

Part IX

Cash Forfeiture

Drafting note: This part is optional, represents good practice in the United Kingdom and can be a very valuable tool in the arsenal of authorised officers. These provisions introduce a new power for authorised officers to seize cash discovered during investigations or at the point of import or export, provided the cash is reasonably suspected of being derived from or intended to be used in criminal activity, or the instrumentalities of such activity.

In the event that cash (as defined) is found above the minimum amount, an application may be made to the appropriate court for the forfeiture of the cash, if the evidence supports to the civil standard of proof that it is derived from, an instrumentality of, or intended to be used in, criminal conduct. No conviction of anyone is required for the forfeiture of the cash to be ordered; cash forfeiture proceedings are civil proceedings and the civil standard of proof applies.

In order to guard against excessive and disproportionate use of the power, there should be a threshold below which the powers will not be available; this is specified in an order under Section 105. States will need to consider (on a 'risk-based analysis') where to set the minimum threshold. Many jurisdictions are heavily cash dependent. Possession of large sums may not be an unusual occurrence and could be a result of local custom, lack of access to banking facilities, the habit of keeping records or simply an extended 'black market economy'. The mere possession of large sums of cash will not of itself lead to applications for forfeiture, however. There has to be, in addition, evidence to show either the illicit source or purpose of the cash. In jurisdictions where the powers have been introduced, they have proved a powerful weapon in the fight against illicit funds flow; they are designed to remove unlawful capital from the economy and disrupt day-to-day criminal operations.

Whilst adopting non-conviction-based civil recovery proceedings, it shall remain the burden of the state to prove the underlying criminal purpose, but the possession of unusual sums of cash will be evidence from which the state will be able to seek inferences to be drawn. A legitimate possessor of cash will be able to establish both the origin of the cash and the reason for the holding. His or her proprietary rights are protected by the provisions contained within this part relating to release, continued detention and review. Third-party rights are also protected.

States will also have to consider the creation of a fund for the payment in of forfeited cash. There should be a publicly available policy for the uses of such forfeited sums, perhaps for crime prevention initiatives.

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The provisions use the term ‘authorised officer’ as an agent of the state empowered to search, seize, detain and apply to forfeit. States will have to consider whether these powers should be available to all police, customs and border officers who may come across cash in their day-to-day duties as ‘front-line officers’. This would remove the need for a specially authorised investigator to be present whenever cash is found, often unexpectedly. Section 95 is an option that serves to maintain accountability and prevent the arbitrary use of these powers.

Furthermore, states will have to consider the appropriate forum for these claims. The recovery of cash is intended to be an uncomplicated, rapid and cost-efficient process that ought to be determined by a competent judicial authority without the need to encumber the higher courts. Reference in this part to judicial authority and court may be drafted to allow continued detention and forfeiture to be determined by a court of summary jurisdiction. An appeal must be available to a court of immediate superiority.

These provisions are taken from the UK Proceeds of Crime Act 2002. UK cash seizure has proved to be an effective and robust method of combating criminal funding and laundering and reflects the reality that criminal profits often circulate outside the legitimate banking system.

Section 91 General Purpose of Cash Forfeiture under this Part

- (1) This Part has effect for the purposes of enabling cash that is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before the court.
- (2) The powers conferred by this Part are exercisable whether or not any proceedings have been brought for an offence in connection with the cash.

Section 92 ‘Unlawful Conduct’

- (1) Conduct occurring in any part of [enter name of State] is unlawful conduct if it is unlawful under the criminal law of that Part.
- (2) Conduct that—
 - (a) occurs in a jurisdiction outside the [enter name of State] and is unlawful under the criminal law of that jurisdiction, and
 - (b) if it occurred in a part of the [enter name of State], would be unlawful under the criminal law of that part is also unlawful conduct.
- (3) The court must decide on a balance of probabilities whether it is proved that any matters alleged to constitute unlawful conduct have occurred, or that any person intended to use any cash in unlawful conduct.

Section 93 'Property Obtained through Unlawful Conduct'

- (1) A person obtains property through unlawful conduct (whether his or her own conduct or another's) if he or she obtains property by or in return for the conduct.
- (2) In deciding whether any property was obtained through unlawful conduct—
 - (a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct;
 - (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.

Section 94 Searches

- (1) If an authorised officer of the enforcement authority who is lawfully on any premises has reasonable grounds for suspecting that there is on the premises cash—
 - (a) that is the proceeds or instrumentalities of crime, or
 - (b) that is intended to be used in the course of unlawful conduct, or
 - (c) is terrorist property
 and
 - (d) the amount of which, not being terrorist property, is not less than the minimum amount, he or she may search for the cash there.

