

PROCEEDS OF CRIME ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Confiscation: Scotland

Confiscation orders

Section 92: Making of order

157. *Section 92* provides that a confiscation order under the Act is an order requiring an accused person convicted of a criminal offence or offences to pay a sum of money representing the accused person's benefit from crime. The approach of the Act therefore reflects that adopted by the existing legislation. However, under the existing legislation, confiscation orders can only be imposed following conviction on indictment or for offences on summary complaint if the offence is punishable by a fine of an amount greater than level 5 on the standard scale or by imprisonment for more than 3 months or both. *Section 92* extends this to cover all summary offences. Confiscation orders will be made by the High Court or the sheriff court. The confiscation procedures are mandatory. The court must go through them when asked to do so by the prosecutor.
158. *Section 92* also makes it clear that the Act contains two different confiscation regimes, only one of which may be applied in any particular case. One enables the confiscation of an accused's benefit from "general criminal conduct", the other the confiscation of an accused's benefit from "particular criminal conduct". General criminal conduct means any criminal conduct of the accused whenever the criminal conduct occurred (see *section 143*) and whether or not it has ever formed the subject of any criminal prosecution. Particular criminal conduct means the offences of which the accused has been convicted in the current proceedings to which the confiscation proceedings relate (again, see *section 143*). General criminal conduct includes particular criminal conduct.
159. The general criminal conduct regime is to be applied where the accused is identified by the court after conviction as having a criminal lifestyle. This is determined by reference to the nature of the offence or offences of which the accused has been convicted in the current proceedings, or certain previous proceedings. The offences in question are specified later in *section 142*, read in conjunction with *Schedule 2*. If the court decides that the accused does not have a criminal lifestyle, confiscation is by reference to his benefit from his particular criminal conduct.

Section 93: Recoverable amount

160. *Section 93* specifies how the amount recoverable under a confiscation order is to be calculated. The method of calculation is much the same as in the existing confiscation statutes. The amount is the amount of the accused's benefit from either his general criminal conduct or his particular criminal conduct (as the case may be), unless the amount available for confiscation is considered by the court and found to be less than the benefit in question, in which case the order must be made in that lesser amount. The amount available for confiscation is described as the available amount (equivalent

to the term “the amount that might be realised” in the earlier confiscation legislation) and the amount which may be ordered to be confiscated as the recoverable amount (equivalent to “the amount to be recovered” in the earlier confiscation legislation). *Subsection (2)* is to the effect that the burden is on the accused to show that the available amount is less than the benefit and to show the extent of the available amount. Where the court considers the available amount (and it will only do so at the accused’s request), *subsection (5)* requires it to include a statement of its calculations in the confiscation order. This is intended to assist enforcement by alerting the enforcement authorities to the property available for confiscation.

Section 94: Accused’s benefit

161. This section describes how the court must work out whether the accused has benefited from criminal conduct and what the value of that benefit is. *Subsection 2* explains that the court must regard the accused as having benefited by the value of any property obtained by him from criminal conduct up to the time the court makes its decision. *Subsections (3) to (8)* deal with the situation where the court is holding a confiscation proceeding in respect of the accused’s general criminal conduct, and a previous confiscation order or orders has been made against the accused in respect of such conduct. General criminal conduct means all the accused’s criminal conduct at any time, so a court making a general criminal conduct confiscation order could confiscate the same benefit twice, unless the legislation prevented it. *Section 94* prevents double counting of the same benefit by providing (broadly) that, once the court has calculated the accused’s benefit from his or her general criminal conduct, it must deduct the amount ordered to be paid under the last general criminal conduct confiscation order previously made against the accused. *Sub-section (4)* ensures that the calculation of benefit for the two orders will be the same. The provision is not required for particular criminal conduct because the same offences cannot be subject to a second conviction twice, and therefore there is no risk of confiscating the same benefit from particular criminal conduct twice.

