



PROCEEDS OF CRIME BILL

Publication of Draft Clauses

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for the Home Department
by Command of Her Majesty
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Publication of Draft Clauses

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FOREWORD BY THE HOME SECRETARY



The publication of draft clauses for a Proceeds of Crime Bill marks an important stage in taking forward one of the key commitments in the Government's paper "Criminal Justice: The Way Ahead", published on 26 February.

Last year's study by the Performance and Innovation Unit (Recovering the Proceeds of Crime, June 2000) showed that criminals and their associates are too often able to retain their ill-gotten gains, even if they have been successfully convicted and imprisoned; and that there is considerable scope for a more concerted focus on investigating and recovering criminal assets. Enjoyment of the fruits of criminal conduct is objectionable in itself, and harmful to society. Greater success in preventing and disrupting this will help to strengthen public confidence in the criminal justice system, undermine harmful role models in the community and deprive criminals of their working capital.

The Proceeds of Crime Bill will bring together in one Act, and in an updated and strengthened form, the law governing investigations, money laundering offences and confiscation. In addition, the Bill will establish the Criminal Assets Recovery Agency in England, Wales and Northern Ireland, to perform both an operational and a strategic role. It will empower the Agency to recover criminal proceeds in a new form of civil litigation in the High Court, and to exercise taxation functions delegated from the Inland Revenue. And, as a product of collaboration between the Government and the Scottish Executive, it will establish parallel arrangements in Scotland, ensuring consistent regimes north and south of the border.

This is a large, complex and innovative draft Bill. I invite all those with an interest or expertise in this subject to study the draft provisions. We will take account of comments received before finalising the Bill for introduction.

Jack Straw

INTRODUCTION

1. The publication of this paper, which sets out draft clauses for a Proceeds of Crime Bill, fulfils the commitment announced in the Queen's Speech on the opening of Parliament on 6 December 2000 that a Bill would be published in draft to increase powers against money laundering and make it easier to recover the proceeds of crime. The report by the Performance and Innovation Unit (PIU) 'Recovering the Proceeds of Crime', published in June 2000, set out the Government's proposed new approach to tackling crime through its finances. The Bill will put before Parliament those conclusions of the report which require legislation.

Proceeds of Crime Bill

2. The main features of the proposed Bill are set out below. The draft is not a complete Bill; the narratives at the start of each section indicate certain specific points on which the Government's policy is still being considered or has yet to be translated into draft legislation. However, work is sufficiently advanced to give a good and detailed indication of how the Bill is shaping up in each of the areas to be covered.

3. It is intended to add to the Bill before introduction measures to extend the scheme (in Part II of the Drug Trafficking Act 1994) for forfeiture of drug cash seized at the border, so as to include cash or monetary instruments which represent the proceeds of, or are intended for use in, any criminal conduct. The Government is considering whether any additional measures are required to facilitate the seizure and retention of suspect cash discovered away from the border.

The Criminal Assets Recovery Agency (I)

4. The Bill will establish a Criminal Assets Recovery Agency, with executive responsibilities for the recovery of criminal assets using a range of investigatory powers. It will be able to pursue criminal assets through confiscation of the assets of convicted criminals or recovery of assets through civil proceedings; or taxation of persons suspected of having benefited from crime. It will be for the Director of the Agency to decide which route to pursue depending on the circumstances of each case.

5. The Director will be appointed by the Home Secretary. He will prepare an annual plan for the Home Secretary's approval, and submit an annual report which the Home Secretary will place before Parliament.

6. The Director will have a strategic role in promoting the recovery of criminal assets and co-operation within the criminal justice system more generally. The Director will develop memoranda of understanding with the law enforcement and prosecution bodies to determine how restraint and confiscation cases are to be apportioned between them and the Agency. The Home Secretary announced in July 2000 that »54 million will be made available over the next three years to pay for the Agency. This sum will also fund the Agency's financial investigation Centre of Excellence, which will promote good practice and co- ordinate the provision of training and accreditation in order to increase the supply of qualified financial investigators to the law enforcement agencies.

7. The Agency will operate in England, Wales and Northern Ireland. Separate arrangements will apply in Scotland.

Criminal Confiscation (II)

8. Powers already exist to seek restraint of property suspected to be criminal proceeds when criminal proceedings are pending, and to ask the court following a conviction for acquisitive indictable and some summary offences to make a confiscation order equivalent to the estimated value of proceeds. The Bill will amalgamate these powers (currently split between drug and non-drug Acts) and strengthen them.

Scotland (III)

9. Given the nature of criminal activity, it is essential to tackle the confiscation and recovery of the proceeds of crime on a coherent United Kingdom basis. It is therefore proposed that similar provisions will apply to Scotland. The proposed legislation will, however, fully reflect differences in Scots law and procedure and in the institutions of justice in Scotland.

Northern Ireland (IV)

10. As indicated above, it is intended that recovery of criminal assets should be approached on a United Kingdom basis. The Bill will be drafted to take account of the differences in the law between Northern Ireland and England and Wales.

Civil Recovery (V)

11. The Bill will create a new right of civil recovery, to permit the recovery of criminal assets where no conviction has been possible, for example because individuals are able to avoid conviction by remaining remote from the commission of the crimes from which they benefit or because they have fled abroad. This will be a civil law procedure in the High Court, with the Agency having sole right to bring an action. It should be noted that, whilst these provisions deal only with England and Wales, it is intended that the scheme will be adapted to apply to Northern Ireland and that equivalent provisions will be made for Scotland.

Taxation (VI)

12. The Bill empowers the Agency to tax suspected criminal assets. It will be able to raise a tax demand where no source of income has been identified.

Investigations (VII)

13. The Bill will extend to financial investigators and the Agency existing powers of constables for tracing and investigating criminal assets. It will introduce new investigatory powers: customer information orders, monitoring orders and (for the Agency only) a compulsory disclosure power. All of these powers will be exercised under judicial authority.

Money Laundering (VIII)

14. The Bill will reform the definition of the criminal offences of money laundering, and replace the existing separate drug and non-drug offences with a single consolidated and simplified set. This will remove obstacles and loopholes which currently impede prosecution and contribute to the low number of convictions.

Regulatory Impact Assessment (Annex)

15. A Regulatory Impact Assessment has been drawn up and circulated, and amended in the light of comments received. A provisional full version is attached as an Annex to this paper.

ECHR issues

16. The Government expects to introduce the Bill with a memorandum of compatibility with the ECHR, in accordance with the Human Rights Act 1998.

Consultation period

17. Having regard to the Bill's size and technical nature, and the ground breaking nature of some of the proposals, the Government wishes to receive comments from the public, members of Parliament, the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly as well as practitioners and experts so that they can be taken into account before the Bill is finalised for introduction.

18. The Government is seeking views on its proposals by Tuesday, 29 May 2001.

For respondents in England and Wales, responses should be sent to:

Financial Crime Team
Room 1103
Home Office
50 Queen Anne's Gate
London SW1H 9AT

Responses may also be sent by fax on 020 7273 4374, or by e-mail to fct@homeoffice.gsi.gov.uk

Copies of this paper are available on the Home Office website,
www.homeoffice.gov.uk

For respondents in Scotland, responses should be sent to:

Scottish Executive Justice Department
Criminal Justice Division
Branch 2A
Spur W(1)A
Saughton House
Broomhouse Drive
Edinburgh EH11 3XD

Responses may also be sent by fax on 0131 244 2623, or by e-mail to: richard.scott@scotland.gsi.gov.uk

Copies of this paper are available on the Scottish Executive website,
www.scotland.gov.uk

24. For respondents from Northern Ireland, responses should be sent to:

Criminal Law Branch
Northern Ireland Office
Massey House
Stoney Road
Belfast BT4 3SX

Responses may also be sent by fax to 028 9052 7507, or by e-mail to: clbranch@nio.x.gsi.gov.uk

Copies of this paper are available on the Northern Ireland Office website,
www.nio.gov.uk

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THE CRIMINAL ASSETS RECOVERY AGENCY

Introduction

1.1 The clauses in I establish the Criminal Assets Recovery Agency (CARA) and the following paragraphs describe the role and structure of the Agency. Its detailed functions in relation to criminal confiscation, civil recovery, the raising of tax assessments and investigatory powers are set out in II, V, VI and VII. The Director's role in relation to criminal confiscation in Northern Ireland is set out in IV.

Role of the Agency

1.2 The role of the Agency, and in particular the Director who will lead it, will be central to the development of asset recovery as a significant contribution to reducing crime. The Director will not only have the operational responsibilities outlined above but will be at the heart of promoting the use of financial investigation and asset recovery as basic tools both for crime reduction and increasing public confidence in the criminal justice system.

1.3 The Director will do so by taking the lead in drawing up and monitoring an overarching Asset Recovery Strategy for the United Kingdom which is intended to cover all parts of the criminal justice system, including law enforcement agencies, prosecution authorities and government departments.

1.4 The Agency will require close relationships with other law enforcement agencies to ensure the maximum amount of inter-agency co-operation and the Bill includes a duty of co-operation on the Director to reflect this. To help achieve this, there will be a need to exchange information between the Director and other bodies, including the law enforcement agencies, Inland Revenue, other government departments and agencies, local authorities and statutory bodies. The Government is preparing the necessary provisions which will be added to the Bill.

1.5 In addition to his investigative and strategic responsibilities, The Director will be charged with assuming responsibility for the accreditation and training of all financial investigators in the public sector in England and Wales and Northern Ireland. He will do so by establishing a Centre of Excellence within the Agency which will devise and develop training packages to ensure that the existing pool of professional expertise in financial investigation is improved and developed to a national standard across the raft of agencies who deploy financial investigators.

Structure of the Agency

1.6 The Agency is intended to be a freestanding organisation that is operationally independent of the Home Secretary and the Home Office. But each year, the Director will be required to draw up a plan within the parameters of wider criminal justice policy and the proposed Asset Recovery Strategy setting out how he intends to exercise his functions during that year. The plan will be subject to the approval of the Secretary of State. At the end of the year, the Director will be required to produce an annual report which will include an assessment of the extent to which he believes that he has met the plan.

1.7 The Agency's remit covers England and Wales and Northern Ireland (see IV). Scotland will be establishing the separate scheme detailed in III.

CRIMINAL ASSETS RECOVERY AGENCY - EXPLANATORY NOTES

Clause 1: The Agency and its Director

1. This Clause establishes the Criminal Assets Recovery Agency (CARA) to be headed by a new office-holder, the Director, who will be appointed by the Secretary of State. The Clause provides for the Director to employ staff to assist him in carrying out his functions, and to enter into contractual arrangements for this purpose. It also provides for the Director to delegate the exercise of his functions to his staff and to others working on a contractual basis for him (for example, people who are seconded to the Agency from other law enforcement agencies). The effect of providing that the Director is a corporation sole (*subsection (3)*) is that the office of the Director has legal personality and the Director (in his capacity as office-holder) can hold property, bring legal proceedings and employ staff.

Clause 2: Functions of the Director: general provisions

2. *Clause 2* sets out the general duties of the Director. *Subsection (2)* imposes a duty on the Director to carry out his functions in the way he considers best calculated to contribute to the reduction of crime. *Subsection (3)* puts the Director under a duty to assist the Secretary of State in devising strategies which will contribute to a reduction in crime.

Clause 3: Accreditation and training

3. *Clause 3* requires the Director to establish a system for the accreditation of financial investigators. Accredited financial investigators will have powers under the Bill to apply for production orders, search warrants and monitoring orders (see Part VII) and to apply for restraint and charging orders (see Part II). *Subsection (5)* puts the Director under a duty to provide general training as regards financial investigation and the operation of the Bill. The second limb might include, for example, training for prosecutors and members of the judiciary as regards their functions under the Bill.

Schedule 1: The Criminal Assets Recovery Agency

4. *Paragraphs 1 to 3* concern the terms of appointment and provision for the pension of the Director. The Director is to be a member of the Principal Civil Service Pension Scheme.

5. The effect of *paragraph 4* is that the Director must appoint a deputy, and also a senior officer to have specific responsibility for his functions in Northern Ireland.

6. *Paragraph 6* imposes a duty on the Director to pass on all monies received in the course of carrying out his functions to the Secretary of State from where they will be transferred to the Consolidated Fund. He is not permitted to offset expenditure against receipts

7. *Paragraph 8* sets out what the Director will be required to include in his annual plan, which will be subject to the approval of the Secretary of State. Express provision is made for the inclusion of details as to how the Director will carry out his functions in Northern Ireland.

8. *Paragraph 9* imposes a duty on the Director to prepare an annual report on his activities over the previous year and to submit it to the Secretary of State who, in turn, is required to lay it before Parliament and arrange for it to be published. In practice, the accounts (*paragraph 7*) would be attached to the annual report and published at the same time.

9. *Paragraphs 10 and 11* mean that the Director may not be a Member of Parliament, or the Northern Ireland Assembly, whilst he is the holder of the post.

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II

CRIMINAL CONFISCATION

2.1 The present criminal confiscation regime in England and Wales and its deficiencies are considered in Chapters 4 and 8 of the PIU report. Part II of the Bill reflects the conclusions of the PIU report and subsequent policy development. It consolidates and streamlines the confiscation procedures currently contained in two separate statutes: the Drug Trafficking Act 1994 and Part VI of the Criminal Justice Act 1988, which deal with benefit from drug and non-drug offences respectively.

Principal reforms

Coverage of the legislation

2.2 The combined effect of the current drug trafficking and non-drug trafficking legislation is to permit, under varying circumstances, the confiscation of benefit from all indictable offences (other than certain terrorist offences which are dealt with in separate legislation) and a small number of summary offences. The Bill simplifies and extends the existing legislation to make it possible to confiscate benefit from any conduct which constitutes an offence in England and Wales, or would constitute an offence if it took place here.

2.3 The Bill contains two criminal confiscation schemes. One is broadly limited to the confiscation of benefit from the offences of which the defendant has been convicted. The other aims to recover the benefit from the defendant's past criminal conduct, whether it has been the subject of a conviction or not.

2.4 Which scheme is applied in a particular case depends on whether or not the defendant has a criminal lifestyle. If the defendant has a criminal lifestyle, the court must calculate and confiscate the defendant's benefit from his entire past criminal conduct. If the defendant does not have a criminal lifestyle, it must calculate and confiscate the defendant's benefit from the offences of which he has been convicted (and any offences which will be taken into consideration in sentencing him). Whether the defendant has or does not have a criminal lifestyle is determined purely by the offences of which the defendant has been convicted as set out in Clause 72 of the Bill.

The assumptions

2.5 The Bill provides that the assumptions must be made wherever the defendant is identified after conviction as having a criminal lifestyle (but otherwise makes no changes from the approach of the Drug Trafficking Act 1994). The discretionary assumptions currently provided for in the Criminal Justice Act 1988 are, therefore, replaced by a scheme in the Bill which is mandatory throughout. This reflects the Government's wish to see a consistent approach to the application of assumptions by the courts in England and Wales in the light of the large number of cases annually which meet the criteria. It will be noted from III, however, that the equivalent provisions for Scotland in the Bill are discretionary, in line with existing Scottish provisions which are discretionary in their entirety.

2.6 The use of assumptions in the current criminal confiscation legislation has been considered by the courts recently in the cases of McIntosh in Scotland (see McIntosh v. HM Advocate, 13th October 2000; HM Advocate and Another v McIntosh, 5th February 2001) and Benjafield and others in England and Wales (see R. v. Karl Robert Benjafield, 21st December 2000). Although their use was upheld in the McIntosh case by the Privy Council, the Government notes that a similar case (Phillips v the United Kingdom) is under consideration before the European Court of Human Rights in Strasbourg. It will, therefore, wish to review the provision on assumptions in the Bill in the light of any further relevant jurisprudence.

The Crown Court as a "one-stop shop"

2.7 As the PIU report points out, proceedings relating to criminal confiscation orders are currently spread across the High Court, the Crown Court, the magistrates' court and the county court. Under the Bill, all confiscation hearings will be in the Crown Court. It will hold a confiscation hearing where a person is convicted before it, or is committed to it for sentence, including under a new power to commit especially for the purpose of confiscation. The power of the magistrates' court to make a confiscation order is accordingly to be abolished. However, it will be possible for a confiscation order to be made following a conviction for any offence, whether the conviction took place in the Crown Court or the magistrates' court. The Bill also makes it possible to confiscate benefit from any conduct which constitutes an offence in England and Wales, or would constitute an offence if it took place here. The power to make a confiscation order against an absconder, currently a High Court function, is

also transferred by the Bill to the Crown Court.

2.8 The PIU report also proposes that restraint and charging orders should be dealt with in the Crown Court. Other current High Court functions transferred to the Crown Court in the Bill are the power to appoint a receiver, the power to make a restraint order and the power to make a charging order. In essence, these are powers exercised by the High Court in its civil law capacity. The principle underlying the change (apart from the general desirability of concentrating confiscation matters in one court) is that the use of the High Court is an unnecessarily expensive procedure and as such discourages the enforcement authorities from applying for these orders as frequently as they should.

2.9 The county court currently has the power to appoint a receiver, where the High Court has previously made a restraint order. This power is also abolished by the Bill.

Role of the Agency

2.10 All confiscation functions currently conducted by the police, Customs or any other prosecutor will be capable of being conducted, under the Bill, by the Director of the Agency. The Director will, for example, have powers to conduct asset tracing investigations and apply for restraint orders, he will be able to apply for criminal confiscation orders to be made, and will have an explicit role in the enforcement of confiscation orders.

Bringing forward the availability of restraint

2.11 One issue not dealt with in the PIU report, but which has been highlighted in particular in international cases, is the inability of the courts to make a restraint or charging order at an early stage, where an investigation is underway but proceedings have not been instituted and are not yet about to be instituted. The Bill closes this gap by enabling a restraint or charging order to be made at any time after an investigation has commenced. Consequential provision is made, amending the current legislation, to enable compensation to be paid under certain circumstances where there is a serious default in the exercise of the powers during the investigation.

Release of restrained assets

2.12 *Clause 40(3)* provides that restrained assets may be released for living or legal expenses. The Government is considering whether legislative provision is needed to limit the amount which may be released.

Abolition of charging orders

2.13 The Bill presently reproduces the provision on charging orders found in the current legislation. Charging orders are, however, used very rarely in practice in confiscation legislation. This is because there is no kind of property which is capable, in theory, of being made the subject of a charge which is not also capable of being placed under restraint and realised by the other realisation powers in the confiscation legislation. The Government therefore considers that there is a strong case to abolish the provisions on charging orders in the confiscation legislation and, subject to any contrary further views from practitioners, proposes to do so.

CRIMINAL CONFISCATION - EXPLANATORY NOTES

Clause 4: Making of order

1. *Clause 4* sets out the basic principles of the Bill. Confiscation orders may only be made in the Crown Court; the limited power of the magistrates' court under current legislation to make an order is abolished. Under the Bill, a confiscation order may be made following any conviction in the Crown Court or the magistrates' court. Where the conviction takes place in the magistrates' court, the defendant must either be committed to the Crown Court for sentence, or committed to the Crown Court for sentence and confiscation under a new power for this purpose created in the Bill, before a confiscation order can be made. The confiscation procedures are mandatory: the Crown Court must go through them where asked to do so by the prosecutor or the Director of the new Agency.

2. *Clause 4* also makes clear the basic nature of a confiscation order under the Bill. It is an order to a convicted defendant to pay a sum of money representing the defendant's benefit from crime. The fundamental approach of the Bill, therefore, reflects that adopted by the existing legislation.

3. *Clause 4* also makes it clear that the Bill contains two different confiscation regimes, only one of which may be applied in any particular case. One enables the confiscation of a defendant's benefit from "general criminal conduct", the other the confiscation of a defendant's benefit from "particular criminal conduct". General criminal conduct means any criminal conduct

of the defendant's and it does not matter when that criminal conduct occurred (see *clause 73*). Particular criminal conduct means the offences of which the defendant has been convicted in the current proceedings, together with any taken into consideration by the court in passing sentence (again, see *clause 73*). General criminal conduct includes particular criminal conduct.

4. The "general criminal conduct" regime is to be applied where the defendant is identified by the court on conviction as having a criminal lifestyle. This is determined solely by the nature of the offence or offences of which the defendant has been convicted in the current proceedings, or certain previous proceedings. The offences in question are specified later in *clause 72*. The "particular criminal conduct" regime is to be applied in all other cases.

Clause 5: Time for making order

5. *Clause 5* makes it clear that a confiscation order must be made before the Crown Court passes sentence. This is, however, subject to the postponement provisions in *clauses 13 and 14*, which enable the court to postpone making a confiscation order and sentence the defendant first.

Clause 6: Recoverable amount

6. *Clause 6* specifies how the confiscation order is to be calculated. Again, the method of calculation is the same as in the existing confiscation statutes. The amount of the order is the amount of the defendant's benefit from either general criminal conduct or particular criminal conduct (as the case may be), except where the amount available for confiscation is considered by the court and is found by the court to be less than the benefit, in which case the order must be made in that lesser amount. The amount available for confiscation is described as the available amount (equivalent to the term "the amount that might be realised" in the current legislation) and the amount actually ordered to be confiscated as the recoverable amount (equivalent to "the amount to be recovered" in the current legislation). *Subsection (2)* affirms in statute a line of case law to the effect that the burden is on the defendant to show that the available amount is less than the benefit and to show the extent of the available amount.

Clause 7: Defendant's benefit

7. This clause stipulates what the court must take into account when deciding whether the defendant has benefited from criminal conduct and what the value of that benefit is. *Subsection (3)* requires any amount ordered to be paid under a previous confiscation order (whether one made under the Bill or the previous confiscation statutes) to be deducted from the amount of the defendant's assessed benefit from "general criminal conduct". This is to avoid confiscating the same benefit twice. The provision is not required for particular criminal conduct because the same offences cannot be subject to a second conviction, or taken into consideration for sentencing purposes twice, and therefore there is no risk of confiscating the same benefit from particular criminal conduct twice.

Clause 8: Available amount

8. *Clause 8* explains how the available amount is to be calculated. It is calculated in the same way as "the amount that might be realised" in the current legislation. In broad terms, the available amount is equal to the value of all the defendant's property plus the value of all tainted gifts made by him. Tainted gifts are defined at *clause 74*.

Clause 9: Assumptions to be made in case of criminal lifestyle

9. *Clause 9* applies where the court has decided that the defendant has a criminal lifestyle and it is, accordingly, considering the defendant's benefit from general criminal conduct. The clause requires the court to make certain specified assumptions to establish whether the defendant has benefited from general criminal conduct, and, if so, by how much. The court is not, however, permitted to make an assumption in relation to particular property or expenditure if it is shown to be incorrect or there would be a serious risk of injustice if it were made. Where the court does not make one or more of the assumptions for any reason specified in the legislation, it must nevertheless continue to decide whether the defendant has benefited from general criminal conduct and decide the recoverable amount, albeit without the assistance of the assumptions.

10. The current legislation provides for similar assumptions to be made. They are mandatory in confiscation proceedings following a conviction for a drug trafficking offence, but discretionary in all other confiscation cases (and, in the latter case, other criteria must be satisfied before they can be made). *Clause 9* creates a single scheme under which the assumptions are mandatory in all cases where a person has a criminal lifestyle (defined in *clause 72*).

Clause 10: Time for payment

11. *Clause 10* indicates how long the court may allow the defendant to pay the confiscation order. At present, there is no limit on the time that may be allowed. *Clause 10* provides that a confiscation order is to be paid immediately, unless the defendant can demonstrate to the court that he needs more time to pay. If the court is satisfied that it is required, the court may allow up to six months time to pay, and up to a further six months on a later occasion if there are exceptional reasons justifying the extension.

Clause 11: Interest on unpaid sums

12. *Clause 11* makes it clear that the defendant must pay interest on a confiscation order which is not paid in full by the time allowed. It leaves no room for doubt that the payment of interest is mandatory in all cases (the existing legislation is framed in terms of a "liability" to pay interest and it has been suggested occasionally that this implies a discretion as to whether or not interest is added to a particular unpaid order).

Clause 12: Effect of order on court's order

13. *Clause 12* requires the court to have regard to the confiscation order before imposing a fine or other order on the defendant, except for a compensation order, but otherwise to leave the confiscation order out of account in sentencing the defendant. It reproduces the effect of existing legislation.

Clause 13: Postponement

14. *Clause 13* enables the court to postpone the confiscation proceedings on one or more occasions for up to a total of two years from the defendant's conviction, or three months from the date on which any appeal against conviction is disposed of, if the three months ends more than two years after the date of conviction. There is no limit to the period of postponement, however, where there are exceptional circumstances. The provision extends the period of postponement permitted under the current legislation, which is normally only up to six months.

15. The new provision in *clause 13* enables proceedings to be postponed for any reason. This enables a postponement to be made if it is required, for example, because a judge is ill. Under current legislation, a postponement can only be made so that the court can obtain further information about the defendant's benefit or the realisable property. The limitation has given rise to confusion as to whether the court may use its inherent power to adjourn for any other reason.

Clause 14: Effect of postponement

16. *Clause 14* makes it clear that, as under current legislation, the court may sentence the defendant at any time during the period of postponement. The purpose of the provision is to avoid the sentence being delayed while confiscation is considered. The court is not allowed to impose a fine or ancillary order (such as a forfeiture order) when it sentences the defendant in the postponement period because it needs to know the amount of the confiscation order before it does this. However, it may vary the sentence within 28 days of the end of the postponement period by making one or more of these disposals, by which time any confiscation order would have been made. This will, in particular, enable the forfeiture of drugs to be ordered in a drug trafficking case.

Clause 15: Statement of information

17. Where the prosecutor or the Director of the Agency requires the court to hold a confiscation hearing, the prosecutor (or the Director, as the case may be) is required to give the court a statement detailing the defendant's benefit from criminal conduct. The nature of the information in the statement will depend on whether the prosecutor or the Director believes the defendant has a criminal lifestyle.

18. *Subsection (2)* provides that, where the court holds a confiscation hearing of its own volition, the prosecutor is required to present the statement. This is based on the assumption that the court will never hold a confiscation hearing of its own volition in a case in which the Director is involved.

Clause 16: Defendant's response to statement of information

19. The statement of information procedure is designed to prove a quick and effective method of identifying the extent of the defendant's benefit, where there is agreement between defendant and prosecutor or Director, and of identifying areas of dispute, where there is not. Where the prosecutor or the Director serves a statement of information on the defendant (as will normally happen), the court may require the defendant to respond separately to every allegation in the statement, and to indicate to what extent each allegation is accepted. Where an allegation is accepted by the defendant, the acceptance is conclusive as far as any matters to which it relates is concerned.

20. Where an allegation is disputed, the defendant must provide particulars (i.e. full details) of any matters relied on. The purpose of the procedure is to identify areas of dispute for the confiscation hearing, where evidence may be brought in relation to the disputed points by the prosecutor or Director (as the case may be), or the defendant. Under *subsection (3)*, if the defendant fails to respond to an allegation, the defendant may be treated as having accepted every allegation in the statement. Thus, if the defendant fails to respond to a statement of fact, the fact is deemed to be true. If, for example, the fact in question is that the defendant spent x sum on y date, and the defendant fails to respond to that, that fact is deemed to be true. However, the defendant is not to be treated as accepting any allegation that he has a criminal lifestyle or has benefited from general or particular criminal conduct because it is not thought appropriate that the defendant's silence should be conclusive of these matters.

21. *Subsection (6)* provides that, where the defendant accepts an allegation that he has benefited from conduct, the acceptance is not admissible in any proceedings for an offence. The exemption is intended to encourage defendants, who may otherwise be reluctant to admit benefit from criminal conduct which has not been the subject of a prosecution, to be more forthcoming by preventing the admissions made from being used in a future prosecution against them or anybody else.

Clause 17: Provision of information by defendant

22. *Clause 17* empowers the court, at any stage in the confiscation procedures, to order the defendant to provide any information it needs to enable it to carry out its confiscation functions. Where the defendant fails to comply with the court's order without reasonable excuse, the court may draw any inference it believes appropriate. The court might use the provision where, for example, the defendant has proposed to rely on certain matters in responding to the statement of information, and the court considers that it requires more information from the defendant in deciding the point at issue. The provision reproduces, with minimal changes, that in the current legislation.

Clauses 18-20: Reconsideration

23. *Clauses 18-20* enable a confiscation order to be made where none was made in the original proceedings, and a confiscation order, once made, to be increased. Application must be made to the Crown Court within six years of the original conviction. *Clause 18* applies where no confiscation hearing was held after the original conviction; *clause 19* applies where a hearing was held, the court decided that the defendant had, or did not have a criminal lifestyle, and then went on to decide that the defendant had not benefited from any criminal conduct; *clause 20* applies where a confiscation order has already been made and may be used to increase a confiscation order on one or more occasions.

24. The clauses reproduce, with some changes, provision in the current legislation. New provision has been required primarily to take account of the new role of the Director in criminal confiscation. Either the prosecutor or the Director may apply to the court for a reconsideration under these clauses.

25. The principle underlying *clauses 18 and 19* is that a reconsideration should only be applied for where new evidence comes to light. It is not appropriate for the prosecutor or the Director to have evidence at the time of the original proceedings, not to apply for a confiscation order on that occasion but to apply for a reconsideration at a later date. Provision is included to reflect this principle.

Clause 21: Order made: reconsideration of available amount

26. *Clause 21* applies where the court made a confiscation order in an amount lower than the defendant's assessed benefit because there was insufficient realisable property to satisfy an order in the full amount. The prosecutor, the Director, or a receiver appointed in the case may apply to the Crown Court for the court to recalculate the available amount. This is an example of a function now exercised by the Crown Court which was previously exercised by the High Court.

27. Any number of applications may be made and there is no limitation to the time when an application may be made (in contrast to *clauses 18 to 20*). If the court calculates that the available amount has increased, it may vary the level of the confiscation order but may not increase it beyond the defendant's assessed benefit. *Subsection (5)* is additional to the existing legislation. It requires the court to have regard to any fine or ancillary order imposed on the defendant following the original conviction.

Clause 22: Inadequacy of available amount: variation of order

28. Where a confiscation order has been made, there is a procedure in the current legislation for the defendant or a receiver appointed in the case to apply to the High Court for a "certificate of inadequacy" on demonstrating that the realisable property is insufficient to satisfy the confiscation order. Where the High Court issues a certificate of inadequacy, the certificate may be

presented to the Crown Court or magistrates' court, and the amount of the order must then be reduced.

29. The current certificate of inadequacy procedure is cumbersome and expensive. *Clause 22* provides instead for application to be made by the defendant or a receiver appointed in the case directly to the Crown Court.

