are transferred from the High Court to the Crown Court.

## **Appeals**

### ***Section 181: Appeal by prosecutor or Director***

246. These sections provide the prosecutor and the Director with new powers to appeal against any confiscation order made by the Crown Court, and against any decision of the Crown Court not to make a confiscation order. The grounds for appeal and the procedure for appeal, both to the Court of Appeal in Northern Ireland and the House of Lords, are essentially the same as those provided for elsewhere in the Act for England and Wales.

### ***Section 182: Court's powers on appeal***

247. *Section 182* provides the Court of Appeal in Northern Ireland with the same broad powers of disposal as that proposed for the criminal division of the Court of Appeal in England and Wales.

### ***Section 183: Appeal to House of Lords***

248. *Section 183* details the powers of disposal provided to the House of Lords. There is no difference in substance between Northern Ireland and the rest of the United Kingdom in the powers provided on appeals from the Crown Court.

## **Enforcement authority**

### ***Section 184: Enforcement authority***

249. *Section 184* sets out the same criteria for Northern Ireland as for England and Wales for the appointment of the Director to enforce a confiscation order. However the rationale for this provision in Northern Ireland is to ensure that the Director when operating in Northern Ireland can use the specific powers of receivership, provided in *section 202* of the Act, to assist him in the enforcement of confiscation orders.

## **Enforcement as fines etc**

### ***Section 185: Enforcement as fines etc***

250. *Section 185* explains how confiscation orders are to be enforced. As at present, the order will be treated as a Crown Court fine and enforced, as a Crown Court fine. Essentially the burden of enforcing such orders falls on the main prosecuting authority in Northern Ireland the Office of the Director for Public Prosecutions in Northern Ireland (DPP). Unlike in England and Wales, Crown Court fines in Northern Ireland are not enforced by or through the magistrates' court. This results in some differences between the two jurisdictions in the powers of enforcement available.

251. Accordingly, this section provides for confiscation orders to be enforced essentially in the same way as fines are enforced in Northern Ireland by referring to the relevant legislation, the Criminal Justice Act (Northern Ireland) 1945. However, as in England and Wales one of the main features of this regime is that the Crown Court, where it makes a confiscation order, is required to set a term of imprisonment in default of payment. The maximum default term that may be imposed is determined by the size of the confiscation order. There is no substantial difference in the maximum default term applicable to a particular confiscation order between the various United Kingdom jurisdictions.

***Section 186: Director's application for enforcement***

252. As noted above, all Crown Court confiscation orders are enforced through the Crown Court in Northern Ireland. The relevant legislative provisions are contained at section 35 of the Criminal Justice Act (Northern Ireland) 1945. They include detailed provision on imprisonment in default of payment. This section provides for the Director to apply to the Crown court to trigger the default term on the same grounds as apply when the DPP is enforcing a confiscation order.

***Section 187: Provisions about imprisonment or detention***

253. *Section 187* contains general provision on imprisonment in default of a confiscation order, applicable when the default term is imposed by the Crown Court in response to an application either by the prosecutor or the Director. The provision reflects existing legislation in Northern Ireland. As in England and Wales, it provides that a term of imprisonment in default of a confiscation order must be served consecutively to the substantive term imposed for the offence(s), and that the service of a default term does not prevent the confiscation order from being enforced subsequently by other means.

***Section 188: Reconsideration etc: variation of prison term***

254. The Crown Court fixes the period of imprisonment in default by reference to the amount of the confiscation order. *Section 188* provides for Northern Ireland in the same way that *section 39* does for England and Wales, for the period of imprisonment in default to be varied where the court varies the amount of a confiscation order under certain provisions of the Act.
255. The overall purpose of the provision is to clarify what happens when the variation of a confiscation order changes the maximum period of imprisonment in default applicable to the order.

**Restraint orders**

***Sections 189 to 191: Conditions for exercise of powers; Restraint orders; Application, discharge and variation***

256. *Sections 189 to 191* essentially reflect the provisions made in this Act at *sections 40 to 41* for England and Wales. The significant difference is that in Northern Ireland restraint orders will remain within the jurisdiction of the High Court. However the point at which a restraint order may be made is brought forward in the Act to any time after an investigation has been started (at present, although both orders may be made at the investigative stage, it is only possible to do so where charges are in the offing). The only other differences arise from references to Northern Ireland legislation. *Section 190* explains the nature and effect of a restraint order. *Section 191* lays down who may apply for a restraint order under the Act, and sets out criteria like those in the existing legislation for the variation or discharge of such orders. The Act provides that application may be made by the prosecutor, the Director and by an accredited financial investigator.