Section 95: Available amount

162. *Section 95* explains how the available amount is to be calculated. It is calculated in the same way as “the amount that might be realised” in the earlier confiscation legislation. The available amount is the value of all the accused’s property, minus certain prior obligations of the accused such as earlier fines, plus the value of all tainted gifts made by him. “Tainted gifts” are defined at *section 14*.

Section 96: Assumptions as to benefit from general criminal conduct

163. *Section 96* applies where the court has decided that the accused has a criminal lifestyle and it is, accordingly, considering the accused’s benefit from general criminal conduct. The section requires the court to make certain specified assumptions to establish whether the accused has benefited from general criminal conduct, and, if so, by how much. The court is not, however, permitted to make an assumption in relation to particular property or expenditure if it is shown to be incorrect. The current legislation provides for similar assumptions to be made. Where for any reason the court does not make any of the assumptions specified in the legislation, it must nevertheless continue to decide whether the accused has benefited from general criminal conduct and decide the recoverable amount, albeit without the assistance of the assumptions.
164. The earlier confiscation legislation provides for similar assumptions to be made. They are mandatory in confiscation proceedings following a conviction for a drug trafficking offence, but discretionary in all other confiscation cases (and, in the latter case, other criteria must be satisfied before they can be made). *Section 97* creates a single scheme under which the assumptions are mandatory in all cases where a person has a criminal lifestyle (defined in *section 142*).

Section 97: Effect of order on court's other powers

165. *Section 97* requires the court to have regard to the confiscation order before imposing a fine or other order for payment or forfeiture on the accused, except for a compensation order but otherwise to leave the confiscation order out of account in sentencing the accused.

Section 98: Disposal of family home

166. *Section 98* provides some protection in relation to the accused's interest in his family home. The section applies where a confiscation order has been made and the prosecution has not satisfied the court that the person's interest in his family home has been acquired as a benefit of his criminal conduct. It replicates existing provisions in the Proceeds of Crime (Scotland) Act 1995. An administrator who has been appointed to ingather the estate of the accused in terms of the confiscation order cannot dispose of the family home, as defined in *subsection (5)*, without the relevant consent, again as defined in *subsection (5)*. Where no consent is forthcoming, he must apply to the court for authority to do so. Once the court has taken into consideration all the circumstances of the case, it may refuse to agree to the disposal of the family home or postpone the application to dispose of the family home for up to 12 months.

Procedural matters

Section 99: Postponement

167. *Section 99* enables the court to postpone the confiscation proceedings on one or more occasions for up to a total of two years from the accused's conviction, or three months from the date on which any appeal against conviction is disposed of, if the three months ends more than two years after the date of conviction. There is no limit to the period of postponement where there are exceptional circumstances or the accused has failed to comply with an order under *section 102*, namely he has failed to respond to the prosecutor's statement within the time limit set down by the court. The provision extends the period of postponement permitted under the earlier confiscation legislation, which is normally only up to six months. Where the court does not postpone confiscation proceedings, it must make a confiscation order before it sentences the accused.
168. The new provision in *section 99* enables proceedings to be postponed for any reason, for example, because a judge is ill. Under current legislation, a postponement can only be made so that the court can obtain further information about the accused's benefit or the realisable property.

Section 100: Effect of postponement

169. *Section 100* makes it clear that, as under earlier confiscation legislation, the court may sentence the accused at any time during the period of postponement. The purpose of the provision is to avoid the sentence being delayed while confiscation is considered. The court is not allowed to impose a fine or an order set out in *section 97(3)* (such as a forfeiture order) when it sentences the accused in the postponement period because it needs to know the amount of the confiscation order before it does this.

Section 101: Statement of information

170. *Section 101* provides that the prosecutor must give the court a statement of information detailing the accused's benefit from criminal conduct within a period specified by the court. This will include information on whether or not the prosecutor considers that the accused has a criminal lifestyle. If the prosecutor does believe that the accused has a criminal lifestyle, under *sub-section (3)* the statement must include information relevant to the making of the assumptions and for the purpose of enabling the court to decide if it should not make an assumption. The statement will therefore include information

about any risk of injustice known to the prosecutor, so that the court can decide whether making an assumption would give rise to a serious risk of injustice.

