



# Scottish Law Commission

DISCUSSION PAPER No. 82

## **FORFEITURE AND CONFISCATION**

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views of the Scottish Law Commission



The Commission would be grateful if comments on this Discussion Paper were submitted by 30 November 1989. All correspondence should be addressed to:

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## FORFEITURE AND CONFISCATION

### 1. INTRODUCTION

1.1 On 2 October 1987 we received a reference from the Secretary of State for Scotland asking us to carry out a review of the law of forfeiture, including confiscation of the proceeds of crime. The reference, which was made under section 3(1)(e) of the Law Commissions Act 1965, invited us

"to consider

1. the adequacy of the present law and the procedure relating to the forfeiture, in criminal proceedings in Scotland, of property used for the purpose of committing, or facilitating the commission of, offences and of proceeds of criminal activity in general; and

2. whether further provision should be made to enable courts in Scotland to order forfeiture of the proceeds of criminal activity generally and property derived from such proceeds

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

1.2 Of the two elements which are to be the subject of the review, it is the latter - confiscation of the proceeds of crime - which has provided the main impetus for reform. Stripping the criminal of the profits made from criminal activities is increasingly being seen as an effective way to combat crime as well as a means of doing justice by restoring the criminal to the position he was in prior to carrying out those crimes. At the same time there are various aspects of the existing law and procedure relating to the forfeiture of property used in the commission of a crime which can usefully be re-examined.

1.3 In this Discussion Paper we shall briefly describe, in Part 2, the existing law in relation to forfeiture, in the sense of forfeiture of property used in the course of, or to facilitate the commission of, a crime; and in Part 3 we shall consider ways in which the existing law on that matter might be improved. Part 4 of the Discussion Paper contains a brief summary of recent legal developments, in Scotland and elsewhere, designed to strip an offender of the proceeds of criminal activity; and finally, in Part 5 we consider how a general power to make confiscation orders might best be introduced in Scotland. Part 6 of the Paper contains a summary of our provisional proposals on which we seek the views of consultees.

1.4 It may be helpful to note at the outset that, in this Paper, we use the term 'forfeiture' to describe the seizure and retention of property connected with the commission of an offence. By contrast, we use the term 'confiscation' to describe the seizure of money or other property representing the proceeds, profits or other benefits derived from crime. Occasionally in the past, and indeed in the reference quoted in paragraph 1.1 above, the term 'forfeiture' has been used in both senses, but we hope that it may avoid confusion if its use is limited to the first of the two matters described above.

## 2. THE PRESENT LAW RELATING TO FORFEITURE

### Sections 223 and 436 of the 1975 Act

2.1 Courts in Scotland have a general power to order the forfeiture of property used in connection with a criminal offence. That power, which is now contained in section 223 of the Criminal Procedure (Scotland) Act 1975 for solemn proceedings and in section 436 for summary proceedings, is as follows:

(1) Where a person is convicted of an offence and the court which passes sentence is satisfied that any property which was in his possession or under his control at the time of his apprehension -

(a) has been used for the purpose of committing, or facilitating the commission of, any offence; or

(b) was intended by him to be used for that purpose,

that property shall be liable to forfeiture, and any property forfeited under this section shall be disposed of as the court may direct.

(2) Any reference in this section to facilitating the commission of an offence shall include a reference to the taking of any steps after it has been committed for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection.

2.2 This general power in the 1975 Act is much wider than its equivalent in prior legislation. In Simpson v Fraser<sup>1</sup> the High Court on appeal had to consider the terms of an earlier provision, section 44 of the Summary Jurisdiction (Scotland) Act 1908. This had provided that "the court shall have power to order the forfeiture of any instruments or other articles found in his possession used or calculated to be of use in the commission of the offence". In that case, three men had been convicted of

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<sup>1</sup> 1948 JC 1

entering upon ground adjacent to the river Deveron. They had travelled there from Aberdeen by car and were in the course of attempting to drive back when they were intercepted. The sheriff indicated that he would in principle have been prepared to grant the motion for forfeiture of the car. However, after examining the terms of section 44, he did not believe that it was competent for him to do so. The High Court, looking at this section and also at the various forfeiture provisions to be found in the Salmon Fisheries Act, came to the same conclusion. It took the view that the words "used, or calculated to be of use, in the commission of the offence" meant that there must be a direct and particular connection between the use of the article and the commission of the offence. The offence was the entering of the river bank in the possession of fishing implements; the car was used to transport the accused to the scene, but not actually to take part in the offence. The High Court consequently held that the car could not competently be forfeited.

2.3 Although that case is still cited, it is likely now to be mainly of historical interest. It is no longer necessary that the property be used in the commission of the offence; facilitating the commission of the offence is now sufficient in terms of section 436(1)(a), quoted above. The wider powers contained in section 436 of the 1975 Act could therefore be used to forfeit the motor vehicle in such a case today. In the recent case of Carruthers v MacKinnon<sup>1</sup> the sheriff forfeited a motor car where the accused had pled guilty to stealing £400 worth of copper cable from a railway line. Delivering the opinion of the High Court in the appeal, the Lord Justice-General (Emslie) commented that "when the sheriff came to impose a penalty, he realised at once the crime could not have been committed without the use of a motor

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<sup>1</sup> 1986 SCCR 643.

car". The Lord Justice-General indicated that the court was entirely satisfied that the sheriff had been right to forfeit the car and the appeal was "resoundingly refused".

### 'Any offence'

2.4 The power of forfeiture contained in the 1975 Act extends to property used or intended to be used in the commission of "any offence", not just the offence of which the person is convicted. This issue arose in Donnelly v HMA<sup>1</sup> where the accused was convicted of possessing cannabis resin with intent to supply. Upon conviction £1,047 which had been found in his possession on his arrest was ordered to be forfeited. He appealed against the forfeiture order on the ground that:

"The forfeiture of the money produced by the Crown in the case was inappropriate as, on the evidence adduced, none of it could have related to an offence of an intention of future supply and, in any event, it was not all proved to have any connection with previous drug supply at all."

The Appeal Court held that the forfeiture was competent. The advocate-depute had argued that it was competent under both heads (a) and (b) or either of them in section 223(1). The High Court based its decision on section 223(1)(b) - "was intended by him to be used for that purpose". It held that the judge had been entitled to be satisfied that the money was intended to be used by the appellant for the purpose of committing an offence, and, for that matter, an offence under the Misuse of Drugs Act 1971.

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<sup>1</sup> 1984 SCCR 93

2.5 In applying to 'any offence' the 1975 Act is wider than the forfeiture provision contained in the Misuse of Drugs Act 1971 itself. Section 27 of that Act provides for the forfeiture of anything shown to relate to 'the offence'. The money could therefore only be forfeited under the 1971 Act if it was the proceeds of the supply of which the accused had been convicted. The 1975 Act, on the other hand, allowed for forfeiture of property intended by the accused to be used for the purpose of committing any offence.

#### **General and specific provisions**

2.6 The case of Donnelly v HMA is also of interest for another reason. Section 27 of the Misuse of Drugs Act 1971 allows the forfeiture of anything shown to relate to the offence. 'Anything' had been held in England to include money.<sup>1</sup> However, also in England, it had been held that where a person was arrested on his way to sell drugs and was in possession of drugs, scales and money, then the money could not competently be forfeited under the 1971 Act.<sup>2</sup> Before Donnelly v HMA it was unclear whether the court could use the general power of forfeiture when the particular statute had its own forfeiture provision which was more restrictive. If forfeiture was not competent under the 1971 Act then it could be argued that it was not competent at all. This case showed that even if the money could not be forfeited under the specific provision in the relevant legislation, it could still be forfeited under the wider provision in the 1975 Act.

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<sup>1</sup> R v Beard (Graham) [1974] 1 WLR 1549.

<sup>2</sup> R v Ribeyre (1982) 4 Cr App R (S) 165; see also R v Simms [1988] Crim L R 186.

## **Probation and absolute discharge**

2.7 In solemn proceedings absolute discharge and probation proceed upon conviction. By virtue of sections 182 and 183 of the 1975 Act, the accused is convicted of the offence, but the court, instead of sentencing him, makes an order discharging him absolutely or placing him on probation. As forfeiture is competent by virtue of section 223 once a person has been convicted, the court may also make a forfeiture order. Conversely, in summary proceedings, by virtue of sections 383 and 384 of the 1975 Act, the court does not proceed to conviction when discharging a person absolutely or placing him on probation. Originally, the general power of forfeiture permitted a forfeiture order to be made either on conviction or on the making of a probation order.<sup>1</sup> In 1980,<sup>2</sup> the existing summary forfeiture general power was replaced by the solemn one, with the result that forfeiture was dependent upon conviction. Consequently, a forfeiture order may not be made in summary proceedings in conjunction with an absolute discharge or a probation order unless such a power is provided for in any of the specific forfeiture provisions.

## **Relevance of ownership and use**

2.8 The terms of the forfeiture sections in the 1975 Act make no mention of ownership of the property. It may therefore be concluded that the property may be forfeited if it meets the

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<sup>1</sup> See Summary Jurisdiction (Scotland) Act 1954, s 54.

<sup>2</sup> The Criminal Justice (Scotland) Act 1980, Sch 7, para 71.

requirements of the section, irrespective of whether or not it belongs to the person who is being sentenced. Nor does it matter whether the property was used by the convicted person or by someone else, as long as it was used for the purpose of committing or facilitating the commission of an offence. The article may therefore relate to offences involving people other than the accused. Although head (b) is limited by the words intended "by him" to be used for that purpose, head (a) does not provide that the articles need have been used "by him" for the purpose of committing or facilitating the commission of any offence. This has given rise to problems in the past, and will be considered in more detail in Part 3 below.

#### **Forfeiture powers in particular statutes**

2.9 In legislation relating to particular types of offences a power to order forfeiture of related property has often been included. These provisions all differ according to the type of offence involved, be it relating to drugs, counterfeit money, smuggling, offensive weapons, illegal fishing or whatever. Section 27 of the Misuse of Drugs Act 1971 has already been mentioned, and further examples will be found in statutes such as the Prevention of Crime Act 1953<sup>1</sup>, the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951<sup>2</sup> and the Sea Fish (Conservation) Act 1967<sup>3</sup>.

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<sup>1</sup> s 1.

<sup>2</sup> s 19.

<sup>3</sup> s 11.



## **Powers exercisable on and irrespective of conviction**

2.10 Amongst specific statutory powers it is possible to draw a distinction between those that can be exercised only after the person has been convicted of the relevant offence and those that are exercisable whether or not proceedings are instituted. An offensive weapon, for instance, may only be forfeited after a conviction.<sup>1</sup> By contrast, the Forgery and Counterfeiting Act 1981 allows for tools for making forgeries or false implements to be seized irrespective of whether criminal proceedings are taken.<sup>2</sup> Section 24(2) provides that any object which is a counterfeit of a currency note or a protected coin may be the subject of an application by the procurator fiscal to the sheriff for a forfeiture order, independently of the court's powers on conviction under section 24(3).

## **Probation and absolute discharge**

2.11 Certain specific statutory provisions, such as that in the Firearms Act 1968, provide that forfeiture may accompany a probation order. Similarly, where a convicted thief is found in possession of any tool or other object from which the commission or intended commission of theft can be inferred, the court may order forfeiture of the tool or other objects concerned where the person is placed on probation, as well as where he is discharged absolutely.<sup>3</sup> This contrasts with the position under the general forfeiture provisions in the 1975 Act.<sup>4</sup>

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<sup>1</sup> Prevention of Crime Act 1953 s 1.

<sup>2</sup> s 7. See also the Copyright, Designs and Patents Act 1988, ss 108 and 195.

<sup>3</sup> Civic Government (Scotland) Act 1982 s 58.

<sup>4</sup> See para 2.7 above.

## Forfeiture and compensation

2.12 Until recently compensation has usually been seen in Scotland as the concern of the civil rather than the criminal courts. However, the Criminal Justice (Scotland) Act 1980 introduced a power allowing the court to make an order requiring a convicted person to pay compensation for any personal injury, loss or damage caused by the acts which constituted the offence.<sup>1</sup> This power can be used either instead of or in addition to dealing with the offender in any other way. In solemn proceedings there is no limit to the amount which may be awarded. In summary proceedings the sheriff and stipendiary magistrate have power to award compensation up to the prescribed sum (currently £2,000) and a justice at the district court may award up to £1,000.<sup>2</sup>

2.13 The system of compensation is quite distinct from that of forfeiture or indeed confiscation and does not of itself come within the terms of reference of this review. It is primarily concerned with compensating the victim whereas forfeiture and confiscation are concerned with depriving the accused of property which he has used or acquired.

2.14 There is nevertheless an overlap between compensation and forfeiture, and between compensation and confiscation which we will be considering. The former occurs where the only funds available to compensate a victim may be those resulting from the sale of forfeited articles. The latter occurs where the confiscation

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<sup>1</sup> s 58.

<sup>2</sup> s 59, as amended by Criminal Justice Act 1982, s 56, Sch 7, para 16.

of illicitly obtained profits may provide the only funds with which a victim might be compensated. We consider those matters more fully in Parts 3 and 5 below.

