

# PROCEEDS OF CRIME ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 1: Assets Recovery Agency**

##### ***Section 1: The Agency and its Director***

11. This section establishes the Assets Recovery Agency (ARA) to be headed by a new office-holder, the Director, who will be appointed by the Secretary of State. In practice, functions of the Secretary of State relating to the Agency will be carried out by the Home Secretary, in consultation with the Secretary of State for Northern Ireland and the Scottish Ministers (for the Director's revenue functions in Scotland) as necessary. The section enables the Director to employ staff to assist him in carrying out his functions, and to enter into contractual arrangements for this purpose. It also enables the Director to delegate the exercise of his functions to his staff and to others working on a contractual basis for him. The effect of providing that the Director is a corporation sole (*subsection (3)*) is that the office of the Director has legal personality and the Director (in his capacity as office-holder) can hold property, bring legal proceedings and employ staff. The Agency will be a Non-Ministerial Department (NMD); it is normal for the Minister for the Civil Service to have a formal role in determining the number of staff employed by such bodies, and this is provided for at *subsection (5)*.

##### ***Schedule 1: Assets Recovery Agency***

12. *Paragraphs 1 and 2* concern the terms of appointment of the Director. The effect of *paragraph 3* is that the Director must appoint a deputy, and also an assistant director to have specific responsibility for his functions in Northern Ireland. Before the latter is appointed, the Director must consult the relevant Secretary of State i.e. the Secretary of State for Northern Ireland.
13. *Paragraph 5* requires the Agency to be funded directly by Parliament, as is normal for a NMD. Subject to specific exceptions in the Act (e.g. *section 57*), monies received by the Director in the course of carrying out his functions must be paid into the Consolidated Fund. As an NMD, the Agency will automatically be subject to Government accounting rules.
14. *Paragraph 6* sets out what the Director will be required to include in his annual plan, which will be subject to the approval of the Secretary of State. Express provision is made for the inclusion of details as to how the Director will carry out his functions in Northern Ireland.
15. *Paragraph 7* imposes a duty on the Director to prepare an annual report on his activities over the previous year and to submit it to the Secretary of State who, in turn, is required to lay it before Parliament and arrange for it to be published.

### ***Section 2: Director's functions: general***

16. *Subsection (1)* requires the Director to exercise his functions in the way he considers best calculated to contribute to the reduction of crime. In considering this matter, the Director must have regard to any guidance given to him by the Secretary of State (*subsection (5)*). The guidance must indicate that the reduction in crime is in general best secured by criminal investigations and prosecutions (*subsection (6)*). *Subsection (2)* requires him to exercise his functions efficiently and effectively. In doing so he must have regard to his current annual plan, which under *Schedule 1* has to be approved by the Secretary of State.
17. *Subsection (3)* empowers the Director to carry out investigations, and take any other steps, which he considers appropriate for facilitating, or incidental or conducive to, the exercise of his functions, such as negotiating Memoranda of Understanding with other agencies or arranging publicity in the field of asset recovery. The Director's functions are set out in other sections of the Act, the principal ones being the recovery of criminal assets through confiscation, civil recovery, the exercise of Revenue functions and the accreditation and training of financial investigators.

### ***Section 3: Accreditation and training***

18. *Section 3* requires the Director to establish a system for the accreditation of financial investigators. Certain accredited financial investigators will have powers to apply in England, Wales and Northern Ireland for restraint orders and certain ancillary orders under Parts 2 and 4, and for certain investigation orders under Part 8. *Subsections (3)* and *(4)* provide that the Director may provide different classes of accreditation for different purposes. *Subsection (7)* requires the Director to make provision for the training of persons both in financial investigation and in the operation of the provisions of the Act. The section does not require that the training should be delivered directly by ARA, but the Director must ensure that training is made available.

### ***Section 4: Co-operation***

19. *Section 4* requires the Director and other persons with investigation or prosecution functions to co-operate with each other in the exercise of their functions under the Act. Such persons would include police officers, officers of HM Customs & Excise and members of the Crown Prosecution Service and the National Criminal Intelligence Service.

### ***Section 5: Advice and assistance***

20. *Section 5* requires the Director to give such advice and assistance to the Secretary of State as he may reasonably require, in relation to the matters set out in *section 5(a)* and *5(b)*. The Director might, for example, if required to do so, propose amendments to the Government's strategy and targets for recovering the proceeds of crime. He might also be required to advise and assist the Secretary of State on matters connected with his own functions.

## **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)* disapplies 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)
- *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 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).

## **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 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 account 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.

## **Part 4: Confiscation: Northern Ireland**

### **Confiscation orders; Procedural matters**

#### ***Sections 156-168: Confiscation orders; Procedural matters***

232. These sections set out some of the basic principles of the Act. These sections will establish essentially the same procedure for the obtaining of confiscation orders in Northern Ireland as the Act proposes elsewhere for England and Wales. However, while all confiscation orders will be made in the Crown Court, in Northern Ireland confiscation orders may only be made in the Crown Court in two circumstances. These are either following conviction in the Crown Court or where a defendant convicted in the magistrates' court is committed to the Crown Court for confiscation under a new power for this purpose created in the Act by *section 221*. This difference from the proposed procedure for England and Wales is a consequence of the lack of power currently in Northern Ireland for a magistrates court to commit for sentence to the Crown Court a person convicted in the magistrates' court. This power introduced in England and Wales by the Criminal Procedure and Investigations Act 1996 did not extend to Northern Ireland.
233. The only other differences in text are as a result of references to Northern Ireland legislation equivalent to the legislation referred to in the sections for England and Wales.

### **Reconsideration**

#### ***Sections 169-171: Reconsideration***

234. *Sections 169-171* reproduce, with some changes, provision in the current legislation in Northern Ireland found at Articles 17 to 20 of the Proceeds of Crime (Northern Ireland) Order 1996. The sections enable a confiscation order to be made where none was made in the original proceedings, and a confiscation order, once made, to be increased.
235. Currently Article 20 of the 1996 Order allows a court, when reconsidering the benefit obtained by a defendant, to apply similar assumptions to those that appear in *section 163* of the Act in relation to property held by or transferred to a defendant on or after the date of conviction. Equally Article 20(4) provides that a court could take into account any payment or other reward received by a defendant on or after the date of conviction, original determination or current assessment but only where it represents the defendant's benefit from relevant criminal conduct or were received in connection with drug trafficking carried on or before the date of the court decision.
236. New provision has been required primarily to take account of the new role of the Assets Recovery Agency (ARA) in criminal confiscation. Either the prosecutor or the Director may apply to the court for a reconsideration of the assessment of benefit from criminal conduct under these sections.

237. The principle underlying *sections 19, 20, 172 and 173* is that reconsideration should only be applied for where new evidence comes to light. It is inappropriate for an authority to have evidence at the time of the earlier proceedings, yet not to apply for a confiscation order on that occasion but to apply for reconsideration at a later date. The provision included in these sections reflects this principle.

***Sections 172 & 173: Order made: reconsideration of available amount; Inadequacy of available amount: variation of order***

238. These sections correspond to those for England and Wales at *sections 22 and 23* save that the comparable references to other sections in this Act reflect the numbering adopted for this part of the Act.

***Section 174: Inadequacy of available amount: discharge of order***

239. As in England and Wales under current legislation, there is no provision for writing off a confiscation order. The same practical difficulties outlined elsewhere in the explanatory notes clearly equally apply in Northern Ireland. However there are no justices' chief executives in Northern Ireland nor are Crown Court orders enforced through the magistrates' courts. Accordingly the section is drafted to reflect the operational circumstances in Northern Ireland.
240. *Section 174* therefore provides that, the prosecutor enforcing a confiscation order, may apply to the Crown Court to 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. No similar provision is available 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 173*.

***Section 175: Small amount outstanding: discharge of order***

241. *Section 175* 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, a chief clerk may apply to the Crown Court for the order to be written off. In all other respects the section is the same as *section 25*.

***Section 176: Information***

242. *Section 176* contains provision ancillary to *sections 169-170*. Its purpose is to make it clear that *sections 166-168* on statements of information and the provision of information by the defendant apply to reconsideration proceedings as they apply to confiscation proceedings immediately following a conviction.

**Defendant absconds**

***Section 177-180: Absconded defendant convicted or committed; Defendant neither convicted nor acquitted; Variation and discharge of orders***

243. *Sections 177 to 180* are sections dealing with confiscation orders against absconders. Under the current legislation in Northern Ireland, the High Court may make a confiscation order against an absconder convicted of one or more offences to which the Proceeds of Crime (Northern Ireland) Order 1996 applies. Article 2(4) of the Order defines the Offences to which the Order applies. These include all indictable offences, i.e. any offence capable of being tried in the Crown Court. Certain terrorist offences are excluded and certain summary offences are included. The Act transfers jurisdiction to the Crown Court to make a confiscation order against an absconder convicted of, or charged with, any crime.

244. *Section 177* 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 confiscation before absconding. Either the prosecutor or the Director may apply to the Crown Court for a confiscation order to be made under this section.
245. The sections as currently drafted will apply in Northern Ireland in the same way as in England and Wales. These sections provide that none of the reconsideration sections, namely *sections 169-171*, apply where a person is still an absconder pre- or post-conviction and that they do all apply where an absconder returns. *Sections 179* and *180* reproduce existing ancillary provision for unconvicted absconders, except that the functions are transferred from the High Court to the Crown Court.

## **Appeals**

### ***Section 181: Appeal by prosecutor or Director***

246. These sections provide the prosecutor and the Director with new powers 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 grounds for appeal and the procedure for appeal, both to the Court of Appeal in Northern Ireland and the House of Lords, are essentially the same as those provided for elsewhere in the Act for England and Wales.

### ***Section 182: Court's powers on appeal***

247. *Section 182* provides the Court of Appeal in Northern Ireland with the same broad powers of disposal as that proposed for the criminal division of the Court of Appeal in England and Wales.

### ***Section 183: Appeal to House of Lords***

248. *Section 183* details the powers of disposal provided to the House of Lords. There is no difference in substance between Northern Ireland and the rest of the United Kingdom in the powers provided on appeals from the Crown Court.

## **Enforcement authority**

### ***Section 184: Enforcement authority***

249. *Section 184* sets out the same criteria for Northern Ireland as for England and Wales for the appointment of the Director to enforce a confiscation order. However the rationale for this provision in Northern Ireland is to ensure that the Director when operating in Northern Ireland can use the specific powers of receivership, provided in *section 202* of the Act, to assist him in the enforcement of confiscation orders.

## **Enforcement as fines etc**

### ***Section 185: Enforcement as fines etc***

250. *Section 185* explains how confiscation orders are to be enforced. As at present, the order will be treated as a Crown Court fine and enforced, as a Crown Court fine. Essentially the burden of enforcing such orders falls on the main prosecuting authority in Northern Ireland the Office of the Director for Public Prosecutions in Northern Ireland (DPP). Unlike in England and Wales, Crown Court fines in Northern Ireland are not enforced by or through the magistrates' court. This results in some differences between the two jurisdictions in the powers of enforcement available.
251. Accordingly, this section provides for confiscation orders to be enforced essentially in the same way as fines are enforced in Northern Ireland by referring to the relevant

legislation, the Criminal Justice Act (Northern Ireland) 1945. However, as in England and Wales one of the main features of this regime 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 size of the confiscation order. There is no substantial difference in the maximum default term applicable to a particular confiscation order between the various United Kingdom jurisdictions.

### ***Section 186: Director's application for enforcement***

252. As noted above, all Crown Court confiscation orders are enforced through the Crown Court in Northern Ireland. The relevant legislative provisions are contained at section 35 of the Criminal Justice Act (Northern Ireland) 1945. They include detailed provision on imprisonment in default of payment. This section provides for the Director to apply to the Crown court to trigger the default term on the same grounds as apply when the DPP is enforcing a confiscation order.

### ***Section 187: Provisions about imprisonment or detention***

253. *Section 187* contains general provision on imprisonment in default of a confiscation order, applicable when the default term is imposed by the Crown Court in response to an application either by the prosecutor or the Director. The provision reflects existing legislation in Northern Ireland. As in England and Wales, it provides that a term of imprisonment in default of a confiscation order 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 confiscation order from being enforced subsequently by other means.

### ***Section 188: Reconsideration etc: variation of prison term***

254. The Crown Court fixes the period of imprisonment in default by reference to the amount of the confiscation order. *Section 188* provides for Northern Ireland in the same way that *section 39* does for England and Wales, for the period of imprisonment in default to be varied where the court varies the amount of a confiscation order under certain provisions of the Act.
255. The overall purpose of the provision is to clarify what happens when the variation of a confiscation order changes the maximum period of imprisonment in default applicable to the order.

## **Restraint orders**

### ***Sections 189 to 191: Conditions for exercise of powers; Restraint orders; Application, discharge and variation***

256. *Sections 189 to 191* essentially reflect the provisions made in this Act at *sections 40 to 41* for England and Wales. The significant difference is that in Northern Ireland restraint orders will remain within the jurisdiction of the High Court. However 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 both orders may be made at the investigative stage, it is only possible to do so where charges are in the offing). The only other differences arise from references to Northern Ireland legislation. *Section 190* explains the nature and effect of a restraint order. *Section 191* lays down who may apply for a restraint order under the Act, and sets out criteria like those in the existing legislation for the variation or discharge of such orders. The Act provides that application may be made by the prosecutor, the Director and by an accredited financial investigator.

### ***Sections 192 & 193: Appeal to Court of Appeal; Appeal to House of Lords***

257. The Judicature Act (Northern Ireland) 1978 provides a general right of appeal against an order of the High Court of Northern Ireland and accordingly there is no need for this legislation to provide a specific right of appeal in relation to restraint orders. However, as it has been necessary to create a specific right of appeal in the Act for England and Wales in relation to restraint orders made (or not made) by the Crown Court, it was considered appropriate to make similar provision in Northern Ireland.

### ***Section 194: Seizure***

258. *Section 194* allows a constable or a customs officer to seize any property subject to a restraint order to prevent its removal from Northern Ireland.

### ***Section 195: Supplementary***

259. *Section 195* contains ancillary provision relating to restraint orders. It re-enacts provision from existing confiscation legislation. In Northern Ireland there are two distinct procedures for the registration of title concerning land. This is as a result of historical differences concerning the purchase and sale of land in Ireland. Accordingly title is required to be registered either in the Land Registry or the Registry of Deeds. The existing provision on restraint orders has the effect that where the prosecutor obtains a restraint order affecting land, an “inhibition” may be placed on the property at the Land Registry preventing its disposal.

## **Management Receivers**

### ***Sections 196 and 197: Appointment; Powers***

260. These sections follow the current legislation in enabling a management receiver to be appointed where a restraint order has been made. The role of a management receiver is to manage property to maintain its value until a confiscation order is made. However, unlike England and Wales the appointment will continue to be made by the High Court. *Section 197* sets out the same powers for a management receiver appointed by the court in Northern Ireland as *section 48* provides for England and Wales.

## **Enforcement receivers**

### ***Section 198: Appointment***

261. Where a confiscation order has been made, *section 198* empowers the Crown Court to appoint a person to act as enforcement receiver to help the prosecutor to enforce the confiscation order. This person may be the same as a management receiver appointed under *section 196* or not, as the case may be.

### ***Section 199: Powers***

262. *Section 199* sets out the powers that the court can confer on a receiver so appointed (for example, the power to seize and sell property).

## **Director’s receivers**

### ***Sections 200 & 201: Appointment; Powers***

263. These sections provide that, as in England and Wales, where the Director is enforcing a confiscation order, the sole enforcement tool will be the appointment of a receiver. *Section 201* 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 195*, on the application of the prosecutor.

## **Application of sums**

### ***Sections 202 & 203: Enforcement receivers; Sums received by chief clerk***

264. These sections largely replicate for Northern Ireland the provisions made for England and Wales at *sections 54* and *55* of the Act. There is no difference in substance but the text reflects the non-existence of justices' chief executives in Northern Ireland. *Section 202* specifies how any sums in the hands of receivers appointed by the Crown Court are to be disposed of after a confiscation order is made. Where a confiscation order is made, the sums are payable, subject to certain prior payments the Crown Court may order, to the chief clerk of the court where the confiscation order was made.
265. *Section 203* also sets out how a chief clerk must dispose of any monies received in satisfaction of a confiscation order. The provision is the same to that proposed for England and Wales at *section 55*.

### ***Sections 204 & 205: Sums received by Director's receivers or Director***

266. *Sections 204 & 205* make provision for Northern Ireland for the realisation of property where the Director is acting as an enforcement authority. *Section 204*, like *section 56*, details how sums received are to be dealt with by the Director's receiver. The provision is, with minor modification, the same as *section 202*. *Section 205* requires the Director to broadly deal with monies received in the same way as the chief clerk under *section 203*.

## **Restrictions**

### ***Sections 206 to 208: Restraint orders; Enforcement receivers; Director's receivers***

267. *Sections 206* to *208* essentially reflect the provisions made in this Act at *sections 58* to *60* for England and Wales. The only significant differences between the changes proposed for England and Wales and those in Northern Ireland is that *section 206* reflects that in Northern Ireland restraint orders will remain within the jurisdiction of the High Court. Further there is no provision made regarding the remedy of distress as that remedy has effectively ceased to be available in Northern Ireland.

## **Receivers: further provisions**

### ***Sections 209 to 214 Protection; Further applications; Discharge and variation***

268. *Sections 209* to *214* essentially reflect the provisions made in this Act at *sections 61* to *64* for England and Wales. Again *sections 210* to *212* reflect the retained power for the High Court to appoint a receiver when exercising its jurisdiction to make a restraint order.

### ***Sections 213 & 214: Appeal to Court of Appeal; Appeal to House of Lords***

269. These sections enable persons who apply for, or are affected by, an order either of the High Court to appoint a management receiver or of the Crown Court to appoint an enforcement receiver to appeal to the Court of Appeal in respect of the order. *Section 214* provides for the Court of Appeal's decision under *section 213* to be further appealed to the House of Lords. The provision is the same in substance as that provided for at *sections 65* and *66* for England and Wales.

## **Seized money**

### ***Section 215: seized money***

270. *Section 215* 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 chief clerk of the relevant Crown Court in satisfaction of a confiscation order. The



power is only available where the prosecutor makes such application and a confiscation order has been made, time to pay has expired and the money is subject to a restraint order. The provision is made for the same purposes set out at [section 67](#).

## **Financial Investigators**

### ***Section 216: Applications and Appeals***

271. [Section 216](#) sets out the same general rules for applications for restraint and receivership orders made by accredited financial investigators in Northern Ireland as appears at [section 68](#) for financial investigators operating in England and Wales.

## **Exercise of powers**

### ***Section 217: Powers of court and receiver***

259. [Section 217](#) makes provision about how the High Court and the Crown Court or receivers appointed by them are to exercise their powers. It includes the same new provisions that are set out in [section 69](#) of this Act for England and Wales and the detail of this section is set out in the notes to that section.

## **Committal**

### ***Section 218: Committal by magistrates' court***

272. [Section 218](#) is to be read in conjunction with [section 156\(2\)\(b\)](#). Its effect is that a person may be committed to the Crown Court for confiscation 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 for confiscation. The power to have a person committed for confiscation is granted only to the prosecutor, not to the Director. In practice, the prosecutor and the Director may consult in such cases, and the Director may assume responsibility for the subsequent confiscation proceedings in the Crown Court.
273. There is one distinct difference between this section and its equivalent section for England and Wales, [section 70](#). It relates to the existing power of a magistrates' court in England and Wales to commit a defendant who is convicted of an offence which is triable either way to the Crown Court for sentence. There is no comparable power in Northern Ireland.

### ***Section 219: sentencing by Crown Court***

274. [Section 219](#) provides that, where a person is committed to the Crown Court for confiscation, the Crown Court will also assume responsibility for the sentencing process. The principle applied is the same as proposed for England and Wales. However, in light of the notes above for [section 218](#), the Crown Court is restricted to the sentencing powers available to the magistrates' court when dealing with a defendant committed for a confiscation hearing from that court.

## **Compensation**

### ***Section 220: serious default***

275. [Section 220](#) 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 on the same grounds as those proposed at [section 72](#) for England and Wales. [Section 220](#) is largely based on existing legislation except that it has been extended to cover the situation where an investigation is started but proceedings are never brought. The section also refers to the Director of Public Prosecutions for Northern Ireland whose office fulfils the same role as the Crown Prosecution Service in England and Wales.

***Sections 221 & 222: Order varied or discharged; Enforcement abroad***

276. *Sections 221 and 222* replicate the provisions for England and Wales contained in *sections 73 and 74*.

**Interpretation**

***Section 223: Criminal lifestyle***

277. This provision is crucial to the operation of the Act and ensures that offenders before the courts in Northern Ireland will be dealt with in exactly the same way in Northern Ireland as in England and Wales. The section replicates the provisions made in *section 75* and the details of the section are set out in the notes to that section. The provision is similar to that which currently exists in Article 9 of the Proceeds of Crime (Northern Ireland) Order 1996.

***Section 224: Conduct and benefit***

278. *Section 224* defines criminal conduct as any conduct constituting an offence in Northern Ireland or (if it took place elsewhere in the United Kingdom or abroad) would constitute an offence if it occurred in Northern Ireland. The restriction of the scope of confiscation under existing legislation to drug trafficking, other indictable offences and specified summary offences is thus abolished. Under the Act, the Crown Court, which makes a confiscation order, will need to consider conduct solely by reference to the law of Northern Ireland. *Section 224(2)* and *(3)* also defines “general criminal conduct” and “particular criminal conduct” (for which, see the note on *section 76*).
279. *Subsection (4)* also provides for Northern Ireland the same definition of “benefit from conduct” proposed at *section 76(4)*. This will replace the similar definition of benefit provided by Article 2(6) of the Proceeds of Crime (Northern Ireland) Order 1996.

***Sections 225 & 226: Tainted gifts; Gifts and their recipients***

280. The existing legislation enables gifts by the defendant to other persons to be recovered in satisfaction of a 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 in Northern Ireland, a tainted gift is described as a “gift caught by this Order”. *Section 225* aligns the different tainted gift schemes which currently apply depending on whether the offence was drug related or not. 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 will be caught, together with any gift at any time out of the proceeds of crime. This definition will be relevant both at the confiscation hearing and for the purposes of enforcement. However, 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 will be relevant at the confiscation hearing and for the purposes of enforcement. The provision is drafted so that it will apply in Northern Ireland as the similar provisions in Part 2 apply in England and Wales.

***Sections 227-229: Value: the basic rule; Value of property obtained from conduct; Value of tainted gifts***

281. *Sections 227-229* 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, apart from referring to Northern Ireland legislation where appropriate, replicate the provisions proposed at *sections 79 to 81*.

***Sections 230-235: Free property; Realisable property; Property: general provisions; Proceedings; Applications; Confiscation orders***

282. These definitional sections essentially reproduce for Northern Ireland the same definitions as those contained at [sections 82 to 87](#) of this Act. The only differences in text are a result of references to the equivalent Northern Ireland legislation or comparable provisions of this Act.