Section 102: Accused's response to statement of information

171. The statement of information procedure is designed to provide a quick and effective method of identifying the extent of the accused's benefit where there is agreement between the accused and the prosecutor, and of identifying areas of dispute where there is not. When the prosecutor serves a statement of information on the accused, the court shall require the accused to respond separately to every allegation in the statement, and to indicate to what extent each allegation is accepted. If proceedings are postponed under [section 99](#), the accused's response to the statement must be lodged within such period the court orders which shall be a period no later than six months before the end of the permitted period mentioned in [section 99](#). Where an allegation is accepted by the accused, the court may treat the acceptance as conclusive as far as any matters to which it relates is concerned.
172. Where an allegation is challenged, the accused must provide full details of any matters relied on. The purpose of the procedure is to identify areas of dispute for the confiscation hearing, where evidence may be brought in relation to the disputed points by the prosecutor or the accused. Under [subsection \(4\)](#), if the accused fails to respond to an allegation, the accused may be treated as having accepted it. However, the accused is not to be treated as accepting any allegation that he has a criminal lifestyle or has benefited from general or particular criminal conduct because it is not thought appropriate that the accused's silence should be conclusive of these matters.
173. [Subsection \(8\)](#) provides that, where the accused accepts an allegation that he has benefited from conduct, the acceptance is not admissible in any proceedings for an offence. The exemption is intended to encourage accused persons to be more forthcoming by preventing the admissions made from being used in a future prosecution against them or anybody else. Accused persons might otherwise be reluctant to admit benefit from criminal conduct which has not been the subject of a prosecution.

Section 103: Provision of information by accused

174. [Section 103](#) empowers the court, at any stage in the confiscation procedures, to order the accused to provide any information it needs to enable it to carry out its confiscation functions. The court might use the provision where, for example, the accused has proposed to rely on certain matters in responding to the statement of information, and the court considers that it requires more information from the accused in deciding the point at issue. The provision reproduces, with minimal changes, that in the earlier confiscation legislation.
175. Where the accused fails to comply with the court's order without reasonable excuse, [subsection \(3\)](#) allows the court to draw any inference it believes appropriate. However, [subsection \(4\)](#) makes it clear that the power does not detract from any other power the court has to deal with the accused, notably its power to punish the accused for contempt of court in refusing to comply with the order.
176. [Subsection \(8\)](#) contains provision like that in [section 102\(8\)](#), protecting the accused from incriminating himself and others by making an admission under [section 103](#). However, it does not prevent the authorities from prosecuting the accused or another person using other evidence which may come to light following such an admission.

Reconsideration

Sections 104-106: Reconsideration

177. [Sections 104](#) and [105](#) enable a confiscation order to be made where none was made in the original proceedings. [Section 106](#) enables a confiscation order which has already

been made to be increased. In all cases application must be made to the court in which the original hearings took place within six years of the original conviction. *Section 104* applies where no confiscation hearing was held after the original conviction. *Section 105* applies where a hearing was held, the court decided that the accused had a criminal lifestyle but had not benefited from his general criminal conduct or that he did not have a criminal lifestyle and had not benefited from his particular criminal conduct. *Section 106* applies where a confiscation order has already been made. It may be used to increase the amount payable under a confiscation order on one or more occasions. The sections reproduce, with some changes, provision in the earlier confiscation legislation. The principle underlying *sections 105* and *106* is that the prosecutor should only apply for a reconsideration where new evidence comes to light. It is not appropriate for the prosecutor to have evidence at the time of the earlier proceedings, not to apply for a confiscation order on that occasion but to apply for a reconsideration at a later date.

