

# PROCEEDS OF CRIME ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 8: Investigations**

##### *Chapter 2: England and Wales and Northern Ireland*

Chapter 2 provides the scheme for the investigation powers in England and Wales and Northern Ireland. The scheme relating to Scotland is provided for in Chapter 3. The provisions within this chapter are largely a consolidation and extension of powers which existed in the Criminal Justice Act 1988, the Drug Trafficking Act 1994 and the Proceeds of Crime (Northern Ireland) Order 1995. The powers of investigation contained in the Drug Trafficking Act and The Proceeds of Crime (Northern Ireland) Order will continue to apply to investigations into the offences of drug trafficking. Furthermore, the additional powers in Schedule 2 in the Northern Ireland Order will continue to be available to financial investigators in Northern Ireland in connection with a confiscation investigation.

##### *Section 343: Judges*

505. *Section 343* specifies the judges to which applications for orders are to be made. In England and Wales, applications in respect of confiscation and money laundering investigations must be made to a judge entitled to exercise the jurisdiction of the Crown Court. This will allow Circuit judges, Recorders and High Court judges in their Crown Court capacity to hear applications for orders in respect of confiscation and money laundering investigations. In Northern Ireland, a Crown Court judge will hear such applications. In both jurisdictions, applications in respect of civil recovery investigations must be made to a High Court judge.

##### *Section 344: Courts*

506. This section specifies the court which is responsible for the hearing of applications relating to the different types of investigation: the Crown Court in respect of confiscation and money laundering investigations and the High Court in respect of civil recovery investigations. *Sections 351, 362, 369 and 375* have supplementary provisions regarding practice and procedure in relation to such applications. In England and Wales these only relate to those applications for investigation orders which would come before the Crown Court, as no provision is needed for the High Court. In Northern Ireland, the supplementary provisions apply to all applications for orders, whether in the Crown Court or the High Court.

#### **Production orders**

##### *Section 345: Production orders*

507. The power for a judge to make a production order is available for all three types of investigations specified in *section 341*. Similar powers previously existed in

section 93H of the Criminal Justice Act 1988, section 55 of the Drug Trafficking Act 1994 and Article 50 of the Proceeds of Crime (Northern Ireland) Order 1996. Under *subsection (1)*, an application for a production order may be made by an appropriate officer; *section 378* specifies the appropriate officer in relation to each type of investigation.

### ***Section 347: Order to grant entry***

508. This section clarifies the power previously contained in section 93H(5) of the Criminal Justice Act 1988 (as amended), section 55(5) of the Drug Trafficking Act 1994 and Article 50(5) of the Proceeds of Crime (Northern Ireland) Order 1996 to grant entry along with a production order authorising access to material (rather than an order to produce material). This power might be used, for example, to enable an appropriate officer to be granted entry to a building in circumstances where a production order had been made in respect of material in a particular office in that building.

### ***Section 350: Government departments***

509. This section extends the scope of a production order to cover material held by an authorised government department and is similar to previous powers in section 93J(11) of the Criminal Justice Act 1988, section 59(11) of the Drug Trafficking Act 1994 and Article 54(11) of the [Proceeds of Crime \(Northern Ireland\) Order 1996 \[SI 1996 No. 1299 \(NI 9\)\]](#). In addition, in order to reflect the effect of devolution in Northern Ireland under the Northern Ireland Act 1998, provision is made to ensure that Northern Ireland departments are, for the purposes of this section, treated as government departments.

### ***Section 351: Supplementary***

510. *Subsection (7)* provides that production orders and orders to grant entry which may be authorised by a judge entitled to exercise the jurisdiction of the Crown Court (or, in Northern Ireland, a Crown Court judge) have effect as if they were orders of the Crown Court. This is so that, if such orders are not complied with, proceedings for contempt of the Crown Court may be instituted. Orders made by a High Court judge automatically attract contempt of the High Court if they are not complied with.

