

Sentencing Amendment Bill

Government Bill

As reported from the committee of the whole
House

This bill was formerly part of the Criminal Proceeds (Recovery) Bill as reported from the Law and Order Committee. The committee of the whole House has further amended the bill and has divided it into the following bills:

- Criminal Proceeds (Recovery) Bill comprising Parts 1 and 2
 - Mutual Assistance in Criminal Matters Amendment Bill comprising subpart 1 of Part 3
 - This bill comprising subpart 2 of Part 3
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Hon Simon Power

Sentencing Amendment Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Sentencing Amendment Act **2009**.

2 Commencement

This Act comes into force on **1 December 2009**.

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243 Principal Act amended

This **subpart** amends the Sentencing Act 2002.

244 Purpose

The purpose of this **subpart** is to establish a regime for the forfeiture of instruments of crime as part of the sentencing process.

245 Application

The amendments made to the Sentencing Act 2002 by this **subpart** apply in respect of qualifying instrument forfeiture offences committed, or believed to have been committed, before, on, or after the commencement of this **subpart**.

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246 Interpretation

Section 4(1) is amended by inserting the following definitions in their appropriate alphabetical order:

“**forfeiture order** has the same meaning as in **section 5(1)** of the Criminal Proceeds (Recovery) Act **2006**”

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“**instrument forfeiture order** means an instrument forfeiture order made under **section 142N**”

“**instrument of crime**—

“(a) means property used (wholly or in part) to commit, or to facilitate the commission of, a qualifying instrument forfeiture offence; and

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“(b) includes, in relation to a qualifying instrument forfeiture offence that is an offence against section 8(1) or (2A) of the Terrorism Suppression Act 2002, funds (as defined in section 4(1) of that Act) allocated for the purpose of committing that offence”

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“**qualifying instrument forfeiture offence**—

“(a) means an offence punishable by a maximum term of imprisonment of 5 years or more; and

“(b) includes an attempt to commit, conspiring to commit, or being an accessory to an offence if the maximum term of imprisonment for that attempt, conspiracy, or activity is 5 years or more”

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“**tainted property** has the same meaning as in **section 5(1)** of the Criminal Proceeds (Recovery) Act **2006**”.

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247 New heading and new section 10B inserted

The following heading and section are inserted after section 10A:

*“Taking account of instrument forfeiture order
or successful application for relief*

**“10B Court must take into account instrument forfeiture order
or successful application for relief**

- “**(1)** In sentencing or otherwise dealing with an offender convicted of a qualifying instrument forfeiture offence, the court must take into account—
- “(a) any instrument forfeiture order made, or to be made, in respect of property used to commit, or to facilitate the commission of, the qualifying instrument forfeiture offence: 10
 - “(b) any forfeiture of that property by any other order or means arising from the offender’s conviction:
 - “(c) any order for relief made under **section 142L or 142M** in favour of another person in respect of property used to commit, or to facilitate the commission of, the qualifying instrument forfeiture offence: 15
 - “(d) the nature of the relationship between that person and the offender:
 - “(e) the likely benefit to the offender of any order referred to in **paragraph (c)**. 20
- “**(2)** In deciding the weight to be given to any matter referred to in **subsection (1)(a), (b), or (d)**, the court must take into account—
- “(a) the value of the property that is the subject of the instrument forfeiture order or that is otherwise forfeited: 25
 - “(b) the nature and extent of the offender’s interest in that property.
- “**(3)** Without limiting any other powers of a court to adjourn, in any case contemplated by this section a court may adjourn the proceedings until— 30
- “(a) any property that is the subject of a forfeiture order has been surrendered to the Official Assignee; or
 - “(b) any appeal or application for relief in relation to an instrument forfeiture order or any other proceeding under the Criminal Proceeds (Recovery) Act **2006** has been determined.” 35

