



Criminal Justice (Scotland) Act 1995

1995 CHAPTER 20

PART II

PROCEEDS OF CRIME AND PROPERTY USED IN CRIME

CHAPTER I

CONFISCATION OF THE PROCEEDS OF CRIME

Confiscation orders

70 General provision

- (1) Subject to the provisions of this Chapter, where in respect of any offence to which this Chapter applies—
 - (a) the accused is convicted, whether in solemn or summary proceedings; or
 - (b) in the case of summary proceedings (without proceeding to conviction) an order is made discharging him absolutely,the court, on the application of the prosecutor, may make an order (a “confiscation order”) requiring the accused to pay such sum as the court thinks fit.
- (2) This Chapter applies to any offence which has been prosecuted—
 - (a) on indictment; or
 - (b) on summary complaint if the offence is punishable by a fine of an amount greater than the amount corresponding to level 5 on the standard scale or by imprisonment for a period longer than 3 months or by both such fine and imprisonment,

but it does not apply to an offence to which section 1 of the 1987 Act (offences relating to drug trafficking) relates or to an offence under Part III of the 1989 Act (financial assistance for terrorism).

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- (3) A confiscation order shall not be made unless the court orders some other disposal (including an absolute discharge) in respect of the accused.
- (4) The court may make a confiscation order against an accused only if it is satisfied that he has benefited from the commission of the offence concerned.
- (5) The sum which a confiscation order requires an accused to pay must not exceed the lesser of—
 - (a) the amount of the benefit—
 - (i) from the commission of the offence; or
 - (ii) where section 71(4) of this Act applies, from the commission of the offence and any other offence to which this Chapter applies; or
 - (b) the amount that might be realised at the time the order is made.
- (6) Any application under this section shall be made—
 - (a) in proceedings on indictment, when the prosecutor moves for sentence or, if the accused is remitted for sentence under section 104 of the 1975 Act, before sentence is pronounced; and
 - (b) in summary proceedings, following the conviction of the accused.
- (7) For the purposes of any appeal or review, a confiscation order is a sentence.

71 Benefit from commission of offence

- (1) For the purposes of this Chapter, an accused shall be held to have benefited from the commission of an offence if in connection with its commission he has obtained, directly or indirectly, any property or other economic advantage.
- (2) Subject to subsection (4) below, in determining whether an accused has benefited from the commission of an offence and, if he has, the amount referred to in section 70(5)(a)(i) of this Act, the court may make the following assumptions, except in so far as he proves either of them, on the balance of probabilities, to be incorrect—
 - (a) that any property or other economic advantage which has been obtained by him since the relevant date has been obtained in connection with the commission of the offence; and
 - (b) that any expenditure by him since the relevant date was met out of property or other economic advantage obtained in connection with the commission of the offence.
- (3) In subsection (2) above “the relevant date” means—
 - (a) the date of the offence; or
 - (b) if the offence is found to have been committed over a period of time, the date occurring at the beginning of that period.
- (4) Where—
 - (a) the application for the confiscation order has been made in respect of two or more offences; or
 - (b) during the relevant period the accused has been convicted of at least one other offence to which this Chapter applies, being an offence committed after the coming into force of this Chapter,

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the court may, in determining the amount referred to in section 70(5)(a)(ii) of this Act, make the assumptions set out in subsection (5) below, except in so far as the accused proves either of those assumptions, on the balance of probabilities, to be incorrect.

- (5) Those assumptions are—
- (a) that any property or economic advantage which has been obtained by the accused during the relevant period has been obtained in connection with the commission of an offence to which this Chapter applies; and
 - (b) that any expenditure by him during the relevant period was met out of property or other economic advantage obtained in connection with the commission of such an offence.
- (6) In subsections (4) and (5) above, “the relevant period” means the period of six years ending with the date on which proceedings were instituted against the accused for the offence in respect of which the application for the confiscation order has been made.
- (7) In this Part of this Act, “property” means any property wherever situated, whether heritable or moveable or whether corporeal or incorporeal.