***Section 239: other interpretative provisions***

283. This section essentially applies in Northern Ireland as the comparable section in Part 2 ([section 88](#)) applies in England and Wales. The textual differences reflect the numbering of the sections of this Part of the Act and the fact that the Powers of Criminal Courts (Sentencing) Act 2000 does not extend to Northern Ireland.

**General**

***Sections 237 & 238: Procedure on appeal to the Court of Appeal; Procedure on appeal to the House of Lords***

284. These sections, as in England and Wales, establish the general principle that the Court of Appeal's leave to appeal is required. Both sections enable the Secretary of State to make an order in relation to appeals to either the Court of Appeal or the House of Lords under this part containing provision corresponding to any provisions of the Criminal Appeal (Northern Ireland) Act 1980. An order of this kind will cover routine matters such as the procedures for obtaining leave to appeal and transcripts.

***Section 239: Crown Court Rules***

285. At present, receivership is a High Court function and the applicable court rules are found in the Rules of the Supreme Court (Northern Ireland) 1980. As some of these functions will in future be dealt with by the Crown Court, (i.e. where the Director is appointed as the enforcement authority) Crown Court rules will be required. [Section 239](#) puts it beyond doubt that proceedings concerning receivers appointed by the Crown Court under this part of the Act may in future be dealt with in Crown Court Rules.

***Schedule 5: Lifestyle offences: Northern Ireland***

286. [Schedule 5](#) should be read in conjunction with [sections 156](#) and [223](#). 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.

**Part 5: Civil Recovery of the Proceeds etc. of Unlawful Conduct**

***Chapter 1: Introductory***

***Section 240: General purpose of this Part***

287. [Subsection \(1\)](#) explains that this Part of the Act has two purposes. One is to enable the enforcement authority to bring civil proceedings in the High Court or Court of Session to recover property that is or represents property obtained through unlawful conduct (civil recovery). This is an entirely new right of action, and is reserved to the enforcement authority. The civil recovery scheme is set out in [sections 243](#) to [288](#). [Section 316\(1\)](#) explains that the enforcement authority means the Director of the ARA, except in Scotland where it means the Scottish Ministers. Except as specifically provided by the sections, court proceedings in the High Court will be governed in the usual way in England and Wales by the Civil Procedure Rules or in Northern Ireland by similar rules of court referred to as Rules of the Supreme Court; and in the Court of Session in Scotland by Petition Rules.

288. The second purpose of Part 5 is to enable cash which is or represents property obtained through unlawful conduct, or is intended to be used in such conduct, to be forfeited in civil proceedings before a magistrates' court or (in Scotland) the sheriff (cash forfeiture). This power replaces, with an extended scheme, the existing provision, in Part II of the 1994 Drug Trafficking Act, for the forfeiture of cash discovered on export or import which is suspected to be derived from or intended for use in drug trafficking. The cash forfeiture scheme is set out in [sections 289 to 303](#).
289. The key components introduced in this section are individually explained in later sections. The meaning of 'property' is explained in [section 316\(4\)](#); 'unlawful conduct' at [section 241](#); 'property obtained through unlawful conduct' in [section 242](#); and 'recoverable property' at [sections 304 to 310](#).
290. *Subsection (2)* makes clear that civil recovery and cash forfeiture proceedings may be brought whether or not proceedings have been brought for an offence in connection with the property. Cases where criminal proceedings have not been brought would include cases where there are insufficient grounds for prosecution, or where the person suspected of the offence is outside the jurisdiction or has died. Cases where criminal proceedings have been brought may include cases where a defendant has been acquitted, or where a conviction did not result in a confiscation order. However, [section 308](#) makes clear that property is not recoverable if it has been taken into account in deciding the amount to be paid under a confiscation order.

#### ***Section 241: "Unlawful conduct"***

291. *Subsection (1)* defines conduct occurring in the UK as unlawful if it is unlawful under the criminal law of the part of the UK in which it occurred.
292. *Subsection (2)* extends the definition of 'unlawful conduct' to include conduct which occurs outside the United Kingdom and is unlawful under the criminal law of that country, and would be unlawful if it occurred in any part of the United Kingdom. The effect of this provision is to enable property which has been obtained through conduct abroad to be recovered, or cash which has been so obtained to be forfeited, if the conduct was unlawful where it took place and would be unlawful in at least one part of the United Kingdom; and to enable cash which is intended for use abroad to be forfeited if the conduct for which it is intended would be unlawful both in at least one part of the United Kingdom and in the country where it was intended to occur.
293. *Subsection (3)* makes clear that the test the court or sheriff must use in determining whether matters alleged to constitute unlawful conduct have occurred or whether any person intended to use cash for unlawful conduct is the balance of probabilities. That is the normal standard of proof applicable in civil proceedings. The criminal standard of proof, under which matters must be proved beyond reasonable doubt, does not therefore apply in civil recovery or cash forfeiture proceedings.

#### ***Section 242: "Property obtained through unlawful conduct"***

294. *Subsection (1)* explains what it means to obtain property through unlawful conduct. A person will obtain property through unlawful conduct if he obtains it:
- by the conduct – for example by stealing it, or by obtaining it by means of dealing in illicit drugs, or
  - in return for the conduct – for example by being paid to commit murder or arson, or taking a bribe to give false evidence or corruptly award a contract.
295. The purpose of *subsection (2)(a)* is to ensure that property counts as having been obtained through unlawful conduct regardless of any investment in that conduct. So if a person buys illicit drugs with honestly come by money, and sells them at a profit, the whole of the proceeds of the sale will count as having been obtained through unlawful conduct, and not just the profit.

296. *Subsection (2)(b)* provides that it is not necessary to show that property was obtained through a particular kind of unlawful conduct, so long as it can be shown to have been obtained through unlawful conduct of one kind or another. So it will not matter, for example, that it cannot be established whether certain funds are attributable to drug dealing, money laundering, brothel-keeping or other unlawful activities, provided it can be shown that they are attributable to one or other of these in the alternative, or perhaps some combination.

## Chapter 2: Civil recovery in the High Court or Court of Session

### *Proceedings for recovery orders*

#### **Section 243: Proceedings for recovery orders in England and Wales or Northern Ireland**

297. *Section 243* explains where court proceedings for civil recovery in England, Wales and Northern Ireland are to take place and how they are to be initiated.
298. Under *subsection (1)* the enforcement authority (for England, Wales and Northern Ireland this means the Director of the ARA – see *section 316(1)*) may take proceedings against any person who he thinks holds recoverable property. ‘Recoverable property’ is property that has been obtained through unlawful conduct or property that represents such property. Detailed provisions regarding recoverable property are set out at *sections 304 to 310* and *sections 305 to 307* define what is meant by representative property. Civil recovery proceedings are to take place in the High Court.
299. As with normal civil procedure, the High Court will issue a claim form in respect of the property at the request of the enforcement authority. Under *subsection (2)*, the enforcement authority must serve the claim form on the person who it thinks holds the recoverable property (the respondent) and, unless the court dispenses with service, on any person who holds associated property which the enforcement authority wishes to be subject to a recovery action. Holding property includes holding an interest in property – see *section 316(5) to (7)*. Associated property is defined in *section 245* and the circumstances in which it may be the subject of a recovery order are set out in *sections 270-272*. Under *subsection (3)* the claim form must either specify the property to which it relates or describe it in general terms, and state whether it is alleged to be recoverable property or associated property.

#### **Section 244: Proceedings for recovery orders in Scotland**

300. *Section 244* provides that proceedings for civil recovery in Scotland will be taken by the Scottish Ministers (the enforcement authority) in the Court of Session. An application will be made by the Scottish Ministers to the Court of Session in respect of the property. The Scottish Ministers must serve the application on the respondent (the person who holds the property) and, unless the court dispenses with service, on any person who holds associated property which the Scottish Ministers wish to be subject to a recovery action. The application must either specify the property to which it relates or describe it in general terms, and state whether it is alleged to be recoverable property or associated property.

#### **Section 245: "Associated property"**

301. Sometimes only part of a property may be recoverable, or there may be several interests in a property, some of which are not recoverable. The non-recoverable part of or interest in the property is described as ‘associated property.’
302. *Subsection (1)* defines associated property. In *paragraph (a)* the associated property might be a tenancy in a recoverable freehold. In *paragraph (b)*, where a lease in a freehold block of flats had been purchased with recoverable property, another lease in the same block bought with legitimate money would be associated property. In *paragraphs (c) and (d)* where two people buy a car together, one with recoverable cash

and one with legitimate cash, the share of the person who bought with legitimate cash is the associated property. In *paragraph (e)*, where a painting is recoverable property but it had been framed using legitimate money, the frame would be associated property.

303. Associated property may be held by a third party or by the respondent, for example where the respondent mixes recoverable property with his own legitimate property (see [section 306](#)).
304. Where the recoverable property consists of rights under a pension scheme, however, no property is to be treated as associated with that recoverable property. This has the effect that the non-recoverable interests in a pension fund, i.e. the interests of all those other than the respondent who have interests in the pension fund, cannot be made the subject of an interim receiving order or a recovery order.

## **Interim receiving orders (England and Wales and Northern Ireland)**

### ***Section 246: Application for interim receiving order***

305. [Sections 246](#) to [255](#) make provision for ‘interim receiving orders’ in England, Wales and Northern Ireland; equivalent provisions for Scotland are at [sections 256](#) to [265](#). Under *subsection (1)* interim receivership procedure may – but need not always – form the preliminary stage of civil recovery procedure.
306. An ‘interim receiving order’ is, as *subsection (2)* explains, a court order for:
- the detention, custody or preservation of property which is claimed to be recoverable property or associated property, and
  - the appointment of an interim receiver in respect of that property.
307. Under *subsection (1)*, the first step in the procedure is for the Director to make an application to the High Court for an interim receiving order. The Director may do this even though he has not yet issued the claim form. And he may do so without putting any interested party on notice that he is doing so, if giving notice would prejudice the Director’s right to recover the property (*subsection (3)*). It may be necessary to act swiftly and without alerting potential parties, for example, to prevent property from being concealed or disposed of.
308. The court may make an interim receiving order only if the conditions set out in *subsections (5)* and *(6)* are satisfied. The Director must satisfy the court that:
- there is a ‘good arguable case’ that the property in question is either recoverable or associated property (the ‘good arguable case’ test is already used by the civil courts for applications for injunctions to freeze disputed property during litigation so that ultimate enforcement of judgment cannot be frustrated. Freezing injunctions were formerly known as ‘*Mareva*’ injunctions (and this is still the appropriate term for such orders in Northern Ireland)), and
  - if the property in relation to which the order is sought includes associated property, he has either identified or has taken all reasonable steps to establish the identities of the person(s) holding that property (if the interim receiving order is made or the proceedings otherwise go ahead, the Director will have to put these persons immediately on notice under [section 243\(2\)](#)).
309. The Director must also, under *subsection (7)*, nominate someone suitably qualified to act as interim receiver. But the Director may not nominate a member of his own staff. This is because the interim receiver on appointment becomes an officer of the court and has investigatory duties (see [section 247\(1\)](#) and [\(2\)](#)) and it is thought appropriate that the interim receiver should be independent of the Director, who is a party to the litigation. The characteristics of an interim receiving order are spelled out more fully at [sections 247](#) to [255](#), but under *subsection (8)* these sections do not limit the extent

of the power to make the order. *Subsection (8)* has been included to make clear that the High Court retains the inherent discretion which it has in civil litigation to make appropriate orders when making interlocutory injunctions.

### ***Section 247: Functions of interim receiver***

310. The detailed functions of an interim receiver will be conferred by the High Court's order itself. The Court's discretion to confer whatever powers it considers appropriate to the circumstances of an individual case are at large, provided always they are for the purposes set out at *subsections (1)* and *(2)*, i.e. the detention, custody or preservation of the property or establishing whether it is recoverable or associated property or whether other property is recoverable property in relation to the same unlawful conduct.
311. *Subsection (1)(a)* introduces *Schedule 6*, which makes explicit mention of some of the more significant powers that the court may choose to confer on an interim receiver. An explanatory note about *Schedule 6* is included below.
312. Although the High Court has a wide discretion over the powers and functions that may be conferred on an interim receiver, there are some duties under which he must always be placed. *Subsection (2)* sets these out. He will always be required to take the necessary steps to establish:
- whether in his view the property is to any extent recoverable or associated property, and
  - whether there is any other property which is recoverable in relation to the same unlawful conduct and if so who holds it.
313. Up until the interim receiving order or the issuing of the claim form (whichever comes first), the Director has access to the civil investigation powers set out in Part 8. Thereafter, the Director ceases to have access to these powers and the duty of taking whatever further steps are needed to establish the facts about the property is placed upon the interim receiver acting under the Court's direction.
314. *Subsection (3)* provides legal protection for the interim receiver if he mistakenly, but honestly and reasonably, deals with property that is not the property specified in the order. He will have immunity from any legal claims in respect of loss or damage caused by such dealing, unless it can be shown that it was caused by his negligence.

### ***Schedule 6: Powers of interim receiver or administrator***

315. *Schedule 6* makes explicit mention of some of the more significant powers which the High Court (or in Scotland the Court of Session) may choose to confer on an interim receiver or interim administrator. These include powers to seize the relevant property (*paragraph 1*), and to obtain information about it and require persons to answer questions, irrespective of any restrictions on the disclosure of information which would otherwise apply (*paragraph 2*). Self-incrimination is therefore to be no answer to the requirement to answer questions, but evidence so obtained cannot be used in any prosecution of the person who provided it (other than in certain restricted circumstances, for example, a prosecution for perjury). Use of the evidence against that person is, however, permissible in civil recovery proceedings. The interim receiver or administrator may be given specified powers of entry, search and seizure (*paragraph 3*) and powers to oblige persons to assist him in the exercise of those powers (*paragraph 4*). *Paragraph 4* also provides that an order made under *paragraphs 2* and *3* must make provision in respect of legal professional privilege (in Scotland legal privilege). Under *paragraph 5* an interim receiver or interim administrator may also be given powers to manage property which include:
- selling perishable or depreciating property,

- where the property in question comprises a trade or business, carrying on that trade or business, and
- incurring capital expenditure in respect of the property.

### ***Section 248: Registration***

316. The main purpose of *section 248* is to ensure that where an interim receiving 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.

### ***Section 249: Registration (Northern Ireland)***

317. *Section 249* makes similar provision to *section 248* in relation to Northern Ireland.

### ***Section 250: Duties of respondent etc.***

318. *Section 250* provides for certain duties to be placed on a person whose property is subject to an interim receiving order. The order may require the person to bring the property, or any documents relating to the property, to a place specified by the interim receiver or to the custody of the receiver. This could also apply where the property or documents are located outside the part of the United Kingdom where the order is made. The order may require the person to do anything the interim receiver reasonably requires him to do for the preservation of the property.

### ***Section 251: Supervision of interim receiver and variation of order***

319. An interim receiver, a respondent, any party to the proceedings and anyone else affected by the receiver's actions (this includes the Director) will be able to ask the court to clarify the receiver's powers. All parties and any persons who may be interested will be able to put their views to the court before it acts. There is also power for the court to vary or set aside the interim receiving order. For example, the court may be asked by the interim receiver to extend the interim receiving order to additional property in respect of which evidence has come to light. Here too, the court must give an opportunity to be heard to the parties and any persons who may be affected by the court's decision.

### ***Section 252: Restrictions on dealing etc. with property***

320. *Subsection (1)* provides that the interim receiving order must prevent any dealing with the property to which it applies, subject to any exclusions which may be made under the rest of the section. This is to prevent the property being dissipated pending a resolution of the civil recovery case. 'Dealing' is explained in *section 316(1)* as including disposing of the property, taking possession of it or removing it from the United Kingdom. A person who has notice of the order and contravenes it will be liable to be proceeded against for contempt of court.
321. *Subsection (2)* states that exclusions may be made either when the order is made or, later, by variation. *Subsection (3)* states that an exclusion may in particular provide for property to be used for meeting any person's reasonable living expenses or to carry on a trade, business, profession or occupation. Living expenses would be likely to include the living expenses of dependants. But the court's discretion to release property is limited by *subsections (4)* (no release of property to meet legal expenses arising from civil recovery) and *(6)* (the court must ensure that the Director's "right to recover" the property (defined at *section 316(8)*) is not be unduly prejudiced). Persons involved in civil recovery proceedings will be able to apply to the Community Legal Service scheme, or the Legal Aid scheme which applies in Northern Ireland, for their legal costs, or of course to use any unfrozen assets they may have available, so there will be no need for them to draw from the property subject to the order.



**Section 253: Restriction on proceedings and remedies**

322. This section enables the existence of an interim receiving order to have an effect on collateral legal proceedings affecting the property in question. *Subsection (1)* allows the court which has made the order to stay any other legal process, including court proceedings, in respect of the property to which the order applies; and specifies that no distress may be levied against that property other than with the leave of the court.
323. *Subsection (2)* allows any court in which proceedings are pending in respect of the property to stay them, or impose terms on their continuation. Under *subsection (3)*, a landlord may not exercise a right of forfeiture by peaceable re-entry on a property to which an order applies, other than with the leave of the court that made the interim receiving order. Before exercising any of these powers, the court must give an opportunity to be heard to the interim receiver (if appointed), the parties to the proceedings and any person who may be affected by the court's decision (*subsection (4)*).

**Section 254: Exclusion of property which is not recoverable etc.**

324. The court has the power to vary an interim receiving order at any time (*section 251(3)*). This section makes specific provision for variations of interim receiving orders to have the effect of excluding property from the proceedings altogether. The court may decide before the final trial of the action, for example on an application by an interested person or a report by an interim receiver (see *section 255*), that some of the property to which the order applies is neither recoverable nor associated property. The court must in that event exclude this property from the terms of the interim receiving order. The court may also release associated property if satisfied that it may be excluded without materially affecting the right of the Director to recover in respect of the remainder. If so, it may vary the order accordingly and the excluded property will be released, with or without conditions.

**Section 255: Reporting**

325. An interim receiving order must, under this section, require an interim receiver to take a number of steps to keep the Director and the court informed. He must report as soon as practicable if he forms the opinion that:
- any property to which the order applies which is claimed to be recoverable property is not in fact recoverable, or
  - any property to which the order applies which is claimed to be associated property is not in fact associated property, or
  - any property not subject to the order is in fact recoverable by virtue of the same unlawful conduct or is associated property, or
  - any property to which the order applies is held by someone different to the person identified on the claim form.
326. All these possibilities are matters to which the interim receiver is required to be alert under the provisions of *section 247(2)*. He must also report any other material change of circumstances. And he must finally make a formal report of his findings to the court, and serve copies of it on all those who may be affected by it. This report may comprise a comprehensive account of the nature and origins of, and interests in, the property in question. It will be capable of being used as a basis to establish agreed facts and to identify disputed matters that will fall to be resolved at the final hearing.

## **Interim administration orders (Scotland)**

### ***Section 256: Application for interim administration order***

327. *Sections 256 to 265* make provision for ‘interim administration orders’ in Scotland; interim administration procedure may – but need not always – form the preliminary stage of civil recovery procedure.

328. An ‘interim administration order’ is, as *subsection (2)* explains, a court order for:

- the detention, custody or preservation of property which is claimed to be recoverable property or associated property, and
- the appointment of an interim administrator in respect of that property.

Its characteristics are spelled out more fully at *sections 257 to 265*, though *undersubsection (8)* these sections do not limit the extent of the power to make the order.

329. Under *subsection (1)*, the first step in the procedure is for the Scottish Ministers to make an application to the Court of Session for an interim administration order. The Scottish Ministers may do this even though they have not yet served the application which marks the start of court proceedings. And they may do so without putting any interested party on notice that they are doing so if giving notice would prejudice the Scottish Ministers’ right to recover the property (*subsection (3)*). It may be necessary to act swiftly and without alerting potential parties, for example, to prevent property from being concealed or disposed of.

330. *Subsections (5) and (6)* set out the conditions which must be satisfied before the court can make an interim administration order. The Scottish Ministers must satisfy the court that:

- there is a ‘probable cause of action’, that the property in question is either recoverable or associated property, and
- if the property in relation to which the order is sought includes associated property, the Scottish Ministers have taken all reasonable steps to establish the identities of everyone who holds the property (if the order is made or the proceedings otherwise go ahead, the Scottish Ministers will have to put these persons immediately on notice of the action under *section 244(2)*).

331. The Scottish Ministers must also, under *subsection (7)*, nominate someone suitable to act as interim administrator, but the nominee may not be a member of staff of the Scottish administration. The interim administrator on appointment becomes an officer of the court and his functions (set out in *section 257*) require him to act to secure the detention, custody or preservation of the property pending resolution of its fate.

### ***Section 257: Functions of interim administrator***

332. The detailed functions of an interim administrator will be conferred by the court’s order itself. The court’s discretion to confer whatever powers it considers appropriate to the circumstances of an individual case are at large, provided always they are for the purpose set out at *subsections (1) and (2)*.

333. Up until the interim administration order, or the raising of proceedings (whichever comes first), the Scottish Ministers have access to the civil investigation powers set out in Part 8. Thereafter, they cease to have access to these powers and the duty of taking whatever further steps are needed to establish the facts about the property is placed upon the interim administrator acting under the court’s direction.

334. *Schedule 6*, which is introduced by *subsection (1)(a)*, makes explicit mention of some of the more significant powers that the court may choose to confer on an interim administrator. These are explained above.

335. Although the court has a wide discretion over the powers and functions which may be conferred on an interim administrator, there are some duties under which he must always be placed. *Subsection (2)* sets these out. He will always be required to take the necessary steps to establish:
- whether in his view the property is to any extent recoverable or associated property, and
  - whether there is any other property which is recoverable in relation to the same unlawful conduct.
336. *Subsection (3)* provides legal protection for the interim administrator if he mistakenly, but honestly and reasonably, deals with property which is not the property specified in the order. He will have immunity from any legal claims in respect of loss or damage caused by such dealing, unless it can be shown that it was caused by his negligence.

### ***Section 258: Inhibition of property affected by order***

337. *Section 258* provides that the Scottish Ministers may apply to the Court of Session for a warrant of inhibition against any person named in an interim administration order. If granted, the warrant would inhibit that person from dealing with the specified property until such time as the court determined the outcome of the civil recovery case. The warrant would be registered in the register of inhibitions and adjudications thus alerting the public to the inhibition.

### ***Section 259: Duties of respondent etc***

338. *Section 259* provides for certain duties to be placed on a person whose property is subject to an interim administration order. The order may require the person to bring the property, or any documents relating to the property, to a place specified by the interim administrator or to the custody of the administrator. This would apply for example where the property or documents are located outside Scotland.

### ***Section 260: Supervision of interim administrator and variation of order***

339. An interim administrator, a respondent, any party to the proceedings and anyone else affected by the administrator's actions (including the Scottish Ministers) will be able to ask the court to clarify the administrator's powers. All parties, and any persons who may be interested, will be able to put their views to the court before it acts. There is also power for the court to vary or set aside the interim administration order. Before it does so, it must give an opportunity to be heard to the parties and any persons who may be affected by the court's decision.