### ***Sections 192 & 193: Appeal to Court of Appeal; Appeal to House of Lords***

257. The Judicature Act (Northern Ireland) 1978 provides a general right of appeal against an order of the High Court of Northern Ireland and accordingly there is no need for this legislation to provide a specific right of appeal in relation to restraint orders. However, as it has been necessary to create a specific right of appeal in the Act for England and Wales in relation to restraint orders made (or not made) by the Crown Court, it was considered appropriate to make similar provision in Northern Ireland.

### ***Section 194: Seizure***

258. *Section 194* allows a constable or a customs officer to seize any property subject to a restraint order to prevent its removal from Northern Ireland.

### ***Section 195: Supplementary***

259. *Section 195* contains ancillary provision relating to restraint orders. It re-enacts provision from existing confiscation legislation. In Northern Ireland there are two distinct procedures for the registration of title concerning land. This is as a result of historical differences concerning the purchase and sale of land in Ireland. Accordingly title is required to be registered either in the Land Registry or the Registry of Deeds. The existing provision on restraint orders has the effect that where the prosecutor obtains a restraint order affecting land, an “inhibition” may be placed on the property at the Land Registry preventing its disposal.

## **Management Receivers**

### ***Sections 196 and 197: Appointment; Powers***

260. These sections follow the current legislation in enabling a management receiver to be appointed where a restraint order has been made. The role of a management receiver is to manage property to maintain its value until a confiscation order is made. However, unlike England and Wales the appointment will continue to be made by the High Court. *Section 197* sets out the same powers for a management receiver appointed by the court in Northern Ireland as *section 48* provides for England and Wales.

## **Enforcement receivers**

### ***Section 198: Appointment***

261. Where a confiscation order has been made, *section 198* empowers the Crown Court to appoint a person to act as enforcement receiver to help the prosecutor to enforce the confiscation order. This person may be the same as a management receiver appointed under *section 196* or not, as the case may be.

### ***Section 199: Powers***

262. *Section 199* sets out the powers that the court can confer on a receiver so appointed (for example, the power to seize and sell property).

## **Director’s receivers**

### ***Sections 200 & 201: Appointment; Powers***

263. These sections provide that, as in England and Wales, where the Director is enforcing a confiscation order, the sole enforcement tool will be the appointment of a receiver. *Section 201* enables the Crown Court to confer certain powers on the Director’s receiver. The powers are the same as those that the Crown Court may confer on a person appointed as enforcement receiver under *section 195*, on the application of the prosecutor.

## **Application of sums**

### ***Sections 202 & 203: Enforcement receivers; Sums received by chief clerk***

264. These sections largely replicate for Northern Ireland the provisions made for England and Wales at [sections 54](#) and [55](#) of the Act. There is no difference in substance but the text reflects the non-existence of justices' chief executives in Northern Ireland. [Section 202](#) specifies how any sums in the hands of receivers appointed by the Crown Court are to be disposed of after a confiscation order is made. Where a confiscation order is made, the sums are payable, subject to certain prior payments the Crown Court may order, to the chief clerk of the court where the confiscation order was made.
265. [Section 203](#) also sets out how a chief clerk must dispose of any monies received in satisfaction of a confiscation order. The provision is the same to that proposed for England and Wales at [section 55](#).

### ***Sections 204 & 205: Sums received by Director's receivers or Director***

266. [Sections 204 & 205](#) make provision for Northern Ireland for the realisation of property where the Director is acting as an enforcement authority. [Section 204](#), like [section 56](#), details how sums received are to be dealt with by the Director's receiver. The provision is, with minor modification, the same as [section 202](#). [Section 205](#) requires the Director to broadly deal with monies received in the same way as the chief clerk under [section 203](#).

## **Restrictions**

### ***Sections 206 to 208: Restraint orders; Enforcement receivers; Director's receivers***

267. [Sections 206](#) to [208](#) essentially reflect the provisions made in this Act at [sections 58](#) to [60](#) for England and Wales. The only significant differences between the changes proposed for England and Wales and those in Northern Ireland is that [section 206](#) reflects that in Northern Ireland restraint orders will remain within the jurisdiction of the High Court. Further there is no provision made regarding the remedy of distress as that remedy has effectively ceased to be available in Northern Ireland.

