

SCOTTISH LAW COMMISSION
(Scot Law Com No 147)



Report on Confiscation and Forfeiture

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Laid before the Scottish Parliament by the Scottish Ministers

Volume One

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Report on Confiscation and Forfeiture

To: The Right Honourable Ian Lang, MP
Her Majesty's Secretary of State for Scotland

We have the honour to submit our Report on Confiscation and Forfeiture

(Signed) **C K DAVIDSON**, *Chairman*
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Kenneth F Barclay, *Secretary*
22 June 1994

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- A. Draft Proceeds of Crime (Scotland) Bill with Explanatory Notes
- B. Part I of the Criminal Justice (Scotland) Act 1987 as amended to 1 May 1994 and as proposed to be further amended by the Draft Bill
- C. List of Respondents to Discussion Paper No 82

Table of Abbreviations

Statutes

CJA	Criminal Justice Act 1988, c 33
CJ(S)A	Criminal Justice (Scotland) Act 1987, c 41
DTOA	Drug Trafficking Offences Act 1986, c 32
NI(EP)A	Northern Ireland (Emergency Provisions) Act 1991, c 24
PT(TP)A	Prevention of Terrorism (Temporary Provisions) Act 1989, c 4
1975 Act	Criminal Procedure (Scotland) Act 1975, c 21
1986 Act	Drug Trafficking Offences Act 1986, c 32
1987 Act	Criminal Justice (Scotland) Act 1987, c 41
1988 Act	Criminal Justice Act 1988, c 33
1989 Act	Prevention of Terrorism (Temporary Provisions) Act 1989, c 4
1990 Act	Criminal Justice (International Co-operation) Act 1990, c 5
1991 Act	Northern Ireland (Emergency Provisions) Act 1991, c 24
1993 Act	Criminal Justice Act 1993, c 36

Other materials

AA (Consolidation) 1988	Act of Adjournment (Consolidation) 1988 (SI 1988 No 110)
DP	Scottish Law Commission Discussion Paper No 82, <i>Forfeiture and Confiscation</i> (1989)
Draft Bill	Draft Proceeds of Crime (Scotland) Bill contained in Appendix A to this report
Feldman	D Feldman, <i>Criminal Confiscation Orders: The New Law</i> (London, 1988)
Hodgson	<i>The Profits of Crime and their Recovery</i> , Report of a Committee set up by the Howard League for Penal Reform and chaired by Sir Derek Hodgson (London, 1984)
Laundering Convention	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Council of Europe, Strasbourg, 1990)
Mitchell	A R Mitchell, M G Hinton and S M E Taylor, <i>Confiscation</i> (London, 1992)
Renton and Brown	R W Renton and H H Brown, <i>Criminal Procedure according to the Law of Scotland</i> (5th edn, Edinburgh, 1983 ed G H Gordon, updated by supplements)

Part I Introduction

The background to this report

1.1 This report has been prepared in response to a reference from the Secretary of State for Scotland under section 3(1)(e) of the Law Commissions Act 1965. The reference is in the following terms:

"To consider

1. the adequacy of the present law and the procedure relating to the forfeiture, in criminal proceedings in Scotland, of property used for the purpose of committing, or facilitating the commission of, offences and of proceeds of criminal activity in general; and
2. whether further provision should be made to enable courts in Scotland to order forfeiture of the proceeds of criminal activity generally and property derived from such proceeds

taking account of existing or proposed measures and the effectiveness of those already in operation, and to advise."

We accordingly published a discussion paper¹ on Forfeiture and Confiscation which made a number of provisional proposals for the reform of the law and sought views. We received in response a number of valuable comments for which we are most grateful. A list of those who submitted comments is given in Appendix C.

1.2 After the publication of the discussion paper and the submission of comments the United Kingdom ratified the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("the Laundering Convention").² We decided that our report must take account of the obligations which the Convention imposes on the Parties to it. We have therefore tried to frame our recommendations so as to meet the requirements of the Convention. The requirements of particular importance are those relating to the taking of provisional measures for the preservation of property before it is confiscated or forfeited,³ the safeguarding of the rights of parties with interests in the property,⁴ and the making of arrangements for the enforcement of orders or requests by other Parties to the Convention in relation to the confiscation or forfeiture of proceeds or property.⁵

¹ DP No 82 (hereafter referred to as "the discussion paper" in the text and "DP" in the footnotes).

² See paras 2.8-2.10 below.

³ See Parts IX, XVI below.

⁴ See Parts X, XVII below.

⁵ See Part XVIII below.

Terminology

1.3 Our reference uses the term "forfeiture" in two senses: to signify both the power of a court to take property used for the purpose of committing, or facilitating the commission of, offences; and the power of a court to deprive an offender of the proceeds of criminal activity and of property derived from such proceeds. "Forfeiture" likewise signifies both powers in American usage, while "confiscation" is sometimes used to signify both in international conventions, and indeed is so used in the Laundering Convention.⁶ In this report it will be convenient to follow English usage and distinguish the two powers by using the term "forfeiture" in the first sense only, that is, the power to take property used in the commission of an offence, and the term "confiscation" in the second sense. In the discussion paper we used the expression "confiscation of the proceeds and profits of crime", noting that an offender might use the proceeds of a crime such as fraud to buy property and re-sell it at a profit, and that some criminal enterprises generated funds which might be regarded as profits.⁷ In this report, however, we shall use the expression "confiscation of the proceeds of crime", meaning by "proceeds" any benefit derived from crime.

Scope of this report

1.4 The discussion paper was entitled "Forfeiture and Confiscation", and dealt with these subjects in the order in which they appear in the reference, forfeiture being discussed at greater length than confiscation. It is confiscation, however, which occupies the greater part of this report. It is therefore entitled "Confiscation and Forfeiture" and considers these subjects in that order. The report is divided into four sections.

1.5 Section A, consisting of Parts II to X, deals with confiscation of the proceeds of crime. Under the present law a Scottish court may make a confiscation order on conviction only where a person has been convicted on indictment of certain offences related to drug trafficking or terrorism.⁸ We recommend that a court should also be entitled to make a confiscation order where a person has been convicted on indictment of any other offence in the High Court or the sheriff court, or has been convicted on summary complaint in the sheriff court of any other offence which is punishable by a fine of an amount above the top level of the standard scale of fines for summary offences or by imprisonment for a period of more than three months, the normal maximum period of imprisonment for a common law offence which may be imposed in the sheriff's summary criminal court. There are unavoidable complexities in any system of confiscation procedure, but we have tried to make our scheme as simple as possible without prejudicing its effectiveness on the one hand or the legitimate rights of accused persons and third parties on the other. We have also recommended a substantial revision of Part I of the Criminal Justice (Scotland) Act 1987 which is concerned with the confiscation of the proceeds of drug trafficking. Our recommendations would have the effect of making the confiscation regimes in the revised Part I of the 1987 Act and in our draft Bill identical in many respects, although that in the 1987 Act would retain certain distinctively severe features which Parliament considered appropriate when dealing with those who commit the particularly serious crimes which form the category of drug-trafficking offences.

⁶ See para 2.9 below.

⁷ DP, paras 5.1-5.6.

⁸ See para 2.3 below.

1.6 Section B of the report, consisting of Parts XI to XVII, is concerned with the forfeiture of property used in the commission of crime. There are several aspects of the present law and procedure relating to forfeiture which give rise to difficulties in practice. The courts have not only a general power to forfeit property but also specific powers of forfeiture under a variety of statutes. We recommend the preservation of the specific powers but the replacement of the general power with an entirely new scheme, the central feature of which is a new type of order known as a "suspended forfeiture order" which could be applied on conviction not only to the various kinds of moveable property which are customarily the subject of forfeiture orders, but to any kind of property, heritable or moveable, corporeal or incorporeal. After the lapse of a specified period the property would be forfeited if any appeal against the suspended forfeiture order had been refused or if no interested third party had successfully applied for the recall of the order. The scheme also resolves a number of minor practical questions which have arisen in relation to forfeiture.

1.7 Our recommended schemes for confiscation and forfeiture have two common features, each intended to meet the obligations imposed by the Laundering Convention. The first is the device of the "restraint order", adapted from Part I of the 1987 Act, whereby any dealings with property which may be the subject of a confiscation order or a suspended forfeiture order are held in abeyance before the trial in order to secure that the property is available should such an order be made in the event of conviction.⁹ The second is a series of provisions designed to protect the interests of third parties in property which is the subject of a restraint order, a confiscation order or a suspended forfeiture order.¹⁰

1.8 Section C of the report is Part XVIII, which contains our recommendations as to reciprocal arrangements between Scotland and other jurisdictions for the enforcement of restraint orders, confiscation orders, suspended forfeiture orders and orders corresponding to or similar to these. Section D is concerned with miscellaneous matters. Part XIX deals with the forfeiture of property where the accused has died before a confiscation order can be made. Part XX introduces the draft Proceeds of Crime (Scotland) Bill which, if enacted, would implement our recommendations. Part XXI contains a summary of our recommendations. There follow three appendices. Appendix A contains the draft Bill and explanatory notes. Appendix B sets out the provisions of Part I of the 1987 Act as amended to 1 May 1994 and as they would be further amended if the draft Bill were enacted. The effect of the proposed amendments is shown in distinguishing type: bold for words which would be inserted or substituted, and italic for words which would be repealed.¹¹ Appendix C gives a list of the individuals and organisations who commented on the discussion paper.

1.9 References in the report to "the time of writing" are to 1 May 1994.

⁹ See Parts IX, XVI below.

¹⁰ See Parts X, XVII below.

¹¹ See paras 20.5, 20.6 below.

Part II Confiscation: Introduction

2.1 In Parts II to X of this report we respond to that part of our reference which requires us to consider the adequacy of the present law and practice, and the need for any further provision, as to the confiscation of the proceeds of crime. By "the confiscation of the proceeds of crime" we mean, as we have already explained, the power of a court to take from an offender any benefit derived from crime.¹ It appears to us to be generally accepted that in principle a convicted offender should not be permitted to derive any benefit from his crime,² and accordingly the court should be empowered to deprive him of any such benefit.³ The validity of that principle is implicitly recognised in our reference and is reflected in measures recently introduced in the United Kingdom and abroad⁴ which are designed to deprive offenders of the profits of their offending. Before considering whether further provision should be made in that regard in Scotland, we take account, as our reference requires us to do, of existing measures⁵ and their effectiveness.

The present law

2.2 Unless an offender has been convicted of one of the recently introduced statutory offences related to drug trafficking or terrorism which we mention in the following paragraph, a Scottish court may deprive him of the proceeds of his crime only by the imposition of a fine, or by making a compensation order. Neither is a reliable method of stripping him of his gains. While the court may wish to ensure that any fine it imposes will not be less than the amount of the offender's gains, it generally has no means of obtaining reliable information on that subject. A compensation order may be made only where the acts which constituted the offence have caused personal injury, loss or damage,⁶ and is accordingly inappropriate where the crime is a "victimless" one, such as an offence relating to unlawful gaming or pornographic material. Further, the courts do not have any common law powers to freeze an accused person's assets before conviction or to seize them after conviction; imprisonment in default of payment of a fine or compensation order is not a satisfactory alternative to recovery of the proceeds of the crime; and an order for recovery of the amount of a fine or compensation order by civil diligence is unlikely to be effective where the offender's financial affairs are complicated or his assets are difficult to identify or

¹ For the terms of our reference see para 1.1 above, and for an explanation of the terminology used in this report see para 1.2 above.

² In civil law the relevant maxim appears to be *Nemo ex suo delicto meliorem suam conditionem facere potest* (No one can improve his condition by his delict): J Trayner, *Latin Maxims and Phrases* (4th ed, 1894) p 378.

³ See DP, para 4.3.

⁴ Some of these are noted in DP, paras 4.1-4.6. See also para 2.7 below.

⁵ Our reference also mentions "proposed measures". Various reforms have been enacted very recently in the Criminal Justice Act 1993, to which we refer below. "Proposed measures" for further reforms in the United Kingdom are recommended in the Reports of the Home Office Working Group on Confiscation: on the Drug Trafficking Offences Act 1986 (1991) and on Part VI of the Criminal Justice Act 1988 (1992). We refer later to such of these recommendations as appear to us to be relevant.

⁶ Criminal Justice (Scotland) Act 1980, c 62, s 58(1).

he has taken steps to disperse, conceal or "launder"⁷ them. Confiscation measures, on the other hand, aim "to *incapacitate*, by depriving a person of the physical or financial ability, power or opportunity to continue to engage in proscribed conduct; to prevent offenders from *unjustly enriching* themselves, by eliminating the advantages and benefits which the offender has gained through his or her illegality; to *deter* the offender and others from crime by undermining the ultimate profitability of the venture; and to *protect* the community by curbing the circulation of prohibited items".⁸

2.3 There are several recent statutes of the United Kingdom Parliament which deal with the confiscation of the proceeds of crime. The principal statutes are: the Drug Trafficking Offences Act 1986,⁹ which is concerned with the confiscation of the proceeds of drug trafficking in criminal proceedings in England and Wales; Part I of the Criminal Justice (Scotland) Act 1987,¹⁰ which makes comparable provision for Scotland; and Part VI of the Criminal Justice Act 1988¹¹ which introduces confiscation orders in relation to certain other offences in criminal proceedings in England and Wales. All these Acts have been amended: in particular, the Acts of 1986 and 1988 have recently been amended in important respects by the Criminal Justice Act 1993.¹² There are three other recent statutes which should be noted, one concerned with drug trafficking and the other two with terrorism. The Criminal Justice (International Co-operation) Act 1990,¹³ which extends to the whole of the United Kingdom, empowers the court to forfeit any cash which has been seized while being imported into or exported from the United Kingdom if the court is satisfied that the cash directly or indirectly represents the proceeds of drug trafficking, or is intended for use in drug trafficking.¹⁴ As to terrorism, the Prevention of Terrorism (Temporary Provisions) Act 1989,¹⁵ which also extends to the whole of the United Kingdom, makes provision for the forfeiture on conviction of money or property related to certain offences concerned with financial assistance for terrorism, and the forfeiture of money or property which was at the time of the offence in the accused's possession or control for the use or benefit of a proscribed organisation.¹⁶ Further, Part VII of and Schedule 4 to the Northern Ireland (Emergency Provisions) Act 1991¹⁷ are concerned with the confiscation of the proceeds of terrorist-related activities. They contain provisions, for the most part extending to Northern Ireland only, similar to the confiscation provisions in the Acts of 1986 and 1988.

⁷ "The phrase 'money laundering' covers all procedures that aim to change the true identity of illegally obtained money so that it appears to have originated from a legitimate source." (K D Magliveras, "The regulation of money laundering in the United Kingdom" 1991 Journal of Business Law 525).

⁸ A Freiberg, "Criminal confiscation, profit and liberty" (1992) 25 Australian and New Zealand Journal of Criminology 44 at pp 45-46, *cit* W C Gilmore, "Money laundering: the international aspect" in *Money Laundering* ed H L MacQueen (1993) 1 at p 3. The last point is more appropriate to measures for forfeiture.

⁹ 1986, c 32, as amended: hereafter referred to as "the 1986 Act" or "DTOA".

¹⁰ 1987, c 41, as amended: hereafter referred to as "the 1987 Act" or "CJ(S)A".

¹¹ 1988, c 33, as amended: hereafter referred to as "the 1988 Act" or "CJA".

¹² 1993, c 36: hereafter referred to as "the 1993 Act". See P Vallance, "UK and US national perspectives: money laundering and asset forfeiture - an update" (1993) 19 Commonwealth Law Bulletin 1852; D A Thomas, "The Criminal Justice Act 1993: (1) Confiscation orders and drug trafficking" [1994] Crim L R 93.

¹³ 1990, c 5, hereafter referred to as "the 1990 Act".

¹⁴ *Ibid*, s 26.

¹⁵ 1989, c 4: hereafter referred to as "the 1989 Act" or "PT(TP)A".

¹⁶ *Ibid*, s 13.

¹⁷ 1991, c 24: hereafter referred to as "the 1991 Act" or "NI(EP)A".

2.4 The Acts of 1986, 1987 and 1988 are derived in part from the recommendations of the Hodgson Committee.¹⁸ The principal source of the relevant provisions of the Acts of 1986 and 1987, however, is the Fifth Report of the Home Affairs Committee¹⁹ which recommended that the courts should be empowered to seize and forfeit assets connected with drug trafficking. The provisions of the Acts of 1986 and 1987 are notable for their stringency and complexity. The court is empowered to make not only a confiscation order when a person is convicted of a drug trafficking offence²⁰ but also restraint orders whereby persons may be forbidden to dispose of property before trial in order to secure that it is available for confiscation on conviction.²¹ Moreover, the court may assume, amongst other things, that any property which the accused has received or any expenditure of his during the six years prior to his being indicted is the proceeds of drug trafficking; and it is for the accused to show that the assumption is incorrect.²² An administrator (in England and Wales, a receiver) may be appointed to deal with the property, if a restraint order has been made; and, once a confiscation order has been made, to dispose of it and apply the proceeds towards the satisfaction of the confiscation order.²³ Each Act also creates new offences of assisting another to retain the proceeds of his drug trafficking²⁴ and of prejudicing an investigation into drug trafficking.²⁵ Further offences are created by the amendments to these Acts by the Criminal Justice Act 1993.²⁶

2.5 The confiscation provisions of Part VI of the Criminal Justice Act 1988, which apply only in England and Wales, provide for confiscation orders,²⁷ restraint orders²⁸ and the appointment of receivers,²⁹ but otherwise are less rigorous than the provisions of the Drug Trafficking Offences Act 1986 and Part I of the Criminal Justice (Scotland) Act 1987. Part VI of the 1988 Act does not entitle the court to make any statutory assumption as to the source of the accused's assets, nor does it create any new offences comparable to those created by these Acts. On the other hand it is clear that the 1988 Act is intended to deal with serious crime: the accused must have been convicted either of an indictable offence other than a drug trafficking offence,³⁰ or of one of a limited number of specified offences in a magistrates' court;³¹ and the confiscation order must be for at least a specified minimum amount, which is at present £10,000.³² The provisions of Part VI of the 1988 Act, like those of the Drug Trafficking Offences Act 1986 and Part I of the Criminal Justice (Scotland) Act 1987, are elaborate and complex.

¹⁸ *The Profits of Crime and their Recovery* (1984), the Report of a Committee set up by the Howard League for Penal Reform after *R v Cuthbertson* [1981] AC 470 and chaired by Sir Derek Hodgson (hereafter referred to as "Hodgson").

¹⁹ Fifth Report 1984-85, "Misuse of Hard Drugs - Interim Report" (HC 399). See also First Report 1985-86 "Misuse of Hard Drugs" (HC 66).

²⁰ DTOA, s 1; CJ(S)A, s 1.

²¹ DTOA, s 8; CJ(S)A, s 9.

²² DTOA, s 2(2), (3); CJ(S)A, s 3(2). On the coming into effect of the amendment of DTOA, s 2(2) by the Criminal Justice Act 1993, s 9(2)(a) the courts in England and Wales will be obliged to make these assumptions.

²³ DTOA, ss 8, 13; CJ(S)A, ss 13-22.

²⁴ DTOA, s 24; CJ(S)A, s 43.

²⁵ DTOA, s 31; CJ(S)A, s 42.

²⁶ 1993 Act, ss 16-19.

²⁷ CJA, s 71.

²⁸ *Ibid*, s 77.

²⁹ *Ibid*, ss 77(8), 80(2).

³⁰ *Ibid*, s 71(2)(a).

³¹ *Ibid*, s 71(3)(a). The offences are listed in Sched 4, Pt I as substituted by the Criminal Justice Act 1988 (Confiscation Orders) Order 1990 (SI 1990/1570), art 3.

³² *Ibid*, s 71(7).

2.6 Our reference requires us to take account of the effectiveness of existing measures. They have been the subject of various reports,³³ but there does not seem to have been any systematic research on how the legislation operates in practice and, in particular, on the relationship between the value of the money and any other property ordered to be confiscated and the value of that actually recovered. The total of the sums ordered to be confiscated under the Drug Trafficking Offences Act 1986 is clearly large,³⁴ but figures which we have obtained from the Crown Prosecution Service and the Commissioners of Customs and Excise suggest that a significant proportion of these sums is not recovered.³⁵ In Scotland the total of the sums ordered to be confiscated under Part I of the Criminal Justice (Scotland) Act 1987 is very much smaller (£406,381.09 as at 13 April 1994) but in virtually every case these sums have been recovered in full, together with any fines imposed and any money or property forfeited. No doubt these differences reflect different patterns of crime in the two jurisdictions. It may also be significant, however, that the making of a confiscation order has been mandatory in England and Wales under section 1 of the 1986 Act,³⁶ but is only discretionary in Scotland under section 1 of the 1987 Act. It may be that a Scottish prosecutor will move for a confiscation order only in a case where he is reasonably certain that the amount ordered to be confiscated will be recoverable, usually because it is already the subject of an effective restraint order. In any event, however, it appears that in both jurisdictions there has been a slow but steady increase in the number of confiscation orders made and in the value of individual orders.

2.7 The confiscation provisions in the United Kingdom, the Commonwealth and certain European States³⁷ are modest in scope by comparison with modern confiscation legislation in the United States of America. American law makes provision for both criminal forfeiture and civil forfeiture. The principal statutes on the subject of criminal forfeiture, both passed in 1970 and later amended, are the Racketeer Influenced and Corrupt Organizations Act (known as RICO), aimed at organised crime, and the Controlled Substances Act, Continuing Criminal Enterprise Offense (CCE), aimed at major drug traffickers. Each contains comprehensive and draconian provisions for the mandatory forfeiture (*ie* confiscation) of the assets of defendants. Civil forfeiture permits the seizure and confiscation of the assets of persons who have not been convicted of any crime, and commonly takes place without any form of hearing. The procedure has been described as "a prosecutor's dream and a defense

³³ The DTOA and Part I of the CJ(S)A were considered in the Seventh Report of the Home Affairs Committee 1988-89, "Drug Trafficking and Related Serious Crime" (HC 370). The Home Office Working Group on Confiscation has published reports on the DTOA (1991) and Part VI of the CJA (1992). Recommendations in these reports are implemented by provisions in Parts II and III of the Criminal Justice Act 1993, some of which are not yet in force at the time of writing (1 May 1994).

³⁴ On 14 April 1993 it was said to have "risen to about £50 million" (Mr Michael Jack, Minister of State, Home Office, *Hansard*, HC Deb vol 222, col 922).

³⁵ Cf P Vallance, "UK and US national perspectives: money laundering and asset forfeiture - an update" (1993) 19 Commonwealth Law Bulletin 1852 at pp 1857-1858: "The most recent figures show that only about a quarter of all the money ordered to be confiscated to date has been realised. Of the remaining three quarters, some will be accessible to realisation, but a proportion will have to be written off because, for example, an offender has served a term of imprisonment in default." D A Thomas, "The Criminal Justice Act 1993: (1) Confiscation orders and drug trafficking" [1994] Crim L R 93 at p 93: "As a means of stripping drug traffickers of their profits, the Act [*sc* DTOA] has had limited success".

³⁶ When the amendment of s 1 by s 7(1) of the Criminal Justice Act 1993 comes into force, an order will be made only on the motion of the prosecutor or if the court decides to do so.

³⁷ For recent surveys of confiscation procedures overseas see D McClean, *International Judicial Assistance* (1992), chap 9 (UK and Commonwealth); *Report on the Confiscation of the Proceeds of Crime* (LRC 35, Law Reform Commission, Dublin, 1991), pp 34-39 (various European jurisdictions).

attorney's nightmare: the government has all the advantages".³⁸ The proceedings are *in rem*, being brought against the property itself, the burden of proof is lower than in a criminal case and the property owner's innocence, even his acquittal in prior criminal proceedings, is generally no defence. These developments in American law have attracted criticism.³⁹ We would endorse the conclusion of a recent study that to copy them in Britain "would be a serious mistake".⁴⁰

The international context of confiscation legislation

2.8 "Modern criminal policy is no longer conceivable if it does not also include an international element. At a time when the mobility of the individual is increasing and the separation function of national borders is constantly decreasing, no domestic criminal legislator can afford to treat crime merely as a national phenomenon."⁴¹ The recent statutes dealing with the confiscation of the proceeds of crime have accordingly been enacted in the context of the growth of international co-operation in this area of law. The United Kingdom is a party to a number of multilateral conventions and bilateral agreements for mutual assistance in criminal matters including, in particular, investigative assistance and the search for and seizure and confiscation of the proceeds of all types of crime, especially drug-related offences.⁴² There are two principal conventions. The first is the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("the Vienna Convention"), which was implemented by Part II of the Criminal Justice (International Co-operation) Act 1990. The second is the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("the Laundering Convention") which was drawn up within the Council of Europe and opened for signature on 8 November 1990.⁴³ The United Kingdom ratified the Convention on 28 September 1992 and it came into force on 1 September 1993. Both Conventions are concerned with the related issues of the confiscation of the proceeds of crime and the prevention of the laundering of such proceeds. The European Community Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering⁴⁴ takes account of both Conventions and was subsequently implemented in the United Kingdom by the Criminal Justice Act 1993⁴⁵ and the Money Laundering Regulations 1993.⁴⁶ As to the confiscation of the proceeds of crime, we have noted above that while schemes are in place in the United Kingdom in relation to drug

³⁸ D B Smith, *Prosecution and Defense of Forfeiture Cases* (1988), p 1, cit M Zander, *Confiscation and Forfeiture Law: English and American Comparisons* (1989), p 25.

³⁹ eg D J Fried, "Rationalizing criminal forfeiture" (1988) 79 J Crim Law and Criminology 328.

⁴⁰ M Zander, *supra*, p 2.

⁴¹ P Wilkitzki (Federal Ministry of Justice, Bonn), cit *International Efforts to Combat Money Laundering* ed W C Gilmore (Cambridge International Documents Series, vol 4, 1992), p ix.

⁴² See F Keyser-Ringnalda, "European integration with regard to the confiscation of the proceeds of crime" (1992) 17 European Law Review 499.

⁴³ For the text of the Convention and a commentary, see the Explanatory Report on the Convention (Council of Europe, Strasbourg, 1991). The text and Report are also printed in *International Efforts to Combat Money Laundering* ed W C Gilmore (Cambridge International Documents Series, vol 4, 1992), pp 177, 192, and discussed in the Introduction, pp xiv-xvi.

⁴⁴ No 91/308/EEC: OJ 1991, L 166/77. See K D Magliveras, "Defeating the money launderer - the international and European framework" 1992 Journal of Business Law 161; *Money Laundering* ed H L MacQueen (1993), esp P J Cullen, "Money laundering: the European Community Directive" p 34.

⁴⁵ Criminal offences related to money laundering are created by the 1987 Act, ss 42A, 43A, 43B and the 1988 Act, ss 93A-93E, all inserted by the 1993 Act, ss 17, 19, 29-33, which are now in force.

⁴⁶ SI 1993, No 1933. See A N Brown, "Money laundering in Scotland: the law" in *Money Laundering* (above), p 50, and "Money laundering and Scottish solicitors" (1994) 39 JLSS 132.

trafficking and terrorism,⁴⁷ and in England and Wales in relation to serious crime,⁴⁸ Scotland has no schemes other than those related to drug trafficking and terrorism.

2.9 In framing our recommendations we have therefore taken account of those obligations of the Laundering Convention which bear upon the matters falling within the terms of our reference. Among the obligations which the Convention imposes on the Parties are obligations "to adopt such legislative and other measures as may be necessary" to achieve various objectives in the field of international co-operation for the purpose of depriving criminals of the proceeds of crime. Chapter II of the Convention prescribes "Measures to be taken at national level". Article 2.1 provides:

"Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds."

The Convention definitions which are relevant to this section of this report⁴⁹ are as follows:⁵⁰

a. 'proceeds' means any economic advantage from criminal offences. It may consist of any property as defined in sub-paragraph *b* of this article;

b. 'property' includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property; ...

d. 'confiscation' means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property."

2.10 Since the scope for confiscation in Scottish criminal procedure is limited, as we have noted,⁵¹ the United Kingdom has entered a declaration "that, in relation to Scotland, Article 2.1 shall apply only to offences the commission of which constitutes drug trafficking as defined in Scottish legislation". In order for the area of Scots law within our terms of reference to comply fully with the Convention it will be necessary to provide not only for the confiscation of proceeds of crime, as required by article 2.1, but also for provisional measures preventing any dealing in property liable to confiscation,⁵² for the preservation of the rights of parties affected by provisional measures and confiscation⁵³ and for compliance with requests from other Parties to the Convention for confiscation of proceeds or for provisional measures with a view to confiscation.⁵⁴ We shall accordingly make recommendations on all these matters.

Recommended policy

2.11 In our discussion paper we considered various types of case in which proceeds can be derived from criminal activity other than drug trafficking or terrorism. We sought views

⁴⁷ See para 2.3 above.

⁴⁸ See para 2.5 above.

⁴⁹ "Instrumentalities", ie items of property used in crime, are considered in Parts XI to XVII of this report.

⁵⁰ Convention, art 1.

⁵¹ See paras 2.3-2.5 above.

⁵² Convention, arts 3, 11. See para 9.1 below.

⁵³ *Ibid*, art 5. See para 10.1 below.

⁵⁴ *Ibid*, art 7.2. See para 18.1 below.

on the proposition that while fines and compensation orders might in some cases be satisfactory as a means of stripping an offender of unlawful proceeds, they were likely to be unsuitable in other cases; and that a new type of order, with associated powers and procedures, was accordingly required.⁵⁵ This proposition was overwhelmingly supported by our consultees. One consultee considered that all that was necessary was to encourage judges to fine offenders more heavily and to impose fines together with sentences of imprisonment. As we have already noted, however,⁵⁶ the courts' powers to impose fines, however heavy⁵⁷ and whether or not imposed together with a sentence of imprisonment, are not adequate to secure that offenders are deprived of the proceeds of crime.

2.12 Our consideration of the confiscation provisions in Part I of the Criminal Justice (Scotland) Act 1987 and in Part VI of the Criminal Justice Act 1988 suggests to us that a new type of order, designed to strip an offender of unlawful proceeds, could with advantage be modelled on certain of these provisions. It also seems obviously necessary that the Scottish courts should have the powers required by the Laundering Convention and should be at least as well equipped as those of England and Wales to confiscate the proceeds of crime. That does not mean, however, that the provisions of Part VI of the 1988 Act should be merely copied in Scottish legislation. Not only has Part VI been amended: the legal system and patterns of criminal activity in Scotland are different from those south of the Border. Naturally we have paid close attention to the English legislation, and we have modelled certain of our recommendations upon it; but we have been concerned only to secure that any new Scottish provisions should be comparable to and at least as effective as their English equivalents, and not that they should be identical to them. We shall therefore refer in detail to the English provisions only where they are particularly relevant.⁵⁸ We also consider that the confiscation schemes in Part I of the 1987 Act and in the new legislation should be identical wherever appropriate. Thus, except for the terrorism-related cases for which special provision is made,⁵⁹ Scotland would have in effect a single confiscation scheme with only a few special features which would apply in drug-trafficking cases.⁶⁰ We shall therefore propose that in all but a few respects the provisions of Part I of the 1987 Act should be amended where necessary to match the provisions of the draft Bill annexed to this report.⁶¹

2.13 We therefore now make a general recommendation in favour of the introduction of confiscation orders in cases other than those related to drug trafficking or terrorism for which provision has already been made. We consider that since the power to make these new confiscation orders would be available in a wide range of circumstances the making of such an order should not be mandatory but should be a matter for the discretion of the

⁵⁵ DP, paras 5.1-5.16, prop 15.

⁵⁶ See para 2.2 above.

⁵⁷ On conviction on indictment a fine or a compensation order of any amount may be imposed: Criminal Procedure (Scotland) Act 1975 (hereafter "the 1975 Act") s 193A; Criminal Justice (Scotland) Act 1980, s 59(2).

⁵⁸ The English legislation as at 1 June 1992 (before amendment by the Criminal Justice Act 1993) is discussed in A R Mitchell, M G Hinton and S M E Taylor, *Confiscation* (1992) (hereafter "Mitchell"). See also D Feldman, *Criminal Confiscation Orders - The New Law* (1988) (hereafter "Feldman") and the reports cited in para 2.6 above, first footnote.

⁵⁹ See para 2.3 above.

⁶⁰ The special features are: the rules for the assessment of the proceeds of drug trafficking (CJ(S)A, s 3: see paras 6.7-6.8 below); the concept of the "implicative gift" (CJ(S)A, s 6: see para 4.21 below); and rules as to investigations and the disclosure of information (CJ(S)A, ss 38-40, 41: see paras 9.47-9.49 below).

⁶¹ The necessary amendments are set out in Schedule 3 to the draft Bill, and the effect of the amendments is shown in the version of Part I of the 1987 Act which is printed in Appendix B to this report. See paras 20.4, 20.5 below.

court, provided that specified circumstances exist.⁶² The amount to be paid under the order⁶³ should also be within the court's discretion. We **recommend**:

1. (1) Subject to the following recommendations, where in a case other than one related to drug trafficking or terrorism a Scottish criminal court is satisfied that an offender has benefited from an offence of which he has been convicted, the court should have a discretionary power to make a confiscation order requiring him to pay such sum as the court thinks fit with the object of depriving him of that benefit.
- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be so amended as to make the scheme for the confiscation of the proceeds of drug trafficking conform, as far as appropriate, to the scheme described in the following recommendations.

(Draft Bill, clauses 1(1), (2), (4), 39(3); Schedule 3)

The nature of confiscation

2.14 The nature of any recommendations on the subject of confiscation orders will depend on the view which is taken of the nature of a confiscation order. In England and Wales it is often maintained that the order is not part of the offender's sentence, but is essentially a civil remedy which is attached to a criminal process. The question of the nature of the order may arise in several contexts. It was discussed in the Parliamentary debates on clauses 7(2) and 24(2) of the Criminal Justice Bill (now sections 7(2) and 27(2) of the Criminal Justice Act 1993) which prescribe the civil standard of proof as the standard for determining certain important issues in a hearing on an application for a confiscation order. The clauses were supported by arguments that confiscation was not a punishment and the hearing was not a criminal proceeding but essentially a civil process.⁶⁴ On the other hand the clauses were criticised on the grounds that the making of the order was an integral part of the criminal process and that confiscation was such a severe penalty that only the criminal standard was appropriate for proof of the allegation that the offender had benefited from the crime.⁶⁵ The same question arises in the context of a discussion of the relationship between a confiscation order and any fine, sentence of imprisonment or other order made by the court when dealing with the offender. If the order is civil in character, it should have no bearing on the other orders made, apart from those which require the offender to pay a fine or make some other payment. If, on the other hand, it is a punishment, the sentencer should take it into account when deciding what other criminal penalty to impose on the offender.

2.15 We discuss in later parts of this report these issues as to standards of proof and the relationship between the confiscation order and other orders imposed on the offender.⁶⁶ It is important, however, that we should state at the outset our opinion on the question of the nature of the confiscation process in the Scottish courts. In our view it cannot be accurately

⁶² This is the approach in CJ(S)A, s 1 and CJA, s 71.

⁶³ In DP, paras 5.19-5.20, prop 16, it was suggested that a confiscation order might be either an order for payment or "such other order as the court considers appropriate in the circumstances". We share the view of experienced consultees that anything other than an order for payment would be unnecessarily complex.

⁶⁴ *Hansard*, HL Deb vol 539, cols 1350, 1383, vol 540, col 750 *per* Earl Ferrers, Minister of State, Home Office.

⁶⁵ *Ibid*, vol 540, cols 742 *per* Baroness Mallalieu, 1470, 1471, 1474 *per* Lord Williams of Mostyn.

⁶⁶ On standards of proof, see Part VI; on the relationship between the confiscation order and other orders, see Part V.

described as being either essentially civil or essentially criminal in character. It is preferable to regard it as a procedure in a class of its own with elements of reparation, in the sense of making amends or restoring matters to a proper state, as well as of punishment. We begin by explaining that a confiscation order made under Part I of the Criminal Justice (Scotland) Act 1987 or under our recommended scheme requires the offender to pay an amount which is to be realised from money or other property *prima facie* belonging to him, on the ground that that money or property is not rightfully his but represents all or part of the benefit he has derived from the commission of the crime of which he has been convicted. We now attempt to summarise some of the views which have been expressed. In support of the view that a confiscation order should not affect the sentence imposed it is argued:⁶⁷

"In principle, the exercise of depriving an offender of the profits of his illegal activities is distinct from and additional to the task of sentencing him for his crimes ... [I]f the offender has sufficient means, there should be both sentence and deprivation of profit."

In support of the view that confiscation is a civil matter it is argued that proof of the connection between the alleged benefit and the crime is a different issue from proof of guilt of the crime, and that the considerations that the order is imposed by a criminal court and is appealable in the same way as a sentence do not necessarily indicate that it is criminal in character. It is sometimes said that the confiscation orders imposed by the courts in England and Wales are not punishments but "the civil consequences of the criminal wrong-doing".⁶⁸ Their object "is not penal, because they merely deprive the defendant of what is not rightfully his".⁶⁹ They are "not penal but merely reparative";⁷⁰ and "a person does not by making reparation incur punishment".⁷¹ If it is pointed out that an English confiscation order is enforceable by imprisonment, it is replied that a party to a civil case in England would be liable to imprisonment for contumaciously refusing to comply with a court order to hand over property.⁷²

2.16 Those arguments in support of the civil character of confiscation orders imposed in England and Wales do not appear to us to apply to Scottish confiscation orders made under the 1987 Act or our recommended scheme. None of these Scottish orders enforces a civil obligation which the offender owes to the State: he cannot be sued by the Crown in the civil courts for reparation in the amount of his proceeds.⁷³ Where the crime is a "victimless" one⁷⁴ there is no person to whom reparation could be made; and in cases where there is an identifiable person who is entitled to claim reparation the appropriate way for the sentencing court to satisfy that claim is by making a compensation order, not a confiscation order. While the defender in a Scottish civil action for the delivery of property would be

⁶⁷ A Ashworth, *Sentencing and Penal Policy* (1983), p 294, *cit* M Wasik "The Hodgson Committee Report on the Profits of Crime and Their Recovery" [1984] Crim L R 708 at p 711. See also A Ashworth, *Sentencing and Criminal Justice* (1992), pp 72-73, 293-295.

⁶⁸ Mitchell, p xi.

⁶⁹ Feldman, p 95: see also p 113.

⁷⁰ Mitchell, p xii.

⁷¹ *Re Thomas (disclosure order)* [1992] 4 All ER 814 at p 819 *per* Leggatt LJ. Cf the dictum of Sir Thomas Bingham MR in *In re Barretto* *cit* para 2.17 below.

⁷² *Hansard*, HL Deb vol 540, col 749 *per* Lord Ackner.

⁷³ A compensation order, on the other hand, is usually (although not necessarily) a means of satisfying a claim which could otherwise be vindicated by civil litigation: Criminal Justice (Scotland) Act 1980, s 58; *Reparation by the Offender to the Victim in Scotland* (1977) Cmnd 6802, paras 7.10-7.17. Cf *R v Inwood* (1974) 60 Cr App R 70 at p 73, *R v Daly* [1974] 1 WLR 133 at p 134; *R v Chappell* (1984) 6 Cr App R (S) 214.

⁷⁴ See para 2.2 above.

liable to imprisonment if he wilfully refused to comply with a decree for delivery,⁷⁵ that is virtually unknown in practice. In any event a confiscation order does not order delivery of property but orders the payment of money; and in Scotland civil imprisonment for debt is very rare indeed.⁷⁶ It is competent only in a very limited class of special cases: where the debtor has wilfully defaulted in the payment of sums decerned for as aliment;⁷⁷ or where he has defaulted in payment of a fine imposed either for contempt of court in civil proceedings or for breach of an order, under section 45 of the Court of Session Act 1988, for restoration of possession or for specific performance of a statutory duty.⁷⁸ On the other hand confiscation may be regarded as reparative in a popular sense in that the recovery of the proceeds in some way compensates society for the damage it has suffered from the offender's criminal conduct.

2.17 The consideration that both under the 1987 Act and under our scheme imprisonment is the sanction for failure to pay the amount due under a confiscation order appears to us to distinguish the order from an ordinary civil decree for payment and to indicate its resemblance to a fine or a compensation order, where the same sanction is applicable. A further distinction is that while a civil court has no discretion as to the amount of a decree for payment of a debt which has been proved or admitted, a Scottish criminal court has a discretion as to the amount to be recovered under a confiscation order. Again, while civil decrees are generally granted irrespective of the defender's ability to pay,⁷⁹ the amount of a confiscation order may be limited by the amount which may be realised from the property available to satisfy it.⁸⁰ Similarly, the means of the offender must be taken into account when the amount of a fine⁸¹ or a compensation order⁸² is determined. We believe that it should also be recognised that to deprive a person of property the use of which he has been enjoying, albeit wrongly, as if it were his own, is to punish him. He, at least, will regard it as a hardship and a penalty. As Jeremy Bentham said of compensation, which likewise involves taking from the offender that which he ought to pay, "Compensation will answer the purpose of punishment".⁸³ The confiscation provisions of the Drug Trafficking Offences Act 1986 have been described as "in a broad sense penal provisions, inflicting the vengeance of society on those who have transgressed in this field".⁸⁴ All these considerations lead us to conclude that confiscation cannot be satisfactorily categorised as being necessarily or exclusively a form of reparation or, on another view, a form of punishment.⁸⁵ It is on that

⁷⁵ Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s 1, which is concerned with the enforcement of decrees *ad factum praestandum*, ie for the performance of an act other than the payment of money.

⁷⁶ From 1987 to 1992 the total number of civil prisoners received into custody in any year did not exceed 34 and the average daily number in custody was 1 (*Prison Statistics Scotland 1992* (Scottish Office, 1993), Tables 1, 6). Even those prisoners were not necessarily debtors: a civil court may imprison for other reasons eg contempt of court, breach of interdict or breach of poinding (Debtors (Scotland) Act 1987, s 29(1)).

⁷⁷ Civil Imprisonment (Scotland) Act 1882, ss 3, 4. *Gray v Gray* 1993 SCLR 580 is a very rare modern reported example.

⁷⁸ *Report on Diligence and Debtor Protection* (1985) Scot Law Com No 95, vol 1, paras 7.70-7.80; Debtors (Scotland) Act 1880, s 4, as amended by the Debtors (Scotland) Act 1987, Sched 6, para 8 and Sched 8, and by the Court of Session Act 1988, s 52(5); Debtors (Scotland) Act 1987, s 74(3).

⁷⁹ The resources of the parties are relevant in determining the amount of an award of aliment or of a financial order on divorce (Family Law (Scotland) Act 1985, ss 4(1), 8(2)(b)).

⁸⁰ See paras 3.7-3.11 below.

⁸¹ Criminal Procedure (Scotland) Act 1975, ss 194, 395(1).

⁸² Criminal Justice (Scotland) Act 1980, s 59(1).

⁸³ Ms portfolio 98 f4 *cit* Hodgson, p 6.

⁸⁴ *In re Barretto*, [1994] 2 WLR 149 *per* Sir Thomas Bingham MR at p 155.

⁸⁵ In *Welch v UK* (12 February 1993, unreported) the European Commission of Human Rights admitted a complaint notwithstanding the respondent's submission that a confiscation order under the DTOA was not a penalty for the purposes of art 7 of the European Convention on Human Rights. In its report of 15 October 1993 the Commission

view of the nature of confiscation that we have made our recommendations, which we now summarise in the following paragraphs.

An overview of our recommendations

2.18 We discuss in the following parts of this report the circumstances in which it should be possible for a confiscation order to be made and the various powers and procedures which would be required. We shall recommend that a confiscation order should be competent against an offender who has been convicted on indictment in the High Court or the sheriff court, or has been convicted of certain serious offences in the sheriff's summary court. The court should be entitled to require him to pay a sum which must not exceed the amount of the benefit he has derived from the offence or, if less, the amount that might be realised from the property available to satisfy the order.⁸⁶ The concepts of "benefit" and "the amount that might be realised" are the subject of detailed recommendations.⁸⁷ We then consider the effect of the confiscation order on the rest of the offender's sentence. We propose that the court should disregard the confiscation order when imposing a custodial sentence or any other sentence which is not directed towards depriving the offender of money or other property: thus the order should not have the effect of reducing the length of any prison sentence the court would otherwise consider appropriate. On the other hand the order should generally be taken into account when the court considers the amount of a fine or any other order requiring some payment by the offender or the forfeiture of his property.⁸⁸ We make detailed recommendations as to the rules of evidence and procedure which should be followed when the court is ascertaining the relevant information which it must have before it makes a confiscation order.⁸⁹ We also propose that the court should be entitled to make subsequent orders where proceeds of the crime are discovered at a later date, or where it is found that the amount of the offender's benefit is greater than was thought, or where the realisable assets either have increased in value or have proved insufficient to meet the amount of the order.⁹⁰

2.19 The next group of recommendations on the subject of confiscation is concerned with the enforcement of confiscation orders. We propose that they should be enforced in the same way as fines, with imprisonment as the sanction for failure to pay.⁹¹ In addition, however, we recommend that as in Part I of the Criminal Justice (Scotland) Act 1987 the court should have power to make restraint orders both before and after the trial which would have the effect that realisable property would be available to satisfy a confiscation order. The court would also have power to appoint an administrator to manage the property and, if an order were made, to realise it. We also recommend the adoption of the provisions of Part I of the 1987 Act concerning the sequestration of a person or the winding-up of a company holding realisable property, cases where property held subject to a floating charge is realisable property, and the protection of insolvency practitioners dealing with

expressed the opinion that there had been no violation of art 7 (seven votes to seven with the casting vote of the acting President). The Commission has referred the case to the European Court of Human Rights: (1994) 5 Human Rights Case Digest 44. See para 20.8 below.

⁸⁶ See Part III below.

⁸⁷ See Part IV below.

⁸⁸ See Part V below.

⁸⁹ See Part VI below.

⁹⁰ See Part VII below.

⁹¹ See Part VIII below.

property subject to a restraint order.⁹² Our recommendations also deal with the protection of the interests of third parties throughout the procedure, and with compensation. If the accused is acquitted, some provision should be made for the payment of compensation to anyone who has suffered loss or damage as a result of anything done in relation to the property under restraint; and if he is convicted, compensation should be payable to an innocent third party whose property has been realised to satisfy a confiscation order.⁹³

2.20 Our discussion of the enforcement of confiscation orders includes a consideration of reciprocal arrangements for the enforcement of such orders: the enforcement in Scotland of orders made in other jurisdictions, and the enforcement in other jurisdictions of orders made in Scotland.⁹⁴

2.21 We also consider the position where a person is charged with an offence in respect of which a confiscation order is competent, but dies before he has been sentenced. We recommend that the Court of Session should be empowered to forfeit such of his assets as may be proved beyond reasonable doubt to have been the proceeds of the offence.⁹⁵

Our recommendations, the Scottish Act of 1987 and the English Acts of 1986 and 1988

2.22 Readers who are familiar with the confiscation provisions of the Acts of 1986, 1987 and 1988 may find it useful to have at this stage a summary of the principal amendments we propose to the 1987 Act and the main differences between, on the one hand, the 1987 Act as so amended and the draft Bill and, on the other, the Acts of 1986 and 1988. Readers who are not familiar with the legislation should ignore the following paragraphs until they have read Parts III to X and XIX of the report.

2.23 A detailed discussion of the matters summarised below and full references to the statutory provisions will be found in the paragraphs mentioned in the footnotes. In the following paragraphs we refer, for the sake of brevity, to the draft Bill as "the Bill" and to the 1987 Act as proposed to be amended by the Bill as "the amended 1987 Act".

Nature of the offence; court

2.24 Under the unamended 1987 Act a confiscation order may be made only in the High Court and only in relation to a drug trafficking offence. The amended 1987 Act continues to apply only to drug trafficking offences, but it allows a confiscation order to be made not only in the High Court but also in the sheriff court. In the sheriff court an order may be made either in proceedings on indictment, or in summary proceedings where the offence, when prosecuted on summary complaint, is punishable by a fine in excess of level 5 or by more than three months' imprisonment. The Bill applies to any offence other than the drug trafficking offences to which the 1987 Act applies and certain terrorism-related offences. As in the amended 1987 Act, a confiscation order may be made where the offence has been prosecuted either on indictment (in the High Court or the sheriff court) or in summary proceedings in the sheriff court where the offence is punishable as stated above.⁹⁶ The 1986 Act applies to drug trafficking offences in the Crown Court, and the 1988 Act to offences

⁹² See Part IX below.

⁹³ See Part X below.

⁹⁴ See Part XVIII below.

⁹⁵ See Part XIX below.

⁹⁶ See paras 3.2-3.6 below.

prosecuted on indictment and to a short list of specified offences prosecuted in the magistrates' court.

Financial limits

2.25 There is no upper or lower limit on the amount of a confiscation order under the 1987 Act (not amended in this respect) or the Bill.⁹⁷ The 1988 Act prescribes a minimum amount of £10,000, variable by statutory instrument.

Benefit

2.26 The Acts of 1986 and 1987 require the court to assess the value of the proceeds of the accused's drug trafficking. The Bill does not amend the 1987 Act in this respect. The 1988 Act defines the accused's "benefit" as the value of property he has obtained, including any pecuniary advantage he has derived, as a result of or in connection with the commission of the offence. Under the Bill, "benefit" is defined as any property or other economic advantage the accused has obtained, directly or indirectly, in connection with the commission of the offence.⁹⁸

2.27 The 1986 Act, as amended by the 1993 Act, requires the court, when assessing the accused's proceeds of drug trafficking, to make certain rebuttable assumptions about the source of property transferred to him up to six years before his being indicted. The 1987 Act gives the court a discretion to make similar assumptions, and is not amended. There is no corresponding provision in the 1988 Act. The Bill gives the court a discretion to make two rebuttable assumptions as to the source of the accused's assets after the commission of the offence.⁹⁹

The amount that might be realised

2.28 In the Acts of 1986, 1987 and 1988 the amount that might be realised at the time a confiscation order is made is the total of the values at that time of all the "realisable property" held, or owned, by the accused less the total amount payable in pursuance of any "obligations having priority", together with the values of certain "caught" or "implicative" gifts. In the Bill and the amended 1987 Act the definition of "realisable property" is extended to include property in the possession or under the control of the accused or the recipient of a "caught" or "implicative" gift.¹⁰⁰ The Bill makes no provision for "obligations having priority" and repeals the 1987 Act's provisions in that regard.¹⁰¹ The unamended 1987 Act requires gifts to be valued by means of an algebraic formula: in the amended Act and the Bill new rules are provided.¹⁰² The Bill also repeals the 1987 Act's exclusion from realisable property of certain gifts made for charitable purposes.¹⁰³ On the other hand, under the Bill and the amended 1987 Act the recipient of a gift is given an opportunity to have it excluded from realisation if he can prove on the balance of probabilities that he received it in good faith, that he had nothing to do with the commission of the offence and that he would otherwise

⁹⁷ See paras 3.7-3.11 below.

⁹⁸ See paras 4.2-4.7 below.

⁹⁹ See paras 6.6-6.10 below.

¹⁰⁰ See para 4.9 below.

¹⁰¹ See paras 4.31-4.33 below.

¹⁰² See paras 4.23-4.25 below.

¹⁰³ See para 4.30 below.

suffer hardship.¹⁰⁴ Again, the Bill and the amended 1987 Act introduce new provisions for the protection of the accused's family by placing constraints on the disposal of the family home if it has been lawfully acquired.¹⁰⁵

Confiscation and other disposals

2.29 The Bill and the amended 1987 Act resemble the 1988 Act in providing that a confiscation order may be made only in addition to, and not instead of, dealing with the accused in any other way.¹⁰⁶ There is no corresponding provision in the 1986 Act or the unamended 1987 Act. The Bill and the amended 1987 Act, unlike the unamended 1987 Act and the 1986 and 1988 Acts, make detailed provision for the relationship between a confiscation order and other sentences, including a compensation order.¹⁰⁷

Procedure and evidence before order made

2.30 The following should be noted:

(i) Under the Bill and the 1987 Act (not amended) the court is entitled to make a confiscation order only on the application of the prosecutor.¹⁰⁸ The 1986 Act, as amended by the 1993 Act, allows the court to make an order on its own initiative and requires it to do so on the prosecutor's request. The 1988 Act requires the court to consider a confiscation order where the prosecutor gives notice that there are likely to be sufficient assets to meet it.

(ii) The 1986 and 1988 Acts, both as amended by the 1993 Act, provide that the standard of proof required to determine any question as to whether a person has benefited and the amount to be recovered should be the civil standard. The Bill and the amended 1987 Act generally impose on the Crown the criminal standard of proof.¹⁰⁹

(iii) Under the unamended 1987 Act a remit may be made by the High Court to the Court of Session where a difficult question of law or a question of fact of exceptional complexity is involved. There is no corresponding procedure in the 1986 Act and 1988 Acts. Under the Bill and the amended 1987 Act there is no remit procedure: any matters in dispute are to be resolved by the criminal court.¹¹⁰

(iv) The Bill and the 1987 Act (not amended), unlike the 1986 and 1988 Acts, do not require the court to issue a formal certificate of its findings.¹¹¹

Variation of confiscation orders

2.31 The Bill and the amended 1987 Act make detailed provision for cases where, after the date of the accused's sentence, the amount of benefit or realisable property is founded to be different from the amount at the date of the sentence. Under the 1986 Act as amended by

¹⁰⁴ See paras 4.28-4.30 below.

¹⁰⁵ See paras 4.15-4.19 below.

¹⁰⁶ See para 5.2 below.

¹⁰⁷ See paras 5.8-5.24 below.

¹⁰⁸ See paras 6.3, 6.4 below.

¹⁰⁹ See paras 6.5, 6.11-6.13 below.

¹¹⁰ See paras 6.21, 6.22 below.

¹¹¹ See para 6.28 below.

the 1993 Act the court may make a revised assessment of the proceeds of drug trafficking. The Criminal Justice (International Co-operation) Act 1990 permits the variation of an order under the 1986 or 1987 Act (but not the 1988 Act) only where there has been an increase in the amount that might be realised. Applications under the 1990 Act have to be made by the prosecutor or receiver or administrator to the civil court and then to the criminal court. Under the Bill and the amended 1987 Act, (i) where there has been an increase either in the benefit or in the amount that might be realised (ii) only the prosecutor may apply (iii) only to the court which made the order (iv) within six years after the date of conviction, the time-limit in the 1986 Act as amended by the 1993 Act.¹¹²

2.32 The Acts of 1986, 1987 and 1988 make provision for the downwards variation of an order where there is insufficient realisable property to satisfy it. Applications must be made to the civil court and to the criminal court. Under the Bill and the amended 1987 Act either the prosecutor or the accused may apply directly to the court which made the order.¹¹³ Both, like the 1986 Act as amended by the 1993 Act, also make provision for a case where no order has been made and benefit is later discovered.¹¹⁴

Enforcement of confiscation orders

2.33 Under the 1986 Act as amended by the 1993 Act, and under the unamended 1987 Act, a confiscation order continues to be enforceable after the offender has served a sentence of imprisonment in default of payment of the amount due under the order. Under the Bill and the amended 1987 Act, which correspond in this respect to the 1988 Act, the accused expunges his debt by serving the sentence of imprisonment.¹¹⁵ The means inquiry court procedure for the purposes of the Bill and the amended 1987 Act is revised to the extent that a court is to be held irrespective of whether the offender is in prison and the prosecutor is to be given an opportunity of being heard.¹¹⁶

Preservation and realisation of property

2.34 The provisions of the Bill as to restraint orders, ancillary orders and the appointment of administrators are essentially the same as those of the unamended 1987 Act. The Bill and the amended 1987 Act, however, have the following additional features.

(i) A restraint order may contain a discretionary exception for reasonable living expenses, as in the 1988 Act.¹¹⁷

(ii) Where a restraint order is applied for before the institution of proceedings, the court must be satisfied that it is proposed to institute proceedings within 28 days (as in the unamended 1987 Act). However, there is no longer any requirement, as in the unamended 1987 Act, that the court should be satisfied that the person is reasonably suspected of the offence: instead, it must appear to the court that there are reasonable grounds for thinking that a confiscation order might be made in the event of conviction (a variant of a requirement in the 1988 Act). (Both the Bill and the 1987 Act (not amended) require that

¹¹² See paras 7.2-7.11 below.

¹¹³ See paras 7.12-7.16 below.

¹¹⁴ See paras 7.17, 7.18.

¹¹⁵ See paras 8.2-8.5 below.

¹¹⁶ See paras 8.6, 8.7 below.

¹¹⁷ See paras 9.11-9.13 below.

the order must be recalled if proceedings are not instituted within 28 days, not, as in the 1986 and 1988 Acts, within such time as the court considers reasonable.)¹¹⁸

(iii) Similarly, where a restraint order is applied for while proceedings are in progress, the court must be satisfied that there are reasonable grounds for thinking that a confiscation order might be made in the event of conviction.

(iv) Under the Bill and the amended 1987 Act a restraint order may be made where the prosecutor makes, or proposes to make, an application after sentence for a new confiscation order or an upwards variation of an existing confiscation order.¹¹⁹

(v) There are new provisions for the registration or recording in the appropriate property register of restraint orders relating to heritable property in Scotland.¹²⁰

(vi) The procedure under the 1987 Act for obtaining an inhibition is simplified.¹²¹

(vii) There are also new provisions for appeals against decisions in relation to restraint orders.¹²²

(viii) The provisions of the Bill as to sequestration, insolvency and related matters in relation to procedures under restraint orders and confiscation orders are essentially the same as those in the unamended 1987 Act. We recommend for both, however, a new provision which has no counterpart in the Acts of 1986 and 1988 relative to a transaction by an insolvent company which is challengeable as a gratuitous alienation or unfair preference.¹²³

2.35 The Bill, like the 1987 Act (not amended), makes no provision for disclosure orders in relation to restraint orders, which are usual in English practice.¹²⁴ The 1986 Act as amended by the 1993 Act, and the 1987 Act (not amended) contain provisions as to special investigative powers, the disclosure of information held by Government departments and the disclosure of information by the accused. There are no such provisions in the 1988 Act or the Bill.¹²⁵

Protection of third parties' rights

2.36 The Bill adopts the compensation scheme in the 1987 Act, with modifications which are also inserted in that Act. The scheme is comparable to those in the 1986 and 1988 Acts.¹²⁶ The Bill and the amended 1987 Act add, however, a further provision which has no counterpart in these Acts, for the payment of compensation to a person other than the

¹¹⁸ See paras 9.21, 9.22.

¹¹⁹ See paras 9.23, 9.24 below.

¹²⁰ See paras 9.25, 9.26 below.

¹²¹ See para 9.34 below.

¹²² See paras 9.29, 9.30 below.

¹²³ See para 9.44 below.

¹²⁴ See para 9.38 below.

¹²⁵ See paras 9.47-9.50 below.

¹²⁶ See paras 10.4-10.7 below.

accused or the recipient of an "implicative" or "caught" gift who was the owner of, or had an interest in, property which has been realised.¹²⁷

Reciprocal enforcement of confiscation orders

2.37 We propose the repeal and restatement of the various provisions for the enforcement in Scotland of confiscation orders made in England and Wales.¹²⁸ As to the enforcement in the United Kingdom of external confiscation orders, the Acts of 1986 and 1988 and the unamended Act of 1987 make provision only for requests for the confiscation of the value of proceeds (value confiscation). The Laundering Convention, however, requires compliance with external requests for the confiscation of specific items of property representing proceeds (property confiscation). The Bill and the amended 1987 Act therefore make provision for compliance with such requests.¹²⁹

Death of accused before confiscation order made

2.38 The 1986 Act as amended by the 1993 Act provides that in drug trafficking cases a confiscation order may be made where the defendant has been convicted but dies or absconds before being sentenced, or where he has absconded after being charged but before being convicted. Thus, no order may be made where he dies between the institution of proceedings and conviction. There are no similar provisions in the unamended 1987 Act or the 1988 Act. The Bill and the amended 1987 Act provide that an order may be made where the accused dies after proceedings have been instituted against him but before he has been sentenced. Thus, an order may be made either where he dies before conviction or where he dies after conviction but before sentence.¹³⁰ In all cases, however, it must be proved beyond reasonable doubt that he committed the offence and thus obtained the property which is the subject of the application. The proceedings take place before the Court of Session on an application by the Lord Advocate, and the order is for forfeiture of the property.¹³¹

¹²⁷ See para 10.8 below.

¹²⁸ See para 18.4 below.

¹²⁹ See para 18.8 below.

¹³⁰ See paras 19.1-19.8 below.

¹³¹ See paras 19.9-19.15 below.

Part III When confiscation should be competent

Introduction

3.1 We discuss in this part the circumstances in which a court should be entitled to make a confiscation order. We have found it useful to consider whether the scope of the power to make an order might be defined by specifying the nature of the offences in respect of which an order might be made,¹ or by conferring the power only on particular courts or in particular forms of procedure,² or by prescribing financial limits within which an order might be made.³

Nature of the offence

3.2 Article 2.1 of the Laundering Convention, which obliges the Parties to enact legislation to permit the confiscation of the proceeds of crime, "contains an implicit invitation for such legislation to be as broad in scope as possible".⁴ We proposed in the discussion paper that, subject to a rule as to a lower limit on the amount of a confiscation order, the power to make such an order should be available in the High Court and the sheriff court under both solemn and summary procedure.⁵ That proposition was supported by most of our consultees, but one body of consultees suggested that it would be desirable for the scope of the Scottish confiscation provisions to be broadly consistent with those for England and Wales in Part VI of the Criminal Justice Act 1988. Part VI confers a power to confiscate in proceedings on indictment generally, but in summary proceedings only on conviction of specified offences from which the benefits obtained may be substantial.⁶ We considered this suggestion carefully. We noted that serious offences from which substantial benefits are likely to be derived are usually prosecuted on indictment in the High Court or the sheriff court, but may sometimes be prosecuted in the summary criminal courts. There is room for debate, however, as to which offences, prosecuted summarily, are likely to result in such benefits. In the discussion paper we suggested that statutory offences under the Trade Descriptions Act 1968, or under legislation relating to fisheries or the prevention of oil pollution, might qualify.⁷ In Part VI of the 1988 Act, on the other hand, the list of offences in respect of which magistrates' courts in England and Wales may make confiscation orders⁸ specifies certain offences relating to the contravention of licensing provisions relative to the

¹ See paras 3.2-3.4 below.

² See paras 3.5, 3.6 below.

³ See paras 3.7-3.11 below.

⁴ *International Efforts to Combat Money Laundering* ed W C Gilmore (Cambridge International Documents Series, vol 4, 1992), p xv.

⁵ DP, para 5.35, prop 24(b).

⁶ Confiscation legislation in Australia and Canada is also broad in scope: D McClean, "Seizing the proceeds of crime: the state of the art" (1989) 38 *International and Comparative Law Quarterly* 334 at p 342. See also para 19.4 below.

⁷ DP, para 5.34.

⁸ CJA, s 71(3)(a) and Sched 4, Pt I as substituted by the Criminal Justice Act 1988 (Confiscation Orders) Order 1990 (SI 1990/1570), art 3.

use of places for entertainment⁹ or as sex establishments,¹⁰ and provisions relative to the supply, or possession for supply, of video recordings of unclassified works¹¹ and to the use of unlicensed premises as cinemas.¹² The list may be amended by statutory instrument.¹³ All the offences listed are capable of yielding large profits to those who commit them and, no doubt for that reason, in each case the offender is liable on summary conviction to a fine not exceeding £20,000. The highest level on the standard scale of fines for summary offences in England and Wales, level 5, is £5,000.¹⁴

3.3 We considered whether to devise a comparable list of summary offences for Scotland. We noted that certain statutory offences are punishable on summary conviction by a penalty in excess of the normal maximum in a summary criminal court; a fine in excess of level 5,¹⁵ the highest level on the standard scale, currently £5,000 in Scotland as it is in England and Wales;¹⁶ or imprisonment for a period of more than three months,¹⁷ the normal maximum sentence for a common law offence.¹⁸ We considered that it could reasonably be assumed that Parliament had prescribed such penalties because it considered the offences concerned to be especially lucrative or particularly serious. We therefore decided that instead of compiling a list of miscellaneous offences which would require amendment from time to time, it would be simpler and more satisfactory to have a provision that confiscation should be competent on summary conviction of an offence for which the maximum penalty is a fine in excess of level 5, or imprisonment for more than three months, or both such fine and imprisonment. Such a provision would be likely to catch all those statutory offences which Parliament considers to be particularly lucrative or serious but not to require prosecution on indictment. It would not be necessary to devise or amend any statutory list: any new statutory offence for which Parliament prescribed a summary penalty above level 5 or three months, or any existing statutory offence for which Parliament raised the summary penalty to a sum above level 5 or a period exceeding three months, would automatically be an offence in respect of which a confiscation order could be made. As we explain below,¹⁹ in a case where a person was convicted of such an offence but was not proved to have derived any benefit therefrom, a confiscation order would not be competent.

3.4 In making a recommendation as to summary proceedings it is also necessary to take account of cases where a summary criminal court, having been satisfied that the accused committed the offence charged, grants him an absolute discharge or places him on probation. In such cases a summary criminal court, unlike a court in solemn procedure,

⁹ Offences to which the following provisions, all substituted by the Entertainments (Increased Penalties) Act 1990, c 20, s 1, apply: London Government Act 1963, c 33, Sched 12, para 10(3A); Private Places of Entertainment (Licensing) Act 1967, c 19, s 4(3A)(b); Local Government (Miscellaneous Provisions) Act 1982, c 30, Sched 1, para 12(2B).

¹⁰ Local Government (Miscellaneous Provisions) Act 1982, Sched 3, paras 20, 21.

¹¹ Video Recordings Act 1984, c 39, ss 9, 10, 15(1).

¹² Cinemas Act 1985, c 13, ss 10(1)(a), 11(1)(a).

¹³ CJA, Sched 4, Pt II.

¹⁴ Criminal Justice Act 1982, s 37(2), substituted by the Criminal Justice Act 1991, s 17(1).

¹⁵ eg Civic Government (Scotland) Act 1982, s 7(1), (2), as amended by the Entertainments (Increased Penalties) Act 1990, s 2 (£20,000 or six months); 1982 Act, Sched 2, para 19(3) (£10,000); Video Recordings Act 1984, ss 9, 10, 15(1) (£20,000); Cinemas Act 1985, ss 10(1)(a), 11(1)(a) (£20,000).

¹⁶ Criminal Procedure (Scotland) Act 1975, s 289G(2), inserted by the Criminal Justice Act 1982, s 54, and substituted by the Criminal Justice Act 1991, s 17(1).

¹⁷ eg most of the offences under the Misuse of Drugs Act 1971; Civic Government (Scotland) Act 1982, s 7(1), (2), noted above.

¹⁸ 1975 Act, s 289(d).

¹⁹ See paras 6.1, 6.5 below.

does not proceed to conviction.²⁰ We consider that in such cases it should nevertheless be competent for a summary criminal court to make a confiscation order.²¹ We therefore recommend:

2. **The power to make a confiscation order should be exercisable where a person is prosecuted for any offence other than a specified offence related to drug trafficking or terrorism and -**
 - (a) **is convicted on indictment; or**
 - (b) **is convicted or found to have committed the offence on summary complaint and the offence is punishable by a fine in excess of level 5 on the standard scale or imprisonment for a period of more than three months or by both such fine and imprisonment.**

(Draft Bill, clause 1(1), (2))

Courts entitled to make confiscation orders

3.5 It follows from the above recommendation that both the High Court and the sheriff court would have power to make confiscation orders under the new legislation. Under Part I of the Criminal Justice (Scotland) Act 1987 confiscation orders in drug-trafficking cases may be made only in the High Court. Since under the new legislation the sheriff court would have a general power to make confiscation orders in solemn procedure in respect of other offences,²² and in summary procedure where the offence is punishable by a fine in excess of level 5 or imprisonment for more than three months, we consider that it would be anomalous if it could not do so in drug-trafficking cases. We therefore propose that Part I of the 1987 Act should be extended to cases where a person is convicted in the sheriff court of any of the offences to which Part I relates, either on indictment or on summary complaint where the offence would attract a fine in excess of level 5 or imprisonment for more than three months.²³

3.6 In the discussion paper we did not propose that the district court should have power to make confiscation orders, and none of those who commented suggested that the district court should have such a power. We do not consider it appropriate that the district courts should be burdened with the complexities which the exercise of such a power would involve. If recommendation 2 above were to be accepted, it would be unnecessary to enact any statutory provision to the effect that confiscation was incompetent in the district court.

