

STATES OF JERSEY



Jersey

DRAFT PROCEEDS OF CRIME (AMENDMENT No. 5) (JERSEY) LAW 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



Jersey

DRAFT PROCEEDS OF CRIME (AMENDMENT No. 5) (JERSEY) LAW 202-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for External Relations and Financial Services has made the following statement –

In the view of the Minister for External Relations and Financial Services, the provisions of the Draft Proceeds of Crime (Amendment No. 5) (Jersey) Law 202- are compatible with the Convention Rights.

Signed: **Senator I.J. Gorst**

Minister for External Relations and Financial Services

Dated: 21st December 2021

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 this draft Law.

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers’ Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT**Human Rights Notes on the Draft Proceeds of Crime (Amendment No. 5)
(Jersey) Law 202-**

These Notes have been prepared in respect of the Draft Proceeds of Crime (Amendment No. 5) (Jersey) Law 202- (the “**draft Law**”) by the Law Officers’ Department.

They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Data Law is compatible with the European Convention on Human Rights (“**ECHR**”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The purpose of the draft Law is to amend the Proceeds of Crime (Jersey) Law 1999 (the “**1999 Law**”) to introduce a modern process for the confiscation of the instruments of crime (‘instrumentalities’) to complement the procedure for the confiscation of the proceeds of crime within the 1999 Law.

The concept of confiscating instrumentalities is not novel and is currently provided for in the Criminal Justice (Forfeiture Orders) (Jersey) Law 2001.

The 1999 Law therefore engages Article 1, Protocol 1 ECHR (“**A1, P1**”).

A1, P1 provides as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A1, P1 is therefore a qualified right. It allows for the control of use of property in accordance with the general interest, and to deprive persons of property in accordance with the public interest, the conditions provided for by law and the general principles of international law.

The result of A1, P1 is that as with other qualified rights, there may be permitted interference so long as any such interference is;

- in accordance with the law;
- justified by a legitimate aim; and
- proportionate i.e. there is a reasonable relationship between the means employed and the aim pursued.

The measures will be clearly prescribed in law and will be based on the legitimate aim of depriving criminals of property and making crime less attractive, in accordance with the international standards set by the Financial Action Task Force.

As regards proportionality, the significant difference between a deprivation of property and a control of use of property is that for a deprivation to be proportionate, reasonable compensation will usually be required, whereas this is not generally required for a control of use. Any interference with the right to the peaceful enjoyment of possessions must in any event strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Contracting States tend though to enjoy a wide margin of appreciation in judging the measures appropriate to achieving the aims sought.

The case law from the ECtHR is firm that confiscation of criminal property is a control of use rather than deprivation.

In *Butler v United Kingdom* (27 June 2002) the applicant claimed that the forfeiture of his money, pursuant to the UK Drug Trafficking Act 1994, breached his A1, P1 rights. The Commission (of the ECtHR) held that;

“while noting that the applicant has been permanently deprived of his money in application of the forfeiture order, [the Commission] considers nonetheless that the impugned interference falls to be considered from the standpoint of the State’s right to “enforce such laws it deems necessary to control the use of property in accordance with the general interest.” ”.

The Commission was therefore minded to categorise a forfeiture of property ancillary to the enforcement of domestic legislation as a control of use and not a deprivation. Furthermore, in *Raimondo v Italy* (1994) 18 E.H.R.R. 237, a seizure of assets pursuant to a criminal investigation was held to be a control of use because it was of a provisional nature.

The proportionality of any seizure of confiscation order will be judged on a case by case basis and by the Royal Court, a self-evidently Article 6 complaint body.

The draft Law is therefore compatible with A1, P1 ECHR.

For completeness, the draft Law also engages Article 6 ECHR but the necessary safeguards to ensure a fair trial for anyone facing the confiscation of their property.

EXPLANATORY NOTE

This draft Law, if passed, will amend the Proceeds of Crime (Jersey) Law 1999 to provide for instrumentalities forfeiture orders in relation to property used or intended to be used in criminal conduct.

Article 1 states that this Law amends the Proceeds of Crime (Jersey) Law 1999 (the “principal Law”).

Article 2 amends Article 1 of the principal Law to amend the definition of “external confiscation order” and to provide definitions for the terms “instrumentalities”, “instrumentalities forfeiture order” and “predicate conduct” that are used in the substantive changes being made to the principal Law. *Article 2* also amends Article 1 of the principal Law to include references to instrumentalities forfeiture orders, as appropriate.