Clause 23: Inadequacy of available amount: discharge of order

30. Under current legislation, there is no provision for writing off a confiscation order. In principle it should not be necessary, as an order cannot be made in a sum greater than the value of the property available to satisfy it and the certificate of inadequacy procedure, as now implemented by *clause 22*, is available to defendants. The absence of any provision for write-offs has on occasion led to unnecessary practical difficulties, for example, where a court makes a confiscation order based on an assessment of realisable property in the form of foreign currency, and a shortfall in payment of the order arises later due entirely to a change in the value of the currency concerned in the period between the order being made and payment.

31. *Clause 23* therefore provides that, where a justices' chief executive in the magistrates' court is enforcing a confiscation order, the justices' chief executive may apply to the Crown Court and the Crown Court may write the order off if the outstanding sum is under £1,000 and the reason for the shortfall is a fluctuation in exchange rates or some other factor specified in secondary legislation, or some combination of the two. The sum of £1,000 is variable by order. No similar provision is available where the Director is enforcing a confiscation order because enforcement by the Director will always involve the appointment of a receiver, who will be able to apply to the Crown Court under *clause 22*.

Clause 24: Small amount outstanding: discharge of order

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

Clause 25: Information

33. *Clauses 25* contains provision ancillary to *clauses 18-20*. Its purpose is to make it clear that *clauses 15-16* on statements of information and *clause 17* on the provision of information by the defendant apply to reconsideration proceedings as they apply to confiscation proceedings immediately following a conviction.

Clause 26: Defendant convicted or committed

34. *Clause 26* is the first of a number of clauses dealing with confiscation orders against absconders. Under the current legislation of England and Wales, the High Court may make a confiscation order against an absconded drug trafficker (one who has absconded either after conviction or after proceedings have been instituted). The Bill empowers the Crown Court to make a confiscation order against an absconder convicted of, or charged with, any crime.

35. The existing provision for the High Court in England and Wales to make a confiscation order against a drug trafficker who dies after conviction but before the Crown Court can make a confiscation order is abolished. It is considered that the recovery of benefit where the perpetrator is dead is better dealt with under the civil recovery procedures in Part V of the Bill.

36. *Clause 6* deals with the situation where a defendant is convicted either in the Crown Court or in the magistrates' court, and then absconds. In the case of a conviction in the magistrates' court, the defendant must have been committed to the Crown Court for sentence or confiscation (and sentence) before absconding. Either the prosecutor or the Director may apply to the Crown Court for a confiscation order to be made under this clause.

37. *Subsection (5)(e)* provides that none of the reconsideration *clauses 18-20* apply where a person is still an absconder post conviction and thus that they do all apply where a convicted absconder returns (in the existing legislation, there is some slight doubt as to the applicability to absconders post conviction of what is now *clause 18*).

Clause 27: Defendant neither convicted nor acquitted

38. *Clause 27* deals with absconders who abscond prior to conviction. A confiscation order may only be made against such an absconder if two years have elapsed from the time he absconded. Under current legislation, a confiscation order may be made by the High Court on application by the prosecutor. Under the Bill, application is made to the Crown Court by the prosecutor or

the Director.

39. *Subsections (5)(e) and (7)-(8)* set out the position with regard to reconsiderations under *clauses 18-20*. No reconsideration under those sections is possible while the defendant remains an absconder. However, when the absconder returns, all three, *clauses 18, 19 and 20*, apply.

Clauses 28 and 29: Variation of order and discharge of order

40. *Clauses 28 and 29* apply where the Crown Court has made a confiscation order against an unconvicted absconder. They reproduce existing ancillary provision for unconvicted absconders, except that the functions are transferred from the High Court to the Crown Court.

Clause 30: Appeal by prosecutor or Director

41. *Clause 30* gives the prosecutor and the Director a new power to appeal against any confiscation order made by the Crown Court, and against any decision of the Crown Court not to make a confiscation order. The appeal lies on any ground. For example, it will be available where a court fails to take account of property which should be taken account of, or makes some miscalculation concerning the amount of the order.

42. An appeal does not, however, lie against a decision of the Crown Court under the reconsideration sections 18 and 19, or under sections 26 and 27 on convicted and unconvicted absconders. The reason for the limitation is that these sections all grant the Crown Court a wide degree of discretion. The target of the appeal is not the court's exercise of a discretion but its application of the mandatory confiscation procedures.

Clause 31: Court's powers on appeal

43. *Clause 31* provides the Court of Appeal with broad powers. The Court of Appeal may confirm, quash or vary the Crown Court's confiscation order and, where the Crown Court decided not to make a confiscation order, it may either go through the confiscation procedures itself or direct the Crown Court to proceed afresh. *Subsection (11)* provides that, where the Court of Appeal makes a confiscation order and appoints the Director as the enforcement authority, it must direct the Crown Court to make a receivership order under *clause 53* (rather than making a receivership order itself).

44. If the Court of Appeal makes or varies a confiscation order or directs the Crown Court to go through the confiscation procedures afresh and the Crown Court has in the meantime imposed a fine or ancillary order such as a forfeiture order on the defendant as part of the sentencing process, *subsection (4)* requires the court to have regard to the fine or order. However, the court is not required to take account of an order if it has already taken account of the order in working out what the free property held by the defendant is (free property excludes property subject to one of these orders). Ideally, the court would consider making a fine or ancillary order after it has made a confiscation order, in the usual way. However, this would mean suspending all areas of the sentencing process except for the imposition of a term of imprisonment, pending the outcome of the prosecutor or Director's appeal.

Clause 32: Appeal to House of Lords

45. *Clause 32* enables the Court of Appeal's decision to be further appealed to the House of Lords. *Clause 32* provides the House of Lords with similarly broad powers to the Court of Appeal. They are not identical, however, because the House of Lords is reviewing the decision of the Court of Appeal, rather than the original decision of the Crown Court. *Subsection (7)* provides that, where the House of Lords makes a confiscation order and appoints the Director as the enforcement authority, it must direct the Crown Court to make a receivership order under *clause 53* (rather than making a receivership order itself).

Clause 33: Enforcement authority

46. *Clause 33* sets out the criteria which determine whether the confiscation order is to be enforced by the Director or by a magistrates' court. Under the current legislation, all confiscation orders are enforced by magistrates' courts, with the assistance of the prosecutor. *Clause 33* provides that the Director is to be responsible for the enforcement of a confiscation order either where he applied for the order (including applications under the reconsideration and absconder provisions) or where the Director applies to the court before the order is made to be appointed to enforce it. In all other cases, the confiscation order will be enforced by the magistrates' court and prosecutor, much as at present.

Clause 34: Director not appointed as enforcement authority

47. *Clause 34* explains how confiscation orders are to be enforced where the magistrates' court is the enforcement authority.

As at present, the order will be treated as a Crown Court fine and enforced, as is a Crown Court fine, by the use of the magistrates' court's fine enforcement powers, as set out in Part III of the Magistrates' Courts Act 1980. One of the main features of this regime is that the Crown Court, where it makes a confiscation order, is required to set a term of imprisonment in default of payment. The maximum default term that may be imposed is determined by the size of the confiscation order. The maximum default term applicable to a particular confiscation order varies from 7 days, for an order not exceeding £200 to, at the other end of the scale, ten years for an order exceeding £1 million.

Clause 35: Director appointed as enforcement authority

48. *Clause 35* also applies certain Crown Court fine enforcement measures where enforcement is to be by the Director. The relevant provisions require the court, where it makes a confiscation order, to specify a term of imprisonment in default of payment.

Clause 36: Director's application for enforcement

49. As noted above, confiscation order enforcement by magistrates' courts will continue to be broadly regulated by the Magistrates' Courts Act 1980. This contains detailed provision on imprisonment in default of payment. Because the 1980 Act will not apply to enforcement by the Director, it has been necessary, in *clause 36*, to create specific procedures for a term of imprisonment in default to be enforced at the Director's request.

50. *Clause 36* contains provision broadly based on that in the 1980 Act, except that the Director will apply to the Crown Court to trigger the default term. This is in accordance with the idea of the Crown Court as a "one stop shop" for confiscation.

Clause 37: Provisions about imprisonment or detention

51. *Clause 37* contains general provision on imprisonment in default of a confiscation order, applicable whether the default term is imposed by a magistrates' court or by the Crown Court in response to an application by the Director. The provision reflects that in existing legislation and provides, in particular, that a term of imprisonment in default of a confiscation order must be served consecutively to the substantive term imposed for the offence(s), and that the service of a default term does not prevent the confiscation order from being collected subsequently by other means.

Clause 38: Reconsideration etc: variation of prison term

52. As explained in the note on *clause 34* above, the Crown Court fixes the period of imprisonment in default by reference to the amount of the confiscation order. *Clause 38* provides for the period of imprisonment in default to be varied where the court varies the amount of a confiscation order under the following provisions of the Bill:

Section 20: Reconsideration of benefit (resulting in upward variation of the order)

Section 21: Reconsideration of available amount (resulting in upward variation of the order)

Section 22: Inadequacy of available amount (resulting in downward variation of the order)

Section 28: Variation of order (for returned absconders, resulting in downward variation of the order)

Section 31: Court of Appeal's variation of Crown Court's order after prosecutor's or Director's appeal (resulting either in upward or in downward variation)

Section 32: House of Lords' variation of Court of Appeal order (resulting either in upward or in downward variation)

53. The overall purpose of the provision is to clarify what happens when the variation of a confiscation order changes the maximum period of imprisonment in default applicable to the order.

54. Where the effect of the variation is to increase the confiscation order so that the new amount falls within a higher band, *clause 38* empowers the court to increase the term of imprisonment in default up to the maximum allowed for the higher band. This also applies, on application by the prosecutor or the Director, where an unpaid confiscation order is increased by the addition of interest. Where the effect of the variation is to decrease the confiscation order so that the new amount falls into a lower band, *clause 38* requires the court to reduce the default term to the maximum applicable to the band in question or lower.

Clause 39: Conditions for exercise of powers

56. *Clause 39* sets out when a restraint and a charging order, as provided for in the ensuing clauses, may be made. A restraint

order has the effect of freezing property which may be liable to confiscation following the trial and the making of a confiscation order. A charging order has the effect of giving the Crown an interest in the property. At present, a restraint or charging order may be made by the High Court, but only where proceedings have been instituted or the defendant is to be charged, or an application in respect of further confiscation proceedings has been made or is to be made (for example, for a reconsideration of the defendant's benefit). The Bill makes two fundamental changes to this scheme.

57. Firstly, the venue for restraint and charging orders is changed from the High Court to the Crown Court, in accordance with the general principle in the Bill of the Crown Court as a "one stop shop".

58. Secondly, the point at which a restraint order or a charging order may be made is brought forward in the Bill to any time after an investigation has been started (at present, although both orders may be made at the investigative stage, it is only possible to do so where charges are anticipated).

Clause 40: Restraint orders

59. *Clause 40* explains the nature and effect of a restraint order. It is an order prohibiting a specific person from dealing with any realisable property held by him. Thus it may be made both against the defendant or person under investigation, and any other person holding realisable property. *Subsection (5)* gives the court the power to make such order as it believes is appropriate for the purpose of ensuring that a restraint order is effective. The provision ensures that the Crown Court has general powers available to it such as the residuary powers currently available to the High Court. These will include, for example, the power to order a person to disclose his assets. Failure to comply with the order provided for in *subsection (5)* will fall to be treated as contempt of the Crown Court. *Subsection (6)* reasserts the principle found in existing legislation that a restraint order cannot be made in relation to any property subject to a charging order, including a charging order under any of the earlier confiscation statutes.

Clause 41: Charging orders

60. *Clause 41* reproduces the provision on charging orders in the current legislation, with only minor changes. It specifies the assets that may be made subject to a charging order as being land and various types of securities.

Clause 42: Application, discharge and variation

61. *Clause 42* lays down who may apply for a restraint order or a charging order under the Bill, and sets out criteria like those in the existing legislation for the variation or discharge of such orders. As well as changing the venue for restraint and charging order hearings and the point at which they may be obtained, the Bill provides that application may be made by the prosecutor, the Director and by an accredited financial investigator.

62. The provision for an accredited financial investigator to apply for a restraint or charging order is also new. These investigators will be accredited by the Director in accordance with *clause 3*. They are likely to be employed primarily in force financial investigation units (FIUs) or Customs. In order to ensure that the powers are only used in appropriate cases, applications will require the authority of a police officer of superintendent rank or Customs equivalent.

Clause 43: Appeal to Court of Appeal

63. There is a very general right of appeal against any order of the High Court at section 16 of the Supreme Court Act 1981. At present that applies to restraint and charging orders made by the High Court. The general right of appeal in the 1981 Act does not, however, apply to the Crown Court. Therefore, it has been necessary to create a specific right of appeal in the Bill in relation to restraint and charging orders made (or not made) by the Crown Court.

64. It is important to note that there is no right of appeal against the Crown Court's decision to make an order. The appeal lies only against the Crown Court's decision to vary or discharge an order (or not to vary or discharge it). A person dissatisfied with a restraint or charging order must first apply to the Crown Court for its variation or discharge before any appeal to the Court of Appeal is possible.

Clause 44: Appeal to House of Lords

65. *Clause 44* provides for a decision of the Court of Appeal under *clause 43* to be further appealed to the House of Lords.

Clause 45: Restraint orders: receivers and seizure

66. *Clause 45* follows the current legislation in enabling a management receiver to be appointed where a restraint order has

been made. The role of a management receiver is to manage property to maintain its value until a confiscation order is made. However, in accordance with the principle of the Crown Court as a "one stop shop" for confiscation, the appointment is made by the Crown Court, not the High Court. The Bill makes it clear that a receiver may only be appointed on application to the Crown Court by the person who applied for the restraint order. This is, in fact, what happens at present (albeit in the High Court) but the current legislation is silent on the need for an application.

67. *Clause 45* also allows a constable to seize any property subject to a restraint order to prevent its removal from England and Wales. In the current legislation, realisable property may be seized by a constable to prevent its removal from anywhere in England and Wales or Scotland. The current provision dates back to the Drug Trafficking Offences Act 1986, when there was no confiscation legislation in force in Scotland. This is not now the case and the earlier extent of the provision to Scotland is no longer required.

Clause 46: Orders: supplementary

68. *Clause 46* contains ancillary provision relating both to restraint orders and to charging orders. It re-enacts provision from existing confiscation legislation. The existing provision on restraint orders has the effect that where the prosecutor obtains a restraint order affecting land, an "inhibition" may be placed on the property at the Land Registry preventing its disposal. The existing provision on charging orders is itself based on still earlier legislation in the Charging Orders Act 1979 and is designed to insert charging orders into the existing procedures for registering claims against land.

Clause 47: Confiscation order made: receivers

69. Where a confiscation order has been made and the magistrates' court will be responsible for enforcing it, *clause 47* empowers the Crown Court to appoint a person to act as enforcement receiver to help enforce the confiscation order. This person may be the same as a management receiver appointed under *clause 44* or not, as the case may be. *Clause 47* also sets out the powers that the court can confer on a receiver so appointed (for example, the power to seize and sell property).

70. This is another function transferred from the High Court to the Crown Court, in accordance with the general principle of the Crown Court as a "one stop shop" for confiscation. As in the current legislation, the application for the appointment of a receiver, where the magistrates' court is enforcing the confiscation order, has to be made by the prosecutor. Thus, prosecutors will continue to be involved in confiscation order enforcement.

Clause 48: Application of sums by receiver

71. *Clause 48* applies to a management receiver appointed under *clause 45*, an enforcement receiver appointed under *clause 47* or a receiver appointed in pursuance of a charging order. It specifies how any sums in the hands of these receivers are to be disposed of, whether before or after a confiscation order is made. Where a confiscation order is made, the sums are payable, subject to certain prior payments the Crown Court may order, to the enforcing justices' chief executive.

Clause 49: Sums received by justices' chief executive

72. *Clause 49* sets out how an enforcing justices' chief executive must dispose of any monies received in satisfaction of a confiscation order, whether from a receiver appointed under *clause 47* or otherwise (for example, voluntary payments by a defendant or the proceeds of the chief executive's own enforcement activities). The provision is similar to the current legislation, except that an existing power for the justices' chief executive to reimburse the prosecutor out of confiscated monies for sums the prosecutor has paid to a receiver in advance has been abolished. The money will go to the Consolidated Fund rather than to reimburse the prosecutor. In practice, this is what happens under the current legislation.

Clause 50: Appeal to Court of Appeal

73. This clause enables a person who applies for the appointment of a management receiver under *clause 45* or an enforcement receiver under *clause 47* to appeal to the Court of Appeal against the Crown Court's refusal to order the receiver's appointment. *Clause 50* also enables anybody affected by the Crown Court's decision to appoint a management receiver under *clause 45* or an enforcement receiver under *clause 47*, as well as the person who applied for the receiver to be appointed, to appeal to the Court of Appeal in respect of the order. Provision on appeals in respect of receivership orders made under *clause 53* is to be found at *clause 56*.

Clause 51: Appeal to House of Lords

74. This clause provides for the Court of Appeal's decision under *clause 50* to be further appealed to the House of Lords. It is not possible for new parties to come forward at this stage. Only people who were already party to the proceedings at the Court

of Appeal stage may appeal to the House of Lords.

Clause 52: Seized money

75. *Clause 52* provides the magistrates' court with a new power to order any realisable property in the form of money in a bank account to be paid to the justices' chief executive in satisfaction of a confiscation order. The power is only available where a confiscation order has been made, time to pay has expired, the confiscation order is being enforced by a justices' chief executive (i.e. not by the Director) and the money is subject to a restraint order.

76. The new power provides an alternative to garnishee procedure to enable justices' chief executives to seize money held by the defendant in a bank account. A garnishee order is an order to pay a debt owed to one person (the defendant) to another (the justices' chief executive). It is usually used to seize money of the defendant's in a bank account. A garnishee order can only be made by the civil courts (the High Court or a county court). Unlike garnishee orders, the new order will be made by the magistrates' court.

77. *Clause 52* also enables justices' chief executives to obtain access to money in the form of cash which has been seized from defendants as evidence and subsequently paid into a bank account. Under existing law, the only legal means of getting at the money without the defendant's consent is by having a receiver appointed. *Subsection (6)* enables the magistrates' court to order a bank or building society which fails to comply with one of the new orders to pay a sum of up to £5,000. It also provides that this sum is to be treated as if it were adjudged to be paid by a conviction of the court. The effect of this is that the fine enforcement powers in Part III of the Magistrates' Courts Act 1980 are available to enforce payment of this sum.

Clause 53: Director as enforcement authority: receivers

78. *Clause 53* sets out how the Director will go about enforcing a confiscation order, when appointed as the enforcing authority under *clause 33*.

79. Where the Director is enforcing a confiscation order, the main enforcement tool will be the appointment of a receiver (the Director will also be able to make requests for assistance outside the jurisdiction and have a term of imprisonment in default imposed).

80. *Subsection (2)* requires the Crown Court, in all cases, to make an order authorising the Director to appoint any person as receiver to enforce the confiscation order. Thus, the receiver will be appointed by order of the court but the person actually nominated as the receiver will be at the Director's discretion. *Subsection (5)* enables the Crown Court to confer certain receivership powers (the same as those the Crown Court may confer on a person appointed as receiver under *clause 47*, on the application of the prosecutor) on a person appointed as receiver by the Director. *Subsections (5) and (6)* make it clear that the Crown Court must exercise the powers that these provisions confer at the same time as it makes an order under *subsection (2)* empowering the Director to appoint a receiver.

Clause 54: Application of sums by Director's receiver

81. *Clause 54* is the equivalent, where enforcement by the Director is concerned, of *clause 48* in relation to receivers appointed on the application of the prosecutor. The provision is, with minor modifications, the same as in *clause 48*, except that in this case the sums must be paid to the Director instead of to the justices' chief executive.

Clause 55: Sums received by Director

82. *Clause 55* is the equivalent, where enforcement by the Director is concerned, of *clause 49* in relation to sums received by justices' chief executives. The provision is broadly similar to that in *clause 49*, but there are two significant differences. Firstly, *subsection (4)* requires the Director to reimburse the expenses of any enforcement receiver appointed in the case, but only where the receiver in question is not a member of the Director's own staff.

83. Secondly, the Director must pay the residue of any monies received to the Secretary of State (see *paragraph 6(3) of Schedule 1*), rather than to the Lord Chancellor, as occurs under fine enforcement mechanisms, as applied to confiscation order enforcement. In both cases, however, the eventual destination of the monies will be the Consolidated Fund.

Clause 56: Appeal to the Court of Appeal

84. This clause provides a right of appeal in respect of a receivership order, where the Director is appointed as enforcement authority in a case. This right of appeal is available to both the Director and to any person affected by the order.

Clause 57: Appeal to House of Lords

85. This clause enables any person who was a party to the Court of Appeal proceedings to appeal the Court of Appeal's decision under *clause 56* to the House of Lords: new parties are thus excluded at the House of Lords stage.

Clause 58: Powers of court and receiver

86. *Clause 58* lays down general principles relating to the exercise of their enforcement powers by the Crown Court and receivers. It largely re-enacts the current legislation in that it emphasises, for example, that the satisfaction of a confiscation order takes precedence over any other obligations of the defendant or the recipient of a tainted gift from the defendant.

87. *Subsections (2)(b), (3)(c), (4) and (5)* are new. Where a confiscation order has not yet been made, they require the powers to be exercised with a view to maintaining the value of the amount available for confiscation. This will enable management receivers to dispose of depreciating assets. *Subsection (4)*, however, enables the defendant or the recipient of a tainted gift to challenge the management receiver's decision to dispose of a particular asset on the grounds that the asset in question is irreplaceable. The purpose of the new provision is to enable management receivers, for example, to sell depreciating assets such as cars. The provision on irreplaceable assets has regard to the fact that the defendant has not been convicted at this stage and should not, therefore, be obliged to lose irreplaceable assets. It does not apply to enforcement receivers because at the enforcement stage, any realisable property can be used to satisfy a confiscation order.

Clause 59: Protection of receivers

89. *Clause 59* protects receivers from liability for anything done by them to property which is not realisable property, unless they are negligent. It changes the current legislation in removing an existing provision for receivers to be paid by the prosecutor, if it is not possible for them to be paid out of monies raised in satisfaction of the confiscation order.

Clause 60: Protection of persons affected

90. *Clause 60* enables a receiver appointed under *clauses 45, 47(3) or 53* or in pursuance of a charging order to apply to the Crown Court for directions as to the exercise of his powers. The clause also contains explicit provision for any person affected by any action taken or to be taken by such a receiver to challenge that action in the Crown Court. The person affected may be the defendant, the recipient of a tainted gift from the defendant or some other person.

Clause 61: Appeal to Court of Appeal

91. This clause provides a right of appeal to the Court of Appeal against any order made by the Crown Court under *clause 60*.

Clause 62: Appeal to House of Lords

92. This clause enables any person who was a party to the Court of Appeal proceedings to appeal the Court of Appeal's decision under *clause 61* to the House of Lords: new parties are thus excluded at the House of Lords stage.

Clauses 63-65: Bankruptcy, sequestration and winding-up

93. *Clauses 63-65* contain provision little changed from that in the existing legislation. Their purpose is to explain what is to happen where the same property is liable to be caught both by the confiscation legislation and by the insolvency legislation. The basic rule expressed by *clause 63* is that, if a person has not been adjudged bankrupt at the time that restraint or receivership action is taken under the confiscation legislation, confiscation takes precedence over bankruptcy (regardless of the fact that a person may later be adjudged bankrupt). Thus, a restraint order and a charging order may be made and any property realised goes to satisfy the confiscation order.

94. However, if a person is adjudged bankrupt before action is taken under the confiscation legislation, no property may then be placed under restraint, made the subject of a charge, or realised under the confiscation legislation. The legislation is designed to prevent defendants from attempting to use the insolvency legislation to defeat the purpose of the confiscation legislation.

95. *Clause 64* also follows the existing legislation closely. Its function is very similar to that of *clause 63*, except that it applies to the Scottish bankruptcy legislation (the Bankruptcy (Scotland) Act 1985) rather than the bankruptcy legislation of England and Wales (the Insolvency Act 1986). The reason provision is made for both Acts is that Scottish insolvency proceedings may affect a confiscation order made in England and Wales (and vice versa, where Scottish confiscation orders and English insolvency legislation are concerned).

96. *Clause 65* deals with the situation where a company rather than an individual holds realisable property. Very broadly, if action is taken under the confiscation legislation before a winding up order is made, confiscation takes precedence over insolvency.

Clause 66: Insolvency practitioners

97. *Clause 66* reproduces existing legislation and explains what is to happen when an insolvency practitioner takes action against property subject to a restraint order. The basic thrust of the provision is to protect insolvency practitioners who unwittingly interfere with property subject to a restraint order from liability, except insofar as is caused by their negligence, and to enable such insolvency practitioners to recover their expenses.

Clause 67: Committal by magistrates' court

98. *Clause 67* is to be read in conjunction with *clause 4(2)(c)*. Its effect is that a person may be committed to the Crown Court for confiscation following a conviction of any offence, indictable or summary, in the magistrates' court. Where the prosecutor asks the magistrates' court to do so, the court must commit the defendant to the Crown Court for confiscation. The power to have a person committed for confiscation is granted only to the prosecutor, not to the Director of the Agency. In practice, the prosecutor and the Director may consult in such cases, and the Director may assume responsibility for the subsequent confiscation proceedings in the Crown Court.

99. Where the defendant is convicted of an either way offence, *subsection (5)* requires the magistrates' court to state whether it would have committed the defendant to the Crown Court for sentence anyway. This subsection is required because, under *clause 68*, the Crown Court's sentencing powers following a committal for confiscation are normally limited to the sentencing powers the magistrates' court would have had in the same case.

Clause 68: Sentencing by Crown Court

100. *Clause 68* provides that, where a person is committed to the Crown Court for confiscation, the Crown Court will also assume responsibility for the sentencing process.

Clause 69: Serious default

101. *Clause 69* provides for compensation to be paid to a person whose property has been affected by the enforcement of the confiscation legislation. Compensation is only payable where an investigation is started but proceedings are never brought, or the defendant is not convicted of an offence, or his conviction is quashed, or he is pardoned for it. In all cases, there must have been a serious default on behalf of one or more of the enforcement authorities. The restriction to serious default cases is based on the principle that the restraint and realisation of property is ancillary to a criminal trial in the same way as the detention of a person pending trial. In neither case is compensation paid on acquittal as a matter of course.

103. *Clause 69* is largely based on existing legislation except that it has been extended to cover the situation where an investigation is started but proceedings are never brought. Under the Bill, it will be possible for a restraint or charging order to be made as soon as a criminal investigation has been started (at present, this is only possible where proceedings have been started or are about to be). Therefore, compensation will in future be payable, subject to the current criteria including the serious default test, from the beginning of an investigation, not only where proceedings have been started.

Clause 70: Order varied or discharged

104. *Clause 70* allows compensation to be payable where a person who absconded before trial and against whom a confiscation order was subsequently made secures a variation or discharge of the order by the Crown Court. The provision is not limited to serious default (as in *clause 69*) because it is considered that the court should be able to exercise a more flexible approach in circumstances where a confiscation order has been made without the defendant having been tried.

Clause 71: Enforcement abroad

105. *Clause 71* sets out the conditions under which requests for assistance in the freezing and realisation of property may be made by authorities in England and Wales to other jurisdictions outside the United Kingdom. Although requests of this nature have been made for many years, the current primary legislation is largely silent as to the respective roles and powers of the various authorities involved. The Bill places outgoing requests on a fully statutory footing. It is important to note that *clause 71* applies only to requests relating to Part II of the Bill. Requests for assistance with civil recovery actions are not covered by the clause.

106. All outgoing requests must be made either by the prosecutor or by the Director, and may only be made with the authority of the Secretary of State. In practice, this means that all outgoing requests must pass through the United Kingdom Central Authority for mutual assistance in criminal matters in the Home Office. Requests may be made for a prohibition on dealing with property or additionally, where a confiscation order has been made, the realisation of property. It will be noted that under *subsection (1)(a)*, a request may be made where any of the conditions in *clause 39* is satisfied. This will enable the prosecutor or the Director to request an asset freeze abroad before any restraint or charging order has yet been made in England and Wales, as long as the conditions for making one are satisfied.

Clause 72: Criminal lifestyle

107. *Clause 72* is to be read in conjunction with *clause 4*. As explained in the note on *clause 4*, the question of whether a person has a criminal lifestyle is crucial to the operation of the Bill, because it determines whether the defendant is subject to the confiscation of benefit from "particular criminal conduct" or the more far reaching scheme for the confiscation of the benefit from "general criminal conduct". *Clause 72* sets out the criteria which govern whether a person has a criminal lifestyle or not.

108. Under the current legislation, drug trafficking is always to be regarded as a criminal lifestyle offence. A conviction of any drug trafficking offence triggers an examination of all the defendant's past drug trafficking and the mandatory application of the assumptions. All drug trafficking offences and money laundering offences are treated by the Bill as conclusive of a criminal lifestyle. The Bill thus adds money laundering to the offences which are always to be regarded as conclusive of a criminal lifestyle. *Subsection (2)(c)* enables the Secretary of State to specify by Regulations other offences which are always criminal lifestyle offences. Such offences might include, for example, arms trafficking or trafficking in human beings.

109. *Subsection (2)(d)* provides that a defendant has a criminal lifestyle if the defendant has been convicted in the current proceedings of four or more acquisitive offences, or has been convicted in the current proceedings of one acquisitive offence and has other convictions for acquisitive offences on at least two separate occasions in the last six years.

110. The provision is similar to that in the current non-drug legislation, where an enquiry may be launched into benefit from a person's entire past criminal conduct (other than drug trafficking) where the person is convicted of two or more acquisitive offences in the current proceedings or one in the current proceedings, and one in the last six years.

111. *Subsection (2)(e)* provides that a defendant has a criminal lifestyle if the defendant is convicted of any acquisitive offence, and the offence in question lasted for six months or more, for example, a conspiracy. It will thus be possible under the Bill to confiscate the benefit from a defendant's entire past criminal conduct where a person is convicted of one offence of any nature. Unless the offence in question is a drug trafficking or money laundering offence, however, the offence in question will have to have been carried out over a period of six months or more.

Clause 73: Conduct and benefit

112. *Clause 73* defines criminal conduct as any conduct constituting an offence in England and Wales or (if it took place abroad) would constitute an offence there. The restriction of the scope of the legislation under existing legislation to drug trafficking, other indictable offences and specified summary offences is thus abolished. Under the Bill, the Crown Court which makes a confiscation order will need to consider conduct solely by reference to the law of England and Wales. *Clause 73* also defines "general criminal conduct" and "particular criminal conduct" (for which, see the note on *clause 4*).