²⁰ Criminal Procedure (Scotland) Act 1975, ss 182, 183(1), 383, 384(1).

²¹ For the sake of convenience, any reference in this report to a conviction of an offence includes, unless otherwise indicated, a reference to a finding that the offence has been committed. The draft Bill contains provisions to the like effect: cl 38(4), 39(3); Sched 3, para 32.

²² In Scotland the power to make a forfeiture order under PT(TP)A, s 13 is not restricted to the High Court.

²³ The offences under the Misuse of Drugs Act 1971 listed in CJ(S)A, s 1(2)(a) are punishable on summary conviction by 12 months' imprisonment (in the case of ss 4(2), 4(3) and 5(3), where a Class A or Class B drug is involved). The offences under the Customs and Excise Management Act 1979 listed in CJ(S)A, s 1(2)(b) may be punishable on summary conviction by a penalty in excess of level 5 or six months' imprisonment or both. The offences under ss 42A and 43 of CJ(S)A listed in CJ(S)A, s 1(2)(bb) and (c) are punishable on summary conviction by six months' imprisonment. The offences under the Criminal Justice (International Co-operation) Act 1990 listed in CJ(S)A, s 1(2)(cc), added by para 5(2)(a) of Sched 4 to the former Act, are punishable on summary conviction by six months' imprisonment (in the case of s 19, where a Class A or Class B drug is involved).

While there is no statutory restriction on the prosecution in the district court of summary offences punishable by a fine in excess of level 5 or imprisonment for more than three months, in practice such offences are prosecuted only in the sheriff court. There is accordingly nothing in our draft Bill which excludes the district court from its confiscation provisions. In any event, however, we **recommend**:

3. (1) **The power to make a confiscation order in terms of Part I of the Criminal Justice (Scotland) Act 1987 should be extended to the sheriff court in solemn procedure and in summary procedure where the offence concerned is punishable by a fine in excess of level 5 on the standard scale or by imprisonment for more than three months or by both such fine and imprisonment.**
- (2) **The power to make a confiscation order should not be exercisable in the district court.**

(Draft Bill, clause 39(3); Schedule 3, paragraph 2)

Financial limits

3.7 In the discussion paper we expressed the view that in the interests of the economical use of resources it was desirable in some way to exclude confiscation orders for the payment of small amounts of money, and that that could best be done, as in Part VI of the Criminal Justice Act 1988, by prescribing a minimum financial amount.²⁴ The 1988 Act prescribes a minimum amount of £10,000, variable by statutory instrument.²⁵ The majority of those who commented agreed with our proposal, and although there were diverse views as to the amount of the minimum figure, most considered that £10,000 would be appropriate. One consultee, however, questioned the need for a minimum amount upon the view that the prosecutor's discretion whether to move for an order²⁶ was a sufficient safeguard against the uneconomic use of resources. Another consultee pointed out that if there were a minimum amount, it might only become clear after the expenditure of much time and effort that the amount that might be recoverable²⁷ was less than the minimum amount.

3.8 We have concluded that it would be undesirable to prescribe a minimum amount. The principle that the offender should not be allowed to retain any benefit from his crime, which is the rationale of confiscation, must apply whatever the amount of the benefit. Besides, any prescribed minimum amount would be arbitrary and artificial. We are confident that the Crown would exercise its discretion to apply for a confiscation order only after careful consideration of all the circumstances, including the amount of the proceeds which might be confiscated. In any event the discretion of the court as to whether to grant the Crown's application is a further control on the making of inappropriate orders. We note that no minimum amount is prescribed in Part I of the Criminal Justice (Scotland) Act 1987, and that the Home Office Working Group on Confiscation has recommended that the

²⁴ DP, para 5.35, prop 24(a).

²⁵ CJA, s 71(7).

²⁶ On the prosecutor's discretion to move for an order, see paras 6.3-6.4 below.

²⁷ On the determination of the amount that might be recoverable, see paras 4.8-4.33 below.

£10,000 limit in Part VI of the Criminal Justice Act 1988 should cease to apply.²⁸ We therefore **recommend**:

4. There should be no lower limit on the amount of a confiscation order.

3.9 The next question is whether any upper limit should be set to the power of the court to make a confiscation order. There are at least two possible approaches to this matter, each of which may be found in the existing legislation. In Part VI of the Criminal Justice Act 1988 the upper limit of the order is the lesser of two figures calculated in accordance with the provisions of the Act: the "benefit" which the offender has derived from the offence, and "the amount that might be realised" at the time the order is made.²⁹ The latter is, in broad terms, the total of the values of any property owned by the offender and certain gifts made by him, less the total amounts payable in pursuance of certain obligations.³⁰ It may be thought that this approach does not deal adequately with two types of case to which we drew attention in the discussion paper. The first is a case where it is difficult, or even impossible, to calculate the benefit which has been derived from an illegal activity, such as the illegal importation and sale of pornographic material, or the contravention of provisions in health and safety legislation. The second is a case where the benefit derived from the offence charged, such as the sale of a single pornographic magazine, is disproportionately small in comparison with the profit which has probably been made from a continuing illegal enterprise. It would be possible to deal with such cases by adopting the approach taken in the drug trafficking legislation of enacting provisions with retrospective effect and introducing statutory assumptions the effect of which would be to entitle the court to assume that certain of the offenders' assets represented the proceeds of crime unless he was able to establish the contrary.³¹ We doubted, however, whether such a draconian approach to confiscation would be justifiable or acceptable in relation to the generality of offences. We therefore sought views on the proposition that any procedure to deprive an offender of the proceeds of crime should extend only to those proceeds derived from the crime or crimes of which he has been convicted.³² A few consultees expressed the view that that proposition was too weak and did not go far enough, but the weight of opinion among our consultees supported it.

3.10 It is important that a confiscation order should not be made for payment of a sum which exceeds the value of the assets which might be realised for the purpose of satisfying the order. In all the statutes which currently permit the making of a confiscation order there is a provision to the effect that if the amount that might be realised at the time the order is made is less than the benefit derived by the offender from the offence, the order must be restricted to the amount that might be realised.³³ All our consultees agreed with our view that any new power to make confiscation orders in Scotland should be subject to a similar restriction.³⁴

3.11 We therefore consider that the approach of the 1988 Act should be followed by setting as the maximum limit the "benefit" or, if it is smaller, "the amount that might be

²⁸ Report (*cit* para 2.6 above, first footnote), para 2.26.

²⁹ CJA, s 71(6).

³⁰ *Ibid*, s 74(3).

³¹ DTOA, s 2(2), (3) (amended by the Criminal Justice Act 1993, s 9, not yet in force); CJ(S)A, s 3.

³² DP, paras 5.15-5.16, prop 13(a).

³³ DTOA, s 4(3); CJ(S)A, s 1(1); CJA, s 71(6); NI(EP)A, s 47(7).

³⁴ DP, paras 5.36-5.37, prop 25.

realised" at the time the order is made.³⁵ We discuss the meanings of these expressions more fully in Part IV. We consider in Part VII what provision should be made for cases where, after the order is made, the realisable property increases or decreases in value or other realisable property is discovered. We **recommend**:

5. **The sum which a confiscation order requires an offender to pay should not exceed the lesser of -**
 - (a) **the amount of the benefit which he has derived from the offence or offences of which he has been convicted;**
 - (b) **the amount that might be realised, as defined in recommendation 12 below, at the time the order is made.**

(Draft Bill, clause 1(5))

³⁵ DTOA, s 4(3) and CJA, s 71(6) use the formula "the amount appearing to the court to be" the amount that might be realised.

Part IV "Benefit" and "the amount that might be realised"

Introduction

4.1 We have recommended above that the sum which a confiscation order requires an offender to pay should not exceed the lesser of two amounts: (1) the amount of the benefit which the offender has derived from the offence, and (2) the amount that might be realised at the time the order is made.¹ We discuss in the following paragraphs the meaning and valuation of "benefit" and issues relevant to the determination of the amount that might be realised.

"Benefit"

Meaning of "benefit"

4.2 The Laundering Convention requires each Party to adopt such measures as may be necessary to enable it to confiscate "proceeds or property the value of which corresponds to such proceeds"; and "proceeds" means "any economic advantage from criminal offences".² In order to comply with this requirement of the Convention it seems appropriate to define "benefit" as any property or other economic advantage which the offender has obtained, directly or indirectly, in connection with the commission of the offence.

4.3 In many cases the proceeds of the offence will be money or other property. The Convention's definition of "proceeds" continues: "It may consist of any property as defined in sub-paragraph *b* of this article." Sub-paragraph *b* provides:

"'property' includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property."

In the draft Bill we give "property" a wide definition which we believe to be consistent with that in sub-paragraph *b*: "any property wherever situated, whether heritable or moveable, or whether corporeal or incorporeal".³ It is also necessary, however, to provide for cases in which the offender has obtained an advantage which is measurable in money terms although no property has changed hands. The words "or other economic advantage" in our definition of "benefit" are designed to cover such cases. Examples are cases in which the offender has obtained by fraudulent means services without payment, or an overdraft, or a licence to trade or to practise a profession, or has evaded an obligation to pay money or deliver property, or has induced a creditor to wait for or to forgo payment.⁴ Again, the offender might have received a reward in the form of a free holiday, or unpaid services.

¹ See recommendation 5, para 3.11 above.

² Arts 2.1, 1*a*. See para 2.9 above.

³ Draft Bill, cl 2(4), 38(1).

⁴ See G H Gordon, *The Criminal Law of Scotland* (2nd edn, 1978) paras 18-14, 18-23, 18-24.

4.4 It is also important to catch any advantage received before the commission of the offence was completed,⁵ and any advantage which may be considered to be connected with the commission of the offence only in an indirect way. We therefore define "benefit" as any property or other advantage which "in connection with"⁶ the commission of the offence the offender "has obtained, directly or indirectly". For example, where the offender has invested money which he has stolen, or has speculated with trust funds which he has misappropriated, or has hired out a vehicle which he has stolen, any money or property which he has thereby obtained should be regarded as a benefit. Other examples are funds obtained as a result of a breach of section 330 of the Companies Act 1985, which prohibits loans to directors of companies and other transactions;⁷ or as a result of a breach of the Company Securities (Insider Dealing) Act 1985;⁸ or section 12(1)(a) of the Sexual Offences (Scotland) Act 1976⁹ which is concerned with male persons living on the earnings of prostitution. Our definition of "benefit" would also, we believe, take account of a case such as *Re Randle and Pottle* where the accused had received £30,000 from publishers for a book which they had written about a crime which they had committed. They were later charged with the crime, and a charging order under section 78(1) of the Criminal Justice Act 1988 was made over their homes to secure the payment of the money under a possible confiscation order. It was held that the £30,000 was property obtained "in connection with" the commission of the offence in terms of section 71(4) of the 1988 Act.¹⁰ Any argument that such a payment was not a "benefit" should be excluded by the statutory definition.¹¹

Valuation of "benefit"

4.5 There is a question whether the court, when calculating the amount of any benefit, should make any deductions in respect of outlays, expenses or other sums which may appear to be relevant. If, for example, as a result of making a fraudulent application to a building society the offender has obtained a loan and purchased a house, should his benefit be the market value of the house, or its value after deduction of the building society's interest and any other sums? In England and Wales the Hodgson Committee recommended confiscation of only the net proceeds of offending,¹² but neither the Drug Trafficking Offences Act 1986 nor the Criminal Justice Act 1988 makes any provision for deductions in the calculation of "proceeds" or "benefit".¹³ In the English courts, accordingly, the measure of the proceeds or benefit has been taken to be the gross receipts from the offence.¹⁴ The relevant provisions of the Criminal Justice (Scotland) Act 1987 are the same as those of the 1986 Act.¹⁵ In Australian and New Zealand legislation the court is directed to disregard,

⁵ Cf *R v Osei* [1988] Crim L R 775 (money paid before importation of drug).

⁶ The expression "in connection with" is used in DTOA, ss 1(3), 2(1)(a) and in CJ(S)A, s 3(1)(a), (2)(a), (b). CJA, s 71(4), has "as a result of or in connection with". The words "as a result of" appear to us to be superfluous.

⁷ Companies Act 1985, c 6, s 342.

⁸ 1985, c 8, ss 1, 2, 4, 5, 8, as amended.

⁹ 1976, c 67. See G H Gordon, *The Criminal Law of Scotland* (2nd edn, 1978, Supp, 1992) paras 36-43, 36-46 to 36-48.

¹⁰ *The Independent*, 26 March 1991 (earlier proceedings *sub nom R v Central Criminal Court, Ex p Randle* [1991] 1 WLR 1087). The accused had allegedly helped a convicted spy to escape from prison. They were acquitted and proceedings under the 1988 Act were discontinued. See A Freiberg, "Confiscating the Literary Proceeds of Crime" [1992] Crim L R 96.

¹¹ It would also be possible, under further provisions of the Bill to be discussed later, to confiscate the proceeds of a book about the crime or sentence written by the offender *after* conviction: see paras 7.2-7.11, 7.17-7.18 below.

¹² Hodgson, pp 74-75.

¹³ DTOA, s 2(1); CJA, s 71(4).

¹⁴ *R v Smith* [1989] 1 WLR 765 (DTOA, s 2(1)); *Re K* [1991] Crown Office Digest 18 (CJA, s 71(4)).

¹⁵ DTOA, s 2(1); CJ(S)A, s 3(1).

when calculating the value of benefits derived by a person from the commission of an offence, any expenses or outgoings of that person in connection with the commission of the offence.¹⁶ It appears to us that this approach could lead to unrealistic results. It would seem that an offender who had speculated with misappropriated trust funds or had engaged in insider dealing would not be entitled, for the purpose of the assessment of "benefit", to have any losses set against his profits; the "benefit" of a trader who had fraudulently obtained a licence would be his gross receipts; and an offender who was hiring out stolen vehicles would not be entitled to any deduction from his receipts in respect of the costs of licensing or maintenance. Indeed, an offender might be held to have derived a "benefit" even where in fact he had made a loss.

4.6 We note that a different approach was taken in the Scottish case of *Gunn, Collie & Topping v Adair*¹⁷ where the accused's "benefit derived from" contraventions of the Making of Civilian Clothing (Restrictions) Order 1942 was taken to be their "gross profit" upon the articles which infringed the prescribed restrictions, not their gross receipts. Lord Justice-Clerk Cooper observed:

"(i) that it was not intended that courts should embark with the aid of expert evidence upon costing analyses of commercial transactions with a view to determining on accountancy principles the precise trading profit, or gross profit, or net profit, derived from some specific offence; (ii) that, while the 'benefit derived from the offence' must normally be a determinable cash benefit capable of being taken away by the imposition of a pecuniary fine, it by no means follows that the word 'benefit' should not be read as including indirect and incidental advantages which may not be reducible to an exact sum of money by any ordinary method of costing; (iii) that the process of assessment should be conducted on broad overhead lines; and (iv) that, if the offender desires to reduce or extinguish the amount of the apparent benefit which he has *prima facie* derived from the offence ... he would do well to provide the court with material on which a decision in either of these senses can be based."¹⁸

These observations must be read in context, and his Lordship declined to decide the general question whether the measure of the "benefit" referred to in the regulation was or was not the "gross profit". We propose, however, that the Scottish courts, when assessing "benefit" for the purposes of confiscation, should likewise take a broad approach and arrive at a realistic result.¹⁹ The words "economic advantage" in our definition of "benefit" should enable them to do so.

4.7 We recommend:

6. (1) **A person should be held to have benefited from the commission of an offence if in connection with its commission he has obtained, directly or indirectly, any property or other economic advantage.**

¹⁶ Proceeds of Crime Act 1987 (Commonwealth of Australia), s 27(8); Proceeds of Crime Act 1991 (New Zealand), s 27(3). Other Australian legislation to the same effect is cited in D McClean, *International Judicial Assistance* (1992), pp 229-230.

¹⁷ 1944 JC 21.

¹⁸ *Ibid* at pp 25-26.

¹⁹ Cf *R v Comiskey* (1991) 93 Cr App R 227 at p 233: "... the court cannot close its eyes to the obvious and cannot ignore the fact that some expenses must have been incurred. There can be no question of carrying out an accountancy exercise, but it does seem to us that some acknowledgment ought to be made of the realities of the situation."

- (2) "Property" should be defined as "any property wherever situated, whether heritable or moveable, or whether corporeal or incorporeal".

(Draft Bill, clause 2(1), (4))

Determination of the amount that might be realised

4.8 We have already noted that a confiscation order should not be made for a greater sum than the value of the assets which might be realised for the purpose of satisfying it, and we have recommended that the sum stated in the order should not exceed the lesser of (1) the amount of the benefit which the offender has derived from the offence and (2) the amount that might be realised at the time the order is made.²⁰ We therefore propose that the court, having satisfied itself that the offender has benefited from the commission of the offence and having quantified that benefit, should be required to determine the amount that might be realised to satisfy a confiscation order. If that amount is found to be smaller than the value of the benefit, the court should be entitled to order confiscation of no more than the smaller amount. In the confiscation provisions of the Acts of 1986, 1987, 1988 and 1991 the amount that might be realised at the time a confiscation order is made is the total of the values at that time of all the "realisable property" held, or owned, by the offender less the total amount payable in pursuance of any "obligations having priority", together with the total of the values of certain gifts specified by the legislation.²¹ We now consider whether this scheme should be followed in the draft Bill. It will be convenient to discuss the nature and valuation of "realisable property",²² the question whether any provision should be made in regard to the offender's family home²³ and the definition and valuation of any gifts which should be taken into account,²⁴ before considering whether any deduction should be made in respect of "obligations having priority".²⁵

Meaning of "realisable property"

4.9 It appears to us that the correct approach to the problem of specifying the property which might be realised for the purpose of satisfying a confiscation order is to adopt a broad definition with the fewest possible exceptions. A broad definition is necessary for several reasons. *First*, as we shall explain more fully later,²⁶ an important component of our recommended scheme is an interim order (a "restraint order") prohibiting any dealing with property which may in due course be realised in order to satisfy a confiscation order. A restraint order may have to be made as a matter of urgency where the risk of the disappearance of property reasonably believed to be the proceeds of crime is so great that its immediate preservation is necessary pending detailed investigation. Indeed in certain circumstances it may be necessary to make a restraint order even before proceedings have been brought.²⁷ In such cases time may well not permit a careful appreciation of exactly how

²⁰ See recommendation 5, para 3.11 above.

²¹ DTOA, s 5(3); CJ(S)A, s 5(4); CJA, s 74(3); NI(EP)A, s 50(3). Accordingly "realisable property" and "the amount that might be realised" are not synonymous: where the latter is the lesser of the two amounts referred to in para 4.8 above, the maximum amount of the confiscation order will be that amount, not the value of the realisable property.

²² See paras 4.10-4.14 below.

²³ See paras 4.15-4.19 below.

²⁴ See paras 4.20-4.30 below.

²⁵ See paras 4.31-4.33 below.

²⁶ See paras 9.6 ff below.

²⁷ See paras 9.21-9.23 below.

much of the property in the possession or under the control of the alleged offender lawfully belongs to him. *Secondly*, in cases where the benefit he has obtained in connection with the offence is reasonably estimated to exceed the value of his assets, the policy of depriving him of any benefit from his crime²⁸ appears to require that as much property as possible should be made available to satisfy a confiscation order. *Thirdly*, it is necessary to prevent an offender from evading a confiscation order by disposing of assets before a restraint order is made. The definition should therefore extend to a person to whom the offender has made a gift; and, to take account of urgent situations, it should comprehend not only the recipient's own property but also any property in his possession or under his control.

4.10 We should say at once, however, that although we propose that "realisable property" should be defined in broad terms, it seems to us to be most unlikely that the property of an innocent third party would be used to satisfy a confiscation order. If, for example, the offender has in his possession property which the police have reasonable cause to believe to have been stolen, the police may be expected to seize that property in the course of their investigations into the theft. It will then no longer be in the offender's possession or under his control, and it will be returned to the true owner in due course: in any event, even if the true owner is not known, it will not be available to satisfy a confiscation order. If the reasonable belief that the property has been stolen arises only after a restraint order has been made, the prosecutor may apply to the court to vary or recall the order so far as it relates to that property.²⁹ Again, any third party who was the owner of, or had an interest in, any property which had been made the subject of a restraint order, would be entitled to apply for the variation or recall of the order.³⁰ The interests of the recipient of a gift are also protected: a restraint order would cover only so much of his realisable property as would be necessary to realise the value of the gift;³¹ and an innocent recipient would be entitled to apply for the variation or recall of the order.³² As to the accused himself, in a case where the amount that might be realised would clearly exceed the amount of the benefit he had apparently obtained in connection with the offence, it would be necessary to restrain only as much of the realisable property as would cover the latter amount, which would be the maximum sum for which a confiscation order could be made. In all cases, both the accused and any recipient would be entitled to apply for compensation if the case against the accused ultimately failed.³³ Any other third party would be entitled to compensation in the event of the realisation of property of which he was the owner or in which he had an interest.³⁴ The protection of third parties' rights in confiscation proceedings is fully considered in Part X of this report.

4.11 We now discuss in detail the terms of our proposed definition of "realisable property" which is set out in clause 3(1) and (2) of the draft Bill. We propose that in the 1987 Act a definition in similar terms should be substituted for the current provisions of section 5(1), (2) and (3).

²⁸ See para 2.1 above.

²⁹ Such an application may be strictly unnecessary: the fact that the restraint order interdicts a named person from dealing with the property would not seem to prevent the police from seizing it in the execution of their duties.

³⁰ See paras 9.26-9.29 below.

³¹ See paras 4.23-4.25, 9.4(ii) below. A restraint order initially granted in wider terms should be restricted as soon as possible.

³² See paras 9.26-9.29 below.

³³ See paras 10.4 ff below.

³⁴ Draft Bill, Sched 1, para 10.

- (i) The definition is directed against the accused and any person to whom he has made a gift. As to the accused, the definition applies both where proceedings have been instituted against him³⁵ and where a restraint order has been made before proceedings have been instituted.³⁶ As to the recipient, it should not matter whether the gift was made directly or indirectly, or in one transaction or a series of transactions.³⁷ If the accused gives property to A on the understanding that A will give it to B, the property should be treated as a gift made by the accused to B; or if he gives it to C on the understanding that C will give it to D and D will give it to E, it should be treated as a gift made by the accused to E.
- (ii) The definition includes the whole estate of the accused or the recipient,³⁸ wherever situated, and any other property in his possession or under his control. The inclusion of the phrase "wherever situated" makes it clear that the court would be entitled to take account of property situated outside Scotland. We discuss later the enforcement of Scottish confiscation orders in other jurisdictions.³⁹ In practice, a Scottish court would not make a confiscation order relative to property outside Scotland where there was no likelihood of the order's being enforced. We have already defined "property" as "any property, whether heritable or moveable, or whether corporeal or incorporeal".⁴⁰ We have also explained the inclusion in the definition of any property "in the possession or under the control" of the accused or the recipient.⁴¹
- (iii) The definition, like the definition in section 5(2)(a) of the 1987 Act, includes any income or estate vesting in the accused or the recipient.

4.12 Section 5(2) of the Criminal Justice (Scotland) Act 1987, as amended, provides that "the whole estate of a person" means his whole estate, wherever situated, and includes not only any income or estate vesting in him but also

"(b) the capacity to exercise, and to take proceedings for exercising, such powers in, over or in respect of any property as might have been exercised by the holder of the realisable property for his own benefit."⁴²

We do not consider that these words are appropriate. They appear to have been taken from section 31(8)(b) of the Bankruptcy (Scotland) Act 1985 which is concerned to define the property of the debtor which vests in the permanent trustee and to make it clear that he has capacity to exercise the powers mentioned in respect of the property.⁴³ Property which is subject

³⁵ The circumstances in which proceedings are instituted are defined in the draft Bill, cl 38(3): see paras 9.16, 9.20, recommendation 47(2) below.

³⁶ See paras 9.21-9.23 below.

³⁷ CJ(S)A, s 5(1)(b) is to this effect.

³⁸ The definitions in DTOA, s 5(1)(b), CJ(S)A, s 5(1)(b), CJA, s 74(1)(b) and NI(EP)A, s 50(1)(b) also include the whole estate of the recipient. Since, however, the object is to realise no more than the value of the gift, it would normally be unnecessary to exercise the powers conferred by the legislation in relation to his whole estate. See para 4.10 above, third footnote.

³⁹ See Part XVIII below.

⁴⁰ Draft Bill, cl 2(4), 38(1): see para 4.3 above.

⁴¹ See para 4.9 above.

⁴² CJ(S)A, s 5(2) as amended by the Criminal Justice (International Co-operation) Act 1990, Sched 4, para 5(4), Sched 5.

⁴³ W W McBryde, *Bankruptcy* (1989), p 123.

to a restraint order, however, remains vested in the person who holds it, unless the court otherwise orders;⁴⁴ and an administrator who is appointed to deal with or realise the property has all the powers necessary for the discharge of his functions.⁴⁵ Accordingly we have not followed section 5(2)(b) in our draft Bill and we recommend that it should not be repeated in the new version of section 5(1), (2) and (3).

4.13 The exceptions to the broad provisions in the definition of "realisable property" should be strictly limited. It is clearly necessary to make an exception for property held on trust, as in section 5(3)(a) of the 1987 Act, since such property vests in the trustee.⁴⁶ On the other hand section 5(3)(b) of the 1987 Act, like other confiscation legislation of the United Kingdom Parliament, makes exceptions for property which is already the subject of a forfeiture order or analogous order.⁴⁷ Such exceptions appear to us to be superfluous, because property which has already been forfeited cannot form part of the person's estate. We therefore propose that those exceptions should not appear in the new version of section 5(1), (2) and (3). It only seems necessary to provide, in that Act and in our draft Bill, for an exception in relation to property which is already liable to be confiscated or forfeited by virtue of being subject to a restraint order or suspended forfeiture order such as we recommend in Part XII of this Report. Such property should not be realisable if it is to remain available to satisfy a confiscation order or to be forfeited in other proceedings. We therefore **recommend**:

7. The property which should be liable to be realised to satisfy a confiscation order should be -

- (a) the whole estate, wherever situated, of -**
 - (i) the offender;**
 - (ii) any person to whom he has made a gift, directly or indirectly and whether in one transaction or a series of transactions;**
- (b) any other property in the possession or under the control of any of the persons mentioned in paragraph (a)(i) and (ii) above; and**
- (c) any income or estate vesting in any of those persons.**

(Draft Bill, clause 3(1))

8. For the purposes of recommendation 7 above "the offender" means a person -

- (a) against whom proceedings have been instituted as defined in recommendation 47(2) below or**

⁴⁴ Draft Bill, Sched 1, para 2(1)(a)(i), (3), derived from CJ(S)A, s 14(1)(a)(i), (3).

⁴⁵ *Ibid*, para 2(1), derived from CJ(S)A, s 14(1).

⁴⁶ Trust property is similarly excluded from vesting in a trustee in bankruptcy: Bankruptcy (Scotland) Act 1985, s 33(1)(b).

⁴⁷ There are provisions to that effect in DTOA, s 5(2), CJA, s 74(2), all as amended, and NI(EP)A, s 50(2).

- (b) in respect of whom a restraint order has been made before the institution of proceedings in terms of recommendation 48(1) below.

(Draft Bill, clause 3(1)(a))

9. Property should not be realisable if -

- (a) it is held on trust by a person mentioned in recommendation 7(a) above for a person not so mentioned; or
- (b) a restraint order or a suspended forfeiture order made in terms of recommendations 61-69 below is in force in respect of the property.

(Draft Bill, clause 3(2))

10. The provisions of section 5(2)(b) and (3)(b) of the Criminal Justice (Scotland) Act 1987 are unnecessary.

11. Section 5(1), (2) and (3) of the Criminal Justice (Scotland) Act 1987 should be replaced by provisions analogous to those recommended in recommendations 7 to 9 above.

(Draft Bill, clause 39(3); Schedule 3, paragraph 6)

12. The amount that might be realised when a confiscation order is made should be the total value -

- (a) of the offender's realisable property as specified in recommendations 7 to 9 above, and
- (b) subject to recommendations 15 to 19 below, of all gifts made by him.

(Draft Bill, clause 3(3))

Valuation of "realisable property"

4.14 We now consider the valuation of the realisable property of the person against whom the confiscation order is to be made.⁴⁸ The value of any money would obviously be its value at the time the order is to be made. A general rule for determining the value of realisable property other than money is stated in section 5(5)(a) of the Criminal Justice (Scotland) Act 1987, where the court is directed to have regard to the market value of the property at the date on which the confiscation order would be made, and may also have regard to any security or real burden which would require to be discharged in realising the property or to any other factors which might reduce the amount recoverable by such realisation. This appears to us to be a satisfactory model, subject to two qualifications. *First*, the market value should be the likely market value at the date mentioned, since market values cannot generally be predicted with certainty. *Secondly*, it seems desirable to make express provision, both in the 1987 Act and in the draft Bill, for cases where the amount recoverable is reduced because a person's estate has been sequestered or he has been adjudged

⁴⁸ On the valuation of gifts, see paras 4.23-4.25 below.

bankrupt in England and Wales or Northern Ireland. In such cases the court should be obliged to take into account the extent to which the property is or has been included in his estate for the purposes of the Bankruptcy (Scotland) Act 1985 or Part IX of the Insolvency Act 1986. *Thirdly*, since "money" may be an imprecise expression it should be defined in section 5(5)(a) of the 1987 Act and the corresponding provision of the draft Bill. It should include cheques, banknotes, postal orders, money orders and foreign currency. We therefore **recommend**:

13. (1) **In assessing the value of realisable property (other than money) the court -**
 - (a) **should be required to have regard to the likely market value of the property at the date on which the confiscation order would be made; and**
 - (b) **should be entitled to have regard to any security or real burden which would require to be discharged in realising the property or to any other factors which might reduce the amount recoverable by such realisation.**
- (2) **"Money" in paragraph (1) above should include cheques, banknotes, postal orders, money orders and foreign currency.**
- (3) **In assessing the value of realisable property held by a person whose estate has been sequestrated, or who has been adjudged bankrupt in England and Wales or Northern Ireland, the court should be required to take into account the extent to which the property is or has been included in his estate for the purposes of the Bankruptcy (Scotland) Act 1985 or Part IX of the Insolvency Act 1986.**
- (4) **Section 5 of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.**

(Draft Bill, clauses 3(4), (5), (6), 39(3); Schedule 3, paragraph 6)

The offender's family home

4.15 We envisage that as a general rule it should not be necessary for the court, when considering the nature of the property available to satisfy a confiscation order, to be satisfied that there is a connection between the property under consideration and the benefit derived from the commission of the offence. If the offender has benefited by a certain amount and has dissipated that benefit before a confiscation order could be made, the court should be entitled to make a confiscation order based on the value of his estate at the time the order is made, even though he has acquired all or part of that estate by lawful means. While this approach might be thought to be a possible cause of hardship in some cases, it should be noted that the making of a confiscation order would be discretionary: the court would be entitled to decide whether to make an order and, if it so decided, the order would require

payment of only "such sum as the court thinks fit",⁴⁹ which might be a sum smaller than the total value of the realisable property.

4.16 Under Part I of the Criminal Justice (Scotland) Act 1987 the Court of Session has a further discretion: when making a restraint order interdicting a person from dealing with his realisable property, or when requiring a person in possession of realisable property to give it to the administrator, the Court may "make an exception ... for the protection of a person or his family".⁵⁰ Since the Court already has power to make such orders subject to exceptions and conditions,⁵¹ it is not clear why a specific reference to such an obvious case was considered necessary. We think it would be preferable, both in the 1987 Act and in the draft Bill, to retain the general powers to attach exceptions and conditions, which would clearly include, without any need for specification, exceptions for the protection of a person or his family, and to make express provision for one particular case which is likely to be a matter for concern: where the offender's family are living in a family home which has been lawfully acquired. We consider that it would be widely accepted that in these circumstances there should be some constraint on the disposal of the family home.⁵² We have noted the restrictions on the sale of a debtor's family home which were introduced by section 40 of the Bankruptcy (Scotland) Act 1985.⁵³ Section 40 represents a considerably modified version of a recommendation by the Cork Committee which had expressed the view that

"... considerable personal hardship can be caused to the debtor's family by a sudden or premature eviction, and we believe it to be consonant with present social attitudes to alleviate the personal hardships of those who are dependant on the debtor but not responsible for his insolvency, if this can be achieved by delaying for an acceptable time the sale of the family home."⁵⁴

Section 40 requires the permanent trustee to obtain either the "relevant consent"⁵⁵ or the authority of the court before he sells or disposes of any right or interest in the debtor's "family home".⁵⁶ The court, when considering an application for such authority, is directed to have regard to all the circumstances of the case, including the needs and financial resources of the spouse and any "child of the family",⁵⁷ the length of the period during which they have resided

⁴⁹ Draft Bill, cl 1(1); see para 2.13 above.

⁵⁰ CJ(S)A, s 23(6).

⁵¹ CJ(S)A, ss 9(1), 13(2)(a).

⁵² In England and Wales there is authority to the effect that a court should not make a compensation order which can be satisfied only by the sale of the family home, unless the offender will be able to buy a less expensive house after satisfying the order: *R v Holah* (1989) 11 Cr App R (S) 282, *R v McGuire* (1992) 13 Cr App R (S) 332. There does not appear to be any similar rule as to confiscation orders: *R v Preston* [1990] Crim L R 528. In *R v Judge and Woodridge* (1992) 13 Cr App R (S) 685 and *R v Crutchley and Tonks* [1994] Crim L R 309 the value of the family home was taken into account in determining the amount that might be realised.

⁵³ 1985, c 66. Cf Insolvency Act 1986, c 45, s 336.

⁵⁴ *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, para 1118.

⁵⁵ "Relevant consent" means the consent of the debtor's spouse or former spouse or, where the debtor and the child occupy the house, the consent of the debtor: s 40(4)(c). The debtor, accordingly, may obstruct the sale temporarily by withholding consent.

⁵⁶ "Family home" means any property in which the debtor had (whether alone or in common with any other person) a right or interest, being property occupied as a residence by the debtor and his spouse or by the debtor's spouse or former spouse (in any case with or without a child of the family) or by the debtor with a child of the family: s 40(4)(a). This definition could apply to more than one house: for example, to a house occupied by the debtor and his spouse and to a house occupied by the debtor's former spouse: *W W McBryde, Bankruptcy* (1989), p 134.

⁵⁷ "Child of the family" includes any child or grandchild of either the debtor or his spouse or former spouse, and any person who has been brought up or accepted by either the debtor or his spouse or former spouse as if he or she were a child of the debtor, spouse or former spouse whatever the age of such a child, grandchild or person may be: s 40(4)(b).

in the family home and the interests of the creditors. The court may grant the application subject to such conditions as it may prescribe, or may refuse to grant it or may postpone granting it for a period not exceeding 12 months.⁵⁸

4.17 Whether the offender's family should be protected to any extent from the consequences of confiscation is a matter on which we have not consulted, but it appears to us that it might be thought anomalous if the law did not extend to the family of an offender some protection analogous to that which it affords to the family of a debtor, if it is assumed that in each case the family has not been responsible for the offence or the insolvency. If it is accepted that such an anomaly should be avoided, there nevertheless remains some room for a reasonable difference of opinion as to the scope of the protection which should be extended to the offender's family. The definition of "family home" in section 40 of the 1985 Act⁵⁹ does not include a residence occupied by the debtor alone, or by the debtor and a cohabitant, friend or parent. On the other hand, the Act may have the effect of protecting the debtor, if he is residing in the family home with a spouse or child, and further, the statutory direction that the court must have regard to all the circumstances of the case⁶⁰ does not exclude the needs of the debtor from consideration.⁶¹

4.18 If the provisions of section 40 of the 1985 Act were to be adapted for a statute dealing with confiscation, it might be thought that they should be modified to take account of the matters mentioned above. We have concluded, however, that it would be inappropriate to have radically different schemes for cases of insolvency and confiscation, especially since the insolvency scheme has been quite recently the subject of consideration by Parliament. We therefore propose that the provisions of the latter scheme should be applied *mutatis mutandis* where a confiscation order has been made and the court has not been satisfied that the offender's interest in the family home has been acquired by means of the benefit derived from the offence. As we shall explain later, we propose that it should be for the prosecutor to prove beyond reasonable doubt the amount of the offender's benefit and the amount that might be realised;⁶² and that the court when making a confiscation order should record its findings.⁶³ Where the court found that the offender's interest in the family home formed part of his realisable property and that it also formed part of his benefit (because he had obtained it directly or indirectly in connection with the commission of the offence),⁶⁴ the provisions as to disposal of the family home would not come into play. They would do so, however, where the court found that his interest formed part of his realisable property but did not find that it formed part of his benefit (because the prosecutor had failed to discharge the burden of proving that matter beyond reasonable doubt). It is possible to envisage cases in which the family home has been acquired by means of the benefit derived from an offence or offences other than the offence concerned, or in which the offender's spouse or child had been an accomplice in the commission of the offence concerned or of other offences committed by the offender. Such circumstances, however, would be among "all the circumstances of the case" to which the court would be obliged to have regard when considering an application.

⁵⁸ s 40(2). See *Stewart v Salmon* 1988 SCLR 647; *Gourlay's Tr v Gourlay* 1994 GWD 14-866.

⁵⁹ See para 4.16 above, footnote.

⁶⁰ Bankruptcy (Scotland) Act 1985, s 40(2).

⁶¹ Cf Insolvency Act 1986, s 336(4)(e): "all the circumstances of the case other than the needs of the bankrupt".

⁶² See para 6.5 below.

⁶³ See para 6.28 below.

⁶⁴ See para 4.7 above.

4.19 We therefore **recommend:**

14. (1) **Where the court is not satisfied that the offender's interest in his family home has been acquired by means of the benefit derived from the offence concerned, any right or interest in the family home should be disposed of only in terms of provisions analogous to those of section 40 of the Bankruptcy (Scotland) Act 1985.**
- (2) **Similar provisions should be inserted in Part I of the Criminal Justice (Scotland) Act 1987.**
- (3) **The reference to an exception for the protection of a person or his family in section 23(6) of the 1987 Act should be repealed.**

(Draft Bill, clauses 36, 39(3), (9); Schedule 3, paragraph 10; Schedule 5)

Gifts

4.20 We have recommended above that in order to prevent an offender from evading the making of a confiscation order by disposing of his assets to third parties, the property available to satisfy a confiscation order should include the estate of any person to whom the offender has made a gift.⁶⁵ The object of including the third party's estate is, however, to realise no more than the value of the gift.⁶⁶ We now consider in more detail the circumstances in which the third party's estate should be included. We discuss the conditions which should be satisfied before a gift made to a third party should be taken into account,⁶⁷ the appropriate approach to sham transactions,⁶⁸ the valuation of gifts⁶⁹ and circumstances in which the court should be entitled to exercise a discretion to disregard the amount of a gift or not to take a gift into account.⁷⁰

4.21 We have already recommended that a gift should be "caught", that is, that its value should be liable to be realised in order to satisfy a confiscation order, whether the gift has been made directly or indirectly, or in one transaction or a series of transactions.⁷¹ We now state our view that a gift should be caught if it has been made either (a) in contemplation of, or after, the commission of the offence or (b) where there is more than one offence, in contemplation of any of them or after the commission of the earlier or earliest of them. It does not seem unreasonable to assume that a gift made after the commission of an offence will generally have been derived from the proceeds of the offence.⁷² Gifts made in contemplation of an offence are not caught by any of the legislation to which we have referred above,⁷³ but it seems to us to be desirable to catch property disposed of by an

⁶⁵ Paras 4.9-4.11, 4.13 and recommendation 7 above.

⁶⁶ See paras 4.23-4.25, 9.4(ii) below. The value of the gift is part of "the amount that might be realised" even if the third party no longer owns it and it is thus no longer "realisable property": *R v Dickens* [1990] 2 QB 102.

⁶⁷ See para 4.21 below.

⁶⁸ See para 4.22 below.

⁶⁹ See paras 4.23-4.25 below.

⁷⁰ See paras 4.26-4.30 below.

⁷¹ Paras 4.11, 4.13 and recommendation 7 above.

⁷² This assumption is implicit in CJA, s 74(10)(a). It may be unsound where there has been a substantial lapse of time between the date of the offence and the date of the gift.

⁷³ DTOA, s 5(9) and CJ(S)A, s 6(1), however, catch gifts made up to six years before the institution of the proceedings. In CJ(S)A such gifts, and others, fall within the complex definition of "implicative gift" in s 6.

offender before the commission of an offence with a view to the preservation of the property in the event of his detection and conviction. It would be for the prosecutor to satisfy the court on the criminal standard of proof that the gift had been made in contemplation of the offence.⁷⁴ We therefore **recommend**:

- 15. A gift made by the offender should be included among the property liable to be realised to satisfy a confiscation order if it has been made either in contemplation of, or after, the commission of the offence; or, where there is more than one offence, in contemplation of any of them or after the commission of the earlier or earliest of them.**

(Draft Bill, clause 4(1))

4.22 It is also important to take account of sham transactions whereby the offender has disposed of property for a sum which is significantly less than its market value. It seems appropriate to treat as a gift the difference between the market value and the sum, or the value of any consideration,⁷⁵ which the offender received for it. That is the approach taken in other United Kingdom confiscation legislation,⁷⁶ and it appears to us to be sound, subject to the qualification that where there has been a subsequent change in the value of money the value of the gift should be adjusted accordingly. The words "adjusted to take account of subsequent changes in the value of money" also appear in other legislation⁷⁷ and do not seem to have caused any difficulty in practice. In the civil courts reference is frequently made to inflation tables calculated from the official retail prices index.⁷⁸ We accordingly **recommend**:

- 16. (1) Where the offender has transferred property to another person for significantly less than its market value, the difference between its market value and the value of the consideration received by the offender should be treated as a gift, and the value of the gift should be adjusted to take account of subsequent changes in the value of money.**
- (2) Section 6 of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.**

(Draft Bill, clauses 4(3), 39(3); Schedule 3, paragraph 7)

⁷⁴ See paras 6.11-6.13 below.

⁷⁵ eg "services worth money": *Re B*, 13 May 1991, unreported, *cit* Mitchell, paras 5.96-5.97.

⁷⁶ DTOA, s 5(10); CJ(S)A, s 6(2); CJA, s 74(12); NI(EP)A, s 50(9).

⁷⁷ DTOA, s 5(5)(a); CJ(S)A, s 5(5)(b)(i); CJA, s 74(7)(a); NI(EP)A, s 50(6)(a). In Australia the Proceeds of Crime Act 1987, s 27(3), provides that the court, in quantifying the value of a benefit, "may treat as the value of the benefit the value that the benefit would have had if derived at the time when the valuation is being made and, without limiting the generality of this, may have regard to any decline in the purchasing power of money between the time when the benefit was derived and the time when the valuation is being made".

⁷⁸ The inflation table in Kemp & Kemp, *The Quantum of Damages* (revised ed, 1991), para 0-101, also printed in McEwan & Paton, *Damages in Scotland* (2nd ed, 1989), p xxxvii, is often referred to in actions of damages in respect of death or personal injury: eg *Bowers v Strathclyde RC* 1981 SLT 122 *per* Lord Cameron at p 125; *Gammell v Wilson* [1982] AC 27 *per* Megaw LJ at p 42. On judicial reference to the retail prices index see *Wright v British Railways Board* [1983] 2 AC 773 *per* Lord Diplock at p 782.

4.23 We now make further recommendations as to the valuation of gifts. The value of a gift of money⁷⁹ which the recipient has retained without spending or investing it should be its value at the time the confiscation order is to be made. That would match the rule about the valuation of money which is realisable property.⁸⁰ It should be for the recipient to prove on a balance of probabilities that the money, or as the case may be part of the money, has not been used to purchase goods or services or to earn interest or any other return. If he proves that, the value of the gift or of the unused part of it should be taken to be the face value of the money or the unused amount of the money. Our recommendations as to the valuation of gifts other than money which has been retained do not follow the pattern of the rules in section 5(5)(b) and (6) of the Criminal Justice (Scotland) Act 1987 and the other legislation noted below.⁸¹ The policy underlying these provisions may be expressed in this way. Since the object of confiscation is to recover the proceeds of crime, a gift made by the offender should be so valued as to reflect the maximum present-day value of the proceeds from which the gift was derived, or of any property which now represents the gift. Its value should therefore be the largest of three figures: its value at the time of receipt, adjusted to take account of subsequent changes in the value of money; or its value at the time the confiscation order is to be made; or, where it is now represented by other property in the hands of the recipient, the present-day value of that property. We consider that it would be preferable to have in Scotland provisions whereby the value of a gift would be taken to be the greater of two values: (a) its value at the time of receipt, adjusted to take account of subsequent changes in the value of money; or (b) the value of any benefit the recipient has received by reason of the making of the gift. Such a benefit might be not only the value of the gift itself, or of property which represents it by the time the confiscation order is to be made, but also the value of any other enrichment of the recipient, such as interest, or the use of property, which has resulted from the gift. Clause 4(2) of the draft Bill accordingly provides that the court must take the value of a gift to be -

"(a) the value of the gift when received adjusted to take account of subsequent changes in the value of money; or

(b) both of the following -

(i) the likely market value, on the date on which the confiscation order is to be made, of -

(A) the gift, if retained; or

(B) where the recipient of the gift retains only part of it, the retained part, and any property or part of any property which, directly or indirectly, represents the gift; or

(C) where the recipient of the gift retains no part of it, any property or part of any property which, directly or indirectly, represents the gift; and

(ii) the value of any other property and any other economic advantage which by reason of the making of the gift the recipient of the gift has obtained, directly

⁷⁹ Defined as in para 4.14, recommendation 13(2) above.

⁸⁰ See para 4.14 above.

⁸¹ DTOA, s 5(5) and (6); CJA, s 74(7) and (8); NI(EP)A, s 50(6) and (7).

or indirectly, prior to the date on which the confiscation order is to be made, adjusted to take account of subsequent changes in the value of money,

whichever is the greater."

4.24 The following are examples of how the proposed rules might be applied in practice.

Example 1

The gift is a painting worth £1,000 at the date of receipt. At the date when the confiscation order is to be made, that value, adjusted to take account of inflation, is £1,100. That, accordingly, is its value under paragraph (a). The recipient, however, has retained the painting, so that paragraph (b)(i)(A) also applies. As a result of the growing reputation of the artist the likely market value of the painting on the date when the confiscation order is to be made is £2,000. That, accordingly, is its value under paragraph (b)(i)(A). Since that value is greater than its value under paragraph (a), the value of the gift is taken to be £2,000.

Example 2

The gift is a house worth £100,000 at the date of receipt. At the date when the confiscation order is to be made that value, adjusted for inflation, is £110,000, which is therefore the value under paragraph (a). The recipient has retained the house, so that paragraph (b)(i)(A) applies. Since house prices have risen at the same rate as inflation, its likely market value is £110,000. The recipient, however, has let it for four years at a profit of £2,500 per annum. That is a further economic advantage which he has obtained by reason of the making of the gift. It must therefore be included in the value of the gift, by virtue of paragraph (b)(ii). The value of the gift under paragraph (b) is £110,000 plus $4 \times £2,500^{82}$ (£10,000); £120,000, which is taken to be the value of the gift since it is greater than its value under paragraph (a).

Example 3

The gift is a house worth £200,000 at the date of receipt. At the date when the confiscation order is to be made its value, adjusted for inflation, is £220,000 (the paragraph (a) value). Before that date, however, the recipient has divided the house into four flats, retained one of these flats for his own use, let another for two years at £2,000 per annum, sold the remaining two flats for £50,000 each and invested the proceeds (£100,000), from which he has derived an income of £7,500 per annum for two years. Accordingly paragraph (b)(i)(B) applies to his own flat and the let flat (the retained part of the gift) and to the investments (which represent the gift). The likely market value of these is, let us say, £55,000 for each flat (£110,000) and £115,000 for the investments: £225,000. Paragraph (b)(ii) applies to the income from the let flat (£4,000) and from the investments (£15,000), since these sums are economic advantages the recipient has indirectly obtained by reason of the making of the gift. Adjusted to take account of changes in the value of money they amount to, say, £20,000. Adding the figures under (b)(i)(B) and (b)(ii) gives a total of £275,000 which, since it is greater than the paragraph (a) value of £220,000, must be taken to be the value of the gift.

⁸² To be strictly correct, each £2,500 should be adjusted for inflation.

Example 4

Again, the gift is a house worth £100,000 at the date of receipt. That figure, adjusted for inflation, is £110,000, which is the value under paragraph (a). The recipient, however, has not retained the house but has sold it and bought another with the proceeds of sale. The second house may therefore be said to represent the gift house, so that paragraph (b)(i)(C) applies. There are no circumstances which attract the application of paragraph (b)(ii). The value of the second house at the time the confiscation order is to be made is £160,000 which, being greater than the value under paragraph (a), is taken to be the value of the gift.

Example 5

The gift is £10,000 in cash. The recipient does not retain it as cash but invests it in a unit trust fund. Adjusted for inflation, the value of the gift when received is £11,000 by the date when the order is to be made (the paragraph (a) value). The value of the units, however, which represent the gift, is by then £15,000 (the paragraph (b)(i)(C) value). In addition, the recipient has derived from them an income of £1,000 per annum for four years, which is an economic advantage in the sense of paragraph (b)(ii). The value assessed under paragraph (b) is therefore £15,000 plus 4 x £1,000⁸³ (£4,000): £19,000, which, since it exceeds its value under paragraph (a), must be taken to be the value of the gift.

Example 6

A gift worth £1,000 is squandered by the recipient. He receives £1,000 in cash and spends it on a holiday; or he receives silver worth £1,000, sells it and gambles away the proceeds. Here, none of the circumstances in paragraph (b) apply: the value of the gift is simply £1,100: its value when received, adjusted to take account of subsequent changes in the value of money.

Many other examples could be figured, such as a gift of services for which the recipient would otherwise have had to pay; or a gift of improvements to a house for which he would have had to pay and which have resulted both in his greater enjoyment of the house and an increase in its value.

4.25 We recommend:

- 17. (1) Where a gift was in the form of money and the recipient proves on a balance of probabilities that the money or any of it has not been used to purchase goods or services or to earn interest or any other return, the value of the gift or such part of it as has not been so used should be taken to be the face value of the money or, as the case may be, the unused amount of the money.**
- (2) In a case other than any of those mentioned in recommendation 16 and in paragraph (1) above,**

the value of a gift should be taken to be the greater of the following:

⁸³ Again, each £1,000 should be adjusted for inflation.

- (a) its value when received, adjusted to take account of subsequent changes in the value of money; or
- (b) both of the following -
 - (i) the likely market value, on the date on which the confiscation order is to be made, of -
 - (A) the gift, if retained; or
 - (B) where the recipient of the gift retains only part of it, the retained part, and any property or part of any property which, directly or indirectly, represents the gift; or
 - (C) where the recipient of the gift retains no part of it, any property or part of any property which, directly or indirectly, represents the gift; and
 - (ii) the value of any property and other economic advantage which the recipient of the gift has obtained, directly or indirectly, by reason of the making of the gift, prior to the date on which the confiscation order is to be made, adjusted to take account of subsequent changes in the value of money.
- (3) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Draft Bill, clauses 4(2), (4), 39(3); Schedule 3, paragraph 7)

Court's discretion not to take gift into account

4.26 We have recommended that the amount that might be realised should be the total value of the offender's realisable property and all gifts made by him which are caught by the legislation.⁸⁴ We have proposed a qualification of this rule in relation to the disposal of the offender's family home,⁸⁵ and we now propose two qualifications in relation to gifts. The confiscation statutes offer differing models. Under the strict provisions of the Drug Trafficking Offences Act 1986 the court has no discretion to consider whether it is appropriate to take a gift into account. By contrast the Criminal Justice Act 1988 confers on the court an unqualified discretion to do so.⁸⁶ The Criminal Justice (Scotland) Act 1987 confers a discretion on the court in two situations: where the court considers it improbable

⁸⁴ See paras 4.10, 4.13, recommendation 12 above.

⁸⁵ See paras 4.15-4.19, recommendation 14 above.

⁸⁶ CJA, s 74(10)(b).

that the amount, or part of the amount, of an implicative gift could be realised;⁸⁷ and where an innocent recipient applies for the recall of a restraint order on the ground of hardship.⁸⁸

4.27 We propose to follow, with modifications, the course taken in the 1987 Act. *First*, it would be idle to take account of the amount of a gift, or of the gratuitous element in a transaction, if the circumstances were such that it was unlikely that the amount could be realised: for example, if the recipient's realisable property was insufficient to meet the amount, or was situated in a country with which there were no arrangements for the enforcement of orders under the legislation. We therefore **recommend**:

- 18. The court should be entitled to disregard the amount (or part of the amount) of a gift caught by the legislation if it considers it improbable that the amount (or part) could be realised.**

(Draft Bill, clause 4(5))

4.28 *Secondly*, we recognise that it may seem unfair to catch a gift which has been received in good faith by a recipient who had had nothing to do with the commission of the crime. In such a case it seems necessary to strike a balance between the principle that all the proceeds of the crime should be confiscated and the interests of the innocent recipient. Here we propose to follow the approach of section 8(2)(b) of the 1987 Act which specifies the circumstances in which the Court of Session may recall a restraint order on the application of the recipient of a gift. Three conditions must be satisfied:

- (i) that the recipient received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the giver was in any way concerned in drug trafficking; and
- (ii) that the recipient is not, and has never been, an associate of the giver; and
- (iii) that the recipient would suffer hardship were the order not to be recalled.

4.29 We propose later that the recipient of a gift may similarly apply for the recall of a restraint order made under the new legislation. We propose here that the recipient should also be entitled in other circumstances to apply to the court to exercise a discretion not to take a gift into account if similar conditions are fulfilled. The recipient would be entitled to apply to the court before or after the confiscation order was made and before his property was realised.⁸⁹ He would have the burden of satisfying the court on the balance of probabilities that the three conditions were satisfied. We would amend condition (i) to refer to knowledge or suspicion that the gift was made in contemplation of, or after, the commission of the offence, and we would alter condition (ii) to read:

"that he was not associated with the giver in the commission of the offence."

⁸⁷ CJ(S)A, s 5(7). See para 4.27 below.

⁸⁸ CJ(S)A, s 8(2)(b). See para 4.28 below.

⁸⁹ In *HMA v McLean* 1993 SCCR 917 the alleged recipient of an implicative gift was allowed to be represented as a minuter at a hearing on an application for a confiscation order under CJ(S)A, s 1. While that was plainly just, it is not clear that she was entitled to appear in terms of the 1987 Act. In any event she would not have been entitled to make any application under the 1987 Act after the confiscation order had been made. Under our proposals a recipient's entitlement to apply to the court and the grounds of application would be specified. There is, however, a difficulty as to entitlement to legal aid: see para 10.8 below.

This is a different test from that in paragraph (ii) of section 8(2)(b) of the 1987 Act, which refers to a person who is an "associate" as defined in section 74 of the Bankruptcy (Scotland) Act 1985.⁹⁰ A person who, in our version, is "associated with the giver in the commission of the offence" may be, but need not necessarily be, named in the proceedings as a co-accused or an accomplice. The third condition, that the recipient would suffer hardship if the gift was taken into account, is intended to be strict. Even if all three conditions were satisfied, the granting of the application would be a matter for the discretion of the court. If, however, the application is refused, the applicant should be entitled to appeal. It seems equally necessary in the interests of justice that the prosecutor should be entitled to appeal against the granting of an application. The appeal procedure would be as in an appeal against sentence.⁹¹

4.30 Provisions on these lines, we think, would not compromise the thoroughness of the regime for confiscation of the proceeds of crime but would permit the court to avoid the confiscation of a gift, or the value of a gift, where it would be generally regarded as unconscionable to do so. We consider that the 1987 Act would be improved by the insertion of similar provisions. If the 1987 Act were amended in that way, it would be possible to repeal section 6(4) and (5) of that Act whereby certain gifts made for charitable purposes are excluded from the definition of "implicative" gifts. These provisions have no counterpart in other United Kingdom confiscation legislation.⁹² Under our scheme a person who received such a gift would be protected in the same way as any other recipient of a gift. We therefore **recommend:**

- 19. (1) The recipient of a gift should be entitled to apply to the court, before or after a confiscation order is made and before his property is realised, for a declaration that the gift should not be caught.**
- (2) The court should have a discretion to grant the application if the recipient satisfies the court, on a balance of probabilities, that -**
 - (a) he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the gift was made in contemplation of, or after, the commission of the offence; and**
 - (b) that he was not associated with the giver in the commission of the offence; and**
 - (c) that he would suffer hardship if the application were not granted.**
- (3) An appeal should lie to the High Court at the instance of -**
 - (a) the recipient against the refusal;**
 - (b) the prosecutor against the granting, of the application.**

⁹⁰ 1987 Act, s 47(1).

⁹¹ 1975 Act, ss 230-280A (solemn procedure), 453B, 453C (summary procedure).

⁹² They seem to have been derived from the Bankruptcy (Scotland) Act 1985, s 34(4)(c)(ii), (5), and the Insolvency Act 1986, s 242(4)(c)(ii), (5).

- (4) The appeal procedure should be as in an appeal against sentence.
- (5) Provisions to the same effect as (1) to (4) above should be inserted in the Criminal Justice (Scotland) Act 1987.
- (6) Section 6(4) and (5) of the 1987 Act should be repealed.

(Draft Bill, clauses 4(6)-(8), 39(3), (9); Schedule 3, paragraph 6; Schedule 5)

Obligations having priority

4.31 The Criminal Justice (Scotland) Act 1987, like other confiscation legislation in the United Kingdom, provides that the amount that might be realised at the time a confiscation order is made is the total value of all the offender's realisable property and of certain gifts, less the total amount payable in pursuance of "obligations having priority".⁹³ In the 1987 Act an obligation has priority if it is an obligation to pay an amount due in respect of (a) a fine or order of a court, imposed or made on the conviction of an offence, where the fine was imposed or the order was made before the confiscation order; (b) a compensation order; or (c) a preferred debt within the meaning of section 51(2) of the Bankruptcy (Scotland) Act 1985 or a preferential debt within the meaning given by section 386 of the Insolvency Act 1986.⁹⁴ Other creditors of the offender are not protected.

4.32 In the discussion paper we proposed that no special provision should be made to secure the position of the offender's ordinary creditors.⁹⁵ We recognise the force of arguments to the effect that the State should not reap a windfall from a confiscation order while innocent creditors go unpaid,⁹⁶ and that it would seem anomalous to make no provision for such creditors while allowing the innocent recipient of a gift to avoid hardship. On consultation, however, the majority of our consultees supported the proposition in the discussion paper. We have concluded that the primary consideration should be to keep the legislation as uncomplicated as possible. We note that Parliament has not extended the categories of obligations having priority although the passage of the various confiscation statutes, including the very recent amendments of them by the Criminal Justice Act 1993, has afforded several opportunities to do so. Indeed, we consider that the provisions of the 1987 Act are unduly complex and raise other problems. *First*, the Act does not require the offender or, where an administrator has been appointed, the administrator, to satisfy any of the "obligations having priority". *Secondly*, a fine or compensation order imposed after the confiscation order has been made is not an "obligation having priority", and would not be a preferred debt in the event of the offender's bankruptcy. *Thirdly*, it is difficult to see why preferred or preferential debts should have a better claim to payment than other debts of an offender. *Fourthly*, the ascertainment of information relative to preferred or preferential debts is likely to be a time-consuming exercise. We have attempted to devise a satisfactory scheme which would meet the first of these objections and would be workable in the event of the offender's insolvency, but we have been unable to do so.

⁹³ CJ(S)A, s 5(4); DTOA, s 5(3); CJA, s 74(3); NI(EP)A, s 50(3).

⁹⁴ CJ(S)A, s 5(8).

⁹⁵ DP, paras 5.10-5.12, 5.16, prop 14(c).

⁹⁶ D J Fried, "Rationalizing criminal forfeiture" (1988) 79 J Crim Law and Criminology 328 at pp 424-430.

4.33 It appears to us that a rule similar to that in the 1987 Act requiring deductions to be made in respect of "obligations having priority" would involve so many anomalies and complexities that it would be preferable not to adopt it. We also consider that the 1987 Act would be improved by the removal of the rule. We therefore **recommend**:

20. (1) **In the assessment of the amount that might be realised no deduction should be made of any sums payable in pursuance of "obligations having priority".**
- (2) **Section 5 of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.**

(Draft Bill, clause 39(9); Schedule 5)

Part V Confiscation and other disposals

Introduction

5.1 We consider in this part the judge's approach to the task of sentencing the offender in a case where it is competent to make a confiscation order and property may be realised to satisfy it. A number of questions must be resolved. Is a confiscation order a sentence? If it is, should it be competent to impose a sentence consisting of a confiscation order and nothing else? If that should not be competent, should there be any restrictions on the kind of sentence which may be combined with a confiscation order? What relationship, if any, should there be between the confiscation order and the rest of the sentence? Should the confiscation order be made separately from, or prior to, or leaving out of account, the other parts of the sentence; should the other elements be determined leaving the confiscation order out of account; or should the confiscation order have a bearing on decisions on any other parts of the sentence; or should the other parts of the sentence have a bearing on decisions as to the confiscation order? As to the first of these questions - whether a confiscation order is a sentence - we have already expressed the view that confiscation is a procedure *sui generis* which has both reparative and punitive features.¹ We therefore regard a confiscation order as a sentence of a special kind. Upon that view of the nature of a confiscation order we discuss the remaining questions in the following paragraphs. Since the discussion applies to confiscation orders in general, including those made under Part I of the Criminal Justice (Scotland) Act 1987, we propose that, where appropriate, Part I of the 1987 Act should be amended so that in certain respects the 1987 Act and any new legislation should be to the same effect.

Confiscation order not to be the only sentence

5.2 Although we consider a confiscation order to be in some degree penal in character we do not think it would be appropriate for an order to be the only sentence or other means of dealing with the offender to be ordered by the court. For the court only to make a confiscation order would be to indicate to the public that an offence of the kind concerned would be tolerated if the offender could be parted from his proceeds. We therefore propose that a confiscation order should be made only in addition to, and not instead of, dealing with the offender in some other way.² We **recommend**:

21. (1) **A confiscation order should be imposed only in addition to another order or sentence.**
- (2) **Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.**

(Draft Bill, clauses 1(3); 39(3); Schedule 3, paragraph 2)

¹ See paras 2.14-2.17 above.

² CJA, s 71(1), is to this effect.

Disapplication of restrictions on combined orders

5.3 We propose an approach to the making of a confiscation order which would enable the judge to regard a confiscation order as one of the various options available to him as ways of dealing with the offender, and would give him a wide discretion not only as to whether to make an order and, if so, for what amount, but also as to the combination of the order with other elements in the sentence. We therefore recommend that any restrictions, in relation to confiscation orders, on the combination of one form of sentence with another should be removed. The only restrictions on the judge's discretion which we propose are that he should not take a confiscation order into account when considering and determining the length of a sentence of imprisonment, or any other sentence, such as a community service order, which does not involve depriving the offender of money or property,³ but he should take the order into account when imposing a fine or making any order for payment or forfeiture.⁴

5.4 We therefore recommend the disapplication, as far as they would relate to confiscation orders, of any statutory provisions which forbid the use of one form of disposal in conjunction with another. An example of such a provision is section 1 of the Community Service by Offenders (Scotland) Act 1978 which appears to prohibit the court from combining a community service order with any other disposal except a compensation order or an order for disqualification, forfeiture or caution.⁵ We cannot identify any reason in principle why a confiscation order should not be combined with a community service order. We therefore propose that such restrictions should not apply where the court makes a confiscation order. Nor should they apply where, in accordance with a procedure which we recommend in Part VI, the court postpones a decision as regards the making of a confiscation order. There are similar provisions in the other confiscation statutes.⁶ We recommend:

- 22. Any enactment restricting the power of a court dealing with an offender in a particular way from dealing with him also in any other way should not by reason only of the making of a confiscation order (or the postponement of a decision as regards making such an order) restrict the court from dealing with an offender in any way it considers appropriate in respect of an offence.**

(Draft Bill, clause 5(3))

Stage at which order made

5.5 Since we regard a confiscation order as in part a form of penalty and not as an order distinct from the sentence, we do not recommend a provision, such as appears in some confiscation legislation, requiring the court to make the order, or to determine its amount, before sentencing or otherwise dealing with the offender.⁷ In any event such a rule would be an obstacle in a case where a prison sentence is obviously called for but the court requires to

³ See paras 5.8-5.11 below.

⁴ See paras 5.12-5.24 below.

⁵ 1978 Act, s 1(1), (7); Criminal Justice (Scotland) Act 1980, s 58(1).

⁶ DTOA, s 1(6); CJ(S)A, s 1(5); CJA, s 72(6); NI(EP)A, s 48(6).

⁷ DTOA, s 1(4); CJA, s 72(4). As amended by the 1993 Act, these Acts make provision for postponed determinations: 1993 Act, ss 8, 28 (not yet in force, 1 May 1994).

adjourn the proceedings in order to obtain further information before making the confiscation order: it would be undesirable to require the offender to wait until the order had been made before he learned the length of his sentence.⁸

5.6 While it is not practicable to require that the confiscation order should be the first part of the sentence to be determined, we consider that the legislation should give effect to the approach that the confiscation order should be the order of primary importance in the range of sentences whose objective is to deprive the offender of his assets, that is, the sentences which involve orders for payment by the offender or for the forfeiture of his property.⁹ Its importance in this respect should, we think, be recognised by a requirement that the court should determine the amount of the confiscation order before making any decisions as to any other elements of the sentence involving payment or forfeiture. In other words, the court should impose a custodial sentence or any other sentence not involving payment or forfeiture, such as a community service order, leaving entirely out of account any confiscation order which it has made or may make.¹⁰ On the other hand, when the court is contemplating the range of sentencing options directed against the offender's assets, it should first consider whether to make a confiscation order and, if so, the amount of the order. Once the court has decided on the amount of the order, any other orders it makes for payment or forfeiture should be calculated in the light of that decision. In other words, the amount of the confiscation order should be taken into account in determining, for example, the amount of a fine, and not vice versa.

5.7 We do not propose that the court should be required to go so far as to make the order before imposing other orders for payment or forfeiture. There may be occasions when it would be convenient for the court to make the confiscation order and then to adjourn before imposing such other orders, and the court would be free to do so. Our objective is simply to guide the order in which the judge makes his decisions as to the confiscation order and other orders for payment or forfeiture. If he decides to make both a confiscation order and such other orders he may, and perhaps usually will, impose all the orders at the same time. If so, he may wish to be seen to have followed the statutory provision, and to be emphasising the primacy of the confiscation order in such a group of orders, by imposing the confiscation order first. That, however, is a matter of sentencing practice which we consider should be within his discretion. We **recommend**:

- 23. (1) If the court decides that it ought to make a confiscation order it should determine the amount of the order before and without regard to the making of any decision as to -**
- (a) imposing a fine on the offender;**
 - (b) making any order involving payment by him; or**
 - (c) making a suspended forfeiture order in terms of recommendations 61-69 below or an order for forfeiture under a particular statute.**

⁸ On the postponement of confiscation orders, see Part VI below.

⁹ A forfeiture order may be either a suspended forfeiture order, as we recommend in Part XII below, or an order for forfeiture under a particular statute: see para 5.15 below.

¹⁰ The relationship between a confiscation order and such sentences is further considered in paras 5.8-5.11 below.

