

# PROCEEDS OF CRIME ACT 2002

---

## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2: Confiscation: England and Wales**

##### **Confiscation orders**

##### *Section 6: Making of order*

21. *Section 6* sets out the circumstances in which confiscation orders under Part 2 of the Act can be made. Confiscation orders may only be made in the Crown Court; the limited power of the magistrates' court under earlier confiscation legislation to make a confiscation order is abolished. Under the Act, a confiscation order may be made following any conviction in the Crown Court or the magistrates' court. Where the conviction takes place in the magistrates' court, a confiscation order can only be made if the defendant is either committed to the Crown Court for sentence or committed to the Crown Court for sentence and confiscation under the new power created in the Act (see *section 70*). The confiscation procedures are mandatory: the Crown Court must go through them where asked to do so by the prosecutor or the Director of the new Agency.
22. *Section 6* also makes clear the nature of a confiscation order under the Act. It is an order to a convicted defendant to pay a sum of money representing the defendant's benefit from crime. The approach of the Act to confiscation therefore reflects that adopted by the existing legislation.
23. *Section 6* also makes it clear that Part 2 provides for confiscation of the defendant's benefit from either his "general criminal conduct" or his "particular criminal conduct". General criminal conduct means any criminal conduct of the defendant's, whenever the conduct occurred (see *section 76*) and whether or not it has ever formed the subject of any criminal prosecution. Particular criminal conduct means the offences of which the defendant has been convicted in the current proceedings, together with any taken into consideration by the court in passing sentence (again, see *section 76*). So general criminal conduct includes particular criminal conduct.
24. Confiscation is by reference to the defendant's benefit from his general criminal conduct where he is identified by the court on conviction as having a criminal lifestyle. This is determined by reference to the nature of the offence or offences of which he has been convicted in the current proceedings or certain previous proceedings. The offences in question are specified in *section 75*, read in conjunction with *Schedule 2*. If the court decides that the defendant does not have a criminal lifestyle, confiscation is by reference to his benefit from his particular criminal conduct.

##### *Section 7: Recoverable amount*

25. *Section 7* 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 defendant'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 actually ordered to be confiscated as the recoverable amount (equivalent to “the amount to be recovered” in the earlier confiscation legislation). *Subsection (2)* affirms a line of case law to the effect that the burden is on the defendant to show that the available amount is less than the benefit and to show the extent of the available amount. Where the court decides the available amount (and it will only do so at the defendant’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 enforcing authorities to the property available for confiscation.

### ***Section 8: Defendant’s benefit***

26. This section describes how the court must work out whether the defendant has benefited from criminal conduct and what the value of that benefit is. *Subsection 2* explains that the court must regard the defendant 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 defendant’s general criminal conduct, and a previous confiscation order or orders has been made against the defendant in respect of such conduct. General criminal conduct means all the defendant’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 8 prevents double counting of the same benefit by providing (broadly) that, once the court has calculated the defendant’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 defendant. Sub-section (4) ensures that a calculation of benefit once made in relation to an offence will apply for the purposes of any subsequent calculation of benefit in respect of general criminal conduct.. The provision is not required for particular criminal conduct because the same offences cannot be subject to a second conviction, or taken into consideration for sentencing purposes twice, and therefore there is no risk of confiscating the same benefit from particular criminal conduct twice.

### ***Section 9: Available amount***

27. *Section 9* 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 defendant’s property, minus certain prior obligations of the defendant’s such as earlier fines, plus the value of all tainted gifts made by the defendant. Tainted gifts are described in *section 77*.

### ***Section 10: Assumptions to be made in case of criminal lifestyle***

28. *Section 10* applies where the court has decided that the defendant has a criminal lifestyle and it is, accordingly, considering the defendant’s benefit from general criminal conduct. The section requires the court to make certain specified assumptions to establish whether the defendant 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 or there would be a serious risk of injustice if it were 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 defendant has benefited from general criminal conduct and decide the recoverable amount, albeit without the assistance of the assumptions.
29. 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 11* creates a single scheme under which the assumptions are mandatory in all cases where a person has a criminal lifestyle (defined in *section 75*).

### ***Section 11: Time for payment***

30. *Section 11* indicates how long the court may allow the defendant to pay the amount due under the confiscation order. At present, there is no limit on the time that may be allowed. *Section 11* provides that the amount is to be paid immediately, unless the defendant can demonstrate to the court that he needs more time to pay. The prosecutor and Director will have the right to be heard at any application by the defendant for time to pay, or an extension of time to pay. If the court is satisfied that time to pay is required, it may allow up to six months 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 12: Interest on unpaid sums***

31. *Section 12* makes it clear that the defendant must pay interest on a confiscation order that is not paid in full by the time allowed. It leaves no room for doubt that the payment of interest is mandatory in all cases (the existing legislation is framed in terms of a “liability” to pay interest and it has been suggested occasionally that this implies a discretion as to whether or not interest is added to a particular unpaid order).

### ***Section 13: Effect of order on court’s other powers***

32. *Section 13* requires the court to have regard to the confiscation order before imposing a fine or other order involving payment on the defendant, except for a compensation order, but otherwise to leave the confiscation order out of account in sentencing the defendant. It reproduces the effect of existing legislation.

## **Procedural matters**

### ***Section 14: Postponement***

33. *Section 14* enables the court to postpone the confiscation proceedings on one or more occasions for up to a total of two years from the defendant’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. 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 defendant.
34. *Section 14* allows proceedings to be postponed for any reason. This enables a postponement to be made if it is required, for example, because a judge is ill. Under earlier confiscation legislation, a postponement can only be made so that the court can obtain further information about the defendant’s benefit or the realisable property.
35. *Section 14(8)* is not found in earlier confiscation legislation. It provides that if an application for extension is made before the end of the period of postponement, it does not matter if the court makes a decision on the application after the end of the period of postponement. This deals with the situation where an application is made in time but, because of listing difficulties, the court cannot hear and make a decision on the application before the existing period of postponement expires.
36. *Section 14(11)* prevents a confiscation order from being quashed, merely because there has been some procedural irregularity in the operation of the postponement procedures.

But *subsection (12)* disapples the provision if the court imposes a fine or other specified order, and then attempts to make a confiscation order subsequently.

### ***Section 15: Effect of postponement***

37. *Section 15* makes it clear that, as under earlier confiscation legislation, the court may sentence the defendant 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 ancillary order (such as a forfeiture order) when it sentences the defendant in the postponement period because it needs to know the amount of the confiscation order before it does this. However, it may vary the sentence within 28 days of the end of the postponement period by making one or more of these disposals, by which time any confiscation order will have been made. This will, in particular, enable the forfeiture and destruction of drugs to be ordered in a drug trafficking case.