### ***Section 261: Restrictions on dealing etc. with property***

340. *Subsection (1)* provides that the interim administration order must prevent any dealing with the property to which it applies, subject to any exclusions which may be made under the rest of the section. This is to prevent the property being dissipated, pending a resolution of the civil recovery case. 'Dealing' is explained in *section 316(1)* as including disposing of the property, taking possession of it or removing it from the United Kingdom. A person who disobeys these provisions will be in contempt of court.
341. *Subsection (2)* states that exclusions may be made either when the order is made or by variation. *Subsection (3)* states that an exclusion may in particular provide for property to be used for meeting any person's reasonable living expenses or to carry on a trade, business, profession or occupation. Living expenses would be likely to include the living expenses of dependants. But the court's discretion to release this property is limited by *subsections (4)* and *(6)*; the legal expenses of a person involved in proceedings may be met through the legal aid scheme, so there will be no need for them to draw from the property subject to the order.

***Section 262: Restriction on proceedings and remedies***

342. This section enables the existence of an interim administration order to have an effect on contemporaneous legal proceedings affecting the property in question. *Subsection (1)* allows the court that has made the order to sist any other legal process, including court proceedings, in respect of the property to which the order applies.
343. *Subsection (2)* allows any court in which proceedings are pending in respect of the property to sist them, or impose terms on their continuation. Before exercising any of these powers, the court must give an opportunity to be heard to the interim administrator (if appointed), the parties to the proceedings or any person who may be affected by the court's decision (*subsection (3)*).

***Section 263: Exclusion of property which is not recoverable etc.***

344. The court has the power to vary an interim administration order at any time (*section 260(3)*). This section makes specific provision for variations of interim administration orders to have the effect of excluding property from the proceedings altogether. The court may decide before the final hearing of the action, for example on an application by a person who may be affected by the court's order or a report by an interim administrator (see *section 264*), that some of the property to which the order applies is neither recoverable nor associated property. The court must exclude this property from the terms of the interim administration order. The court may also release associated property, if satisfied that it may be excluded without materially affecting the claims of the Scottish Ministers in respect of the remainder. If so, it may vary the order accordingly and the excluded property will be released, with or without conditions.

***Section 264: Reporting***

345. An interim administration order must, under this section, require an interim administrator to take a number of steps to keep the Scottish Ministers and the court informed. He must report as soon as practicable if he forms the opinion that:
- any property to which the order applies which is claimed to be recoverable property is not in fact recoverable, or
  - any property to which the order applies which is claimed to be associated property is not in fact associated property, or
  - any property not subject to the order is in fact recoverable by virtue of the same unlawful conduct or is associated property, or
  - any property to which the order applies is held by someone different to the person identified on the claim form.
346. All these possibilities are matters to which the interim administrator is required to be alert under the provisions of *section 257(2)*. He must also report any other material change of circumstances. And he must make a report of his findings to the court, and serve copies of it on all those who may be affected by it. This report may comprise a comprehensive account of the nature and origins of, and interests in, the property in question. It will be capable of being used as a basis to establish agreed facts and to identify disputed matters that will fall to be resolved at the final hearing.

***Section 265: Arrestment of property affected by interim administration order***

347. *Section 265* enables the Scottish Ministers or the interim administrator to apply to the Court of Session for an order to arrest (or attach) moveable property which is subject to an interim administration order but is in the hands of third parties. An example of this would be a person's bank account. The warrant of arrestment would enable the bank account and other assets to be frozen thus preventing their being moved or dispersed

before a final recovery order was made vesting the property in the hands of the trustee for civil recovery.

## **Vesting and realisation of recoverable property**

### ***Section 266: Recovery orders***

348. This section sets out what the court must do if it finds any property to be recoverable. Under *subsection (1)*, if the court finds, on the trial of a civil recovery action or after a proof in Scotland, that any property is recoverable, it must order its recovery. Under *subsection (2)* a recovery order vests the recovered property in the trustee for civil recovery, whose appointment and functions are set out at *section 267*. The making of the order is subject to the limitations set out in *subsections (3), (4), (5), (6) and (8)*, and to *sections 270 to 278*. There are also certain exemptions set out in *sections 281 and 282*.
349. Under *subsection (3)* a court may not make any provision in a recovery order that would contravene the European Convention on Human Rights. Under *subsections (3) to (5)* the court may not make a recovery order if all of the following conditions apply and it would not be just and equitable to make the recovery order. The conditions for England, Wales and Northern Ireland are:
- the respondent obtained the recoverable property in good faith;
  - before or after the respondent obtained the property, without knowing that the property was recoverable, he took action which he would not have taken if he had not anticipated receiving or had not received the property (for example, he spends his own money as a result of receiving the recoverable property);
  - the making of a recovery order would be detrimental to the respondent, due to the action he had taken in relation to the property.

*Subsection (5)* makes similar provision in relation to Scotland.

350. In deciding whether it would be just and equitable to make provision in a recovery order in such cases, the court must weigh the detriment to the respondent if the provision were to be made against the interests of the enforcement authority, as well as any other factors that would go to the justice and equity of the case (*Subsection (6)*).
351. The recovery order may sever the recoverable element of the property from the remainder if recoverable property and associated property subsist in the same property, for example, where property is mixed under *section 306 (subsection (7))*. The order may also impose conditions on how the trustee may deal with the property (*subsection (8)*).

### ***Section 267: Functions of the trustee for civil recovery***

352. Where it makes a recovery order, or a consent order under *section 276*, the court must appoint a trustee for civil recovery. The enforcement authority is required by *subsection (2)* to nominate someone suitably qualified, and may do so from its own staff (this is because unlike the interim receiver or interim administrator the trustee acts in the interests of the enforcement authority following the court's judgment in favour of that authority and has no investigative functions). *Subsection (3)* places the trustee under a duty to secure the property which will be vested in him, and to liquidate non-cash assets for the benefit of the enforcement authority. *Subsection (4)* states that the trustee acts as such on behalf of the enforcement authority and on its instructions. *Subsection (5)* places the trustee under a duty to maximise the amount realisable from the property vested in him. These provisions together make clear that the trustee must approach his functions with a view to giving the fullest effect to the enforcement of the authority's right of recovery.

### ***Schedule 7: Powers of trustee for civil recovery***

353. *Schedule 7*, which is introduced by *section 267(6)*, sets out the principal and ancillary powers of the trustee for civil recovery.

### ***Section 268: Recording of recovery order (Scotland)***

354. Where a recovery order relates to heritable property in Scotland, *section 268* places the clerk of the court under a duty to immediately send a copy of the order to the registrar of inhibitions and adjudications for recording in the register. This gives a clear public notice that the recoverable property now vests in the trustee for civil recovery and prohibits any other person having a claim on the property.

### ***Section 269: Rights of pre-emption, etc***

355. *Subsection (1)* establishes that a recovery order will override any provisions that would otherwise prevent, penalise or restrict the vesting of the property in the trustee for civil recovery. Under *subsection (2)*, rights relating to the property such as those specified here do not automatically come into effect or become exercisable as a result of the vesting of the property. However, under *subsection (3)*, following a recovery order, any such rights will continue to have effect when the property is vested as if no transfer of property has taken place. This applies to any interests created by the recovery order (see *section 272(3)(b)*), as well as any interests transferred by the order. So a person who has the first right to buy property when it changes hands will not be able to exercise his right to prevent the vesting of recoverable property in the trustee by the recovery order. But he will have first right to buy the property when the trustee, or other person in whom the recovery order vests it, comes to sell it on (*paragraph 1 of Schedule 7* gives the trustee the power of sale). Under *subsection (4)*, the protections provided for any of the rights referred to in *subsections (2)* and *(3)* do not apply if the right itself is the subject of a recovery order.
356. If a person holding such rights suffers loss as a result of property vesting in the trustee, he may apply to the court for compensation under *section 283(6)* and the court may require compensation to be paid under *section 283(8)*.

### ***Section 270: Associated and joint property***

357. This section introduces *sections 271* and *272*, which explain how associated property and joint property are to be dealt with when a recovery order is made.
358. Under *subsection (2)* these sections apply where the property to which the proceedings relate includes both recoverable property and associated property (as defined in *section 245*), where the associated property is specified in the claim form, or in Scotland the application, and the form has been served on the person who holds the associated property (if different from the respondent) – or the court has dispensed with service.
359. Under *subsection (3)* these sections also apply where the property belongs to joint tenants, and one of the tenants is an 'excepted joint owner', as defined in *subsection (4)*. Specific provision is needed for joint tenants because joint tenants are treated as though they were a single owner of the property at issue. Joint tenancies may arise, for example, where two people have a joint bank account or own real property jointly. But it might be the case that one of the joint tenants has acquired his joint tenancy with recoverable property and the other has acquired his with non-recoverable property. If so, the second would be an "excepted joint owner" whose interest would not be recoverable (*subsection (4)*). *Subsections (3)* and *(4)* do not apply to Scotland, as the concept of joint tenancy is not relevant in Scots law.

***Section 271: Agreements about associated and joint property***

360. *Subsection (1)* provides for the situation where a person who holds associated property, or an excepted joint owner, comes to an agreement with the enforcement authority to make a payment to the trustee in lieu of the recoverable property. Where an agreement is reached, the recovery order may then require the person to make the payment to the trustee, rather than vesting the property in the trustee. The order may reflect the agreement by including provision for vesting, creating or extinguishing an interest in the property (*subsection (2)*). For example, title to the recoverable property may be transferred to the owner of the associated property or the excepted joint owner in exchange for a payment – in effect, he buys out the enforcement authority’s interest.
361. Provisions relating to the amount to be paid are at *subsection (3)*. *Subsection (4)* provides that where the enforcement authority has agreed that a person has suffered loss as a result of an interim receiving order or interim administration order applying to the property, the payment may take account of the loss and any other relevant circumstances. *Subsection (5)* establishes that where there is more than one item of associated property or excepted joint owner, the payment to be made is to be agreed between all of them and the enforcement authority. The recovery order must provide that the property concerned ceases to be recoverable (*subsection (6)*).

***Section 272: Associated and joint property: default of agreement***

362. This section applies where no agreement can be reached under *section 274*, but the court thinks it would be just and equitable to make provision concerning associated property or joint property. In such cases, the recovery order may provide for the associated property to vest in the trustee; for an excepted joint owner’s interest in the property to be extinguished; or for an excepted joint owner’s interest to be severed from the recoverable property (*subsection (2)*). Where the associated property vests in the trustee or the excepted joint owner’s interest is extinguished, the order may provide for the trustee to make a payment in lieu, or for there to be conditions attached to the property in favour of the persons concerned (*subsection (3)*). There is also provision for the court to create interests in favour of the person with the joint interest or associated property interest. So, for example, the court might order that a joint owner’s interest in a house be extinguished, but might at the same time create a right for him to live in the house for his lifetime (as well, perhaps, as ordering that he be paid compensation). In deciding what provision to make, the court must have regard to the rights of the persons and the value to them of the property, as well as the interest of the enforcement authority (*subsection (4)*). Where a person who holds associated property or is an excepted joint owner has suffered loss as a result of an interim receiving order or interim administration order applying to the property, the recovery order may require the enforcement authority to pay compensation of an amount which the court thinks reasonable, having regard to the person’s loss and any other relevant circumstances (*subsections (5) and (6)*).

***Section 273: Payments in respect of rights under pension schemes***

363. *Section 273* allows the recovery of recoverable property from pension funds. In the case of other types of property, once the court has made a recovery order, recoverable property will be vested in the trustee for civil recovery, and will eventually be disposed of by the trustee, i.e. selling the property to raise money. However, rights in a pension scheme cannot be vested in the trustee for civil recovery in this way, as they cannot be transferred to another person and subsequently sold, as they are not a transferable or tradable commodity. Therefore, *subsection (2)(a)* provides that pension trustees or managers must pay to the trustee for civil recovery an amount equal to the value of the pension rights secured by the original payment or payments into the fund.
364. When pension trustees or managers incur costs before a recovery order is made, or when complying with a recovery order, *subsection (4)* provides that such costs may be

reimbursed, either by deducting the appropriate amount from the sum paid to the trustee for civil recovery, or in another appropriate manner.

365. Pensions legislation and pension scheme rules contain provisions preventing any commutation, surrender or variation of pension rights. Clearly these provisions would be at odds with the Director's and the Scottish Ministers' new powers of recovery. *Subsection (5)* therefore provides that these provisions, whenever and wherever present, will not frustrate the Director's or the Scottish Ministers' ability to pursue recovery of the value of pension rights. Similarly, *subsection (3)* provides that a recovery order seeking to realise the value of pension rights overrides provisions of a pension scheme to the extent that the latter conflict with the provisions of the order.

#### ***Section 274: Consequential adjustment of liabilities under pension schemes***

366. Under *subsection (1)* a recovery order must provide that the trustees or managers of a pension scheme reduce its liabilities to the extent they think necessary following the payment made under the order. Under *subsection (2)*, the order must also provide for liabilities arising out of the recoverable rights to cease. *Subsection (3)* makes clear that this may involve a reduction of present or future benefits to which the respondent may be entitled, or any future benefits to which another person may be entitled in respect of the recoverable property.

#### ***Section 275: Pension schemes: supplementary***

367. This section defines which types of pension rights are amenable to a recovery order, and defines the terms pension trustee and pension manager.
368. *Subsection (1)* provides that the Secretary of State, after consultation with the Scottish Ministers (*subsection (3)*), may make regulations as to the exercise by trustees or managers of pension schemes of their powers under [sections 273](#) and [274](#). The regulations may include provision for the calculation and verification of the value at any time of pension rights and liabilities.
369. *Subsection (2)* provides that the powers can be used by reference to guidance produced by a person prescribed in the regulations, for example, the Institute of Actuaries in England and Wales and by the Faculty of Actuaries in Scotland.

#### ***Section 276: Consent orders***

370. This section gives the parties to civil recovery proceedings the power to settle the proceedings at any time after the claim form, or in Scotland the application, has been issued and served. Under *subsection (1)*, the court will have the power to make an order to stay – or in Scotland sist – the proceedings on terms agreed by all the parties concerned.
371. Such an order may provide for the property to which it applies to cease to be recoverable, or make any further provision which the court thinks appropriate (*subsection (2)*). *Subsection (3)* provides that where property vests in, or money is paid to, the trustee for civil recovery under this section, the provisions of [section 280](#) apply as though a recovery order had been made.

#### ***Section 277: Consent orders: pensions***

372. This section extends [section 276](#) so that an order involving pension rights can be made with the consent of the parties involved. As pension rights cannot be transferred to the trustee for civil recovery and then realised, *subsections (2)* and *(3)* provide that the trustees or managers of the pension scheme may make a payment to the trustee for civil recovery and make any agreed adjustment to the scheme if they are party to the agreement. *Subsection (4)* makes clear that they have the power to enter into such agreements.



373. *Subsection (6)* goes on to mention that a consent order will override the provisions of the pension scheme to the extent that they conflict with the provisions of the order. *Section 273(4)* provides for the trustees or managers of a pension scheme to recover costs. *Subsection (7)* of *section 278* makes identical provision for consent orders.
374. *Subsection (8)* provides that *sections 273(5)* and *274* will also apply where an order is made by consent. This means that any rules preventing the commutation, surrender or variation of pension rights will not prevent the making of a consent order – and that the pension scheme will be required to adjust its liabilities following a payment under a consent order.

### ***Section 278: Limit on recovery***

375. Subject to certain safeguards described elsewhere (e.g. for bona fide purchasers), property is recoverable if:
- it was obtained through unlawful conduct, or
  - it ‘represents’ property obtained through unlawful conduct.
376. Under *section 305*, property may come to ‘represent’ the original property where a person has disposed of the original property and has obtained other property in place of it. Moreover, property obtained in place of representative property may itself become representative property. Under *subsection (2)*, items of original and representative property are to be treated as ‘related’ property. If property is recoverable, it may remain recoverable after passing through several hands in a series of transactions. The right of the enforcement authority to trace its claim over the recoverable property is analogous to similar tracing rights in civil law proprietary litigation. Either original or representative property may be traced in this way.
377. However, there is potential for a large family of related property to grow up as a result of such a series of transactions, comprising the original property and several items of representative property. Each of these items will potentially be recoverable. But if the enforcement authority were to recover the entire family of recoverable property, that would be disproportionate to its primary right to recover the original property.
378. *Section 278* addresses this situation by providing a series of rules designed to ensure that if the enforcement authority seeks to recover items of related property, rather than confining itself to the original property, the court is able to limit its recovery order to what it thinks is necessary to satisfy the enforcement authority’s right to recover the original property.
379. For example, the provisions ensure that the enforcement authority cannot recover representative property in addition to the original property. If the enforcement authority pursues more than one avenue of recovery simultaneously, for example where the original property cannot be found, the court has some flexibility under *subsections (4)* and *(5)* as to how the enforcement authority’s interest should be satisfied. The court may order full recovery of some items of the related property but not others; or it may order partial recovery of some or all of the items; or a combination of both.
380. Nothing in this section prevents a court, where it makes a recovery order in respect of property, from also ordering the recovery of any profits that have accrued in respect of that property (*subsection (6)*).
381. If a forfeiture order has been made under *section 298* in respect of cash which was found to constitute recoverable property, it is to be treated for the purpose of this section as though it were a recovery order, so that the limitations on recovery in this section will apply (*subsection (7)*). This ensures that the proceeds of the same criminal conduct cannot be recovered twice, first through the cash forfeiture scheme in Chapter 3 and then again through civil recovery.

382. Similarly, *subsection (8)* ensures that the enforcement authority cannot secure an order under the civil recovery scheme if the property that was obtained through the unlawful conduct concerned, or property which represents it, has already been recovered by the victim of the conduct in civil litigation. And *subsections (9)* and *(10)* make similar provision in respect of property which has been taken into account in deciding a person's benefit from criminal conduct for the purposes of making a confiscation order under Parts 2, 3 or 4 of the Act or corresponding provisions.

***Section 279: Section 278: supplementary***

383. *Section 279* gives examples of circumstances in which the enforcement authority's right to recover property would be satisfied, for the purposes of *section 278*.

***Section 280: Applying realised proceeds***

384. This section governs the use of sums in the hands of the trustee for civil recovery. The sums may have reached his hands because:
- it was the proceeds of sale of non-cash property recovered under *section 266* or *section 276*, or
  - it was itself vested under *section 266* or *section 276*, or
  - it was paid under the provisions of *section 271* as a result of an agreement between the enforcement authority and other persons with non-recoverable interests in the property for them to 'buy out' the value of the recoverable property, or
  - it was an amount equal to the value of rights under a pension scheme, paid to the trustee under *section 273* or *277*.
385. The trustee must first make any payment required to be made by him following an order made under *section 272*. Second, he must pay expenses incurred by a person acting as an insolvency practitioner. The balance must be paid to the Director or the Scottish Ministers.

**Exemptions etc.**

***Section 281: Victims of theft, etc.***

386. Property which has been stolen (or is the result of some other unlawful conduct comprising the deprivation of a true owner of his property) is property obtained through unlawful conduct, and therefore potentially recoverable by the enforcement authority. But *section 281* gives the claims of a true owner precedence over those of the enforcement authority. Where civil recovery court proceedings have begun in respect of property, a true owner is entitled to request a declaration from the court that he has a valid claim to it because he was deprived of it (or of property which it 'represents') by unlawful conduct. This need not be the unlawful conduct on which the authority relies. So if, for example, a drug trafficker steals money from a person and invests it in drug trafficking, the enforcement authority may bring proceedings in respect of the property that the drug trafficker has obtained through the drug trafficking. But the victim would still be able to claim that part of the property belonged to him, even though the authority was relying on the drug trafficking, rather than the theft. The effect of such a declaration is that the property ceases to be recoverable by the Director or by the Scottish Ministers (*subsection (4)*).
387. *Subsection (3)* makes clear that this exception only applies to the original true owner of property. It would not benefit someone who has for example stolen property from its original owner, but who in turn has had that property stolen from him. The property would have become recoverable when it was stolen from the original owner; the original owner will be able to request a declaration even if it is stolen again, whereas the person who first stole the property will not.

### **Section 282: Other exemptions**

388. This section provides that proceedings for civil recovery may not be taken in respect of certain people in prescribed circumstances.
389. *Subsection (1)* provides for a power to make an order to exempt a person from having civil recovery proceedings brought against them. The power can be exercised by reference to any sort of description of the person and by reference to specified circumstances. The power to make exemption orders under this section will be exercised by the Secretary of State, but the Secretary of State is to consult with Scottish Ministers before making the order. Any order made under these provisions will be subject to approval by both Houses of Parliament (*section 459(6)(a)*).
390. Under *subsection (2)*, the Director or the Scottish Ministers may not take civil recovery proceedings in respect of cash unless they are simultaneously taking proceedings against other property held by the same person. Proceedings involving cash only may be brought under the summary proceedings in Chapter 3.
391. *Subsections (3) to (5)* specify particular types of property and persons against whom proceedings may not be taken. These include property held by the Financial Services Authority (*subsection (3)*). The Authority may hold recoverable property, in the form of levies and civil penalties it may impose on people engaging in market abuse. The charges in *subsection (4)* relate to assets which are intended as security for financial markets. *Subsection (5)* protects a person acting as an insolvency practitioner from proceedings in respect of recoverable property he holds or has held in connection with his role as a practitioner.

### **Miscellaneous**

#### **Section 283: Compensation**

392. This section deals with the case where any property has been made subject to an interim receiving order, or in Scotland an interim administration order, but has not in the end been held to be recoverable or associated property, either because the court has so determined or because the claim or the application has been withdrawn. Subjection to the interim receiving order or interim administration order may, despite the duties of the interim receiver or interim administrator to preserve its value, have resulted in losses to the owners of the property.
393. Under *subsection (1)*, the person whose property it is may apply to the court for compensation for such losses; under *subsection (5)*, the court may order the enforcement authority to pay compensation. Under *subsection (2)*, no application for compensation may be made if the right of the victim has defeated that of the enforcement authority by virtue of *section 281*, or if an order has been made following an agreement by virtue of *section 276*.
394. An application must be made within three months of the date on which the court makes a decision the effect of which is that a recovery order cannot be made (*subsection (3)*). If an application is made for leave to appeal, the three months is to run from the date the appeal proceedings are finally concluded; or the date the application for leave to appeal is withdrawn or refused. In England and Wales and Northern Ireland, if the proceedings are discontinued, an application must be made within three months of the date on which they were discontinued (*subsection (4)*).
395. *Subsections (6) to (8)* provide for compensation in respect of rights of pre-emption etc which have become inoperable when the property to which they relate vests under a recovery order.
396. *Subsection (9)* provides for the measure of compensation to be at the court's discretion, having regard to the losses suffered and to all other circumstances. If therefore the

claimant has himself contributed to the losses through delays, for example, that may be taken into account here.

### ***Section 284: Payment of interim administrator or trustee (Scotland)***

397. This section makes provision for the payment of interim administrators and trustees for civil recovery in Scotland by the Scottish Ministers. No such provision is considered necessary in relation to England, Wales and Northern Ireland where it is envisaged such matters will be regulated by contract.