Article 3 amends Article 2 of the principal Law to extend the meaning of “realisable property” where the Attorney General makes or intends to make an application for an instrumentalities forfeiture order under Article 28B of the principal Law, but only for the purposes of the proceedings as they relate to the instrumentalities forfeiture order. *Article 3* also amends Article 2 of the principal Law so that Article 2(3) is subject to Article 28B(5)(b), where it applies.

Article 4 amends the heading of Part 2 to insert a reference to instrumentalities forfeiture orders.

Article 5 amends Article 3(5)(a)(ii) of the principal Law to provide an exception for an instrumentalities forfeiture order under Article 28B of the principal Law from the requirement for the Court to take into account a confiscation order before making an order involving payment by the defendant.

Article 6 amends Article 4 of the principal Law so that an exception is provided in Article 4(1) where Article 28B(5)(b)(i) applies in relation to the amount to be recovered under a confiscation order.

Article 7 amends Article 5 of the principal Law, which deals with confiscation orders relating to a course of relevant criminal conduct, to insert a reference to “instrumentalities forfeiture order” in Article 5(6)(b).

Article 8 amends Article 6 of the principal Law, which provides for the court to postpone determining whether the defendant has benefited from any relevant criminal conduct or the amount to be recovered in the defendant’s case. The effect of the amendment is that Article 6 applies to determinations under Article 28B and the Court must not specify a postponement period that exceeds 6 months beginning with the date of the conviction unless it is in the interests of justice to do so.

Article 9 amends Article 7 of the principal Law to give the Attorney General the power to make a statement of matters which the Attorney General considers relevant for the purpose of making any of the determinations set out in Article 28B(1), (3), (4), (5) or (9) of the principal Law.

Article 10 amends Article 8(1)(a) of the principal Law, which deals with the provision of information by a defendant, to insert a reference to Article 28B of the principal Law.

Article 11 amends Article 9 of the principal Law, which deals with the powers of the Court where the defendant has died or absconded, so that Article 9 also applies to an instrumentalities forfeiture order.

Article 12 amends Article 10 of the principal Law, which provides for the effect of a confiscation order on sentencing of a defendant who has absconded so that Article 10 also applies to instrumentalities forfeiture orders. *Article 12* also substitutes.

Article 13 amends Article 11 of the principal law, which provides for the enforcement of confiscation orders, to make Article 11 applicable to instrumentalities forfeiture orders. A new paragraph (5A) is inserted in Article 11 which provides that if the defendant is required to serve terms of imprisonment imposed under paragraph (1), in relation to both a confiscation order and an instrumentalities forfeiture order at the same time, the default terms of imprisonment must be served concurrently with each other.

Article 14 amends Article 12 of the principal Law, which provides for the reconsideration of a case where the Court has not considered a confiscation order, so an instrumentalities forfeiture order may be taken into account in considering the circumstances of the case.

Article 15 amends Article 15 of the principal Law, which provides for cases in which *saisies judiciaires* (an order for seizure of property made on application by or on behalf of the Attorney General) may be made, so that Article 15 applies to instrumentalities forfeiture orders in the same way that it applies to confiscation orders.

Article 16 substitutes Article 17(1)(a) of the principal Law, which gives the Court the discretion to empower the Viscount to realise property where a confiscation order made or an order is varied, so that the Article 17(1)(a) also applies to instrumentalities forfeiture orders.

Article 17 amends Article 18, which provides for interest on sums unpaid under a confiscation order, so that Article 18 also applies to an instrumentalities forfeiture order.

Article 18 amends Article 19(4) of the principal Law, which provides for increases in realisable property, so that Article 19(4) is subject to Article 28B(7) of the principal Law.

Article 19 amends Article 20 of the principal Law, which provides for the application of the proceeds of realisable property and other sums, so that Article 20 applies in respect of an instrumentalities forfeiture order in the same way as it applies to a confiscation order.

Article 20 amends Article 21 of the principal Law, which provides for the variation of a confiscation order where realisable property is inadequate, so that Article 21 also applies to an instrumentalities forfeiture order.

Article 21 amends Article 22(2) of the principal Law, which deals with bankruptcy of a defendant, to insert a reference to Article 28B of the principal Law.

