

STATES OF JERSEY



Jersey

DRAFT PROCEEDS OF CRIME (ENFORCEMENT OF CONFISCATION ORDERS) (AMENDMENT) (JERSEY) REGULATIONS 202-

**Lodged au Greffe on 23rd December 2021
by the Minister for External Relations and Financial Services
Earliest date for debate: 8th February 2022**

STATES GREFFE

REPORT

This Report applies to the following draft Propositions as taken together; they represent a package of amendments (“the amendments”) that look to achieve a single policy position –

- (i) Draft Proceeds of Crime (Amendment No. 5) (Jersey) Law 202-;
- (ii) Draft Proceeds of Crime (Enforcement of Confiscation Orders) (Amendment) (Jersey) Regulations 202-;
- (iii) Draft Court of Appeal (Amendment No. 9) (Jersey) Law 202-.

These draft Amendments are concerned with what are known in the International Conventions to which Jersey is a party as the ‘instrumentalities of crime’. This is more commonly referred to as property used in or intended to be used in criminal offences.

The amendments are being proposed to be achieved through four different pieces of legislation: the Draft Proceeds of Crime (Amendment No. 5) (Jersey) Law 202-, the Draft Proceeds of Crime (Enforcement of Confiscation Orders) (Amendment) (Jersey) Regulations 202-, and the Draft Court of Appeal (Amendment No. 9) (Jersey) Law 202-. Consequential amendments will also be made to the relevant Rules of Court.

Taken together, the draft Amendments have three purposes:

- (a) to provide for a new post-conviction order permitting the Royal Court to order the forfeiture of the instrumentalities of crime or (if they are no longer available) the value of those instrumentalities;
- (b) to provide for Jersey to co-operate with other jurisdictions in the enforcement of post-conviction instrumentalities forfeiture orders;
- (c) to make necessary amendments to Article 29 of the [Proceeds of Crime \(Jersey\) Law 1999](#) to allow the regime to function effectively.

The need for Jersey to enact legislation to provide for post-conviction instrumentalities forfeiture orders arises from the requirements of the international standards concerning the prevention of money laundering and terrorist financing, set by the Financial Action Task Force (the “FATF”).

The Methodology to the FATF Recommendations states for c.4.1 the following:

“c.4.1 Countries should have measures, including legislative measures, that enable the confiscation of the following, whether held by criminal defendants or by third parties:

- (a) *property laundered;*
- (b) *proceeds of (including income or other benefits derived from such proceeds), or instrumentalities used or intended for use in, ML or predicate offences;*
- (c) *property that is the proceeds of, or used in, or intended or allocated for use in the financing of terrorism, terrorist acts or terrorist organisations;*
or
- (d) *property of corresponding value.”*

These draft Amendments provide for legislative provisions in Jersey to cover the instrumentalities and their equivalent in (b) and (d) of this part of the FATF Methodology.

Previously, Jersey has relied on the [Criminal Justice \(Forfeiture Orders\) \(Jersey\) Law 2001](#) (the “2001 Law”) to cover these provisions of the international conventions, however, the proposed amendments adopt a more modern approach designed to bring the Island fully in line with Recommendation 4.

The 2001 Law is primarily concerned with forfeiting property found on defendants when they are arrested (the most common order is for the forfeiture of drugs, paraphernalia and mobile telephones found on those arrested for drugs offences). It is designed to provide a simple and straightforward process and applications under that Law are rarely contested, and this Law will remain on the statute book for cases which are not complex. The 2001 Law does not contain the freezing or ancillary powers that are needed in complex cases.

The proposed amendments will allow a regime to be put in place which can be used in relation to bank accounts, which is the major area of concern related to Jersey money laundering prosecutions (which are the primary focus of FATF Recommendation 4).

In relation to the proposed new orders and the inter-relation with any existing orders, the Proceeds of Crime (Jersey) Law 1999 provides the Royal Court with wide ranging powers of confiscation in relation to benefits that convicted defendants have obtained from their crimes.

Jersey has based the design of this legislation on legislative provisions from the nations of the United Kingdom and there is extensive and detailed case law. Importantly, these orders are made against defendants personally requiring them to pay a sum of money of an equivalent value to their benefit, but up to the amount that they can pay.