## **Receivers: further provisions**

### ***Sections 209 to 214 Protection; Further applications; Discharge and variation***

268. [Sections 209](#) to [214](#) essentially reflect the provisions made in this Act at [sections 61](#) to [64](#) for England and Wales. Again [sections 210](#) to [212](#) reflect the retained power for the High Court to appoint a receiver when exercising its jurisdiction to make a restraint order.

### ***Sections 213 & 214: Appeal to Court of Appeal; Appeal to House of Lords***

269. These sections enable persons who apply for, or are affected by, an order either of the High Court to appoint a management receiver or of the Crown Court to appoint an enforcement receiver to appeal to the Court of Appeal in respect of the order. [Section 214](#) provides for the Court of Appeal's decision under [section 213](#) to be further appealed to the House of Lords. The provision is the same in substance as that provided for at [sections 65](#) and [66](#) for England and Wales.

## **Seized money**

### ***Section 215: seized money***

270. [Section 215](#) provides the magistrates' court with a new power to order any realisable property in the form of money in a bank or building society account to be paid to the chief clerk of the relevant Crown Court in satisfaction of a confiscation order. The

power is only available where the prosecutor makes such application and a confiscation order has been made, time to pay has expired and the money is subject to a restraint order. The provision is made for the same purposes set out at [section 67](#).

## **Financial Investigators**

### ***Section 216: Applications and Appeals***

271. [Section 216](#) sets out the same general rules for applications for restraint and receivership orders made by accredited financial investigators in Northern Ireland as appears at [section 68](#) for financial investigators operating in England and Wales.

## **Exercise of powers**

### ***Section 217: Powers of court and receiver***

259. [Section 217](#) makes provision about how the High Court and the Crown Court or receivers appointed by them are to exercise their powers. It includes the same new provisions that are set out in [section 69](#) of this Act for England and Wales and the detail of this section is set out in the notes to that section.

## **Committal**

### ***Section 218: Committal by magistrates' court***

272. [Section 218](#) is to be read in conjunction with [section 156\(2\)\(b\)](#). Its effect is that a person may be committed to the Crown Court for confiscation following a conviction of any offence, indictable or summary, in the magistrates' court. Where the prosecutor asks the magistrates' court to do so, the court must commit the defendant to the Crown Court for confiscation. The power to have a person committed for confiscation is granted only to the prosecutor, not to the Director. In practice, the prosecutor and the Director may consult in such cases, and the Director may assume responsibility for the subsequent confiscation proceedings in the Crown Court.
273. There is one distinct difference between this section and its equivalent section for England and Wales, [section 70](#). It relates to the existing power of a magistrates' court in England and Wales to commit a defendant who is convicted of an offence which is triable either way to the Crown Court for sentence. There is no comparable power in Northern Ireland.

### ***Section 219: sentencing by Crown Court***

274. [Section 219](#) provides that, where a person is committed to the Crown Court for confiscation, the Crown Court will also assume responsibility for the sentencing process. The principle applied is the same as proposed for England and Wales. However, in light of the notes above for [section 218](#), the Crown Court is restricted to the sentencing powers available to the magistrates' court when dealing with a defendant committed for a confiscation hearing from that court.

## **Compensation**

### ***Section 220: serious default***

275. [Section 220](#) provides for compensation to be paid to a person whose property has been affected by the enforcement of the confiscation legislation. Compensation is only payable on the same grounds as those proposed at [section 72](#) for England and Wales. [Section 220](#) is largely based on existing legislation except that it has been extended to cover the situation where an investigation is started but proceedings are never brought. The section also refers to the Director of Public Prosecutions for Northern Ireland whose office fulfils the same role as the Crown Prosecution Service in England and Wales.

***Sections 221 & 222: Order varied or discharged; Enforcement abroad***

276. *Sections 221 and 222* replicate the provisions for England and Wales contained in *sections 73 and 74*.

**Interpretation**

***Section 223: Criminal lifestyle***

277. This provision is crucial to the operation of the Act and ensures that offenders before the courts in Northern Ireland will be dealt with in exactly the same way in Northern Ireland as in England and Wales. The section replicates the provisions made in *section 75* and the details of the section are set out in the notes to that section. The provision is similar to that which currently exists in Article 9 of the Proceeds of Crime (Northern Ireland) Order 1996.

