

# PROCEEDS OF CRIME ACT 2002

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## 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.

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

### ***Proceedings for recovery orders***

#### ***Section 243: Proceedings for recovery orders in England and Wales or Northern Ireland***

297. *Section 243* explains where court proceedings for civil recovery in England, Wales and Northern Ireland are to take place and how they are to be initiated.
298. Under *subsection (1)* the enforcement authority (for England, Wales and Northern Ireland this means the Director of the ARA – see *section 316(1)*) may take proceedings against any person who he thinks holds recoverable property. ‘Recoverable property’ is property that has been obtained through unlawful conduct or property that represents such property. Detailed provisions regarding recoverable property are set out at *sections 304 to 310* and *sections 305 to 307* define what is meant by representative property. Civil recovery proceedings are to take place in the High Court.
299. As with normal civil procedure, the High Court will issue a claim form in respect of the property at the request of the enforcement authority. Under *subsection (2)*, the

enforcement authority must serve the claim form on the person who it thinks holds the recoverable property (the respondent) and, unless the court dispenses with service, on any person who holds associated property which the enforcement authority wishes to be subject to a recovery action. Holding property includes holding an interest in property – see [section 316\(5\)](#) to (7). Associated property is defined in [section 245](#) and the circumstances in which it may be the subject of a recovery order are set out in [sections 270-272](#). Under [subsection \(3\)](#) the claim form must either specify the property to which it relates or describe it in general terms, and state whether it is alleged to be recoverable property or associated property.

### ***Section 244: Proceedings for recovery orders in Scotland***

300. [Section 244](#) provides that proceedings for civil recovery in Scotland will be taken by the Scottish Ministers (the enforcement authority) in the Court of Session. An application will be made by the Scottish Ministers to the Court of Session in respect of the property. The Scottish Ministers must serve the application on the respondent (the person who holds the property) and, unless the court dispenses with service, on any person who holds associated property which the Scottish Ministers wish to be subject to a recovery action. The application must either specify the property to which it relates or describe it in general terms, and state whether it is alleged to be recoverable property or associated property.

### ***Section 245: "Associated property"***

301. Sometimes only part of a property may be recoverable, or there may be several interests in a property, some of which are not recoverable. The non-recoverable part of or interest in the property is described as ‘associated property.’
302. [Subsection \(1\)](#) defines associated property. In [paragraph \(a\)](#) the associated property might be a tenancy in a recoverable freehold. In [paragraph \(b\)](#), where a lease in a freehold block of flats had been purchased with recoverable property, another lease in the same block bought with legitimate money would be associated property. In [paragraphs \(c\)](#) and [\(d\)](#) where two people buy a car together, one with recoverable cash and one with legitimate cash, the share of the person who bought with legitimate cash is the associated property. In [paragraph \(e\)](#), where a painting is recoverable property but it had been framed using legitimate money, the frame would be associated property.
303. Associated property may be held by a third party or by the respondent, for example where the respondent mixes recoverable property with his own legitimate property (see [section 306](#)).
304. Where the recoverable property consists of rights under a pension scheme, however, no property is to be treated as associated with that recoverable property. This has the effect that the non-recoverable interests in a pension fund, i.e. the interests of all those other than the respondent who have interests in the pension fund, cannot be made the subject of an interim receiving order or a recovery order.

## **Interim receiving orders (England and Wales and Northern Ireland)**

### ***Section 246: Application for interim receiving order***

305. [Sections 246](#) to [255](#) make provision for ‘interim receiving orders’ in England, Wales and Northern Ireland; equivalent provisions for Scotland are at [sections 256](#) to [265](#). Under [subsection \(1\)](#) interim receivership procedure may – but need not always – form the preliminary stage of civil recovery procedure.
306. An ‘interim receiving order’ is, as [subsection \(2\)](#) explains, a court order for:
- the detention, custody or preservation of property which is claimed to be recoverable property or associated property, and

- the appointment of an interim receiver in respect of that property.
307. Under *subsection (1)*, the first step in the procedure is for the Director to make an application to the High Court for an interim receiving order. The Director may do this even though he has not yet issued the claim form. And he may do so without putting any interested party on notice that he is doing so, if giving notice would prejudice the Director's right to recover the property (*subsection (3)*). It may be necessary to act swiftly and without alerting potential parties, for example, to prevent property from being concealed or disposed of.
308. The court may make an interim receiving order only if the conditions set out in *subsections (5) and (6)* are satisfied. The Director must satisfy the court that:
- there is a 'good arguable case' that the property in question is either recoverable or associated property (the 'good arguable case' test is already used by the civil courts for applications for injunctions to freeze disputed property during litigation so that ultimate enforcement of judgment cannot be frustrated. Freezing injunctions were formerly known as 'Mareva' injunctions (and this is still the appropriate term for such orders in Northern Ireland)), and
  - if the property in relation to which the order is sought includes associated property, he has either identified or has taken all reasonable steps to establish the identities of the person(s) holding that property (if the interim receiving order is made or the proceedings otherwise go ahead, the Director will have to put these persons immediately on notice under *section 243(2)*).
309. The Director must also, under *subsection (7)*, nominate someone suitably qualified to act as interim receiver. But the Director may not nominate a member of his own staff. This is because the interim receiver on appointment becomes an officer of the court and has investigatory duties (*see section 247(1) and (2)*) and it is thought appropriate that the interim receiver should be independent of the Director, who is a party to the litigation. The characteristics of an interim receiving order are spelled out more fully at *sections 247 to 255*, but under *subsection (8)* these sections do not limit the extent of the power to make the order. *Subsection (8)* has been included to make clear that the High Court retains the inherent discretion which it has in civil litigation to make appropriate orders when making interlocutory injunctions.

### ***Section 247: Functions of interim receiver***

310. The detailed functions of an interim receiver will be conferred by the High Court's order itself. The Court's discretion to confer whatever powers it considers appropriate to the circumstances of an individual case are at large, provided always they are for the purposes set out at *subsections (1) and (2)*, i.e. the detention, custody or preservation of the property or establishing whether it is recoverable or associated property or whether other property is recoverable property in relation to the same unlawful conduct.
311. *Subsection (1)(a)* introduces *Schedule 6*, which makes explicit mention of some of the more significant powers that the court may choose to confer on an interim receiver. An explanatory note about *Schedule 6* is included below.
312. Although the High Court has a wide discretion over the powers and functions that may be conferred on an interim receiver, there are some duties under which he must always be placed. *Subsection (2)* sets these out. He will always be required to take the necessary steps to establish:
- whether in his view the property is to any extent recoverable or associated property, and
  - whether there is any other property which is recoverable in relation to the same unlawful conduct and if so who holds it.

313. Up until the interim receiving order or the issuing of the claim form (whichever comes first), the Director has access to the civil investigation powers set out in Part 8. Thereafter, the Director ceases to have access to these powers and the duty of taking whatever further steps are needed to establish the facts about the property is placed upon the interim receiver acting under the Court's direction.
314. *Subsection (3)* provides legal protection for the interim receiver if he mistakenly, but honestly and reasonably, deals with property that is not the property specified in the order. He will have immunity from any legal claims in respect of loss or damage caused by such dealing, unless it can be shown that it was caused by his negligence.

