

23. Proceeds of Crime Act 2002

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23.1 Scope of CLS Funding

1. The Proceeds of Crime Act 2002 (the “2002 Act”) created a range of civil procedures in the High Court, Crown Court and magistrates’ court for which CLS funding has been made available.
2. Many cases under the 2002 Act remain criminal proceedings, for example the money laundering offences in Part 7 of the Act. Representation for defendants in criminal proceedings under the Act is funded in the same way as any other criminal proceedings. Representation orders can be granted by the court and funding provided through the Criminal Defence Service.
3. However, the Act also created a number of types of civil proceedings for which CLS funding is available. Section 36 of Schedule 11 of the Proceeds of Crime Act 2002 amended Schedule 2 of the Access to Justice Act 1999 to bring a range of proceedings in the Crown Court and magistrates’ court within the scope of CLS funding.
4. All High Court proceedings under Part 5 or Part 8 of the 2002 Act and all proceedings under Parts 2, 5 or 8 of the Act which have been brought within Schedule 2 of the Access to Justice Act 1999 are civil proceedings for which CLS funding is available.
5. The availability of public funding for proceedings under the 2002 Act can be summarised as follows:
 - (a) Proceedings which are “criminal proceedings” within the meaning of section 12(2) of the Access to Justice Act 1999 are funded through the Criminal Defence Service. Application for a representation order must be made to the court.
 - (b) Proceedings under the Act which are in the High Court or are otherwise specified under Schedule 2 of the Access to Justice Act 1999 are civil proceedings for which CLS funding is available as explained above. Applications for funding must be made to the Commission. The procedures for doing so are described at section 23.4 below.
 - (c) Representation in any proceedings under the 2002 Act which do not fall under (a) or (b) above can only be funded in exceptional cases under section 6(8)(b) of the 1999 Act – see section 27 of the Funding Code guidance.

Part 2 – Confiscation Orders

6. The Crown Court has wide powers under Part 2 to order confiscation of assets from a defendant who has a criminal lifestyle or has benefited from criminal conduct. In general, representation for a defendant when the court is deciding whether to make a confiscation order will be covered by CDS funding under the representation order for the substantive criminal proceedings which led to the court considering confiscation. If for any reason no representation order is in force application may be made to the court for a representation order to cover the hearing concerning the confiscation order. Such matters come within the definition of “criminal proceedings” under section 12(2)(b) of the Access to Justice Act 1999 since they concern “proceedings before any court for dealing with an individual convicted of an offence (including proceedings in respect of a sentence order)”.
7. There are, however, specific types of proceedings under Part 2 for which CLS funding in the Crown Court is available. These are:

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- (a) The court has power under section 41 to make a restraint order prohibiting any specified person from dealing with property. Such an order is akin to a freezing injunction. Section 41(7) allows the court to make such other order as is appropriate to make the restraint order effective. CLS funding is available to any person who does not qualify for CDS funding who likely to be affected by a restraint order or an order under section 41(7) to challenge the making of that order. In addition, any person likely to be affected by a restraint order or an order under section 41(7) may apply to the Crown Court under section 42(3) to discharge or vary it. CLS funding is available for applications to discharge or vary under section 42(3). Such funding is available both to defendants and third parties affected by the restraint order.
- (b) When a confiscation order is not satisfied the Crown Court has power to appoint a receiver in respect of any realisable property, who may be the director of the Assets Recovery Agency. Under section 54(3) and 56(3) the receiver has power to distribute assets but can only do so after giving persons who have an interest in the property concerned a reasonable opportunity to make representations. CLS funding is available to enable any such persons to be represented in hearings in the Crown Court as to the distribution of assets. Note that CLS funding is only available to third parties, not to the original defendant against whom the confiscation order was made (see paragraph 3(2)(a) of Schedule 2 of the Access to Justice Act 1999).
- (c) Any person affected by an action that a receiver takes or proposes to take may apply to the Crown Court under section 62. CLS funding is available for such applications. Such funding is available to either a defendant or a third party.
- (d) Under sections 48 to 53 the court may appoint and confer a range of powers on receivers. Under section 63 any person affected by an order under sections 48 to 53 may apply to the Crown Court to vary or discharge the order. CLS funding is available for such proceedings both to defendants and third parties.
- (e) Sections 72 and 73 give the Crown Court power to award compensation to persons who have suffered loss as a result of orders made or actions done under Part 2 of the 2002 Act. Section 72 concerns compensation for serious default. CLS funding is available both to defendants and third parties in applications under this section. Section 73 concerns compensation where a confiscation order is varied under section 29 (defendant was an absconder) or where a confiscation order is discharged under section 30 (defendant acquitted or not proceeded against). CLS funding is not available to defendants who are claiming compensation under section 73 where the confiscation order was varied under section 29 (see paragraph 3(2)(b) of Schedule 2 of the Access to Justice Act 1999). Otherwise, CLS funding is available to defendants and third parties for applications for compensation under sections 72 or 73.