72 Realisable property

- (1) In this Part of this Act “realisable property” means, subject to subsection (2) below—
- (a) the whole estate wherever situated of a person—
 - (i) against whom proceedings have been instituted for an offence to which this Chapter applies; or
 - (ii) in respect of whom a restraint order has been made by virtue of section 95(3) of this Act;
 - (b) the whole estate wherever situated of a person to whom any person whose whole estate is realisable by virtue of paragraph (a) above has (directly or indirectly and whether in one transaction or in a series of transactions) made a gift caught by this Chapter;
 - (c) any other property in the possession or under the control of a person mentioned in paragraph (a) or (b) above; and
 - (d) any income or estate vesting in a person mentioned in paragraph (a) or (b) above.
- (2) Property is not realisable if—
- (a) held on trust by a person mentioned in subsection (1)(a) or (b) above for a person not so mentioned;
 - (b) a suspended forfeiture order is in force in respect of the property; or
 - (c) it is, for the time being, subject to a restraint order made in respect of other proceedings.
- (3) Subject to section 73(4) of this Act, for the purposes of this Chapter, the amount that might be realised at the time a confiscation order is made in respect of a person is the total value at that time of all his realisable property, and of all gifts caught by this Chapter which have been made by him, less any amount due by him at that time in respect of any compensation order under section 58 of the Criminal Justice (Scotland) Act 1980 made before the confiscation order.
- (4) In assessing the value of realisable property (other than money) of a person in respect of whom it proposes to make a confiscation order, the court shall have regard to the likely market value of the property at the date on which the order would be made;

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but it may also have regard to any security or real burden which would require to be discharged in realising the property or to any other factors which might reduce the amount recoverable by such realisation.

- (5) In assessing the value of realisable property of a person whose estate has been sequestrated, or who has been adjudged bankrupt in England and Wales or Northern Ireland, the court shall take into account the extent to which the property is subject to, as the case may be, sequestration or bankruptcy procedure by virtue of paragraph 1 or 2 of Schedule 4 to this Act.
- (6) In subsection (4) above, “money” includes cheques, banknotes, postal orders, money orders and foreign currency.

73 Gifts

- (1) A gift is caught by this Chapter if—
 - (a) it was made by the accused in contemplation of, or after, the commission of the offence or, if more than one, in contemplation of any of the offences or after the commission of the earlier or the earliest of the offences to which the proceedings mentioned in section 72(1)(a)(i) of this Act for the time being relate; or
 - (b) where subsection (4) of section 71 of this Act applies, it was made by the accused within the relevant period within the meaning of subsection (6) of that section.
- (2) In assessing the value of a gift caught by this Chapter, the court shall, subject to subsections (3) to (5) below, take it to be the greater of—
 - (a) the value of the gift when received adjusted to take account of subsequent changes in the value of money; or
 - (b) both of the following—
 - (i) the likely market value, on the date on which the confiscation order is to be made, of—
 - (A) the gift, if retained; or
 - (B) where the recipient of the gift retains only part of it, the retained part, and any property or part of any property which, directly or indirectly, represents the gift; or
 - (C) where the recipient of the gift retains no part of it, any property or part of any property which, directly or indirectly, represents the gift; and
 - (ii) the value of any other property and any other economic advantage which by reason of the making of the gift the recipient of the gift has obtained, directly or indirectly, prior to the date on which the confiscation order is to be made, adjusted to take account of subsequent changes in the value of money.
- (3) The circumstances in which the accused is to be treated as making a gift include those where he transfers an interest in property to another person directly or indirectly for a consideration the value of which is significantly less than the value of that interest at the time of transfer; and in those circumstances the value of the gift shall be the difference between the value of that consideration and the value of that interest at the time of transfer adjusted to take account of subsequent changes in the value of money.

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- (4) Where a gift caught by this Chapter was in the form of money and the recipient of the gift shows that, on the balance of probabilities, the money or any of it has not been used to purchase goods or services or to earn interest or any other return, the value of the gift or such part of it as has not been so used shall be taken to be the face value of the money or, as the case may be, unused amount of the money; and in this subsection, “money” includes cheques, banknotes, postal orders, money orders and foreign currency.
- (5) The court may, notwithstanding the foregoing provisions of this section, disregard the amount (or part of the amount) of a gift caught by this Chapter if it considers it improbable that such amount (or part) could be realised.
- (6) At any time before the realisation of property which is or represents a gift caught by this Chapter, the recipient of the gift may apply to the court for an order under this subsection, and, if the court is satisfied, on the balance of probabilities—
- (a) that the person received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the gift was made in contemplation of, or after, the commission of the offence or, if more than one, in contemplation of any of the offences or after the commission of the earlier or the earliest of the offences to which the proceedings for the time being relate; and
 - (b) that he was not associated with the giver in the commission of the offence; and
 - (c) that he would suffer hardship if the application were not granted,
- it may make an order declaring that the gift or a part of the gift shall not be caught by this Chapter and that the property or part of the property of the recipient of the gift shall not be, or shall cease to be, realisable for the purposes of this Chapter and, if a confiscation order has already been made, varying that order accordingly, where necessary.
- (7) An appeal shall lie to the High Court at the instance of—
- (a) the applicant against the refusal;
 - (b) the prosecutor against the granting,
- of an application under subsection (6) above, and the High Court in determining such an appeal may make such order as could have been made by the court on an application under subsection (6) above.
- (8) The procedure in an appeal under this section shall be the same as the procedure in an appeal against sentence.