Section 107: Order made: reconsideration of available amount

178. *Section 107* applies where the court made a confiscation order for an amount lower than the accused's assessed benefit because there was insufficient realisable property to satisfy an order in the full amount. The prosecutor may apply to the court for the court to recalculate the available amount. Any number of applications may be made and there is no limitation to the time when an application may be made (in contrast to *sections 104* to *106*, under which application must be made within six years of the accused's conviction). If the court calculates that the available amount has increased, it may vary the amount payable under the confiscation order but may not increase it beyond the accused's assessed benefit (meaning either the benefit assessed when the confiscation order was originally made or when it was increased on a revaluation under *section 106*). *Subsection (4)* requires the court to have regard to any fine or order as set out in *section 97(3)* imposed on the accused following the original conviction (because these may affect the amount the accused is able to pay). However, *subsection (5)* contains similar technical provisions to *section 106(9)* to prevent allowance being made twice in the accused's favour for the same compensation order.

Section 108: Inadequacy of available amount: variation of order

179. *Section 108* enables the prosecutor or the accused to apply to the court for a variation of a confiscation order where the court is satisfied that the realisable property is inadequate to meet the order

Section 109: Inadequacy of available amount: discharge of order

180. *Section 109* provides for writing off a confiscation order when the amount outstanding is less than £1,000 and the reason is a fluctuation in the value of foreign currency, or some other reason specified by the Scottish Ministers.

Section 110: Information

181. *Section 110* contains provision ancillary to *sections 104* to *107*. Its purpose is to make it clear that *sections 101* and *102* on statements of information and *section 103* on the provision of information by the accused apply to reconsideration proceedings as they apply to confiscation proceedings immediately following a conviction.

Accused unlawfully at large

Sections 111-114: Accused unlawfully at large

182. These sections deal with confiscation orders against accused persons unlawfully at large. These are new provisions; there are no provisions relating to persons unlawfully at large in existing Scottish legislation. The Act empowers the court to make a confiscation

order against an accused person unlawfully at large who has been convicted of an offence or against whom proceedings have been instituted.

183. *Section 111* deals with the situation where an accused person has been convicted and is then unlawfully at large. The prosecutor may ask the court for a confiscation order to be made against the accused. *Subsection (3)(e)* provides that none of the reconsideration *sections 104-106* apply where a person is still unlawfully at large post conviction and thus that they do all apply where a convicted person unlawfully at large returns.
184. *Section 112* deals with persons unlawfully at large who are unlawfully at large prior to conviction. A confiscation order may only be made against a person unlawfully at large against whom proceedings have been instituted, and if two years have elapsed from the time the accused went unlawfully at large.
185. *Section 113* provides that where an unconvicted accused is unlawfully at large and has a confiscation order made against him, but later ceases to be unlawfully at large, he may apply to the court to have the order varied. Where such a person returns and is subsequently acquitted, *section 114* provides that he can apply to the court to have the confiscation order discharged and the court must do so.

Appeals

Section 115: Appeal by prosecutor

186. *Section 115* gives the prosecutor a clear power to appeal against any decision of the court not to make a confiscation order and also against any confiscation order where it considers that the amount required to be paid is unduly low.

Payment and enforcement

Section 116: Time for payment

187. *Section 116* indicates how long the court may allow the accused to pay the amount due under the confiscation order. It provides that a confiscation order is to be paid immediately, unless the accused can demonstrate to the court that he needs more time to pay. If the court is satisfied that it is required, the court may allow up to six months time to pay, and up to a further six months on a later occasion if there are exceptional reasons justifying the extension. In no case, however, will more than 12 months be granted from the day on which the confiscation order is made.

Section 117: Interest on unpaid sums

188. *Section 117* makes it clear that the accused must pay interest on a confiscation order which is not paid in full by the time allowed.