Part 5 – Civil Recovery of the Proceeds of Crime

- 8. Chapter 2 of Part 5 of the 2002 Act covers civil recovery in the High Court. Proceedings under this chapter can only be brought by the Assets Recovery Agency. All proceedings under Chapter 2 are civil proceedings for which CLS funding is available. This can apply to both a respondent against whom the agency is proceeding or a third party who claims to be an innocent owner of property. For example, under section 281 a person who claims to be a victim of theft etc may apply to the court for a declaration that certain property is not recoverable property. Chapter 2 of Part 5 came into effect on 24 February 2003.
- 9. Chapter 3 of Part 5 deals with the recovery of cash in summary proceedings. CLS funding is available for the following proceedings in magistrates' courts under Chapter 3 of Part 5:

Part C The Funding Code: Guidance

- (a) Section 295. Application to extend the period during which seized cash may be detained.
 - (b) Section 297. Orders directing the release of the whole or any part of detained cash.
 - (c) Section 298. This is the key provision of Chapter 3 of Part 5. It covers applications for the forfeiture of detained cash.
 - (d) Section 301. Application by a person other than the person from whom the cash was seized, claiming ownership of detained cash and seeking its release.
 - (e) Section 302. Application for compensation for the detention of cash if no forfeiture order is made by the court.
10. Where the magistrates' court makes an order for forfeiture under section 298 any person aggrieved by the order may appeal to the Crown Court. CLS funding is also available for representation on such appeals.
11. Being civil proceedings, CDS funding is not available for any proceedings under Part 5 of the 2002 Act.

Part 6 – Revenue Functions

12. The Director of the Assets Recovery Agency has wide powers under Part 6 of the Act to examine the tax position of people suspected to have received criminal gains, and where appropriate to issue tax demands. Under section 320 of the Act decisions of the Director under Part 6 can be appealed to the Special Commissioner of Income Tax.
13. Although hearings before the Special Commissioner are normally outside the scope of CLS funding, the Lord Chancellor has issued a direction allowing certain proceedings to be covered. The text of the direction is at section 22.2 of this guidance, and guidance upon it is at section 22.4. Funding is only available for proceedings that concern penalties that the Courts have declared to be criminal in ECHR terms or where an applicant reasonably seeks to argue that the penalties are criminal.
14. Because the Director's powers under Part 6 are wide ranging and tax penalties are likely to be substantial, we are likely to treat cases before the Special Commissioner arising under Part 6 as falling within the Lord Chancellor's direction, subject to any further guidance on this issue from the Court.

Part 8 – Investigations

15. Under Chapter 2 of Part 8 the Crown Court can make a range of orders to support investigations into whether a person has benefited from criminal conduct, holds recoverable property or has committed a money laundering offence. CLS funding is available for the following proceedings in the Crown Court under Part 8.
- (a) Application under section 351(3) to discharge or vary a production order or an order to grant entry.
 - (b) Application under section 362(3) to discharge or vary a disclosure order.
 - (c) Application under section 369(3) to discharge or vary a customer information order.
 - (d) Application under section 375(2) to discharge or vary an account monitoring order.
16. All these provisions allow any person affected by the order to apply. These provisions of the 2002 Act came into operation on 24 February 2003. CLS funding is available to any person making such an application, whether or not they are a person who is subsequently the subject of criminal proceedings.

Part 11 – Co-operation

17. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, made pursuant to section 444 of the 2002 Act, and in force from 1 January 2006, provides for assets in the United Kingdom to be restrained in the Crown Court on the basis of overseas' investigations of criminal conduct that may lead to an order for confiscation of the property, and for overseas' confiscation orders to be registered against property in the United Kingdom. Such proceedings are outside of the scope of either CDS or CLS Funding. Proceedings under this part of the 2002 Act can be funded only by way of exceptional funding under section 6 (8) (b) of the Access to Justice Act 1999.

Business cases

18. The Lord Chancellor's direction authorises the Commission to fund services in relation to matters arising out of the carrying on of a business, where the services are provided to the defendant in Proceeds of Crime Act 2002 proceedings of the type listed above.

