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Proceeds of Crime Bill

Bill 31 of 2001-2002

The Proceeds of Crime Bill brings together existing and new powers designed to deprive criminals and their associates of money and property connected with or derived from criminal activity. It strengthens and amalgamates existing criminal confiscation powers. It also introduces a new civil power to recover property which has been obtained through criminal conduct, as well as strengthening and extending existing civil forfeiture powers.

It sets up a new Assets Recovery Agency which is to have a central role in crime reduction, and whose powers will include a special power to tax suspected criminal assets.

The Bill is due to be debated on Second Reading on 30 October 2001.

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Summary of main points

This paper summarises the current criminal and civil provisions for depriving criminals of property which is associated with crime, either because of its use for criminal purposes or because it represents a profit from criminal conduct. It summarises the development of the reform proposals which have provided the basis for the changes set out in the *Proceeds of Crime Bill.*

The Bill, which was introduced on 18 October 2001 is largely based on draft clauses published with the Government Consultation Paper *Proceeds of Crime: Consultation on Draft Legislation* [Cm 5066] published in March 2001. Those draft clauses followed proposals developed by the Home Office Working Group on Confiscation in their Third Report, *Criminal Assets* published in November 1998, and the Cabinet Office Performance and Innovation Unit in their report *Recovering the Proceeds of Crime*, published in June 2000.

This paper goes on to consider the principal changes to the existing powers, and the new powers introduced by the Bill. The *Proceeds of Crime Bill* has UK-wide application. Under the Sewell convention, the agreement of the Scottish Parliament will be required before the UK Parliament legislates on those areas which are devolved.

The Bill sets up a new Assets Recovery Agency, which will have powers in England Wales and Northern Ireland (but not in Scotland) to investigate suspected criminal assets, to make applications both for criminal confiscation orders and civil recovery orders, and to take steps in the enforcement of orders which are made

The Bill contains measures which correspond broadly with those contained in general criminal justice legislation, and legislation dealing specifically with drug trafficking offences, in England and Wales, Scotland and Northern Ireland. But it brings together, for each jurisdiction, the previously separate schemes in respect of drug trafficking offences, and in respect of other offences where conviction gives rise to criminal confiscation powers.

This paper goes on to describe the core provisions of the completely new right of action in the civil courts to recover property which is, or represents, property obtained through unlawful conduct. The right is based, with some modifications, on measures which are already in force in the Republic of Ireland.

The Bill consolidates and reforms existing money laundering provisions to create a single regime of offences for all forms of money laundering which will now apply to all UK jurisdictions.

The paper also summarises the new Revenue function of the Director of the Assets Recovery Agency, extended powers which may be exercisable in investigations, and provisions about the Director’s use of information obtained by him in carrying out his various functions.

Finally, the paper sets out extracts from the *European Convention on Human Rights* which may have relevance to the powers which the Bill seeks to create. Under the provisions of the *Human Rights Act 1998*, domestic legislation must be read and given effect in a way which is compatible with Convention rights so far as it is possible to do so. A court may make a declaration of incompatibility where it is satisfied that such a construction is not possible, so that a provision of primary legislation is incompatible with a Convention right. The Home Secretary has made a statement under section 19(1)(a) of the *Human Rights Act* that in his view the provisions of the *Proceeds of Crime Bill* are compatible with the Convention rights.

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I Current legislation on forfeiture, confiscation and money laundering andGovernment proposals for change

A. Meaning and use of "forfeiture" and "confiscation"

The concepts of "forfeiture" and "confiscation" are closely related, and the terms are often used interchangeably. For example, one definition of "confiscation", in the Oxford English dictionary is:

> The action of confiscating; the appropriation of private property to the sovereign or public treasury; seizure under public authority, as forfeited

The potential for confusion was recognised by the *Hodgson Committee*, whose report in 1984[1] led to the introduction of a new confiscatory regime for drug trafficking offences, following a notorious case[2] in which there had been an unsuccessful attempt to use existing forfeiture provisions to deprive the defendant of his profits. They said:

> At an early stage we realised that there was no generally accepted terminology to describe the various situations which we should have to examine. To some extent we have had to invent our own vocabulary and we have consequently attributed discrete meaning to terms which in ordinary speech might be treated as synonymous. The four words we use are 'forfeiture', compensation', restitution' and 'confiscation'.
>
> By *forfeiture* we mean the power of the Court to take property that is immediately connected with an offence. Spread throughout our law there are very many specific powers of forfeiture such as the one unsuccessfully sought to be exercised in the Operation Julie case. There is also a general power contained in sect.43 of the Powers of Criminal Courts Act 1973….
>
> [-] *confiscation* is taken to mean the depriving of an offender of the proceeds or the profits of crime. It was the inability of the courts to order confiscation in this sense which was highlighted by the Operation Julie case.

That distinction has generally been observed in subsequent legislation and most commentaries. The *Proceeds of Crime Bill* reserves the word "confiscation" for the provisions, in Parts 2 to 4, which build on the existing confiscation regimes in criminal

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1 *Profits of Crime and their Recovery*: the Report of a Committee Chaired by Sir Derek Hodgson: 1984: Cambridge Studies in Criminology

2 *R v Cuthbertson* [1981] A.C. 470, which came to be known as the "Operation Julie" case

proceedings, and the word "forfeiture" for the provisions, in Chapter 3 of Part 5, which extend the existing civil powers of forfeiture. The Bill avoids the use of either words in the context of the new powers in Part 5, to order "civil recovery of the proceeds etc of unlawful conduct", although they may be regarded as confiscatory under the Hodgson analysis and have been so described by many commentators.

B. Forfeiture in criminal proceedings

From medieval times until the *Forfeiture Act 1870*, all the property of a convicted felon was automatically forfeited to the Crown. Since then, many specific forfeiture powers have been enacted, and a general power was introduced by the *Powers of Criminal Courts Act 1973*[3], which provided:

> **43 Power to deprive offender of property used, or intended for use, for purposes of crime**
>
> (1) Subject to the following provisions of this section, where a person is convicted of an offence and –
>
> (a) the court by or before which he is convicted is satisfied that any property which has been lawfully seized from him or which was in his possession or under his control at the time when he was apprehended for the offence or when a summons in respect of it was issued –
>
> (i) has been used for the purpose of committing, or facilitating the commission of, any offence; or
>
> (ii) was intended by him to be used for that purpose; or
>
> (b) the offence, or an offence which the court has taken into consideration in determining his sentence, consists of unlawful possession of property which –
>
> (i) has been lawfully seized from him; or
>
> (ii) was in his possession or under his control at the time when he was apprehended for the offence of which he has been convicted or when a summons in respect of that offence was issued,
>
> the court may make an order under this section in respect of that property.
>
> [-]

[3] See now the Powers of Criminal Courts (Sentencing) Act 2000, section 143

> (3) An order under this section shall operate to deprive the offender of his rights, if any, in the property to which it relates and the property shall (if not already in their possession) be taken into the possession of the police."

Other specific powers of forfeiture include the power, under section 27(1) of the *Misuse of Drugs Act 1971:*

> **27 Forfeiture**
>
> (1) Subject to subsection (2) below, the court by or before which a person is convicted of an offence under this Act [or a drug trafficking offence, as defined in section 1(3) of the Drug Trafficking Act 1994 or an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates or a drug trafficking offence, as defined in Article 2(2) of the Criminal Justice (Confiscation)(Northern Ireland) Order 1990 may order anything shown to the satisfaction of the court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may order.
>
> (2) The court shall not order anything to be forfeited under this section, where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made.

It was the narrow scope of those forfeiture provisions, identified in the *Operation Julie* case, which led to the introduction of the first legislation which empowered the courts to confiscate proceeds of crime, as opposed to merely forfeiting property associated with the commission of an offence. The reasons are apparent from the *Hodgson Committee's* commentary on the background to its work:

> In the summer of 1978 a case which came to be known as the "Operation Julie" case (after one of the policewomen involved in the investigation) was tried in the Crown Court at Bristol. Those convicted at the trial had, over a number of years, and on a vast scale, manufactured and sold the hallucinogenic drug lysergic acid , more commonly known as LSD. The case attracted a great deal of public attention. The offenders were sentenced to long terms of imprisonment. In addition the Judge made an order, confirmed by the Court of Appeal, for the forfeiture of certain assets in their hands purportedly exercising a power given by sect.27(1) of the Misuse of Drugs Act 1971. Huge profits had been made, and the prosecution was able to trace some £750,000 of those profits to assets in the criminals' hands. These assets included cash, cars, deposits of money and securities at bank accounts in Switzerland and France, rights and interests in a post office savings account, a debt due to one of the gang, paintings and electrical equipment. The power given to the Court under the Act was to " order anything shown to the satisfaction of the Court to relate to the offence to be forfeited".
>
> A further appeal was made to the House of Lords against the orders for forfeiture and the House "with considerable regret" found itself compelled to allow the appeals. Among the reasons given for allowing the appeal the House held that Parliament had never intended orders of forfeiture to " serve as a means of

> stripping the drug traffickers of the total profits of their unlawful enterprises". The power could only be used where it was "possible to identify something tangible that can fairly be said to relate to any such transaction such as the drugs involved, apparatus for making them, vehicles used for transporting them or cash ready to be or having just been handed over for them". The House also held that an English court has no jurisdiction to make orders for the transfer of property situated abroad; and that no order could be made under sect.27(1) because the defendants were charged not with offences under the Act but with conspiracy to commit them.

C. Forfeiture without criminal proceedings

While most forfeiture provisions are conviction led, cash may be forfeited , without the need for any conviction, under the provisions of Part II of the *Drug Trafficking Act 1994*. Part II of the *Criminal Justice (International Co-operation) Act 1990* introduced a new power for police and Customs officers to seize cash discovered on import or export which is reasonably suspected of being derived from or intended for use in drug trafficking.