Section 118: Application of provisions about fine enforcement

189. *Section 118* provides that the sums ordered to be paid under a confiscation order shall be enforced in the same way as fines, that is under the procedure set out in the Criminal Procedure (Scotland) Act 1995. Enforcement will continue to be carried out by the sheriff clerk. *Section 118* also contains general provision on imprisonment in default of a confiscation order. The provision reflects that in existing legislation and provides, in particular, that a term of imprisonment in default of a confiscation order must be served consecutively to the substantive term imposed for the offence(s).

Restraint orders etc

Section 119: Conditions for exercise of powers

190. *Section 119* sets out when a restraint order, as provided for in the ensuing sections, may be made by the Court of Session or sheriff court (civil). A restraint order has the effect of freezing property which may be liable to confiscation following the trial and the making of a confiscation order. Under the earlier confiscation legislation, the earliest time when a restraint may be made by the court was within 28 days before proceedings were instituted, or an application in respect of further confiscation proceedings had been made or was to be made (for example, for a reconsideration of the accused's benefit).
191. The Act maintains the present position on restraint orders with one change. The point at which a restraint order may be made is brought forward to any time after a criminal investigation has been instituted, as defined in *section 154(1)*. The change is likely to be of particular assistance in cases where the investigative process involves questioning the suspect (as often occurs, for example, in fraud cases) and the suspect is, accordingly, alerted to the risk that the authorities may be thinking of applying for a restraint order.

Section 120: Restraint orders etc.

192. *Section 120* explains the nature and effect of a restraint order. It is an order interdicting a specific person from dealing with any realisable property held by him. Thus it may be made both against the accused or person under investigation, and any other person holding realisable property. *Subsection (3)* provides for exceptions to be made for reasonable legal expenses but *subsection (4)* prevents funds under restraint from being released for legal expenses to defend the criminal charges in respect of which the restraint order is made or for legal expenses relating to those charges which are incurred by a recipient of a tainted gift. Legal aid will continue to be available in those circumstances.

Section 121: Application, recall and variation

193. An application for a restraint order may only be made by the prosecutor. Once obtained, the prosecutor must notify every person affected by it. The court has powers to recall or vary a restraint order.

Section 122: Appeals

194. *Section 125* provides the prosecutor with a right of appeal against a court's decision not to make a restraint order, and the prosecutor or any person affected by the order a right of appeal against the court's decision to vary or recall an order (or not to vary or recall it).

Sections 123 & 124: Inhibition of property affected by order; arrestment of property affected by order

195. These provisions replicate those in existing legislation and are designed to prevent the dissipation of the accused's heritable or moveable property.

Section 128: Management administrators

196. *Section 125* follows the earlier confiscation legislation in enabling an administrator to be appointed by the court where a restraint order has been made. The role of an administrator is to manage property to maintain its value until a confiscation order is made.
197. The current legislation enables "an administrator" to be appointed on the application of the prosecutor. In fact, administrators perform two different functions. They manage property pending the accused's conviction (and sometimes afterwards) and they

dispose of property to satisfy the confiscation order. The earlier legislation did not distinguish between them as such. The Act now deals separately with the two different sorts of administrators and calls them management administrators and enforcement administrators.

Section 126: Seizure

198. This section empowers the police or customs officers to seize property subject to a restraint order to prevent its removal from Scotland.

Section 127: Restraint orders: restriction on proceedings and remedies

199. While a restraint order is in force, the court may sist any action, execution or legal process relating to property affected by the restraint order.

Realisation of property: general

Section 128: Enforcement administrators

200. Where a confiscation order has been made, *section 128* empowers the court, on the application of the prosecutor, to appoint an administrator to assist the enforcement of the confiscation order. This person may be the same as the administrator appointed under *section 128* or not, as the case may be. *Section 128* also sets out the powers that the court can confer on an administrator so appointed (for example, the power to seize and sell property).

Section 129: Management administrators: discharge

201. *Section 129* makes provision for the discharge of an administrator appointed at the restraint stage in cases where a new administrator is appointed after a confiscation order has been made. It enables the transfer of property from the first administrator to the new administrator.