Article 22 amends Article 24(2) of the principal Law, which provides for the Criminal Offences Confiscations Fund, so that amounts recovered under or in satisfaction of an instrumentalities forfeiture order are included in monies to be paid into the Fund.

Article 22 also amends Article 24(8) of the principal Law to include a reference to instrumentalities in the definition of “asset sharing agreement”.

Article 23 amends Article 26 of the principal Law, which provides for the cancellation of a confiscation order and compensation where an absconder is acquitted, so that Article 26 also applies to an instrumentalities forfeiture order.

Article 24 amends Article 27 of the principal Law, which deals with the cancellation of a confiscation order and compensation where an absconder returns, so that Article 27 also applies to an instrumentalities forfeiture order.

Article 25 amends Article 28 of the principal Law, which deals with the variation of a confiscation order and compensation where an absconder returns, so that Article 28 also applies to an instrumentalities forfeiture order.

Article 26 amends Article 28A of the principal Law, which deals with enforcement of confiscation orders in a country or territory outside Jersey, so that Article 28A also applies to instrumentalities forfeiture orders.

Article 27 inserts a new Article 28B into the principal Law to give the Attorney General the discretion to apply for, and sets the procedure in relation to an application for, an instrumentalities forfeiture order where a defendant appears before the Court to be sentenced in respect of an offence specified in Schedule 1 to the principal Law. Article 28B only applies to offences committed after it comes into force. Article 28B provides that an instrumentalities forfeiture order is an order for the forfeiture of –

- (a) property used in or intended to be used in the offence of which the defendant has been convicted;
- (b) where the offence is one under Article 30 or 31 of the principal Law or an attempt or conspiracy to commit such an offence, property used in or intended to be used in any predicate conduct that occurred in Jersey, whether occurring before or after Article 28B comes into force;
- (c) property into which property described in sub-paragraph (a) or (b) has been converted (whether in a single, in multiple or in a series of consecutive transactions); or
- (d) a sum of money of equivalent value to the value of the property described in sub-paragraph (a) or (b) at the time the offence or conduct as the case may be occurred, adjusted to take account of subsequent changes in the value of money, if, or to the extent that, any order of a kind described in sub-paragraph (a) to (d) would not be disproportionate.

Article 28 amends Article 29 of the principal Law, which gives the meaning of criminal property, so that it includes property derived from or obtained in whole or in part through criminal conduct.

Article 29 amends Article 30(5) of the principal Law to provide a defence for a person carrying out a function relating to enforcement relating to instrumentalities.

Article 30 amends Article 31 of the principal Law to provide a defence for a person carrying out a function relating to enforcement relating to instrumentalities. *Article 30* also amends Article 31 to prohibit the importation or exportation of criminal property which constitutes or represents instrumentalities of drug trafficking.

Article 31 amends Article 32 of the principal Law, which provides for protection for disclosures, and the defence of intended disclosure, so that it applies to property used in or intended to be used in criminal conduct.

Article 32 amends Article 34D of the principal Law, which deals with the failure of a financial institution to report to a designated police officer, designated customs officer or nominated officer a suspicion that another person is engaged in money laundering or that property constitutes proceeds of criminal conduct. The effect of the amendment is that Article 34D also applies in respect to property that has been, is being or is intended to be used in criminal conduct.

Article 33 amends Article 35(8) of the principal Law, which creates offences relating disclosure of information relating to a criminal investigation into money laundering (tipping off) or interference with material relating to such a criminal investigation. The effect of the amendment is that a person is not guilty of such an offence in respect of anything done by the person in the course of acting in connection with the enforcement,

or intended enforcement, of any provision of the principal Law or any other enactment relating to instrumentalities.

Article 34 amends Article 40 of the principal Law, which provides for investigations relating to proceeds of criminal conduct, by substituting paragraph (1) so that the provision also applies to instrumentalities. *Article 34* also makes consequential changes to Article 40(4)(a) in respect of the use of property in criminal conduct.

Article 35 amends Article 41 of the principal Law, which provides for the authority to search, by substituting paragraph (1) so that the provision applies to instrumentalities. *Article 35* also makes consequential changes in Article 41(3)(a) and (4)(b)(ii) in respect of the use of property in criminal conduct and instrumentalities.

Article 36 amends Schedule 1 to the principal Law relating to offences for which confiscation may be made to insert a reference to Article 28B(1) and to instrumentalities forfeiture orders in the Schedule subheading.