113. *Clause 73* also provides that a person benefits from criminal conduct if he obtains property as a result of or in connection with the conduct. This unites in one new provision two similar but not identical definitions in the existing drug trafficking and all crime statutes. Under the drug trafficking legislation a person benefits from drug trafficking if he receives any payment or reward in connection with drug trafficking carried on by him or another person. Under the all crime legislation, a person benefits from an offence if he obtains any property as a result of or in connection with its commission.

Clauses 74 and 75: Tainted gifts; gifts and their recipients

114. The existing legislation enables gifts by the defendant to other persons to be recovered in satisfaction of the confiscation order, and makes ancillary provision (for example, to enable assets of the recipient of a gift to be placed under restraint). Under the existing legislation, a tainted gift is described as a "gift caught by the Act". *Clause 74* reappraises and aligns the two different tainted gift schemes currently found in the drug and non-drug legislation. The new scheme provides that, where the court has decided that the defendant has a criminal lifestyle, any gift from the defendant to any person in the six years before the commencement of proceedings is caught, together with any gift at any time out of the proceeds of crime. This definition would apply both at the confiscation hearing and for the purposes of enforcement. However, if the court decides that the defendant does not have a criminal lifestyle, only gifts made since the earliest of the offences committed are caught. Again, this

would apply at the confiscation hearing and for the purposes of enforcement.

115. However, in relation to a time before the court has decided whether the defendant has a criminal lifestyle, for example, at a restraint hearing, the wider "general criminal conduct" definition applies. When making a restraint order, the court must exercise its discretion as to how much property to restrain by reference to the size of the confiscation order that may eventually be made. So, although a court could technically apply the wider "general criminal conduct" definition of gifts at the restraint stage, if it is clear at that time that the defendant does not have a criminal lifestyle and that therefore the narrower definition will apply at the confiscation hearing, the court would have to take this into account when making the restraint order.

Clauses 76-78: Value: the basic rule; value of property obtained from conduct; value of tainted gifts

116. *Clauses 76-78* set out how the court is to work out the value of property held by a person, the value of property, and the value of a tainted gift. These clauses broadly reproduce the property valuation principles set out in the existing legislation.

Clauses 79-81: Free property; realisable property; property: general provisions

117. These definitional clauses, amongst other things, introduce the new concept of free property as any realisable property which is not subject to certain kinds of forfeiture and deprivation orders. The underlying principle is that property already subject to one of these orders made in earlier proceedings should not be added to the amount available for confiscation because it is already accounted for. *Clause 81* contains a very wide definition of property.

Clauses 82-84: Proceedings; applications; confiscation orders

118. *Clauses 82-84* define when proceedings are started, when proceedings and applications are concluded, and when confiscation orders are satisfied. The definitions are particularly important in that they determine the earliest and latest points at which a restraint or charging order may be made. The provisions in *clause 82* have been extensively reworked when compared with those in existing legislation to take account of the new right of appeal (in *clauses 30-32*) for the prosecutor and the Director. The purpose of the new provision is to ensure that proceedings are not concluded where the prosecutor or Director appeals against the Crown Court's decision, and thus to ensure that a restraint or charging order may be made where such an appeal is lodged, and that any restraint or charging order already made in the case does not have to be discharged.

Clause 85: Drug trafficking offences

119. The definition of a drug trafficking offence in this clause is required because any conviction of a drug trafficking offence is conclusive, under the Bill, of the fact that the defendant has a criminal lifestyle. As explained above, where the defendant has a criminal lifestyle, the case is a "general criminal conduct" case. The court must calculate the benefit from all the defendant's past criminal conduct and in so doing must make the assumptions provided for in *clause 9*.

120. The definition in *clause 85* replaces that currently found in section 1 of the Drug Trafficking Act 1994, but there are two important differences between the two. Firstly, the offence of allowing premises to be used for drug related activities (section 8 of the Misuse of Drugs Act 1971) is regarded as having the characteristics of a drug trafficking offence and so has been added to the list. Secondly, drug money laundering offences have been removed from the list, because, under the money laundering provisions of the Bill, the current separate drug and other crime money laundering offences are being abolished and replaced with new money laundering offences applicable to the proceeds of all criminal conduct. The handling of money laundering offences for confiscation purposes is discussed further in the note on *clause 86*.

Clause 86: Money laundering offences

121. Under *clause 86*, the three new principal all crime money laundering offences created by the Bill are all defined as money laundering offences, as are the so called "inchoate" offences of conspiracy etc to launder. All these money laundering offences are conclusive, under the Bill, of a criminal lifestyle and a conviction of any one or more of them will thus trigger an examination of the defendant's benefit from general criminal conduct.

Clause 87: Other interpretative provisions

122. The definition of an investigation in *subsection (3)* is required because the power to make a restraint or charging order is brought forward, by *clause 39(2)*, to the beginning of an investigation.

Clause 88: Procedure on appeal to the Court of Appeal

123. *Clause 88* establishes the general rules which will apply to any appeal to the Court of Appeal under Part II of the Bill.

The first principle is that the Court of Appeal's leave to appeal is required. The second principle is that the appeal lies (subject to anything in rules of court under *section 53(1)* of the Supreme Court Act 1981) to the criminal division of the Court of Appeal.

124. Three kinds of appeal are caught, the prosecutor's or Director's appeal against the Crown Court's decision to make or not to make a confiscation order, appeals in connection with restraint and charging orders and appeals in connection with receivership orders.

125. *Clause 88* also enables the Secretary of State to make an order in relation to appeals to the Court of Appeal under this Part containing provision corresponding to any provisions of the Criminal Appeal Act 1968. An order of this kind will cover routine matters such as the procedures for obtaining leave to appeal and transcripts.

Clause 89: Procedure on appeal to the House of Lords

126. *Clause 89* establishes the general rules which will apply to any appeal to the House of Lords under Part II of the Bill. Like *clause 88*, *clause 89* enables the Secretary of State to make an order in relation to appeals to the House of Lords under this Part containing provision corresponding to any provisions of the Criminal Appeal Act 1968. An order of this kind will cover matters such as those mentioned above.

Clause 90: Crown Court Rules

127. Restraint, charging and receivership are High Court civil law functions so the applicable Rules of Court are currently found in the Civil Procedure Rules. *Clause 90* puts it beyond doubt that this territory may in future be dealt with in Crown Court Rules.

CRIMINAL CONFISCATION - CLAUSES

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III

SCOTLAND

Introduction

3.1 In extending and strengthening the provisions on criminal confiscation and in introducing a scheme of civil recovery and new powers on taxation, it is essential that there continue to be broadly similar provisions throughout the United Kingdom. At the same time, any new legislation must fully reflect the significant differences in Scots law and procedure and in the institutions of justice in Scotland.

3.2 Some of the subject matter covered by the proposed Bill is reserved while other areas are devolved. To enact separate Bills at Westminster and in the Scottish Parliament for different aspects of the proceeds of crime could undermine the essential rationale for coherent, consolidated legislation in this area, would create less effective legislation for practitioners, and could create confusion and undesirable loopholes. Subject to the agreement of the Scottish Parliament, the Scottish Ministers therefore propose that Scottish interests should be covered in a United Kingdom Bill at Westminster. Under the Sewel Convention, Westminster will not normally legislate on devolved matters without the consent of the Scottish Parliament. A motion to allow Westminster to legislate on those aspects of the Bill which are devolved will therefore be brought before the Scottish Parliament for debate in due course.

Criminal Confiscation

Principal Reforms

3.3 The aim is to strengthen the existing powers of criminal confiscation and align them on an all-crimes basis, thereby removing various loopholes which currently can be exploited. It is proposed to achieve this by replacing the existing provisions of the Proceeds of Crime (Scotland) Act 1995 with new free-standing Scottish provisions on criminal confiscation in the Proceeds of Crime Bill. Many of the detailed procedural provisions (see draft clauses and explanatory notes below) replicate those set out in the 1995 Act. The main substantive changes proposed are as follows.

3.4 It is proposed to mirror the provisions for England and Wales, set out in Part II, in terms of criminal lifestyle and assumptions. However, the courts in Scotland will continue to have a discretion whether or not to impose a confiscation order where the various tests are met.

3.5 The accused will, as at present, have a right of appeal against both the imposition of a confiscation order and the amount of the order. These provisions are contained in the Criminal Procedure (Scotland) Act 1995. It is proposed that the Bill will also provide a new right of appeal for the Crown against a decision of the court not to impose an order or against the amount of an order.

3.6 Under the present provisions, restraint orders, freezing the assets in question pending a criminal trial, can only be granted by the court within 28 days before proceedings are instituted against the accused. That can often give those involved ample time to dispose of their assets. Under the Bill, the intention is therefore to make restraint orders available from the commencement of the investigation.

3.7 At present there are no provisions in Scotland to cover cases where an accused person absconds, either before he is convicted or after he is convicted but before a confiscation order can be made. The Government proposes to bring Scotland into line with England and Wales in this respect so that the court in which the criminal prosecution has been brought can make a confiscation order in such circumstances. The clauses (109 - 112 below) will contain various safeguards, including provision for cases in which a confiscation order has been made against an accused person who absconds but who later returns and is subsequently acquitted.

3.8 In England and Wales, enforcement of confiscation orders will in some cases fall to the new Criminal Assets Recovery Agency. However, the existing arrangements in Scotland, whereby confiscation orders are enforced by the sheriff clerk in much the same way as fines, work well. It is therefore proposed that they be retained, subject to tightening up on the provisions on time to pay.

3.9 Compensation will be paid to an accused person where there has been serious default on the part of the police or the

prosecution authorities. The Bill will make such compensation available to the accused from the start of an investigation (as compared to when proceedings have been instituted as at present), reflecting the proposal, discussed above (paragraph 3.6), to allow restraint orders to be available from the start of an investigation.

3.10 Finally, it is proposed that the Bill make provision for a simpler and more effective scheme of cross border enforcement of confiscation orders throughout the United Kingdom and also for the reciprocal handling and enforcement of overseas orders.

3.11 Responsibility for investigating and pursuing confiscation of assets in criminal cases in Scotland will continue to rest with the Lord Advocate as part of his wider responsibility for the investigation and prosecution of crime. The Criminal Confiscation Unit of the Crown Office will be strengthened, for example by seconding in police and customs officers.

3.12 The core clauses on criminal confiscation, together with short explanatory notes, are set out below.

Civil Recovery

3.13 The aim of civil recovery is to recover the proceeds of crime from individuals who cannot be prosecuted or convicted, for example as a result of witness intimidation or because they remain remote from the criminal activity itself but benefit, often very considerably, from its profits. It is proposed that the Bill should make provisions for a scheme of civil recovery in Scotland, similar in principle to that outlined for England and Wales in V but with the detailed procedure being aligned to existing Scots civil law and procedure. Indeed, much of the procedure will follow normal petition procedure in the Court of Session.

3.14 It is proposed that the Bill would set out a new statutory property right, providing that title to any property which derives, in whole or in part, from the proceeds of criminal conduct should vest in Scottish Ministers. The proposed procedure for securing the Scottish Ministers' title to such property considered to be the proceeds of crime would then be

· Scottish Ministers may make an *ex parte* application to the Court of Session, without any notice to respondents at that stage, on the basis of *probabilis causa* and the balance of convenience, that the property specified in the application was the proceeds of crime. The identity of persons appearing to be in possession or control of the property, and of persons otherwise appearing to have an interest in the property, would be set out in a petition to the Court.

· On considering such an application, the Court of Session could make an 'interim order' which would 'freeze' the specified property, in other words it would provide for the inhibition of heritable property and the arrestment of moveable property. The order would also appoint an interim administrator with a range of powers to gather, protect and manage the property in question. The interim administrator would be an officer of the court.

· The interim order would be served on the respondent and on any other person(s) who appeared to be in possession or control of the property or appeared to have an interest in it. Seizure of the property would rest with the administrator. Thereafter normal petition procedure would apply in terms of lodging answers etc. Objection could be made to the application in the form of written answers to the petition.

· The procedure would allow for a range of further applications to the Court of Session to vary or recall the 'interim order', including *ex parte* applications by the Scottish Ministers to extend it to other property.

· Where answers to the petition were lodged, there would be a hearing of the merits of the case before the Court of Session, with provision for persons appearing to have an interest in the property to enter the proceedings in the normal way. The onus would be on the Scottish Ministers to show on the balance of probabilities - the normal standard of civil proof - that the property in question was the proceeds of criminal conduct.

· The Court of Session would reach its decision on the basis of the balance of probabilities. The Court may draw such inferences as it thinks fit from a respondent's failure to provide evidence of the honest origins of property.

· If the Court found in favour of the Scottish Ministers, it would make a final order vesting the property in the Scottish Ministers. The administrator would then liquidate the assets, pay protected third parties and submit the remainder to the Scottish Ministers.

· Where the Court found against the Scottish Ministers, it would direct the immediate discharge of the interim order and could require them to pay compensation to any person affected by the interim order for any loss incurred as a result of the making of that order.

There would be a right of appeal for all parties to the Inner House of the Court of Session and subsequently to the House of Lords.

3.15 Action for civil recovery would be possible against any person in possession or control of the proceeds of crime, whether or not they are suspected of criminal conduct. The Bill will, however, contain provisions to protect the rights and interests of innocent third parties and the court will have considerable discretion in this regard.

3.16 The pursuit of the Scottish Ministers' interests in the civil recovery of the proceeds of criminal conduct will be undertaken by officials of a new Civil Recovery Unit responsible to Ministers. It is also proposed that the five investigatory powers outlined at paragraph 3.18 below would be available for the purpose of considering whether to seek a civil recovery order in the Court of Session.

3.17 Draft clauses to provide for the scheme outlined above are currently being prepared. The Government considers that the proposals are firmly based on existing Scots civil law and procedure and will be effective in targeting the proceeds of criminal conduct. Civil recovery will only be used where the Crown decides that a criminal prosecution is not feasible.

Investigatory Powers

3.18 In order to tackle the often sophisticated methods used by criminals to hide the proceeds of their crimes, the existing powers of financial investigation to track and uncover such proceeds need to be strengthened. Thus, in addition to the existing provisions which enable the Crown to apply to the court for production orders and search warrants, it is proposed that the Bill will provide for 3 new investigatory powers to facilitate more effective investigation into the proceeds of crime. These are

- a compulsory disclosure order

- a customer information order

- a monitoring order.

3.19 Fuller details of these orders are set out in VII. In each case, in Scotland an application would need to be made to the court - normally this would be the relevant sheriff court - for a specific order, thus safeguarding against oppressive use.

Money laundering and Taxation

3.20 The current money laundering provisions are contained in a number of pieces of legislation: the Criminal Justice Act 1988, the Criminal Justice (International Co-operation) Act 1990, the Drug Trafficking Act 1994, and the Criminal Law (Consolidation) (Scotland) Act 1995. Since the substantive law on money laundering the proceeds of drug trafficking is reserved, it is proposed to consolidate and reform the provisions on money laundering on a United Kingdom basis, as set out in VIII. These reforms will represent a significant improvement on the current legislation, which is little used in Scotland.

3.21 Taxation law applies throughout the United Kingdom and is a wholly reserved matter. The new powers being delegated by the Inland Revenue Board to the Director in England and Wales, including the power to tax unsourced income where it can be shown to be the proceeds of criminal conduct, will also extend to Scotland. The details are set out in VI. Consideration is being given to which would be the most appropriate authority to exercise such delegated powers in Scotland.

SCOTLAND - EXPLANATORY NOTES

Clause 91: Making of order

1. *Clause 91* provides that a confiscation order under the Bill is an order on an accused person convicted of a criminal offence or offences to pay a sum of money representing the accused person's benefit from crime. The fundamental approach of the Bill, therefore, reflects that adopted by the existing legislation. However, under the existing legislation, confiscation orders can only be imposed following conviction on indictment or for offences on summary complaint if the offence is punishable by a fine of an amount greater than level 5 on the standard scale or by imprisonment for more than 3 months or both. *Clause 91* extends this to cover all summary offences. Confiscation orders will be made by the High Court or the sheriff court; the courts will continue to have a discretion on whether to impose a confiscation order in a particular case and as to how much to confiscate.

2. *Clause 91* also makes it clear that the Bill contains two different confiscation regimes, only one of which may be applied in any particular case. One enables the confiscation of an accused's benefit from "general criminal conduct", the other the confiscation of an accused's benefit from "particular criminal conduct". General criminal conduct means any criminal conduct of the accused and it does not matter when that criminal conduct occurred (see *clause 139*). Particular criminal conduct means

the offences of which the accused has been convicted in the current proceedings (again, see *clause 139*). General criminal conduct includes particular criminal conduct.

3. The "general criminal conduct" regime is to be applied where the accused is identified by the court on conviction as having a criminal lifestyle. This is determined solely by the nature of the offence or offences of which the accused has been convicted in the current proceedings, or certain previous proceedings. The offences in question are specified later in *clause 138*. The "particular criminal conduct" regime is to be applied in all other cases.

Clause 92: Time for making order

4. *Clause 92* makes it clear that where the court decides to make a confiscation order, it should do so before imposing a fine on the accused or any other order involving payment. This is, however, subject to the postponement provisions in *clauses 98* and *99* which enable the court to postpone making a confiscation order and sentence the accused first.

Clause 93: Recoverable amount

5. *Clause 93* specifies how the maximum amount which the court may order to be confiscated ("the recoverable amount") is to be calculated. The method of calculation is the same as in the existing confiscation statutes. The recoverable amount is the amount of the accused's benefit from either general criminal conduct or particular criminal conduct (as the case may be), except where the amount available for confiscation is considered by the court and is found by the court to be less than the benefit, in which case the recoverable amount is that lesser amount. The amount available for confiscation is described as the available amount (equivalent to the term "the amount that might be realised" in the current legislation) and the maximum amount which may be ordered to be confiscated as the recoverable amount (equivalent to "the amount to be recovered" in the current legislation).

Clause 94: Accused's benefit

6. This Clause stipulates what the court must take into account when deciding whether the accused has benefited from criminal conduct and what the value of that benefit is. *Subsection (3)* requires any amount ordered to be paid under a previous confiscation order (whether one made under the Bill or the previous confiscation statutes) to be deducted from the amount of the accused's assessed benefit from "general criminal conduct". This is to avoid confiscating the same benefit twice. The provision is not required for particular criminal conduct because the same offences cannot be subject to a second conviction and therefore there is no risk of confiscating the same benefit from particular criminal conduct twice.

Clause 95: Available amount

7. *Clause 95* explains how the available amount is to be calculated. It is calculated in the same way as "the amount that might be realised" in the current legislation. In broad terms, the available amount is equal to the value of all the defendant's free property plus the value of all tainted gifts made by him. "Free property" and "tainted gifts" are defined at *clauses 140* and *144*.

Clause 96: Assumptions as to benefit from criminal conduct

8. *Clause 96* applies where the court has decided that the accused has a criminal lifestyle and it is, accordingly, considering the accused's benefit from general criminal conduct. The clause enables the court to make certain specified assumptions to establish whether the accused has benefited from general criminal conduct, and, if so, by how much, unless the assumption is shown, on the balance of probabilities, to be incorrect. The current legislation provides for similar assumptions to be made. Where the court does not make one or more of the assumptions for any reason, it must nevertheless continue to decide whether the accused has benefited from general criminal conduct and decide the recoverable amount, albeit without the assistance of the assumptions.

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

9. *Clause 97* requires the court to have regard to the confiscation order before imposing a fine or other order for payment or forfeiture on the accused, except for a compensation order which is to be paid out of any sums recovered under a confiscation order. Otherwise the court is not to be restricted in dealing with an accused simply because it has imposed a confiscation order. It reproduces the effect of existing legislation.

Clause 98: Postponement

10. *Clause 98* enables the court to postpone the confiscation proceedings on one or more occasions for up to a total of two years from the accused's conviction, or three months from the date on which any appeal against conviction is disposed of, if the

three months ends more than two years after the date of conviction. There is no limit to the period of postponement, however, where there are exceptional circumstances. The provision extends the period of postponement permitted under the current legislation, which is normally only up to six months.

11. The new provision in *clause 98* enables proceedings to be postponed for any reason, for example, because a judge is ill. Under current legislation, a postponement can only be made so that the court can obtain further information about the accused's benefit or the realisable property.

Clause 99: Effect of postponement

12. *Clause 99* makes it clear that, as under current legislation, the court may sentence the accused at any time during the period of postponement. The purpose of the provision is to avoid the sentence being delayed while confiscation is considered. The court is not allowed to impose a fine or an order set out in *clause 97(3)* (such as a forfeiture order) when it sentences the accused in the postponement period because it needs to know the amount of the confiscation order before it does this.

Clause 100: Statement of information

13. *Clause 100* provides that the prosecutor must give the court a statement of information detailing the accused's benefit from criminal conduct within a period specified by the court. This will include information on whether or not the prosecutor considers that the accused has a criminal lifestyle.

Clause 101: Accused's response to statement of information

14. The statement of information procedure is designed to prove a quick and effective method of identifying the extent of the accused's benefit where there is agreement between the accused and the prosecutor, and of identifying areas of dispute where there is not. Where the prosecutor serves a statement of information on the accused (as will normally happen), the court may require the accused to respond separately to every allegation in the statement, and to indicate to what extent each allegation is accepted. Where an allegation is accepted by the accused, the acceptance is conclusive as far as any matters to which it relates is concerned.

15. Where an allegation is challenged, the accused must provide full details of any matters relied on. The purpose of the procedure is to identify areas of dispute for the confiscation hearing, where evidence may be brought in relation to the disputed points by the prosecutor or the accused. Under *subsection (4)*, if the accused fails to respond to an allegation, the accused may be treated as having accepted every allegation in the statement. However, the accused is not to be treated as accepting any allegation that he has a criminal lifestyle or has benefited from general or particular criminal conduct because it is not thought appropriate that the accused's silence should be conclusive of these matters.

16. *Subsection (8)* provides that, where the accused accepts an allegation that he has benefited from conduct, the acceptance is not admissible in any proceedings for an offence. The exemption is intended to encourage accused persons, who may otherwise be reluctant to admit benefit from criminal conduct which has not been the subject of a prosecution, to be more forthcoming by preventing the admissions made from being used in a future prosecution against them or anybody else.

Clause 102: Provision of information by accused

17. *Clause 102* empowers the court, at any stage in the confiscation procedures, to order the accused to provide any information it needs to enable it to carry out its confiscation functions. Where the accused fails to comply with the court's order without reasonable excuse, the court may draw any inference it thinks appropriate. The court might use the provision where, for example, the accused has proposed to rely on certain matters in responding to the statement of information, and the court considers that it requires more information from the accused in deciding the point at issue. The provision reproduces, with minimal changes, that in the current legislation.

Clauses 103-105: Reconsideration

18. *Clauses 103-105* enable a confiscation order to be made where none was made in the original proceedings, and a confiscation order, once made, to be increased. Application must be made to the court in which the original hearings took place within six years of the original conviction. *Clause 103* applies where no confiscation hearing was held after the original conviction; *clause 104* applies where a hearing was held, the court decided that the accused had, or did not have a criminal lifestyle, and then went on to decide that the accused had not benefited from any criminal conduct; *clause 105* applies where a

confiscation order has already been made and may be used to increase a confiscation order on one or more occasions where new evidence as to the accused's benefit comes to light. The clauses reproduce, with some changes, provision in the current

legislation. The principle underlying *clauses 104 and 105* is that the prosecutor should only apply for a reconsideration where new evidence comes to light. It is not appropriate for the prosecutor to have evidence at the time of the original proceedings, not to apply for a confiscation order on that occasion but to apply for a reconsideration at a later date.

Clause 106: Order made: reconsideration of available amount

19. *Clause 106* applies where the court made a confiscation order for an amount lower than the accused's assessed benefit because there was insufficient realisable property to satisfy an order in the full amount of the benefit. The prosecutor may apply to the court for the court to recalculate the available amount. Any number of applications may be made and there is no limitation to six years from conviction (in contrast to *clauses 103 to 105*). If the court calculates that the available amount has increased, it may vary the level of the confiscation order but may not increase it beyond the defendant's assessed benefit. *Subsection (4)* is additional to the existing legislation. It requires the court to have regard to any fine or order as set out in *clause 97(3)* imposed on the accused following the original conviction.

Clause 107: Inadequacy of realisable property

20. *Clause 107* enables the prosecutor, the accused or an administrator appointed in the case to apply to the court for a variation in or discharge of a confiscation order where the court is satisfied that the realisable property is inadequate to meet the order.

Clause 108: Information

21. *Clause 108* contains provision ancillary to *clauses 103 to 105*. Its purpose is to make it clear that *clauses 100-102* on statements of information and the provision of information by the accused apply to reconsideration proceedings as they apply to confiscation proceedings immediately following a conviction.

Clauses 109 -112: Accused absconds

22. These clauses deal with confiscation orders against absconders. There are no provisions relating to absconders in existing Scottish legislation. These are new provisions. The Bill empowers the court to make a confiscation order against an absconder who has been convicted of an offence or against whom proceedings have been instituted.

23. *Clause 109* deals with the situation where an accused person has been convicted and then absconds. The prosecutor may ask the court for a confiscation order to be made against the accused. *Subsection (3)(e)* provides that none of the reconsideration *clauses 103 - 105* apply where a person is still an absconder post conviction and thus that they do all apply where a convicted absconder returns

24. *Clause 110* deals with absconders who abscond prior to conviction. A confiscation order may only be made against an absconder against whom proceedings have been instituted, and if two years have elapsed from the time the accused absconded. *Subsections (3)(e) and (6)-(7)* set out the position with regard to reconsiderations under *clauses 103 -105*. No reconsideration under those clauses is possible while the accused remains an absconder. However, when the absconder returns, all three clauses apply.

25. *Clause 111* provides that where an unconvicted accused absconds and has a confiscation order made against him, but later ceases to be an absconder, he may apply to the court to have the order varied. Where such an absconder returns and is subsequently acquitted, *clause 112* provides that he can apply to the court to have the confiscation order discharged and the court must do so.

Clause 113: Appeal by prosecutor

26. *Clause 113* gives the prosecutor a clear power to appeal against any decision of the court not to make a confiscation order and also against any confiscation order where it considers that the amount required to be paid is unduly low.

Clause 114: Time for payment

27. At present, there is no limit on the time that may be allowed an accused to pay a confiscation order. *Clause 114* provides that a confiscation order is to be paid immediately, unless the accused can demonstrate to the court that he needs more time to pay. If the court is satisfied that it is required, the court may allow up to six months time to pay, and up to a further six months on a later occasion if there are exceptional reasons justifying the extension.

Clause 115: Interest on unpaid sums

28. *Clause 115* makes it clear that the accused must pay interest on a confiscation order which is not paid in full by the time allowed.

Clause 116: Application of provisions about fine enforcement

29. *Clause 115* provides that the sums ordered to be paid under a confiscation order shall be enforced in the same way as fines, that is under the procedure set out in the Criminal Procedure (Scotland) Act 1995. Enforcement will continue to be carried out by the sheriff clerk. *Clause 116* also contains general provision on imprisonment in default of a confiscation order. The provision reflects that in existing legislation and provides, in particular, that a term of imprisonment in default of a confiscation order must be served consecutively to the substantive term imposed for the offence(s).

Clauses 117 - 123 deal with restraint orders

Clause 117: Conditions for exercise of powers

30. *Clause 117* sets out when a restraint order, as provided for in the ensuing clauses, may be made by the Court of Session or sheriff court (civil). A restraint order has the effect of freezing property which may be liable to confiscation following the trial and the making of a confiscation order. At present, the earliest time when a restraint may be made by the court is within 28 days before proceedings are instituted, or an application in respect of further confiscation proceedings has been made or is to be made (for example, for a reconsideration of the accused's benefit).

31. The Bill maintains the present position on restraint orders with one change. The point at which a restraint order may be made is brought forward to any time after a criminal investigation has been instituted. The change is likely to be of particular assistance in cases where the investigative process involves questioning the suspect (as often occurs, for example, in fraud cases) and the suspect is, accordingly, alerted to the risk that the authorities may be thinking of applying for a restraint order.

Clause 118: Restraint orders etc.

32. *Clause 118* explains the nature and effect of a restraint order. It is an order interdicting a specific person from dealing with any realisable property held by him. Thus it may be made both against the accused or person under investigation, and any other person holding realisable property. An order may make provision for reasonable living and legal expenses.

Clause 119: Application, recall and variation

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

Clause 120: Appeals

34. *Clause 120* provides the prosecutor with a right of appeal against a court's decision not to make a restraint order, and the prosecutor or any person having an interest in the order a right of appeal against the court's decision to vary or recall an order (or not to vary or recall it).

Clauses 121 and 122: Inhibition of property affected by order; arrestment of property affected by order

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

Clause 123: Restraint orders: administrators and seizure

36. *Clause 123* follows the current legislation in enabling an administrator to be appointed by the court where a restraint order has been made. The role of an administrator is to manage property to maintain its value until a confiscation order is made. *Clause 123* also allows a constable to seize any property subject to a restraint order to prevent its removal from Scotland.

Clause 124: Confiscation order made: administrators

37. Where a confiscation order has been made, *clause 124* empowers the court, on the application of the prosecutor, to appoint an administrator to help enforce the confiscation order. This person may be the same as the administrator appointed under *clause 123* or not, as the case may be. *Clause 124* also sets out the powers that the court can confer on an administrator so appointed (for example, the power to seize and sell property).

Clause 125: Application of sums by administrator

38. *Clause 125* specifies how any sums in the hands of an administrator are to be disposed of. Where a confiscation order is made, the sums are payable, subject to certain prior payments, to the clerk of court.

Clause 126: Sums received by clerk of court

39. *Clause 126* sets out how the clerk of court must dispose of any monies received in satisfaction of a confiscation order, whether from an administrator appointed under *clause 124* or otherwise (for example, voluntary payments by an accused). An administrator's remuneration and expenses will normally be paid out of the sums raised by the confiscation order.

Clause 127: Powers of court and administrator

40. *Clause 127* is an overarching clause which lays down general principles relating to the exercise of their enforcement powers by the court and administrators. It largely re-enacts the current legislation in that it emphasises, for example, that the satisfaction of a confiscation order takes precedence over any other obligations of the accused or the recipient of a tainted gift from the accused.