Section 130: Application of sums by enforcement administrator

202. *Section 130* specifies how any sums in the hands of an enforcement administrator are to be disposed of. Where a confiscation order is made, the sums are payable, subject to certain prior payments, to the clerk of court.

Section 131: Sums received by clerk of court

203. *Section 131* sets out how the clerk of court must dispose of any monies received in satisfaction of a confiscation order, whether from an administrator appointed under *section 127* or otherwise (for example, voluntary payments by an accused). An administrator's remuneration and expenses will normally be paid out of the sums raised by the confiscation order.

Exercise of powers

Section 132: Powers of court and administrator

204. *Section 132* is an overarching section that lays down general principles relating to the exercise of their enforcement powers by the court and administrators. It largely re-enacts the current legislation in that it emphasises, for example, that the satisfaction of a confiscation order takes precedence over any other obligations of the accused or the recipient of a tainted gift from the accused.
205. *Subsections (2)(b), (3)(c), (4) and (5)* are new. Where a confiscation order has not yet been made, they require the powers to be exercised with a view to maintaining the value of the amount available for confiscation. This will enable administrators to dispose

of depreciating assets. *Subsection (4)*, however, enables the accused to challenge the administrator's decision to dispose of a particular asset on the grounds that the asset in question is irreplaceable. The purpose of the new provision is to enable administrators for example to sell depreciating assets such as cars. The provision on irreplaceable assets has regard to the fact that the accused has not been convicted at this stage and should not, therefore, be obliged to lose irreplaceable assets. It does not apply to administrators at the enforcement stage, since any realisable property can then be used to satisfy a confiscation order. *Subsection (5)* makes provision to revoke or vary an order under *subsection (4)*.

Administrators: general

Section 133: Protection of administrators

206. *Section 133* protects administrators from liability for anything done by them to property which is not realisable property, unless they are negligent. The section also provides that where a confiscation order is not made, or where the sums available from such an order are insufficient, the administrator will be reimbursed by the Lord Advocate.

Section 134: Protection of persons affected

207. *Section 134* contains explicit provision for any person affected by any action taken or to be taken by an administrator to challenge that action in court and the court may then make such an order as it thinks appropriate. The person affected may be the accused, the recipient of a tainted gift from the accused or some other person.

Section 135: Recall and variation of order

208. *Section 135* makes provision for the recall and variation of an order appointing an administrator. It covers both management administrators under section 128 and enforcement administrators under section 128. The section enables the prosecutor and any other person affected by the order appointing either a management or enforcement administrator to apply to the court for a variation or discharge of it.

Section 136: Appeals

209. *Section 136* provides a right of appeal to the Court of Session for the prosecutor or any person affected against decision of the court on the appointment etc of a management or enforcement administrator. It also sets out the procedure for dealing with such appeals.

Section 137: Administrators: further provision

210. *Section 137* introduces *Schedule 3* to the Act, which makes further detailed provision on the appointment, functions etc of an administrator.

Section 138: Administrators: restriction on proceedings and remedies

211. *Section 138* permits the court to sist any action, execution or other legal process relating to property which is affected by the appointment of an administrator.

Compensation

Section 139: Serious default

212. *Section 139* provides for compensation to be paid to a person whose property has been affected by the enforcement of the confiscation legislation. Compensation is only payable where a criminal investigation is instituted but proceedings are never brought, or the accused is not convicted of an offence, or the sentence is quashed, or he is pardoned for it. In all cases, there must have been a serious default on the part of one or more of the enforcement authorities specified in *subsection (9)*. The restriction

to serious default cases is based on the principle that the restraint and realisation of property is ancillary to a criminal trial in the same way as the detention of a person pending trial. In neither case is compensation paid on acquittal as a matter of course.