74 Making of confiscation orders

- (1) If the court decides to make a confiscation order, it shall determine the amount to be payable thereunder before making any decision as to—
- (a) imposing a fine on the accused;
 - (b) making any order involving any payment by him.
- (2) Where a court makes a confiscation order against an accused in any proceedings, it shall, in respect of any offence of which he is convicted in those proceedings, take account of the order before—
- (a) imposing any fine on him;
 - (b) making any order involving any other payment by him,

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but subject to that, the court shall leave the order out of account in determining the appropriate sentence or other manner of dealing with the accused.

- (3) No enactment restricting the power of a court which deals with an accused in a particular way from dealing with him also in any other way shall, by reason only of the making of a confiscation order (or the postponement of a decision as regards making such an order), have the effect of restricting the court in dealing with the accused in any way it considers appropriate in respect of an offence.
- (4) Where a court makes both a confiscation order and a compensation order under section 58 of the Criminal Justice (Scotland) Act 1980 against the same person in the same proceedings in relation to the same offence and the offence involves the misappropriation of property, it shall direct that the compensation shall be paid first out of any sums applied towards the satisfaction of the confiscation order.

75 Statements relevant to making confiscation orders

- (1) Where the prosecutor applies for the making of a confiscation order, the prosecutor may lodge with the clerk of court a statement as to any matters relevant—
 - (a) to determining whether the accused has benefited from the commission of the offence; or
 - (b) to an assessment of the value of the accused's benefit for the purposes of section 70(5)(a) of this Act.
- (2) Without prejudice to section 150 (or as the case may be section 354) of the 1975 Act, if the accused accepts to any extent any allegation in the statement lodged under subsection (1) above, the court may, for the purpose of such determination or assessment as is mentioned in paragraph (a) or (b) of that subsection, treat his acceptance as conclusive of the matters to which it relates.
- (3) Where—
 - (a) a statement is lodged under subsection (1) above; and
 - (b) the court is satisfied that a copy of that statement has been served on the accused,
 the court may require the accused to indicate, within such period as the court may specify, to what extent he accepts each allegation in the statement and, in so far as he does not accept any such allegation, to indicate the basis of such non-acceptance.
- (4) If the accused fails in any respect to comply with a requirement under subsection (3) above, he may be treated for the purposes of this section as accepting every allegation in the statement apart from any allegation in respect of which he has complied with the requirement.
- (5) Without prejudice to section 150 (or as the case may be section 354) of the 1975 Act, where—
 - (a) there is lodged with the clerk of court by the accused a statement as to any matters relevant to determining the amount that might be realised at the time the confiscation order is made; and
 - (b) the prosecutor accepts to any extent any allegation in the statement,
 the court may, for the purposes of that determination, treat that acceptance as conclusive of the matters to which it relates.
- (6) Without prejudice to section 76(1) of this Act, where—

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- (a) any allegation in the statement lodged under subsection (1) above is challenged by the accused, or
- (b) the basis of the non-acceptance by the accused of any such allegation is challenged by the prosecutor,

the court shall consider the matters being challenged at a hearing.

- (7) Where the judge presiding at a hearing held under subsection (6) above is not the trial judge he may, on the application of either party, if he considers that it would be in the interests of justice to do so, adjourn the hearing to a date when the trial judge is available.

76 Postponed confiscation orders

- (1) If the court considers that it has some, but not sufficient, relevant information for the purpose of enabling it to come to a decision as to whether to make a confiscation order or that it does not have sufficient relevant information to enable it to come to a decision as to the amount to be payable under the confiscation order, it may, subject as the case may be to subsection (6) or (10) below, postpone that decision for a period not exceeding 6 months after the date of conviction for the purpose of enabling further information to be obtained.
- (2) Without prejudice to sections 179 and 219 (or as the case may be sections 380 and 432) of the 1975 Act, the court may, notwithstanding postponement under subsection (1) above and subject to subsection (3) below, proceed, on the prosecutor's motion therefor, to sentence or to otherwise deal with the accused in respect of the conviction.
- (3) Where the court proceeds as mentioned in subsection (2) above—
 - (a) no fine shall be imposed on the accused; and
 - (b) no order shall be made involving any other payment by him,in relation to the conviction before the decision whether to make a confiscation order is taken.
- (4) Where in the case of conviction on indictment a decision has been postponed under subsection (1) above for a period, any intention to appeal under section 228 of the 1975 Act against conviction or against both conviction and any sentence passed during that period in respect of the conviction, shall be intimated under section 231(1) of the 1975 Act not within 2 weeks of the final determination of the proceedings but within 2 weeks of—
 - (a) in the case of an appeal against conviction where there has been no such sentence, the day on which the period of postponement commences;
 - (b) in any other case, the day on which such sentence is passed in open court.
- (5) Notwithstanding any appeal of which intimation has been given by virtue of subsection (4) above, a person may appeal under section 228 of the 1975 Act against the confiscation order (if the decision is to make one) or against any other sentence passed, after the period of postponement, in respect of the conviction.
- (6) If during the period of postponement intimation is given by virtue of subsection (4) above by the person, the High Court may, on the application of the prosecutor, extend that period to a date up to 3 months after the date of disposal of the appeal.
- (7) This subsection applies where in the case of summary conviction a decision has been postponed under subsection (1) above for a period.