### ***Section 16: Statement of information***

38. Where the prosecutor or the Director of the Agency requires the court to hold a confiscation hearing, the prosecutor (or the Director, as the case may be) is required to give the court a statement detailing the defendant's benefit from criminal conduct. The nature of the information in the statement will depend on whether the prosecutor or the Director believes the defendant has a criminal lifestyle. If the prosecutor or Director does believe that the defendant has a criminal lifestyle, under *sub-section (4)* 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 matters known to the prosecutor or Director which could cause the court to decide that making an assumption would give rise to a serious risk of injustice.
39. *Subsection (2)* provides that, where the court holds a confiscation hearing of its own volition, it may require the prosecutor (but not the Director) to present a statement. The provision is based on the assumption that the court will never hold a confiscation hearing of its own volition in a case in which the Director is involved.

### ***Section 17: Defendant's response to statement of information***

40. The statement of information procedure is designed to provide a quick and effective method of identifying the extent of the defendant's benefit, where there is agreement between defendant and prosecutor or Director, and of identifying areas of dispute, where there is not. Where the prosecutor or the Director serves a statement of information on the defendant (as will normally happen), the court may require the defendant to respond separately to every allegation in the statement, and to indicate to what extent each allegation is accepted. Where an allegation is accepted by the defendant, the court may treat the acceptance as conclusive as far as any matters to which it relates are concerned.
41. Where an allegation is disputed, the defendant must provide particulars (i.e. 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 Director (as the case may be), or the defendant. Under *subsection (3)*, if the defendant fails to respond to an allegation, the defendant may be treated as having accepted it. Thus, if the defendant fails to respond to a statement of fact, the fact may be deemed to be true. If, for example, the fact in question is that the defendant spent x sum on y date, and the defendant fails to respond to that, that fact is deemed to be true. However, the defendant is not to be treated as accepting any allegation that he has benefited from general or particular criminal conduct because it is not thought appropriate that the defendant's silence should be conclusive of these matters.

42. *Subsection (6)* provides that, where the defendant 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 defendants to be more forthcoming by preventing the admissions made from being used in a future prosecution against them or anybody else. Defendants might otherwise be reluctant to admit benefit from criminal conduct which has not been the subject of a prosecution.

### ***Section 18: Provision of information by defendant***

43. *Section 18* empowers the court, at any stage in the confiscation procedures, to order the defendant 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 defendant 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 defendant in deciding the point at issue.
44. Where the defendant fails to comply with the court's order without reasonable excuse, *subsection (4)* allows the court to draw any inference it believes appropriate. However, *subsection (5)* makes it clear that the power does not detract from any other power the court has to deal with the defendant, notably its power to punish the defendant for contempt of court in refusing to comply with the order
45. *Subsection (9)* contains provision like that in *section 17(6)*, protecting the defendant from incriminating himself and others by making an admission under *section 18*. However, it does not prevent the authorities from prosecuting the defendant or another person using other evidence which may come to light following such an admission.

## **Reconsideration**

### ***Sections 19-21: Reconsideration***

46. *Sections 19* and *20* enable a confiscation order to be made where none was made in the original proceedings. *Section 21* enables a confiscation order which has already been made to be increased. In all cases, application must be made to the Crown Court within six years of the original conviction. *Section 19* applies where no confiscation hearing was held after the original conviction. *Section 20* applies where a hearing was held, the court decided that the defendant 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 21* 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.
47. The sections reproduce, with some changes, provision in the earlier confiscation legislation. New provision has been required primarily to take account of the new role of the Director in criminal confiscation. Either the prosecutor or the Director may apply to the court for a reconsideration under these sections.
48. The principle underlying these sections is that a reconsideration should only be applied for where new evidence comes to light. It is not appropriate for an authority 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. Provision is included to reflect this principle.
49. Some technical provisions are new. Firstly, the earlier legislation requires the court to take into account any fine imposed on the defendant at the original proceedings (to avoid double recovery, since a fine might have been used as a confiscatory measure). The Act now requires the court also to take into account certain orders made against the defendant in the original proceedings – see *section 19(7)(c)* and *(d)*, *20(11)(c)* and *(d)*, and *21(9)(b)* and *(c)*. These mainly include forfeiture orders. They have been added because the court might not have made them in the original proceedings if it had made

a confiscation order. However, these orders are not to be taken into account if they have already been taken into account by the court in deciding what is free property for the purposes of the revaluation proceedings. This is to prevent the defendant from being allowed a reduction twice in respect of the same property.

50. Secondly, *sections 19(8)* and *20(12)* put it beyond doubt that, where a compensation order was made post-trial, but not a confiscation order, the court cannot order payment of the compensation out of a confiscation order made at a revaluation hearing under *sections 19* or *20*. There is no provision for the revaluation of a compensation order, which has to be settled at the sentencing stage. Therefore, the payment of any compensation should only be ordered out of confiscated monies under *section 13(6)* where a confiscation order is also made in the original proceedings.
51. Thirdly, *section 21(10)* deals with the situation where both a compensation order and a confiscation order have been made in the original proceedings and the court has directed under *section 13(6)* that the compensation order be paid out of the proceeds of the confiscation order. In this case, the court cannot take the compensation order into account in reconsidering the defendant's benefit. This is because the defendant would then be able to offset the impact of the compensation order twice.

### ***Section 22: Order made: reconsideration of available amount***

52. *Section 22* applies where the court made a confiscation order in an amount lower than the defendant's assessed benefit because there was insufficient realisable property to satisfy an order in the full amount. The prosecutor, the Director, or a receiver appointed in the case may apply to the Crown Court for the court to recalculate the available amount. This is an example of a function exercised by the Crown Court under the Act that has previously been exercised by the High Court.
53. 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 19* to *21*, under which application must be made within six years of the defendant'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 defendant'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 21*). *Subsection (5)* requires the court to have regard to any fine, ancillary order or compensation order imposed on the defendant following the original conviction because these may affect the amount the offender is able to pay. However, *subsection (6)* contains similar technical provision to *section 21(10)* to prevent allowance being made twice in the defendant's favour for the same compensation order.

### ***Section 23: Inadequacy of available amount: variation of order***

54. Where a confiscation order has been made, there is a procedure in the earlier confiscation legislation for the defendant or a receiver appointed in the case to apply to the High Court for a "certificate of inadequacy" on demonstrating that the realisable property is insufficient to satisfy the confiscation order. Where the High Court issues a certificate of inadequacy, the certificate may be presented to the Crown Court or magistrates' court and the amount of the confiscation order must then be reduced.
55. This certificate of inadequacy procedure is cumbersome and expensive. *Section 23* provides instead for application to be made directly to the Crown Court by the defendant or a receiver appointed in the case.