> 4.7. These powers were introduced because there was increasing evidence that the tougher anti-money laundering systems which had been enacted in the United Kingdom had resulted in criminals moving drug cash to less well regulated countries. The legislation enables a Customs or police officer to seize on import or export cash in amounts of £10,000 or more if there are reasonable rounds to suspect that it directly or indirectly represents any person's proceeds of drug trafficking or is intended by any person for use in drug trafficking. Cash which has been seized may not be detained for more than 48 hours unless its continued detention is authorised by an order made by a Justice of the Peace, and no such order can be made unless the Justice is satisfied that reasonable grounds exist for the suspicion and that the continued detention of the cash is justified while its origin is further investigated or consideration is given to the institution (in he United Kingdom or elesewhere) of criminal proceedings against any person for an offence with which the cash is connected.. a magistrates' court may order continued detention of the cash for a period not exceeding 3 months , and such orders may be obtained repeatedly as long as the total period from the first Justice's order does not exceed 2 years. But the cash may not be released if an application for forfeiture has been made or if there are proceedings against any person for an offence with which the cash is connected. No cash may be forfeited until any proceedings against any person for an offence with which the cash is connected have been disposed of.
>
> 4.8 Notice is required to be given to any persons affected by the detention order. Moreover, at any time while the cash is under detention, a magistrates' court may authorise the release of the cash if it is satisfied on an application made by the person from whom it was seized or a person by or on whose behalf it was being imported or exported, that there are no, or are no longer any, grounds for its detention, or on an application by any other person that detention of the cash is not justified. The Customs or police officer may also release the cash if satisfied that its detention is no longer justified but the Justice who first ordered the

> detention must first be notified. But again these provisions are overridden by the rule that the cash must not be released if an application for forfeiture has been made or if there are proceedings against any person for an offence with which the cash is connected.
>
> 4.9 Application for forfeiture of the cash is made to the magistrates' court. No criminal conviction is required. The proceedings are civil proceedings and it must be proved to on the balance of probabilities that the cash represents the proceeds of drug trafficking or is intended for use in drug trafficking…[4]

D. Confiscation in criminal proceedings

1. Drug related proceedings

In 1984, the *Hodgson Committee*[5] recommended that:

> Criminal courts should have the power to order the confiscation of proceeds of an offence of which the defendant has been convicted or asked to be taken into consideration. There should be a prescribed minimum amount below which no confiscation order could be made, but once that limit is established there should be no maximum limit [-]
>
> Only crown courts should have the power to make confiscation orders, but magistrates should be able to commit defendants to the crown court with a view to a confiscation order being made, Committal for this sole purpose should be possible even though the offence is only triable summarily. Crown courts should be required to consider whether a confiscation order should be made and Magistrates' Courts to consider whether to commit for consideration of the making of a confiscation order.

Following that recommendation, the *Drug Trafficking Offences Act 1986* empowered the Crown Court to make orders confiscating drug trafficking profits. The powers apply when a defendant has been convicted of a drug trafficking offence[6] and either the prosecutor asks the court to proceed, or the court decides that it is appropriate to do so. The court then has to decide whether the defendant has "benefited from drug trafficking". A person who has received any payment or reward in connection with drug trafficking carried out by himself or another will have "benefited from drug trafficking". The court must make the "required assumptions" in making this determination, and in assessing the value of his proceeds of drug trafficking, unless in the defendant's case an assumption is shown to be incorrect, or there would be a serious risk of injustice if the assumption were made.

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4 Home Office Working Group on Confiscation Third Report: *Criminal Assets* : November 1998, p.27

5 *Profits of Crime and their Recovery*: the Report of a Committee Chaired by Sir Derek Hodgson: 1984: Cambridge Studies in Criminology

6 as defined in section 1

The required assumptions, under section 4(3) are:

> (a) that any property appearing to the court—
>
> (i) to have been held by the defendant at any time since his conviction, or
> (ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him,
>
> was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him;
>
> (b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him; and
>
> (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.

If the court determines that the defendant has benefited from drug trafficking at any time, it must assess the value of his proceeds of drug trafficking ("the amount to be recovered") and make a confiscation order for that amount unless the defendant satisfies the court (on the standard of proof applicable in civil proceedings) that the "amount which might be realised" is less.

2. Other criminal proceedings

Part VI of the *Criminal Justice Act 1988* introduced a separate confiscation regime for all other indictable offences and specified summary offences. Under the original provisions a court had to be satisfied that the offender's benefit from the offence or offences of which he had been convicted and any offences taken into consideration was at least £10,000 before any order could be made. Sections 71-4 prescribed the circumstances in which a confiscation order could be made. Sections 75-89 related to the enforcement of confiscation orders including provision for the making of restraint orders[7] and charging orders[8]

Section 71 was amended by the *Criminal Justice Act 1993* which inserted express provision [9] that the standard of proof in determining any question arising as to whether a person has benefited from an offence, or the amount to be recovered in his case, should be

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7 section 77
8 section 78
9 now section 71 (7A) of the 1988 Act

that applicable in civil proceedings. It also allowed[10] for the postponement of the determination of certain matters (whether the defendant had benefited, whether the benefit was at least the minimum amount, the amount to be recovered) for a period not exceeding six months (unless there were exceptional circumstances). Money laundering and other offences were also added.

More strengthening amendments were made by the *Proceeds of Crime Act 1995*, which brought the confiscation laws relating to the proceeds of crime in general into line with the more robust confiscation provisions in the drug trafficking legislation. It -

- abolished the minimum amount requirement,
- introduced measures[11] which have often been described as "draconian" in the case of a "course of criminal conduct"[12] so that a confiscation order may relate to the benefit of criminal conduct in respect of which there has been no conviction and which has never been formally taken into consideration in court proceedings,
- made provision in the case of a "course of criminal conduct" for the court to make assumptions similar to the required assumptions in drug trafficking cases, for the purposes of determining whether the defendant has benefited from relevant criminal conduct and if he has of assessing the value of his benefit from it,
- significantly amended the provisions relating to a prosecutor's statement as to the matters relevant to determining whether the defendant has benefited from any relevant criminal conduct or to an assessment of the value of the defendants benefit from such conduct,
- made provision for ordering the defendant to supply the court with relevant information with the court being entitled to draw such inferences as it thinks appropriate from any failure without reasonable excuse to comply with the order[13], and
- inserted a further group of sections into Part VI which allow for the making of applications up to six years from the date of conviction for decisions of the court to be reviewed; in the case of decisions not to asses the proceeds of crime or that there has been no benefit, review can only occur in the light of new evidence or evidence which was not considered at the time; in the case of a review of the value of the benefit, there is no such restriction.

The complexity of the current confiscation provisions was criticised by the Cabinet Office Performance and Innovation Unit who conducted a review[14] in 1999/2000. They summarised the statutes that introduced and amended confiscation powers in the table which is reproduced below.

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[10] ibid section 72A
[11] section 72AA
[12] a phrase not used in the text of the section , only in the marginal note
[13] section 73A
[14] *Recovering the Proceeds of Crime*, June 2000

Confiscation Legislation

Year	Statute	Provisions
1986	Drug Trafficking Offences Act (DTOA)	Confiscation provisions for drug trafficking offences and first drug money laundering offence
1987	Criminal Justice (Scotland) Act	
1988	Criminal Justice Act 1988 (CJA 1988)	Confiscation provisions for all non-drug indictable offences and specified summary offences
1990	Criminal Justice (International Co-operation) Act	Mutual legal assistance, further drug money laundering offences and drug cash seizure on import or export
1993	Criminal Justice Act (CJA 1993)	(Other forms of) money laundering offences and enhancements to all crime confiscation provisions
1994	Drug Trafficking Act (DTA)	Consolidating the drug provisions and removing mandatory confiscation
1994	Criminal Justice and Public Order Act	Bringing forward the date from which CJA 1993 confiscation provisions apply
1995	Proceeds of Crime Act (PCA)	Further alignment of all crime confiscation provisions with DTA 1994; notably use of assumptions in crime lifestyle cases
1995	Proceeds of Crime (Scotland) Act	
1996	Proceeds of Crime (NI) Order	
1998	Crime and Disorder Act	Amendment to CJA for confiscation orders on committal for sentence

E. Money laundering

Money laundering is the term used to describe the processes by which criminals make money which has been acquired as a result of criminal activity appear to have been lawfully acquired. These processes are typically complex and by design hard to trace. Funds, whether generated by organised crime, terrorism or drug trafficking, will be placed within the mainstream economy or financial sector and the source and origin of the funds will be progressively concealed with each transaction. These transactions must be carried out in such a way as to avoid attracting the attention of the authorities and with it the risk of detection, confiscation and criminal proceedings. Often this involves dividing criminal funds into smaller amounts which are easier to pass on without suspicion, or mixing criminal funds with money derived from lawful businesses (typically those which handle cash routinely). As a result of the laundering, the funds will appear to have been lawfully acquired.

In the UK, powers to address some forms of money laundering have long existed under the *Theft Act 1968* which makes it an offence to handle stolen goods (s.22(1)). The creation of more specific offences, which are better suited to the range of conduct involved in laundering, was at first concentrated in anti-drug laws (for example the *Misuse of Drugs Act 1971* s.27 and the *Drug Trafficking Offences Act 1986*). Anti-laundering provisions were also brought forward in terrorism legislation, for example the recently-repealed *Prevention of Terrorism (Temporary Provisions) Act 1989*. The *Criminal Justice Act 1988* (CJA 1988) powers (as inserted by the *Criminal Justice Act*

1993) are much wider in scope since they apply to all indictable offences. The CJA 1988 currently makes it an offence to assist in the retention or use of the proceeds of criminal conduct (ss.93A, 93B CJA 1988). It is also an offence to conceal or transfer the proceeds of criminal conduct in an attempt to avoid prosecution for laundering offences (s.93C CJA 1988). Similar provisions apply in Scotland and Northern Ireland.[15]

The legislation is both aimed at making it more difficult for criminals to enjoy the benefits of their crimes and at increasing the chance of detection by encouraging vigilance (backed up by criminal sanctions) among those whose work may bring them into contact with criminal funds. The *Criminal Justice Act 1988* provisions implement the first EC Money Laundering Directive (91/308/EC). More detailed measures, including identification and record keeping requirements for the financial sector, are set out in the *Money Laundering Regulations 1993* (made under the *European Communities Act 1972*).[16] The EC is currently discussing a second measure, which will extend the coverage of the 1991 Directive, and in particular the obligations on professionals to report suspicious transactions.[17] In the international arena, action to combat money laundering is primarily taken forward by the Financial Action Task Force (FATF) whose membership includes twenty nine countries with substantial financial sectors.

F. The Government's proposals for reform

Although there had been piecemeal introduction and modifications of existing legislation during the 1980s and 90s, more radical reform and extension of the legislation designed to recover the instrumentalities and proceeds of crime has been on the agenda for several years.