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- (8) Where subsection (7) above applies and the offender appeals under section 442 of the 1975 Act against conviction or against both conviction and any sentence passed during the period of postponement—
- (a) his application for a stated case shall be made not within one week of the final determination of the proceedings but within one week of the day mentioned in paragraph (a) or (b) of subsection (4) above;
 - (b) his draft stated case shall be prepared and issued not within 3 weeks of the final determination of the proceedings but within 3 weeks of the said day.
- (9) Where subsection (7) above applies, then, notwithstanding any appeal against conviction or sentence or both the offender may appeal under section 442(1)(a)(ii), and the prosecutor may appeal under section 442(1)(b)(ii), of the 1975 Act against any confiscation order or against any other sentence passed, after the period of postponement, in respect of the conviction.
- (10) Where subsection (7) above applies, then, if during the period of postponement the offender applies for a stated case or lodges a note of appeal, the High Court may, on the application of the prosecutor, extend the period of postponement to a date up to 3 months after the date of disposal of the appeal.

77 Increase in benefit or realisable property

- (1) This section applies where the court which made a confiscation order is satisfied, on an application made by the prosecutor, that at the time the application is made the benefit for the purposes of section 70(5)(a) of this Act, or the amount that might be realised, is greater than—
- (a) the benefit; or, as the case may be,
 - (b) the amount that might be realised,
- which was taken into account when the order was made.
- (2) The considerations by reference to which the court may be satisfied as mentioned in subsection (1) above shall include—
- (a) the benefit was greater than was taken into account when the confiscation order was made or has increased in value since the confiscation order was made; or
 - (b) further benefit has been obtained since the confiscation order was made; or
 - (c) the value of realisable property was greater than was taken into account when the confiscation order was made; or
 - (d) any realisable property taken into account at the time when the confiscation order was made has subsequently increased in value; or
 - (e) that the amount, or part of the amount, of a gift which was disregarded under section 73(5) of this Act could now be realised.
- (3) An application under subsection (1) above shall be made as soon as is reasonably practicable after the relevant information becomes available to the prosecutor but in any event within 6 years commencing with the date when the person was convicted of the offence.
- (4) Where this section applies, and notwithstanding that any matters in relation to the making of the confiscation order are, by virtue of section 75(2) or (5) of this Act, to be treated as conclusive—

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- (a) the court may make a new confiscation order for the payment of such sum as appears to the court to be appropriate having regard to what is now shown to be the benefit or the amount that might be realised; and
 - (b) if the earlier confiscation order has not been satisfied then the court, in making the new confiscation order, shall recall the earlier order and may take into account the amount unpaid (including any interest payable by virtue of section 81(1) of this Act) under the earlier order.
- (5) Section 75 of this Act shall, subject to any necessary modifications, apply in relation to the making of a new confiscation order in pursuance of this section as it applies where the prosecutor has applied for the making of a confiscation order under section 70 of this Act.
- (6) The assumptions mentioned in section 71(2) and (5) of this Act shall not apply for the purposes of this section.

78 Realisable property inadequate to meet payments under confiscation order

- (1) This section applies where the court which made a confiscation order is satisfied on the balance of probabilities, on an application made to it by the accused or the prosecutor, that the value of the realisable property is inadequate to meet any amount unpaid (including any interest payable by virtue of section 81(1) of this Act) under the confiscation order.
- (2) When considering whether the value of the realisable property is inadequate the court—
- (a) shall, unless already taken into account under section 72(5) of this Act, take into account the extent to which property of a person whose estate has been sequestrated or who has been adjudged bankrupt is or has been included in the bankrupt's estate for the purposes of the Bankruptcy (Scotland) Act 1985 or Part IX of the Insolvency Act 1986; and
 - (b) may disregard any inadequacy which appears to it to be attributable, wholly or partly, to anything done by the accused for the purpose of protecting the realisable property from realisation.
- (3) Where this section applies, the court shall recall the confiscation order and make a new confiscation order for the payment of such sum of a lesser amount than that for which the original order was made which appears to the court to be appropriate having regard to—
- (a) the value of the realisable property as determined under subsection (1) above; and
 - (b) any amount paid in pursuance of the original order.
- (4) Section 75 of this Act shall, subject to any necessary modifications, apply in relation to an application under this section as it applies where the prosecutor has applied for the making of a confiscation order under section 70 of this Act.