Article 37 amends Schedule 3 to the principal Law, which has effect in respect of obtaining financial information, to insert a reference to an instrumentalities forfeiture order in paragraph 5(2)(b) of Part 2 of that Schedule (relating to statements). The effect of the amendment is that the prohibition on the use of a statement made by a person in response to an account monitoring order in evidence against that person in criminal proceedings does not apply in the case of proceedings for or in respect of an instrumentalities forfeiture order, as in the case of a confiscation order.

Article 38 provides that this Law may be cited as the Proceeds of Crime (Amendment No. 5) (Jersey) Law 202- and comes into force 7 days after it is registered.



Jersey

DRAFT PROCEEDS OF CRIME (AMENDMENT No. 5) (JERSEY) LAW 202-

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Jersey

DRAFT PROCEEDS OF CRIME (AMENDMENT No. 5) (JERSEY) LAW 202-

A LAW to further amend the [Proceeds of Crime \(Jersey\) Law 1999](#).

<i>Adopted by the States</i>	<i>[date to be inserted]</i>
<i>Sanctioned by Order of Her Majesty in Council</i>	<i>[date to be inserted]</i>
<i>Registered by the Royal Court</i>	<i>[date to be inserted]</i>
<i>Coming into force</i>	<i>[date to be inserted]</i>

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Amendment of the [Proceeds of Crime \(Jersey\) Law 1999](#)

This Law amends the [Proceeds of Crime \(Jersey\) Law 1999](#).

2 Article 1 (interpretation) amended

In Article 1 –

- (a) in paragraph (1) –
 - (i) in the definition “external confiscation order” –
 - (C) after sub-paragraph (c) there is inserted –
 - “(d) for the purpose of recovering property used or intended to be used in such conduct or in predicate conduct outside Jersey, or property of equivalent value to such property;”,
 - (ii) the following definitions are inserted in alphabetical sequence –
 - ““instrumentalities” means property used in or intended to be used in criminal conduct;
 - “instrumentalities forfeiture order” means an order made under Article 28B (including any order under that Article that is made by virtue of Article 9);
 - “predicate conduct” means the conduct alleged by the Attorney General to be the criminal conduct which makes property criminal property, where the Attorney General is

- alleging an offence under Article 30 or 31 or an attempt or conspiracy to commit such an offence;”;
- (b) in paragraph (4) –
 - (i) in sub-paragraph (b), after “confiscation order” there is inserted “or an instrumentalities forfeiture order”,
 - (ii) for sub-paragraph (c) there is substituted –
 - “(c) if a confiscation order or an instrumentalities forfeiture order is made against the defendant, when all the orders are satisfied.”;
 - (c) in paragraph (5)(a) and (b), after “confiscation order” there is inserted “or, in the case of Article 9, an instrumentalities forfeiture order”;
 - (d) after paragraph (6) there is inserted –
 - “(6A) An application under Article 28B(6) is concluded –
 - (a) if the Court decides not to make or vary the instrumentalities forfeiture order, when it makes that decision; or
 - (b) if the Court makes or varies the instrumentalities forfeiture order as a result of the application, when the order is satisfied.”;
 - (e) in paragraph (7), after “confiscation order” there is inserted “or an instrumentalities forfeiture order”.

3 Article 2 (meanings of expressions relating to realisable property) amended

In Article 2 –

- (a) after paragraph (1) there is inserted –
 - “(1A) Where the Attorney General makes or intends to make an application for an instrumentalities forfeiture order under Article 28B, but only for the purposes of the proceedings as they relate to the instrumentalities forfeiture order, “realisable property” also includes –
 - (a) before any instrumentalities forfeiture order is made, any property suspected to be –
 - (i) property used in or intended to be used in the relevant offence or in predicate conduct that occurred in Jersey, or
 - (ii) property into which such property has been converted (whether in a single, in multiple or in a series of consecutive transactions); or
 - (b) after any instrumentalities forfeiture order has been made, any property that has been found by the Court to be –
 - (i) property used in or intended to be used in the relevant offence or in predicate conduct that occurred in Jersey, or

- (ii) property into which such property has been converted (whether in a single, in multiple or in a series of consecutive transactions).”;
- (b) in paragraph (3), after “For the purposes of Part 2” there is inserted “and subject to Article 28B(5)(b) where it applies”.