### ***Section 24: Inadequacy of available amount: discharge of order***

56. Under earlier confiscation legislation, there is no provision for writing off a confiscation order. In principle it should not be necessary, as an order cannot be made in a sum greater than the value of the property available to satisfy it and the certificate of

inadequacy procedure, as now implemented by [section 23](#), is available to defendants. The absence of any provision for write-offs has, however, led on occasion to unnecessary practical difficulties, for example, where a court makes a confiscation order based on an assessment of realisable property in the form of foreign currency seized at an airport, and a shortfall in payment of the order arises later due entirely to a change in the value of the currency concerned in the period between the order being made and payment.

57. [Section 24](#) therefore provides that, where a justices' chief executive in the magistrates' court is enforcing a confiscation order, the justices' chief executive may apply to the Crown Court and the Crown Court may write the order off if the outstanding sum is under £1,000 and the reason for the shortfall is a fluctuation in exchange rates or some other factor specified in secondary legislation, or some combination of the two. The sum of £1,000 is variable by order. No similar provision is either available or necessary where the Director is enforcing a confiscation order because enforcement by the Director will always involve the appointment of a receiver, who will be able to apply to the Crown Court under [section 23](#).

### ***Section 25: Small amount outstanding: discharge of order***

58. [Section 25](#) also applies only where a justices' chief executive is enforcing a confiscation order. It deals with the situation where a confiscation order has been satisfied almost in its entirety, but a sum of £50 or less is outstanding. Under these circumstances, the justices' chief executive may apply to the Crown Court for the confiscation order to be written off. Like [section 24](#), this section introduces an exception to the general principle that a confiscation order may not be written off, but this is made subject to judicial oversight, and applies only where a small amount is outstanding. In such circumstances, the recovery of the sum in question would not justify the expense required to recover it. The sum of £50 is variable by secondary legislation.

### ***Section 26: Information***

59. [Section 26](#) contains provision ancillary to [sections 19-21](#). Its purpose is to make it clear that [sections 16 and 17](#) on statements of information and [section 18](#) on the provision of information by the defendant apply to reconsideration proceedings as they apply to confiscation proceedings immediately following a conviction.

## **Defendant absconds**

### ***Section 27: Defendant convicted or committed***

60. [Section 27](#) is the first of a number of sections dealing with confiscation orders against absconders. Under the earlier confiscation legislation of England and Wales, the High Court may make a confiscation order against an absconded drug trafficker (one who has absconded either after conviction or after proceedings have been instituted). The Act empowers the Crown Court to make a confiscation order against an absconder convicted of, or charged with, any crime.
61. The existing provision for the High Court in England and Wales to make a confiscation order against a drug trafficker who dies after conviction but before the Crown Court can make a confiscation order is abolished. It is considered that the recovery of benefit where the perpetrator is dead is better dealt with under the civil recovery procedures in Part 5 of the Act.
62. [Section 27](#) deals with the situation where a defendant is convicted either in the Crown Court or in the magistrates' court, and then absconds. In the case of a conviction in the magistrates' court, the defendant must have been committed to the Crown Court for sentence or confiscation (and sentence) before absconding. Either the prosecutor or the Director may apply to the Crown Court for a confiscation order to be made under this section.

63. *Subsection (5)(e)* provides that *sections 19-21* (reconsideration) do not apply where a person is still an absconder following conviction. Thus they do all apply where a convicted absconder returns.

### ***Section 28: Defendant neither convicted nor acquitted***

64. *Section 28* deals with absconders who abscond prior to conviction. A confiscation order may only be made against such an absconder if two years have elapsed from the time he absconded. Under earlier confiscation legislation, a confiscation order may be made by the High Court on application by the prosecutor in these circumstances. Under the Act, application is made to the Crown Court by the prosecutor or the Director.
65. *Subsections (5)(d) and (e)* set out how *sections 19-21* (reconsideration) are to apply where the defendant absconds before he has been convicted. *Sections 19* and *20* do not apply and *section 21* does not apply whilst the offender is an absconder. It is not appropriate for *sections 19* and *20* to apply because they deal with the situation where decisions have been taken after a conviction. *Subsection (7)* provides that when a court has made a confiscation order in this situation it cannot go on to make another confiscation order if the defendant returns and is convicted.

### ***Section 29 : Variation of order***

66. *Section 29* applies where the Crown Court has made a confiscation order in absentia against an absconder who absconded after proceedings were instituted, but had not been convicted when the confiscation order was made. Where the absconder returns and is convicted of one or more of the charges, the confiscation order made in absentia stands. A new confiscation order is not made. However, the absconder may apply within 28 days of the conviction for a variation of the order made in absentia. The section represents a departure from the earlier confiscation legislation, which only enables a confiscation order made in absentia to be varied within six months of its being made, regardless of whether the defendant has returned and been convicted.

### ***Section 30: Discharge of order***

67. *Section 30* applies where the Crown Court has made a confiscation order in absentia and the absconder returns and is acquitted on all counts or is not proceeded against. On application by the absconder, where he has been acquitted the confiscation order must be discharged. Where the prosecutor does not intend to proceed or there is undue delay in proceeding, the court has a discretion to discharge the order.

## **Appeals**

### ***Section 31: Appeal by prosecutor or Director***

68. *Section 31* gives the prosecutor and the Director a new power to appeal against any confiscation order made by the Crown Court, and against any decision of the Crown Court not to make a confiscation order. The appeal lies on any ground because the Act does not specify the kind of appeal involved. However, only an appeal on a point of law or fact will be possible under these provisions. The reason for this is that the post-conviction confiscation procedures are mandatory and therefore it is not possible for there to be an appeal on the merits in such a case (but see next paragraph for the position on revaluation cases etc). The appeal will be available where, for example, the prosecutor or the Director believe that the court has failed to take account of property which should be taken account of, or has made some miscalculation concerning the amount of the order.
69. A prosecutor's or Director's appeal does not, however, lie against a decision of the Crown Court under *sections 19* and *20* (reconsideration), or under *sections 27* and *28* (convicted and unconvicted absconders). These sections all grant the Crown Court a wide degree of discretion and it would be possible to give the prosecutor and the

Director an appeal on the merits in such a case. The target of their appeal rights in this Act, however, is not the court's exercise of a discretion but its application of the mandatory confiscation procedures.