- 248 Power of adjournment for inquiries as to suitable punishment**
 Section 25(1) is amended by inserting the following paragraph after paragraph (d):
 “(da) to determine whether to impose an instrument forfeiture order and, if so, the terms of that order.”. 5
- 249 Access to reports**
 Section 29(1) is amended by inserting “or **section 142F**” after “section 33”.
- 250 New heading and sections 142A to 142Q inserted** 10
 The following heading and sections are inserted after section 142:
“Instrument forfeiture orders
“142A Interpretation of terms used in sections 142B to 142Q 15
 For the purposes of **sections 142B to 142Q**, unless the context otherwise requires,—
“Commissioner means the Commissioner of Police
“prosecutor has the same meaning as in **section 5(1)** of the Criminal Proceeds (Recovery) Act **2006**.
- “142B Duties of prosecutor if offender guilty of qualifying instrument forfeiture offence** 20
 If a person is convicted of a qualifying instrument forfeiture offence and any property was used to commit, or to facilitate the commission of, that offence, the prosecutor must, if in the prosecutor’s opinion the court should consider whether 25
 to make an instrument forfeiture order in respect of that property, notify the court in writing of—
“(a) the details of that property:
“(b) the name and identifying details of any person (other than the offender) who, to the knowledge of the prosecutor, has an interest in the property. 30

“**142C Duties of court on notification**

On receiving notice under **section 142B**, the court, if it is of the opinion that it should consider making an instrument forfeiture order,—

- “(a) must direct the prosecutor to issue and serve any notice 5
required by **section 142E**;
- “(b) may direct the prosecutor to report further information
to the court under **section 142F**.

“**142D Notice of possible instrument forfeiture order may be recorded on registers**

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“(1) **Subsection (2)** applies if the court has given a direction under **section 142C** relating to property of a kind that is covered by a New Zealand enactment that enables the registration of—

- “(a) title to that property; or
- “(b) charges over that property. 15

“(2) If this subsection applies, the court may order any authority responsible for administering an enactment of the kind referred to in **subsection (1)** (an **Authority**) to enter on the register a note of the fact that the court will consider whether an instrument forfeiture order may be made against the property. 20

“(3) The court must order an **Authority** to cancel an entry made on a register under **subsection (2)** if—

- “(a) the matter to which the entry relates is finally determined and the relevant appeal period (defined in **section 73(3)** and referred to in **section 85** of the Criminal Proceeds (Recovery) Act **2006**) has expired; or 25
- “(b) proceedings to which the entry relates are discontinued for any reason.

“Compare: 1991 No 120 s 16(2), (3)

“**142E Duties of prosecutor as to service**

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“(1) If a court gives a direction under **section 142C**, the prosecutor must take all reasonable steps to notify every person (other than the offender) whose name was included in the notice given to the court under **section 142B**, any other person whom the prosecutor believes has an interest in the property 35
in question, and the Commissioner—

- “(a) that the property may be made the subject of an instrument forfeiture order:
 - “(b) that the person may, within 10 working days of the date of the notice, apply to the court for relief:
 - “(c) of the grounds set out in **section 77(1)** of the Criminal Proceeds (Recovery) Act **2006** on which an application for relief may be made. 5
- “(2) A notice given under **subsection (1)** must be given as soon as practicable after the court gives a direction under **section 142C** and in any event not later than 5 working days after the giving of that direction. 10

“142F Court may require further information

The court may, for the purposes of determining whether to make an instrument forfeiture order or an order for relief from an instrument forfeiture order, or for the purposes of determining the terms of an instrument forfeiture order or an order for relief from an instrument forfeiture order, direct the prosecutor, the offender, or any person who applies for relief to provide further information to the court about— 15

- “(a) the value of the property that comprises the instrument of crime: 20
- “(b) the nature, extent, and value of the offender’s interest in the property that comprises the instrument of crime:
- “(c) the name of any other person with an interest in the instrument of crime, the nature and extent of that person’s interest, and whether or not that person has been notified of the proceedings: 25
- “(d) the name of any person who may suffer undue hardship if the property is confiscated and the nature of that hardship: 30
- “(e) any other matter specified by the court.

“142G Independent valuation of property

For the purposes of determining the value of an instrument of crime, a court may, at its own discretion or at the request of either party to the proceedings or any person who claims to have an interest in the property, seek an independent valuation as to the value of the property or any interest in the property. 35