4 Part 2 (confiscation orders) amended

In Part 2 in the Part heading, after “Confiscation” there is inserted “and Instrumentalities Forfeiture Orders”.

5 Article 3 (confiscation orders) amended

In Article 3(5)(a)(ii), after “order” there is inserted “(except an instrumentalities forfeiture order under Article 28B)”.

6 Article 4 (amount to be recovered under confiscation order) amended

In Article 4(1), after “shall” there is inserted “, except where Article 28B(5)(b)(i) applies,”.

7 Article 5 (confiscation order relating to a course of relevant criminal conduct) amended

In Article 5(6)(b), after “confiscation order” there is inserted “or instrumentalities forfeiture order”.

8 Article 6 (postponed determinations) amended

In Article 6 –

- (a) in paragraph (1) –
 - (i) after “Where the Court is acting under Article 3” there is inserted “or 28B”,
 - (ii) after sub-paragraph (b) there is inserted –
 - “(c) making any determinations under Article 28B(1), (3), (4), (5) or (9),”;
- (b) in paragraph (3), for “there are exceptional circumstances” there is substituted “it is in the interests of justice to do so”;
- (c) in paragraph (4)(a) “either or both of” is deleted;
- (d) in paragraph (8), after “make a confiscation order under Article 3” there is inserted “or exercise any of the powers in Article 28B”.

9 Article 7 (statements relating to criminal offences) amended

In Article 7 –

- (a) in paragraph (1)(a), after clause (ii) there is inserted –

- “(iii) of making any of the determinations under Article 28B(1), (3), (4), (5) or (9); and”;
- (b) in paragraph (8), after sub-paragraph (b) there is inserted –
 - “(c) making any of the determinations under Article 28B(1), (3), (4), (5) or (9).”;
- (c) in paragraph (9), after sub-paragraph (b) there is inserted –
 - “(c) any allegation that property was used in or intended to be used in an offence or in predicate conduct that occurred in Jersey, or is property into which such property has been converted.”;
- (d) in paragraph (10)(a), after “the confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (e) for paragraph (12) there is substituted –
 - “(12) No acceptance by the defendant under this Article that –
 - (a) the defendant has benefited from an offence;
 - (b) any property was obtained by the defendant as a result of or in connection with an offence; or
 - (c) any property was used in or intended to be used in an offence or in predicate conduct that occurred in Jersey, or is property into which such property has been converted,is admissible in evidence in any proceedings for an offence.”.

10 Article 8 (provision of information by defendant) amended

In Article 8(1)(a), after “under Article 3” there is inserted “or 28B”.

11 Article 9 (powers of the Court where defendant has died or absconded) amended

In Article 9 –

- (a) in paragraph (2), after “to make a confiscation order” there is inserted “or an instrumentalities forfeiture order”;
- (b) in paragraph (4), after “to make a confiscation order” there is inserted “or an instrumentalities forfeiture order”;
- (c) in paragraph (6)(b) and (c), after “a confiscation order” there is inserted “or an instrumentalities forfeiture order”.

12 Article 10 (effect of confiscation order on sentencing of absconder) amended

In Article 10 –

- (a) in the Article heading after “confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (b) in paragraph (1) –
 - (i) after “made a confiscation order” there is inserted “or an instrumentalities forfeiture order”,

- (ii) in sub-paragraph (a), for “take account of the order” there is substituted “take account of the orders”;
- (c) for paragraph (2) there is substituted –
 - “(2) Where the Court has made a confiscation order or an instrumentalities forfeiture order by virtue of Article 9, and the defendant subsequently appears before the Court to be sentenced in respect of one or more of the offences concerned, neither Article 3(1) nor 28B(1) apply so far as the defendant’s appearance is in respect of that offence or those offences.”.

13 Article 11 (enforcement of confiscation orders) amended

In Article 11 –

- (a) in the Article heading after “confiscation orders” there is inserted “and instrumentalities forfeiture orders”;
- (b) in paragraph (1), after “under Article 3” there is inserted “or 28B”;
- (c) after paragraph (1) there is inserted –
 - “(1A) If orders are made under both Articles 3 and 28B in the same proceedings, a separate term of imprisonment must be specified in respect of each order.”;
- (d) in paragraph (3)(b) after “the confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (e) after paragraph (5) there is inserted –
 - “(5A) If the defendant is required to serve terms of imprisonment imposed under paragraph (1) in relation to both a confiscation order and an instrumentalities forfeiture order at the same time, the default terms of imprisonment must be served concurrently with each other.”;
- (f) in paragraph (6), after “confiscation orders” in both places where it appears there is inserted “and instrumentalities forfeiture orders”;
- (g) in paragraph (7), after “confiscation order” in both places where it occurs there is inserted “or instrumentalities forfeiture order”.