#### ***Schedule 6: Powers of interim receiver or administrator***

315. *Schedule 6* makes explicit mention of some of the more significant powers which the High Court (or in Scotland the Court of Session) may choose to confer on an interim receiver or interim administrator. These include powers to seize the relevant property (*paragraph 1*), and to obtain information about it and require persons to answer questions, irrespective of any restrictions on the disclosure of information which would otherwise apply (*paragraph 2*). Self-incrimination is therefore to be no answer to the requirement to answer questions, but evidence so obtained cannot be used in any prosecution of the person who provided it (other than in certain restricted circumstances, for example, a prosecution for perjury). Use of the evidence against that person is, however, permissible in civil recovery proceedings. The interim receiver or administrator may be given specified powers of entry, search and seizure (*paragraph 3*) and powers to oblige persons to assist him in the exercise of those powers (*paragraph 4*). *Paragraph 4* also provides that an order made under *paragraphs 2* and *3* must make provision in respect of legal professional privilege (in Scotland legal privilege). Under *paragraph 5* an interim receiver or interim administrator may also be given powers to manage property which include:
- selling perishable or depreciating property,
  - where the property in question comprises a trade or business, carrying on that trade or business, and
  - incurring capital expenditure in respect of the property.

#### ***Section 248: Registration***

316. The main purpose of *section 248* is to ensure that where an interim receiving order affecting land is applied for, its effect may be reinforced by taking action at the Land Registry to prevent the disposal of the land in question.

#### ***Section 249: Registration (Northern Ireland)***

317. *Section 249* makes similar provision to *section 248* in relation to Northern Ireland.

#### ***Section 250: Duties of respondent etc.***

318. *Section 250* provides for certain duties to be placed on a person whose property is subject to an interim receiving order. The order may require the person to bring the property, or any documents relating to the property, to a place specified by the interim receiver or to the custody of the receiver. This could also apply where the property or documents are located outside the part of the United Kingdom where the order is made. The order may require the person to do anything the interim receiver reasonably requires him to do for the preservation of the property.

#### ***Section 251: Supervision of interim receiver and variation of order***

319. An interim receiver, a respondent, any party to the proceedings and anyone else affected by the receiver's actions (this includes the Director) will be able to ask the court to

clarify the receiver's powers. All parties and any persons who may be interested will be able to put their views to the court before it acts. There is also power for the court to vary or set aside the interim receiving order. For example, the court may be asked by the interim receiver to extend the interim receiving order to additional property in respect of which evidence has come to light. Here too, the court must give an opportunity to be heard to the parties and any persons who may be affected by the court's decision.

### ***Section 252: Restrictions on dealing etc. with property***

320. *Subsection (1)* provides that the interim receiving order must prevent any dealing with the property to which it applies, subject to any exclusions which may be made under the rest of the section. This is to prevent the property being dissipated pending a resolution of the civil recovery case. 'Dealing' is explained in *section 316(1)* as including disposing of the property, taking possession of it or removing it from the United Kingdom. A person who has notice of the order and contravenes it will be liable to be proceeded against for contempt of court.
321. *Subsection (2)* states that exclusions may be made either when the order is made or, later, by variation. *Subsection (3)* states that an exclusion may in particular provide for property to be used for meeting any person's reasonable living expenses or to carry on a trade, business, profession or occupation. Living expenses would be likely to include the living expenses of dependants. But the court's discretion to release property is limited by *subsections (4)* (no release of property to meet legal expenses arising from civil recovery) and *(6)* (the court must ensure that the Director's "right to recover" the property (defined at *section 316(8)*) is not be unduly prejudiced). Persons involved in civil recovery proceedings will be able to apply to the Community Legal Service scheme, or the Legal Aid scheme which applies in Northern Ireland, for their legal costs, or of course to use any unfrozen assets they may have available, so there will be no need for them to draw from the property subject to the order.

### ***Section 253: Restriction on proceedings and remedies***

322. This section enables the existence of an interim receiving order to have an effect on collateral legal proceedings affecting the property in question. *Subsection (1)* allows the court which has made the order to stay any other legal process, including court proceedings, in respect of the property to which the order applies; and specifies that no distress may be levied against that property other than with the leave of the court.
323. *Subsection (2)* allows any court in which proceedings are pending in respect of the property to stay them, or impose terms on their continuation. Under *subsection (3)*, a landlord may not exercise a right of forfeiture by peaceable re-entry on a property to which an order applies, other than with the leave of the court that made the interim receiving order. Before exercising any of these powers, the court must give an opportunity to be heard to the interim receiver (if appointed), the parties to the proceedings and any person who may be affected by the court's decision (*subsection (4)*).

### ***Section 254: Exclusion of property which is not recoverable etc.***

324. The court has the power to vary an interim receiving order at any time (*section 251(3)*). This section makes specific provision for variations of interim receiving orders to have the effect of excluding property from the proceedings altogether. The court may decide before the final trial of the action, for example on an application by an interested person or a report by an interim receiver (see *section 255*), that some of the property to which the order applies is neither recoverable nor associated property. The court must in that event exclude this property from the terms of the interim receiving order. The court may also release associated property if satisfied that it may be excluded without materially affecting the right of the Director to recover in respect of the remainder. If so, it may

vary the order accordingly and the excluded property will be released, with or without conditions.

### ***Section 255: Reporting***

325. An interim receiving order must, under this section, require an interim receiver to take a number of steps to keep the Director and the court informed. He must report as soon as practicable if he forms the opinion that:
- any property to which the order applies which is claimed to be recoverable property is not in fact recoverable, or
  - any property to which the order applies which is claimed to be associated property is not in fact associated property, or
  - any property not subject to the order is in fact recoverable by virtue of the same unlawful conduct or is associated property, or
  - any property to which the order applies is held by someone different to the person identified on the claim form.
326. All these possibilities are matters to which the interim receiver is required to be alert under the provisions of [section 247\(2\)](#). He must also report any other material change of circumstances. And he must finally make a formal report of his findings to the court, and serve copies of it on all those who may be affected by it. This report may comprise a comprehensive account of the nature and origins of, and interests in, the property in question. It will be capable of being used as a basis to establish agreed facts and to identify disputed matters that will fall to be resolved at the final hearing.

### **Interim administration orders (Scotland)**

#### ***Section 256: Application for interim administration order***

327. [Sections 256 to 265](#) make provision for ‘interim administration orders’ in Scotland; interim administration procedure may – but need not always – form the preliminary stage of civil recovery procedure.
328. An ‘interim administration order’ is, as [subsection \(2\)](#) explains, a court order for:
- the detention, custody or preservation of property which is claimed to be recoverable property or associated property, and
  - the appointment of an interim administrator in respect of that property.

Its characteristics are spelled out more fully at [sections 257 to 265](#), though [undersubsection \(8\)](#) these sections do not limit the extent of the power to make the order.

329. Under [subsection \(1\)](#), the first step in the procedure is for the Scottish Ministers to make an application to the Court of Session for an interim administration order. The Scottish Ministers may do this even though they have not yet served the application which marks the start of court proceedings. And they may do so without putting any interested party on notice that they are doing so if giving notice would prejudice the Scottish Ministers’ right to recover the property ([subsection \(3\)](#)). It may be necessary to act swiftly and without alerting potential parties, for example, to prevent property from being concealed or disposed of.
330. [Subsections \(5\) and \(6\)](#) set out the conditions which must be satisfied before the court can make an interim administration order. The Scottish Ministers must satisfy the court that:
- there is a ‘probable cause of action’, that the property in question is either recoverable or associated property, and

- if the property in relation to which the order is sought includes associated property, the Scottish Ministers have taken all reasonable steps to establish the identities of everyone who holds the property (if the order is made or the proceedings otherwise go ahead, the Scottish Ministers will have to put these persons immediately on notice of the action under [section 244\(2\)](#)).

331. The Scottish Ministers must also, under [subsection \(7\)](#), nominate someone suitable to act as interim administrator, but the nominee may not be a member of staff of the Scottish administration. The interim administrator on appointment becomes an officer of the court and his functions (set out in [section 257](#)) require him to act to secure the detention, custody or preservation of the property pending resolution of its fate.