79 Confiscation orders where proceeds of crime discovered at later date

- (1) This section applies where no confiscation order has been made in relation to an offence under section 70 or 76 of this Act.

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- (2) Where the court, on an application made to it by the prosecutor under this section, is satisfied—
- (a) that a person convicted of an offence to which this Chapter applies has benefited in connection with the commission of the offence concerned;
 - (b) that the information necessary to enable a confiscation order to be made on the date on which an application under section 70 of this Act was or could have been made was not available to the prosecutor,
- it may make a confiscation order in relation to that person.
- (3) An application under this section shall be made as soon as is reasonably practicable after the relevant information becomes available to the prosecutor but in any event not later than 6 years after the date when the person was convicted of the offence.
- (4) In determining the sum to be payable under a confiscation order made in pursuance of this section, the court shall take into account—
- (a) any order involving any payment by the offender;
 - (b) any suspended forfeiture order or an order for forfeiture under any other enactment made in respect of the offender,
- which forms part of the sentence already imposed for the offence concerned.
- (5) Sections 70(3) and 74(1), (2) and (4) of this Act shall not apply in relation to a confiscation order made in pursuance of this section.
- (6) Section 75 of this Act shall, subject to any necessary modifications, apply in relation to the making of a confiscation order in pursuance of this section as it applies where the prosecutor has moved for a confiscation order under section 70 of this Act.
- (7) Where the court makes a confiscation order in pursuance of this section and a compensation order has been made under section 58 of the Criminal Justice (Scotland) Act 1980 in respect of misappropriation of property by the offender, the court shall direct that compensation shall first be paid out of any sums applied towards the satisfaction of the confiscation order to the extent of any sums outstanding in respect of the compensation order.
- (8) The assumptions mentioned in section 71(2) and (5) of this Act shall not apply for the purposes of this section.
- (9) In this section “the court” means the court which had jurisdiction in respect of the offence concerned to make a confiscation order under section 70 of this Act.

80 Application of provisions relating to fines to enforcement of confiscation orders

- (1) Sections 196 and 203, or sections 402 and 412, of the 1975 Act and the provisions of that Act specified in subsection (2) below (or those provisions as applied by section 194 of that Act) shall, subject to the qualifications mentioned in subsection (2) below, apply in relation to confiscation orders as they apply in relation to fines; and section 91 of the Magistrates' Courts Act 1980 and Article 96 of the Magistrates' Courts (Northern Ireland) Order 1981 (provisions relating to transfer of fines from Scotland etc.) shall be construed accordingly.
- (2) The provisions mentioned in subsection (1) above are—
- (a) section 396, provided that any allowance under that section of time (or further time) for payment shall be without prejudice to the exercise by any

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- administrator appointed in relation to the confiscation order of his powers and duties under this Act; and the court may, pending such exercise, postpone any decision as to refusing or allowing time (or further time) for payment;
- (b) section 397, subject to the like proviso as in paragraph (a) above;
 - (c) section 398, but as if subsection (1)—
 - (i) gave the prosecutor an opportunity to be heard at any enquiry thereunder; and
 - (ii) applied whether the offender was in prison or not;
 - (d) section 399, provided that any order of payment by instalments shall be without prejudice to such exercise as is mentioned in paragraph (a) above;
 - (e) section 400;
 - (f) section 401(2) and (3);
 - (g) section 403;
 - (h) section 404;
 - (i) section 406;
 - (j) section 407, provided that—
 - (i) where a court imposes a period of imprisonment both in respect of a fine and of a confiscation order the amounts in respect of which the period is imposed shall, for the purposes of subsection (1A) of that section, be aggregated; and
 - (ii) before imposing a period of imprisonment to which there is a liability by virtue of that section the court shall, if an administrator has been appointed in relation to the confiscation order, require a report from him as to whether and in what way he is likely to exercise his powers and duties under this Act and shall take that report into account; and the court may, pending such exercise, postpone any decision as to such imposition;
 - (k) section 408;
 - (l) section 409, except that the reference in subsection (1) of that section to the person paying a sum to the governor of the prison under conditions prescribed by rules made under the Prisons (Scotland) Act 1989 shall be construed as including a reference to an administrator appointed in relation to the confiscation order making such payment under this Act in respect of the person;
 - (m) section 411, provided that an order of recovery by civil diligence shall not be made under the section where an administrator is appointed in relation to the confiscation order;
 - (n) Schedule 7.
- (3) Where a court, by virtue of subsection (1) above, orders the sum due under a confiscation order to be recovered by civil diligence under section 411 of the 1975 Act, any arrestment executed by a prosecutor under subsection (2) of section 99 of this Act shall be deemed to have been executed by the court as if that subsection authorised such execution.
- (4) Where in any proceedings a confiscation order has been made as regards a person and a period of imprisonment or detention is imposed on him in default of payment of its amount (or as the case may be of an instalment thereof), that period shall run from the expiry of any other period of imprisonment or detention (not being one of life imprisonment or detention for life) imposed on him in the proceedings.