## **Search and seizure warrants**

### ***Section 352: Search and seizure warrants***

511. Powers to issue warrants previously derived from the powers in section 93I of the Criminal Justice Act 1988, section 56 of the Drug Trafficking Act 1994 and Article 51 of the Proceeds of Crime (Northern Ireland) Order 1996. They differ from warrants under Part II of the Police and Criminal Evidence Act 1984 (PACE) or Part III of [Police and Criminal Evidence \(Northern Ireland\) Order 1989 \[SI 1989 No.1341 \(NI 12\)\]](#) in that they permit the seizure of special procedure material (defined at section 14 of PACE). These warrants also differ from those issued under Schedule 1 to PACE (which also permit the seizure of special procedure material) in that applications may be made without notice to the person whose premises are to be searched. Except where different provision is made in the Act, the general provisions in Part II of PACE about search warrants apply to search warrants issued under this section.
512. As in *section 345*, an application for a warrant may be made by an appropriate officer as set out in *section 378*. *Subsection (5)* provides for a constable to execute the warrant if it is sought in relation to a confiscation or money laundering investigation, and for a named member of staff of ARA if the warrant is sought in relation to a civil recovery investigation. The name of the member of staff can be a pseudonym if the Director so directs (*section 449*). A warrant may be issued either if a production order has been made and not complied with and there are reasonable grounds for believing that the

material specified in the warrant is on the premises, or the requirements of [section 353](#) are met ([subsection \(6\)](#)).

***Section 353: Requirements where production order not available***

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

***Section 355: Further provisions: confiscation and money laundering***

514. This section makes provision for the application by subordinate legislation (subject to the negative resolution procedure) of certain provisions of the Police and Criminal Evidence Act 1984 (or its Northern Ireland equivalent) concerning search warrants to search warrants under the Act where they are sought in relation to confiscation or money laundering investigations.

***Section 356: Further provisions: civil recovery***

515. This section sets out provisions regarding when and how a warrant issued by the High Court for the purposes of a civil recovery investigation may be exercised. *Subsection (3)* gives power for the High Court judge to make the warrant subject to such conditions as he thinks fit. Where a member of staff of ARA executes a search warrant, he will have no automatic right to use reasonable force (in contrast to the position where a constable or customs officer executes a search warrant). *Subsection (7)* gives a High Court judge power to authorise the member of staff of ARA to use reasonable force if he thinks it necessary to make the warrant effective.

**Disclosure orders**

***Section 357: Disclosure orders***

516. Under *subsection (1)*, only the Director may apply to a judge for a disclosure order. It is available in respect of a confiscation and a civil recovery investigation but not a money laundering investigation. Owing to the necessarily invasive nature of the disclosure order, it is thought appropriate to limit the order's use to the Director. Since the Director will not have a role in the investigation of money laundering offences, it is a consequence that the disclosure order will not be available for use in money laundering investigations. Furthermore, the Director can only apply for a disclosure order in respect of his own investigations (*subsection 3*). He cannot use this power on behalf of law enforcement authorities in respect of investigations they are carrying out and in which the Director is not otherwise involved. However, law enforcement authorities can transfer entire confiscation investigations to the Director if this is thought necessary.
517. Once a disclosure order has been made, the Director may use the extensive powers set out in *subsection (4)* throughout the investigation. Thus, unlike the other orders covered by this Part which have to be applied for separately on each occasion, a disclosure order gives the Director continuing powers for the purposes of the investigation. A person may require that evidence of the authority to exercise disclosure powers be provided. Where this happens, it is envisaged that a copy of the disclosure order will be given to the person.

***Section 358: Requirements for making of disclosure order***

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

***Section 359: Offences***

519. As the disclosure order obliges persons to comply with certain requirements, sanctions to compel such compliance are required. There is a maximum penalty of six months imprisonment and/or a level 5 fine (currently £5000) for non-compliance and two years imprisonment and/or an unlimited fine for knowingly or recklessly makes a false or misleading statement.

***Section 360: Statements***

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

**Customer information orders**

***Section 363: Customer information orders***

521. A customer information order requires all (or a targeted sample of) banks and other financial institutions to provide details of any accounts held by the person who is the subject of a confiscation or money laundering investigation. The order can also apply to persons who appear to hold property that is subject to a civil recovery investigation. *Section 369(7)* requires the prior authorisation of a senior appropriate officer before an appropriate officer can make an initial or variation application for a customer information order. This mirrors the approach taken for restraint order applications in confiscation proceedings (see *section 42* read with *section 68*). An appropriate officer who is also a senior appropriate officer can apply for the order and variations himself without requiring further and separate authorisation. *Section 378* sets out who is a senior appropriate officer in the three types of investigation. As with disclosure orders, a person may require the person serving a notice given under the order to demonstrate that they have the authority they claim. Again, it is envisaged that a copy of the original customer information order will be provided.