### ***Section 257: Functions of interim administrator***

332. The detailed functions of an interim administrator will be conferred by the court's order itself. The court's discretion to confer whatever powers it considers appropriate to the circumstances of an individual case are at large, provided always they are for the purpose set out at [subsections \(1\) and \(2\)](#).

333. Up until the interim administration order, or the raising of proceedings (whichever comes first), the Scottish Ministers have access to the civil investigation powers set out in Part 8. Thereafter, they cease to have access to these powers and the duty of taking whatever further steps are needed to establish the facts about the property is placed upon the interim administrator acting under the court's direction.

334. [Schedule 6](#), which is introduced by [subsection \(1\)\(a\)](#), makes explicit mention of some of the more significant powers that the court may choose to confer on an interim administrator. These are explained above.

335. Although the court has a wide discretion over the powers and functions which may be conferred on an interim administrator, there are some duties under which he must always be placed. [Subsection \(2\)](#) sets these out. He will always be required to take the necessary steps to establish:

- whether in his view the property is to any extent recoverable or associated property, and
- whether there is any other property which is recoverable in relation to the same unlawful conduct.

336. [Subsection \(3\)](#) provides legal protection for the interim administrator if he mistakenly, but honestly and reasonably, deals with property which is not the property specified in the order. He will have immunity from any legal claims in respect of loss or damage caused by such dealing, unless it can be shown that it was caused by his negligence.

### ***Section 258: Inhibition of property affected by order***

337. [Section 258](#) provides that the Scottish Ministers may apply to the Court of Session for a warrant of inhibition against any person named in an interim administration order. If granted, the warrant would inhibit that person from dealing with the specified property until such time as the court determined the outcome of the civil recovery case. The warrant would be registered in the register of inhibitions and adjudications thus alerting the public to the inhibition.

### ***Section 259: Duties of respondent etc***

338. [Section 259](#) provides for certain duties to be placed on a person whose property is subject to an interim administration order. The order may require the person to bring the property, or any documents relating to the property, to a place specified by the interim



administrator or to the custody of the administrator. This would apply for example where the property or documents are located outside Scotland.

***Section 260: Supervision of interim administrator and variation of order***

339. An interim administrator, a respondent, any party to the proceedings and anyone else affected by the administrator's actions (including the Scottish Ministers) will be able to ask the court to clarify the administrator's powers. All parties, and any persons who may be interested, will be able to put their views to the court before it acts. There is also power for the court to vary or set aside the interim administration order. Before it does so, it must give an opportunity to be heard to the parties and any persons who may be affected by the court's decision.

***Section 261: Restrictions on dealing etc. with property***

340. *Subsection (1)* provides that the interim administration order must prevent any dealing with the property to which it applies, subject to any exclusions which may be made under the rest of the section. This is to prevent the property being dissipated, pending a resolution of the civil recovery case. 'Dealing' is explained in *section 316(1)* as including disposing of the property, taking possession of it or removing it from the United Kingdom. A person who disobeys these provisions will be in contempt of court.
341. *Subsection (2)* states that exclusions may be made either when the order is made or by variation. *Subsection (3)* states that an exclusion may in particular provide for property to be used for meeting any person's reasonable living expenses or to carry on a trade, business, profession or occupation. Living expenses would be likely to include the living expenses of dependants. But the court's discretion to release this property is limited by *subsections (4)* and *(6)*; the legal expenses of a person involved in proceedings may be met through the legal aid scheme, so there will be no need for them to draw from the property subject to the order.

***Section 262: Restriction on proceedings and remedies***

342. This section enables the existence of an interim administration order to have an effect on contemporaneous legal proceedings affecting the property in question. *Subsection (1)* allows the court that has made the order to sist any other legal process, including court proceedings, in respect of the property to which the order applies.
343. *Subsection (2)* allows any court in which proceedings are pending in respect of the property to sist them, or impose terms on their continuation. Before exercising any of these powers, the court must give an opportunity to be heard to the interim administrator (if appointed), the parties to the proceedings or any person who may be affected by the court's decision (*subsection (3)*).

***Section 263: Exclusion of property which is not recoverable etc.***

344. The court has the power to vary an interim administration order at any time (*section 260(3)*). This section makes specific provision for variations of interim administration orders to have the effect of excluding property from the proceedings altogether. The court may decide before the final hearing of the action, for example on an application by a person who may be affected by the court's order or a report by an interim administrator (see *section 264*), that some of the property to which the order applies is neither recoverable nor associated property. The court must exclude this property from the terms of the interim administration order. The court may also release associated property, if satisfied that it may be excluded without materially affecting the claims of the Scottish Ministers in respect of the remainder. If so, it may vary the order accordingly and the excluded property will be released, with or without conditions.

### **Section 264: Reporting**

345. An interim administration order must, under this section, require an interim administrator to take a number of steps to keep the Scottish Ministers and the court informed. He must report as soon as practicable if he forms the opinion that:
- any property to which the order applies which is claimed to be recoverable property is not in fact recoverable, or
  - any property to which the order applies which is claimed to be associated property is not in fact associated property, or
  - any property not subject to the order is in fact recoverable by virtue of the same unlawful conduct or is associated property, or
  - any property to which the order applies is held by someone different to the person identified on the claim form.
346. All these possibilities are matters to which the interim administrator is required to be alert under the provisions of [section 257\(2\)](#). He must also report any other material change of circumstances. And he must make a report of his findings to the court, and serve copies of it on all those who may be affected by it. This report may comprise a comprehensive account of the nature and origins of, and interests in, the property in question. It will be capable of being used as a basis to establish agreed facts and to identify disputed matters that will fall to be resolved at the final hearing.

### **Section 265: Arrestment of property affected by interim administration order**

347. [Section 265](#) enables the Scottish Ministers or the interim administrator to apply to the Court of Session for an order to arrest (or attach) moveable property which is subject to an interim administration order but is in the hands of third parties. An example of this would be a person's bank account. The warrant of arrestment would enable the bank account and other assets to be frozen thus preventing their being moved or dispersed before a final recovery order was made vesting the property in the hands of the trustee for civil recovery.

## **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);

*These notes refer to the Proceeds of Crime Act 2002 (c.29) which received Royal Assent on 24 July 2002*

- 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)*).

### ***Section 267: Functions of the trustee for civil recovery***

352. Where it makes a recovery order, or a consent order under section 276, the court must appoint a trustee for civil recovery. The enforcement authority is required by *subsection (2)* to nominate someone suitably qualified, and may do so from its own staff (this is because unlike the interim receiver or interim administrator the trustee acts in the interests of the enforcement authority following the court's judgment in favour of that authority and has no investigative functions). *Subsection (3)* places the trustee under a duty to secure the property which will be vested in him, and to liquidate non-cash assets for the benefit of the enforcement authority. *Subsection (4)* states that the trustee acts as such on behalf of the enforcement authority and on its instructions. *Subsection (5)* places the trustee under a duty to maximise the amount realisable from the property vested in him. These provisions together make clear that the trustee must approach his functions with a view to giving the fullest effect to the enforcement of the authority's right of recovery.

### ***Schedule 7: Powers of trustee for civil recovery***

353. *Schedule 7*, which is introduced by *section 267(6)*, sets out the principal and ancillary powers of the trustee for civil recovery.

### ***Section 268: Recording of recovery order (Scotland)***

354. Where a recovery order relates to heritable property in Scotland, *section 268* places the clerk of the court under a duty to immediately send a copy of the order to the registrar of inhibitions and adjudications for recording in the register. This gives a clear public notice that the recoverable property now vests in the trustee for civil recovery and prohibits any other person having a claim on the property.