(2) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Draft Bill, clauses 5(1), 39(3); Schedule 3, paragraph 2)

Confiscation and imprisonment¹¹

5.8 Section 1(3) of the Criminal Justice (Scotland) Act 1987 directs the court to take account of the provisions of any confiscation order "in determining the amount of any fine imposed on the person as regards the offence but not in determining any other matter as regards sentence". There are similar provisions in the other Acts¹² which require the court to take account of the confiscation order before imposing not only a fine but any other order¹³ involving any payment by him or depriving him of property but, subject to that requirement, direct the court to leave the order out of account in determining the appropriate sentence. The effect of all these provisions is that while the court may adjust a fine or other such order because it has made a confiscation order, it must leave the confiscation order out of account when determining whether to impose a sentence of imprisonment and, if so, the length of the sentence, and when reaching a decision as to any other sentence, such as a community service order, which does not involve depriving the offender of money or property. For the sake of brevity we refer only to imprisonment, but the following discussion applies equally to those other sentences. The objective of these provisions has been stated in this way: "It is clear ... that what would otherwise be the appropriate sentence of imprisonment is not to be cut down because a confiscation order has been made."¹⁴

5.9 This policy appears to us to be soundly based on the consideration that to allow the judge to take account of a confiscation order when determining any question of imprisonment would be to allow an offender with substantial realisable proceeds to obtain a less severe sentence than that which the judge would otherwise have imposed. The offender might, for example, obtain a shorter prison sentence, or avoid imprisonment altogether. There is an obvious danger that the court might thus seem to indicate to the public that the offence concerned had been dealt with leniently because the accused had handed over the proceeds. Again, suppose that a wealthy accused were to be convicted together with a co-accused who was equally culpable but had fewer, or no, realisable proceeds: the co-accused might receive a sentence which his wealthier colleague could avoid by giving up his proceeds from the offence.

5.10 The injustice of such results is self-evident. The question for us, however, is whether it is necessary to enact a statutory rule in order to avoid them. It may be thought that they could be avoided if the judge adhered to the principle that an offender should not be allowed to buy his way out of a just penalty. That principle appears to be well established in England, where the courts have observed that compensation orders are not intended to enable the convicted to buy themselves out of the penalties for crime.¹⁵ It is not clear,

¹¹ In this part we include in the term "imprisonment" custodial sentences on young offenders.

¹² DTOA, s 1(5); CJA, s 72(5); NI(EP)A, s 48(5).

¹³ CJA, s 72(5) and NI(EP)A, s 48(5) make an exception for compensation orders. We consider later the relationship between confiscation orders and compensation orders: see paras 5.17-5.24 below.

¹⁴ *R v Saunders* (1991) 92 Cr App R 6 at p 10.

¹⁵ *R v Inwood* (1974) 60 Cr App R 70 at p 73; *R v Copley* (1979) 1 Cr App R (S) 55.

however, whether the principle is equally well established in Scotland. While one case makes it clear that where a fine is appropriate, imprisonment should not be imposed because the accused would be unable to pay it,¹⁶ there does not appear to be any authority for the view that where imprisonment is appropriate it should be imposed even if the accused would be able to pay a large fine. Indeed, a later case has been understood to suggest that where prison would be appropriate, it is none the less correct to impose a large fine instead if the accused is able to pay it.¹⁷ While we doubt whether the Court would endorse that view if the matter were to be fully argued before it, the uncertain state of the authorities in Scotland appears to indicate that there may be some advantage in a statutory rule to the effect that the court must leave a confiscation order out of account in determining the appropriateness and duration of a sentence of imprisonment.

5.11 On the other hand there may be thought to be at least one disadvantage in such a rule: it does not encourage the offender to co-operate with the Crown in their investigations of his financial affairs, and thus the full extent of his benefit or realisable property may never be known. If the court were entitled to reduce any sentence of imprisonment to reflect the co-operation of the offender in these investigations, he would have an incentive to disclose information and consequently the amount of the order might be higher than it otherwise would have been.¹⁸ The sentence of imprisonment, however, would be shorter than it otherwise would have been, and thus the offender by that means would have bought his way out of the appropriate sentence. That result appears to us to be no less objectionable because of the means by which it was reached. We therefore **recommend**:

- 24. (1) The court should be directed that where it makes a confiscation order, it should leave the order out of account in determining, in respect of the offence concerned or any other offence of which**
- the offender has been convicted in the same proceedings, -**
- (a) whether or not to impose a custodial sentence and, if so, the length of the sentence; and**
- (b) any other sentence which does not involve depriving the offender of money or property.**
- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.**

(Draft Bill, clauses 5(2), 39(3), (9); Schedule 3, paragraph 2; Schedule 5)

¹⁶ *Milligan v Jessop* 1988 SCCR 137.

¹⁷ *McLean v MacDougall* 1989 SCCR 625, commentary at p 627; C G B Nicholson, *Sentencing* (2nd ed, 1992), p 219.

¹⁸ This was proposed by Hodgson, pp 137-138 (see also Sir Derek Hodgson, foreword to Mitchell, pp vii-viii) and supported by M Wasik, "The Hodgson Committee Report on the Profits of Crime and Their Recovery" [1984] Crim L R 708 at p 712 on the ground that the sentence discount would be akin to the incentive provided by the discount allowed by the English (but not yet the Scottish) courts for pleading guilty. Sentence discounting is discussed in *Improving the Delivery of Justice in Scotland: 1993 Review of Criminal Evidence and Criminal Procedure* (Scottish Office, 1993), chap 11.

Confiscation, financial and forfeiture orders

5.12 We now discuss the relationship between a confiscation order on the one hand and, on the other, a fine or an order for forfeiture. We consider separately the relationship between a confiscation order and a compensation order.¹⁹

Fines and other orders for payment

5.13 Since the court, when determining the amount of a fine, is required to take into consideration the means of the offender so far as known to the court,²⁰ the fact that a confiscation order has been imposed is clearly relevant to the court's decision whether to impose a fine and, if so, its amount. The other confiscation statutes require a court which has made a confiscation order to take account of it before imposing any fine,²¹ and we recommend a similar provision. While it would be competent to combine a fine with a confiscation order, that would obviously not be appropriate in a case where the maximum sum for which the order could be made was the amount that might be realised and the order had been made for that amount, since the offender would then have no other assets from which to pay a fine. Nor would it generally be appropriate to impose a fine as a punishment where the court, in addition to making a confiscation order, had imposed a sentence of imprisonment. There is a special rule which is applicable to a drug trafficking offender who has been convicted on indictment and is sentenced to imprisonment. In the sheriff court, where confiscation is not competent under the 1987 Act, the sheriff must impose a fine, unless satisfied that for any reason it would be inappropriate to do so. The same rule applies in the High Court, unless a confiscation order has been made: in that event, the Court has a discretion to impose a fine.²² The object of this special rule appears to be to enable the court to punish both by imprisonment and by a fine a drug trafficking offender where the amount of his realisable property exceeds the amount of his benefit, or where he has been convicted in the sheriff court and accordingly a confiscation order is incompetent. We do not consider that such a rule is necessary for other categories of offender.

5.14 We propose that the confiscation order should be taken into account not only before the court imposes a fine but also before the court makes any other order involving any payment by him, since the offender's ability to comply with such an order will also be related to his means after the confiscation order has been satisfied. There are similar provisions in other legislation.²³ We make a separate recommendation in relation to compensation orders.²⁴

Forfeiture orders

5.15 The final category of orders affecting the offender's property is comprised of orders for forfeiture. A forfeiture order may be made under the general statutory power to forfeit property used in crime by means of a suspended forfeiture order which we recommend later

¹⁹ See paras 5.17-5.24 below.

²⁰ 1975 Act, ss 194, 395(1).

²¹ DTOA, s 1(5)(b)(i); CJ(S)A, s 1(3); CJA, s 72(5)(a); NI(EP)A, s 48(5)(a).

²² CJ(S)A, s 44 (replacing s 193B of the 1975 Act, referred to in *HMA v McLean* 1993 SCCR 917 which was repealed by CJ(S)A, Sched 2). For an example of a decision that a fine would not be justified in terms of s 44 see *HMA, Petr* 1994 SCCR 136 at p 139, note.

²³ DTOA, s 1(5)(b)(ii); CJA, s 72(5)(b); NI(EP)A, s 48(5)(b).

²⁴ See paras 5.17-5.24 below.

in this report,²⁵ or under a specific power to forfeit property which is conferred by a statute creating a particular offence.²⁶ We consider that the confiscation order should be taken into account before the court makes an order under either the general power or a specific power, in view of the effect of the confiscation order in reducing the offender's means and in view of the importance of not depriving the offender of the same property twice over, both under the confiscation order and under the forfeiture order. Care should be taken where, for example, it is competent to make an order under the power conferred by section 27 of the Misuse of Drugs Act 1971 to forfeit "anything shown to the satisfaction of the court to relate to the offence". "Anything" could be the proceeds of the offence, or drugs or equipment relating to drugs. It is important that the proceeds should not be taken twice over, under the confiscation order and under a section 27 order.

5.16 We therefore **recommend**:

25. (1) **The court should be directed that where it makes a confiscation order it should take account of the order before dealing with the offender, in respect of the offence concerned or any other offence of which he has been convicted in the same proceedings, by -**
- (a) **fining him;**
 - (b) **making any order involving payment by him; or**
 - (c) **making a suspended forfeiture order as recommended below or an order for forfeiture under a particular statute.**
- (2) **Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.**

(Draft Bill, clauses 5(2), 39(3); Schedule 3, paragraph 2)

Confiscation and compensation

5.17 Where a person has suffered loss, injury or damage in connection with the offence, he may sue the offender in the civil courts, although he is most unlikely to do so for a variety of reasons. The prospect of civil proceedings by the victim is therefore very seldom likely to be a factor in the judge's deliberations when he is deciding whether or not to make a confiscation order. In England and Wales, however, section 72(3) of the Criminal Justice Act 1988 specifically entitles the court, when deciding whether or not to make an order, to take account of any information showing that the victim has instituted, or intends to institute, civil proceedings against the offender. The objective of such a provision, if enacted for Scotland, would appear to be to alert the court to consider leaving the offender with enough money to satisfy a decree against him for damages and expenses. That would seem to involve that in the rare cases where such proceedings were likely to be taken the court should estimate the total amount which the offender would be required to pay in the event of the victim's success. In most of these rare cases the victim's prospects of success should be

²⁵ See Part XII below.

²⁶ See para 12.16 below.

reasonably good, given the evidential value of the conviction²⁷ and the civil standard of proof. Nevertheless the prospect of civil proceedings is only one of many factors which the court may properly take into account in the exercise of its discretion when reaching its decision, and it seems curious that it should have been thought necessary to enact a statutory provision on the matter. In the very few cases where a Scottish court may be given reliable information about civil proceedings at the instance of the victim, we would not think it necessary for the court to be told that it is entitled to take that information into account. We would expect that any consequent adjustment of the amount of the confiscation order which the court considered necessary would be "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe".²⁸ We therefore consider that it would be superfluous to enact for Scotland a provision on the lines of section 72(3) of the 1988 Act.

5.18 In the discussion paper we proposed that as a general rule the emphasis in any confiscation procedures should be on depriving the offender of his proceeds rather than on compensating the victim of the crime in question; but where a victim had sustained loss and a sum of money representing all or part of that loss is confiscated from the offender's assets, consideration should be given to paying that sum of money as compensation to the victim rather than paying it to the State.²⁹ Our consultees were in general agreement with this proposal. We therefore now examine the relationship between the making of a confiscation order and a compensation order.

5.19 The powers of the court to make a compensation order are conferred and regulated by Part IV of the Criminal Justice (Scotland) Act 1980, as amended. We do not propose any further amendment of Part IV of the 1980 Act. We consider that compensation orders are not intended to entitle offenders to buy themselves out of the penalties for crime:³⁰ accordingly, the court should not refrain from imposing a prison sentence only because the offender would be able to satisfy a compensation order. That is a general consideration with no particular relevance to the making of confiscation orders, and a recommendation to that effect would be beyond our terms of reference. It is necessary, however, to discuss the considerations which arise where the court may make both a confiscation order and a compensation order against the offender. In the discussion paper we proposed to follow section 72(7) of the Criminal Justice Act 1988 whereby, in a case where the court makes both orders and it appears to the court that the offender will not have sufficient means to satisfy both orders in full, the court must direct that so much of the compensation as will not in its opinion be recoverable because of the insufficiency of his means are to be paid out of any sums recovered under the confiscation order.³¹ The majority of our consultees agreed with this proposal.

5.20 After further consideration we have decided to clarify and simplify our proposal. *First*, we propose to have a special rule only where the victim has lost money or other property as a result of the offence. *Secondly*, we propose that in such a case the court should simply be required to direct that the compensation is to be paid out of any sums applied towards the satisfaction of the confiscation order.

²⁷ Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 10, as amended.

²⁸ *Watson, Laidlaw, & Co Ltd v Pott, Cassels, & Williamson* 1914 SC (HL) 18 *per* Lord Shaw of Dunfermline at pp 29-30.

²⁹ DP, para 5.16, prop 14(a), (b).

³⁰ See para 5.10 above.

³¹ DP, para 5.42, prop 28. NI(EP)A, s 48(7), is in the same terms as CJA, s 72(7).

5.21 The first branch of our proposal differs from Part I of the Criminal Justice (Scotland) Act 1987 in its approach to compensation orders. Under the 1987 Act, as we have explained,³² "the amount that might be realised" is the total value of all realisable property owned, and all implicative gifts made, by the offender less the total amount payable in pursuance of "obligations having priority". Among these obligations is an obligation to pay an amount due in respect of a compensation order made on conviction of an offence, where such an order was made before, or in the same proceedings as, the confiscation order.³³ We have already recommended that no deductions should be made in respect of "obligations having priority"³⁴ on the grounds that the legislation should be as uncomplicated as possible and that in any event it is difficult to discriminate satisfactorily among the liabilities of the offender. We consider, however, that it is necessary to make special provision for a case where the offence in relation to which the confiscation order is made involves the misappropriation of a person's property. Indeed that appears to be generally the only type of offence in relation to which it would be likely to be competent to make both a confiscation order and a compensation order. In such a case the benefit obtained from the offence by the offender will consist of or include the assets lost by the victim. If the court were to make, without any qualification, a confiscation order to strip the offender of the assets gained and a compensation order to compensate the victim for the assets lost, the offender in satisfying both orders would be paying the value of the assets twice over.

5.22 We propose that in such a case the court should be required to direct that the compensation is to be paid out of "any sums applied towards the satisfaction of the confiscation order". We choose that form of words in view of the terms of a later recommendation as to the application of the proceeds of a realisation of property and other sums: they should first be applied in payment of certain expenses; next, such payments as the court may direct should be made; and then the sums must be applied towards the satisfaction of the confiscation order.³⁵ At that third stage, accordingly, those sums must first be attributed to the compensation order.

5.23 Our proposed scheme would therefore operate in this way. The judge begins his sentencing exercise by reviewing all the sentencing options open to him, including confiscation and compensation. He will know the amounts of the offender's benefit and of the realisable property, and the amount of money which would be required to compensate the victim. He may decide, in the exercise of his discretion, not to make a confiscation order at all: in that event, no question as to the interrelationship of confiscation and compensation would arise. That, however, would be an unusual course, particularly where, as would usually be the case, there was property under restraint³⁶ which could be realised to satisfy a confiscation order. In the ordinary case we would expect the judge to decide to make a confiscation order. If he so decides, he determines the amount of the order without regard to the amount of any possible compensation order, in accordance with our recommendation 23(1)(b) above.³⁷ He then considers whether to make a compensation order and, if so, what the amount of the order should be. If he decides to make an order, he proceeds to do so; and

³² See para 4.31 above.

³³ CJ(S)A, s 5(4), (8)(a)(ii).

³⁴ See para 4.33 above.

³⁵ See paras 9.40-9.41 below.

³⁶ On restraint orders see Part IX below.

³⁷ See para 5.7 above.

if, as we think will generally be the case, the offence has involved the misappropriation of the victim's property, he attaches the direction to which we have referred.

5.24 We recommend:

26. (1) Where the court makes both a confiscation order and a compensation order against the offender in the same proceedings in relation to the same offence and the offence involves the misappropriation of property, the court should be required to direct that the compensation is to be paid out of any sums applied towards the satisfaction of the confiscation order.
- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Draft Bill, clauses 5(4), 39(3); Schedule 3, paragraph 2)

Appeal against confiscation order

5.25 It is obviously necessary that the offender should have an opportunity to challenge either the amount of the order or the fact that it has been made at all. We propose to provide for a right of appeal against the order in the same way as against a confiscation order under Part I of the Criminal Justice (Scotland) Act 1987, where section 1(4) provides that a confiscation order is a sentence "for the purposes of any appeal or review". It has been observed that "review" is apt to include such procedures as an application to the *nobile officium* or a bill of advocation.³⁸ We therefore recommend:

27. For the purposes of any appeal or review, a confiscation order should be a sentence.

(Draft Bill, clause 1(8))

³⁸ *Scottish Current Law Statutes*, annotation to s 1(4) by C Gane.

Part VI Procedure and evidence before order made

Introduction

6.1 Under our proposed scheme the court, when deciding whether to make a confiscation order, must determine the following questions:

1. Has the offender benefited from the commission of the offence? If he has not, that is the end of the matter.
2. If he has benefited, what is the amount of the benefit?
3. What is the amount that might be realised?
4. Would it be appropriate, having taken into account all the considerations relevant to the proper exercise of a judicial discretion in sentencing, to make a confiscation order?

If the answer to the last question is in the affirmative, the court may make a confiscation order in an amount which must not exceed the amount of the benefit or, if less, the amount that might be realised, but is otherwise within the discretion of the court.

6.2 In this part we consider the rules of procedure and evidence which should govern the way in which the court obtains the information it will require before it can answer the first three questions set out in the preceding paragraph. The first issue which we discuss is how the decision-making procedure should be brought into play. Next, in relation to each of the three questions it is necessary to decide whether the burden of proof should lie on the prosecutor or on the offender, whether the standard of proof required to discharge the burden should be the criminal standard of proof beyond reasonable doubt or the civil standard of proof on the balance of probabilities, and whether the party on whom the burden lies should be assisted by the application of any assumptions. The procedural matters to be resolved are: what use should be made of written statements after the fashion of civil pleadings; how any issues of fact between the prosecutor and the defence should be determined; what arrangements should be made if the court requires further information before coming to any decision as regards the making of an order; and how the court should express its decision. The rules on these matters will have a significant effect on the way the law works in practice. There are differences between the provisions of the Criminal Justice (Scotland) Act 1987 on this subject and those of the confiscation legislation for England and Wales which seem to reflect, in particular, the differing positions of prosecutors in the two jurisdictions. We have decided, for the following reasons, to adopt the 1987 provisions as a model. *First*, we understand that they operate satisfactorily in practice. *Secondly*, consistency as between the 1987 procedures in relation to drug trafficking and the new procedures in relation to other crimes should make for coherence in the operation and development of the law and practice in relation to confiscation. *Thirdly*, where a person has been convicted of a combination of drug trafficking charges and other charges where under

the new legislation confiscation is competent, it would be undesirable to impose on the court two different procedures to be followed in the same proceedings, except where there was a sound reason in principle for making some distinction between them.¹

Confiscation order on the motion of the prosecutor

6.3 The first issue is how the decision-making procedure should be brought into play. There seem to be four options: to make it mandatory for the court to operate the procedure; to give the court a discretion to make an order on its own initiative; to require the court to make an order upon the application of the prosecutor; or to give the court a discretion to do so upon such an application.² It is the last of these options which was selected for the 1987 Act. In the discussion paper we proposed that the same course should be adopted in any new legislation,³ and that proposal met with the approval of all our consultees. No one suggested that the prosecutor should not be concerned in the procedure. Where the question of benefit has not been fully explored at the trial, only the prosecutor will know whether there is evidence of the fact that the offender has benefited and of the extent of any benefit; and in any event the prosecutor is more likely than the court to have information about the extent of the offender's realisable property. To oblige the court to operate the procedure even in cases where there was no reason to suppose that benefit could be proved or property realised would be to oblige it to waste its time.⁴ To give the court a discretion to do so *ex proprio motu* would likewise be to oblige it to consider the matter in every case. In all these cases, moreover, the court's decision would depend in practice upon information provided by the prosecutor. We therefore consider that the appropriate course is to entitle the court to make a confiscation order only upon an application by the prosecutor. It is to be expected that a Scottish public prosecutor, who is required to act in the public interest and subject to the supervision of the Lord Advocate, would exercise his discretion to apply for an order only after careful consideration of all the relevant circumstances. In any event, as we have already observed in another context,⁵ the discretion of the court as to whether to grant the prosecutor's application, and as to the amount any order made would oblige the offender to pay, should generally prevent the making of inappropriate orders.

6.4 In solemn procedure the application should be made as directed in the 1987 Act: when the prosecutor moves for sentence or, where the offender has been remitted to the High Court for sentence, before sentence is pronounced.⁶ While the motion for sentence should be made explicitly in solemn procedure,⁷ it is only implied in summary procedure.⁸ We therefore propose that it should be provided that in summary procedure the application

¹ See paras 2.12, 2.13, recommendation 1(2) above.

² DTOA, s 1(1) as amended by the Criminal Justice Act 1993, s 7(1) (not yet in force at the time of writing), allows the court to make an order on its own initiative and requires it to do so on the prosecutor's request. CJA, s 72(2) requires the court to consider a confiscation order where the prosecutor gives notice that there are likely to be sufficient assets to meet it: the Home Office Working Group's recommendation that the court should be obliged to make an order on such notice (Report on Part VI of CJA (1992), paras 2.24-2.25) was not implemented by the 1993 Act.

³ DP, paras 5.21-5.22, prop 17.

⁴ That is the position under DTOA, s 1(1), which will be amended on the coming into effect of s 7(1) of the Criminal Justice Act 1993: see commentary to *R v Bragason* [1988] Crim L R 778.

⁵ Para 3.8 above.

⁶ CJ(S)A, s 1(1).

⁷ *Noon v HMA* 1960 JC 52.

⁸ R W Renton and H H Brown, *Criminal Procedure according to the Law of Scotland* (5th edn, 1983 ed G H Gordon, updated by supplements) (hereafter "Renton and Brown"), para 15-03.

should be made after the accused has been convicted. If these rules are adopted, the sentencing judge will be able, before he pronounces the sentence or any part of it, to take account of the possibility that an order may be made. We therefore **recommend**:

28. (1) **The court should be entitled to make a confiscation order only on the application of the prosecutor.**
- (2) **The application should be made -**
 - (a) **in proceedings on indictment, when the prosecutor moves for sentence or, in a remit to the High Court for sentence, before sentence is pronounced;**
 - (b) **in summary proceedings, following the conviction of the accused.**
- (3) **Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.**

(Draft Bill, clauses 1(1), (6), 39(3); Schedule 3, paragraph 2)

Benefit: burden and standard of proof

6.5 In the discussion paper we proposed that it should be for the prosecutor to establish the fact that the offender has benefited from the offence concerned and the value of the benefit, and that the standard of proof required of the prosecutor should be the criminal standard of proof beyond reasonable doubt.⁹ The majority of those consultees who responded to this proposition agreed with it. A few considered that the standard of proof required of the prosecutor should be the civil standard of proof on the balance of probabilities, and one argued that it should be for the offender to prove that his assets had not been derived from crime. No standard is specified in the Criminal Justice (Scotland) Act 1987. In England and Wales the Court of Appeal held in *R v Dickens*¹⁰ that the Drug Trafficking Offences Act 1986, which was likewise silent on the matter, required the prosecutor to prove to the criminal standard that the offender had benefited from drug trafficking and the amount of his benefit. The Criminal Justice Act 1993 amends both the Drug Trafficking Offences Act 1986 and the Criminal Justice Act 1988 (which is also silent) to the effect that in England and Wales the standard of proof required to determine any question as to whether a person has benefited and the amount to be recovered should be the civil standard.¹¹ We are not satisfied that that is correct in principle. It may be supportable upon the view that a confiscation order is not a penalty but is reparative in character,¹² but we are unable to share that view.¹³ We therefore adhere to our proposal that the standard of proof in relation to benefit should be the criminal standard. We consider later the burden

⁹ DP, para 5.7, prop 13(c); paras 5.30-5.33, prop 23.

¹⁰ [1990] 2 QB 102.

¹¹ DTOA, s 1(7A), CJA, s 71(7A), inserted respectively by the 1993 Act, ss 7(2), 27(2) (not yet in force, 1 May 1994), reversing *R v Dickens* *supra*.

¹² *Re Thomas (disclosure order)* [1992] 4 All ER 814 at p 819 *per* Leggatt LJ; A Mitchell and M Hinton, "Confiscation inquiries - what the Dickens?" (1994) 58 Journal of Criminal Law 201.

¹³ See paras 2.14-2.17 above.

and standard of proof in the determination of questions as to the amount that might be realised.¹⁴ We **recommend**:

- 29. (1) It should be for the prosecutor to prove -**
- (a) that the offender has benefited from the commission of an offence, and**
 - (b) the amount of his benefit.**
- (2) The standard of proof required of the prosecutor should be proof beyond reasonable doubt.**

(Draft Bill, clause 1(7)(a), (b))

6.6 While we consider that the standard of proof required of the prosecutor should be the criminal standard, we acknowledge that in practice it might be difficult for the prosecutor to establish a link between the commission of the offence and the alleged benefit, and that the source of the alleged benefit is a matter which should be peculiarly within the knowledge of the offender. We have therefore considered whether it would be appropriate for the prosecutor to be helped to discharge the burden of proof upon him by the application of any assumptions. It could be provided that the court would be entitled to make certain assumptions unless the offender overcame them by evidence which established the contrary to the civil standard of proof.

6.7 There are precedents for this approach in the drug trafficking legislation, which entitles the court to make certain assumptions for the purpose of determining whether the offender has benefited from drug trafficking and, if he has, of assessing the value of his proceeds of drug trafficking. Unless the offender can establish the contrary, the court may assume, amongst other things, that any property held by him since his conviction, or transferred to him at any time during the six years before his being indicted, was received by him as a payment or reward in connection with drug trafficking carried on by him.¹⁵ The Northern Ireland (Emergency Provisions) Act 1991 entitles the court to make similar assumptions when assessing the value of the proceeds of the offender's terrorist-related activities.¹⁶ The Prevention of Terrorism (Temporary Provisions) Act 1989, which creates offences relative to financial assistance for terrorism, empowers the court on conviction to forfeit money or property related to such offences and to assume, in the absence of evidence to the contrary, that it would be applied or used for the commission of, or the furtherance of or in connection with, acts of terrorism.¹⁷

6.8 In the discussion paper we referred to the drug trafficking legislation and expressed the view that that was a very draconian approach to confiscation which might be justifiable in relation to drug trafficking offences, but was only doubtfully justifiable or acceptable in

¹⁴ Paras 6.11-6.13 below.

¹⁵ CJ(S)A, s 3(2)(a); DTOA, s 2(3)(a). The latter provision is to be amended: see para 6.8, last footnote. For comparable approaches in Commonwealth legislation see D McClean, "Seizing the proceeds of crime: the state of the art" (1989) 38 International and Comparative Law Quarterly 334 at pp 343-349.

¹⁶ NI(EP)A, s 51(1).

¹⁷ PT(TP)A, s 13(5).

relation to the generality of other offences.¹⁸ We invited views on the proposition that any new procedures should not entitle the court to make assumptions as to the source of assets in an offender's possession or under his control.¹⁹ While most of our consultees supported that proposition, there was some support for the introduction of a rebuttable presumption as to the source of the offender's assets. We have concluded that it would be justifiable and consistent with principle and common sense to entitle the court to make two assumptions: as to advantages obtained, and expenditure made, after the commission of the offence. The first assumption is that any property or other economic advantage which has been obtained (as mentioned in recommendation 6 above)²⁰ since the date of the offence was obtained in connection with the commission of the offence. The second assumption is that any expenditure by the offender since that date was met out of payments, property or other advantages obtained in connection with the commission of the offence. Where the application for the confiscation order was made in respect of two or more offences, the relevant date would be the date of the earlier or earliest offence. Where the application was made in respect of an offence found to have been committed over a period of time, the relevant date would be the date occurring at the beginning of that period. It should be noted that the court would only be entitled, and not bound, to make these assumptions.²¹

6.9 We consider that it would be reasonable to place on the offender the burden of proving that the assumptions were incorrect, since the source of any property, economic advantage or expenditure should be a matter within his knowledge. The effect of statutory provisions on these lines would be that the prosecutor would discharge the burden of proving the matter concerned by proving the fact on which the assumption may be based: that the advantage had been obtained or the expenditure made since the relevant date. The court would then be entitled to find the matter established to the criminal standard of proof by making the relevant assumption unless the offender raised a reasonable doubt as to the existence of the basic fact or established on the balance of probabilities that the assumption was incorrect. It would be sufficient for him to lead enough evidence to raise a reasonable doubt as to the existence of the basic fact: that is, evidence tending to show that he had not obtained the property or economic advantage or had not made the expenditure, either at all or since the relevant date. Alternatively, he would be entitled to establish on the balance of probabilities that the assumed fact was incorrect: that is, that he had admittedly obtained the property or economic advantage since the relevant date, but that he had not done so in connection with the commission of the offence; or that he had admittedly made the expenditure since that date but that he had not met it from any property or economic advantage obtained in connection with the commission of the offence. The standard of proof on the balance of probabilities is that required of an accused who has to discharge the burden of proof in a criminal trial.²² In *HM Advocate v McLean*,²³ a hearing in an application

¹⁸ DP, para 5.7.

¹⁹ DP, para 5.16, prop 13(b).

²⁰ See para 4.7 above.

²¹ They are thus to be distinguished from "rebuttable presumptions of law" which *must* be made unless overcome by contrary evidence: W G Dickson, *The Law of Evidence in Scotland* (3rd ed, 1887), para 112; W J Lewis, *Manual of the Law of Evidence in Scotland* (1925), p 20. CJ(S)A, s 3(2) likewise permits the making of assumptions. The similar discretionary assumptions in DTOA, s 2 will be rendered obligatory on the coming into effect of the amendments made by the Criminal Justice Act 1993, s 9. CJA 1988 has neither assumptions nor presumptions.

²² *Robertson v Watson* 1949 JC 73 per LJ-G Cooper at p 88. He need not adduce corroborated evidence: *King v Lees* 1993 SCCR 28.

²³ 1993 SCCR 917.

for a confiscation order under Part I of the Criminal Justice (Scotland) Act 1987, Lord Sutherland held that it was for the accused to establish to that standard that the assumptions in section 3(2) of that Act should not be made.

6.10 We therefore **recommend**:

30. (1) **For the purpose of determining whether a person has benefited from the commission of an offence and, if he has, of assessing the amount of the benefit, the court should be entitled to make the following assumptions, except in so far as he proves either of them to be incorrect on a balance of probabilities:**
- (a) **that any property or other economic advantage which he has obtained since the relevant date (as defined below) has been obtained in connection with the commission of the offence; and**
 - (b) **that any expenditure by him since the relevant date was met out of property or other economic advantage obtained in connection with the commission of the offence.**
- (2) **"The relevant date" means -**
- (a) **the date of the offence; or**
 - (b) **where the offence is found to have been committed over a period of time, the date occurring at the beginning of that period; or**
 - (c) **where the application has been made in respect of two or more offences, the date of the earlier or earliest offence.**

(Draft Bill, clause 2(2), (3))

Amount that might be realised: burden and standard of proof

6.11 We have recommended above that it should be for the prosecutor to establish, to the criminal standard of proof, that the offender has benefited from the commission of the offence and the amount of his benefit.²⁴ We have also recommended that the court, in determining whether the offender has benefited, and if so, the amount of the benefit, should be entitled to make assumptions as to the sources of the property or economic advantages obtained or expenditure made by the offender after the offence unless the offender proved them on a balance of probabilities to be incorrect.²⁵ We now consider what should be the rules as to the burden and standard of proof in relation to the amount that might be realised. Here it is relevant to notice that in practice, as we later explain more fully, the prosecutor in an application for a confiscation order under Part I of the Criminal Justice (Scotland) Act 1987 lodges a statement which includes averments as to the nature and value of any

²⁴ Para 6.5, recommendation 29 above.

²⁵ Paras 6.6-6.10, recommendation 30 above.

realisable property known to the Crown. The offender may respond to these averments in his answers to the prosecutor's statement or may lodge a separate statement of his own setting out any matters relevant to the determination of the amount that might be realised. If he were to do neither, it is very likely that the court would accept any evidence adduced in support of the prosecutor's averments. The offender therefore has an incentive to make averments and adduce evidence in contradiction of the prosecutor's evidence. That does not mean, however, that he has any burden of proof in this branch of the inquiry.

6.12 In England and Wales the courts have held that in confiscation order proceedings under the Drug Trafficking Offences Act 1986 it is for the offender to establish that the amount that might be realised is less than the value of his proceeds: if he takes no steps to show that that is the case, the court is entitled to make a confiscation order for the full amount of the value of the proceeds.²⁶ What is not clear, however, is the nature of the burden on an offender who adduces evidence on the matter. It may be an evidential burden, which is the burden of adducing enough evidence to raise a question as to the amount, so that the prosecutor would be required to prove that the amount is greater than the offender claims it to be. Alternatively, it may be a persuasive burden of proof, requiring the offender to satisfy the court to the civil standard of proof that the amount that might be realised is less than the value of the proceeds.²⁷

6.13 Such questions have not yet arisen in Scotland where, as we have mentioned, it has been the practice of the Crown to make averments relative to the amount that might be realised. It has not been suggested to us that any burden of proof should be placed on the accused in this respect, and we doubt whether it would be appropriate to impose such a burden in cases other than those offences related to drug trafficking or terrorism which Parliament has decided should be treated with particular severity. In other cases it might seem oppressive to entitle the court to make a confiscation order, enforceable by imprisonment, for the full amount of the offender's benefit unless the offender could show that the amount that might be realised was a lesser sum. We consider, accordingly, that on any issue as to the amount that might be realised,²⁸ like any issue as to whether the offender has benefited or the amount of his benefit, it should be for the prosecutor to satisfy the court to the criminal standard of proof. In practice the offender would know that he ought to exert himself to make averments and lead evidence which would at least raise a reasonable doubt as to the prosecutor's contentions. We therefore **recommend**:

31. (1) **It should be for the prosecutor to prove the amount that might be realised.**
- (2) **Subject to recommendation 41(3) below, the standard of proof required of the prosecutor should be proof beyond reasonable doubt.**

(Draft Bill, clause 1(7)(c))

²⁶ *R v Ilseman* (1990) 12 Cr App R (S) 398; *R v Comiskey* (1991) 93 Cr App R 227 at p 232.

²⁷ D A Thomas, commentary to *R v Comiskey* [1991] Crim L R 484 at p 485.

²⁸ In an exceptional case, discussed later, we recommend that the civil standard should apply: see paras 7.15, 7.16, recommendation 41(3) below.

Written statements

6.14 We have recommended above that the amount which a confiscation order requires an offender to pay should not exceed the lesser of two figures: the amount of his benefit from the offence, and the amount that might be realised.²⁹ It is therefore necessary to devise a procedure whereby the court may be satisfied (a) that the defender has benefited from the offence, (b) as to the amount of his benefit, and (c) as to the amount that might be realised. The scheme set out in the 1987 Act³⁰ allows the prosecutor to lodge a statement as to any matter relevant to the assessment of the value of the accused's proceeds of drug trafficking; and if the accused accepts to any extent any allegation in that statement, the court may, for the purposes of that assessment, treat that acceptance as conclusive of the matters to which it relates.³¹ Where a copy of the statement has been served on the accused, the court may require him to indicate to what extent he accepts each allegation and, in so far as he does not accept any allegation, to indicate "the basis of such non-acceptance".³² If he fails to do so in respect of any allegation, he is treated as accepting it.³³ As to the amount that might be realised, the accused may tender a statement of any relevant matters, and the court may treat as conclusive, for the purposes of determining that amount, any allegation in the accused's statement to the extent that it is accepted by the prosecutor.³⁴ The scheme is declared to be without prejudice to section 150 of the 1975 Act which makes provision for formal admissions and agreements. The 1987 Act also enables the court to postpone a determination in relation to the making of a confiscation order if it considers that it requires further information.³⁵

6.15 We understand that this scheme has proved to be so effective in focusing the issues that it has only once been necessary to resolve differences between the prosecutor and the accused by the leading of evidence; and that in that case the documents lodged, like civil pleadings, enabled the judge and the parties to concentrate on those matters which were truly in dispute.³⁶ We also understand that the power to postpone the making of a confiscation order for the purpose of obtaining more information has proved to be invaluable. In the discussion paper we made proposals similar to the scheme in the 1987 Act³⁷ which were accepted by the majority of our consultees. Differing views were expressed, however, as to whether allegations might be made and accepted orally before the court, or should always be made in documents. The Scottish Law Agents Society considered

²⁹ See paras 3.9-3.11, recommendation 5 above.

³⁰ CJ(S)A, s 4(1)-(3). The scheme is modelled on DTOA, s 3. S 3 is amended and a new s 3A inserted by s 10 of the Criminal Justice Act 1993 (not yet in force, 1 May 1994) to the effect that the prosecutor is obliged to provide a statement if asking the court to proceed under the Act, and may be required by the court to do so if the court proceeds on its own motion. We do not consider that the CJ(S)A scheme requires any similar alteration: see paras 6.3 above and 6.15-6.19 below.

³¹ Under the corresponding English provision, DTOA s 3(1), the figures accepted as conclusive for the purposes of the crown court are conclusive also in the Court of Appeal: *R v Crutchley and Tonks* [1994] Crim L R 309; *R v Tredwen* [1994] Crim L R 388, *The Times* 3 January 1994.

³² CJ(S)A, s 4(2). "The best way of doing what that subsection provides is to require the person to lodge answers to the statement with sufficient specification to meet the particular points which are at issue" (*HMA, Petr*, 1994 SCCR 136 at p 138).

³³ CJ(S)A, s 4(3); *HMA, Petr*, above.

³⁴ CJ(S)A, s 4(4).

³⁵ CJ(S)A, s 2. See para 6.24 below.

³⁶ *HMA v McLean* 1993 SCCR 917. The accused lodged answers to the Crown's statement, which was adjusted in the light of the answers; and the hearing proceeded on the basis of the adjusted statement and answers.

³⁷ DP, para 5.33, props 18-19.

that a detailed written statement by the prosecutor should be attached to the indictment or complaint. Others favoured leaving the matter to the discretion of the prosecutor, as in the 1987 Act.

6.16 There are practical difficulties in the way of attaching a statement to the indictment or complaint. If, as we recommend, the benefit in respect of which an order may be made is restricted to that derived from an offence of which the accused is convicted, then in a case where the indictment or complaint set forth a number of charges the prosecutor would have to produce a statement in respect of each charge: it would be more satisfactory to produce a single statement in respect of the conviction or convictions actually obtained. We understand, moreover, that in a number of drug trafficking cases it has not been possible to complete a financial investigation before the expiry of the 110 days from full committal within which the trial of an accused who is in custody generally has to commence,³⁸ so that a post-conviction postponement for a short period under section 2 of the 1987 Act has been necessary. If the prosecutor were to be required to append a statement to the indictment in a complex case where the accused was in custody, he would be obliged to complete the investigation within the period of 80 days from full committal which is generally allowed for service of the indictment.³⁹ Experience in drug trafficking cases indicates that that would be unrealistic.

6.17 The financial circumstances of accused persons will vary widely, as will the complexities of the assessment of the benefit derived from their offences. We understand that Scottish prosecutors have found it expedient in all applications for confiscation in drug trafficking cases to prepare a detailed written statement in the style of civil pleadings, with numbered paragraphs or articles of condescendence and detailed schedules. Such a document is easy for the defence to answer in corresponding paragraphs, and for the judge to follow. It is, however, possible to figure a simple case (say, of insider dealing) in which the prosecutor was able to inform the court orally, and the defence could orally accept, that the benefit derived was a single payment of £x, and that the accused's only assets were a house worth £y, free of incumbrances, and a bank account containing £z. In such a case a written statement might well be unnecessary. We conclude, therefore, that while a full written statement is likely to be appropriate in most cases, oral statements should also be permissible. We therefore consider that the means by which the statement is made to the court should be left to the discretion of the prosecutor. If he chose to make the statement orally and the judge indicated that he would prefer to have a written statement, we have no doubt that a written statement would be provided.

6.18 We now consider the position of the accused person who is served with a copy of a written statement by the prosecutor and is required by the court to indicate to what extent he accepts each allegation in the statement and, in so far as he does not, "the basis of such non-acceptance",⁴⁰ on pain of being held to have accepted the allegation.⁴¹ Those provisions were not criticised by any of our consultees and they appear to us to be entirely consistent with the position of an accused where the prosecutor gives a narrative when moving for sentence in an ordinary case. If the accused, in the course of his plea in mitigation of

³⁸ 1975 Act, s 101(2)(b), as substituted by the Criminal Justice (Scotland) Act 1980, s 14(1).

³⁹ *Ibid*, s 101(2)(a).

⁴⁰ CJ(S)A, s 4(2). CJA, s 73(2), has "any matters he proposes to rely on", which we understand in practice produces responses which are much less specific than the written answers elicited by the Scottish provision.

⁴¹ CJ(S)A, s 4(3).

sentence, does not dispute something said by the prosecutor, it will be assumed that he accepts it. If he does take issue with any matter stated by the prosecutor he is expected to explain why he does so and, if the dispute is on a matter of importance and cannot otherwise be resolved, to lead evidence at a proof in mitigation of sentence.⁴² The objectives of the provisions are, we think, to enable undisputed facts to be established without evidence and to give the accused an opportunity to indicate any grounds on which he contradicts anything stated by the prosecutor. We therefore consider that it would be appropriate to follow the model of the 1987 Act in this respect.

6.19 We therefore **recommend**:

- 32. (1) Where the prosecutor has moved for a confiscation order he should be entitled to lodge a statement as to any matters relevant -**
- (a) to determining whether the offender has benefited from the offence; or**
 - (b) to an assessment of the amount of his benefit from the offence.**
- (2) Where the offender accepts to any extent any allegation in the statement, the court should be entitled, for the purposes of such determination or assessment, to treat his acceptance as conclusive of the matters to which it relates.**
- (3) The court should be empowered to require the offender to indicate to what extent he accepts each allegation in the statement and, in so far as he does not accept any such allegation, to indicate the basis of such non-acceptance.**
- (4) If the offender fails in any respect to comply with such a requirement, he should be liable to be taken as accepting every allegation in the statement apart from any allegation in respect of which he has complied with the requirement.**

(Draft Bill, clause 6(1)-(4))

6.20 The prosecutor's statement and the offender's answers, in so far as we have considered them above, are concerned with the assessment of the offender's benefit. The second figure which must be ascertained is the amount that might be realised. The lesser of the two figures, it will be recalled, will be the maximum which the confiscation order may require the offender to pay.⁴³ In practice, the prosecutor's statement lodged in terms of the 1987 Act includes averments as to the nature and value of any realisable property known to the Crown, and these averments are answered by the defence in their answers to the prosecutor's statement, which may be adjusted in the light of the answers. Accordingly, the contentions of both parties as to both figures may be appreciated from a reading of the statement and answers. The 1987 Act, however, allows the accused to submit a separate

⁴² *Forbes v HMA* 1963 JC 68.

⁴³ Para 3.11, recommendation 5 above.

statement as to any matters relevant to determining the amount that might be realised. If he does so, the prosecutor may indicate the extent to which he accepts any of the allegations in the accused's statement, and the court may, for the purposes of determining the amount to be realised, treat the prosecutor's acceptance as conclusive of the matters to which it relates.⁴⁴ The court has no power to require the prosecutor to give any such indication, but that does not appear to be necessary. Here again, we propose to follow the scheme of the 1987 Act. We **recommend**:

33. (1) **The offender should be entitled to lodge a statement as to any matters relevant to determining the amount that might be realised at the time the confiscation order is made.**
- (2) **Where the prosecutor accepts to any extent any allegation in the statement, the court should be entitled, for the purposes of the determination, to treat that acceptance as conclusive of the matters to which it relates.**

(Draft Bill, clause 6(5))

Hearing

6.21 Next, it seems desirable to prescribe a procedure for the resolution of any issues remaining in dispute after any statements have been lodged and any indications given of the extent to which the allegations in them are accepted. In the discussion paper we proposed that there might be either a hearing before the trial judge or, in High Court cases, a remit to the Court of Session where that seemed to be the most convenient way of dealing with the matter.⁴⁵ The proposal for a remit was derived from section 3(5) of the 1987 Act, whereby a remit may be made by the High Court to the Court of Session where a difficult question of law or a question of fact of exceptional complexity is involved, and the Court of Session, on deciding the question, is directed to transmit the case to the High Court.⁴⁶ Several experienced consultees criticised the proposal. They considered that it was difficult to justify the inconvenience of remitting to a civil court a question which had arisen in a criminal process, and particularly difficult to see the advantage of a sheriff remitting to his own civil court a question which had arisen after a trial in his criminal court. They argued that it would be preferable for the question to be decided by the court in which it had arisen. There is no remit provision analogous to section 3(5) of the 1987 Act in any other United Kingdom confiscation legislation, and we understand that in practice the remit procedure under section 3(5) has never been used: instead, a diet has been fixed in the High Court at which the parties have been entitled to lead evidence. Evidence has been led at such a diet in only one case.⁴⁷

6.22 We have been persuaded by these considerations that a remit procedure would not be appropriate, and that any matters in dispute should be resolved at a hearing before the court in which the trial took place, that is, the High Court (not necessarily sitting in the town

⁴⁴ CJ(S)A, s 4(4). DTOA, s 3(4), CJA, s 73(4) and NI(EP)A, s 52(4) are in similar terms.

⁴⁵ DP, paras 5.26-5.28, 5.33, props 20, 21.

⁴⁶ Procedural rules are provided by the Act of Adjournal (Consolidation) 1988, r 67A and r 201D of the Rules of the Court of Session.

⁴⁷ *HMA v McLean* 1993 SCCR 917.

where the trial took place) or the sheriff court. It is desirable that the hearing should take place before the trial judge, since evidence relevant to the disputed matter might have been led at the trial,⁴⁸ but that is not, we think, essential: the trial judge might not be available for a variety of good reasons. If he would not be available within a reasonable time, the hearing should proceed before another judge of the same court, that is, another High Court judge or another sheriff of the sheriffdom in which the trial took place. We **recommend**:

- 34. (1) **Where any allegation in the prosecutor's statement is not accepted by the offender, or any allegation in the offender's statement is not accepted by the prosecutor, a hearing should be arranged before the trial judge, or if he is not available to preside at such a hearing within a reasonable time, before another judge, to resolve the matters in dispute.**
- (2) **Where the trial has taken place in the High Court of Justiciary the other judge should be a judge of that Court, and where it has taken place in the sheriff court, he should be another sheriff of the sheriffdom concerned.**

(Draft Bill, clause 6(6), (7))

- 35. (1) **Section 3(5) of the Criminal Justice (Scotland) Act 1987 should be repealed and replaced by a provision implementing recommendation 34 above.**
- (2) **Rule 67A of the Act of Adjournal (Consolidation) 1988 and rule 201D of the Rules of the Court of Session should be revoked.**

(Draft Bill, clause 39(3), (9); Schedule 3, paragraph 5; Schedule 5)

6.23 We envisage that the judge's decisions as to whether the offender has benefited, the amount of his benefit and the amount that might be realised may be based on evidence led at the trial (where there has been a trial);⁴⁹ any allegations made in one party's oral or written statement which the other party accepts, or is treated as accepting; and (where there has been a hearing) the evidence adduced at the hearing.⁵⁰ Where evidence relevant to these decisions has been led at the trial, it should not be necessary to lead it over again at the hearing. It should, however, be competent to recall a witness to speak to matters which were not in issue at the trial but which are relevant to the inquiry. Where the accused has given evidence at the trial, he should nevertheless be entitled to give evidence on such matters at the hearing.⁵¹ We do not think, however, that rules as to the evidence at the hearing need be prescribed by legislation.

⁴⁸ None of our consultees suggested that it might be objectionable for the trial judge to preside at the hearing on the ground that he might be required to assess the credibility and reliability of the accused's evidence at the hearing after his evidence at the trial had been rejected by the jury (or by the judge himself, in a summary trial).

⁴⁹ In *HMA v McLean*, *supra*, Lord Sutherland preferred evidence given at the trial to certain evidence given at the hearing.

⁵⁰ *R v Dickens* [1990] 2 QB 102 at p 106.

⁵¹ *R v Jenkins* [1991] Crim L R 481.

Postponement of hearing

6.24 Our recommendation as to the resolution of matters in dispute at a hearing is closely connected to our next recommendation, which relates to the postponement of the hearing. In practice, the hearing will have to be postponed to a date later than that on which the prosecutor applies for the order except where he is able at that stage to make an oral statement or produce a written statement and either the defence accepts the entire contents of the statement or any matter disputed by the defence can be resolved immediately. In proceedings under the 1987 Act postponed hearings are usual. Where the offender has been tried on an indictment containing several charges, the prosecutor's statement has to be prepared in the light of the convictions returned. In any event the defence generally seek time to consider the prosecutor's statement and prepare answers; and the prosecutor may wish to adjust his statement in the light of these answers. The current practice of the High Court has been described in these terms:⁵²

"The prosecutor's statement is a very substantial document and it is reasonable that the accused should have some chance to digest it. It is usual, therefore, on the production of such a statement on conviction for the court to invoke section 2 of the 1987 Act which allows the postponement of a decision on a confiscation order for a period not exceeding six months from the date of the conviction. Usually the defence will be allowed about six weeks to lodge answers and the case will call again in court at the conclusion of that time. Unless the Crown is in a position to agree everything in the defence Answers (which would be unusual), the case is then continued to a hearing on the evidence in relation to the financial aspects of the case. At the end of this, the judge makes his assessment and such order as he thinks appropriate. This procedure has no statutory sanction but it is difficult to see how the court could in any other way make an assessment of the value of the proceeds of drug trafficking or be satisfied as to the value of the realisable property of the accused."

Postponements in such circumstances are obviously justifiable, and are permissible in terms of section 2(1) of the 1987 Act which enables the court to postpone a decision in relation to a confiscation order if it considers that it requires further information. The court may do so without prejudice to its powers under the 1975 Act to adjourn before sentence or to defer sentence. Notwithstanding the postponement, however, the court may sentence the offender otherwise than by fining him.

6.25 In the discussion paper we proposed that where a hearing on a confiscation order could be completed within six weeks of the date of conviction, the whole sentence should be postponed until after the hearing; but where the hearing could not be completed within that time, any sentence other than a confiscation order or fine should be imposed not later than six weeks after conviction.⁵³ Opinion among our consultees was divided, but the weight of opinion was in favour of postponing only those elements in a possible sentence on which the amount of a confiscation order might have a bearing, and otherwise leaving the matter of sentence to the judge. In particular, it was strongly maintained that where a custodial sentence was called for, it was undesirable that the imposition of such a sentence should be postponed.

⁵² A N Brown, "Money laundering in Scotland: the law" in *Money Laundering* ed H L MacQueen (1993) 51 at p 58.

⁵³ DP, para 5.33, prop 22.

6.26 We have decided to follow the scheme of section 2 of the 1987 Act, with minor modifications. If the court is postponing a decision in relation to a confiscation order⁵⁴ it should, we think, also postpone any decision not only as to a fine but as to any other order involving payment or forfeiture. On the other hand the court should be entitled to impose a sentence of imprisonment before making its decision as to a confiscation order. There are two reasons why that should be so. *First*, as we have already recommended, an appropriate sentence of imprisonment should not be reduced because a confiscation order is to be made.⁵⁵ *Secondly*, if the judge, having heard the plea in mitigation at the conclusion of the trial, is minded to impose a sentence of imprisonment, it would seem unfair to the offender to oblige him to await the decision on the confiscation order before he learns the length of his sentence.

6.27 The period for which a decision on a confiscation order may be postponed under section 2 of the 1987 Act is normally six months.⁵⁶ Section 2 also allows an appeal against conviction or sentence to proceed notwithstanding a postponement of the decision as to a confiscation order, and a further appeal to be taken against the confiscation order or any other sentence passed after the period of postponement. If an appeal is intimated during the period of postponement the court may, on the application of the prosecutor, extend the period of postponement to a date up to three months after the disposal of the appeal.⁵⁷ Such provisions appear to us to be appropriate. They would have to deal with appeals under both solemn and summary procedure. Since Part I of the 1987 Act would apply to certain summary prosecutions, it would be convenient to deal with all the necessary modifications of section 2 of the 1987 Act by substituting a new section 2 in terms identical to those of clause 7 of the draft Bill. We therefore **recommend**:

36. (1) **If the court considers that it requires further information before coming to any decision as regards making a confiscation order it should be able to postpone that decision for up to six months.**
- (2) **If the court postpones that decision, it should also postpone passing any part of the sentence on the offender which might be affected by the making of a confiscation order, but it should be entitled to pass a sentence of imprisonment before making that decision.**
- (3) **The offender's entitlement to appeal against conviction or sentence should not be affected by any postponement, but in the event of an appeal the court should be entitled, on the application of the prosecutor, to extend the period of postponement.**
- (4) **The offender should be entitled to appeal against any confiscation order or other sentence passed after the period of postponement.**

⁵⁴ The decision may be as to whether to make an order, or as to the amount to be payable. This is made explicit in the draft Bill, cl 7(1), but not in CJ(S)A, s 2(1).

⁵⁵ See paras 5.8-5.11 above.

⁵⁶ CJ(S)A, s 2(1). The question whether the six-month period might be extended in the exercise of the *nobile officium* was raised but not decided in *HMA, Petr*, 1994 SCCR 136.

⁵⁷ CJ(S)A, s 2(2), (3), (4)(a).

- (5) Provisions implementing paragraphs (1) to (4) above should be substituted for section 2 of the Criminal Justice (Scotland) Act 1987.

(Draft Bill, clauses 7, 39(3); Schedule 3, paragraph 3)

Form of the court's decision

6.28 We note that in *R v Johnson*,⁵⁸ an appeal against a confiscation order made under the Drug Trafficking Offences Act 1986, the Court of Appeal observed that the sentencing court should state the relevant findings made. Section 4(2) and (3) of the 1986 Act and section 73(6) of the Criminal Justice Act 1988 require the court, where it is satisfied that the amount to be realised is less than the amount of the proceeds or benefit, to issue a certificate to that effect. We do not consider that any similar rules need be prescribed in Scotland.⁵⁹ It is important, however, that the relevant findings of the court should be clearly recorded. Applications may be made later for the variation of the order, or for a further confiscation order,⁶⁰ and the court to which such an application is made should be able to ascertain without difficulty the grounds on which the original order was made. In particular, there should be a clear record of what the court found to be the amount of the benefit, the elements of the benefit, the amount that might be realised and the nature and value of the realisable property which the court took into account. We **recommend**:

37. **Where the court makes a confiscation order, it should record its findings relevant to the amount the offender is ordered to pay, including findings as to the amount of the benefit, the elements of the benefit, the amount that might be realised and the nature and value of the realisable property.**

⁵⁸ [1991] 2 QB 249 at p 260.

⁵⁹ We would expect the opinion of Lord Sutherland in *HMA v McLean* 1993 SCCR 917 to be taken as a model for subsequent decisions under CJ(S)A and any new Scottish legislation.

⁶⁰ See Part VII.

Part VII Variation of confiscation orders

Introduction

7.1 It is necessary to make provision for cases where, after the date of the offender's sentence, the amount of the benefit or realisable property is found to be different from the amount at which it was assessed at the date of the sentence. Such a situation is likely to arise quite frequently in practice, in view of the difficulties facing the prosecutor in ascertaining these amounts. There are essentially three situations to be considered. In the *first*, the court has made a confiscation order; it now appears that one or other of the amounts is greater than the amount which the court took into account in making the order; and there is a question whether the amount to be paid under the order should therefore be increased.¹ In the *second*, the court has made a confiscation order; it now appears that the realisable property is inadequate to meet the amount which remains outstanding under the order; and the question is whether the amount to be paid under the order should therefore be reduced.² In the *third*, no confiscation order has been made; it now appears that the offender has benefited from the commission of the offence concerned; and the question is whether the court should now make a confiscation order.³ We consider these situations in turn in the following paragraphs.

Increase in benefit or realisable property after order made

7.2 Where a confiscation order has been made, the maximum amount which the court could have required the offender to pay will have been the lesser of two amounts: the value of the offender's benefit, or the amount that might have been realised at the time the order was made. We consider here what steps should be open to the court where the amount which it has taken as the maximum has increased since the date when the order was made. It will be convenient to begin by noticing the only relevant statutory provisions on this matter, which are sections 16 and 17 of the Criminal Justice (International Co-operation) Act 1990. Section 17 applies to Scotland and matches section 16, which applies to the rest of the United Kingdom. Each section deals with drug trafficking cases where the amount of the confiscation order was less than the value of the offender's proceeds and there has been an increase in the value of the realisable property. In other words they deal with cases where the value of the proceeds exceeded the value of the realisable property, and the latter therefore determined the maximum amount of the order. They do not deal with cases where the value of the realisable property exceeded the value of the proceeds, which accordingly determined the maximum amount, and there has been an increase in the value of the proceeds.

7.3 We now examine section 17 in detail. It prescribes a somewhat cumbersome procedure whereby either the prosecutor or an administrator who has been appointed in relation to the realisable property may apply to the Court of Session for a certificate that the

¹ See paras 7.2-7.11 below.

² See paras 7.12-7.16 below.

³ See paras 7.17-7.18 below.

amount that might be realised is greater than the amount taken into account in making the confiscation order. If the Court grants a certificate, the prosecutor (but not the administrator) may apply to the High Court of Justiciary for an increase in the amount to be recovered under the confiscation order. The High Court may substitute for that amount such amount as appears to it to be appropriate having regard to the amount now shown to be realisable. The substituted amount, however, must not exceed the amount assessed to be the value of the offender's proceeds of drug trafficking. Thus, where it is discovered that the offender owns property of substantial value which the Court, had it been aware of it when it made the order, would have been entitled to take to be the proceeds of drug trafficking,⁴ the amount of the order can nevertheless be increased only to the originally assessed amount. The High Court may also increase the term of imprisonment or detention fixed in default of payment of the confiscation order if the effect of the substitution is to increase the maximum period applicable in relation to the order.

7.4 We propose that there should be a new scheme, differing in several respects from that in section 17, which should apply to all confiscation orders, whether made under Part I of the 1987 Act or under our proposed new legislation.⁵ *First*, we consider that an application should be competent both where a confiscation order has been made after conviction and where, under procedures to be discussed below,⁶ a new order is made later. *Secondly*, the prosecutor should be entitled to apply where either the benefit obtained from the commission of the offence or the amount that might be realised is greater than the benefit or the amount taken into account in making the order. *Thirdly*, the application should not be made to the Court of Session but to the court which made the order. *Fourthly*, only the prosecutor should be entitled to apply: it seems to us to be unnecessary to extend to administrators a right to apply.

7.5 Next, we try to define more closely the nature of the increase on which the prosecutor should be entitled to rely when making his application. *First*, there may be cases where the benefit obtained from the commission of the offence is found to be greater than that which the court took into account when it made the order. *Secondly*, as to the amount that might be realised, there may be cases where the court had disregarded the amount (or part of the amount) of a gift on the ground that it was improbable that the amount (or part) could be realised;⁷ and the court now considers that the amount (or part) probably could be realised. Cases in these two categories do not seem to involve any issues of principle.

7.6 In other cases, however, where the ground of the application is an increase in the amount that might be realised, there is a question as to the nature of the increase on which the prosecutor should be entitled to rely. Section 17 of the 1990 Act refers to the Court's being satisfied that the amount that might be realised is "greater than the amount taken into account in making the confiscation order (whether it was greater than was thought when the order was made or has subsequently increased)". In *Re B*⁸ Schiemann J, considering the identical wording of section 16 of the 1990 Act, observed that the effect of the section was to

⁴ By making the assumption permitted by CJ(S)A, s 3(2)(a): see para 6.7 above.

⁵ The new scheme, however, like that in ss 16 and 17 of the 1990 Act (see *In re Barretto* [1994] 2 WLR 149), would not have retroactive effect: see para 20.5 below.

⁶ See paras 7.10-7.18 below. For convenience we do not make any further reference to new orders.

⁷ See paras 4.26-4.27 above.

⁸ Queen's Bench Division, 30 November 1992, not fully reported on this point in *The Times*, 31 December 1992. The decision, although not the observation discussed in the text, was affirmed *sub nom In re Barretto* [1994] 2 WLR 149.

enable a prosecutor or receiver to apply to the court to vary a confiscation order where (i) the defendant had concealed assets from the court which made the order; or (ii) the assets taken into account by the court had unexpectedly increased in value; or (iii) the defendant had after the making of the confiscation order come into some money or other assets.⁹ We have no difficulty in agreeing that variation should be competent in cases (i) and (ii). We have had some difficulty, however, in resolving the question whether our own scheme should permit variation in case (iii). If it did, it would enable the court to confiscate property which the offender had lawfully acquired after the date of the order such as a legacy, or money legitimately earned. We acknowledge the force of arguments to the effect that an offender who has benefited from the commission of a crime and has dissipated his proceeds should be at risk of repeated variation of the confiscation order which was originally made against him for so long as it takes to deprive him of the equivalent of the full amount of his proceeds.¹⁰ On the other hand, if variation were to be competent in case (iii) the offender would have little incentive to earn an honest living. We have noted that in the law of bankruptcy the whole estate of the debtor, with certain exceptions, vests in the permanent trustee.¹¹ In particular, estate acquired by the debtor after the date of sequestration and before his discharge vests in the trustee,¹² as does any non-vested contingent interest which the debtor has.¹³ On the other hand, income received by the debtor vests in the debtor (unless it is income arising from estate which is vested in the permanent trustee), but the trustee may apply to the sheriff for an order for payment to the trustee of any excess above a suitable amount to allow for aliment for the debtor and any obligation of his to aliment, make a periodical allowance or pay child support maintenance.¹⁴ Thus a debtor, unlike an offender under our scheme, is prohibited from enjoying a legacy or a windfall and may retain only a limited amount of any earnings. We have considered whether we should recommend that in this respect the position of an offender should be comparable to that of a debtor. That, however, could only be achieved by the addition of somewhat elaborate statutory provisions to legislation which is already fairly complex. We have concluded, with some hesitation, that the matter is not of sufficient importance to justify such provisions. We therefore propose that variation on the ground that the amount that might be realised is greater than the amount taken into account in making the order should be competent only where the amount of the realisable property which was in existence at the time the order was made was greater than that which the court took into account (because, for example, its existence was not disclosed, or it was erroneously undervalued) or where its value has subsequently increased.

7.7 The final question relative to these applications is whether any time-limit should be imposed within which an application would have to be made. No time-limit is prescribed by section 16 or 17 of the 1990 Act. On the other hand, the new sections 5A to 5C of the Drug Trafficking Offences Act 1986,¹⁵ which empower the courts in England and Wales to

⁹ P Taylor, "The variation of confiscation orders" (1993) 143 NLJ 686, argues that s 16 does not extend to case (iii). In the Lexis version of the judgment Schiemann J states that after delivering the judgment he read Taylor's article in draft and was persuaded that there was force in his arguments.

¹⁰ We have no difficulty in accepting that when the original order is made there need be no connection between the benefit and the property to be realised: see para 4.15 above.

¹¹ Bankruptcy (Scotland) Act 1985, s 31(1).

¹² *Ibid*, s 32(6), (10).

¹³ *Ibid*, s 31(5).

¹⁴ *Ibid*, s 32(3) as amended by the Child Support Act 1991, Sched 5, para 6(2).

¹⁵ Inserted by the Criminal Justice Act 1993, s 12 (not yet in force, 1 May 1994). See ss 5A(10), 5B(8), 5C(15).

make revised assessments of the proceeds of drug trafficking on the application of the prosecutor, forbid the courts to entertain applications made more than six years after the date of conviction. It seems to us to be necessary to reconcile the public interest in depriving the offender of the proceeds of his crime and the public interest in the maintenance of a humane system of criminal justice which does not burden an offender for an indefinite period after conviction with the prospect that in effect his sentence might be increased. Not only would he regard an upwards variation of the amount in the order as an additional punishment: he would be liable to imprisonment in default of payment of the increased amount. We therefore consider that there should be some limitation on the period during which the prosecutor may apply for an upwards variation of the amount in the order.

7.8 The selection of the length of the period should be determined by balancing, on the one hand, considerations of humanity and on the other, the practical consideration that there may be good reasons for a prosecutor's inability to ascertain the true amount of the benefit or the true value of the realisable property until some time has elapsed after the offender's conviction. It appears that the choice of six years for sections 5A to 5C of the 1986 Act was influenced by the statutory assumption (in section 2 of that Act) that property transferred to the offender during the six years before the institution of the proceedings was a payment or reward in connection with drug trafficking.¹⁶ The selection of six years in that provision was influenced in turn by the requirement in the Finance Act 1985 that value-added tax records should be preserved for six years¹⁷ and by the significance of six years as a period of limitation in English law.¹⁸ None of these considerations appears to us to point to the selection of six years as the appropriate time-limit for our scheme.¹⁹ Since, however, our scheme is intended to apply both to drug-trafficking cases and to other cases and it would be undesirable for there to be different time-limits in Scottish and English drug-trafficking cases, we have concluded that a six-year time-limit would be appropriate. We also think, however, that in order to prevent undue delay in the making of an application after the relevant information has become available to the prosecutor, he should be required to apply as soon as is reasonably practicable after he obtains the information.

7.9 We therefore **recommend**:

- 38. (1) After a confiscation order has been made, the prosecutor should be entitled to apply to the court which made the order for a new order for payment of a different sum -**
- (a) where the maximum amount of the order was determined by the benefit, and it is now known -**
- (i) that the benefit the offender had obtained in connection with the commission of the offence at the time the order was made was greater than the benefit taken into account in making the order; or**

¹⁶ CJ(S)A, s 3(2)(a)(ii) is to the same effect.

¹⁷ Finance Act 1985, s 23, Sched 7, para 2, amending the Value Added Tax Act 1983, Sched 7, para 7(2).

¹⁸ *Hansard*, HL Deb vol 540, col 748 *per* Earl Ferrers, Minister of State, Home Office.

¹⁹ There is, however, an ordinary time-limit of six years on the making of assessments to tax: Taxes Management Act 1970, s 34(1) as amended by the Development Land Tax Act 1976, Sched 8, para 6.

- (ii) that the benefit taken into account in making the order has increased in value since the order was made; or
 - (iii) that some further benefit has been obtained in connection with the offence since the order was made; or
- (b) where the maximum amount of the order was determined by the amount that might be realised, and it is now known that the amount that might be realised is greater than the amount taken into account in making the order in respect that -
 - (i) at the time when the order was made there was more realisable property than the court at that time took into account, or
 - (ii) the realisable property taken into account at the time when the order was made has subsequently increased in value, or
 - (iii) the amount, or part of the amount, of a gift which was disregarded on the ground that it was improbable that it could be realised, could be realised now.
- (2) Any such application should be made as soon as is reasonably practicable after the relevant information becomes available to the prosecutor and in any event within six years of the date of the offender's conviction.

(Draft Bill, clause 8(1), (2), (3))

7.10 If the court is satisfied that the benefit or the amount that might be realised is greater than the benefit or amount taken into account in making the order, it should proceed as follows. Where the earlier order has already been satisfied, the court should be entitled to make a new order. The court should have a discretion both as to whether to make a new order at all, and as to the amount which any new order should require the offender to pay, corresponding to its discretion in relation to the original order. It should be for the court to determine what sum is appropriate having regard to the newly established figure. Where the earlier order has not been satisfied, the court should recall it and make a new order which takes into account both the amount unpaid under the earlier order²⁰ and the newly established figure. If, for example, the maximum figure which could have been imposed under the earlier order was £60,000, the earlier order was made for payment of £60,000, the offender has paid £50,000 and the newly established maximum figure is £80,000, the court may think it appropriate to take account of the increase of £20,000 and the unpaid £10,000 and make a new order for payment of £30,000. These appear to us to be neater procedures than the substitutions of figures and terms of imprisonment required by section 17 of the

²⁰ Including any interest: see para 8.10, recommendation 44, below.