### 3. FORFEITURE: THE NEED FOR REFORM AND PROVISIONAL PROPOSALS

#### Rights of innocent owners of forfeited property

3.1 A major deficiency in the 1975 Act provisions dealing with forfeiture is that no express account is taken of the innocent person with an interest in property which is liable to forfeiture. Sections 223 and 436 of the 1975 Act, as well as the specific provisions in particular statutes, do not make any reference to the ownership of the property. Consequently, the property is liable to be forfeited if it falls within the requirements of the section, irrespective of whether or not it belongs to the person being sentenced.

3.2 Where property owned by an innocent third party is forfeited, it would always be possible for that third party to raise a civil action against the person convicted in an attempt to recover his loss from that person. However, in many cases the convicted person may have no means of paying any amount awarded against him and, if imprisoned, would have no way of acquiring funds to meet any court order.

3.3 In addition to the possibility of seeking a remedy through the civil courts, the criminal courts have themselves attempted to provide a certain relief. In Loch Lomond Sailings Limited v Hawthorn<sup>1</sup> a boat and its oars were ordered to be forfeited. Two men had been found guilty of an offence under the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, section 19 of which contained a forfeiture provision. As the boat had been used in the commission of the offence, the sheriff ordered it to be forfeited. However, the boat belonged to a limited company

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<sup>1</sup> 1962 JC 8.

which had hired it out to the accused. In these circumstances, the High Court entertained a bill of suspension brought by the owners, although it was unusual to have one introduced by a party other than the accused. No answers were lodged by the Crown and the motion itself was not opposed. The Bill was therefore duly passed and the order of forfeiture was suspended.

3.4 A similar case arose the following year. In J W Semple and Sons v MacDonald<sup>1</sup> a television set belonging to a third party had been ordered to be forfeited when the accused was convicted of a charge under the Wireless Telegraphy Act 1949. The forfeiture provision in that Act specifically stated that such an order could be made "in addition to any other penalty".<sup>2</sup> Looking at the terms of the section, the Lord Justice-Clerk (Grant) stated:

"...in view of the use of the word 'penalty', it seems to me that the subsection has no application in the case where an innocent third party is the owner of the set."<sup>3</sup>

The High Court therefore passed the Bill suspending the forfeiture order.

3.5 It may be noted in passing that wireless telegraphy apparatus may now be forfeited in respect of various offences under the Wireless Telegraphy Act notwithstanding that it is not the property of the person by whom the offence was committed.<sup>4</sup>

3.6 The main case illustrating the plight of innocent owners was that of Lloyds and Scottish Finance Ltd v HMA<sup>5</sup>. At the time,

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<sup>1</sup> 1963 JC 90.

<sup>2</sup> s 14(3).

<sup>3</sup> At pp 93-94.

<sup>4</sup> Wireless Telegraphy Act 1949, s 14(3) to (3E), as substituted by Telecommunications Act 1984, s 82.

<sup>5</sup> 1974 JC 24.

the general power of forfeiture was contained in section 23 of the Criminal Justice Act 1972. That section contained forfeiture provisions for courts in Scotland and in England and Wales. Subsection 23(5) dealt with the court's power of forfeiture in solemn proceedings in Scotland. Subsection 23(3) provided for the delivery of forfeited property to its true owner - but that provision did not apply to Scotland.

3.7 After a forfeiture order had been made in the sheriff court under section 23(5) in respect of a motor car, the hire-purchase company which owned the car petitioned the High Court to exercise its nobile officium to quash the order and to issue a new one preserving their rights in the car. It was agreed that their interest amounted to £299. The court granted their petition, ordered the car to be sold and the company to receive its £299 before any balance was paid to the Queen's and Lord Treasurer's Remembrancer (ie the Crown).

3.8 In delivering the opinion of the court, the Lord Justice-General (Emslie) commented that nowhere in section 23 was there any Scottish provision comparable to section 23(3) for the protection of the rights of true owners of forfeited property. He added that it would be manifestly inequitable if there was indeed no protection for them at all. The court held that the section read as a whole contained a sufficiently clear intention that no order made under it should operate to defeat the rights of true owners whether in Scotland or in England. The Lord Justice-General went on to say:

"Parliament, therefore, has provided us with its intention, but by a remarkable omission has failed to provide, in Scotland, any machinery by which that intention can be achieved."<sup>1</sup>

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<sup>1</sup> p 27.

3.9 The section, like the later sections in the 1975 Act, stated that "any property forfeited ... shall be disposed of as the court may direct." Accordingly, the provision was wide enough to enable the court to take into account the position of innocent owners (as well as any other matter) although their rights were not specifically referred to. The court concluded its judgment by directing Scottish courts when making forfeiture orders thereafter to frame their decisions in such a way as to be consistent with the intention expressed by Parliament. Although it is to be hoped that courts will follow this guidance, they - and in particular the innocent owners affected - may not in every case have it brought to their attention. An express statutory provision applying to Scotland would accordingly appear to be called for to cure this omission which the Lord Justice-General pointed to as long ago as 1974.

3.10 The equivalent English legislation to sections 223 and 436 of the 1975 Act is now to be found in section 43 of the Powers of Criminal Courts Act 1973, as amended by section 69 of the Criminal Justice Act 1988. Subsection 43(3) provides that any property to which an order under the section relates is to be taken into the possession of the police, if not already in their possession. Subsection 43(4) goes on:

"(4) The Police (Property) Act 1897 shall apply, with the following modifications, to property which is in the possession of the police by virtue of this section -

- (a) no application shall be made under section 1(1) of that Act by any claimant of the property after the expiration of six months from the date on which the order in respect of the property was made under this section; and

- (b) no such application shall succeed unless the claimant satisfies the court either that he had not consented to the offender having possession of the property or that he did not know, and had no reason to suspect, that the property was likely to be used for the purpose mentioned in subsection (1) above."

Therefore, in England there is a six month period after the making of the order for the innocent owner to apply to the court for the property to be returned to him.

3.11 At present in Scotland it is probably open to an innocent person with an interest in property liable to be forfeited to make representations to the judge before sentence is passed. Where such a person does intimate a claim and, if necessary, is heard in court, the matter can be dealt with at the time and no further provision would appear to be called for. Less formally, an innocent owner of property could bring his interest to the attention of the procurator fiscal and, after making such inquiry as seemed appropriate, the procurator fiscal would normally advise the court of all the relevant facts as known to him.

3.12 Frequently the court will be faced with a claim put forward by the defence that the property does not in fact belong to the accused but belongs to someone else. Little in the way of evidence in support of this denial of ownership may be adduced. In such a case, we believe that courts should be encouraged to make a reasonable enquiry into ownership of the property. This may have implications on court time if a subsequent hearing has to be fixed. It may therefore be inappropriate to impose a statutory



duty upon the courts to make a full enquiry into ownership, but we would wish to encourage courts to make such enquiry wherever possible.

3.13 There remains the situation where the innocent third party does not learn that his property is liable to forfeiture until after the order is made. One possible course of action would be to give innocent parties with an interest in forfeited property the opportunity to approach the court after the order was made. As the property will eventually have to be disposed of, some time limit would have to be fixed. There is no established procedure in Scotland like the Police (Property) Act 1897 in England,<sup>1</sup> but provision could be made allowing a petition to be brought before the court in order to have the forfeiture order reviewed.

3.14 We believe that express provision ought to be made in Scotland to take account of an innocent person with an interest in forfeited property. We provisionally propose that it should be possible for the innocent third party to make an application to the court which imposed the forfeiture order to have that order altered. In the case of an order made by the High Court, the application would be made to a single judge of the High Court, not necessarily to the one who had originally sentenced the accused.

3.15 It is to be noted, however, that one consequence of introducing the possibility of having the forfeiture order subsequently altered is that the whole sentence which had been imposed on the accused could thereby be affected. In deciding

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<sup>1</sup> The Civic Government (Scotland) Act 1982 contains provision for owners to apply to a Chief Constable for the return of lost or abandoned property, but that provision seems inappropriate for present purposes.

upon an appropriate sentence, the judge may have selected a forfeiture order as part if not all of the penalty to be imposed upon the accused. Acting on the assumption that the property belonged to the accused, depriving the accused of that property would in itself have some punitive effect. The judge might therefore have imposed a lesser sentence of imprisonment or a lower fine than he would otherwise have done to take account of this. If the forfeiture order was later lifted, the accused may have been dealt with more leniently than had the true position been known at the time when he was sentenced.

3.16 As the sentencing would in that event have proceeded upon the basis of wrong information, it may be argued that the case should be referred to the Court of Appeal for that court to sentence the accused afresh. However, we believe that it would be neither practicable nor acceptable to sentence a person twice in these circumstances. The main mischief which requires correction is the protection of the rights of the innocent third party. It may therefore be necessary to accept the possibility of an accused being treated more leniently than might have been the case had all the facts been known, but still proceed with the introduction of a review procedure for the benefit of third parties.

3.17 There would have to be a time limit within which any application is made. This could be, for example, six months from the date of the order as in England. We would be interested to hear whether six months would be regarded as too long a time, or indeed, too short. Whatever the actual extent of the time limit, the possibility of a reversal of the forfeiture order will have implications for the disposal of the forfeited property. It may mean that any property which is forfeited could not be disposed

of during this period. We would like to hear from consultees affected whether the retention of the property would create a sizeable problem. In the case of items such as drugs, of course, there will normally be no difficulty in destroying them immediately, since no innocent owner is likely to claim them, unless perhaps where they have been stolen from, say, a doctor or a pharmacist.

3.18 To sum up,

- 1.(a) We propose that a procedure should be introduced to allow an innocent person with an interest in forfeited property to apply to the court which made the order for the order to be reviewed.
- (b) Should the length of the period within which an application for review must be made be six months, or some other period?
- (c) If a review procedure was introduced, should there also be a procedure for reviewing the original sentence imposed?
- (d) Would the introduction of a review procedure cause undue difficulties in storing the forfeited property prior to its disposal?

#### **Compensation from forfeited property**

3.19 A development relating to forfeiture which has recently taken place in England and Wales concerns the payment of compensation

to the victim from the proceeds of sale of forfeited property. The English provision is contained in section 107 of the Criminal Justice Act 1988. A similar provision for Scotland was recommended by a working party of The Scottish Association of Victim Support Schemes.<sup>1</sup> The English section will apply where the offender has been convicted of an offence which has resulted in a person suffering personal injury, loss or damage. If the court makes a forfeiture order, it may also order that any proceeds arising from the sale of the property, up to a specified sum, shall be paid to the victim. The court may make such an order only if satisfied that, but for the inadequacy of the means of the offender, it would have made a compensation order of at least that specified amount.

3.20 This provision was necessary in England and Wales to counter prior court decisions to the opposite effect. In Regina v Kingston-upon-Hull Stipendiary Magistrates, ex parte Hartung<sup>2</sup> the appellant had been fined and ordered to pay compensation. His van was forfeited in order that the proceeds of sale could be applied in payment of the fine and compensation. The order in respect of the van was quashed by the Divisional Court, Comyn J. stating that the magistrate was not imposing an additional penalty of forfeiture, but was giving security for payment of the fine and compensation. In Regina v Thibeault<sup>3</sup> the Court of Appeal reiterated that a court had no power to order a car to be sold and the proceeds distributed among the victims.

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<sup>1</sup> Compensation for Victims of Crime, 1988, recommendation 11.

<sup>2</sup> (1981) 72 Cr App R 26.

<sup>3</sup> [1983] Crim LR 102.

3.21 In Scotland it is not entirely clear whether the courts would have the power to make an order directing the proceeds from the sale of forfeited property to be applied towards payment of a compensation order. The matter would turn upon the interpretation given to the words "and any property forfeited under this section shall be disposed of as the court may direct", which appear at the end of sections 223(1) and 436(1) of the 1975 Act. On one argument, this phrase relates only to the property itself and accordingly would only permit the court to make an order as to how the forfeited property is to be dealt with. This may be, for example, that the property should be destroyed or given to someone else. On another reading of the phrase, it may be argued that it would be sufficiently wide to cover not only the actual property forfeited, but also the proceeds derived from a sale of that property. On this basis, the order disposing of the property might be that the property be sold and the proceeds of the sale paid over to the victim.

3.22 We are of the view that the courts in Scotland should have the power to direct the proceeds of the sale of forfeited property towards payment of a compensation order. Given that it may be open to doubt whether the existing provisions would be sufficiently wide to allow for this, we suggest that there should be an express provision to this effect.

3.23 It should be recognised that the introduction of a review period relating to forfeiture orders taken along with an express power to order compensation orders to be met from the proceeds of forfeited property will have cross implications. If the forfeiture order could be reviewed within a set period, it would not be appropriate to sell that property and use the proceeds in payment

of a compensation order during that period. The right of review enjoyed by the innocent third party would be thwarted if the property had already been sold and disposed of. It would probably be necessary to delay the sale of forfeited property, or payment of the proceeds of sale, until the expiry of the review period, and we also invite comments on such a delay.