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- (5) The reference in subsection (4) above to “any other period of imprisonment or detention imposed” includes (without prejudice to the generality of the expression) a reference to such a period on default of payment of a fine (or instalment thereof); but only where that default had occurred before the warrant for imprisonment is issued for the default in relation to the order.

81 Interest on sums unpaid under confiscation orders

- (1) If any sum required to be paid by a person under a confiscation order is not paid when it is required to be paid (whether forthwith on the making of the order or at a time specified under section 396(1) of the 1975 Act) that person shall be liable to pay interest on that sum for the period for which it remains unpaid and the amount of the interest shall for the purposes of enforcement be treated as part of the amount to be recovered from him under the confiscation order.
- (2) The sheriff may, on the application of the prosecutor, increase the term of imprisonment or detention fixed in respect of the confiscation order under section 396(2) of the 1975 Act if the effect of subsection (1) above is to increase the maximum period applicable in relation to the order under section 407(1A) of the 1975 Act.
- (3) The rate of interest under subsection (1) above shall be the rate payable under a decree of the Court of Session.

Exercise of powers

82 Exercise of powers by court or administrator

- (1) This section applies to the powers as regards realisable property conferred on the court by sections 94, 95, 97, 98 and 99 of and paragraphs 1, 4 and 12 of Schedule 3 to this Act in relation to confiscation orders and on an administrator by that Schedule.
- (2) Subject to the following provisions of this section, the powers shall be exercised with a view to making available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the case of a person mentioned in section 72(1)(a) of this Act, the value for the time being of realisable property held by any person by the realisation of such property.
- (3) In the case of realisable property held by a person by virtue only of having received a gift made directly or indirectly by the accused which is caught by this Chapter, the powers shall be exercised with a view to realising no more than the value of the gift as assessed under subsection (2), (3) or (4) of section 73 of this Act.
- (4) The powers shall be exercised with a view to allowing any person other than a person mentioned in section 72(1)(a) of this Act or the recipient of any such gift to retain or recover the value of any property held by him.
- (5) An order may be made or other action taken in respect of a debt owed by the Crown.
- (6) In exercising those powers, no account shall be taken of any obligations of such a person or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order.

Compensation

83 Compensation

- (1) Subject to subsection (3) below, if proceedings are instituted against a person for an offence to which this Chapter applies and either—
 - (a) the proceedings do not result in his conviction for any such offence, or
 - (b) where he is convicted of one or more such offences—
 - (i) the conviction or convictions concerned are quashed (and no conviction for any such offence is substituted); or
 - (ii) he is pardoned by Her Majesty in respect of the conviction or convictions concerned,the court may, on an application by a person who held property which was realisable property, order compensation to be paid to the applicant if, having regard to all the circumstances, it considers it appropriate to do so.
- (2) Subsection (1) above is without prejudice to any right which may otherwise exist to institute proceedings in respect of delictual liability disclosed by such circumstances as are mentioned in paragraphs (a) and (b) of subsection (3) below.
- (3) The court shall not order compensation to be paid under subsection (1) above in any case unless satisfied—
 - (a) that there has been some serious default on the part of a person concerned in the investigation of the offence or offences concerned, being a person mentioned in subsection (5) below, and that, but for that default, the proceedings would not have been instituted or continued; and
 - (b) that the applicant has suffered loss or damage in consequence of anything done in relation to the property under section 94, 95, 97, 98, 99 or 108 of or Schedule 3 to this Act.
- (4) The amount of compensation to be paid under this section shall be such as the court thinks just in all the circumstances of the case.
- (5) Compensation payable under this section shall be paid, where the person in default was—
 - (a) a constable of a police force within the meaning of the Police (Scotland) Act 1967, by the police authority or joint police board for the police area for which that force is maintained;
 - (b) a constable other than is mentioned in paragraph (a) above, but with the powers of such a constable, by the body under whose authority he acts;
 - (c) a procurator fiscal or was acting on behalf of the Lord Advocate, by the Lord Advocate;
 - (d) a person commissioned by the Commissioners of Customs and Excise, by those Commissioners; and
 - (e) an officer of the Commissioners of Inland Revenue, by those Commissioners.
- (6) An application for compensation under this section shall be made not later than three years after the conclusion of the proceedings in respect of which the confiscation order was made; and subsection (6) of section 95 of this Act shall apply for the purpose of determining when proceedings are concluded for the purposes of this subsection as it applies for the purposes of that section.