1990 Act.²¹ The new order would be a confiscation order. It would accordingly be a sentence for the purposes of any appeal or review,²² and the provisions of the draft Bill as to enforcement²³ and the payment of interest on unpaid sums would apply.²⁴ We **recommend**:

39. If the court is satisfied that the benefit or amount is greater than that which was taken into account in making the order, and -

- (a) that order has been satisfied, the court should be entitled to make a new order for the payment of such sum as appears to the court to be appropriate having regard to what is now shown to be the benefit or the amount realisable;**
- (b) that order has not been satisfied, the court, if it decides to order payment of a further amount, should be required to recall the order and in making the new order should be entitled to take into account both the sum referred to in (a) above and the amount unpaid (including any interest payable) under the earlier order.**

(Draft Bill, clause 8(4))

7.11 The rules of evidence and procedure in an application of this kind should be essentially the same as in the making of a confiscation order, subject to one qualification. As in the making of a confiscation order, the prosecutor should have the burden of proving beyond reasonable doubt that the benefit or amount is greater than that which was taken into account in making the order. He should lodge a statement as to any relevant matters, to which the offender should be required to respond on pain of being held to accept any allegation by the prosecutor which he does not challenge. The offender should also be entitled to lodge a separate statement. The application should be disposed of by the trial judge or, if he would not be available within a reasonable time, another judge, and any matters in dispute should be resolved by the leading of evidence. The court should have before it the findings of the court which made the original order. If the court makes a new order it should issue a written judgment giving its reasons for so doing. The qualification relates to the assumptions which a court is entitled to make under clause 2(2) of the draft Bill or section 3(2) of the 1987 Act.²⁵ There would be, we think, a real risk of oppression if these assumptions could be made in an application which might be brought up to six years after the offender's conviction. We note that the corresponding provisions of the Drug Trafficking Offences Act 1986 exclude the making of the statutory assumptions.²⁶ We **recommend**:

40. (1) The rules of evidence and procedure in an application in terms of recommendation 38 should be similar to those in an application for the making of a confiscation order, except that the court should not be entitled to make the assumptions referred to in recommendation 30 above or in section 3(2) of the Criminal Justice (Scotland) Act 1987.

²¹ The enforcement of confiscation orders by imprisonment is discussed in Part VIII.

²² See para 5.25 above; draft Bill, cl 1(8).

²³ Draft Bill, cl 11 (see para 8.9 below) and Part IV (see Part XVIII below).

²⁴ cl 12; see para 8.10 below.

²⁵ See paras 6.6-6.10 above.

²⁶ DTOA, s 5C(10). Ss 5A(9) and 5B(6) are in similar terms.

- (2) **Section 17 of the Criminal Justice (International Co-operation) Act 1990 should be replaced by provisions in Part I of the Criminal Justice (Scotland) Act 1987 implementing recommendations 38 to 40(1) above.**

(Draft Bill, clauses 8(5), (6), 39(3), (9); Schedule 3, paragraph 8; Schedule 5)

Insufficient realisable property to satisfy order

7.12 We now consider the circumstances in which it should be possible for the effect of a confiscation order to be varied by the reduction of the amount to be paid. Cases may occur in which it becomes apparent that the order cannot be satisfied by the realisation of the property which was taken into account when it was made. Such cases may be few because the offender normally will have been concerned to persuade the court to minimise the value of the realisable property. On the other hand its value may be diminished, for example by the destruction by fire of some uninsured item, or may turn out to have been assessed under a misapprehension, as in a case of which we were informed where an offender's assets were understood to include a Welsh tin mine and it was discovered (albeit before the confiscation order was made) that he had neglected to obtain a conveyance of the mineral rights. Again, the recipient of a gift may have obtained from the court, under the procedure we have recommended above, a declaration that the gift should not be caught.²⁷ Section 25 of the Criminal Justice (Scotland) Act 1987 makes provision for the variation downwards of the amount in the order, but the procedure it prescribes appears to us to be unnecessarily complex.²⁸ The offender is required to apply to the Court of Session for a certificate that the realisable property is inadequate to meet any amount which remains to be recovered under the confiscation order. If the Court is satisfied that that is so, having considered certain prescribed matters, it issues a certificate to that effect, stating its reasons. The offender then applies to the High Court of Justiciary for a reduction of the amount to be recovered under the order. The High Court must substitute "such lesser amount as [it] thinks just in all the circumstances of the case" and make any consequential reduction in the period of imprisonment to be served in default of payment.

7.13 We propose both for the 1987 Act and for our recommended scheme a procedure which would be less elaborate than the section 25 rules in that it would not be necessary to apply both to the Court of Session and to the High Court of Justiciary, but only to the court which had made the confiscation order. That is the court which we have recommended should entertain an application for a new order for a higher amount at the instance of the prosecutor. We also propose that it should be possible for either the prosecutor or the offender to apply for a new order for a lower amount.²⁹ While it may be that an application of this kind would usually be made by the offender, there may be cases in which it comes to the notice of the prosecutor that the realisable property is insufficient and the offender for some reason, such as ignorance or considerations of expense, fails to make an application and thus exposes himself to the risk of unjust imprisonment for default in payment of an order which cannot be satisfied. In such a case the risk of injustice would be obviated if the prosecutor were entitled to make an application.

²⁷ See paras 4.28-4.30, recommendation 19 above.

²⁸ DTOA, s 14 and CJA, s 83 are in terms similar to CJ(S)A, s 25. DTOA, s 14 is amended by the 1993 Act, s 11 (not yet in force, 1 May 1994).

²⁹ Mitchell, para 6.16, suggests that both should be entitled to apply for a downwards variation of the order.

7.14 Otherwise, the procedure would be similar to that in section 25. The court, in considering whether it was satisfied that the value of the realisable property was inadequate for the payment of any amount still outstanding under the order,³⁰ would be required to take into account the extent to which any property of a person whose estate had been sequestrated, or who had been adjudged bankrupt in England and Wales or in Northern Ireland, is or has been included in his estate,³¹ unless account of that had already been taken in the original assessment of the value of the realisable property.³² On the other hand, again as in section 25, the court would be entitled to disregard any inadequacy in the realisable property which appeared to it to be attributable wholly or partly to anything done by the offender for the purpose of preserving such property from realisation. If the court is satisfied that the realisable property is inadequate, it should be required to reduce the amount the offender is required to pay: it would not be fair to him to give the court a discretion not to reduce the amount. The court should, however, have a discretion as to the extent of the reduction, comparable to its discretion when making a new order at the instance of the prosecutor.³³ We propose that the court should give effect to its decision in a simpler way than that prescribed by section 25, which entails the substitution in the order of a different amount and a different period of imprisonment or detention. As in an application by the prosecutor where there has been an increase in the benefit or realisable property, the court should recall the existing order and make a new order.³⁴ The new order should be for payment of such lesser amount as appears to the court to be appropriate having regard to what is now shown to be the value of the property and to any amount already paid under the existing order. If, for example, the earlier order was made for payment of £75,000 because that figure had been taken to be the value of the realisable property, the offender has paid £10,000 and the value of the realisable property is now shown to be £40,000, it may appear to the court to be appropriate, having regard to the two latter figures, to make an order for payment of £30,000.

7.15 It should be for the applicant to satisfy the court on a balance of probabilities that the realisable property is inadequate. That is the standard which would have been required of the offender in an application to the Court of Session under section 25. The applicant should lodge a statement, to which the respondent should be entitled to lodge answers, and the application should be disposed of by the trial judge, if available, and in all other respects like a prosecutor's application for a new order for a higher amount.

7.16 **We recommend:**

- 41. (1) After a confiscation order has been made, both the prosecutor and the offender should be entitled to apply to the court which made the order for a new order requiring a smaller amount to be paid by the offender on the ground that the value of the realisable property is inadequate for the payment of any amount outstanding (including any interest payable).**

³⁰ Including any interest: see para 8.10, recommendation 44, below.

³¹ If the sequestration or bankruptcy occurred after the making of a restraint order, the property concerned will not form part of his estate for distribution among creditors: see para 9.43 below.

³² See para 4.14 above.

³³ See para 7.10, recommendation 39(1)(a) above.

³⁴ See para 7.10 above.

- (2) When considering whether the value of the realisable property is inadequate, -
- (a) the court should be required to take into account the extent to which property of a person whose estate has been sequestrated or who has been adjudged bankrupt is or has been included in his estate; and
 - (b) the court should be entitled to disregard any inadequacy which appears to it to be attributable, wholly or partly, to anything done by the offender for the purpose of protecting the realisable property from realisation.
- (3) If the applicant satisfies the court on a balance of probabilities that the realisable property is inadequate, the court should be required to recall the order and make a new order for the payment of such lesser sum as appears to the court to be appropriate having regard to what is now shown to be the value of the realisable property and to any amount already paid under the earlier order.
- (4) The rules of evidence and procedure should otherwise be similar to those which apply in an application at the instance of the prosecutor in terms of recommendations 38 to 40(1) above.
- (5) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Draft Bill, clauses 9, 39(3); Schedule 3, paragraph 22)

No order made: benefit discovered

7.17 Finally, we consider a case where no order has been made and it comes to the prosecutor's notice that the offender has benefited in connection with the commission of the offence. Justice appears to require that the court should be entitled to make a confiscation order, just as it should be entitled to make a new order to replace an existing order after further proceeds have been discovered. We therefore propose that the prosecutor should be entitled to apply to the court for a confiscation order. As before,³⁵ he should apply as soon as is reasonably practicable after he obtains the relevant information, and not later than six years after the date of conviction. The rules as to the burden and standard of proof, the use of written statements and the disposal of the application by the trial judge, if available within a reasonable time, which apply in the making of a confiscation order should also apply to such an application, with the exception of the rules as to the making of assumptions. The rule that the court must determine the amount of the confiscation order before reaching any decision on other orders for payment or forfeiture would obviously not apply since the court would have already sentenced the offender. On the other hand, when fixing the amount of the confiscation order the court should be entitled to take account of any order for payment or forfeiture which was an element in the offender's sentence. If the court had made the confiscation order when sentencing the offender, it would have taken

³⁵ See para 7.8 above.

account of the order before making any order for payment or forfeiture. Now that the confiscation order is to be made after the sentence, it is important to avoid any complaint that an order for payment or forfeiture which formed part of the offender's sentence might have been less severe if the confiscation order had been imposed at the same time and the amount of the confiscation order had been determined first. The court to which the application is made should be able to say, when imposing the confiscation order, that in determining the amount of the order it has taken account of the order for payment or forfeiture already imposed.³⁶ The general rules as to appeal, enforcement and other matters would apply to the order.³⁷

7.18 We therefore **recommend**:

42. (1) **Where the court has imposed a sentence which does not include a confiscation order and the prosecutor learns thereafter that the offender has benefited in connection with the commission of the offence, the prosecutor should be entitled to apply to the court for a confiscation order.**
- (2) **The application should be made as soon as is reasonably practicable after the relevant information becomes available to the prosecutor and in any event within six years of the date of the offender's conviction.**
- (3) **The rules of evidence and procedure in the application should be similar to those in an application for a confiscation order made on a motion or remit for sentence, except that the court should not be entitled to make the assumptions referred to in recommendation 30 above or in section 3(2) of the Criminal Justice (Scotland) Act 1987.**
- (4) **In determining the amount of the confiscation order the court should be required to take into account any order for payment or forfeiture which forms part of the sentence already imposed.**
- (5) **Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.**

(Draft Bill, clauses 10, 39(3); Schedule 3, paragraph 8)

³⁶ DTOA, s 5A(6), inserted by the Criminal Justice Act 1993, s 12 (not yet in force, 1 May 1994), requires the court to take into account the amount of any fine imposed.

³⁷ See para 7.10 above.

Part VIII Enforcement of confiscation orders

Introduction

8.1 We now propose a scheme for the enforcement of confiscation orders which is broadly similar to that which applies to confiscation orders imposed under Part I of the Criminal Justice (Scotland) Act 1987. It has three principal features. *First*, a confiscation order is enforced in the same way as a fine. *Secondly*, interest is payable on any unpaid sum. *Thirdly*, the court has power to enforce a confiscation order by making restraint orders and supplementary orders for the preservation of realisable property with a view to the satisfaction of the confiscation order. Since these orders may be made both before and after conviction and in each case operate in the same way, it will be convenient to discuss them separately in Part IX. We also deal separately, in Part XVIII, with reciprocal arrangements for the enforcement of confiscation orders. In the following paragraphs we discuss the application of the statutory fine enforcement provisions to the enforcement of confiscation orders¹ and the payment of interest which has accrued on sums unpaid under confiscation orders.²

Enforcement in the same way as fines

8.2 Section 7 of the Criminal Justice (Scotland) Act 1987, which we propose to follow subject to the modifications noted in the following paragraphs, applies to confiscation orders various provisions of the Criminal Procedure (Scotland) Act 1975 relating to the enforcement of fines.³ The effect of the application of the principal provisions is that the offender may be given time to pay the sum required by the confiscation order or may be allowed to pay it by instalments, and he is liable to imprisonment in default of payment. Several of the other provisions of the 1975 Act are technical and need not be discussed here: their subject-matter is briefly mentioned in the explanatory notes on clause 11 of our draft Bill. Suffice it to say that certain of them are modified to take account of the appointment of an administrator in relation to a confiscation order.

Enforceability of order after service of sentence of imprisonment in default of payment

8.3 There are, however, two provisions of the 1975 Act the application of which by section 7 of the 1987 Act seems to us to be capable of improvement. The first is section 411(3).⁴ Section 411 is concerned with the recovery of fines by civil diligence, and subsection (3) provides:

"(3) Proceedings by civil diligence under this section may be adopted at any time after the imposition of the fine to which they relate:

¹ See paras 8.2-8.9 below.

² See para 8.10 below.

³ DTOA, s 6 and CJA, s 75 likewise adopt fine enforcement procedures in England and Wales. See, however, the amendment to DTOA, s 6 discussed in para 8.4 below.

⁴ For the second see para 8.6 below.

Provided that no such proceedings shall be authorised after the offender has been imprisoned in consequence of his having defaulted in payment of the fine."

In other words, once the offender has served a period of imprisonment in default of payment, the fine is no longer enforceable. Section 7(2) of the 1987 Act, however, provides that section 411 is to apply in relation to confiscation orders "except the proviso to subsection (3)". Thus, after the offender has been imprisoned for failure to pay the sum required under the confiscation order, the order continues to be enforceable by civil diligence: the offender has not expunged his debt by serving the sentence of imprisonment.

8.4 There is a question whether such a rule is justifiable in principle. We note that in England and Wales section 13(1) of the Criminal Justice Act 1993 has implemented a recommendation by the Home Office Working Group on Confiscation⁵ that that should be the rule in drug trafficking cases. Section 13(1) of the 1993 Act adds to section 6 of the Drug Trafficking Offences Act 1986 a new subsection (7) in these terms:

"(7) Where the defendant serves a term of imprisonment or detention in default of paying any amount due under a confiscation order, his serving that term does not prevent the confiscation order from continuing to have effect, so far as any other method of enforcement is concerned."

Section 41(2) of the 1993 Act introduces a similar rule in relation to confiscation orders made under the Northern Ireland (Emergency Provisions) Act 1991.⁶ No such rule applies to confiscation orders made under the Criminal Justice Act 1988. In support of the rule it has been argued that the amount due under a confiscation order is a debt which must be paid, and that imprisonment for failure to pay a civil debt does not expunge the obligation to pay: income tax and maintenance debts all remain in force even after a term of imprisonment is served. Further, the confiscation order will have been made on the basis that there was sufficient realisable property to satisfy it: if it is insufficient, the offender may apply to the court for a downwards variation of the order. Moreover, he will not be imprisoned in default of payment unless the court is satisfied that he has sufficient resources to pay the outstanding amount. He should not be allowed to choose to serve the alternative sentence of imprisonment and enjoy his proceeds on his release.⁷

8.5 As we have explained, we are not satisfied that an amount due under a confiscation order is essentially or exclusively a species of civil debt.⁸ In any event we do not find persuasive the analogy with civil imprisonment for debt. In Scotland there is no civil imprisonment for non-payment of taxes or local government charges,⁹ and civil imprisonment for non-payment of an alimentary debt is very rare.¹⁰ If it is thought that offenders might prefer to serve a period of imprisonment rather than pay the sum due under a confiscation order, it seems to us that the appropriate course would be to prescribe

⁵ Report on DTOA (1991), para 3.11.

⁶ Ss 13 and 41 are not yet in force at the time of writing (1 May 1994).

⁷ *Hansard*, HL Deb vol 540, cols 749-750 *per* Lord Ackner and Earl Ferrers, Minister of State, Home Office. Reference was also made to community charge debts which were not extinguished by imprisonment.

⁸ See paras 2.14-2.17 above.

⁹ The Debtors (Scotland) Act 1880, s 4, para 1, which preserved civil imprisonment for such debts, was repealed by the Debtors (Scotland) Act 1987, Sched 6, para 8. S 74(3) of the latter Act provides that no one may be imprisoned "for failure to pay rates or any tax".

¹⁰ See para 2.16 above.

maximum periods of imprisonment for non-payment of a confiscation order which would be longer than the maximum periods for non-payment of a fine.¹¹ That would appear to be preferable to the rule in drug-trafficking cases in Scotland and in the drug-trafficking and terrorism cases to which the amendments made by the Criminal Justice Act 1993 will apply. That rule appears to us to be anomalous. It is not applied to confiscation orders made under the Criminal Justice Act 1988. Further, if confiscation is regarded as a criminal financial penalty, there is no other case in which imprisonment in default of payment of such a penalty does not extinguish the obligation to pay. We therefore consider that the proviso to subsection (3) of section 411 of the 1975 Act should apply to confiscation orders as well as to fines.

Procedure at means inquiry court.

8.6 The other provision of the 1975 Act the application of which we propose to modify is section 398(1). The effect of section 398(1) as amended¹² and applied to confiscation orders by section 7 of the 1987 Act is that where a court has made a confiscation order without imposing imprisonment in default of payment¹³ it must not thereafter impose imprisonment for failure to pay unless on an occasion subsequent to the making of the confiscation order the court has inquired, in the offender's presence, into the reason why the amount required has not been paid.¹⁴ Such an inquiry takes place at a diet generally referred to as a means inquiry court.¹⁵ It is unnecessary where the offender is in prison. We propose that this procedure should be modified in order to take account of the policy that where a confiscation order has been made, imprisonment in default of payment should be a last resort. The reasons for that policy are, *first*, that it is important to deprive the offender of the proceeds of his crime and to guard against any possibility, however remote, that he may be seeking to stultify the order and retain his proceeds by serving a term of imprisonment. *Secondly*, it is equally important to avoid the imprisonment of an offender in circumstances where a justifiable application could be made for a downwards variation of the order on the ground of the insufficiency of the realisable property.

8.7 We therefore propose that a means inquiry court should be held irrespective of whether the offender is in prison, and that the prosecutor should be given an opportunity of being heard in order that the court may have sufficient information before reaching its decision.¹⁶ The court should then have sufficient information to determine whether there is still some way in which the amount required under the order could be recovered (for example, by reducing the instalments or allowing further time to pay), or an opportunity should be given for an application for a downwards variation of the amount, before concluding that imprisonment is inevitable. The approach which we hope would commend itself to the court broadly corresponds with the following observations of the Divisional Court on the subject of the discretion of justices to issue a warrant committing an offender to

¹¹ For the current maxima see the 1975 Act, s 407(1A) as amended.

¹² By the Criminal Justice (Scotland) Act 1980, Sched 7, para 61.

¹³ There are various statutory constraints on the imposition of imprisonment in default of payment: 1975 Act, s 396(1), (2), (3), (4).

¹⁴ It must also require a report from any administrator who has been appointed in relation to the confiscation order: 1975 Act, s 407 as applied by CJ(S)A, s 7(2).

¹⁵ So called because under earlier legislation the inquiry was into the offender's means: Criminal Justice (Scotland) Act 1963, s 25; 1975 Act, s 398(1) before amendment.

¹⁶ The prosecutor must have such an opportunity in an application for further time to pay a fine: 1975 Act, s 396(7), a curious provision which is regularly ignored in practice (C G B Nicholson, *Sentencing* (2nd ed, 1992), para 1-80).

prison for non-payment of a confiscation order under the Drug Trafficking Offences Act 1986.¹⁷

"We have been invited to provide general guidance to magistrates' courts which are called upon to enforce confiscation orders. It is not the function of this Court in applications for an order of certiorari of a particular decision so to respond. What we can do is to remind justices that they have a discretion whether or not to issue a warrant of commitment and that the discretion is one which must be exercised judicially. For such discretion to be properly exercised, it is well that the following points should be kept in mind. (1) The object of a confiscation order is to divest the defaulter of money or other realisable assets. Consequently, (2) it is not a matter of choice for the defaulter to 'buy' his way out of such an order by serving the term of imprisonment imposed in default of responding to the order of confiscation: see *Clacton Justices, ex p. Customs and Excise Comrs.* (1988) 152 J.P. 129. (3) The mere fact of a confiscation order is evidence that at the date it was made there were realisable assets available to meet the requirements of the order. (4) Even if at the date when justices have to consider the question of enforcement the value of realisable assets are [*sic*] less than they were [*sic*] at the date of the confiscation order, it is open to the defaulter to apply for a certificate of inadequacy under section 14 of the Drug Trafficking Offences Act 1986 which will lead to a reduction in the amount of the original order. (5) Given the *inter partes* nature of the procedure leading to the making of a confiscation order, it will be in the nature of things that the prosecution will in all probability have information available which would be relevant for the justices' consideration. More compellingly, the prosecution has a legitimate interest in being heard before the justices come to any decision. (6) Given the purposes of the Drug Trafficking Offences Act 1986, it is incumbent on justices to consider all methods of enforcement short of issuing a warrant of commitment in a Drug Trafficking Offences Act case before doing so."

8.8 The remaining provisions of section 7 of the 1987 Act appear to us to be appropriate for our scheme. Section 7(3) provides that where the offender has been sentenced to a period of imprisonment¹⁸ in the proceedings in which the confiscation order has been made, the period of imprisonment imposed for default must run from the expiry of that period.¹⁹ We agree that it should not be possible for the offender to serve the period of imprisonment in default concurrently with the sentence imposed for the offence concerned. A concurrent sentence would not be an effective penalty for default, whereas the prospect of serving a consecutive sentence might encourage an offender to co-operate with an administrator in the realisation of his assets.

8.9 We recommend:

43. (1) **Section 7(2) of the Criminal Justice (Scotland) Act 1987 should be so amended that -**
- (a) **section 398(1) of the Criminal Procedure (Scotland) Act 1975 applies whether the offender is in prison or not;**
 - (b) **the prosecutor is given an opportunity of being heard on the occasion mentioned in section 398(1); and**

¹⁷ *R v Harrow JJ, ex p DPP* (1991) 93 Cr App R 388 at p 391, [1991] 1 WLR 395 at p 398.

¹⁸ Including a period of imprisonment on default of payment of a fine where the default occurred before the issue of the warrant for imprisonment for the default in relation to the order: CJ(S)A, s 7(4).

¹⁹ DTOA, s 6(2) and CJA, s 75(3) are to the same effect.

- (c) the reference to the proviso to section 411(3) of the 1975 Act is deleted.
- (2) Provisions identical to those of section 7 of the 1987 Act, as so amended, should apply to the enforcement of confiscation orders made in respect of the offences to which our recommendations relate.

(Draft Bill, clauses 11, 39(3), (9); Schedule 3, paragraph 9; Schedule 5)

Interest on unpaid sums

8.10 The Drug Trafficking Offences Act 1986 and the Criminal Justice (Scotland) Act 1987 do not provide that interest is chargeable on sums unpaid under confiscation orders imposed in terms of these Acts. Such provision was made by section 15 of the Criminal Justice (International Co-operation) Act 1990. As to orders under the 1987 Act it provides that the offender is liable to pay interest, at the rate applicable to an award of damages in the Court of Session,²⁰ on the amount remaining unpaid at the time when it should be paid, whether forthwith or on the expiry of a period allowed as time to pay. The interest is treated as part of the amount to be recovered under the confiscation order, and any period of imprisonment in default may be increased if the effect of so treating the interest is to increase the maximum period applicable under section 407(1A) of the Criminal Procedure (Scotland) Act 1975. It seems clearly appropriate that similar provisions should be included in our scheme. We therefore **recommend**:

- 44. **Provision for the payment of interest on sums unpaid under confiscation orders should be made in terms similar to those of section 15 of the Criminal Justice (International Co-operation) Act 1990.**

(Draft Bill, clause 12)

²⁰ The current rate is 8 per cent per annum: Rules of the Court of Session 1965 (SI 1965 No 321), r 66 as amended by Act of Sederunt (Rules of the Court of Session Amendment) (Interest in Decrees and Extracts) 1993 (SI 1993 No 770).

Part IX Preservation and realisation of property

Introduction

9.1 In Part VIII we discussed the enforcement of confiscation orders by applying to them the statutory provisions as to the enforcement of fines. We now consider how the court might be empowered to enforce a confiscation order by taking steps to preserve realisable property with a view to its being made available to satisfy the order. It is necessary to have in place a procedure which will meet the obligations of the United Kingdom under the Laundering Convention.¹ Article 3, which is headed "Investigative and provisional measures", provides:

"Each Party shall adopt such legislative and other measures as may be necessary to enable it to identify and trace property which is liable to confiscation pursuant to Article 2, paragraph 1, and to prevent any dealing in, transfer or disposal of such property."

Article 3 is intended to facilitate international co-operation in terms of the Convention. Paragraph 1 of article 11, which is headed "Obligation to take provisional measures", provides:

"At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request."

It is obvious that an offender who knows that a confiscation order may be made, or has been made, against him will have an incentive to frustrate the order by concealing or disposing of any realisable property or by removing it from the jurisdiction of the court. Part I of the Criminal Justice (Scotland) Act 1987, like many other confiscation statutes,² confers jurisdiction to make orders prohibiting persons from dealing in realisable property and further orders for the realisation of such property for the purpose of satisfying a confiscation order. In the discussion paper we proposed that similar provisions should be included in any new legislation.³ On consultation there was general support for this proposal, although one body of consultees expressed reservations about the complexity of the procedures under Part I of the 1987 Act.

9.2 We have concluded that it would not be appropriate for us to recommend a scheme which departed to any significant extent from that in Part I of the 1987 Act. The only aspect of that scheme which our consultees thought cumbersome was that relating to the management and realisation of property by administrators. We understand, however, that there has been little opportunity for that branch of the scheme to be tested in practice. We

¹ On this Convention see paras 2.8, 11.1 above.

² For a review of the relevant provisions in United Kingdom and Commonwealth legislation see D McClean, "Seizing the proceeds of crime: the state of the art" (1989) 38 *International and Comparative Law Quarterly* 334 at pp 352-356; D McClean, *International Judicial Assistance* (1992), pp 207-214.

³ DP, paras 5.38-5.41, props 26, 27.

also note that in England and Wales the corresponding provisions as to receivers in the Drug Trafficking Offences Act 1986 and the Criminal Justice Act 1988 have not been amended by the Criminal Justice Act 1993. We shall therefore propose only certain minor amendments to the scheme in Part I of the 1987 Act, and we shall recommend that any new legislation should include provisions similar to those in the 1987 Act, as so amended.

Our recommendations in outline

9.3 In Part I of the 1987 Act, the Drug Trafficking Offences Act 1986 and Part VI of the Criminal Justice Act 1988 jurisdiction to make orders for the preservation and realisation of property is conferred on the civil courts. Part I of the 1987 Act empowers the Court of Session to make such orders with a view to the satisfaction of confiscation orders made, or to be made, by the High Court of Justiciary. Our scheme likewise confers on the Court of Session or on the sheriff exercising his civil jurisdiction such powers in respect of confiscation orders made, or to be made, by the High Court of Justiciary or by the sheriff in the exercise of his criminal jurisdiction. The "clear dichotomy"⁴ between the provisions conferring such jurisdiction on the civil courts and those conferring jurisdiction on the criminal courts is justified by the essentially civil character of the orders concerned. The court⁵ may, on the application of the prosecutor, make an order known as a "restraint order". Such an order may interdict a specified person from dealing with his realisable property; or it may interdict that person, and any person who appears to have received from him a gift caught by the legislation,⁶ from dealing with their own or the other's property.⁷ The order may be made either before criminal proceedings have been instituted or while they are in progress, and if the latter, both before and after conviction.⁸ The court may vary or recall the order, and must recall it when the proceedings have been concluded.⁹ A restraint order may also be made where the accused has been convicted and the proceedings have been concluded but the prosecutor subsequently applies for a confiscation order on the ground of an increase in benefit or realisable property or on the ground that proceeds have been discovered.¹⁰ There are provisions for appeals against decisions relating to restraint orders.¹¹ Once a restraint order has been made, the court may exercise a number of ancillary powers.¹² It may order inhibition in respect of heritable property affected by the order, or grant warrant for the arrestment of moveable property so affected; it may interdict a person from dealing with the property even though that person is not named in the restraint order; and it may appoint an administrator. The administrator's functions in relation to the realisable property affected by the restraint order are to manage or otherwise deal with it before, and to realise it after, a confiscation order is made.¹³ There are rules for the avoidance of conflicts between the functions of the administrator and the processes of the sequestration of a person, or the winding-up of a company, holding realisable property.¹⁴ We do not

⁴ *In re O (Restraint Order: Disclosure of Assets)* [1991] 2 QB 520 *per* Lord Donaldson of Lymington MR at pp 527-528.

⁵ In this and the following paragraphs "the court" means the Court of Session or the sheriff exercising his civil jurisdiction.

⁶ See paras 4.20-4.22 above.

⁷ See paras 9.7-9.13 below.

⁸ See paras 9.14-9.23 below.

⁹ See paras 9.26-9.28 below.

¹⁰ See paras 7.9, 7.18 above.

¹¹ See paras 9.29-9.30 below.

¹² See paras 9.31-9.37 below.

¹³ See paras 9.39-9.41 below.

¹⁴ See paras 9.42-9.46 below.

recommend the adoption of various special powers conferred on the courts by the drug-trafficking legislation to make orders for the purpose of assisting investigations or for the disclosure of information by Government departments or the accused.¹⁵ On the other hand we recommend that certain new statutory offences concerned with money-laundering should extend to the proceeds of offences punishable on summary complaint by a fine in excess of level 5 on the standard scale or by imprisonment for more than three months.¹⁶

General principles

9.4 The general principles which we recommend should govern the exercise of the powers of the court and the administrator under this scheme are set out in clause 13 of our draft Bill, which is derived from section 23 of the 1987 Act and other legislation.¹⁷

- (i) The first principle is that the powers must be exercised with a view to the satisfaction of the confiscation order, or potential confiscation order, by making available for that purpose the value for the time being of the realisable property.¹⁸
- (ii) Next, safeguards are provided for the protection of third parties. Where the third party is the recipient of a gift caught by the legislation,¹⁹ the powers are to be exercised with a view to realising no more than the value of the gift as assessed in accordance with the rules recommended in Part IV above.²⁰ That is so notwithstanding that "realisable property" is defined in clause 3(1)(b) as including "the whole estate" of the recipient: the exercise of the powers in relation to his whole estate would often be oppressive.
- (iii) Where a third party (other than the recipient of such a gift) is liable to be affected by the exercise of the powers - for example, where both he and the offender have interests in the same property - the powers must be exercised with a view to allowing the third party to retain or recover the value of his property.²¹
- (iv) An order may be made or other action taken in respect of a debt owed by the Crown.²² This provision is designed to elide questions of Crown immunity, for example in relation to arrestment,²³ although there is no modification of the terms of section 45 of the Crown Proceedings Act 1947 which is concerned with the satisfaction of orders granted against the Crown in civil proceedings in Scotland.
- (v) In principle, the obligation to satisfy the confiscation order takes priority over other obligations. Clause 13(6) therefore states a general rule that in exercising

¹⁵ See paras 9.47-9.50 below.

¹⁶ See para 9.51 below.

¹⁷ DTOA, s 13; CJA, s 82; NI(EP)A, Sched 4, para 13.

¹⁸ Draft Bill, cl 13(2).

¹⁹ Draft Bill, cl 13(3).

²⁰ See paras 4.22-4.25 above. CJ(S)A, s 23(3) has "the value for the time being" of the gift.

²¹ *Ibid*, cl 13(4). See *In re Peters* [1988] QB 871 *per* Lord Donaldson of Lymington MR at p 879 on DTOA, s 13(4).

²² *Ibid*, cl 13(5).

²³ Crown Proceedings Act 1947, s 46, proviso, as amended.

the powers no account is to be taken of any obligations of the offender or of the recipient of a caught gift which conflict with the obligation to satisfy the confiscation order. Thus a restraint order, which has the effect of freezing a person's assets with the intention that they should be available to meet a confiscation order,²⁴ cannot be varied so as to permit the payment of a debt owed to one of his creditors, unless the value of the remaining realisable property is clearly enough to satisfy any reasonable confiscation order.²⁵ Special rules apply, however, where the realisable property is held by a person whose estate is sequestrated or by a company which has been wound up.²⁶ Moreover, constraints are placed on the disposal of the offender's family home²⁷ and, as we shall explain,²⁸ a restraint order may contain conditions and exceptions and should allow for the offender's reasonable living and legal expenses.

9.5 We accordingly **recommend**:

- 45. (1) The powers conferred on the civil courts and on administrators in terms of the following recommendations should be exercised -**
- (a) with a view to -**
 - (i) satisfying a confiscation order;**
 - (ii) realising no more than the value for the time being of a caught gift as assessed under the rules in recommendations 16(1) and 17(1) and (2) above;**
 - (iii) allowing anyone other than the offender or the recipient of such a gift to retain or recover the value of any property held by him;**
 - (b) without taking account of any obligations of the offender or recipient which conflict with the obligation to satisfy the confiscation order.**
- (2) In the exercise of these powers it should be competent to make an order or to take other action in respect of a debt owed by the Crown.**
- (3) Section 23 of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.**

(Draft Bill, clauses 13, 39(3); Schedule 3, paragraph 20)

²⁴ See para 9.6 below.

²⁵ *In re W* (Buckley J) 12 September 1990, not fully reported on this point in *The Times*, 15 November 1990: see Mitchell, para 3.20.

²⁶ See paras 9.42-9.46 below.

²⁷ See paras 4.15-4.19 above.

²⁸ See paras 9.11-9.12 below.

The nature of a restraint order

9.6 A restraint order forms part of the procedure for the enforcement of a confiscation order which is likely to be made or has already been made. Its object is to preserve realisable property for the purpose of securing payment of the confiscation order. In England and Wales, where the device of the restraint order was created by the Drug Trafficking Offences Act 1986, it is often regarded as the equivalent, for the purposes of criminal proceedings, of the *Mareva* injunction in civil proceedings²⁹ whereby a defendant is prevented from disposing of assets in order to defeat a judgment.³⁰ There is no similar procedure prior to decree in the Scottish civil courts: the pursuer in an action for payment may be able, in the event of success, to obtain payment of the sum decerned for in consequence of having used arrestment or inhibition on the dependence³¹ or of having obtained consignment or caution (*ie* security) for the sum sued for, but he is not generally³² entitled to have the defender interdicted from disposing of his assets.³³ In Scotland, accordingly, the law and practice as to restraint orders is to be found only in the relevant statutory provisions and any judicial decisions thereon and cannot be developed, as in England and Wales, by reference to the law and practice relative to comparable orders in civil proceedings.

9.7 Under our proposed statutory scheme a restraint order is an order of the Court of Session, or of a sheriff exercising his civil jurisdiction, interdicting a person from dealing with realisable property. The property to which it applies is no longer a part of the person's estate for practical purposes: while he continues to hold a title to the property, all his dealings with it are held in abeyance until the proceedings are concluded and any confiscation order which is made has been satisfied.³⁴ The restraint order operates at two stages: before a confiscation order is made, to preserve the property against the possibility of a confiscation order; and after a confiscation order has been made, to enable the order to be satisfied. A restraint order may be directed against the accused, or against the accused and the recipient of a caught gift. It may interdict the accused from dealing with his realisable property; or, where he has given another person a caught gift, it may interdict each of them from dealing with his own, or the other's, realisable property.

9.8 In either case the order need not specify the property which it affects. A restraint order which is made at a time when investigations into the amount of the person's benefit and realisable property are incomplete, as they may be before or shortly after the institution of proceedings, will necessarily be framed in very wide terms.³⁵ There will also be cases

²⁹ eg *In re Peters* [1988] QB 871 at pp 879-881. They do not appear to correspond exactly: *In re R (Restraint Order)* [1990] 2 QB 307; Mitchell, paras 1.12, 3.01, 3.02.

³⁰ The injunction is named after one of the two cases in which it was first established, *Mareva Compania Naviera SA v International Bulkcarriers SA*, *The Mareva* (1975) [1980] 1 All ER 213. The power to grant such an injunction is now regulated by statute (Supreme Court Act 1981, s 37; Civil Jurisdiction and Judgments Act 1982, s 25) and many decisions: see *Halsbury's Laws of England* (4th ed) vol 24 (re-issue, 1991), sv "Injunctions" paras 866-871.

³¹ Arrestment and inhibition on the dependence are explained in paras 9.33-9.35 below.

³² The court has wide powers to secure the effectiveness of an anti-avoidance order in an application under s 18 of the Family Law (Scotland) Act 1985: see s 18(2) and (4).

³³ See the discussion in *Diligence on the Dependence and Admiralty Arrestments* (1989) Scot Law Com DP No 84, paras 2.45-2.50, 4.1-4.3, 4.7, 4.8, 4.13-4.16.

³⁴ *In re M (Restraint Order)* [1992] 1 QB 377 at pp 382-383. The order does not restrain diligence, but the appointment of an administrator does so: see para 9.40 below.

³⁵ "The policy of the [1986] Act is to catch a large category of property pending detailed investigation as to exactly what may properly be subject to confiscation." (D McClean, *International Judicial Assistance* (1992), p 209.)

where the amount of the confiscation order which is likely to be made, or has been made, is so great that the whole estate of the person or persons named in it will be realisable. In other cases, however, it may be obvious that a person's whole estate need not be realised in order to satisfy a confiscation order. Where, for example, a wealthy accused has realisable property whose value is greater than the value of his benefit from the offence, it should be necessary to restrain only as much of his realisable property as would be required to meet the amount of any confiscation order which is likely to be made.³⁶ In practice, restraint orders which cover a person's whole estate are so drafted as to include, if possible, references to specific items of property.³⁷ It is also necessary when framing a restraint order to observe the principles designed for the protection of the recipients of caught gifts and other third parties to which we have referred above.³⁸

9.9 A restraint order which covers a person's whole realisable property extends to his "whole estate"³⁹ and thus to property which he acquires after the order has been made. If he wishes to deal with any property which is subsequently transferred to him, he should obtain an appropriate variation of the order⁴⁰ before doing so, on pain of being found in contempt of court.⁴¹ A restraint order may apply to property situated outside Scotland⁴² and, if so, it may be made effective in the other jurisdiction provided that the necessary arrangements for enforcement are in place.⁴³ In practice, we would not expect the prosecutor to apply for, or the court to grant, a restraint order covering property in another jurisdiction which could not be enforced.

"Dealing with" property

9.10 Section 9(3) of the Criminal Justice (Scotland) Act 1987 provides that the reference to "dealing with" property in the definition of a restraint order in section 9(1) includes a reference to making a payment in reduction of the amount of a debt, and to removing the property from Great Britain. We propose to adapt the wording of section 9(3) and to add a reference to transferring or disposing of the property.⁴⁴ This addition takes account of the requirement of article 3 of the Laundering Convention that each Party should adopt such legislation and other measures as may be necessary to enable it "to prevent any dealing in, transfer or disposal of" property which is liable to confiscation.

Conditions and exceptions

9.11 Section 9(1) of the 1987 Act provides that the restraint order may be qualified by conditions and exceptions. Thus, where the confiscation order, or potential confiscation order, is or is likely to be for a comparatively small amount, the restraint order may be restricted to property which is less than the accused's whole estate. Section 9(5) further

³⁶ *In re W* (Buckley J) 12 September 1990, not fully reported on this point in *The Times*, 15 November 1990: see Mitchell, para 3.20.

³⁷ eg "The Lord Ordinary ... interdicts [AB and CD] from dealing with their own or each other's realisable property and in particular and without prejudice to that generality with [specified heritable property and sums of money in specified accounts]."

³⁸ See para 9.4(ii), (iii) above.

³⁹ See para 4.10 above.

⁴⁰ See paras 9.26-9.28 below.

⁴¹ See para 9.25 below.

⁴² See paras 4.10, 4.13, recommendation 7 above.

⁴³ See Part XVIII below.

⁴⁴ See draft Bill, cl 21(4).

provides that an exception must be made for reasonable legal expenses payable in relation to the proceedings. The Criminal Justice Act 1988 and the Northern Ireland (Emergency Provisions) Act 1991 provide that a restraint order may be made subject to such conditions and exceptions as may be specified therein, and may make such provision as the court thinks fit for living expenses and legal expenses.⁴⁵ Before the enactment of the 1988 Act the Court of Appeal expressed the view that the jurisdiction to make or vary restraint orders was closely analogous to the jurisdiction to make or vary *Mareva* injunctions:⁴⁶ in both cases the object was to strike a balance at an interlocutory stage between keeping assets available to satisfy a final order, if and when one was made, and meeting the reasonable requirements of the owner in the meantime. The Court stated that a restraint order should not prevent the meeting of ordinary and reasonable expenditure, although the power to qualify the order with conditions and exceptions had to be exercised with a view to keeping available the value of the realisable property for the purpose of satisfying a confiscation order.⁴⁷

9.12 We have concluded that it should be competent for a restraint order to contain conditions and exceptions; that an exception in relation to legal expenses should be mandatory, as in the 1987 Act (otherwise a wealthy accused might qualify for legal aid⁴⁸), and that there should be a discretionary exception for living expenses, as in the Acts of 1988 and 1991.

9.13 We recommend:

46. (1) **The Court of Session or a sheriff exercising his civil jurisdiction should be empowered to make a restraint order.**
- (2) **A restraint order should interdict -**
 - (a) **a specified person from dealing with his realisable property, or**
 - (b) **that person and the named recipient of a caught gift from dealing with their own, or the other's, realisable property,****whenever that property was acquired and whether it is described in the order or not.**
- (3) **"Dealing with" property should include -**
 - (a) **making a payment in reduction of the amount of a debt;**
 - (b) **removing the property from the jurisdiction of the court; and**

⁴⁵ CJA, s 77(1), (2); NI(EP)A, Sched 4, para 5(1), (2). A restraint order under the DTOA, s 8, may be made subject to exceptions relating to the defendant's living expenses and legal expenses: RSC Ord 115, r 4(1); *In re P*, *In re W*, *The Times*, 11 April 1990. In *In re Watson* Hutchison J observed that the purpose of a restraint order under the DTOA was to prevent the dissipation of assets, not to put the defendant in shackles, and suggested, *obiter*, that expenditure necessary to preserve and protect a legitimate business from collapse could probably be allowed (13 February 1990, unreported: *cit* D McClean, *International Judicial Assistance* (1992), p 209).

⁴⁶ On *Mareva* injunctions see para 9.6 above.

⁴⁷ *In re Peters* [1988] QB 871 at pp 879-881, referring to DTOA, ss 8(1), 13(2).

⁴⁸ *Customs and Excise Commissioners v Norris* [1991] 2 QB 293.

- (c) transferring or disposing of the property.
- (4) The court in making a restraint order -
 - (a) should be entitled to specify conditions and exceptions and, in particular, to make such provision as it thinks fit for reasonable living expenses; and
 - (b) should be required to make provision for reasonable legal expenses payable in relation to the proceedings.

(Draft Bill, clause 21(1)(a), (2), (4))

When a restraint order should be competent

9.14 A restraint order should be competent at any stage of the period from the time when proceedings are imminent to the time when any confiscation order is satisfied. That period may be regarded as falling into two distinct stages: before a confiscation order is made, where the object of a restraint order is to preserve property against the possibility of the making of a confiscation order; and after a confiscation order is made, where its object is to preserve property from which the confiscation order may be satisfied. A restraint order should also be competent where a confiscation order is likely to be made after the proceedings have been concluded. It will be convenient to consider four sets of circumstances: first, where proceedings are in progress - here the court should be able to make a restraint order before and after making a confiscation order; secondly, before the alleged offender has been charged; thirdly, where the proceedings have been concluded, a confiscation order having been imposed, and the prosecutor applies for a new confiscation order on the ground of an increase in benefit or realisable property; and fourthly, where the proceedings have been concluded without a confiscation order having been imposed, and the prosecutor applies for a confiscation order on the ground that it has become apparent that the offender has obtained hitherto undiscovered benefit from the offence. In each of these four situations certain conditions should be met before a restraint order may be made, as we explain in the following paragraphs.

Proceedings in progress

9.15 In the first category, proceedings have been instituted in Scotland against a person for an offence to which Part I of the draft Bill applies, that is, an offence on indictment other than a drug-trafficking or terrorism offence, or a summary offence punishable by a fine in excess of level 5 on the standard scale or by imprisonment for more than three months.⁴⁹ In cases in this category a restraint order may be made provided that the proceedings have not been concluded and either a confiscation order has been made or it appears to the court that there are reasonable grounds for thinking that a confiscation order may be made in the event of conviction.

9.16 It is necessary to define for the purposes of this rule the times when proceedings for an offence should be taken to have been instituted and concluded. Clause 38(3) of the draft Bill provides that proceedings are instituted when a person is arrested without warrant; or

⁴⁹ See paras 3.2-3.4, recommendation 2 above.

when he is charged with the offence without being arrested; or when a warrant to arrest or to cite him is granted; or when a petition is intimated to him or an indictment or a complaint is served on him; or, in summary proceedings, on the first calling of the case. Where more than one of these applies, proceedings are taken to have been instituted at the time of the earlier or earliest of them. The times when the accused first appears before the court, or when the trial begins, are irrelevant.

9.17 The various circumstances in which proceedings are taken to have been concluded are listed in clause 22(7), the effect of which is that they are concluded only where there is no longer any possibility of a confiscation order being made (other than a new order following the post-trial discovery of proceeds) or where a confiscation order has been satisfied. The list in clause 22(7) is derived from section 47(5) of the Criminal Justice (Scotland) Act 1987 and is comprised of cases where the trial diet is deserted *simpliciter*; the accused is acquitted or, under the rules for the prevention of delay in trials,⁵⁰ is discharged or liberated; the court sentences or otherwise deals with him without making a confiscation order and without postponing a decision as regards making such an order; the court postpones a decision and decides not to make such an order; the accused's conviction is quashed on appeal; or a confiscation order has been made and is satisfied, whether by payment of the amount due under the order or by the accused serving a period of imprisonment in default. Thus, the proceedings are not necessarily concluded for the purposes of the rule by the conclusion of the trial or the determination of an appeal.

9.18 We now consider the two alternative conditions referred to in paragraph 9.15 above which must be met before a restraint order may be made while proceedings are in progress. The first is that a confiscation order should have been made: it is obviously necessary that in these circumstances a restraint order should be competent. The second is that it must appear to the court that there are reasonable grounds for thinking that a confiscation order may be made in the event of conviction. These two conditions are derived from section 76(1)(c) of the Criminal Justice Act 1988 but there the second is differently expressed as "... or it appears to the court that there are reasonable grounds for thinking that a confiscation order may be made in [the proceedings]".⁵¹ That requirement has been held to mean that it should appear that there are reasonable grounds for thinking (i) that the defendant will be found guilty of an offence to which Part VI of the 1988 Act applies; (ii) that the court will be satisfied that the value of his benefit is at least £10,000; (iii) that the value of his realisable assets is at least £10,000; and (iv) that in all the circumstances a confiscation order of at least £10,000 could be made.⁵²

9.19 The matters to be considered under our scheme would be somewhat different. We do not recommend a lower financial limit of £10,000 or any other figure.⁵³ Of greater importance, however, is our view as to (i) above; whether it should appear to the court that there are reasonable grounds for thinking that the accused will be found guilty. We do not consider that it would be appropriate to require a Scottish judge who, unlike an English

⁵⁰ 1975 Act, ss 101, 331A, respectively substituted and inserted by the Criminal Justice (Scotland) Act 1980, s 14.

⁵¹ PT(TP)A, Sched 4, para 13(2)(c) is in similar terms. DTOA, s 7(1)(c)(ii) and NI(EP)A, Sched 4, para 4(2)(b)(ii), substituted by the Criminal Justice Act 1993, ss 13(3), 41(3) (not yet in force, 1 May 1994), prescribe a condition that it should appear to the court that there is reasonable cause to believe that the defender has benefited from drug trafficking or terrorist-related activities.

⁵² *In re K (McCullough J)*, *The Times*, 30 September 1990.

⁵³ See paras 3.7, 3.8, recommendation 4 above.

judge, is not given any information about the evidence before the trial,⁵⁴ to consider the nature of the evidence against the accused and form a view as to the prospects of his being convicted. It is, we think, significant that section 8 of the Criminal Justice (Scotland) Act 1987, which prescribes the conditions which must be met before a restraint order may be made in a drug-trafficking case, differs from the corresponding provision in section 7 of the Drug Trafficking Offences Act 1986 in that it does not require the court to be satisfied that there is reasonable cause to believe that the accused has benefited from drug trafficking.⁵⁵ We therefore propose that the application for a restraint order should only narrate that proceedings have been instituted against the accused for a specified offence, that it is the intention of the prosecutor to move for a confiscation order in the event of conviction, that the value of the accused's benefit from the offence is, or is believed to be, a particular amount and that the value of the realisable property is, or is believed to be, another particular amount. The judge would then have to consider whether there were reasonable grounds for thinking that, in the event of conviction, the court in the exercise of its discretion might make a confiscation order. His decision would depend primarily on the prosecutor's valuations of the benefit and realisable property, since he would wish to form a view as to the amount in which any confiscation order would be likely to be made. In some cases it might not be necessary to restrain the whole of the accused's realisable property.⁵⁶ In any event the judge's only other information about the case would generally be the statement of the charge⁵⁷ and he would have no information about the personal circumstances of the accused other than his name and designation. In some cases, however, it might be proper to give the judge further information. For example, in a case where the alleged offence involved the misappropriation of property and there was an alleged victim in whose favour a compensation order could properly be made in the event of conviction, the compensation being payable out of any sums applied towards the satisfaction of a confiscation order,⁵⁸ those circumstances might lead the judge to conclude that there were reasonable grounds for thinking that a confiscation order might be made.

9.20 We therefore **recommend**:

- 47. (1) The court should be entitled to make a restraint order where -**
- (a) proceedings have been instituted in Scotland against a person for an offence of the kind specified in recommendation 2 above;**
 - (b) the proceedings have not been concluded; and**
 - (c) either -**
 - (i) a confiscation order has been made, or**

⁵⁴ See *Evidence: Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings* (1992) Scot Law Com No 137, paras 2.63, 4.19.

⁵⁵ See para 9.18 above, first footnote.

⁵⁶ See para 9.8 above.

⁵⁷ In practice a copy of the petition specifying the charge is produced with and held as repeated in an Outer House petition for a restraint order in terms of CJ(S)A, s 8.

⁵⁸ See paras 5.20-5.24 above.

- (ii) it appears to the court that there are reasonable grounds for thinking that a confiscation order may be made in the event of conviction.
- (2) Proceedings for an offence should be taken to have been instituted against a person -
 - (a) on his arrest without warrant;
 - (b) when he is charged with the offence without being arrested;
 - (c) when a warrant to arrest him is granted;
 - (d) when a warrant to cite him is granted;
 - (e) in summary proceedings, on the first calling of the case; or
 - (f) when a petition is intimated to him or an indictment or a complaint is served on him,and where more than one of these applies, at the time of the earlier or earliest of them.
- (3) Proceedings should be taken to have been concluded on the occurrence of any of the events listed in section 47(5) of the Criminal Justice (Scotland) Act 1987, as extended to summary proceedings.

(Draft Bill, clauses 22(1), (2), (7); 38(3))

Before proceedings instituted

9.21 It is also necessary to provide for cases where the institution of proceedings, as defined above, might lead the accused to take immediate steps to dispose of his assets, or where it is urgently necessary to place property under restraint although a charge cannot yet be brought. Section 8(1)(b) of the Criminal Justice (Scotland) Act 1987 empowers the Court of Session to make a restraint order where the Court is satisfied that a procurator fiscal proposes to petition within 28 days for warrant to arrest and commit a person suspected of a drug-trafficking offence, that the suspicion is reasonable and that it is intended that the trial should proceed in the High Court. We recommend a provision in somewhat different terms. We propose that a restraint order should be competent where the court is satisfied that it is proposed to institute proceedings against a person for an offence to which Part I of the draft Bill applies. Further, as in a case where an application is made when proceedings are in progress, it should appear to the court that there are reasonable grounds for thinking that a confiscation order might be made in the event of conviction. We do not recommend, however, the adoption of the condition in section 8(1)(b) of the 1987 Act that the court should be satisfied "that the suspicion is reasonable". A Scottish court would have no means of forming an independent judgment on that matter and would have little alternative to accepting the *ipse dixit* of the prosecutor. We do not envisage the introduction into Scottish practice of some novel procedure whereby the prosecutor would lodge affidavits or would otherwise provide the court with detailed information in support of the proposed charge.

We therefore consider that that condition should be deleted from section 8(1)(b) and should not appear in the draft Bill.

9.22 Section 8(4) of the 1987 Act provides that if the 28 days expire without the petition having been presented, the restraint order must be recalled. There is a question whether it would be appropriate to adopt the 28-day limit in the draft Bill. There is no time-limit in the corresponding provisions in other legislation, which state only that the order should be discharged if the proceedings are not instituted within such time as the court considers reasonable.⁵⁹ It is to be expected that in Scotland the public prosecutor would be most unlikely to apply for an order unless he was confident that proceedings would be instituted; and the time reasonably required to complete the investigations necessary before a charge can be brought will vary from case to case. It may be that in practice an application would generally be made very shortly before the institution of proceedings. Notice of the order must be given to persons affected by it;⁶⁰ and an interval between the notification and the institution of proceedings might result in the disappearance of the alleged offender or his assets or both. On the other hand we consider that the draft Bill should provide a safeguard against the freezing of the property of a suspect or any other person holding realisable property for an indefinite time without any prosecution being brought for the charge in respect of which the restraint order was made. Moreover, it would be curious if Parliament, having provided such a safeguard in the very strict confiscation regime for drug-trafficking cases, failed to do so in relation to other cases. We therefore propose a safeguard in the form of a limited period of validity for a restraint order made before the institution of proceedings: not only should the court be satisfied that the proceedings will be instituted within 28 days, but the order should cease to have effect if they are not. On the expiry of the 28 days the prosecutor should be obliged to apply immediately for its recall, and the court should be obliged to grant the application. We accordingly **recommend**:

- 48. (1) The court should also be entitled to make a restraint order where -**
- (a) the court is satisfied that the prosecutor proposes within 28 days to institute proceedings against a person for an offence of the kind specified in recommendation 2 above; and**
 - (b) it appears to the court that there are reasonable grounds for thinking that a confiscation order may be made in the event of conviction.**
- (2) Where the proposed proceedings have not been instituted within 28 days the prosecutor should be obliged to apply to the court immediately upon the expiry of the 28 days for the recall of the restraint order and the court should be required to grant the application.**

(Draft Bill, clause 22(1), (3)(a), (4))

⁵⁹ DTOA, s 7(2), (4), NI(EP)A, Sched 4, para 4(2), (4) as substituted by the Criminal Justice Act 1993, ss 13(4), 41(3); CJA, s 76(2)(a), (4); PT(TP)A, Sched 4, para 13(3), (4).

⁶⁰ See para 9.25 below.

9.23 It should also be possible for the court to make a restraint order in the two situations discussed in Part VII where property comes to light after the offender has been sentenced and the prosecutor makes an application for a confiscation order: for a new order, where an order has already been made,⁶¹ or simply for an order, where none has been made.⁶² The prosecutor should be entitled to apply for a restraint order both before and after he makes his application for a confiscation order. We propose that the legitimate interests of the offender and any other holder of realisable property should be protected by a requirement that it should appear to the court that there are reasonable grounds for thinking that a confiscation order may be made. Where the application for the restraint order precedes the making of the application for the confiscation order a 28-day rule should apply, as in an application made before the institution of proceedings.

9.24 We consider that it would be appropriate to amend the provisions of Part I of the 1987 Act as to when a restraint order should be competent in such a way as to make them consistent with the corresponding provisions of the draft Bill. We **recommend**:

49. (1) **The court should be entitled to make a restraint order where the prosecutor has made an application in terms of either recommendation 38 or recommendation 42 above and it appears to the court that there are reasonable grounds for thinking that the application may be granted.**
- (2) **The court should also be entitled to make a restraint order where -**
- (a) **the court is satisfied that the prosecutor proposes within 28 days to make an application in terms of either recommendation 38 or recommendation 42 above; and**
 - (b) **it appears to the court that there are reasonable grounds for thinking that the application may be granted.**
- (3) **Where the proposed application has not been made within 28 days the prosecutor should be obliged to apply to the court immediately upon the expiry of the 28 days for the recall of the restraint order and the court should be required to grant the application.**
- (4) **Part I of the Criminal Justice (Scotland) Act 1987 should be so amended as to give effect to recommendations 46 to 49(3) above.**

(Draft Bill, clauses 22(1), (3)(b), (4), 39(3); Schedule 3, paragraphs 11, 32)

Procedure in applications for restraint orders⁶³

9.25 We propose that, as in other legislation, a restraint order should be made only on the application of the prosecutor.⁶⁴ Since speed and confidentiality are essential lest property be

⁶¹ See paras 7.2-7.9, recommendation 38 above.

⁶² See paras 7.17-7.18, recommendation 42 above.

⁶³ The Rules of the Court of Session make provision for applications in relation to restraint orders under the CJ(S)A (rr 201E-201G) and the PT(TP)A (rr 201T-201V).

disposed of before the order comes into effect, the application should be made *ex parte*, that is, without notice to⁶⁵ and in the absence of the alleged offender or any other party, and should be heard in chambers. The order should, however, be intimated to persons affected by it.⁶⁶ It would be necessary to consider carefully the persons to whom intimation should be made⁶⁷ and to intimate to anyone who was in a position to deal with the realisable property affected by the order. Any person interdicted by the order who acted in breach of its terms after he had sufficient knowledge of them⁶⁸ would be liable to punishment in the same way as for a breach of interdict: his disobedience of a competent order of court would constitute contempt of court.⁶⁹ Where the restraint order relates to heritable property in Scotland, the prosecutor should be required to enter a certified copy of the order in the appropriate property register. We therefore **recommend**:

50. (1) **A restraint order -**
 - (a) **should be made only on an application by the prosecutor;**
 - (b) **should be made on an *ex parte* application which should be heard in chambers; and**
 - (c) **should be intimated to persons affected by the order.**
- (2) **Where a restraint order is made in relation to heritable property in Scotland, the prosecutor should forthwith record a certified copy of the order in the General Register of Sasines or, as the case may be, register it in the Land Register of Scotland.**

(Draft Bill, clause 21(1), (3), (5))

Variation and recall of restraint orders

9.26 We propose that, as with restraint orders made under the confiscation provisions of other statutes, the court should be entitled to vary or recall a restraint order on the application of the prosecutor or any person having an interest, and should be required to recall it when proceedings for the offence are concluded.⁷⁰ We have already recommended that a restraint order made before the institution of proceedings, or before the making of an application by the prosecution for a confiscation order after the offender has been sentenced, should be recalled if the proceedings are not instituted, or if the application is not made,

⁶⁴ In practice, where the restraint order would affect heritage he might apply at the same time for an order for inhibition (see para 9.34 below) and for the appointment of an administrator (see paras 9.39-9.40 below).

⁶⁵ *Harris* 1993 SCCR 881.

⁶⁶ CJ(S)A, ss 8(1), 9(2); DTOA, s 8(4); CJA, s 77(5); PT(TP)A, Sched 4, para 14(1); NI(EP)A, Sched 4, para 5(5).

⁶⁷ *In re R (Restraint Order)* [1990] 2 QB 307 at p 313.

⁶⁸ *Henderson v Maclellan* (1874) 1 R 920; *Anderson v Moncrieff* 1966 SLT (Sh Ct) 28. The order may be effective notwithstanding the absence of formal intimation: *Robertson v McDonald* (1829) 7 S 272; *Clark v Stirling* (1839) 1 D 955; *Matheson v Fraser* 1911, 2 SLT 493; *Neville v Neville* 1924 SLT (Sh Ct) 43.

⁶⁹ *Gribben v Gribben* 1976 SLT 266 at p 269. Contravention of a restraint order made under the NI(EP)A is a criminal offence: Sched 4, para 9.

⁷⁰ CJ(S)A, s 8(2), (5)(b); DTOA, s 8(5) substituted by the Criminal Justice Act 1993, s 13(6), and s 8(5A) inserted by CJA, Sched 5, para 3(1); CJA, s 77(6), (7); PT(TP)A, Sched 4, para 14(2), (3); NI(EP)A, Sched 4, para 5(6) substituted by the Criminal Justice Act 1993, s 41(5), and para 5(7). (Ss 13 and 41 of the 1993 Act are not yet in force at the time of writing, 1 May 1994).

within 28 days.⁷¹ We now add three further recommendations. Where a restraint order relating to heritable property in Scotland is recalled, the prosecutor should be required to enter a certified copy of the recalling order in the Register in which such a copy of the restraint order was entered.⁷² Where a restraint order has been made relative to an application by the prosecutor after the offender has been sentenced, the court should be required to recall it when the proceedings in the application are concluded, that is, when the application is refused or, if it is granted, when the confiscation order then made is satisfied either by the payment of the amount due or by the serving of a period of imprisonment in default. Where a restraint order is in force after a confiscation order has been made, an administrator⁷³ should not realise the property concerned in the period between the making of an application for the recall of the order and the court's decision on the application.⁷⁴

9.27 A "person having an interest" includes both the accused and the recipient of a gift. The accused may seek a variation because, for example, he wishes to deal with property he has acquired since the order was made;⁷⁵ or because, notwithstanding the mandatory provision made for legal expenses when the restraint order was framed,⁷⁶ he needs additional funds to meet further legal expenses, such as the expenses of an appeal.⁷⁷ As to the recipient of a gift, we have recommended that a recipient should be entitled to apply to the court for a declaration that the gift should not be, or should cease to be, realisable provided that certain conditions are satisfied.⁷⁸ We now recommend a corresponding provision to the effect that the court should have a discretion to recall a restraint order on the application of a recipient if satisfied on a balance of probabilities that the same conditions are met. Thus, while a restraint order is similar in effect to an interim interdict, the rule governing its recall would be different where an application was made by a recipient. We envisage, however, that in some cases it might be possible for the court to reach a decision without hearing oral evidence, either because the relevant facts were not in dispute or because the recipient was able to adduce evidence of sufficient weight in the form of affidavits or other documents. Where the court recalls a restraint order on the application of a recipient or any other person having an interest, it should be entitled to order that that person's property shall cease to be realisable.⁷⁹

9.28 We recommend:

51. (1) **The court should be entitled to vary or recall a restraint order at any time on the application of the prosecutor or any person having an interest.**
- (2) **Where a restraint order is in force after a confiscation order has been made, an administrator should not realise the property concerned in the period between the making of an application for the recall of the order and the court's decision on the application.**

⁷¹ See paras 9.22, 9.23, recommendation 48(2) above; para 9.24, recommendation 49(3) above.

⁷² See para 9.25 above.

⁷³ See paras 9.39-9.41 below.

⁷⁴ CJ(S)A, s 8(4).

⁷⁵ See para 9.8 above.

⁷⁶ See para 9.12 above.

⁷⁷ *Customs and Excise Commissioners v Norris* [1991] 2 QB 293.

⁷⁸ See paras 4.28-4.30, recommendation 19 above.

⁷⁹ CJ(S)A, s 8(3).

- (3) The court should be entitled to grant an application for recall at the instance of the recipient of a gift if the recipient satisfies the court on a balance of probabilities that the three conditions referred to in recommendation 19(2) above are met.
- (4) Where the court has recalled a restraint order at the instance of a person having an interest, it should be entitled to order that property of that person shall cease to be realisable.
- (5) Where -
 - (a) proceedings for the offence, or
 - (b) proceedings in an application by the prosecutor in terms of recommendation 49(1) above have been concluded, the prosecutor should be required to apply to the court forthwith for the recall of the restraint order and the court should be required to grant the application.
- (6) Proceedings in an application in terms of recommendation 49(1) above should be taken to have been concluded where -
 - (a) the application is refused, or
 - (b) the confiscation order made when the application was granted is satisfied either by payment of the amount due or by the offender serving a period of imprisonment in default.
- (7) Where the court has recalled a restraint order relating to heritable property in Scotland, the prosecutor should forthwith record a certified copy of the recalling order in the General Register of Sasines or, as the case may be, register it in the Land Register of Scotland.

(Draft Bill, clauses 22(5), (6), (8), 24(1), (2), (3), (4))

Appeals

9.29 Part I of the Criminal Justice (Scotland) Act 1987 does not make any provision for appeals against decisions in relation to restraint orders. In the Court of Session an application for a restraint order is made by petition to the Outer House, and applications for the variation or recall of the order are made by motion in the process of the petition to which the application relates.⁸⁰ The closest analogue to a restraint order appears to be an interim interdict. In the Court of Session an interlocutor granting or refusing or recalling or refusing to recall an interim interdict may be reclaimed against, without leave, not later than the fourteenth day after the date on which the interlocutor is pronounced, unless either of these days falls in vacation or recess: in such a case the reclaiming days are extended to 21.⁸¹ We

⁸⁰ RC 201E(1), 201G(1), inserted by SI 1990 No 705.

⁸¹ RC 264(b), as amended.

propose that the same rule should apply to an interlocutor refusing, varying, recalling or refusing to vary or recall a restraint order.⁸² In the sheriff court an interlocutor granting or refusing interim interdict may be appealed without leave to the sheriff principal or with leave to the Court of Session; but an interlocutor recalling or refusing to recall an interim interdict may be appealed only with leave.⁸³ Where leave is required, an application must be made within seven days after the date of the interlocutor; and where leave is granted the appeal must be made within seven days after the date on which leave was granted. Where leave is not required, the interlocutor may be appealed within 14 days after its date.⁸⁴

9.30 We consider that it would be in the interests of uniformity of practice and consistency in decisions if the appeal rules in the Court of Session and the sheriff court were the same, with the result that a reclaiming motion or an appeal could be taken to the Inner House of the Court of Session without leave. The time for reclaiming or appealing should be prescribed by Act of Sederunt. We therefore **recommend**:

52. (1) **It should be competent to reclaim or appeal to the Court of Session without leave against an interlocutor refusing or varying or recalling or refusing to vary or recall a restraint order, within such period as may be prescribed by Act of Sederunt.**
- (2) **Part I of the Criminal Justice (Scotland) Act 1987 should be so amended as to give effect to recommendations 50 to 52(1) above.**

(Draft Bill, clauses 24(5), 39(3); Schedule 3, paragraph 11)

Ancillary powers

9.31 Once a restraint order has been made under Part I of the Criminal Justice (Scotland) Act 1987 the Court of Session may exercise a number of ancillary powers. It may interdict a person from dealing with the property affected by the order even though that person is not named in the order; it may order the inhibition of heritable property affected by the order, or grant warrant for the arrestment of moveable property so affected; and it may appoint an administrator. We propose in the following paragraphs that courts which make restraint orders in terms of the new legislation should have similar powers. It is also a consequence of the making of a restraint order under the 1987 Act that a constable, or a person commissioned by the Commissioners of Customs and Excise, may seize any property subject to the order for the purpose of preventing its removal from Great Britain. The property seized is dealt with in accordance with the directions of the court.⁸⁵ We **recommend** a similar power:

⁸² A party aggrieved by the granting of a restraint order should not reclaim but should in the first instance apply for the recall or variation of the order.

⁸³ Sheriff Courts (Scotland) Act 1907, ss 27(a), 28(1)(d), as amended.

⁸⁴ Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, Sched 1, rules 31.1, 31.2(1), (2), which came into force on 1 January 1994.

⁸⁵ CJ(S)A, s 10. The corresponding provisions are DTOA, s 8(8) (as amended by CJ(S)A, s 45(7)(b)), s 38(1); CJA, ss 77(10), 102(1); PT(TP)A, Sched 4, para 15; NI(EP)A, Sched 4, para 5(10), (11).