3.24 We would therefore welcome views on the following points:

2.(a) Courts should be given an express power to order that the proceeds of the sale of forfeited property should be directed towards payment of a compensation order in cases where the offender would not otherwise have sufficient means to meet such an order.

(b) Should the sale of the property, or the payment of the proceeds, be delayed until the expiry of the review period?

#### Heritable and incorporeal property

3.25 The tradition in Scotland, as distinct from the authoritative position in England, has been that any forfeiture order applies only to moveables. In the case of the existing forfeiture provisions it may be asked whether they are - or should be capable of being - applicable to heritage. The general forfeiture provisions in the 1975 Act refer to "any property" which was in the possession or control of the convicted person at the time of his arrest.<sup>1</sup> To the best of our knowledge, the Scottish courts have never yet been required to resolve the question of whether "any property" would include heritable property. A similar question arises in relation to incorporeal property.

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<sup>1</sup> ss 223 and 436.

3.26 In the lack of any Scottish authority, it might be instructive to consider the English authority on this point. The question arose in R v Khan; R v Crawley<sup>1</sup>, where the Court of Appeal commented that this was the first time that the question had had to be considered in England. Following upon his conviction on one count and a plea of guilty on two counts of possession of a controlled drug with intent to supply, Khan was sentenced to 10 years' imprisonment and a fine of £10,000. He was also ordered to forfeit a car under section 27 of the Misuse of Drugs Act 1971, and the property at 4 Burnham Road, St Albans, under section 43 of the Powers of Criminal Courts Act 1973. It was from the house, which was registered in his name and controlled by him, that he had been involved in the offences. The judge made the order relating to the house under the general provision, since it was not open to him to do so under the powers contained in the Misuse of Drugs Act 1971. Earlier, in R v Beard (Graham)<sup>2</sup>, Caulfield J had held that a house was not included in the word "anything" in section 27 of the Misuse of Drugs Act 1971.

3.27 The Court of Appeal in R v Khan had to interpret the phrase in the unamended section 43(1) of the 1973 Act "any property which was in his possession or under his control at the time of his apprehension", which is identical to the wording to be found in the Scottish provisions.<sup>3</sup> In deciding whether "any property" included heritable property, the court looked at subsection 43(4)<sup>4</sup>. This was the subsection which applied the Police (Property) Act 1897. It provided that the 1897 Act should apply to property which was in

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<sup>1</sup> [1982] 1 WLR 1405; [1982] 3 All ER 969.

<sup>2</sup> [1974] 1 WLR 1549.

<sup>3</sup> ss 223 and 436 of the 1975 Act. s 43(1) of the Powers of Criminal Courts Act 1973 has since been amended by the Criminal Justice Act 1988 s 69(1).

<sup>4</sup> See para 3.10 above.

the possession of the police by virtue of this section. From subsection 43(4) the court deduced that the section as a whole was limited to personal property. It held:

"It is true that the section uses the word 'property' in subsection (1) without any qualification, but subsection (4), which makes the Police Property Act 1897 applicable, refers to property which is in the possession of the police by virtue of the section, thus confining it to personal property and not real property."<sup>1</sup>

3.28 It is unclear to what extent this interpretation would be relevant to Scotland. As there is no such provision as subsection (4) which applies in Scotland, the interpretation of "any property" may not be restricted in the same way as in England. Alternatively, as in Lloyds and Scottish Finance Ltd v HMA<sup>2</sup>, that subsection may be looked at by the courts in Scotland in order to ascertain the intention of Parliament. Yet, even if a Scottish court did consider the subsection, it is still not certain that it would place a construction on the provision similar to that of the Court of Appeal. The subsection provides that the 1897 Act shall apply to property in the possession of the police. From this it was said that since only personal property can be in the possession of the police, real property is excluded from the whole section. However, the subsection could equally plainly be taken to read that, in the case of that property which is in the possession of the police, the terms of the 1897 Act shall apply but in other cases it shall not. Thus, in the case of heritable property, it would not be in the possession of the police, and it would be inappropriate to apply the 1897 Act to it.

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<sup>1</sup> [1982] 3 All ER 971.

<sup>2</sup> 1974 JC 24.



3.29 The English authority on this point is accordingly less than wholly convincing. However, it is in line with the other English case of R v Cuthbertson.<sup>1</sup> In that case the House of Lords was considering the forfeiture provision in section 27 of the Misuse of Drugs Act 1971. Lord Diplock said:<sup>2</sup>

"I would apply a purposive construction to the section considered as a whole. What does it set out to do? Its evident purpose is to enable things to be forfeited so that they may be destroyed or dealt with in some other manner as the court thinks fit. The words are apt and, as it seems to me, are only apt to deal with things that are tangible, things of which physical possession can be taken by a person authorised to do so by the court and which are capable of being physically destroyed by that person or disposed of by him in some other way. To ascribe to the section any more extended ambit would involve putting a strained construction on the actual language that is used, and so far from there being any grounds for doing so, it seems to me that if it were attempted to extend the subject matter of orders of forfeiture to choses in action or other intangibles, this would lead to difficulties and uncertainties in application which it can hardly be supposed that Parliament intended to create."

Lord Scarman stated:<sup>3</sup>

"Counsel for the appellants put it correctly, though strangely, when he suggested that forfeiture was limited to 'the accoutrements of crime', by which I took him to mean, in workaday English, the tools, instruments, or other physical means used to commit the crime."

Of course, the case of Cuthbertson was not concerned with the question whether heritable property was "used to commit the crime", but rather with the question whether financial profits made from the crime fell within the forfeiture provisions. Nonetheless, their Lordships' words contained no qualification in

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<sup>1</sup> [1981] AC 470.

<sup>2</sup> Ibid at 483.

<sup>3</sup> Ibid at 486.

respect of heritable property. The net result would appear to be that in England real property cannot competently be forfeited. In Scotland, where the matter does not appear to have been judicially considered, it would seem to be desirable that the law on this point should be clear, and an express statutory provision may well be called for.

3.30 While the distinction may be appropriate in other regards, it may seem strange - especially to a lay person - to distinguish between heritable and moveable property used in connection with a crime. Although the value of the heritable property would normally be expected to be greater than that of moveable property, that will not always be the case. For example, a small cottage in a remote area near the sea might be used in the smuggling of contraband into the country. In the course of a police raid a large quantity of contraband worth £250,000 and £100,000 in money might be found. The cottage itself might only be valued at £10,000. If it was established that the cottage had been acquired specifically for the purpose of aiding the smuggling, it would seem anomalous that the contraband and money could be forfeited but not the cottage, solely because it was heritage.

3.31 The difficulty inherent in allowing heritable property to be forfeited is that such an action could be an extreme punishment where the crime committed was itself relatively trivial. Should a minor offence be committed in a house, clearly it would be inappropriate for that house to be the subject of a forfeiture order. While this problem might be more acute in relation to heritage, where the value of the property is potentially very high, it also exists, however, in respect of moveable property. For example, a minor offence could take place in or involving an

expensive car or a luxury coach. While forfeiture could be a competent order in such a case, it would not be made unless the sentencer considered it appropriate in relation to the offence committed, and the same would presumably apply in the case of heritable property.

3.32 Nevertheless the value of the property which could be involved means that this issue requires to be approached with caution. Moreover, it must be recognised that several difficulties arise if heritable property is forfeitable. For example, there may be difficulties relating to the type of tenure under which the property is held. If held on a long lease, there may be a prohibition against assignation of the lease. Problems could also arise in relation to, for example, rights of pre-emption, building society loans and property held jointly. On the other hand, the fact that heritable property is normally easily identifiable and that the registered owner of it may readily be ascertained provides an advantage if a forfeiture order was to be made in respect of it.

3.33 There are therefore arguments in favour of allowing heritable property to be the subject of forfeiture orders as well as drawbacks inherent in doing so. We would welcome views on whether it is considered that the Scottish courts should have the power to order forfeiture of heritable property, and if so, whether express provision would be required. It is difficult to imagine how incorporeal property could be used in the commission of a crime but, if such a case is possible, its liability to forfeiture is similarly open to doubt. The same issue therefore arises in relation to it.

3.34 Finally, there remains the question of the competency of the court in this matter. If heritable and incorporeal property is subject to forfeiture, it may be necessary to limit the amount of property that a summary court would be able to forfeit. The power might require to be restricted to the High Court and to the sheriff court when exercising solemn jurisdiction.

3.35 Consultees are therefore asked:

- 3.(a) Should any doubt as to whether forfeiture of heritable and, possibly, incorporeal property is competent in Scottish criminal courts be resolved?
- (b) If so, which way should it be resolved?
- (c) If the courts were given an express power to forfeit heritable and incorporeal property, which courts should have such a power and should any restrictions be placed upon it?

#### General and specific forfeiture powers

3.36 When the Hodgson Committee<sup>1</sup> came to examine specific forfeiture powers, they indicated that they had encountered no less than fifty different statutes each with its own forfeiture provision.<sup>2</sup> With many of the statutes applying in both jurisdictions, the position is similar in Scotland. This multiplicity of provisions could give rise to confusion, which raises the question whether the large number of separate provisions is necessary or whether they could all be consolidated into a single provision.

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<sup>1</sup> Profits of Crime and their Recovery, 1984.

<sup>2</sup> p 18.

3.37 There is an argument in favour of consolidating all of the forfeiture powers into one provision. It would make the exercise of the power much more straightforward. Gone would be the overlap between specific and general forfeiture powers where, when the former is too restrictive, the latter may be employed. A single rule may therefore also be more principled.

3.38 There may alternatively be advantages in having a specific power of forfeiture attached to particular offences. In this way, it may be easier to tailor the powers of forfeiture to match the particular offence. Moreover, any attempt to incorporate all of the specific provisions into one general power might be unduly clumsy. It might be difficult, for instance, to incorporate some of the compulsory forfeiture provisions of the fisheries legislation into a general provision. Some forfeiture provisions are quite different from the normal ones. In the Copyright, Designs and Patents Act 1988, for example, the court may order delivery of infringing property irrespective of whether the person is convicted of an offence or not.<sup>1</sup>

3.39 In considering the question of consolidation in England and Wales, the Hodgson Committee concluded that it was sensible to retain powers in particular statutes so far as they related to specific articles of property whose possession was prohibited. To the extent that specific powers did overlap with the general power, they recommended that they should be amended to replicate the general power.<sup>2</sup>

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<sup>1</sup> ss 108 and 195.

<sup>2</sup> pp 95 and 153.

3.40 Our provisional view is that it would not be prudent to consolidate all of the individual forfeiture powers. As some are wider than the general provision and others more restrictive, consolidation does not appear to be appropriate. Moreover, it would be difficult to consolidate for Scotland alone when so many of the provisions, such as those in the Misuse of Drugs Act 1971, apply to the whole of the United Kingdom.

3.41 If the provisions are not consolidated, the problem will remain of a possible divergence between the powers contained in the specific and the general provisions. In paragraph 2.6 above we discussed the case of Donnelly v HMA,<sup>1</sup> where it was held that, even although forfeiture may not be competent under the specific provision, it may be competent under the general one. Therefore, although an order could not have been made under the Misuse of Drugs Act 1971, an order was made under section 223 of the 1975 Act.

3.42 Although that case may have settled any uncertainty as to what the law is on this point in Scotland, the arguments as to what it should be continue. The main counter-argument to the view reached in Donnelly v HMA is that where Parliament has legislated that certain powers should be the appropriate ones for a particular statute, those powers should be the only ones that are applied. However, should the general power be fettered in this way? Would there be any undue adverse consequences if it was? Views of consultees are therefore also sought on whether the court should be able to exercise its general forfeiture power even although it would not be able to do so under the power in the particular statute.

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<sup>1</sup> 1984 SCCR 93.

3.43 We accordingly seek views on the following:

4.(a) The various forfeiture provisions in particular statutes should not be consolidated into a single provision.

(b) If the specific forfeiture provisions are to remain, is the approach adopted in Donnelly v HMA considered to be generally acceptable and, if so, should it be embodied in a statutory provision?

#### Possession or control

3.44 Both sections 223 and 436 of the 1975 Act are restricted to property which was "in his [ie the convicted person's] possession or under his control at the time of his apprehension." In limiting the power of forfeiture in this way, anomalous situations can result. We have been advised of a case, for example, where objection was taken to the forfeiture of pornographic video tapes on the basis that the accused had never been arrested, but had simply been invited to attend at the police station where he had been interviewed, cautioned and charged. In these circumstances the court considered that a forfeiture order could not be made.

3.45 Several cases have been reported in England where an identical phrase was to be found in section 43 of the Powers of Criminal Courts Act 1973 before it was amended by section 69 of the Criminal Justice Act 1988. In Regina v Hinde<sup>1</sup> the appellant with four co-accused drove his car to a shop which they burgled. Some of the stolen items were placed in the car. The appellant ran off when police officers arrived, leaving the car behind. The

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<sup>1</sup> [1977] Crim LR 847.

appellant was apprehended four days later. The Court of Appeal held that the car could not be forfeited as it was not in his possession or control at the time of his apprehension. Similarly, in Regina v McFarlane<sup>1</sup> a car belonging to the appellant was used when he and a co-accused rushed at a woman who was walking home at night. They stole her handbag and watch and made off in the car. The car was discovered by police and impounded, a witness having noted its number. The appellant was arrested when he went to the police station to claim it. On appeal, the forfeiture order in respect of the car was quashed as the car was not in the appellant's possession when apprehended.