41. *Subsections (2)(b), (3)(c), (4) and (5)* are new. Where a confiscation order has not yet been made, they require the powers to be exercised with a view to maintaining the value of the amount available for confiscation. This will enable administrators to dispose of depreciating assets. *Subsection (4)*, however, enables the accused to challenge the administrator's decision to dispose of a particular asset on the grounds that the asset in question is irreplaceable. The purpose of the new provision is to enable administrators for example to sell depreciating assets such as cars. The provision on irreplaceable assets has regard to the fact that the accused has not been convicted at this stage and should not, therefore, be obliged to lose irreplaceable assets. It does not apply to administrators at the enforcement stage, since any realisable property can then be used to satisfy a confiscation order.

Clause 128: Protection of administrators

42. *Clause 128* protects administrators from liability for anything done by them to property which is not realisable property, unless they are negligent. The clause also provides that where a confiscation order is not made, or where the sums available from such an order are insufficient, the administrator will be reimbursed by the Lord Advocate.

Clause 129: Protection of persons affected

43. *Clause 129* contains explicit provision for any person affected by any action taken or to be taken by an administrator to challenge that action in court and the court may then make such an order as it thinks appropriate. The person affected may be the accused, the recipient of a tainted gift from the accused or some other person.

Clause 130: Administrators: further provision

44. *Clause 130* introduces *Schedule 2* to the Bill which makes further detailed provision on the appointment, functions etc of an administrator.

Clauses 131 - 133: Bankruptcy, sequestration and winding-up

45. *Clauses 131 -133* contain provision little changed from that in the existing legislation. Their purpose is to explain what is to happen where the same property is liable to be caught both by the confiscation legislation and by the insolvency legislation. The basic rule expressed by *clause 131* is that, if a person's estate is sequestrated at a time when restraint action is in force under the confiscation legislation, confiscation takes precedence over sequestration. Thus, a restraint order may be made and any property realised goes to satisfy the confiscation order. The legislation is designed to prevent accused persons from attempting to use the insolvency legislation to defeat the purpose of the confiscation legislation.

46. However, if an award of sequestration has been made before action is taken under the confiscation legislation, no property forming part of the debtor's estate may then be placed under restraint or realised under the confiscation legislation. This protects the creditors of the person who is being sequestrated from loss of expected dividend.

47. *Clause 132* also follows the existing legislation closely. Its function is very similar to that of *clause 131*, except that it applies in cases where an accused is subject to the bankruptcy legislation of England and Wales (the Insolvency Act 1986) rather than Scottish sequestration legislation (the Bankruptcy (Scotland) Act 1985). The reason provision is made for both Acts is to cater for the possibility that an accused in Scotland is subject to bankruptcy legislation in England and Wales and such bankruptcy proceedings may affect a confiscation order made in Scotland.

48. *Clause 133* deals with the situation where a company rather than an individual holds realisable property. Very broadly, if action is taken under the confiscation legislation before a winding up order is made, confiscation takes precedence over insolvency.

Clause 134: Floating charge

49. Scottish companies and industrial and provident societies can grant floating charges. These rights in security do not attach to any particular property of the company or society but float over all its property. *Clause 134* treats realisable property which is subject to a floating charge in a similar manner to property in *clauses 131 - 133*. If an action under the confiscation legislation precedes the appointment of a receiver, then the confiscation takes precedence over the functions of the receiver.

Clause 135: Insolvency practitioners

50. *Clause 135* reproduces existing legislation and explains what is to happen when an insolvency practitioner takes action against property subject to a restraint order. The basic thrust of the provision is to protect insolvency practitioners who unwittingly interfere with property subject to a restraint order from liability, except insofar as is caused by their negligence, and to enable such insolvency practitioners to recover their expenses.

Clause 136: Serious default

51. *Clause 136* provides for compensation to be paid to a person whose property has been affected by the enforcement of the confiscation legislation. Compensation is only payable where a criminal investigation is instituted but proceedings are never brought, or the accused is not convicted of an offence, or the sentence is quashed, or he is pardoned for it. In all cases, there must have been a serious default on behalf of one or more of the enforcement authorities. The restriction to serious default cases is based on the principle that the restraint and realisation of property is ancillary to a criminal trial in the same way as the detention of a person pending trial. In neither case is compensation paid on acquittal as a matter of course.

52. *Clause 136* is largely based on existing legislation except that it has been extended to cover the situation where an investigation is started but proceedings are never brought. Under the Bill, it will be possible for a restraint order to be made as soon as a criminal investigation has been started (at present, this is only possible where proceedings have been instituted or are about to be). Therefore, compensation will in future be payable, subject to the current criteria including the serious default test, from the beginning of an investigation.

Clause 137: Confiscation order varied or discharged

53. *Clause 137* allows compensation to be payable where a person who absconded before trial and against whom a confiscation order was subsequently made secures a variation or discharge of the order. The provision is not limited to serious default (as in *clause 136*) because it is considered that the court should be able to exercise a more flexible approach in circumstances where a confiscation order has been made without the accused having been tried.

Clause 138: Criminal lifestyle

54. *Clause 138* is to be read in conjunction with *Clause 91*. As explained in the note on *clause 91*, the question of whether a person has a criminal lifestyle is crucial to the operation of the Bill, because it determines whether the accused is subject to the confiscation of benefit from "particular criminal conduct" or the more far reaching scheme for the confiscation of the benefit from "general criminal conduct". *Clause 138* sets out the criteria which govern whether a person has a criminal lifestyle or not

55. Under the current legislation, drug trafficking is always to be regarded as a criminal lifestyle offence. A conviction of any drug trafficking offence triggers an examination of all the accused's past drug trafficking and the possible application of the assumptions. The Bill adds money laundering to the offences which are always to be regarded as indicative of a criminal lifestyle. *Subsection (1)(c)* enables the Secretary of State to specify by Regulations other offences which are always criminal lifestyle offences. Such offences might include, for example, arms trafficking or trafficking in human beings.

56. *Subsection (1)(d)* together with *subsections 2(a)* and *(b)* provide that an accused has a criminal lifestyle if the accused has been convicted in the current proceedings of four or more offences, or has been convicted in the current proceedings of one offence and has another conviction of an offence on two separate occasions in the last six years. The provision is similar to that in the current non-drug legislation, where an enquiry may be launched into benefit from a person's entire past criminal conduct (other than drug trafficking) where the person is convicted of two or more offences in the current proceedings or one in the current proceedings, and has another conviction of an offence at any time in the last six years. The number of convictions has been increased from two to four in the current proceedings test and the number of separate convictions from two to three in the last six years test, because under the Bill, a combination of convictions for offences is always to be regarded as indicative of a

criminal lifestyle, whereas under the current legislation it may be so regarded at the discretion of the court.

57. *Subsection (1)(e)* provides that an accused has a criminal lifestyle if the accused is convicted of any offence, and the offence in question lasted for six months or more, for example, a conspiracy. It will thus be possible under the Bill to confiscate the benefit from an accused's entire past criminal conduct where a person is convicted of one offence of any nature. Unless the offence in question is a drug trafficking or money laundering offence, however, the offence in question will have to have been carried out over a period of six months or more.

Clause 139: Conduct and benefit

58. *Clause 139* defines criminal conduct as any conduct constituting an offence in Scotland or, if it took place further of Scotland would constitute an offence if it had occurred in Scotland. The restriction to drug trafficking, other indictable offences and certain summary offences is thus abolished. Under the Bill, the court which makes a confiscation order will need to consider conduct solely by reference to the law of Scotland. *Clause 139* also defines "general criminal conduct" and "particular criminal conduct" (for which, see the note on *clause 91*).

59. *Clause 139* also provides that a person benefits from criminal conduct if he obtains property as a result of or in connection with the conduct. This unites in one new provision two similar but not identical definitions in the existing drug trafficking and all crime statutes.

Clauses 140: Tainted gifts and their recipients

60. The existing legislation enables gifts by the accused to other persons to be recovered in satisfaction of the confiscation order, and makes ancillary provision (for example, to enable assets of the recipient of a gift to be placed under restraint). Under the existing legislation, a tainted gift is described as a "gift caught by the Act". *Clause 140* reappraises and aligns the two different tainted gift schemes currently found in the drug and non-drug legislation. The new scheme provides that,

where the court has decided that the accused has a criminal lifestyle, any gift from the accused to any person in the six years before the institution of proceedings is caught, together with any gift at any time out of the proceeds of crime. This definition would apply both at the confiscation hearing and for the purposes of enforcement. However, if the court decides that the accused does not have a criminal lifestyle, only gifts made after the commission of the offence are caught. Again, this would apply at the confiscation hearing and for the purposes of enforcement.

Clauses 141 -143: Value: the basic rule; value of property obtained from conduct; value of tainted gifts

61. *Clauses 141 - 143* set out how the court is to work out the value of property held by a person, the value of property, and the value of a tainted gift. These clauses all reproduce, with some redrafting, the property valuation principles set out in the existing legislation.

Clauses 144 -146: Free property; realisable property; property: general provisions

62. These definitional clauses, amongst other things, introduce the new concept of free property as any realisable property which is not subject to certain kinds of forfeiture and deprivation orders. The underlying principle is that property already subject to one of these orders made in earlier proceedings should not be added to the amount available for confiscation because it is already accounted for. *Clause 146* contains a very wide definition of property.

Clauses 147 - 149: Proceedings; applications; satisfaction of confiscation orders

63. *Clauses 147 -149* define when proceedings are started, when proceedings and applications are concluded, and when confiscation orders are satisfied. The definitions are particularly important in that they determine the earliest and latest points at which a restraint may be made.

Clause 150: Drug trafficking offences

64. The definition of a drug trafficking offence in this clause is required because any conviction of a drug trafficking offence is indicative, under the Bill, of the fact that the defendant has a criminal lifestyle. As explained above, where the accused has a criminal lifestyle, the case is a "general criminal conduct" case. The court must calculate the benefit, if any, from all the accused's past criminal conduct and in so doing may make the assumptions provided for in *clause 96*.

65. The definition in *clause 150* replaces that currently found in section 49 of the Proceeds of Crime (Scotland) Act 1995, but there are two important differences between the two. Firstly, the offence of allowing premises to be used for drug related

activities (section 8 of the Misuse of Drugs Act 1971) is regarded as having the characteristics of a drug trafficking offence and so has been added to the list. Secondly, drug money laundering offences have been removed from the list, because, under the money laundering provisions of the Bill, the current separate drug and other crime money laundering offences are being abolished and replaced with new money laundering offences applicable to the proceeds of all criminal conduct. The handling of money laundering offences for confiscation purposes is discussed further in the note on *clause 151*.

Clause 151: Money laundering offences

66. Under *clause 151*, the three new principal all crime money laundering offences created by the Bill are all defined as money laundering offences, as are the so called "inchoate" offences of conspiracy etc to launder. All these money laundering offences are indicative, under the Bill, of a criminal lifestyle and a conviction of any one or more of them will thus trigger an examination of the accused's benefit from "general criminal conduct".

Clause 152: Other interpretative provisions

67. The definition of a "criminal investigation" in *subsection (1)* is required because the power to make a restraint order is brought forward, by *clause 117(2)*, to the beginning of an investigation.

Clause 153: Rules of Court

68. *Clause 153* provides that rules of court may make provision for giving notice or serving any document for the purpose of the Part of the Bill and for the account of court's functions under *Schedule 2* below.

Schedule 2: Administrators: further provision

69. *Schedule 2* makes further detailed provision for the appointment and functions of an administrator and for the supervision of his activities by the court. It is similar in scope to the existing provisions in Schedule 1 of the Proceeds of Crime (Scotland) Act 1995.

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IV

NORTHERN IRELAND

Introduction

4.1 As envisaged in the PIU report, the legislative changes proposed in this Bill will also be introduced in Northern Ireland. Criminal justice matters are reserved under the Northern Ireland Act 1998 and remain the responsibility of the Secretary of State for Northern Ireland. The Bill also covers excepted matters, such as taxation, which lie solely within the legislative competence of Parliament. Though there are many similarities in the law and procedures of Northern Ireland and of England and Wales, there are some differences. This Bill will reflect these differences. Details of the Bill as it will affect Northern Ireland are set out below.

The Agency in Northern Ireland

4.2 The Bill provides the Director with sole responsibility for the exercise in Northern Ireland of the new powers of civil recovery and taxation. In addition the Director will essentially have the same powers in Northern Ireland for criminal confiscation and enforcement as in England and Wales.

Proceeds of crime investigations in Northern Ireland today

4.3 The legislation in Northern Ireland, which contains powers to assist investigations into the proceeds of crime, is the Proceeds of Crime (NI) Order 1996. Part IV of the Order contains provisions to obtain a production order and search warrant similar to those that exist currently in England and Wales. These powers are available on the same basis as in England and Wales. The provisions in the Bill would replace those provisions in Part IV of the Order.

4.4 However Article 49 of the 1996 Order makes additional provision for investigation powers into the proceeds of crime similar to those which have been available since 1987 to those involved in the investigation of complex or serious fraud throughout the United Kingdom. Article 49 currently provides for "an officer of the Royal Ulster Constabulary, not below the rank of superintendent", to apply to a county court judge for the appointment of a financial investigator to assist the police investigation into whether any person has benefited from conduct to which the Article applies or the extent or whereabouts of the proceeds of such conduct.

4.5 Article 49 applies to criminal conduct covered by the Order (i.e. all indictable offences and summary offences listed in the Schedule to the Order) and to offences under Part III of the Prevention of Terrorism (Temporary Provisions) Act 1989 (PTA) which are not generally covered by the rest of the Order. This ceased to be the case when the Terrorism Act 2000 commenced on the 19 February 2001. That Act repeals in totality the PTA. Similar financial investigation powers are introduced for the whole of the United Kingdom by Schedules 5 and 6 of the Terrorism Act.

4.6 The financial investigator is authorised by the Judge to exercise the powers set out in Schedule 2 of the Order. These are the powers that are described as compulsory disclosure orders and general bank circulars at chapter 7 of the PIU report. These additional powers have proved very effective in uncovering previously unknown bank accounts which have been used to launder the proceeds of crime or to conceal assets that could be realised to meet a confiscation order.

4.7 The Government has recently completed consultation under section 85 of the Northern Ireland Act 1998 on a proposal for an Order in Council entitled "The Financial Investigations (Northern Ireland) Order 2001". The aim of the proposal is to extend to customs officers the same financial investigator powers as are currently available to the police and to broaden in some particular respects the powers available to the financial investigator. It is the Government's intention that this proposed Order will be considered in Parliament in March or April of this year. Some of the powers proposed in this draft Order are not covered in the Bill.

4.8 The Government intends that the investigation powers proposed in this Bill should apply in Northern Ireland, as in England and Wales, so that they form a common base. However the disclosure power and customer information order proposed in the Bill do not replicate the powers in the 1996 Order. It is intended that the powers currently found in the Proceeds of Crime(NI) Order, Article 49 and Schedule 2 and in the proposal for a draft Financial Investigators (NI) Order 2001 will be retained. There are procedural differences and in due course a rationalisation to remove any overlap of powers can be effected by an Order in Council under section 85 of the Northern Ireland Act 1998. Equally the same Order can make provision for

the additional powers to be available to the Director on the same basis as they are available to police and Customs in Northern Ireland.

The Proceeds of Crime Bill

4.9 The Bill will replace the provisions of the Proceeds of Crime (Northern Ireland) Order 1996 save for the additional powers of investigation created under Article 49 and Schedule 2 of the Order, discussed at paragraph 4.8 .

4.10 The Bill will generally apply in Northern Ireland in substantially the same way as in England and Wales. There are however some differences in the provisions reflecting differences in enforcement procedures and operational requirements for Northern Ireland.

Particular Issues

Coverage of the legislation

4.11 The Bill proposes to extend the existing Northern Ireland legislation to make it possible to confiscate benefit from any conduct that constitutes an offence in Northern Ireland or would constitute an offence if it took place in Northern Ireland.

Venue for Confiscation Hearings

4.12 The Bill proposes, as in England and Wales that all confiscation hearings will be in the Crown Court.

4.13 Unlike the proposals for England and Wales, the Bill does not propose for Northern Ireland that restraint and charging orders should be dealt with by the Crown Court. The rationale contained in the PIU report for this proposal does not apply to circumstances in Northern Ireland. Unlike England and Wales the High Court for Northern Ireland is easily accessible to any of the relevant prosecuting authorities. Extending the powers of the Crown Court to cover restraint and charging orders would not facilitate the ease and speed with which restraint orders can be obtained in Northern Ireland. However the current jurisdiction of the High Court to issue certificates of inadequacy where a defendant's assets are exhausted will be transferred to the Crown Court, reflecting the fact that any confiscation order will be enforced through the Crown Court.

4.14 The Bill sets out specific provision for appeals.

Abolition of Charging Orders

4.15 For the same reasons as set out in paragraph 2.13, for England and Wales, the Government proposes in Northern Ireland to abolish the role of charging orders in the confiscation legislation.

Enforcement

4.16 The Bill proposes that confiscation orders will be enforced as if they were fines. However, streamlined enforcement powers are proposed for the Agency in England and Wales. These proposals will also apply in Northern Ireland.

4.17 Enforcement of a term of imprisonment in default of a confiscation order currently occurs in Northern Ireland under different procedures and conditions than those that apply in England and Wales. The Bill therefore provides for the Director to act in accordance with the procedures and conditions that apply in Northern Ireland, rather than those which would apply in England and Wales.

Enforcement Orders

4.18 Confiscation orders made by the Crown Court in Northern Ireland are enforced not through the magistrates' court as in England and Wales but through the Crown Court. Further, chief clerks in magistrates' courts in Northern Ireland do not perform the same operational role as justices' chief executives in England and Wales. Accordingly, in Northern Ireland, it is proposed that the prosecuting authority will be empowered to apply to the relevant magistrates' court for a new enforcement order, which will enable it to obtain more effectively monies held under restraint in a bank or building society.

Civil Recovery in Northern Ireland

4.19 It is proposed that the scheme of civil recovery provided for in the Bill for England and Wales will also apply in Northern Ireland. As in England and Wales the responsibility for initiating civil recovery proceedings will solely lie with the Director. Proceedings will lie within the jurisdiction of the High Court for Northern Ireland. The Director will operate civil recovery in Northern Ireland on the same principles, procedures and safeguards proposed for England and Wales. There are

differences in the legal terminology, legislation and minor differences in the structure of courts between the two jurisdictions. This will be reflected in the clauses that are eventually drafted to extend civil recovery to Northern Ireland.

Taxation

4.20 Taxation law applies throughout the United Kingdom and is an excepted matter under the Northern Ireland Act 1998. Excepted matters remain the sole responsibility of Parliament. They are referred to in section 4(1) and defined in Schedule 2 of that Act. The relevant paragraphs are 9 and 10. The new powers being delegated by the Inland Revenue Board to the Director in this Bill will be exercised by the Director in Northern Ireland in the same way as in England and Wales. While the functions relevant to taxpayers role as an employer, in respect of PAYE, NIC and student loan collection may be found in legislation distinct to Northern Ireland, there are no differences in substance. These differences will be reflected in the clauses eventually drafted.

Money laundering

4.21 The equivalent money laundering offences to those in England and Wales are currently found in Part III of the Proceeds of Crime (Northern Ireland) Order 1996, Articles 44 to 48. As the Order is similar in substance to the law in England and Wales, the rationale for reform applies equally.

NORTHERN IRELAND - CONFISCATION - EXPLANATORY NOTES

Clause 154 to 167: Confiscation orders

1. These clauses set out some of the basic principles of the Bill. These clauses will establish essentially the same procedure for the obtaining of confiscation orders in Northern Ireland as the Bill proposes elsewhere for England and Wales. However, there is no power currently in Northern Ireland for a magistrates' court to commit for sentence to the Crown Court a person convicted in the magistrates' court. The position is therefore quite different from that in England and Wales. Thus a confiscation order will be able to be made by the Crown Court in two instances, either where the person was tried and convicted at the Crown Court or tried and convicted at the magistrates' court and committed to the Crown Court for a confiscation hearing. In the latter circumstances, the sentencing powers available to the Crown Court will be limited to those powers available to the magistrates' court.

Clauses 168-170: Reconsideration

2. *Clauses 168-170* reproduce, with some changes, provision in the current legislation in Northern Ireland found at Article 17 to 20 of the Proceeds of Crime (Northern Ireland) Order 1996. The clauses enable a confiscation order to be made where none was made in the original proceedings, and a confiscation order, once made, to be increased.

3. Currently Article 20 of the 1996 Order provides that a court, when reconsidering the benefit obtained by a defendant, shall not apply similar assumptions to those that appear in *clause 159* of the Bill unless it is property held by or transferred to a defendant on or after the date of conviction. Equally Article 20(4) provides that a court could take into account any payment or other reward received by a defendant on or after the date of conviction, original determination or current assessment but only where it represents the defendant's benefit from relevant criminal conduct or were received in connection with drug trafficking carried on before the date of the court decision.

4. New provision has been required primarily to take account of the new role of the Director in criminal confiscation. Either the prosecutor or the Director may apply to the court for a reconsideration of the assessment of benefit from criminal conduct under these clauses.

5. The principle underlying *clauses 168* and *169* is that reconsideration should only be applied for where new evidence comes to light. It is inappropriate for the prosecutor or the Director to have evidence at the time of the original proceedings, yet not to apply for a confiscation order on that occasion but to apply for reconsideration at a later date. The provision included in these clauses reflects this principle.

Clause 173: Inadequacy of available amount: discharge of order

6. As in England and Wales under current legislation, there is no provision for writing off a confiscation order. The same practical difficulties outlined elsewhere in the explanatory notes [paragraphs 30 and 31 of Explanatory Notes on Part II] clearly equally apply in Northern Ireland. However there are no justice's chief executives in Northern Ireland nor are Crown Court orders enforced through the magistrates' courts. Accordingly the clause is drafted to reflect the operational circumstances in Northern Ireland.

7. *Clause 173* therefore provides that, the prosecutor enforcing a confiscation order, may apply to the Crown Court to write the order off if the outstanding sum is under £1,000 and the reason for the shortfall is a fluctuation in exchange rates or some other factor specified in secondary legislation, or some combination of the two. No similar provision is available where the Director is enforcing a confiscation order because enforcement by the Director will always involve the appointment of a receiver, who will be able to apply to the Crown Court under *clause 172*.

Clause 174: Small amount outstanding: discharge of order

8. *Clause 174* deals with the situation where a confiscation order has been satisfied almost in its entirety, but a sum of £50 or less is outstanding. Under these circumstances, in Northern Ireland, the chief clerk may apply to the Crown Court for the order to be written off. The clause introduces an exception to the general principle that a confiscation order may not be written off, but this is made subject to judicial oversight, and applies only where a small amount is outstanding. In such circumstances, the recovery of the sum in question would not justify the expense required to recover it.

Clause 175: Information

9. *Clause 175* contains provision ancillary to *clauses 168-170*. Its purpose is to make it clear that *clauses 165-167* on statements of information and the provision of information by the defendant apply to reconsideration proceedings as they apply to confiscation proceedings immediately following a conviction.

Clauses 176 to 179: Defendant absconds

10. *Clauses 176 to 179* are clauses dealing with confiscation orders against absconders. Under the current legislation in Northern Ireland, the High Court may make a confiscation order against an absconder convicted of one or more offences to which the Proceeds of Crime (Northern Ireland) Order 1996 applies. Article 2(4) of the Order defines the offences to which the Order applies. These include all indictable offences i.e. any offence capable of being tried in the Crown Court. Certain terrorist offences are excluded and certain summary offences are included. The Bill confers jurisdiction on the Crown Court to make a confiscation order against an absconder convicted of, or charged with, any crime.

11. It is not proposed to include in this Bill the existing provision in Northern Ireland to make a confiscation order against an absconder who dies after conviction but before the High Court can make a confiscation order. It is considered that the recovery of benefit where the perpetrator is dead is better dealt with under the civil recovery procedures in Part V of the Bill.

12. *Clause 176* deals with the situation where a defendant is convicted either in the Crown Court or in the magistrates' court, and then absconds. In the case of a conviction in the magistrates' court, the defendant must have been committed to the Crown Court for confiscation before absconding. Either the prosecutor or the Director of the Agency may apply to the Crown Court for a confiscation order to be made under this clause.

13. The clauses as currently drafted will apply in Northern Ireland in the same way as in England and Wales. These clauses provide that none of the reconsideration clauses, namely *clauses 168-170* applies where a person is still an absconder pre or post conviction and that they all apply where an absconder returns. *Clauses 178 and 179* reproduce existing ancillary provision for unconvicted absconders, except that the functions are transferred from the High Court to the Crown Court.

Clauses 180 to 182: Appeals

14. These clauses provide the prosecutor and the Director with new powers to appeal against any confiscation order made by the Crown Court, and against any decision of the Crown Court not to make a confiscation order. The grounds for appeal are the same as the bill proposes at *clause 30* for England and Wales. *Clause 181* provides the Court of Appeal for Northern Ireland with the same broad powers of disposal as those proposed for the criminal division of the Court of Appeal. *Clause 182* enables the Court of Appeal's decision to be further appealed to the House of Lords. There is no difference in substance between Northern Ireland and England and Wales in the powers provided on appeals from the Crown Court.

Clause 183: Enforcement authority

15. *Clause 183* provides the same criteria for Northern Ireland as for England and Wales for the appointment of the Director to enforce a confiscation order. However the rationale for this provision in Northern Ireland is to ensure that the Director when operating in Northern Ireland can use the specific powers of receivership, provided in *clause 202* of the Bill, to assist him in the enforcement of confiscation orders.

Clause 184: Enforcement as fines etc.

16. *Clause 184* explains how confiscation orders are to be enforced where the Director is not appointed as the enforcement authority. As at present, the order will be treated as a Crown Court fine and enforced as a Crown Court fine. Essentially the burden of enforcing such orders falls on the main prosecuting authority in Northern Ireland, the Office of the Director for Public Prosecutions in Northern Ireland (DPP). Unlike England and Wales, Crown Court fines in Northern Ireland are not enforced by or through the magistrates' court. This results in some differences between the two jurisdictions in the powers of enforcement available. Accordingly this clause provides for confiscation orders to be enforced essentially in the same way as fines are enforced in Northern Ireland by referring to the relevant legislation, the Criminal Justice Act (Northern Ireland) 1945. Where the Crown Court makes a confiscation order, it may set a term of imprisonment in default of payment. The maximum default term that may be imposed is determined by the size of the confiscation order. The maximum default term applicable to a particular confiscation order varies from 7 days, for an order not exceeding £200 to, at the other end of the scale, ten years for an order exceeding £1 million.

Clause 185: Director's application for enforcement

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

Clause 186: Provisions about imprisonment or detention

18. *Clause 186* contains general provisions on imprisonment in default of a confiscation order, applicable when the default term is imposed by the Crown Court in response to an application either by the prosecutor or the Director. The provision reflects existing legislation in Northern Ireland. As in England and Wales it provides that a term of imprisonment in default of a confiscation order must be served consecutively to the substantive term imposed for the offence(s), and that the service of a default term does not prevent the confiscation order from being collected subsequently by other means.

Clause 187: Reconsideration etc: variation of prison term

19. As explained in the note on *clause 184* above, the Crown Court fixes the period of imprisonment in default by reference to the amount of the confiscation order. *Clause 187* provides for Northern Ireland in the same way that *clause 38* does for England and Wales, for the period of imprisonment in default to be varied where the court varies the amount of a confiscation order under the provisions of the Bill.

20. The overall purpose of the provision is to clarify what happens when the variation of a confiscation order changes the maximum period of imprisonment in default applicable to the order.

Clauses 188 to 191: Restraint orders and charging orders

21. *Clauses 188 to 191* essentially reflects the provisions made in this Bill at *clauses 39 to 42* for England and Wales. The Bill makes two fundamental changes to the arrangements proposed for England and Wales. The main difference between the changes proposed for England and Wales and those in Northern Ireland is that in Northern Ireland, restraint and charging orders will remain within the jurisdiction of the High Court. However, the point at which a restraint order or a charging order may be made is brought forward in the Bill, as for England and Wales, to any time after an investigation has been started. At present, although both orders may be made at the investigative stage, it is only possible to do so where charges are in the offing. The only other differences arise from references to Northern Ireland legislation. *Clause 189* explains the nature and effect of a restraint order. *Clause 190* reproduces the provision on charging orders in the current legislation, with only minor changes. It specifies the assets that may be made subject to a charging order as being land and various types of securities. *Clause 191* lays down who may apply for a restraint order or a charging order under the Bill, and sets out criteria similar to those in the existing legislation for the variation or discharge of such orders. The Bill provides that application may be made by the prosecutor, the Director and, subject to the consent of a senior officer, by an accredited financial investigator.

Clauses 192 and 193: Appeal to Court of Appeal and House of Lords

22. As in England and Wales there exists legislation that provides for a very general right of appeal against any order of the High Court. These are the Judicature (Northern Ireland) Act 1978 and the Supreme Court Rules for Northern Ireland. However, as it has been necessary to create a specific right of appeal in the Bill for England and Wales in relation to restraint and charging orders made (or not made) by the Crown Court, it was considered appropriate to provide that the same provisions would apply in Northern Ireland.

Clause 194: Restraint orders: receivers and seizure

23. *Clause 194* follows the current legislation in enabling a management receiver to be appointed where a restraint order has been made. The role of a management receiver is to manage property to maintain its value until a confiscation order is made. However, unlike England and Wales the appointment will continue to be made by the High Court.

24. *Clause 194* also allows a constable to seize any property subject to a restraint order to prevent its removal from Northern Ireland.

Clause 195: Orders: supplementary

25. *Clause 195* contains ancillary provisions relating both to restraint orders and to charging orders. It re-enacts those provisions in existing confiscation legislation. In Northern Ireland there are two distinct procedures for the registration of title concerning land. This is as a result of historical differences concerning the purchase and sale of land in Ireland. Accordingly, title is required to be registered either in the Land Registry or the Registry of Deeds. The existing provision on restraint orders has the effect that where the prosecutor obtains a restraint order affecting land, an "inhibition" may be placed on the property at the relevant Registry preventing its disposal. The existing provision on charging orders is itself based on the still earlier legislation referred to in the clause. The clause is designed to insert charging orders into the existing procedures for registering claims against land.

Clause 196: Confiscation order made: receivers

26. Where a confiscation order has been made *clause 196* empowers the Crown Court to appoint a person to act as enforcement receiver to help the prosecutor to enforce the confiscation order. This person may be the same as a management receiver appointed under *clause 194* or not, as the case may be. *Clause 196* also sets out the powers that the court can confer on a receiver so appointed (for example, the power to seize and sell property).

27. This is a function transferred from the High Court to the Crown Court, in accordance with current and future practice in Northern Ireland of the Crown Court as the sole venue for enforcement of confiscation orders.