### ***Section 285: Effect of diligence on recovery order (Scotland)***

398. *Section 285* clarifies the relationship in Scots law between the vesting of recoverable property in the hands of the trustee for civil recovery and any other action that might be taken by a creditor against the property to enforce a court order that he has obtained against the respondent. The section makes it clear that any such action against property executed after it has been vested in the trustee for civil recovery is ineffectual. In other words, once recoverable property is vested in the trustee, any other enforcement action (diligence) executed thereafter in relation to that property falls.

### ***Section 286: Scope of powers (Scotland)***

399. The section provides that the Court of Session may make an order in respect of a person whether or not he is domiciled, present or resident in the United Kingdom. No similar provision is required in respect of England, Wales and Northern Ireland, due to the jurisdiction of the civil courts and the general provisions on property in *section 316*.

### ***Section 287: Financial threshold***

400. *Subsection (1)* provides that the enforcement authority may not take proceedings for a recovery order unless it reasonably believes that the total value of the recoverable property is not less than an amount to be specified in an order. This ensures that civil recovery will not be used in minor or trivial cases. The order will be made by the Secretary of State following consultation with Scottish Ministers (*subsection (2)*). The threshold applies only at the time the enforcement authority starts proceedings, or applies for an interim receiving order or interim administration order (*subsection (3)*). As long as the threshold is observed at the start of the proceedings, it will not matter if for example the Director subsequently discontinues proceedings in respect of certain property and the value of the remaining property is less than the amount specified in the order. The proceedings will be able to continue (*subsection (4)*).

### ***Section 288: Limitation***

401. *Subsection (1)* sets a limitation period within which proceedings for a recovery order must be brought, through an amendment to the Limitation Act 1980. Proceedings must be brought within twelve years of the original property being obtained through unlawful conduct.
402. *Subsections (2)* and *(3)* make equivalent provision for Scotland and Northern Ireland.

## ***Chapter 3: Recovery of cash in summary proceedings***

### ***Sections 289-291: Searches; Prior approval; Report on exercise of powers***

403. *Section 289* is necessary in order to support the powers to seize cash that is the proceeds of unlawful conduct or intended for use in such conduct (*section 294*). These new search powers will not be exercisable unless the suspect cash is thought to exceed the threshold set under *section 303*. In chapter 3, cash has the meaning attributed to it in *section 289(6)* and *(7)*.

404. The search powers will only be exercisable on private premises where the constable or customs officer has lawful authority to be present. In respect of a constable, this would be where he is exercising his powers of entry under the Police and Criminal Evidence Act 1984 and in respect of a customs officer where he is exercising such powers under the Customs and Excise Management Act 1979 or other enactment. In Scotland a constable or a customs officer would be exercising their powers of entry under common law or under a statutory warrant. An officer could also be lawfully present on private premises, if he is there at the invitation of the owner. By virtue of *subsection (5)(b)*, a customs officer may only exercise the powers if he has reasonable grounds for suspecting that the unlawful conduct relates to an assigned matter within the meaning of the Customs and Excise Management Act 1979. This would cover such conduct as drug trafficking, money laundering and excise evasion.
405. By virtue of *subsection (3)(b)*, the search powers include the powers to search a person. However, this power does not extend to requiring a person to undergo an intimate or strip search (*subsection (8)*).
406. *Section 290* provides the safeguard that the search powers in *section 289* may only be exercised where prior judicial authority has been obtained or, if that is not practicable, with the approval of a senior officer. *Section 290(1)* also recognises that there may be circumstances where it may not even be possible for a constable or a customs officer to obtain the approval of a senior officer. If judicial approval is not obtained prior to a search, and cash is either not seized or is released before the matter comes before a court, the constable or customs officer concerned must prepare a written report and submit it to an independent person appointed by the Secretary of State in relation to England and Wales and Northern Ireland and, in relation to Scotland, by the Scottish Ministers (*subsection (8)*). This report will detail why the constable or customs officer considered that he had the power to carry out the search and why it was not practicable to obtain judicial approval of the search.
407. *Section 291* provides that the person to whom the reports are submitted is under an obligation to submit an annual report to the Secretary of State (or the Scottish Ministers in Scotland) drawing general conclusions about the matters reported to him, making any appropriate recommendations. This report will be laid before Parliament (or the Scottish Parliament as appropriate) and be published.

### ***Sections 292-293: Code of practice; Code of practice: Scotland***

408. In recognition of the sensitivity of search powers, *section 292* requires the Secretary of State to publish a Code of Practice setting out how the powers in *section 289* are to be exercised by a constable or customs officer. There will be a separate code of practice for constables in Scotland, issued by the Scottish Ministers; see *section 293*.

### **Seizure and detention**

#### ***Section 294: Seizure of cash***

409. *Chapter 3* expands and replaces the scheme set out in Part II of the Drug Trafficking Act 1994 which provides for the seizure and forfeiture of cash which is being imported into or exported from the United Kingdom, and which represents the proceeds of, or is intended for use in, drug trafficking. This scheme is expanded to include cash related to all unlawful conduct and also provides for the seizure of such cash inland. *Section 294* enables a customs officer or a constable to seize cash at the borders or inland if he has reasonable grounds for suspecting that the cash is recoverable property or intended for use in unlawful conduct. *Subsection (2)* allows for the seizure of indivisible cash only part of which is under suspicion. An example of this is a single cheque of £50,000 where the cash under suspicion is only £25,000. *Section 296(2)* provides that when such cash can be divided on payment into an interest bearing account, the part not under suspicion must be released.

410. *Section 289(6) and (7)* defines cash for the purposes of Chapter 3 and enables the Secretary of State following consultation with Scottish Ministers to prescribe by order other monetary instruments. Such monetary instruments must be of a kind that can be paid into an interest bearing account, so as to comply with the requirements of *section 296*. In order to guard against excessive and disproportionate use of the power, there is to be a threshold below which the powers will not be available; this is specified in an order under *section 303*. A definition of unlawful conduct is to be found in *section 241*, and of recoverable property at *section 304 to 310*.

### ***Sections 295-296: Detention of seized cash; Interest***

411. The effect of *section 295* is that cash may not be detained for more than 48 hours except by order of a magistrate (or a sheriff in Scotland). A magistrate may make such an order if satisfied that there are reasonable grounds for the officer's suspicion and that the continued detention is justified for the purposes of investigating its origin or intended use. The magistrate may also make an order for continued detention if consideration is being given to the bringing of criminal proceedings, or if such proceedings have been commenced and not concluded. Monies detained would in most cases be paid into an interest bearing account as provided in *section 296* pending the outcome of proceedings.

### ***Section 297: Release of detained cash***

412. *Section 297* envisages two situations in which cash or any part of the cash may be released to the person from whom it was seized. Firstly, the magistrates' court (or a sheriff in Scotland) may do so in response to an application by the person from whom the cash was seized on the grounds that it is not recoverable property and is not intended for use in unlawful conduct. The fact that only the person from whom the money is seized may apply to the court is intended to prevent the magistrates' court from becoming embroiled in a dispute between the person from whom the cash was seized and the rightful owner of the cash. Secondly, a customs officer, a constable or (in Scotland) a procurator fiscal, may release cash or any part of it after notifying the justice, magistrates' court or sheriff if satisfied that the detention can no longer be justified.

## **Forfeiture**

### ***Section 298: Forfeiture***

413. *Section 298* enables the magistrates' court (or, in Scotland, the sheriff) to order the forfeiture of cash or any part of it if satisfied that it is recoverable property or is intended for use in unlawful conduct. The balance of probabilities is the evidential standard that applies to the proceedings, this being the normal civil standard of proof (*section 241(3)*).
414. Where the cash is recoverable property belonging to joint tenants, one of whom falls within the definition in *section 270(4)*, the court must not forfeit the cash that it thinks attributable to the "innocent" partner's share. An example of this might be a joint bank account into which drug trafficking proceeds (dirty money) has been paid by one signatory and clean money by the other. If the former withdraws all the cash and it is subsequently seized, the court must then distinguish between the clean and dirty money. The court may then return to the "innocent" partner his share of the money.
415. *Subsection (4)* provides that cash cannot be released under any circumstance once an application for the forfeiture of that cash is made, until such time as forfeiture proceedings have concluded.

## **Supplementary**

### ***Section 301: Victims and other owners***

416. *Section 301* allows the true owner of detained cash to apply for its release. Two cases are provided for. *Subsection (3)* relates to a person who claims that some or all of the

cash rightfully belongs to him, and he was deprived of it through unlawful conduct. An example of this would be a person who claims that the cash was stolen from him. If the court is satisfied, it may order the applicant's cash to be released to him.

417. *Subsection (4)* relates to the case of any other true owner who is not the person from whom the cash was seized. Here, if the court is satisfied, the cash may be released – but only if the person from whom it was seized does not object. That proviso is intended to prevent the court from becoming involved in a complicated ownership dispute between the person from whom the cash was seized and the rightful owner of the cash. Unlike subsection (3) the court will have to be satisfied that the cash is not recoverable property or intended for use in unlawful conduct before it can release to a claimed owner.

### ***Section 302: Compensation***

418. *Section 302* provides that where no forfeiture is made following the detention of cash the person from whom it was seized, or the person to whom the cash belongs, may apply to the court for compensation. In most cases, it is thought that the interest that will have accrued from the deposit of the cash into an interest-bearing account as provided in *section 296* will suffice. If, after 48 hours, cash has not been paid into such an account, then by virtue of *subsections (2) and (3)* the court may order the payment of compensation to the value of the lost interest. *Subsections (4) and (5)* also give the court further discretion to order the payment of reasonable compensation where loss has occurred as a result of the detention of the cash (even taking into account interest and compensation otherwise payable) and where the circumstances are exceptional. This section only applies to compensation for loss incurred as a result of the detention of the cash; if an individual has suffered loss for any other reason, this must be pursued elsewhere.

### ***Section 303: "The minimum amount"***

419. The current level in respect of the forfeiture of drug-related cash on import or export under the Drug Trafficking Act 1994 is £10,000 or more and the Government intends that the same level should be imposed in respect of this scheme.

## **Chapter 4: General**

### ***Recoverable property***

#### ***Section 304: Property obtained through unlawful conduct***

420. *Sections 304 to 316* apply to both civil recovery and cash forfeiture. *Section 304* defines when property is recoverable, and how the original property may be followed when it is disposed of by the person who originally obtained it or a person who subsequently obtained it. Under *subsection (1)*, property that is obtained through unlawful conduct is recoverable property; as such, it may be recovered by the enforcement authority. But the enforcement authority will not always be able to recover the property from the person who obtained the property through unlawful conduct. The property may, for example, have been sold; or the person may be untraceable, or dead. *Subsections (2) and (3)* therefore provide that where the property has been disposed of or passed to someone else, it may be 'followed' by the enforcement authority and recovered from that person. If the person to whom the property has been passed then in turn passes it on, the enforcement authority will be able to follow the property along the chain of transactions.
421. The ability to 'follow' property is, however, limited in several ways. Recovery depends on the original property continuing to be identifiable as such. And if any of the transactions in question is of the sort set out at *section 308*, the chain will be broken and the enforcement authority will no longer be able to follow and recover the property.

**Section 305: Tracing property, etc.**

422. *Sections 305* and *306* allow the enforcement authority to recover property which has not itself been obtained through unlawful conduct but which ‘represents’ such property.
423. *Section 305* establishes the principle of tracing the original recoverable property if it is disposed of. Under *subsection (1)*, property which represents property which is or has been recoverable, is also recoverable.
424. Under *subsection (2)*, where a person disposes of either the original recoverable property or representative property, and receives property in return, the property he receives in return becomes representative property and will also be recoverable. For example, if a stolen car is sold, the proceeds of sale will ‘represent’ the original property and the enforcement authority will be able to ‘trace’ into those proceeds and recover them. And if the proceeds of drug dealing are spent on jewellery, the jewellery itself will represent the original proceeds, and the enforcement authority will be able to recover it.
425. Like ‘following’ under *section 304*, ‘tracing’ is capable of being pursued along a chain of transactions. Under *subsection (3)*, where representative property is disposed of, it may be followed into the hands of the person who obtains it; it continues to represent the original property, and is therefore recoverable.
426. Tracing and following may multiply indefinitely the items of property that are rendered potentially recoverable. However, the enforcement authority will not be able to multiply its total recovery accordingly; limitations on total recovery are placed by *section 278*.

**Section 306: Mixing property**

427. Property which was not itself obtained through unlawful conduct at any stage can come to ‘represent’ such property, and therefore be potentially recoverable, not only by being traceable by the enforcement authority under *section 305* but also by having become mixed with recoverable property. Because the ability to follow property under *section 304* is dependent on the property retaining its identity, it may become impossible to follow property when it is mixed into other property.
428. *Subsection (3)* gives some illustration of this problem. If cash which is the proceeds of drug dealing is paid into a bank account which is in credit through deposits of honest earnings, it becomes impossible to identify any individual withdrawals which may be made from that account as being the ‘dirty’ money rather than the clean. *Subsection (2)* therefore provides that in such circumstances so much of the ‘mixed’ property as is attributable to the recoverable property will be representative of the original property, and is therefore itself recoverable.

**Section 307: Recoverable property: accruing profits**

429. *Section 307* provides that the property that is recoverable under *sections 304* to *306* is to be taken to include accrued profits; the profits are to be treated as representative property. So, for example, if the enforcement authority can recover money paid into a bank account, the authority can recover it with any interest accrued.

**Section 308: General exceptions**

430. *Section 308* constitutes a limitation on the enforcement authority’s ability to follow and trace property; the exceptions set out here also apply to the forfeiture provisions in Chapter 3. *Section 304* provides that where, for example, someone is given a yacht in return for a contract killing, and then sells the yacht, the authority may follow the yacht into the hands of the purchaser and recover it from him. Under *subsection (1)* of this section, if the purchaser paid full value for the yacht, and was unaware of its unlawful provenance, the authority is not entitled to recover it from him or from anyone else who may subsequently acquire it. The fact that the yacht has ceased to be recoverable property, however, does not prevent the proceeds of the sale of the



yacht representing property obtained through unlawful conduct, and themselves being recoverable (*subsection (10)*).

431. *Subsection (2)* ensures that property ceases to be recoverable following successful civil recovery or cash forfeiture proceedings or following disposal in accordance with Part 5 powers. For example, if property is sold by an interim receiver or interim administrator in the exercise of his powers, although it may still be ‘property obtained through unlawful conduct’, or representative of such property, it will not be recoverable in the hands of the recipient and may be recycled in the market in the ordinary way.
432. *Subsections (3) to (7)* set out other circumstances in which property will cease to be recoverable: for example, where a payment is made following a compensation or restitution order under the Powers of Criminal Courts (Sentencing) Act 2000, and the sum or property received would otherwise be recoverable; where a claimant obtains property from a defendant in civil proceedings which are based on the defendant’s unlawful conduct, and the property would otherwise be recoverable; where an amount is paid in accordance with a restitution order made by a court under the Financial Services and Markets Act 2000 and that amount would otherwise be recoverable; and where restitution is required to be made by the Financial Services Authority under that Act paying an amount which would otherwise be recoverable.
433. *Subsections (8) and (9)* serve to exclude property from civil recovery if such property is already the subject of a restraint order, or has been taken into account in making a criminal confiscation order.

### ***Section 309: Other exemptions***

434. *Section 309* provides that certain property is not recoverable or associated property if it is prescribed by order or is disposed of in pursuance of a prescribed enactment. *Subsection (2)* provides that where property is disposed of in pursuance of a prescribed enactment, it is to be treated for the purposes of *section 278* (limit on recovery) as though it had been disposed of under a recovery order. *Subsection (4)* provides that an order is to be made by the Secretary of State, following consultation with the Scottish Ministers. The order is subject to the affirmative resolution procedure under *section 459(6)(a)*.

### ***Section 310: Granting interests***

435. This section makes some detailed provision about the granting of interests in property. Take, for example, the case of someone who obtains a freehold house through the proceeds of unlawful conduct, and then grants a tenancy of it. At the time the house was ‘obtained’, the tenancy had no existence. The tenancy, therefore, cannot be described as having been obtained through unlawful conduct, either by the landlord or by the tenant. But it is intended to be as recoverable as the property obtained by the same unlawful conduct.
436. Under *subsection (1)*, where a person grants an interest in recoverable property, the granting of the interest is to be regarded as a disposal of the property; and the question of whether the interest is recoverable is to be determined in line with the provisions regarding disposal of recoverable property. Under *subsection (2)*, if the interest is in the original property that was obtained through unlawful conduct, it is to be treated as though it had been obtained through the same conduct. And if the interest is in property which represents property obtained through unlawful conduct, it is to be treated as such.

## **Insolvency**

### ***Section 311: Insolvency***

437. This section sets out the interrelationship between civil recovery and insolvency proceedings. Broadly, a civil recovery claim will be treated in the same way that any other civil proprietary claim is treated in insolvency proceedings. This means

that in most circumstances the enforcement authority will have to apply for leave from the court dealing with the insolvency proceedings to bring or continue civil recovery proceedings. This is provided for in the Insolvency Act 1986 (and its Northern Ireland and Scottish equivalents, the Insolvency (Northern Ireland) Order 1989 and the Bankruptcy (Scotland) Act 1985). However, under the insolvency legislation, leave does not have to be obtained in relation to all types of insolvency proceedings. [Section 311](#) therefore covers the insolvency proceedings that are not covered by the 1985 or 1986 Acts or the 1989 Order, so that the enforcement authority will have to apply for leave from the insolvency court in all circumstances.

438. The section also covers the interrelationship between cash forfeiture and insolvency proceedings. Under *subsection (1)*, civil recovery proceedings may not be initiated or continued in respect of property which is subject to insolvency proceedings (as defined in *subsection (3)*) without the leave of the court which is dealing with the insolvency. Under *subsection (2)*, an application for the further detention of cash under the cash forfeiture provisions in Chapter 3, where the cash forms part of the insolvency proceedings listed in *subsection (3)*, may not be made without the leave of the insolvency court. An application to the insolvency court may be made without notice, to prevent a potential civil recovery respondent finding out about the Director's intention to bring proceedings (*subsection (4)*); but notice must still be given where required to the insolvency practitioner or to the official receiver (*subsection (5)*).

## **Delegation of enforcement functions**

### ***Section 312: Performance of functions of Scottish Ministers by constables in Scotland***

439. [Schedule 11](#) of the Act amends the Police (Scotland) Act 1967 to enable constables to undertake temporary service with the Scottish Ministers in connection with their functions under Part 5 (civil recovery) of the Act. On secondment, a constable will not bring with him his police powers. There are, however, certain of the functions bestowed by Part 5 on Scottish Ministers that it would not be appropriate for seconded constables to exercise. These are set out in [section 312](#) and include taking proceedings in the Court of Session and exercising the Scottish Ministers' order making powers.

### ***Section 313: Restriction on performance of Director's functions by police***

440. [Section 313](#) provides that police officers who are seconded to the Agency will not be able to undertake civil recovery work on behalf of the Director. Seconded officers will retain their police powers and it would not be appropriate for them to work on civil recovery cases.

## **Interpretation**

### ***Section 314: Obtaining and disposing of property***

441. 'Disposing' of property is a key feature of the provisions at [section 304](#) and [305](#), which deal with following and tracing property. Disposal of property may take place, for instance:
- where the property is dealt with to some extent only (including where an interest in the property is created – for example where a tenancy is granted out of freehold real property); a disposal might also consist of the grant of an interest in a part (*subsection (1)*);
  - where a person makes a payment, in cash or any other kind of property, to another (*subsection (2)*);
  - where property changes hands on death (*subsection (3)*).

442. *Subsection (4)* is relevant to the protection provided at [section 308\(1\)](#) for persons who obtain property ‘for value’. It provides that a person obtains property ‘for value’ only when he has given executed consideration for it. That means that if someone obtains property in return for a promise to pay for it or to perform some service in exchange, that will not count as having ‘obtained for value’ until the payment is actually made or the service performed.

### ***Section 315: Northern Ireland: courts***

443. The Act relies upon procedural mechanisms contained in the Civil Procedure Rules for England and Wales. These do not apply in Northern Ireland. Further, the relevant rules of court in Northern Ireland have recently been the subject of a review and a number of changes have been recommended but not yet implemented. It is not therefore possible at this stage to specify the exact terms for the procedural mechanisms that will apply to civil recovery. Against that background it is necessary to provide that the expressions relating to the initiation and conduct of proceedings used in this Part of the Act are to be read in accordance with rules of court made in Northern Ireland. Such rules of court would be made under section 55 of the Judicature (Northern Ireland) Act 1978.

### ***Section 316: General interpretation***

444. *Subsection (1)* defines certain terms used in this Part of the Act. *Subsection (3)* enables property to be identified and traced by reference to events occurring before commencement of this Part. *Subsections (4) to (7)* explain the use of the terms ‘property’ and ‘holding property.’

## **Part 6: Revenue Functions**

### **General Functions**

#### ***Section 317: Director’s general Revenue functions***

445. *Subsection (1)* sets out the qualifying condition which must be satisfied before the Director of the Assets Recovery Agency can take over general Revenue functions (defined at [section 323\(1\)](#)). The condition is that the Director must have reasonable grounds to suspect that income, profits or gains arising or accruing to a person (including a company) in respect of a chargeable period are chargeable to tax and arise or accrue as a result of that person’s, or another’s, criminal conduct. Criminal conduct is defined in [section 326](#).
446. If this condition is satisfied, then *subsection (2)* allows the Director to serve a notice on the Board of the Inland Revenue that has the effect of vesting certain functions of the Inland Revenue in the Director.
447. The notice served on the Board of the Inland Revenue will specify a number of things. These will include adequate details to identify the relevant person or company, the chargeable periods in question and also the particular functions that the Director wishes to assume responsibility for. These may be some or all of the functions listed in [section 323\(1\)](#). The notice will also specify the particular tax periods during which the income, profits or gains are suspected of arising as a result of criminal conduct.
448. *Subsection (3)* gives effect to the vesting of the Revenue functions in the Director, while *subsection (4)* allows the Director to serve on the Board a notice of withdrawal of the notice under subsection (2). *Subsection (4)(b)* provides that such a notice must be served if the qualifying condition ceases to be satisfied.
449. *Subsection (6)* states that when a notice of withdrawal is served under *subsection (4)* above, the Director is divested of the functions specified in that notice and for the periods specified in that notice. *Subsection (7)* provides for the tax function to be vested in both the Director and the Inland Revenue officers concurrently. This will

allow, among other things, routine work to be carried out by the Inland Revenue notwithstanding that the functions are also vested in the Director

450. *Subsection (8)* provides that in circumstances where authorisation of the Board would normally be required for the exercise of a function it is not necessary if the function is vested in the Director.