Transitional Cases – RSC Order 115

19. Prior to the Proceeds of Crime Act 2002 confiscation and forfeiture proceedings in the High Court were governed by RSC Order 115. Such proceedings are prescribed as incidental to the substantive criminal proceedings from which they arise. They are therefore subject to CDS funding under representation orders.
20. RSC Order 115 will continue to operate not just for existing cases but for certain residual confiscation and forfeiture cases, e.g. under the Anti-Terrorism, Crime and Security Act 2001. Subject to any change which may be made to the criminal regulations such cases will continue to be subject to CDS funding only.

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Court	Section of 2002 Act	Nature of Proceedings	Funding Available
Magistrates' Court	295, 297, 298, 301 and 302	Part 5 – Civil recovery proceedings concerning the recovery of cash in summary proceedings	<p>CLS Full Representation is available provided relevant means and merits tests are met.</p> <p>CDS CDS funding is not available.</p>
Crown Court	42, 54(3), 56(3), 62, 63, 72 and 73	Part 2 – proceedings involving the confiscation of assets	<p>CLS Full Representation is available provided relevant means and merits tests are met Except:</p> <ul style="list-style-type: none"> - Section 54(3) and 56(3) - CLS funding is only available to third parties, not to the original defendant against whom the confiscation order was made (see paragraph 3(2)(a) of Schedule 2 of the Access to Justice Act 1999). - Section 73 - CLS funding is not available to defendants who are claiming compensation where the confiscation order was varied under section 29 (see paragraph 3(2)(b) of Schedule 2 of the Access to Justice Act 1999). <p>CDS Defendants who have been charged with an offence to which their proceedings relate are eligible for funding under CDS and therefore not eligible for funding under CLS.</p>
	Proceedings that relate to s298	Part 5 – Civil recovery proceedings concerning the recovery of cash in summary proceedings	<p>CLS Full Representation is available provided relevant means and merits tests are met.</p> <p>CDS CDS funding is not available.</p>

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	351(3), 362(3), 369(3) and 375(2)	Part 8 – Proceedings relating to orders made to support investigations	<p>CLS</p> <p>Full Representation is available provided relevant means and merits tests are met.</p> <p>CDS</p> <p>Where investigation relates to confiscation or restraint proceedings under Part 2 of the Act arising from criminal proceedings the application is eligible for funding under CDS and therefore not eligible for funding under CLS.</p>
	444	Part 11 – External Requests and Orders	<p>CLS and CDS</p> <p>Proceedings are out of scope of CLS and CDS funding. Legal Representation is available only under a grant of exceptional funding under section 6 (8) (b) of the Access to Justice Act 1999</p>
High Court and above			<p>CLS</p> <p>Full Representation is available provided relevant means and merits tests are met. However, funding may be refused for proceedings under Part 5 of the Act where a legal expenses exclusion is available.</p> <p>CDS</p> <p>Defendants who have been charged with an offence to which there proceedings relate are eligible for funding under CDS and therefore not eligible for funding under CLS.</p>