1. The Home Affairs Committee: 1995

In 1995, in their Third Report[18] on Organised Crime, in the Home Affairs Committee concluded:

> 175 The fight against serious and organised crime requires effective criminal justice measures both in the law and in the organisation of crime fighting bodies. Particularly important are measures facilitating the effective gathering and

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15 See the *Criminal Law (Consolidation) (Scotland) Act 1995* and the *Proceeds of Crime (Northern Ireland) Order 1996*

16 SI 1993 No 1933

17 Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (9971/01)

18 17 July 1995

> analysis of intelligence. Some steps have already been taken. The Drug Trafficking Offences Act of 1986 and subsequent Criminal Justice Acts introducing and tightening up offences of money laundering and provisions for confiscation of the proceeds of serious crime have been very valuable. This process has been carried forward still further with the Proceeds of Crime Act 1995. In respect of law enforcement agencies and structures, the most important single development has been the establishment of the National Criminal Intelligence Service 1992.
>
> 176 We have made a number of recommendations in this report, designed to help the further development of the criminal law and the organisation and powers of the law enforcement agencies in ways which do not involve major upheavals in the current position. We have always been conscious that the end of achieving greater success against serious criminals should not be at the expense of unacceptable reductions in the liberties of individual citizens and should not entail excessive growth in the powers of the police and other bodies. Equally, we must be careful to safeguard as many of the benefits of local policing as possible, as steps are taken to strengthen national responses to the threat posed by the internationalisation of organised crime.
>
> 177 At the same time, this Committee has no doubt that just as one of the pre-eminent functions of the state must be to protect itself from external attack by foreign enemies, so too one of its pre-eminent functions must be to protect its citizens from internal attack by criminals. It must be understood that we are today faced with organised crime resourced to an hitherto unimaginable extent. So it must be recognised that organised crime can – by using these resources to internationalise its activities and to exploit every weakness in the system, and by using intimidation – take advantage of a criminal justice system which has evolved to meet the challenges of a lower level of essentially localised crime. If it should become apparent that serious and organised crime continues to grow and to threaten the very fabric of British society, then additional measures of the kind produced in this report may no longer be sufficient. In such circumstances Parliament would have to introduce stronger measures.

One of their recommendations was that, as the sums recovered under confiscation orders were much lower than the sums ordered, a full study should be carried out of the rate of recovery of sums ordered to be confiscated and that the reasons for any shortfall should be identified and addressed. They also welcomed the then recent extension of the provisions of the drug trafficking confiscation legislation to cover other serious crime and recommended that the Home Office Working Group on Confiscation should continue to keep the legislation under constant review.

2. The Home Office Working Group on Confiscation: 1998

The Home Office Working Group on Confiscation then reported, in November 1998[19], on the enforcement of criminal confiscation orders. They proposed a number of miscellaneous amendments to the criminal confiscation and money laundering legislation. But the core of their report was:

> a more radical analysis of the case for extending the United Kingdom's existing limited powers for confiscation without a criminal conviction, and the related question of a national confiscation agency.

Their recommendations for improving the criminal confiscation scheme included:

> 1. The offence of failure to disclose to a constable knowledge or suspicion that another person is engaged in drug or terrorist money laundering should be extended to cover laundering of the proceeds of conduct to which Part VI of the Criminal Justice Act 1988 applies.
>
> 2. There should be legislation for the High Court to make a confiscation order against persons who died after conviction of an offence to which Part VI of the Criminal Justice Act applies, but before a confiscation order can be made, and against absconders against whom proceedings have been instituted for such an offence.
>
> 3. The exemption in the Drug Trafficking Act 1994 which prevents the assumptions from being made where the offence or offences convicted are drug money laundering offences should be repealed.
>
> 4. The non drug confiscation legislation in England and Wales should allow a confiscation order to be increased where fresh realisable property comes to light.
>
> 5. The service of a term of imprisonment in default of an external confiscation order should not be regarded as satisfying the order.

But they commented that while the United Kingdom's criminal confiscation scheme had had some effect in depriving criminals of their assets, it had not been as successful as originally anticipated.

They summarised the existing civil forfeiture powers and advanced two main arguments for extending them:

> The first is the absence of a convincing rationale for some of the restrictions to which civil forfeiture is currently subject. In particular, there seems no good

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[19] Home Office Working Group on Confiscation, Third Report: Criminal Assets, published in November 1998, inviting comments by the end of February 1999.

> reason why only cash which is suspected to be the proceeds of drug trafficking should be liable to civil forfeiture, while suspected cash proceeds from other crimes are immune from forfeiture. There is also, in the Working Group's view, a strong case that civil forfeiture should not be restricted to cash which is imported or exported, but should be available wherever the suspected proceeds or instrumentalities of crime are discovered.
>
> 4.11 Secondly, the current very limited scope of civil forfeiture means that in most cases criminal proceeds and instrumentalities cannot be seized by the authorities unless a criminal conviction has been obtained: sometimes not even then, if the proceeds have been transferred to an associate and no specific evidence of the transfer can be found. The police and customs authorities have advised the working group that they regularly encounter cases in which there is strong circumstantial evidence of the criminal origins of property, but insufficient evidence for a criminal prosecution of the owner."

They examined three main options for extending the civil forfeiture powers. These were:

> Option 1: include crimes other than drug trafficking.
> Option 2: include also cash which is not being imported or exported.
> Option 3: include other forms of property.

They recommended option 2, which encompassed option 1 but went further. In considering option 3, they recognised that legislation would require a different procedure from cash on account of the complexities which can arise in respect of rights of ownership and the fact that some types of property cannot, unlike cash, be seized. They went on to examine the civil forfeiture systems in the United States and the Republic of Ireland:

> 4.28 in the United States, any form of suspect property is liable to be seized pending forfeiture proceedings. The management of the property is generally overseen by the enforcement authorities (although it can be sold prior to forfeiture under certain circumstances). Before property is seized, the authorities must show probable cause that it is subject to forfeiture, and if so satisfied a judge will issue a seizure warrant.
>
> 4.29 Before property can be made permanently forfeit, a complaint for forfeiture of the property is made to a court and published. It then falls to any person who wishes to contest the forfeiture to file a claim, for which a limited period is allowed. In the forfeiture proceedings before a jury, the claimant can contest the forfeiture on various grounds. These include primarily an innocent owner defence, or proving that there is no probable cause that the property is subject to forfeiture.
>
> 4.30 Legislation to reform these laws has been under discussion in the United States for some years. Various proposals have been made for amendment, but of particular note in the context of this report is the US Department of Justice's acceptance of a general proposal to place the burden in civil forfeiture cases on the government to prove, by a preponderance of the evidence, that property is

> subject to forfeiture. This will reverse the current position under which the burden of proof at the forfeiture stage is on the claimant.
>
> 4.31 in the Republic of Ireland action does not normally begin with "seizure" of the property. Instead, the Irish High Court issues interim and interlocutory orders. These orders are "in personam" (made against persons). Their effect is to prohibit persons in possession or control of property from disposing of it pending its eventual forfeiture (similar to UK restraint orders to prevent dealing in property in advance of criminal confiscations).
>
> 4.32 The Irish High Court makes an interim order on the ex parte application of a designated officer. The interim order lasts for 21 days. Before making such an order, the court has to be satisfied (to the civil standard) that a person is in possession or control of (i) specified property and that the property constitutes, directly or indirectly, proceeds of crime or (ii) specified property that was acquired in whole or in part, with or in connection with property that directly or indirectly constitutes proceeds of crime and that the value of the property (or total value) in each case is not less than £10,000. Property cannot be seized or made forfeit on the grounds that it has been used for the commission of a crime or is intended to be so used.
>
> 4.33 A designated officer will then apply to the High Court for an interlocutory order which, unless discharged, lasts indefinitely. The court will make such an order if it appears to it that the criteria mentioned in paragraph 4.28 are met, unless the person who is to be the subject of the order can prove to the contrary. Where an interlocutory order has been in force for not less than 7 years, a designated officer can apply to the High Court for a disposal order, for the forfeiture of the property. The court will make a disposal order unless it is shown to its satisfaction that the criteria described in paragraph 4.28 are not met.
>
> 4.34 In affidavits presented to the Irish court, evidence can be adduced as to the alleged criminality of the person who is in possession or control of suspect property or who has acquired such property. It will cover such factors as standard of living (incompatibility with earning capacity), lifestyle, previous convictions, accumulated wealth and intelligence gathered by enforcement authorities."

The Working Group considered that the Irish system, with its use of restraint rather than seizure, was more in line with existing restraint powers available in the UK. They suggested that an option 3 scheme might be along the lines:

> " Application would be made to the High Court ex parte for a restraint order preventing the disposal of any property, which the court would grant if it was satisfied that there were reasonable grounds for suspecting that a person was in possession or control of or had acquired property which represented the proceeds of, or was intended for use in drug trafficking or other criminal conduct.
>
> [-]

> 4.41 The venue for option 3 proceedings would be the High Court because it is accustomed to handling complex matters involving property…
>
> 4.41 In order to minimise costs, option 3 would be implemented alongside option 2, so that it would be possible for forfeitures involving cash alone to be dealt with in the magistrates' court, whereas forfeitures involving other property alone, or other property together with cash, would be dealt with under Option 3 in the High Court.
>
> 4.42 as noted above, under the Irish system the onus is on the claimant to satisfy the court that the property should be released, but seven years are required to lapse before "disposal" or forfeiture of the property can take place. In the UK, however, the existing cash across borders provisions of the Drug Trafficking Act 1994 place the burden of proof on the authorities who must apply for forfeiture within 2 years, in the absence of which the cash will be returned (unless there are proceedings against any person for an offence with which the cash is connected). The Working Group favours continued adherence to this scheme in any extended version of civil forfeiture here.
>
> 4.43 The Working Group has also noted that under the Irish system, a threshold of £10,000 has to be reached (singly or in aggregate) before the powers can be triggered and that this threshold is identical to that in the UK's existing "cash across borders" forfeiture legislation. The Working Group recognises that the threshold of £10,000 which was introduced to limit the use of the non-drug criminal confiscation powers in Part VI of the Criminal Justice Act 1988 was abolished in the Proceeds of Crime Act 1995. It considers, however, that in view of the breadth of Option 3, there needs to be a guarantee that the power will not be used in minor cases and therefore that a threshold of £10,000 should apply as in options 1 and 2."

The Working Group went on to discuss scope for safeguards, including the burden of proof, release of property for legal expenses and for living expenses, compensation arrangements and protection for legitimate interests of third parties. They also considered potential advantages and disadvantages of adopting a more centralised approach to confiscation. Their conclusion was:

> 5.24 The rationale for a central confiscation agency would be to focus efforts in one place, build expertise and foster multi-disciplinary working. Such an agency could also address in a radical way many of the communications and gateways issues which weaken the current system. Most importantly, this approach would seek to tackle the perceived problem of the present fragmentary approach of work taking place in organisations where confiscation work has to compete against higher priorities. The agency would be measured solely on its record in realising confiscations and forfeitures – it might even be appropriate to formally incentivise this approach by explicitly tying some proportion of the agency's funding to the level of confiscations realised. However, a realistic view of the improvements that could be achieved by this approach would have to be maintained. And it would be important that the agency should concentrate its efforts in those areas where it could be most effective.

> 5.25 With these points in mind, the Working Group considers that the potential advantages are sufficient to justify a fuller examination of the scope for and functions of a possible agency along the lines described in this chapter.