Clauses 197 and 198: Application of sums by receiver or chief clerk

28. These clauses largely replicate for Northern Ireland the provisions made for England and Wales at *clauses 48* and *49* of the Bill. There is no difference in substance but the text reflects the limited retention of the role for the High Court in restraint and charging orders and the non-existence of justices' chief executives in Northern Ireland. *Clause 198* specifies how any sums in the hands of receivers appointed by a court are to be disposed of, whether before or after, a confiscation order is made. Where a confiscation order is made, the sums are payable, subject to certain prior payments the Crown Court may order, to the chief clerk of the court where the confiscation order was made.

29. *Clause 198* also sets out how a chief clerk must dispose of any monies received in satisfaction of a confiscation order. The provision is similar to that proposed for England and Wales at *clause 49*.

Clauses 199 and 200: Appeal to Court of Appeal and House of Lords

30. These clauses enable persons who apply for, or are affected by, an order either of the High Court to appoint a management receiver or of the Crown Court to appoint an enforcement receiver to appeal to the Court of Appeal in respect of the order. *Clause 200* provides for the Court of Appeal's decision under *clause 199* to be further appealed to the House of Lords. The provision is the same in substance as that provided for at *clauses 50* and *51* for England and Wales, save that the provision reflects the retained role of the High Court in Northern Ireland for restraint procedures

Clause 201: Seized money

31. *Clause 200* provides the magistrates' court with a new power to order any realisable property in the form of money in a bank account to be paid to the chief clerk of the relevant Crown Court in satisfaction of a confiscation order. The power is only available where the prosecutor makes such application and a confiscation order has been made, time to pay has expired and the money is subject to a restraint order. This provision is made for the same purposes set out at *clause 49*.

Clauses 202 to 206: Realisation of property: Director

32. *Clauses 202* to *206* essentially make the same provision for Northern Ireland for the realisation of property as the Bill sets out at *clauses 53* to *57* for England and Wales. As in England and Wales, where the Director is enforcing a confiscation order,

the main enforcement tool will be the appointment of a receiver (although the Director will also be able to make requests for assistance outside the jurisdiction and have a term of imprisonment in default imposed).

Clauses 207 to 211: Exercise of powers

33. *Clauses 207 to 211* essentially make the same provision for Northern Ireland, as the Bill sets out at *clauses 58 to 62* for England and Wales, regarding the exercise of the enforcement powers of the courts and receivers. *Clause 209(2)* reflects the retained role of the High Court to appoint a receiver. The clause also contains explicit provision for any person affected by any action taken or to be taken by such a receiver to challenge that action in the appropriate court. The person affected may be the defendant, the recipient of a tainted gift from the defendant or some other person. *Clauses 210 and 211* provide a right of appeal to the Court of Appeal and the House of Lords.

Clauses 212-214: Insolvency

34. *Clauses 212-214* contains provisions little changed from that in the existing legislation. Their purpose is to explain what is to happen where the same property is liable to be caught both by the confiscation legislation and by the insolvency legislation. The basic rule expressed by *clause 213* is that, if a person has not been adjudged bankrupt at the time that restraint or receivership action is taken under the confiscation legislation, confiscation takes precedence over bankruptcy (regardless of the fact that a person may later be adjudged bankrupt). Thus, a restraint order and a charging order may be made and any property realised goes to satisfy the confiscation order.

35. However, if a person is adjudged bankrupt before action is taken under the confiscation legislation, no property may then be placed under restraint, made the subject of a charge, or realised under the confiscation legislation. The legislation is designed to prevent defendants from attempting to use the insolvency legislation to defeat the purpose of the confiscation legislation.

36. *Clause 213* deals with the situation where a company rather than an individual hold realisable property. Very broadly, if action is taken under the confiscation legislation before a winding up order is made, confiscation takes precedence over insolvency.

37. *Clause 214* reproduces existing legislation on insolvency practitioners and explains what is to happen when an insolvency practitioner takes action against property subject to a restraint order. The basic thrust of the provision is to protect insolvency practitioners who unwittingly interfere with property subject to a restraint order from liability, except insofar as is caused by their negligence, and to enable such insolvency practitioners to recover their expenses.

Clause 215: Committal by magistrates' court

38. *Clause 215* is to be read in conjunction with *clause 154(2)(b)*. Its effect is that a person may be committed to the Crown Court for confiscation following a conviction of any offence, indictable or summary, in the magistrates' court. Where the prosecutor asks the magistrates' court to do so, the court *must* commit the defendant to the Crown Court for confiscation. The power to have a person committed for confiscation is granted only to the prosecutor, not to the Director. In practice, the prosecutor and the Director may consult in such cases, and the Director may assume responsibility for the subsequent confiscation proceedings in the Crown Court.

39. There is one distinct difference between this clause and its equivalent clause for England and Wales, *clause 67*. It relates to the existing power of a magistrates' court in England and Wales to commit a defendant who is convicted of an either way offence to the Crown Court for sentence. There is no comparable power in Northern Ireland.

Clause 216: Sentencing by Crown Court

40. *Clause 216* provides that, where a person is committed to the Crown Court for confiscation, the Crown Court will also assume responsibility for the sentencing process. The principle applied is the same as proposed for England and Wales. However, in the interests of justice, the Crown Court is restricted to the sentencing powers available to the magistrates' court when dealing with a defendant committed for a confiscation hearing from that court.

Clause 217: Serious default

41. *Clause 217* provides for compensation to be paid to a person whose property has been affected by the enforcement of the confiscation legislation. Compensation is only payable on the same grounds as those proposed at *clause 69* for England and Wales. *Clause 217* is largely based on existing legislation except that it has been extended to cover the situation where an investigation is started but proceedings are never brought. Equally the draft Bill at *subsection (9)* refers to the Police Service for Northern Ireland. This reflects the provisions of Schedule 7 paragraph 1 of the Police (Northern Ireland) Act 2000 which

provides as a matter of law that such references are to be taken to be a reference to the Royal Ulster Constabulary and its Chief Constable until such time as section 78(2) of that Act (the change of name) comes into force. The clause also refers to the Director of Public Prosecutions for Northern Ireland whose office fulfils the same role as the Crown Prosecution Service in England and Wales.

Clauses 218 to 220:

42. *Clauses 218 to 220* replicates the provisions for Northern Ireland contained in *clauses 70 to 72*.

Clause 221: Conduct and benefit

43. *Clause 221* defines criminal conduct as any conduct constituting an offence in Northern Ireland or (if it took place outside Northern Ireland) would constitute an offence in Northern Ireland. The restriction of the scope of the legislation under existing legislation to drug trafficking, other indictable offences and specified summary offences is thus abolished. Under the Bill, the Crown Court, which makes a confiscation order, will need to consider conduct solely by reference to the law of Northern Ireland. *Clause 221* also defines "general criminal conduct" and "particular criminal conduct" (for which, see the note on *clause 4*).

44. *Clause 221* also provides for Northern Ireland the same definition of "benefit from criminal conduct" proposed at *clause 73*. This will replace the not dissimilar definition of benefit provided by Article 2(6) of the Proceeds of Crime (Northern Ireland) Order 1996.

Clauses 222 and 223: Tainted gifts; gifts and their recipients

45. The existing legislation enables gifts by the defendant to other persons to be recovered in satisfaction of the confiscation order, and makes ancillary provision (for example, to enable assets of the recipient of a gift to be placed under restraint). Under the existing legislation in Northern Ireland, a tainted gift is described as a "gift caught by this Order". *Clause 222* reappraises and aligns the two different tainted gift schemes currently found to apply depending whether the offence was drug related or not. The new scheme provides for the courts in Northern Ireland to deal with gifts, from the defendant to any person, in the same way as is proposed for England and Wales at *clauses 74 and 75*. Accordingly, where the court has decided that the defendant has a criminal lifestyle, any gift from the defendant to any person in the last six years before the commencement of proceedings is caught, together with any gift at any time out of the proceeds of crime. Otherwise only gifts made since the earliest of the offences committed are caught. This definition would apply both at the confiscation hearing and for the purposes of enforcement. Transfers of property for less than the real value will be deemed a gift.

Clauses 224-226: Value: the basic rule; value of property obtained from conduct; value of tainted gifts

46. *Clauses 224-226* set out how the court is to work out the value of property held by a person, the value of property, and the value of a tainted gift. These clauses apart from referring to Northern Ireland legislation where appropriate replicate the provisions proposed at *clauses 76 to 78*.

Clauses 227-234: Free property; realisable property; property: general provisions; proceedings; applications; confiscation orders; drug trafficking offences; money laundering offences

47. These definitional clauses essentially reproduce for Northern Ireland the same definitions as those contained at *clauses 79 to 86* of this Bill. The only differences in the text are a result of references to the equivalent Northern Ireland legislation or comparable provisions of this Bill.

Clause 235: Other interpretative provisions

48. This clause essentially applies in Northern Ireland as it does in England and Wales. The only difference is that there is no reference to the Sentencing Act, as the Powers of Criminal Courts (Sentencing) Act 2000 does not extend to Northern Ireland. Any other difference in text relates to the numbering of clauses of this Part of the Bill.

Clauses 236 and 237: General

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

Clause 238: Crown Court Rules

50. Receivership is currently a High Court civil law function so the applicable Rules of Court are currently found in the Rules of the Supreme Court for Northern Ireland. *Clause 238* puts it beyond doubt that for proceedings or receivers appointed by the Crown Court under this Part of the Bill may in future be dealt with in Crown Court Rules.

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V

CIVIL RECOVERY

5.1 Part V of the Bill contains draft clauses relating to the establishment of a new civil right of action to enable the state to sue for the recovery of property which has been obtained through conduct contrary to the criminal law. The new right is to be exercised solely by the Director of the Criminal Assets Recovery Agency. The right is to have the character of a traceable proprietary interest, with suitable safeguards for certain protected prior rights. It is to be exercisable through the High Court by means of a procedure, governed by the existing Civil Procedure Rules, during which the disputed property may be placed under the control of the court.

5.2 Part V applies to England and Wales; it is intended that equivalent provision will be made for Northern Ireland. The position for Scotland is referred to in III.

5.3 This section describes the Government's intended policy, and reproduces the draft clauses to the extent that they have so far been prepared. Work on the scheme is continuing; the clauses reproduced here are under continuing development and subject to later revision. They will be supplemented by provisions dealing with, inter alia, the interaction between civil recovery and other branches of civil property law, including insolvency.

The role of civil recovery

5.4 The peaceful enjoyment of the proceeds of crime damages public confidence in the rule of law, holds out harmful role models and provides those engaged in criminal activity with their working capital. Effective means of recovery are essential in order to disrupt and prevent criminality and thereby protect society. They are also important in maintaining this country's reputation as an international financial centre.

5.5 There is in the Government's view a gap in the resources available to the state for recovering criminal proceeds. This gap arises because criminal confiscation, by definition, cannot attack the proceeds of crime otherwise than by a prosecution and conviction. The proceeds of crime are therefore immune from confiscation where the precondition of a conviction cannot be fulfilled because, for example:

·rules of criminal procedure or evidence, having no bearing on the issue of the attribution of assets to criminal conduct, protect a respondent from conviction, with the result that no prosecution ensues or that the case results in an acquittal;

·there may be convincing evidence that particular property was obtained through criminal conduct, but insufficient evidence to establish which of a group of identified individuals were involved in the crime, with the result that no prosecution has proved possible;

·the respondent is wholly beyond the reach of prosecution, perhaps because he is abroad in circumstances in which he cannot be extradited, or because he has died;

·the crime in question was committed abroad in circumstances where there is no extra-territorial jurisdiction to prosecute.

5.6 The Government believes that a means of recovery of the proceeds of crime, focusing not primarily on the criminality of an identified individual but on the characterisation of the property itself, is required in order to fill that gap.

Overseas legislation

5.7 In drawing up its proposals the Government has taken account of civil schemes in Ireland, the USA, Australia (New South Wales) and South Africa. All are common law jurisdictions, and Ireland like the UK is subject to the European Convention on Human Rights. The proposals set out below have characteristics in common with each of these overseas models, but have however been designed to fit the particular circumstances and legal system of England and Wales.

The new civil right of recovery

5.8 An important objective has been to design a scheme which fits within the existing civil law principles and procedures, with which the courts will be familiar. The Government intends that the civil procedures and rules of evidence should apply, so

that (for example) hearsay evidence should be more readily admissible; the rule against self-incrimination should not be a bar to the admission in civil recovery proceedings of evidence obtained from a respondent under compulsion (see paragraph 5.31 below); the civil standard of proof rather than the criminal (i.e. the balance of probabilities rather than proof beyond reasonable doubt) should apply; and the Director's right of recovery should apply retrospectively to existing criminal proceeds, i.e. to property which was obtained through criminal conduct that occurred before the Bill came into force.

5.9 The civil law right the Government intends to introduce is a right to recover any property which (on proof to the civil standard) has been obtained through conduct which is contrary to the criminal law. Property obtained through conduct which contravened the criminal law of another country is also to be recoverable, provided that the conduct would also be criminal under domestic law if it occurred here.

The nature of the right

5.10 The Director's right to recover the property is to be based on its unlawful provenance, regardless of whether it was a respondent now in possession of it or a third party who committed the unlawful conduct. The proceedings will not seek to determine the criminal guilt or innocence of any person, but will focus on whether the property can be shown to have been obtained through some person's unlawful conduct.

5.11 The right of action will also lie not only in respect of the property originally obtained through unlawful conduct, but also in respect of property which later comes to represent that original property. For example, if a drug trafficker buys a house with his ill-gotten money, the house will represent the recoverable money, and will itself be recoverable by the Director.

5.12 Property is to remain recoverable regardless of any change, whether up or down, in its value. Any profits which have accrued from the recoverable property will themselves be recoverable, for example where money from drug trafficking is invested in an interest-bearing account or in a house which yields income through being rented out.

5.13 Where the property which was obtained through criminal conduct (e.g. cash obtained through drug trafficking), or the property which represents property obtained through criminal conduct (e.g. a house bought with money obtained from drug trafficking), is transferred from the drug trafficker's possession to that of another party, the Director will be able to follow it into the hands of the recipient and assert his claim. So, if a drug trafficker places his house in the name of a spouse or associate, the house will remain recoverable by the Director.

5.14 The right of recovery will lie against the proceeds of unlawful conduct, not only against profits. So, if a drug trafficker earns £50,000 by selling drugs, the full earnings will be recoverable, even if the respondent spent £10,000 of his legitimate earnings buying the drugs from abroad in order to sell them at a profit here.

Limits on recovery

5.15 The Government is minded to place the following limits on the scope of the Director's claim over property.

The Director will have a claim to the actual criminal proceeds (or property which represents those proceeds), but not to the respondent's other property. Thus, if the drug trafficker can show that he dissipated his drug earnings on luxurious living or expensive holidays, but still has the house which he inherited legitimately from his parents, the Director will not have a claim on the house.

The Director will not have a claim against a person who acquires criminal property for full value, in good faith and without notice of its alleged criminal origins. This exception is consistent with a standard principle of the civil law on property.

The Director will not have a complete claim against property of which a third party has been unlawfully deprived, for example through theft, fraud or blackmail. This situation is not expected to arise often because the Director will normally be going after the proceeds of crimes such as trafficking in drugs or contraband where there is often no readily identifiable victim. But it may sometimes turn out after an action has begun that some of the property has been (say) stolen from a third party, who can establish his ownership of it. In such circumstances, the court will be able to order that the property should be returned to the lawful owner.

The Director will be prevented from recovering criminal proceeds twice over. For example, where the drug trafficker exchanges his criminally obtained cash for a foreign currency through a corrupt associate, the Director will be able to recover the original sum from the associate, or the foreign currency from the drug trafficker (which now represents the property obtained through unlawful conduct) - or conceivably some combination of the two - but not both in full.

Where only part of a property or asset can be attributed to the unlawful conduct, the Director may be limited to recovery of only that part. For example, the respondent may have used criminal proceeds to buy a joint share in a house or a business. In deciding how to enable the Director to realise the recoverable part of the property or asset concerned, the court will take account of the rights of the owner of the non-recoverable part.

Summary of the procedure

Initial investigation

5.16 It will be for the Director of the Agency to decide whether to initiate civil recovery proceedings. It is intended that he will be able to draw on information obtained from law enforcement authorities, using a gateway provision which has not yet been drafted but is described in I. He will also, on application to the Crown Court, have access to the information-gathering powers which are set out in VII. If the information obtained enables the Director to establish that property is derived from unlawful conduct, it is intended that the evidence should be available for use either in criminal confiscation (if the prosecution authorities mount proceedings and secure a conviction) or in a civil recovery action.

Interim receiving order

5.17 Where he considers, as may frequently be the case, that there is a risk that property may be dissipated or removed, the Director will be able to apply to the High Court, if necessary without notice, for an 'interim receiving order'. The Director will have to satisfy the court that there is a good arguable case that the property identified in the application has been obtained through unlawful conduct. If granted, an interim receiving order will place the property under the control of an interim receiver, appointed by the court. The holder of the property and anyone known to own a part of or have an interest in the property will be notified of the order. The role of the receiver will be to prevent dissipation or disposal of the property, to preserve its value, and to make enquiries relating to the property, including in order to identify persons who may have an interest in it.

5.18 Where an action has been initiated both parties will have access to the procedures under the Civil Procedure Rules relating to the disclosure of documents and powers of the court to order a party to provide additional information. This will include procedures for the court to require third parties who may have relevant evidence to provide it. In addition, the interim receiver will be empowered to obtain information, including (when the court so orders) through powers of entry and seizure.

5.19 The main stage of the procedure will be a hearing before the High Court, conducted on the same basis as any other High Court civil action. If the court finds, on the civil standard of the balance of probabilities, that the property was obtained through unlawful conduct, it will give judgment in favour of the Director. Judgment may take the form of a 'recovery order' which may vest the title to the property in a trustee appointed by the court, or may require another person with an interest in the property to pay the Director a sum equivalent to the value of whatever was held to be recoverable by him. The trustee will have a duty, subject to any conditions imposed by the court, to protect investment interests in the property, to realise the value of the property, or that part of it which represents the proceeds of crime, and to pay the proceeds to the Director. The money recovered in this way will be paid to the Consolidated Fund. The Government intends however that a proportion of civil recovery receipts will be made available to the Recovered Assets Fund, which will dispense recycled receipts into initiatives in support of the Drugs Strategy, the emerging Asset Recovery Strategy and for other uses.

Extra-territorial reach

5.20 Civil recovery is unlikely to be able to take advantage of the main EU and international agreements for civil judicial co-operation. The Government intends however to explore with like-minded partner countries, in particular those which have introduced civil forfeiture or recovery schemes, the scope for bilateral or multilateral agreements for the mutual enforcement of court judgments in this field.

5.21 In the meantime, however, the various mechanisms for the enforcement of civil court orders against property located abroad can be utilised. These include the ability of the High Court to order service of documents outside the jurisdiction; and its ability to order parties within the jurisdiction to render up, deal with or dispose of foreign based assets which are the subject of the litigation. These mechanisms will be available for the purpose of civil recovery.

5.22 Where recoverable property has not yet been removed from the country, the provision enabling the Director to apply for an interim receiving order without notice to the respondent will enable steps to be taken to prevent its removal.

Safeguards

5.23 The new right of action will be subject to a number of safeguards. These are set out in the following paragraphs.

Separation of civil recovery from the prosecution function

5.24 The Bill separates civil recovery from the prosecution function. The Director will not be a prosecution authority. He will on the other hand have a duty of co-operation with the prosecution and law enforcement authorities, and a statutory basis (not yet included in the draft Bill) to obtain information from those authorities. The duty of the law enforcement authorities to enforce the criminal law will remain unchanged and where they initiate criminal proceedings, confiscation rather than civil recovery will be the expected method of recovery.

The burden of proof

5.25 It is intended that it should be for the Director to prove that the respondent's property has been obtained through unlawful conduct or represents property obtained in that way. If however a respondent fails to provide evidence of the legitimate origins of property, or fails to provide an explanation for such a failure, the court, in considering whether the Director has discharged the burden of proof upon him, should in the Government's view be able to draw such inferences as it thinks fit. The Government is considering what explicit statement of this may be needed in the Bill.

Compensation

5.26 If judgment is given against the Director, it is intended that the court should have power to order him to pay compensation to any person suffering loss as a result of an interim receiving order but that the court should be able to take into account any contribution that that person may have made to losses and delays through his own conduct.

Release of frozen assets

5.27 The court will have discretion to release assets in order to defray the applicant's reasonable living expenses and his expenses in carrying on a business. It is intended that living expenses should include expenses of maintaining dependants. There will be provision for the court to require the applicant to provide a complete statement of assets and liabilities and to satisfy the court that he has no other assets from which the living expenses can be met.

Legal costs

5.28 As regards legal expenses, the Government intends to make assistance under the Community Legal Service (CLS) scheme available to defendants and other parties, subject to the usual tests of means and merits. Access by respondents to the disputed assets will be provided for as a fallback where necessary. Where the court finds for the Director, the CLS scheme will have a call on recovered assets to reimburse its costs, but there will be a mechanism for limiting this so that a proportion of recovered assets is available for the Treasury and for recycling through the Recovered Assets Fund.

5.29 It is also intended that, where the court finds in the Director's favour, he should be able to make representations to the court in the assessment of any of the respondent's legal costs which have been funded from the recoverable property. Consideration is being given to the means of implementing this proposal.

Protection for third parties

5.30 Protection will be provided for third party interests. Anyone identified as having an interest in property which is the subject of civil recovery proceedings will be notified and will be entitled to be joined in the action. Property which has been acquired by a person for its full value and without knowing of its links to criminal proceeds will not be liable to civil recovery. Similarly, where the true owner of the property concerned comes forward during civil recovery proceedings, the property will be returned to the true owner and will not be recovered by the Director. The Government will consider further whether these measures provide sufficient protection for third parties, or whether more is needed.

Self-incrimination

5.31 Information obtained from respondents under compulsion, whether by the Director under the proposed disclosure order (described in VII), or by the High Court during civil recovery proceedings, will be subject to the rule against self-incrimination and will not be capable of being used as evidence in any subsequent prosecution of the person providing the information, except a prosecution for giving false information. The Government is considering precisely how to express this.

Issues under consideration

5.32 As stated above, the clauses reproduced here are still under development, and therefore subject to a continuing process of refinement. The Government is moreover considering what further provisions may be needed in order to give effect to (inter

alia) the following policy objectives.

Civil recovery is not yet fully integrated into the network of other legal provisions determining priorities for claims over property. There is a particular need to define the relationship between civil recovery and insolvency proceedings, for example, having regard to the risk that holders of criminal assets and their associates may attempt to use insolvency as a means of avoiding civil recovery. The Government is also anxious to ensure that civil recovery fits neatly into the processes governing the administration of the estates of deceased persons. The relationship with other forms of property-related proceedings and law may very well also need to be clarified.

Provision may need to be made for the court to mitigate final recovery orders if, exceptionally, the order could not be made without breaching the court's duty under Section 1 of the Human Rights Act to act in accordance with the ECHR (e.g. for reasons of exceptional hardship to the respondent amounting to an unwarranted interference with a Convention right). It is however intended that any such mitigation will be genuinely exceptional. For example the recovery of the family home, if it represents the proceeds of criminal conduct, should not normally be mitigated unless children or elderly dependants are involved, and not even then if those concerned can reasonably be expected to find accommodation or shelter elsewhere (for example from housing authorities).

Provision is to be made for settlement of claims between the parties and without the need for litigation, where the Director is able to reach an agreement with the respondent on terms which he considers to be in the best interests of his statutory functions and priorities.

The Government is not minded to insert a limit on the period after criminal conduct during which property will be recoverable, but is considering this point carefully.

Further consideration is being given to what powers will be required by interim receivers, and at the final recovery order stage by trustees, in order to discharge their functions, and whether they should be set out more fully than has so far been done in the draft clauses reproduced below.

5.33 More generally, the Government is considering whether the policy for defining the nature of the Director's claim and how it should work through property transactions while properly protecting other interests involved requires further clarification or elaboration.

CIVIL RECOVERY - EXPLANATORY NOTES

Clause 239: Purpose of this Part

1. *Clause 239* explains that the purpose of this Part of the Bill is to enable the Director of the Criminal Assets Recovery Agency to bring civil proceedings in the High Court to recover property which is or represents property obtained through unlawful conduct. This is an entirely new right of action, and is reserved to the Director alone. Except as specifically provided by the clauses, the court proceedings will be governed in the usual way by the Civil Procedure Rules.

2. The key components introduced in this clause are individually explained in *clauses 240 to 247*. 'Property' is defined at *clause 240*, 'property obtained through unlawful conduct' at *clauses 241 and 243(3)*, 'obtaining' itself at *clause 242* and 'property which represents property obtained through unlawful conduct' at *clauses 243(3), 246 and 247*.

Clause 240: Property and possession of property

3. 'Property' is defined for the purposes of the civil recovery action in very wide terms at *clause 240(1) and (2)*, and may refer to property either in whole or in part. *Clause 240(3)* explains what it means to be 'in possession of property'; this is relevant to subsequent provisions describing from whom the Director may recover property.

Clause 241: Property obtained through unlawful conduct

4. The property which the Director may recover must be related (in ways set out subsequently in this Part) to 'unlawful conduct'. *Clause 241(1)* defines 'unlawful conduct' as conduct contrary to the criminal law of England and Wales. *Clause 241(2)* is a 'dual criminality' provision; it extends the definition of 'unlawful conduct' to conduct which has not occurred within the criminal law jurisdiction of England and Wales, but which is contrary to the criminal law of the jurisdiction in which it did occur *and* would be contrary to the criminal law of England and Wales. The effect of this is to extend the Director's right of civil recovery to property which is related to 'unlawful conduct' which took place anywhere in the world, provided that conduct would have been prohibited by the criminal law had it taken place in the jurisdiction of England or Wales.

5. *Clause 241(3) and (4)* makes the point that the High Court must decide whether any relevant 'unlawful conduct' has taken place to the civil standard of proof (a balance of probabilities) and not the criminal standard (beyond reasonable doubt). This applies to all the components of 'unlawful conduct' - events, actions, and any mental states. Civil rules of evidence will apply, and it is not to matter, for example, that the person who carried out the conduct might be untraceable, or have died, or have been acquitted on a criminal trial relating to the 'unlawful conduct'. The court in a civil recovery action, in other words, is not concerned to establish criminal guilt. It is concerned with 'unlawful conduct' solely for the purpose of identifying property with a sufficient relationship to that conduct to render it recoverable.

6. *Clause 241(5)* explains what it means to obtain property 'through' unlawful conduct ('obtaining' itself is explained in *clause 242*). A person will obtain property 'through' unlawful conduct if he obtains it:

·by the conduct - for example by stealing it, or by obtaining it by means of dealing in illicit drugs, or

·in return for the conduct - for example by being paid as a hit-man, or taking 'hush money' to pervert the course of justice.

7. The purpose of *clause 241(6)(a)* is to ensure that property counts as having been obtained 'through' unlawful conduct regardless of any investment in that conduct. So if a person buys illicit drugs with honestly come by money, and sells them at a profit, the whole of the proceeds of the sale will count as having been obtained through unlawful conduct, and not just the profit.

8. *Clause 241(6)(b)* ensures that it will not be necessary for the Director to show that property was obtained through *a particular kind* of unlawful conduct, so long as he can show it was obtained through unlawful conduct of one kind or another. So it will not matter, for example, that it cannot be established that certain funds are attributable to a person's drug dealing, as opposed to his money laundering or brothel-keeping activities, if it can be shown that they were attributable to one or other of these in the alternative, or perhaps some combination.

Clause 242: Obtaining and disposing of property

9. The meaning of 'obtaining' is mainly relevant to the idea of obtaining property through unlawful conduct. 'Disposing' of property is a key feature of the provisions at *clauses 245 and 246* which deal with following and tracing property.

10. Obtaining and disposal of property may take place:

·where nothing changes hands other than possession (*clause 242(2)*)

·where the property is dealt with to some extent only (including where an interest in the property is created - for example where a tenancy is granted out of freehold real property) (*clause 242(3)*)

·where property changes hands on death (*clause 242(5)*).

11. *Clause 242(6)* is relevant to the protection provided at *clause 249* for certain purchasers of property 'for value'. It provides that a person obtains property 'for value' *only* when he has given executed consideration for it. That means that if someone obtains property in return for a *promise* to pay for it or to perform some service in exchange, that will not count as having 'obtained for value' until the payment is actually made or the service performed.

Clause 243: Granting interests

12. This clause makes some detailed provision about 'obtaining' and 'disposing', with reference to the granting of interests in property. Take, for example, the case of someone who obtains a freehold house through unlawful conduct, and then grants a tenancy of it. At the time the house was 'obtained', the tenancy had no existence. The tenancy, therefore, cannot easily be described as having been obtained through unlawful conduct, either by the landlord or by the tenant. *Clause 243* provides that the tenancy is to be regarded as having been obtained as a separate entity by the landlord in the same way and at the same time as he obtained the house in the first place (that is, through unlawful conduct).

13. The concepts of 'property which may be recovered' and 'representing property obtained through unlawful conduct' which appear in this clause are explained in the next section of this Part, at *clauses 244 to 251*.

Clause 244: Recoverable property

14. Having established some of the key basic component concepts of civil recovery in the preceding clauses, these now begin

to be assembled into an expression of the extent of the Director's right to recover property. *Clause 244* establishes the idea of 'recoverable property', which is then explained in the ensuing clauses. *Clause 244(2)* plants the idea that the recoverability of property may depend on who it is that the Director seeks or might seek to recover the property from - an issue which is also elaborated later in this group of clauses.

15. *Clause 244(3)* establishes the retroactive potential of civil recovery. In deciding whether property is recoverable, it is immaterial that any key component - the unlawful conduct, say - or indeed all the matters relied on, took place before this Part comes into force.

Clause 245: Right to recover property obtained through unlawful conduct

16. The primary aspect of civil recovery, set out in *clause 245(1)*, is the Director's right to recover

- property (*clause 240*)
- obtained (*clauses 242 and 243*)
- through (*clause 241(5)*)
- unlawful conduct (*clause 241*).

17. This property is 'recoverable property', and the primary right to recover it is exercisable in two cases. In the first place, the Director may recover in proceedings against the person who obtained the property through unlawful conduct (*clause 245(2)(a)*). That may be done in a number of cases, for example when–

·that person is himself in possession of the property

·the person purports to have made a gift of the property to someone else but remains in a position to get it back

·the property has been lawfully seized from the person by law enforcement authorities.