### ***Section 269: Rights of pre-emption, etc***

355. *Subsection (1)* establishes that a recovery order will override any provisions that would otherwise prevent, penalise or restrict the vesting of the property in the trustee for civil recovery. Under *subsection (2)*, rights relating to the property such as those specified here do not automatically come into effect or become exercisable as a result of the vesting of the property. However, under *subsection (3)*, following a recovery order, any such rights will continue to have effect when the property is vested as if no transfer of property has taken place. This applies to any interests created by the recovery order (see *section 272(3)(b)*), as well as any interests transferred by the order. So a person who has the first right to buy property when it changes hands will not be able to exercise his right to prevent the vesting of recoverable property in the trustee by the recovery order. But he will have first right to buy the property when the trustee, or other person in whom the recovery order vests it, comes to sell it on (*paragraph 1 of Schedule 7* gives the trustee the power of sale). Under *subsection (4)*, the protections provided for any

of the rights referred to in *subsections (2) and (3)* do not apply if the right itself is the subject of a recovery order.

356. If a person holding such rights suffers loss as a result of property vesting in the trustee, he may apply to the court for compensation under *section 283(6)* and the court may require compensation to be paid under *section 283(8)*.

### ***Section 270: Associated and joint property***

357. This section introduces *sections 271 and 272*, which explain how associated property and joint property are to be dealt with when a recovery order is made.
358. Under *subsection (2)* these sections apply where the property to which the proceedings relate includes both recoverable property and associated property (as defined in *section 245*), where the associated property is specified in the claim form, or in Scotland the application, and the form has been served on the person who holds the associated property (if different from the respondent) – or the court has dispensed with service.
359. Under *subsection (3)* these sections also apply where the property belongs to joint tenants, and one of the tenants is an 'excepted joint owner', as defined in *subsection (4)*. Specific provision is needed for joint tenants because joint tenants are treated as though they were a single owner of the property at issue. Joint tenancies may arise, for example, where two people have a joint bank account or own real property jointly. But it might be the case that one of the joint tenants has acquired his joint tenancy with recoverable property and the other has acquired his with non-recoverable property. If so, the second would be an "excepted joint owner" whose interest would not be recoverable (*subsection (4)*). *Subsections (3) and (4)* do not apply to Scotland, as the concept of joint tenancy is not relevant in Scots law.

### ***Section 271: Agreements about associated and joint property***

360. *Subsection (1)* provides for the situation where a person who holds associated property, or an excepted joint owner, comes to an agreement with the enforcement authority to make a payment to the trustee in lieu of the recoverable property. Where an agreement is reached, the recovery order may then require the person to make the payment to the trustee, rather than vesting the property in the trustee. The order may reflect the agreement by including provision for vesting, creating or extinguishing an interest in the property (*subsection (2)*). For example, title to the recoverable property may be transferred to the owner of the associated property or the excepted joint owner in exchange for a payment – in effect, he buys out the enforcement authority's interest.
361. Provisions relating to the amount to be paid are at *subsection (3)*. *Subsection (4)* provides that where the enforcement authority has agreed that a person has suffered loss as a result of an interim receiving order or interim administration order applying to the property, the payment may take account of the loss and any other relevant circumstances. *Subsection (5)* establishes that where there is more than one item of associated property or excepted joint owner, the payment to be made is to be agreed between all of them and the enforcement authority. The recovery order must provide that the property concerned ceases to be recoverable (*subsection (6)*).

### ***Section 272: Associated and joint property: default of agreement***

362. This section applies where no agreement can be reached under *section 274*, but the court thinks it would be just and equitable to make provision concerning associated property or joint property. In such cases, the recovery order may provide for the associated property to vest in the trustee; for an excepted joint owner's interest in the property to be extinguished; or for an excepted joint owner's interest to be severed from the recoverable property (*subsection (2)*). Where the associated property vests in the trustee or the excepted joint owner's interest is extinguished, the order may provide for the trustee to make a payment in lieu, or for there to be conditions attached to the property

in favour of the persons concerned (*subsection (3)*). There is also provision for the court to create interests in favour of the person with the joint interest or associated property interest. So, for example, the court might order that a joint owner's interest in a house be extinguished, but might at the same time create a right for him to live in the house for his lifetime (as well, perhaps, as ordering that he be paid compensation). In deciding what provision to make, the court must have regard to the rights of the persons and the value to them of the property, as well as the interest of the enforcement authority (*subsection (4)*). Where a person who holds associated property or is an excepted joint owner has suffered loss as a result of an interim receiving order or interim administration order applying to the property, the recovery order may require the enforcement authority to pay compensation of an amount which the court thinks reasonable, having regard to the person's loss and any other relevant circumstances (*subsections (5) and (6)*).

### ***Section 273: Payments in respect of rights under pension schemes***

363. *Section 273* allows the recovery of recoverable property from pension funds. In the case of other types of property, once the court has made a recovery order, recoverable property will be vested in the trustee for civil recovery, and will eventually be disposed of by the trustee, i.e. selling the property to raise money. However, rights in a pension scheme cannot be vested in the trustee for civil recovery in this way, as they cannot be transferred to another person and subsequently sold, as they are not a transferable or tradable commodity. Therefore, *subsection (2)(a)* provides that pension trustees or managers must pay to the trustee for civil recovery an amount equal to the value of the pension rights secured by the original payment or payments into the fund.
364. When pension trustees or managers incur costs before a recovery order is made, or when complying with a recovery order, *subsection (4)* provides that such costs may be reimbursed, either by deducting the appropriate amount from the sum paid to the trustee for civil recovery, or in another appropriate manner.
365. Pensions legislation and pension scheme rules contain provisions preventing any commutation, surrender or variation of pension rights. Clearly these provisions would be at odds with the Director's and the Scottish Ministers' new powers of recovery. *Subsection (5)* therefore provides that these provisions, whenever and wherever present, will not frustrate the Director's or the Scottish Ministers' ability to pursue recovery of the value of pension rights. Similarly, *subsection (3)* provides that a recovery order seeking to realise the value of pension rights overrides provisions of a pension scheme to the extent that the latter conflict with the provisions of the order.

### ***Section 274: Consequential adjustment of liabilities under pension schemes***

366. Under *subsection (1)* a recovery order must provide that the trustees or managers of a pension scheme reduce its liabilities to the extent they think necessary following the payment made under the order. Under *subsection (2)*, the order must also provide for liabilities arising out of the recoverable rights to cease. *Subsection (3)* makes clear that this may involve a reduction of present or future benefits to which the respondent may be entitled, or any future benefits to which another person may be entitled in respect of the recoverable property.

### ***Section 275: Pension schemes: supplementary***

367. This section defines which types of pension rights are amenable to a recovery order, and defines the terms pension trustee and pension manager.
368. *Subsection (1)* provides that the Secretary of State, after consultation with the Scottish Ministers (*subsection (3)*), may make regulations as to the exercise by trustees or managers of pension schemes of their powers under *sections 273 and 274*. The regulations may include provision for the calculation and verification of the value at any time of pension rights and liabilities.

369. *Subsection (2)* provides that the powers can be used by reference to guidance produced by a person prescribed in the regulations, for example, the Institute of Actuaries in England and Wales and by the Faculty of Actuaries in Scotland.