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23.2 Funding Criteria

1. Where CLS funding is available for proceedings under the Proceeds of Crime Act 2002 as specified above, applications for Legal Representation will be subject to the normal CLS criteria for scope, means and merits.
2. Proceedings under the 2002 Act are unlikely to be excluded under Schedule 2 of the Access to Justice Act 1999. The Lord Chancellor has issued a direction allowing such cases to be funded even if they arise out of the client's business activities.
3. Previously the Funding Code Guidance stated that most applications under the Proceeds would be considered under the "interests of justice" test at section 14 of the Funding Code Criteria, rather than requiring applications to meet the General Funding Code Criteria of prospects of success and costs benefit. That position was based on the lack of any definitive determination as to whether proceedings under the Act should be considered to be seeking to impose, or to relate to, penalties or other orders of a criminal nature within the terms of Article 6 ECHR, or should be accepted as civil proceedings in ECHR terms.
4. It now appears highly unlikely, however, that there will be such a determination by the House of Lords or European Court of Human Rights. In October 2004, the Court of Appeal, in the case of *S –v- The Commissioners of HM Customs and Excise [2004] EWCA Crim 2374* held that proceedings in the Crown Court for a Restraint Order were clearly civil in nature, having regard to *Raimondo –v- Italy (1994) 18 EHRR 237*, such that the requirements for legal representation in criminal proceedings under Article 6 (2) and (3) did not apply. In December 2004, in the case of *Assets Recovery Agency –v- He and Chen [2004] EWHC 3021 (Admin)*, Collins J. carried out an extensive analysis of this question under ECHR case law. A number of cases, such as *Arcuri v Italy* have held that forfeiture of property obtained by unlawful conduct does not constitute a penalty. There are, broadly, two bases for this conclusion: first, the forfeiture applies to the specific recoverable property, rather than requiring payment of a fine; second, the purpose of such orders is to restrict the funding of criminal activity rather than to punish or condemn. Neither *S* nor *He and Chen* has been appealed and there have been no further attempts to challenge the civil classification of these proceedings.
5. Accordingly, all applications for funding for representation in proceedings under the Proceeds of Crime Act will be assessed under the General Funding Code at section 5 of the Criteria. Under Criterion 5.7.2, prospects of success, a successful outcome for the applicant will not necessarily involve defeating or setting aside a restraining/freezing order or confiscation/recovery order in full. The terms of the application will be considered in detail. A successful outcome may be a restriction in the property covered by an Order made under the Act or a variation of an order to permit increased expenses. In relation to cost benefit, other than in applications for compensation, the applicant will be viewed as defending the proceedings and the criterion to be applied will be the "reasonable private paying client" test at 5.7.4. The potential operation of the statutory charge is likely to be of particular significance in proceedings in the magistrates court in relation to seizure, detention and forfeiture of cash, given the uncertainty of recovery of the costs incurred under the certificate.
6. Where the main purpose of funding is to seek compensation under the Act (see, for example, sections 72 or 73 in the Crown Court and section 302 in the magistrates' court) the General Funding Code Criteria on prospects of success and cost benefit will apply as for a damages claim. Therefore, funding will only be available where there are at least moderate prospects of successfully obtaining compensation and the relevant cost benefit ratios are satisfied.

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7. Proceedings under the 2002 Act will not be treated as suitable for CFAs for the time being. However, all applications will need to demonstrate that there is no alternative source of funding, in accordance with Code Criteria 5.4.2. With effect from 1 January 2006 amendments made by the Serious Organised Crime and Police Act 2005 to sections 245 and 252 of the Proceeds of Crime Act 2002 widen the scope of permitted “exclusions” from interim receiver orders and property freezing orders to permit funds to be released to meet reasonable legal expenses incurred in connection with proceedings under Part 5 of the 2002 Act itself, where there is no available property not subject to the order from which these expenses can be met instead. A request made by a respondent to the proceedings for release of funds must not be refused solely on the basis that CLS funding may be available. The Court may refuse to make an exclusion to allow payment of legal expenses, however, where there are issues of competing third party interests. Where the court makes a property freezing order or interim receiving order on a without notice application it will normally make an initial exclusion from the order for legal expenses in a sum up to £3,000, such that an application for public funding would be unnecessary at that point. Otherwise, where an application for funding is made in connection with proceedings under Part 5 of the Act, the possibility of an exclusion will usually be considered as potential alternative funding. Public Funding will therefore normally be refused for representation in proceedings under this Part unless the court has refused to make a legal expenses exclusion when making an interim receiver or property freezing order, or an unsuccessful application has been made for a variation of the order to allow an exclusion. For further details, see the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 (at www.uk-legislation.hmso.gov.uk/si/si2005/uksi_20053382_en.pdf) and the new Practice Direction on Civil Recovery Proceedings and new section 49A to the Costs Practice Direction.
8. The Order in Council relating to external requests (section 444 of the 2002 Act) makes similar provision for the release of assets for legal expenses, which will again be considered as potential alternative funding.
9. In relation to property subject to a Restraint Order under section 41 of the Proceeds of Crime Act 2002 (pending investigation of criminal offences and possible confiscation following conviction), however, the position remains that assets may not be released for legal expenses in relation to a relevant offence. Applications for funding in relation to relevant proceedings must be considered according to financial eligibility (taking into account any sums released by the court for living expenses) and the relevant Criteria under the General Funding Code.
10. Regarding means criteria, CLS funding under the Proceeds of Crime Act 2002 will only be available for clients who are financially eligible for such funding under the CLS (Financial) Regulations 2000 as amended. In assessing disposable capital we will treat any assets which have already been seized under the 2002 Act as subject matter of dispute under Regulation 32A, which provides for a disregard of the client’s interest in those assets to a maximum of £100,000; restrained assets may also be disregarded under Regulation 37 of the CLS (Financial) Regulations 2000. All of the client’s income and any disposable capital will be taken into account. For clients whose financial circumstances are complex, which may well be the case where the court is considering whether the client has a criminal lifestyle or has benefited from crime, referral of the financial eligibility determination to the Special Investigations Unit may be appropriate.
11. Success in the proceedings resulting in the release of assets to the client will be treated as a recovery or preservation. The statutory charge will then apply. Equally, the charge will apply to any funds released under an exclusion or paid as part of a recovery order, under the amended section 266 of the 2002 Act, in respect of legal