### ***Section 32: Court's powers on appeal***

70. *Section 32* provides the Court of Appeal with broad powers. The Court of Appeal may confirm, quash or vary the Crown Court's confiscation order and, where the Crown Court decided not to make a confiscation order, it may either go through the confiscation procedures itself or direct the Crown Court to proceed afresh.
71. If the Court of Appeal makes or varies a confiscation order or directs the Crown Court to go through the confiscation procedures afresh and the Crown Court has in the meantime imposed a fine or ancillary order such as a forfeiture order on the defendant as part of the sentencing process, *subsection (4)* requires the court to have regard to the fine or order. However, the court is not required to take account of an order if it has already taken account of the order in working out what the free property held by the defendant is (to avoid double counting – see the note on *sections 19-21* above).
72. Under *subsection (7)*, where a compensation order has been made against the defendant, the Court of Appeal and the Crown Court proceeding afresh must have regard to it but may not order its payment out of confiscated monies. This is to prevent different treatment on appeal from in the substantive proceedings.

### ***Section 33: Appeal to House of Lords***

73. *Section 33* enables the Court of Appeal's decision to be further appealed to the House of Lords. *Section 33* provides the House of Lords with similar powers to the Court of Appeal. They are not identical, however, because the House of Lords is reviewing the decision of the Court of Appeal, rather than the original decision of the Crown Court. Where a confiscation order has been made or confirmed by the Court of Appeal, the House of Lords may confirm, quash or vary the order. Where the Court of Appeal confirms the Crown Court's decision not to make a confiscation order or quashes the Crown Court's order, the House of Lords may confirm the decision or remit the case to the Crown Court, with directions, to proceed afresh. For practical reasons, the House of Lords will not itself proceed under *section 6*.

## **Enforcement authority**

### ***Section 34: Enforcement authority***

74. *Section 34* sets out the criteria that determine whether the confiscation order is to be enforced by the Director or by a magistrates' court. Under the earlier confiscation legislation, all confiscation orders are enforced by magistrates' courts, with the assistance of the prosecutor. *Section 34* provides that the Director is to be responsible for the enforcement of a confiscation order either where the Director applied for the order (including applications under the reconsideration and absconder provisions), where the Director appealed against a decision in respect of a confiscation order or where the Director applied to the court before the order was made to be appointed to enforce it. In all other cases, the confiscation order will be enforced by the magistrates' court and prosecutor, much as at present.
75. Thus, if the Director is to enforce a confiscation order applied for by a prosecutor, this will have to be arranged when the confiscation order is about to be made, and no later.

## **Enforcement as fines etc**

### ***Section 35: Director not appointed as enforcement authority***

76. *Section 35* explains how confiscation orders are to be enforced where the magistrates' court is the enforcement authority. As at present, the order will be treated as a Crown Court fine and enforced, as is a Crown Court fine, by the use of the magistrates' court's fine enforcement powers, as set out in Part 3 of the Magistrates' Courts Act 1980 but subject to some modifications. One of the main features of treating the order as a Crown Court fine is that the Crown Court, where it makes a confiscation order, is required to set a term of imprisonment in default of payment. The maximum default term that may be imposed is determined by the amount payable under the confiscation order. The maximum default term applicable to a particular confiscation order varies from 7 days, for an amount not exceeding £200 to, at the other end of the scale, ten years for an amount exceeding £1 million.

### ***Section 36: Director appointed as enforcement authority***

77. *Section 36* also applies certain Crown Court fine enforcement measures where enforcement is to be by the Director. The relevant provisions require the court, where it makes a confiscation order, to specify a term of imprisonment in default of payment.

### ***Section 37: Director's application for enforcement***

78. As noted above, confiscation order enforcement by magistrates' courts will continue to be broadly regulated by the Magistrates' Courts Act 1980. This contains detailed provision on imprisonment in default of payment. Because the 1980 Act will not apply to enforcement by the Director, it has been necessary, in *section 37*, to create specific procedures for a term of imprisonment in default to be enforced at the Director's request.
79. *Section 37* contains provision broadly based on that in the 1980 Act, except that the Director will apply to the Crown Court to trigger the default term. This is in accordance with the concept of the Crown Court being the main venue for confiscation and related proceedings.

### ***Section 38: Provisions about imprisonment or detention***

80. *Section 38* contains general provision on imprisonment in default of payment of a sum due under a confiscation order, applicable whether the default term is imposed by a magistrates' court or by the Crown Court in response to an application by the Director. The provision reflects that in existing legislation and provides, in particular, that a term of imprisonment in default must be served consecutively to the substantive term imposed for the offence(s), and that the service of a default term does not prevent the sum due under the confiscation order from being collected subsequently by other means.

### ***Section 39: Reconsideration etc: variation of prison term***

81. As explained in the note on *section 35* above, the Crown Court fixes the period of imprisonment in default by reference to the amount due under the confiscation order. *Section 39* provides for the period of imprisonment in default to be varied where the court varies the amount due under a confiscation order under the following provisions of the Act:
- *Section 21*: reconsideration of benefit (resulting in upward variation of the amount due under the order)
  - *Section 22*: reconsideration of available amount (resulting in upward variation of the amount due)
  - *Section 23*: inadequacy of available amount (resulting in downward variation of the amount due)

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

- *Section 29*: variation of order (for returned absconders, resulting in downward variation of the amount due)
  - *Section 32*: Court of Appeal's variation of Crown Court's order after prosecutor's or Director's appeal (resulting either in upward or in downward variation)
  - *Section 33*: House of Lords' variation of Court of Appeal order (resulting either in upward or in downward variation)
82. The overall purpose of the provision is to clarify what happens when the variation of the amount due under a confiscation order changes the maximum period of imprisonment in default applicable to the order.
83. Where the effect of the variation is to decrease the amount due under the order so that the new amount falls into a lower band, *section 39* requires the court to reduce the default term to one lower than the maximum applicable to the band in question. In other cases the court is given a discretion to amend the term of imprisonment in default, i.e. the court has power to increase it.
84. In addition, where the amount due under the confiscation order is increased by interest payable under *section 12*, the Director or the prosecutor may apply to the court to increase the term of imprisonment in default.

## **Restraint orders**

### ***Section 40: Conditions for exercise of powers***

85. *Section 40* sets out the circumstances under which a restraint order, as provided for in the ensuing sections, may be made. A restraint order has the effect of freezing property that may be liable to confiscation following the trial and the making of a confiscation order.
86. Under the earlier confiscation legislation, a restraint or charging order may be made by the High Court where proceedings have been instituted or the defendant is to be charged, or an application in respect of further confiscation proceedings has been made or is to be made (for example, for a reconsideration of the defendant's benefit). The Act makes three fundamental changes to this scheme.
87. Firstly, the power of the High Court to make a charging order is abolished as unnecessary. Secondly, the venue for restraint orders is changed from the High Court to the Crown Court, in accordance with the general principle in the Act of the Crown Court being the main venue for confiscation proceedings and related proceedings. Thirdly, the point at which a restraint order may be made is brought forward in the Act to any time after an investigation has been started (at present, although a restraint order may be made at the investigative stage, it is only possible to do so where charges are anticipated).