### **Section 276: Consent orders**

370. This section gives the parties to civil recovery proceedings the power to settle the proceedings at any time after the claim form, or in Scotland the application, has been issued and served. Under *subsection (1)*, the court will have the power to make an order to stay – or in Scotland sist – the proceedings on terms agreed by all the parties concerned.
371. Such an order may provide for the property to which it applies to cease to be recoverable, or make any further provision which the court thinks appropriate (*subsection (2)*). *Subsection (3)* provides that where property vests in, or money is paid to, the trustee for civil recovery under this section, the provisions of [section 280](#) apply as though a recovery order had been made.

### **Section 277: Consent orders: pensions**

372. This section extends [section 276](#) so that an order involving pension rights can be made with the consent of the parties involved. As pension rights cannot be transferred to the trustee for civil recovery and then realised, *subsections (2) and (3)* provide that the trustees or managers of the pension scheme may make a payment to the trustee for civil recovery and make any agreed adjustment to the scheme if they are party to the agreement. *Subsection (4)* makes clear that they have the power to enter into such agreements.
373. *Subsection (6)* goes on to mention that a consent order will override the provisions of the pension scheme to the extent that they conflict with the provisions of the order. [Section 273\(4\)](#) provides for the trustees or managers of a pension scheme to recover costs. *Subsection (7)* of [section 278](#) makes identical provision for consent orders.
374. *Subsection (8)* provides that [sections 273\(5\) and 274](#) will also apply where an order is made by consent. This means that any rules preventing the commutation, surrender or variation of pension rights will not prevent the making of a consent order – and that the pension scheme will be required to adjust its liabilities following a payment under a consent order.

### **Section 278: Limit on recovery**

375. Subject to certain safeguards described elsewhere (e.g. for bona fide purchasers), property is recoverable if:
- it was obtained through unlawful conduct, or
  - it ‘represents’ property obtained through unlawful conduct.
376. Under [section 305](#), property may come to ‘represent’ the original property where a person has disposed of the original property and has obtained other property in place of it. Moreover, property obtained in place of representative property may itself become representative property. Under *subsection (2)*, items of original and representative property are to be treated as ‘related’ property. If property is recoverable, it may remain recoverable after passing through several hands in a series of transactions. The right of the enforcement authority to trace its claim over the recoverable property is analogous to similar tracing rights in civil law proprietary litigation. Either original or representative property may be traced in this way.
377. However, there is potential for a large family of related property to grow up as a result of such a series of transactions, comprising the original property and several items of representative property. Each of these items will potentially be recoverable. But if the

enforcement authority were to recover the entire family of recoverable property, that would be disproportionate to its primary right to recover the original property.

378. *Section 278* addresses this situation by providing a series of rules designed to ensure that if the enforcement authority seeks to recover items of related property, rather than confining itself to the original property, the court is able to limit its recovery order to what it thinks is necessary to satisfy the enforcement authority's right to recover the original property.
379. For example, the provisions ensure that the enforcement authority cannot recover representative property in addition to the original property. If the enforcement authority pursues more than one avenue of recovery simultaneously, for example where the original property cannot be found, the court has some flexibility under *subsections (4)* and *(5)* as to how the enforcement authority's interest should be satisfied. The court may order full recovery of some items of the related property but not others; or it may order partial recovery of some or all of the items; or a combination of both.
380. Nothing in this section prevents a court, where it makes a recovery order in respect of property, from also ordering the recovery of any profits that have accrued in respect of that property (*subsection (6)*).
381. If a forfeiture order has been made under *section 298* in respect of cash which was found to constitute recoverable property, it is to be treated for the purpose of this section as though it were a recovery order, so that the limitations on recovery in this section will apply (*subsection (7)*). This ensures that the proceeds of the same criminal conduct cannot be recovered twice, first through the cash forfeiture scheme in Chapter 3 and then again through civil recovery.
382. Similarly, *subsection (8)* ensures that the enforcement authority cannot secure an order under the civil recovery scheme if the property that was obtained through the unlawful conduct concerned, or property which represents it, has already been recovered by the victim of the conduct in civil litigation. And *subsections (9)* and *(10)* make similar provision in respect of property which has been taken into account in deciding a person's benefit from criminal conduct for the purposes of making a confiscation order under Parts 2, 3 or 4 of the Act or corresponding provisions.

### ***Section 279: Section 278: supplementary***

383. *Section 279* gives examples of circumstances in which the enforcement authority's right to recover property would be satisfied, for the purposes of *section 278*.

### ***Section 280: Applying realised proceeds***

384. This section governs the use of sums in the hands of the trustee for civil recovery. The sums may have reached his hands because:
- it was the proceeds of sale of non-cash property recovered under *section 266* or *section 276*, or
  - it was itself vested under *section 266* or *section 276*, or
  - it was paid under the provisions of *section 271* as a result of an agreement between the enforcement authority and other persons with non-recoverable interests in the property for them to 'buy out' the value of the recoverable property, or
  - it was an amount equal to the value of rights under a pension scheme, paid to the trustee under *section 273* or *277*.
385. The trustee must first make any payment required to be made by him following an order made under *section 272*. Second, he must pay expenses incurred by a person acting as an insolvency practitioner. The balance must be paid to the Director or the Scottish Ministers.

## **Exemptions etc.**

### ***Section 281: Victims of theft, etc.***

386. Property which has been stolen (or is the result of some other unlawful conduct comprising the deprivation of a true owner of his property) is property obtained through unlawful conduct, and therefore potentially recoverable by the enforcement authority. But *section 281* gives the claims of a true owner precedence over those of the enforcement authority. Where civil recovery court proceedings have begun in respect of property, a true owner is entitled to request a declaration from the court that he has a valid claim to it because he was deprived of it (or of property which it ‘represents’) by unlawful conduct. This need not be the unlawful conduct on which the authority relies. So if, for example, a drug trafficker steals money from a person and invests it in drug trafficking, the enforcement authority may bring proceedings in respect of the property that the drug trafficker has obtained through the drug trafficking. But the victim would still be able to claim that part of the property belonged to him, even though the authority was relying on the drug trafficking, rather than the theft. The effect of such a declaration is that the property ceases to be recoverable by the Director or by the Scottish Ministers (*subsection (4)*).
387. *Subsection (3)* makes clear that this exception only applies to the original true owner of property. It would not benefit someone who has for example stolen property from its original owner, but who in turn has had that property stolen from him. The property would have become recoverable when it was stolen from the original owner; the original owner will be able to request a declaration even if it is stolen again, whereas the person who first stole the property will not.

### ***Section 282: Other exemptions***

388. This section provides that proceedings for civil recovery may not be taken in respect of certain people in prescribed circumstances.
389. *Subsection (1)* provides for a power to make an order to exempt a person from having civil recovery proceedings brought against them. The power can be exercised by reference to any sort of description of the person and by reference to specified circumstances. The power to make exemption orders under this section will be exercised by the Secretary of State, but the Secretary of State is to consult with Scottish Ministers before making the order. Any order made under these provisions will be subject to approval by both Houses of Parliament (*section 459(6)(a)*).
390. Under *subsection (2)*, the Director or the Scottish Ministers may not take civil recovery proceedings in respect of cash unless they are simultaneously taking proceedings against other property held by the same person. Proceedings involving cash only may be brought under the summary proceedings in Chapter 3.
391. *Subsections (3) to (5)* specify particular types of property and persons against whom proceedings may not be taken. These include property held by the Financial Services Authority (*subsection (3)*). The Authority may hold recoverable property, in the form of levies and civil penalties it may impose on people engaging in market abuse. The charges in *subsection (4)* relate to assets which are intended as security for financial markets. *Subsection (5)* protects a person acting as an insolvency practitioner from proceedings in respect of recoverable property he holds or has held in connection with his role as a practitioner.