The forfeiture of instrumentalities of crime is a different process. It is primarily concerned with making orders for the forfeiture of specific property (whether it is held by the defendant or someone else) which was used in or intended to be used in the relevant crime. The process is directed to the property rather than to the defendant. The FATF Recommendation requires jurisdictions to provide a fall-back provision. This provision permits the forfeiture of a specific sum of money from the defendant equivalent to the instrumentality (again based on ability to pay).

Because confiscation on the current UK model as enacted in Jersey is a different process to instrumentalities forfeiture it has been necessary to draft a new provision. The use of separate orders is the approach that is followed in other jurisdictions which provide for both proceeds and instrumentalities forfeiture (for example, New Zealand).

The amendments therefore propose revisions to a number of the ‘machinery’ provisions of the Proceeds of Crime (Jersey) Law 1999 and associated statutes dealing with confiscation orders so that they can also be used where the Attorney General wishes to apply for an instrumentalities forfeiture order. These ‘machinery’ provisions provide for things like investigatory powers, freezing, default sentences, enforcement and revisiting orders (used when further information comes to light).

Financial and manpower implications

There are no additional resource implications for the States arising as a result of these draft Regulations.

EXPLANATORY NOTE

These Regulations, if passed, would amend the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 (the “principal Regulations”) to make them applicable to instrumentalities forfeiture orders.

Regulation 1 provides that the Regulations amend the principal Regulations.

Regulation 2 amends Regulation 4 of the principal Regulations to provide that a certificate purporting to be issued by or on behalf of the appropriate authority of a country or territory outside Jersey and stating that an order (however described) made or to be made by a court of that country or territory has the purpose of, or will have the purpose of, recovering property used or intended to be used in criminal conduct or any predicate conduct or recovering property of equal value to such property is admissible as evidence of the facts contained in it in any proceedings in the Royal Court.

Regulation 3 amends Regulation 7 of the principal Regulations, which deals with satisfaction of confiscation orders in a country or territory outside Jersey, to extend its application to instrumentalities forfeiture orders.

Regulation 4 amends Regulation 8(1) of the principal Regulations which deals with the conversion of currency, to extend its application instrumentalities forfeiture orders.

Regulation 5 amends Regulation 9 of the principal Regulations to change the citation so that it reflects the extension of the enforcement of the rules to instrumentalities forfeiture orders.

The Schedule to the principal Regulations modifies the Proceeds of Crime (Jersey) Law 1999 in relation to its application to external confiscation orders and enforcement proceedings instituted in a country or territory outside Jersey. *Regulation 6* amends the Schedule to the principal Regulations to make it applicable to instrumentalities forfeiture orders in the same way that it applies to confiscation orders.

Regulation 7 provides that these Regulations may be cited as the Proceeds of Crime (Enforcement of Confiscation Orders) (Amendment) (Jersey) Regulations 202- and come into force on the commencement of the Proceeds of Crime (Amendment No. 5) (Jersey) Law 202-.



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Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES make these Regulations under Articles 28A and 38 of the [Proceeds of Crime \(Jersey\) Law 1999](#) –

1 Amendment of the [Proceeds of Crime \(Enforcement of Confiscation Orders\) \(Jersey\) Regulations 2008](#)

These Regulations amend the [Proceeds of Crime \(Enforcement of Confiscation Orders\) \(Jersey\) Regulations 2008](#).

2 Regulation 4 (evidence of proceedings and orders in a country or territory outside Jersey) amended

In Regulation 4(1) after sub-paragraph (g) there is inserted –

“(h) that an order (however described) made or to be made by a court of that country or territory has the purpose of, or will have the purpose of –

- (i) recovering property used or intended to be used in criminal conduct or predicate conduct; or
- (ii) recovering property equal to the value of the property referred to in clause (i).”