### ***Section 41: Restraint orders***

88. *Section 41* explains the nature and effect of a restraint order. It is an order prohibiting a specified person from dealing with any realisable property held by him (realisable property is defined in *section 83*). Thus it may be made both against the defendant or person under investigation, and any other person holding realisable property. *Subsection (3)* provides for exceptions to be made for reasonable living and legal expenses and for carrying on any trade, business, profession or occupation. *Subsection (4)* prevents funds under restraint from being released to the defendant or the recipient of a tainted gift for legal expenses incurred in relation to the offences in respect of which the restraint order is made. However, public funding for legal expenses, on the standard conditions, will be available to both instead.

89. *Subsection (7)* gives the court the power to make such order as it believes is appropriate for the purpose of ensuring that a restraint order is effective. The provision ensures that the Crown Court has general powers available to it such as the residuary powers currently available to the High Court. These will include, for example, the power to order a person to disclose his or her assets. Failure to comply with a restraint order or an order provided for in *subsection (7)* will fall to be treated as contempt of the Crown Court. *Subsection (8)* provides that a restraint order cannot be made in relation to any property subject to a charging order under any of the earlier confiscation legislation, reflecting the principle that a restraint order and a charging order should not be made in relation to the same property.

#### ***Section 42: Application, discharge and variation***

90. *Section 42* lays down who may apply for a restraint order under the Act, and sets out criteria like those in the earlier confiscation legislation for the variation or discharge of restraint orders. Under the earlier legislation, only the prosecutor may apply for a restraint order. The Act provides that application may be made by the prosecutor, the Director or an accredited financial investigator.
91. The provision enabling the Director or an accredited financial investigator to apply for a restraint order is accordingly new. Accredited financial investigators are those accredited by the Director in accordance with *section 3*. They are likely to be employed primarily in force financial investigation units (FIUs) or by Customs and Excise. Under *section 68*, in order to ensure that the powers are only used in appropriate cases, applications will require the authority of a police officer of superintendent rank or the Customs equivalent or a financial investigator of the kind specified in an order made by the Secretary of State under *section 453*.

#### ***Section 43: Appeal to Court of Appeal***

92. There is a general right of appeal against any order of the High Court in section 16 of the Supreme Court Act 1981. It applies to restraint orders made by the High Court and orders ancillary to them. The general right of appeal in the 1981 Act does not, however, apply to the Crown Court. Therefore, it has been necessary to create a specific right of appeal in the Act in relation to restraint orders made (or not made) by the Crown Court.
93. It is important to note that there is no right of appeal against the Crown Court's decision to make a restraint order. The appeal lies only against the Crown Court's decision to vary or discharge an order (or not to vary or discharge it). A person dissatisfied with a restraint order must first apply to the Crown Court for its variation or discharge before any appeal to the Court of Appeal is possible. This is because most restraint orders are likely to be made *ex parte* so the Crown Court will not have had the opportunity of hearing the defendant unless he applies to vary the restraint order.

#### ***Section 44: Appeal to House of Lords***

94. Under *section 44*, only the parties to the Court of Appeal proceedings under *section 43* may appeal further to the House of Lords. Any person who wishes to contest a restraint matter must, therefore, first do so in the Court of Appeal.

#### ***Section 45: Seizure***

95. *Section 45* allows a constable to seize any property subject to a restraint order to prevent its removal from England and Wales. In the earlier confiscation legislation, realisable property may be seized by a constable to prevent its removal from anywhere in England and Wales or Scotland. That provision dates back to the Drug Trafficking Offences Act 1986, when there was no confiscation legislation in force in Scotland. This is not now the case and so (unlike the earlier legislation) *section 45* does not need to apply to Scotland.

### ***Section 46: Hearsay Evidence***

96. Under earlier confiscation legislation, applications for restraint orders in the High Court frequently rely on hearsay evidence. However, there are considerable limitations on the admission of hearsay evidence in the Crown Court. *Section 46* makes it clear that hearsay is admissible in restraint proceedings in the Crown Court in the same way as in the High Court, in accordance with the general principle adopted in the Act of transferring tried and tested restraint procedures to the Crown Court.

### ***Section 47: Supplementary***

97. *Section 47* contains ancillary provision relating to restraint orders. It re-enacts provision from earlier confiscation legislation and takes account of the enactment of the Land Registration Act 2002. The main purpose of the section is to ensure that where a restraint order affecting land is applied for, its effect may be reinforced by taking action at the Land Registry to prevent the disposal of the land in question.

## **Management receivers**

### ***Section 48: Appointment***

98. The earlier confiscation legislation enables a receiver to be appointed by the High Court on the application of the prosecutor. In fact, receivers perform two quite different functions under the legislation. They manage property pending the defendant's conviction (and sometimes afterwards) and they dispose of it to satisfy the confiscation order. These receivers are known in practice as "management" and "enforcement" receivers respectively but the earlier legislation does not distinguish between them as such. The Act now deals separately with the two sorts of receivers' functions.
99. *Section 48* enables a management receiver to be appointed where a restraint order has been made. In accordance with the principle of the Crown Court as the main venue for confiscation, the appointment is made by the Crown Court, not the High Court. *Section 48(1)(b)* makes it clear that a receiver may only be appointed on application to the Crown Court by the applicant for the restraint order. However, the application need not be made by the same individual who applied for the restraint order (since that individual may, for example, become ill after applying for the order).

### ***Section 49: Powers***

100. *Section 49* sets out the powers that the court can confer on a management receiver. They are based on the powers that receivers use in practice under the earlier legislation to manage property pending conviction and confiscation. *Subsection (7)* prevents the powers from being exercised in relation to property subject to a charging order under earlier confiscation legislation in England and Wales or Northern Ireland (there was no provision for charging orders in the Scottish legislation).

## **Enforcement receivers**

### ***Section 50: Appointment***

101. Where a confiscation order has been made and the magistrates' court will be responsible for enforcing it, *section 50* empowers the Crown Court to appoint a person to act as enforcement receiver to help enforce the confiscation order. This is another function transferred from the High Court to the Crown Court, in accordance with the general principle of the Crown Court as the main venue for confiscation. As in earlier confiscation legislation, the application for the appointment of an enforcement receiver, where the magistrates' court is enforcing the confiscation order, has to be made by the prosecutor. Thus, prosecutors will continue to be involved in confiscation order enforcement. The enforcement receiver may (but need not) be the same as the management receiver appointed under *section 48*.