### ***Section 318: Revenue functions regarding employment***

451. This section deals with two areas where there may be a mismatch between periods of account.
452. First, a company will account for income tax, National Insurance contributions and student loan repayments for which it is responsible as an employer for a year of assessment, but its own corporation tax liability will be determined by reference to its accounting period, which is usually different.
453. Second, self employed people are taxed by reference to years of assessment but Class 2 National Insurance contributions are calculated for each week of self employment and due quarterly in arrears.
454. This section ensures that the Director can only take over the functions which a company is responsible for as an employer and Class 2 National Insurance contributions of the self-employed where the relevant periods for those matters fall wholly within a period or periods for which the Director has served a notice under *section 317*.

### ***Section 319: Source of income***

455. Assessments to income tax raised by the Inland Revenue are required to specify the source of the income in question, such as a particular trade. This is not the case for capital gains tax or corporation tax. This section enables the Director to raise income tax assessments where he discovers a loss of tax even where he cannot identify the source of the income in question.
456. The section does not extend to the assessments raised by the Inland Revenue, whose practice and powers will remain unaffected. Because of this, the section stipulates that when the case is transferred back from the Director to the Inland Revenue, any “no-source” assessment made by the Director is invalid.

### ***Section 320: Appeals***

457. This section provides a right of appeal to the Special Commissioners. All appeals against actions arising from the exercise by the Director of his Revenue functions will be to the Special Commissioners. The right of appeal is equivalent to those available to taxpayers subjected to decisions made by the Inland Revenue. *Subsection (1)* limits the right of appeal to hearings before the Special Commissioners, effectively excluding access to the General Commissioners.
458. *Subsections (2) to (5)* provide for the appointment, role and payment of specially qualified assessors to assist in the consideration of appeals against the exercise of the Director’s Revenue functions.
459. The Taxes Management Act 1970 enables the Lord Chancellor to regulate by secondary legislation the administration of the Special Commissioners’ hearings. *Subsection (4)* enables him to include provision about how specialist assessors may assist the Special Commissioners with a hearing of an appeal against the exercise of any of the Director’s revenue functions.

## **Inheritance Tax Functions**

### ***Section 321: Director's functions: transfers of value***

460. Inheritance tax is generally charged on a “transfer of value”, which is a disposition made by a person such that the value of their estate goes down. This section enables the Director to exercise inheritance tax functions if the qualifying condition is satisfied. The qualifying condition requires the Director to have reasonable grounds for believing that there has been a transfer of value and that the value transferred is in whole or in part attributable to criminal property. Criminal property is defined at [section 326](#). The section includes provisions equivalent to those in *subsections (2) to (4), (6) and (7) of section 317*.

### ***Section 322: Director's functions: certain settlements***

461. This section makes similar provision in cases of settlements of property which are not subject to a “qualifying interest in possession” (i.e. broadly, they are held on discretionary trusts).
462. In these cases, the Director may assume the Revenue's inheritance tax functions if he has reasonable grounds to believe that all or part of the property comprised in the settlement is criminal property.
463. The section includes provisions equivalent to those in *subsections (2) to (4), (6) and (7) of section 317*.

## **General**

### ***Section 323: Functions***

464. This section lists the functions that may be vested in the Director if he specifies them in the notice he serves on the Board of the Inland Revenue under the sections above. It also lists functions that do not vest in the Director.

### ***Section 324: Exercise of Revenue Functions***

465. This section regulates the Director's exercise of his Revenue functions. *Subsection (2)* prohibits the Director from delegating his Revenue functions to anyone who is not a member of his staff.
466. *Subsections (3) and (4)* require the Director to apply any interpretation of the law as published by the Revenue Board and any concessions published by the Revenue Board. Also, he must take account of any other material published by the Board. *Subsection (5)* will enable the Board to obtain documents and information concerning the exercise by the Director of Revenue functions and his application of the law and concessions.

### ***Section 325: Declarations***

467. This section requires the Director and the members of the Agency staff authorised to exercise Revenue functions to make a declaration undertaking not to make any unlawful disclosure of information obtained in the exercise of his Revenue functions. The text of each declaration is reproduced at [Schedule 8](#) to the Act.

### ***Section 326: Interpretation***

468. This section provides definitions and meanings for some of the terminology used in Part 6 and in particular the terms “criminal conduct” and “criminal property.” For the purposes of this Part, “criminal conduct” does not include an offence relating to a matter under the care and management of the Board of the Inland Revenue, for example, tax fraud.

## **Part 7: Money Laundering**

### **Offences**

#### **Section 327: Concealing etc.**

469. *Section 327* creates one of three principal money laundering offences. The other two are to be found in *sections 328* and *329*. Because of the definition of criminal property at *section 340*, all three principal money laundering offences now apply to the laundering of an offender's own proceeds of crime as well as those of someone else.
470. *Section 327* simplifies and replaces section 49 of the Drug Trafficking Act 1994 and section 93C of the Criminal Justice Act 1988 and the corresponding provisions in Scotland & Northern Ireland (section 14 of the Criminal Justice (International Co-operation) Act 1990 and Article 47 of the Proceeds of Crime (Northern Ireland) Order 1996). Along with *sections 328* and *329*, *section 327* replaces the parallel drug and non-drug crime money laundering offences with single offences that do not distinguish between the proceeds of drug trafficking and the proceeds of other crimes.
471. The *section 327* offence would be committed where a person concealed, disguised, converted, transferred or removed from the jurisdiction criminal property. Criminal property is defined at *section 340(3)* as being property which the alleged offender knows or suspects constitutes or represents benefit from any criminal conduct as defined in *section 340(2)*.
472. The section contains defences against committing the offence. For example, the offence is not committed if an authorised disclosure is made under *section 338* as soon as possible after the transaction has taken place, or if the disclosure is made before the act has taken place and the discloser has obtained the appropriate consent, or there was a reasonable excuse for not making such a disclosure. Additionally, it is not uncommon for the police or other enforcement authorities to take possession of criminal property in the course of their official duties and to convert or transfer it, for example into an interest bearing account pending further investigation. Therefore *subsection (2)(c)* gives them the necessary exemption from the offence.
473. The maximum penalty for the *section 327* offence, and for the other two principal money laundering offences at *sections 328* and *329*, is 14 years imprisonment, as set out at *section 334*.

#### **Section 328: Arrangements**

474. *Section 328* simplifies and replaces section 50 of the Drug Trafficking Act 1994 and section 93A of the Criminal Justice Act 1988, section 38 of the Criminal Law (Consolidation) (Scotland) Act 1995 and Article 46 of the Proceeds of Crime (Northern Ireland) Order 1996.
475. To establish an offence under this clause, the prosecutor would need to establish that a person entered into or became concerned in an arrangement which he knew or suspected would make it easier for another person to acquire, retain, use or control criminal property and that the person concerned also knew or suspected that the property constituted or represented benefit from criminal conduct. *Section 328* includes the same defences against committing the offence, as are included in *section 327*.

#### **Section 329: Acquisition, use and possession**

476. *Section 329* unifies and replaces section 51 of the Drug Trafficking Act, section 93B of the Criminal Justice Act 1988, section 37 of the Criminal Law (Consolidation) (Scotland) Act 1995 and Article 45 of the Proceeds of Crime (Northern Ireland) Order 1996. As in *sections 327* and *328*, by reason of *section 340*, this offence is only

committed where a person knows or suspects that the property which is acquired etc constitutes or represents his own or another's benefit from criminal conduct.

477. Again, the same defences against committing the offence apply as in [sections 327 and 328](#). Additionally, the effect of the defence in [subsection \(2\)\(c\)](#) is that persons, such as tradesmen, who are paid for ordinary consumable goods and services in money that comes from crime are not under any obligation to question the source of the money. [Subsection \(3\)\(c\)](#) makes it clear that the provision of goods or services that help a person to carry out criminal conduct would not be a defence. However, [section 329\(3\)\(c\)](#) only negates the defence in [section 329\(2\)\(c\)](#) if the person who provides the goods or services knows or suspects that they will help the recipient to carry out criminal conduct.

### ***Section 330: Failure to disclose: regulated sector***

478. [Section 330](#) replaces section 52 of the Drug Trafficking Act 1994 and creates an obligation to report suspicions of money laundering to the authorities. The equivalent provision in Scotland is section 39 of the Criminal Law (Consolidation)(Scotland) Act 1995 and in Northern Ireland is Article 44 of the Proceeds of Crime (Northern Ireland) Order 1996. [Section 330](#) widens the scope of the offences that it replaces beyond reporting drug money laundering to reporting the laundering of the proceeds of any criminal conduct. [Subsection \(2\)\(b\)](#) introduces a negligence test which means that the failure to disclose offence would also be committed where a person has reasonable grounds for knowing or suspecting that another person is engaged in money laundering, even if they did not actually know or suspect.
479. The duty to report under [section 330](#) is, however, restricted to those persons who receive information in the course of a business in the regulated sector, as defined in [Schedule 9](#) to the Act. This definition closely follows equivalent provisions in the Money Laundering Regulations 1993 (as amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001), which determines the applicability of those Regulations. The definition provides that a business is in the regulated sector to the extent that it carries out the activities listed in [Part 1 of Schedule 9](#). The section reflects the fact that persons who are carrying out activities in the regulated sector should be expected to exercise a higher level of diligence in handling transactions than those employed in other businesses. Where a business carries out some activities which are listed in [Schedule 9](#) and some which are not, then only employees carrying out the listed activities will be caught by the offence.
480. The offence is committed if the "required disclosure" is not made. The "required disclosure" is defined at [subsection \(5\)](#) as being a disclosure to a nominated officer, or to a person authorised by the Director General of the National Criminal Intelligence Service, which has been made in the form and manner (if any) prescribed under the order making power at [section 339](#). This reflects the policy that disclosures in the regulated sector should be made directly to the National Criminal Intelligence Service (NCIS), rather than through a constable or a customs officer. It gives those in the regulated sector the choice of either disclosing direct to NCIS, which might be appropriate for sole practitioners, or disclosing to the nominated officer who will operate as a filter for disclosures to NCIS.
481. The maximum penalty for committing the offence, as set out at [section 334](#), is 5 years imprisonment.
482. [Subsection \(6\)](#) provides a defence for a person who has a reasonable excuse for not disclosing the information and also for a lawyer, where the information came to him in privileged circumstances. There is also a defence for staff who have not had adequate training concerning the identification of transactions which may be indicative of money laundering. In order to use this defence successfully, the defendant would have to show that he did not actually know or suspect that another person was engaged in money laundering and that, in his case, his employer had not complied with requirements to provide employees with such training as is specified by the Secretary of State by order.

483. Guidance Notes on Money Laundering have been produced and issued since 1990 to regulated institutions by the industry's Joint Money Laundering Steering Group, which operates under the auspices of the British Bankers' Association. *Section 330(8)* recognises the potential value of such guidance and provides that the court must take any guidance issued by a supervisory authority (as listed in *Part 2* of *Schedule 6*) or any other appropriate body (as defined at *section 330(13)*) into account when determining whether an offence has been committed. The court would only be obliged to take into account guidance, the content and manner of publication of which has been approved by the Treasury (in its capacity as the Government department which has overall lead responsibility for money laundering policy in the regulated sector). As at present, the industry itself will draw up relevant guidance, and it will be for the industry bodies to decide whether they wish to seek Treasury approval, and make use of this additional safeguard.
484. The scope of *section 330* extends to inchoate offences such as conspiracy by reason of the definition of money laundering in *section 340(11)*.

### ***Section 331: Failure to disclose: nominated officers in the regulated sector***

485. *Section 331* creates an offence where a nominated officer who receives a report under section 330 (the failure to disclose offence) which causes him to know or suspect or gives reasonable grounds for knowledge or suspicion, that money laundering is taking place, does not disclose that report as soon as practicable after the information comes to him. *Subsection (5)* specifies that the "required disclosure" which a nominated officer must make, has to be made to the National Criminal Intelligence Service, in the form and manner (if any) prescribed by the order making power at *section 339*.

### ***Section 332: Failure to disclose: other nominated officers***

486. *Section 332* creates an offence where a nominated officer who receives a report under *section 337* or *338* (in other words, a disclosure in relation to one of the principal money laundering offences or a voluntary disclosure) which causes him to know or suspect that money laundering is taking place does not disclose that report as soon as practicable after the information comes to him. The nominated officer is required to disclose to the National Criminal Intelligence Service in the form prescribed by section 339. This clause applies to nominated officers both in the regulated sector and outside the regulated sector.

### ***Section 333: Tipping off***

487. *Section 333* creates the offence of making a disclosure likely to prejudice a money laundering investigation being undertaken or which may be undertaken by law enforcement authorities. Together with *section 342* (offence of prejudicing an investigation), these new offences replace section 53 of the Drug Trafficking Offences Act 1994 and section 93D of the Criminal Justice Act 1988. The equivalent provision in Scotland is section 40 of the Criminal Law (Consolidation) (Scotland) Act 1995; in Northern Ireland it is Article 48 of the Proceeds of Crime (Northern Ireland) Order 1996.
488. As for *sections 327(2)(c)*, *328(2)(c)* and *329(2)(c)*, there is protection from the offence for law enforcement officers who may need to make a prohibited disclosure in the course of their official duties, and there is an additional defence if a person did not know or suspect that the disclosure would prejudice an investigation. As for *section 330*, *section 333* also extends to inchoate offences, for the same reason. The maximum penalty for the offence, as set out at *section 334*, is 5 years imprisonment.



## **Consent**

### ***Section 335: Appropriate consent***

489. *Section 335* defines the parameters of "appropriate consent" for the purposes of the authorised disclosure provisions. A key element of this section is the specification of time limits within which a constable or customs officer must respond to suspicious transaction reports in circumstances where a consent decision is required. It specifies that consent decisions must be made within 7 working days. If nothing is heard within that time, then the discloser can go ahead with an otherwise prohibited act without an offence being committed. If consent is withheld within the 7 working days, then the constable or customs officer has a further 31 calendar days in which to take further action such as seeking a court order to restrain the assets in question. Again if nothing further is heard after the end of the 31-day period, then the discloser can proceed with the transaction with no risk of committing an offence.

### ***Section 336: Nominated officer: consent***

490. *Section 336* provides that a nominated officer must not give appropriate consent unless he has authorisation from the National Criminal Intelligence Service or the time limits specified in *subsections (7) to (9)* have expired. These time limits mirror the limits in *section 335* for the giving of consent to an otherwise prohibited act by a customs officer or constable. *Section 335(5)* makes it an offence for a nominated officer to consent to an otherwise prohibited act except as outlined above. A nominated officer does not commit an offence under this section if he gives consent to a transaction taking place, if he genuinely does not know or suspect that money laundering is taking place.

## **Disclosures**

### ***Section 337: Protected disclosures***

491. *Section 337* exempts a person who receives information in the course of his trade, profession, business or employment from any legal or other obligations that would otherwise prevent him from making disclosures to the authorities. The protection extends not just to the regulated sector which is required to make disclosures in order to avoid committing an offence under *section 330*, but also to those carrying out any trade, profession, business or employment, even if this is not in the regulated sector, who voluntarily make disclosures about money laundering to the police. This includes those exercising a profession in a voluntary capacity such as accountants or solicitors giving free advice. It does not, however, mean that they become subject to the failure to disclose offence at *section 330*. Although it should be noted that if they are a nominated officer working outside the regulated sector, they will be subject to the offence of "Failure to disclose: other nominated officers" at *section 332*.
492. The protection provided by *section 337* is very wide, consistent with the United Kingdom's obligations under Article 9 of the 1991 European Community Directive on prevention of the use of the financial system for the purpose of money laundering.

### ***Section 338: Authorised disclosures***

493. *Section 338* sets out the circumstances in which a disclosure will be 'authorised' for the purposes of affording a defence to the principal money laundering offences in *sections 327 to 329*. Where a disclosure is 'authorised' for these purposes, then it is not to be taken to breach any rule which would otherwise restrict that disclosure.
494. This is necessary because, in the course of their business, those working inside or outside the regulated sector may need to complete a transaction that they know or suspect could constitute one of the three principal money laundering offences. This section gives them the means of obtaining the authorisation necessary to complete the transaction, if the disclosure is made before a transaction is completed; or provides

a defence against the failure to disclose offence if the disclosure is made as soon as possible after the transaction has taken place and there was a good reason not to make it before.

### ***Section 339: Form and manner of disclosures***

495. This section provides an order making power that enables the Secretary of State to prescribe the form and manner in which a disclosure must be made under [sections 330, 331, 332 and 338](#).
496. The prescribed form may include a request to the person making the disclosure to provide additional information in support of the disclosure/suspicious transaction report. The information requested, by virtue of [subsection \(3\)](#) must be information that would be necessary to enable the authorities to decide whether to start a money laundering investigation. Additionally, by virtue of [subsection \(4\)](#) any information supplied is given immunity from any restriction on the disclosure of information such as confidentiality clauses in contracts and the law of confidence. It is important to note that no offence is committed if the person making the disclosure does not supply the additional information.

### **Interpretation**

#### ***Section 340: Interpretation***

497. [Subsection \(12\)](#) ensures that where Part 7 permits disclosure to a nominated officer, (under [sections 330, 337 and 338](#)) not only employees, but people exercising functions in relation to an organisation who are not technically employees, will also be able to disclose to a nominated officer, if the organisation has set one up. Directors, partners and volunteers for example will be able to make a report to a nominated officer, if their organisation has one. The liability for reporting to NCIS or a constable, if appropriate, then falls on the nominated officer by virtue of [sections 331 and 332](#).
498. [Subsection \(13\)](#) extends the definition of a constable (as used in this Part only) to a person authorised by the Director General of the National Criminal Intelligence Service. This is for the purpose of facilitating the handling of suspicious transaction reports by civilian staff employed by NCIS.

#### ***Schedule 9: Regulated sector and supervisory authorities***

499. [Part 1](#) of this Schedule defines what is or is not a business in the regulated sector for the purpose of [section 330\(3\)](#). It is broadly based on Article 4 of the [Money Laundering Regulations 1993 \(SI 1933/1993\)](#) as amended by article 439 of the [Financial Services and Markets Act 2000 \(Consequential Amendments and Repeals\) Order 2001 \[SI 3649/2001\]](#). A business that engages in activities listed in paragraph 1, in addition to other non-regulated activities, is only in the regulated sector to the extent that it carries on the listed activities. This ensures that people working in businesses which conduct both regulated and unregulated activities would only be caught by the failure to disclose offence at [section 330](#) whilst actually carrying out the regulated activities and not in the course of other non-regulated activities.
500. [Part 2](#) of [Schedule 9](#) lists supervisory authorities for the purpose of [section 330\(8\)\(a\)](#), and is consistent with Article 15 of the 1993 Money Laundering Regulations (as amended by the [Money Laundering Regulations 2001, SI 3641/2001](#)).
501. [Part 3](#) of [Schedule 9](#) provides that the Treasury may by Order amend the definitions in Part 1 and 2 of the Schedule.

## **Part 8: Investigations**

### **Chapter 1: Investigations**

#### **Section 341: Investigations**

502. *Section 341* defines the types of investigations in respect of which the powers set out in Part 8 may be variously exercised. These are:
- an investigation into whether a person has benefited from criminal conduct and the extent or whereabouts of his benefit (a confiscation investigation);
  - an investigation into whether property is recoverable property or associated property, who holds the property and its extent or whereabouts (a civil recovery investigation); and
  - an investigation into whether a person has committed a money laundering offence (a money laundering investigation).
503. *Subsection (3)* precludes the use of the powers for the purposes of a civil recovery investigation if civil recovery proceedings have been started under *section 243* or *244*, an interim receiving order (interim administration order in Scotland) applies to the property as provided under *section 246* or *256*, or cash is seized and detained by virtue of *sections 294* and *295*. Apart from in the context of money laundering investigations, none of the powers under Part 8 is available for use in investigations into criminal offences.

#### **Section 342: Offences of prejudicing investigation**

504. This section makes it an offence to prejudice an investigation or prospective investigation by making a disclosure about it or by tampering with evidence relevant to the investigation.

### **Chapter 2: England and Wales and Northern Ireland**

Chapter 2 provides the scheme for the investigation powers in England and Wales and Northern Ireland. The scheme relating to Scotland is provided for in Chapter 3. The provisions within this chapter are largely a consolidation and extension of powers which existed in the Criminal Justice Act 1988, the Drug Trafficking Act 1994 and the Proceeds of Crime (Northern Ireland) Order 1995. The powers of investigation contained in the Drug Trafficking Act and The Proceeds of Crime (Northern Ireland) Order will continue to apply to investigations into the offences of drug trafficking. Furthermore, the additional powers in Schedule 2 in the Northern Ireland Order will continue to be available to financial investigators in Northern Ireland in connection with a confiscation investigation.

#### **Section 343: Judges**

505. *Section 343* specifies the judges to which applications for orders are to be made. In England and Wales, applications in respect of confiscation and money laundering investigations must be made to a judge entitled to exercise the jurisdiction of the Crown Court. This will allow Circuit judges, Recorders and High Court judges in their Crown Court capacity to hear applications for orders in respect of confiscation and money laundering investigations. In Northern Ireland, a Crown Court judge will hear such applications. In both jurisdictions, applications in respect of civil recovery investigations must be made to a High Court judge.

#### **Section 344: Courts**

506. This section specifies the court which is responsible for the hearing of applications relating to the different types of investigation: the Crown Court in respect of

confiscation and money laundering investigations and the High Court in respect of civil recovery investigations. [Sections 351, 362, 369 and 375](#) have supplementary provisions regarding practice and procedure in relation to such applications. In England and Wales these only relate to those applications for investigation orders which would come before the Crown Court, as no provision is needed for the High Court. In Northern Ireland, the supplementary provisions apply to all applications for orders, whether in the Crown Court or the High Court .

## **Production orders**

### ***Section 345: Production orders***

507. The power for a judge to make a production order is available for all three types of investigations specified in [section 341](#). Similar powers previously existed in section 93H of the Criminal Justice Act 1988, section 55 of the Drug Trafficking Act 1994 and Article 50 of the Proceeds of Crime (Northern Ireland) Order 1996. Under *subsection (1)*, an application for a production order may be made by an appropriate officer; [section 378](#) specifies the appropriate officer in relation to each type of investigation.

### ***Section 347: Order to grant entry***

508. This section clarifies the power previously contained in section 93H(5) of the Criminal Justice Act 1988 (as amended), section 55(5) of the Drug Trafficking Act 1994 and Article 50(5) of the Proceeds of Crime (Northern Ireland) Order 1996 to grant entry along with a production order authorising access to material (rather than an order to produce material). This power might be used, for example, to enable an appropriate officer to be granted entry to a building in circumstances where a production order had been made in respect of material in a particular office in that building.

### ***Section 350: Government departments***

509. This section extends the scope of a production order to cover material held by an authorised government department and is similar to previous powers in section 93J(11) of the Criminal Justice Act 1988, section 59(11) of the Drug Trafficking Act 1994 and Article 54(11) of the [Proceeds of Crime \(Northern Ireland\) Order 1996 \[SI 1996 No. 1299 \(NI 9\)\]](#). In addition, in order to reflect the effect of devolution in Northern Ireland under the Northern Ireland Act 1998, provision is made to ensure that Northern Ireland departments are, for the purposes of this section, treated as government departments.