3 Regulation 7 (satisfaction of confiscation orders in a country or territory outside Jersey) amended

In Regulation 7 –

- (a) in the heading, after “confiscation orders” there is inserted “or instrumentalities forfeiture orders”;
- (b) in paragraph (1) –
 - (i) in sub-paragraph (a) after “Article 3 of the Law” there is inserted “or an instrumentalities forfeiture order has been made under Article 28B of the Law”,

- (ii) after “the amount payable under the confiscation order” there is inserted “or the value of property forfeited under the instrumentalities forfeiture order”.

4 Regulation 8 (conversion of currency) amended

In Regulation 8(1) after “confiscation order” there is inserted “or instrumentalities forfeiture order”.

5 Regulation 9 (citation) amended

In Regulation 9 after “Confiscation” there is inserted “and Instrumentalities Forfeiture”.

6 Schedule amended

In the Schedule –

- (a) in paragraph 1 (Article 1 amended) after sub-paragraph (1)(f) there is inserted –

- “(g) for the definition “predicate conduct” there is substituted the following definition –

- “ “predicate conduct” means, where the overseas conduct corresponds to an offence under Article 30 or 31, or an attempt or conspiracy to commit such an offence, the conduct that was alleged to give the property its criminal character;”.

- (b) in paragraph 2 (Article 2 amended) –
 - (i) in sub-paragraph (a) after “paragraphs (1)” there is inserted “, (1A)”,
 - (ii) in the substituted Article 2(2)(a) after “a confiscation order” there is inserted “or an instrumentalities forfeiture order”;
- (c) in paragraph 3 (Part 2 amended) –
 - (i) in sub-paragraph (2) for “28A” there is substituted “28B”,
 - (ii) in sub-paragraph (6) for “ “confiscation order” wherever” there is substituted “ “confiscation order or instrumentalities forfeiture order” wherever”,
 - (iii) for sub-paragraph (7) there is substituted –
 - “(7) In Article 22, in paragraph (2) for “, 18, 19, 20 and 28B” there is substituted “and 20”.
 - (iv) in sub-paragraph (8) –
 - (A) in clause (a) for “ “confiscation order” there” there is substituted “ “confiscation order or instrumentalities forfeiture order” there”,
 - (B) in clause (b) in the substituted paragraph (8), after “proceeds of criminal conduct” there is inserted “or instrumentalities or property of equal value to the instrumentalities”;

- (d) in paragraph 6(3) for “Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008” there is substituted “Proceeds of Crime (Enforcement of Confiscation and Instrumentalities Forfeiture Orders) (Jersey) Regulations 2008”.
- (e) in the [Proceeds of Crime \(Jersey\) Law 1999](#) as modified by the [Proceeds of Crime \(Enforcement of Confiscation Orders\) \(Jersey\) Regulations 2008](#) –
 - (i) for the heading “The Proceeds of Crime (Jersey) Law 1999 as modified by the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008” there is substituted “The Proceeds of Crime (Jersey) Law 1999 as modified by the Proceeds of Crime (Enforcement of Confiscation and Instrumentalities Forfeiture Orders) (Jersey) Regulations 2008”,
 - (ii) in Article 1(1) –
 - (A) in the definition “external confiscation order” after subparagraph (c) there is inserted –
 - “(d) for the purposes of recovering property used in or intended to be used in such conduct or in predicate conduct outside Jersey or recovering property of equal value to such property;”,
 - (B) after the definition “police officer” there is inserted the following definition –
 - “ “predicate conduct” means, where the overseas conduct corresponds to an offence under Article 30 or 31, or an attempt or conspiracy to commit such an offence, the conduct that was alleged to give the property its criminal character;”,
 - (iii) in Article 2(2)(a) after “a confiscation order” there is inserted “or an instrumentalities forfeiture order”,
 - (iv) in Article 24(8) after “proceeds of criminal conduct” there is inserted “or instrumentalities or property of equal value to the instrumentalities”.

7 Short title amended

In the short title after “Confiscation” there is inserted “and Instrumentalities Forfeiture”.

8 Citation and commencement

These Regulations may be cited as the Proceeds of Crime (Enforcement of Confiscation Orders) (Amendment) (Jersey) Regulations 202- and come into force on the commencement of the Proceeds of Crime (Amendment No. 5) (Jersey) Law 202-.