18. But the Director may not always be able to recover the property from the person who obtained the property through unlawful conduct. The property may have been a stolen car which has since been sold, or it may be the proceeds of drug dealing which have since been spent. The person may be untraceable, or dead. *Clause 245(2)(b)* and *245(3)* therefore provides a second means by which he can exercise the primary right of recovery, namely by 'following' that property and recovering it from someone else.

20. The Director will be able to 'follow' property along a chain of transactions. In the case of the stolen car which has been sold, he will be able to recover it from the buyer; and if the buyer has sold it on to another, the Director will be able to recover it from that other - although neither of these need himself have obtained the property through unlawful conduct. In the case of cash made by drug dealing, if that cash is spent on jewellery, the Director will be able to follow it into the hands of the jeweller and recover it. And if the jeweller uses the cash to buy a yacht, the Director will be able to follow it into the hands of the yacht dealer. Where the original person has died, the Director will be able to follow the property into his estate and to his beneficiaries.

21. The ability to 'follow' property is, however, limited in a number of important ways. It depends on the original property continuing to be identifiable as such - it must be the 'same' property or at least part of it. And if any of the transactions in question is of the sort set out at *clause 249*, the chain will be broken and the Director will no longer be able to follow and recover the property.

Clause 246: Tracing property etc

22. Because of the limitations on the two immediate means of enforcing the primary aspect of civil recovery (namely the right to recover property obtained through unlawful conduct against (i) the person who obtained the property through unlawful conduct or (ii) any person into whose hands that property may be 'followed'), a secondary aspect of civil recovery is set out in *clauses 246 and 247*. This allows the Director to recover property which has not itself been obtained through criminal conduct, and cannot be 'followed' by reference to such obtaining - but which 'represents' such property.

23. Property will 'represent' such property (the original property) if it has been received in exchange for that property. So if a stolen car is sold, the proceeds of sale will 'represent' the original property and the Director will be able to 'trace' into those proceeds and recover them. And if the proceeds of drug dealing are spent on jewellery, the jewellery will itself 'represent' the

original proceeds, and the Director will be able to recover it. *Clause 246(1) to (3)* sets out this principle of tracing into representative or equivalent property.

24. Like 'following' under *clause 245*, 'tracing' under *clause 246* is capable of being pursued along a chain of transactions (*clause 246(6)*). Tracing and following are also capable of operating in conjunction or in sequence. For example, where the drug dealer spends his proceeds on a car, the proceeds can be followed into the hands of the car dealer and traced into the car. Since the car now 'represents' the original proceeds (*clause 246(3)*), if the drug dealer trades the car for a yacht, then the Director can follow the car (*clause 246(5)*) and trace into the yacht (*clause 246(6)*). Following always remains subject to *clause 249*, however.

25. This ability of tracing and following to multiply indefinitely the items of property which are rendered potentially recoverable does not however mean that the Director will ultimately be able to multiply his total recovery accordingly. Important limitations on total recovery are placed by *clause 268*.

Clause 247: Mixing property

26. Property which was not itself obtained through unlawful conduct at any stage can come to 'represent' such property, and therefore be potentially recoverable, not only by being traceable by the Director under *clause 246* but also by having become mixed with recoverable property. Because the ability to follow property under *clause 245* is dependent on the property retaining its identity, it may become impossible to follow property when it is mixed into other property.

27. *Clause 247(3)* gives some illustrations of this problem. If cash which is the proceeds of drug dealing is paid into a bank account which is in credit through deposits of honest earnings, it becomes impossible to identify any individual withdrawals which may be made from that account as being the 'dirty' money rather than the clean. *Clause 247(1) and (2)* therefore provides that in such circumstances so much of the 'mixed' property as is attributable to the recoverable property will be representative of the original property, and therefore itself recoverable.

Clause 247: Exceptions for victims of theft, etc

28. Property which has been stolen (or is the result of some other unlawful conduct comprising the deprivation of a 'true owner' of his property) is property obtained through unlawful conduct, and therefore potentially recoverable by the Director. But *clause 248* gives the claims of a true owner precedence over those of the Director. Where civil recovery court proceedings have begun in respect of property, a true owner is entitled to request a declaration that he has a valid claim to it because he was deprived of it (or of property which it 'represents' in the terms of *clauses 246 and 247*) by the 'unlawful conduct' on which the Director relies (*clause 248(4)(a) and (5)*) and there is no reason why he should not claim it. The effect of such a declaration is that the property ceases to be recoverable by the Director (*clause 248(3)*).

29. The true owner will himself already have (non-statutory) rights to follow his property and to trace into equivalent property. But he cannot multiply these rights to inflate or reduplicate what he can recover - he may have to elect, for example, either to follow his property or to trace into equivalent property. The Director's right in these circumstances will be displaced only to the extent to which the true owner has elected to pursue his own remedy (*clause 248(6)*). So, for example, if a person steals a painting and sells it, the true owner may be in a position to follow the painting or trace into the proceeds of sale but not both. If he elects to follow the painting, he may prevent the Director from recovering it, but the Director may still be able to recover the proceeds.

Clause 249: Exceptions for bona fide purchasers etc

30. *Clause 249* constitutes an important limitation on the Director's ability to follow property under *clause 245*. *Clause 245* provides that where, for example, someone is given a yacht in return for a contract killing, and then sells the yacht, the Director may follow the yacht into the hands of the purchaser and recover it from him. But under *clause 249(1)*, if the purchaser paid full value for the yacht, and was unaware that of its unlawful provenance, the Director is not entitled to recover it from him or from anyone else who may subsequently acquire it. The fact that the yacht has ceased to be recoverable property, however, does not prevent the proceeds of the sale of the yacht *representing* property obtained through unlawful conduct (*clause 249(2)*), and themselves being recoverable.

31. *Clause 249(3)* ensures that the quality of property as being 'recoverable' is capable of being extinguished in the civil recovery proceedings themselves, so that for example if property is recovered on behalf of the Director and disposed of in the process of liquidating his recovered assets, or sold by an interim receiver in the exercise of his powers, although it may be no less 'property obtained through unlawful conduct', or representative of such property, it will not be recoverable in the hands of the recipient and may be recycled in the market in the ordinary way.

Clause 250: Nature of recovery

32. This clause provides that if, at the end of the civil recovery proceedings, the High Court decides that the Director is entitled to recovery, it will give effect to that either by vesting the property in a specially-appointed trustee for the purpose of realising it for the benefit of the Director (*clause 264*) or by requiring someone with an interest in the property to pay the trustee an amount equivalent to its value (*clause 267(2)*). The vesting or the payment constitute the recovery.

Clause 251: Recoverable property: accruing profits

33. *Clause 251* provides that property which is recoverable under *clauses 245 to 247* is to be taken to include accrued profits. So, for example, if the Director can recover cash paid into a bank account, he can recover it with any interest accrued.

Clause 252: Proceedings for recovery

34. *Clause 252* provides the bridge between the idea of 'recoverable property' set out in the earlier clauses and the court proceedings for recovery set out in the ensuing clauses. It should be noted that although only a part of, or interest in, property may actually qualify as 'recoverable', the proceedings themselves may affect the whole property, including the non-recoverable elements.

Clause 253: Application for interim receiving order

35. *Clauses 253 to 262* make provision for 'interim receiving orders'; interim receivership procedure may - but need not always - form the preliminary stage of civil recovery procedure.

36. An 'interim receiving order' is, as *clause 253(2)* explains, a court order for

·the detention, custody or preservation of property which is claimed to be (to any extent) recoverable, and

·the appointment of an interim receiver in respect of that property.

Its characteristics are spelled out more fully at *clauses 254 to 257*.

37. Under *clause 253(1)*, the first step in the procedure is for the Director to make an application to the High Court for an interim receiving order. He may do this even though he has not yet issued the claim form which marks the start of High Court proceedings. And he may do so without putting any interested party on notice (*clause 253(3)*) that he is doing so. The Civil Procedure Rules (CPR) which govern High Court proceedings will allow this to be done on an emergency basis where necessary. It may be necessary to act swiftly and without alerting potential parties.

38. *Clause 253(5) and (6)* sets out the conditions which must be satisfied before the Court can make an interim receiving order. The Director must satisfy the court that:

·there is a 'good arguable case' that the property in question is to some extent 'recoverable' (the 'good arguable case' test is already used by the court for applications for injunctions to freeze dealings in property during litigation so that ultimate enforcement of judgment cannot be frustrated meantime - freezing injunctions were formerly known as 'Mareva' injunctions), and

·he has taken all reasonable steps to establish the identities of everyone to whom the property belongs, in whole or in part (this is because, if the order is made or the proceedings otherwise go ahead, he will have to put these persons immediately on notice of the action under *clause 263*).

39. The Director must also, under *clause 253(7)*, nominate someone suitable to act as interim receiver. The interim receiver on appointment becomes an officer of the court and his functions (set out in *clause 254*) require him to act to preserve the property pending resolution of its fate; while the Director is likely to have on his staff a number of persons suitably qualified to carry out receivership functions (and indeed ultimately to act as trustees for civil recovery (*clause 265*)), it is thought appropriate that the interim receiver should be independent of the Director, and *clause 253(7)* so provides.

Clause 254: Functions of interim receiver

40. The detailed functions of an interim receiver will be conferred by the court's order itself. The court's discretion to confer whatever powers it considers appropriate to the circumstances of an individual case are at large, provided always they are for the purpose set out at *clause 254(1)*.

41. *Schedule 3*, which is introduced by *clause 254(1)(a)* and *254(5)*, makes explicit mention of some of the more significant powers which the court may choose to confer on an interim receiver.

42. Although the court has a wide discretion over the powers and functions which may be conferred on an interim receiver, there are some duties under which he must always be placed. *Clause 254(2)* sets these out. He will always be required to take the necessary steps to establish

·whether in his view the property is indeed to any extent recoverable,

·whether, in relation to any particular respondent, there is any other property which is recoverable, and

·whether, in relation to the property to which the order applies, there is anyone else against whom the Director might proceed for its recovery (for example, the property might be in the possession of a respondent, but have been gifted by a third party against whom the Director would be entitled to proceed, or it is discovered that there is a charge on the property and the charge would be recoverable if a new respondent were joined).

43. *Clause 254(3)* provides legal protection for the interim receiver if he mistakenly, but honestly and reasonably, deals with property which is not the property specified in the order. He will have immunity from any legal claims in respect of loss or damage caused by such dealing, unless it can be shown that it was caused by his negligence.

44. *Clause 254(4)* makes technical provision to ensure that the fact that the interim receiver takes possession of property does not mean that it ceases to be in the possession of the person from whom he takes it for the purposes of determining liability. So, for example, property does not cease to be recoverable from the person who through unlawful conduct obtained the property (*clause 245(2)(a)*) on the grounds that he no longer has it because it is in the possession of the interim receiver.

Clause 255: Restrictions on disposals

45. This clause gives an interim receiving order the characteristic of preventing disposals of property; it provides that while an interim receiving order is in force, disposals (within the narrower meaning here of *clause 255(3)* rather than *clause 242*) of property to which it applies are void unless made or authorised by the interim receiver within the terms of the powers conferred on him in the order, or made with the consent of (or later ratified by) the court. Such purported but void disposals will thus have no legal effect to transfer ownership.

46. Necessary exceptions are made by *clause 255(2)* in the case of 'disposals' occasioned by death (where the provision would otherwise involve an unsatisfactory fiction that the deceased continued to have property rights) and disposals of trust property (where the provisions could otherwise create technical breaches of trust requirements); in neither of these cases is court intervention appropriate.

Clause 256: Restriction on proceedings and remedies

47. *Clause 256* enables the existence of an interim receiving order to have an effect on collateral legal proceedings affecting the property in question, in two ways. It allows the High Court to stay any other legal process, including court proceedings, in respect of the property to which the order applies (*clause 256(1)*).

48. It also allows any court in which proceedings are pending in respect of the property to stay them, or impose terms on their continuation (*clause 256(2)*). The Director must be given an opportunity to be heard in the court in question on the matter of the exercise of this power.

Clause 257: Reporting

49. An interim receiving order must, under this clause, require an interim receiver to take a number of steps to keep the Director and the court informed.

50. He must report as soon as practicable if he forms the opinion that:

·any of the property to which the order applies is not in fact recoverable from a given respondent, or

·any property *not* subject to the order *is* recoverable against a respondent, or

·any property to which the order applies is recoverable against anyone not so far a respondent to the action.

51. All these possibilities are matters to which the interim receiver is required to be alert under the provisions of *clause 254(2)*. A respondent for these purposes will be someone in respect of whom the Director is seeking to exercise his right of recovery.

52. He must also report any other material change of circumstances (*clause 257(1)*). And he must finally make a formal report of his findings to the court, and serve copies of it on all those who may be affected by it. This report may be expected to comprise a comprehensive account of the nature and origins of, and interests in, the property in question. It will be capable of being used as a basis to establish agreed facts and to identify disputed matters which will fall to be resolved at the final hearing.

Clause 258: Interim receiver: supervision and variation

53. This clause is self-explanatory. An interim receiver will be able to ask the court to clarify his powers, or to confer different powers on him, or to vary the order so that, for example, it applies to new property which he considers to be recoverable, or ceases to apply to property which he considers not to be recoverable. The Director, and others potentially affected, will be able to put their views on the proposition to the court before it acts.

Clause 259: Release of part of interest not recoverable

54. The court will have an inherent power to vary the orders it makes, including interim receiving orders. *Clause 259* makes specific provision for variations of interim receiving orders to have the effect of excluding property from the proceedings altogether. The court may decide before the final trial of the action, for example on an application by an interested person or a report by an interim receiver, that some of the property to which the order applies is not recoverable, and may be excluded from the terms of the interim receiving order without materially affecting the Director's claims in respect of the remainder. If so, it may vary the order accordingly and the excluded property will be released, with or without conditions. Where such a variation excludes a part of or interest in property, if the court ultimately finds the rest of the property recoverable, the excluded part or interest will not be capable of being vested in the trustee for civil recovery.

Clause 260: release of property to meet respondent's needs

55. *Clauses 260* and *261* provide specifically for the court to authorise the disposal of property which is subject to an interim receiving order so that a respondent or other person in possession of any of the property (*clause 254(4)* is relevant here) can meet certain needs and expenses. Property so disposed of will cease to be recoverable by the Director (*clause 249(3)*). *Clause 260(2)* sets out the purposes in question. But the court's discretion to release this property is limited by *clause 261*.

Clause 261: release of property: supplementary

56. *Clause 261* sets out a number of conditions relating to the court's power to consent to release property subject to an interim receiving order. Any application for release of property under *clause 260* will have to be served on the Director and the interim receiver, and either may object. If there is an objection to the release of property to meet the applicant's reasonable living expenses, *clause 261(1)* to *(3)* requires the applicant to provide a formal, verified document setting out a complete and accurate account of his financial position. The court must then be satisfied that he cannot meet these expenses other than from the property subject to the order. The court would be expected to have regard to the applicant's commitments in respect of any dependants.

57. *Clause 261(4)* and *(5)* applies to consent to the release of property for legal expenses. *Clause 261(4)* confers a power on the Secretary of State to make secondary legislation limiting the extent to which the court may consent to the release of assets to meet this purpose. *Clause 261(5)* provides that the Director or the interim receiver can ask for any legal expenses on which such property is expended to be assessed by the court, for the purpose of ensuring that they have been properly incurred; the court will be familiar with the process of assessing legal costs in other litigation.

58. *Clause 261(6)* applies where the release of property to enable the respondent to carry on any trade or business is opposed by the Director. The court will be able to give consent only if the interim receiver recommends that it does so; the interim receiver may be expected to take an informed view of the claim in question and the extent to which the Director's claim may be prejudiced as a result of releasing the property.

Clause 262: Interim receiver: expenses etc

59. This clause makes provision for interim payments to be required of the Director in respect of the interim receiver's remuneration and expenses; the interim receiver's expenses will ultimately become costs in the case, generally falling on the loser.

Clause 263: Service of proceedings

60. The proceedings leading up to the main trial of the civil recovery action will be conducted largely on the same basis as any other High Court civil proceedings, namely under the court's own inherent jurisdiction and the Civil Procedure Rules. But *clauses 263* and *264* make some adjustments for matters not so provided for.

61. High Court proceedings are generally commenced by the service of a claim form; particulars of the claim may be served with the form or subsequently. These documents will set out what is being claimed and the basis of the claim. These will normally have to be served on all those against whom the claim is made. The same will be true for civil recovery, and such persons will automatically be respondents to the action. But in addition, these documents must, as a result of *clause 263*, be served on anyone else appearing to the Director to be in possession of any property concerned, including any part of that property or interest in it (*clause 240*). These are persons who may potentially be affected by the claim, and who will, if they choose, be able to be joined in the action as respondents to the Director's claim. If the court considers the Director to have overlooked anyone in this category, it will in any event be able to require him to serve the papers on such a person; express provision for this is not needed in the clause.

Clause 264: Requirement to provide information etc.

62. *Clause 264(1)(a)* allows the court to order a respondent to provide information about property which is or may be recoverable. This is similar to the interim order provided for at Part 25.1 (1)(g) of the Civil Procedure Rules, which is ancillary to a civil freezing order. It will enable further information to be provided to the court about the nature and source of property which is or has been in the respondent's possession. *Clause 264(1)(b)* also allows the court to order the respondent to appear before the court and answer questions about such property.

63. *Clause 264(4)* provides that a respondent cannot refuse to supply information when required to do so under this clause on the ground that he might incriminate himself. But *clause 264(5)* and (6) provides that self-incriminating material obtained in this way cannot subsequently be used to prosecute the respondent, other than for perjury. These provisions parallel those in *Schedule 3* relating to the conferring of a power on an interim receiver to compel self-incriminating information for civil recovery purposes.

Clause 265: Functions of the trustee for civil recovery

64. *Clause 265* introduces the functions of the trustee for civil recovery. The trustee plays a key role when the court makes a final adjudication that property is recoverable by the Director, as provided in *clause 266(2)*.

65. Where it makes such a final adjudication, the court must appoint a trustee for civil recovery; the Director is required by *clause 265(2)* to nominate someone suitably qualified, and may do so from his own staff. *Clause 265(3)* places the trustee under a duty to secure the property which will be vested in him, and to liquidate non-cash assets for the benefit of the Director. *Clause 265(4)* states that the trustee acts as such on behalf of the Director and on his instructions. *Clause 265(5)* places the trustee under a duty to maximise the amount realisable from the property vested in him. These provisions together make clear that the trustee must approach his functions with a view to giving the fullest effect to the enforcement of the Director's right of recovery which will have been confirmed.

66. The trustee, by virtue of *clause 269*, may be paid for his expenses and remuneration from the property vested in him by the final recovery order. *Clause 265(7)* provides that, in the event that the trustee is unable to do this, his expenses and remuneration should be met by the Director.

67. *Clause 265(6)* introduces *Schedule 4*, which sets out the principal and ancillary powers of the trustee for civil recovery which will be available for the purposes of his functions.

Clause 266: Recovery orders

68. *Clause 266* sets the default position for what the court must do if it finds any property to be recoverable. But it is subject to important limitations set out in *clauses 267* and *268*. Under *clause 266*, if the court finds, on the trial of a civil recovery action, that any property is recoverable, it must order its recovery, and any other interest in it will be extinguished. Where only a part of or interest in property is recoverable, the court must still order the recovery of the whole property, but that duty is subject to a number of the ensuing clauses.

69. A recovery order vests the recovered property in the trustee for civil recovery for the purposes set out at *clause 265*.

Clause 267: Parts, interests etc. not recoverable

70. This clause makes important provision to ensure that protective exceptions may be made to the general rule in *clause 266* that, where only a part of or interest in property is recoverable, the court should nevertheless order the recovery of the whole property.

71. In the first place, the Director and those to whom the non-recoverable parts or interests belong, may agree that instead of the property vesting in the trustee, the others will effectively 'buy out' the Director's interest by making a payment to him of an amount representing the value of his interest in it (*clause 267(2)-(4)*). If, for example, the proceeds of drug dealing are used to build an extension to a house which has been innocently acquired, *clause 266* would mean that the Director would take the house. But *clause 267(2)-(4)* means that if the parties agree, the owner of the house could keep it on the basis that he pays the Director a sum of money representing the value of the 'recoverable' extension.

72. If the parties do not agree, the outcome will not necessarily be that the entirety of the property is vested in the trustee under *clause 266*. The court, if it considers it just and equitable to do so (*clause 267(5)*), may instead make an order effecting any, or any combination of, the following:

- vesting the non-recoverable property in the trustee as envisaged by *clause 266*, but subject to an obligation to pay a compensatory amount to the owner of the non-recoverable part or interest (*clause 267(7)(a)*)

- splitting off a non-recoverable part of the property and excluding it from the order (this might involve breaking the property up) (*clause 267(7)(b)*)

- vesting the recoverable property in the trustee but subject to, and without extinguishing, the non-recoverable interests (so, for example, a house may be vested in the trustee, but subject to the rights of a sitting tenant who bought a leasehold for full value and without notice of the unlawful origins of the cash used to buy the house (*clause 267(7)(c)*).

73. In exercising its discretion to make an order of this nature rather than simply proceeding under *clause 266*, the court will have to take into account in full both

- the rights of those to whom the non-recoverable property belongs, and the value (including non-cash value) to them of those rights; in other words the court must take into account the what such persons stand to lose from their own perspective (*clause 267(6)(a)*), and

- the interest of the Director in being able to realise the market value of the recoverable property (*clause 267(6)(b)*).

Clause 268: Limit on recovery

74. The definition of 'recoverable property' at *clauses 244 to 247* means that the Director has a right to recover property:

- which was obtained through unlawful conduct, and

- which 'represents' property obtained through unlawful conduct.

75. Property may come to 'represent' the original property where the original property has been transferred. Both the original property and the 'representative' property can be followed or traced through any number of subsequent transactions, so that the Director can pursue his interest into any form, or any hands, into which the property may be transferred. If the original property has been subjected to very many transactions, there is clearly a potential for a large 'family' of 'related' property to develop, comprising the original property (conceivably itself mixed or fragmented), the 'representative' property it generates at every point of exchange, and the representative property generated in turn by that representative property when it is dealt with. All of that property will have the characteristic of being recoverable. But if the Director were to recover the entire family of recoverable property, that would be disproportionate to his primary right to recover the original property.

76. *Clause 268* addresses this situation by providing that where the Director seeks to recover both 'representative' property and any other related property from within the same family, the court must order recovery *only* to the extent that it considers necessary to satisfy the Director's primary right to recover the original property (*clause 268(3)*).

77. That may mean that if the Director has recovered the original property in full, for example because it has retained its identity in being passed from hand to hand, then he will not be able to recover any of the 'representative' property. If a drug dealer trades his drugs for a yacht, which is then sold on several times through a string of accomplices, the Director may, for example, have recovered the yacht from the final purchaser. But he will not be able to recover the proceeds of each sale in the

chain as well.

78. The Director may well decide to pursue more than one avenue of recovery simultaneously, particularly where the original property cannot be found, and the 'representative' property is scattered as the outcome of a series of fragmenting transactions, and perhaps subject to concurrent interests the full extent of which may not always be clear. The court in these circumstances has some flexibility under *clause 268(4)* as to precisely how the Director's interest should be satisfied in the event that there is a 'surplus' of recoverable property. It may order full recovery of some items but not others, or it may order partial recovery of some or all items. In the example of the yacht which is sold (for full value) through a series of accomplices, if say the yacht has disappeared, the court might perhaps order recovery of

·the proceeds of sale in full from one of the accomplices, or

·half of the proceeds of sale from one accomplice and half from another, or

·whatever configuration of recovery the circumstances suggested.

79. In doing so, the court is to disregard subsequent appreciation or depreciation in the properties or accrued profits (*clause 268(5)*) - the Director will take the benefits or burdens of these as they fall out, but the court will be looking principally to match the available property to the Director's original entitlement.

Clause 269: Applying realised proceeds

80. This clause determines the use of cash in the hands of the trustee for civil recovery. The cash may have reached his hands because

·it was the proceeds of sale of non-cash property recovered under *clause 266*, or

·it was itself vested as recoverable property under *clause 266*, or

·it was paid under the provisions of *clause 267* as a result of an agreement between the Director and other persons with non-recoverable interests in the property for them to 'buy out' the value of the recoverable property.

81. The trustee must deal with the cash in the following order.

(i) First he must satisfy any order of the court which vests property in him but subject to a duty to pay a compensatory amount to any person whose non-recoverable interest was thereby extinguished.

(ii) Second he must settle his own expenses.

(iii) Third he must remunerate himself.

(iv) The balance must be paid to the Director.

Clause 270: Compensation for loss

82. *Clause 270* deals with the case where any property has been made subject to an interim receiving order but has not in the end been held to be recoverable, either because the court has so determined at trial or at some earlier stage or because the claim has been withdrawn. Subjection to the interim receiving order may, despite the duties of the interim receiver to preserve its value, have resulted in losses to the owners of the property. Under *clause 270(1)* and *(2)*, the court may order the Director to pay compensation for such losses.

83. *Clause 270(5)* provides the measure of compensation to be at the court's discretion, having regard to the losses suffered and to all other circumstances. If therefore the claimant has himself contributed to the losses through delays, for example, that may be taken into account here.

84. *Clause 270(6)* to *(8)* makes special provision in the particular circumstances of property which is recovered by the Director as having been obtained through unlawful conduct consisting of the deprivation of a 'true owner'.

85. For example, a quantity of jewellery may have been stolen from a number of victims and melted down. The Director can bring civil recovery proceedings to recover the resultant gold. Any victim known about should have been identified either at the outset or during the course of the proceedings (say as a result of the interim receiver's investigations) and put on notice of the

proceedings. Any victim may prevent the Director recovering his share of the gold by means of a declaration under *clause 248*.

86. But it may happen that not all the victims are traced before the end of the proceedings, and their rights may have been extinguished by an order under *clause 266*.

87. Where:

·property has been recovered under *clause 266*,

·it originally belonged to someone who was wrongly deprived of it by another,

·the original owner would have been able to recover it under *clause 248*,

·but the original owner was not formally put on notice of the proceedings and had no other reasonable opportunity to apply for a declaration under *clause 248*,

then he may apply to the Director for compensation. The Director must give proper consideration to such an application, and may make such payment as he considers reasonable, but the victim has no absolute right to compensation. In some cases, the Director may reimburse the victim in full, but the Director will be able to take account of all relevant circumstances - the victim may already have covered his losses in other ways, for example by obtaining compensation from the thief, or by making a successful insurance claim.

88. If the trustee for civil recovery, or the Director, is still in possession of the original property, it may be restored to the true owner rather than compensation paid.

Clause 271: General interpretation

89. This clause defines certain terms used in the Bill. *Clause 271(2)* lists the clauses where the meaning of the expressions in the first column of the table can be found.

Schedule 3

90. *Schedule 3*, which is introduced by *clause 254(1)(a)* and *254(5)*, makes explicit mention of some of the more significant powers which the court may choose to confer on an interim receiver. These include powers to seize the relevant property (*paragraph 1*), and to obtain information about it (*paragraph 2*) (in particular about its history and about who might have rights to or interests in it). He may be given powers of entry, search and seizure for either of these purposes (*paragraph 3*), and to oblige persons to assist him in the exercise of those powers (*paragraph 4*); self-incrimination is to be no answer to the exercise of such powers to compel information, but material so obtained cannot be used in prosecuting the person in question (other than for perjury) (*paragraph 5*). An interim receiver may also be given extensive powers to manage property referred to in *paragraph 6*, that is

·by selling perishable or depreciating property, or

·where the property in question comprises a trade or business, by carrying that trade or business on.

Schedule 4

91. *Schedule 4*, which is introduced by *clause 265(6)*, sets out the principal and ancillary powers of the trustee for civil recovery, which will be available for the purposes of his functions. The Schedule is self-explanatory.

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VI

TAXATION

Introduction

6.1 Part VI of the Bill provides for the Agency to exercise taxation functions, under powers vested in the Director from the Board of the Inland Revenue, where income, gain or profits are suspected on reasonable grounds to have derived or accrued from criminal conduct. The intention here is to counter the efforts of persons to protect their criminal assets by arguing they were accumulated from legitimate sources. In many such cases the income, gain or profits are in fact unknown to the Revenue. Since they have not been declared the subject will be exposed not only to the collection of tax, but also to interest and penalties on it. This means that much, and in some cases all, of a subject's illegally gained wealth can be recovered by taxation.

6.2 Taxation must be applied consistently and fairly. The ordinary taxpayer is disadvantaged if others do not pay their share according to their income, not least because it increases the tax burden on the rest of society's taxpayers whose activities are lawful. The application of Inland Revenue powers to individuals who have acquired assets derived from criminal conduct will send out a strong message that the UK taxation system is indeed fairly applied across all sections of society.

Key provisions

6.3 Part VI provides that the people whose tax affairs will be dealt with by the Agency will only be those in receipt of any income, gains or profits which the Director has reasonable grounds to suspect to have resulted from the proceeds of crime. If at any time the grounds for that suspicion cease to exist, the Director's locus will cease and the case will be passed back to the Revenue to handle in the normal way.

6.4 The Director will be able to take responsibility for the affairs of a person only for periods for which the Director has the requisite grounds for suspicion. In addition to responsibility for income tax, capital gains tax and corporation tax, the Director may also exercise inheritance tax functions, and functions relevant to a taxpayer's role as an employer in respect of PAYE and National Insurance Contributions. It is desirable for the Director to be able to exercise all these functions so that he can investigate properly the tax affairs of suspect companies and the directors who run them where there are grounds for suspicion.

6.5 Which tax functions in any particular case it is sensible for the Agency to exercise will be for the Director to decide in consultation with the Inland Revenue. Functions the Director chooses not to exercise in a case will remain with the Revenue. There may well be instances whereby the tax function exercised by the Agency is also retained within the Inland Revenue. This is to cater for cases such as the subject of the Agency's enquiry being an employer of many individuals. In this case the Agency will want to focus on the financial affairs of the subject who is of concern to it, whilst not being distracted by the considerable associated routine workload. This may remain with the Inland Revenue officials who would ordinarily process it.

6.6 The Agency will not simply act as an information gathering body, passing its findings back to the Inland Revenue for action. It will instead be responsible for all stages in the process of taxing a person for a particular period. This will include the recovery of the tax, interest and civil penalties. Responsibility for a taxpayer's affairs will then be passed back to the Inland Revenue to handle the liability for other years.

6.7 The main effects of a person's tax affairs being handled by the Agency will be twofold. First, information obtained by the Agency through the investigation powers set out in Part VII will be available and admissible for the purpose of enabling the Director to assess whether there are reasonable grounds to suspect that income, gains or profits were derived from criminal conduct and for the purpose of assessing their value. Second, the Director will be able to raise a tax assessment which does not identify the source of income (see 6.10 and 6.11 below).