53. (1) **A constable or a person commissioned by the Commissioners of Customs and Excise should be entitled to seize property subject to a restraint order for the purpose of preventing its removal from the jurisdiction of the court.**
- (2) **The property should then be dealt with in accordance with the directions of the court.**

(Draft Bill, clause 21(6), (7))

Interdict

9.32 As in section 12 of the 1987 Act, the court should have power to interdict a person who is not subject to a restraint order from dealing with property affected by the order. Such a person may be in possession of property belonging to the offender or to the recipient of a caught gift. The definition of "dealing with" and the rules as to an application for such an interdict, variation, recall and appeals should be the same as for a restraint order. In addition, where the restraint order relative to the interdict is recalled, the clerk of court should have the duty of so informing forthwith each of the persons interdicted. We recommend:

54. (1) **The court should be entitled to interdict a person not subject to a restraint order from dealing with property affected by the order.**
- (2) **The procedural rules applicable to restraint orders should apply to such an interdict.**
- (3) **Where the restraint order is recalled, the clerk of court should be obliged so to inform forthwith each of the persons interdicted.**

(Draft Bill, clauses 24(6), 25(8)-(10))

Inhibition

9.33 In the 1987 Act the inhibition of heritable property affected by a restraint order or by an interdict under section 12 is regulated by section 11. Inhibition is a procedure whereby a person may be prevented from dealing with heritable property. Since inhibition proceeds on a writ passing under the Signet, or Seal, of the Court of Session, it is not competent in the sheriff court. The procedure under section 11 is too cumbersome to be convenient in an emergency. The Lord Advocate must apply to the Court of Session for a warrant for inhibition; he must then have a certified copy of the interlocutor served personally by messengers-at-arms on the person to be inhibited; and he must have the execution of service of the inhibition recorded in the Register of Inhibitions and Adjudications. It is only then that the person is inhibited, unless advantage is taken of a procedure under section 155 of the Titles to Land Consolidation (Scotland) Act 1868 whereby a notice of inhibition may be recorded prior to the recording of the inhibition itself and will take effect from the date of recording of the notice if the inhibition is recorded within 21 days.

9.34 We propose to substitute for this procedure a simpler scheme for cases where heritable property in Scotland is affected by a restraint order. This scheme would replace the existing provisions in section 11 of the 1987 Act and in the corresponding paragraph 16

of Schedule 4 to the Prevention of Terrorism (Temporary Provisions) Act 1989. The Court of Session or the sheriff in the exercise of his civil jurisdiction would be entitled, on the application of the prosecutor, to make an order inhibiting any person who had been interdicted by the restraint order, or had been interdicted in relation to the property by an ancillary interdict. We would expect that as a general rule, in a case where the prosecutor was seeking a restraint order affecting heritage he would make such an application at the same time, and the court would make both orders together. The recording of a certified copy of the order for inhibition in the Register of Inhibitions and Adjudications would have the same effect, from the date of recording, as if letters of inhibition at the instance of the prosecutor had been signeted, executed against the person named in the order and recorded. The inhibition would prescribe on the lapse of five years from the date of recording.⁸⁶ The court would have power to recall or restrict the order. Where it did so, a certified copy of the order for recall or restriction would be likewise recorded. It would take effect from the date of its making, not from the date of its recording, since the new order, unlike the original order, would not prejudice third parties who had dealt with the property between the date of the order and the date of recording.

Arrestment

9.35 Section 11 of the 1987 Act also deals with the arrestment of moveable property affected by a restraint order. In a civil action for payment, arrestment is a procedure whereby the pursuer may attach moveable property of the defender which is in the hands of a third party, and debts and obligations to account to the defender by a third party, with the object of obtaining from the subjects attached the payment of his debt, in whole or in part, in the event of his succeeding in the action. The effect of the arrestment is to prohibit the defender from alienating, and the third party from parting with, the subject. Under section 11, a warrant for arrestment granted by the Court of Session on the application of the Lord Advocate attaches moveable property if it would be arrestable were the person entitled to it a debtor.⁸⁷ We propose to adopt this procedure and extend it to the sheriff court.

Provisions applicable to inhibition and arrestment

9.36 We propose that the prosecutor should be required to intimate the making of an order for inhibition, or the granting of a warrant for arrestment, to any persons thereby affected. The recording of a certified copy of an order for inhibition, or the execution of a warrant for arrestment, should not prejudice the exercise of an administrator's powers in respect of the property concerned; and when the relevant restraint order ceases to have effect, the prosecutor should be required to apply to the court for the recall or restriction of the inhibition or arrestment and to transmit a copy of an order recalling or restricting an inhibition to the Keeper for recording in the Register.

9.37 We **recommend**:

⁸⁶ The draft Bill, Sched 4, para 1, so provides by amending s 44(3) of the Conveyancing (Scotland) Act 1924.

⁸⁷ In practice, where a valuable moveable asset is to be the subject of a restraint order, the Crown may also obtain a warrant for arrestment: A N Brown, "Money laundering in Scotland: the law" in *Money Laundering* ed H L MacQueen (1993) 50 at p 56.

55. (1) The procedures for inhibition and arrestment relative to property affected by a restraint order or by an ancillary interdict should be regulated as described in paragraphs 9.34 to 9.36.
- (2) The procedure for inhibition in section 11 of the Criminal Justice (Scotland) Act 1987 and paragraph 16 of Schedule 4 to the Prevention of Terrorism (Temporary Provisions) Act 1989 should be replaced by the procedure described in paragraph 9.34.

(Draft Bill, clauses 25, 39(3), (4); Schedule 3, paragraph 12; Schedule 4, paragraph 12)

Disclosure

9.38 A remarkable feature of the practice of the courts in England and Wales in making a restraint order is the inclusion in the order of a requirement that the defendant should disclose the value, nature and whereabouts of his assets, with a condition that the material so disclosed should not be used in the prosecution of the defendant.⁸⁸ It appears that disclosure orders are normally sought in all cases in which restraint orders are made.⁸⁹ The object of the disclosure requirement is to make the restraint order effective. It has been said that if a restraint order is made but the Crown Prosecution Service do not know what property the defendant has, or the full extent of his property, there is no way in which the Crown Prosecution Service can ensure that he complies with the order.⁹⁰ The House of Lords has recently approved the practice of attaching to the requirement the condition that the material disclosed should not be used in the defendant's prosecution.⁹¹ The Court of Session does not appear to have exercised comparable powers in relation to restraint orders under the 1987 Act and it has not been suggested to us that statutory provisions should now confer such powers or regulate their exercise. Accordingly we make no recommendations.

Administrators

9.39 Part I of the 1987 Act empowers the Court of Session, on the application of the Lord Advocate, to appoint an administrator in respect of property affected by a restraint order. We understand that it has very seldom been necessary to appoint an administrator but the scheme has been found to work satisfactorily. We therefore propose the amendment of sections 13 to 24 of the 1987 Act to reflect the recommendations made in this report, and the adoption of virtually identical provisions in the draft Bill. The amendments are listed in Schedule 3 to the draft Bill and their effect is shown in Appendix B. The corresponding provisions of the draft Bill relative to administrators are set out in Schedule 1. Later in this report we recommend that it should also be competent to appoint an administrator in relation to forfeitable property.⁹² The provisions of Schedule 1 apply, with variations, to all administrators appointed in terms of the draft Bill.

9.40 We now explain the effect of the amended provisions of the 1987 Act and the matching provisions in Schedule 1 to the Bill in so far as they relate to an administrator

⁸⁸ eg *In re T (Restraint Order: Disclosure of Assets)* [1992] 1 WLR 949.

⁸⁹ *In re O (Restraint Order: Disclosure of Assets)* [1991] 2 QB 520 at p 526.

⁹⁰ *Ibid* at pp 528, 530-531.

⁹¹ *Istel Ltd v Tully* [1993] AC 45. The practice is noted in *The Privilege Against Self-Incrimination in Civil Proceedings*, a consultation paper issued by the Lord Chancellor's Department in July 1992, para 10.

⁹² See paras 16.11, 16.12, recommendation 96 below.

appointed in relation to realisable property. An administrator may be appointed, on the application of the prosecutor, either by the Court of Session or by the sheriff in the exercise of his civil jurisdiction, according as the relevant criminal proceedings are High Court or sheriff court proceedings. His functions are to manage or otherwise deal with property affected by a restraint order and, where a confiscation order has been made, to realise the property.⁹³ In the exercise of his powers he is required to comply with certain general principles which have already been discussed.⁹⁴ His powers and duties are prescribed in detail.⁹⁵ Where a confiscation order has been made, he must take possession of the property as soon as practicable: in other cases he may do so at his discretion.⁹⁶ The court may facilitate realisation by making orders affecting property held by third parties.⁹⁷ Further provisions prescribe how money received by the administrator is to be dealt with and how the proceeds of a realisation of property and other sums are to be applied.⁹⁸ Other provisions deal with the administrator's accounts, remuneration, expenses, liability and discharge.⁹⁹ In the performance of his functions he is subject to the supervision of the Accountant of Court. Before exercising certain of his functions he must obtain the Accountant's consent.¹⁰⁰ The Accountant may report any failure in duty to the court which appointed the administrator, and the court may remove him from office, censure him or make such other order as the circumstances may appear to the court to require.¹⁰¹ The Court of Session may make provision by rules of court as regards the Accountant of Court's powers and duties in relation to the functions of administrators.¹⁰²

9.41 Diligence¹⁰³ used in respect of realisable property on or after the appointment of an administrator is not, in general, to be effectual.¹⁰⁴ Thus the appointment of an administrator may be particularly appropriate where a restraint order affects heritage and there is a heritable creditor. The appointment would place restraints on diligence; and while the administrator would be entitled, with the Accountant's consent, to bring, defend or continue any proceedings relating to the property, he would be likewise entitled to discharge any security.¹⁰⁵ It seems desirable that a heritable creditor who might wish to call up the security should do so when a responsible administrator is in place. We **recommend**:

56. (1) The provisions of Part I of the Criminal Justice (Scotland) Act 1987 relative to administrators should be amended to take account of the recommendations in this report.

⁹³ CJ(S)A, s 13(1); draft Bill, Sched 1, para 1. Where a restraint order is in force he cannot realise the property in the period between an application for the recall of the order and the court's decision on the application: CJ(S)A, s 8(4) (s 9(3) in Appendix B); draft Bill, cl 24(3). See paras 9.26, 9.28, recommendation 51(2) above.

⁹⁴ CJ(S)A, s 23; draft Bill, cl 13. See paras 9.4, 9.5, recommendation 45 above.

⁹⁵ CJ(S)A, s 14; draft Bill, Sched 1, para 2.

⁹⁶ CJ(S)A, s 14(1)(a); draft Bill, Sched 1, para 2(1)(a).

⁹⁷ CJ(S)A, s 24; draft Bill, Sched 1, para 12.

⁹⁸ CJ(S)A, ss 15, 16; draft Bill, Sched 1, paras 3, 4.

⁹⁹ CJ(S)A, ss 18, 20, 21; draft Bill, Sched 1, paras 6, 8, 9.

¹⁰⁰ CJ(S)A, s 17(1); draft Bill, Sched 1, para 5(1).

¹⁰¹ CJ(S)A, s 17(2); draft Bill, Sched 1, para 5(2).

¹⁰² CJ(S)A, s 22; draft Bill, Sched 1, para 11. See RC 201L-201R. See also RC 201H-201K and, for administrators under the PT(TP)A, RC 201W-201Y.

¹⁰³ "Diligence" in the sense used here means legal procedures for the enforcement of obligations due under court decrees or for obtaining security before judgment for sums claimed in court actions.

¹⁰⁴ CJ(S)A, s 19; draft Bill, Sched 1, para 7.

¹⁰⁵ CJ(S)A, s 14(1)(a), (j); draft Bill, Sched 1, para 2(1)(c), (j).

(2) Corresponding provisions should be inserted in the draft Bill.

(Draft Bill, clauses 26, 39(3); Schedule 1; Schedule 3, paragraphs 14-21)

Sequestration, insolvency and related matters

9.42 Sections 33 to 37 of the 1987 Act deal with the interrelationship between procedures under restraint orders or confiscation orders on the one hand and, on the other, the law relating to sequestration, insolvency and related matters. As with the 1987 Act's provisions relative to administrators, we recommend some amendment of these sections and the insertion into the draft Bill of provisions in virtually the same terms. The amendments are listed in Schedule 3 to the Bill and their effect may be seen in Appendix B. The matching provisions of the Bill are contained in Schedule 2, which also deals with sequestration, insolvency and related matters in relation to proceedings leading to forfeiture.

9.43 Section 33 of the 1987 Act, as amended,¹⁰⁶ is concerned with the process of sequestration. Its general effect is that where a person holding realisable property is sequestrated, any property which has already been made subject to a restraint order,¹⁰⁷ or any proceeds of realised property which are in the administrator's hands, are excluded from the person's estate for the purposes of the Bankruptcy (Scotland) Act 1985. Where, however, the sequestration occurs before the exercise of the powers of restraint and confiscation, these powers cannot be exercised in relation to the person's whole estate, or in relation to any income ordered to be paid to, or any estate which vests in, the permanent trustee. Comparable provision is made by section 34, as amended,¹⁰⁸ for a case where a person is adjudged bankrupt in England and Wales. Section 35 provides for a case where a company which holds realisable property is wound up. The scheme of these provisions is somewhat different from that of Part IV of Schedule 4 to the Prevention of Terrorism (Temporary Provisions) Act 1989 which affords some protection to creditors against the forfeiture of money or property in terms of that Act. On the other hand sections 33 to 35 of the 1987 Act correspond with similar provisions in the Drug Trafficking Offences Act 1986 and the Criminal Justice Act 1988,¹⁰⁹ and we consider that it is desirable to maintain the consistency in this respect of British measures dealing with the confiscation of the proceeds of crime.

9.44 We propose, however, to remove an anomaly in section 35 in relation to gratuitous alienations and unfair preferences. Section 33, which deals with the sequestration of the estate of a person who holds realisable property, provides that where the person has made an implicative gift, the gift cannot be restored to his estate as a gratuitous alienation or unfair preference so long as the criminal proceedings against him have not been concluded or so long as the property of the recipient is subject to a restraint order.¹¹⁰ Section 34, like other legislation,¹¹¹ makes similar provision in relation to the bankruptcy in England and Wales of a person holding realisable property. Section 35, however, which deals with the

¹⁰⁶ By the Housing Act 1988, Sched 17, para 81 (amending s 33(2)(b)).

¹⁰⁷ We propose to add a requirement that where the property subject to the restraint order is heritable property in Scotland, the order must have been recorded in the General Register of Sasines or registered in the Land Register of Scotland before the date of sequestration.

¹⁰⁸ By the Housing Act 1988, Sched 17, para 82 (amending s 34(2)(b)) and CJA, Sched 5, para 22 (amending s 34(6)(d)).

¹⁰⁹ DTOA, ss 15-17, CJA, ss 84-86, all as amended.

¹¹⁰ CJ(S)A, s 33(5).

¹¹¹ CJ(S)A, s 34(5); DTOA, s 15(6) as amended by the Criminal Justice Act 1993, s 13(9) (not yet in force, 1 May 1994); CJA, s 84(6).

winding-up of a company holding realisable property, makes no such provision. There is likewise no provision in the confiscation legislation for England and Wales to deal with a case where the defendant is an insolvent company which has carried out a transaction at undervalue for the purpose of prejudicing its creditors.¹¹² Thus, if the transaction were successfully challenged under section 242 of the Insolvency Act 1986, the property which was the subject of the transaction might be restored to the company's assets. We therefore propose to insert in section 35 a provision corresponding to sections 33(5) and 34(5).

9.45 We note that section 33(5)(b) provides that where, after the conclusion of the proceedings, a decree is granted in respect of a gratuitous alienation or unfair preference, the decree must "take into account" any realisation of property held by the person to whom the implicative gift was made. It would therefore appear that if by surrendering for realisation the gratuitous element in the gift the recipient has effectively given full consideration for it, no decree should be pronounced. This seems to reflect the law in England and Wales which confers on the court wide discretionary powers as to the adjustment of a company's prior transactions at undervalue,¹¹³ and to place the recipient of an implicative gift in Scotland in a better position than the recipient of a gratuitous alienation where no proceedings under Part I of the 1987 Act have intervened: in such a case the court has no discretionary powers and may set aside the whole transaction.¹¹⁴ We do not recommend, however, any amendment of section 33, which appears to us to be satisfactory.

9.46 Section 36 provides, in terms analogous to those of sections 33 to 35, for cases where property held subject to a floating charge is realisable property. Section 37 is concerned with the protection of the position of an insolvency practitioner who deals in good faith with property which is subject to a restraint order: his entitlement to expenses is safeguarded, and he is liable only for loss or damage caused by his negligence.¹¹⁵ We **recommend**:

57. (1) Sections 33 to 36 of the Criminal Justice (Scotland) Act 1987 should be amended as proposed in paragraphs 9.43 and 9.44.

(2) Provisions corresponding to sections 33 to 37 of the 1987 Act, as so amended, should be inserted in the draft Bill.

(Draft Bill, clauses 35(1), 39(3); Schedule 2; Schedule 3, paragraphs 27-30)

Investigative powers

9.47 We now discuss three matters about which we make no recommendations: special investigative powers, the disclosure of information held by Government departments and the disclosure of information by the accused.¹¹⁶ Part I of the Criminal Justice (Scotland) Act 1987 confers on the sheriff special powers to make orders for access to or production of evidence, and to issue search warrants, in drug-trafficking cases. Under section 38 as

¹¹² Feldman, para 9.17.

¹¹³ Insolvency Act 1986, ss 238, 239.

¹¹⁴ *Short's Tr v Chung* 1991 SCLR 629.

¹¹⁵ Cf DTOA, s 17A (inserted by CJA, Sched 5, para 10); CJA, s 87; PT(TP)A, Sched 4, para 33; NI(EP)A, Sched 4, para 18.

¹¹⁶ The first two matters were noted in DP, para 5.41. For English and Commonwealth legislation on these subjects see D McClean, "Seizing the proceeds of crime: the state of the art" (1989) 38 International and Comparative Law Quarterly 334 at pp 356-358; D McClean, *International Judicial Assistance* (1992), pp 192-198.

amended¹¹⁷ the sheriff may, on the application of the procurator fiscal, make an order against a person who appears to the sheriff to be in possession of material likely to be of substantial value to an investigation into drug-trafficking. The order requires the person to give access to the material to a police or customs officer, or to produce it to the officer for him to take away. Where the order is for access to material on any premises the sheriff may order a person who appears to him to be entitled to grant entry to the premises to allow the officer to enter in order to gain access to the material.¹¹⁸ Section 39 enables the sheriff to issue a warrant, for the purposes of an investigation into drug trafficking, authorising an officer to enter and search specified premises. A warrant may be issued only if the sheriff is satisfied that any of three sets of conditions is fulfilled: that an order made under section 38 in relation to material on the premises has not been complied with, or that it would not be appropriate to make such an order, or that it would not be practicable to enforce such an order.¹¹⁹

Disclosure of information held by Government departments

9.48 Section 41 of the 1987 Act prescribes a procedure whereby the Court of Session may on an application by the Lord Advocate order that material in the possession of an authorised Government department¹²⁰ be produced to the Court. The power to make an order may be exercised only if the Court has power to make a restraint order in proceedings which are in progress or has made a restraint order before the institution of proceedings. The material must have been submitted to an officer of the department by a person who holds or has held realisable property, or must have been made by such an officer in relation to such a person, or must be correspondence between such an officer and such a person. The material must also appear to the Court to be likely to contain information that would facilitate the exercise of the powers conferred on the Court in relation to restraint orders, the appointment of an administrator or the facilitation of the realisation of property, or the exercise of the powers of an administrator.

9.49 The Drug Trafficking Offences Act 1986 contains provisions corresponding to sections 38 to 41 of the 1987 Act,¹²¹ but there are no such provisions in Part VI of the Criminal Justice Act 1988. In their report on Part VI the Home Office Working Group recommended that it should be amended by the inclusion of such provisions,¹²² but that recommendation has not been implemented by the Criminal Justice Act 1993. For our part we consider that it would not be justifiable to recommend the extension of such unusual powers to all the crimes and offences to which the new legislation would apply unless and until experience of the operation of the new legislation in practice demonstrated that such powers were necessary.

¹¹⁷ By CJA, Sched 5, para 23 (amending s 38(5)).

¹¹⁸ CJ(S)A, ss 38(2), (5). The procedure is regulated by the AA (Consolidation) 1988, rr 154, 155 as amended by SI 1990 No 718.

¹¹⁹ For the procedure see AA (Consolidation) 1988, r 156 as amended by SI 1990 No 718.

¹²⁰ *ie* authorised for the purposes of the Crown Proceedings Act 1947: CJ(S)A, s 47(1).

¹²¹ DTOA, ss 27-30 as amended. DTOA, s 29 and CJ(S)A, s 40 contain supplementary provisions and definitions. Special provision in relation to investigations and search warrants is made by NI(EP)A, Sched 5.

¹²² Report (1992), para 3.4.

Disclosure by the accused

9.50 In England and Wales the court may order the defendant in a drug-trafficking case to give it such information as it may specify for the purpose of assisting it to carry out its functions in relation to the making of a confiscation order. If the defendant fails without reasonable excuse to comply with the order, the court may draw such inference from that failure as it considers appropriate.¹²³ As one commentator has observed:

"Abolition of the right of silence in other contexts may be controversial; in this context it appears to have passed unnoticed. There appears to be no statutory protection against the use of information disclosed in compliance with such an order in a subsequent prosecution, if the offender discloses (expressly or by implication) the commission of other offences, whether involving drug trafficking or not."¹²⁴

In their Report on Part VI of the 1988 Act the Home Office Working Group recommended that provisions to the same effect should be added to Part VI,¹²⁵ but that recommendation has not been implemented by the Criminal Justice Act 1993. We are not satisfied that such powers are necessary in Scotland, and we make no recommendation.

Offences

9.51 Section 42 of the Criminal Justice (Scotland) Act 1987 supports investigations into drug trafficking by creating a new offence of doing anything likely to prejudice such an investigation. The corresponding section 31 of the Drug Trafficking Offences Act 1986 creates the more precisely defined offence of making any disclosure likely to prejudice such an investigation, later named "tipping-off" in the Criminal Justice Act 1993. Section 43 of the 1987 Act, which matches section 24 of the 1986 Act, creates the offence of assisting another to retain the proceeds of his drug trafficking, a form of "money laundering". Further offences in connection with money laundering and tipping-off are added by the 1993 Act not only to the 1987 Act but also to the 1986 Act and the Criminal Justice Act 1988.¹²⁶ The new offences in the 1988 Act, which appear in the new sections 93A to 93D, are also, with one modification, offences in Scots law. They are: assisting another to retain the benefit of criminal conduct; knowingly acquiring, using or having the possession of another person's proceeds of criminal conduct; concealing or transferring proceeds of criminal conduct; and "tipping-off" or disclosing information likely to prejudice an investigation into any of these offences, which are referred to as "money laundering".¹²⁷ A new section 93E of the 1988 Act applies sections 93A to 93D to Scotland, with the modification that the criminal conduct with which the new offences are concerned is conduct which constitutes an offence triable on indictment other than an offence to which section 1 of the 1987 Act relates or an offence under Part III of the Prevention of Terrorism (Temporary Provisions) Act 1989.¹²⁸ Part I of our draft Bill, which is concerned with the confiscation of the proceeds of crime, applies to the same range of

¹²³ DTOA, s 3A, inserted by the Criminal Justice Act 1993, s 10(5) (not yet in force, 1 May 1994) and apparently derived from the Report of the Home Office Working Group on the DTOA (1991), para 2.9.

¹²⁴ D A Thomas, "The Criminal Justice Act 1993: (1) Confiscation orders and drug trafficking" [1994] Crim L R 93 at p 95.

¹²⁵ Report (1992), para 3.8.

¹²⁶ CJ(S)A, ss 42A, 43A, 43B inserted by the 1993 Act, ss 17, 19 (CJ(S)A, s 43 is amended by the 1993 Act, s 19(2), (3)); DTOA, ss 23A, 26B, 26C, inserted by the 1993 Act, ss 16, 18 (DTOA, s 24 is amended by the 1993 Act, s 18(2), (3)); CJA, ss 93A-93D inserted by the 1993 Act, ss 29-32. Ss 16-19 and 29-32 of the 1993 Act are now in force. See para 2.8 above.

¹²⁷ s 93D(7).

¹²⁸ s 93E, inserted by the 1993 Act, s 33 (now in force).

offences in solemn procedure, but it also applies to any offence prosecuted on summary complaint which is punishable by a fine in excess of level 5 of the standard scale or by imprisonment for more than three months or by both such fine and imprisonment.¹²⁹ We consider that the new offences should be related to the whole range of criminal conduct in respect of which confiscation of the proceeds would be competent. We therefore **recommend:**

- 58. The criminal conduct to which the offences created by sections 93A to 93D of the Criminal Justice Act 1988 refer should include any offence punishable on summary complaint by a fine in excess of level 5 of the standard scale or by imprisonment for more than three months or by both such fine and imprisonment.**

(Draft Bill, clause 39(4); Schedule 4, paragraph 9)

¹²⁹ See paras 3.2-3.4, recommendation 2 above and draft Bill, cl 1(2).

Part X Protection of third parties' rights in confiscation proceedings

International conventions

10.1 It is necessary that the procedure for making a confiscation order should protect the rights of third parties who have interests in the property which is liable to be realised in order to satisfy the order.¹ Such protection is required by the European Convention on Human Rights² and, more particularly, by the Laundering Convention. Article 1 of the First Protocol to the European Convention provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."³

Article 5 of the Laundering Convention provides:

"Each Party shall adopt such legislative and other measures as may be necessary to ensure that interested parties affected by measures under Articles 2 and 3 shall have effective legal remedies in order to preserve their rights."

Article 2.1 is concerned with, amongst other things, the confiscation of the proceeds of crime, and article 3 with provisional measures for the prevention of the disposal of property which is liable to confiscation. The Explanatory Report on the Convention published by the Council of Europe, which includes a commentary on the text of the Convention, does not claim to provide an authoritative interpretation of its provisions but is intended to facilitate the understanding of them. Part of the commentary on article 5 is in the following terms:⁴

"31. Interested parties are basically all persons who claim that their rights with respect to property subject to provisional measures and confiscation are unjustifiably affected. These claims should in principle be honoured in cases where the innocence or *bona fides* of the party concerned is likely or beyond reasonable doubt. As long as no final confiscation order has been made against him, the accused may also qualify as an interested party. The legal provisions required by this article should guarantee 'effective' legal remedies for interested third parties. This implies that there should

¹ For a review of Commonwealth legislation see D McClean, "Seizing the proceeds of crime: the state of the art" (1989) 38 International and Comparative Law Quarterly 334 at pp 349-352.

² On the relevance of the Convention to the reform of Scots law, see *Evidence: Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings* (1992) Scot Law Com No 137, para 4.17.

³ In *Raimondo v Italy* 22 February 1994 (not yet reported) the European Court of Human Rights held that the seizure and confiscation of property apparently not lawfully acquired, pending an irrevocable decision, was in the general interest and did not violate art 1 of the First Protocol.

⁴ *Explanatory Report* (Strasbourg, 1991), pp 19-20.

be a system where such parties, if known, are duly informed by the authorities of the possibilities to challenge decisions or measures taken, that such challenges may be made even if a confiscation order has already become enforceable, if the party had no earlier opportunity to do so, that such remedies should allow for a hearing in court, that the interested party has the right to be assisted or represented by a lawyer and to present witnesses and other evidence, and that the party has a right to have the court decision reviewed."

Provisions already discussed

10.2 Several of the provisions of the draft Bill which we have already discussed are designed to protect the rights of third parties. Among the general principles governing the exercise of powers by the court or an administrator are the principles that the powers should be exercised with a view to realising no more than the value for the time being of a caught gift and, where a person other than the offender or a recipient of a caught gift is concerned, with a view to allowing that person to retain or recover the value of any property held by him.⁵ The recipient of a caught gift is specifically protected by two further provisions: he may apply to the court, on the grounds of his good faith, innocence and hardship, for the recall of a restraint order or, before or after a confiscation order has been made, for a declaration that the gift is not to be realisable; and in each case he has a right of appeal if his application is refused.⁶ Specific protection is also extended to members of an offender's family by the constraints placed on the disposal of the family home.⁷ The victim of an offence involving the misappropriation of property may be compensated from sums applied towards the satisfaction of the confiscation order.⁸

10.3 The commentary on article 5 points out that the accused may qualify as an interested party within the meaning of that article as long as no final confiscation order has been made against him.⁹ The draft Bill contains a number of provisions in favour of "interested parties" including the accused. A restraint order may be made subject to conditions and exceptions; it must be intimated to any person whom it affects; and any person having an interest may apply for its variation or recall and may appeal against the refusal of his application.¹⁰ The court must not exercise its powers to facilitate the realisation of property without giving such persons as hold an interest in the property a reasonable opportunity to make representations to it in that regard.¹¹ Where the court has requested a person in possession of realisable property to give possession of it to an administrator, it may vary or withdraw the requirement at the instance of any person having an interest.¹² If there is any surplus remaining in the hands of the administrator after authorised payments have been made and the confiscation order has been satisfied, he must distribute it among those who held the property which has been realised in such proportions as the court may direct, but only after the court has given such persons an opportunity to be heard as regards the matter.¹³

⁵ cl 13(3), (4): see para 9.4 above.

⁶ cll 4(6)-(8), 24(2), (5). See paras 4.28-4.30, 9.27-9.30 above.

⁷ cl 36. See paras 4.15-4.19 above.

⁸ cl 5(4). See paras 5.20-5.24 above.

⁹ See para 10.1 above.

¹⁰ cll 21(2), (3), 24. See paras 9.11-9.13, 9.25, 9.26-9.30 above. The ordinary rules of law apply to the recall, variation etc of any inhibitions, arrestments or ancillary interdicts which may follow on the making of a restraint order: see paras 9.32-9.37 above.

¹¹ Sched 1, para 12(2). See paras 9.40-9.41 above.

¹² Sched 1, para 1(4)(a). See paras 9.40-9.41 above.

¹³ *Ibid*, para 4(2). See paras 9.40-9.41 above.

Compensation

10.4 We consider that compensation should be payable for loss or damage sustained as a result of the exercise of the powers of the court or an administrator in relation to the preservation and realisation of property. The accused or the recipient of what is taken to be a caught gift may suffer loss as a result of the imposition of restraint orders, as may a person with an interest in the property under restraint who may or may not have been himself constrained by an ancillary interdict. An innocent third party will suffer loss if by some error his property is realised to satisfy a confiscation order.

10.5 There are two broad approaches to the formulation of a compensation scheme. The first, which was favoured by the Hodgson Committee, is to give the court a general discretion to award compensation: the Committee proposed that if the defendant was acquitted, the trial judge should have a discretion to order either the payment of compensation in a stated amount or an inquiry as to the damage suffered.¹⁴ The second, which is followed in the current United Kingdom confiscation legislation, is to empower the court to award compensation subject to very strict conditions. Thus, section 26 of the 1987 Act, which broadly corresponds to other United Kingdom provisions, requires that proceedings must have been instituted and must have ultimately failed; there must have been some "serious default", and the loss or damage sustained must have been "substantial". Such provisions have been described as "rather parsimonious",¹⁵ "severely drawn"¹⁶ and "very stringent indeed",¹⁷ and it has been said that "compensation will only exceptionally be payable".¹⁸ None of our consultees, however, offered any criticism of these provisions. No doubt in Scotland the risk that loss may be unfairly sustained is reduced by the system of public prosecution:

"... considerable protection is afforded to the individual by the interposition of an independent public prosecutor charged with the responsibility (in his discretion) of initiating a prosecution only where, *inter alia*, sufficient evidence exists to support it, the matter is of sufficient importance to justify it and ... there is no reason to suspect that the information is inspired by malice or ill-will on the part of the informant towards the person accused."¹⁹

It may therefore be justifiable to limit compensation to cases where there has been "serious default". It may also be said in favour of the scheme that it limits any likelihood of compensation being paid to unmeritorious persons, unlike the Hodgson Committee's scheme which would require the court to make invidious distinctions between those applicants who should receive compensation and those who should not.²⁰ The conditions imposed by section 26 reduce the discretionary element in the decision. It is also true that a decision on an application

¹⁴ Hodgson, pp 109, 154 (recommendation 31).

¹⁵ A Nicol, "Confiscation of the profits of crime" (1988) 52 JCL 75 at pp 81-82 on DTOA, s 19.

¹⁶ C Graham and C Walker, "The continued assault on the vaults - bank accounts and criminal investigations" [1989] Crim L R 185 at p 195 on DTOA, s 19 and CJA, s 89.

¹⁷ C Gane, *Scottish Current Law Statutes*, general note to CJ(S)A, s 26.

¹⁸ *Ibid*, general note to Part I of CJ(S)A, para (h).

¹⁹ *Criminal Procedure in Scotland (Second Report)* (1975, Cmnd 6218), para 61.11.

²⁰ cf the views of the Thomson Committee on a power to award expenses to acquitted persons: *Criminal Procedure in Scotland (Second Report)* above, para 61.13.

may be reclaimed against or appealed;²¹ and that the scheme is stated to be without prejudice to any right which may otherwise exist to institute proceedings in respect of delictual liability.

10.6 We have concluded that the scheme is acceptable, subject to minor amendment, in a case where the proceedings have not succeeded. It makes no provision, however, for a case where a confiscation order has been made and property belonging to a person other than the accused or a recipient has been realised in error. That may seem a remote possibility, given that such a person should have had an opportunity to apply for the recall of the preceding restraint order in relation to his property, but it appears to us to be prudent to make provision for it in view of the terms of the European Convention on Human Rights and the Laundering Convention.²² We therefore propose for such a case a scheme similar to that which we recommend later to meet the inadvertent disposal of a third party's property after forfeiture.²³

10.7 We now explain our proposals in detail. First, we propose that section 26 of the 1987 Act should be amended to correspond with the current compensation provisions in other confiscation legislation²⁴ and that matching provisions should appear in the draft Bill.²⁵ Each set of provisions would be to the following effect.

- (i) An application may be made by a person who held property which was realisable property.
- (ii) The application must be made not later than three years after the conclusion of the proceedings²⁶ in respect of which the confiscation order was made.²⁷
- (iii) The application is made to the Court of Session if the criminal proceedings concerned took place in the High Court of Justiciary, or to the sheriff exercising his civil jurisdiction if they took place in the sheriff court.
- (iv) Compensation is payable only where proceedings have been instituted against a person for an offence to which Part I of the 1987 Act, or of the draft Bill, applies.²⁸ Compensation is not, accordingly, payable where a restraint order has been made before the institution of proceedings and the proceedings have never been instituted. In such a case, however, the property should not have been under restraint for more than 28 days.²⁹

²¹ Court of Session Act 1988, s 28; RC 262; Sheriff Courts (Scotland) Act 1907, ss 27, 28 as amended.

²² See para 10.1 above.

²³ See paras 17.5-17.7 below.

²⁴ DTOA, s 19, as amended by CJ(S)A, s 45, CJA, Sched 5, para 12, and the Criminal Justice Act 1993, s 24(2); CJA, s 89; PT(TP)A, Sched 4, paras 7, 17, 27; NI(EP)A, Sched 4, para 20. Our amended version of CJ(S)A, s 26 follows most closely PT(TP)A, Sched 4, para 17.

²⁵ cl 14.

²⁶ The "conclusion of proceedings" is as defined in cl 22(7). See paras 9.16-9.17 above.

²⁷ There is no time-limit in the compensation provisions in the other United Kingdom confiscation legislation. In view of the need to prove serious default, a three-year time-limit seems appropriate: cf the Prescription and Limitation (Scotland) Act 1973, ss 17, 18.

²⁸ The "institution of proceedings" is defined in cl 38(3). See paras 9.16, 9.20 above.

²⁹ See paras 9.21-9.23 above.

- (v) Further, the accused must have been successful. Either the proceedings have not resulted in a conviction, or he has been convicted but either the conviction has been quashed or he has obtained a Royal pardon.
- (vi) The court must be satisfied as to three matters: (a) that there has been some serious default on the part of a person concerned in the investigation of the offence; (b) that the proceedings would not have been instituted or continued but for that default; and (c) that the applicant has suffered loss or damage in consequence of anything done in relation to the property under the powers referred to above.
- (vii) Even if those three conditions are met, the applicant is not thereby entitled to compensation. The court may order payment of compensation only if, having regard to all the circumstances, it considers it appropriate to do so. It is possible, for example, that the court would decline to award compensation to an accused who had obtained an unmeritorious or technical acquittal.
- (viii) If the court decides to award compensation, the amount is to be such as the court thinks just in all the circumstances of the case. It is to be paid by the authority on whose behalf the person in serious default was acting.
- (ix) The power of the court to award compensation is without prejudice to any right which may otherwise exist to institute proceedings in respect of delictual liability disclosed by such circumstances as are mentioned in (iv) above.

10.8 Secondly, we propose that provision should be made for the payment of compensation to a person other than the accused or the recipient of a caught gift (or, in the 1987 Act, an "implicative gift") who was the owner of, or had an interest in, property which has been realised. Such a person should be entitled to compensation on satisfying the court on a balance of probabilities that he was the owner of the property or had a specified interest in it. The measure of compensation should usually be, for the owner, the amount received on realisation of the property, and for a person with an interest other than as owner, the proportion of that amount which corresponds to the extent of his interest. We discuss the quantification of compensation more fully in the context of the payment of compensation where property has been forfeited in error.³⁰ Again, a three-year time-limit should apply. Where compensation is paid in a case where the amount of the confiscation order was determined by the amount that might be realised, an application should be made for a new confiscation order on the ground that the realisable property is now inadequate for the payment of the amount to be recovered under the order.³¹

10.9 All these proposals, we believe, meet the requirements of article 5 of the Laundering Convention as these are explained in the extract from the Council of Europe's Report which we have quoted above,³² and protect a person's right under the European Convention on Human Rights not to be deprived of his possessions except in the public interest and subject to the conditions provided for by law. We do not think it necessary to recommend any express provisions for hearings in court, legal representation or assistance, or the right to

³⁰ See para 17.7 below.

³¹ See paras 7.2-7.16 above.

³² See para 10.1 above.

adduce evidence or awards of expenses, since we understand these to be inherent characteristics of judicial procedure in the Scottish civil courts.³³

10.10 We note, however, that a third party appears not to be entitled to legal aid for the purpose of being represented before a criminal court. A third party who proposed to apply to the Court of Session, or to the sheriff exercising his civil jurisdiction, in relation to a restraint order, compensation or any of the other matters on which he was entitled to be heard could, we believe, apply for legal advice and assistance and for legal aid under the civil legal aid scheme. If, however, he applied to the High Court, or to the sheriff exercising his criminal jurisdiction, for a declaration that a gift should not be realisable,³⁴ he would appear not to be entitled to legal aid.³⁵ There is no provision for civil legal aid before a criminal court, and he could not apply for criminal legal aid because he was not an accused person. While we consider that that would be unfortunate, the matter appears to us to be outside our terms of reference and we make no recommendation.

10.11 We recommend:

59. (1) **Section 26 of the Criminal Justice (Scotland) Act 1987 should be so amended as to correspond with the terms of paragraph 10.7.**
- (2) **Identical provisions should be inserted in the draft Bill.**
- (3) **A person other than the accused or the recipient of a caught gift who is the owner of, or otherwise has an interest in, property which has been realised should be entitled to apply for compensation not later than three years after the conclusion of the proceedings to the Court of Session, where the confiscation order was made in the High Court of Justiciary, or to the sheriff exercising his civil jurisdiction, where the order was made in the sheriff court.**
- (4) **The court should be required to grant the application if the applicant proves on a balance of probabilities that immediately before the realisation of the property he was the owner of, or a person otherwise having an interest in, the property.**
- (5) **The amount of compensation payable to the owner of property which has been realised should be -**
- (a) **where a consideration has been received, an amount equal to the amount of the consideration or its value at the time of the realisation, or**
- (b) **where no consideration has been received, an amount equal to the value of the property as at the date of the realisation.**

³³ I D Macphail, *Sheriff Court Practice* (1988), paras 26-25 (hearings; evidence); 1-32 (legal representation); 19-03, 26-45 (expenses).

³⁴ See paras 4.28-4.30 above.

³⁵ We understand that the recipient of an implicative gift who was allowed to appear in *HMA v McLean* 1993 SCCR 917 (see first footnote to para 4.29 above) could not be granted legal aid.

- (6) The amount of compensation payable to a person who has an interest in property which has been realised should be an amount corresponding to the extent of his interest.
- (7) The 1987 Act should be amended to make similar provision for the payment of compensation to a person other than the accused or the recipient of an implicative gift.

(Draft Bill, clauses 14, 39(3); Schedule 1, paragraph 10; Schedule 3, paragraph 23)

Part XI Forfeiture: Introduction

Our reference and the Laundering Convention

11.1 We now address that part of our reference which requires us to consider

"the adequacy of the present law and the procedure relating to the forfeiture, in criminal proceedings in Scotland, of property used for the purpose of committing, or facilitating the commission of, offences ...".¹

As we have already noted,² the United Kingdom has ratified the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("the Laundering Convention"). In Chapter II, which prescribes "Measures to be taken at national level", article 2.1 provides in part:

"Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities ..."

"Instrumentalities" means:

"any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences."³

"Confiscation" is defined as:

"a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property."⁴

As we shall immediately explain, "confiscation" in the Laundering Convention includes, where appropriate, "forfeiture" in the sense in which that expression is used in our reference.⁵ In arriving at our recommendations we have therefore kept in view the need for compliance with the requirements of Chapter II of the Laundering Convention.

11.2 We shall begin by defining the meaning of "forfeiture",⁶ discussing its objectives⁷ and noting the relevant provisions of the Laundering Convention and the European Convention on Human Rights.⁸ We shall then review briefly the present law and practice relating to

¹ For the full terms of our reference see para 1.1 above. The words omitted from the quotation above, "... and of proceeds of criminal activity in general", are considered in Parts II-X.

² See para 2.8 above.

³ Convention, article 1c.

⁴ *Ibid*, article 1d.

⁵ *Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (Strasbourg, 1991), p 16. See para 11.3 below.

⁶ See para 11.3 below.

⁷ See para 11.4 below.

⁸ See para 11.5 below.

forfeiture in Scottish criminal proceedings,⁹ identify the areas in which reform appears to be necessary¹⁰ and state our recommendations in outline¹¹ before explaining them in detail.¹²

Definition of "forfeiture"

11.3 Our reference is concerned with forfeiture in the sense of the power of a criminal court to take property connected with the commission of an offence after a person has been convicted.¹³ Our reference is not concerned with forfeiture in the sense of the seizure and disposal of property by order of the court or by other agencies irrespective of a conviction: for example, the disposal, by order of the court, of firearms or ammunition seized by the police under section 52(4) of the Firearms Act 1968, or of counterfeit banknotes or coins seized by them under section 24(2) of the Forgery and Counterfeiting Act 1981; or the forfeiture of property seized under the customs and excise Acts.¹⁴ Nor is our reference concerned with forfeiture in relation to the rules which preclude an unlawful killer from acquiring a benefit in consequence of the death of his victim.¹⁵

Objectives of forfeiture

11.4 The purpose of a court order for the forfeiture of property connected with the commission of an offence may be the punishment of the offender, or the prevention of crime, or both.¹⁶ The offender may be punished by being deprived of an item of his property, such as a car, which is capable of being used for legitimate purposes but has been used by him to facilitate the commission of an offence: for example, in order to remove goods stolen in a housebreaking. In such a case forfeiture is used as a penalty. Forfeiture may be ordered for the purpose of crime prevention in three situations: where the property has been used in the commission of an offence, for the purpose of preventing a repetition of the offence;¹⁷ or where the property was intended to be used to commit an offence, for the purpose of preventing the commission of that or any similar offence with that property in the future; or where the property is inherently dangerous or harmful and cannot be possessed by its owner for any lawful purpose, such as a controlled drug, and it is clearly in the public interest that it should be taken out of circulation. An order for forfeiture may be both penal and preventative where the property is capable of being lawfully used but either has been or may be used to commit an offence. Forfeiture is not ordered for the purpose of depriving

⁹ See para 11.6 below.

¹⁰ See para 11.7 below.

¹¹ See paras 11.8-11.11 below.

¹² See Parts XII-XVII below.

¹³ Throughout this report (see para 3.4 above) "convicted", "conviction" and similar expressions include, unless otherwise indicated, cases in which a summary criminal court is satisfied that the accused has committed the offence charged but grants him an absolute discharge or places him on probation and does not proceed to conviction.

¹⁴ Customs and Excise Management Act 1979, ss 139-144, as amended. In proceedings for an offence under s 107 of the Copyright, Designs and Patents Act 1988 the court may order the delivery up of infringing copies whether the accused is convicted or not: s 108(3).

¹⁵ We examined these rules and made recommendations for reform in our *Report on Succession* (1990) Scot Law Com No 124, paras 7.2-7.27.

¹⁶ In *R v Highbury Corner Stipendiary Magistrates' Court, ex p Di Matteo* (1991) 92 Cr App R 263, [1991] 1 WLR 1374 at pp 268, 1379 the court observed that the Powers of Criminal Courts Act 1973, s 43 (as substituted by the Criminal Justice Act 1988, s 69) could serve a dual purpose: the removal of the article from circulation, and part of the punishment of the offender.

¹⁷ Where the primary object of forfeiture is crime prevention, the value of the property to the offender may be irrelevant: see para 12.4 below.

the offender of the proceeds of his crime: that may be done by the exercise of the power of confiscation discussed in Part II to X of this report.¹⁸

The European Convention on Human Rights

11.5 When considering the reform of the law and practice relative to forfeiture it is necessary to keep in view not only the requirements of the Laundering Convention but also the terms of the first paragraph of article 1 of the First Protocol to the European Convention on Human Rights which we have quoted above.¹⁹ While that article does not appear to have been interpreted by the European Court of Human Rights in the context of an order for forfeiture made by a criminal court after conviction, it seems clear that the Court "will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation".²⁰ We consider that legislative provisions for the forfeiture of property which is connected with the commission of crime and belongs to the convicted person would be most unlikely to be vulnerable to criticism by the European Court of Human Rights. On the other hand both Conventions require - the Laundering Convention expressly,²¹ and the European Convention on Human Rights by implication - that the rights of third parties in property which is liable to forfeiture, or has been forfeited, should be preserved. We have therefore taken account of this requirement when framing our recommendations. All our proposals for the protection of third parties' rights in proceedings for forfeiture are brought together in Part XVII.

The present law

11.6 The Scottish criminal courts have both a general statutory power to order the forfeiture of property used in crime, and specific statutory powers to order forfeiture in relation to particular offences.²² As we shall explain,²³ this report is primarily concerned with the general power, which is conferred by the Criminal Procedure (Scotland) Act 1975. Sections 223(1) and (2)²⁴ and 436(1) and (2),²⁵ which relate respectively to solemn and summary proceedings, are in identical terms²⁶ and provide:²⁷

"(1) Where a person is convicted of an offence and the court which passes sentence is satisfied that any property which was in his possession or under his control at the time of his apprehension-

(a) has been used for the purpose of committing, or facilitating the commission of, any offence; or

¹⁸ It may be, however, that an offender's "working capital", used or intended to be used for the purpose of committing an offence, could be forfeited: *Donnelly v HMA* 1984 SCCR 93; *R v O'Farrell* (1988) 10 Cr App R (S) 74, [1988] Crim L R 387. See para 12.17 below.

¹⁹ See para 10.1 above.

²⁰ *James v UK* (1986) 8 EHRR 123 at p 142. See also *Raimondo v Italy* noted in para 10.1, third footnote.

²¹ Convention, art 5. See para 10.1 above.

²² The history of forfeiture in Scots law is outlined in D Kelly, "Forfeiture" (1991) 59 Scot Law Gaz 7. For examples of specific statutory powers, see para 12.16 below.

²³ See para 12.16 below.

²⁴ Derived from the Criminal Justice Act 1972, s 23(1), (5) and (6).

²⁵ Substituted by the Criminal Justice (Scotland) Act 1980, Sched 7, para 71. The original s 436 was derived from the Summary Jurisdiction (Scotland) Act 1954, s 54, which replaced the Summary Jurisdiction (Scotland) Act 1908, s 44.

²⁶ New subsections (1A) and (1B) were added by s 37 of the Road Traffic Act 1991: see para 12.14 below.

²⁷ Neither section applies where a person is convicted of an offence under the Wireless Telegraphy Act 1949: Telecommunications Act 1984, Sched 3, para 3(b).

(b) was intended by him to be used for that purpose,

that property shall be liable to forfeiture, and any property forfeited under this section shall be disposed of as the court may direct.

(2) Any reference in this section to facilitating the commission of an offence shall include a reference to the taking of any steps after it has been committed for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection."

The need for reform

11.7 Experience has shown that these provisions are unsatisfactory in several respects. Doubts and difficulties have arisen as to the conditions which must be satisfied before forfeiture is competent; the protection of the interests of innocent owners of property which has been forfeited; whether property other than moveable property may be forfeited; and whether a compensation order may be satisfied from the proceeds of forfeited property. There are also several minor procedural problems which frequently occur and could with advantage be resolved. Our discussion paper offered for comment provisional proposals on all these matters. Each proposal and the responses of consultees will be referred to, where appropriate, in the following parts of this report.

Our recommendations in outline

11.8 Our recommendations may be summarised as follows. Where the High Court or the sheriff court is satisfied that a person has committed an offence and that property which was under his control at the time of the offence or his apprehension has been used, or was intended to be used, for the purpose of committing an offence, the court should be entitled to make a "suspended forfeiture order" in respect of that property, whether it be heritable, moveable, corporeal or incorporeal.²⁸ The effect of the suspended forfeiture order would be to mark the beginning of a prescribed period of time - 60 days where the property was moveable, six months where it was heritable - at the end of which the property would be automatically forfeited to the Crown, if in the meantime the order had not been recalled or set aside on appeal.²⁹ During that period anyone claiming to be the owner of the property would be entitled to apply to the court for the recall of the order. The court would recall the order if the applicant proved ownership on a balance of probabilities, unless the prosecutor proved beyond reasonable doubt that he knew or ought to have known of the nefarious use of the property: even then, however, the court might recall the order if forfeiture of the property appeared to it to be oppressive in the circumstances of the case.³⁰ If the application for recall were refused, or if no such application were made, the property would be forfeited to the Crown at the end of the period. Once the property had been forfeited, anyone claiming to have an interest in it would be entitled to apply to the court for the return of the property or, if it had been disposed of, for compensation.³¹ Both the third party and the Crown would be entitled to appeal against decisions on any of these applications.

²⁸ See Part XII below.

²⁹ See Part XIV below.

³⁰ See Part XV below.

³¹ This recommendation extends to cases where property has been forfeited under a specific power conferred by any other enactment. See Part XVII below.

11.9 We also recommend that provision should be made for the control, by means of orders of court, of property which is liable to be made, or which has been made, the subject of a suspended forfeiture order. The court should have power, both before and after making a suspended forfeiture order, to grant warrants for the search for and seizure of such property and to make restraint orders and ancillary orders which would have the effect of preventing anyone from dealing with the property. We envisage that in practice a restraint order would be resorted to where the property concerned was not in the hands of the prosecutor. In such cases a restraint order would often be advisable prior to the accused's conviction and sentence, and would generally be necessary in order to preserve the property after a suspended forfeiture order had been made.³²

11.10 Our other proposals include a recommendation that when sentencing, the court should be entitled to make both a suspended forfeiture order and a compensation order in favour of a victim, and to order that the proceeds of the sale of any forfeited property should be first directed towards satisfaction of the compensation order.³³

11.11 We do not recommend the repeal of the courts' specific statutory powers to order forfeiture in relation to particular offences, or the consolidation of the courts' general and specific powers of forfeiture into a single new statutory scheme. We consider, however, that in cases where the court is entitled to make either an order for forfeiture under a specific power or a suspended forfeiture order under our recommended scheme, the prosecutor may opt to move for a suspended forfeiture order, primarily because the rights of third parties would be safeguarded and also because, in an appropriate case, the court would be able to make an effective compensation order.³⁴

³² See Part XVI below.

³³ See Part XIII below.

³⁴ See Part XII below.

Part XII When a suspended forfeiture order should be competent

Introduction

12.1 We discuss in this part the circumstances in which a court should be entitled to make a suspended forfeiture order. The questions we consider are: which courts should have the power to make a suspended forfeiture order;¹ the nature of the property which should be liable to forfeiture² and its relationship to the commission of an offence;³ and two procedural questions: whether the notice of penalties for a statutory offence in summary proceedings should give notice of liability to forfeiture,⁴ and whether it should be possible to combine a suspended forfeiture order with an absolute discharge or a probation order.⁵

Courts which should have power to make a suspended forfeiture order

12.2 We begin by explaining our view that the procedures which we recommend and have summarised in paragraphs 11.8 to 11.11 above should be competent only in the High Court and the sheriff court. The question of which courts should have powers under any new forfeiture regime arose in the discussion paper in the context of a proposal, which we discuss later, that courts should be given an express power to forfeit heritable and incorporeal property.⁶ It will be more convenient, however, to consider the question in the context of the overview of our recommendations as a whole which we have offered in paragraphs 11.8 to 11.11 above. It appears to us that while our proposed scheme is not unduly complex, it is of such a character that it would not be reasonable to impose it on the district court. It involves not only the making of suspended forfeiture orders in respect of any kind of property, but also the adjudication of third parties' claims, the recall of suspended forfeiture orders and, where the property of third parties has been disposed of, the awarding of compensation. We therefore propose that our recommended scheme should be competent only in the High Court and the sheriff court. We do not propose any restriction of any powers of the district court to order forfeiture under specific powers in particular statutes. Accordingly we **recommend**:

- 60. The power to make a suspended forfeiture order should not be exercisable in the district court.**

(Draft Bill, clause 15(13))

¹ See para 12.2 below.

² See paras 12.3-12.4 below.

³ See paras 12.5-12.20 below.

⁴ See paras 12.21-12.22 below.

⁵ See paras 12.23-12.26 below.

⁶ DP, paras 3.25-3.35, prop 3(c).

Nature of property liable to forfeiture

12.3 Under the general powers conferred by sections 223 and 436 of the Criminal Procedure (Scotland) Act 1975 "any property"⁷ which satisfies the conditions there prescribed may be forfeited. In practice the Scottish courts have forfeited only corporeal moveable property and they have never had to consider whether "any property" might include heritable or incorporeal property. Such property could be used to facilitate the commission of crime: a small cottage in a remote area could be acquired for the purpose of smuggling, or shares could be acquired to lend colour to a fraudulent scheme. In the discussion paper we noted that the English courts regard their statutory powers of forfeiture as being limited to personal property⁸ and, in cases under section 43 of the Powers of Criminal Courts Act 1973, to simple, uncomplicated cases in which no other person has an interest in the property.⁹ We questioned, however, whether there was any reason in principle why the Scottish courts' powers of forfeiture should be similarly limited, although we recognised that the forfeiture of heritable property would involve practical difficulties and would often be an inappropriate or excessive penalty. We therefore asked whether any doubt as to the competency of the forfeiture of property other than corporeal moveable property should be resolved, and if so, in which way.¹⁰

12.4 On consultation there was general agreement that the matter should be put beyond doubt. Most of our consultees agreed that all categories of property should be liable to forfeiture. The minority who considered that forfeiture of heritable or incorporeal property should be excluded did so on the grounds that forfeiture of such property would involve practical difficulties, or could be a punishment disproportionate to the gravity of the offence. We have concluded that there is no reason in principle why heritable or incorporeal property should not be liable to forfeiture.¹¹ We deal later with the practical consequences.¹² While in many cases forfeiture would be an excessive punishment, it is to be expected that sentencing judges would continue to exercise their discretion judicially when selecting a sentence and would make suspended forfeiture orders in respect of such property only in appropriate cases. We have no doubt that it would be obvious to a sentencing judge that forfeiture following upon such an order, like any other forfeiture, would be part of the total penalty imposed for the offence or offences of which the accused had been convicted, and if its effect, taken together with any other sentences passed or orders made, would be to create an excessive or inappropriate penalty, the order should not be made.¹³ Any suspended forfeiture order which constituted a miscarriage of justice by being excessive or inappropriate would be liable to be quashed in the same way as any other excessive or inappropriate sentence or order.¹⁴ We note that in England and Wales section 43(1A) of the

⁷ See subs (1), quoted in para 11.6 above.

⁸ *R v Cuthbertson* [1981] AC 470; *R v Khan* (1983) 76 Cr App R 29, [1982] 1 WLR 1405, [1982] 3 All ER 969.

⁹ *R v Troth* (1979) 71 Cr App R 1.

¹⁰ DP, paras 3.25-3.35, Prop 3(a), (b).

¹¹ Under the PT(TP)A a Scottish court may forfeit property wherever situated, including heritable or incorporeal property: ss 13(2)-(4), (7), (8), 20(1) (definition of "property"), Sched 4, para 11(1)(b).

¹² See para 13.12 and Parts XVI and XVIII below.

¹³ Cf *R v Highbury Corner Stipendiary Magistrates' Court ex p Di Matteo* (1991) 92 Cr App R 263 at pp 265-266. Where, however, the purpose of the forfeiture is preventative rather than penal, the value of the property to the accused may be irrelevant: see para 11.4 above. The decision in *McKenzie v McLeod* 1988 GWD 20-864 may be based on this view.

¹⁴ Criminal Procedure (Scotland) Act 1975, ss 228, 254(3)(b), 442, 453C(1)(b); Renton and Brown, paras 11-47, 16-46, 16-47.

Powers of Criminal Courts Act 1973¹⁵ requires the court, when considering whether to make a deprivation order, to have regard to the value of the property and "to the likely financial and other effects on the offender of the making of the order (taken together with any other order that the court contemplates making)". We share the view that "why it should be considered necessary to enact such banal reminders is not obvious".¹⁶ We **recommend**:

- 61. A suspended forfeiture order should be competent in respect of any property, wherever situated, whether heritable or moveable, or whether corporeal or incorporeal.**

(Draft Bill, clauses 15(2), 38(1))

Relationship between property and commission of offence

12.5 In the following paragraphs we consider the question of the conditions which should have to be satisfied as regards the relationship of property to the commission of an offence before a suspended forfeiture order may be made. We begin by examining the question in general terms. We then notice recent legislation on forfeiture in relation to certain road traffic offences, and finally we consider forfeiture in relation to other statutory offences.

General rules

12.6 The Laundering Convention requires each Party to adopt such measures as may be necessary to enable it to confiscate (*ie* forfeit) "instrumentalities", which it defines as

"any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences."¹⁷

In Scotland, on the other hand, sections 223(1) and 436(1) of the Criminal Procedure (Scotland) Act 1975 provide that property is liable to forfeiture where a person is convicted of an offence and

"the court which passes sentence is satisfied that any property which was in his possession or under his control at the time of his apprehension -

(a) has been used for the purpose of committing, or facilitating the commission of, any offence; or

(b) was intended by him to be used for that purpose."

This part of the subsection has proved to have a few defects. Our recommendations are intended to rectify these defects and to make this part of the subsection satisfy the requirements of the Convention. The first problem is that under sections 223 and 436 the property must have been in the offender's possession or under his control "at the time of his apprehension" and at no other time. This requirement has led to various anomalous situations. If the offender has

¹⁵ Inserted by the Criminal Justice Act 1988, s 69(1).

¹⁶ D A Thomas, "The Criminal Justice Act 1988: the sentencing provisions" [1989] Crim L R 43 at p 51. Hodgson recommended that a court should have power to make a forfeiture order if the value of the property did not exceed the maximum fine for the offence. If the defendant was also fined or ordered to pay compensation, the total of the financial penalties (including the value of any forfeited property) should not exceed the maximum fine for the offence. (Hodgson, pp 101, 154.)

¹⁷ Convention, art 1c. See para 11.1 above.

abandoned the property,¹⁸ or if the police have seized it,¹⁹ before his arrest, it cannot be forfeited. In other circumstances there may be room for argument as to whether property such as a motor vehicle which was in the offender's possession or under his control at the time of the offence could still be so described at the time of his apprehension several weeks later.²⁰ Some offenders who have in their possession or under their control property which satisfies condition (a) or (b) are cautioned and charged without being arrested at all. We noted such anomalies in our discussion paper.²¹ We also noted that sections 223 and 436 made no mention of ownership of the property.²² We asked whether the phrase "in his possession or under his control at the time of his apprehension" should be replaced by a phrase such as "property which was *at the time of the offence or at the time of his apprehension in his ownership or possession or under his control*".²³ We have italicised the proposed additional words.

12.7 Most of the consultees who considered this question answered it in the affirmative. One was content with the present wording of sections 223(1) and 436(1), two suggested other forms of words, and one pointed out that our proposed formulation would not catch property which had been used in the preparation for a crime (that is, to facilitate its commission) but had been disposed of before the crime was committed. We have concluded that our proposed formulation would cover most of the situations which are likely to arise in practice. We therefore **recommend**:

- 62. The property in respect of which a suspended forfeiture order may be made should have been in the ownership or possession of the offender or under his control either at the time of the offence or at the time of his apprehension.**

(Draft Bill, clause 15(2))

12.8 The first of the two further, alternative, conditions which must be satisfied before forfeiture is competent under section 223(1) or 436(1) is condition (a): that the property

"(a) has been used for the purpose of committing, or facilitating the commission of, any offence."

This paragraph is drafted in broad terms. The user of the property and the person committing or facilitating the commission of the offence need not be one and the same, and it is not necessary that the convicted person should be either of them. Nor is it necessary that the offence committed should be the offence of which he was convicted.²⁴ Thus it is possible that where an accused, A, has been convicted of offence *x*, the court may forfeit property which was in his possession at the time of his apprehension for that offence but in fact had been used by B for the purpose of the commission of offence *y* by C. The court's power to forfeit property is accordingly wider than the power to confiscate the proceeds of crime recommended earlier in this report, which is confined to the proceeds of the crime of which the accused has been

¹⁸ *R v Hinde* [1977] 64 Cr App R 213.

¹⁹ *R v McFarlane* (1982) 4 Cr App R (S) 264.

²⁰ *Reid v Houston* 1992 SCCR 442.

²¹ DP, paras 3.44-3.46.

²² DP, para 2.8.

²³ DP, para 3.47, prop 5.

²⁴ See *Donnelly v HMA* 1984 SCCR 93.

convicted.²⁵ The width of the power to forfeit is nevertheless well established,²⁶ and it has not been suggested to us that it is unduly extensive. The terms of paragraph (a) are identical to those of paragraph (a)(i) of section 43(1) of the Powers of Criminal Courts Act 1973. In *R v Colville-Scott*²⁷ the Court of Appeal held that the power to order deprivation under section 43(1)(a) extended to property used by some person other than the offender to facilitate the commission of an offence *by the offender*. Section 43(3), however, operates only to deprive *the offender* of his rights, if any, in the property. Under our recommendations, on the other hand, suspended forfeiture orders would operate irrespective of whether the offender or anyone else had rights in the property, but appropriate provision would be made to safeguard the rights of innocent owners.²⁸ We consider that the prospect of forfeiture might deter owners of property from knowingly allowing it to be used by others for nefarious purposes.

12.9 The meaning of "facilitating the commission of an offence" in subsection (1)(a) of sections 223 and 436 is the subject of subsection (2):

"(2) Any reference in this section to facilitating the commission of an offence shall include a reference to the taking of any steps after it has been committed for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection."

This provision does not appear to have caused any difficulty in practice.²⁹ There are several reported examples of the forfeiture of motor vehicles used to facilitate the commission of crimes of dishonesty³⁰ and other offences.³¹

12.10 The second, alternative, condition in subsection (1) is that the property -

"(b) was intended by him [ie the convicted person] to be used for that purpose [ie for the purpose of committing, or facilitating the commission of, any offence]."

There is a curious distinction between paragraphs (a) and (b): paragraph (b) is limited by the words "by him", so that before forfeiture can be competent in terms of paragraph (b) the court must be satisfied that the property was intended by the convicted person to have been used for the nefarious purpose. Paragraph (a), on the other hand, does not require that the property should have been used "by him" for the nefarious purpose. It is difficult to see why under paragraph (a) it does not matter whether the property was used by him or anyone else for that purpose, while under paragraph (b) it must have been intended by him, and no-one else, to be used for that purpose. The limitation in paragraph (b) is all the more curious because the intended user need not be the offender: it does not say "intended by him to be used by him for that purpose". The use of the words "by him" in paragraph (b) appears to us to be anomalous because it is inconsistent with the breadth of the rest of subsection (1). Paragraph (b) is satisfied even if the property was not used as intended or the offence was not committed.

²⁵ See para 2.13 above.

²⁶ It is derived from the Criminal Justice Act 1972, s 23(1), (5) and (6).

²⁷ (1990) 12 Cr App R (S) 238, [1990] 1 WLR 958.

²⁸ See Part XVII below.

²⁹ s 43(2) of the Powers of Criminal Courts Act 1973 is in similar terms.

³⁰ *Carruthers v MacKinnon* 1986 SCCR 643; *Walsh v Taylor-Wilson* 1987 GWD 6-182; *McDuff v Carmichael* 1987 GWD 26-996; *McQueeney v Carmichael* 1991 SCCR 221; *Wallace v MacDougall* 1991 SCCR 962; *Devine v Carmichael* 1991 GWD 40-2465; *Hughes v O'Brien* 1992 GWD 12-664; *Hazley v McLeod* 1993 GWD 17-1103; *Wilde v Crowe* 1993 GWD 27-1697. Cf *Simpson v Fraser* 1948 JC 1, 1948 SLT 124.

³¹ *Mitchell v Scott* 1990 GWD 27-1550 (Deer (Scotland) Act 1959, s 25(1)); *McLachlan v Buchanan* 7 July 1993 (unreported: Crown Office Circular A26/93) (Salmon and Freshwater Fisheries Protection (Scotland) Act 1951, s 7(1), (3)).

12.11 The terms of paragraphs (a) and (b) of subsection (1), and of subsection (2) of sections 223 and 436, appear to us to be satisfactory, subject to the deletion of "by him" from paragraph (b). They would then be consistent with the definition of "instrumentalities" in the Laundering Convention.³² We therefore propose that, with that qualification, they should be substantially reproduced in any new legislation. Their effect, taken together with the provision recommended in recommendation 62 above, would be that the property liable to forfeiture would be property which (i) was in the offender's ownership or possession or under his control, either at the time of the offence or at the time of his arrest, and (ii) either had been used by anyone for the purpose of committing or facilitating the commission of any offence by anyone, or had been intended by anyone to be used by anyone for that purpose. We accordingly **recommend**:

- 63. (1) The property in respect of which a suspended forfeiture order may be made should have been either -**
- (a) used for the purpose of committing, or facilitating the commission of, any offence; or**
 - (b) intended to be used for that purpose.**
- (2) "Facilitating the commission of an offence" should be defined as including the taking of any steps, after an offence has been committed, for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection.**

(Draft Bill, clause 15(2), (5))

12.12 The question has recently arisen whether property should be liable to forfeiture where its only connection with the commission of an offence is the fact that the offence could not have been committed without the use of the property. In *Findlay v McNaughtan* the appellant was convicted of driving while disqualified, and the sheriff ordered forfeiture of the vehicle he had been driving at the time of the offence. The High Court held that the forfeiture was incompetent on the ground that section 436(1) of the Criminal Procedure (Scotland) Act 1975 did not apply to the offence of driving while disqualified.³³ In *Woods, Petitioner*³⁴ the High Court, differently constituted, disapproved *Findlay*, observing that subsection (1) of sections 223 and 436 was entirely general in its terms and there was nothing in it to suggest that the power to direct forfeiture did not extend to the forfeiture of a vehicle which had been used in the commission of an offence under the Road Traffic Acts, if the view could properly be taken that the vehicle had been used for the purpose of committing, or facilitating the commission of, the offence.