14 Article 12 (reconsideration of case where Court has not considered a confiscation order) amended

In Article 12(6) –

- (a) “the amount of” is deleted;
- (b) after paragraph (a) there is inserted –
 - “(aa) any order made under Article 28B(5)(b); and”.

15 Article 15 (cases in which *saisies judiciaires* may be made) amended

In Article 15 –

- (a) in paragraph (1)(a), after “confiscation order” there is inserted “or an instrumentalities forfeiture order”;
- (b) in paragraph (1)(b) –

- (i) for “14 and 19” there is substituted “14, 19 and 28B”,
- (ii) in clause (ii) after sub-clause (A) there is inserted –
 - “(AA) in the case of an application under Article 28B, that the Court may make or vary an instrumentalities forfeiture order, or”;
- (c) in paragraph (1A), after sub-paragraph (b), there is inserted –
 - “(c) the Court is satisfied that there is reasonable cause to believe that property was used in or intended to be used in the alleged criminal conduct or in any predicate conduct that occurred in Jersey.”.

16 Article 17 (realisation of property) amended

For Article 17(1)(a) there is substituted –

- “(a) in proceedings that have been instituted for an offence, a confiscation order or an instrumentalities forfeiture order is made or an order is varied under Article 14, 19 or 28B(6);”.

17 Article 18 (interest on sums unpaid under confiscation orders) amended

In Article 18 –

- (a) in the Article heading, after “confiscation orders” there is inserted “or instrumentalities forfeiture orders”;
- (b) in paragraph (1), after “confiscation order” in both places where it occurs there is inserted “or instrumentalities forfeiture order”.

18 Article 19 (increase in realisable property) amended

In Article 19(4), after “on that application” there is inserted “and subject to Article 28B(7)”.

19 Article 20 (application of proceeds of realisation and other sums) amended

In Article 20(1), (2) and (3), after “confiscation order” there is inserted “or instrumentalities forfeiture order”.

20 Article 21 (variation of confiscation order where realisable property is inadequate) amended

In Article 21 –

- (a) in the Article heading, after “confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (b) in paragraph (1), after “confiscation order” there is inserted “or an instrumentalities forfeiture order”.

21 Article 22 (bankruptcy of defendant) amended

In Article 22(2), for “19 and 20” there is substituted “19, 20 and 28B”.

22 Article 24 (Criminal Offences Confiscations Fund) amended

In Article 24 –

- (a) in paragraph (2)(a), after “confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (b) in paragraph (8), after “proceeds of criminal conduct” there is inserted “or instrumentalities or their value”.

23 Article 26 (cancellation of confiscation order, and compensation, where absconder acquitted) amended

In Article 26 –

- (a) in the Article heading after “confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (b) in paragraphs (1), (2) and (6) after “confiscation order” wherever it occurs, there is inserted “or instrumentalities forfeiture order”.

24 Article 27 (cancellation of confiscation order, and compensation, where absconder returns) amended

In Article 27 –

- (a) in the Article heading, after “confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (b) in paragraphs (1), (2), (3) and (7), after “confiscation order” wherever it occurs there is inserted “or instrumentalities forfeiture order”.

25 Article 28 (variation of confiscation order, and compensation, where absconder returns) amended

In Article 28 –

- (a) in the Article heading, after “confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (b) in paragraph (1)(a), after “confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (c) in paragraph (2) –
 - (i) after “confiscation order” in both places where it occurs there is inserted “or instrumentalities forfeiture order”,
 - (ii) after sub-paragraph (b) there is inserted –
“(c) the value of property described under Article 28B(3),”;
- (d) in paragraph (3) –
 - (i) in sub-paragraph (a), after “Article 3(4)” there is inserted “or 28B(3)”,

- (ii) in sub-paragraph (b), after “confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (e) in paragraph (4), after “Article 3(4)” there is inserted “or 28B(3)”;
- (f) in paragraph (5), after “confiscation order” wherever it occurs there is inserted “or instrumentalities forfeiture order”;
- (g) in paragraph (9), after “confiscation order” there is inserted “or instrumentalities forfeiture order”.