Delegation of tax functions

6.8 The tax functions will be vested in the Director. The Director will then be able to authorise his staff to exercise these functions under his direction. In carrying out these functions the Director and his staff will apply the Inland Revenue Board's interpretation of the law and the extra-statutory concessions published under its care and management powers, with the aid of the same specialist support available to tax offices.

6.9 The Inland Revenue Board will not be responsible for the Agency's financial management, including such matters as

organisational structures, pay rates of staff, case-loads, use of team working, targets set, appraisal processes and so on.

Income whose source is not known

6.10 Under current law income tax assessments (but not those to capital gains tax or corporation tax) are required to identify the source of the income in question, such as a particular trade. In the case of a person who is in receipt of suspected criminal proceeds and has no tax history there may be no obvious taxable source to which income represented by unexplained assets can be attributed. This may be the case, for example, where there are grounds for suspecting that income has accrued from a number of possible criminal activities.

6.11 Part VI provides a power, exercisable only by the Agency, to raise assessments which do not need to identify a source of income. Such a rule does not change substantive tax law, in particular the boundary between taxable and non-taxable activity, but it should help to prevent suspected recipients of criminals' assets from avoiding tax by refusing to identify the source of their income, and place the onus on the taxpayer to displace the tax assessment by providing evidence on appeal that assets came from a non-taxable source.

Information gateways

6.12 In order to carry out tax functions the Agency will need access to tax information held by the Inland Revenue. The Bill will make provision for gateways so that the Inland Revenue can pass relevant information to the Director. This will be available for use for confiscation or civil recovery purposes, as well as for the Director's taxation function, as will any information obtained by the Director through his own tax functions, to avoid setting up unnecessary barriers within the Agency

6.13 The confidentiality of tax information will be safeguarded by making the Agency subject to the same duty of confidentiality as the Inland Revenue. In addition, when the Inland Revenue resumes responsibility for a taxpayer's affairs, any information obtained by the Agency other than under its taxing powers, will not be passed back to the Inland Revenue. This means the Inland Revenue will not hold any information about a taxpayer beyond what it could have obtained itself, without the involvement of the Agency.

6.14 Part VI will not affect the vast majority of taxpayers, whose affairs will continue to be dealt with by the Inland Revenue. The Inland Revenue's tax assessing powers will remain unchanged. Selection of cases to be dealt with by the Agency will be a matter for the Director of the Agency rather than by referral from the Inland Revenue.

TAXATION - EXPLANATORY NOTES

REVENUE FUNCTIONS

General Functions

Clause 272: Director's general revenue functions

1. *Subsection (1)* sets out the qualifying condition which must be satisfied before the Director of the Criminal Assets Recovery Agency can take over general Revenue functions (defined at *clause 277(1)*). To satisfy this condition the Director must have reasonable grounds to suspect the individual, or associated companies, trusts and nominees, to have income or gains derived from crime.
2. If this condition is satisfied, then the transferring of the case is at the discretion of the Director. The Director, in effect, is able to decide which cases he wants to take over from the Inland Revenue, once the condition has been met. He does this by serving notice on the Board of the Inland Revenue.
3. The notice served on the Board of the Inland Revenue will specify a number of things. These will include adequate details to identify the individual or trust or company as the case may be, the chargeable periods in question and also the functions which the Director wishes to assume responsibility for. These may be some or all of the taxes, contributions and other payments which the entity is liable for, such as income tax and National Insurance Contributions. It may be that the Director wishes to focus on only one or two taxes and the notice will stipulate this. Also, it may be that there are only some tax periods during which the person or business is suspected of crime, so the notice will be restricted to these.
4. This clause also sets out the conditions and logistics of the return of the responsibility for the taxpayer's tax matters to the Board of the Inland Revenue. Again a notice from the Director to the Board of the Inland Revenue is needed and this relinquishes the Director of responsibility for the tax affairs of the entity. Equally, that responsibility returns to the Inland Revenue.

5. *Subsection (6)* provides for the circumstances in which the workload associated with a particular tax function is routine and yet considerable. In such instances, for the Director and Agency staff to remain focussed on the matters of concern to them, the routine workload will remain with the Inland Revenue. So this subsection provides for the tax function to be vested in both the Director and the Inland Revenue officers concurrently.

6. The clause stipulates that once the qualifying condition is no longer satisfied, then he has no choice but to serve a notice on the Board of the Inland Revenue, effectively returning all tax-related responsibility for the entity back to them. So, the Director is free from this responsibility once he has served the notice of withdrawal.

Clause 273: Revenue functions regarding employment

7. This clause deals with two areas where there may be a mismatch between periods of account. First, a company will account for income tax, National Insurance Contributions and student loan repayments for which it is responsible as an employer for a year of assessment, but its own corporation tax liability will be determined by reference to its accounting period, which is usually different. Second, self employed people are taxed by reference to years of assessment but Class 2 national insurance contributions are calculated for each week of self employment and due quarterly in arrears. This clause ensures that the Director can only take over the functions which a company is responsible for as an employer and Class 2 national insurance contributions where the relevant periods for those matters fall wholly within a period or periods for which the Director has served a notice under *clause 272*.

Clause 274: No-source assessments

8. Assessments to income tax raised by the Inland Revenue are required to specify the source of the income in question, such as a particular trade. This is not the case for capital gains tax or corporation tax. This clause enables the Director to exercise his general Revenue functions and raise income tax assessments even where he cannot specify the source of the income in question.

9. The clause does not extend to the assessments raised by the Inland Revenue, whose practice and powers will remain unaffected. Because of this, the clause stipulates that when the case is transferred back from the Director to the Inland Revenue, any source-less assessment made by the Director is invalid.

INHERITANCE TAX - DIRECTOR'S FUNCTIONS:

Clause 275: Transfers of value

10. This clause sets out the equivalent arrangements for the transfer of inheritance tax functions from the Inland Revenue to the Director as were set out in *clause 272* for the transfer of general Revenue functions. Tax is generally charged on a "transfer of value", which is a disposition made by a person such that the value of their estate goes down.

Clause 276: Certain Settlements

11. This clause sets out the equivalent arrangements to *clause 275* above, but for cases of inheritance tax settlements rather than transfers of value. Some inheritance tax charges arise in circumstances which are not dispositions out of a person's estate, but are treated as such by inheritance tax legislation (for example transfers by a "close company" in which a person has a shareholding, which are apportioned to them). There are also charges which do not arise from transfers of value at all, and the Director may very well come across some such cases. They arise where assets are held in settlements not subject to a "qualifying interest in possession" (i.e. broadly, they are held on discretionary trusts).

12. In these cases, the Director will assume the Revenue's inheritance tax functions as are specified in the Director's notice.

GENERAL

Clause 277: Functions

13. This clause lists the functions which are capable of being vested in the Director if he specifies them in the notice he serves on the Board of the Inland Revenue under the clauses above.

Clause 278: Exercise of Revenue Functions

14. This clause obliges the Director to operate the taxation system in a manner consistent with that of the Board of the Inland Revenue. The Director must apply any interpretation of the law as published by the Revenue Board and any concessions

published by the Revenue Board and must take account of any other published material which has a bearing on the operation of the tax system. In order for the Board to be able to check that the Director is complying with this requirement, he will have to provide the Board with relevant documents and information.

15. The effect of *subsection (2)* is that the Director may only delegate his Revenue functions to members of his permanent staff. The Director may delegate his other functions both to members of his permanent staff and to those who have contracted on a temporary basis to provide services to him.

Clause 279: Interpretation

16. For the purposes of this Part, criminal conduct does not include an offence relating to a matter under the care and management of the Board, for example, tax fraud.

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VII

INVESTIGATIONS

7.1 Part VII of the Bill provides five powers for use in investigations into whether a person has benefited from criminal conduct and of the extent or whereabouts of such benefit. These are a production order and a search warrant (as under existing legislation) and a disclosure order, a customer information order and an account monitoring order (which are new). The compulsory disclosure power is available only to the Director, whereas the other powers are also available to the police and Customs and in some cases to "accredited financial investigators" (as set out in clause 3 of the Bill). "Accredited financial investigators" will include civilians, but the Government intends to limit the use of powers to such investigators who are acting as members of law enforcement authorities, such as the police, Customs, and the Serious Fraud Office. The Government is considering whether any adjustment of the relevant clauses may be required to that end. All five powers are subject to the authorisation of a Circuit judge.

7.2 The Bill provides for three means of recovering the proceeds of crime: criminal confiscation proceedings, civil recovery proceedings and tax assessments. Since at the time that the investigatory powers are used, it will often not be known which of these means will ultimately be pursued, the Government intends that the investigatory powers should be available for use in any investigation concerning the proceeds of crime, irrespective of which of the methods of recovery it eventually leads to.

Principal Reforms

Production order and search warrant

7.3 These powers have been unified and rationalised for use in respect of the proceeds of any criminal conduct. The Bill replaces the current drug and non-drug powers set out in sections 55 & 56 of the Drug Trafficking Act 1994 and in sections 93H & 93I of the Criminal Justice Act 1988 (as amended). The Bill extends the authorities authorised to apply to a Circuit judge for production orders and search warrants to any "accredited financial investigator" and to the Director, as well as police and customs officers as now.

Compulsory disclosure

7.4 A disclosure order will enable the Director to require a person who has information relevant to an investigation to do any or all of the following: answer questions at interview; provide information and/or produce documents. The disclosure order will be exercisable against a person whose assets are under investigation or (more usually) against a third party. In formulating this power, the Government has taken account of existing compulsory disclosure powers, such as those available to the Serious Fraud Office and the Financial Services Authority under section 2 of the Criminal Justice Act 1987 and sections 171- 173 of the Financial Services and Markets Act 2000 respectively. Financial investigators in Northern Ireland, once appointed for the purpose of exercising the powers by a county court judge, also have similar powers under Schedule 2 of the Proceeds of Crime (Northern Ireland) Order 1996 (SI 1996 No. 1299).

Customer information order

7.5 A customer information order will require all (or a targeted sample of) banks and other financial institutions to provide details of any accounts held by the person under investigation, thus enabling an investigator to find out with which financial institutions the person in question holds accounts. Precedents for this new power can be found in Schedule 2 to the Proceeds of Crime (Northern Ireland) Order 1996 and in Schedule 6 to the Terrorism Act 2000. Once accounts have been identified, production- or account monitoring- orders will enable a more detailed investigation to be carried out of the account. An application for a customer information order may only be made by a police officer of the rank of superintendent, the Customs equivalent, or the Director of the Agency.

Account monitoring order

7.6 An account monitoring order will require a bank or other financial institution to provide transaction information on a suspect account for a specified period. At present, if an investigator wants to track the flow of funds through an account, he must obtain a series of production orders, requiring the production of bank statements, which is time-consuming and costly for all concerned. Power to apply for account monitoring orders will be available to the same range of people as the new production order (see 7.3 above).

Scope of powers

7.7 The investigatory powers in this Part of the Bill are limited to the investigation of the proceeds of crime and are not available for the investigation of offences. However, the powers set out in sections 55-59 of the Drug Trafficking Act 1994 are available for the investigation of both the proceeds of drug trafficking and for the investigation of drug trafficking offences. For this reason the Proceeds of Crime Bill will not repeal those sections, although it will repeal the equivalent provisions of the Criminal Justice Act 1988, which deal with proceeds only.

Production of material by a government department

7.8 Section 59 of the Drug Trafficking Act 1994 (and its other-crime equivalent, section 93J of the Criminal Justice Act 1988) presently enables the High Court (on the application of a prosecutor) to order any material which is in the possession of a government department to be produced to the court. The Government has consulted widely with investigators as to whether this power is used, and is advised that a 'normal' production order is sufficient to obtain a department's assistance. The Government has decided therefore not to replicate these provisions in this Bill.

INVESTIGATIONS - EXPLANATORY NOTES

Clause 280: Investigations in relation to which this Part applies

1. This clause defines the investigations in the case of which the powers set out below may be exercised, namely investigations into the existence and/or whereabouts of the benefit of criminal conduct and not investigations into the commission of crime. This means that the powers can be used for investigations which may lead to criminal confiscation proceedings, civil recovery proceedings or the use of taxation powers.

Clause 281: Production orders

2. In addition to the police and customs officers (who may apply for production orders under current legislation), the Director of the Criminal Assets Recovery Agency and accredited financial investigators may apply for production orders. An accredited financial investigator is a person accredited by the Director of the Agency (see *clause 3*).

Clause 282: Requirements for making a production order

3. Consequent upon the entry into force of the Human Rights Act 1998, in considering whether to exercise his discretion to make a production order under this provision, a judge must take into account the provisions of European Convention on Human Rights. It seems unnecessary, therefore, to retain the "public interest" test contained in section 93H(4)(c) of the Criminal Justice Act 1988 (as amended) and section 55(4)(c) of the Drug Trafficking Act 1994 as one of the requirements for making a production order.

4. An appropriate officer will have to satisfy a judge that the benefit to be gained from making an order (which must in any event be substantial (see *subsection (4)*)) also outweighs any infringement of, for example, a suspect's right to privacy under Article 8 of the Convention.

Clause 283: Order to grant entry

5. This clause clarifies the power contained in section 93H(5) of the Criminal Justice Act 1988 (as amended) and section 55(5) of the Drug Trafficking Act 1994 to grant entry along with a production order authorising access to material (rather than an order to produce material). This power is only intended for use in very exceptional circumstances; for example, an order might be sought in relation to an office building requiring an appropriate officer to be granted entry to material (that was the subject of a production order) in a particular office in that building.

Clause 284: Production orders: computer information

6. This clause makes provision for production orders to apply to computerised records, consistent with the provisions of section 20 of the Police and Criminal Evidence Act 1984.

Clause 286: Production orders: government departments

7. This clause extends the scope of a production order to cover material held by an authorised government department and replicates the effect of section 93J(11) of the Criminal Justice Act 1988 and section 59(11) of the Drug Trafficking Act 1994.

Clause 287: Supplementary

8. *Subsection (3)* provides that production orders and orders to grant entry have effect as if they were orders of the Crown Court. This is so that, if such orders are not complied with, proceedings for contempt of the Crown Court may be instituted.

Clause 288: Search and seizure warrants

9. Powers to issue warrants under this Bill derive from the existing powers in the Criminal Justice Act 1988 and the Drug Trafficking Act 1994. They differ from warrants under Part II of the Police and Criminal Evidence Act 1984 (PACE) in that they permit the seizure of special procedure material (defined at section 14 of PACE). These warrants also differ from those issued under Schedule 1 of PACE (which also permit the seizure of special procedure material) in that a different suspicion test applies (dealing with 'benefit' rather than the commission of an offence) and that applications may be made without notice to the person whose premises are to be searched. Except where different provision is made in the Bill, the general provisions in Part II of PACE about search warrants apply to search warrants issued under this clause.

Clause 289: Requirements where production order not available

10. The same change to the "public interest" test is made here as in the case of production orders (see paragraph 3 above). *Subsection (1)(b)* refers to two sets of conditions. The first set of conditions might be met, for example, where the person who owns the material is abroad and therefore it is not possible to communicate with that person. In such circumstances, it is clear that a production order in respect of that person would have no effect. The second set of conditions might be met where it is impossible to describe the material (for the purposes of a production order) and access is unlikely to be gained without a warrant (e.g. the residence of the suspect).

Clause 290: Further provisions

11. This clause applies certain provisions of the Police and Criminal Evidence Act 1984 concerning search warrants generally to search warrants under the Bill.

Clause 291: Disclosure orders

12. Once a disclosure order has been made, the Director may use the extensive powers set out in *subsection (3)* throughout the investigation. Thus, unlike the other orders covered by this Part which have to be applied for separately on each occasion, a disclosure order gives the Director continuing powers for the purposes of the investigation. A person may require that evidence of the authority to exercise disclosure powers be provided. Where this happens, it is envisaged that a copy of the disclosure order to be given to the person.

Clause 292: Requirements for making of a disclosure order

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

Clause 293: Offences

14. Because of the nature of the disclosure order power, sanctions to compel compliance are needed. The sanctions contained in this clause follow the precedent of those in section 2 of the Criminal Justice Act 1987, namely maximum penalties of six months imprisonment or a level 5 fine (currently £5000) for non-compliance and two years imprisonment and/or an unlimited fine for knowingly or recklessly making a false or misleading statement.

Clause 294: Statements

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

Clause 297: Customer information orders

16. A customer information order would require all (or a targeted sample of) banks and other financial institutions to provide details of any accounts held by the person under investigation. Owing to the potentially disruptive effect that such orders could

have on the financial industry and the need to discourage speculative applications, *subsection (2)* requires an application to be made by the Director or an officer of police superintendent (or equivalent) rank. As with disclosure orders, a person may require the person serving the order to demonstrate that they have the authority that they claim to have.

Clause 298: Meaning of "customer information"

17. The definition of customer information in *subsection (2)* is based upon that in paragraph 7(1) of Schedule 6 to the Terrorism Act 2000, while that at *subsection (3)* seeks the same level of detail where the order is seeking details of a corporate body rather than an individual.

Clause 300: Offences

18. As with the disclosure order, there are two offences connected with customer information orders and again the sanctions follow the precedent of those in section 2 of the Criminal Justice Act 1987, although they will be directed at a non-compliant institution rather than an individual. The maximum penalties are therefore solely financial; a level 5 fine (currently £5000) for non-compliance and an unlimited fine for knowingly or recklessly making a false or misleading statement.

Clause 301: Statements

19. Like the disclosure order, this power requires an institution to divulge information, and this clause sets out the standard conditions on the use of such information to prevent information obtained under compulsion from being used against the financial institution in criminal proceedings against it (subject to certain exceptions).

Clause 304: Account monitoring orders

20. This clause would have the effect of requiring a financial institution to provide, to an appropriate officer, details of all transactions passing through an account during the specified period and would normally be provided in the form of a bank statement.

Clause 305: Requirements for making of account monitoring order

21. As part of his consideration of the proportionality test which he must apply by virtue of section 6 of the Human Rights Act 1998, the judge would have to satisfy himself that an order of this type (rather than a production order) is appropriate.

Clause 306: Statements

22. As with the disclosure and customer information orders, this power requires an institution to divulge information, and this clause sets out the standard conditions on the use of such information to prevent self-incrimination of the institution giving it. There is one difference in that, rather than specific statutory offences being created to ensure compliance, contempt of court proceedings are available instead. There is therefore an exception for contempt of court proceedings that is in contrast to disclosure orders and customer information orders.

Clause 308: Supplementary

23. *Subsection (3)* provides that account monitoring orders have effect as if they were orders of the Crown Court. This is so that, if they are not complied with, proceedings for contempt of the Crown Court can be brought.

Clause 309: Offences of prejudicing investigation

24. This clause makes it an offence to prejudice an investigation by making a disclosure about it or by tampering with evidence relevant to the investigation. The first limb of the offence is similar to the offence of prejudicing an investigation into money laundering (see *clause 315*).

Clause 310: Interpretation

25. It is to be noted that notices in writing include notices given by electronic means. It is anticipated that notices issued in accordance with a customer information order may be given by electronic means.

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VIII

MONEY LAUNDERING

8.1 Money laundering is a relatively recent phenomenon and is the means by which criminals bring the profits from their criminal enterprises within the legitimate financial sector with a view to disguising their true origin and avoiding confiscation.

8.2 The UK's current anti-money laundering regime focuses on three aspects: the criminalisation of money laundering with severe penalties for offenders; the regulation of the financial sector so that they are obliged to put systems in place to detect and prevent money laundering and the reporting of known or suspected money laundering to the authorities.

8.3 The PIU report concludes that, notwithstanding this regime which has led to an annual average of 15,000 reports about suspicious transactions to the authorities, the number of prosecutions of money laundering is very low despite some notable successes. It points out that there is a reluctance to take on money laundering cases as they are thought either to be ancillary to the main crime being targeted, or too complex to address and emphasises that there is a clear public interest in pursuing all such cases. The report invites the Government to consolidate the money laundering offences and to simplify them so as to remove obstacles weighting the test for money laundering unacceptably in the respondent's favour. Part VIII of the Bill reflects the outcome of the Government's review of the relevant offences against the background of the PIU report. It is intended that the provisions on money laundering will extend to Scotland and to Northern Ireland.

Principal Reforms

Scope of the offences

8.4 The new offences set out in clauses 311 to 319 of the draft Bill are based on the laundering of the proceeds of any criminal conduct and make no distinction as between benefit from drug trafficking and from other crimes.

Offence of failing to report knowledge or suspicion of money laundering

8.5 The Government has considered whether the scope of the reporting obligation in clause 314 should be subject to a threshold so as to avoid the need for reporting suspicions of minor incidences of laundering, but since one of the aims of the legislation is to require the exercise of greater caution in handling suspicious transactions, the Government has decided that the baseline should be consistent with the principal money laundering offences (clauses 311, 312 and 313). The Government accepts that this policy may lead to an increase in the number of reports which are made to the authorities, but it would prefer that all laundering activity should be reported for possible investigation by law enforcement given the importance it attaches to combating money laundering.

Negligence

8.6 The Government has also looked carefully at the mental element which should be required for the "failure to report offence" and has concluded that the introduction of a negligence test is now necessary as a deterrent against those in the financial sector and other relevant sectors who fail to act competently and responsibly where information before them ought to make them suspect money laundering in keeping with any relevant guidance. The new offence will therefore apply not just in cases where the prosecution can prove beyond reasonable doubt that a person knew or suspected that another person was engaged in money laundering but also where the respondent can be shown to have had reasonable grounds for knowing or suspecting that another person was engaged in money laundering.

8.7 The new offence will only apply to information or other matters which come to persons in the course of a business in the regulated sector. Such business is defined in Part I of Schedule 5 to the Bill and is consistent with institutions which are regulated by the Money Laundering Regulations 1993. In view of the proposed introduction of a negligence test, the Bill is to provide that, in determining whether an offence has been committed, the court will be required to have regard to any guidance which has been issued by a supervising authority or other relevant body and the content and publication of which has been approved by the Treasury. This duty on the court is to be found in clause 314(6).

8.8 The Government has examined whether the revised "failure to report" offence should apply more widely to persons outside the regulated sector. However, it considers that the most significant opportunities for money laundering occur in the sectors covered by the Regulations and the additional sectors to which they are expected to be extended under the new EU

Money Laundering Directive. Comprehensive guidance is produced by the regulated industries themselves on suspicious transaction reporting requirements (in future to be approved by Government as indicated above) and is available to persons who come within the ambit of the Money Laundering Regulations. It is reasonable therefore to expect a high level of care from such employees in reporting suspect financial transactions.

MONEY LAUNDERING - EXPLANATORY NOTES

Clause 311: Concealing etc.

1. *Clause 311* creates one of three principal money laundering offences. The other two are to be found in *clauses 312* and *312*. *Clause 311* simplifies and replaces section 49 of the Drug Trafficking Act 1994 and section 93C of the Criminal Justice Act 1988. Consistent with *clauses 312* and *313*, the offence would be committed where a person knows or suspects that property constitutes or represents benefit from any criminal conduct as defined in *clause 73*. The equivalent provision in Northern Ireland is found at Article 47 of the Proceeds of Crime (Northern Ireland) Order 1996.

Clause 312: Arrangements

2. Similarly, *clause 312* simplifies and replaces section 50 of the Drug Trafficking Act 1994 and section 93A of the Criminal Justice Act 1988. The equivalent provision in Northern Ireland is Article 46 of the Proceeds of Crime (Northern Ireland) Order 1996. The prosecutor would need to establish under this offence that a person entered into or became concerned in an arrangement which he knew or suspected would assist another person to launder criminal property and by reason of *clause 319* that the person also knew or suspected that the property constituted or represented benefit from crime.

Clause 313: Acquisition, use and possession

3. *Clause 313* unifies and replaces section 51 of the Drug Trafficking Act and section 93B of the Criminal Justice Act 1988. The equivalent provision in Northern Ireland is Article 45 of the Proceeds of Crime (Northern Ireland) Order 1996. As in *clauses 311* and *312*, by reason of *clause 319*, this offence is only committed where a person knows or suspects that the property which is acquired etc constitutes or represents his own or another's benefit from criminal conduct. The defence in *subsection (2)(c)* is necessary in order to protect persons, such as tradesmen, who are paid for ordinary consumable goods and services in money which they may know or suspect comes from crime. *Subsection (3)(d)* makes it clear that the provision of goods or services for adequate consideration which help a person to carry out criminal conduct would not be a defence. It is not uncommon for the police or other enforcement authority to take possession of criminal property in the course of their official duties. *Subsection (2)(d)* gives them the necessary exemption from the offence.

Clause 314: Failure to disclose: regulated sector

4. *Clause 314* replaces section 52 of the Drug Trafficking Act 1994 and creates an obligation to report suspicions of money laundering to the authorities. The equivalent provision in Northern Ireland is Article 44 of the Proceeds of Crime (NI) Order 1996. *Clause 314* widens the scope of the offences which it replaces beyond drug money laundering to the laundering of the proceeds of any criminal conduct. By virtue of *subsection (2)(b)*, the offence would also be committed where a person has reasonable grounds for knowing or suspecting that another person is engaged in money laundering.

5. The duty to report under *clause 314* is, however, restricted to those persons who are employed in a business as defined in *Schedule 5* to the Act. This definition follows closely equivalent provision in the Money Laundering Regulations 1993 which determines the applicability of those Regulations. The clause reflects the fact that persons who are employed in the regulated sector should be expected to exercise a higher level of diligence in handling transactions than those employed in other businesses. Guidance Notes on Money Laundering have been produced and issued since 1990 to regulated institutions by the industry's Joint Money Laundering Steering Group, which operates under the auspices of the British Bankers' Association. *Clause 314(6)* recognises the potential value of such guidance and provides that the court must take any guidance issued by a supervisory authority or any other appropriate authority into account when determining whether an offence has been committed. A list of supervisory authorities is to be found in Part II of *Schedule 5*. The court would only be obliged to take into account guidance, the content and manner of publication of which has been approved by the Treasury (in its capacity as the government department which has overall lead responsibility for money laundering policy in the regulated sector).

6. The scope of *clause 314* extends to inchoate offences such as conspiracy by reason of the definition of money laundering in *clauses 319(5)(c)* and *(5)(d)*.

Clause 315: Tipping-off

7. *Clause 315* creates new offences of making a disclosure likely to prejudice a money laundering investigation being

undertaken by law enforcement authorities. It replaces sections 53 and 58 of the Drug Trafficking Offences Act 1994 and section 93(D)(1) of the Criminal Justice Act 1988 in so far as the investigation relates to the proceeds of crime. The equivalent provision in Northern Ireland is Article 48 of the Proceeds of Crime (Northern Ireland) Order 1996. Similar to *clause 313(2)(d)*, there is protection in *clause 315(3)(b)* from the offence for law enforcement officers who may need to make a prohibited disclosure in the course of their official duties.

8. As for *clause 314*, *clause 315* also extends to inchoate offences for the same reason.

Clause 317: Protected disclosures

9. *Clause 317* exempts a person in the regulated sector from any legal or other obligations which would otherwise prevent him from making the disclosures to the authorities which are required by *clause 314*. The protection is very wide, consistent with the United Kingdom's obligations under article 9 of the 1991 European Community Directive on prevention of the use of the financial system for the purpose of money laundering.

Clause 318: Authorised disclosures

10. *Clause 318* sets out the circumstances in which a disclosure will be 'authorised' for the purposes of affording a defence to the principal money laundering offences in *clauses 311* to *313*. Where a disclosure is 'authorised' for these purposes, then it is not to be taken to breach any rule which would otherwise restrict that disclosure.

Clause 319: Interpretation

11. *Subsection (6)(b)* extends the definition of a constable as used throughout this Part to a person authorised by the Director General of the National Criminal Intelligence Service.

Schedule 5

12. Part I of this Schedule defines what is or is not a business in the regulated sector for the purpose of *clause 314(3)(b)*. It is broadly based on article 4 of the Money Laundering Regulations 1993. Part II of *Schedule 5* defines supervisory authorities for the purpose of *clause 314(6)(a)*. Similarly, this is consistent with article 15 of the 1993 Regulations.

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IX

GENERAL

9.1 Part IX of the Bill contains a small number of clauses on subjects that sit more comfortably in a general Part than in one of the earlier Parts of the Bill.

9.2 *Clause 320* paves the way for Orders in Council to be made to enable the United Kingdom to freeze property and enforce overseas orders in relation to the proceeds of any criminal conduct upon request by an overseas government. However, the European Union is currently negotiating a draft Framework Decision on the Execution in the European Union of Orders Freezing Assets or Evidence. This draft Framework Decision is based on the principle of mutual recognition between Member States of judicial decisions (a concept first proposed by the United Kingdom) and if there is early agreement within the European Union on the proposal, consideration will be given to using the Bill to implement all or some of its provisions with a view to its early adoption. Some adjustments to clause 320 may therefore be necessary.

9.3 Part IX also contains the general provisions found in all Bills, such as provision for the Bill's commencement.

9.4 Part IX is not complete in certain respects. It does not contain provision for the territorial extent of the Bill, or transitional provisions governing the implementation of the Bill. *Schedule 6* on consequential amendments to other legislation, provided for in clause 324, does not yet contain amendments to Scottish and Northern Ireland legislation. The view has been taken that all these matters should be settled at a later date, when the final form of the legislation is clearer.

GENERAL - EXPLANATORY NOTES

Clause 320: External requests and orders

1. *Clause 320* provides for the freezing of property in England and Wales which may be needed to satisfy overseas orders in relation to the recovery of criminal proceeds, and for the enforcement of such orders by the realisation of property in England and Wales. Such provision is to be made by Order in Council. This clause differs from the existing legislation in certain important respects.

2. It should be noted that there is another scheme, in section 9 of the Criminal Justice (International Co-operation) Act 1990, for the enforcement in England and Wales, also by Order in Council, of forfeiture orders made outside the United Kingdom. However, these forfeiture orders are restricted to orders for the disposal of "instrumentalities" of crime (i.e. items used, or intended for use in the commission of criminal offences). The Bill makes no change to section 9 and does not affect the operation of the Orders in Council made under it.

3. Under current legislation, assistance in freezing property and enforcing overseas orders may only be granted to countries and territories which have been "designated" for the purpose. *Clause 320* does not require designation. It enables such assistance to be granted to the government of any country or territory outside the United Kingdom, without any need for designation.

4. The Bill makes an external order which is made in relation to the recovery of the proceeds of crime enforceable here, regardless of the form the external order takes. It could be an order made against a person (an "in personam" order) or an order made against property (an "in rem" order, as in civil forfeiture proceedings in the USA). It could be a forfeiture order (an order changing the title of property), an order to a person to pay a sum of money, or some other kind of order.