## **Miscellaneous**

### ***Section 283: Compensation***

392. This section deals with the case where any property has been made subject to an interim receiving order, or in Scotland an interim administration order, but has not in the end



been held to be recoverable or associated property, either because the court has so determined or because the claim or the application has been withdrawn. Subjection to the interim receiving order or interim administration order may, despite the duties of the interim receiver or interim administrator to preserve its value, have resulted in losses to the owners of the property.

393. Under *subsection (1)*, the person whose property it is may apply to the court for compensation for such losses; under *subsection (5)*, the court may order the enforcement authority to pay compensation. Under *subsection (2)*, no application for compensation may be made if the right of the victim has defeated that of the enforcement authority by virtue of *section 281*, or if an order has been made following an agreement by virtue of *section 276*.
394. An application must be made within three months of the date on which the court makes a decision the effect of which is that a recovery order cannot be made (*subsection (3)*). If an application is made for leave to appeal, the three months is to run from the date the appeal proceedings are finally concluded; or the date the application for leave to appeal is withdrawn or refused. In England and Wales and Northern Ireland, if the proceedings are discontinued, an application must be made within three months of the date on which they were discontinued (*subsection (4)*).
395. *Subsections (6) to (8)* provide for compensation in respect of rights of pre-emption etc which have become inoperable when the property to which they relate vests under a recovery order.
396. *Subsection (9)* provides for the measure of compensation to be at the court's discretion, having regard to the losses suffered and to all other circumstances. If therefore the claimant has himself contributed to the losses through delays, for example, that may be taken into account here.

#### ***Section 284: Payment of interim administrator or trustee (Scotland)***

397. This section makes provision for the payment of interim administrators and trustees for civil recovery in Scotland by the Scottish Ministers. No such provision is considered necessary in relation to England, Wales and Northern Ireland where it is envisaged such matters will be regulated by contract.

#### ***Section 285: Effect of diligence on recovery order (Scotland)***

398. *Section 285* clarifies the relationship in Scots law between the vesting of recoverable property in the hands of the trustee for civil recovery and any other action that might be taken by a creditor against the property to enforce a court order that he has obtained against the respondent. The section makes it clear that any such action against property executed after it has been vested in the trustee for civil recovery is ineffectual. In other words, once recoverable property is vested in the trustee, any other enforcement action (diligence) executed thereafter in relation to that property falls.

#### ***Section 286: Scope of powers (Scotland)***

399. The section provides that the Court of Session may make an order in respect of a person whether or not he is domiciled, present or resident in the United Kingdom. No similar provision is required in respect of England, Wales and Northern Ireland, due to the jurisdiction of the civil courts and the general provisions on property in *section 316*.

#### ***Section 287: Financial threshold***

400. *Subsection (1)* provides that the enforcement authority may not take proceedings for a recovery order unless it reasonably believes that the total value of the recoverable property is not less than an amount to be specified in an order. This ensures that civil recovery will not be used in minor or trivial cases. The order will be made by

the Secretary of State following consultation with Scottish Ministers (*subsection (2)*). The threshold applies only at the time the enforcement authority starts proceedings, or applies for an interim receiving order or interim administration order (*subsection (3)*). As long as the threshold is observed at the start of the proceedings, it will not matter if for example the Director subsequently discontinues proceedings in respect of certain property and the value of the remaining property is less than the amount specified in the order. The proceedings will be able to continue (*subsection (4)*).

### **Section 288: Limitation**

401. *Subsection (1)* sets a limitation period within which proceedings for a recovery order must be brought, through an amendment to the Limitation Act 1980. Proceedings must be brought within twelve years of the original property being obtained through unlawful conduct.
402. *Subsections (2)* and *(3)* make equivalent provision for Scotland and Northern Ireland.

### **Chapter 3: Recovery of cash in summary proceedings**

#### **Sections 289-291: Searches; Prior approval; Report on exercise of powers**

403. *Section 289* is necessary in order to support the powers to seize cash that is the proceeds of unlawful conduct or intended for use in such conduct (*section 294*). These new search powers will not be exercisable unless the suspect cash is thought to exceed the threshold set under *section 303*. In chapter 3, cash has the meaning attributed to it in *section 289(6)* and *(7)*.
404. The search powers will only be exercisable on private premises where the constable or customs officer has lawful authority to be present. In respect of a constable, this would be where he is exercising his powers of entry under the Police and Criminal Evidence Act 1984 and in respect of a customs officer where he is exercising such powers under the Customs and Excise Management Act 1979 or other enactment. In Scotland a constable or a customs officer would be exercising their powers of entry under common law or under a statutory warrant. An officer could also be lawfully present on private premises, if he is there at the invitation of the owner. By virtue of *subsection (5)(b)*, a customs officer may only exercise the powers if he has reasonable grounds for suspecting that the unlawful conduct relates to an assigned matter within the meaning of the Customs and Excise Management Act 1979. This would cover such conduct as drug trafficking, money laundering and excise evasion.
405. By virtue of *subsection (3)(b)*, the search powers include the powers to search a person. However, this power does not extend to requiring a person to undergo an intimate or strip search (*subsection (8)*).
406. *Section 290* provides the safeguard that the search powers in *section 289* may only be exercised where prior judicial authority has been obtained or, if that is not practicable, with the approval of a senior officer. *Section 290(1)* also recognises that there may be circumstances where it may not even be possible for a constable or a customs officer to obtain the approval of a senior officer. If judicial approval is not obtained prior to a search, and cash is either not seized or is released before the matter comes before a court, the constable or customs officer concerned must prepare a written report and submit it to an independent person appointed by the Secretary of State in relation to England and Wales and Northern Ireland and, in relation to Scotland, by the Scottish Ministers (*subsection (8)*). This report will detail why the constable or customs officer considered that he had the power to carry out the search and why it was not practicable to obtain judicial approval of the search.
407. *Section 291* provides that the person to whom the reports are submitted is under an obligation to submit an annual report to the Secretary of State (or the Scottish Ministers in Scotland) drawing general conclusions about the matters reported to him, making

any appropriate recommendations. This report will be laid before Parliament (or the Scottish Parliament as appropriate) and be published.

### ***Sections 292-293: Code of practice; Code of practice: Scotland***

408. In recognition of the sensitivity of search powers, [section 292](#) requires the Secretary of State to publish a Code of Practice setting out how the powers in [section 289](#) are to be exercised by a constable or customs officer. There will be a separate code of practice for constables in Scotland, issued by the Scottish Ministers; see [section 293](#).

### **Seizure and detention**

#### ***Section 294: Seizure of cash***

409. [Chapter 3](#) expands and replaces the scheme set out in Part II of the Drug Trafficking Act 1994 which provides for the seizure and forfeiture of cash which is being imported into or exported from the United Kingdom, and which represents the proceeds of, or is intended for use in, drug trafficking. This scheme is expanded to include cash related to all unlawful conduct and also provides for the seizure of such cash inland. [Section 294](#) enables a customs officer or a constable to seize cash at the borders or inland if he has reasonable grounds for suspecting that the cash is recoverable property or intended for use in unlawful conduct. [Subsection \(2\)](#) allows for the seizure of indivisible cash only part of which is under suspicion. An example of this is a single cheque of £50,000 where the cash under suspicion is only £25,000. [Section 296\(2\)](#) provides that when such cash can be divided on payment into an interest bearing account, the part not under suspicion must be released.
410. [Section 289\(6\)](#) and [\(7\)](#) defines cash for the purposes of [Chapter 3](#) and enables the Secretary of State following consultation with Scottish Ministers to prescribe by order other monetary instruments. Such monetary instruments must be of a kind that can be paid into an interest bearing account, so as to comply with the requirements of [section 296](#). In order to guard against excessive and disproportionate use of the power, there is to be a threshold below which the powers will not be available; this is specified in an order under [section 303](#). A definition of unlawful conduct is to be found in [section 241](#), and of recoverable property at [section 304](#) to [310](#).

