

PROCEEDS OF CRIME ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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

Chapter 2: Civil recovery in the High Court or Court of Session

Proceedings for recovery orders

Vesting and realisation of recoverable property

Section 266: Recovery orders

348. This section sets out what the court must do if it finds any property to be recoverable. Under *subsection (1)*, if the court finds, on the trial of a civil recovery action or after a proof in Scotland, that any property is recoverable, it must order its recovery. Under *subsection (2)* a recovery order vests the recovered property in the trustee for civil recovery, whose appointment and functions are set out at *section 267*. The making of the order is subject to the limitations set out in *subsections (3), (4), (5), (6) and (8)*, and to *sections 270 to 278*. There are also certain exemptions set out in *sections 281 and 282*.
349. Under *subsection (3)* a court may not make any provision in a recovery order that would contravene the European Convention on Human Rights. Under *subsections (3) to (5)* the court may not make a recovery order if all of the following conditions apply and it would not be just and equitable to make the recovery order. The conditions for England, Wales and Northern Ireland are:
- the respondent obtained the recoverable property in good faith;
 - before or after the respondent obtained the property, without knowing that the property was recoverable, he took action which he would not have taken if he had not anticipated receiving or had not received the property (for example, he spends his own money as a result of receiving the recoverable property);
 - the making of a recovery order would be detrimental to the respondent, due to the action he had taken in relation to the property.

Subsection (5) makes similar provision in relation to Scotland.

350. In deciding whether it would be just and equitable to make provision in a recovery order in such cases, the court must weigh the detriment to the respondent if the provision were to be made against the interests of the enforcement authority, as well as any other factors that would go to the justice and equity of the case (*Subsection (6)*).
351. The recovery order may sever the recoverable element of the property from the remainder if recoverable property and associated property subsist in the same property, for example, where property is mixed under *section 306 (subsection (7))*. The order may also impose conditions on how the trustee may deal with the property (*subsection (8)*).