5. The external order must, however, have been made by an overseas court. It is, again, immaterial what kind of court proceedings the external order is made in. It could be made in criminal proceedings, civil proceedings or some other court proceedings. However, non-court orders such as "administrative" confiscation orders made by police officers and similar authorities are excluded from the scheme.

6. An external order is defined as being for the recovery of specified property. This will enable external orders to be enforced, whether they are orders for the recovery of particular tainted property or orders for specified sums which may be satisfied out of any property, legally or illegally obtained.

7. It should be noted that *clause 320* will enable property in England and Wales to be frozen in response to a request from an

overseas government at a very early stage in an investigation, as long as there are reasonable grounds to believe that the property to be frozen may be needed to satisfy an external order which may be made.

Clause 321: Customs and Excise prosecutions

8. *Clause 321* provides that the Commissioners of Customs and Excise may bring proceedings for an offence under Part VIII of the Bill (money laundering), an offence under *clause 309* (prejudicing an investigation) and certain inchoate offences in relation to these offences. The provision reflects that in existing legislation, except that the range of offences covered has been increased slightly.

Clause 322: Crown servants and regulators

9. *Clause 322* provides that the money laundering offences in Part VIII of the Bill and the offence of prejudicing an investigation under *clause 309* can be applied, by regulations made by the Secretary of State, to persons in the public service of the Crown. The provision is required because Crown servants are not subject to criminal offences in the exercise of their duties as Crown servants, but areas of Crown business may potentially be vulnerable to money laundering. The provision closely follows the existing legislation, under which regulations have been made applying the offences to the Director of Savings and his staff.

10. *Clause 322* also enables the offence of failing to disclose that another is engaged in money laundering (in *clause 314*) to be disapplied, by regulations made by the Secretary of State, where supervisors and investigators are concerned. The principle underlying the provision is that the reporting of money laundering by such persons to law enforcement should not be regulated by means of this criminal offence. There is a separate requirement under regulation 16 of the Money Laundering Regulations 1993 for them to make disclosures to a constable. Again, regulations have been made under a similar provision in the existing legislation.

11. The second limb of this clause, as described above, may no longer be necessary. The existing (drugs only) "failure to report" offence is universal. The offence in *clause 314*, however, only applies to the regulated sector. If it is impossible for a person to be at the same time a person in the regulated sector and a supervisor or investigator, the provision is otiose. The Government is investigating whether there is any overlap between the two areas.

Schedule 6

12. The enabling power for *Schedule 6* is in *clause 324*. This Schedule contains amendments which need to be made to other legislation as a result of Parts II and VIII of the Bill. In some cases, these substantially replicate consequential amendments made in the existing legislation. This applies to the amendments to the *Land Registration Act 1925*, the *Rehabilitation of Offenders Act 1974*, the *Criminal Justice Act 1982*, the *Insolvency Act 1986*, the *Criminal Justice (International Co-operation) Act 1990* and the *Crime (Sentences) Act 1997*.

13. In other instances, it has been necessary to modify the existing provision as a result of changes made by the Bill. Thus, the amendment of the *Criminal Appeal Act 1968* contains a new provision in *sub-paragraph (2)*. This is needed because the Director may be involved in certain appeals to the House of Lords under the 1968 Act.

14. The amendment to the *Misuse of Drugs Act 1971* is one of a number affected by the new approach to money laundering adopted in the Bill. Part VIII of the Bill establishes a number of new money laundering offences, applicable to benefit from all criminal conduct. The new offences replace separate drug money laundering and other crime money laundering offences in the existing legislation. In the existing legislation, the drug money laundering offences are defined as "drug trafficking offences".

15. Because there is no longer such a thing, under the Bill, as a drug money laundering offence, the definition of a drug trafficking offence no longer includes drug money laundering offences. (As explained in the note on *clause 85* above, the Bill adds to the definition of drug trafficking an offence under section 8 of the Misuse of Drugs Act 1971.)

16. The phrase "drug trafficking offence", as defined in the confiscation legislation, is used in other legislation, including section 27 of the *Misuse of Drugs Act 1971*, which empowers the courts to make a forfeiture order following a conviction of a drug trafficking offence. Because of the new definition of a drug trafficking offence, section 27 will no longer apply to drug money laundering offences but will apply to section 8 of the Misuse of Drugs Act 1971.

17. The amendment to the *Criminal Justice Act 1988* similarly takes account of the abolition of drug money laundering offences, where certain HM Customs powers are concerned. The amendment to the *Extradition Act 1989* makes it clear that, in future, the new all crime money laundering offences created by the Bill will implement the United Kingdom's obligations in relation to drug money laundering under the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and

Psychotropic Substances.

18. By virtue of the amendment to section 110(5) of the *Powers of Criminal Courts (Sentencing) Act 2000*, those convicted of drug trafficking offences (but not drug money laundering offences) will continue to be subject to mandatory sentences.

19. By virtue of the amendment to section 116 of the *Police and Criminal Evidence Act 1984*, a drug trafficking offence (but not a drug money laundering offence) will continue to be a serious arrestable offence. The amendments to sections 56 and 58 of the 1984 Act enable the exercise of an arrested person's rights to be delayed under certain circumstances where this might result in the dissipation of a person's benefit from crime.

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ANNEX - REGULATORY IMPACT ASSESSMENT

PROVISIONAL FULL REGULATORY IMPACT ASSESSMENT

1. The provisions of the Bill that are expected to have an impact on businesses are as follows:

·the change in procedures to make restraint available earlier in an investigation (II);

·in money laundering, the extension of the "failure to report" offence to all crime (VIII);

·the investigatory powers (VII);

·the new power to make Interim Receiving Orders in connection with the recovery of property by means of civil proceedings (V);

·use of the tax system to target the proceeds of crime (VI);

·the corresponding provisions for Northern Ireland & Scotland (III & IV).

No direct impact on charities or voluntary bodies has been identified.

2. The measures in the Bill are designed to prevent persons from profiting from the proceeds of crime by giving law enforcement agencies new powers and by establishing a new specialist agency, focused on depriving criminals of their illegally obtained assets. These measures are designed to implement the recommendations set out in the PIU Report.

3. While it is inevitably difficult to quantify objectively the benefits of certain techniques (whether on a standalone basis or in comparison with other techniques), in the light of the PIU study the Government considers that there is sufficient benefit in each of the measures to justify their introduction.

4. The total cost of the package of measures contained in the Bill is estimated at between £8.3 million and £9.25 million. However, the introduction of the new monitoring order will mean a significant reduction in the number of production orders sought, bringing the net cost down to £3.3m to £4.25m.

5. The provisional Full Regulatory Impact Assessment for the Bill is attached. The Government will take into consideration any further comments which are received and will amend the RIA as necessary in the light of them.

DRAFT REGULATORY IMPACT ASSESSMENT

A.Issue and Objective

1. On 14th June 2000 the Cabinet Office's Performance and Innovation Unit (PIU) published its report "*Recovering the Proceeds of Crime*". The Report (which can be found at www.cabinet-office.gov.uk/innovation/2000/crime/recovering/default.htm) looks at how attacking the profit of crime can act as an effective deterrent to its commission. Implementation of the report is being taken forward by the Home Office, in consultation with other departments and organisations, and the draft Proceeds of Crime Bill has resulted from this work.

2. The Bill would enable the law enforcement authorities and the proposed Agency to investigate effectively the origin of suspected criminals proceeds, and enable assets to be restrained pending criminal and/or civil proceedings and their ultimate confiscation or recovery. In addition, where criminal conduct is suspected, the Agency would ensure that tax and other Inland Revenue obligations are met.

3. This assessment estimates the costs likely to be imposed on business by the Bill. It reflects the response to the public consultation on the Partial Regulatory Impact Assessment issued on 4th September 2000.

4. The Partial Assessment was sent to **148** individuals and organisations, and was also placed on the Home Office website. A total of **seven** replies were received, from business organisations (**3**), organisations representing legal professionals (**2**) and organisations representing areas of the criminal justice system (**2**).

5. As a result of the consultation exercise, the Government has modified some proposals and costings as follows:

Money laundering: extension of the offence of failing to report knowledge or suspicion that another person is engaged in drug money laundering and the introduction of a negligence test (items h) and i) of paragraph 8 below).

The Government remains convinced that an extension of the current failure to report offence, which only applies at the moment in cases of drug money laundering, is necessary because it places an inappropriate burden on business to decide whether the suspected laundering is concerned with drug trafficking or some other crime. The distinction can also provide a loophole for those so minded to evade prosecution, on the basis that they can claim that the funds are derived from crime other drug trafficking. However, business has raised the point in consultation about the difficulty of applying a negligence test when the level of awareness throughout business would vary widely between individuals and sectors. The Government accepts that this could lead to unfairness and has decided to restrict the failure to report offence, extended to cover all crime money laundering and incorporating a negligence test, to those bodies and institutions which are subject to the Money Laundering Regulations 1993.

Money laundering: abolition of the "adequate consideration" defence in respect of the offence of acquiring, possessing or using the proceeds of crime (item j) of paragraph 8 below).

The Government recognises that the abolition of the defence that a person acquired, uses or has possession of property for adequate consideration would require routine transactions to be scrutinised disproportionately, in order to attempt to ascertain whether the money exchanged for everyday goods etc represented the proceeds of crime. Equally, the setting of thresholds or exceptions in order to prevent, for example, grocery shopping coming within such an offence would not be straightforward. The compliance cost of such a change in the law could be high, and might outweigh the benefit to the prevention of money laundering. For this reason, the Government has decided not to proceed with the proposal.

Cost to business of certain measures.

As a result of the consultation exercise, the cost to business of the *Disclosure Order and Customer Information Order* powers (set out at paragraphs 33-34 and 35-38 below) have been increased. Even in the light of these increased costs, the Government remains satisfied that they are still significantly outweighed by the benefits of these proposals, and will be proceeding with these changes.

B.Risk Assessment

6. Acquisitive crime causes inconvenience and disruption to its victims, and can have wider effects such as a loss of confidence in the police service and the criminal justice establishment. This is particularly true of drug trafficking. Money laundering can adversely affect the level of stability and confidence in both financial markets generally and in individual institutions. Illegally obtained assets are also used to start up legitimate businesses, which then act as money laundering institutions. The illicit source of this start-up funding is at a lower cost than to a legitimate business, thus distorting the conditions of the legitimate market. Failure to pay the taxes due serves to compound this distortion.

7. The value of criminal proceeds available to be confiscated from those perpetrating acquisitive crime (not including the criminal justice costs of prosecuting such offenders) was estimated in May 1995 as being as much as £650 million per annum. While there is no methodology for gauging the accuracy of this figure or the extent of criminal proceeds, amounts of this order (and anecdotal evidence from the law enforcement agencies is that the amount has grown steadily since 1995) are both unacceptable in themselves and have potentially harmful economic effects. For example, if such money is not targeted in a systematic way, failures of legitimate businesses could occur due to criminally financed competition.

C. (i) Options

8. The Report of the PIU, and the Third Report of the Home Office Working Group on Confiscation[2], identified a number of proposals for improving the recovery rate of illegally obtained assets. Those with potential regulatory impact are:

- (a) Disclosure Orders (formerly known as Explanation Orders);
- (b) Customer Information Orders (formerly known as General Bank Circulars);
- (c) Account Monitoring Orders;
- (d) Increase in the use of existing Production and Restraint Order powers;

- (e) Transfer of Restraint Order powers to Circuit judges;
- (f) Power to make Interim Receiving Orders in connection with the recovery of property by means of civil proceedings
- (g) Use of the tax system to target the proceeds of crime;
- (h) Money laundering: extension of "failure to report" offence to all crime;
- (i) Money laundering: the "objective" mens rea;
- (j) Money laundering: abolition of the "for value" defence.

A description of each of proposals a) - g) above, as reflected in the draft Bill, is set out at heading D. (i) below. As set out at paragraph 5 above, the Government has decided not to proceed with the original proposals h) to j); the new objective failure to report offence for the regulated professions is set out at paragraphs 19-21 below.

9. Owing to the legal framework relevant to client confidentiality and data protection, it is not possible to obtain more effective access to personal information other than by legislative means. The Government considers that a strengthening of the powers to investigate criminal proceeds is essential and has therefore decided to implement proposals a) to g) and, as set out above, the modified failure to report offence at paragraphs 19-21 below. The regulatory impact of each of the proposals is identified below; further detail can be found in the Reports mentioned above and in the Explanatory Notes to the draft Bill.

2 Published as part of a consultation exercise by the Home Office in November 1998. It can be found at www.homeoffice.gov.uk/oicd/jcu/wgconf.htm. Back

C. (ii) Issues of Equity or Fairness

10. It is perceived that the proposed measures should impact equally across the whole industry. Indeed, if they were not universally applied, those sectors that already fully comply with the Guidance Notes issued by the financial industry's Joint Money Laundering Steering Group on Money Laundering could complain with some justification that they were behaving responsibly whilst others in the industry were benefiting from their non-adherence to regulatory and legislative obligations, or even getting away with criminality.

11. The Government has, throughout the process of policy development, been alert to the risk that the likely burden might be more onerous for some small businesses where they lack administrative capacity. Now that the consultation on the Partial RIA has taken place and representations received from the business community, the Government is better informed on these issues. This is one reason why it has decided not to proceed with the abolition of the "for value" defence and the wider application of "failure to report" and the objective mens rea that was originally proposed.

D. (i) Benefits

Disclosure Orders (formerly known as Explanation Orders) (See clauses 291 to 295).

12. Material obtained under existing production orders, such as information contained in bank or other transaction reports, can often be extremely complex and, without the assistance of the provider, it can take a long time to interpret. In circumstances where such assistance is not forthcoming, a disclosure order would compel the person or organisation producing the material to attend for interview and explain the material to an Agency investigator (this power would only be available to the Agency), thus saving time and cost and reducing the possibility of error.

Customer Information Orders (formerly known as General Bank Circulars) (See clauses 297 to 303).

13. Production orders can be obtained against a specific person or organisation when it is known that a suspect has dealings with them. A Customer Information Order would enable an investigator to ask a targeted sample of institutions (or, in depending on the circumstances, all institutions) whether they had dealings with a person under investigation. Once such business relationships have been identified, a production order could be applied for as at present. This would give the benefit of being able to find a suspect's financial details more efficiently than at present. The Government is aware that extensive use of this power could have a significant effect on the financial services industry. In an effort to reassure the financial industry that the power will not be used unnecessarily, the Government proposes that only those with a high level of authority (police superintendents or equivalent) will be able to authorise applications for these orders.

Account Monitoring Orders (See clauses 304 to 308).

14. Under existing law, if an investigator wishes to monitor the transactions on an account over a period of time, he must seek a series of production orders from the court, incurring costs for himself, the court and the organisation which is the target of the order. It is intended that a single account monitoring order would cover a set period of no more than 90 days without further reference to the court, with commensurate savings for all concerned.

Increasing the use of Production and Restraint Order powers (See clauses 281 to 287 and 39 to 46).

15. The PIU Report identified that only a very small proportion of confiscation orders are preceded by restraint orders each year, allowing criminals to disperse their assets before they can be seized. In addition, existing production order powers are not used to their fullest extent. It is anticipated that, as part of the increased emphasis on financial investigation, these powers will be employed in more cases, allowing more illicitly obtained assets to be identified and recovered.

Transfer of Restraint Order powers to Circuit judges (See clauses 39 to 46).

16. Further to the previous paragraph, it is proposed to allow Circuit judges (rather than High Court judges as at present) to make restraint orders, in line with the simplified procedure set out in the PIU Report, whereby all confiscation matters are dealt with in the Crown Court.

New power to make Interim Receiving Orders in connection with recovery proceedings (See Clauses 253 to 262).

17. If the civil recovery powers proposed by the Working Group (at Chapter 4) and the PIU (at Chapter 5) are to work effectively, they will need to be supported by a range of powers, including those of receivership and restraint.

Use of the Tax System to target the Proceeds of Crime (see clauses 272 to 279).

18. The PIU Report identified that many criminal organisations generate substantial revenues that go untaxed. The intention is for the Criminal Assets Recovery Agency to investigate tax liabilities. The Director of the Agency is to have a special power to raise estimated assessments for income tax (subject to the normal rights of appeal) even though at the time he cannot identify a particular source.

Money laundering: extension of the "failure to report" offence to all crime (See clause 314).

19. Under Section 52 of the Drug Trafficking Act 1994 it is an offence, punishable by up to five years imprisonment, not to disclose to a constable knowledge or suspicion that another person is engaged in the laundering of drug money. A similar offence in respect of terrorist funds is at Section 19 of the Terrorism Act 2000. However, no such offence exists to require someone to disclose knowledge or suspicion of the laundering of other illegally obtained money. There is some evidence that this loophole has been exploited; for example, non-disclosure of such suspicion has been defended on the grounds that the origin of the money was unknown.

20. In order to streamline the law, remove any ambiguity and reduce the burden on professionals in considering the origins of the money, it is proposed to widen the offence to cover all forms of money laundering. However, given the complexities of money laundering techniques, the Government proposes to restrict this offence to the regulated sector, namely those businesses which are already under an obligation to have in place measures against money laundering by virtue of the Money Laundering Regulations 1993 (SI 1993 No. 1933).

Money laundering: the knowledge test (See clause 314).

21. The need for the prosecutor to prove that a person actually knew or suspected that money was criminal in origin is considered by the law enforcement community to be an unacceptably high threshold to meet in order to secure a successful prosecution for money laundering. The Government proposes instead that, alongside the principal money laundering offences (which will continue to have a mental test of actual suspicion or knowledge) there should be a lesser offence, applying to the regulated sector only, that a person knew, or had reasonable grounds for suspecting in the course of business, that another person was engaged in money laundering. Given the nature of this sector, it is considered that the application of such a test to it is fully justified.

D. (ii) Quantifying and Valuing the Benefits

22. Owing to the nature of criminal work and the difficulty of quantifying objectively the benefits of certain techniques (whether on a standalone basis or in comparison with other techniques), this section is necessarily lacking in objective valuations for the various measures. Nonetheless, the Government considers that there is sufficient benefit in each of the measures set out below to justify introducing them.

Disclosure Orders (formerly known as Explanation Orders)

23. The Northern Ireland authorities have found the disclosure order power set out in paragraph 12 above to be of considerable assistance in financial investigations generally and, due to the similar nature of investigations across the rest of the UK, such a benefit is anticipated more widely.

Customer Information Orders (formerly known as General Bank Circulars).

24. The Northern Ireland authorities have also found Customer Information Orders to be of considerable assistance in financial investigations generally. Between 1997 and 1999 they issued 15 GBCs and identified 650 accounts, of which 550 were of value to the investigation. A similar success rate is anticipated if such powers were extended across the UK.

Account Monitoring Orders.

25. Account monitoring orders have been used advantageously by the Australian authorities, and in terrorist cases throughout the UK. The Government has concluded that the proposed extension to cover crime generally would improve the efficiency and effectiveness of financial investigations in this country.

Increasing the use of Production and Restraint Order powers.

26. Additional resources for, and higher profile of, financial investigation will make it possible to make greater use of both existing and new investigatory powers, leading to more financial investigations, more money laundering prosecutions and more effective confiscation and recovery of the proceeds of crime.

Transfer of Restraint Order powers to Circuit judges.

27. The wider availability of restraint, by making it obtainable nationally in the Crown Court (rather than centrally in the High Court as at present), is central to improving the recovery of criminal assets. The transfer of this function to the Crown Court is a central part of the Government's strategy to concentrate all confiscation and related proceedings in the Crown Court. This will simplify the law for practitioners and lead to overall increased efficiency.

New power to make Interim Receiving Orders in connection with civil recovery (formerly civil forfeiture) proceedings.

28. The power to apply for receivership and restraint in advance of civil recovery proceedings will be vital to prevent the dissipation of assets. This measure will be a key element of civil recovery action and will help to increase the overall amount of criminal assets recovered.

Use of the tax system to target the proceeds of crime

29. The ability of the Director to enforce tax liabilities will be a useful tool to disrupt criminal activity and will reduce further the value of the assets available to fund such activity.

Money laundering: extension of "failure to report" offence to all crime.

30. The extended "failure to report" offence will ensure that more money laundering activity is brought to the attention of the authorities and thus enable money laundering to be combated more effectively, further enhancing levels of confidence in the financial services industry of the UK.

Money laundering: the knowledge test.

31. The introduction of an objective test in the offence of failing to report suspicions of money laundering will increase the level of criminal action against money launderers. It will also increase the awareness of professionals of the need to report suspicious transactions.

Compliance Costs for Business, Charities and Voluntary Organisations

E. (i) Affected Business Sectors

32. These proposals would affect charities or voluntary organisations in exactly the same way as the law on money laundering already affects all trading entities. The main businesses affected by these changes would be those that provide financial services within the regulated sector, such as banks, building societies, accountants and solicitors. It is estimated that the total size of the financial sector is in excess of 10,000 companies, partnerships or individuals.

E. (ii) Compliance Costs for a Typical Business

Disclosure Orders (formerly known as Explanation Orders)

33. In the consultation exercise the industry agreed that the estimate of £250 per order would be reasonably accurate in the majority of cases. However, where the provider of the explanation was called to give evidence in court, the cost could escalate considerably (by around £25 per hour). This could vary on a case by case basis, dependent upon geographical location, but in such an event, the party calling them (i.e. usually the Agency) would reimburse the witness's costs. Nonetheless, one of the responses to the consultation considered that, in a minority of cases, compliance with a disclosure order would require a senior member of staff to familiarise themselves with a case (perhaps for as much as 1½-2 days) before attending the Agency to answer questions

34. On the assumption of continuing levels of co-operation from the financial sector, the Government estimates that there would be no more than 200 disclosure orders required annually, usually in complex cases, and that senior staff would only need to become involved in 40% of these. The Government has assumed a cost of £250 per institution to respond to each 'normal' order and an average £1000 where a senior member of staff is involved. On this basis, it is anticipated that the annual cost to industry will be in the region of 120 x £250 plus 80 x £1000, or a total of £110,000 per annum, spread across a wide range of institutions.

Customer Information Orders (formerly known as General Bank Circulars)

35. The Regulatory Impact Assessment which was carried out for the General Bank Circular provision in the Terrorism Act 2000 assumed 36 circulars per year at a maximum total cost per circular per institution of £250. The cost of £250 was arrived at in Northern Ireland because their institutions rely heavily on manual records, making such a circular very labour-intensive. This gave a maximum cost to the industry of £900,000, on the assumption that each circular would be served on a maximum of 100 institutions.

36. The Government is mindful that the cost per institution of £250 could be significantly reduced where, for example, there is extensive computerisation of most financial business on the mainland or where no customer relationship is found to exist. As a result of the consultation exercise, the industry considered that the estimated cost of £50 is too low; it would only be accurate if circulars were to include information about the suspect in a form which made it easy for institutions to search their records. The Government will examine this point in implementing the measures in the Bill, but in the light of the comments received, the cost estimate has been increased to £100 per institution per circular, as an average figure between a request in the correct format and one which requires further work.

37. Concerns were raised that if details of specific transactions were required under the circular, the compliance cost burden would escalate dramatically. This will not be the case; if an investigator requires transaction details, a production order would be necessary on the basis of information provided in response to the customer information order. There was also an enquiry about the level of enquiry that a bank would be expected to undertake. As can be seen from the Bill, the test to be met by an institution will be whether it was "reasonably practicable" for it to provide the information.

38. It has been assumed that there will be about 250 uses per annum of the new power. While potentially such a circular could be served on all 10,000 institutions, the Government intends that the power should be used in a more focused way, probably affecting no more than 200 institutions. Using these estimates, the approximate total cost to the industry would be £100 (cost per institution per circular) x 250 (total number of circulars per annum) x 200 (total number of institutions a circular is served on) or around £5,000,000 per annum.

Account Monitoring Orders.

39. The Government has also assumed that a monitoring order will have a similar cost to that of a production order, which cost approximately £250 per institution per order, and that the 70 FIUs will raise a total of 9000 orders per annum. The total cost to the industry would then be 9000 x £250 or in the region of £2,250,000 per annum. Business considers that Monitoring Orders would be a positive development to reduce the number of production orders issued, and would therefore benefit both the authorities and the industry.

Increasing the use of Production and Restraint Order powers.

40. In the absence of accurate statistics for the number of production orders currently made, it has been assumed that around 75,000 orders are made per annum by existing financial investigators. Monitoring orders will act in lieu of some 25,000 of these, reducing the figure to 50,000 per annum. It is anticipated that there will be around 10% more applications for production

orders as a result of the additional resources for financial investigation. Accordingly, one would expect the proposal, on the basis of the estimates above, to give rise to a total additional number of 5000 requests annually. On the basis of our estimates of the cost of £250 per production order, the total cost to business of this proposal would be a saving of 20,000 x £250 or in the region of £5,000,000 per annum, taking into account the reduction due to proposal c) in paragraph 8 above.

41. Business considers that the use of Customer Information Orders will generate the need for a significant increase in the number of production order applications. However, given the Government's estimate of the low number of these orders to be made annually (250) and the large number of production orders set out above (55,000) it considers that any increase will be at the margins of this figure, and it has not factored any increase into the above calculations.

Transfer of Restraint Order powers to circuit judges.

42. The Government has assumed that the combined effects of proposals d) and e) in paragraph 8 above will mean that restraint orders will be applied for in around 20% more cases than at present (250 cases per year), giving rise to approximately 50 more orders per year. The cost to business of an individual restraint order is estimated at £150.

On the assumption of an additional 20% per annum or 50 orders per year, the total cost to business would be 50 x £150 or £7,500 per annum.

New power to make Interim Receiving Orders in connection with civil recovery (formerly civil forfeiture) proceedings.

43. It is unlikely that the proposed Agency would take on more than about 50 civil recovery cases per year to start with. However, such cases would, in the main, be high in value and Interim Receiving Orders will probably be made in all cases. The Government has assumed that, for the purposes of assessing compliance cost, an Interim Receiving Order will cost the same as a (criminal) restraint order. On this basis, it is assumed that 50 Interim Receiving Orders a year will be made, giving an additional cost of the same magnitude as proposal e), at a cost of around £7,500 per year.

Use of the tax system to target the proceeds of crime

44. The Agency cases that involve the use of the tax system will be included within the 50 cases referred to above. The costs of proper compliance with Inland Revenue obligations will not normally be increased by the fact the Agency is involved. Extra costs could be incurred where a person, who *ex hypothesi* will not have properly met these obligations, decides to contest a special assessment to income tax raised by the Agency (see paragraph 29). These costs will vary substantially according to each case but where specialist tax and/or legal representation is obtained the cost could be significant.

Money laundering: extension of "failure to report" offence to all crime

45. No records are kept as to how many of the 15,000 reports made annually to NCIS are made under the existing "failure to report" offence. However, experience of the introduction of such an offence for drug and terrorist money laundering produced no significant increase in the overall level of reports. On one view, therefore, it is unlikely that the effect of extending these offences to cover the proceeds of crime in general will have any significant effect. On another view, the extension of these offences might generate an increase of anything from 25% up to 50% in reporting, or 3,750–7,500 additional reports per annum. Given an approximate cost of £250 per report, the additional cost to industry would be between 3,750 x £250 (£937,500) and 7,500 x £250 (£1.875m) per annum.

46. As a result of the consultation exercise, the proposal to extend the "failure to report" offence is welcomed by business as it will give consistency to the reporting requirements and will simplify industry-training requirements. However, points raised in the consultation about the difficulty of applying such a test to routine, low value transactions have persuaded us to limit the new offence to the regulated professions only i.e. those businesses subject to the Money Laundering Regulations.

47. Another point raised in consultation was the effect of introducing a negligence test for the new extended failure to report offence. One party suggested that this would result in a "great upsurge" in reports. This is reflected in the range of figures given in paragraph 45 above.

E. (iii) Total Compliance Costs

Subject	Cost
(a) Disclosure orders	£110,000
(b) Customer Information Orders	£5,000,000
(c) Account Monitoring Orders	£2,250,000
(e) Transfer of restraint order powers to circuit judges	£7,500
(f) New power to make an Interim Receiving Order in connection with civil forfeiture	£7,500
(g) Money laundering: "failure to report" to	£937,500
Total Cost	£1,875,000
to	£8,312,500
Savings	£9,250,000
(d) Increasing the use made of existing production and restraint powers	£5,000,000
Total Savings	£5,000,000
Net Cost	£5,000,000
to	£3,312,000
	£4,250,000

F. Consultation with small business: "The Litmus Test"

48. The measures in the Bill are not perceived as having a significant impact on small business; rather they will impact on financial institutions of at least medium size. The difficulties for unregulated small businesses in respect of the offence of failing to report knowledge or suspicion of money laundering and the application of a negligence test for such an offence are set out above, and are part of the rationale for the Government's decision not to proceed with these changes. The Small Business Service of the Department of Trade & Industry concur with this view.

G. Any other costs

49. None.

H. Results of consultation

50. Consultation has taken place on the Working Group and PIU Reports with the police, other government departments, the financial industry and its regulators. There has also been a full consultation exercise on the Interim RIA on these proposals, which was issued on the 4th September 2000.

51. The Home Office and the Department of Social Security (DSS) are also discussing the interaction of these measures and the latter's proposals to obtain information to prevent and detect benefit fraud. These proposals were set out in the DSS's consultation document and Preliminary Regulatory Impact Assessment "Safeguarding Social Security: Getting the Information we Need" (published in July 2000) and now form the Social Security Fraud Bill currently before Parliament.

I. Summary and Recommendation

Costs	Benefits
£3,312,500–£4,250,000	up to £650 million (see para 7 above)

52. The assessment has indicated very significant benefits that could accrue from implementing the package of proposals. Indeed, even if only 10% of the amount estimated to be available for confiscation were in fact achieved, it would still significantly exceed the estimated regulatory cost of compliance. The Government is therefore proceeding with these changes as set out in the draft Proceeds of Crime Bill.

J. Enforcement, Sanctions, Monitoring and Review

53. It is anticipated that most of the enforcement activity will arise out of enquiries made by the police and other law enforcement agencies. As part of the Asset Confiscation Strategy proposed by the PIU, the Agency would be responsible for monitoring the effectiveness of these proposals, including their levels of use.

K. Declaration

54. I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

(To be signed by the responsible Minister)

Jack Straw
Secretary of State
Home Office

Date:

Departmental Contact:

Peter Vallance, Financial Crime Team, 50 Queen Anne's Gate, London SW1H 9AT
Tel: 020 7273 3071E-mail: peter.vallance@homeoffice.gsi.gov.uk

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