#### ***Sections 295-296: Detention of seized cash; Interest***

411. The effect of [section 295](#) is that cash may not be detained for more than 48 hours except by order of a magistrate (or a sheriff in Scotland). A magistrate may make such an order if satisfied that there are reasonable grounds for the officer's suspicion and that the continued detention is justified for the purposes of investigating its origin or intended use. The magistrate may also make an order for continued detention if consideration is being given to the bringing of criminal proceedings, or if such proceedings have been commenced and not concluded. Monies detained would in most cases be paid into an interest bearing account as provided in [section 296](#) pending the outcome of proceedings.

#### ***Section 297: Release of detained cash***

412. [Section 297](#) envisages two situations in which cash or any part of the cash may be released to the person from whom it was seized. Firstly, the magistrates' court (or a sheriff in Scotland) may do so in response to an application by the person from whom the cash was seized on the grounds that it is not recoverable property and is not intended for use in unlawful conduct. The fact that only the person from whom the money is seized may apply to the court is intended to prevent the magistrates' court from becoming embroiled in a dispute between the person from whom the cash was seized and the rightful owner of the cash. Secondly, a customs officer, a constable or (in Scotland) a procurator fiscal, may release cash or any part of it after notifying the justice, magistrates' court or sheriff if satisfied that the detention can no longer be justified.

## **Forfeiture**

### ***Section 298: Forfeiture***

413. *Section 298* enables the magistrates' court (or, in Scotland, the sheriff) to order the forfeiture of cash or any part of it if satisfied that it is recoverable property or is intended for use in unlawful conduct. The balance of probabilities is the evidential standard that applies to the proceedings, this being the normal civil standard of proof (*section 241(3)*).
414. Where the cash is recoverable property belonging to joint tenants, one of whom falls within the definition in *section 270(4)*, the court must not forfeit the cash that it thinks attributable to the "innocent" partner's share. An example of this might be a joint bank account into which drug trafficking proceeds (dirty money) has been paid by one signatory and clean money by the other. If the former withdraws all the cash and it is subsequently seized, the court must then distinguish between the clean and dirty money. The court may then return to the "innocent" partner his share of the money.
415. *Subsection (4)* provides that cash cannot be released under any circumstance once an application for the forfeiture of that cash is made, until such time as forfeiture proceedings have concluded.

## **Supplementary**

### ***Section 301: Victims and other owners***

416. *Section 301* allows the true owner of detained cash to apply for its release. Two cases are provided for. *Subsection (3)* relates to a person who claims that some or all of the cash rightfully belongs to him, and he was deprived of it through unlawful conduct. An example of this would be a person who claims that the cash was stolen from him. If the court is satisfied, it may order the applicant's cash to be released to him.
417. *Subsection (4)* relates to the case of any other true owner who is not the person from whom the cash was seized. Here, if the court is satisfied, the cash may be released – but only if the person from whom it was seized does not object. That proviso is intended to prevent the court from becoming involved in a complicated ownership dispute between the person from whom the cash was seized and the rightful owner of the cash. Unlike subsection (3) the court will have to be satisfied that the cash is not recoverable property or intended for use in unlawful conduct before it can release to a claimed owner.

### ***Section 302: Compensation***

418. *Section 302* provides that where no forfeiture is made following the detention of cash the person from whom it was seized, or the person to whom the cash belongs, may apply to the court for compensation. In most cases, it is thought that the interest that will have accrued from the deposit of the cash into an interest-bearing account as provided in *section 296* will suffice. If, after 48 hours, cash has not been paid into such an account, then by virtue of *subsections (2) and (3)* the court may order the payment of compensation to the value of the lost interest. *Subsections (4) and (5)* also give the court further discretion to order the payment of reasonable compensation where loss has occurred as a result of the detention of the cash (even taking into account interest and compensation otherwise payable) and where the circumstances are exceptional. This section only applies to compensation for loss incurred as a result of the detention of the cash; if an individual has suffered loss for any other reason, this must be pursued elsewhere.

### ***Section 303: "The minimum amount"***

419. The current level in respect of the forfeiture of drug-related cash on import or export under the Drug Trafficking Act 1994 is £10,000 or more and the Government intends that the same level should be imposed in respect of this scheme.

## Chapter 4: General

### **Recoverable property**

#### **Section 304: Property obtained through unlawful conduct**

420. *Sections 304 to 316* apply to both civil recovery and cash forfeiture. *Section 304* defines when property is recoverable, and how the original property may be followed when it is disposed of by the person who originally obtained it or a person who subsequently obtained it. Under *subsection (1)*, property that is obtained through unlawful conduct is recoverable property; as such, it may be recovered by the enforcement authority. But the enforcement authority will not always be able to recover the property from the person who obtained the property through unlawful conduct. The property may, for example, have been sold; or the person may be untraceable, or dead. *Subsections (2)* and *(3)* therefore provide that where the property has been disposed of or passed to someone else, it may be ‘followed’ by the enforcement authority and recovered from that person. If the person to whom the property has been passed then in turn passes it on, the enforcement authority will be able to follow the property along the chain of transactions.
421. The ability to ‘follow’ property is, however, limited in several ways. Recovery depends on the original property continuing to be identifiable as such. And if any of the transactions in question is of the sort set out at *section 308*, the chain will be broken and the enforcement authority will no longer be able to follow and recover the property.

#### **Section 305: Tracing property, etc.**

422. *Sections 305* and *306* allow the enforcement authority to recover property which has not itself been obtained through unlawful conduct but which ‘represents’ such property.
423. *Section 305* establishes the principle of tracing the original recoverable property if it is disposed of. Under *subsection (1)*, property which represents property which is or has been recoverable, is also recoverable.
424. Under *subsection (2)*, where a person disposes of either the original recoverable property or representative property, and receives property in return, the property he receives in return becomes representative property and will also be recoverable. For example, if a stolen car is sold, the proceeds of sale will ‘represent’ the original property and the enforcement authority will be able to ‘trace’ into those proceeds and recover them. And if the proceeds of drug dealing are spent on jewellery, the jewellery itself will represent the original proceeds, and the enforcement authority will be able to recover it.
425. Like ‘following’ under *section 304*, ‘tracing’ is capable of being pursued along a chain of transactions. Under *subsection (3)*, where representative property is disposed of, it may be followed into the hands of the person who obtains it; it continues to represent the original property, and is therefore recoverable.
426. Tracing and following may multiply indefinitely the items of property that are rendered potentially recoverable. However, the enforcement authority will not be able to multiply its total recovery accordingly; limitations on total recovery are placed by *section 278*.

#### **Section 306: Mixing property**

427. Property which was not itself obtained through unlawful conduct at any stage can come to ‘represent’ such property, and therefore be potentially recoverable, not only by being traceable by the enforcement authority under *section 305* but also by having become mixed with recoverable property. Because the ability to follow property under *section 304* is dependent on the property retaining its identity, it may become impossible to follow property when it is mixed into other property.

428. *Subsection (3)* gives some illustration of this problem. If cash which is the proceeds of drug dealing is paid into a bank account which is in credit through deposits of honest earnings, it becomes impossible to identify any individual withdrawals which may be made from that account as being the ‘dirty’ money rather than the clean. *Subsection (2)* therefore provides that in such circumstances so much of the ‘mixed’ property as is attributable to the recoverable property will be representative of the original property, and is therefore itself recoverable.