12.13 As we shall notice in the following paragraph, sections 223 and 436 of the 1975 Act have been amended by section 37 of the Road Traffic Act 1991 in order to make it clear that the power of forfeiture extends to vehicles used in the commission of specified serious road

³² "Any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences": Convention, art 1c. See para 12.6 above.

³³ 1991 SCCR 321. On the day after *Findlay* was decided the Divisional Court, considering the equivalent English provision, reached the opposite conclusion in *R v Highbury Corner Stipendiary Magistrates' Court, ex p Di Matteo* (1991) 92 Cr App R 263, [1991] 1 WLR 1374.

³⁴ 1993 SCCR 106, 1994 SLT 197.

traffic offences, including driving while disqualified. We consider that there may nevertheless be some doubt as to the competency of forfeiture in respect of other offences where property has been used at the time of the commission of the offence and, while the offence could not have been committed without using the property, it could be argued that the property was being used for another, legitimate, purpose and the offence, properly regarded, was ancillary to that use. It is possible, for example, to support the disapproved ground of judgment in *Findlay* with an argument that the appellant had used the vehicle not for the purpose of committing the offence, but in order to get from A to B. We consider that such arguments should be excluded, since forfeiture may often be appropriate where property has been used to any extent in the commission of an offence. We therefore propose that, for the avoidance of doubt, there should be a general rule that forfeiture is competent in such cases. Since it is possible to envisage technical statutory offences in respect of which Parliament might consider that forfeiture could never be appropriate, the general rule would not apply where the enactment creating the offence expressly excluded the general rule. We accordingly **recommend**:

- 64. Where the use of property is necessary for the commission of an offence, the property should be regarded for the purpose of recommendation 63(1)(a) above as used for the purpose of committing the offence unless, in the case of a statutory offence, the statute creating the offence otherwise provides.**

(Draft Bill, clause 15(6))

Road traffic offences

12.14 In our discussion paper³⁵ we asked a series of questions about the forfeiture of motor vehicles in respect of road traffic offences, having noted the views expressed in the Road Traffic Law Review Report³⁶ and the subsequent White Paper, *The Road User and the Law*.³⁷ The first of two, alternative, questions was whether the courts should be given a discretion to order forfeiture of a vehicle used in a road traffic offence which was punishable with imprisonment.³⁸ The majority of the consultees who responded to this question answered it in the affirmative. Such a discretion has now been conferred by section 37 of the Road Traffic Act 1991, which amends sections 223 and 436 of the Criminal Procedure (Scotland) Act 1975 by adding new subsections (1A) and (1B).³⁹ Subsection (1A) applies to an offence under the Road Traffic Act 1988 which is punishable with imprisonment and, in section 223, to an offence of culpable homicide.⁴⁰ Where a person commits such an offence by driving, attempting to drive or being in charge of a vehicle,⁴¹ or failing to provide a specimen for an analysis or a laboratory test,⁴² or failing to stop and give information or to report an

³⁵ DP, paras 3.66-3.68, prop 11.

³⁶ HMSO, 1988 ("The North Report").

³⁷ 1989, Cm 576.

³⁸ DP, prop 11(a).

³⁹ For the terms of these sections before this amendment see para 11.6 above.

⁴⁰ 1975 Act, ss 223(1B), 436(1B).

⁴¹ The relevant offences, in addition to culpable homicide and the other offences mentioned in the text above, are those under ss 1, 2, 3A, 4(1), 4(2), 5(1)(a), 5(1)(b), 22A, 94A, 103(1)(b) and 178.

⁴² In the course of an investigation into whether he had committed an offence while driving, attempting to drive or being in charge of a vehicle: 1988 Act, s 7.

accident,⁴³ the vehicle is to be regarded for the purposes of subsection (1)(a) as used for the purpose of committing the offence. We are in no doubt that the substance of this new provision should be preserved. In our draft Bill we achieve that by repealing section 37 of the Road Traffic Act 1991 and inserting in the Road Traffic Offenders Act 1988 a new section 33A in appropriate terms. We **recommend**:

65. It should continue to be competent to order forfeiture of a vehicle used in a road traffic offence which is punishable with imprisonment.

(Draft Bill, clause 39(4), (9); Schedule 4, paragraph 11; Schedule 5)

12.15 Our discussion paper also posed a second, alternative, question: should courts have a discretion to order forfeiture of a vehicle in respect of all road traffic offences?⁴⁴ Our consultees were divided on this issue. One group answered with an unqualified affirmative. Others were content that forfeiture should be competent only in respect of offences punishable with imprisonment. Others, again, replied that forfeiture should be competent for offences involving intent or giving rise to serious prejudice to the safety of the public because of the condition of the vehicle. It appears to us that in some circumstances forfeiture would be appropriate in respect of road traffic offences which are not punishable with imprisonment: for example, in the case of a persistent road traffic offender, in order to deprive him of a vehicle with which to commit further offences, or in the case of a person who has committed serious breaches of the construction and use regulations, in order to ensure that a dangerous vehicle will no longer be on the road.⁴⁵ We do not think it is possible to bring the varied circumstances in which forfeiture would be appropriate within a satisfactory statutory definition, and we accordingly propose that this issue should be covered by our recommendation 65 above: where the use of the vehicle has been necessary for the commission of the offence, the vehicle should be liable to forfeiture. Obviously there would be many cases where forfeiture would not be sensible, but we do not consider that that is a weighty argument against giving the court the option to order forfeiture where that would be appropriate and practical.

Other statutory offences

12.16 Apart from the road traffic legislation, there are many other statutes which create offences and confer specific powers to forfeit property which is related to the commission of the offences.⁴⁶ The first question presented by this range of forfeiture provisions is whether they should be repealed and replaced by our proposed new statutory scheme. Such a consolidation would have the advantage that in every case the rights of innocent third parties would be protected under the provisions of the scheme which we recommend later.⁴⁷ Consolidation might also have the advantage of uniformity, so that there would be no disparity between the general power and any specific power; but it would also have the disadvantage that the details of any specific powers which had been tailored to suit the

⁴³ 1988 Act, s 170(2), (3), (4).

⁴⁴ DP, prop 11(b).

⁴⁵ These are examples of preventative forfeiture: see para 11.4 above.

⁴⁶ eg the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, s 19 (as amended); the Prevention of Crime Act 1953, s 1(2); the Betting, Gaming and Lotteries Act 1963, s 52(4); the Sea Fish (Conservation) Act 1967, s 11(2), as substituted by the Fisheries Act 1981, s 24(1); the Misuse of Drugs Act 1971, s 27; the Immigration Act 1971, s 25(6); the Contempt of Court Act 1981, s 9(3); the Prevention of Terrorism (Temporary Provisions) Act 1989, s 13.

⁴⁷ See Part XVII below.

purposes of particular statutes⁴⁸ either would have to be incorporated into a complex general power, or would disappear. Further, consolidation would be difficult because some specific provisions are wider, and others are more restrictive, than the general power in our scheme.⁴⁹ It would also be difficult to consolidate for Scotland only, because many of the specific provisions apply to the whole of the United Kingdom. We canvassed these issues in the discussion paper,⁵⁰ and our consultees unanimously agreed that consolidation would be inappropriate. We therefore **recommend**:

66. The various forfeiture provisions in particular statutes should not be consolidated into a single provision.

12.17 If the various specific powers of forfeiture are to remain, it is necessary to resolve the question whether it should be competent to make a suspended forfeiture order under the general power in a case to which a specific provision for forfeiture applies. Two recent Scottish cases are relevant to this question. In *Donnelly v HM Advocate*⁵¹ the appellant pleaded guilty to a contravention of section 5(3) of the Misuse of Drugs Act 1971. Section 27(1) of that Act empowers the court, on conviction of an offence under the Act, to order the forfeiture of anything shown to relate to the offence. The trial judge ordered the forfeiture of money which had been found concealed in the appellant's house. On appeal the Crown conceded that the order could not be justified under section 27(1), but successfully argued that it was competent under section 223(1)(b) of the Criminal Procedure (Scotland) Act 1975 on the ground that the court was entitled to be satisfied that the money was intended by the appellant to be used for the purpose of committing an offence.⁵²

12.18 The second case is *Aitken v Lockhart*,⁵³ where the appellant was convicted of a contravention of the Wireless Telegraphy Act 1949, section 14(3) of which⁵⁴ provides that where a person is convicted of certain offences under that Act the court may order forfeiture of the apparatus in connection with which the offences were committed, other than apparatus not designed or adapted for emission. The trial court nevertheless forfeited apparatus of the latter description. The High Court held that although forfeiture under section 436 of the 1975 Act might have been competent, it would not have been appropriate having regard to the terms of section 14(3) of the 1949 Act. It is unfortunate that the attention of the Court was not drawn either to *Donnelly* or, more importantly, to the Telecommunications Act 1984, Schedule 3, paragraph 3(b), which provides that sections 223 and 436 of the 1975 Act do not apply where a person is convicted of an offence under the 1949 Act.

⁴⁸ eg Sea Fish (Conservation) Act 1967, s 11(2)(a), (b), (d), (e) as substituted by the Fisheries Act 1981, s 24(1).

⁴⁹ eg s 27(1) of the Misuse of Drugs Act 1971 is wider in that it permits forfeiture of "anything shown to the satisfaction of the court to relate to [not "to have been used or intended to be used for the purpose of committing or facilitating the commission of"] the offence", but narrower in that the forfeiture of anything related to some other offence or intended offence is forbidden.

⁵⁰ DP, paras 3.36-3.40, 3.43, prop 4(a).

⁵¹ 1984 SCCR 93.

⁵² A similar view was expressed in *R v O'Farrell* (1988) 10 Cr App R (S) 74, [1988] Crim L R 387. While section 27(1) permits only the forfeiture of anything shown to relate to the offence of which the accused was convicted, s 223(1)(b) permits the forfeiture of any property intended by the convicted person to be used for the purpose of committing any offence.

⁵³ 1989 SCCR 368.

⁵⁴ As substituted by the Telecommunications Act 1984, s 82.

12.19 The view has been expressed that there is some conflict between *Donnelly* and *Aitken* and some doubt as to whether it is appropriate to order forfeiture under the 1975 Act where there are statutory provisions for forfeiture related to the specific offence of which the offender has been convicted.⁵⁵ In our discussion paper, which went to press before *Aitken* was decided, we asked whether the approach adopted in *Donnelly* was considered to be generally acceptable and, if so, whether it should be embodied in a statutory provision.⁵⁶ All but one of those consultees who responded to this question favoured the approach in *Donnelly*. Several of them were of course aware of the decision in *Aitken*. One consultee preferred *Aitken*. Most of our consultees supported the introduction of a statutory provision.

12.20 We doubt whether there is any conflict between the two decisions. *Donnelly* makes it clear that the general provisions in the 1975 Act may be used to forfeit property which is not caught by a specific power of forfeiture, while *Aitken* indicates that the general power should not be used to forfeit articles whose forfeiture is expressly prohibited by the statute which confers the specific power.⁵⁷ We consider, however, that for the avoidance of doubt the effect of these two decisions should be embodied in any new legislation.⁵⁸ We note that in many cases, unless the property is clearly valueless or its possession is deemed to be contrary to the public interest (such as controlled drugs or obscene publications),⁵⁹ it will be preferable for the prosecutor to move for a suspended forfeiture order under the general provisions which we recommend rather than for forfeiture under a specific statutory provision, since the general provisions take account of the protection of the interests of third parties which is required by the Laundering Convention and the European Convention on Human Rights.⁶⁰ We recommend:

67. **Where a person is convicted of a statutory offence, any property falling within the general provisions recommended in recommendations 62 and 63 above should be liable to forfeiture notwithstanding that it is not liable to forfeiture under the statute creating the offence, unless that statute**
- (a) **expressly excludes the general provisions, or**
 - (b) **specifies the category of property which is to be liable to forfeiture under that statute, and the specified category does not include property used or intended to be used as mentioned in recommendation 63(1).**

(Draft Bill, clause 15(7), (8))

Notice of penalties

12.21 The first procedural question relative to the competency of a suspended forfeiture order is whether it should be necessary, where an accused is prosecuted for a statutory

⁵⁵ Renton and Brown, para 17-44.

⁵⁶ DP, paras 3.41-3.43, prop 4(b).

⁵⁷ C G B Nicholson, *Sentencing* (2nd ed, 1992), para 6-04.

⁵⁸ In England and Wales the court may make a deprivation order under s 43 of the Powers of Criminal Courts Act 1973 without regard to any restrictions on forfeiture in an enactment passed before the Criminal Justice Act 1988 (1973 Act, s43(1) as substituted by the 1988 Act, s 69(1)).

⁵⁹ See paras 14.7-14.8 below.

⁶⁰ See Part XVII below.

offence in summary proceedings, for the notice of penalties to include a notice that a suspended forfeiture order might be made. Under the present law, where a person is charged under summary procedure with the commission of a statutory offence, the prosecutor must serve on him along with the complaint a notice of the penalties applicable to the offence.⁶¹ Where the statute specifies that property may be forfeited on conviction, the notice of penalties must refer to forfeiture.⁶² It was held in *Findlay v McNaughtan*⁶³ that such a reference is necessary before forfeiture for a statutory offence may be ordered under the general power in section 436 of the Criminal Procedure (Scotland) Act 1975. A notice of penalties is not required where a summary complaint contains only a common law charge or charges, or in solemn procedure whatever the nature of the charge or charges.

12.22 In the discussion paper we posed two questions: whether notices of penalty should be required in relation to forfeiture orders at all; and, if so, whether they should be required in relation to forfeiture orders under the general power as well as to orders under specific statutory provisions.⁶⁴ Opinion among our consultees was divided on each question. We find it difficult to make a principled recommendation in view of the many anomalies in this branch of criminal procedure. Notices of penalty are required in summary procedure, but not in solemn procedure, and in respect of statutory offences, but not common law offences. Although the object of the requirement of a notice of penalties has been said to be "to ensure that a person charged with a statutory offence should be apprised of all the sanctions which it was within the power of the court to apply to anyone convicted of a contravention of the Act or Order in question,"⁶⁵ in practice notices of penalty do not refer to all the options open to the judge when sentencing for the statutory offence: they do not mention, for example, community service orders or compensation orders. These anomalies could be removed by radical measures: either by abolishing the requirement of notices of penalty altogether, or by introducing comprehensive notices of all the sentencing options available for both common law and statutory charges in both solemn and summary proceedings. Even if we were convinced that either of these courses was desirable, however, we could not recommend it in the context of this report. We consider that we can only express the view that so long as a notice of penalties has to be served on the accused in respect of a statutory charge in summary proceedings, any penalty which may be imposed should logically be included in the notice. Since forfeiture is, or may be,⁶⁶ a penalty, the notice should refer not only to any particular penalty of forfeiture provided for in the statute creating the offence, but also to the general power which we recommend above, in cases where the court may competently exercise it.⁶⁷ This view is, we think, consistent with *Findlay v McNaughtan*.⁶⁸ It could be given effect by an amendment to Form 46 of Schedule 1 to the Act of Adjournment (Consolidation) 1988 which specifies the form of a notice of penalties. We therefore **recommend**:

⁶¹ Criminal Procedure (Scotland) Act 1975, s 311(5); Act of Adjournment (Consolidation) 1988, r 87(2), Sched 1, Form 46.

⁶² *Duffy v Lakie* 1962 SLT 30, applying *Coogans v MacDonald* 1954 JC 98, 1954 SLT 279.

⁶³ 1991 SCCR 321.

⁶⁴ DP, paras 3.55-3.62, prop 8.

⁶⁵ *Coogans v MacDonald* 1954 JC 98, L J-G Cooper at pp 103-104.

⁶⁶ Some forfeitures may be preventative rather than punitive (see paras 11.4 above, 12.24 below); and the forfeiture of property belonging to a third party does not penalise the accused.

⁶⁷ The exercise of the general power would be excluded in certain cases: see para 12.13, recommendation 64, and para 12.20, recommendation 67 above.

⁶⁸ 1991 SCCR 321. See para 12.21 above.

68. (1) Where a summary complaint includes any statutory charge, the notice of penalty should give notice of liability to forfeiture under the general power recommended in recommendations 60 to 64 above where forfeiture thereunder is competent, as well as notice of any liability to forfeiture under the statute creating the offence.
- (2) Form 46 of Schedule 1 to the Act of Adjournal (Consolidation) 1988 should be amended accordingly.

Conjunction of suspended forfeiture order with probation or absolute discharge

12.23 Under subsection (1) of sections 223 and 436 of the Criminal Procedure (Scotland) Act 1975, set out above,⁶⁹ property is liable to forfeiture "where a person is convicted of an offence". The effect of the words just quoted is that a summary criminal court has no general power⁷⁰ to forfeit property on discharging a person absolutely or placing him on probation, because in such cases a summary criminal court, having been satisfied that the person committed the offence, does not proceed to conviction.⁷¹ In solemn procedure, on the other hand, there is no such restriction since there the person is convicted before being discharged absolutely or placed on probation.⁷² This anomaly has arisen as the result of the application to summary procedure of the provisions for forfeiture in solemn procedure when a new section 436 of the 1975 Act was substituted by the Criminal Justice (Scotland) Act 1980.⁷³ The original section 436 and its predecessors had empowered summary criminal courts to forfeit property on making a probation order. In the discussion paper we expressed the view that they should have power to forfeit not only when making a probation order but also when granting an absolute discharge; and we proposed that a forfeiture order should be competent in conjunction with a probation order or an absolute discharge both in solemn and summary proceedings.⁷⁴

12.24 Of the consultees who commented on that proposition only one disagreed, on the ground that forfeiture was not consistent with a probation order or an absolute discharge. That view may have some force in so far as it relates to an absolute discharge, which is granted where the court is of opinion "that it is inexpedient to inflict punishment".⁷⁵ It has been held in two English cases that a property deprivation order made under section 43 of the Powers of Criminal Courts Act 1973, being a punitive order, could not be combined with an absolute or conditional discharge.⁷⁶ As we have explained, however,⁷⁷ a forfeiture order is not necessarily exclusively punitive in effect. In certain circumstances it may also, or even exclusively, have a preventative effect. The property which would be liable to forfeiture under our recommendations would not necessarily be related only to the offence which the

⁶⁹ See para 11.6 above.

⁷⁰ The Firearms Act 1968, s 52(1)(c) confers a specific power to forfeit on making a probation order. The Civic Government (Scotland) Act 1982, s 58(3), confers a specific power to forfeit on granting an absolute discharge or making a probation order in relation to a person in respect of a contravention of s 58(1) of that Act. In *Wilson v Houston* 1988 GWD 13-566 the forfeiture order seems to have been approved *per incuriam*.

⁷¹ 1975 Act, ss 383 (absolute discharge), 384(1) (probation).

⁷² 1975 Act, ss 182 (absolute discharge), 183(1) (probation).

⁷³ See para 11.6 above, fourth footnote.

⁷⁴ DP, paras 2.7, 3.52-3.54, prop 7. A forfeiture order may be combined with a deferred sentence: *Devine v Carmichael* 1991 GWD 40-2465.

⁷⁵ 1975 Act, ss 182, 383.

⁷⁶ *R v Hunt* [1978] Crim L R 697; *R v Savage* (1983) 5 Cr App R (S) 216.

⁷⁷ See para 11.4 above.

accused was proved to have committed, or even to any other offence which he had committed or intended to commit. One of the objectives of our recommendations is that property which has been used, or has been intended to be used, by anyone for the purpose of committing any offence should be taken out of circulation lest the accused or anyone else should do harm with it in the future. In any event it is not difficult to envisage circumstances in which a person has committed a technical offence and, either at the time of the offence or at the time of his apprehension, has had under his control some object which some other person had used, or had intended to use, for the purposes of some other offence.⁷⁸ In such circumstances the just and practical course might be to discharge the accused absolutely and make a suspended forfeiture order in respect of the property. We are fortified in our views by the fact that in England and Wales the two cases to which we have referred were in effect overruled by section 69(2) of the Criminal Justice Act 1988, whereby a forfeiture order may be combined with a probation order or an absolute or conditional discharge.

12.25 Under sections 223 and 436 of the Criminal Procedure (Scotland) Act 1975 forfeiture is competent where a person is convicted of any offence. None of our consultees suggested that the power to forfeit should be restricted in any way by reference to the nature of the offence which the accused was proved to have committed.⁷⁹ We would not find it possible to justify any such restriction.

12.26 We therefore **recommend**:

- 69. A suspended forfeiture order should be competent where in respect of any offence -**
- (a) a person is convicted, whether in solemn or summary proceedings;
or**
 - (b) in the case of summary proceedings the court, without proceeding to conviction, makes in respect of a person either an order discharging him absolutely or a probation order.**

(Draft Bill, clause 15(1))

⁷⁸ eg police officers see A committing a technical offence and find that he has in his possession equipment lent to him by B after B had used it to break into a house.

⁷⁹ In England and Wales s 43(1) of the Powers of Criminal Courts Act 1973, as originally enacted, limited the power to cases in which the offender was convicted of an offence punishable on indictment by at least two years' imprisonment. The current s 43(1), substituted by s 69(1) of the Criminal Justice Act 1988, contains no restriction on the type of offence to which it may apply.

Part XIII The making of a suspended forfeiture order

Introduction

13.1 Under our proposed scheme the forfeiture of property is preceded by a suspended forfeiture order which is made by the court after the accused has been convicted. The making of the order would have the effect of starting the running of a period of time at the end of which the property would be automatically forfeited to the Crown. We discuss in Part XIV the length of the period and various practical consequences of the making of the order. In this part we consider the rules of evidence and procedure which should apply in relation to the making of the order. We propose that the court should have a discretion to make an order¹ if the prosecutor applies for an order² and satisfies the court beyond reasonable doubt that the conditions for the making of an order are satisfied.³ We discuss whether the property concerned should have to be produced to the court,⁴ the need for its accurate identification,⁵ the notification of third parties,⁶ procedure where the order relates to heritable property,⁷ the satisfaction of a compensation order in favour of a victim from the proceeds of sale of the forfeited property,⁸ and appeals.⁹

Application by prosecutor

13.2 We propose that the court should not be empowered to make a suspended forfeiture order on its own initiative but should be entitled to do so only upon an application by the prosecutor. The prosecutor will be the best judge of whether a suspended forfeiture order would create undesirable difficulties - where, for example, a third party has an interest in the property, or the preservation of the property or some other aspect of the execution of the suspended forfeiture order would present problems disproportionate to the value of the property. We have already recommended that a confiscation order may be made only on the application of the prosecutor: in proceedings on indictment, when he moves for sentence or, in a remit to the High Court for sentence, before sentence is pronounced; and in summary proceedings, after the accused has been convicted.¹⁰ We consider that a corresponding provision is appropriate here. If the prosecutor made the application at any of those stages, the court would be able to consider the matter before the sentence or any part of it had been pronounced. The application would be made orally, but in some cases it would be convenient if the prosecutor tendered a document listing or specifying the

¹ See para 13.6 below.

² See para 13.2 below.

³ See paras 13.3-13.5 below.

⁴ See paras 13.7-13.9 below.

⁵ See para 13.10 below.

⁶ See para 13.11 below.

⁷ See para 13.12 below.

⁸ See paras 13.13-13.16 below.

⁹ See para 13.17 below.

¹⁰ See para 6.4 above.

property which is the subject of the application.¹¹ The defence would have an opportunity to argue that the suspended forfeiture order should not be made, or should not extend to particular items of property, when addressing the court in mitigation of sentence. We deal in the following paragraphs with the procedure where the defence contend that the conditions for making an order do not apply. We **recommend**:

70. (1) **The court should be entitled to make a suspended forfeiture order only on the application of the prosecutor.**
- (2) **The application should be made -**
- (a) **in proceedings on indictment, when the prosecutor moves for sentence or, in a remit to the High Court for sentence, before sentence is pronounced;**
 - (b) **in summary proceedings, following the conviction of the accused.**

(Draft Bill, clause 15(2), (3))

Standard of proof

13.3 We propose that before the court may consider making an order it must be satisfied that the conditions prescribed in recommendations 62 and 63 are met - that the property in respect of which the prosecutor's application is made (i) was in the convicted person's ownership or possession or under his control, either at the time of the offence or at the time of his arrest, and (ii) either had been used by anyone for the purpose of committing or facilitating the commission of any offence, or had been intended by anyone to be used by anyone for that purpose. We consider that in many cases these matters will be beyond dispute. Where the charge of which the accused has been convicted specifies that he used the property for the purpose of committing the offence, no question should arise. In many other cases it will be clear from the jury's verdict that they must have accepted evidence relative to the property which indicates that the conditions are satisfied. In such cases, and others, the defence may admit that the conditions are satisfied.

13.4 It is necessary, however, to make provision for cases where, the prosecutor's application having been made, the trial judge expresses some doubt¹² or the defence contend that any condition does not apply. There might, for example, be a question as to whether the property was intended to be used for the purpose of committing an offence other than that of which the accused has been convicted. We consider that in such a situation it should be for the prosecutor to satisfy the court that the condition in question is met.¹³ The prosecutor has a similar duty in relation to the making of confiscation orders under the Criminal Justice (Scotland) Act 1987, and we have made a corresponding recommendation in relation to the confiscation orders proposed in this report.¹⁴ In relation to suspended

¹¹ On the need for precision when framing an application or order, see para 13.10 below.

¹² eg where the accused is unrepresented.

¹³ In England and Wales the prosecution have this duty in relation to deprivation orders: *R v Pemberton* (1982) 4 Cr App R (S) 328, [1983] Crim L R 121.

¹⁴ See paras 6.3-6.5 above.

forfeiture orders, in some cases the prosecutor will be able to satisfy the court that the condition in question is met by founding on passages in the evidence led at the trial. In others, where it is necessary to establish facts which do not appear from the evidence at the trial because they were not essential to the proof of the accused's guilt of the offence charged, the prosecutor should be entitled to lead additional evidence before the trial judge after conviction, either immediately or at an adjourned diet. The defence would be entitled to challenge the prosecutor's case either by founding on other passages in the evidence led at the trial, or by cross-examining the additional witnesses and leading additional evidence of their own.

13.5 It is important to make clear provision as to the standard of proof which the prosecutor must attain before the court may be satisfied that the conditions have been met. In Part VI of this report we have recommended that in certain matters relative to confiscation orders the burden of proof should lie on the prosecutor, who should be required to establish his case beyond reasonable doubt.¹⁵ Most of the reasons there given appear to us to be equally applicable here. We **recommend**:

- 71. In any hearing on the question whether any condition in recommendations 62 and 63 above is satisfied, the burden of proof should lie on the prosecutor, who should be required to establish his case beyond reasonable doubt.**

(Draft Bill, clause 15(2))

Judicial discretion

13.6 Even if the prosecutor discharges the burden of proving that the statutory conditions for making a suspended forfeiture order are met, the judge would not be required to make an order. As we have already pointed out, the consequent forfeiture would be part of the total penalty imposed on the offender, and the judge would have to consider whether its effect, taken together with any other sentences passed or orders made, would be to create an excessive or inappropriate penalty.¹⁶

Presence of moveable property in court

13.7 It is the practice of some sheriffs to refuse to make an order for forfeiture unless the property is produced in court or is otherwise in safe custody.¹⁷ While some specific statutory provisions require the property to be produced,¹⁸ there is no other statutory authority for this practice. Sections 223 and 436 of the Criminal Procedure (Scotland) Act 1975 do not require the property to be in court, and sections 224 and 437 clearly indicate that it need not be, since they provide that a warrant may be granted to search for an article which has been forfeited. In any event it is impracticable or impossible to produce in court a large article such as a motor vehicle,¹⁹ and it is dangerous to have in the courtroom, unless absolutely necessary for

¹⁵ See paras 6.5, 6.13, 7.17 above.

¹⁶ See para 12.4 above.

¹⁷ DP, para 3.48; 17 *Stair Memorial Encyclopaedia* para 807.

¹⁸ eg the Betting, Gaming and Lotteries Act 1963, s 52(4). In *Shandon Supply Co Ltd v MacLeod* 21 October 1965 (unreported: Crown Office Circular A6/65) an order for the forfeiture and destruction of a gaming machine was suspended on the ground that it had not been produced to the court in terms of s 52(4).

¹⁹ Where such a production is forfeited, the label lodged in lieu of it is handed to the clerk of court.

production at the trial, such articles as firearms, ammunition, offensive weapons, explosives or large quantities of drugs or money. Again, an article may not be in court when a plea of guilty is unexpectedly tendered at a pleading diet in a summary criminal court. On the other hand, while there may be very good reasons why an article is not in court, its absence may lead to difficulties when a forfeiture order is made. It is then the duty of the Clerk of Justiciary or the sheriff clerk²⁰ to take possession or control of the article and dispose of it in terms of the court's direction. We asked our consultees whether they had encountered any practical problems at that stage,²¹ and we have been told that on some occasions in the sheriff court the property is not lodged with the sheriff clerk by the procurator fiscal or the police until he asks them to do so. On other occasions the procurator fiscal or the police have reported to the sheriff clerk that the property cannot be found, and the procurator fiscal then has to lodge with the sheriff clerk a certificate to that effect in order to relieve the sheriff clerk of the obligation to account for the property.

13.8 It is obviously desirable that any new procedure should reduce the occurrence of such lapses as far as possible. Under our scheme, in many cases any moveable property which is the subject of an application for a suspended forfeiture order will already have been lodged in court as a production, or seized in terms of a warrant, or will already be the subject of a restraint order.²² If none of these courses has been taken, or if for any reason the property is not in court when the application is made, we would expect an efficient prosecutor to have ascertained either that the property is under his control or, if it is not, that its whereabouts are known or strongly suspected. If it is under his control he will see to it that it is lodged with the clerk of court as soon as is practicable after the order is made. We understand that in some cases in the sheriff court the procurator fiscal has produced a certificate certifying that the property is held either by himself or by the police in secure storage. If the property is not under the prosecutor's control, we propose that he should be entitled to apply at once for a search warrant.²³ We envisage that as soon as he obtained the warrant he would instruct its immediate execution. We consider that we need only recommend an appropriate statutory provision, which we propose should be modelled on sections 224 and 437 of the Criminal Procedure (Scotland) Act 1975 but without any requirement for information on oath.²⁴ Otherwise we consider that the conduct of the prosecutor and the arrangements for ensuring that the property is produced to the clerk of court are matters of efficient administration. We therefore **recommend**:

- 72. Any necessary instructions to prosecutors or clerks of court relative to the lodging with the clerk of court of moveable property which has been made the subject of a suspended forfeiture order should be the subject of directions by Crown Office or Scottish Courts Administration.**

²⁰ Hereafter we use the expression "the clerk of court" to mean the Clerk of Justiciary or the sheriff clerk.

²¹ DP, para 3.51, prop 6.

²² We discuss warrants and restraint orders in Part XVI.

²³ He could, alternatively, apply for a restraint order: see Part XVI.

²⁴ See para 13.9, recommendation 74 below. Ss 224 and 437 of the 1975 Act provide that where a court has made an order for the forfeiture of an article, the court or any justice may issue a search warrant if satisfied by information on oath that there is reasonable cause to believe that the article is to be found in any place or premises and that admission thereto has been refused or a refusal of admission is apprehended.

13.9 We also asked consultees whether it was necessary to introduce an express statutory provision regarding the presence of property in court prior to the granting of an order.²⁵ Two groups of consultees expressed a wish for a provision making it clear that the presence of the property was unnecessary, but the weight of opinion was against the enactment of any provision on the subject. We have concluded that a provision is unnecessary. As we have observed, it is clear from the terms of the present legislation that the property need not be in court;²⁶ and we believe that that should be equally clear from the terms of our draft Bill. We think that if a court refused to make a suspended forfeiture order on the ground that the property was not in court, an appeal by the Crown would very probably be successful. We consider that any practical difficulty will be minimised if prosecutors are instructed as we have envisaged in the previous paragraph, and if the order clearly identifies the property to which it relates. We consider the topic of identification of the property in the next paragraph. We **recommend**:

- 73. It is unnecessary to enact a statutory provision as to the presence in court of the moveable property to which a suspended forfeiture order relates.**
- 74. Where a court has made a suspended forfeiture order in respect of an article of moveable property, it should be entitled, on the application of the prosecutor, to grant a warrant for the search for and seizure of that article if satisfied that there is reasonable cause to believe that it is to be found in any place or premises specified in the application and that admission thereto has been refused or it is reasonably believed that such admission will be refused.**

(Draft Bill, clause 16(2), (3))

Identification of property

13.10 It is important that the property which is the subject of a suspended forfeiture order should be clearly identified in the order, especially in cases where the property is not in court when the order is made. In the discussion paper we referred to *Rankin v Wright*²⁷ where there was a dispute as to the meaning of "net" in a forfeiture provision in the Herring Fishery Acts, and we sought comments on the proposition that no statutory provision was required clarifying the identification or specification of forfeited property.²⁸ Our consultees were generally agreed that no such provision was necessary, but one group of consultees emphasised the need for precision in orders for forfeiture under section 11(2) of the Sea Fish (Conservation) Act 1967²⁹ whereby valuable gear and catches may be forfeited, and another group criticised orders for the forfeiture of "a quantity of drugs" or "a number of magazines" as creating uncertainty as to the amount forfeited and difficulties in accounting. We have already suggested that the prosecutor might tender a document specifying the property in respect of which he was applying for an order.³⁰ While precision is clearly essential, both in an application for an order and in the formulation and minuting of the order, it appears to

²⁵ DP, para 3.51, prop 6(b).

²⁶ See para 13.7 above.

²⁷ (1901) 3 Adam 483.

²⁸ DP, para 3.63, prop 9.

²⁹ As substituted by the Fisheries Act 1981, s 24(1).

³⁰ See para 13.2 above.

us to be a matter of good practice which does not require to be prescribed in legislation. We therefore **recommend**:

- 75. It is unnecessary to enact any statutory provision as to the identification or specification in a suspended forfeiture order of the property to which it relates.**

Identification and notification of third parties

13.11 As soon as a suspended forfeiture order is made, there are two matters which should be attended to at once: the protection of the interests of third parties in the property, and, where the property is heritable,³¹ the prevention of dealings with it. In order to safeguard the interests of innocent third parties we consider that any person, other than the convicted person, whom the prosecutor knows or reasonably suspects³² to be the owner³³ of, or to have an interest in, the property to which a suspended forfeiture order relates should be named in the order, notified of the order at once and advised of the remedies available to innocent third parties.³⁴ The remedies which we propose later in this report are the recall of the order³⁵ or, where the property has been forfeited, the return of the property or, if it has been disposed of, compensation.³⁶ We propose that if the identity of the owner or any other person who may be interested in the property is unknown, or if his address is unknown, a notice of the terms of the order should be published in the *Edinburgh Gazette* or elsewhere if the court so directs. Where, for example, it is thought that a car may be the subject of a hire-purchase agreement, a notice in the *Edinburgh Gazette* may come to the attention of the finance company. In other cases an advertisement in a local newspaper may be appropriate. The question whether any notice or advertisement is necessary should, we think, be a matter for the court. A notice might be deemed unnecessary where, for example, the property was clearly of little value. Where the property is heritable property in Scotland, the naming in the order of the owner and any other interested party will be essential to the further procedure which we recommend below.³⁷ We therefore **recommend**:

- 76. (1) If the prosecutor knows or reasonably suspects the identity of a person (other than the offender) as being the owner of, or otherwise having an interest in, the property to which the suspended forfeiture order relates, that person should be named in the order as a person having, or suspected of having, an interest in the property.**

³¹ Moveable property either will have been produced to the sheriff clerk or will be the subject of a warrant for search and seizure.

³² The test of "reasonable suspicion" is not intended to be rigorous. "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'." (*Hussien v Chong Fook Kam* [1970] AC 942 *per* Lord Devlin at p 948.)

³³ If, of course, the prosecutor is satisfied that the property has an innocent owner he will not have applied for a suspended forfeiture order and the property will be released under the normal arrangements for productions.

³⁴ The Commissioners of Customs and Excise are required to give notice of the seizure of any thing as liable to forfeiture and of the grounds thereof to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof: Customs and Excise Management Act 1979, Sched 3, paras 1, 2, as amended by the Isle of Man Act 1979, Sched 1, para 23.

³⁵ See Part XV below.

³⁶ See Part XVII below.

³⁷ See paras 13.12, 16.9-16.12 below.

- (2) Where a person is named in the order in pursuance of paragraph (1) above, the prosecutor should, as soon as may be after the order has been made, notify that person in writing that the order has been made and that he may apply to the court for recall of the order or, in the event of forfeiture, for the return of the property or compensation.

(Draft Bill, clause 15(4), (10)(a))

77. The prosecutor should, as soon as may be after a suspended forfeiture order has been made, insert in the *Edinburgh Gazette* or some other appropriate publication a notice specifying the terms of the order, if directed to do so by the court.

(Draft Bill, clause 15(10)(c))

Registration of order relating to heritable property in Scotland

13.12 Where a suspended forfeiture order relates to heritable property in Scotland, it is necessary that information should be publicly available that the property will be automatically forfeited to the Crown at the end of the period of which the making of the order marks the beginning, unless the order is varied or recalled or is set aside on appeal. We propose that this should be achieved by the recording of a certified copy of the order in the General Register of Sasines or by its registration in the Land Register of Scotland. We consider that it should be the duty of the prosecutor to record or register the certified copy as soon as possible. We recommend later that it should likewise be his duty to record or register a certified copy of any subsequent order varying or recalling the suspended forfeiture order³⁸ or setting it aside on appeal.³⁹ The prevention of any dealings with heritable property between the date of the order and the date of forfeiture would be achieved by means of restraint orders and any necessary ancillary orders. We discuss these in Part XVI. We recommend:

78. Where a suspended forfeiture order relates to heritable property in Scotland, the prosecutor should, as soon as may be after the order has been made, record a certified copy of the order in the General Register of Sasines or register it in the Land Register of Scotland.

(Draft Bill, clause 15(10)(b))

Compensation from proceeds of sale of forfeited property

13.13 In the discussion paper we sought views on the question whether the court should have power to direct that the proceeds of the sale of forfeited property should be applied towards the satisfaction of a compensation order⁴⁰ where the offender did not have sufficient

³⁸ See paras 15.2, 15.12 below.

³⁹ See para 13.17, recommendation 82 below.

⁴⁰ A compensation order may be made in respect of any personal injury, loss or damage caused directly or indirectly by the acts which constituted the offence: Criminal Justice (Scotland) Act 1980, s 58. See Renton and Brown, paras 17-38 to 17-43.

means to meet such an order.⁴¹ We pointed out that it was doubtful whether the powers of the Scottish courts under sections 223(1) and 436(1) of the Criminal Procedure (Scotland) Act 1975, which provide only that "any property forfeited under this section shall be disposed of as the court may direct",⁴² extended to the making of an order directing the sale of the property and the application of the proceeds towards payment of a compensation order. We noted that in England and Wales judicial decisions that the courts had no power to make such an order under section 43 of the Powers of Criminal Courts Act 1973, since that section was concerned not with compensation but with punishment,⁴³ had led to the insertion of a new section 43A in that Act.⁴⁴ Section 43A(1) enables a court which has made a deprivation order under section 43 in a case where the offender has been convicted of an offence which has resulted in a person suffering personal injury, loss or damage, to order payment to that person of any proceeds which arise from the disposal of the property and which do not exceed a sum specified by the court. Section 43A(2) provides that the court may only make such an order if it is satisfied that but for the inadequacy of the means of the offender it would have made a compensation order under which he would have been required to pay compensation of an amount not less than the specified amount. In other words, if compensation is appropriate and the offender has sufficient means to satisfy a compensation order, the court should make a compensation order instead of an order under section 43A.

13.14 We noted in the discussion paper that a provision similar to section 43A had been recommended for Scotland by a Working Party of The Scottish Association of Victim Support Schemes.⁴⁵ Proposition 2(a) in the discussion paper was based on section 43A, and all but one of the consultees who commented on that proposition supported it in its entirety. The Sheriffs' Association, however, while agreeing that the courts should have power to order compensation from the sale of forfeited property, observed that there seemed no good reason why the power should be restricted to those cases where the offender would not otherwise have sufficient means to meet a compensation order. That is the restriction imposed by section 43A(2). We have concluded that such a restriction is unnecessary and undesirable. It prevents the court from making a section 43A order as an alternative to a compensation order against an offender who has means from which compensation could be paid. That could be inconvenient for both the victim and the offender, and could also be unfair to the offender. Suppose that the offender not only has property which is liable to forfeiture but also has sufficient means to pay a compensation order, and that the court makes both a forfeiture order and a compensation order to be paid by instalments. Under the English scheme, when the forfeited property is sold, the proceeds cannot be paid at once, or indeed at all, to the victim, who has to wait for payment by instalments under the compensation order; and the offender not only loses his property but also has the burden of paying compensation.⁴⁶ This appears to us to be an unattractive result. While forfeiture may be regarded as a penalty,⁴⁷ a compensation order is generally an ancillary order giving effect to civil liabilities which the victim could otherwise pursue by action.⁴⁸ If the property was not forfeited and the victim raised a civil action, the offender might decide to satisfy the victim's

⁴¹ DP, paras 2.12-2.14, 3.19-3.24, prop 2(a).

⁴² For the complete text see para 11.6 above.

⁴³ *R v Kingston-upon-Hull Justices, ex p Hartung* (1981) 72 Cr App R 26; *R v Thibeault* (1983) 76 Cr App R 201.

⁴⁴ By s 107 of the Criminal Justice Act 1988.

⁴⁵ *Compensation for Victims of Crime* (1988), recommendation 11, *cit* DP, para 3.19.

⁴⁶ D A Thomas, "The Criminal Justice Act 1988: the sentencing provisions" [1989] Crim L R 43 at p 52.

⁴⁷ See para 11.4 above.

⁴⁸ See para 2.16 above, first footnote.

claim by selling his property. While in practice that might well be an unlikely train of events, it nevertheless seems unjust that, because of the restriction imposed by section 43A(2), the offender should both lose his property and be required to pay compensation.

13.15 We have therefore decided to recommend a scheme whereby the court may make both a suspended forfeiture order and a compensation order⁴⁹ against the offender, and may further order that in the event of forfeiture the proceeds of sale should be first directed towards the satisfaction of the compensation order. We do not consider it necessary for there to be any connection between the offence in respect of which the compensation order is made and the offence in respect of which the suspended forfeiture order is made.

13.16 In the discussion paper we asked whether the sale of the property should be delayed until the expiry of a period during which an innocent third party would have the right to bring the order under review. All those consultees who responded answered in the affirmative, except for one consultee who favoured early disposal of the property and the payment of compensation to any innocent third party. We must now take account of the Laundering Convention's requirement that the rights of third parties must be preserved.⁵⁰ We doubt whether the early disposal of property and the payment of compensation would meet that requirement. In any event, while a period of delay might create practical difficulties in relation to the storage or preservation of the property, we consider that most innocent third parties would rather have their property than compensation, there could be disputes as to the quantification of the compensation and the compensation would have to be payable from public funds. While we have found it necessary to include a long-stop provision for compensation in the event of the mistaken disposal of an innocent third party's property after the expiry of the period of delay,⁵¹ we consider it desirable that the payment of compensation to innocent third parties should be restricted to those cases. Our scheme therefore includes a period of delay between the making of the suspended forfeiture order and the forfeiture of the property (except in special cases⁵²) during which the order may be recalled at the instance of the owner. Our recommendations as to the period of delay and the procedure for recall of the order are also explained later.⁵³ In practice, we envisage that a court which made both a suspended forfeiture order and a compensation order would suspend the payment by the offender of the sum, or the instalments of the sum, due under the compensation order until the proceeds of sale had been applied towards the satisfaction of the compensation order. If the proceeds were less than the amount of the order, the offender would have to pay the difference. If the proceeds exceeded the amount of the order, the excess would remain in the hands of the Crown. We **recommend**:

⁴⁹ While it would be competent to combine a suspended forfeiture order with a probation order or an absolute discharge in terms of our recommendation 70 above, it remains incompetent to combine a compensation order with an absolute discharge, a deferred sentence or a probation order: see the Criminal Justice (Scotland) Act 1980, s 58(1). A compensation *requirement*, however, may be included in a probation order: Criminal Procedure (Scotland) Act 1975, ss 183(5B), 384(5B) as inserted by the Criminal Justice (Scotland) Act 1987, s 65.

⁵⁰ Convention, art 5. See paras 10.1 above, 17.1 below.

⁵¹ See Part XVII below.

⁵² See Part XIV below.

⁵³ See Part XV below.

79. **The court should be entitled to make both a suspended forfeiture order and a compensation order against the same person in the same proceedings, and to order that, in the event of the forfeiture of the property on the expiry of the period mentioned in recommendation 83 below, the property should be sold and the proceeds of sale first directed towards satisfaction of the compensation order.**

(Draft Bill, clause 15(9))

Appeals

13.17 Where the court has made a suspended forfeiture order, the accused should be entitled to appeal against the order by way of an appeal against sentence, since the order will be part, or all, of his sentence. It would not be practicable to postpone his entitlement to appeal until the property had been forfeited. It is necessary, however, to provide that the property will not be forfeited until the appeal, if it is proceeded with, is determined in favour of the Crown or until the expiry of the period of delay, whichever is the later. It is clearly important that the period of delay, which is for the protection of third parties, should not be cut down in the event of the determination of an appeal within that period. A provision on these lines would match the provisions as to the suspension of forfeiture in sections 264(2) and 443A(1) of the Criminal Procedure (Scotland) Act 1975. Where the court has refused to make a suspended forfeiture order, the steps available to the prosecutor under existing legislation seem to us to be sufficient. In summary proceedings, the prosecutor may appeal on a point of law against the sentence passed.⁵⁴ In both solemn and summary proceedings, provision for an appeal by the prosecutor against sentence is made by section 42 of the Prisoners and Criminal Proceedings (Scotland) Act 1993.⁵⁵ Where the court has made a suspended forfeiture order relating to moveable property in any of the categories which we recommend should be forfeited immediately,⁵⁶ the provisions of sections 264(2) and 443A(1) of the 1975 Act seem to us to be applicable and we do not recommend any amendment of them. The only further provision which we propose is that where a suspended forfeiture order relating to heritage is quashed on appeal, it should be the duty of the prosecutor to record or register a certified copy of the Court's interlocutor in the General Register of Sasines or the Land Register of Scotland. We therefore **recommend**:

80. **For the purposes of any appeal or review a suspended forfeiture order should be a sentence.**

(Draft Bill, clause 15(12))

⁵⁴ Criminal Procedure (Scotland) Act 1975, s 442(1)(b)(ii).

⁵⁵ S 42 amends the Criminal Procedure (Scotland) Act 1975 by adding a new s 228A and inserting further provisions in s 442. Ss 228A and 442 have since been amended by s 68 of the Criminal Justice Act 1993. Under s 228A as amended the Lord Advocate may appeal against a sentence or other disposal in solemn procedure on the ground of undue leniency or on a point of law. Under s 442 as amended the prosecutor may appeal in summary procedure on the ground of undue leniency in any class of case specified by order by the Secretary of State. No such orders have been made.

⁵⁶ See para 14.7 below.

81. Where a person appeals against a sentence which consists of or includes a suspended forfeiture order, other than an order relating to moveable property certified in terms of recommendation 84 below, the forfeiture of the property to which the order relates should be suspended until the appeal, if it is proceeded with, is determined in favour of the Crown or until the expiry of the period of delay mentioned in recommendation 83 below, whichever is the later.

(Draft Bill, clause 17(4))

82. Where a suspended forfeiture order relating to heritable property in Scotland is recalled on appeal the prosecutor should, as soon as may be after the appeal has been disposed of, record a certified copy of the Court's interlocutor in the General Register of Sasines or register it in the Land Register of Scotland.

(Draft Bill, clause 20(3))

Part XIV The effect of a suspended forfeiture order

Introduction

14.1 We propose that as a general rule the effect of a suspended forfeiture order should be to start the running of a period of time at the end of which the property concerned would be automatically forfeited to and vested in the Crown. The general rule would not apply where the order was recalled or where the accused appealed against conviction or sentence. There would also have to be an exception for special classes of moveable property which ought to be disposed of at once. In the following paragraphs we discuss how long the period of time should be;¹ the exception for special classes of moveable property;² responsibility for the property during the running of the period;³ and how the property should be disposed of after it has been forfeited.⁴

Interval between suspended forfeiture order and forfeiture

14.2 We begin by considering the length of time which, as a general rule, should elapse between the making of the suspended forfeiture order and the forfeiture of the property to which it relates. The object of having such an interval is to protect the interests of third parties by providing an opportunity for them to apply for the return of their property before forfeiture. How long should the interval be? In the discussion paper we noted that in England and Wales the effect of subsection (4) of section 43 of the Powers of Criminal Courts Act 1973 is that an innocent owner of property which is the subject of a deprivation order has a period of six months in which to apply to the court for the return of the property. We asked our consultees whether in Scotland the period should be six months or some other period.⁵

14.3 Those who responded suggested a variety of periods between two months and six months. Some of those who favoured six months considered that there was some advantage in having the same period as in England and Wales. There are, however, other considerations which appear to be relevant. Under our recommendations anyone whom the prosecutor believes to have an interest in the property should have been notified of the terms of the order and his remedies, unless his identity or whereabouts are unknown.⁶ As to moveable property, the storage and preservation of at least some articles, such as motor vehicles, for as long as six months might lead to the accumulation of property, some of it perhaps of modest value, for which adequate space and staff could be provided only at a cost disproportionate to the value of the property. We have concluded that a period of 60 days would be sufficient for moveable property.

¹ See paras 14.2-14.6 below.

² See paras 14.7-14.8 below.

³ See para 14.9 below.

⁴ See para 14.10 below.

⁵ DP, paras 3.10, 3.18, prop 1(b).

⁶ See para 13.11 and recommendations 75 and 77 above.

14.4 On the other hand six months seems to us to be a suitable period for heritable property. In general, the ownership of heritable property in Scotland may be readily ascertained from the Land Register of Scotland, while the computerisation of the General Register of Sasines presentment book now makes it possible to ascertain whether a conveyance in favour of a named person has been presented for registration. The ascertainment of the information may be delayed, however, if there is difficulty in identifying persons or property. It is also important that any persons with interests in the property should have sufficient time to consider their positions and negotiate with any administrator appointed to deal with the property or apply to the court for the recall of the suspended forfeiture order insofar as it affects their interests. The same consideration would apply where the heritable property was situated outside Scotland. While six months may seem a generous period, we consider that when devising a novel procedure for the purpose of forfeiting heritage it would be prudent to err on the side of caution. The six months would run from the date of recording or registration of an order relating to heritable property in Scotland, and from the date of the order in any other case.⁷

14.5 Whatever period or periods may be chosen, where an application for the recall or variation of the suspended forfeiture order has been timeously made⁸ the property should not be forfeited unless and until the application has been finally disposed of in favour of the Crown. Again, in the event of an appeal against conviction or sentence, there should be no forfeiture of property until the appeal, if it is proceeded with, is determined in favour of the Crown.⁹ In every case, however, no further order of the court would be required: forfeiture would occur automatically on the expiry of the period of 60 days or six months or on the final disposal of the application for recall or variation, or on the determination of the appeal, whichever was the later. It is important that the fact that the property was forfeited on a particular date should be authoritatively stated. We propose that a certificate by the clerk of court should be conclusive evidence of the fact and date of forfeiture. Where the property is Scottish heritable property, the prosecutor should be obliged to record or register a certified copy of the certificate forthwith in the Register in which the suspended forfeiture order was recorded or registered.

14.6 We recommend:

83. (1) **Heritable property in Scotland should be forfeited to and vest in the Crown six months after the date on which a certified copy of the suspended forfeiture order is recorded or registered as mentioned in recommendation 78.**
- (2) **Heritable property situated outside Scotland should be forfeited to and vest in the Crown six months after the date of the making of the suspended forfeiture order.**

⁷ For the purposes of enforcement outside Scotland the statutory period could be varied by Order in Council: see draft Bill, clauses 33(4), 34(3).

⁸ See Part XV below.

⁹ See para 13.17, recommendation 81 above.

- (3) Moveable property (other than that which has been forfeited immediately in terms of recommendation 84 below) should be forfeited to and vest in the Crown 60 days after the date of the making of the suspended forfeiture order.
- (4) Where an application for the recall or variation of the suspended forfeiture order has been made, the property should be forfeited only if and when the application is finally disposed of in favour of the Crown, or on the expiry of the period mentioned in paragraph (1) or (2) above, whichever is the later.
- (5) A certificate by the clerk of court should be conclusive evidence of the fact that the property was forfeited on the date specified in the certificate.
- (6) Where the property is heritable property in Scotland, the prosecutor should be obliged to record or register a certified copy of the certificate forthwith in the Register in which the suspended forfeiture order was recorded or registered.

(Draft Bill, clause 17(1), (3), (6))

Perishable, dangerous, illegal or valueless moveable property

14.7 In some cases the suspended forfeiture order may relate to property which it would be pointless or dangerous to preserve for any length of time. We propose that such property should be forfeited immediately after the making of the order and thereafter disposed of in an appropriate way. It seems obvious that the classes of property which should be dealt with in this way should include property which is perishable, such as catches of fish; or dangerous, such as weapons or explosives; or which it is unlawful to sell, such as obscene publications, or supply, such as controlled drugs, or possess, such as counterfeit notes or coins. In many cases such items will not be the subject of a suspended forfeiture order but will be forfeited on conviction on a statutory charge under a specific power of forfeiture in the statute creating the offence. In other cases the prosecutor may know that articles such as controlled drugs or explosives are legitimately the property of a third party, such as a doctor or pharmacist or a commercial undertaking from whom they have been stolen: in such cases the prosecutor will not move for forfeiture or a suspended forfeiture order and the articles will be returned to the lawful owner. It seems necessary, however, to make provision for other cases in which articles in any of these categories may be the subject of a suspended forfeiture order. A further category of moveable property for which such provision seems desirable is property of no value which no-one is likely to claim. We understand that in a significant number of cases orders have been made for the forfeiture of articles such as bricks, stones, bottles or pieces of wood which have been produced in trials for breach of the peace or mobbing and rioting.¹⁰ There is clearly no purpose in keeping such articles.¹¹

¹⁰ The forfeiture of such articles may be regarded as preventative rather than penal: see para 11.4 above.

¹¹ It would be for the clerk of court to select the means of disposal of the articles in these categories, as of any other forfeited property (see para 14.10 below).

14.8 While it will generally be very clear whether an article falls into any of these categories, we consider that specific authority for its immediate forfeiture should be provided by a certificate by the prosecutor certifying that the property which it specifies falls into a particular category. It would be regarded as forfeited whenever the certificate was produced to the clerk of court. We envisage that in practice the prosecutor would have the certificate among his papers when he applied for the suspended forfeiture order, and would produce it to the clerk of court as soon as the judge granted the order. We **recommend**:

84. (1) **Moveable property which is of a perishable or dangerous nature or cannot lawfully be sold, supplied or possessed or is of no commercial value should be forfeited immediately after the making of the suspended forfeiture order.**
- (2) **Moveable property should be regarded as falling within any of the categories mentioned in paragraph (1) above if certified as such by the prosecutor in a certificate produced to the clerk of court.**

(Draft Bill, clause 17(2))

Responsibility for property subject to a suspended forfeiture order

14.9 We propose that where a suspended forfeiture order is made, the clerk of court should immediately become responsible for the property concerned just as, in current practice, he becomes responsible for property which has been forfeited. Thus, when a suspended forfeiture order is made in respect of any moveable property it should be the duty of the clerk of court to take the property into his possession or control. If the property has been lodged as a production, it will already be in his hands or, where lodging it with him has been impossible because of its nature, in the hands of some person who holds it as his representative.¹² In other cases, if a warrant to search for the property is granted,¹³ it will be produced to the clerk of court when it is recovered. In every case the property should remain in the possession or control of the clerk of court and he should be responsible for its preservation until the order is recalled¹⁴ or the property is disposed of after forfeiture.¹⁵ We recommend:

85. **Property which is the subject of a suspended forfeiture order should be placed in the possession or under the control of the clerk of court until the order is recalled or the property is disposed of after forfeiture.**

(Draft Bill, clause 15(11))

Disposal of forfeited property

14.10 The effect of forfeiture is to vest the property in the Crown. Property which is forfeited under section 223(1) or 436(1) of the Criminal Procedure (Scotland) Act 1975 is disposed of "as the court may direct".¹⁶ In practice it is the duty of the clerk of court to

¹² *Stark and Smith v HMA* 1938 JC 170, L J-G Normand at p 173.

¹³ See paras 13.8, 13.9, recommendation 73 above.

¹⁴ See Part XV below.

¹⁵ See para 14.10 below.

¹⁶ For the terms of these provisions, see para 11.6 above.

dispose of the property in terms of any direction given by the court or, if there is no such direction, to determine the appropriate means of disposal and act accordingly. We consider that under the new procedures which we propose it would not be appropriate for the court to give directions as to the disposal of the property, other than directions as to payment towards a compensation order.¹⁷ It seems preferable that the means of disposal should be determined in the light of the circumstances prevailing at the time of forfeiture. By that time the condition of moveable property might have altered, or the existence of transactions with heritable property might have come to light.¹⁸ We therefore propose that all property which is forfeited should be dealt with by the Crown in such manner as seems to it to be appropriate. In practice it would normally be disposed of by the clerk of court in accordance with regulations or other directions made by Scottish Courts Administration, but the Crown should not be obliged to dispose of it. We **recommend**:

- 86. Property in respect of which a suspended forfeiture order is in force should in due course be forfeited to and vest in the Crown and thereafter dealt with by the Crown in such manner as seems to it to be appropriate.**

(Draft Bill, clause 17(1), (5))

¹⁷ See paras 13.13-13.16, recommendation 79 above.

¹⁸ See para 14.4 above.

Part XV Variation and recall of suspended forfeiture orders

Introduction

15.1 We discuss in this part the rules which should govern the variation or recall of suspended forfeiture orders. The prosecutor may seek a variation if it comes to his notice that his information as to the persons interested in the property was incorrect. A third party who owns or has an interest in property affected by the order may wish to have the order recalled in so far as it affects his property or his interest in the property.

Application by prosecutor for variation

15.2 In order to secure the correct identification of third parties and the protection of their rights, it is necessary to make provision for circumstances in which, after the order has been made, the prosecutor ascertains that incorrect information had been placed before the court as to the interests of third parties in the property. We have already recommended that when the order is made it should name any person known or suspected by the prosecutor to have an interest in the property.¹ Where a person has been named in the order and thereafter the prosecutor ascertains that that person does not have an interest in the property, the prosecutor should be entitled to apply to the court which made the order for the variation of the order by the deletion of that person's name and, where the identity of anyone truly having an interest is known, the substitution of the name of the latter person. Similarly, when at the time of the making of the order no-one was known to be interested in the property and it later appears to the prosecutor that a person does have or may have an interest in it, the prosecutor should be entitled to apply for the variation of the order by the insertion of that person's name. Since we cannot see any reason why the court should have a discretion to refuse any of these applications for variation, we consider that it should be obliged to grant them. The order, as varied, would have the same consequences as an order made on the prosecutor's application when he moves for sentence. Where the effect of the variation was to insert a new name in the order, the prosecutor would be required to give notice to that person.² Where the property was Scottish heritable property, he would be required to record or register a certified copy of the order for variation in the Register in which the certified copy of the original order had been recorded or registered.³ Where the address of the newly named person was unknown, or where the effect of the variation was only to delete a name, so that no one was named in the order, the court might think it appropriate to direct the publication of a notice in the *Edinburgh Gazette* or some other appropriate publication.⁴ In all cases, the time which must elapse before the property is forfeited would begin to run from the date of the order for variation, or, where the property was heritable property in Scotland, from the date of recording or registration of the order for variation. We **recommend**:

¹ See para 13.11, recommendation 75 above.

² See para 13.11, recommendation 76 above.

³ See para 13.12, recommendation 78 above.

⁴ See para 13.11, recommendation 77 above.

87. (1) If, after a suspended forfeiture order has been made, the prosecutor comes to believe that it does not correctly identify any person having an interest in the property, he should be entitled to apply to the court for the variation of the order.
- (2) The application should be made to the court which made the order, at any time before the property is forfeited.
- (3) The court should be required to grant any such application.
- 4) Where the order is varied by the insertion of the name of a person believed to have an interest in the property, the prosecutor should notify the person as mentioned in recommendation 76 above.
- (5) Where the order to be varied relates to heritable property in Scotland, -
- (a) the prosecutor should, as soon as may be after the order for variation has been made, record or register a certified copy of the order for variation in the Register in which the certified copy of the order to be varied was recorded or registered; and
- (b) the property should be forfeited six months after the date of recording or registration of that certified copy of the order for variation.
- (6) Where the order is varied and relates to moveable property, the property should be forfeited 60 days after the date of the order for variation.
- (7) In any case in which an order for variation is made, the court should be entitled to direct the prosecutor to insert a notice specifying its terms in the *Edinburgh Gazette* or some other appropriate publication.

(Draft Bill, clause 18(5), (6), (7), (8), (10))

Application by third party for recall

15.3 In outline, our proposal here is that an applicant for the recall of a suspended forfeiture order should be required to satisfy the court, on a balance of probabilities, that he is the owner⁵ of the property; he should then be entitled to recover it unless the prosecutor satisfies the court beyond reasonable doubt that he culpably failed to prevent the nefarious use of the property or knowingly acquired it after it had been so used; and even if the court is so satisfied he should nevertheless recover it if it appears to the court that forfeiture would be an excessive or inappropriate penalty in the particular circumstances of the case. We now explain the proposed procedure in detail.

⁵ For the sake of brevity, "owner" in the following paragraphs includes a person with an interest in the property.

15.4 We propose that the application, like a prosecutor's application for variation, should be made to the court which made the order. It is desirable but not, we think, necessary that it should be heard by the judge who pronounced the order: that might not be possible for a variety of good reasons. The application should be competent at any time before the property is forfeited. If it were made shortly before the date when the order would expire, forfeiture would not follow unless and until the application had been disposed of in favour of the Crown.⁶ All that the applicant should have to prove is that he is the owner of the property. Although the application would be made to a criminal court, we consider that the standard of proof required of the applicant should be the civil standard of proof on a balance of probabilities, since that is the standard which would be required of him if he were pursuing an action for the recovery of the property in a civil court.

15.5 The commentary on article 5 of the Laundering Convention states that the claims of interested third parties "should in principle be honoured in cases where the innocence or *bona fides* of the party concerned is likely or beyond reasonable doubt".⁷ While we consider that the applicant should be obliged to prove that he is the owner of the property, we do not think that he should also be obliged to prove that he is justifiably innocent of any knowledge of the nefarious purpose which led to the making of the freezing order. Here we do not follow the rule of English law which requires a person claiming property which is the subject of a deprivation order to satisfy the court "either that he had not consented to the offender having possession of the property or ... that he did not know, and had no reason to suspect, that the property was likely to be used for the purpose [of committing, or facilitating the commission of, any offence]".⁸ The Hodgson Committee were in favour of this requirement,⁹ but it appears to us that anyone who can prove that he is the owner of property should be *prima facie* entitled to recover it without also having to prove the negative proposition that he had no knowledge of the criminal purpose for which it had been used or intended to be used by someone else. We readily accept that an owner of property should take reasonable care to see that it is not used by another for a criminal purpose and that an applicant who was or should have been well aware that it would be so used should not be entitled to recover it, since the rationale of forfeiture in such circumstances is its deterrent and punitive effect. We consider, however, that it should not be for the applicant to prove that he was blameless, but for the prosecutor to prove that he was blameworthy. Moreover, since his blameworthiness would be tainted with criminality, even if he was not technically an accomplice, we are of opinion that the prosecutor should have to satisfy the criminal standard of proof beyond reasonable doubt. We note that before deciding to oppose an application the prosecutor might wish to consider whether the leading of evidence as to the applicant's culpability might prejudice any subsequent trial of the applicant for an offence related to the events under investigation.

15.6 The nature of the matters which the prosecutor would have to prove would depend on whether the applicant (a) was the owner of the property before or at the time of the commission of the offence, or (b) became the owner of the property after the commission of the offence. In case (a), it would be necessary to prove (i) that the applicant knew or ought to have known that the property was intended to be used for the purpose of committing, or facilitating the commission of an offence, and (ii) that he did not take all the steps which

⁶ See para 14.5, recommendation 83(3) above.

⁷ See para 10.1 above.

⁸ Powers of Criminal Courts Act 1973, s 43(4)(b).

⁹ Hodgson, p 124.

were reasonable for him to take to prevent such use. The offence concerned would normally, but not necessarily, be the offence as to which the court was satisfied in terms of clause 15(2) when it made the order: that is, the offence for the commission of which the property had been used or intended to be used. Since, however, one of the justifications for the forfeiture of a third party's property is to deter third parties from letting others use their property to commit offences, it should not matter if A lets B have property for the purpose of committing one kind of crime and B uses it to commit a different kind of crime. Suppose that A lends B some equipment, such as a drill, knowing that B intends to use it for a housebreaking, and B on his way to the house encounters his enemy C, assaults him with the equipment and is arrested. When B is convicted of assault and the court makes a suspended forfeiture order on the ground that the equipment had been used for the purpose of committing the assault, A should not be entitled to get it back on the ground that he only knew that B had intended to use it for the housebreaking. Requirement (ii) above is necessary in order to protect an owner who, having innocently lent his property to another, learns of that person's intention to use it to commit an offence and tries to prevent him from doing so.

15.7 In case (b), where the applicant has become the owner of the property after the commission of an offence, we propose that the prosecutor should be required to prove that the applicant knew or ought to have known that the property had been intended to be, or had been, used for the purpose of committing, or facilitating the commission of, the offence. The rationale here is that where property has been used to commit an offence, those who thereafter acquire it in good faith should be protected, and those who acquire it otherwise should be penalised. Here again we differ from the Hodgson Committee, who were "not satisfied that, as a matter of policy, subsequent purchasers ought to lose their rights even if they acquired the article in the knowledge that it had previously been involved in an unlawful enterprise. They would not thereby condone or assist the illegality".¹⁰ It appears to us, however, that they would thereby enable the offender to escape the penalty of forfeiture, and that it is only just that they should be so penalised in turn. We note that this situation would normally arise only where the property had been in the accused's possession (or ownership, or under his control) at the time of the offence but not at the time of his apprehension. Property in his possession at the time of his apprehension normally would be seized by the police and could not then be readily acquired by a third party.¹¹

15.8 We would assume that at the hearing of an application for the recall of a suspended forfeiture order it would not be competent for either party, in the absence of the agreement of the other, to found on evidence given by witnesses at the trial. We have envisaged that such evidence might be founded on at the hearing as to the making of the order,¹² but there the evidence would have been led in the presence of both parties and the judge. At the hearing on an application by a third party for the recall of the order that would not be so, and the third party would not have had an opportunity to cross-examine the witnesses on

¹⁰ *Ibid*, p 124.

¹¹ It would of course be possible for the accused to sell lawfully to an optimistic purchaser an item of property which the latter knew was in the hands of the police.

¹² See para 13.4 above.

whose trial evidence the prosecutor might wish to found.¹³ We do not think it necessary, however, to make any provision on this matter in the draft Bill.

15.9 Even if the prosecutor proved either case (a) or case (b),¹⁴ it is possible that the court might nevertheless consider that in the particular circumstances of the case the forfeiture of the property would be penal rather than preventative, and would be an excessive or inappropriate penalty for the applicant to pay. That might be so where, for example, a valuable piece of property such as a car, which the applicant normally used for legitimate purposes, had been used to facilitate the commission of a comparatively minor crime of dishonesty. It seems clear that an excessive or inappropriate penalty upon a third party would be just as much a miscarriage of justice as such a penalty upon a convicted person.¹⁵ We consider, accordingly, that if the court is satisfied that forfeiture would be excessive or inappropriate it should grant the application.