3.46 Other possibilities have also been put to us, such as where two getaway cars are seen to leave the scene of an armed robbery. One is stopped by the police and a person arrested in it; the other is later found abandoned by the police, containing a shotgun. If the shotgun is identified as having been used in the robbery - it may even be shown to belong to the person arrested - it could still be argued that a forfeiture order would be incompetent because the shotgun was not in the possession or under the control of the person at the time of his arrest. Similarly, a housebreaker who runs away from the police, having left his ladder against the wall of the house, and is arrested some time later may find that his ladder cannot competently be forfeited.

3.47 It would appear to be clear that the present phrase "in his possession or under his control at the time of his apprehension" is unsatisfactory, with the result that some substitute phraseology will require to be found. We suggest that a formula along the

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<sup>1</sup> [1982] Crim LR 863.



following lines may be preferable: "property which was at the time of the offence or at the time of his apprehension in his ownership or possession or under his control". We put this forward as one alternative and would welcome views on ways of dealing with the original phrase, including this option.

5. Should the phrase "in his possession or under his control at the time of his apprehension" in sections 223 and 436 of the 1975 Act be replaced by a phrase such as "property which was at the time of the offence or at the time of his apprehension in his ownership or possession or under his control"?

#### **Presence of the property in court**

3.48 One of the difficulties relating to forfeiture which, it appears, is commonly encountered in practice is the refusal of judges to grant forfeiture orders where the item is not produced in court. The terms of sections 223 and 436 of the 1975 Act do not contain any special requirement for the property to be in court. Indeed sections 224 and 437 specifically make provision for a warrant to be granted to search for property that has been forfeited. Section 224 provides in relation to solemn proceedings:

"Where a court has made an order for the forfeiture of an article, the court or any justice may, if satisfied on information on oath -

- (a) that there is reasonable cause to believe that the article is to be found in any place or premises; and

(b) that admission to the place or premises has been refused or that a refusal of such admission is apprehended,  
issue a warrant of search which may be executed according to law."

Section 437 is in similar terms for summary proceedings. It may be noted that the section refers to "an article" rather than "any property". If "any property" is to be interpreted as meaning literally any property, including heritable and incorporeal property, the distinction between that term and "an article" is brought out in this section, since a search warrant would only be required for an item. Normally, the property will already have been taken possession of by the police, so that this section would rarely require to be used. Clearly if a warrant is required the property could not have been in court at the time when the order was made. Parliament therefore could not have intended that the property need be in court. Any such requirement is consequently a matter of court practice rather than a legal rule. Nevertheless, if it is in fact found to be giving rise to difficulty, then an express provision dealing with it may be called for.

3.49 It may be wholly inappropriate that certain items should be produced in open court. For example, it could be dangerous to have firearms, offensive weapons or explosives in court unless absolutely necessary. Similarly, it may be better that items which may have been infected with a virus or other infectious matter, or large quantity of drugs, should not be brought into court. There may be a large number of cases on the court list, with the result that the property could be left on a side table for some time until the case was actually dealt with. This could give rise to

dangers in respect of, for example, offensive weapons. It could also lead to items such as drugs going missing during adjournments. Given that problems apparently do exist in requiring items to be present in court before a forfeiture order will be made, there may be merit in expressly providing that presence of the property in court is not required. This must be weighed against the advantage to the judge and to the clerk of court in having the item present. That item can then be clearly identified. If the property is not in court, some other means of identifying it would have to be employed.

3.50 Our view is that, standing the possibility of a warrant being granted to search for the property, an item need not be produced in court for a forfeiture order to be made. We would be interested to hear of any practical problems which might be anticipated where the property is not in court, and also whether an express statutory provision on this point is called for.

3.51 We therefore seek views on the following issues:

- 6.(a) Are there any practical problems in the granting of forfeiture orders where the property to be forfeited is not in court?
- (b) Is an express statutory provision called for regarding the presence of the property in court prior to the granting of a forfeiture order?

## Probation and absolute discharge

3.52 We have observed<sup>1</sup> that, under section 54 of the Summary Jurisdiction (Scotland) Act 1954, a forfeiture order could be made in conjunction with a probation order but that under the revised section 436 of the 1975 Act a forfeiture order can only be made after conviction, and therefore not where the accused is put on probation. The position is the same in the case of an absolute discharge. This seems somewhat strange since cases could obviously arise where it would be appropriate to order forfeiture of property and yet also to put a person on probation or to grant an absolute discharge.

3.53 In the English case of R v Hunt<sup>2</sup> the Court of Appeal held that a forfeiture order was a punitive order which amounted to an additional penalty and that it should not be combined with an absolute discharge. However, the effect of this restriction may be that where a court was of the view that forfeiture was necessary it could not place the accused on probation nor grant an absolute discharge although either of these represented the most appropriate disposal. In the analogous case of compensation orders, the Criminal Justice (Scotland) Act 1987 has recently introduced the possibility of a compensation requirement being included in a probation order.<sup>3</sup>

3.54 We believe that this may be an instance where practical considerations should prevail and where the option of making a forfeiture order ought to be available to the court. We therefore provisionally propose that:

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<sup>1</sup> Para 2.7 above.

<sup>2</sup> [1978] Crim LR 697.

<sup>3</sup> s.65.

7. A forfeiture order should be competent in conjunction with a probation order or an absolute discharge both in solemn and in summary proceedings.

### Notice of penalties

3.55 Section 311(5) of the 1975 Act requires that, where a summary complaint includes a statutory charge, a notice corresponding to Form No 1 of Part III of Schedule 2 to the Summary Jurisdiction (Scotland) Act 1954 or subsequent Act of Adjournal must be served on the accused with the complaint. That form has since been superseded and is now to be found in the Act of Adjournal (Consolidation) 1988,<sup>1</sup> form 46 of which contains the current form of notice. It follows upon this provision that, if forfeiture is properly to be regarded as a penalty, notice of that penalty must be given along with the complaint in cases involving statutory offences.

3.56 In Coogans v Macdonald<sup>2</sup> a full bench, including Lord Justice-General Cooper and Lord Justice-Clerk Thomson, was convened to consider what was involved in the concept of a penalty. In that case it was a disqualification from holding or obtaining a driving licence which was at issue. Commenting on the form of notice as it then was, the Lord Justice-General said:<sup>3</sup>

"It is to be noted (i) that the requirement is peremptory; (ii) that the subsection is silent as to the contents of the notice, information on this topic being derivable only from the scheduled form; and (iii) that, by using the words 'as nearly as may be,' Parliament has plainly indicated an

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<sup>1</sup> SI 1988/110, rule 168, Schd 2; form 46, Schd 1.

<sup>2</sup> 1954 JC 98.

<sup>3</sup> At 103.

intention that the scheduled form should be treated only as a model to be adapted to suit each case."

After quoting the terms of the scheduled form as it then was, the Lord Justice-General continued:

"It appears to me to be sufficiently plain that the overriding purpose of the above provisions was to ensure that a person charged with a statutory offence should be apprised of all the sanctions which it was within the power of the Court to apply to anyone convicted of a contravention of the Act or Order in question, whether these sanctions were to be found in the section alleged to have been contravened, or in another section, or partly in one and partly in the other. Moreover, I consider that the word 'penalty' falls to be read in a wide popular sense, which is the sense which the recipient of such a notice would naturally give it; and I select two definitions as adequately conveying that sense. The late Mr Robertson Christie (Encyclopaedia, vol xi, p 204) said: 'Penalty in the broad sense may be defined as any suffering in person or property by way of forfeiture, deprivation, or disability, imposed as a punishment by law or judicial authority in respect of ... an act prohibited by statute.' The Oxford Dictionary echoes the same wide conception by referring to 'a loss, disability or disadvantage of some kind ... fixed by law for some offence.'"

It followed from this reading of the provision that disqualification from holding or obtaining a driving licence was held to be a 'penalty'.

3.57 In Duffy v Lakie<sup>1</sup> the High Court had to deal with an appeal where forfeiture had been ordered although no mention of forfeiture had been made in the notice of penalties which was served upon the accused. The charge related to section 409 of the Burgh Police (Scotland) Act 1892 (property in possession of a known thief) which provided that any money found on the accused might be forfeited. The Lord Justice-Clerk (Thomson) referred to

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<sup>1</sup> 1962 SLT 30.

the general consideration given to what constitutes a penalty in Coogans v Macdonald. The court held that notice would have been required and consequently that it was not competent to order forfeiture in this case.

3.58 While it is therefore clear that in the case of a specific forfeiture provision an order cannot be made unless that is mentioned in the notice of penalties served on the accused, the position is less clear in the case of a forfeiture order, on the basis of a statutory charge, made under the general power contained in section 436 of the 1975 Act. As no dispensation is given, it would be logical to assume that prior notice would be required in such cases also.<sup>1</sup> However, in practice it would appear that forfeiture orders are often made under section 436 without there having been any prior notice. Renton and Brown comments "but that limitation probably does not apply to forfeitures under section 436 of the 1975 Act".<sup>2</sup> There would accordingly appear to be some doubt on this matter.

3.59 Two questions emerge: first, whether notices of penalty should be required in relation to forfeiture orders at all, and second, if so, whether they should be required in the exercise of general as well as specific forfeiture powers. The argument in favour of having notices of penalty in relation to forfeiture has been largely set out in Coogans v Macdonald. That is that a person charged with a statutory offence should be advised of all the sanctions which might be applied, forfeiture being one such sanction. That argument would apply equally to general or specific powers of forfeiture.

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<sup>1</sup> Cf Nicholson, The Law and Practice of Sentencing in Scotland para 7-03.

<sup>2</sup> Renton and Brown, Criminal Procedure in Scotland (5th ed) 17-44.

3.60 Such an argument may be open to challenge in that notices of penalty are not required for more serious cases, which are taken on indictment, nor in relation to common law crimes. The requirement can also give rise to practical difficulties in that the prosecutor might be unaware that forfeiture would be appropriate when preparing the complaint and notice of penalty.

3.61 Abolishing any requirement to give notice of a possible liability to forfeiture would be a simple way of resolving this issue. While at this stage we have no firm views, we tend to believe that this may prove the preferable solution. If that is not the course adopted, an alternative option would be to connect the requirement to the general and specific powers of forfeiture. Notice could be given that the accused was liable to forfeiture in terms of, for example, section 27 of the Misuse of Drugs Act 1971. To this could be added notice that in addition thereto, the accused was liable to forfeiture in terms of section 436 of the 1975 Act. This may be one method of resolving the problem of the overlap of powers discussed above.<sup>1</sup> If notice of liability to forfeiture under the general provision of section 436 is also to be required, presumably a statement could be printed on the standard notice of penalties giving effect to this.

3.62 To sum up:

- 8.(a) We provisionally propose that there should be no requirement for notice of liability to a forfeiture order to be given in the notice of penalties served on an accused in respect of statutory offences in summary proceedings.**

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<sup>1</sup> See paras 3.24-3.30.



- (b) If notice of liability to forfeiture is deemed to be required, should that be required in relation only to forfeiture orders made under specific provisions or also under the general provision?

### Identification and specification of forfeited property

3.63 On occasion a dispute has arisen as to the actual property which is to be liable to forfeiture. For instance, in the case of Rankin v Wright<sup>1</sup> the sheriff convicted the accused of "otter-trawling" from a steam trawler, and, acting under section 3 of the Herring Fishery (Scotland) Act Amendment Act 1890, declared the net to be forfeited. On a Crown appeal, the High Court held that 'net' in section 3 meant not only the netted part of the fishing gear but also the two otter boards or otter heads and the warp of about one hundred fathoms long, sixty fathoms of which had been seized. It was considered that without these the net would not be a fishing net. The court therefore granted the appeal so that the whole apparatus would be included in the forfeiture order. In most cases identification and specification of the property liable to forfeiture should not present any difficulties. Frequently the property will in fact be in court, thus avoiding any confusion. While this may have given rise to difficulty in the past, it does not appear to us to be a problem which is likely to arise in the future. If the court order specifies the property and this is noted in the minutes, the matter should be sufficiently clear. We therefore provisionally propose that:

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<sup>1</sup> 1901 3 Adam 483.

9. No further legislation is required clarifying the identification or specification of forfeited property.

#### The right to take possession of the property

3.64 In the case of Mauchline v Stevenson<sup>1</sup> a water-bailiff, finding a person fishing with roe in the river Tweed, seized the roe which was in a bag hanging round his neck. The High Court on appeal held that the bailiff was entitled to do so, both at common law and under statute. Lord Young said that 'the statutory forfeiture of prohibited articles implies in the officer a power of seizure'.<sup>2</sup> The case is generally referred to as authority for the proposition that forfeiture does imply the right to seize the property. However, the case is narrower than might at first appear since it was dealing with a situation where the accused was caught red-handed, and only looked at those circumstances. Moreover, the statutes involved conferred an express right to seize and take possession of any article which might be forfeited.<sup>3</sup> Consequently, the court did not actually require to draw implications from common law and statutory powers of forfeiture.