Drafting note: Drafters will need to consider what the minimum amount should be with reference to local cash practices and customs. This is dealt with in Section 105 below and is discussed in the drafting note at the beginning of this section, as well as in the introductory remarks to these model provisions ['the Threshold Amount']. These model provisions are intended to apply a zero tolerance approach to terrorist property, which is why there is no suggestion of 'minimum amount' in respect of that property.

- (2) If an authorised officer has reasonable grounds for suspecting that a person (the suspect) is carrying cash—
 - (a) that is proceeds or instrumentalities of crime, or
 - (b) that is intended to be used in the course of unlawful conduct, and
 - (c) the amount of which is not less than the minimum amount, he or she may exercise the powers described in subsections (4) and (5) below.

- (3) The authorised officer may, so far as he or she thinks it necessary or expedient, require the suspect—
 - (a) to permit a search of any article he or she has with him or her, and
 - (b) to permit a search of his or her person.
- (4) An authorised officer exercising powers by virtue of subsection (3) may detain the suspect for so long as is necessary to exercise those powers.
- (5) The powers conferred by this Section are exercisable only so far as reasonably required for the purpose of finding cash.
- (6) Cash means
 - (a) notes and coins in any currency;
 - (b) postal orders;
 - (c) cheques of any kind, including travellers' cheques;
 - (d) bankers' drafts;
 - (e) bearer bonds and bearer shares.
- (7) Cash also includes any kind of monetary instrument that is found at any place in the [insert name of State], if the instrument is specified by the [relevant minister].
- (8) This Section does not require a person to submit to an intimate search or strip search.

Drafting note: Section 94 is necessary in order to support the powers to seize cash that is the proceeds of crime or which is intended to be used in the course of criminal conduct. These new search powers will not be exercisable unless the suspect cash is thought to exceed the threshold set under Section 105. The search powers will be exercisable on private premises only if an authorised officer has lawful authority to be present.

Section 95 Prior Approval

- (1) The powers conferred by this Section may be exercised only with appropriate approval unless, in the circumstances, it is not practicable to obtain that approval before exercising the power.
- (2) Appropriate approval means the approval of a judicial officer or (if that is not practicable in any case) the approval of a senior authorised officer.
- (3) If the powers are exercised without the approval of a judicial officer in a case where—
 - (a) no cash is seized by virtue of Section 97, or

- (b) any cash seized is not detained for more than 48 hours, the authorised officer who exercised the powers must give a written report to the appointed person.
- (4) In this Section, the appointed person means a person appointed by [insert name of the relevant ministry].

Drafting note: This optional section provides the safeguard that the search powers in Section 95 may be exercised only if prior judicial authority has been obtained or, if that is not practicable, with the approval of a senior investigating officer. This section also recognises that there may be circumstances in which it may not be possible for an officer to obtain the approval of a senior officer. As a matter of good practice and accountability, states may wish to consider whether or not, 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 officer concerned ought to prepare a written report and submit it to an independent person appointed by the relevant minister detailing why the officer considered that he or she had the power to carry out the search and why it was not practicable to obtain judicial approval of the search.

Section 96 Seizure of Cash

- (1) An authorised officer may seize any cash that he or she finds pursuant to searches lawfully carried out if he or she has reasonable grounds for suspecting that the cash is:
- (a) the proceeds or instrumentalities of unlawful conduct;
 - (b) intended to be used in the course of unlawful conduct;
 - (c) terrorist property.
- (2) An authorised officer may also seize cash if he or she has reasonable grounds for suspecting only part of it to be—
- (a) the proceeds or instrumentalities of unlawful conduct or terrorist property, or
 - (b) intended to be used in the course of unlawful conduct, if it is not reasonably practicable to seize only that part.
- (3) This Section does not authorise the seizure of an amount of cash if it or, as the case may be, the part to which the authorised officer's suspicion relates is less than the minimum amount.

Drafting note: Section 96 enables an authorised officer to seize cash if he or she has reasonable grounds for suspecting that the cash is derived from unlawful conduct 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

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of this is a single cheque for US\$50,000 where the suspicion relates to only US\$25,000.

States may wish to consider whether there ought to be a 'minimum amount' when it comes to terrorist property.

Section 97 Detention of Seized Cash

- (1) While the authorised officer continues to have reasonable grounds for his or her suspicion, cash seized under Section 96 may be detained initially for a period of 72 hours.

Drafting note: Care will have to be taken over the initial detention period. A period of 72 hours may not be sufficient if courts do not sit regularly enough. Bank holidays pose a particular problem.