3. Cabinet Office Performance and Innovation Unit: 2000

Those proposals were examined and developed by the Cabinet Office's Performance and Innovation Unit (PIU) which reported in June 2000[20]. It noted that:

> 1.5 Since 1986, the UK has had extensive powers to confiscate criminal assets. The aims of the laws are clear and wide-ranging: to deprive offenders of the proceeds of their crimes. Yet there are anomalies in the legal regime, which has developed in a piecemeal fashion. And there are significant deficiencies in the use of legislative provisions.
>
> 1.6 In the last five years, confiscation orders have been raised in an average of only 20 per cent of drugs cases in which they were available, and in a mere 0.3 per cent of other crime cases. The collection rate is running at an average of 40 per cent or less of the amounts ordered by the courts to be seized. Specially tasked law enforcement officers struggle to investigate the financial aspects of crime to support this effort, but their effectiveness is limited by their numbers and modest training.
>
> 1.7 Pursuit and recovery of criminal assets in the UK is failing to deliver the intended attack on the proceeds of crime. Improvements in the pipeline go some way to addressing the problem, but more needs to be done.
>
> 1.8 The Government should take urgent steps to maximise the benefits that the pursuit and recovery of the proceeds of crime can offer.[21]

Their conclusions fell into seven areas of activity:

> 1. A more joined-up strategic approach (with an Asset Recovery Strategy and a new National Confiscation Agency)
> 2. Focusing on financial investigation
> 3. A new legislative attack
> 4. Tightening the money laundering regime
> 5. Taxing unlawful gains
> 6. Setting a higher international standard

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[20] *Recovering the Proceeds of Crime*. In addition, Chapter 9 dealt with money laundering and chapter 10 dealt with taxation of unlawful gains

[21] *Executive Summary*, p.5

7. Implementation, monitoring and evaluation

Chapter 5 adopted the Home Office proposals for extension of civil forfeiture powers, adding:

> Civil forfeiture is a significant extension in the powers available to the State to deal with the proceeds of crime. It can be expected to be viewed as controversial by some. There is a careful balance to be struck between the civil rights of the individual and the need to ensure that the State has the tools to protect society by tackling crime effectively. This chapter sets out a number of safeguards to ensure that the right balance is struck and that the proposals give expression to the European Convention on Human Rights (ECHR).

It also dealt with practical aspects of implementation of civil forfeiture in the UK, including the establishment of a new National Confiscation Agency (NCA). The proposed safeguards included:

- a £10,000 de minimis threshold;
- the burden of proof remaining with the State;
- the provision of civil legal aid;
- compensation provisions; and
- organisational management arrangements to ensure that the civil forfeiture route is not adopted as a 'soft option' in place of criminal proceedings.

The chapter explained the need for and likely effect of those safeguards:

> The £10,000 limit for civil forfeiture cases should encourage its use in a proportionate way. It is highly likely, in fact, that only proceedings relating to cash seizures by police and customs should be at this low level.
>
> The introduction of civil forfeiture must not perversely affect the priority of law enforcement activity, i.e. the prosecution and conviction of criminals. It is imperative that it is not used as a substitute for criminal proceedings where there is a reasonable chance of securing conviction. And performance measures for civil forfeiture must not drive the system to pursue a civil route for high-value cases regardless of the additional benefits of following the criminal route. There should be a rigorous process to determine the reasons why a criminal prosecution is not appropriate before civil forfeiture proceedings alone are instigated. Decisions as to whether civil forfeiture proceedings are appropriate should be taken by the Board of the National Confiscation Agency (see below) or Police Superintendent, or equivalent, for cash only cases.
>
> The earlier restraint of assets that civil forfeiture will permit is a significant increase in the State's powers to deal with an individual's assets. A safeguard is also needed to help avoid and repair any financial loss sustained as a result of early restraint where access to assets has been denied and the civil forfeiture case later fails. Proportionate use of early restraint would be encouraged by some form of extension of the existing criminal compensation requirements (which is

> payable only when there has been "some serious default" on the part of the prosecutor) for civil forfeiture cases.
>
> There should be compensation for financial loss (e.g. interest foregone) associated with assets restrained under civil forfeiture found later not to be the proceeds of crime or intended for use in crime. The details of a compensation scheme are being considered further by the Home Office. One option would be to limit compensation in cases where the court considers that the person whose assets have been restrained has caused unnecessary expense or delay by his or her own conduct. Prudent use of civil forfeiture powers should mean that compensation should be needed only in very few cases (for example, in Ireland the State has not lost any civil forfeiture actions).

In addition, it proposed that the court should have power, when restraining assets, to limit the amount payable from those assets in legal fees. The rationale was:

> Currently, a restraint order allows the defendant to spend a reasonable amount of restrained assets in legal fees in defending the case. In some instances, defendants may be unable to use restrained assets due to legitimate third party claims, and legal aid may be appropriate. Where fees are being paid from the defendant's own restrained resources, the prosecutor has a right to ask the High Court to assess their reasonableness (a process known as 'taxation'). This is rarely done because it is expensive, time-consuming and unlikely to result in a significant reduction.
>
> However, as seen in Table 8.2 above, legal fees are causing a considerable drain on the assets recovered under confiscation orders. The amount of legal fees paid from restrained assets should be more effectively controlled whilst protecting the defendant's legitimate right of access to legal advice. When making a restraint order the court should have power (on application by the prosecutor) to limit the amount payable from restrained assets in legal fees to set rates, for example, legal aid hourly rates, perhaps with an uplift in complex cases. If taxation is still considered necessary, it should be carried out by a Crown Court assessment officer used to applying normal legal aid rules. Corresponding provisions should also be built into civil forfeiture cases.
>
> This proposal is based on the civil restraint provisions in New South Wales, Australia, where rates up to 20 per cent above legal aid are permitted. The effectiveness of these new arrangements in reducing the amount of restrained assets that are dissipated through excessive legal fees should be reviewed by the Board of the NCA after three years, taking into account any changes to the Legal Aid system.

The possibility of invoking civil forfeiture after an acquittal was expressly envisaged.[22]

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[22] para 5.43

Chapter 8 proposed a number of legislative and policy changes to strengthen the criminal confiscation regime, to remove the anomalies, and to enhance confiscation powers. These included:

- making the confiscation laws relating to drug and non-drug offences the same. In particular, a criminal conviction should enable the burden of proving the origin of assets to be shifted to the defendant in all cases, except where this would be disproportionate;
- encouraging dedicated training for lawyers, prosecutors and Crown Court judges in confiscation matters;
- strongly encouraging confiscation to be considered by prosecutors after all convictions where criminals have profited;
- formalising the right of prosecutors to appeal confiscation decisions; and
- extending the time limit for making confiscation orders.

The chapter also concluded that a number of steps were necessary to improve the collection rate under confiscation orders, including:

- allowing the State to confiscate restrained assets immediately after conviction in part satisfaction of the confiscation order debt;
- allowing receivers in certain circumstances to maximise the realisable value of restrained assets;
- allowing restraint orders to be made in the Crown Court;
- tasking the National Confiscation Agency (NCA) to oversee all restraint and confiscation matters, ready to apply for the sanction of imprisonment in contempt and default matters; and
- limiting defendants' access to restrained assets to pay legal fees.

It further concluded that legislative time should be found as soon as possible to make the legislative changes dealt with in the chapter, ideally in the 2000/2001 session of Parliament.

4. Publication of draft clauses: March 2001

In *Criminal Justice: The Way Ahead*[23], which focused on a comprehensive overhaul of the criminal justice system to lever up performance in catching, trying, convicting punishing and rehabilitating offenders, the Home Office heralded its imminent publication of draft clauses:

> Justice demands that we should stop criminals profiting from their crimes. Confiscating assets and preventing money laundering also reduces the incentives

[23] CM 5074, February 2001

> for crime and removes an important source of finance for the continued operation and expansion of criminal enterprises.
>
> We will ensure that powers to deprive criminals of their assets are used more extensively, so that criminals know that they face a greater likelihood of losing the proceeds of their crimes. a new assets recovery agency will be established to pursue the confiscation of criminal assets both at home and abroad…we will channel more of the resulting receipts into a fund for crime fighting and reduction, and into drugs prevention. We also plan to extend powers to seize drugs-related cash at frontiers to non-drugs cases.
>
> The Proceeds of Crime Bill, to be published shortly in draft, will reform and unify the criminal law on money laundering, introduce new powers for the investigation of suspected criminal proceeds and update and strengthen restraint and confiscation procedures.
> The Bill will also establish an assets recovery agency to pursue and co-ordinate the recovery of property derived from crime in civil litigation in the High Court, and to tax suspected criminal assets under powers delegated from the Inland Revenue.

Draft clauses were published for consultation on 3 March 2001[24]. A Home Office news release of the same date[25] summarised the proposals as follows:

> The "Proceeds of Crime" Bill would establish a Criminal Assets Recovery Agency (CARA) which would investigate and remove offenders' wealth accumulated through criminal activity, such as cash, cars and houses.
>
> The draft Bill would provide new powers for financial investigators to help them trace and recover the cash and goods derived from crime. These include the power to restrain property at the start of a criminal investigation to avoid it being hidden or dissipated.
>
> It would introduce, for the first time, a UK-wide scheme for recovering the proceeds of crime through civil proceedings rather than the criminal courts.
>
> The draft Bill would also give the Director of CARA the ability to carry out tax functions, for example income tax, capital gains, corporation and inheritance taxes, where he has reasonable grounds to suspect that a person's income or gains were derived from crime. This would apply to individuals, companies or partnerships.

The News Release went on:

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[24] *Proceeds of Crime: Consultation on Draft Legislation*: Cm 5066
[25] 059/2001 *Proposals to remove criminals' ill-gotten gains published*

Work to pave the way for these changes is already underway. The Home Secretary announced last July, a total of £54 million over the next three years to set up CARA.

This includes strengthening the financial investigation capacity of police forces. The Performance and Innovation Unit report, published last June, envisaged a substantial increase in the number of trained financial investigators.

Part of the £54 million has also been earmarked to fund a Centre of Excellence for financial investigation within CARA. This money would pay for the training and accreditation of greater numbers of financial investigators in law enforcement agencies and government.

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The draft clauses contain proposals for:

- CARA to be established next year or 2003 depending on the Parliamentary timetable. The Agency would have a Director accountable to the Home Secretary and within it a Centre of Excellence for training and accreditation of financial investigators.

- A new civil recovery scheme, allowing the Director of CARA to sue in the High Court to recover the proceeds of criminal conduct.