### **Section 51: Powers**

102. *Section 51* sets out the powers that the court can confer on an enforcement receiver. Again, these are based on the powers that enforcement receivers use in practice. The main difference between their powers and those of management receivers is the inclusion (for enforcement receivers) of powers to realise property (other than for their own remuneration and expenses). However, enforcement receivers may need to manage property before disposing of it and they are given the powers to do so. Managing property includes selling the property where, for example, this is necessary in order to maximise its value.

### **Director's receivers**

#### **Section 52: Appointment**

103. Where the Director is enforcing a confiscation order, the main enforcement tool will be the appointment of a receiver (the Director will also be able to make requests for assistance outside the jurisdiction and have a term of imprisonment in default imposed).
104. *Subsection (3)* requires the Crown Court, in all cases where *section 52* applies, to make an order authorising the Director to appoint any person as receiver to enforce the confiscation order. Thus, the court will authorise the appointment of a receiver but it will be for the Director to decide on who is appointed.

#### **Section 53: Powers**

105. *Section 53* enables the Crown Court to confer certain powers on the Director's receiver. The powers are the same as those that the Crown Court may confer on a person appointed as enforcement receiver under *section 50*, on the application of the prosecutor.

### **Application of sums**

#### **Section 54: Enforcement receivers**

106. *Section 54* applies to an enforcement receiver appointed under *section 50* on the application of the prosecutor (i.e. to cases in which the Director is not the enforcement authority). It specifies how any sums in the hands of the receiver are to be disposed of, after a confiscation order has been made. The sums are payable, subject to certain prior payments the Crown Court may order, to the enforcing justices' chief executive. Under *subsection (3)*, once a confiscation order has been satisfied, the receiver is to pay any remaining sums in his hands to those with an interest in the property concerned, as directed by the Crown Court. The Crown Court must give those with interests in the property concerned a reasonable opportunity to make representations before making any directions under *subsection (3)*.

#### **Section 55: Sums received by justices' chief executive**

107. *Section 55* sets out how an enforcing justices' chief executive must dispose of any monies received in satisfaction of a confiscation order, whether from a receiver appointed under *section 50* or otherwise (for example, voluntary payments by a defendant or the proceeds of the chief executive's own enforcement activities). The provision is similar to the earlier confiscation legislation, with certain exceptions.
108. *Firstly*, an earlier obligation of the justices' chief executive to reimburse the prosecutor out of confiscated monies for sums the prosecutor has paid to a receiver in advance has been abolished as unnecessary, as prosecutors do not make advance payments to receivers. *Secondly*, under the earlier legislation, victims who receive confiscated monies in satisfaction of a compensation order made in their favour in the same proceedings have to pay a share of the costs of enforcement. This obligation has also

been abolished. *Thirdly*, where the confiscation order takes precedence over parallel bankruptcy proceedings and monies are left over in the receiver's hands after the confiscation order has been satisfied, they go into the bankrupt's estate, rather than being entrusted to the confiscation court to dispose of – see *Schedule 11, paragraph 16*, and the new section 306B(1)(d) and (2) which it adds to the Insolvency Act 1986.

### ***Section 56: Director's receivers***

109. *Section 56* is the equivalent, where enforcement by the Director's receiver is concerned, of *section 54* in relation to receivers appointed on the application of the prosecutor. The provision is, with minor modifications, the same as *section 54*, except that in this case the sums must be paid to the Director instead of to the justices' chief executive.

### ***Section 57: Sums received by Director***

110. *Section 57* is the equivalent, where enforcement by the Director is concerned, of *section 55* in relation to sums received by justices' chief executives. The provision is broadly similar to *section 55*, but there are two significant differences. Firstly, *subsection (4)* requires the Director to reimburse the expenses of any management or enforcement receiver appointed in the case, but *subsection (6)* makes it clear that this does not apply where the receiver is a member of the Director's own staff or providing services under arrangements made by the Director. These costs will be met out of the Director's budget.
111. Secondly, the Director must pay the residue of any monies received directly into the Consolidated Fund (see *paragraph 5(2) of Schedule 1*) which will also be the eventual destination of the monies when they are received by a justices' chief executive.

## **Restrictions**

### ***Section 58: Restraint orders***

112. *Section 58* prevents certain actions from being taken against property subject to a restraint order without the leave of the Crown Court. It also gives any court dealing with property proceedings the power to stay them, or allow them to continue, if it learns that a restraint order has been applied for or made. The earlier confiscation legislation is silent on this issue, but the High Court has in practice stayed other property proceedings occasionally where a restraint order has been made.

### ***Sections 59 & 60: Enforcement receivers; Director's receivers***

113. *Sections 59* and *60* make similar provision to *section 58* for property in respect of which an enforcement or Director's receiver has been appointed after a confiscation order has been made.

## **Receivers: further provisions**

### ***Section 61: Protection***

114. *Section 61* protects receivers from liability for anything done by them to property which is not realisable property (as defined in *section 83*), unless they are negligent. It replicates earlier legislation and protects the receiver if he inadvertently deals with the property of third parties.

### ***Section 62: Further applications***

115. *Section 62* relates to receivers appointed under *section 48, 50* or *52*. The section enables such receivers to apply to the Crown Court for directions as to the exercise of their powers. It also enables any person affected by any action taken or to be taken by such

receivers to challenge the action in the Crown Court. The person affected may be the defendant, the recipient of a tainted gift from the defendant or some other person.

### ***Section 63: Discharge and variation***

116. *Section 63* explains who may apply for the variation or discharge of a receivership order. It also indicates when the court has to discharge a management receivership order .

### ***Section 64: Management receivers: discharge***

117. *Section 64* results from the new formal distinction in the Act between management and enforcement receivers. Its purpose is to ensure that any property in the hands of a management receiver is handed over to an enforcement receiver when appointed (except property realised for the management receiver's remuneration and expenses).

### ***Section 65: Appeal to Court of Appeal***

118. This section provides rights of appeal to the Court of Appeal against decisions of the Crown Court relating to receivership matters. Like *section 43*, it is required because the general right of appeal which exists under earlier legislation against a decision of the High Court in a confiscation receivership matter does not apply to receivership decisions of the Crown Court under the Act.

### ***Section 66: Appeal to House of Lords***

119. This section provides a right of appeal to the House of Lords against a decision of the Court of Appeal under *section 65*. As with *section 44*, it is not possible for new parties to come forward at this stage. Only people who were already party to the proceedings at the Court of Appeal stage may appeal to the House of Lords.