26 Article 28A (enforcement of confiscation orders in a country or territory outside Jersey) amended

In Article 28A –

- (a) in the Article heading after “confiscation orders” there is inserted “or instrumentalities forfeiture orders”;
- (b) in paragraph (1)(a) after “confiscation order” there is inserted “or instrumentalities forfeiture order”;
- (c) in paragraph (1)(b) –
 - (i) after “confiscation order” there is inserted “or instrumentalities forfeiture order,
 - (ii) after the “amount payable” there is inserted “or the value of property forfeited”.

27 Article 28B (instrumentalities forfeiture orders) inserted

After Article 28A there is inserted –

“28B Instrumentalities forfeiture orders

- (1) Where a defendant appears before the Court to be sentenced in respect of an offence specified in Schedule 1, the Attorney General may apply for and the Court may make an instrumentalities forfeiture order.
- (2) This Article applies only to offences committed after it comes into force.
- (3) An instrumentalities forfeiture order is an order for the forfeiture of –
 - (a) property used in or intended to be used in the offence for which the defendant has been convicted;
 - (b) where the offence is one under Article 30 or 31 or an attempt or conspiracy to commit such an offence, property used in or intended to be used in any predicate conduct that occurred in Jersey;
 - (c) property into which property described in sub-paragraph (a) or (b) has been converted (whether in a single, in multiple or in a series of consecutive transactions); or
 - (d) a sum of money of equivalent value to the value of the property described in sub-paragraph (a) or (b) at the time the

offence or conduct, as the case may be, occurred, adjusted to take account of subsequent changes in the value of money, if, or to the extent that, any order of a kind described in subparagraphs (a) to (d) would not be disproportionate.

(4) When considering whether the proposed order under paragraph (3) would be disproportionate, without limiting the factors that the Court may consider, the Court must take into account –

- (a) the defendant's means;
- (b) any gift caught by this Part; and
- (c) any civil proceedings instituted or intended to be instituted against the defendant by a victim of the offence or the defendant's predicate conduct in respect of loss or damage sustained in connection with the offence or conduct.

(5) The Court may proceed under both Article 3 (including by applying Article 5) and this Article in respect of the same offence but, where it is considering doing so, the following rules apply –

- (a) the Court must proceed under this Article before proceeding under Article 3;
- (b) if the Court makes an instrumentalities forfeiture order, it must only proceed under Article 3 (whether by reason of Article 3(1) or Articles 9, 12, 13 or 14) if, or to the extent that –
 - (i) an order under Article 3 would not lead to the same property (or its value) being taken into account in calculating the amount in respect of which the confiscation order made as was taken into account in calculating the value of the property in respect of which the instrumentalities forfeiture order is made, and
 - (ii) the making of a confiscation order in addition to an instrumentalities forfeiture order would not be disproportionate.

(6) Where –

- (a) by reason of paragraph (4)(a), the Court has decided that it will not make an instrumentalities forfeiture order or has decided to reduce the amount of the instrumentalities forfeiture order it would otherwise have made; and
- (b) the Attorney General subsequently becomes aware that the defendant's ability to pay an instrumentalities forfeiture order has increased (whether by means of the discovery of or subsequent acquisition of property),

the Attorney General may apply to the Court for the decision under paragraphs (1) and (3) to be reconsidered.

(7) If the Attorney General makes an application under paragraph (6) at the same time as proceeding under Article 19, the Court

- (a) must first consider the application under paragraph (6); and
- (b) may only make an order under Article 19 if to do so would not be disproportionate.