### ***Section 351: Supplementary***

510. *Subsection (7)* provides that production orders and orders to grant entry which may be authorised by a judge entitled to exercise the jurisdiction of the Crown Court (or, in Northern Ireland, a Crown Court judge) have effect as if they were orders of the Crown Court. This is so that, if such orders are not complied with, proceedings for contempt of the Crown Court may be instituted. Orders made by a High Court judge automatically attract contempt of the High Court if they are not complied with.

## **Search and seizure warrants**

### ***Section 352: Search and seizure warrants***

511. Powers to issue warrants previously derived from the powers in section 93I of the Criminal Justice Act 1988, section 56 of the Drug Trafficking Act 1994 and Article 51 of the Proceeds of Crime (Northern Ireland) Order 1996. They differ from warrants under Part II of the Police and Criminal Evidence Act 1984 (PACE) or Part III of [Police and Criminal Evidence \(Northern Ireland\) Order 1989 \[SI 1989 No.1341 \(NI 12\)\]](#) in

that they permit the seizure of special procedure material (defined at section 14 of PACE). These warrants also differ from those issued under Schedule 1 to PACE (which also permit the seizure of special procedure material) in that applications may be made without notice to the person whose premises are to be searched. Except where different provision is made in the Act, the general provisions in Part II of PACE about search warrants apply to search warrants issued under this section.

512. As in [section 345](#), an application for a warrant may be made by an appropriate officer as set out in [section 378](#). [Subsection \(5\)](#) provides for a constable to execute the warrant if it is sought in relation to a confiscation or money laundering investigation, and for a named member of staff of ARA if the warrant is sought in relation to a civil recovery investigation. The name of the member of staff can be a pseudonym if the Director so directs ([section 449](#)). A warrant may be issued either if a production order has been made and not complied with and there are reasonable grounds for believing that the material specified in the warrant is on the premises, or the requirements of [section 353](#) are met ([subsection \(6\)](#)).

### ***Section 353: Requirements where production order not available***

513. [Subsection \(1\)\(b\)](#) refers to two sets of conditions for issuing a warrant in the absence of a production order. The first set of conditions ([subsections \(3\) and \(4\)](#)) might be satisfied, for example, where the person who owns the material is abroad and therefore it is not possible to communicate with that person. In such circumstances, it is clear that a production order in respect of that person would have no effect. The second set of conditions ([subsections \(5\) to \(9\)](#)) might be satisfied where it is impossible to describe the material (for the purposes of a production order) and access will not be gained without a warrant (e.g. to the residence of the suspect).

### ***Section 355: Further provisions: confiscation and money laundering***

514. This section makes provision for the application by subordinate legislation (subject to the negative resolution procedure) of certain provisions of the Police and Criminal Evidence Act 1984 (or its Northern Ireland equivalent) concerning search warrants to search warrants under the Act where they are sought in relation to confiscation or money laundering investigations.

### ***Section 356: Further provisions: civil recovery***

515. This section sets out provisions regarding when and how a warrant issued by the High Court for the purposes of a civil recovery investigation may be exercised. [Subsection \(3\)](#) gives power for the High Court judge to make the warrant subject to such conditions as he thinks fit. Where a member of staff of ARA executes a search warrant, he will have no automatic right to use reasonable force (in contrast to the position where a constable or customs officer executes a search warrant). [Subsection \(7\)](#) gives a High Court judge power to authorise the member of staff of ARA to use reasonable force if he thinks it necessary to make the warrant effective.

## **Disclosure orders**

### ***Section 357: Disclosure orders***

516. Under [subsection \(1\)](#), only the Director may apply to a judge for a disclosure order. It is available in respect of a confiscation and a civil recovery investigation but not a money laundering investigation. Owing to the necessarily invasive nature of the disclosure order, it is thought appropriate to limit the order's use to the Director. Since the Director will not have a role in the investigation of money laundering offences, it is a consequence that the disclosure order will not be available for use in money laundering investigations. Furthermore, the Director can only apply for a disclosure order in respect of his own investigations ([subsection 3](#)). He cannot use this power on behalf of law

enforcement authorities in respect of investigations they are carrying out and in which the Director is not otherwise involved. However, law enforcement authorities can transfer entire confiscation investigations to the Director if this is thought necessary.

517. Once a disclosure order has been made, the Director may use the extensive powers set out in *subsection (4)* throughout the investigation. Thus, unlike the other orders covered by this Part which have to be applied for separately on each occasion, a disclosure order gives the Director continuing powers for the purposes of the investigation. A person may require that evidence of the authority to exercise disclosure powers be provided. Where this happens, it is envisaged that a copy of the disclosure order will be given to the person.

### ***Section 358: Requirements for making of disclosure order***

518. Because of their intrusive nature, it is not anticipated that disclosure orders will be sought unless other powers, such as production orders, have already been sought or would demonstrably not suffice to enable the required information to be obtained. Indeed, this would be one of the points a judge would be expected to consider as part of his consideration of the proportionality test which would apply by virtue of section 6 of the Human Rights Act 1998.

### ***Section 359: Offences***

519. As the disclosure order obliges persons to comply with certain requirements, sanctions to compel such compliance are required. There is a maximum penalty of six months imprisonment and/or a level 5 fine (currently £5000) for non-compliance and two years imprisonment and/or an unlimited fine for knowingly or recklessly makes a false or misleading statement.

### ***Section 360: Statements***

520. As part of the Government's response to the judgment of the European Court of Human Rights in the case of *Saunders v UK*, Schedule 3 to the Youth Justice and Criminal Evidence Act 1999 amended a number of compulsory disclosure powers in order to prevent a statement obtained under compulsion from a person from being used to incriminate him (subject to exceptions). Similar provision is made in this section.

## **Customer information orders**

### ***Section 363: Customer information orders***

521. A customer information order requires all (or a targeted sample of) banks and other financial institutions to provide details of any accounts held by the person who is the subject of a confiscation or money laundering investigation. The order can also apply to persons who appear to hold property that is subject to a civil recovery investigation. *Section 369(7)* requires the prior authorisation of a senior appropriate officer before an appropriate officer can make an initial or variation application for a customer information order. This mirrors the approach taken for restraint order applications in confiscation proceedings (see *section 42* read with *section 68*). An appropriate officer who is also a senior appropriate officer can apply for the order and variations himself without requiring further and separate authorisation. *Section 378* sets out who is a senior appropriate officer in the three types of investigation. As with disclosure orders, a person may require the person serving a notice given under the order to demonstrate that they have the authority they claim. Again, it is envisaged that a copy of the original customer information order will be provided.

### ***Section 364: Meaning of customer information***

522. This section sets out the definition of "customer information" for individuals and for companies and partnerships. *Subsections (2)(f) and (3)(i)* require financial institutions

to produce evidence of identity obtained in compliance with the relevant existing legislation, currently the [Money Laundering Regulations 1993 \[SI 1993 No.1933\]](#). By virtue of [section 459\(6\)](#), any order made by the Secretary of State under [subsection \(4\)](#) to extend the meaning of “customer information” will have to be laid before, and approved by a resolution of, both Houses of Parliament.

### ***Section 366: Offences***

523. As with the disclosure order, there are two offences connected with customer information orders. As the sanctions are directed at non-compliant institutions rather than an individual they are solely financial. The maximum penalties are a level 5 fine (currently £5000) for non-compliance and an unlimited fine for knowingly or recklessly making a false or misleading statement.

### ***Section 367: Statements***

524. Like the disclosure order, a customer information order requires an institution to divulge information. This section sets out the standard conditions on the use of such information to prevent information obtained under compulsion from being used against the financial institution in criminal proceedings against it (subject to certain limited exceptions) (see [section 360](#)).

## **Account monitoring orders**

### ***Section 370: Account monitoring orders***

525. This section has the effect of requiring a financial institution to provide specified information in relation to an account (for example, details of all transactions passing through the account) during a specified period up to a maximum of 90 days. The information would normally be provided in the form of a bank statement. An account monitoring order may be obtained in respect of all three types of investigation specified in [section 341](#) and can be applied for by an appropriate officer as set out in [section 378](#).

### ***Section 371: Requirements for making of account monitoring order***

526. As part of his consideration of the proportionality test that he must apply by virtue of section 6 of the Human Rights Act 1998, the judge might want to satisfy himself that an order of this type lasting over a period of time (rather than a one-off production order) is necessary for the purposes of the investigation.

### ***Section 372: Statements***

527. As with the disclosure and customer information orders, an account monitoring order compels an institution to divulge information. Similar to provisions for disclosure orders and customer information orders, this section sets out the standard conditions on the use of such information to prevent self-incriminatory information being used as evidence in criminal proceedings against the financial institutions (subject to certain limited exceptions).

### ***Section 375: Supplementary***

528. *Subsection (2)* allows the account monitoring order itself to be varied. In England and Wales, High Court rules already allow for such variations in civil recovery investigations. *Subsection (6)* provides that account monitoring orders made by a judge entitled to exercise the jurisdiction of the Crown Court have effect as if they were orders of the Crown Court. This is so that it is clear that, if the order is not complied with, contempt proceedings may be brought in the Crown Court. Contempt proceedings are automatically attracted if an order of the High Court is not complied with.

## **Evidence overseas**

### ***Section 376: Evidence overseas***

529. This section enables the Director to request evidence from overseas for use in confiscation investigations. Prosecuting authorities are able to obtain such evidence using section 3 of the Criminal Justice (International Co-operation) Act 1990; however, as the Agency is not a prosecuting authority, specific provision in the Act is necessary.

## **Code of practice**

### ***Section 377: Code of practice***

530. This section requires the Secretary of State to issue a statutory code of practice in relation to the exercise of the investigation powers in Chapter 2 of Part 8. The code will provide clear guidance as to how such powers in respect of confiscation, money laundering and civil recovery investigations are to be operated in England and Wales, and Northern Ireland. There will be a separate code for Scotland (see [section 410](#)).
531. This follows the precedent of paragraph 8 of Schedule 2 to the [Proceeds of Crime \(Northern Ireland\) Order 1996 \[SI 1996 No.1299 \(N.I. 9\)\]](#), which contains a provision requiring the Secretary of State to draw up a code in relation to the exercise of the investigation powers conferred by that Schedule. Similar to those provisions, this code will be published in draft for consultation and laid before both Houses. Also, a breach of the code will not render a person liable to criminal or civil proceedings but the code will be admissible as evidence in criminal and civil proceedings. [Section 459](#) provides that this code will be brought into operation by the affirmative resolution procedure.

## **Interpretation**

### ***Section 378: Officers***

532. This section lists the appropriate officers and senior appropriate officers who may apply for the orders and warrants set out in set out in this Chapter. [Section 443](#) empowers the Secretary of State to specify by order particular groups of accredited financial investigators who may exercise the powers of appropriate officers and senior appropriate officers, for example, accredited financial investigators who are also company investigators attached to the Department for Trade and Industry. An accredited financial investigator is a person accredited under [section 3](#). Only the Director can investigate civil recovery, and accredited financial investigators engaged by ARA will not have access to money laundering investigation powers ([subsection \(7\)](#)).
533. Civilians authorised by the Director General of the National Criminal Intelligence Service to handle suspicious transaction reports may or may not be accredited financial investigators. For the purposes of the offence of prejudicing a money laundering investigation ([section 342](#)), [subsection \(5\)](#) includes them in the definition of “appropriate officer”. It is therefore an offence to make a disclosure or tamper with evidence which involves an investigation being carried out by such civilians (see the note for [section 342](#) above).

## **Chapter 3: Scotland**

### ***Production orders***

#### ***Section 380: Production orders***

534. The power for a sheriff to make a production order is available for all three types of investigations specified in [section 341](#). Similar powers exist at present in section 18 of the Proceeds of Crime (Scotland) Act 1995 and section 31 of the Criminal Law (Consolidation)(Scotland) Act 1995. Under [subsection \(1\)](#), an application for a



production order may be made by an appropriate person: [section 412](#) specifies the appropriate person in relation to each type of investigation.

### ***Section 382: Order to grant entry***

535. This power might be used, for example, to enable a proper person, as specified in [section 412](#), to be granted entry to a building in circumstances where a production order has been made in respect of material in a particular office in that building.

### ***Section 385: Government departments***

536. [Section 385](#) extends the scope of a production order to cover material held by an authorised government department and is similar to existing powers in section 20 of the Proceeds of Crime (Scotland) Act 1995 and section 35 of the Criminal Law (Consolidation) (Scotland) Act 1995. In addition, in order to reflect the effect of devolution in Scotland under the Scotland Act 1998, provision is made to ensure that the Scottish Administration is, for the purposes of this section, treated as government departments.

## **Search warrants**

### ***Section 387: Search warrants***

537. Powers to issue warrants derive from the existing powers in section 19 of the Proceeds of Crime (Scotland) Act 1995 and section 32 of the Criminal Law (Consolidation) (Scotland) Act 1995. As in [section 380](#), an application for a warrant may be made by an appropriate person as set out in [section 412](#). A warrant may be issued either if a production order has been made and not complied with and there are reasonable grounds for believing that the material specified in the warrant is on the premises, or if [section 388](#) is satisfied (*subsection (5)*).

### ***Section 388: Requirements where production order is not available***

538. *Subsection (1)(b)* refers to two sets of conditions for issuing a warrant in the absence of a production order. The first set of conditions (*subsections (3) and (4)*) might be met, for example, where the person who owns the material is abroad and therefore it is not possible to communicate with that person. In such circumstances, it is clear that a production order in respect of that person would have no effect. The second set of conditions (*subsections (5) to (9)*) might be met where it is impossible to describe the material (for the purposes of a production order) and access will not be gained without a warrant (e.g. to the residence of the suspect).

### ***Section 390: Further provisions: confiscation, civil recovery and money laundering***

539. This section makes additional provisions in respect of warrants issued for confiscation, civil recovery and money laundering investigations. *Subsection (2)* provides that warrants will continue in force for one month from the day on which they were issued. Search warrants will also authorise the person executing it to require that information which is held on computer and which he believes is relevant to the investigation to be produced in a form which it can be taken away and is visible and legible.
540. *Subsection (5)* gives power for a sheriff to make a civil recovery investigation warrant subject to such conditions as he thinks fit. A person executing a civil recovery search warrant will have no automatic right to use reasonable force (in contrast to the position where a constable executes a search warrant). *Subsection (6)* therefore gives a sheriff power to authorise the person executing the civil recovery investigation warrant to use reasonable force if he thinks it is necessary to make the warrant effective.

## **Disclosure orders**

### ***Section 391: Disclosure orders***

541. Under *subsection (1)*, the Lord Advocate may apply to the High Court for a disclosure order in respect of a confiscation investigation and the Scottish Ministers may apply to the Court of Session for a disclosure order in respect of a civil recovery investigation. Because of the necessarily invasive nature of such an order, it is not thought appropriate that such a power should be available for investigations into money laundering offences, although comparable powers exist in the Terrorism Act 2000 in relation to terrorist offences as well as terrorist funding.
542. Once a disclosure order has been made, the Lord Advocate or the Scottish Ministers may use the extensive powers set out in *subsection (4)* throughout the relevant investigation. Thus, unlike the other orders covered by this Part which have to be applied for separately on each occasion, a disclosure order gives the Lord Advocate or the Scottish Ministers continuing powers for the purposes of the relevant investigation. A person may require that evidence of the authority to exercise disclosure powers be provided. Where this happens, it is envisaged that a copy of the disclosure order will be given to the person.

### ***Section 392: Requirements for making of disclosure order***

543. Because of their intrusive nature, it is not anticipated that disclosure orders will be sought unless other powers, such as production orders, have already been sought or would demonstrably not suffice to enable the required information to be obtained. Indeed, this would be one of the points the High Court or the Court of Session would be expected to consider as part of his consideration of the proportionality test which would apply by virtue of section 6 of the Human Rights Act 1998.

### ***Section 393: Offences***

544. As the disclosure order obliges persons to comply with certain requirements, sanctions to compel such compliance are required. There is a maximum penalty of six months imprisonment and/or a level 5 fine (currently £5000) for non-compliance and two years imprisonment and/or an unlimited fine for knowingly or recklessly making a false or misleading statement.

### ***Section 394: Statements***

545. As part of the Government's response to the judgment of the European Court of Human Rights in the case of *Saunders v UK*, Schedule 3 to the Youth Justice and Criminal Evidence Act 1999 amended a number of compulsory disclosure powers in order to prevent a statement obtained under compulsion from a person from being used to incriminate him (subject to exceptions). Similar provision is made in this section.

## **Customer information orders**

### ***Section 397: Customer information orders***

546. A customer information order would require all (or a targeted sample of) banks and other financial institutions to provide details of any accounts held by the person who is the subject of a confiscation or money laundering investigation. The order can also apply to persons who appear to hold a property which is subject to a civil recovery investigation. Under *subsection (1)* an application for a customer information will be made to the sheriff court by the appropriate person as defined in *section 412*. As with disclosure orders, a person may require the person serving the order to demonstrate that they have the authority they claim. Again, it is envisaged that a copy of the original customer information order will be provided.

### ***Section 398: Meaning of customer information***

547. *Section 398* sets out the definition of “customer information” for individuals and for companies and partnerships. *Subsections (2)(f) and (3)(i)* require financial institutions to produce evidence of identity obtained in compliance with the relevant existing legislation, currently the [Money Laundering Regulations 1993 \[SI 1993 No.1933\]](#). By virtue of [section 459\(6\)](#), any order made by the Scottish Ministers under *subsection (4)* to extend the meaning of “customer information” will have to be laid before and approved by a resolution of the Scottish Parliament.

### ***Section 400: Offences***

548. As with the disclosure order, there are two offences connected with customer information orders. As the sanctions are directed at non-compliant institutions rather than an individual they are solely financial. The maximum penalties are a level 5 fine (currently £5000) for non-compliance and an unlimited fine for knowingly or recklessly making a false or misleading statement.

### ***Section 401: Statements***

549. Like the disclosure order, the customer information order requires an institution to divulge information. *Section 401* sets out the standard conditions on the use of such information to prevent information obtained under compulsion from being used against the financial institution in criminal proceedings against it (subject to certain limited exceptions) (see [section 394](#)).

## **Account monitoring orders**

### ***Section 404: Account monitoring orders***

550. *Section 404* has the effect of requiring a financial institution to provide specified information in relation to an account (for example, details of all transactions passing through the account) during a specified period up to a maximum of 90 days. The information would normally be provided in the form of a bank statement. An account monitoring order may be obtained in respect of all three types of investigation specified in [section 341](#) and can be applied for by an appropriate person as specified in [section 412](#).

### ***Section 405: Requirements for making of account monitoring order***

551. As part of his consideration of the proportionality test that he must apply by virtue of section 6 of the Human Rights Act 1998, the sheriff might want to satisfy himself that an order of this type (rather than a production order) is necessary for the purpose of the investigation.

### ***Section 406: Statements***

552. As with the disclosure and customer information orders, an account monitoring order compels an institution to divulge information. Similar to the provisions for disclosure orders and customer information orders, [section 400](#) sets out the standard conditions on the use of such information to prevent self-incriminatory information being used as evidence in criminal proceedings against the financial institutions (subject to certain limited exceptions).

### ***Section 408: Supplementary***

553. *Subsection (4)* allows application to be made to discharge or vary an account monitoring order.

## **General**

### ***Section 409: Jurisdiction of sheriff***

554. *Section 409* gives the sheriff jurisdiction to grant a production order, search warrant, customer information order, or account monitoring order in respect of property which is located anywhere in Scotland, *Subsection (2)* provides for the execution of any such order throughout Scotland without the necessity of endorsement or backing by the sheriff of the sheriffdom where the property or information is located.

### ***Section 410: Code of practice***

555. *Section 410* provides a code of practice relating to the operation of the powers set out in Chapter 3 of Part 8 in the same way that *section 377* does for Chapter 2. The code will be published in draft for consultation and laid before the Scottish Parliament for approval by resolution of the Parliament (see *section 459*).

### ***Section 411: Performance of functions of Scottish Ministers by constables in Scotland***

556. *Schedule 8* of the Act amends the Police (Scotland) Act 1967 to enable constables to undertake temporary service with the Scottish Ministers in connection with their functions under Part 5 (civil recovery) or Part 8 (investigations) of the Act. On secondment, a constable will not bring with him his police powers. There are, however, certain of the functions bestowed by Part 8 on Scottish Ministers that it would not be appropriate for seconded constables to exercise. These are set out in *section 411* and concern the making of applications to the court in connection with the various investigatory orders contained in Part 8. Such functions will be carried out by lawyers.

### ***Section 412: Interpretation***

557. In Chapter 3, the various sections provide that the appropriate person will apply to the court for the relevant production order, search warrant, customer information order, or account monitoring order. *Section 412* defines appropriate person as being a procurator fiscal in relation to confiscation or money laundering investigations and the Scottish Ministers in relation to a civil recovery investigation. Similarly, the various sections provide that the relevant orders will be executed by a proper person. *Section 412* defines a proper person as being a constable (which is further defined as including a customs officer) in relation to confiscation or money laundering investigations and the Scottish Ministers or a person named by them, in relation to a civil recovery investigation.

## **Chapter 4: General**

### ***Interpretation***

#### ***Section 413: Criminal conduct***

558. The definition of ‘criminal conduct’ is similar to the one given for confiscation proceedings (see *sections 76, 143* and *224*) and is only relevant to confiscation investigations. The effect of *subsection (5)* is that the powers in this Part may be used from the date of its commencement irrespective of whether the conduct was committed or the property in question was obtained before the Act is enacted.

## **Part 9: Insolvency etc.**

### **Bankruptcy in England & Wales**

#### ***Section 417: Modifications of the 1986 Act***

559. The purpose of Part 9 is to explain what happens when the same property is subject both to criminal confiscation legislation and to insolvency legislation. The Part is United

Kingdom-wide and much of it is based on earlier legislation. *Sections 417-419* deal with the interaction of the insolvency legislation of England and Wales with the confiscation legislation of England and Wales, Scotland and Northern Ireland (“the 1986 Act” means the Insolvency Act 1986 in this context). This is necessary because both the criminal confiscation legislation and the insolvency legislation throughout the United Kingdom affect property in other jurisdictions.

560. The basic rule expressed by *section 417* is that, if at the time a person is adjudged bankrupt under the 1986 Act a restraint order has previously been made or a receiver or administrator has previously been appointed in respect of any of his property, that property is excluded from his estate for the purpose of the bankruptcy. So any of that property first goes to satisfy the confiscation order, rather than being dispersed to creditors. The legislation is designed to prevent defendants from attempting to use the insolvency legislation to defeat the purpose of the confiscation legislation.
561. *Schedule 11* makes some related consequential amendments to the Insolvency Act 1986. They deal with the problem that property can only be included in a bankrupt’s estate at the time the bankruptcy order is made. If restraint or receivership action is underway when the bankruptcy order is made, any unconfiscated property cannot be given to the creditors at a later date. The amendments provide that property not required for confiscation can subsequently be included in the bankrupt’s estate. See also the note on *Schedule 11, paragraph 16*, amendments to the Insolvency Act 1986.