## **Seized money**

### ***Section 67: Seized money***

120. *Section 67* provides the magistrates' court with a new power to order any realisable property in the form of money in a bank or building society account to be paid to the justices' chief executive in satisfaction of a confiscation order. The power is only available where a confiscation order has been made, time to pay has expired, the confiscation order is being enforced by a justices' chief executive (i.e. not by the Director) and the money is subject to a restraint order.
121. The new power provides an alternative to garnishee proceedings to enable justices' chief executives to seize money held by the defendant in a bank or building society account. A garnishee order is an order to a person who owes a debt to one person (the defendant) to pay it to another (the justices' chief executive). It is usually used to seize money of the defendant's in a bank account. A garnishee order can only be made by the civil courts (the High Court or a county court). Unlike garnishee orders, the new order will be made by the magistrates' court.
122. *Section 67* also enables justices' chief executives to confiscate money in the form of cash which has been seized from defendants as evidence and subsequently paid into a bank account. Under earlier legislation, the only legal means of getting at the money without the defendant's consent is by having a receiver appointed. *Subsection (6)* enables the magistrates' court to order a bank or building society which fails to comply with one of the new orders to pay a sum of up to £5,000. It also provides that this sum is to be treated as if it were adjudged to be paid by a conviction of the court. The effect of this is that the fine enforcement powers in Part 3 of the Magistrates' Courts Act 1980 are available to enforce payment of this sum.

## **Financial investigators**

### ***Section 68: Applications and appeals***

123. *Section 68* sets out general rules for applications for restraint and receivership orders made by accredited financial investigators. It provides in particular that steps in a case after the initial application need not be taken by the same investigator who made the initial application. This is intended to ensure that no problems are caused by, for example, the subsequent ill health of the investigator who makes the initial application for a restraint order.

## **Exercise of powers**

### ***Section 69: Powers of court and receiver***

124. *Section 69* makes provision about how the Crown Court and receivers appointed under the Act are to exercise their powers. It largely re-enacts earlier legislation in that it emphasises, for example, that the satisfaction of a confiscation order takes precedence over any other obligations of the defendant or the recipient of a tainted gift from the defendant.
125. *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 management receivers to dispose of depreciating assets. *Subsection (4)*, however, enables the defendant or the recipient of a tainted gift to challenge the management receiver's decision to dispose of a particular asset on the grounds that the asset is irreplaceable. The provision has regard to the fact that the defendant has not been convicted at this stage and should not, therefore, be obliged to lose irreplaceable assets. It does not apply to enforcement receivers because at the enforcement stage, any realisable property can be used to satisfy a confiscation order.

## **Committal**

### ***Section 70: Committal by magistrates' court***

126. *Section 70* needs to be read in conjunction with *section 6(2)(c)*. Its effect is that a person may be committed to the Crown Court for confiscation proceedings following a conviction of any offence, indictable or summary, in the magistrates' court. Where the prosecutor asks the magistrates' court to do so, the court must commit the defendant to the Crown Court under this section. The power to have a person committed is granted only to the prosecutor, not to the Director of the Agency. However the Director can assume responsibility for the subsequent confiscation proceedings in the Crown Court.
127. Where the defendant is convicted of an either way offence, *subsection (5)* requires the magistrates' court to state whether it would have committed the defendant to the Crown Court for sentence anyway. This subsection is required because, under *section 71*, the Crown Court's sentencing powers following a committal for confiscation are normally limited to the sentencing powers the magistrates' court would have had in the same case.

### ***Section 71: Sentencing by Crown Court***

128. *Section 71* provides that, where a person is committed to the Crown Court for confiscation proceedings, the Crown Court will also assume responsibility for the sentencing process.

## **Compensation**

### ***Section 72: Serious default***

129. *Section 72* 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 an investigation is started but proceedings are never brought, or the defendant is not convicted of an offence, or his conviction is quashed, or he is pardoned. 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.
130. *Section 72* 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 started or are about to be). Therefore, compensation will in future be payable, subject to criteria including the serious default test, from the beginning of an investigation, not only where proceedings have been started.

### ***Section 73: Order varied or discharged***

131. *Section 73* allows compensation to be paid where a person absconds before trial, has a confiscation order made against him, and subsequently secures a variation or discharge of the order by the Crown Court. The provision is not limited to serious default (as in *section 72*) 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 defendant having been tried.

## **Enforcement abroad**

### ***Section 74: Enforcement abroad***

132. *Section 74* sets out the conditions under which requests for assistance in the freezing and realisation of property may be made by authorities in England and Wales 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. *Section 74* applies only to requests relating to Part 2 of the Act.
133. All outgoing requests must be made either by the prosecutor or by the Director, 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 40* is satisfied. This will enable the prosecutor or the Director to request an asset freeze abroad before any restraint order has yet been made in England and Wales, as long as the conditions for making a restraint order are satisfied at the time.

## **Interpretation**

### ***Section 75: Criminal lifestyle***

134. *Section 75* is to be read in conjunction with *section 6* and *Schedule 2*. As explained in the note on *section 6*, the question of whether a person has a criminal lifestyle is central to the operation of Part 2 of the Act, because it determines whether the defendant is

subject to the confiscation of benefit from his particular criminal conduct or his general criminal conduct. [Section 75](#) set out in detail the criteria that govern whether or not a person has a criminal lifestyle.

135. 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 75](#), a person has a criminal lifestyle if he satisfies one or more of the tests set out in that section.
136. The first test is that he is convicted of an offence specified in [Schedule 2](#) (see the commentary on [Schedule 2](#) below). [Subsection \(7\)](#) enables the Secretary of State to amend [Schedule 2](#) by order. The second test is that the defendant 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 and/or any others taken into consideration by the court on the same occasion. The third test is that the defendant is convicted of a combination of offences amounting to “a course of criminal activity”.
137. The third test is more complicated than the other two. The defendant 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 and/or any others taken into consideration by the court on the same occasion (or, in the case of (b), occasions) must be not less than £5,000.
138. 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 10](#), the application of the assumptions is mandatory where a criminal lifestyle is identified, whereas it is discretionary in the earlier non-drug legislation.

### ***Section 76: Conduct and benefit***

139. [Section 76](#) defines criminal conduct as any conduct constituting an offence in England and Wales or which (if it took place elsewhere in the United Kingdom or abroad) would constitute an offence there. The restriction of the scope of confiscation under earlier confiscation legislation to the proceeds of drug trafficking, other indictable offences and specified summary offences is thus abolished. Under the Act, the Crown Court that makes a confiscation order will only need to consider whether the defendant has benefited from any conduct which is, or would be contrary to the criminal law of England and Wales. [Section 76](#) also defines “general criminal conduct” and “particular criminal conduct”. For the significance of these terms see the note on [section 6](#).
140. [Section 76](#) 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 earlier confiscation legislation relating to drug trafficking, and that relating to other offences. Under the earlier drug trafficking legislation a person benefits from drug trafficking if he receives any payment or reward in connection with drug trafficking carried on by him or another person. Under the earlier legislation relating to other offences, a person benefits from an offence if he obtains any property as a result of or in connection with its commission.