- New court-approved powers to help investigators working for the police, other law enforcement authorities and the Agency, including in some cases accredited civilian financial investigators, to trace assets including the power:
  - To require banks or other financial institutions to provide transaction details of specified accounts;
  - To require banks or other financial institutions to identify any accounts held by a person under investigation
  - To restrain property at the start of a criminal investigation to avoid the dissipation of assets. Currently this can only be done by a prosecutor when a charge has been brought or about to be brought.
  - Giving the Director of CARA the power to compel a person to answer questions, provide information and produce documents. These new powers would be added to the existing powers to compel the production of documents for example bank accounts and tax records (production order) and the issue of search warrants.
  - Giving the Director of CARA the ability to carry out tax functions, for example income tax, capital gains, corporation and inheritance taxes, where he has reasonable grounds to suspect that a person's income or gains were derived from crime. This would apply to individuals, companies or partnerships.

- Crown Courts would hear all asset restraint and criminal confiscation hearings. Courts would have the ability to apply confiscation orders to all

offences (all summary offences to be included rather than specified ones as now).

- Restraint of assets would be brought forward from when a person is charged (or about to be charged) with an offence to the start of a criminal investigation.

- Unifying money laundering legislation to remove loopholes, for example, distinctions between drug and non-drug offences.

- Extending the offence of failing to report knowledge or suspicion of drug money laundering in two ways: by including any money laundering (instead of just drug money laundering) and by penalising negligent failure to report (i.e. where a person had reasonable grounds to suspect that another person was engaged in money laundering). The new extended offence would apply to people working in sectors covered by the Money Laundering Regulations. The penalty is 5-years imprisonment and/or an unlimited fine.

Mr Straw, who was then Home Secretary, was reported to have said:

> Criminals are motivated by money and profit and the fact that in many cases they appear to be 'untouchable', damages public confidence in the criminal justice system.
> Through a range of new measures, including civil recovery and taxation, we will target those individuals that benefit from crime, crippling their criminal enterprises and stripping them of the means to commit further offences.
> By removing the assets offenders have accumulated through criminality, we will deter others from following suit and send out a clear message to the public that nobody is beyond the reach of the law.
>
> The draft clauses which I am publishing today for a Proceeds of Crime Bill contain a number of ground-breaking proposals. I invite comments from practitioners and the public before we introduce the Bill to Parliament.[26]

5. Publication of the Bill

The *Proceeds of Crime Bill* was introduced on 18 October 2001. On the same day, a Home Office News Release[27] described its purpose and effect:

> The Bill aims to disrupt organised crime gangs, who often rely on cash transactions to fuel their business, by allowing officers to search persons and premises for criminal cash.

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[26] The consultation period ended on 29 May 2001.

[27] 252/2001 *Tough new powers to search and seize criminal cash announced*

> The Proceeds of Crime Bill, introduced into the House of Commons today, would set up an Assets Recovery Agency (ARA) to investigate and remove wealth accumulated through criminal activity.
>
> It would also amalgamate and strengthen existing criminal confiscation powers in one Act; introduce a new power of civil recovery; empower the Agency to tax suspected criminal assets; extend investigation powers and re-define money laundering offences to close identified loopholes.

Home Office Minister Bob Ainsworth was reported to have said:

> Most criminals are motivated by profit. They traffic in drugs, illegal immigrants, and contraband goods, building up large criminal empires that reach far and wide into our lives. The pushers outside our schools and the muggers on our streets are often at the end of a chain going back to organised crime barons.
>
> Taking the profit out of crime will help dismantle and disrupt these criminal enterprises. It is not acceptable that people should enjoy the proceeds of criminal activity and live a life of luxury including big houses, swimming pools and fast cars when it is built on the misery of victims or activities which damage or exploit society.
>
> Our plans to seize criminal cash, coupled with the separate measures we announced on Monday to deter terrorists and disrupt the financing of terrorism, sends out a clear message to the public that nobody is beyond the reach of the law.
>
> The Proceeds of Crime Bill sets out a number of new measures to help financial investigators trace the proceeds of crime and investigate money laundering. These include:
>
> - freezing assets at a much earlier stage, for example when an investigation is started, to stop them being hidden or transferred;
> - orders requiring banks or other financial institutions to identify accounts of those under investigation;
> - monitoring orders to provide transaction information on a suspect account;
> - for the first time, some investigation powers would be available to civilian financial investigators of law enforcement authorities, provided they have been accredited by the Agency.
>
> These measures will be complemented by the legislative package announced by the Home Secretary to tackle terrorist funding.
>
> On top of this a new criminal offence will be introduced for those in the regulated financial sector of failing to report a reasonable suspicion of money laundering.
>
> The package of measures aims to take the profit out of crime and dismantle and disrupt criminal empires by removing the money, which is their motivation and their lifeblood.

Customs and Excise Minister Paul Boateng was reported to have said:

> Our innovative use of cash seizure powers will be significantly enhanced by today's Bill.
>
> Customs is applying a strategic approach to tackling drugs and other criminal enterprises – we do not just focus our efforts on the people but on the profits too.
>
> Customs has a vast experience in criminal confiscation and recovering debt. We have nearly 300 financial investigators and are further concentrating efforts to strip the profits out of every fraud, drugs or money laundering operation.

Vince Harvey, Director of NCIS's[28] UK Tactical Services Division said:

> NCIS welcomes the introduction of the Proceeds of Crime Bill which will assist them to tackle those who through their activities have made themselves "untouchable" but continue to reap the benefits of previous or current activities through their lifestyle or property.

Further information on the Government's proposals is available at the "Proceeds of Crime" website at:

> www.homeoffice.gov.uk/proceeds/index.htm.

A Press Release[29] issued by the Scottish Office on the same day explained how the Bill would apply to Scotland. Scottish Secretary Helen Liddell was reported to have said:

> Criminals living on the proceeds of crime will sleep a lot less easy in their beds from now on as the Government publishes measures to hunt down and seize the assets of those who make a living from committing crimes in our society.
>
> These tough new measures will go a long way to prove once and for all that crime doesn't pay. Taking the profits of their crimes away from the criminals and drug barons will hit them where it hurts the most, their bank balances.
>
> This important Bill has been developed by the Government and the Scottish Executive working together in partnership. Policy on the proceeds of crime from drug trafficking is reserved to Westminster, but responsibility for proceeds from other crimes is a matter for the Scottish Parliament. I am very pleased with this excellent joint effort to tackle a problem that respects no geographical boundaries within the UK.

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[28] (National Criminal Intelligence Service, an independent statutory body providing intelligence in the fight against serious and organised crime)

[29] SS0201 *Criminals to be hit hard by new measures*

> Minister of State for Scotland, George Foulkes, will join Home Office minister Bob Ainsworth in piloting the new Proceeds of Crime Bill through parliament.

The *Notes for Editors* explained

> The Bill, which will apply UK-wide, has specific Scottish provisions to ensure that the powers are fully aligned to the Scottish justice system and process. It will also provide for different institutional arrangements in Scotland.
>
> Many of the proposals are reserved - such as confiscation of the proceeds of drug trafficking, money laundering and taxation - but some are devolved. The provisions of the Bill relating to money laundering will apply to Scotland, but the Assets Recovery Agency will have no role in Scotland except in exercising the new powers for taxing suspected criminal assets. Under the Sewel convention, the agreement of the Scottish Parliament will be required before the UK Parliament legislates on areas in the Bill that are devolved.

6. Anti-terrorist measures

On 15 October 2001 the Home Secretary outlined a legislative package to combat terrorism.[30] He said that the emergency legislation would build on the Proceeds of Crime Bill to deal specifically with terrorist finance through monitoring and freezing the accounts of suspected terrorists.

Those clauses will be in a separate Emergency Anti-Terrorist Bill.

II The Proceeds of Crime Bill

The Bill consists of 444 clauses, in 12 parts, with 9 schedules.

Part 1 creates an Assets Recovery Agency (ARA).

Part 2 makes provision for confiscation in England and Wales, replacing separate drug trafficking and criminal justice legislation with a consolidated and updated set of provisions. Restraint, confiscation, receivership and related matters are covered.

Parts 3 & 4 make similar provision for Scotland and Northern Ireland respectively.

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[30] Home Office News Release 250/2001: *Blunkett outlines further anti-terrorist measures*

Part 5 sets out new provisions for the recovery in the United Kingdom in civil proceedings of property which has been obtained through unlawful conduct or property which represents property obtained through unlawful conduct; and provisions for the search and seizure of cash which is reasonably suspected of having been obtained through unlawful conduct or of being intended for use in such conduct, and for the forfeiture of such cash in proceedings before a magistrates' court, sheriff or justice of the peace.

Part 6 empowers the Director of ARA to exercise functions of the Inland Revenue in relation to income, gains and profits arising or accruing as a result of criminal conduct.

Part 7 consolidates, updates and reforms the criminal law in the United Kingdom with regard to money laundering.

Part 8 sets out powers for use in criminal confiscation, civil recovery and money laundering investigations.

Part 9 deals with the relationship between confiscation and insolvency proceedings.

Part 10 provides for the disclosure of information to and by the Director of ARA and the Scottish Ministers. It also allows the exchange of information between the Scottish Ministers and the Lord Advocate.

Part 11 provides for co-operation in investigation and enforcement between the jurisdictions of the United Kingdom and with overseas authorities.

Part 12 deals with miscellaneous and general matters.

A. The Assets Recovery Agency

Clause 1 provides for the establishment of a new Assets Recovery Agency, to be headed by a Director who will be appointed by the Home Secretary in consultation with the Secretary of State for Northern Ireland. In the published draft clauses it had been proposed that the Agency should be called the Criminal Assets Recovery Agency.

Clause 2 contains general provisions as to the exercise of the Director's functions, including an obligation to exercise them "in the way which he considers are best calculated to contribute to the reduction of crime". Clause 3 requires him to establish a system for the accreditation of financial investigators, who may then exercise certain powers under the Act, and to make provision for training. Clause 5 requires him to give such advice and assistance to the Secretary of State as he may require in relation to the operation of the Act, and crime reduction. Clause 4 requires the Director and other persons with investigation, prosecution or other functions relating to crime to co-operate

with each other. But Part 1 does not provide a list of his functions, which appear from the succeeding Parts of the Bill. His principal functions will be:

(1) instigating and pursuing recovery of criminal assets through confiscation (Parts 2 and 4);

(2) instigating and pursuing civil recovery of the proceeds of unlawful conduct (Part 5);

(3) exercising Revenue functions in respect of income, profit or gains from criminal conduct and transfers of value attributable to criminal property (Part 6);

Under Part 8 he will have a range of powers (some exclusive to him) in carrying out investigations relating to benefits from criminal conduct (confiscation investigations) and recoverable property (civil recovery investigations).

All the functions are to be carried out in England and Wales and Northern Ireland, but only the Revenue functions will extend to Scotland.

When the draft clauses were published in March 2001[31], the commentary anticipated that in addition to his specific operational responsibilities, the Director would be:

> at the heart of promoting the use of financial investigation and asset recovery as basic tools both for crime reduction and increasing public confidence in the criminal justice system.[32]

The Director will not in general be subject to the jurisdiction of the Parliamentary Commissioner for Administration, but he will be in respect of the Revenue functions[33].