3.65 Since Mauchline v Stevenson, the courts have been given specific power to grant warrant to search for forfeited property, which may be executed 'according to law', in what are now sections 224 and 437 of the 1975 Act.<sup>4</sup> We are of the view that these sections should adequately deal with the matter and that no further provision is required. To give police officers an express power to take possession of any property which is likely to be

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<sup>1</sup> 1878 4 Couper 20.

<sup>2</sup> At p 27.

<sup>3</sup> Salmon Fisheries (Scotland) Act 1868, s 18, Tweed Fisheries Act 1857 s 92.

<sup>4</sup> Set out in para 3.48 above.

forfeited is liable to be too wide. Virtually any property could be seized. The present powers of the police appear to operate satisfactorily and so no provisional proposal is made in this regard.

10. We do not consider it necessary to give the law enforcement authorities an express power to take possession of property which is likely to be forfeited.

#### Forfeiture of motor vehicles in respect of certain road traffic offences

3.66 In the Road Traffic Law Review Report, published in 1988,<sup>1</sup> it is recommended<sup>2</sup> that courts should be given a discretion to order forfeiture of a vehicle used in a road traffic offence which is punishable with imprisonment. The Government's response to that Report is contained in a White Paper, The Road User and The Law, which was published in 1989.<sup>3</sup> In relation to the North Report's recommendation on forfeiture of motor vehicles the Government appears to take the view, firstly, that forfeiture of a motor vehicle should be considered by courts in respect of all road traffic offences, and, secondly, that the existing general forfeiture provisions would permit courts to make such an order without the need for any express statutory provision.<sup>4</sup>

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<sup>1</sup> HMSO, 1988 ("the North Report").

<sup>2</sup> Para 19.47.

<sup>3</sup> Cm 576.

<sup>4</sup> White Paper, para 4.13. Curiously, the White Paper refers only to the general forfeiture provisions applicable in England and Wales: it is not noted that in this respect the Scottish provisions in the 1975 Act are in identical terms.

3.67 We have considerable reservations about whether the existing provisions in sections 223 and 436 of the 1975 Act would permit a court to order the forfeiture of a motor vehicle used in a road traffic offence (with the possible exception of the offence of driving while disqualified). Those sections allow forfeiture of property which "has been used for the purpose of committing, or facilitating the commission of, any offence", and it would in our view be difficult, if not impossible, to suggest that a vehicle involved in, say, a careless driving offence had been used with either of those purposes. The majority of road traffic offences (with the possible exception noted above) are not offences of intent, and consequently the words of the forfeiture provisions are not appropriate for them. We note that the North Report expresses similar doubts on this matter.<sup>1</sup> It follows that, in our view, express statutory provision will have to be made if the forfeiture of vehicles used in road traffic offences is to be competent.

3.68 There remains the question of policy. The North Report's recommendation was limited to offences punishable with imprisonment, which would in effect have restricted the power to order forfeiture to reckless driving offences, to drink/driving offences, and to the offence of driving while disqualified. Our provisional view is that a power to order forfeiture should certainly go no further than that. Indeed, we have some reservations about whether a penalty of forfeiture of a motor vehicle is likely to be useful or desirable in relation to any road traffic offences. We would, however, welcome the views of consultees on this matter.

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<sup>1</sup> Para 19.44.

- 11.(a) Do you agree with the recommendation of the Road Traffic Law Review Report, to the effect that courts should be given a discretion to order forfeiture of a vehicle used in a road traffic offence which is punishable with imprisonment?
- (b) Alternatively, do you agree with the view which is implicit in the White Paper, namely that courts should have a discretion to order such forfeiture in respect of all road traffic offences?
- (c) In either event, do you agree that, if such forfeiture is to be competent, there will require to be express statutory provision to that effect?

#### Further areas of difficulty

3.69 Outlined above are the main areas of the law and procedure relating to forfeiture which appear to give rise to difficulty. If there are any further problems with the present law of forfeiture or the way in which it operates, it would be helpful to have a note of them. Consequently:

12. Are there any further aspects of the law and procedure of forfeiture which have given rise to difficulty or are likely to do so?

#### 4. CONFISCATION OF THE PROCEEDS OF CRIME: RECENT DEVELOPMENTS

##### General background

4.1 In recent years increasing concern about the large sums of money which can be made from criminal activities has led to considerable legislative and other activity around the world. In 1970 wide ranging confiscation and forfeiture provisions were introduced in the United States in the Racketeer Influenced and Corrupt Organisations Act and in the Controlled Substances Act. Subsequently many international organisations have given consideration to ways in which criminals might most effectively be stripped of their illicit profits: these organisations include the United Nations, the Commonwealth, and the Council of Europe. One outcome of such deliberations has been the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth which provides for the tracing, freezing and confiscation of the proceeds of major crime. At a national level many countries have followed the lead of the United States, and have introduced new laws to deal with the proceeds of criminal activity. Examples are to be found in Canada,<sup>1</sup> Italy,<sup>2</sup> and Australia.<sup>3</sup>

4.2 In the United Kingdom the Drug Trafficking Offences Act 1986 (applying mainly to England and Wales) was followed by comparable provisions for Scotland, contained in Part I of the Criminal Justice (Scotland) Act 1987. Those statutes empowered courts to order the confiscation of proceeds made from certain

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<sup>1</sup> Criminal Law Amendment Act 1975, s 29.

<sup>2</sup> Law No 646, 1982 (La Torre Law).

<sup>3</sup> Proceeds of Crime Act, 1987.

drug trafficking offences, and contained provision for the freezing and tracing of assets. Subsequently, under Part VI of the Criminal Justice Act 1988, courts in England and Wales were given power to make orders for the confiscation of the proceeds of a much wider range of offences. The Prevention of Terrorism (Temporary Provisions) Act 1989, applying to the whole of the United Kingdom, makes it an offence to deal with, or to facilitate the retention or control of, terrorist funds. The Act also allows courts, on conviction of any of these offences, to order the forfeiture of any money or property in the possession or control of the convicted person at the time of the offence.

4.3 Against the foregoing background it seems clear to us that there is now a general acceptance of the desirability of having a means of depriving criminals of their ill-gotten gains, and accordingly we do not consider it necessary to advance arguments in favour of such a principle. Our task, as we see it, is simply to examine ways in which the principle of confiscation can be extended, for Scotland, to a range of crimes other than drug trafficking offences. We consider this in detail in Part 5 below. Before doing so, however, it may be helpful to look in a little more detail at how that matter has been addressed, for England and Wales, in Part VI of the Criminal Justice Act 1988.

#### **Part VI of the Criminal Justice Act 1988**

4.4 Part VI of the Criminal Justice Act 1988 empowers Crown Courts and magistrates courts in England and Wales, in addition to dealing with an offender in any other way, to make an order, known as a confiscation order, which requires the offender to pay

such sum as the court thinks fit. Before making such an order the court must be satisfied that the offender has benefited from the offence of which he has been convicted or from that offence taken together with some other offence of which he is convicted in the same proceedings. In this respect the provisions of the 1988 Act are considerably narrower than the corresponding provisions in the Drug Trafficking Offences Act 1986 (and in the Criminal Justice (Scotland) Act 1987) since these latter Acts effectively permit all property belonging to an offender to be confiscated unless it can be shown not to be derived from drug trafficking. By contrast the 1988 Act provisions are restricted to proceeds, or "benefits", derived from the particular crime or crimes of which the offender has been convicted.

4.5 A confiscation order may be made in the Crown Court in respect of any indictable offence, but a magistrates court may make such an order only in respect of the limited number of offences specified in Schedule 4 to the Act. These are offences relating to sex establishments, the offence under section 10 of the Cinemas Act 1985 of using unlicensed premises for exhibition which requires a licence, and offences of supplying or possessing a video recording of unclassified work under sections 9 and 10 of the Video Recordings Act 1984. In all cases a confiscation order must be for an amount in excess of the minimum amount for the time being; that amount is currently £10,000.

4.6 Part VI of the 1988 Act goes on to make provision about the supplying, by the prosecution, of statements relating to benefits obtained by the offender; about restraint orders, having the effect of freezing an offender's assets; and about the enforcement of confiscation orders. These provisions are largely modelled on the



comparable provisions in the Drug Trafficking Offences Act 1986 and in Part I of the Criminal Justice (Scotland) Act 1987. There is, however, one provision of note which does not appear in the drug trafficking legislation, and which recognises the fact that in some instances the powers under the 1988 Act may be exercised in cases where there is a known victim. Section 72(7) of the Act provides that, where a court makes both a confiscation order and a compensation order, it may direct that some or all of the compensation should be paid out of sums recovered under the confiscation order if it appears to the court that the offender would not otherwise have sufficient means to satisfy both orders in full.<sup>1</sup>

4.7 With that brief summary of the 1988 Act provisions we now turn to consider how comparable provision might be made for Scotland.

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<sup>1</sup> cf paras 2.12 to 2.14, and 3.19 to 3.24, above.

## 5. CONFISCATION OF THE PROCEEDS AND PROFITS OF CRIME: THE SHAPE OF POSSIBLE REFORM

### Proceeds and profits

5.1 Hitherto in this Discussion Paper we have tended to use the words "proceeds" and "profits" interchangeably, and without trying to draw any distinction between them. However, we think that it may be helpful to try to draw such a distinction now, and to do so by reference to four rather different kinds of case.

5.2 In the context of a crime such as theft we think that the proceeds of such a crime can properly be regarded as that which was stolen, be it a motor car, a television set, a quantity of money, or whatever. Where, as sometimes happens, the proceeds in that sense are recovered by the police, they will simply be returned to the true owner at the conclusion of court proceedings. So far as we are aware, existing practice in this regard appears to operate satisfactorily.

5.3 A second kind of case may also involve a crime such as theft or fraud, but with the difference that the articles or money stolen or obtained by fraud are not recovered by the police. A case of this sort presents two significant features. First, the value of that which has been stolen or obtained by fraud can often be determined with reasonable accuracy (and, in the case of money, usually with precision). Second, it is arguable that in this kind of case any attempt to deprive an offender of the proceeds of his crime (in the sense of an equivalent monetary value) should be directed primarily at compensating the victim rather than at penalising the offender. In that respect the approach would be analogous to the simple restoration of stolen property mentioned

in the previous paragraph; and confiscation of proceeds, in the sense of confiscation to the state, may not be appropriate. This approach, however, raises issues of principle to which we shall return later. For the moment it may suffice simply to note that, whatever might be the ultimate destination of any funds recovered from an offender in this kind of case, their recovery might be assisted by the existence of procedures for freezing and seizing an offender's assets.

5.4 A third kind of case raises sharply the distinction which can be made between proceeds and profits. Let us suppose that an offender successfully carries out what is commonly referred to as a "mortgage fraud", that is to say he obtains sums of money by fraud for the purchase of heritable property. Suppose then that he uses that money to buy properties which, in a rising market, he subsequently resells at a profit. In that case it might be said that the money which he fraudulently obtained from the bank or building society represented the proceeds of his crime while the difference between the buying and selling prices of the properties represented its profits. Other examples can readily be figured where illegally obtained funds are applied in a variety of profit-making enterprises, possibly themselves of a wholly legitimate kind.

5.5 The fourth kind of case to which we should like to refer is the kind which, in a strict sense, has no victim. This sort of case might involve the illegal importation and sale of pornographic material, or the illegal importation of guns and explosives for distribution to other criminals or to terrorist groups. Such cases are in many respects analogous to drug trafficking offences. Somewhat different, but still having the characteristic of being

"victimless" crimes, are cases of the sort described in Schedule 4 to the Criminal Justice Act 1988,<sup>1</sup> and cases where, for example, a builder or other contractor has increased his profitability by contravening provisions in health and safety legislation. In all such cases the profits to be made from the activities in question may be very large, but equally they may be very difficult to quantify. Conversely, if any power to order confiscation of profits were to be restricted to the actual crime charged, it might seem slightly absurd that, for example, a retail newsagent caught selling a pornographic magazine should be deprived of the profit attaching to that one magazine when plainly that one sale was merely an incident in a continuing course of conduct.

5.6 In making a distinction between proceeds and profits we are not simply trying to make a semantic point. It seems to us that we should be clear about the different ways in which proceeds or profits can arise from criminal activity since this may affect not only the form of any new power to make confiscation orders but also the purpose for which such orders should be made. If, as is the case for England and Wales under the Criminal Justice Act 1988, confiscation orders are to be made only in respect of proceeds or profits derived from the crime of which a person has been convicted, and if it is to be for the prosecution in every case to establish the amount of the proceeds or profits, such orders would normally be appropriate for the kinds of case suggested in paragraphs 5.3 and 5.4 above. They might, however, be less appropriate for cases of the kind suggested in paragraph 5.5, either because it may be impossible to assess the amount of the profits, or because, as in the last example given in that paragraph, the amount to be confiscated would appear absurd in the whole context of the case.