***Sections 77 & 78: Tainted gifts; Gifts and their recipients***

141. *Section 77* is another section which aligns two similar but slightly different provisions in the earlier drug and non-drug confiscation legislation (where a tainted gift is referred to as a “gift caught by this Act”). Like the Act, the earlier legislation enables gifts made by the defendant 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)..
142. The new scheme provides that, where the court has decided that the defendant has a criminal lifestyle, any gift made by the defendant to any person in the period beginning six years before the commencement of proceedings is caught, together with any gift made at any time out of the proceeds of crime. This is relevant both at the confiscation hearing and for the purposes of enforcement. If the court decides that the defendant does not have a criminal lifestyle, only gifts made since the beginning of the earliest of the offences committed are caught. Again, this is relevant at the confiscation hearing and for the purposes of enforcement.
143. However, in relation to a time before the court has decided whether the defendant has a criminal lifestyle, for example, at a pre-trial restraint hearing, the wider definition of tainted gifts applies. When making a restraint order, the court must exercise its discretion as to how much property to restrain by reference to the size of the confiscation order that may eventually be made. So, although a court can technically apply the wider definition of tainted gifts at the restraint stage, if it is clear at that time that the defendant does not have a criminal lifestyle and that therefore the narrower definition will apply at the confiscation hearing, the court will have to take this into account when making the restraint order.
144. *Section 78* makes it clear that a gift includes a transaction for a consideration which is significantly less than the value of the gift at the time of the transfer; for example, if the defendant sells a car worth £10,000 at the time of the transfer for £2,000. This is a departure from the earlier legislation, where an undervalue transaction is defined as the difference between the value of the property when the defendant received it and its value at the time of the transfer. The old definition could cause injustice when the property transferred at an undervalue has depreciated in value between its receipt by the defendant and its transfer.

***Sections 79-81: Value: the basic rule; Value of property obtained from conduct; Value of tainted gifts***

145. *Sections 79-81* set out how the court is to work out the value of property held by a person, the value of property obtained from criminal conduct and the value of a tainted gift. These sections broadly reproduce the property valuation principles set out in the earlier legislation.

***Sections 82-84: Free property; Realisable property; Property: general provisions***

146. *Section 82* introduces the new concept of free property as any property that 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 included in the calculation of 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 83* defines realisable property by reference to the free property of the defendant and the recipient of a tainted gift. *Section 84(1)* defines property in very wide terms.

***Sections 85-87: Proceedings; Applications; Confiscation orders***

147. *Sections 85-87* define when proceedings are started, when proceedings and applications are concluded, and when confiscation orders are satisfied and are subject to appeal.

The definitions are particularly important in that they determine the earliest and latest points at which a restraint order may be made. The provisions in [section 85](#) have been extensively reworked when compared with those in existing legislation to take account of the new right of appeal (in [sections 31-33](#)) for the prosecutor and the Director. The purpose of the new provision is to ensure that proceedings are not concluded where the prosecutor or Director appeals against the Crown Court's decision, and thus to ensure that a restraint order may be made where such an appeal is lodged, and that any restraint order already made in the case does not have to be discharged.

### ***Section 88: Other interpretative provisions***

148. The definition of a criminal investigation in [subsection \(2\)](#) is required because the power to make a restraint order is brought forward, by [section 40\(2\)](#), to the beginning of a criminal investigation.

## **General**

### ***Section 89: Procedure on appeal to the Court of Appeal***

149. [Section 89](#) establishes the general rules that will apply to any appeal to the Court of Appeal under Part 2 of the Act. The first of these is that the Court of Appeal's leave to appeal is required. The second is that the appeal lies (subject to anything in rules of court under [section 53\(1\)](#) of the Supreme Court Act 1981) to the criminal division of the Court of Appeal.
150. [Section 89](#) also enables the Secretary of State to make an order in relation to appeals to the Court of Appeal under Part 2 containing provision corresponding to any provisions of the Criminal Appeal Act 1968. An order of this kind will cover routine matters such as the procedures for obtaining leave to appeal and transcripts.

### ***Section 90: Procedure on appeal to the House of Lords***

151. [Section 90](#) establishes the general rules that will apply to any appeal to the House of Lords under Part 2 of the Act. Like [section 89](#), [section 90](#) enables the Secretary of State to make an order in relation to appeals to the House of Lords under this Part containing provision corresponding to any provisions of the Criminal Appeal Act 1968. An order of this kind will cover matters such as those mentioned above in relation to [section 89](#).

### ***Section 91: Crown Court Rules***

152. Restraint and receivership are High Court civil law functions so the applicable rules of court are currently found in the Civil Procedure Rules. [Section 91](#) puts it beyond doubt that these matters may in future be dealt with in Crown Court Rules.

### ***Schedule 2: Lifestyle offences: England and Wales***

153. [Schedule 2](#) should be read in conjunction with [sections 6](#) and [75](#). 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.
154. The first group of offences listed are drug trafficking offences. Under the earlier drug confiscation legislation, drug trafficking offences are criminal lifestyle offences (although the term itself is not used in the earlier legislation). Under the Drug Trafficking Act 1994, appearance in the Crown Court for sentence following a conviction of any listed drug trafficking offence can trigger an examination of all the defendant's past drug trafficking and the mandatory application of the assumptions.
155. The drug trafficking offences listed in [paragraph 1](#) are slightly different from those listed in [section 1](#) of the Drug Trafficking Act 1994. Firstly, the offence of allowing premises to be used for drug related activities ([section 8](#) of the Misuse of Drugs Act

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

1971) is regarded as having the characteristics of a criminal lifestyle offence and so has been added to the list. Secondly, drug money laundering offences have been removed from the list, because the Act abolishes the separate drug money laundering offences found in the earlier proceeds of crime legislation. It replaces them with a single set of money laundering offences applicable to the proceeds of all criminal conduct.

156. Some of these new money laundering offences have also been listed in Schedule 2 – see *paragraph 2*. Other criminal lifestyle offences listed in *Schedule 2* also address areas of criminal conduct associated with professional criminals, organised crime and racketeering (for example, counterfeiting, intellectual property offences) and which in some cases are also of major public concern (for example, arms trafficking, trafficking for the purposes of sexual exploitation).