B. Confiscation orders in the criminal courts

The core of the criminal confiscation regime[34] is contained in clauses 6 - 14 and the interpretation provisions in clauses 75 - 90 of the Bill. The parallel provisions for Scotland and for Northern Ireland are at clauses 94 –101, 142 – 156 and 158 – 166, 226 – 241 respectively. The criminal confiscation regime for Northern Ireland is virtually identical to that for England and Wales, differing only to reflect differences in the legal systems and terminology of the two jurisdictions. The criminal confiscation regime to be applicable in Scotland is also broadly similar, but a very significant difference is that

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31 *Proceeds of Crime: Consultation on Draft Legislation*: Cm 5066.

32 Ibid p.19.

33 Schedule 8 para 2.

34 For England and Wales

some key provisions which would have mandatory operation in the courts of England, Wales and Northern Ireland, would apply at the courts' discretion in Scotland.[35]

1. England and Wales (and Northern Ireland)

Clause 6 requires the Crown Court, if two conditions are satisfied, to consider whether a defendant had benefited from criminal conduct and, if it decides that he had, to decide the recoverable amount and make a corresponding order for payment. The court will be required to proceed under the section following any conviction in the Crown Court, or any committal to the Crown Court for sentence (or sentence and confiscation under a new power), either where the prosecutor or the Director of the Asset Recovery Agency has asked the court to, or the court believes it is appropriate for it to do so.

a. First step

The first step is for the court to decide[36] whether the defendant has a criminal lifestyle. Clause 75 provides that he only has a criminal lifestyle if the offence (or any of the offences) on which he is convicted or committed satisfies one of five tests. These are that:

(a) it is a drug trafficking offence,
(b) it is a money laundering offence,
(c) it is specified in regulations under this section by the Secretary of State,
(d) it constitutes conduct forming part of a course of criminal activity, or
(e) it is an offence committed over a period of at least six months.

The *Explanatory Notes* explain that:[37]

> Under the current legislation, drug trafficking is always regarded as a criminal lifestyle offence. A conviction for any drug trafficking offence triggers an examination of all the defendant's past drug trafficking and the mandatory application of the assumptions. All drug trafficking offences and money laundering offences are treated by the Bill as conclusive of a criminal lifestyle. The Bill thus adds money laundering to the offences which are always to be regarded as conclusive of a criminal lifestyle.

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35 see discussion below
36 Clause 6(4)(a)
37 *Bill 31-EN*: Home Office October 2001: Para 130

and go on to suggest that other offences to be specified (by regulations made under subsection (2)(c)) as being always criminal lifestyle offences "might include, for example, trafficking in arms or human beings".

Clause 75(3) sets out the threshold factors by which conduct will be judged to form part of a course of criminal activity. Firstly, it must be conduct from which the defendant has benefited. Secondly, the defendant must have been convicted of some combination of other offences. The threshold effect is explained in the Explanatory Notes as:[38]

> that a defendant has a criminal lifestyle if the defendant has been convicted in the current proceedings of four or more offences from which he has received a benefit, or has been convicted in the current proceedings of one such offence and has other convictions for such offences on at least two separate occasions in the last six years.

A single offence which is committed over a period of six months, for instance a conspiracy, will also satisfy the condition, so that the defendant will have a criminal lifestyle.

b. Next step

The next step depends on whether or not the court decides that the defendant has a criminal lifestyle. If it decides that he has, it must go on to decide "whether he has benefited from his general criminal conduct" (clause 6(4)(b)). The particular significance of a decision that the defendant does have a criminal lifestyle is that the court *must*, under clause 11, make four assumptions for the purpose of deciding whether he has benefited from his general criminal conduct and in deciding his benefit from the conduct.

Clause 76(1) defines "criminal conduct" as conduct which either constitutes an offence in England and Wales or would constitute such an offence if it occurred in England and Wales. Clause 76(2) defines "the general criminal conduct of the defendant" as all his conduct. It is immaterial whether the conduct occurred, or the property constituting a benefit from it was obtained, before or after the passing of the Act.

c. Assumptions to be made if the defendant has a criminal lifestyle

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[38] ibid: para 131

The four assumptions which must be made are:

> (2) The first assumption is that any property transferred to the defendant at any time after the relevant day[39] was obtained by him –
>
> (a) as a result of his general criminal conduct and
>
> (b) at the earliest time he appears to have held it.
>
> (3) The second assumption is that any property held by the defendant at any time after the date of conviction[40] was obtained by him
>
> (a) as a result of his general criminal conduct and
>
> (b) at the earliest time he appears to have held it.
>
> (4) The third assumption is that any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct.
>
> (5) The fourth assumption is that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it.

The court must not make a required assumption in relation to any particular property or expenditure if the assumption is shown to be incorrect or there would be a serious risk of injustice if the assumption were made (subsection (6)). It must state its reasons for not making any one or more of the required assumptions (subsection (7)).

The *Explanatory Notes* state that[41]:

> 31. The current legislation provides for similar assumptions to be made. They are mandatory in confiscation proceedings following a conviction for a drug trafficking offence, but discretionary in all other confiscation cases (and, in the latter case, other criteria must be satisfied before they can be made). Clause 11 creates a single scheme under which the assumptions are mandatory in all cases where a person has a criminal lifestyle (defined in clause 75).

d. If the defendant does not have a criminal lifestyle

If the court decides that the defendant does not have a criminal lifestyle, it must decide, under clause 6(4)(c) "whether he has benefited from his particular criminal conduct",

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[39] the relevant day is defined by subsection (8) to be the day (or if there are several offences the earliest day) on which proceedings were started.

[40] The date of conviction is, if there are two or more offences, the latest: subsection (9).

[41] *Bill 31–EN*: Home Office October 2001: Para 31

which means the offences of which the defendant has been convicted in the current proceedings together with any taken into consideration by the court in passing sentence: (clause 76(3)). (in that case there is no requirement for the assumptions in clause 11 to be made).

e. Definitions

Clauses 8 and 10 define "*recoverable amount*" and "*available amount*" respectively, while clause 77 defines "*tainted gifts*", which may be relevant in deciding what is the available amount.

If a court has decided that a defendant has a criminal lifestyle, or no decision has been made, a gift made by him after the relevant day (i.e. when proceedings were started) or (if it was of property obtained by him as a result of or in connection with his general criminal conduct, or represents such property) at any time, before or after the passing of the Act, is a tainted gift.

If a court has decided that a defendant does not have a criminal lifestyle, a gift is tainted if he made it after the date on which the offence concerned (or the earliest of more than one) was committed (Clause 77).

The starting point for deciding on the "*recoverable amount*" is that it will be an amount equal to the defendant's benefit from the conduct concerned (clause 8(1)). But if the defendant shows that the "*available amount*" is less than that, the recoverable amount is the available amount, or a nominal amount if the available amount is nil. The available amount is:

> The aggregate of –
> (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
> (b) the total of the values (at that time) of all tainted gifts. (Clause 10(1)).

"*Free property*" is defined by clause 8, broadly as property which is not already subject to specified kinds of forfeiture and deprivation orders, or orders made under the new civil recovery provisions in Part V of the Bill. "Property" is widely defined by clause 84 (1), which provides:

> (1) Property is all property wherever situate and includes –
> (a) money;
> (b) all forms of real or person property;
> (c) things in action and other intangible or incorporeal property.

while subsection (2) applies further rules such as that property is held by a person if he holds an interest in it. Obligations which have priority are previous fines or other court orders made on conviction, and obligations which would have been preferential debts on his bankruptcy: (Clause 10(2)).

According to the *Explanatory Notes*[42], the method of calculation of the "recoverable amount" (under clause 8) is "much the same as in the existing confiscation statutes", and the "available amount" is "calculated in the same way as 'the amount that might be realised' in the current legislation.

f. Standard of proof

Clause 6(7) provides that:

> The court must decide any question arising under subsection (4) or (5) on the balance of probabilities.

This means that all questions arising in deciding whether the defendant has a criminal lifestyle, whether he has benefited from his general or particular criminal conduct, and what the recoverable amount is must be decided on the balance of probabilities. The provisions in the existing confiscation statutes are that:

> The standard of proof required to determine any question arising under this Part of this Act as to –
> (a) whether a person has benefited from any offence; or
> […]
> (c) the amount to be recovered in his case…
> shall be that applicable in civil proceedings.[43]

and

> The standard of proof required to determine any question arising under this Act as to […]
> (a) whether a person has benefited from drug trafficking, or
> (b) the amount to be recovered in his case by virtue of this section,
> shall be that applicable in civil proceedings.[44]

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42 *Bill 31-EN* Home Office October 2001: Para 27
43 *Criminal Justice Act 1988* s.71(7A) as inserted by the *Criminal Justice Act 1993.*
44 S.2 (7) of the *Drug Trafficking Act 1994*

2. Scotland

Part 3 of the Bill deals with criminal confiscation in the Scottish courts. Clause 94(1) provides that the court *may* act under the section if three conditions are satisfied. Under clause 99, when the court has decided that the defendant has a criminal lifestyle, it *may* make the four assumptions set out in the section, for the purposes of deciding whether he has benefited from his general criminal conduct and deciding his benefit from it. This is in contrast to the parallel provisions for England, Wales and Northern Ireland. There is also special provision, in clause 101, for cases where a confiscation order has been made against a person and the court is not satisfied that his interest in it has been acquired as a benefit from his criminal conduct.

3. Restraint Orders

Restraint orders may be made, in any of the jurisdictions[45]. A restraint order has the effect of freezing property which may be liable to confiscation following the trial and the making of a confiscation order. It prohibits (or interdicts) a person from dealing with "realisable property" which is defined to mean any free property held by the defendant or by the recipient of a tainted gift. An order may be made against any person who holds recoverable property, not only the person who is suspected of, or facing proceedings for, committing an offence.

The courts which will have the power to make restraint orders are the Crown Court in England and Wales, the Court of Session or sheriff court (civil) in Scotland, and the High Court in Northern Ireland. In each case, a restraint order may now be made at any time after an investigation has been started. Applications may be made by the prosecutor or (in England, Wales and Northern Ireland) by the Director of the Assets Recovery Agency or by an accredited financial investigator.

The court may also appoint a management receiver (or an administrator in Scotland) in respect of any property to which the restraint order applies. Clauses 49 and 200 set out the powers which may be conferred on a management receiver. These are based on the powers that receivers now use in practice to manage property pending conviction and

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[45] Clauses 42, 122 and 193

confiscation. Under clause 127 an administrator is appointed to take possession of realisable property to which the restraint order applies and (in accordance with the court's directions) to manage or otherwise deal with the property.