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<sup>1</sup> See para 4.5 above.

## **Statutory assumptions**

5.7 One way of dealing with the kind of case just mentioned - where it is difficult, or even impossible, to calculate the amount of profit to have flowed from an illegal activity, or where the profit made from the actual crime charged is disproportionately small in comparison with the profit which was probably made from a continuing illegal enterprise - would be to adopt the approach taken in drug trafficking legislation. On that approach statutory assumptions would be introduced, the effect of which would be to entitle a court to assume that the whole, or part, of an offender's assets represented the proceeds of crime unless the offender was able to establish the contrary. This is a very draconian approach to confiscation and, while it may be justifiable in relation to drug trafficking offences, we doubt whether it is justifiable or acceptable in relation to the generality of other offences. It may be that such an approach could be justified in respect of a few specific offences other than drug trafficking - for example, trafficking in weapons and explosives, where the consequences of such offences are analogous in terms of widespread harm - but we are concerned to find an approach to confiscation which will be appropriate for all crimes other than those for which particular provision is made. On that basis we presently take the view that it would be contrary to principle, and therefore inappropriate, to adopt the approach of drug trafficking legislation in this regard. Accordingly, we consider that, for the generality of crimes, confiscation should be restricted to the proceeds or profits which can be shown to be attributable to the crime or crimes of which a person has been convicted. It follows from this approach that it

will be for the prosecution to establish in each case the amount of the proceeds or profit derived from the crime or crimes of which an offender has been convicted: it will not be for the offender to establish that assets in his possession or under his control were honestly obtained.<sup>1</sup>

### **Penalty or compensation**

5.8 In paragraph 5.3 above we suggested that, in some cases, it might be appropriate to regard confiscation primarily as a means of recovering for a victim the value of that which he had lost as a result of an offender's criminal activities. That, however, raises the wider question of whether confiscation of profits or proceeds should in general be regarded as a means of compensating a victim or of penalising an offender. We are of the view that, first and foremost, confiscation should be seen as a means of ensuring that crime does not pay, and is seen not to pay. In other words, the primary purpose of any confiscation procedures should be to strip an offender of any gains which he has derived from his criminal activity, and to put him back into the position he was in before that activity occurred. Indeed, as we have seen,<sup>2</sup> many crimes and offences which yield unlawful profits have no victim in the ordinary sense at all. That is, in our view, an added reason for placing the primary emphasis on deprivation of profits rather than on compensation for the victim.

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<sup>1</sup> It follows from this approach that, where a prosecutor accepts a plea of guilty to a lesser charge than that originally brought against an accused, he will be able to seek confiscation of proceeds or profits only in respect of that lesser charge.

<sup>2</sup> Para 5.5 above.

5.9 It remains the case, however, that in many instances a victim will have suffered financially as a result of criminal activity; and, if ways are to be found to strip an offender of the proceeds of his crime (using the word "proceeds" in the sense which we have described above) there appears to us to be a good case for providing that any confiscated sum of money representing such proceeds should be paid to the victim rather than to the state. Any consequential profits (using that word also in the sense described above) would, however, go to the State and not to the victim. We return to this matter later.<sup>1</sup>

5.10 There is a related matter which occurs to us, and on which we would welcome the views of consultees. Where courts have a power to confiscate large amounts of property or large sums of money in the hands of an offender, a consequence of that being done may be that the offender will have no resources left with which to meet the lawful demands of ordinary creditors. Such creditors will not, of course, have any involvement with the crime or crimes of which the offender has been convicted, and thus will not be victims in the ordinary sense. Consequently, a compensation order could not be made in their favour. On the other hand, it may be thought to be socially unacceptable that a power to confiscate the proceeds or profits of crime should operate, in effect, to the advantage of the State and to the detriment of innocent, ordinary creditors.

5.11 This conflict is recognised in the other statutes which provide for the confiscation of assets but, for reasons which are not immediately apparent, their approach is not uniform. All of them deal with the problem in the context of the insolvency of the

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<sup>1</sup> Para 5.42 below.

person holding the assets (normally the offender). However, the drug trafficking statutes, and the confiscation provisions for England and Wales in the Criminal Justice Act 1988, all give a substantial preference to the State by excluding from a debtor's estate for the purposes of sequestration (a) property which is subject to a restraint order made before the award of sequestration, and (b) any proceeds of property realised by virtue of the confiscation provisions.<sup>1</sup> By contrast, the Prevention of Terrorism (Temporary Provisions) Act 1989 provides that, during the period of six months following the making of a forfeiture order under the Act, no money or other property which is subject to the order is to be finally disposed of. Moreover, if sequestration occurs before the expiry of that period, the money or property in question is to cease to be subject to the forfeiture order and is to be dealt with in the insolvency proceedings as if the forfeiture order had never been made.<sup>2</sup>

5.12 As we have said, the reason for these different approaches is not immediately apparent. However, the reason may be that, in cases falling under the 1989 Act, the assets which are to be used to fund terrorist organisations may themselves have been honestly acquired and, as such, could legitimately be viewed by creditors as being available to meet their claims. By contrast, the proceeds or profits of crime could never have that character, and consequently should not be made available to meet the demands of creditors. On balance, we think that, for present purposes, the approach of the 1986, 1987, and 1988 Acts is the one which ought to be adopted, and accordingly we do not consider that any special provision should be made to protect the position of ordinary

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<sup>1</sup> 1986 Act, ss 15, 16; 1987 Act, ss 33, 34; 1988 Act, ss 84, 85.

<sup>2</sup> 1989 Act, Sch 4, Part IV.



creditors. As noted above, however, we do think that some special provision should be made to improve the position of those who have been the victims of the crime or crimes in question.

#### **Are new statutory powers required?**

5.13 If one accepts, as we have provisionally suggested above, that any powers to confiscate the proceeds or profits of crime should be aimed only at those derived from a particular crime or crimes of which an offender has been convicted, it may be asked whether any new statutory powers are required in order to achieve that result. Since any new power would presumably take the form of an order requiring the offender to pay a sum of money, could not the same result be achieved by the imposition of a fine or, in suitable cases a compensation order of an appropriate amount? In summary cases there are, of course, upper limits to the amount of a fine or a compensation order, but in cases on indictment fines and compensation orders can be of any amount. Arguably, therefore, an offender can be deprived of all the benefits accruing from a given crime or offence by the imposition of one or other of those orders.

5.14 While it is true that a fine or compensation order can be used to deprive an offender of the proceeds or profits derived from crime, that is so only up to a point. Fines and compensation orders do not allow for any pre-sentence freezing of an accused person's assets. Consequently, an astute offender might be able to conceal all his assets prior to sentence; and, at that stage, since the court is bound to have regard to the means of the offender so far as these are known to the court, it might be impossible to

impose either a fine or a compensation order of a realistic amount. Even if that did not happen, there are also problems in relation to enforcement. Both fines and compensation orders are enforceable either by imprisonment in default of payment or by the use of civil diligence. In our view imprisonment in default of payment is an unsatisfactory alternative to actual recovery of the proceeds or profits of crime. Despite the very long periods of imprisonment which can now be imposed in default of payment of large fines,<sup>1</sup> it may nonetheless be an attractive proposition for some criminals to serve a period in prison secure in the knowledge that substantial financial benefits will be awaiting them on release. So far as civil diligence is concerned, it is not in our view a very effective way of enforcing payment of sums of money representing the proceeds or profits of crime. While it may be reasonably effective in relatively simple cases, and where the amounts involved are small, it is unlikely to achieve results in cases where the amounts are substantial, where the offender's assets are complex, or where the offender has taken steps to disperse or "launder" his criminal proceeds. Civil diligence is not well suited to tracing assets which have been dispersed or concealed, and of course it cannot be used at all in respect of assets which lie beyond the immediate territorial jurisdiction of the Scottish courts.

5.15 In the result we conclude that, while fines and compensation orders may provide an adequate means of stripping an offender of the proceeds or profits of crime in some cases, a new type of order, with associated powers and procedures, should be introduced to deal with more complex cases where fines and compensation

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<sup>1</sup> For example, 10 years imprisonment for a fine in excess of £1 million: Criminal Procedure (Scotland) Act 1975, s 407(1A), as amended by Criminal Justice (Scotland) Act 1987, s 67(1).

orders alone would be unsatisfactory and, possibly, ineffective. In the remainder of this Part of the Discussion Paper we discuss the nature and incidents of a new order. Before doing so, however, it may be helpful to summarise the proposals which we have made thus far, and in respect of which we seek the views of consultees.

5.16 The views of consultees are sought on the following provisional proposals:

- 13.(a) Any procedure to deprive an offender of the proceeds or profits of crime should extend only to those proceeds or profits derived from a crime or crimes of which the offender has been convicted.
  - (b) As a consequence any new procedures should not entitle a court to make assumptions as to the source of assets in an offender's possession or under his control.
  - (c) In each case it will be for the prosecution to establish the amount of the proceeds or profits which an offender is alleged to have derived from the crime or crimes of which he has been convicted; and it will not be for an offender to establish that assets in his possession or under his control were honestly obtained.
- 14.(a) As a general rule the emphasis in any confiscation procedures should be on depriving an offender of unlawful proceeds and profits rather than on compensating the victim of the crime in question.

- (b) However, where a victim has sustained loss as a result of a crime, and a sum of money, representing all or part of that loss, is confiscated from an offender's assets, consideration should be given to paying that sum of money as compensation to the victim rather than paying it to the State.
  - (c) No special provision should be made to secure the position of a convicted person's ordinary creditors.
15. While fines and compensation orders may in some cases be satisfactory as a means of stripping an offender of unlawful proceeds or profits, they are likely to be unsuitable in other cases: a new type of order, with associated powers and procedures, is accordingly required.

#### A new confiscation order

5.17 In considering what form any new order might take there are several general issues which have to be resolved. These are:

- (a) What should be the nature of the order?
- (b) Should the power to make the order be available to the court on its own initiative or only on a motion by the prosecution?
- (c) If the prosecution is to be required to prove the amount of any proceeds or profits derived from a crime or crimes, how should that be done, and what should be the standard of proof?

- (d) Should the power to make a confiscation order be restricted to cases where the proved proceeds or profits exceed a minimum financial value?
- (e) Should the amount of a confiscation order be restricted to the amount which is likely to be recoverable out of an offender's assets?
- (f) Should there be a power to freeze an accused person's assets in advance of conviction and sentence? If so, how and when should that power be exercised; how should it be given effect; and should there be any limitations on its use?
- (g) Where an order has been made, how should it be enforced? What provisions are required for enforcement outside Scotland?
- (h) What should be the destination of any sums of money recovered from a convicted offender? Should any special provision be made in respect of compensation to the victims of crime?

In what follows we deal with each of those issues in turn.

**(a) The nature of the order**

5.18 We have already noted<sup>1</sup> that the issue of confiscation will not arise in, for example, cases of theft where that which has actually been stolen can be recovered and restored to the true

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<sup>1</sup> Para 5.2 above.

owner. It appears to follow, therefore, that confiscation orders will be appropriate not in respect of specific articles or specific property but rather in respect of sums of money which represent, as nearly as may be, the value of the proceeds or profits in question. A confiscation order, therefore, would be an order for payment, out of an offender's assets, of a sum of money. This, we note, is the approach adopted for England and Wales in the Criminal Justice Act 1988,<sup>1</sup> and we consider that it is, at least in the majority of cases, the right one.

5.19 There could, however, be exceptional cases where payment of a sum of money might not be the appropriate solution. Suppose, for example, that a fraudster has contrived, by some sort of trick, to induce someone to convey to him as a gift a piece of heritable property, such as a house. Unlike a television set or a motor car, that cannot be seized by the police and returned to the true owner. At the same time it is likely that the person who has been defrauded may much prefer to have his house restored to him rather than to receive its value in a sum of money. This example, of course, raises sharply the possible conflict, which we discussed in paragraphs 5.8 and 5.9 above, between simply penalising the offender or compensating the victim. In the example which we are presently considering, however, it seems to us to be beyond argument that the victim should not merely receive compensation but should in fact have restored to him the house which he lost through fraud. However, that would require a special order by the court, possibly authorising the clerk of court to sign a reconveyance of the property to the victim. No doubt other examples could be figured where an order for payment of a sum of money would not be the best way of depriving an offender of the proceeds of his crimes. We think it may be better not to try

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<sup>1</sup> s 71(1).

to anticipate all such cases in legislation, but rather to give to the court a power to make whatever kind of order seems most appropriate in the circumstances.

5.20 Accordingly, we provisionally propose:

16. An order confiscating the proceeds or profits of crime should take the form of -

- (a) an order requiring the offender to pay a sum of money, or
- (b) such other order as the court considers appropriate in the circumstances.