“142H Court may order declaration of ownership to be completed

- “(1) If a court is considering whether or not to make an instrument forfeiture order, the court may order that the offender, or any other person, complete a declaration of ownership before making the order. 5
- “(2) The declaration of ownership must specify—
- “(a) whether the offender owns, or has any interest in, the property in question at the relevant date; and
 - “(b) whether any other person owns, or has any interest in, the property at the relevant date, and, if so, the name of that person and the nature of that interest; and 10
 - “(c) whether the offender has ceased to be the owner of, or to have any interest in, the property in question at any time subsequent to the commission of the offence but before the date of his or her conviction; and 15
 - “(d) if the offender has disposed of his or her interest in the property in question during the period referred to in **paragraph (c)**, to whom the ownership or interest in the property was disposed, the relationship of that person to the offender, and the consideration received by the offender. 20
- “(3) If a court does not make an order under this section that does not affect the validity of any other order of the court.
- “(4) In this section, **relevant date** means the date on which the offender was convicted of the qualifying instrument forfeiture offence. 25

“142I Determining ownership of property

For the purpose of determining the nature and extent of any person’s interest in an instrument of crime, the court may apply the provisions of **section 58** of the Criminal Proceeds (Recovery) Act **2006**, which applies with all necessary modifications. 30

“142J Applications for relief from instrument forfeiture order

- “(1) Any person (other than the offender) may make an application for relief from an instrument forfeiture order. 35

- “(2) An application by any person for relief must be made to the court that convicted the offender—
- “(a) on either of the grounds set out in **section 77(1)** of the Criminal Proceeds (Recovery) Act **2006**; and
 - “(b) in the prescribed form (if any); and 5
 - “(c) within—
 - “(i) the time specified in the notice served on the person under **section 142E**; or
 - “(ii) if no notice is served on the person, 15 working days after the day on which the offender was convicted of the qualifying instrument forfeiture offence; or 10
 - “(iii) the time allowed by the court, if the court grants an application by the person to make an application for relief after the time by which such an application must be made under **subparagraph (i) or subparagraph (ii)**. 15
- “(3) An applicant for relief from an instrument forfeiture order must serve notice of that application on—
- “(a) the prosecutor: 20
 - “(b) the offender:
 - “(c) the Commissioner:
 - “(d) the Official Assignee:
 - “(e) any other person whom the applicant has reason to believe may— 25
 - “(i) have an interest in the property that is the subject of the application; or
 - “(ii) suffer undue hardship as a consequence of the forfeiture of the property:
 - “(f) any specified person or class of persons in respect of whom the court directs the applicant to serve notice of the application. 30
- “(4) An applicant for relief must provide the court and the prosecutor with a list of persons on whom notice of the application has been served. 35
- “142K Hearings concerning instrument forfeiture orders**
- “(1) If a court issues a direction under **section 142C**, it may convene a hearing to determine whether to make an instrument

forfeiture order or to grant an application made for relief from an instrument forfeiture order under **section 142J**.

- “(2) At the hearing, the prosecutor, the offender, any person making an application for relief from an instrument forfeiture order, and any other person who claims to have an interest in the property that may be the subject of the instrument forfeiture order or who believes that he or she may suffer undue hardship if the property is forfeited, may be heard. 5
- “(3) If a hearing is not held under **subsection (1)**, the matters referred to in that subsection and **subsection (2)** may occur during the sentencing hearing. 10

“**142L Court may grant relief from instrument forfeiture order to applicant who establishes interest in property**

- “(1) This section applies if—
- “(a) a person applies to the court under **section 142J** for relief from an instrument forfeiture order in respect of an interest in property on the ground set out in **section 77(1)(a)** of the Criminal Proceeds (Recovery) Act **2006**; and 15
- “(b) the court is satisfied, following a hearing under **section 142K**, that the applicant has established on the balance of probabilities that the applicant— 20
- “(i) has an interest in the property to which the instrument forfeiture order relates; and
- “(ii) was not involved in the qualifying instrument forfeiture offence to which the order relates. 25
- “(2) If this section applies, the court must make an order—
- “(a) declaring the nature, extent, and value of the applicant’s interest in the property; and
- “(b) either— 30
- “(i) directing the Crown to transfer the interest to the applicant; or
- “(ii) declaring that there is payable by the Crown to the applicant an amount equal to the value of the interest declared by the court; or 35
- “(iii) directing that the interest not be included in an instrument forfeiture order made in respect of the proceedings that gave rise to the application; or