#### ***Section 418: Restriction of powers***

562. This section, on the other hand, explains the circumstances under which the bankruptcy legislation takes priority. If a person is adjudged bankrupt before a restraint order is made or a receiver or administrator is appointed, no property that is for the time being comprised in the bankrupt’s estate may then be placed under restraint or subject to realisation under the confiscation legislation. However, once the creditors have been satisfied, any remaining property may be used to satisfy the confiscation order.
563. Further to the problem described under the previous section and dealt with in *Schedule 11, paragraph 16, subsections (3)(d) and (e)* prevent the confiscation court from exercising its powers in relation to property left over after a confiscation order has been satisfied. This will ensure that, where a bankruptcy order has been made, any surplus sums will go into the bankrupt’s estate for distribution to creditors, rather than being distributed by the Crown Court to the defendant and others under the confiscation legislation.

#### ***Section 419: Tainted gifts***

564. This section deals with the procedure under the insolvency legislation for voiding a gift made by a bankrupt to a third party, so that it can be used to pay creditors. This procedure is similar to the procedure for recovering tainted gifts in the confiscation legislation. Where a person holds a gift, it is possible for the confiscation legislation and the insolvency legislation both to lay claim to the same property simultaneously. The section explains what happens when this situation arises.
565. The approach to gifts adopted by *section 419* is similar to the overall approach in *Part 9* of the Act, which was described in the notes on *sections 417 and 418* above. *Section 419* makes it clear that where restraint or receivership action has been taken against property in the hands of the gift recipient, then the power to void the gift under the insolvency legislation cannot be exercised for as long as that action is underway.

## **Sequestration in Scotland**

### ***Section 420-422: Modifications of the 1985 Act; Restriction of powers; Tainted gifts***

566. *Sections 420-422* make corresponding provision in relation to property which may form part of the debtor's estate under the Scottish insolvency legislation (primarily, the Bankruptcy (Scotland) Act 1985).

## **Bankruptcy in Northern Ireland**

### ***Sections 423-425: Modifications of the 1989 Order; Restriction of powers; Tainted gifts***

567. *Sections 423-425* contain corresponding provision in relation to property which may be subject to proceedings under the insolvency legislation in Northern Ireland (the Insolvency (Northern Ireland) Order 1989).

## **Winding up in England & Wales and Scotland**

### ***Section 426: Winding up under the 1986 Act***

568. *Section 426* deals with the situation where an insolvent company rather than an individual holds realisable property. Broadly, if action is taken under the confiscation legislation before a winding up order is made, confiscation takes precedence over insolvency. The provision is thus analogous to that which applies to personal bankruptcy in England and Wales or Northern Ireland, and sequestration in Scotland. This section covers the company insolvency legislation of both England and Wales and Scotland. The same legislation, the Insolvency Act 1986, applies to company insolvency in the two jurisdictions.

### ***Section 427: Tainted gifts***

569. *Section 427* makes provision like that in *sections 419, 422* and *425* for the situation where a tainted gift is made not by an individual but by a company. The purpose of the section is to ensure that where restraint or receivership action has been taken against property in the hands of the gift recipient, then the power to void the gift under the insolvency legislation cannot be exercised for as long as that action is underway.

## **Winding up in Northern Ireland**

### ***Section 428: Winding up under the 1989 Order***

570. The Insolvency Act 1986 does not apply to company insolvencies in Northern Ireland. In Northern Ireland, the relevant legislation is the Insolvency (Northern Ireland) Order 1989. This section contains provision similar to that in *section 426*, except that it deals with the situation where a company insolvency falls under the 1989 Order rather than the 1986 Act.

### ***Section 429: Tainted gifts***

571. *Section 429* makes provision like that in *section 427*. It covers the situation where a gift qualifies both as a tainted gift under the confiscation legislation and as a voidable gift under the Northern Ireland company insolvency legislation.

## **Floating charges**

### ***Section 430: Floating charges***

572. A floating charge is a charge over the property of a company or society. Unlike an ordinary charge, it does not attach to any particular property of the company or society

but “floats” over all its property. The charge-holder may under certain circumstances have a receiver appointed to recover the value of the charge.

573. This section applies to companies which may be wound up in any part of the United Kingdom. It is designed to address the situation where a charge-holder’s receiver might be appointed at the same time as a confiscation receiver. It establishes a scheme of priorities so that only one of the receivers acts at any given time. It provides that if a charge-holder’s receiver has been appointed, then any property in relation to which that receiver’s functions are exercisable is not subject to restraint or realisation action under the confiscation legislation. Any property left after the value of the charge had been distributed to creditors would, however, subsequently be available for restraint and realisation.
574. Conversely, if a restraint order is made or realisation action is taken against property before the appointment of the charge-holder’s receiver, it is the charge-holder’s receiver who is prevented from taking action in relation to the property. This does not mean that the charge-holder can no longer recover the value of the charge. The confiscation receiver’s functions must still be exercised in this situation in accordance with [section 69](#), which requires the powers of restraint and receivership to be exercised with a view to allowing third parties to retain or recover the value of any interest held by them. This includes an interest under a floating charge.

## **Limited liability partnerships**

### ***Section 431: Limited liability partnerships***

575. Limited liability partnerships are a new form of corporate structure created by the Limited Liability Partnerships Act 2000. This section provides that [sections 426, 427 and 430](#)(company insolvency and floating charges) are to apply to limited liability partnerships in much the same way as they apply to any other company.

## **Insolvency practitioners**

### ***Section 432: Insolvency practitioners***

576. This section reproduces earlier legislation and explains what is to happen when an insolvency practitioner takes action against property subject to a restraint order. The main purpose of the provision is to protect insolvency practitioners who unwittingly interfere with property subject to a restraint order from liability, except insofar as is caused by their negligence, and to enable such insolvency practitioners to recover their expenses.

## **Part 10: Information**

### **England and Wales and Northern Ireland**

#### ***Section 435: Use of information by Director***

577. [Section 435](#) ensures that the Director can use information obtained in connection with any one of his functions to assist him in exercising any of his other functions. For example, information obtained in the course of a criminal confiscation investigation may be used by the Director in a civil recovery investigation.

#### ***Section 436: Disclosure of information to Director***

578. [Section 436](#) enables information to be disclosed to the Director by a person (a ‘permitted person’) listed in [subsection \(5\)](#). The reference to a constable in [subsection \(5\)\(a\)](#) will include any person with the powers of a constable including, for example, officers of the British Transport Police and the Ministry of Defence Police. Under [subsection \(6\)](#), the Secretary of State will be able to add to the list of permitted persons by order

which, by virtue of [section 459\(6\)\(a\)](#), will be subject to approval by each House of Parliament. *Subsection (7)* narrows the designation power to specific functions; for example when designating the Secretary of State for Trade and Industry, the Secretary of State would be required to designate a relevant function within that department such as its insolvency function. *Subsections (8) and (9)* deal with information provided by the Commissioners of Inland Revenue and Commissioners of Customs and Excise. For information to be passed from either to the Director, the Commissioners, or a person to whom they have delegated the power to disclose, must authorise the disclosure. This is to ensure that there are safeguards in place to protect sensitive personal information held by both bodies.

579. Disclosures of information that contravene the Data Protection Act 1998, or are prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000, are not permitted (*subsection (3)*). It is also implicit that the provisions of the Human Rights Act 1998 would need to be taken into account before any disclosure is made by a permitted person or body.

### ***Section 437: Further disclosure***

580. *Subsections (1) to (4)* restrict the onward transmission from the Director of information received from either the Commissioners of Inland Revenue or Commissioners of Customs and Excise (or persons who have disclosed on their behalf). As with [section 436\(8\) and \(9\)](#), these measures are an acknowledgement of the personal nature of the information. They ensure that it can only be used for purposes connected with the exercise of the Director's functions and with the permission of the providing body.
581. *Subsection (6)* enables a provider of information to the Director other than the Commissioners of Inland Revenue or the Commissioners of Customs and Excise to attach conditions relating to its further disclosure, for example where it may contain sensitive operational details.

### ***Section 438: Disclosure of information by Director***

582. *Section 438* provides that the Director may disclose information to any person or body for any of the purposes set out in *subsection (1)(a) to (i)*. *Subsections (2) and (3)*, however, prohibit disclosure of any information obtained by the Director under Part 6 of the Act (Revenue Functions) except to the Commissioners of Inland Revenue, or to the Lord Advocate for the exercise of his functions under Part 3 of the Act. These measures again recognise the delicate nature of information relating to the tax affairs of an individual. The purpose of enabling such information to be disclosed to the Lord Advocate is to ensure that he is on the same footing in relation to his Part 3 functions as the Director would be in relation to his Part 2 functions – the Director would be able to use such information for his Part 2 functions by virtue of [section 435](#). Similarly, *subsection (4)* allows the Lord Advocate to disclose such information to Scottish Ministers for the purpose of their functions under Part 5 of the Act; this is so that Scottish Ministers will be on the same footing as the Director, who, by virtue of [section 435](#), would be able to use such information in connection with his Part 5 functions.
583. *Subsection (5)* provides for the Director to impose conditions on the further disclosure of any information disclosed by him. *Subsection (6)* prohibits the disclosure of the information in contravention of these conditions. Under *subsection (9)*, the Secretary of State will be able to add to the list of disclosure purposes by order which, by virtue of [section 459\(6\)\(a\)](#), will be subject to approval by both Houses of Parliament.
584. As with [section 436\(3\)](#), exchanges of information which contravene the Data Protection Act 1998, or are prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000, are not permitted and any disclosure would be subject to the provisions of the Human Rights Act 1998.



## **Scotland**

### ***Section 439: Disclosure of information to Lord Advocate and to Scottish Ministers***

585. *Section 439* enables information to be disclosed to the Scottish Ministers or to the Lord Advocate by a person (a 'permitted person') listed in *subsection (5)*. The reference to a constable in *subsection 5(a)* will include any person with the powers of a constable, including for example the British Transport Police and the Ministry of Defence Police. Under *subsection (6)*, the Scottish Ministers will be able to add to the list of permitted persons by order which, by virtue of *section 459(6)(b)*, will be subject to approval by the Scottish Parliament. *Subsection (7)* narrows the designation power to specify functions; for example, when designating a Government department, the Scottish Ministers would be required to designate a relevant function within that department. *Subsections (8)* and *(9)* deal with information provided by the Commissioners of Inland Revenue and Commissioners of Customs and Excise. For information to be passed from either to the Scottish Ministers or to the Lord Advocate, the Commissioners, or a person nominated by them, must authorise the disclosure. This is to ensure that there are safeguards in place to protect sensitive personal information held by both bodies.
586. Disclosures of information that contravene the Data Protection Act 1998, or are prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000, are not permitted (*subsection (3)*). It is also implicit that the provisions of the Human Rights Act 1998 would need to be taken into account before any disclosure is made by a permitted person or body.

### ***Section 440: Further disclosure***

587. *Subsections (1) to (4)* relates to the onward transmission from the Scottish Ministers or the Lord Advocate of information received from either the Commissioners of Inland Revenue or Commissioners of Customs and Excise (or persons to whom authority has been delegated). As with *section 439(8)* and *(9)*, these measures are an acknowledgement of the personal nature of the information. They ensure that it can only be used for purposes connected with the exercising of the functions of the Scottish Ministers or of the Lord Advocate under the Act with the permission of the providing body.
588. *Subsection (6)* enables a provider of information to the Scottish Ministers or to the Lord Advocate to attach conditions relating to its further disclosure for example, where it may contain sensitive operational details.

### ***Section 441: Disclosure of information by Lord Advocate and by Scottish Ministers***

589. *Section 441* provides that the Scottish Ministers and the Lord Advocate may disclose information to any person or body for any of the purposes set out in *subsection (1) (a) to (i)*. Under *subsection (8)*, the Scottish Ministers will be able to add to the list of disclosure purposes by order.
590. As with *section 439(3)*, exchanges of information which contravene the Data Protection Act 1998, or are prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000, are not permitted and any disclosure would be subject to the provisions of the Human Rights Act 1998.

## **Overseas purposes**

### ***Section 442: Restriction on disclosure for overseas purposes***

591. *Section 442* brings the power to disclose information for overseas purposes within the scope of the provisions of the Anti-Terrorism, Crime and Security Act 2001. Section 18 of that Act provides power for the Secretary of State to restrict disclosure of information for overseas purposes. The power may be exercised where it appears to the Secretary of

State that the overseas investigation or proceeding relates to a matter where it would be more appropriate for any investigation to be carried out by the authorities of the United Kingdom or a third country.

592. *Subsection (1)* provides that the provisions of section 18 apply to a disclosure made under *section 438(1)(a)* or *(b)*, or under *section 441(2)(a)* or *(b)*. *Subsection (2)* disapplies section 20 of the ATCS Act in relation to disclosures under Part 10; section 20 contains interpretation provisions for Part 3 of the Act which are not needed for the Act.

## **Part 11: Co-operation**

### ***Section 443: Enforcement in different parts of the United Kingdom***

593. This section provides for restraint, receivership and confiscation orders, including ancillary orders, and investigation orders and warrants under Part 8, made in each of three jurisdictions of the United Kingdom to be enforced in the other. The arrangements for such enforcement are to be made by Order in Council. *Subsection (2)* enables provision to be made so that the functions of a receiver or, in Scotland, an administrator may be recognised in the other jurisdictions. The section also provides for the amendment and application of other legislation for the specific narrow purpose of achieving the successful conversion of orders between the different jurisdictions.

### ***Section 444: External requests and orders***

594. *Section 444* provides for the freezing of property in the United Kingdom which may be needed to satisfy overseas orders in relation to the recovery of criminal proceeds, and for the enforcement of such orders by the realisation of property in any part of the United Kingdom. Such provision is to be made by Order in Council, and corresponds to provisions in Parts 2, 3 & 4 or Part 5 (excluding Chapter 3). Similar provisions in existing legislation are to be found in sections 39 and 40 of the Drug Trafficking Act 1994, sections 96 and 97 of the Criminal Justice Act 1988, sections 40 and 41 of the Proceeds of Crime (Scotland) Act 1995 and Article 42 of the Proceeds of Crime (Northern Ireland) Order 1996.
595. It should be noted that there is another scheme, in section 9 of the Criminal Justice (International Co-operation) Act 1990, for the enforcement in the United Kingdom, also by Order in Council, of forfeiture orders made overseas. However, these forfeiture orders are restricted to orders for the disposal of “instrumentalities” of crime (i.e. items used, or intended for use, in the commission of criminal offences). The Act makes no change to section 9 and does not affect the operation of the Orders in Council made under it.
596. It should also be noted that *section 444* will, as in domestic cases under Parts 2 to 4 of the Act, enable restraint orders to be granted from the start of a criminal investigation. The Home Secretary may therefore, by Order in Council under this section, provide for the United Kingdom’s courts to restrain assets at the request of a foreign jurisdiction at an earlier stage in proceedings than is possible at present.
597. Under current legislation, assistance in freezing property and enforcing overseas orders may only be granted to countries and territories which have been “designated” for the purpose. *Section 444* dispenses with the designation procedure and has been constructed so that asset recovery assistance can, like other forms of judicial co-operation under the Criminal Justice (International Co-operation) Act 1990 be granted to an external jurisdiction without the need for the country concerned to be designated.

### ***Section 445: External investigations***

598. *Section 445* makes provision for investigative powers to be made available in respect of overseas investigations. These will be provided by Order in Council which will be subject to annulment in pursuance of a resolution of either House (*section 459(4)*).

The domestic investigation orders and warrants are provided in Part 8; *subsection (1)* allows these powers to be made available for external investigations and permits the creation of offences which are equivalent to offences created in Part 8 in relation to external investigations. Such offences would include the offence of prejudicing an investigation and the offence of failing to comply with a customer information or disclosure order in respect of an overseas investigation. External investigations are defined at *section 447(3)* as the overseas equivalents to domestic confiscation, money laundering and civil recovery investigations. *Subsection (3)* provides that disclosure orders will not be available for external money laundering investigations. *Subsection (2)* allows for investigation powers corresponding to those in Part 8 to be applied, with any necessary modifications, for use in response to a request from an overseas authority.

### **Section 447: Interpretation**

599. *Section 447(2)* makes an external order, which is made in relation to the recovery of the proceeds of crime, enforceable in the United Kingdom regardless of the form it takes. It could be an order made against a person (an “*in personam*” order) or an order made against property (an “*in rem*” order, as in civil forfeiture proceedings in the USA). It could be a forfeiture order (an order changing the title of property), an order to a person to pay a sum of money or some other kind of order.
600. The external order must have been made by an overseas court (as defined by *subsection (10)*). It is immaterial what kind of court proceedings the external order is made in. It could be made in criminal proceedings, civil proceedings or some other court proceedings. However, non-court orders such as “administrative” confiscation orders made by police officers and similar authorities are excluded from this scheme.
601. An external order is defined as being for the recovery of specified property or a specified sum of money (*subsection (2)(b)*). This will enable external orders to be enforced, whether they are orders for the recovery of particular tainted property or orders for specified sums of money that may be satisfied out of any property, legally or illegally obtained.
602. *Subsection (11)* defines “overseas authority”. This section of the Act refers to “overseas authority” rather than “overseas government” because it will not always be the government of a country which has responsibility for the functions outlined at *subsection (11)(a) – (c)*.

## **Part 12: Miscellaneous and General**

### **Miscellaneous**

#### **Section 448: Tax**

603. This section introduces *Schedule 10*.

#### **Schedule 10: Tax**

##### **Part 1 – General**

604. Sections 75 and 77 of the Taxes Management Act 1970 have the effect that, where the receiver is appointed by the court, certain taxes payable by the person whose property is under receivership may be recovered instead from the receiver. Whilst both the tax and the confiscation legislation is silent on the subject, there is an argument that these sections apply to receivers and administrators appointed under the confiscation and civil recovery legislation. *Schedule 10* provides expressly that these sections do not so apply.

## **Part 2 – Provisions relating to Part 5**

605. This part applies where property vests in the trustee for civil recovery or other person under a recovery order or cash is forfeited under *section 298*.
606. Without special provision, such vesting or forfeiture might count for capital gains purposes as a disposal at market value, and any resulting gains would be chargeable. A charge to income tax or corporation tax might also arise instead.
607. *Paragraph 2* is introductory. It explains terms used in the context of this Part of the Schedule, notably, Part 5 transfer, transferor, transferee and compensating payment both where there is a single interest and multiple interests in the property concerned.
608. *Paragraph 3* of Schedule 10 provides as a general rule that transfers by way of vesting or forfeiture should not be treated as giving rise to chargeable gains. This does not apply to the extent that a compensatory payment is made, for example under *section 272*: in that case tax may be charged by reference to the payment actually made.
609. A similar issue potentially arises where a transfer is made under Part 5 with the benefit of interest accrued but not yet paid. Without special provision, a charge on the transferor would then arise under the Accrued Income Scheme, on top of the amounts recovered or forfeited. *Paragraph 4* provides in effect that a transfer in civil recovery or cash forfeiture proceedings will be disregarded for purposes of the Accrued Income Scheme.
610. *Paragraphs 5 to 8* cover other assets where comparable income tax or corporation tax issues arise. In each case, transfers will not be treated as giving rise to an income tax charge, except to the extent that a compensatory payment is made to the transferor for what is acquired. The assets concerned are:
- relevant discounted securities;
  - certificates of deposit;
  - material interests in offshore funds; and
  - futures and options.
611. *Paragraph 9* applies the same general rule to transfers that would otherwise give rise to debits or credits taken into account under the loan relationship rules for computing a corporation tax charge.
612. *Paragraph 10* makes it clear the *paragraphs 4 to 9* do not apply where a compensating payment is made to the transferor.
613. *Paragraph 11* covers analogous issues where the property transferred is trading stock of a business. The normal rule is that stock disposed of not by way of trade, or valued on the discontinuance of the trade, is taken into account for tax purposes at market value. These rules are disapplied so that transfers of stock give rise to no profit or loss.
614. *Paragraphs 12 to 29* contain provisions that apply where the assets have qualified for capital allowances. The rules bring into account any compensating payments made, otherwise ensuring the vesting will be tax neutral.
615. *Paragraphs 12 to 17* set out the rules for plant and machinery. *Paragraph 12* provides that, where there is a Part 5 transfer of plant or machinery the disposal value, in the context of this part of the Schedule, to be brought into account is determined by reference to these provisions.
616. *Paragraph 13* provides that, if a compensatory payment is made to the transferor, the disposal value is the amount of that payment. Otherwise it is the amount that will give rise to neither a balancing allowance nor a balancing charge.

617. *Paragraph 14* disappplies the rules in *paragraph 13(2)* if the plant or machinery is in the main pool, or class pool. Instead, the disposal value is that amount which would have given rise to neither a balancing allowance nor a balancing charge had the asset been in a single asset pool, assuming all allowances had been claimed.
618. *Paragraphs 15 and 16* cover the special rules for partnerships. *Paragraph 15* disappplies the rules in *paragraph 13* if the business is carried on in partnership, and a compensating payment is made to at least one, but not all of the partners. In these cases, the disposal value is the sum of any compensating payments plus, for each partner who does not receive a compensating payment, an amount that would give rise to neither balancing allowance nor balancing charge in relation to their share in the asset (the “tax neutral amount”).
619. *Paragraph 16* disappplies the rules in *paragraph 13* if the business is carried on in partnership, and the asset is the property of two or more partners (but not the partnership) and compensating payments are made to at least one, but not all of the owners. In these cases, the disposal value is the sum of any compensating payments plus, for owners to whom no compensating payments are made, the “tax neutral amount”.
620. *Paragraph 17* ensures the general rules for capital allowances will apply as necessary to these provisions, and defines the “tax neutral amount”.
621. *Paragraphs 18 to 21* set out the rules for industrial buildings. *Paragraph 18* provides that a Part 5 transfer of the relevant interest in an industrial building is treated as a balancing event for industrial buildings allowances (IBA) only through these provisions.
622. *Paragraph 19* provides that, if a compensating payment is made to the transferor, that payment is treated as the proceeds from the balancing event. Otherwise the proceeds are deemed to be equal to the residue of qualifying expenditure immediately before the event. Further rules ensure a balancing allowance or balancing charge will not arise even if there were periods of non-qualifying use.
623. *Paragraph 20* disappplies *paragraph 19* if the relevant interest in the industrial building belongs to a partnership and a compensating payment is made to one or more, but not all of the partners. In these cases, the proceeds from the balancing event are the sum of any compensating payments plus, in respect of each partner to whom no such payment is made, his or her share of the residue of qualifying expenditure immediately before the transfer.
624. *Paragraph 21* ensures the general rules for IBA will apply as necessary to these provisions.
625. *Paragraphs 22 to 25* cover the rules for flat conversion. *Paragraph 22* provides that a Part 5 transfer of the relevant interest in a flat is treated as a balancing event for flat conversion allowances (FCA) only through these provisions.
626. *Paragraph 23* provides that, if a compensating payment is made to the transferor, that payment is treated as the proceeds from the balancing event. Otherwise the proceeds are taken to be equal to the residue of qualifying expenditure immediately before the event, so no balancing allowance or balancing charge will arise.
627. *Paragraph 24* disappplies *paragraph 23* if the relevant interest in the flat is held by a partnership and a compensating payment is made to one or more, but not all of the partners. In these cases the proceeds from the balancing event is the sum of any compensating payments plus, in respect of each partner to whom no such payment is made, his or her share of the residue of qualifying expenditure immediately before the transfer.