***Section 224: Conduct and benefit***

278. *Section 224* defines criminal conduct as any conduct constituting an offence in Northern Ireland or (if it took place elsewhere in the United Kingdom or abroad) would constitute an offence if it occurred in Northern Ireland. The restriction of the scope of confiscation under existing legislation to drug trafficking, other indictable offences and specified summary offences is thus abolished. Under the Act, the Crown Court, which makes a confiscation order, will need to consider conduct solely by reference to the law of Northern Ireland. *Section 224(2)* and *(3)* also defines “general criminal conduct” and “particular criminal conduct” (for which, see the note on *section 76*).
279. *Subsection (4)* also provides for Northern Ireland the same definition of “benefit from conduct” proposed at *section 76(4)*. This will replace the similar definition of benefit provided by Article 2(6) of the Proceeds of Crime (Northern Ireland) Order 1996.

***Sections 225 & 226: Tainted gifts; Gifts and their recipients***

280. The existing legislation enables gifts by the defendant to other persons to be recovered in satisfaction of a confiscation order, and makes ancillary provision (for example, to enable assets of the recipient of a gift to be placed under restraint). Under the existing legislation in Northern Ireland, a tainted gift is described as a “gift caught by this Order”. *Section 225* aligns the different tainted gift schemes which currently apply depending on whether the offence was drug related or not. The new scheme provides that, where the court has decided that the defendant has a criminal lifestyle, any gift made by the defendant to any person in the period beginning six years before the commencement of proceedings will be caught, together with any gift at any time out of the proceeds of crime. This definition will be relevant both at the confiscation hearing and for the purposes of enforcement. However, if the court decides that the defendant does not have a criminal lifestyle, only gifts made since the beginning of the earliest of the offences committed are caught. Again, this will be relevant at the confiscation hearing and for the purposes of enforcement. The provision is drafted so that it will apply in Northern Ireland as the similar provisions in Part 2 apply in England and Wales.

***Sections 227-229: Value: the basic rule; Value of property obtained from conduct; Value of tainted gifts***

281. *Sections 227-229* set out how the court is to work out the value of property held by a person, the value of property, and the value of a tainted gift. These sections, apart from referring to Northern Ireland legislation where appropriate, replicate the provisions proposed at *sections 79 to 81*.

***Sections 230-235: Free property; Realisable property; Property: general provisions; Proceedings; Applications; Confiscation orders***

282. These definitional sections essentially reproduce for Northern Ireland the same definitions as those contained at [sections 82 to 87](#) of this Act. The only differences in text are a result of references to the equivalent Northern Ireland legislation or comparable provisions of this Act.

***Section 239: other interpretative provisions***

283. This section essentially applies in Northern Ireland as the comparable section in Part 2 ([section 88](#)) applies in England and Wales. The textual differences reflect the numbering of the sections of this Part of the Act and the fact that the Powers of Criminal Courts (Sentencing) Act 2000 does not extend to Northern Ireland.

**General**

***Sections 237 & 238: Procedure on appeal to the Court of Appeal; Procedure on appeal to the House of Lords***

284. These sections, as in England and Wales, establish the general principle that the Court of Appeal's leave to appeal is required. Both sections enable the Secretary of State to make an order in relation to appeals to either the Court of Appeal or the House of Lords under this part containing provision corresponding to any provisions of the Criminal Appeal (Northern Ireland) Act 1980. An order of this kind will cover routine matters such as the procedures for obtaining leave to appeal and transcripts.

***Section 239: Crown Court Rules***

285. At present, receivership is a High Court function and the applicable court rules are found in the Rules of the Supreme Court (Northern Ireland) 1980. As some of these functions will in future be dealt with by the Crown Court, (i.e. where the Director is appointed as the enforcement authority) Crown Court rules will be required. [Section 239](#) puts it beyond doubt that proceedings concerning receivers appointed by the Crown Court under this part of the Act may in future be dealt with in Crown Court Rules.

***Schedule 5: Lifestyle offences: Northern Ireland***

286. [Schedule 5](#) should be read in conjunction with [sections 156](#) and [223](#). It lists offences which are always criminal lifestyle offences. An offender convicted of one instance of any of these offences has a criminal lifestyle under the Act. The offences are similar to those set out in Schedule 2 for England and Wales.