- “(iv) determining, in accordance with **section 142N**, not to make an instrument forfeiture order.
- “(3) Despite **subsection (2)**, the court may, but is not required to, refuse to make an order under **subsection (2)** if it is satisfied that— 5
- “(a) the applicant was, in any respect, involved in the commission of the offence in respect of which forfeiture of the property is or was under consideration; or
- “(b) if the applicant acquired the interest at the time of or after the commission of the offence, the applicant did not acquire the interest in the property in good faith and for value. 10
- “(4) The court must not make an order under **subsection (2)(b)(ii)** unless it is satisfied that it cannot reasonably make an order under **subsection (2)(b)(i) or (iii)** (for example, because the interest of the applicant is not severable from the other property in question). 15
- “**142M Court may grant relief from instrument forfeiture order to applicant on grounds of undue hardship**
- “(1) This section applies if a person applies to the court under **section 142J** for relief from an instrument forfeiture order on the ground set out in **section 77(1)(b)** of the Criminal Proceeds (Recovery) Act **2006**. 20
- “(2) If the court is satisfied that, having regard to all the circumstances, undue hardship is likely to be caused to the person making the application or to another person (other than the offender), by the operation of an instrument forfeiture order, the court— 25
- “(a) may order that the person is entitled to be paid a specified amount out of the proceeds of sale of the property, being an amount that the court thinks is necessary to prevent undue hardship to that person; and 30
- “(b) if the person is under 18 years, may make additional orders for the purpose of ensuring the proper application of an amount to be paid to that person. 35
- “(3) The circumstances a court may have regard to under **subsection (2)** include, without limitation,—

- “(a) the use that is ordinarily made, or was intended to be made, of the property that would be the subject of the instrument forfeiture order; and
- “(b) the nature and extent of any person’s interest in the property; and 5
- “(c) any other matter relating to the nature and circumstances of the qualifying instrument forfeiture offence to which the property relates.

“Compare: 1991 No 120 ss 15(2), 18

“**142N Instrument forfeiture orders** 10

- “(1) Following a hearing under **section 142K**, the court may, if it is satisfied that the property described in the notice given under **section 142B** is an instrument of crime, order that the instrument of crime or any part of it specified by the court be forfeited to the Crown. 15
- “(2) In considering whether or not to make an instrument forfeiture order under **subsection (1)** in respect of particular property, the court may have regard to—
 - “(a) any matter raised in an application for relief under **section 142J**; and 20
 - “(b) the use that is ordinarily made, or was intended to be made, of the instrument of crime; and
 - “(c) any undue hardship that is reasonably likely to be caused to any person by the operation of such an order; and 25
 - “(d) the nature and extent of the offender’s interest in the instrument of crime (if any), and the nature and extent of any other person’s interest in it (if any); and
 - “(e) in addition to the matters referred to in **section 77(1)** of the Criminal Proceeds (Recovery) Act **2006**, any other matter relating to the nature and circumstances of the qualifying instrument forfeiture offence or the offender, including the gravity of the qualifying instrument forfeiture offence. 30
- “(3) A court that makes an instrument forfeiture order may, if it considers that it is appropriate to do so, by order,— 35
 - “(a) declare the nature, extent, and value of any person’s interest in an instrument of crime; and

“(b) declare that the instrument forfeiture order may, to the extent to which it relates to the interest, be discharged under **section 85** of the Criminal Proceeds (Recovery) Act **2006**.

“(4) If the court orders that property (other than money) be forfeited to the Crown, the court must specify in the order the amount that it considers to be the value of the property at the time the order is made. 5

“(5) If a court makes an instrument forfeiture order, the court may give any directions that are necessary or convenient for giving effect to the order. 10

“**142O Offence of providing false or misleading information under section 142F**

Every person is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$1,000 who provides false or misleading information to a court in response to a direction under **section 142F**. 15

“**142P Evidence in instrument forfeiture order proceedings**

In determining whether or not to make an instrument forfeiture order under **section 142N** as a result of a person’s conviction, the court may take into account evidence given in the proceedings taken against that person for the offence, including, without limitation,— 20

“(a) documents, exhibits, or other things connected with the proceedings that the court considers relevant; and 25

“(b) notes or transcripts of evidence admitted in the proceedings.

“Compare: 1991 No 120 s 14(1)

“**142Q Relationship with other provisions in Act**

Nothing in **sections 142A to 142P** affects sections 127 to 142.” 30

Sentencing Amendment Bill

Legislative history

31 March 2009

Divided from Criminal Proceeds (Recovery) Bill
(81–2) by committee of the whole House as Bill
81–3B
Third reading