- (2) The period for which the cash or any part of it may be detained may be extended by an order made by a judicial authority, but the order may not authorise the detention of any of the cash:
- (a) beyond the end of the period of [three] months beginning with the date of the order;
 - (b) in the case of any further order under this Section, beyond the end of the period of two years beginning with the date of the first order.
- (3) An application for an order under subsection (2) may be made by an authorised officer and the court may make the order if satisfied, in relation to any cash to be further detained, that one the following conditions is met.
- (4) The first condition is that there are reasonable grounds for suspecting that the cash is the proceeds of unlawful conduct or terrorist property and:
- (a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in [insert name of State] or elsewhere) proceedings against any person for an offence with which the cash is connected; or
 - (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.
- (5) The second condition is that there are reasonable grounds for suspecting that the cash is the proceeds or instrumentalities of unlawful conduct or terrorist property and:
- (a) its continued detention is justified while its use is further investigated or consideration is given to bringing (in [insert name of state] or elsewhere)

- proceedings against any person for an offence with which the cash is connected; or
- (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.
- (6) The third condition is that there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct and:
- (a) its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in [insert name of state] or elsewhere) proceedings against any person for an offence with which the cash is connected; or
- (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.
- (7) An application for an order under subsection (2) may also be made in respect of any cash seized under Section 96(2), and the court may make the order if satisfied that:
- (a) the condition in subsections (4), (5) or (6) is met in respect of part of the cash; and
- (b) it is not reasonably practicable to detain only that part.
- (8) An order under subsection (2) must provide for notice to be given to persons affected.

Section 98 Interest

- (1) If cash is detained under Section 97 for more than 72 hours, it must at the first opportunity thereafter be paid into an interest-bearing account and held there; and the interest accruing on it is to be added to it on its forfeiture or release.
- (2) In the case of cash detained under Section 97 that was seized under Section 96(2), the authorised officer after paying it into the account may release the part of the cash to which the suspicion does not relate.
- (3) Subsection (1) does not apply if the cash or, as the case may be, the part to which the suspicion relates is required as evidence of an offence or evidence in proceedings under this Part.

Drafting note: The effect of Section 98 is that cash may not be detained for more than [72] hours except by order of court. The court may make such an order if satisfied that there are reasonable grounds for the applicant's suspicion and that the continued detention is justified for the purposes of investigating its origin or intended use. The court 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.

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Monies detained would in most cases be paid into an interest-bearing account as provided in Section 98(1) pending the outcome of proceedings. (Refer to Part XII for the creation of a recovered asset fund by the relevant authority.)

Section 99 Release of Detained Cash

- (1) This Section applies while any cash is detained under Section 98.
- (2) A court may direct the release of the whole or any part of the cash if the following condition is met.
- (3) The condition is that the court, on an application by the person from whom the cash was seized, that the conditions in Section 98 for the detention of the cash are no longer met, in relation to the cash to be released.
- (4) An authorised officer may, after notifying the court under whose order cash is being detained, release the whole or any part of it if satisfied that the detention of the cash to be released is no longer justified.

Drafting note: Section 99 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 court may do so in response to an application by the person from whom the cash was seized on the grounds that it was not proceeds or intended to be used in unlawful conduct, and was not terrorist property. The fact that only the person from whom the money is seized may apply to the court is intended to prevent the court from becoming embroiled in a dispute between the person from whom the cash was seized and the rightful owner of the cash.

Secondly, the authorised officer may release cash or any part of it after notifying the court if satisfied that the detention can no longer be justified.

Section 100 Forfeiture

- (1) While cash is detained under Section 99, an application for the forfeiture of the whole or any part of it may be made to a court by the authorised officer.
- (2) The court may order the forfeiture of the cash or any part of it if it is satisfied on a balance of probabilities that the cash or any part thereof:
 - (a) is the proceeds of unlawful conduct;
 - (b) is the instrumentalities of unlawful conduct;
 - (c) is terrorist property;
 - (d) is intended to be used for the purposes of unlawful conduct.

- (3) But in the case of property that belongs to joint owners, the order may not apply to so much of it as the court thinks is attributable to the joint owner's share.
- (4) Where an application for the forfeiture of any cash is made under this Section, the cash is to be detained (and may not be released under any power conferred by this Part) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded.

Drafting note: Section 100 enables the court to order the forfeiture of cash or any part of it if satisfied that it is proceeds or intended to be used in unlawful conduct. The balance of probabilities is the evidential standard that applies to the proceedings, this being the normal civil standard of proof. Where the cash is property belonging to joint owners 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. 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.