***Section 364: Meaning of customer information***

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

***Section 366: Offences***

523. As with the disclosure order, there are two offences connected with customer information orders. As the sanctions are directed at non-compliant institutions rather than an individual they are solely financial. The maximum penalties are a level 5 fine

(currently £5000) for non-compliance and an unlimited fine for knowingly or recklessly making a false or misleading statement.

***Section 367: Statements***

524. Like the disclosure order, a customer information order requires an institution to divulge information. This section sets out the standard conditions on the use of such information to prevent information obtained under compulsion from being used against the financial institution in criminal proceedings against it (subject to certain limited exceptions) (see [section 360](#)).

**Account monitoring orders**

***Section 370: Account monitoring orders***

525. This section has the effect of requiring a financial institution to provide specified information in relation to an account (for example, details of all transactions passing through the account) during a specified period up to a maximum of 90 days. The information would normally be provided in the form of a bank statement. An account monitoring order may be obtained in respect of all three types of investigation specified in [section 341](#) and can be applied for by an appropriate officer as set out in [section 378](#).

***Section 371: Requirements for making of account monitoring order***

526. As part of his consideration of the proportionality test that he must apply by virtue of section 6 of the Human Rights Act 1998, the judge might want to satisfy himself that an order of this type lasting over a period of time (rather than a one-off production order) is necessary for the purposes of the investigation.

***Section 372: Statements***

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

***Section 375: Supplementary***

528. *Subsection (2)* allows the account monitoring order itself to be varied. In England and Wales, High Court rules already allow for such variations in civil recovery investigations. *Subsection (6)* provides that account monitoring orders made by a judge entitled to exercise the jurisdiction of the Crown Court have effect as if they were orders of the Crown Court. This is so that it is clear that, if the order is not complied with, contempt proceedings may be brought in the Crown Court. Contempt proceedings are automatically attracted if an order of the High Court is not complied with.

**Evidence overseas**

***Section 376: Evidence overseas***

529. This section enables the Director to request evidence from overseas for use in confiscation investigations. Prosecuting authorities are able to obtain such evidence using section 3 of the Criminal Justice (International Co-operation) Act 1990; however, as the Agency is not a prosecuting authority, specific provision in the Act is necessary.

## **Code of practice**

### ***Section 377: Code of practice***

530. This section requires the Secretary of State to issue a statutory code of practice in relation to the exercise of the investigation powers in Chapter 2 of Part 8. The code will provide clear guidance as to how such powers in respect of confiscation, money laundering and civil recovery investigations are to be operated in England and Wales, and Northern Ireland. There will be a separate code for Scotland (see [section 410](#)).
531. This follows the precedent of paragraph 8 of Schedule 2 to the [Proceeds of Crime \(Northern Ireland\) Order 1996 \[SI 1996 No.1299 \(N.I. 9\)\]](#), which contains a provision requiring the Secretary of State to draw up a code in relation to the exercise of the investigation powers conferred by that Schedule. Similar to those provisions, this code will be published in draft for consultation and laid before both Houses. Also, a breach of the code will not render a person liable to criminal or civil proceedings but the code will be admissible as evidence in criminal and civil proceedings. [Section 459](#) provides that this code will be brought into operation by the affirmative resolution procedure.

## **Interpretation**

### ***Section 378: Officers***

532. This section lists the appropriate officers and senior appropriate officers who may apply for the orders and warrants set out in set out in this Chapter. [Section 443](#) empowers the Secretary of State to specify by order particular groups of accredited financial investigators who may exercise the powers of appropriate officers and senior appropriate officers, for example, accredited financial investigators who are also company investigators attached to the Department for Trade and Industry. An accredited financial investigator is a person accredited under [section 3](#). Only the Director can investigate civil recovery, and accredited financial investigators engaged by ARA will not have access to money laundering investigation powers ([subsection \(7\)](#)).
533. Civilians authorised by the Director General of the National Criminal Intelligence Service to handle suspicious transaction reports may or may not be accredited financial investigators. For the purposes of the offence of prejudicing a money laundering investigation ([section 342](#)), [subsection \(5\)](#) includes them in the definition of “appropriate officer”. It is therefore an offence to make a disclosure or tamper with evidence which involves an investigation being carried out by such civilians (see the note for [section 342](#) above).