213. *Section 139* is largely based on earlier legislation, except that the provisions have been extended to cover the situation where an investigation is started but proceedings are never brought. Under the Act, it will be possible for a restraint order to be made as soon as a criminal investigation has been started (at present, this is only possible where proceedings have been instituted or are about to be). Therefore, compensation will in future be payable, subject to the criteria including the serious default test, from the beginning of an investigation, not only where proceedings have been started.

Section 140: Confiscation order varied or discharged

214. *Section 140* allows compensation to be payable where a person who absconded before trial and against whom a confiscation order was subsequently made secures a variation or discharge of the order. The provision is not limited to serious default (as in *section 139*) because it is considered that the court should be able to exercise a more flexible approach in circumstances where a confiscation order has been made without the accused having been tried.

Enforcement abroad

Section 141: Enforcement abroad

215. *Section 141* sets out the conditions under which requests for assistance in the freezing and realisation of property may be made by authorities in Scotland to other jurisdictions outside the United Kingdom. Although requests of this nature have been made for many years, the earlier legislation is largely silent as to the respective roles and powers of the various authorities involved. The Act places outgoing requests on a fully statutory footing. It is important to note that *section 141* applies only to requests relating to Part 3 of the Act.
216. All outgoing requests must be made by the prosecutor and may only be made with the authority of the Secretary of State. In practice, this means that all outgoing requests must pass through the United Kingdom Central Authority for mutual assistance in criminal matters in the Home Office. Requests may be made for a prohibition on dealing with property or additionally, where a confiscation order has been made, the realisation of property. It will be noted that under *subsection (1)(a)*, a request may be made where *any* of the conditions in *section 119* is satisfied. This will enable the prosecutor to request an asset freeze abroad before any restraint order has yet been made in Scotland, as long as the conditions for making a restraint order are satisfied at the time.

Interpretation

Section 142: Criminal lifestyle

217. *Section 142* is to be read in conjunction with *section 94*. As explained in the note on *section 92*, the question of whether a person has a criminal lifestyle is crucial to the operation of the Act, because it determines whether the accused is subject to the confiscation of benefit from his particular criminal conduct or his general criminal conduct. *Section 142* sets out in detail the criteria which govern whether or not a person has a criminal lifestyle.
218. The criminal lifestyle regime is based on the principle that an offender who gives reasonable grounds to believe that he is living off crime should be required to account for his assets, and should have them confiscated to the extent that he is unable to account for their lawful origin. The criminal lifestyle tests, therefore, are designed to identify offenders who may be regarded as normally living off crime. Under *section 142*, a

person has a criminal lifestyle if he satisfies one or more of the tests set out in that section.

219. The first test is that he is convicted of an offence specified in *Schedule 4* (see the commentary on *Schedule 4* below). *Subsection (7)* enables the Scottish Ministers to amend *Schedule 4* by order. The second test is that the accused is convicted of an offence of any description, provided it was committed over a period of at least six months and he obtained not less than £5,000 from that offence. The third test is that the accused is convicted of a combination of offences amounting to “a course of criminal activity”.
220. The third test is more complicated than the other two. The accused satisfies it if he has (a) been convicted in the current proceedings of four or more offences of any description from which he has benefited, or (b) he has been convicted in the current proceedings of any one such offence and has other convictions for any such offences on at least two separate occasions in the last six years. In addition, the total benefit from the offences, (or, in the case of (b), occasions) must be not less than £5,000.
221. The first test is based on the earlier drug confiscation legislation, where conviction of a drug trafficking offence is always regarded as indicative of a criminal lifestyle (although the term itself is not used in the earlier legislation). The second test is new. The third test is similar to that in the earlier non-drug legislation, where an enquiry may be launched into benefit from a person’s entire past criminal conduct (other than drug trafficking) where the person is convicted in the current proceedings of two or more offences from which he has benefited, or of one offence in the current proceedings and another one in the last six years. However, the number of triggering offences is greater in the Act because, under *section 96*, the application of the assumptions is mandatory where a criminal lifestyle is identified, whereas it is discretionary in the earlier non-drug legislation.