Section 101 Appeal against Forfeiture

- (1) Any party to proceedings in which a forfeiture order is made under Section 100 in respect of detained cash who is aggrieved by the order may appeal to [insert name of superior court with appellants jurisdiction].
- (2) An appeal under subsection (1) must be made within the period of [28] days beginning on the date on which the order is made.
- (3) The appeal is to be by way of a rehearing.
- (4) The court hearing the appeal may make any order it thinks appropriate.
- (5) If the court upholds the appeal, it may order the release of the cash.

Section 102 Application of Forfeited Cash

- (1) Cash forfeited and any accrued interest on it is to be paid into the [insert name of appropriate fund].
- (2) But it is not to be paid in:
 - (a) before the end of the period within which an appeal under Section 101 may be made; or
 - (b) if a person appeals under that Section before the appeal is determined or otherwise disposed of.

Section 103 Victims and Other Owners

- (1) A person who claims that any cash detained under this Part, or any part of it, belongs to him or her may apply to the court for the cash or part to be released to him or her.
- (2) The application may be made in the course of proceedings under Section 97 or Section 100 or at any other time.
- (3) If it appears to the court concerned that—
 - (a) the applicant was deprived of the cash to which the application relates, or of property which it represents, by unlawful conduct,
 - (b) the property of which the applicant was deprived was not, immediately before he or she was deprived of it, the proceeds of unlawful conduct, or represented or was an instrumentality of unlawful conduct, or was intended to be used in unlawful conduct, and
 - (c) that cash belongs to him or her, the court may order the cash to which the application relates to be released to the applicant.
- (4) If—
 - (a) the applicant is not the person from whom the cash to which the application relates was seized,
 - (b) it appears to the court that that cash belongs to the applicant,
 - (c) the court is satisfied that the conditions in Section 97 for the detention of that cash are no longer met or, if an application has been made under Section 100, the court decides not to make an order under that Section in relation to that cash, and

Drafting note: Section 103 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 or her, and that he or she was deprived of it through unlawful conduct. An example of this would be a person who claims that the cash was stolen from him or her. If the court is satisfied, it may order the applicant's cash to be released to him or her. 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. The court will have to be satisfied that the cash is not proceeds or intended to be used in unlawful conduct before it can release to a claimed owner.

- (d) no objection to the making of an order under this subsection has been made by the person from whom that cash was seized, the court may order the cash to which the application relates to be released to the applicant or to the person from whom it was seized.

Section 104 Compensation

- (1) If no forfeiture order is made in respect of any cash detained under this Part, the person to whom the cash belongs or from whom it was seized may make an application to the court for compensation.
- (2) If, for any period beginning with the first opportunity to place the cash in an interest-bearing account after the initial detention of the cash for 72 hours, the cash was not held in an interest-bearing account while detained, the court may order an amount of compensation to be paid to the applicant.
- (3) The amount of compensation to be paid under subsection (2) is the amount the court thinks would have been earned in interest during the period in question if the cash had been held in an interest-bearing account.
- (4) If the court is satisfied that, taking account of any interest to be paid under Section 98 or any amount to be paid under subsection (2), the applicant has suffered loss as a result of the detention of the cash and that the circumstances are exceptional, the court may order compensation (or additional compensation) to be paid to him or her.
- (5) The amount of compensation to be paid under subsection (4) is the amount the court thinks reasonable, having regard to the loss suffered and any other relevant circumstances.
- (6) If a forfeiture order is made in respect only of a part of any cash detained under this Part, this Section has effect in relation to the other part.

Drafting note: Section 104 provides that, where no forfeiture is made following the detention of cash, the person from whom the case was seized, or the person to whom the cash belongs, may apply to the court for compensation. In most cases, the interest that will have accrued from the deposit of the cash into an interest-bearing account as provided in Section 98 will suffice. If, after 72 hours, the 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 applies to compensation for loss incurred only 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 105 'The Minimum Amount'

- (1) In this Part, the minimum amount is the amount in [name the currency] specified in an order made by [insert name of the relevant minister].
- (2) For that purpose the amount of any cash held in a currency other than [insert currency of State here] must be taken to be its [insert currency here] equivalent, calculated in accordance with the prevailing rate of exchange.

Drafting note: See the introductory drafting note to this part in relation to setting the appropriate threshold. Any variation to the threshold amount ought to be implemented by secondary legislation. Over time, citizens of the state will become aware of the need to account for and reduce the amount of cash carried at any one time to avoid engagement with these provisions. States ought to periodically review such social behaviour and adjust the amount accordingly.

- (3) There is no minimum amount if the cash seized relates to or is connected with terrorism.