628. *Paragraph 25* ensures the general rules for FCA will apply as necessary to these provisions.
629. *Paragraphs 26 to 29* cover the rules for research and development. *Paragraph 26* provides that, where there is a Part 5 transfer of an asset representing qualifying research and development expenditure, the disposal value for research and development allowances (RDA) is determined by these provisions.
630. *Paragraph 27* provides that, if a compensating payment is made to the transferor, the disposal value is deemed to be that amount. If there is no compensating payment, the disposal value is nil.
631. *Paragraph 28* disapplies *paragraph 27* if the asset is partnership property and a compensating payment is made to one or more, but not all of the partners. In these cases, the proceeds from the balancing event are the sum of any compensating payments made to the partners.
632. *Paragraph 29* ensures the general rules for RDA will apply as necessary to the provisions in this Schedule.
633. *Paragraphs 30 to 33* apply to employee share schemes. They cover the situations where an employee has acquired shares, or options over shares and that interest is recovered as representing the proceeds of crime. In each case, without special provisions, there would be a charge to income tax at the time of the disposal.
634. *Paragraph 30* deals with share options acquired by an employee that are transferred to the trustee for civil recovery. Where the trustee then exercises the option and acquires the shares, the gain is not to be charged to tax under this provision.
635. *Paragraph 31* relates to shares which are acquired subject to conditions where the charge to tax is deferred from the time of acquisition of the shares to the time the restriction is lifted, or the shares disposed of. The tax charge on the transferor on the market value of the shares at the time of the disposal is removed under this provision.
636. *Paragraph 32* deals with shares that are acquired at an undervalue, so effectively a taxable benefit arises. When the shares are transferred there would normally be a tax charge on the transferor on the amount of the undervalue. This charge is removed under this provision.
637. *Paragraph 33* covers shares that are acquired in a subsidiary company, where there would normally be a tax charge on the transferor on the increase in the value of those shares from the time of acquisition until the time of disposal. This charge is removed under this provision.

***Sections 449 & 450: Agency staff: pseudonyms; Pseudonyms: Scotland***

638. *Section 449* provides protection for Agency staff when carrying out their duties. A member of staff of the Agency may identify himself by means of a pseudonym whenever it would otherwise be necessary or expedient to provide his name, including when exercising powers under Part 8 of the Act that would require him to be named. *Section 450* relates to Scotland and provides similar protection for persons carrying out civil recovery investigations on behalf of the Scottish Ministers.
639. *Section 449* will mean that the Director – and only the Director – will have the power to direct that Agency staff may identify themselves by means of a pseudonym when they are authorised to do anything for the purposes of the Act. A certificate signed by the Director will be conclusive evidence that the member of staff is entitled to use the pseudonym. Where staff are acting under a pseudonym, they may not be asked any question which is likely to reveal their true identity. If they are asked such a question, they do not have to answer. *Section 450* for Scotland reflects the different arrangements

there, where the law enforcement and prosecution authorities will continue to be responsible for confiscation and the Scottish Ministers for civil recovery.

### ***Section 451: Customs and Excise prosecutions***

640. *Section 451* provides that the Commissioners of Customs and Excise may bring proceedings for an offence under Part 7 of the Act (money laundering), an offence under *section 342* (prejudicing an investigation) and certain inchoate offences in relation to these offences. The provision reflects that in existing legislation (section 60 of the Drug Trafficking Act 1994, and section 93F of the Criminal Justice Act 1988), except that the range of offences covered has been slightly increased. This means that, in addition to the Part 7 offences (the three principal money laundering offences, failure to disclose and tipping off) or the section 342 (prejudicing an investigation) offence, the provision now covers any attempt, conspiracy or incitement to commit any of the above-mentioned offences, or similarly aiding, abetting, counselling or procuring the commission of any of those offences.
641. It should be noted that this section does not apply to proceedings on indictment in Scotland, where such prosecutions are conducted in the name of the Lord Advocate. Statutory provision for Customs and Excise officers to bring summary prosecutions in Scotland is set out in section 34(1) of the Criminal Law (Consolidation)(Scotland) Act 1995, but in practice these are conducted in the name of the Procurator Fiscal.

### ***Section 452: Crown servants***

642. *Section 452* provides that the money laundering offences in Part 7 of the Act and the offence of prejudicing an investigation under *section 342* can be applied, by regulations made by the Secretary of State, to persons in the public service of the Crown. The provision is required because otherwise Crown Servants would not be subject to those criminal offences in the exercise of their duties as Crown Servants, although areas of Crown business may potentially be vulnerable to money laundering. The provision closely follows the existing legislation set out in section 61(1) of the Drug Trafficking Act 1994 and at section 93G(1) of the Criminal Justice Act 1988 (as amended by the Criminal Justice Act 1993). Under the existing legislation regulations have been made applying the offences to the Director of National Savings and his staff in order to put them in the same position as those in financial service businesses in the private sector.

### ***Section 453: References to financial investigators***

643. This section enables the Secretary of State to specify by order a description of the type of accredited financial investigators who may exercise restraint powers under Part 2 or investigation powers under Part 8. The order is subject to annulment in pursuance of a resolution of either House (*section 459(4)*). A system for the accreditation of financial investigators is provided under *section 3* and the purpose of the order-making power is to enable the Secretary of State to limit the use of restraint and investigation powers to those financial investigators who are employed or engaged by law enforcement authorities or are employed or engaged in a law enforcement capacity by Government departments. It will be possible to describe in an order investigators working in specified organisations or Government departments, or investigators who are not below a specified grade. It would thus be possible to designate under the order investigators who may act as senior appropriate officers for the purposes of making an application for a customer information order (*section 369(7)*).

### ***Schedule 11: Amendments***

644. *Schedule 11* is introduced by *section 456*. This Schedule contains amendments that need to be made to other legislation as a result of the Act. In some cases, these substantially replicate consequential amendments made in the earlier proceeds of crime legislation. This applies to the amendments to the Rehabilitation of Offenders Act 1974,

the Rehabilitation of Offenders (Northern Ireland) Order 1978, the Criminal Justice Act 1982, the Insolvency Act 1986, the Insolvency (Northern Ireland) Order 1989, the Criminal Justice (International Co-operation) Act 1990 and the Crime (Sentences) Act 1997.

645. In other instances, it has been necessary to make new consequential provision as a result of new material in the Act. These amendments are discussed below, in chronological order of the legislation amended.

### **Parliamentary Commissioner Act 1967 (c.13)**

646. *Paragraph 2(3)* of this schedule brings the taxation functions of the Director of ARA within the remit of the Parliamentary Commissioner for Administration in respect of his consideration of complaints. This places consideration of such matters by the Commissioner on an equal footing with other matters to do with taxation, which remain under the responsibility of the Inland Revenue.

### **Criminal Appeal Act 1968 (c.19)**

647. The consequential amendment in earlier legislation of the Criminal Appeal Act 1968 has been expanded to include a new provision in *sub-paragraph (2)*. This is needed because the Director of the ARA may be involved in certain appeals to the House of Lords under the 1968 Act.

### **Misuse of Drugs Act 1971 (c.38)**

648. The amendment of the Misuse of Drugs Act 1971 is one of a number occasioned by the new approach to money laundering adopted in the Act. Part 7 of the Act establishes a number of new money laundering offences, applicable to benefit from all criminal conduct. The new offences replace the separate drug money laundering and non-drug money laundering offences in the existing legislation.
649. In the existing legislation, drug money laundering offences are defined as “drug trafficking offences”. The classification of a particular offence as a drug trafficking offence has a number of practical consequences. For example, a confiscation hearing must be held where a person appears for sentence in the Crown Court for a drug trafficking offence. Because there is no longer such a thing, following the changes made by the Act, as a drug money laundering offence, the definition of a drug trafficking offence no longer includes drug money laundering offences.
650. The expression “drug trafficking offence” does not only appear in the confiscation legislation. It also appears, for example, in section 27 of the Misuse of Drugs Act 1971, which empowers the courts to make a forfeiture order following a conviction for “a drug trafficking offence”. Because the definition of a drug trafficking offence, as amended by the Act, will no longer include drug money laundering offences (which will no longer exist), section 27 of the 1971 Act will no longer apply to drug money laundering offences. The consequential amendment of section 27 makes this clear. However, the change is not expected to have any practical effect, as there is other legislation in place which achieves a similar effect to section 27.

### **Rehabilitation of Offenders Act 1974 (c.53)**

651. The amendment of the Rehabilitation of Offenders Act 1974 provides that failure to pay a confiscation order prevents a person from being rehabilitated under the 1974 Act. The amendment is one of a number of provisions in the Act to encourage offenders to pay their confiscation orders. Similar amendment is made to the equivalent Northern Ireland legislation the Rehabilitation of Offenders (Northern Ireland) Order 1978.



### **Criminal Appeal (Northern Ireland) Act 1980 (c.47)**

652. As in England and Wales the Director of the ARA may be involved in appeals to the House of Lords and current Northern Ireland confiscation legislation amends the Criminal Appeal (NI) Act so that confiscation orders attract a right of appeal as if they were part of a sentence. Accordingly similar amendment is made to the Criminal Appeal (Northern Ireland) Act as to the Criminal Appeal Act 1968.

### **Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (S.I. 1981/228 (N.I. 8))**

653. These amendments make it clear that civil legal aid funding is available for applications to and in the Crown Court by persons affected by the powers of a receiver, for proceedings related to the seizure, detention and forfeiture of cash or for compensation actions taken subsequent to such proceedings under Chapter 3 Part 5 and for applications made to vary or discharge certain orders made under Part 8 .of this Act.

### **Civil Jurisdiction and Judgments Act 1982 (c. 27)**

654. The amendment of the Civil Jurisdiction and Judgments Act 1982 provides that orders in relation to confiscation made in one part of the UK are not enforced in another part of the UK under the 1982 Act (which establishes a scheme for the mutual enforcement of civil judgments between the three UK jurisdictions). Instead, they are enforced under powers particular to the confiscation legislation (see [section 443](#)).

### **Civic Government (Scotland) Act 1982 (c.45)**

655. The 1982 Act makes provision to deal with property that is in the unlawful possession of persons taken into police custody. Section 86A(2) of that Act provides that property that is subject to suspended forfeiture orders and restraint orders is not covered by these provisions. The amendment extends the exemption in section 86A(2) to property subject to a restraint order made under Part 3 of the Act. Such property will be dealt with by the restraint order provisions in Part 3.

### **Criminal Justice Act 1982 (c.48)**

656. The amendment of the Criminal Justice Act 1982 provides that persons convicted of the principal money laundering offences in Part 7 of the Act are not eligible for early release from prison under the 1982 Act.

### **Police and Criminal Evidence Act 1984 (c.60)**

657. The amendments of sections 56 and 58 of the Police and Criminal Evidence Act 1984 enable the exercise of an arrested person's rights to be delayed under certain circumstances where this might result in the dissipation of a person's benefit from crime. These consequential amendments of the 1984 Act are similar to those made by the earlier confiscation legislation.
658. By virtue of the amendment of section 116 of the 1984 Act, a drug trafficking offence as defined in paragraph 1 of Schedule 2 to the Act is always a "serious arrestable offence" for the purposes of the 1984 Act. The classification of an offence as a serious arrestable offence makes certain powers available in relation to it which are not available in relation to other offences. Again, the position here is similar to that in earlier legislation.
659. In addition, however, the new principal "all crime" money laundering offences created by the Act are defined as offences which are always serious arrestable offences. At present, the principal drug money laundering offences are always serious arrestable offences but not the principal laundering offences applicable to the proceeds of other crimes.

### **Bankruptcy (Scotland) Act 1985 (c.66)**

660. The amendment of the Bankruptcy (Scotland) Act 1985 makes it clear that the discharge of a bankrupt does not release the bankrupt from the liability to pay a confiscation order.

### **Insolvency Act 1986 (c. 45)**

661. As with its Scottish equivalent above, the amendments of the Insolvency Act 1986 make it clear that the discharge of a bankrupt does not release the bankrupt from the liability to pay a confiscation order.
662. In addition, they make provision ancillary to Part 9 of the Act. As explained in the note on [section 417](#), they are designed to deal with the fact that a bankrupt's estate is assessed at the time the bankruptcy order is made. When property is excluded from a bankrupt's estate, there is currently no way of putting it into the bankrupt's estate if it ceases to be excluded at a later date.
663. The regime set out in Part 9 of the Act provides that where restraint or receivership action is taken before a bankruptcy order is made, the property concerned is excluded from the bankrupt's estate. In the unlikely event that a bankruptcy order is made whilst restraint or receivership action is ongoing and the restraint or receivership action does not result in the confiscation of the property concerned, the effect of the Act in the ordinary course of events would be to return the property to the bankrupt. As a result, creditors would lose out.
664. These amendments have been made to prevent this from happening. They provide that, if property which has been subject to action under the confiscation powers is not ultimately required to satisfy a confiscation order, it vests in the trustee in bankruptcy as part of the bankrupt's estate. This will make the property available for distribution to creditors, rather than being returned to the person who held it.

### **Criminal Justice Act 1988 (c.33)**

665. The main amendment of the Criminal Justice Act 1988 is also a consequence of the replacement of drug and non-drug money laundering offences with new all crime money laundering offences. Under section 151 of the 1988 Act, HM Customs have certain powers to arrest bail absconders. The amendment of section 151 gives Customs the power to arrest bail absconders in connection with a wider range of money laundering activity.

### **Extradition Act 1989 (c.33)**

666. The amendment of the Extradition Act 1989 makes it clear that, in future, the new all-crime money laundering offences created by the Act will implement the United Kingdom's obligations in relation to drug money laundering under the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

### **Police & Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12))**

667. The Police and Criminal Evidence (Northern Ireland) Order 1989 provides the police in Northern Ireland with the same powers and duties as those provided in the Police and Criminal Evidence Act 1984. These amendments replicate for Northern Ireland the amendments set out earlier (paragraphs 657-659).

### **Insolvency (Northern Ireland) Order 1989 (SI 1989/2405 (NI 19))**

668. The amendments set out at paragraphs 661-664 to the Insolvency Act 1986 are replicated for the equivalent Northern Ireland legislation.

### **Criminal Justice (International Co-operation) Act 1990 (c. 5)**

669. Section 13 of the Criminal Justice (International Co-operation) Act 1990 enables regulations to be made relating to substances useful for the production of controlled drugs. The amendment of section 13(6) of the 1990 Act enables information gained from such regulations to be made available in confiscation proceedings under Parts 2, 3 or 4 of the Proceeds of Crime Act 2002 (whether they follow a drug trafficking conviction or not).

### **Criminal Justice and Public Order Act 1994 (c.31)**

670. This amendment replaces the definition of “legal privilege” for Scotland in the 1994 Act with a reference to the definition in Section 412 of the Act.

### **Drug Trafficking Act 1994 (c.37)**

671. The effect of the amendments of the Drug Trafficking Act 1994 is to keep in force sections 55 and 56 of the 1994 Act, together with their ancillary provisions, which permit the police and HM Customs to obtain production orders and search warrants for the purpose of an investigation into drug trafficking. These powers are used to conduct investigations into drug trafficking offences, with a view to a prosecution, as well as into the proceeds of drug trafficking. Under the Proceeds of Crime Act 2002, there is a new power for the enforcement authorities to obtain a production order and a search warrant for the purposes of an investigation into the proceeds of any criminal conduct, which would include drug trafficking proceeds, but the new power does not cover investigations into drug trafficking offences. It has therefore been decided to keep the existing powers in force.

### **Proceeds of Crime (Scotland) Act 1995 (c.43)**

672. Much of the Proceeds of Crime (Scotland) Act 1995 deals with confiscation of the proceeds of crime and many of its provisions are superseded by the Act. However, Part II of the 1995 Act makes provision for the forfeiture of property used in crime – as opposed to being the proceeds of crime. These provisions are being retained as they have no equivalent in the Act. The amendment therefore removes all the provisions in the 1995 Act dealing with confiscation of the proceeds of crime.

### **Criminal Procedure (Scotland) Act 1995 (c.46)**

673. The amendment substitutes in the Criminal Procedure (Scotland) Act 1995 references to the Act in place of references to the Proceeds of Crime (Scotland) Act 1995.

### **Proceeds of Crime (Northern Ireland) Order 1996 (SI 1996/1299 (NI 9))**

674. The Proceeds of Crime (Northern Ireland) Order 1996 updated and restated the law relating to the confiscation of the proceeds of drug trafficking and other serious crime. Part 4 of the Act largely replaces the existing provisions in Parts II and III of the 1996 Order. Article 49 of the 1996 Order, as amended by the Financial Investigations (Northern Ireland) 2001, introduced additional investigation powers through the appointment by a county court judge of a financial investigator to assist the police or customs in investigations into the proceeds of crime. While retaining those financial investigation powers for criminal confiscation investigations applications will be made to a Crown Court judge, consistent with the process set out at Part 8 of the Act. Financial investigators will be required to be accredited within the meaning given by *section 3(5)* of the Act. Confiscation investigations are defined by reference to *section 341* of the Act.
675. The powers of a financial investigator are found at Schedule 2 to the 1996 Order. The Schedule 2 paragraph 3 power, commonly referred to as the “General Bank Circular” shall cease to have effect as it is largely duplicated by the customer information order

introduced at [section 363](#) of the Act. The Schedule 2 paragraph 3A power is amended to reflect the terminology used elsewhere in the Act to ensure that the question of whether a person has benefited from criminal conduct is decided in accordance with Part 4 of the Act. The amendments ensure that the Director of ARA will have the same powers for criminal confiscation investigations as the other law enforcement authorities in Northern Ireland.

676. Articles 50 and 51 of the 1996 Order are amended to retain, as in England and Wales, the powers for police and customs to obtain production orders and search warrants for the purpose of an investigation into drug trafficking offences. The definition of ‘drug trafficking offence’ is amended to reflect the new approach to money laundering adopted in the Act.

### **Crime (Sentences) Act 1997 (c. 43)**

677. Confiscation orders like fines attract imprisonment in default if they are not paid. Sections 35 and 40 of the Crime (Sentences) Act 1997 enable magistrates’ courts to replace imprisonment in default of payment of a fine with certain non-custodial measures. This power is specifically disappplied where confiscation order enforcement is concerned.

### **Access to Justice Act 1999 (c.22)**

678. These amendments make it clear that Community Legal Service funding (civil public funding) is available for certain proceedings under the Act. They are required, firstly, because Part 2 of the Act transfers restraint and receivership proceedings from the High Court to the Crown Court. High Court proceedings attract civil public funding, but Crown Court proceedings normally do not. Civil public funding is to be available, on the standard basis, to cover situations where criminal public funding is unavailable and inappropriate. They will make civil public funding available for applications to vary restraint and receivership orders, applications challenging action taken by a receiver, proceedings relating to the distribution of excess funds once a confiscation order has been satisfied, compensation applications under [section 72](#) and [73](#) and applications to vary the investigative orders made under Part 8. In all these cases the recipient of a tainted gift or a third party who is affected by restraint or receivership might need legal funding. In addition, the defendant will not be entitled to criminal legal funding until the institution of proceedings. However, restraint and receivership action can be taken before the institution of proceedings, at the investigative stage. Therefore, the amendments ensure that there is no gap in the funding available to the defendant.
679. The amendments also make it clear that cash forfeiture proceedings under Chapter 3 of Part 5 also attract Community Legal Service funding.

### **Powers of Criminal Courts (Sentencing) Act 2000 (c.6)**

680. By virtue of the amendment of section 110(5) of the Powers of Criminal Courts (Sentencing) Act 2000, those convicted of drug trafficking offences (but not drug money laundering offences, which cease to exist as separate offences following the Act) will continue to be subject to mandatory sentences.

### **Financial Services and Markets Act 2000 (c.8)**

681. [Paragraph 38](#) provides that financial investigators employed or appointed by the Financial Services Authority and acting as accredited financial investigators under this Act are treated as carrying out functions of the Financial Services Authority. This is necessary in order for their actions to come within the scope of certain provisions of the Financial Services and Markets Act 2000.

### **Terrorism Act 2000 (c.11)**

682. The Act makes certain amendments to Schedule 8 to the Terrorism Act 2000, which is concerned with the rights of persons detained under section 41 of, or Schedule 7 to, that Act (i.e. persons arrested or detained as suspected terrorists under anti-terrorism powers). The amendments in question run in parallel with those made to sections 56 and 58 of the Police and Criminal Evidence Act 1984, as described above. Their basic effect, like the amendments of the 1984 Act, is to enable the exercise of an arrested or detained person's rights to be delayed in certain circumstances where this might result in the dissipation of a person's benefit from crime.

### **Criminal Justice and Police Act 2001 (c.16)**

683. The amendments of the Criminal Justice and Police Act 2001 are consequential on the new seizure powers created by the Act, and are designed to bring those powers within the ambit of the 2001 Act. The 2001 Act lays down new procedures for the handling of material seized by the enforcement authorities which is or includes excluded or special procedure material, as originally defined by the Police and Criminal Evidence Act 1984. Special procedure material means material maintained in confidence, such as banking records.
684. The amendment of section 55 of the 2001 Act makes it clear that the obligation to return excluded or special procedure material envisaged by that section does not include special procedure material seized under the Act (because the Act creates a specific power to seize special procedure material). Similarly, the amendment of section 60 of the 2001 Act makes it clear that the duty to secure seized property which is or includes excluded or special procedure material, as provided for in that section, does not apply to special procedure material seized under the Act. Again, the reason for the amendment is that the Act contains a specific power to seize special procedure material.
685. The amendments of Part 1 of Schedule 1 to the 2001 Act bring the new seizure power in the Act within the ambit of section 50 of the 2001 Act, which provides primarily that persons with seizure powers may seize property which may include property which they are not entitled to seize, so that the latter element may be separated out. The amendment of Part 3 of Schedule 1 brings the new seizure power in the Act within the ambit of section 55 of the 2001 Act (subject to the amendment of section 55 mentioned above).

### ***Section 458: Commencement***

686. This section provides that all substantive provisions of the Act will be brought into force by means of commencement orders. These orders will be made by the Secretary of State for those Parts applying wholly or in part to England & Wales and Northern Ireland, and by the Scottish Ministers for Part 3 and the necessary provisions of Part 12 as they apply to Scotland. Parts 5, 8 and 10 contain provisions that are limited to Scotland. The Secretary of State must therefore consult with Scottish Ministers when commencing these provisions.

### **General**

#### ***Section 459: Orders and regulations***

687. This section provides that subordinate legislation is to be made by statutory instrument and makes provision as to the procedure which should apply to each power under the Act (including where the power is to be exercised by the Scottish Ministers). It allows subordinate legislation to make different provision for different purposes and to include ancillary provision.

#### ***Section 461: Extent***

688. *Section 461* delineates the geographical extent of the various parts of the Act.