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- (7) In this section, “the court” means the Court of Session or the sheriff exercising his civil jurisdiction.
- (8) Until the date on which paragraph 71 of Schedule 13 to the Local Government etc. (Scotland) Act 1994 comes into force, the reference in subsection (5)(a) above to a joint police board shall be construed as a reference to a joint police committee.

Investigations and disclosure of information

84 Order to make material available

- (1) The procurator fiscal may, for the purpose of an investigation into whether a person has benefited from the commission of an offence to which this Chapter applies and as to the amount of that benefit, apply to the sheriff for an order under subsection (2) below in relation to particular material or material of a particular description.
- (2) If on such an application the sheriff is satisfied that the conditions in subsection (4) below are fulfilled, he may make an order that the person who appears to him to be in possession of the material to which the application relates shall—
 - (a) produce it to a constable for him to take away; or
 - (b) give a constable access to it,
 within such period as the order may specify.
 This subsection is subject to section 86(11) of this Act.
- (3) The period to be specified in an order under subsection (2) above shall be seven days unless it appears to the sheriff that a longer or shorter period would be appropriate in the particular circumstances of the application.
- (4) The conditions referred to in subsection (2) above are—
 - (a) that there are reasonable grounds for suspecting that a specified person has benefited from the commission of an offence to which this Chapter applies;
 - (b) that there are reasonable grounds for suspecting that the material to which the application relates—
 - (i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made; and
 - (ii) does not consist of or include items subject to legal privilege; and
 - (c) that there are reasonable grounds for believing that it is in the public interest, having regard—
 - (i) to the benefit likely to accrue to the investigation if the material is obtained; and
 - (ii) to the circumstances under which the person in possession of the material holds it,
 that the material should be produced or that access to it should be given.
- (5) Where the sheriff makes an order under subsection (2)(b) above in relation to material on any premises he may, on the application of the procurator fiscal, order any person who appears to him to be entitled to grant entry to the premises to allow a constable to enter the premises to obtain access to the material.
- (6) An application under subsection (1) or (5) above may be made ex parte in chambers.

Status: This is the original version (as it was originally enacted).

- (7) Provision may be made by rules of court as to—
- (a) the discharge and variation of orders under this section, and
 - (b) proceedings relating to such orders.
- (8) Where the material to which an application under this section relates consists of information contained in a computer—
- (a) an order under subsection (2)(a) above shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible; and
 - (b) an order under subsection (2)(b) above shall have effect as an order to give access to the material in a form in which it is visible and legible.
- (9) An order under subsection (2) above—
- (a) shall not confer any right to production of, or access to, items subject to legal privilege;
 - (b) shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise; and
 - (c) may be made in relation to material in the possession of an authorised government department;
- and in this subsection “authorised government department” means a government department which is an authorised department for the purposes of the Crown Proceedings Act 1947.
- (10) In this section—
- (a) “items subject to legal privilege” and “premises” have the same meanings as in section 40 of the Criminal Justice (Scotland) Act 1987; and
 - (b) references to a person benefiting from the commission of an offence to which this Chapter applies, in relation to conduct which is not such an offence but which would have been if it had occurred in Scotland, shall be construed in accordance with section 71 of this Act as if that conduct had so occurred.

85 Authority for search

- (1) The procurator fiscal may, for the purpose of an investigation into whether a person has benefited from the commission of an offence to which this Chapter applies and as to the amount of that benefit, apply to the sheriff for a warrant under this section in relation to specified premises.
- (2) On such application the sheriff may issue a warrant authorising a constable to enter and search the premises if the sheriff is satisfied—
- (a) that an order made under section 84 of this Act in relation to material on the premises has not been complied with; or
 - (b) that the conditions in subsection (3) below are fulfilled; or
 - (c) that the conditions in subsection (4) below are fulfilled.
- (3) The conditions referred to in subsection (2)(b) above are—
- (a) that there are reasonable grounds for suspecting that a specified person has benefited from the commission of an offence to which this Chapter applies; and