(b) Order by court, or only on prosecutor's motion

5.21 The 1988 Act provides<sup>1</sup> that a confiscation order is not to be made unless the prosecutor has given written notice to the court to the effect that it appears to him that, were the court to consider that it ought to make such an order, it would be able to make an order requiring the offender to pay at least the minimum amount.<sup>2</sup> While this provision, of course, stems in part from the fact that the 1988 Act provides for a minimum amount, it nonetheless seems to us that there may be general advantage in allowing the prosecutor to decide whether or not, in effect, to invite the court to consider the making of a confiscation order. Only the prosecutor will know whether an offender has, or is likely to have, assets from which a confiscation order may be realised, and in some cases only he will be able to put before the

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<sup>1</sup> s 72(1)

<sup>2</sup> Presently £10,000: see para 4.5 above.

court information relating to the profits which are thought to have been made from a particular criminal enterprise. It might, we think, lead to the making of fruitless orders, possibly leading to expensive and unproductive tracing procedures, if courts were to be able to make confiscation orders on their own initiative.

5.22 We therefore propose that:

17. **Regardless of whether or not there is to be a minimum amount restriction in Scotland, confiscation orders should be made only on the motion of the prosecutor.**

**(c) Proof of amount of proceeds or profits**

5.23 Given the Scottish system for detailing the charges in a complaint or indictment, the nature of any proceeds directly derived from a crime will normally be clearly stated in the charge of which an offender has been convicted. Accordingly, in cases where what are involved are direct proceeds, there should be no problem about determining what these proceeds are. Furthermore, if the proceeds are themselves a sum of money, obtained, say, by fraud, the financial value of those proceeds will be self-evident.

5.24 There will, however, be cases where the proceeds, as libelled in the complaint or indictment, are not money but are articles - paintings, jewelry, silver, or whatever - which have been sold and converted into other assets. In such cases the value of those articles will not usually be revealed in the charge of which the offender is convicted. Moreover, there will be other cases, involving consequential profits, where the fact that there has been



financial gain to the offender may not appear in terms in the charge at all. Dealing in pornographic materials would be an example of such a case. In all such cases it will be necessary to establish the amount by which the offender has benefited.<sup>1</sup>

5.25 The 1988 Act makes some provision to deal with this by providing<sup>2</sup> for the tendering by the prosecutor of a statement containing, inter alia, an assessment of the value of the offender's benefit. In so far as the details of that statement are not challenged by the offender, they may be accepted by the court. The 1988 Act does not, however, appear to indicate what is to happen in relation to matters which are challenged by the offender. Presumably it is intended that the court should apply the normal procedures for ascertaining disputed facts prior to passing sentence. In England and Wales these procedures are well developed and well known.<sup>3</sup>

5.26 In Scotland there does not seem to be any general practice of conducting hearings to resolve disputes of fact prior to sentence, though there appears to be nothing to prevent this being done.<sup>4</sup> Nonetheless, if it were thought to be desirable that the court before which an offender is convicted should itself conduct an inquiry into disputed issues relative to benefits allegedly obtained by the offender, we think that there would be advantage in making express statutory provision for this. We note, however,

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<sup>1</sup> It is worth noting that cases of stolen property can illustrate the desirability of emphasising deprivation of an offender's gains in preference to compensation of a victim: in such cases the amounts realised by the offender might be considerably less than the value of the articles to the victim.

<sup>2</sup> s 73.

<sup>3</sup> R v Newton (1982) 4 Cr App R (S) 388.

<sup>4</sup> Renton and Brown, Criminal Procedure (5th ed) 10-23; Nicholson, Law and Practice of Sentencing in Scotland, 8.03.

that, in relation to drug trafficking offences, the Criminal Justice (Scotland) Act 1987 provides<sup>1</sup> that difficult questions of law or questions of fact of exceptional complexity may be remitted to the Court of Session for a decision. That provision appears to have been made in the context of an earlier provision<sup>2</sup> which allows the court of conviction to postpone the making of a confiscation order for a period not exceeding six months to enable further information to be obtained.

5.27 In the context of general confiscation orders it therefore has to be considered whether there should be provision similar to that in the 1987 Act, or whether it would be preferable to make express provision for the criminal court itself to conduct hearings on disputed issues. Whichever option is selected, there is an ancillary question as to whether, if there is to be a delay to allow disputed facts to be ascertained, the sentencing court should immediately proceed to impose sentence (other than the confiscation order), or whether instead it should postpone sentence so that the whole sentence of the court can be imposed at the same time. On this point the 1987 Act allows for any sentence other than a fine to be imposed prior to the making of a confiscation order.<sup>3</sup> The 1988 Act, by contrast, provides that a confiscation order is to be made before any other sentence is imposed,<sup>4</sup> and also provides that the amount of any such order is to be taken into account in determining the amount of any fine.<sup>5</sup>

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<sup>1</sup> s 3(5).

<sup>2</sup> s 2(1).

<sup>3</sup> s 2(1).

<sup>4</sup> s 72(4).

<sup>5</sup> s 72(5).

5.28 So far as the High Court is concerned (which alone can make confiscation orders in drug trafficking cases), we can see that there may be advantage in having difficult issues of fact or law remitted to a separate hearing in the Court of Session. It would clearly be inconvenient, and perhaps at times impossible, to arrange a hearing before the judge who had presided at a trial - possibly in a remote part of Scotland. On the other hand, if the power to make general confiscation orders were to be available in the sheriff court,<sup>1</sup> there would not be the same difficulty about arranging post-trial hearings, and in any event it might be thought inappropriate that cases being dealt with in the sheriff court should be remitted to the Court of Session for a decision on questions of fact and law. It seems to us that a general power to make confiscation orders is unlikely, in the majority of cases, to give rise to complex issues of fact and law such as may more readily arise in drug trafficking cases. Quite often the amount of any proceeds, or even profits, will be fairly easily determined, and may at worst require only a fairly brief and straightforward inquiry to resolve any disputed facts. Accordingly, we take the view that the best solution might be to adopt a flexible approach which would allow either a hearing before the trial judge or, in High Court cases, a remit to the Court of Session where that seemed to be the most convenient way of dealing with the matter.

5.29 On the question whether or not sentence should be postponed until the amount of a confiscation order can be determined, we think that as a general rule it would be better if the whole of a court sentence could be imposed at the one time. On the other hand, the period between conviction and final resolution of outstanding issues in relation to confiscation could, in some

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<sup>1</sup> see para 5.34 below.

instances, be substantial. At present section 179(1) of the Criminal Procedure (Scotland) Act 1975 provides that a court may adjourn a case after conviction and prior to sentence, but may not do so for any single period exceeding three weeks. The wording of that subsection clearly envisages that there may be more than a single adjournment of three weeks, but it might well be thought to be oppressive were that power to be used repeatedly and excessively, particularly if the offender was remanded in custody throughout the period in question. We would welcome views on this matter, but it seems to us that a possible compromise might be to provide that sentence should always be postponed where a hearing to resolve disputed issues can be held and concluded within, say, six weeks after conviction: where that cannot be done, any sentence other than the confiscation order and, possibly, a fine should be imposed within, at the most, six weeks after the date of conviction.

5.30 Whatever form a hearing takes, there is, we think, one further matter which merits consideration. At such a hearing where should the burden of proof lie, and what should be the standard of proof? Both the 1987 and 1988 Acts are silent on this matter. So far as the 1987 Act is concerned, that is presumably because the general framework is different from what we are proposing here. Under that Act the court is entitled to assume that, in effect, the whole of an offender's assets represent the proceeds of drug trafficking. In that context it will be for the offender to show, if he can, that his assets were honestly acquired, and presumably he can do that on a balance of probabilities. We, by contrast, are proposing that it should be for the prosecutor to establish the amount of any benefits obtained by

an offender, and it therefore follows that, at any hearing on that matter, the burden of proof will rest on the prosecutor.

5.31 This appears to be the position adopted by the 1988 Act for England and Wales. However, that Act has nothing to say about the standard of proof which should be applied. Possibly that is because, in England and Wales, there appears to be a well established case law,<sup>1</sup> relating to the ascertainment of facts for the purpose of sentence, which lays down that the standard of proof should be the criminal one, namely beyond reasonable doubt.

5.32 We consider that that standard of proof should be required in the hearings which we are proposing. We have already noted that, in some instances, the proceeds of a particular crime will actually be specified in the charge brought against an accused. In such cases that part of the charge, like others, will have to be proved beyond reasonable doubt. We see no reason why any other course should be adopted in cases where the amount of any proceeds or profits have to be established in a separate hearing.

5.33 To sum up, therefore, we propose:

18. **Where the prosecutor is moving the court to make a confiscation order, the prosecutor should tender a written statement detailing the benefits which he alleges the offender has derived from the crime or crimes of which he has been convicted.**
19. **Where any matters in that statement are not challenged by the offender, the court may hold that such matters are established.**

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<sup>1</sup> See, for example, R v McGrath and Casey (1983) 5 Cr App R (S) 460; R v Ahmed (1984) 6 Cr App R (S) 391.

20. Where any such matters are challenged by the offender, and cannot be immediately resolved, the court should be entitled to fix a hearing at a future date at which evidence may be led.
21. Where such a hearing cannot conveniently be arranged within a reasonable time, and the offender has been convicted before the High Court, any disputed issues of fact or law may be remitted for a decision by the Court of Session.
- 22.(a) Where any hearing can be completed within, say, six weeks of the date of conviction, the whole sentence of the court should be postponed until after that hearing.
  - (b) Where a hearing cannot be completed within that time, sentence, other than a confiscation order and a fine, should be imposed not later than six weeks after the date of conviction.
23. At any hearing, whether before the trial judge or in the Court of Session, the burden of proof, to the criminal standard of beyond reasonable doubt, should be on the prosecutor.

(d) Minimum financial amount

5.34 The Criminal Justice Act 1988 provides,<sup>1</sup> for England and Wales, that a confiscation order must be for at least the minimum

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<sup>1</sup> s 71(6) and (7).

amount, which is presently £10,000. This is presumably to avoid the possibility that orders might be made for small amounts where the costs of their recovery would not be worthwhile. We can see the advantage of such a provision, but we have considered whether a similar result might be achieved for Scotland by restricting the availability of such orders either to cases in the High Court (as is the case with confiscation orders in respect of drug trafficking offences), or at least to cases taken on indictment whether in the High Court or the sheriff court. As a rule the amounts involved in such cases, and particularly those in the High Court, will be sufficiently substantial to justify the use of enforcement and recovery procedures. On the other hand, there may be summary cases of a kind dealt with in the sheriff court where the amounts of proceeds, and particularly profits, could be very substantial indeed. This might be particularly so in the case of certain statutory offences such as, for example, those under the Trade Descriptions Acts, and those under legislation relating to fisheries or the prevention of oil pollution. To a limited extent the 1988 Act has given the power to make confiscation orders to magistrates courts in England and Wales, but we think that, for Scotland, the power might usefully be extended to cover all summary cases in the sheriff court. Accordingly we conclude that, if, in the interests of economical use of resources, it is desirable in some way to exclude confiscation orders in cases where the amounts involved are small, that can best be done, as in the English legislation, by imposing a minimum financial amount. There does not seem to be any reason why that amount should differ, for Scotland, from that presently applying in England and Wales, but we should be glad to hear of any contrary view.

5.35 We accordingly propose:

24.(a) It should not be competent to make a confiscation order for an amount less than a minimum amount prescribed by statute. For the present that minimum amount should be £10,000.

(b) Subject to (a) above, the power to make a confiscation order should be available in the High Court and in the sheriff court under both solemn and summary jurisdiction.

**(e) Restriction to amount that can be recovered**

5.36 In all the statutes which currently permit the making of a confiscation order there is provision restricting the amount of any such order to the amount that appears likely to be realised out of the offender's assets at the time when the order is made.<sup>1</sup> This appears to be a sensible provision, and we suggest that any new confiscation order power in Scotland should be subject to a similar restriction. For this purpose "assets" will mean such assets as may be realised after, for example, discharging any security or real burden affecting the offender's property.<sup>2</sup>

5.37 We propose:

25. A confiscation order should not be made for an amount which is greater than the amount which appears likely to be realised out of an offender's assets at the time when the order is made.

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<sup>1</sup> Drug Trafficking Offences Act 1986, s 4(3); Criminal Justice (Scotland) Act 1987, s 1(1)(b); Criminal Justice Act 1988, s 71(6).

<sup>2</sup> cf, for example, 1987 Act, s 5(5)(a).



(f) Pre-trial freezing of assets

5.38 The 1986, 1987 and 1988 Acts all make provision<sup>1</sup> for the granting of restraint orders the effect of which is to prohibit an accused person, and certain other persons, from dealing with realisable property. Such orders may be made, in England and Wales, by the High Court and, in Scotland, by the Court of Session following on an application by the Lord Advocate. We are of the view that, if confiscation order procedures are to be effective, it will be essential to have restraint orders available for use in appropriate cases.

5.39 A model for restraint orders presently exists in each of the statutes mentioned above. So far as Scotland is concerned,<sup>2</sup> this may involve physical seizure of property, the granting of warrants for inhibition and arrestment, and the appointment of an administrator to manage or deal with an offender's property during the operation of the restraint order. As well as extending to property which is in an accused person's possession or under his direct control, a restraint order may also extend to what are referred to as "implicative gifts".<sup>3</sup> In the context of the 1987 Act these include gifts made at any time during a period up to six years prior to the granting of a warrant for the accused's arrest or the making of the restraint order.<sup>4</sup> Under the 1988 Act the term "implicative gifts" is not used, but gifts made to third parties are included in the definition of "realisable property",<sup>5</sup> and may be included in the scope of a restraint order.