15.10 We therefore **recommend**:

- 88. A person other than the offender who is the owner of, or otherwise has an interest in, any property in respect of which a suspended forfeiture order has been made should be entitled to apply to the court which made the order, at any time before the property is forfeited, for the recall of the order in so far as it relates to the property or his interest in it.**

(Draft Bill, clause 18(1), (8), (10))

- 89. The court should be required to grant the application if -**

- (1) the applicant proves on a balance of probabilities that he is the owner of, or otherwise has an interest in, the property; and either**
- (2) the prosecutor fails to prove beyond reasonable doubt that the applicant -**
 - (a) where he was the owner of, or otherwise had an interest in, the property before the commission of an offence,**
 - (i) knew or ought to have known that the property was intended to be used for the purpose of committing, or facilitating the commission of an offence, and**
 - (ii) did not take all the steps which were reasonable for him to take to prevent such intended use; or**
 - (b) where he became the owner of, or otherwise acquired an interest in, the property after the commission of an offence, that he knew or ought to have known that the property had been intended to be, or had been, so used; or**

¹³ Unless the third party was a co-accused who had been acquitted. Even so, however, the issues at the trial and the hearing might not be the same.

¹⁴ See para 15.6 above.

¹⁵ See para 12.4 above.

- (3) **the prosecutor proves beyond reasonable doubt either of the matters mentioned in paragraph (2) above but the court nevertheless considers that in all the circumstances of the case forfeiture would be an excessive or inappropriate penalty upon the applicant.**

(Draft Bill, clause 18(1), (2), (3))

15.11 In some cases in which a suspended forfeiture order has been imposed the court may have determined the other elements in the accused's sentence upon the assumption that the property belonged to him and forfeiture would be penal in its effect.¹⁶ In such a case, should the recall of the order permit any adjustment of the sentence? It is not impossible that the court would have selected a more severe penalty if it had known the true position. Where, for example, the order has been combined with a fine or a sentence of imprisonment, the court might have imposed a higher fine or a longer sentence. The question therefore arises whether a court which has recalled a suspended forfeiture order should be entitled to sentence the accused afresh. In the discussion paper we expressed the view that that would be neither practicable nor acceptable,¹⁷ and the majority of our consultees agreed. Two groups of consultees favoured a procedure for reviewing the original sentence. We have concluded, however, that the primary consideration must be the protection of the innocent third party's rights, and that it would be unjust that from the date of his sentence the offender should be in a state of uncertainty as to whether the order might be recalled and he might receive a more severe sentence. If the court has sentenced him on the basis of wrong information as a result of his own deliberate misrepresentations, he will be liable to be prosecuted for attempting to pervert the course of justice. We therefore **recommend**:

90. **The court to which an application for the recall of a suspended forfeiture order is made should not be entitled to review any other element in the sentence imposed, or any probation order or order for absolute discharge made, in respect of the offence to which the order relates.**

(Draft Bill, clause 18(9))

15.12 Where the court grants an application for the recall of an order relating to heritable property in Scotland, the prosecutor should be required to register a certified copy of the order for recall in the Register in which the certified copy of the order recalled was recorded or registered. We **recommend**:

91. **Where the order is recalled and relates to heritable property in Scotland, the prosecutor should, as soon as may be after the order has been recalled, record or register a certified copy of the order for recall in the Register in which the certified copy of the order recalled was recorded or registered.**

(Draft Bill, clause 18(4))

15.13 The "effective legal remedies" which must be available to any interested party in terms of article 5 of the Laundering Convention include the right to have reviewed the

¹⁶ See para 11.4 above.

¹⁷ DP para 3.16, prop 1(c).

decision of the court on his challenge to any decision or measures taken.¹⁸ A third party should therefore be able to bring under review a decision of the court refusing his application for the recall of a suspended forfeiture order. We consider that it is equally necessary in the interests of justice that the prosecutor should be entitled to appeal against a decision granting such an application. We therefore propose that either party should be entitled to appeal. Where an appeal is taken against a decision on an application under solemn procedure, we propose that the procedure should be regulated by the appeal provisions of Part I of the Criminal Procedure (Scotland) Act 1975.¹⁹ Where an appeal is taken in summary proceedings, we propose that the procedure should be as in an appeal against sentence under Part II of the Act.²⁰ Where an order relating to Scottish heritage is recalled on appeal, the prosecutor should be required to enter a certified copy of the Court's interlocutor in the Register in which such a copy of the order was entered.²¹ We therefore **recommend:**

92. (1) **Both the applicant and the prosecutor should be entitled to appeal against a decision on an application for the recall of a suspended forfeiture order.**
- (2) **The appeal procedure should be as in an appeal against sentence.**
- (3) **Where a suspended forfeiture order relating to heritable property in Scotland is recalled on appeal, the prosecutor should proceed as in recommendation 82 above.**

(Draft Bill, clause 20)

¹⁸ See para 10.1 above.

¹⁹ *ie* ss 230-280A.

²⁰ The relevant provisions would be ss 453B and 453C.

²¹ See para 13.17, recommendation 82 above.

Part XVI Search warrants and restraint orders in forfeiture proceedings

Introduction

16.1 Where property is liable to be made, or has been made, the subject of a suspended forfeiture order, it is important that the offender or alleged offender should not be able to defeat the order by concealing or disposing of the property. In practice, where the property is moveable he may seldom have an opportunity to do so, because an item of moveable property which is liable to be forfeited will often be seized by the police and may be lodged as a production in the case. It is important, however, to make adequate provision for other cases.

16.2 It is also necessary to have in place a procedure which will meet the obligations of the United Kingdom under the Laundering Convention.¹ Article 3, headed "Investigative and provisional measures", is intended to facilitate international co-operation in terms of the Convention. It provides:

"Each Party shall adopt such legislative and other measures as may be necessary to enable it to identify and trace property which is liable to confiscation pursuant to Article 2, paragraph 1, and to prevent any dealing in, transfer or disposal of such property."²

Paragraph 1 of article 11, headed "Obligation to take provisional measures", provides:

"At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request."³

16.3 The present law only makes provision for search warrants in relation to articles which have been forfeited.⁴ We therefore propose that provision should be made for the granting of warrants for the search for and seizure of property which is liable to forfeiture,⁵ and for the making of restraint orders in relation to such property.⁶

¹ On this Convention see paras 2.8, 11.1 above.

² Art 2.1, so far as relevant to forfeiture, is quoted in para 11.1 above.

³ For the Convention's definition of "confiscation", which includes the forfeiture of property in the sense in which that expression is used in our reference, see paras 11.1, 11.3 above.

⁴ See para 16.4 below.

⁵ See paras 16.5-16.8 below.

⁶ See paras 16.9-16.12 below.

Warrants to search for and seize forfeitable property

The present law

16.4 Sections 224 and 437 of the Criminal Procedure (Scotland) Act 1975⁷ provide that where a court has made an order for the forfeiture of an article, the court or any justice may issue a search warrant if satisfied by information on oath that there is reasonable cause to believe that the article is to be found in any place or premises and that admission thereto has been refused or a refusal of admission is apprehended. These provisions apply to an order for forfeiture which is made under section 223 or 436 of the 1975 Act or any other enactment. If our recommendations in relation to suspended forfeiture orders are implemented, sections 223 and 436 will be repealed but sections 224 and 437 will continue to apply to forfeiture orders made by virtue of specific powers conferred by statutes which create particular offences and make provision for the forfeiture of property to which these offences are related. Sections 224 and 437 appear to be satisfactory and we have no proposals for their amendment.

Warrant where suspended forfeiture order made

16.5 We have already recommended⁸ that where the court has made a suspended forfeiture order in respect of an item of moveable property, it should be entitled to grant a warrant for the search for and seizure of that article. It would be for the prosecutor to apply for the warrant, and the court would be entitled to grant it if it was satisfied as to the matters mentioned in sections 224 and 437: that there was reasonable cause to believe that the article was to be found in any place or premises and that admission thereto had been refused or a refusal of admission was apprehended.

Warrant where suspended forfeiture order liable to be made

16.6 While sections 224 and 437 make provision for the granting of a search warrant after forfeiture, there is no corresponding statutory provision relative to property which is liable to be forfeited. The common law is not clear. The old case of *Mauchline v Stevenson*⁹ has been cited as authority for the proposition that where the court is empowered to order forfeiture of an article on conviction, that implies that an officer of law has power to seize the article before the trial¹⁰ but, as we pointed out in the discussion paper,¹¹ it is doubtful whether the case supports that broad proposition. In the discussion paper we expressed the view that any new statutory provision which conferred on the police power to take possession of property which was likely to be forfeited would be too widely drawn and was in any event unnecessary.¹²

16.7 All those consultees who expressed an opinion on this matter agreed that a general power would be inappropriate, but a few of them pointed to the value of a power to seize

⁷ Both sections are derived from the Criminal Justice (Scotland) Act 1963, s 34.

⁸ See paras 13.8, 13.9, recommendation 74 above.

⁹ (1878) 4 Coup 20.

¹⁰ T Trotter, *Summary Criminal Jurisdiction According to the Law of Scotland* (1936), p 263; C G B Nicholson, *Sentencing* (2nd ed, 1992), p 97, para 6-05.

¹¹ DP, para 3.64. Cf *Malone v Metropolitan Police Commissioner* [1980] QB 49.

¹² DP, para 3.65, prop 10.

specified items in particular cases. Where, for example, a crime has been committed with the use of a motor vehicle, ship or aircraft which could be swiftly disposed of or removed from the jurisdiction, it would be useful if the law enforcement agencies could be empowered to seize it. It was also pointed out that while some articles which are liable to forfeiture might be relevant productions at the trial of the offender and could be seized under a search warrant or common law powers, it might not be competent to seize by those means other articles which were liable to forfeiture. An analogy was drawn with the provision in the confiscation regime for drug trafficking offences in the Criminal Justice (Scotland) Act 1987 whereby the realisable property of a person subject to a restraint order may be seized for the purpose of preventing it from being removed from Great Britain.¹³ We do not think that such a general power of seizure would be appropriate in respect of the very wide range of offences to which forfeitable property might be related, but we have been persuaded by our consultees' other arguments that a court should be entitled to authorise the seizure of specified items of forfeitable moveable property.

16.8 We therefore propose that a warrant to search for and seize property should be obtainable before a suspended forfeiture order is made. The prosecutor would apply to the sheriff for such a warrant. He would be able to do so either where proceedings for an offence had been instituted¹⁴ against a person or where they were likely to be instituted. The sheriff would be entitled to grant the warrant if he was satisfied that there was reasonable cause to believe that the property specified in the application was to be found in the place or premises specified in the application, and if it appeared to him that there were reasonable grounds for thinking that in the event of the person being convicted of the offence a suspended forfeiture order might be made in relation to the property. We **recommend**:

93. Where -

- (a) the sheriff is satisfied, on an application being made to him by the prosecutor,**
 - (i) that proceedings are likely to be instituted or have been instituted against a person in Scotland for an offence, and**
 - (ii) that there is reasonable cause to believe that property specified in the application is to be found in a place or in premises specified in the application, and**
- (b) it appears to him that there are reasonable grounds for thinking that in the event of the person being convicted of the offence a suspended forfeiture order might be made in relation to the property,**

he should be entitled to grant a warrant authorising a person named therein to enter and search the place or premises and seize the property.

(Draft Bill, clause 16(1))

¹³ 1987 Act, s 10. See para 9.31 above.

¹⁴ For "the institution of proceedings" see para 9.16 above.

Restraint orders in relation to forfeitable property

16.9 We also propose a scheme for the preservation of forfeitable property by means of restraint orders and ancillary orders, similar to the scheme in relation to realisable property which we have recommended in Part IX of this report. Our scheme also resembles the provisions of the Prevention of Terrorism (Temporary Provisions) Act 1989 as to the making of restraint orders by the Scottish courts in relation to property liable to forfeiture when a person is convicted of any of certain specified offences connected with financial assistance for terrorism.¹⁵ Thus, the various powers of the Scottish courts to make provisional orders for the preservation of property in relation to proceedings for confiscation or forfeiture would be broadly similar.

16.10 Under our scheme, power to make restraint orders and ancillary orders is conferred on the Court of Session, where the criminal proceedings concerned are brought, or are likely to be brought, in the High Court of Justiciary; and on the sheriff exercising his civil jurisdiction in the case of criminal proceedings in the sheriff court. The principal order is a restraint order. It interdicts a specified person from dealing with a specified item of property. "Dealing with" property includes, as required by the Laundering Convention, transferring or disposing of property.¹⁶ The court is entitled to grant a restraint order both before and after the institution of proceedings,¹⁷ so that a restraint order may be granted either after a suspended forfeiture order has been made, or where there are reasonable grounds for thinking that a suspended forfeiture order may be made. Where, however, a restraint order is sought on the ground that proceedings are likely to be instituted, the court must be satisfied that it is proposed to institute them within 28 days. If that is not done, the order must be recalled.¹⁸ A restraint order may be made only upon an *ex parte* application by the prosecutor which is heard in chambers, and is intimated to persons affected by it.¹⁹ The court is entitled to vary or recall the order at the instance of the prosecutor or any person having an interest (including the accused), and is required to recall it when proceedings for the offence are concluded.²⁰ Decisions relating to restraint orders are appealable.²¹

16.11 Once the court has made a restraint order, a police or customs officer is entitled to seize the property for the purpose of preventing its removal from the jurisdiction of the court.²² The court is entitled, on the application of the prosecutor, to exercise a number of ancillary powers: to order inhibition in respect of heritable property, or to grant warrant for the arrestment of moveable property, affected by the order; and to interdict a person from dealing with the property even though that person is not named in the restraint order.²³ The court is also empowered to appoint an administrator to manage or deal with property affected by a restraint order or a suspended forfeiture order. The administrator's powers and duties and the other provisions relative to his office are similar to those of an

¹⁵ PT(TP)A, Sched 4, paras 13-16. A new para 16 is substituted by the draft Bill, Sched 4, para 12.

¹⁶ See para 9.10 above.

¹⁷ For the definition of "the institution of proceedings" see para 9.16 above. The circumstances in which proceedings are taken to have been concluded are the same as in para 9.17, *mutatis mutandis*: see draft Bill, cl 23(6).

¹⁸ See the discussion in paras 9.21-9.22 above.

¹⁹ See para 9.25 above.

²⁰ See para 9.26 above.

²¹ See para 9.29 above.

²² See para 9.31 above.

²³ See paras 9.32-9.37 above.

administrator appointed in relation to property which may be or has been confiscated. The appointment of an administrator in relation to forfeitable property may seldom be necessary, but it may sometimes be appropriate in relation to heritable property or in relation to a business which, although apparently used in the commission of crime, appears to be in part legitimate and ought to be preserved as a going concern. The administrator may rarely be required to realise property but there may be cases where it would be convenient for him to do so. As to sequestration, insolvency and related matters we recommend, as in the case of persons holding realisable property, provisions corresponding to an amended version of sections 33 to 37 of the Criminal Justice (Scotland) Act 1987.²⁴

16.12 We recommend:

- 94. (1) The Court of Session or a sheriff exercising his civil jurisdiction should be empowered to make a restraint order in relation to property which is liable to be forfeited.**
- (2) A restraint order should interdict a specified person from dealing with property specified in the order.**
- (3) The court should be entitled to make a restraint order**
- (a) where proceedings against a person for an offence have been instituted, but not concluded, in Scotland and either -**
- (i) a suspended forfeiture order is in force, or**
- (ii) it appears to the court that there are reasonable grounds for thinking that such an order might be made in the event of conviction; or**
- (b) where it is proposed to institute such proceedings within 28 days and paragraph (ii) above applies.**

(Draft Bill, clauses 21(1)(b), 23(1), (2))

- 95. (1) The rules as to applications for restraint orders, their variation and recall, and appeals should be as for restraint orders in relation to realisable property.**
- (2) The court's powers as to ancillary interdicts, inhibitions and arrestments should be the same as its powers as regards restraint orders in relation to realisable property.**

(Draft Bill, clauses 21(3)-(5), 23(3)-(6), 24(1), (3)-(6), 25)

- 96. The provisions mentioned in recommendation 56(2) above as to administrators of realisable property should be extended, subject to**

²⁴ See paras 9.42-9.46 above.

necessary modifications, to a case in which a restraint order or a suspended forfeiture order is made relative to forfeitable property.

(Draft Bill, clause 26; Schedule 1)

97. (1) A constable or a person commissioned by the Commissioners of Customs and Excise should be entitled to seize property subject to a restraint order for the purpose of preventing its removal from the jurisdiction of the court.
- (2) The property should then be dealt with in accordance with the directions of the court.

(Draft Bill, clause 21(6), (7))

98. The provisions mentioned in recommendation 57(2) above as to the sequestration, etc, of persons holding realisable property should be extended, subject to any necessary modifications, to persons holding forfeitable property.

(Draft Bill, clause 35; Schedule 2)

Part XVII Protection of third parties' rights in forfeiture proceedings

Introduction

17.1 We now consider the question of the protection of the rights of third parties who have interests in property which is liable to forfeiture. Our consultees were unanimously agreed that such protection was necessary, and it is required both by the European Convention on Human Rights and by the Laundering Convention. We have already noticed the relevant provisions of these Conventions in our discussion of the protection of third parties' rights in confiscation proceedings.¹

The present law

17.2 The present law is unsatisfactory. Some specific provisions for forfeiture for a statutory offence imply that only the property of the convicted person may be forfeited,² or provide that a third party claiming to be interested in the property should be given an opportunity to be heard,³ but others do not. The general provisions for forfeiture in sections 223 and 436 of the Criminal Procedure (Scotland) Act 1975⁴ do not include any procedure for safeguarding the rights of third parties, and the provision from which they were derived, which was likewise defective, was criticised on that account by the High Court of Justiciary in *Lloyds and Scottish Finance Ltd v HM Advocate*.⁵ The Court nevertheless encouraged courts in Scotland to frame their directions for the disposal of forfeited property in such a way as to protect the rights of true owners; but it is doubtful whether this guidance is always brought to their attention. It is possible for an innocent third party who is aware of the proceedings to draw his interest in the property to the attention of the procurator fiscal,⁶ or to be given leave to address the court before any order for forfeiture is pronounced;⁷ but if those steps are unsuccessful or if he does not become aware of the proceedings until after the order is made, he may have to seek a remedy in the High Court by way of bill of suspension⁸ or a petition to the *nobile officium*.⁹

Our recommendations

17.3 Several of the recommendations which we have already made are designed to protect the interests of third parties. We now summarise them. Except where the property

¹ See para 10.1 above.

² *Semple and Sons v MacDonald* 1963 JC 90, 1963 SLT 295 (on the Wireless Telegraphy Act 1949, s 14(3)).

³ Misuse of Drugs Act 1971, s 27(2); Immigration Act 1971, s 25(8); Forgery and Counterfeiting Act 1981, s 24(4); Contempt of Court Act 1981, s 9(3); Prevention of Terrorism (Temporary Provisions) Act 1989, s 13(6). None of these Acts gives the third party a right to notice of an application for forfeiture.

⁴ See para 11.6 above.

⁵ 1974 JC 24 at p 27, commenting on the Criminal Justice Act 1972, s 23(5).

⁶ DP, para 3.11.

⁷ As in *Loch Lomond Sailings Ltd v Hawthorn* 1962 JC 8.

⁸ *Loch Lomond Sailings Ltd*, *supra*; *Semple and Sons*, *supra*.

⁹ *Lloyds and Scottish Finance Ltd*, *supra*.

to be forfeited is perishable or in some other special category, forfeiture should not take place until the expiry of a period during which the property is subject to a suspended forfeiture order.¹⁰ Any person whom the prosecutor knows or suspects to have an interest in the property should be named in the order and notified of its terms and his rights. If the identity or address of such a person is unknown, a notice may be published in the *Edinburgh Gazette* or some other appropriate publication.¹¹ Where it appears to the prosecutor that an error has been made in the order as to the identity of any interested person, the order should be varied and intimation made to the correct person.¹² Where a restraint order is made in relation to forfeitable property, notice of the order must be given to persons affected by it and, again, if an error is made the order should be varied and intimation made to the correct person.¹³ While a suspended forfeiture order or a restraint order is in force, any person with an interest in the property affected by the order may apply to the court for the recall of the order and may appeal against the refusal of his application.¹⁴ He may likewise apply and appeal if he is interdicted by an ancillary interdict or if the property is affected by an inhibition or an arrestment.¹⁵

17.4 In the following paragraphs we make two further recommendations. Not later than three years after the date on which the property has been forfeited, either under the new legislation or under an order for forfeiture made in terms of any other enactment, the owner should be entitled to apply for its return or, where it has been disposed of, for compensation. Any person with an interest in forfeited property should also be entitled to apply for compensation. In each case the applicant should have the right to appeal against the refusal of his application.¹⁶ We shall also recommend that where a person's family home has been forfeited under the new legislation, there should be constraints on its disposal similar to those recommended in relation to confiscation in Part IV of this report.¹⁷ We consider that legislation which implemented all these recommendations would satisfy the requirements of the Laundering Convention and would protect a person's right under the European Convention on Human Rights not to be deprived of his possessions except in the public interest and subject to the conditions provided for by law.

Recovery or compensation after forfeiture

17.5 We now consider measures for the preservation of the rights of an innocent third party after the property has been forfeited. Circumstances may arise in which the third party has not applied for the recall of a restraint order or a suspended forfeiture order made under the new legislation - where, for example, he has not received notice of it - and the property has been forfeited on the expiry of the appropriate time-limit. A forfeiture order under a specific provision in another enactment may have been made without the third party's knowledge.¹⁸ We propose that in all these circumstances a third party who is the owner of the property should be entitled to apply to the court for the return of the property

¹⁰ See paras 14.1-14.8, recommendations 84, 85 above.

¹¹ See para 13.11, recommendations 76-78 above.

¹² See para 15.2, recommendation 88 above.

¹³ See paras 16.10, 16.12, recommendation 96 above.

¹⁴ See paras 15.3-15.10, 15.13, 16.10, 16.12 above.

¹⁵ See second footnote to para 10.3 above.

¹⁶ See paras 17.5-17.10 below.

¹⁷ See paras 4.15-4.19 above.

¹⁸ See para 17.2 above.

or, if that is not reasonably practicable, for compensation. If he has an interest in the property otherwise than as owner, he should be entitled to apply for compensation in a sum corresponding to the extent of his interest, irrespective of whether the property has been disposed of.¹⁹ The application should be made not later than three years after the date on which the property was forfeited.²⁰

17.6 Our proposals as to the burdens and standards of proof in such applications are similar to those we have made above in relation to an application for the recall of a suspended forfeiture order.²¹ For the reasons already given, the third party should have the burden of satisfying the court on a balance of probabilities that immediately before the forfeiture of the property he was its owner or a person otherwise having a specified interest in it. It would be for the prosecutor to satisfy the court beyond reasonable doubt that the applicant had culpably failed to prevent the nefarious use of the property or had knowingly acquired it after it had been so used. The application would be granted if the prosecutor failed so to satisfy the court or if the court, having been so satisfied, nevertheless considered that in all the circumstances of the case forfeiture had been an excessive or inappropriate penalty. We therefore **recommend**:

99. (1) **The owner of property which has been forfeited, whether under the new legislation or any other enactment, should be entitled to apply to the court which made the suspended forfeiture order for the return of the property or, if that is not reasonably practicable, for compensation.**
- (2) **A person with an interest, otherwise than as owner, in property which has been so forfeited should be entitled to apply for compensation to the court which made the suspended forfeiture order.**
- (3) **The application should be made not later than three years after the date on which the property was forfeited.**

(Draft Bill, clause 19(1), (2), (6), (10))

100. **The court should be required to grant the application if -**

- (1) **the applicant proves on a balance of probabilities that immediately before the forfeiture of the property he was the owner of, or a person otherwise having an interest in, the property; and either**
- (2) **the prosecutor fails to prove beyond reasonable doubt that the applicant -**
- (a) **where he was the owner of the property before the commission of an offence,**

¹⁹ Cf Companies Act 1985, s 655: where a company is revived after dissolution it is entitled to compensation from the Crown where the Crown has disposed of property vested in it as *bona vacantia*.

²⁰ We have recommended a three-year time-limit for applications for compensation relative to confiscation proceedings: see para 10.7(ii) above.

²¹ See paras 15.3-15.10 above.

- (i) knew or ought to have known that the property was intended to be used for the purpose of committing, or facilitating the commission of an offence, and
 - (ii) did not take all the steps which were reasonable for him to take to prevent such intended use; or
- (b) where he became the owner of the property after the commission of an offence, that he knew or ought to have known that the property had been intended to be, or had been, so used; or
- (3) the prosecutor proves beyond reasonable doubt either of the matters mentioned in paragraph (2) above but the court nevertheless considers that in all the circumstances of the case forfeiture would be or has been an excessive or inappropriate penalty upon the applicant.

(Draft Bill, clause 19(1), (3), (4))

17.7 Where the application is granted, the property has not yet been disposed of and it belongs wholly to the applicant, it should simply be returned to him, if that is reasonably practicable. Where it has not yet been disposed but the applicant has an interest in it otherwise than as owner, it will normally be necessary to dispose of the property and compensate the applicant from the proceeds. In any event, where the property has been disposed of for whatever reason, the applicant should be entitled to compensation, whatever the extent of his interest. In the ordinary case the property will have been sold and the applicant will be entitled to the price received,²² if he is the sole owner, or, if he has an interest in the property other than as owner, to the proportion of the price which corresponds to the extent of his interest. If the property has been disposed of in some other way, the compensation should be based on the value of whatever the Crown received in return for the property. Where, for example, heritage has been disposed of by a contract of excambion, the compensation should be based on the value of the property received. Where the property has been disposed of and for some reason nothing has been received in return - for example, where it has been accidentally destroyed while in the possession of the Crown - the compensation should be based on its value as at the date of disposal. Such situations may seem unlikely, but we note that they are provided for in the analogous provisions of the Companies Act to which we have referred,²³ and we consider that there should be matching provisions in our draft Bill. We therefore **recommend**:

101. (1) The amount of compensation payable to the owner of property which has been disposed of should be -

²² Not the net proceeds of sale, as in *Lloyds and Scottish Finance Ltd v HMA* 1974 JC 24, 1974 SLT 3, and in s 72(3) and (4) of the Civic Government (Scotland) Act 1982 (compensation payable to owner of lost property which has been disposed of for value by the chief constable under s 68). Since the property has been sold through no fault of the applicant, he should not have to bear the expenses of the sale.

²³ See footnote to para 17.5 above.

- (a) where a consideration has been received, an amount equal to the amount of the consideration or its value at the time of the disposal, or
 - (b) where no consideration has been received, an amount equal to the value of the property as at the date of the disposal.
- (2) The amount of compensation payable to a person who has an interest in property which has been forfeited should be an amount corresponding to the extent of his interest.

(Draft Bill, clause 19(1), (2), (5))

17.8 As in the case of a third party's application for the recall of a suspended forfeiture order,²⁴ we consider that the court which hears a third party's application for the return of forfeited property or for compensation should not be entitled to sentence the offender afresh. We **recommend**:

102. The court which considers an application for the return of forfeited property or for compensation should not be entitled to review any other element in the sentence imposed, or any probation order or order for absolute discharge made, in respect of the offence to which the suspended forfeiture order related.

(Draft Bill, clause 19(9))

17.9 Just as the prosecutor under our scheme has a duty to secure the correction of any error as to the identity of a third party to whom a suspended forfeiture order or a restraint order relates,²⁵ so also we propose that he should have a duty to act if a similar error comes to his notice after forfeiture. On forfeiture the suspended forfeiture order will be spent, so that it cannot thereafter be varied. The prosecutor should, we think, draw the error to the attention of the court, whether or not he knows who the correct third party is, since the court should be made aware of any mistake in any order which it has pronounced. It is of greater importance, however, that if he does know or reasonably suspects²⁶ who the correct third party is he should write to that person at once and advise him that he may be entitled to apply for the return of the property or for compensation. We therefore **recommend**:

103. If, after property has been forfeited under the new legislation, the prosecutor comes to believe that the preceding suspended forfeiture order did not correctly identify any person having an interest in the property, the prosecutor should forthwith -

- (a) advise the court of the error, whether or not he knows the identity of any person truly having an interest in the property; and

²⁴ See para 15.11, recommendation 91 above.

²⁵ See paras 15.2, 16.10.

²⁶ On "reasonable suspicion" see second footnote to para 13.11 above.

- (b) where he knows or reasonably suspects the identity of any such person, notify that person in writing that he may be entitled to apply for the return of the property or for compensation.

(Draft Bill, clause 19(7), (8))

17.10 As in an application for the recall of a suspended forfeiture order or a restraint order, we think that a right of appeal against a decision on an application for the return of forfeited property or compensation is necessary for the protection of the third party's interests, and that the prosecutor should also have a right of appeal. We propose that the procedure should be the same as in an appeal against a decision on an application for the recall of a suspended forfeiture order.²⁷ While either party would be entitled to bring under review the quantification of the compensation payable to the applicant, such appeals should be rare. The compensation payable will usually have been determined by reference to the price obtained for the property on disposal by the Crown in the person of the clerk of court. In practice, the clerk of court should have followed administrative directions designed to obtain the best price for the property. We **recommend**:

104. (1) Both the applicant and the prosecutor should be entitled to appeal against a decision on an application for the recovery of forfeited property or for compensation.
- (2) The appeal procedure should be as in an appeal against sentence.

(Draft Bill, clause 20)

The offender's family home

17.11 Among the third parties whose interests should be protected in any new regime for the forfeiture of property used in crime are the family of any person whose family home has been forfeited. We have already recommended in Part IV of this report that there should be some constraint on the disposal of the family home of a person in relation to whom a confiscation order has been made.²⁸ For the reasons given in support of that recommendation we now propose that the same restrictions should apply in relation to the disposal of a family home which has been forfeited. We **recommend**:

105. Where a person's family home has been forfeited under the new legislation, any right or interest in it should be disposed of only in terms of the provisions referred to in recommendation 14.

(Draft Bill, clause 36(1)(b))

²⁷ See para 15.13, recommendation 92 above.

²⁸ See paras 4.15-4.19 above.

Part XVIII Reciprocal arrangements for the enforcement of orders

Introduction

18.1 In proceedings where confiscation or forfeiture is competent it is possible that the accused may be concerned in transactions or may have interests in property in more than one jurisdiction. We therefore consider that any new Scottish legislation should make provision for effective co-operation in the enforcement of orders not only between Scotland and other parts of the United Kingdom but also between Scotland and jurisdictions outside the United Kingdom. Co-operation with jurisdictions overseas is in any event required by the Laundering Convention. Article 7 provides:

"1. The Parties shall co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds.

2. Each Party shall adopt such legislative or other measures as may be necessary to enable it to comply, under the conditions provided for in this chapter,¹ with requests:

a. for confiscation of specific items of property representing proceeds or instrumentalities,² as well as for confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;

b. for investigative assistance and provisional measures with a view to either form of confiscation referred to under *a* above."

The obligation to take provisional measures imposed by article 7.2.*b* is the subject of article 11:

"1. At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.

2. A Party which has received a request for confiscation pursuant to Article 13 shall, if so requested, take the measures mentioned in paragraph 1 of this article in respect of any property which is the subject of the request or which might be such as to satisfy the request."

Article 13, referred to in article 11.2, provides by paragraph 1:

¹ *Ie* Chapter III of the Convention, entitled "International Co-operation".

² *Ie* "any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences": Convention, art 1.c.

"1. A Party, which has received a request made by another Party for confiscation concerning instrumentalities or proceeds, situated in its territory, shall:

- a. enforce a confiscation order made by a court of a requesting Party in relation to such instrumentalities or proceeds; or
- b. submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it."

18.2 In making recommendations on this subject it will be convenient to deal with confiscation and forfeiture separately, and to discuss in relation to each (1) the reciprocal enforcement of orders within the United Kingdom, (2) the enforcement in Scotland of orders made outside the United Kingdom and (3) the enforcement outside the United Kingdom of orders made in Scotland.

Confiscation

Enforcement in England and Wales of orders made in Scotland

18.3 Section 24A of the Drug Trafficking Offences Act 1986³ provides for the recognition and enforcement in England and Wales of orders and functions under Part I of the Criminal Justice (Scotland) Act 1987.⁴ We propose that similar provision should be made for the recognition and enforcement in England and Wales of confiscation orders, restraint orders and ancillary orders in relation to realisable property which may be made by the Scottish courts in terms of the new legislation. It should also be provided that the functions of an administrator appointed under the new legislation should have effect in the law of England and Wales. We therefore **recommend**:

- 106. Provision should be made for the recognition and enforcement in England and Wales of orders and functions relative to Scottish confiscation proceedings in terms similar to section 24A of the Drug Trafficking Offences Act 1986.**

(Draft Bill, clause 33)

Enforcement in Scotland of orders made in England and Wales

18.4 The enforcement in Scotland of orders made in England and Wales under the Drug Trafficking Offences Act 1986 is provided for by sections 11, 27 and 28 of the Criminal Justice (Scotland) Act 1987, while sections 90 to 93 of the Criminal Justice Act 1988 provide for the enforcement in Scotland of orders made in proceedings under Part VI of that Act. These provisions appear to us to be satisfactory, but we consider that some re-arrangement of them would be useful. First, section 11(6) of the 1987 Act applies the other provisions of section 11, which deal with the inhibition and arrestment of property affected by a restraint order or ancillary interdict, to restraint orders made under section 8 of the 1986 Act. It does so by setting out a large number of modifications to subsections (1) to (5) of section 11 in such a way that it is not easy to understand the result. We propose that section 11(6) should

³ Inserted by CJ(S)A, s 31; a new s 24A(6) was substituted by the Criminal Justice Act 1993, s 21(2) (now in force).

⁴ The Drug Trafficking Offences (Enforcement in England and Wales) Order 1988 (SI 1988 No 593) was made under the powers conferred by s 24A.

be repealed and its effect restated in a new section inserted as section 28A of the 1987 Act. The provisions of section 11(6) would thus take their logical place in the sequence of sections 27 to 30A of the 1987 Act which deal with reciprocal arrangements for the enforcement of confiscation orders under that Act. Secondly, we propose that sections 90 to 93 of the 1988 Act should be repealed and incorporated, with modifications,⁵ into the new Scottish legislation. Their logical place, we think, is in a statute which enacts for Scotland a general criminal confiscation regime. We therefore **recommend**:

- 107. Section 11(6) of the Criminal Justice (Scotland) Act 1987 should be repealed and restated in a new section of that Act.**

(Draft Bill, clause 39(3), (9); Schedule 3, paragraph 24; Schedule 5)

- 108. Sections 90 to 93 of the Criminal Justice Act 1988 should be repealed and restated, with modifications, in the draft Bill.**

(Draft Bill, clauses 27, 28, 29, 39(9); Schedule 5)

Northern Ireland

18.5 There are several provisions for the enforcement of Northern Ireland orders in Scotland. Section 29 of the 1987 Act⁶ provides for the enforcement of Northern Ireland orders corresponding to confiscation orders under Part I of the 1987 Act, while the Northern Ireland (Emergency Provisions) Act 1991 provides for the enforcement of confiscation orders made under section 47 of that Act.⁷ Section 95 of the Criminal Justice Act 1988⁸ provides for the enforcement in Scotland of a Northern Ireland order corresponding to an order made under Part VI of the 1988 Act. It so provides by permitting the application by Order in Council, for the purposes of the law of Northern Ireland, of sections 90 to 93 of the 1988 Act, the sections which we have recommended⁹ should be transferred from that Act to the new Scottish Act. We propose that section 95 should be likewise transferred. We **recommend**:

- 109. Section 95 of the Criminal Justice Act 1988 should be repealed and restated in the draft Bill.**

(Draft Bill, clauses 30, 39(9); Schedule 5)

18.6 The Criminal Justice (Confiscation) (Northern Ireland) Order 1990¹⁰ provides for the enforcement in Northern Ireland of orders made under Part I of the 1987 Act. We propose that similar provision should be made for the enforcement in Northern Ireland of confiscation orders, restraint orders and ancillary orders made in terms of the new Scottish legislation. We **recommend**:

⁵ In particular, the restatement of s 92 (inhibition and arrestment of property in Scotland) should take account of the recommendations in paras 9.33-9.37 of this Report.

⁶ The Criminal Justice Act 1993 inserted a new s 29(3A) (by s 22(2)) and substituted a new s 29(4) (by s 21(3)(c)). Ss 21 and 22 of the 1993 Act came into force on 1 December 1993 (SI 1993/2734).

⁷ NI(EP)A, Sched 4, para 19 as amended by the Criminal Justice Act 1993, s 46.

⁸ The Criminal Justice Act 1993 inserted a new s 95(2A) (by s 34(2)) and substituted a new s 95(3) (by s 21(3)(f)). S 34 of the 1993 Act also came into force on 1 December 1993 (SI 1993/2734).

⁹ See para 18.4, recommendation 108 above.

¹⁰ SI 1990 No 2588 (NI 17), art 26.

110. Provision should be made by statutory instrument for the enforcement in Northern Ireland of orders made in confiscation proceedings in Scotland under the new legislation.

Enforcement in Scotland of orders made outside the United Kingdom

18.7 Sections 30 and 30A of the Criminal Justice (Scotland) Act 1987¹¹ provide for the registration and enforcement of "external confiscation orders", that is, orders made by courts outside the United Kingdom "for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value".¹² Those sections correspond to sections 26 and 26A of the Drug Trafficking Offences Act 1986¹³ and sections 96 and 97 of the Criminal Justice Act 1988.¹⁴ In each set of provisions the scheme is the same. On an application made by or on behalf of the government of a country or territory outside the United Kingdom designated by an Order in Council, the Court of Session (or, in England and Wales, the High Court) may register an external confiscation order made there if: (1) it is satisfied that the order is in force and not subject to appeal; (2) it is satisfied, where the person against whom it is made did not appear in the proceedings, that he had notice of them in sufficient time to enable him to defend them; and (3) it is of the opinion that enforcing the order in Scotland (or in England and Wales) would not be contrary to the interests of justice. The Order in Council will specify how the powers conferred by the Act are to apply to the order.¹⁵ The Court must cancel the registration of the order if it appears to the Court that the order has been satisfied by payment of the amount due under it or by the person against whom it was made serving imprisonment in default of payment or by any other means.

18.8 We consider that it would be appropriate to enact, with one modification, a similar scheme for the enforcement in Scotland of external confiscation orders made relative to offences corresponding with or similar to those to which Part I of the draft Bill applies. The modification is necessary in order to take account of article 7.2.a of the Laundering Convention which requires compliance with external requests for confiscation of specific items of property representing proceeds (property confiscation) as well as for confiscation of the value of proceeds (value confiscation).¹⁶ The Drug Trafficking Offences Act 1986, Part I of the Criminal Justice (Scotland) Act 1987 and Part VI of the Criminal Justice Act 1988 make provision for value confiscation. The Laundering Convention, however, requires legislative measures which would enable the United Kingdom to comply with a request from a

¹¹ Substituted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 63. A new s 30(5) was substituted by the Criminal Justice Act 1993, s 21(3)(d).

¹² CJ(S)A, s 30(2) as substituted.

¹³ Substituted by the CJA, s 103(1), Sched 5, para 15. A new s 26(5) was substituted by the Criminal Justice Act 1993, s 21(3)(b).

¹⁴ A new s 96(5) was substituted by the Criminal Justice Act 1993, s 21(3)(g).

¹⁵ See the Confiscation of the Proceeds of Drug Trafficking (Designated Countries and Territories (Scotland)) Order 1991 (SI 1991 No 1467, amended by SI 1992 No 1733, SI 1993 No 1806 and SI 1993 No 3156); the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990 (SI 1990 No 1199, amended by SI 1991 No 1465); the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991 (SI 1991 No 2873, amended by SI 1993 No 1790). In *In re JL* (*The Times*, 4 May 1994) Judge J held that DTOA, s 38(11) as modified by SI 1990 No 1199, which corresponds to CJ(S)A, s 47(5) as modified by SI 1991 No 1467, conferred on the High Court jurisdiction to make a restraint order restraining access to funds held in London notwithstanding that the proceedings in the designated foreign country were civil proceedings *in rem*. On procedure in England under SI 1990 No 1199 and SI 1991 No 2873 see A Bolt, "Practical problems in mutual assistance in criminal matters" (1993) 19 Commonwealth Law Bulletin 1911 at pp 1915-1916.

¹⁶ See para 18.1 above.

jurisdiction which operates a property confiscation regime. We doubt whether the expression "other rewards" in the statutory definition of "external confiscation order"¹⁷ is broad enough to include "specific items of property representing proceeds". We therefore propose that the definition should be extended to include them, both in the 1987 Act and in the draft Bill.

18.9 We note that there seems to be a drafting error in section 30(1) of the 1987 Act as substituted by section 63 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. In the new section 30(1)(b)(i) and (c) provisions which appear in section 32 of the 1987 Act are repeated. They are therefore redundant and should be repealed.

18.10 We **recommend**:

111. Section 30(1)(b)(i) and (c) of the 1987 Act should be repealed.

(Draft Bill, clause 39(9); Schedule 5)

112. In section 30(2) of the 1987 Act the definition of "external confiscation order" should be extended to include orders made for the purpose of recovering specific items of property representing proceeds.

(Draft Bill, clause 39(3); Schedule 3, paragraph 25)

113. Provision should be made for the registration and enforcement of confiscation and ancillary orders made outside the United Kingdom relative to offences similar to the offences to which Part I of the draft Bill applies, in terms similar to sections 30 (amended as recommended above) and 30A of the Criminal Justice (Scotland) Act 1987.

(Draft Bill, clauses 31, 32)

Enforcement outside the United Kingdom of orders made in Scotland

18.11 By virtue of section 32(1) of the Criminal Justice (Scotland) Act 1987 such provision as appears to be expedient may be made by Order in Council in connection with the taking of action in a designated country in consequence of the making of a restraint order or of a confiscation order under Part I of the 1987 Act. Section 32(1) further provides that such provision may include a direction that, in such circumstances as may be specified, proceeds arising out of action taken in that country with a view to satisfying a confiscation order which are retained there are nevertheless to be treated as reducing the amount payable under the confiscation order to such extent as may be specified. The rationale of this further provision appears to be that if the proceeds are retained in the designated country the object of depriving the offender of these proceeds will have been achieved and thus they may be treated as reducing the amount payable under the confiscation order. Section 32(1) appears to us to be satisfactory and we therefore propose that the draft Bill should include a provision to the same effect.

¹⁷ See para 18.7 above.

18.12 Section 32(2) provides that subsections (9)(a), (10), (11) and (12) of the original section 30 of the 1987 Act are to apply in respect of Orders in Council under section 32 as they apply in respect of Orders in Council under the original section 30. Those subsections were repealed when the whole of the original section 30 was repealed by section 63 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. While section 32(2) should now be read as referring to the subsections of the new section 30 which correspond to those subsections,¹⁸ we think it would be convenient if section 32(2) were amended to refer to the new subsections. Subsection (9)(a) is replaced by the new subsection (1)(b)(ii), subsection (10) by subsection (1)(b)(iii), subsection (11) by subsection (3) and subsection (12) by subsection (5) as substituted by section 21(3)(d) of the Criminal Justice Act 1993.

18.13 We **recommend**:

- 114. Section 32(2) of the Criminal Justice (Scotland) Act 1987 should be amended as indicated in paragraph 18.12.**

(Draft Bill, clause 39(3); Schedule 3, paragraph 26)

- 115. Provision should be made for the enforcement outside the United Kingdom of confiscation and ancillary orders made in Scotland in terms similar to section 32 of the 1987 Act, as so amended.**

(Draft Bill, clause 34)

Forfeiture

Enforcement in England and Wales of orders made in Scotland

18.14 The only statutory provisions relative to the enforcement in England and Wales of forfeiture orders and ancillary orders made in Scotland seem to be those in paragraphs 8 and 9 of Schedule 4 to the Prevention of Terrorism (Temporary Provisions) Act 1989 which are concerned only with orders made under that Act. It is therefore necessary to provide for the enforcement in England and Wales of suspended forfeiture orders and restraint orders made under the new Act and of forfeiture orders made under specific enactments other than the 1989 Act. We propose that provision should be made by Order in Council for the purpose of enabling the enforcement of such orders. That would most conveniently be done by extending the scope of clause 33, discussed above in relation to confiscation proceedings,¹⁹ to include such orders. We **recommend**:

- 116. The provisions referred to in recommendation 106 above should be extended to include Scottish restraint orders relative to forfeitable property and suspended forfeiture orders made under the new Act and forfeiture orders made under any enactment other than the Prevention of Terrorism (Temporary Provisions) Act 1989.**

(Draft Bill, clause 33(1)(c), (2)-(6))

¹⁸ Interpretation Act 1978, s 17(2)(a).

¹⁹ See para 18.3, recommendation 106 above.

Enforcement in Scotland of orders made in England and Wales or in Northern Ireland

18.15 Paragraphs 18 and 19 of Schedule 4 to the Prevention of Terrorism (Temporary Provisions) Act 1989, which apply to Scotland, deal with the enforcement in Scotland of forfeiture orders and restraint orders made under the 1989 Act elsewhere in the British Islands. There seem to be no other relevant statutory provisions. The enforcement in Scotland of orders made in England and Wales or in Northern Ireland, whether these orders are forfeiture orders made under other enactments or orders corresponding to suspended forfeiture orders or restraint orders under the new Scottish legislation, appears to us to be primarily a matter for consideration in the context of the law and practice in England and Wales and in Northern Ireland relative to orders for the forfeiture or deprivation of property in criminal proceedings. We are obviously neither entitled nor qualified to make recommendations for the reform of the law in these jurisdictions.

Enforcement in Northern Ireland of orders made in Scotland

18.16 Again, the only relevant provisions are in the 1989 Act.²⁰ We have noted above that provision has been made by statutory instrument for the enforcement in Northern Ireland of orders made under Part I of the Criminal Justice (Scotland) Act 1987, and we have recommended that similar provision be made as regards orders made in confiscation proceedings under the new legislation.²¹ We now make a similar proposal relative to restraint orders and suspended forfeiture orders under the new legislation and to forfeiture orders under any enactment other than the 1989 Act. We **recommend**:

- 117. Provision should be made by statutory instrument for the enforcement in Northern Ireland of Scottish restraint orders relative to forfeitable property and suspended forfeiture orders made under the new Act and forfeiture orders made under any enactment other than the Prevention of Terrorism (Temporary Provisions) Act 1989.**

Enforcement in Scotland of orders made outside the United Kingdom

18.17 There are two sets of statutory provisions concerned with the enforcement in Scotland of forfeiture orders made outside the United Kingdom. The Prevention of Terrorism (Temporary Provisions) Act 1989 provides for the enforcement in Scotland of orders for the forfeiture of terrorist funds and related orders made in a country or territory designated by Order in Council.²² In a scheme of much broader application the Criminal Justice (International Co-operation) Act 1990 makes provision for the enforcement in the United Kingdom of any order for the forfeiture and destruction or other disposal of any property in respect of which an offence has been committed or which was used or intended for use in connection with the commission of an offence.²³ The order must have been made by a court in a country or territory outside the United Kingdom designated by Order in Council, and the offence concerned must correspond to or be similar to one of the offences specified in section 9(6) of the 1990 Act. These offences are: an offence under the Misuse of Drugs Act 1971, a drug trafficking offence as defined in section 38(1) of the Drug Trafficking

²⁰ PT(TP)A, Sched 4, Pt III, paras 28, 29.

²¹ See para 18.6, recommendation 110 above.

²² PT(TP)A, Sched 4, para 20.

²³ 1990 Act, s 9 as amended by the Criminal Justice Act 1993, s 21(1), (3)(h) (now in force).

Offences Act 1986, an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates and an offence to which Part VI of the Criminal Justice Act 1988 applies. The Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Scotland) Order 1991, as amended,²⁴ provides for the enforcement in Scotland of orders made by a court in a designated country or territory for the forfeiture and destruction or other disposal of property used in connection with the commission of a drug trafficking offence.

18.18 We have considered whether to combine with our recommended provisions for the enforcement in Scotland of overseas confiscation orders²⁵ some further provisions as to overseas forfeiture orders, so that all the general powers for the enforcement in Scotland of overseas confiscation or forfeiture orders would appear in one statute. We have concluded, however, that it is more appropriate that the general provisions for the enforcement in the United Kingdom of overseas forfeiture orders should all appear together in section 9 of the 1990 Act. We therefore propose that section 9 should apply to any offence which corresponds to or is similar to an offence to which Part I or Part II of our draft Bill applies. Part I applies to any offence prosecuted on indictment or on summary complaint if the offence is punishable by a fine over level 5 on the standard scale, or by imprisonment for more than three months or by both such fine and imprisonment, but not to an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates or to an offence under Part III of the Prevention of Terrorism (Temporary Provisions) Act 1989. Part II applies to any offence of which a person may be convicted in solemn proceedings in the High Court or the sheriff court or in summary proceedings in the sheriff court. We **recommend**:

118. The application of section 9 of the Criminal Justice (International Co-operation) Act 1990 should be extended to any offence which corresponds to or is similar to an offence to which Part I or Part II of the draft Bill applies.

(Draft Bill, clause 39(4); Schedule 4, paragraph 13)

Enforcement outside the United Kingdom of orders made in Scotland

18.19 There do not appear to be any statutory provisions relative to the enforcement of Scottish forfeiture orders in countries or territories outside the United Kingdom. We propose that the recommendations which we have already made as to the enforcement of Scottish confiscation orders outside the United Kingdom²⁶ should also apply to restraint orders relative to forfeiture proceedings and suspended forfeiture orders made under the new legislation and to forfeiture orders made under any other enactment. We **recommend**:

²⁴ SI 1991 No 1468, amended by SI 1992 No 1734, SI 1993 No 1807 and SI 1993 No 3155.

²⁵ See para 18.10, recommendation 113 above.

²⁶ See paras 18.11-18.13, recommendations 114, 115 above.

119. Provision should be made, in terms similar to section 32 of the Criminal Justice (Scotland) Act 1987, amended as proposed in paragraph 18.12, for the enforcement outside the United Kingdom of restraint orders and suspended forfeiture orders made under the new Act and forfeiture orders made under any other enactment.

(Draft Bill, clause 34)

Part XIX Forfeiture of property where the accused has died

Introduction

19.1 Under the present law the proceeds of a crime cannot be confiscated if the offender is not amenable to justice: if he cannot be tried, or cannot be sentenced, because he has absconded or died or because he has become insane or suffers from some other medical condition which makes his trial an impossibility. In such circumstances a confiscation order cannot be made and the proceeds of the crime may be enjoyed, or applied for other criminal purposes, by the offender himself or by his accomplices, relations or beneficiaries.¹ In this Part we consider the question whether in such cases the courts should have power to recover the proceeds of the offence. This matter has been considered recently in other jurisdictions² and we therefore discuss it in this report although it was not referred to in the discussion paper and we consequently do not have the advantage of the views of our consultees.

19.2 It would, we think, be generally agreed that in principle the proceeds of a crime should not escape confiscation only because it is not possible to make a confiscation order against the offender. It does not seem acceptable that the proceeds should remain available to him or to his family or accomplices. If the principle is accepted, it becomes necessary to devise some scheme whereby the proceeds may be taken out of circulation by the State. The primary matters for decision are the range of offences to which the scheme is to apply and which of the possible reasons why a confiscation order cannot be made should be a condition for bringing the scheme into operation: that the offender is dead, or has absconded, or is unfit to be tried or sentenced by reason of his mental or bodily condition. There is also a question as to the stage the criminal investigation or process should have reached before the procedure can be set in motion: the stage of the institution of proceedings, or some earlier stage, or a later stage such as the commencement of the trial or the conviction of the accused. Important procedural issues must also be resolved: the nature of the order which should be made, the court which should be entitled to make it, the person or authority who should be entitled to apply for it, the matters to be proved, the burden and standard of proof, the period after the death or other relevant event within which the application must be made, provisional measures before the order is made and the protection of the rights of third parties.

Stage of proceedings

19.3 It seems obvious that it should be a necessary condition of the operation of any scheme that the Crown not only should be in possession of sufficient evidence against the

¹ If the offender dies, absconds or becomes mentally or physically incapable *after* a confiscation order is made the order is nevertheless enforceable, at least in theory.

² See para 19.4 below.

alleged offender to justify the taking of proceedings but also should have instituted proceedings.³ It might otherwise appear that the Crown was taking advantage of his absence in order to seize the alleged proceeds. It would scarcely be acceptable, for example, for the Crown to recover the proceeds of a crime allegedly committed by a person who had died if the Crown had not raised proceedings against him during his lifetime. All the legislative provisions in other jurisdictions to which we refer in the following paragraph apply only where proceedings have been instituted against the person concerned. We do not think it is necessary that the proceedings should have reached any particular stage, such as the commencement of the trial or the conviction of the accused. As we shall explain, we propose that where the accused has not been convicted it should be necessary for his guilt to be established beyond reasonable doubt before the court grants an application for the recovery of the proceeds.

Range of offences; reasons why confiscation order cannot be made

19.4 It will be convenient to consider together the two questions of the range of the offences to which the scheme might apply and the reasons why a confiscation order cannot be made against the accused. Here it is helpful to examine the recently introduced statutory provisions in jurisdictions with confiscation regimes broadly similar to that which we have recommended in Parts II to X of this report. In Australia the relevant provisions are very widely drawn: a confiscation order may be made in relation to any indictable offence where the offender dies, or cannot be found, or is outside Australia and not extradited, or is for any other reason not amenable to justice.⁴ In New Zealand the scope of the provisions is narrower: the relevant offence must be a "serious offence", that is, an offence punishable by imprisonment for a term of five years or more; and the order may be made only if the offender cannot be found or, by reason of being outside New Zealand and not being the subject of an order for extradition or rendition, is not amenable to justice.⁵ In Canada the offence must be an "enterprise crime offence"⁶ and the offender must have died or absconded.⁷ In England and Wales the Home Office Working Group on Confiscation recommended that in drug-trafficking cases the courts should be able to make a confiscation order in the absence of the defendant where he was not amenable to justice for whatever reason.⁸ The Criminal Justice Act 1993, however, provides that in drug-trafficking cases a confiscation order may be made only where the defendant has been convicted but dies or absconds before being sentenced, or where he has absconded after being charged but before being convicted.⁹

19.5 We consider that if it is correct in principle for the State to recover the proceeds of crime although the offender is not amenable to justice, it should be competent to do so not only in relation to drug-trafficking offences but also in relation to any of the other offences in respect of which a confiscation order may be made on conviction.

³ For the meaning of "the institution of proceedings" see para 9.16 above and the draft Bill, cl 38(3).

⁴ Proceeds of Crime Act 1987 (No 87 of 1987), ss 5(1)(d), 6, 14(1), 17.

⁵ Proceeds of Crime Act 1991 (1991, No 120), ss 2(1), 3(1)(c), 4, 13.

⁶ A large category of offences including corruption of public officers, fraud, counterfeiting and possession of the proceeds of drug trafficking.

⁷ Criminal Code, ss 462.3, 462.38, inserted by the Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act 1988, c 51 (Revised Statutes of Canada 1985, c 42 (4th Supp)), s 2.

⁸ Report on the DTOA (1991), paras 5.3-5.9.

⁹ DTOA, s 4A inserted by s 14(1) of the 1993 Act (not yet in force, 1 May 1994). Ss 42 and 43 of the 1993 Act (also not yet in force) insert similar provisions in the NI(EP)A.

19.6 The selection of the grounds relative to the offender is more difficult: they range from the broad ground that he is not amenable to justice for any reason to the narrow ground that he has disappeared or absconded. We have concluded that a scheme is clearly necessary only where the offender has died. In at least some of the cases in which he is not amenable to justice for some other reason - because he has absconded, or because of a medical condition - there may be some prospect that he will become amenable to justice in the future: he may be apprehended, or he may recover. If proceedings have been instituted against an absconder or an invalid, the prosecutor may obtain a restraint order and any necessary inhibitions, warrants or interdicts relative to his realisable property which will have the effect of taking the proceeds of his crime out of circulation. In the event that he did not become amenable to justice during his life, the proceeds could be forfeited after his death.¹⁰ We note that circumstances might arise in which an accused who has been ill or who has absconded recovers or returns only after a trial has become impracticable because material witnesses are no longer available: in such circumstances the restraint order and any other orders would no doubt be recalled and the accused would be entitled to apply for compensation.¹¹

19.7 We therefore propose a scheme which may be operated only where the offender has died. If experience suggests that it would be advantageous for the scheme to be extended to meet other circumstances, that could be done by amendment of the legislation. We note that provisions for circumstances other than the accused's death might be complex. For example, in making provision for a case where the offender had absconded before conviction it might be thought desirable to require that reasonable attempts had been made to arrest him, to prescribe that the recovery of the alleged proceeds should not be competent until a specified period had expired, and to provide for a variety of circumstances which might arise in the event of the absconder's return: for the variation of the order if he could show that it had been made on wrong information, for leaving the order out of account if he is sentenced, or for the discharge of the order and the payment of compensation in the event of the prosecution not being proceeded with or in the event of the absconder being tried and acquitted.¹²

19.8 The scheme in the Drug Trafficking Offences Act 1986, as amended, applies where the defendant absconds before or after conviction or where he dies after conviction: it does not apply where he dies between the institution of proceedings and conviction. It appears to us, however, that if a person has committed an offence and is prosecuted but dies possessed of the proceeds, his estate should be deprived of the proceeds if a court is satisfied to the criminal standard of proof that he committed the offence, whether that is established by his conviction before death or by a finding made upon a judicial assessment of the evidence after his death. If he has committed the offence, the occurrence of his death cannot alter the fact that the proceeds are the proceeds of crime. We therefore **recommend**:

¹⁰ If he has absconded and has not been known to be alive for seven years he may be presumed dead: Presumption of Death (Scotland) Act 1977, s 1(1).

¹¹ See paras 10.4-10.9 above.

¹² Cf DTOA, ss 4A, 4B, 19A-19C, inserted by the Criminal Justice Act 1993, ss 14, 15 (not yet in force, 1 May 1994).

120. It should be competent for the Crown to recover by means of a court order the proceeds of an offence to which Part I of the draft Bill applies where proceedings have been instituted against a person for the offence and he dies before being sentenced or otherwise dealt with in these proceedings.

(Draft Bill, clause 37(1), (2), (8))

The court and the order

19.9 We propose that the recovery of the proceeds should be effected by an order of the Court of Session. Since the procedure is concerned with the transfer of property it should, we think, take place in a civil court; and since such cases are likely to be rare and may involve difficult questions of fact or law we consider that the appropriate court would be the Court of Session. The order would not be for confiscation, an expression which we think should be confined to criminal procedure, but for forfeiture. The forfeited property would be disposed of in the same way as property forfeited as a result of the making of a suspended forfeiture order: it would be dealt with by the Crown in such manner as seemed to the Crown to be appropriate.¹³

The parties

19.10 The application for the order would be made by the Lord Advocate. The application would be intimated to any person appearing to the Court to be likely to be affected by the making of the order. Any such person would be entitled to appear, lead evidence and make submissions.

Burden and standard of proof

19.11 Before the Court could make an order it would have to be satisfied that the person against whom the proceedings had been instituted had committed the offence of which he had been charged;¹⁴ and that the property which was the subject of the application had been obtained by the accused, directly or indirectly, in connection with the commission of the offence, or was a gift caught by Part I of the draft Bill. It would be for the Lord Advocate to prove these two matters, and the standard of proof would be the criminal standard of proof beyond reasonable doubt, the standard which we have recommended in relation to the analogous matters of benefit and the amount that might be realised.¹⁵

19.12 Where the accused has died after being convicted, we do not propose that proof of the conviction should be conclusive evidence that he committed the offence. It is possible to envisage a case in which a person with an interest to oppose an application, such as an heir or beneficiary of the accused, might reasonably consider that the accused had been wrongly convicted. Again, the accused might have died before the hearing of an appeal against his conviction which had had reasonably good prospects of success. In such cases injustice might result from the treatment of the conviction as conclusive evidence of guilt. It might be argued that the heirs would be deprived of their inheritance in violation of the European

¹³ See para 14.10, recommendation 86, above.

¹⁴ The Court should be entitled to permit any amendment of the application which does not change the character of the offence with which the deceased had been charged in the proceedings: cf Criminal Procedure (Scotland) Act 1975, ss 123(3), 335(2).

¹⁵ See paras 6.5, 6.13 above.

Convention on Human Rights.¹⁶ We therefore propose that the ordinary rules of evidence in civil proceedings should apply. Thus, where the accused is proved to have been convicted of the offence, he should be taken to have committed the offence unless the contrary is proved.¹⁷ A provision to that effect would set up a rebuttable presumption of law: the Court would be required to presume that the accused had committed the offence unless anyone opposing the application overcame that presumption by proving the contrary on the ordinary civil standard of a balance of probabilities.¹⁸ In practice, where the conviction has followed a trial at which all the relevant evidence has been led "this is likely to be an uphill task"¹⁹ notwithstanding that, under the ordinary rules of evidence in civil proceedings, hearsay would be admissible and corroborative evidence would not be required.²⁰

19.13 Where the accused has died before conviction, however, we propose that the burden of proof would remain with the Crown: the Crown would be required to satisfy the Court beyond reasonable doubt that the accused had committed the offence. Here we follow section 13 of the New Zealand Proceeds of Crime Act 1991 and not the corresponding Australian provision which prescribes the less exacting requirement that the Court should be satisfied, having regard to all the evidence before it, that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.²¹ Any person to whom the application had been intimated would be entitled to challenge any evidence adduced by the Lord Advocate and to lead contradictory evidence, but would not be required to prove that the accused had not committed the offence.

19.14 In all contested applications the fact that the accused himself could not give evidence would no doubt be a matter which the Court would take into account when assessing all the evidence led. On the other hand, in accordance with the ordinary rules of evidence any relevant statement which the accused had made before his death would be admissible as evidence of the facts stated in it unless the circumstances raised a presumption that it did not truly reflect what was in his mind, or unless it was a statement in a precognition or some other statement made with a view of constituting evidence.²²

19.15 The second matter on which the Court would have to be satisfied beyond reasonable doubt is that the property either (a) had been obtained by the accused, directly or indirectly, in connection with the commission of the offence, or (b) was a gift caught by Part I of the draft Bill, that is, a gift made by the offender in contemplation of, or after, the commission of the offence. The formula in (a) is that which we have recommended in relation to the definition of "benefit".²³ We do not consider, however, that the Court should be entitled by statute to make any assumptions as to property obtained or expenditure made after the commission of the offence. We have recommended the introduction of such assumptions in relation to the determination of benefit and the placing on the offender of the burden of

¹⁶ First Protocol, art 1, *cit* para 10.1 above.

¹⁷ This proposal follows the general rule as to convictions as evidence in civil proceedings (Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 10) rather than the rule in defamation actions that a conviction is conclusive evidence of the commission of an offence (same Act, s 12).

¹⁸ *King v Patterson* 1971 SLT (Notes) 40; *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 *per* Lord Diplock at p 544.

¹⁹ *Hunter, supra*. See also Cross on *Evidence* (7th edn, 1990 ed C Tapper), p 103.

²⁰ Civil Evidence (Scotland) Act 1988, ss 1-4, 9.

²¹ Proceeds of Crime Act 1987, s 17.

²² 10 *Stair Memorial Encyclopaedia* para 711.

²³ See paras 4.2-4.7 above.

proving them incorrect.²⁴ We consider, however, that it would not be appropriate to have similar provisions where the person about whom the assumptions would be made would no longer be alive to contradict them in person.²⁵ This is not to say, however, that the Court would not be entitled to draw inferences as a matter of common sense from all the relevant proved circumstances, giving proper weight to the consideration that no evidence from the accused could be led.

19.16 Where the Crown contends that the property is a caught gift, the application should be served on the alleged recipient. If the Crown proves that the property is a caught gift, it should not be forfeited if the recipient proves, on a balance of probabilities, the matters a recipient is entitled to prove when seeking an order that a gift should not be caught or that a restraint order should not be realised: that he received the gift in good faith, was not associated with the giver in the commission of the offence and would suffer hardship if he were to be deprived of the property.²⁶

19.17 We recommend:

121. (1) The Court of Session should be entitled, on an application being made to it by the Lord Advocate, to grant an order for the forfeiture of the proceeds of the offence.
- (2) The application should be intimated to any person appearing to the Court to be likely to be affected by the making of the order, and any such person should be entitled to appear before the Court, lead evidence and make representations, all in such manner as may be prescribed by Act of Sederunt.
- (3) The Court's power to allow the amendment of pleadings should extend to any amendment of the application which does not change the character of the offence with which the accused had been charged in the proceedings.
- (4) It should be for the Lord Advocate to satisfy the Court beyond reasonable doubt
 - (a) that the accused committed the offence concerned, and
 - (b) that the property to which the application relates either -
 - (i) was obtained directly or indirectly by the accused in connection with the commission of the offence, or

²⁴ See paras 6.6-6.10 above.

²⁵ In an application under the DTOA, s 4A (see para 19.4 above) the required assumptions may not be made (s 4A(6)(a)). In Canada, however, the court may infer that property was obtained as a result of the commission of the offence where the accused's income cannot reasonably account for an increase in the value of his property thereafter: Criminal Code (*cit* para 19.4 above), s 462.39

²⁶ See paras 4.29, 4.30, recommendation 19(2); paras 9.27, 9.28, recommendation 51(2).

- (ii) is a gift as defined in recommendations 15 and 16 above.
- (5) The application should be a civil proceeding to which the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, section 10, and the Civil Evidence (Scotland) Act 1988 apply.
- (6) Where the Court is satisfied as to (4)(a) and (b)(ii) above it should nevertheless have a discretion to refuse the application if the recipient of the gift satisfies the Court, on a balance of probabilities, that -
 - (a) he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the gift was made in contemplation of, or after, the commission of the offence; and
 - (b) that he was not associated with the giver in the commission of the offence; and
 - (c) that he would suffer hardship if the application were granted.
- (7) Forfeited property should be dealt with by the Crown in such manner as seems to it to be appropriate.

(Draft Bill, clause 37(2), (3), (5), (9), (11))

Time-limits

19.18 As a safeguard against the oppressive use of the forfeiture procedure it is necessary to have some provision as to the period after the death within which the application must be made. We propose a rule similar to that which we have recommended for applications by the prosecutor for the making of a new order after the conclusion of the proceedings. Such applications must be made as soon as is reasonably practicable after the relevant information becomes available to the prosecutor but in any event within six years after the date of the offender's conviction.²⁷ Here we propose that the application should be made as soon as reasonably practicable after the relevant information becomes available but in any event within six years of the date of death. We accordingly **recommend**:

- 122. The application should be made as soon as is reasonably practicable after the relevant information becomes available to the Lord Advocate but in any event within six years of the date of death.**

(Draft Bill, clause 37(4))

²⁷ See paras 7.8, 7.9, recommendation 37(2); paras 7.17, 7.18, recommendation 42(2).

Preservation of property

19.19 Where a restraint order has been made in respect of the accused before his death, his death will not by itself affect the operation of the restraint order, since it remains in force until it is recalled. The prosecutor must apply to the Court of Session for the recall of the order, and the Court must grant the application, when proceedings for the offence are concluded; but the death of the accused is not one of the circumstances whereby the proceedings are concluded in terms of clause 22(5) of the draft Bill.²⁸ Any inhibition of heritable property which may have been recorded, and any arrestment of moveable property which may have been executed, following upon a restraint order made before the accused's death will continue to have effect so long as the restraint order remains in force.²⁹ An interdict of a person not subject to the restraint order from dealing with the property affected by the order while the order is in force³⁰ will also continue to have effect notwithstanding the death of the accused, since the restraint order will continue in force.

19.20 Where, however, a restraint order is not in force when the accused dies, there should be a procedure whereby the property may be preserved pending the determination of an application for its forfeiture. We propose that the Court of Session should be empowered, on the application of the Lord Advocate, to make orders for inhibition in relation to heritable property in Scotland and to grant warrants for arrestment in relation to moveable property, in the same way as when the property is affected by a restraint order.³¹ We **recommend**:

- 123. Where a restraint order is not in force in respect of the accused at the date of his death the Court of Session should be entitled, on the application of the Lord Advocate, to make an order for inhibition relative to any heritable property in Scotland and to grant a warrant for the arrestment of any moveable property in regard to which an order for forfeiture is to be sought.**

(Draft Bill, clause 37(10))

Protection of third parties' rights

19.21 As in ordinary proceedings for confiscation or forfeiture,³² it is necessary to protect the rights of third parties who have interests in property which is liable to forfeiture where the accused has died. We have already recommended that the Lord Advocate's application for the order for forfeiture should be intimated to any person who seems likely to be affected by the order.³³ We now consider the position after the Court has made the order for forfeiture. At this stage it is necessary to protect the interests of a third party other than a recipient of a caught gift. Whether the property is a caught gift and, if so, whether it should be forfeited are issues which should have been determined at the hearing of the application for forfeiture. We propose to adapt the procedure which we have recommended in Part XVII for the return of property or the payment of compensation to a third party after

²⁸ See para 9.17 above.