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- (b) that the conditions in section 84(4)(b) and (c) of this Act are fulfilled in relation to any material on the premises; and
 - (c) that it would not be appropriate to make an order under that section in relation to the material because—
 - (i) it is not practicable to communicate with any person entitled to produce the material; or
 - (ii) it is not practicable to communicate with any person entitled to grant access to the material or entitled to grant entry to the premises on which the material is situated; or
 - (iii) the investigation for the purposes of which the application is made might be seriously prejudiced unless a constable could secure immediate access to the material.
- (4) The conditions referred to in subsection (2)(c) above are—
- (a) that there are reasonable grounds for suspecting that a specified person has benefited from the commission of an offence to which this Chapter applies; and
 - (b) that there are reasonable grounds for suspecting that there is on the premises material relating to the specified person, or to the question whether that person has so benefited or the amount of that benefit, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, but that the material cannot at the time of the application be particularised; and
 - (c) that—
 - (i) it is not practicable to communicate with any person entitled to grant entry to the premises; or
 - (ii) entry to the premises will not be granted unless a warrant is produced; or
 - (iii) the investigation for the purpose of which the application is made might be seriously prejudiced unless a constable arriving at the premises could secure immediate entry to them.
- (5) Where a constable has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the warrant was issued.
- (6) Subsection (10) of section 84 of this Act shall apply for the purposes of this section as it applies for the purposes of that section.

86 Disclosure of information held by government departments

- (1) Subject to subsection (4) below, the Court of Session may on an application by the Lord Advocate order any material mentioned in subsection (3) below which is in the possession of an authorised government department to be produced to the Court within such period as the Court may specify.
- (2) The power to make an order under subsection (1) above is exercisable if—
 - (a) the powers conferred on the Court by section 94(1)(a) of this Act are exercisable by virtue of section 95(2) of this Act; or
 - (b) those powers are exercisable by virtue of section 95(3) of this Act and the Court has made a restraint order which has not been recalled.

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- (3) The material referred to in subsection (1) above is any material which—
- (a) has been submitted to an officer of an authorised government department by a person who holds, or has at any time held, realisable property;
 - (b) has been made by an officer of an authorised government department in relation to such a person; or
 - (c) is correspondence which passed between an officer of an authorised government department and such a person;
- and an order under that subsection may require the production of all such material or of a particular description of such material, being material in the possession of the department concerned.
- (4) An order under subsection (1) above shall not require the production of any material unless it appears to the Court of Session that the material is likely to contain information that would facilitate the exercise of the powers conferred on the Court by section 94(1)(a) of or paragraph 1 or 12 of Schedule 3 to this Act or on an administrator appointed under paragraph 1(1) of that Schedule.
- (5) The Court may by order authorise the disclosure to such an administrator of any material produced under subsection (1) above or any part of such material; but the Court shall not make an order under this subsection unless a reasonable opportunity has been given for an officer of the department to make representations to the Court.
- (6) Material disclosed in pursuance of an order under subsection (5) above may, subject to any conditions contained in the order, be further disclosed for the purposes of the functions under Part II of this Act of the administrator or the High Court.
- (7) The Court of Session may by order authorise the disclosure to a person mentioned in subsection (8) below of any material produced under subsection (1) above or any part of such material; but the Court shall not make an order under this subsection unless—
- (a) a reasonable opportunity has been given for an officer of the department to make representations to the Court; and
 - (b) it appears to the Court that the material is likely to be of substantial value in exercising functions relating to the investigation of crime.
- (8) The persons referred to in subsection (7) above are—
- (a) a constable;
 - (b) the Lord Advocate or any procurator fiscal; and
 - (c) an officer within the meaning of the Customs and Excise Management Act 1979.
- (9) Material disclosed in pursuance of an order under subsection (7) above may, subject to any conditions contained in the order, be further disclosed for the purposes of functions relating to the investigation of crime or whether any person has benefited from the commission of an offence to which this Chapter applies or the amount of that benefit.
- (10) Material may be produced or disclosed in pursuance of this section notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise.
- (11) An order under subsection (1) above and, in the case of material in the possession of an authorised government department, an order under section 84(2) of this Act may require any officer of the department (whether named in the order or not) who may for the time being be in possession of the material concerned to comply with such

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order; and any such order shall be served as if the proceedings were civil proceedings against the department.

(12) Where any requirement is included in any order by virtue of subsection (11) above, the person on whom the order is served—

- (a) shall take all reasonable steps to bring it to the attention of the officer concerned; and
- (b) if the order is not brought to that officer's attention within the period referred to in subsection (1) above, shall report the reasons for the failure to the Court of Session,

and it shall also be the duty of any other officer of the department in receipt of the order to take such steps as are mentioned in paragraph (a) above.

(13) In this section “authorised government department” means a government department which is an authorised department for the purposes of the Crown Proceedings Act 1947; and subsection (10) of section 84 of this Act shall apply for the purposes of this section as it applies for the purposes of that section.