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<sup>1</sup> s 8 et seq; s 8 et seq; and s 77 et seq, respectively.

<sup>2</sup> 1987 Act, s 8 et seq.

<sup>3</sup> Described in 1987 Act, s 6.

<sup>4</sup> s 6(1)(a) and s 5(2).

<sup>5</sup> s 74(1)(b).

5.40 The details of restraint order procedures are quite complex. However, these procedures have very recently been introduced for drug trafficking offences in the 1987 Act and, more generally for England and Wales, in the 1988 Act. In these circumstances we do not think that it would be helpful at this stage to examine these procedures in detail. We are at the moment primarily concerned to know whether consultees would as a matter of principle favour the introduction of restraint orders alongside a general power to make confiscation orders. If so, we would propose that existing provisions should simply be used for that purpose subject to any necessary modifications. One particular modification which occurs to us is that, since confiscation orders of the kind we are presently considering may on occasions be for relatively small amounts, it may be helpful and appropriate to permit the court to restrict a restraint order to less than an accused person's whole assets. We accordingly propose:

26. **Subject to any necessary modifications, provision, analogous to that relating to drug trafficking offences in the Criminal Justice (Scotland) Act 1987, should be made to enable the Court of Session, on the application of the Lord Advocate, to make restraint orders prohibiting an accused person, and certain other persons, from dealing with realisable property.**

**(g) Enforcement of confiscation orders**

5.41 As in the case of restraint orders, the 1986, 1987 and 1988 Acts all contain provisions for the enforcement of confiscation

orders. In all cases these provisions are detailed and complex and, in the case of the 1987 Act, include provisions relating to the duties and functions of administrators; to the supervision of administrators; to the variation of confiscation orders; to the payment of compensation to holders of realisable property; to reciprocal arrangements for the enforcement of confiscation orders; to the sequestration of estates comprising realisable property; to investigations and disclosure of information; and to certain ancillary offences. We consider that similar provisions would require to be made in relation to general confiscation orders, but once again we do not consider that it would be beneficial to examine such provisions in minute detail at this stage. Accordingly, we propose on this matter:

27. Subject to any necessary modifications, provision, analogous to that relating to drug trafficking offences in the Criminal Justice (Scotland) Act 1987, should be made regarding the enforcement of general confiscation orders.

(h) Destination of sums recovered under a confiscation order

5.42 We have previously expressed the view that confiscation orders should be regarded, first and foremost, as a means of depriving an offender of his ill-gotten gains rather than as a means of obtaining compensation for a victim.<sup>1</sup> However, we have also pointed out that there may often be cases where any sums recovered from an offender should be used, in whole or in part, to compensate his victim for his loss rather than simply being paid to the state. Unless express provision were to be made, however, that result could not normally be achieved. It seems to us,

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<sup>1</sup> Para 5.8 above.

therefore, that there would be advantage in adopting the approach taken for England and Wales in the 1988 Act<sup>1</sup> whereby, if a court makes both a confiscation order and a compensation order, and the offender does not appear to have sufficient means to satisfy both orders in full, the court must direct that some or all of the compensation order should be paid out of sums recovered under the confiscation order. We would welcome views on this, and accordingly propose:

28. Where a court makes both a confiscation order and a compensation order, and the offender does not appear to have sufficient means to satisfy both orders in full, the court should be required to direct that so much of the compensation as will not in its opinion be recoverable because of the insufficiency of means should be paid out of any sums recovered under the confiscation order.

#### Other matters

5.43 In this Part of the Discussion Paper we have deliberately sought to concentrate on what appear to us to be the important issues of principle associated with the possible introduction in Scotland of a general power to make confiscation orders. In view of the recent introduction of the 1987 Act, and the 1988 Act for England and Wales, we have not sought to examine in detail the provisions which those Acts contain in relation to restraint orders and enforcement. Indeed, we understand that the first confiscation order under the 1987 Act was only made in January 1989, and consequently there has been little opportunity in practice so far to

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<sup>1</sup> s 72(7); and see para 4.6 above.

assess the strengths, and possible weaknesses, of the procedures laid down by that statute. It therefore appears to us to be premature to consider doing anything other than to adopt those provisions, subject only to any necessary modifications, for general confiscation orders. However, it would be helpful to know if in fact the 1987 Act provisions have so far presented any problems or difficulties, and we would welcome advice on that point. We therefore pose the following question:

29. Have those consultees who have experience of the working of the confiscation order provisions in the Criminal Justice (Scotland) Act 1987 encountered any problems or difficulties in practice? If so, what are they?

## **6. SUMMARY OF PROVISIONAL PROPOSALS**

### **FORFEITURE**

#### **Rights of innocent owners of forfeited property**

- 1.(a) We propose that a procedure should be introduced to allow an innocent person with an interest in forfeited property to apply to the court which made the order for the order to be reviewed.
- (b) Should the length of the period within which an application for review must be made be six months, or some other period?
- (c) If a review procedure was introduced, should there also be a procedure for reviewing the original sentence imposed?
- (d) Would the introduction of a review procedure cause undue difficulties in storing the forfeited property prior to its disposal?

#### **(Paragraph 3.18)**

#### **Compensation from forfeited property**

- 2.(a) Courts should be given an express power to order that the proceeds of the sale of forfeited property should be directed towards payment of a compensation order in cases where the offender would not otherwise have sufficient means to meet such an order.

- (b) Should the sale of the property, or the payment of the proceeds, be delayed until the expiry of the review period?

**(Paragraph 3.24)**

**Heritable and incorporeal property**

- 3.(a) Should any doubt as to whether forfeiture of heritable and, possibly, incorporeal property is competent in Scottish criminal courts be resolved?
- (b) If so, which way should it be resolved?
- (c) If the courts were given an express power to forfeit heritable and incorporeal property, which courts should have such a power and should any restrictions be placed upon it?

**(Paragraph 3.35)**

**General and specific forfeiture powers**

- 4.(a) The various forfeiture provisions in particular statutes should not be consolidated into a single provision.
- (b) If the specific forfeiture provisions are to remain, is the approach adopted in Donnelly v HMA considered to be generally acceptable and, if so, should it be embodied in a statutory provision?

**(Paragraph 3.43)**

### **Possession or control**

5. Should the phrase "in his possession or under his control at the time of his apprehension" in sections 223 and 436 of the 1975 Act be replaced by a phrase such as "property which was at the time of the offence or at the time of his apprehension in his ownership or possession or under his control"?

### **(Paragraph 3.47)**

### **Presence of the property in court**

- 6.(a) Are there any practical problems in the granting of forfeiture orders where the property to be forfeited is not in court?
- (b) Is an express statutory provision called for regarding the presence of the property in court prior to the granting of a forfeiture order?

### **(Paragraph 3.51)**

### **Probation and absolute discharge**

7. A forfeiture order should be competent in conjunction with a probation order or an absolute discharge both in solemn and in summary proceedings.

### **(Paragraph 3.54)**



## **Notice of penalties**

8.(a) We provisionally propose that there should be no requirement for notice of liability to a forfeiture order to be given in the notice of penalties served on an accused in respect of statutory offences in summary proceedings.

(b) If notice of liability to forfeiture is deemed to be required, should that be required in relation only to forfeiture orders made under specific provisions or also under the general provision?

## **(Paragraph 3.62)**

### **Identification and specification of forfeited property**

9. No further legislation is required clarifying the identification or specification of forfeited property.

## **(Paragraph 3.63)**

### **The right to take possession of the property**

10. We do not consider it necessary to give the law enforcement authorities an express power to take possession of property which is likely to be forfeited.

## **(Paragraph 3.65)**

**Forfeiture of motor vehicles in respect of certain road traffic offences**

- 11.(a) Do you agree with the recommendation of the Road Traffic Law Review Report, to the effect that courts should be given a discretion to order forfeiture of a vehicle used in a road traffic offence which is punishable with imprisonment?
- (b) Alternatively, do you agree with the view which is implicit in the White Paper, namely that courts should have a discretion to order such forfeiture in respect of all road traffic offences?
- (c) In either event, do you agree that, if such forfeiture is to be competent, there will require to be express statutory provision to that effect?

**(Paragraph 3.68)**

**Further areas of difficulty**

12. Are there any further aspects of the law and procedure of forfeiture which have given rise to difficulty or are likely to do so?

**(Paragraph 3.69)**

## CONFISCATION

### General issues

- 13.(a) Any procedure to deprive an offender of the proceeds or profits of crime should extend only to those proceeds or profits derived from a crime or crimes of which the offender has been convicted.
- (b) As a consequence any new procedures should not entitle a court to make assumptions as to the source of assets in an offender's possession or under his control.
- (c) In each case it will be for the prosecution to establish the amount of the proceeds or profits which an offender is alleged to have derived from the crime or crimes of which he has been convicted; and it will not be for an offender to establish that assets in his possession or under his control were honestly obtained.
- 14.(a) As a general rule the emphasis in any confiscation procedures should be on depriving an offender of unlawful proceeds and profits rather than on compensating the victim of the crime in question.
- (b) However, where a victim has sustained loss as a result of a crime, and a sum of money, representing all or part of that loss, is confiscated from an offender's assets, consideration should be given to paying that sum of money as compensation to the victim rather than paying it to the state.

- (c) No special provision should be made to secure the position of a convicted person's ordinary creditors.
15. While fines and compensation orders may in some cases be satisfactory as a means of stripping an offender of unlawful proceeds or profits, they are likely to be unsuitable in other cases: a new type of order, with associated powers and procedures, is accordingly required.

**(Paragraph 5.16)**

**A new confiscation order**

**(a) The nature of the order**

16. An order confiscating the proceeds or profits of crime should take the form of -
- (a) an order requiring the offender to pay a sum of money, or
  - (b) such other order as the court considers appropriate in the circumstances.

**(Paragraph 5.20)**

**(b) Order by court, or only on prosecutor's motion**

17. Regardless of whether or not there is to be a minimum amount restriction in Scotland, confiscation orders should be made only on the motion of the prosecutor.

**(Paragraph 5.22)**

**(c) Proof of amount of proceeds or profits**

18. Where the prosecutor is moving the court to make a confiscation order, the prosecutor should tender a written statement detailing the benefits which he alleges the offender has derived from the crime or crimes of which he has been convicted.
19. Where any matters in that statement are not challenged by the offender, the court may hold that such matters are established.
20. Where any such matters are challenged by the offender, and cannot be immediately resolved, the court should be entitled to fix a hearing at a future date at which evidence may be led.
21. Where such a hearing cannot conveniently be arranged within a reasonable time, and the offender has been convicted before the High Court, any disputed issues of fact or law may be remitted for a decision by the Court of Session.
- 22.(a) Where any hearing can be completed within, say, six weeks of the date of conviction, the whole sentence of the court should be postponed until after that hearing.
  - (b) Where a hearing cannot be completed within that time, sentence, other than a confiscation order and a fine, should be imposed not later than six weeks after the date of conviction.

23. At any hearing, whether before the trial judge or in the Court of Session, the burden of proof, to the criminal standard of beyond reasonable doubt, should be on the prosecutor.

**(Paragraph 5.33)**

**(d) Minimum financial amount**

- 24.(a) It should not be competent to make a confiscation order for an amount less than a minimum amount prescribed by statute. For the present that minimum amount should be £10,000.

- (b) Subject to (a) above, the power to make a confiscation order should be available in the High Court and in the sheriff court under both solemn and summary jurisdiction.

**(Paragraph 5.35)**

**(e) Restriction to amount that can be recovered**

25. A confiscation order should not be made for an amount which is greater than the amount which appears likely to be realised out of an offender's assets at the time when the order is made.

**(Paragraph 5.37)**

**(f) Pre-trial freezing of assets**

26. Subject to any necessary modifications, provision, analogous to that relating to drug trafficking offences in the Criminal Justice (Scotland) Act 1987, should be made to enable the Court of Session, on the application of the Lord Advocate, to make restraint orders prohibiting an accused person, and certain other persons, from dealing with realisable property.

**(Paragraph 5.40)**

**(g) Enforcement of confiscation orders**

27. Subject to any necessary modifications, provision, analogous to that relating to drug trafficking offences in the Criminal Justice (Scotland) Act 1987, should be made regarding the enforcement of general confiscation orders.

**(Paragraph 5.41)**

**(h) Destination of sums recovered under a confiscation order**

28. Where a court makes both a confiscation order and a compensation order, and the offender does not appear to have sufficient means to satisfy both orders in full, the court should be required to direct that so much of the compensation as will not in its opinion be recoverable because of the insufficiency of means should be paid out of any sums recovered under the confiscation order.

**(Paragraph 5.42)**

**Other matters**

29. Have those consultees who have experience of the working of the confiscation order provisions in the Criminal Justice (Scotland) Act 1987 encountered any problems or difficulties in practice? If so, what are they?

**(Paragraph 5.43)**