²⁹ Draft Bill, cl 25(7); paras 9.34-9.36 above.

³⁰ Draft Bill, cl 26; para 9.32 above.

³¹ Draft Bill, cl 25; paras 9.34-9.36 above.

³² See Parts X, XVII above.

³³ See paras 19.10, 19.17, recommendation 121(2) above.

the forfeiture of property used in crime.³⁴ Where the third party is the owner of the property he should be entitled to apply to the Court for the return of the property or, if it has been disposed of, for compensation. If he has an interest in the property otherwise than as owner, he should be entitled to apply for compensation in a sum corresponding to the extent of his interest, irrespective of whether the property has been disposed of. The applicant should have the burden of satisfying the court on a balance of probabilities that immediately before the forfeiture of the property he was its owner or a person otherwise having a specified interest in it. It would be open to the Lord Advocate, if he opposed the application, to challenge the applicant's evidence and to lead contradictory evidence. If the application is unopposed, or if the Crown's opposition is unsuccessful, the Court should order the return of the property to the applicant, if he is the owner, or the payment of compensation, if the property has been disposed of or if the applicant has an interest in it otherwise than as owner, the amount of the compensation being calculated as recommended in paragraph 17.7 above. We **recommend**:

124. (1) **The owner of property which has been forfeited, other than the recipient of a gift, should be entitled to apply to the Court of Session for the return of the property or, if the property has been disposed of, for compensation.**
- (2) **A person with an interest, otherwise than as owner, in property which has been forfeited should be entitled to apply to the Court for compensation.**
- (3) **The Court should be required to grant the application if the applicant proves on a balance of probabilities that immediately before the forfeiture he was the owner of, or a person otherwise having an interest in, the property.**
- (4) **The amount of compensation payable should be calculated as provided in recommendation 101 above.**

(Draft Bill, clause 37(6)-(8))

Criminal Justice (Scotland) Act 1987, Part I

19.22 As we have mentioned above,³⁵ we consider that forfeiture of property after the death of the accused should be competent not only in the case of an offence to which Part I of our draft Bill applies, but also to an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates. We therefore **recommend**:

125. **Recommendations 120 to 124 above should apply to an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates.**

(Draft Bill, clause 39(3); Schedule 3, paragraph 31)

³⁴ See paras 17.5-17.7 above; draft Bill, cl 19.

³⁵ See para 19.5 above.

Part XX The legislation required

The draft Bill

20.1 The draft Bill, with explanatory notes, is set out in Appendix A. Its short title, "The Proceeds of Crime (Scotland) Bill", may not seem quite accurate for a Bill which deals not only with the confiscation of the proceeds of crime but also with the forfeiture of property used in crime. We have been unable, however, to find a way of indicating briefly and comprehensibly in the short title that the Bill deals with forfeiture. The title which we have chosen is, we think, justifiable because the greater part of the Bill is concerned with confiscation, and because in Australia and New Zealand each of the recent statutes dealing with both matters bears the short title "The Proceeds of Crime Act".¹

20.2 The draft Bill is divided into five Parts. Parts I and II respectively make provision for confiscation and forfeiture, other than restraint orders and other measures for the interim preservation of property which are the subject of Part III. Part IV is concerned with reciprocal arrangements for the enforcement of orders. Part V contains miscellaneous and general provisions including clauses dealing with constraints on the disposal of the offender's family home when it is confiscated or forfeited, and the forfeiture of the proceeds of crime where the accused has died before a confiscation order can be made.

20.3 The draft Bill has five Schedules. Schedule 1 makes provision as to administrators of realisable or forfeitable property. Schedule 2 is concerned with the sequestration, bankruptcy, winding-up or receivership of persons or companies holding realisable or forfeitable property. Amendments to the Criminal Justice (Scotland) Act 1987 are set out in Schedule 3. Schedule 4 contains minor and consequential amendments to legislation other than the 1987 Act, and Schedule 5 gives a list of repeals.

20.4 The amendments to the 1987 Act are set out separately in Schedule 3 because of their number and significance. As we explained in Part II,² our recommendations apply to cases other than terrorism-related cases for which special provision is made by particular statutes. For all other cases we have endeavoured to devise for Scotland a single confiscation scheme which preserves for drug-trafficking cases the special features prescribed in Part I of the 1987 Act. In order to achieve this we have amended many provisions of Part I of the 1987 Act to match the corresponding provisions of the draft Bill, while leaving untouched those provisions of Part I which are concerned with the rules for the assessment of the proceeds of drug-trafficking, implicative gifts, investigations and the disclosure of information.³ If the draft Bill is enacted, it might be thought desirable in due course to consolidate Part I of the 1987 Act and the new Act into a single statute dealing with confiscation and forfeiture in Scotland.

¹ Australia, No 87 of 1987; New Zealand, 1991, No 120.

² See para 2.12 above.

³ See para 2.12, footnote.

20.5 In order to indicate the effect of our proposed amendments to Part I of the 1987 Act we have provided a version of Part I in Appendix B to this report. This version fulfils two functions. First, it provides an up-to-date text of Part I, which has already been amended in some respects by several statutes. Such a text is not available elsewhere: the Statutes in Force give the text of the 1987 Act as at the date of Royal Assent, and Part I is not printed in *The Parliament House Book*. Secondly, the version shows how Part I, as it has been amended to date, would be further amended by Schedule 3 to the draft Bill. These further amendments are shown as follows. Words to be inserted or substituted are printed in bold type, while words to be repealed are printed in italic type. The sources of the proposed amendments are shown in marginal notes. We hope that Appendix B, which is an innovation in the reports of this Commission, will make it possible for readers to understand how Part I would appear if amended by the enactment of the draft Bill.

20.6 In the event of the implementation of this report, those responsible for preparing the necessary Bill may wish to consider including in the Bill a Keeling Schedule on the lines of Appendix B. A Keeling Schedule is a device which has occasionally been used where a Bill has made textual amendments in an enactment.⁴ The enactment is re-enacted, with the amendments made by the Bill, in a Schedule, the words introducing the Schedule saying that in accordance with amendments made earlier in the Bill the enactment is to have effect as set out in the Schedule. In the Bill the changes are shown in bold type, but in the Act they are reset in ordinary type. In Appendix B, on the other hand, insertions and substitutions are shown in bold type, repeals are in italic type, and the sources of the new material are shown in marginal notes. Bold type was used for the additions and substitutions in Schedules 4 and 8 to the Civil Jurisdiction and Judgments Act 1982, and marginal notes were printed in Schedule 8.⁵ It would, however, be an innovation to print the omitted material in italics instead of indicating it by dots, as in Schedule 4 to the 1982 Act. We have derived the idea of printing such material in italics from a recommendation made by the Renton Committee upon a suggestion by Lord Gardiner.⁶

20.7 The draft Bill, like Part I of the 1987 Act, is to be construed as one with the Criminal Procedure (Scotland) Act 1975 except where the context otherwise requires.⁷ One expression frequently used in the draft Bill and in Part I of the 1987 Act as amended by the draft Bill, which has a wider meaning than in the 1975 Act, is "conviction". In this wider sense it includes a finding that the offence has been committed⁸ and thus takes account of cases where a summary criminal court, having been satisfied that the accused committed the offence, grants him an absolute discharge or places him on probation. In such cases a summary criminal court, unlike a court in solemn procedure, does not proceed to conviction.⁹

20.8 Clause 40(2) of the draft Bill provides that the new Act is to come into force on such day as the Secretary of State may by order made by statutory instrument appoint. In

⁴ For a discussion of Keeling Schedules see F A R Bennion, *Statute Law* (3rd ed, 1990), pp 51-52; *The Preparation of Legislation* (1975 Cmnd 6053), paras 13.21, 13.22.

⁵ See 1982 Act, ss 16(2)(b) and 20(4)(a). Schedules 4 and 8 are not Keeling Schedules.

⁶ *The Preparation of Legislation* (above), para 13.22.

⁷ Draft Bill, cl 38(2); CJ(S)A, s 47(2).

⁸ Draft Bill, cl 38(4), 39(3); Sched 3, para 32 (amending CJ(S)A, s 47).

⁹ See para 3.4 above.

framing the transitional provisions in clause 39(1) and (2) we have taken into account article 7.1 of the European Convention on Human Rights which provides in part:

"Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

We note that the European Commission of Human Rights recently declared admissible a complaint under article 7 relative to a confiscation order imposed under section 1 of the Drug Trafficking Offences Act 1986 (which came into force on 12 January 1987) in respect of offences committed between 1 January 1986 and 3 November 1986. In its subsequent report the Commission was divided as to whether there had been a violation of article 7: it expressed the opinion that there had not, but by seven votes to seven with the casting vote of the acting President.¹⁰ No doubt it is arguable that a confiscation order is not a penalty,¹¹ but we think that such arguments are best avoided. We therefore consider that the new statutory powers to make confiscation orders, suspended forfeiture orders and other orders should not be exercisable where a person has been convicted of an offence committed before the coming into force of the relevant Part of the new Act. We also propose that where forfeiture would have been competent under section 223 or section 436 of the Criminal Procedure (Scotland) Act 1975 the court should continue to be entitled to exercise the power thereby conferred where the offence was committed before the coming into force of Part II, notwithstanding the repeal of those sections by Schedule 2 to the new Act. We therefore **recommend**:

- 126. (1) None of the powers conferred by the new Act should be exercisable in proceedings against a person for an offence committed before the Act comes into force.**
- (2) After the Act comes into force it should be competent for a court to exercise the powers conferred by section 223 or section 436 of the Criminal Procedure (Scotland) Act 1975, but not the powers conferred by Part II of the new Act, where a person is convicted of an offence committed before the coming into force of Part II of the new Act.**

(Draft Bill, clause 39(1), (2))

Subordinate legislation

20.9 It may be considered appropriate that the forms and procedures in various applications under Parts I and II of the new Act to the High Court or to the sheriff in the exercise of his criminal jurisdiction¹² should be prescribed by Act of Adjournal. The draft Bill makes no provision for this in view of the powers of the High Court to regulate procedure by Act of Adjournal.¹³ Any necessary provision for applications under Parts III, IV and V to the Court of Session or to the sheriff in the exercise of his civil jurisdiction would be made by

¹⁰ *Welch v UK* 12 February 1993, 15 October 1993. The Commission has referred the case to the European Court of Human Rights: (1994) 5 Human Rights Case Digest 44.

¹¹ See paras 2.14-2.17 above.

¹² eg applications under cdl 4(5), 8(1), 9(1), 10(1), 16(1), 18(1), (5), (6), 19(1), 36(3).

¹³ Criminal Procedure (Scotland) Act 1975, ss 282, 457.

Act of Sederunt. Again, nothing is said in the draft Bill since the Court of Session has sufficient powers.¹⁴

¹⁴ Court of Session Act 1988, s 5; Sheriff Courts (Scotland) Act 1971, s 32. Cf Rules of Court 1965, chap IV, s 2A, rules 201C-201R (causes under the CJ(S)A); s 8D, rules 249S-249Y (reciprocal enforcement of orders in relation to confiscation of proceeds of crime).

Part XXI Summary of recommendations

A. CONFISCATION OF THE PROCEEDS OF CRIME

Confiscation: Introduction

1. (1) Subject to the following recommendations, where in a case other than one related to drug trafficking or terrorism a Scottish criminal court is satisfied that an offender has benefited from an offence of which he has been convicted, the court should have a discretionary power to make a confiscation order requiring him to pay such sum as the court thinks fit with the object of depriving him of that benefit.
- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be so amended as to make the scheme for the confiscation of the proceeds of drug trafficking conform, as far as appropriate, to the scheme described in the following recommendations.

(Paragraphs 2.11-2.13. Draft Bill, clauses 1(1), (2), (4), 39(3); Schedule 3)

When confiscation should be competent

2. The power to make a confiscation order should be exercisable where a person is prosecuted for any offence other than a specified offence related to drug trafficking or terrorism and -
 - (a) is convicted on indictment; or
 - (b) is convicted or found to have committed the offence on summary complaint and the offence is punishable by a fine in excess of level 5 on the standard scale or imprisonment for a period of more than three months or by both such fine and imprisonment.

(Paragraphs 3.2-3.4. Draft Bill, clause 1(1), (2))

3. (1) The power to make a confiscation order in terms of Part I of the Criminal Justice (Scotland) Act 1987 should be extended to the sheriff court in solemn procedure and in summary procedure where the offence concerned is punishable by a fine in excess of level 5 on the standard scale or by imprisonment for more than three months or by both such fine and imprisonment.
- (2) The power to make a confiscation order should not be exercisable in the district court.

(Paragraphs 3.5, 3.6. Draft Bill, clause 39(3); Schedule 3, paragraph 2)

4. There should be no lower limit on the amount of a confiscation order.

(Paragraphs 3.7, 3.8)

5. The sum which a confiscation order requires an offender to pay should not exceed the lesser of -

- (a) the amount of the benefit which he has derived from the offence or offences of which he has been convicted;
- (b) the amount that might be realised, as defined in recommendation 12 below, at the time the order is made.

(Paragraphs 3.9-3.11. Draft Bill, clause 1(5))

"Benefit" and "the amount that might be realised"

6. (1) A person should be held to have benefited from the commission of an offence if in connection with its commission he has obtained, directly or indirectly, any property or other economic advantage.
- (2) "Property" should be defined as "any property wherever situated, whether heritable or moveable, or whether corporeal or incorporeal".

(Paragraphs 4.2-4.7. Draft Bill, clause 2(1), (4))

7. The property which should be liable to be realised to satisfy a confiscation order should be -

- (a) the whole estate, wherever situated, of -
 - (i) the offender;
 - (ii) any person to whom he has made a gift, directly or indirectly and whether in one transaction or a series of transactions;
- (b) any other property in the possession or under the control of any of the persons mentioned in paragraph (a)(i) and (ii) above; and
- (c) any income or estate vesting in any of those persons.

(Paragraph 4.11. Draft Bill, clause 3(1))

8. For the purposes of recommendation 7 above "the offender" means a person -

- (a) against whom proceedings have been instituted as defined in recommendation 47(2) below or
- (b) in respect of whom a restraint order has been made before the institution of proceedings in terms of recommendation 48(1) below.

(Paragraph 4.11. Draft Bill, clause 3(1)(a))

9. Property should not be realisable if -

- (a) it is held on trust by a person mentioned in recommendation 7(a) above for a person not so mentioned; or
- (b) a restraint order or a suspended forfeiture order made in terms of recommendations 61-69 below is in force in respect of the property.

(Paragraph 4.13. Draft Bill, clause 3(2))

10. The provisions of section 5(2)(b) and (3)(b) of the Criminal Justice (Scotland) Act 1987 are unnecessary.

(Paragraphs 4.12, 4.13)

11. Section 5(1), (2) and (3) of the Criminal Justice (Scotland) Act 1987 should be replaced by provisions analogous to those recommended in recommendations 7 to 9 above.

(Paragraph 4.11. Draft Bill, clause 39(3); Schedule 3, paragraph 6)

12. The amount that might be realised when a confiscation order is made should be the total value -

- (a) of the offender's realisable property as specified in recommendations 7 to 9 above, and
- (b) subject to recommendations 15 to 19 below, of all gifts made by him.

(Paragraphs 4.8-4.13. Draft Bill, clause 3(3))

13. (1) In assessing the value of realisable property (other than money) the court -

- (a) should be required to have regard to the likely market value of the property at the date on which the confiscation order would be made; and
- (b) should be entitled to have regard to any security or real burden which would require to be discharged in realising the property or to any other factors which might reduce the amount recoverable by such realisation.

(2) "Money" in paragraph (1) above should include cheques, banknotes, postal orders, money orders and foreign currency.

(3) In assessing the value of realisable property held by a person whose estate has been sequestrated, or who has been adjudged bankrupt in England and Wales or Northern Ireland, the court should be required to take into account the extent to which the property is or has been included in his estate for the purposes of the Bankruptcy (Scotland) Act 1985 or Part IX of the Insolvency Act 1986.

(4) Section 5 of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraph 4.14. Draft Bill, clauses 3(4), (5), (6), 39(3); Schedule 3, paragraph 6)

14. (1) Where the court is not satisfied that the offender's interest in his family home has been acquired by means of the benefit derived from the offence concerned, any right or interest in the family home should be disposed of only in terms of provisions analogous to those of section 40 of the Bankruptcy (Scotland) Act 1985.
- (2) Similar provisions should be inserted in Part I of the Criminal Justice (Scotland) Act 1987.
- (3) The reference to an exception for the protection of a person or his family in section 23(6) of the 1987 Act should be repealed.

(Paragraphs 4.15-4.19. Draft Bill, clauses 36, 39(3), (9); Schedule 3, paragraph 10; Schedule 5)

15. A gift made by the offender should be included among the property liable to be realised to satisfy a confiscation order if it has been made either in contemplation of, or after, the commission of the offence; or, where there is more than one offence, in contemplation of any of them or after the commission of the earlier or earliest of them.

(Paragraphs 4.20, 4.21. Draft Bill, clause 4(1))

16. (1) Where the offender has transferred property to another person for significantly less than its market value, the difference between its market value and the value of the consideration received by the offender should be treated as a gift, and the value of the gift should be adjusted to take account of subsequent changes in the value of money.
- (2) Section 6 of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraph 4.22. Draft Bill, clauses 4(3), 39(3); Schedule 3, paragraph 7)

17. (1) Where a gift was in the form of money and the recipient proves on a balance of probabilities that the money or any of it has not been used to purchase goods or services or to earn interest or any other return, the value of the gift or such part of it as has not been so used should be taken to be the face value of the money or, as the case may be, the unused amount of the money.
- (2) In a case other than any of those mentioned in recommendation 16 and in paragraph (1) above, the value of a gift should be taken to be the greater of the following:
 - (a) its value when received, adjusted to take account of subsequent changes in the value of money; or
 - (b) both of the following -
 - (i) the likely market value, on the date on which the confiscation order is to be made, of -
 - (A) the gift, if retained; or

- (B) where the recipient of the gift retains only part of it, the retained part, and any property or part of any property which, directly or indirectly, represents the gift; or
- (C) where the recipient of the gift retains no part of it, any property or part of any property which, directly or indirectly, represents the gift; and
- (ii) the value of any property and other economic advantage which the recipient of the gift has obtained, directly or indirectly, by reason of the making of the gift, prior to the date on which the confiscation order is to be made, adjusted to take account of subsequent changes in the value of money.
- (3) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 4.23-4.25. Draft Bill, clauses 4(2), (4), 39(3); Schedule 3, paragraph 7)

18. The court should be entitled to disregard the amount (or part of the amount) of a gift caught by the legislation if it considers it improbable that the amount (or part) could be realised.

(Paragraphs 4.26, 4.27. Draft Bill, clause 4(5))

- 19. (1) The recipient of a gift should be entitled to apply to the court, before or after a confiscation order is made and before his property is realised, for a declaration that the gift should not be caught.
- (2) The court should have a discretion to grant the application if the recipient satisfies the court, on a balance of probabilities, that -
 - (a) he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the gift was made in contemplation of, or after, the commission of the offence; and
 - (b) that he was not associated with the giver in the commission of the offence; and
 - (c) that he would suffer hardship if the application were not granted.
- (3) An appeal should lie to the High Court at the instance of -
 - (a) the recipient against the refusal;
 - (b) the prosecutor against the granting,
 of the application.
- (4) The appeal procedure should be as in an appeal against sentence.

- (5) Provisions to the same effect as (1) to (4) above should be inserted in the Criminal Justice (Scotland) Act 1987.
- (6) Section 6(4) and (5) of the 1987 Act should be repealed.

(Paragraphs 4.28-4.30. Draft Bill, clauses 4(6)-(8), 39(3), (9); Schedule 3, paragraph 6; Schedule 5)

- 20. (1) In the assessment of the amount that might be realised no deduction should be made of any sums payable in pursuance of "obligations having priority".
- (2) Section 5 of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 4.31-4.33. Draft Bill, clause 39(9); Schedule 5)

Confiscation and other disposals

- 21. (1) A confiscation order should be imposed only in addition to another order or sentence.
- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraph 5.2. Draft Bill, clauses 1(3); 39(3); Schedule 3, paragraph 2)

22. Any enactment restricting the power of a court dealing with an offender in a particular way from dealing with him also in any other way should not by reason only of the making of a confiscation order (or the postponement of a decision as regards making such an order) restrict the court from dealing with an offender in any way it considers appropriate in respect of an offence.

(Paragraphs 5.3, 5.4. Draft Bill, clause 5(3))

- 23. (1) If the court decides that it ought to make a confiscation order it should determine the amount of the order before and without regard to the making of any decision as to -
 - (a) imposing a fine on the offender;
 - (b) making any order involving payment by him; or
 - (c) making a suspended forfeiture order in terms of recommendations 61-69 below or an order for forfeiture under a particular statute.
- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 5.5-5.7. Draft Bill, clauses 5(1), 39(3); Schedule 3, paragraph 2)

- 24. (1) The court should be directed that where it makes a confiscation order, it should leave the order out of account in determining, in respect of the offence

concerned or any other offence of which the offender has been convicted in the same proceedings, -

- (a) whether or not to impose a custodial sentence and, if so, the length of the sentence; and
 - (b) any other sentence which does not involve depriving the offender of money or property.
- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 5.8-5.11. Draft Bill, clauses 5(2), 39(3), (9); Schedule 3, paragraph 2; Schedule 5)

25. (1) The court should be directed that where it makes a confiscation order it should take account of the order before dealing with the offender, in respect of the offence concerned or any other offence of which he has been convicted in the same proceedings, by -
- (a) fining him;
 - (b) making any order involving payment by him; or
 - (c) making a suspended forfeiture order as recommended below or an order for forfeiture under a particular statute.
- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 5.13-5.16. Draft Bill, clauses 5(2), 39(3); Schedule 3, paragraph 2)

26. (1) Where the court makes both a confiscation order and a compensation order against the offender in the same proceedings in relation to the same offence and the offence involves the misappropriation of property, the court should be required to direct that the compensation is to be paid out of any sums applied towards the satisfaction of the confiscation order.
- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 5.17-5.24. Draft Bill, clauses 5(4), 39(3); Schedule 3, paragraph 2)

27. For the purposes of any appeal or review, a confiscation order should be a sentence.

(Paragraph 5.25. Draft Bill, clause 1(8))

Procedure and evidence before order made

28. (1) The court should be entitled to make a confiscation order only on the application of the prosecutor.
- (2) The application should be made -

- (a) in proceedings on indictment, when the prosecutor moves for sentence or, in a remit to the High Court for sentence, before sentence is pronounced;
- (b) in summary proceedings, following the conviction of the accused.
- (3) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 6.3, 6.4. Draft Bill, clauses 1(1), (6), 39(3); Schedule 3, paragraph 2)

- 29. (1) It should be for the prosecutor to prove -
 - (a) that the offender has benefited from the commission of an offence, and
 - (b) the amount of his benefit.
- (2) The standard of proof required of the prosecutor should be proof beyond reasonable doubt.

(Paragraph 6.5. Draft Bill, clause 1(7)(a), (b))

- 30. (1) For the purpose of determining whether a person has benefited from the commission of an offence and, if he has, of assessing the amount of the benefit, the court should be entitled to make the following assumptions, except in so far as he proves either of them to be incorrect on a balance of probabilities:
 - (a) that any property or other economic advantage which he has obtained since the relevant date (as defined below) has been obtained in connection with the commission of the offence; and
 - (b) that any expenditure by him since the relevant date was met out of property or other economic advantage obtained in connection with the commission of the offence.
- (2) "The relevant date" means -
 - (a) the date of the offence; or
 - (b) where the offence is found to have been committed over a period of time, the date occurring at the beginning of that period; or
 - (c) where the application has been made in respect of two or more offences, the date of the earlier or earliest offence.

(Paragraphs 6.6-6.10. Draft Bill, clause 2(2), (3))

- 31. (1) It should be for the prosecutor to prove the amount that might be realised.

- (2) Subject to recommendation 41(3) below, the standard of proof required of the prosecutor should be proof beyond reasonable doubt.

(Paragraphs 6.11-6.13. Draft Bill, clause 1(7)(c))

32. (1) Where the prosecutor has moved for a confiscation order he should be entitled to lodge a statement as to any matters relevant -
- (a) to determining whether the offender has benefited from the offence; or
 - (b) to an assessment of the amount of his benefit from the offence.
- (2) Where the offender accepts to any extent any allegation in the statement, the court should be entitled, for the purposes of such determination or assessment, to treat his acceptance as conclusive of the matters to which it relates.
- (3) The court should be empowered to require the offender to indicate to what extent he accepts each allegation in the statement and, in so far as he does not accept any such allegation, to indicate the basis of such non-acceptance.
- (4) If the offender fails in any respect to comply with such a requirement, he should be liable to be taken as accepting every allegation in the statement apart from any allegation in respect of which he has complied with the requirement.

(Paragraphs 6.14-6.19. Draft Bill, clause 6(1)-(4))

33. (1) The offender should be entitled to lodge a statement as to any matters relevant to determining the amount that might be realised at the time the confiscation order is made.
- (2) Where the prosecutor accepts to any extent any allegation in the statement, the court should be entitled, for the purposes of the determination, to treat that acceptance as conclusive of the matters to which it relates.

(Paragraph 6.20. Draft Bill, clause 6(5))

34. (1) Where any allegation in the prosecutor's statement is not accepted by the offender, or any allegation in the offender's statement is not accepted by the prosecutor, a hearing should be arranged before the trial judge, or if he is not available to preside at such a hearing within a reasonable time, before another judge, to resolve the matters in dispute.
- (2) Where the trial has taken place in the High Court of Justiciary the other judge should be a judge of that Court, and where it has taken place in the sheriff court, he should be another sheriff of the sheriffdom concerned.

(Paragraphs 6.21, 6.22. Draft Bill, clause 6(6), (7))

35. (1) Section 3(5) of the Criminal Justice (Scotland) Act 1987 should be repealed and replaced by a provision implementing recommendation 34 above.

- (2) Rule 67A of the Act of Adjournal (Consolidation) 1988 and rule 201D of the Rules of the Court of Session should be revoked.

(Paragraph 6.21. Draft Bill, clause 39(3) (9); Schedule 3, paragraph 5; Schedule 5)

36. (1) If the court considers that it requires further information before coming to any decision as regards making a confiscation order it should be able to postpone that decision for up to six months.
- (2) If the court postpones that decision, it should also postpone passing any part of the sentence on the offender which might be affected by the making of a confiscation order, but it should be entitled to pass a sentence of imprisonment before making that decision.
- (3) The offender's entitlement to appeal against conviction or sentence should not be affected by any postponement, but in the event of an appeal the court should be entitled, on the application of the prosecutor, to extend the period of postponement.
- (4) The offender should be entitled to appeal against any confiscation order or other sentence passed after the period of postponement.
- (5) Provisions implementing paragraphs (1) to (4) above should be substituted for section 2 of the Criminal Justice (Scotland) Act 1987.

(Paragraphs 6.24-6.27. Draft Bill, clauses 7, 39(3); Schedule 3, paragraph 3)

37. Where the court makes a confiscation order, it should record its findings relevant to the amount the offender is ordered to pay, including findings as to the amount of the benefit, the elements of the benefit, the amount that might be realised and the nature and value of the realisable property.

(Paragraph 6.28)

Variation of confiscation orders

38. (1) After a confiscation order has been made, the prosecutor should be entitled to apply to the court which made the order for a new order for payment of a different sum -
- (a) where the maximum amount of the order was determined by the benefit, and it is now known
- (i) that the benefit the offender had obtained in connection with the commission of the offence at the time the order was made was greater than the benefit taken into account in making the order; or
- (ii) that the benefit taken into account in making the order has increased in value since the order was made; or

- (iii) that some further benefit has been obtained in connection with the offence since the order was made; or
- (b) where the maximum amount of the order was determined by the amount that might be realised, and it is now known that the amount that might be realised is greater than the amount taken into account in making the order in respect that -
 - (i) at the time when the order was made there was more realisable property than the court at that time took into account, or
 - (ii) the realisable property taken into account at the time when the order was made has subsequently increased in value, or
 - (iii) the amount, or part of the amount, of a gift which was disregarded on the ground that it was improbable that it could be realised, could be realised now.
- (2) Any such application should be made as soon as is reasonably practicable after the relevant information becomes available to the prosecutor and in any event within six years of the date of the offender's conviction.

(Paragraphs 7.2-7.9. Draft Bill, clause 8(1), (2), (3))

39. If the court is satisfied that the benefit or amount is greater than that which was taken into account in making the order, and -

- (a) that order has been satisfied, the court should be entitled to make a new order for the payment of such sum as appears to the court to be appropriate having regard to what is now shown to be the benefit or the amount realisable;
- (b) that order has not been satisfied, the court, if it decides to order payment of a further amount, should be required to recall the order and in making the new order should be entitled to take into account both the sum referred to in (a) above and the amount unpaid (including any interest payable) under the earlier order.

(Paragraph 7.10. Draft Bill, clause 8(4))

- 40. (1) The rules of evidence and procedure in an application in terms of recommendation 38 should be similar to those in an application for the making of a confiscation order, except that the court should not be entitled to make the assumptions referred to in recommendation 30 above or in section 3(2) of the Criminal Justice (Scotland) Act 1987.
- (2) Section 17 of the Criminal Justice (International Co-operation) Act 1990 should be replaced by provisions in Part I of the Criminal Justice (Scotland) Act 1987 implementing recommendations 38 to 40(1) above.

(Paragraph 7.11. Draft Bill, clauses 8(5), (6), 39(3), (9); Schedule 3, paragraph 8; Schedule 5)

41. (1) After a confiscation order has been made, both the prosecutor and the offender should be entitled to apply to the court which made the order for a new order requiring a smaller amount to be paid by the offender on the ground that the value of the realisable property is inadequate for the payment of any amount outstanding (including any interest payable).
- (2) When considering whether the value of the realisable property is inadequate, -
- (a) the court should be required to take into account the extent to which property of a person whose estate has been sequestrated or who has been adjudged bankrupt is or has been included in his estate; and
- (b) the court should be entitled to disregard any inadequacy which appears to it to be attributable, wholly or partly, to anything done by the offender for the purpose of protecting the realisable property from realisation.
- (3) If the applicant satisfies the court on a balance of probabilities that the realisable property is inadequate, the court should be required to recall the order and make a new order for the payment of such lesser sum as appears to the court to be appropriate having regard to what is now shown to be the value of the realisable property and to any amount already paid under the earlier order.
- (4) The rules of evidence and procedure should otherwise be similar to those which apply in an application at the instance of the prosecutor in terms of recommendations 38 to 40(1) above.
- (5) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 7.12-7.16. Draft Bill, clauses 9, 39(3); Schedule 3, paragraph 22)

42. (1) Where the court has imposed a sentence which does not include a confiscation order and the prosecutor learns thereafter that the offender has benefited in connection with the commission of the offence, the prosecutor should be entitled to apply to the court for a confiscation order.
- (2) The application should be made as soon as is reasonably practicable after the relevant information becomes available to the prosecutor and in any event within six years of the date of the offender's conviction.
- (3) The rules of evidence and procedure in the application should be similar to those in an application for a confiscation order made on a motion or remit for sentence, except that the court should not be entitled to make the assumptions referred to in recommendation 30 above or in section 3(2) of the Criminal Justice (Scotland) Act 1987.
- (4) In determining the amount of the confiscation order the court should be required to take into account any order for payment or forfeiture which forms part of the sentence already imposed.

- (5) Part I of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 7.17, 7.18. Draft Bill, clauses 10, 39(3); Schedule 3, paragraph 8)

Enforcement of confiscation orders

43. (1) Section 7(2) of the Criminal Justice (Scotland) Act 1987 should be so amended that -
- (a) section 398(1) of the Criminal Procedure (Scotland) Act 1975 applies whether the offender is in prison or not;
 - (b) the prosecutor is given an opportunity of being heard on the occasion mentioned in section 398(1); and
 - (c) the reference to the proviso to section 411(3) of the 1975 Act is deleted.
- (2) Provisions identical to those of section 7 of the 1987 Act, as so amended, should apply to the enforcement of confiscation orders made in respect of the offences to which our recommendations relate.

(Paragraphs 8.1-8.9. Draft Bill, clauses 11, 39(3), (9); Schedule 3, paragraph 9; Schedule 5)

44. Provision for the payment of interest on sums unpaid under confiscation orders should be made in terms similar to those of section 15 of the Criminal Justice (International Co-operation) Act 1990.

(Paragraph 8.10. Draft Bill, clause 12)

Preservation and realisation of property

45. (1) The powers conferred on the civil courts and on administrators in terms of the following recommendations should be exercised -
- (a) with a view to -
 - (i) satisfying a confiscation order;
 - (ii) realising no more than the value for the time being of a caught gift as assessed under the rules in recommendations 16(1) and 17(1) and (2) above;
 - (iii) allowing anyone other than the offender or the recipient of such a gift to retain or recover the value of any property held by him;
 - (b) without taking account of any obligations of the offender or recipient which conflict with the obligation to satisfy the confiscation order.
- (2) In the exercise of these powers it should be competent to make an order or to take other action in respect of a debt owed by the Crown.

- (3) Section 23 of the Criminal Justice (Scotland) Act 1987 should be amended accordingly.

(Paragraphs 9.1-9.5. Draft Bill, clauses 13, 39(3); Schedule 3, paragraph 20)

46. (1) The Court of Session or a sheriff exercising his civil jurisdiction should be empowered to make a restraint order.
- (2) A restraint order should interdict -
- (a) a specified person from dealing with his realisable property, or
 - (b) that person and the named recipient of a caught gift from dealing with their own, or the other's, realisable property,
- whenever that property was acquired and whether it is described in the order or not.
- (3) "Dealing with" property should include -
- (a) making a payment in reduction of the amount of a debt;
 - (b) removing the property from the jurisdiction of the court; and
 - (c) transferring or disposing of the property.
- (4) The court in making a restraint order -
- (a) should be entitled to specify conditions and exceptions and, in particular, to make such provision as it thinks fit for reasonable living expenses; and
 - (b) should be required to make provision for reasonable legal expenses payable in relation to the proceedings.

(Paragraphs 9.6-9.13. Draft Bill, clause 21(1)(a), (2), (4))

47. (1) The court should be entitled to make a restraint order where -
- (a) proceedings have been instituted in Scotland against a person for an offence of the kind specified in recommendation 2 above;
 - (b) the proceedings have not been concluded; and
 - (c) either -
 - (i) a confiscation order has been made, or
 - (ii) it appears to the court that there are reasonable grounds for thinking that a confiscation order may be made in the event of conviction.

- (2) Proceedings for an offence should be taken to have been instituted against a person -
- (a) on his arrest without warrant;
 - (b) when he is charged with the offence without being arrested;
 - (c) when a warrant to arrest him is granted;
 - (d) when a warrant to cite him is granted;
 - (e) in summary proceedings, on the first calling of the case; or
 - (f) when a petition is intimated to him or an indictment or a complaint is served on him,

and where more than one of these applies, at the time of the earlier or earliest of them.

- (3) Proceedings should be taken to have been concluded on the occurrence of any of the events listed in section 47(5) of the Criminal Justice (Scotland) Act 1987, as extended to summary proceedings.

(Paragraphs 9.14-9.20. Draft Bill, clauses 22(1), (2), (7); 38(3))

48. (1) The court should also be entitled to make a restraint order where -
- (a) the court is satisfied that the prosecutor proposes within 28 days to institute proceedings against a person for an offence of the kind specified in recommendation 2 above; and
 - (b) it appears to the court that there are reasonable grounds for thinking that a confiscation order may be made in the event of conviction.
- (2) Where the proposed proceedings have not been instituted within 28 days the prosecutor should be obliged to apply to the court immediately upon the expiry of the 28 days for the recall of the restraint order and the court should be required to grant the application.

(Paragraphs 9.21, 9.22. Draft Bill, clause 22(1), (3)(a), (4))

49. (1) The court should be entitled to make a restraint order where the prosecutor has made an application in terms of either recommendation 38 or recommendation 42 above and it appears to the court that there are reasonable grounds for thinking that the application may be granted.
- (2) The court should also be entitled to make a restraint order where -
- (a) the court is satisfied that the prosecutor proposes within 28 days to make an application in terms of either recommendation 38 or recommendation 42 above; and

- (b) it appears to the court that there are reasonable grounds for thinking that the application may be granted.
- (3) Where the proposed application has not been made within 28 days the prosecutor should be obliged to apply to the court immediately upon the expiry of the 28 days for the recall of the restraint order and the court should be required to grant the application.
- (4) Part I of the Criminal Justice (Scotland) Act 1987 should be so amended as to give effect to recommendations 46 to 49(3) above.

(Paragraph 9.23, 9.24. Draft Bill, clauses 22(1), (3)(b), (4), 39(3); Schedule 3, paragraphs 11, 32)

50. (1) A restraint order -
- (a) should be made only on an application by the prosecutor;
 - (b) should be made on an *ex parte* application which should be heard in chambers; and
 - (c) should be intimated to persons affected by the order.
- (2) Where a restraint order is made in relation to heritable property in Scotland, the prosecutor should forthwith record a certified copy of the order in the General Register of Sasines or, as the case may be, register it in the Land Register of Scotland.

(Paragraph 9.25. Draft Bill, clause 21(1), (3), (5))

51. (1) The court should be entitled to vary or recall a restraint order at any time on the application of the prosecutor or any person having an interest.
- (2) Where a restraint order is in force after a confiscation order has been made, an administrator should not realise the property concerned in the period between the making of an application for the recall of the order and the court's decision on the application.
- (3) The court should be entitled to grant an application for recall at the instance of the recipient of a gift if the recipient satisfies the court on a balance of probabilities that the three conditions referred to in recommendation 19(2) above are met.
- (4) Where the court has recalled a restraint order at the instance of a person having an interest, it should be entitled to order that property of that person shall cease to be realisable.
- (5) Where -
- (a) proceedings for the offence, or
 - (b) proceedings in an application by the prosecutor in terms of recommendation 49(1) above

have been concluded, the prosecutor should be required to apply to the court forthwith for the recall of the restraint order and the court should be required to grant the application.

- (6) Proceedings in an application in terms of recommendation 49(1) above should be taken to have been concluded where -

- (a) the application is refused, or
- (b) the confiscation order made when the application was granted is satisfied either by payment of the amount due or by the offender serving a period of imprisonment in default.

- (7) Where the court has recalled a restraint order relating to heritable property in Scotland, the prosecutor should forthwith record a certified copy of the recalling order in the General Register of Sasines or, as the case may be, register it in the Land Register of Scotland.

(Paragraphs 9.26-9.28. Draft Bill, clauses 22(5), (6), (8), 24(1), (2), (3), (4))

52. (1) It should be competent to reclaim or appeal to the Court of Session without leave against an interlocutor refusing or varying or recalling or refusing to vary or recall a restraint order, within such period as may be prescribed by Act of Sederunt.

- (2) Part I of the Criminal Justice (Scotland) Act 1987 should be so amended as to give effect to recommendations 50 to 52(1) above.

(Paragraphs 9.29, 9.30. Draft Bill, clauses 24(5), 39(3); Schedule 3, paragraph 11)

53. (1) A constable or a person commissioned by the Commissioners of Customs and Excise should be entitled to seize property subject to a restraint order for the purpose of preventing its removal from the jurisdiction of the court.

- (2) The property should then be dealt with in accordance with the directions of the court.

(Paragraph 9.31. Draft Bill, clause 21(6), (7))

54. (1) The court should be entitled to interdict a person not subject to a restraint order from dealing with property affected by the order.

- (2) The procedural rules applicable to restraint orders should apply to such an interdict.

- (3) Where the restraint order is recalled, the clerk of court should be obliged so to inform forthwith each of the persons interdicted.

(Paragraph 9.32. Draft Bill, clauses 24(6), 25(8)-(10))

55. (1) The procedures for inhibition and arrestment relative to property affected by a restraint order or by an ancillary interdict should be regulated as described in paragraphs 9.34 to 9.36.
- (2) The procedure for inhibition in section 11 of the Criminal Justice (Scotland) Act 1987 and paragraph 16 of Schedule 4 to the Prevention of Terrorism (Temporary Provisions) Act 1989 should be replaced by the procedure described in paragraph 9.34.

(Paragraphs 9.33-9.37. Draft Bill, clauses 25, 39(3), (4); Schedule 3, paragraph 12; Schedule 4, paragraph 12)

56. (1) The provisions of Part I of the Criminal Justice (Scotland) Act 1987 relative to administrators should be amended to take account of the recommendations in this report.
- (2) Corresponding provisions should be inserted in the draft Bill.

(Paragraphs 9.39-9.41. Draft Bill, clauses 26, 39(3); Schedule 1; Schedule 3, paragraphs 14-21)

57. (1) Sections 33 to 36 of the Criminal Justice (Scotland) Act 1987 should be amended as proposed in paragraphs 9.43 and 9.44.
- (2) Provisions corresponding to sections 33 to 37 of the 1987 Act, as so amended, should be inserted in the draft Bill.

(Paragraphs 9.42-9.46. Draft Bill, clauses 35(1), 39(3); Schedule 2; Schedule 3, paragraphs 27-30)

58. The criminal conduct to which the offences created by sections 93A to 93D of the Criminal Justice Act 1988 refer should include any offence punishable on summary complaint by a fine in excess of level 5 of the standard scale or by imprisonment for more than three months or by both such fine and imprisonment.

(Paragraph 9.51. Draft Bill, clause 39(4); Schedule 4, paragraph 9)

Protection of third parties' rights in confiscation proceedings

59. (1) Section 26 of the Criminal Justice (Scotland) Act 1987 should be so amended as to correspond with the terms of paragraph 10.7.
- (2) Identical provisions should be inserted in the draft Bill.
- (3) A person other than the accused or the recipient of a caught gift who is the owner of, or otherwise has an interest in, property which has been realised should be entitled to apply for compensation not later than three years after the conclusion of the proceedings to the Court of Session, where the confiscation order was made in the High Court of Justiciary, or to the sheriff exercising his civil jurisdiction, where the order was made in the sheriff court.

- (4) The court should be required to grant the application if the applicant proves on a balance of probabilities that immediately before the realisation of the property he was the owner of, or a person otherwise having an interest in, the property.
- (5) The amount of compensation payable to the owner of property which has been realised should be -
 - (a) where a consideration has been received, an amount equal to the amount of the consideration or its value at the time of the realisation, or
 - (b) where no consideration has been received, an amount equal to the value of the property as at the date of the realisation.
- (6) The amount of compensation payable to a person who has an interest in property which has been realised should be an amount corresponding to the extent of his interest.
- (7) The 1987 Act should be amended to make similar provision for the payment of compensation to a person other than the accused or the recipient of an implicative gift.

(Paragraphs 10.4-10.11. Draft Bill, clauses 14, 39(3); Schedule 1, paragraph 10; Schedule 3, paragraph 23)

B. FORFEITURE OF PROPERTY USED IN CRIME

When a suspended forfeiture order should be competent

60. The power to make a suspended forfeiture order should not be exercisable in the district court.

(Paragraph 12.2. Draft Bill, clause 15(13))

61. A suspended forfeiture order should be competent in respect of any property, wherever situated, whether heritable or moveable, or whether corporeal or incorporeal.

(Paragraphs 12.3, 12.4. Draft Bill, clauses 15(2), 38(1))

62. The property in respect of which a suspended forfeiture order may be made should have been in the ownership or possession of the offender or under his control either at the time of the offence or at the time of his apprehension.

(Paragraphs 12.5-12.7. Draft Bill, clause 15(2))

- 63. (1) The property in respect of which a suspended forfeiture order may be made should have been either -
 - (a) used for the purpose of committing, or facilitating the commission of, any offence; or
 - (b) intended to be used for that purpose.

- (2) "Facilitating the commission of an offence" should be defined as including the taking of any steps, after an offence has been committed, for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection.

(Paragraphs 12.8-12.11. Draft Bill, clause 15(2), (5))

64. Where the use of property is necessary for the commission of an offence, the property should be regarded for the purpose of recommendation 63(1)(a) above as used for the purpose of committing the offence unless, in the case of a statutory offence, the statute creating the offence otherwise provides.

(Paragraphs 12.12, 12.13. Draft Bill, clause 15(6))

65. It should continue to be competent to order forfeiture of a vehicle used in a road traffic offence which is punishable with imprisonment.

(Paragraph 12.14. Draft Bill, clause 39(4), (9); Schedule 4, paragraph 11; Schedule 5)

66. The various forfeiture provisions in particular statutes should not be consolidated into a single provision.

(Paragraphs 12.15, 12.16)

67. Where a person is convicted of a statutory offence, any property falling within the general provisions recommended in recommendations 62 and 63 above should be liable to forfeiture notwithstanding that it is not liable to forfeiture under the statute creating the offence, unless that statute

- (a) expressly excludes the general provisions, or
- (b) specifies the category of property which is to be liable to forfeiture under that statute, and the specified category does not include property used or intended to be used as mentioned in recommendation 63(1).

(Paragraphs 12.17-12.20. Draft Bill, clause 15(7), (8))

68. (1) Where a summary complaint includes any statutory charge, the notice of penalty should give notice of liability to forfeiture under the general power recommended in recommendations 60 to 64 above where forfeiture thereunder is competent, as well as notice of any liability to forfeiture under the statute creating the offence.
- (2) Form 46 of Schedule 1 to the Act of Adjournal (Consolidation) 1988 should be amended accordingly.

(Paragraphs 12.21, 12.22)

69. A suspended forfeiture order should be competent where in respect of any offence -

- (a) a person is convicted, whether in solemn or summary proceedings; or

- (b) in the case of summary proceedings the court, without proceeding to conviction, makes in respect of a person either an order discharging him absolutely or a probation order.

(Paragraphs 12.23-12.26. Draft Bill, clause 15(1))

The making of a suspended forfeiture order

70. (1) The court should be entitled to make a suspended forfeiture order only on the application of the prosecutor.

(2) The application should be made -

- (a) in proceedings on indictment, when the prosecutor moves for sentence or, in a remit to the High Court for sentence, before sentence is pronounced;
- (b) in summary proceedings, following the conviction of the accused.

(Paragraph 13.2. Draft Bill, clause 15(2), (3))

71. In any hearing on the question whether any condition in recommendations 62 and 63 above is satisfied, the burden of proof should lie on the prosecutor, who should be required to establish his case beyond reasonable doubt.

(Paragraphs 13.3-13.5. Draft Bill, clause 15(2))

72. Any necessary instructions to prosecutors or clerks of court relative to the lodging with the clerk of court of moveable property which has been made the subject of a suspended forfeiture order should be the subject of directions by Crown Office or Scottish Courts Administration.

(Paragraph 13.8)

73. It is unnecessary to enact a statutory provision as to the presence in court of the moveable property to which a suspended forfeiture order relates.

(Paragraph 13.9)

74. Where a court has made a suspended forfeiture order in respect of an article of moveable property, it should be entitled, on the application of the prosecutor, to grant a warrant for the search for and seizure of that article if satisfied that there is reasonable cause to believe that it is to be found in any place or premises specified in the application and that admission thereto has been refused or it is reasonably believed that such admission will be refused.

(Paragraph 13.9. Draft Bill, clause 16(2), (3))

75. It is unnecessary to enact any statutory provision as to the identification or specification in a suspended forfeiture order of the property to which it relates.

(Paragraph 13.10)

76. (1) If the prosecutor knows or reasonably suspects the identity of a person (other than the offender) as being the owner of, or otherwise having an interest in, the property to which the suspended forfeiture order relates, that person should be named in the order as a person having, or suspected of having, an interest in the property.
- (2) Where a person is named in the order in pursuance of paragraph (1) above, the prosecutor should, as soon as may be after the order has been made, notify that person in writing that the order has been made and that he may apply to the court for recall of the order or, in the event of forfeiture, for the return of the property or compensation.

(Paragraph 13.11. Draft Bill, clause 15(4), (10)(a))

77. The prosecutor should, as soon as may be after a suspended forfeiture order has been made, insert in the *Edinburgh Gazette* or some other appropriate publication a notice specifying the terms of the order, if directed to do so by the court.

(Paragraph 13.11. Draft Bill, clause 15(10)(c))

78. Where a suspended forfeiture order relates to heritable property in Scotland, the prosecutor should, as soon as may be after the order has been made, record a certified copy of the order in the General Register of Sasines or register it in the Land Register of Scotland.

(Paragraph 13.12. Draft Bill, clause 15(10)(b))

79. The court should be entitled to make both a suspended forfeiture order and a compensation order against the same person in the same proceedings, and to order that, in the event of the forfeiture of the property on the expiry of the period mentioned in recommendation 83 below, the property should be sold and the proceeds of sale first directed towards satisfaction of the compensation order.

(Paragraphs 13.13-13.16. Draft Bill, clause 15(9))

80. For the purposes of any appeal or review a suspended forfeiture order should be a sentence.

(Paragraph 13.17. Draft Bill, clause 15(12))

81. Where a person appeals against a sentence which consists of or includes a suspended forfeiture order, other than an order relating to moveable property certified in terms of recommendation 84 below, the forfeiture of the property to which the order relates should be suspended until the appeal, if it is proceeded with, is determined in favour of the Crown or until the expiry of the period of delay mentioned in recommendation 83 below, whichever is the later.

(Paragraph 13.17. Draft Bill, clause 17(4))

82. Where a suspended forfeiture order relating to heritable property in Scotland is recalled on appeal the prosecutor should, as soon as may be after the appeal has been disposed of,

record a certified copy of the Court's interlocutor in the General Register of Sasines or register it in the Land Register of Scotland.

(Paragraph 13.17. Draft Bill, clause 20(3))

The effect of a suspended forfeiture order

83. (1) Heritable property in Scotland should be forfeited to and vest in the Crown six months after the date on which a certified copy of the suspended forfeiture order is recorded or registered as mentioned in recommendation 78.
- (2) Heritable property situated outside Scotland should be forfeited to and vest in the Crown six months after the date of the making of the suspended forfeiture order.
- (3) Moveable property (other than that which has been forfeited immediately in terms of recommendation 84 below) should be forfeited to and vest in the Crown 60 days after the date of the making of the suspended forfeiture order.
- (4) Where an application for the recall or variation of the suspended forfeiture order has been made, the property should be forfeited only if and when the application is finally disposed of in favour of the Crown, or on the expiry of the period mentioned in paragraph (1) or (2) above, whichever is the later.
- (5) A certificate by the clerk of court should be conclusive evidence of the fact that the property was forfeited on the date specified in the certificate.
- (6) Where the property is heritable property in Scotland, the prosecutor should be obliged to record or register a certified copy of the certificate forthwith in the Register in which the suspended forfeiture order was recorded or registered.

(Paragraphs 14.2-14.5. Draft Bill, clause 17(1), (3), (6))

84. (1) Moveable property which is of a perishable or dangerous nature or cannot lawfully be sold, supplied or possessed or is of no commercial value should be forfeited immediately after the making of the suspended forfeiture order.
- (2) Moveable property should be regarded as falling within any of the categories mentioned in paragraph (1) above if certified as such by the prosecutor in a certificate produced to the clerk of court.

(Paragraphs 14.7, 14.8. Draft Bill, clause 17(2))

85. Property which is the subject of a suspended forfeiture order should be placed in the possession or under the control of the clerk of court until the order is recalled or the property is disposed of after forfeiture.

(Paragraph 14.9 Draft Bill, clause 15(11))

86. Property in respect of which a suspended forfeiture order is in force should in due course be forfeited to and vest in the Crown and thereafter dealt with by the Crown in such manner as seems to it to be appropriate.

(Paragraph 14.10. Draft Bill, clause 17(1), (5))

Variation and recall of suspended forfeiture orders

87. (1) If, after a suspended forfeiture order has been made, the prosecutor comes to believe that it does not correctly identify any person having an interest in the property, he should be entitled to apply to the court for the variation of the order.
- (2) The application should be made to the court which made the order, at any time before the property is forfeited.
- (3) The court should be required to grant any such application.
- (4) Where the order is varied by the insertion of the name of a person believed to have an interest in the property, the prosecutor should notify the person as mentioned in recommendation 76 above.
- (5) Where the order to be varied relates to heritable property in Scotland, -
- (a) the prosecutor should, as soon as may be after the order for variation has been made, record or register a certified copy of the order for variation in the Register in which the certified copy of the order to be varied was recorded or registered; and
- (b) the property should be forfeited six months after the date of recording or registration of that certified copy of the order for variation.
- (6) Where the order is varied and relates to moveable property, the property should be forfeited 60 days after the date of the order for variation.
- (7) In any case in which an order for variation is made, the court should be entitled to direct the prosecutor to insert a notice specifying its terms in the *Edinburgh Gazette* or some other appropriate publication.

(Paragraph 15.2. Draft Bill, clause 18(5), (6), (7), (8), (10))

88. A person other than the offender who is the owner of, or otherwise has an interest in, any property in respect of which a suspended forfeiture order has been made should be entitled to apply to the court which made the order, at any time before the property is forfeited, for the recall of the order in so far as it relates to the property or his interest in it.

(Paragraphs 15.3, 15.4. Draft Bill, clause 18(1), (8), (10))

89. The court should be required to grant the application if -

- (1) the applicant proves on a balance of probabilities that he is the owner of, or otherwise has an interest in, the property; and either

- (2) the prosecutor fails to prove beyond reasonable doubt that the applicant -
 - (a) where he was the owner of, or otherwise had an interest in, the property before the commission of an offence,
 - (i) knew or ought to have known that the property was intended to be used for the purpose of committing, or facilitating the commission of an offence, and
 - (ii) did not take all the steps which were reasonable for him to take to prevent such intended use; or
 - (b) where he became the owner of, or otherwise acquired an interest in, the property after the commission of an offence, that he knew or ought to have known that the property had been intended to be, or had been, so used; or
- (3) the prosecutor proves beyond reasonable doubt either of the matters mentioned in paragraph (2) above but the court nevertheless considers that in all the circumstances of the case forfeiture would be an excessive or inappropriate penalty upon the applicant.

(Paragraphs 15.5-15.10. Draft Bill, clause 18(1), (2), (3))

90. The court to which an application for the recall of a suspended forfeiture order is made should not be entitled to review any other element in the sentence imposed, or any probation order or order for absolute discharge made, in respect of the offence to which the order relates.

(Paragraph 15.11. Draft Bill, clause 18(9))

91. Where the order is recalled and relates to heritable property in Scotland, the prosecutor should, as soon as may be after the order has been recalled, record or register a certified copy of the order for recall in the Register in which the certified copy of the order recalled was recorded or registered.

(Paragraph 15.12. Draft Bill, clause 18(4))

- 92. (1) Both the applicant and the prosecutor should be entitled to appeal against a decision on an application for the recall of a suspended forfeiture order.
- (2) The appeal procedure should be as in an appeal against sentence.
- (3) Where a suspended forfeiture order relating to heritable property in Scotland is recalled on appeal, the prosecutor should proceed as in recommendation 82 above.

(Paragraph 15.13. Draft Bill, clause 20)

Search warrants and restraint orders in forfeiture proceedings

93. Where -

- (a) the sheriff is satisfied, on an application being made to him by the prosecutor,
 - (i) that proceedings are likely to be instituted or have been instituted against a person in Scotland for an offence, and
 - (ii) that there is reasonable cause to believe that property specified in the application is to be found in a place or in premises specified in the application, and
- (b) it appears to him that there are reasonable grounds for thinking that in the event of the person being convicted of the offence a suspended forfeiture order might be made in relation to the property,

he should be entitled to grant a warrant authorising a person named therein to enter and search the place or premises and seize the property.

(Paragraphs 16.4-16.8. Draft Bill, clause 16(1))

94. (1) The Court of Session or a sheriff exercising his civil jurisdiction should be empowered to make a restraint order in relation to property which is liable to be forfeited.
- (2) A restraint order should interdict a specified person from dealing with property specified in the order.
- (3) The court should be entitled to make a restraint order
- (a) where proceedings against a person for an offence have been instituted, but not concluded, in Scotland and either -
 - (i) a suspended forfeiture order is in force, or
 - (ii) it appears to the court that there are reasonable grounds for thinking that such an order might be made in the event of conviction; or
 - (b) where it is proposed to institute such proceedings within 28 days and paragraph (ii) above applies.

(Paragraphs 16.9, 16.10. Draft Bill, clauses 21(1)(b), 23(1), (2))

95. (1) The rules as to applications for restraint orders, their variation and recall, and appeals should be as for restraint orders in relation to realisable property.

- (2) The court's powers as to ancillary interdicts, inhibitions and arrestments should be the same as its powers as regards restraint orders in relation to realisable property.

(Paragraph 16.11. Draft Bill, clauses 21(3)-(5), 23(3)-(6), 24(1), (3)-(6), 25)

96. The provisions mentioned in recommendation 56(2) above as to administrators of realisable property should be extended, subject to necessary modifications, to a case in which a restraint order or a suspended forfeiture order is made relative to forfeitable property.

(Paragraph 16.11. Draft Bill, clause 26; Schedule 1)

97. (1) A constable or a person commissioned by the Commissioners of Customs and Excise should be entitled to seize property subject to a restraint order for the purpose of preventing its removal from the jurisdiction of the court.
- (2) The property should then be dealt with in accordance with the directions of the court.

(Paragraph 16.11. Draft Bill, clause 21(6), (7))

98. The provisions mentioned in recommendation 57(2) above as to the sequestration, etc, of persons holding realisable property should be extended, subject to any necessary modifications, to persons holding forfeitable property.

(Paragraph 16.11. Draft Bill, clause 35; Schedule 2)

Protection of third parties' rights in forfeiture proceedings

99. (1) The owner of property which has been forfeited, whether under the new legislation or any other enactment, should be entitled to apply to the court which made the suspended forfeiture order for the return of the property or, if that is not reasonably practicable, for compensation.
- (2) A person with an interest, otherwise than as owner, in property which has been so forfeited should be entitled to apply for compensation to the court which made the suspended forfeiture order.
- (3) The application should be made not later than three years after the date on which the property was forfeited.

(Paragraph 17.5. Draft Bill, clause 19(1), (2), (6), (10))

100. The court should be required to grant the application if -

- (1) the applicant proves on a balance of probabilities that immediately before the forfeiture of the property he was the owner of, or a person otherwise having an interest in, the property; and either
- (2) the prosecutor fails to prove beyond reasonable doubt that the applicant -

- (a) where he was the owner of the property before the commission of an offence,
 - (i) knew or ought to have known that the property was intended to be used for the purpose of committing, or facilitating the commission of an offence, and
 - (ii) did not take all the steps which were reasonable for him to take to prevent such intended use; or
- (b) where he became the owner of the property after the commission of an offence, that he knew or ought to have known that the property had been intended to be, or had been, so used; or
- (3) the prosecutor proves beyond reasonable doubt either of the matters mentioned in paragraph (2) above but the court nevertheless considers that in all the circumstances of the case forfeiture would be or has been an excessive or inappropriate penalty upon the applicant.

(Paragraph 17.6. Draft Bill, clause 19(1), (3), (4))

101. (1) The amount of compensation payable to the owner of property which has been disposed of should be -
- (a) where a consideration has been received, an amount equal to the amount of the consideration or its value at the time of the disposal, or
 - (b) where no consideration has been received, an amount equal to the value of the property as at the date of the disposal.
- (2) The amount of compensation payable to a person who has an interest in property which has been forfeited should be an amount corresponding to the extent of his interest.

(Paragraph 17.7. Draft Bill, clause 19(1), (2), (5))

102. The court which considers an application for the return of forfeited property or for compensation should not be entitled to review any other element in the sentence imposed, or any probation order or order for absolute discharge made, in respect of the offence to which the suspended forfeiture order related.

(Paragraph 17.8. Draft Bill, clause 19(9))

103. If, after property has been forfeited under the new legislation, the prosecutor comes to believe that the preceding suspended forfeiture order did not correctly identify any person having an interest in the property, the prosecutor should forthwith -

- (a) advise the court of the error, whether or not he knows the identity of any person truly having an interest in the property; and

- (b) where he knows or reasonably suspects the identity of any such person, notify that person in writing that he may be entitled to apply for the return of the property or for compensation.

(Paragraph 17.9. Draft Bill, clause 19(7), (8))

104. (1) Both the applicant and the prosecutor should be entitled to appeal against a decision on an application for the recovery of forfeited property or for compensation.

- (2) The appeal procedure should be as in an appeal against sentence.

(Paragraph 17.10. Draft Bill, clause 20)

105. Where a person's family home has been forfeited under the new legislation, any right or interest in it should be disposed of only in terms of the provisions referred to in recommendation 14.

(Paragraph 17.11. Draft Bill, clause 36(1)(b))

C. INTERNATIONAL CO-OPERATION

Reciprocal arrangements for the enforcement of orders

Confiscation

106. Provision should be made for the recognition and enforcement in England and Wales of orders and functions relative to Scottish confiscation proceedings in terms similar to section 24A of the Drug Trafficking Offences Act 1986.

(Paragraph 18.3. Draft Bill, clause 33)

107. Section 11(6) of the Criminal Justice (Scotland) Act 1987 should be repealed and restated in a new section of that Act.

(Paragraph 18.4. Draft Bill, clause 39(3), (9); Schedule 3, paragraph 24; Schedule 5)

108. Sections 90 to 93 of the Criminal Justice Act 1988 should be repealed and restated, with modifications, in the draft Bill.

(Paragraph 18.4. Draft Bill, clauses 27, 28, 29, 39(9); Schedule 5)

109. Section 95 of the Criminal Justice Act 1988 should be repealed and restated in the draft Bill.

(Paragraph 18.5. Draft Bill, clauses 30, 39(9); Schedule 5)

110. Provision should be made by statutory instrument for the enforcement in Northern Ireland of orders made in confiscation proceedings in Scotland under the new legislation.

(Paragraph 18.6).

111. Section 30(1)(b)(i) and (c) of the 1987 Act should be repealed.

(Paragraph 18.9. Draft Bill, clause 39(9); Schedule 5)

112. In section 30(2) of the 1987 Act the definition of "external confiscation order" should be extended to include orders made for the purpose of recovering specific items of property representing proceeds.

(Paragraph 18.8. Draft Bill, clause 39(3); Schedule 3, paragraph 25)

113. Provision should be made for the registration and enforcement of confiscation and ancillary orders made outside the United Kingdom relative to offences similar to the offences to which Part I of the draft Bill applies, in terms similar to sections 30 (amended as recommended above) and 30A of the Criminal Justice (Scotland) Act 1987.

(Paragraph 18.8. Draft Bill, clauses 31, 32)

114. Section 32(2) of the Criminal Justice (Scotland) Act 1987 should be amended as indicated in paragraph 18.12.

(Paragraph 18.12. Draft Bill, clause 39(3); Schedule 3, paragraph 26)

115. Provision should be made for the enforcement outside the United Kingdom of confiscation and ancillary orders made in Scotland in terms similar to section 32 of the 1987 Act, as so amended.

(Paragraph 18.12. Draft Bill, clause 34)

Forfeiture

116. The provisions referred to in recommendation 106 above should be extended to include Scottish restraint orders relative to forfeitable property and suspended forfeiture orders made under the new Act and forfeiture orders made under any enactment other than the Prevention of Terrorism (Temporary Provisions) Act 1989.

(Paragraph 18.14. Draft Bill, clause 33(1)(c), (2)-(6))

117. Provision should be made by statutory instrument for the enforcement in Northern Ireland of Scottish restraint orders relative to forfeitable property and suspended forfeiture orders made under the new Act and forfeiture orders made under any enactment other than the Prevention of Terrorism (Temporary Provisions) Act 1989.

(Paragraph 18.16)

118. The application of section 9 of the Criminal Justice (International Co-operation) Act 1990 should be extended to any offence which corresponds to or is similar to an offence to which Part I or Part II of the draft Bill applies.

(Paragraphs 18.17, 18.18. Draft Bill, clause 39(4); Schedule 4, paragraph 13)

119. Provision should be made, in terms similar to section 32 of the Criminal Justice (Scotland) Act 1987, amended as proposed in paragraph 18.12, for the enforcement outside the United Kingdom of restraint orders and suspended forfeiture orders made under the new Act and forfeiture orders made under any other enactment.

(Paragraph 18.19. Draft Bill, clause 34)

D. MISCELLANEOUS MATTERS

Forfeiture of property where the accused has died

120. It should be competent for the Crown to recover by means of a court order the proceeds of an offence to which Part I of the draft Bill applies where proceedings have been instituted against a person for the offence and he dies before being sentenced or otherwise dealt with in these proceedings.

(Paragraphs 19.1-19.8. Draft Bill, clause 37(1), (2), (8))

121. (1) The Court of Session should be entitled, on an application being made to it by the Lord Advocate, to grant an order for the forfeiture of the proceeds of the offence.
- (2) The application should be intimated to any person appearing to the Court to be likely to be affected by the making of the order, and any such person should be entitled to appear before the Court, lead evidence and make representations, all in such manner as may be prescribed by Act of Sederunt.
- (3) The Court's power to allow the amendment of pleadings should extend to any amendment of the application which does not change the character of the offence with which the accused had been charged in the proceedings.
- (4) It should be for the Lord Advocate to satisfy the Court beyond reasonable doubt
- (a) that the accused committed the offence concerned, and
 - (b) that the property to which the application relates either -
 - (i) was obtained directly or indirectly by the accused in connection with the commission of the offence, or
 - (ii) is a gift as defined in recommendations 15 and 16 above.
- (5) The application should be a civil proceeding to which the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, section 10, and the Civil Evidence (Scotland) Act 1988 apply.
- (6) Where the Court is satisfied as to (4)(a) and (b)(ii) above it should nevertheless have a discretion to refuse the application if the recipient of the gift satisfies the Court, on a balance of probabilities, that -

- (a) he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the gift was made in contemplation of, or after, the commission of the offence; and
 - (b) that he was not associated with the giver in the commission of the offence; and
 - (c) that he would suffer hardship if the application were granted.
- (7) Forfeited property should be dealt with by the Crown in such manner as seems to it to be appropriate.

(Paragraphs 19.9-19.17. Draft Bill, clause 37(2), (3), (5), (9), (11))

122. The application should be made as soon as is reasonably practicable after the relevant information becomes available to the Lord Advocate but in any event within six years of the date of death.

(Paragraph 19.18. Draft Bill, clause 37(4))

123. Where a restraint order is not in force in respect of the accused at the date of his death the Court of Session should be entitled, on the application of the Lord Advocate, to make an order for inhibition relative to any heritable property in Scotland and to grant a warrant for the arrestment of any moveable property in regard to which an order for forfeiture is to be sought.

(Paragraphs 19.19, 19.20. Draft Bill, clause 37(10))

124. (1) The owner of property which has been forfeited, other than the recipient of a gift, should be entitled to apply to the Court of Session for the return of the property or, if the property has been disposed of, for compensation.
- (2) A person with an interest, otherwise than as owner, in property which has been forfeited should be entitled to apply to the Court for compensation.
- (3) The Court should be required to grant the application if the applicant proves on a balance of probabilities that immediately before the forfeiture he was the owner of, or a person otherwise having an interest in, the property.
- (4) The amount of compensation payable should be calculated as provided in recommendation 101 above.

(Paragraph 19.21. Draft Bill, clause 37(6)-(8))

125. Recommendations 120 to 124 above should apply to an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates.

(Paragraph 19.22. Draft Bill, clause 39(3); Schedule 3, paragraph 31)

The legislation required

126. (1) None of the powers conferred by the new Act should be exercisable in proceedings against a person for an offence committed before the Act comes into force.
- (2) After the Act comes into force it should be competent for a court to exercise the powers conferred by section 223 or section 436 of the Criminal Procedure (Scotland) Act 1975, but not the powers conferred by Part II of the new Act, where a person is convicted of an offence committed before the coming into force of Part II of the new Act.

(Paragraph 20.8. Draft Bill, clause 39(1), (2))