### ***Section 307: Recoverable property: accruing profits***

429. *Section 307* provides that the property that is recoverable under *sections 304* to *306* is to be taken to include accrued profits; the profits are to be treated as representative property. So, for example, if the enforcement authority can recover money paid into a bank account, the authority can recover it with any interest accrued.

### ***Section 308: General exceptions***

430. *Section 308* constitutes a limitation on the enforcement authority’s ability to follow and trace property; the exceptions set out here also apply to the forfeiture provisions in Chapter 3. *Section 304* provides that where, for example, someone is given a yacht in return for a contract killing, and then sells the yacht, the authority may follow the yacht into the hands of the purchaser and recover it from him. Under *subsection (1)* of this section, if the purchaser paid full value for the yacht, and was unaware of its unlawful provenance, the authority is not entitled to recover it from him or from anyone else who may subsequently acquire it. The fact that the yacht has ceased to be recoverable property, however, does not prevent the proceeds of the sale of the yacht representing property obtained through unlawful conduct, and themselves being recoverable (*subsection (10)*).
431. *Subsection (2)* ensures that property ceases to be recoverable following successful civil recovery or cash forfeiture proceedings or following disposal in accordance with Part 5 powers. For example, if property is sold by an interim receiver or interim administrator in the exercise of his powers, although it may still be ‘property obtained through unlawful conduct’, or representative of such property, it will not be recoverable in the hands of the recipient and may be recycled in the market in the ordinary way.
432. *Subsections (3) to (7)* set out other circumstances in which property will cease to be recoverable: for example, where a payment is made following a compensation or restitution order under the Powers of Criminal Courts (Sentencing) Act 2000, and the sum or property received would otherwise be recoverable; where a claimant obtains property from a defendant in civil proceedings which are based on the defendant’s unlawful conduct, and the property would otherwise be recoverable; where an amount is paid in accordance with a restitution order made by a court under the Financial Services and Markets Act 2000 and that amount would otherwise be recoverable; and where restitution is required to be made by the Financial Services Authority under that Act paying an amount which would otherwise be recoverable.
433. *Subsections (8) and (9)* serve to exclude property from civil recovery if such property is already the subject of a restraint order, or has been taken into account in making a criminal confiscation order.

### ***Section 309: Other exemptions***

434. *Section 309* provides that certain property is not recoverable or associated property if it is prescribed by order or is disposed of in pursuance of a prescribed enactment. *Subsection (2)* provides that where property is disposed of in pursuance of a prescribed enactment, it is to be treated for the purposes of *section 278* (limit on recovery) as though it had been disposed of under a recovery order. *Subsection (4)* provides that an order is to be made by the Secretary of State, following consultation with the Scottish Ministers. The order is subject to the affirmative resolution procedure under *section 459(6)(a)*.

### **Section 310: Granting interests**

435. This section makes some detailed provision about the granting of interests in property. Take, for example, the case of someone who obtains a freehold house through the proceeds of unlawful conduct, and then grants a tenancy of it. At the time the house was 'obtained', the tenancy had no existence. The tenancy, therefore, cannot be described as having been obtained through unlawful conduct, either by the landlord or by the tenant. But it is intended to be as recoverable as the property obtained by the same unlawful conduct.
436. Under *subsection (1)*, where a person grants an interest in recoverable property, the granting of the interest is to be regarded as a disposal of the property; and the question of whether the interest is recoverable is to be determined in line with the provisions regarding disposal of recoverable property. Under *subsection (2)*, if the interest is in the original property that was obtained through unlawful conduct, it is to be treated as though it had been obtained through the same conduct. And if the interest is in property which represents property obtained through unlawful conduct, it is to be treated as such.

## **Insolvency**

### **Section 311: Insolvency**

437. This section sets out the interrelationship between civil recovery and insolvency proceedings. Broadly, a civil recovery claim will be treated in the same way that any other civil proprietary claim is treated in insolvency proceedings. This means that in most circumstances the enforcement authority will have to apply for leave from the court dealing with the insolvency proceedings to bring or continue civil recovery proceedings. This is provided for in the Insolvency Act 1986 (and its Northern Ireland and Scottish equivalents, the Insolvency (Northern Ireland) Order 1989 and the Bankruptcy (Scotland) Act 1985). However, under the insolvency legislation, leave does not have to be obtained in relation to all types of insolvency proceedings. *Section 311* therefore covers the insolvency proceedings that are not covered by the 1985 or 1986 Acts or the 1989 Order, so that the enforcement authority will have to apply for leave from the insolvency court in all circumstances.
438. The section also covers the interrelationship between cash forfeiture and insolvency proceedings. Under *subsection (1)*, civil recovery proceedings may not be initiated or continued in respect of property which is subject to insolvency proceedings (as defined in *subsection (3)*) without the leave of the court which is dealing with the insolvency. Under *subsection (2)*, an application for the further detention of cash under the cash forfeiture provisions in Chapter 3, where the cash forms part of the insolvency proceedings listed in *subsection (3)*, may not be made without the leave of the insolvency court. An application to the insolvency court may be made without notice, to prevent a potential civil recovery respondent finding out about the Director's intention to bring proceedings (*subsection (4)*); but notice must still be given where required to the insolvency practitioner or to the official receiver (*subsection (5)*).

## **Delegation of enforcement functions**

### **Section 312: Performance of functions of Scottish Ministers by constables in Scotland**

439. *Schedule 11* 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) 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 5 on Scottish Ministers that it would not be appropriate for seconded constables to exercise. These are set out in *section 312* and include taking proceedings in the Court of Session and exercising the Scottish Ministers' order making powers.

### ***Section 313: Restriction on performance of Director's functions by police***

440. *Section 313* provides that police officers who are seconded to the Agency will not be able to undertake civil recovery work on behalf of the Director. Seconded officers will retain their police powers and it would not be appropriate for them to work on civil recovery cases.

## **Interpretation**

### ***Section 314: Obtaining and disposing of property***

441. 'Disposing' of property is a key feature of the provisions at *section 304* and *305*, which deal with following and tracing property. Disposal of property may take place, for instance:
- where the property is dealt with to some extent only (including where an interest in the property is created – for example where a tenancy is granted out of freehold real property); a disposal might also consist of the grant of an interest in a part (*subsection (1)*);
  - where a person makes a payment, in cash or any other kind of property, to another (*subsection (2)*);
  - where property changes hands on death (*subsection (3)*).
442. *Subsection (4)* is relevant to the protection provided at *section 308(1)* for persons who obtain property 'for value'. It provides that a person obtains property 'for value' only when he has given executed consideration for it. That means that if someone obtains property in return for a promise to pay for it or to perform some service in exchange, that will not count as having 'obtained for value' until the payment is actually made or the service performed.

### ***Section 315: Northern Ireland: courts***

443. The Act relies upon procedural mechanisms contained in the Civil Procedure Rules for England and Wales. These do not apply in Northern Ireland. Further, the relevant rules of court in Northern Ireland have recently been the subject of a review and a number of changes have been recommended but not yet implemented. It is not therefore possible at this stage to specify the exact terms for the procedural mechanisms that will apply to civil recovery. Against that background it is necessary to provide that the expressions relating to the initiation and conduct of proceedings used in this Part of the Act are to be read in accordance with rules of court made in Northern Ireland. Such rules of court would be made under section 55 of the Judicature (Northern Ireland) Act 1978.

### ***Section 316: General interpretation***

444. *Subsection (1)* defines certain terms used in this Part of the Act. *Subsection (3)* enables property to be identified and traced by reference to events occurring before commencement of this Part. *Subsections (4) to (7)* explain the use of the terms 'property' and 'holding property.'