4. After a confiscation order is made

Parts 2-4 also make provision about what may happen after a confiscation order is made, such as the appointment of enforcement receivers, Director's receivers, and administrators to assist in enforcement, realisation of property, and the application of the proceeds.

5. Recent caselaw on current confiscation legislation

a. McIntosh v Lord Advocate (Privy Council)

In *McIntosh v Lord Advocate and another*,[46] the Judicial Committee of the Privy Council considered the issue whether the prosecutor was or would be acting incompatibly with the respondent's rights under Article 6.2 of the Convention in inviting the court to rely on the assumptions set out in section 3(2) of the *Proceeds of Crime (Scotland) Act 1998*, which provides that the court *may*

> in making an assessment as regards a person under section 1(5) of this Act, make the following assumptions, except in so far as any of them may be shown to be incorrect in that person's case -
>
> (a) that any property appearing to the court -
> (i) to have been held by him at any time since his conviction; or, as the case may be,
> (ii) to have been transferred to him at any time since a date six years before his being indicted, or being served with the complaint,
> was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him;

[46] [2001] 3 WLR 107

> (b) that any expenditure of his since the date mentioned in paragraph (a)(ii) above was met out of payments received by him in connection with drug trafficking carried on by him, and
>
> (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.
>
> "(3) Subsection (2) above does not apply if the only offence by virtue of which the assessment is being made is an offence under section 14 of the Criminal Justice (International Co-operation) Act 1990 or section 37 or 38 of the Criminal Law (Consolidation) (Scotland) Act 1995.
>
> "(4) The court shall, in making an assessment as regards a person under section 1(5) of this Act, leave out of account any of his proceeds of drug trafficking that are shown to the court to have been taken into account in a case where a confiscation order (whether under this Act or under and within the meaning of -
>
> (a) section 2 of the 1994 Act; or
> (b) any corresponding provision in Northern Ireland),
> has previously been made against him.

The Court concluded that Article 6.2. had no application. In delivering the leading judgment, Lord Bingham of Cornhill said:

> It is of course true that if, following conviction of the accused and application by the prosecutor for a confiscation order, the court chooses to make the assumptions specified in section 3(2) of the 1995 Act or either of them, an assumption is made (unless displaced) that the accused has been engaged in drug trafficking which, as defined in section 49(2), (3) and (4), may (but need not) have been criminal. But there is no assumption that he has been guilty of drug trafficking offences as defined in section 49(5). The process involves no inquiry into the commission of drug trafficking offences. Unless Strasbourg jurisprudence points towards a different result, I would not conclude that a person against whom application for a confiscation order is made is, by virtue of that application, a person charged with a criminal offence.[47]

He also said:

> The general interest of the community in suppressing crime, however important, will not justify a state in riding roughshod over the rights of a criminal defendant, as graphically pointed out by Sachs J in State v Coetzee [1997] 2 LRC 593 at 677 (paragraph 220). But it is not irrelevant. Nor is the position of the defendant. In weighing the balance between the general interest of the community and the

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[47] ibid p.114

> rights of the individual, it will be relevant to ask (as Lord Hope suggested in Ex parte Kebilene at page 386) what public threat the provision is directed to address, what the prosecutor must prove to transfer the onus to the defendant and what difficulty the defendant may have in discharging the onus laid upon him. In some cases the acceptability of a reverse onus provision will turn not on consideration of the provision in the abstract but on its application in a particular case (Hoang v France, above, paragraph 33). The right to a fair trial, guaranteed by article 6(1), will ensure that any reverse onus provision is fairly applied in the given case.[48]

And:

> The confiscation order procedure can only be initiated if the accused is convicted of a drug trafficking offence. The court is therefore dealing with a proven drug trafficker. It is then incumbent on the prosecutor to prove, as best he can, the property held by the accused and his expenditure over the chosen period up to six years, including any implicative gifts relied on. In practice the prosecutor's statement lodged under section 9 will always particularise such of the accused's sources of income as are known to the prosecutor, and any source of income known to the prosecutor of any person to whom the accused is said to have made an implicative gift. The schedules served by the prosecutor in this case contained those details (whether accurately or not has not yet been determined) relating to the respondent and Ms Black, and had they not done so the court would inevitably have exercised its power under section 10 to enable further information to be obtained. It is only if a significant discrepancy is shown between the property and expenditure of the accused on the one hand and his known sources of income on the other that the court will think it right to make the section 3(2) assumptions, and unless the accounting details reveal such a discrepancy the prosecutor will not in practice apply for an order. It would be an obviously futile exercise to seek an order where the assets and expenditure of the accused are fully explained by his known sources of legitimate income. If a significant discrepancy is shown, and in the first instance it is for the prosecutor to show it, I do not for my part think it unreasonable or oppressive to call on the accused to proffer an explanation. He must know the source of his assets and what he has been living on[49].

b. Phillips v UK (ECHR)

Judgment was given by the European Court of Human Rights in the case of *Phillips v the United Kingdom*[50] on 5 July 2001. The applicant had alleged, inter alia, that the statutory assumption made against him by the court which issued a confiscation order against him violated his right to the presumption of innocence under Article 6.2. of the Convention.

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48 ibid p.119
49 ibid p.121
50 Application no. 41087/98

The assumptions under section 4 (2) and (3) of the *Drug Trafficking Act 1994* (that any property appearing to have been held by the defendant at any time since his conviction or during the period of six years before the date on which criminal proceedings were commenced was received as a payment or reward in connection with drug trafficking and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking) had been applied.

The court held:

> 30. It is not in dispute that during the prosecution which led to his conviction on 27 June 1996 of being concerned in the importation of cannabis resin contrary to section 170(2) of the Customs and Excise Management Act 1979, the applicant was "charged with a criminal offence" and was therefore entitled to - and received - the protection of Article 6 § 2. The questions for the Court regarding the applicability of this Article to the confiscation proceedings are, first, whether the prosecutor's application for a confiscation order following the applicant's conviction amounted to the bringing of a new "charge" within the meaning of Article 6 § 2 and secondly, even if that question must be answered in the negative, whether Article 6 § 2 should nonetheless have some application to protect the applicant from assumptions made during the confiscation proceedings.
>
> 31. In order to determine whether in the course of the confiscation proceedings the applicant was "charged with a criminal offence" within the meaning of Article 6 § 2, the Court must have regard to three criteria, namely the classification of the proceedings under national law, their essential nature, and the type and severity of the penalty that the applicant risked incurring (see the A.P., M.P. and T.P. v. Switzerland judgment of 29 August 1997, § 39, and, mutatis mutandis, the Welch v. the United Kingdom judgment of 9 February 1995, Series A no. 307-A, §§ 27-28).
>
> 32. As regards the first of the above criteria - the classification of the proceedings under domestic law - while recent United Kingdom judicial decisions have been divided as to whether the application by the prosecution for a confiscation order amounts to the bringing of a "criminal charge" within the autonomous meaning of Article 6 § 2 (see paragraphs 24-26 above), it is clear that such an application does not involve any new charge or offence in terms of national criminal law. As the Lord Chief Justice observed in the Benjafield judgment (paragraph 25 above), "[i]n English domestic law, confiscation orders are part of the sentencing process which follow upon the conviction of the defendant of the criminal offences with which he is charged".
>
> 33. Turning to the second and third relevant criteria - the nature of the proceedings and the type and severity of the penalty at stake - it is true that the assumption required by the 1994 Act, that all property held by the applicant within the preceding six years represented the proceeds of drug trafficking, required the national court to assume that he had been involved in other unlawful drugs-related activity prior to the offence of which he was convicted. In contrast to the usual obligation on the prosecution to prove the elements of the allegations against the accused, the burden was on the applicant to prove, on the balance of

probabilities, that he acquired the property in question other than through drug trafficking. Following the judge's inquiry, a substantial confiscation order - £ 91,400 - was imposed. If the applicant failed to pay this amount he was to serve an extra two years' imprisonment, consecutive to the nine year term he had already received in respect of the November 1995 offence.

34. However, the purpose of this procedure was not the conviction or acquittal of the applicant for any other drugs-related offence. Although the Crown Court assumed that he had benefited from drug-trafficking in the past, this was not, for example, reflected in his criminal record, to which was added only his conviction for the November 1995 offence. In these circumstances, it cannot be said that the applicant was "charged with a criminal offence". Instead, the purpose of the procedure under the 1994 Act was to enable the national court to assess the amount at which the confiscation order should properly be fixed. The Court considers that this procedure was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to impose upon a properly convicted offender. This, indeed, was the conclusion which it reached in its Welch v. the United Kingdom judgment of 9 February 1995 (Series A no. 307-A) when, having examined the reality of the situation, it decided that a confiscation order constituted a "penalty" within the meaning of Article 7.

35. The Court has also considered whether, despite its above finding that the making of the confiscation order did not involve the bringing of any new "charge" within the meaning of Article 6 § 2, that provision should nonetheless have some application to protect the applicant from assumptions made during the confiscation proceedings.
However, whilst it is clear that Article 6 § 2 governs criminal proceedings in their entirety, and not solely the examination of the merits of the charge (see, for example, the Minelli v. Switzerland judgment of 25 March 1983, Series A no. 62, § 30, the Sekanina v. Austria judgment of 25 August 1993, Series A no. 266-A, and the Allenet de Ribemont v. France judgment of 10 February 1995, Series A no. 308), the right to be presumed innocent under Article 6 § 2 arises only in connection with the particular offence "charged". Once an accused has properly been proved guilty of that offence, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning referred to in paragraph 28 above (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, § 90).

36. In conclusion, therefore, the Court holds that Article 6 § 2 was not applicable to the confiscation proceedings brought against the applicant.

The court also considered the question whether there had been a breach of Article 6.2:

42. The Court's starting point in this examination is to repeat its above observation that the statutory assumption was not applied in order to facilitate finding the applicant guilty of an offence, but instead to enable the national court to assess the amount at which the confiscation order should properly be fixed (see paragraph 34 above). Thus, although the confiscation order calculated by way of

the statutory assumption was considerable –£ 91,400 – and although the applicant risked a further term of two years' imprisonment if he failed to make the payment, his conviction of an additional drug-trafficking offence was not at stake.

43. Further, whilst the assumption was mandatory when the sentencing court was assessing whether and to what extent the applicant had benefited from the proceeds of drug trafficking, the system was not without safeguards. Thus the assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. The court was empowered to make a confiscation order of a smaller amount if satisfied, on the balance of probabilities, that only a lesser sum could be realised. The principal safeguard, however, was that the assumption made by the 1994 Act could have been rebutted if the applicant had shown, again on the balance of probabilities, that he had acquired the property other than through drug trafficking. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice.