expenses (see below). Any assets so recovered or sums paid must therefore be paid to the solicitor and on to the Commission – see Regulations 18 and 20 of the CLS (Costs) Regulations 2000. The charge will apply to recovery or preservation not just of ownership but also of possession of seized property (*Curling v Law Society* [1985] 1 All ER 705).

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23.3 Transitional provisions for existing certificates

1. Existing certificates, granted on the basis of the interests of justice test, will not be reassessed under the General Funding Code Criteria.
2. The new court powers to release funds for legal expenses apply to proceedings under Part 5 of the Proceeds of Crime Act 2002 whether commenced before or after 1 January 2006 and irrespective of whether the respondent holds a public funding certificate. In principle, existing certificates for representation under Part 5 of the 2002 Act are therefore potentially liable to be discharged on the basis of alternative funding under Code Criteria 5.4.2 and 15.2. Accordingly, applications to amend existing certificates are likely to be refused unless the court has rejected a request for a legal expenses exclusion, other than where the matter is so close to a final hearing that it would be impractical to make an application for an exclusion. It will generally, however, be appropriate for the application for the legal expenses exclusion to be covered by the existing certificate.
3. Where any sums are released under a legal expenses exclusion, or paid in respect of legal expenses under a recovery order in a case previously funded under a certificate, the statutory charge will attach in the normal way. Unless sufficient sums are released, the effect of the statutory charge may extinguish or reduce the funds below the level required for future legal representation. In an application for an exclusion in respect of future legal expenses, it will therefore be necessary to include a request for a release of funds in respect of any previous stages of the proceedings that were covered by a public funding certificate (and, if appropriate, the application for the exclusion itself).

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23.4 Procedures

1. CLS funding for Legal Representation under the Proceeds of Crime Act 2002, unless covered by exceptional funding, is Licensed Work. Applications must therefore be made to the Commission for certificates to authorise such work. All applications must be submitted to the Commission's Special Cases Unit (where the claimant is the Assets Recovery Agency) or the London Office (in all other cases), both at Exchange Tower, 2 Harbour Exchange Square, London E14 9GE DX 100170 Docklands 2. Normal CLS means and merits forms must be supplied (CLS APP1 for merits and the appropriate means forms), but applications where the claimant is Assets Recovery Agency must be accompanied by a case plan. Applications for exceptional funding for representation in proceedings under section 444 of the 2002 Act (external requests and orders) must be submitted in the usual way to the Special Cases Unit.
2. It is important that applications for CLS funding for Proceeds of Crime Act proceedings are made at the earliest opportunity, to minimise any delay in the granting of funding. Cases under the 2002 Act often raise complex issues as to financial eligibility which require investigation by our Special Investigations Unit.
3. Amendments have been being made to the General Criminal Contract to bring all civil proceedings under the 2002 Act within the definition of "Associated CLS Work". This will mean that any firm with a criminal franchise is licensed to undertake such work.
4. In cases not involving the Assets Recovery Agency, suppliers are able to self-grant emergency Legal Representation under the usual emergency criteria (see section 12 of

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this guidance). Since the General Criminal Contract has been amended to bring Proceeds of Crime Act cases within the heading of “Associated CLS Work” criminal practitioners have devolved powers to grant emergency representation. This is because the General Criminal Contract gives criminal franchisees the same powers as civil contractors in relation to Associated CLS work. Practitioners are reminded that where emergency representation is granted the relevant means and merits forms must be submitted to the London Regional Office as soon as possible and in any event not later than five working days after the decision to grant emergency representation. In relation to clients with complex financial means practitioners are also reminded that emergency representation may only be granted if it appears likely on the information available that the client will be found to be financially eligible.

5. Standard wordings have been added to cover representation under the 2002 Act. These are:

CR028 – To be represented in proceedings in the magistrates' court under the Proceeds of Crime Act 2002.

CR029 – To be represented in proceedings in the Crown Court under the Proceeds of Crime Act 2002.

CR030 – To be represented in proceedings in the High Court under the Proceeds of Crime Act 2002.