- (8) Where the Court makes an instrumentalities forfeiture order –
 - (a) it must take account of the order before –
 - (i) imposing any fine on the defendant,
 - (ii) making any order involving any payment by the defendant, or
 - (iii) making any forfeiture order under Article 29 of the [Misuse of Drugs \(Jersey\) Law 1978](#), Article 27 of the [Terrorism \(Jersey\) Law 2002](#) or Part 3 of the [Forfeiture of Assets \(Civil Proceedings\) \(Jersey\) Law 2018](#); and
 - (b) subject to sub-paragraph (a), it must leave the order out of account in determining the appropriate sentence or other manner of dealing with the defendant in the proceedings.
- (9) Where the Court makes an instrumentalities forfeiture order (whether with or without a confiscation order) the Court, instead of making an order under the [Criminal Justice \(Compensation Orders\) \(Jersey\) Law 1994](#), may make such orders as it considers appropriate for payment of the value of property due under the instrumentalities forfeiture order and any confiscation order to compensate victims of the offence or the predicate conduct for any loss or damage caused by that offence or conduct.
- (10) No enactment restricting the power of a court dealing with an offender in a particular way from dealing with the offender also in any other way restricts, by reason only of the making of an order under this Article, the Court from dealing with an offender in any way that the Court considers appropriate in respect of an offence described in paragraph (1).
- (11) The standard of proof on any contested issue of fact that arises in the course of considering an application for an instrumentalities forfeiture order is that which is applicable in civil proceedings.”.

28 Article 29 (criminal property) amended

In Article 29(1)(a), after “obtained,” there is inserted “in whole or in part,”.

29 Article 30 (offences of dealing with criminal property) amended

In Article 30(5), after “proceeds of criminal conduct” there is inserted “or instrumentalities”.

30 Article 31 (concealment etc. of criminal property) amended

In Article 31 –

- (a) in paragraph (4), after “proceeds of criminal conduct” there is inserted “or instrumentalities”;
- (b) in paragraph (5), after “the proceeds of drug trafficking” there is inserted “or instrumentalities of drug trafficking”.

31 Article 32 (protection for disclosures, and defence of intended disclosure) amended

In Article 32 –

- (a) in paragraph (1)(a) after “proceeds of criminal conduct” there is inserted “or property used in or intended to be used in criminal conduct”;
- (b) in paragraph (7)(a) after “proceeds of criminal conduct” there is inserted “or property used in or intended to be used in criminal conduct”.

32 Article 34D (failure in a financial institution to report to designated police officer, designated customs officer or nominated officer) amended

In Article 34D(2), after sub-paragraph (b) there is inserted –

- “ (c) any property has been, is being or is intended to be used in criminal conduct.”.

33 Article 35 (tipping off and interference with material) amended

In Article 35(8) after “proceeds of criminal conduct” there is inserted “or instrumentalities”.

34 Article 40 (investigations relating to proceeds of criminal conduct) amended

In Article 40 –

- (a) in the Article heading, after “criminal conduct” there is inserted “or instrumentalities”;
- (b) for paragraph (1) there is substituted –
 - “(1) A police officer may apply to the Bailiff for an order under paragraph (2) in relation to particular material or material of a particular description for the purposes of an investigation into –
 - (a) whether any person has benefited from any criminal conduct, or whether any property has been, is being or is intended to be used in criminal conduct; or
 - (b) the extent or whereabouts of the proceeds of any criminal conduct or instrumentalities.”;
- (c) in paragraph (4)(a), after “criminal conduct” there is inserted “or has used, is using or intends to use property in criminal conduct”.

35 Article 41 (authority for search) amended

In Article 41 –

- (a) for paragraph (1) there is substituted –

- “(1) A police officer may apply to the Bailiff for a warrant under this Article in relation to specified premises for the purposes of an investigation into –
 - (a) whether any person has benefited from any criminal conduct, or whether any property has been, is being or is intended to be used in criminal conduct; or
 - (b) the extent or whereabouts of the proceeds of any criminal conduct or instrumentalities.”;
- (b) in paragraph (3)(a) after “criminal conduct” there is inserted “or has used, is using or intends to use property in criminal conduct”;
- (c) for paragraph (4)(b)(ii) there is substituted –
 - “(ii) to the question whether a person has benefited from any criminal conduct or has used, is using or intends to use property in criminal conduct or to any question as to the extent or whereabouts of the proceeds of any criminal conduct or instrumentalities.”.

36 Schedule 1 (offences for which confiscation orders may be made) amended

In Schedule 1 –

- (a) in the Schedule subheading, after “Confiscation Orders” there is inserted “or Instrumentalities Forfeiture Orders”;
- (b) after “25(1),” there is inserted “28B(1)”.

37 Schedule 3 (financial information and monitoring orders) amended

In paragraph 5(2)(b) of Part 2 of Schedule 3, after “confiscation order” there is inserted “or an instrumentalities forfeiture order”.

38 Citation and commencement

This Law may be cited as the Proceeds of Crime (Amendment No. 5) (Jersey) Law 202- and comes into force 7 days after it is registered.