Section 143: Conduct and benefit

222. *Section 143* defines criminal conduct as any conduct constituting an offence in Scotland or, which (if it took place elsewhere in the United Kingdom or abroad) would constitute an offence if it had occurred in Scotland. The restriction of the scope of confiscation under earlier confiscation legislation to the proceeds of drug trafficking, other indictable offences and certain summary offences is thus abolished. Under the Act, the court that makes a confiscation order will only need to consider whether the accused has benefited from any conduct which is or would be contrary to the criminal law of Scotland. *Section 143* also defines “general criminal conduct” and “particular criminal conduct” (for which, see the note on *section 92*).
223. *Section 143* also provides that a person benefits from criminal conduct if he obtains property as a result of or in connection with the conduct. This unites in one new provision two similar but not identical definitions in the legislation relating to drug trafficking and that relating to other offences.

Section 147: Tainted gifts and their recipients

224. Like the Act, the earlier legislation enables gifts made by the accused to other persons to be recovered in satisfaction of the confiscation order, and makes ancillary provision (for example, to enable assets of the recipient of a gift to be placed under restraint). Under the existing legislation, a tainted gift is described as a “gift caught by the Act”. *Section 144* reappraises and aligns the two different tainted gift schemes currently found in the drug and non-drug legislation. The new scheme provides that, where the court has decided that the accused has a criminal lifestyle, any gift made by the accused to any person in the period beginning six years before the institution of proceedings is caught, together with any gift at any time out of the proceeds of crime. This definition would apply both at the confiscation hearing and for the purposes of enforcement. However, if the court decides that the accused does not have a criminal lifestyle, only gifts made after

*These notes refer to the Proceeds of Crime Act 2002 (c.29)
which received Royal Assent on 24 July 2002*

the commission of the offence are caught. Again, this would apply at the confiscation hearing and for the purposes of enforcement.

Sections 145-147: Value: the basic rule; value of property obtained from conduct; value of tainted gifts

225. *Sections 145-147* set out how the court is to work out the value of property held by a person, the value of property, and the value of a tainted gift. These sections all reproduce, with some redrafting, the property valuation principles set out in the earlier legislation.

Sections 151-153: Free property; realisable property; property: general provisions

226. These definitional sections, amongst other things, introduce the new concept of free property as any realisable property which is not subject to certain kinds of forfeiture and deprivation orders. The underlying principle is that property already subject to one of these orders made in earlier proceedings should not be added to the amount available for confiscation because it is already accounted for. In addition, property is not free if it is subject to certain orders under Part 5 of the Act on civil recovery. *Section 148* contains a very wide definition of property.

Sections 151-153: Proceedings; applications; Satisfaction of confiscation orders

227. *Sections 151-153* define when proceedings are instituted, when proceedings and applications are concluded, and when confiscation orders are satisfied. The definitions are particularly important in that they determine the earliest and latest points at which a restraint may be made.

Section 154: Other interpretative provisions

228. The definition of a criminal investigation in *subsection (1)* is required because the power to make a restraint order is brought forward, by *section 119(2)*, to the beginning of an investigation.

General

Section 155: Rules of Court

229. *Section 155* provides that rules of court may make provision for giving notice or serving any document for the purposes of this Part of the Act, the accountant of court's functions under *Schedule 3* and the accounts to be kept by the administrator in relation to the exercise of his functions.

Schedule 3: Administrators: further provision

230. *Schedule 3* makes further detailed provision for the appointment and functions of an administrator and for the supervision of his activities by the court. It is similar to the existing provisions in Schedule 1 of the Proceeds of Crime (Scotland) Act 1995.

Schedule 4: Lifestyle offences: Scotland

231. *Schedule 4* should be read in conjunction with *sections 92* and *142*. It lists offences which are always criminal lifestyle offences. An offender convicted of one instance of any of these offences has a criminal lifestyle under the Act. The offences are similar to those set out in Schedule 2 for England and Wales.