44. The Court notes that there was no direct evidence that the applicant had engaged in drug trafficking prior to the events which led to his conviction. In calculating the amount of the confiscation order based on the benefits of drug trafficking, therefore, the judge expressed himself to be reliant on the statutory assumption (see paragraph 13 above). In reality, however, and looking in detail at the steps taken by the judge to reach the final figure of £ 91,400, the Court notes that in respect of every item taken into account the judge was satisfied, on the basis either of the applicant's admissions or evidence adduced by the prosecution, that the applicant owned the property or had spent the money, and that the obvious inference was that it had come from an illegitimate source. Thus the judge found, "real indications on the civil basis of proof" that the sale of the house to X had not been genuine and was instead a cover for the transfer of drug money (see paragraph 14 above). As for the additional £ 28,000 which the applicant admitted receiving in cash from X, the judge said: "No sensible explanation for the involvement of [X] was given to me at all, and it is impossible, in my judgment, to see any sensible reason other than that ... it was a simple payment." Similarly, when assessing the amount of the applicant's expenditure on cars, the judge based himself on the lowest of the applicant's estimates as to how much he had spent (see paragraph 16 above). Since the applicant was not able to provide any record explaining the source of this money, the judge assumed that it was a benefit of drug trafficking. On the basis of the judge's findings, there could have been no objection to including the matters in a schedule of the applicant's assets for the purpose of sentencing, even if the statutory assumption had not applied.

45. Furthermore, the Court notes that, had the applicant's account of his financial dealings been true, it would not have been difficult for him to rebut the statutory assumption; as the judge stated, the evidentiary steps which he could have taken to demonstrate the legitimate sources of his money and property were "perfectly obvious and ordinary and simple" (see paragraph 13 above). It is not open to the applicant to complain of unfairness by virtue of the fact that the judge may have

> included in his calculations assets purchased with the proceeds of other, undocumented forms of illegal activity, such as "car ringing".

c. R v Risdale-Tomblin (Court of Appeal)

On 16 October 2001 in *R v Risdale-Tomblin,*[51] Rose LJ, in dealing with an application for permission to appeal against a confiscation order made under the *Criminal Justice Act 1988,* is reported as having said that:

> before dealing with the merits of the present application, it was pertinent to say that it was very important, when judges passed sentence, that they made full use of all the relevant powers which had been conferred on them by Parliament. The power to make a confiscation order was not limited to offences involving drug trafficking. On the contrary, the Criminal Justice Act 1988, by sections 71 and 72AA, as inserted by the Proceeds of Crime Act 1995, conferred wide powers to confiscate benefits derived from criminal conduct.
>
> In the experience of the court, those powers were very rarely exercised by Crown Court judges, and it was desirable that they should be used much more frequently in appropriate cases.
>
> The present case afforded a good example of the trial judge exercising those powers in relation to a solicitor. There were many others including, but not limited to, professionals such as accountants and financial advisers in relation to whom confiscation orders would often be appropriate.

6. Reactions to the Bill

None of the provisions described above appears to make any significant departure from the equivalent provisions in the published draft clauses. However, the numbering of the clauses has changed. In extracts below, from comments made in the consultation on the draft clauses,[52] the numbering of the Bill clauses is shown in square brackets alongside references to the draft clauses .

In its briefing provided for Second Reading of the Bill, the Law Society said:

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51 reported in *The Independent*, 17 October 2001

52 *Proceeds of Crime: Consultation on Draft Legislation*: Cm 5066

> The Bill will apply retrospectively. This is wrong in principle, is incompatible with the Human Rights Act, and will cause confusion and uncertainty. It is also not clear how such legislation would work in practice.
>
> Proprietary rights are complex, often involving third parties, legitimate business and personal interests and a number of jurisdictions. Previously all such restraint orders were dealt with in the High Court. Restraint orders are now to be dealt with in the Crown Court to be heard by a circuit judge, although complexity of proprietary rights is still recognised by the fact civil recovery is still to be heard in the High Court.
>
> The Law Society is concerned as to whether judges and prosecutors will have the training and specialist expertise required to deal with these complex matters, or that Crown Courts will have sufficient time to have the matters listed and dealt with, without impacting on court business.
>
> The Law Society recommends that
>
> I. Public funding be available to apply to the High Court for variation of a restraint order;
> II. No application for a restraint order is made without approval of an appropriate person in the relevant

In commenting on the draft clauses, the civil liberties pressure group Liberty made the following points:

> 3.1 In assessing the overall effect of the Draft Bill, it is particularly important to note that it proposes that wide reaching criminal confiscation may be triggered by a potentially much lower and more trivial qualifying threshold of offending behaviour.
>
> […]
>
> 3.5. Thus the combined effect of clauses 72 [75] and 73 [76] is to extend the scope of confiscation to two offences in a six year period regardless of their nature. In addition, specific powers are given to magistrates' courts to commit a person to the crown court for a confiscation hearing (see clause 67 [70]). Thus the criminal courts will now theoretically have the power to embark on wide ranging confiscation proceedings in circumstances where a person is convicted of nothing more than two shoplifting offences over a two-year period.
>
> 3.6 The fact that the system will apply to any type of offence, which a defendant is convicted of twice, represents a new lower threshold for triggering criminal confiscation and can be contrasted with many practices around the world. The scheme appears to be unique in the world in terms of justifying such stringent measures on the basis of such a minimal qualifying offences. The following are examples of reverse burden schemes, which confiscate the proceeds of crime beyond those profits directly relating to formal convictions, but which have a higher qualifying threshold:

(i) The French system justifies a draconian process of confiscating any deemed proceeds of crime, but the offences are limited to crimes against humanity (articles 213-3 of the Code) drugs (article 222-49) and prostitution (article 225-24).

(ii) In Finland a court cannot exercise its discretion to confiscate proceeds beyond the trigger offences unless the particular offence is habitual or professional (no further definition given).

(iii) The closest system in Europe to that which the Draft Bill proposes is in Denmark where a new Bill empowers the Courts to order partial or total confiscation of property where a person is convicted of offences with a six year maximum (clause 76a) or of "a particularly aggravated nature" (clause 236).

(iv) The Australian Federal provisions relate to serious offences namely (a) a serious narcotics offence, (b) an organised fraud offence or (c) a money laundering offence in relation to the proceeds of a serious narcotics offence or an organised fraud offence (Proceeds of Crime Act 1987 s.7).

(v) The New Zealand Proceeds of Crime Act 1991 generally requires an evidential link to the offences that form the basis for the conviction, save in relation to drug convictions which occasion a reverse burden in relation to property and expenditure in the previous two years (s.28(4)).

(vi) The Canadian confiscation provisions are contained in Part X11.2 of the Criminal Code. They apply to any "enterprise crime offence", and a list of such offences is contained in section 462.3, which includes drugs offences, frauds, breaches of trust by public officers and laundering offences.

3.6 The potentially trivial nature of the qualifying threshold in the draft bill increases the draconian nature of the scheme and heightens the need for substantial justification for the new proposals.

[…]

4.3 In looking at the reality of confiscation proceedings, a defendant is effectively tried for completely unspecified allegations of criminal conduct that are made against his entire estate once the trigger convictions are obtained. It is submitted that in order to justify the use of a reverse burden of proof in terms of human rights law it is necessary from the point of view of public policy to conclude that a defendant convicted of no more than two offences on separate occasions in a six year period must forfeit a right of equality before the law in relation to his entire estate.

> 4.4. The crown have previously argued in *R v Benjafield* and *McIntosh v HM Advocate*, that confiscation proceedings do not constitute a criminal charge. The matter is likely to be ultimately determined by the case of *Phillips v UK* [53]and *R v Rezvi and Benjafield* which is currently on appeal to the House of Lords. LIBERTY takes the view that the proceedings do constitute a criminal charge.
>
> 5.1 LIBERTY submits that Parliament should not employ the reverse burden system in the way proposed by the Draft Bill, since to do so will result in a system which is too draconian in nature and cannot be justified on the basis of necessity and fairness. Three concerns are raised in relation to the use of reverse burdens.
>
> 5.2 The reverse burden scheme is historically anomalous in the context of the English legal history and tradition.
>
> […]
>
> 5.3 The reverse burden scheme endorses potentially irrational assumptions.
>
> 5.3.1 The application of the statutory assumptions creates a mandatory forensic exercise where there is potentially no rational connection between the facts proved by way of the trigger convictions and the ultimate facts presumed.
>
> […]
>
> It is noted that Lord Prosser described the assumptions (presumably in the abstract) in McIntosh in the Scottish High Court of Judiciary at paragraph 31 as "in a quite literal sense baseless" and suggested that there must be "proved criminative circumstances" before assumptions could be applied to any piece of property.
>
> 5.4 The reverse burden system is incompatible with a generally shared international approach.

The all party legal human rights organisation Justice supported Liberty's conclusions, adding:

> ... he effect of these provisions is to impose a persuasive reverse onus of proof on the defendant which impacts significantly on the presumption of innocence as guaranteed by Article 6.2.

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[53] Judgment was given in *Phillips v UK* on 5 July 2001, after Liberty's submissions were made: see discussion below

> 11. Although such presumptions are not necessarily incompatible with Article 6.2. they must be kept within reasonable limits, having regard to the importance of fair trial rights:[54]
>
> A. Since confiscation orders may be made following any conviction in the Crown Court (clause 4 [6]) and given the broad definition of criminal lifestyle, defendants are likely to be faced with confiscation on the basis of a reverse onus of proof in a very wide range of cases, not necessarily involving the most serious offences.
>
> B. The provisions appear to create a persuasive rather than an evidential burden of proof, however the objectives of the legislation could equally be achieved by the imposition of an evidential burden only…. It is notable that in the passage through Parliament of the recent Terrorism Act, a reverse onus clause relating to the possession of equipment for use in terrorist offences, (now section 118) which had originally transferred a persuasive burden of proof, was amended, following concerns expressed in Parliament.[55]
>
> […]
>
> D It is also relevant, in terms of the proportionality of the mandatory assumptions, that the Bill establishes a separate regime for Scotland, which makes the assumptions discretionary (Part III of the Bill). This calls into question the necessity of the mandatory assumptions in England and Wales. It also raises the possibility that the Bill would be found to discriminate, under Article 14 of the ECHR in conjunction with either Article 6 or Article 1 Protocol 1, against those in respect of whom confiscation orders were made in England and Wales.
>
> […]
>
> 13. The application to confiscation orders of the principle of equality of arms, which requires that one party to proceedings should not be placed at a substantial disadvantage, which is protected by Article 6(1), would apply irrespective of whether confiscation orders are considered to be criminal in nature, since the order will in any event amount to a determination of civil rights and obligations, and therefore attract the protection of Article 6 (1).

An article in the *Aberdeen Press and Journal* on 19 October 2001, reported mixed reactions to publication of the Bill:

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54 *Salabiaku v France* 13 EHRR 379

55 HC Deb 23 May 2000 Col 754. Section 118 now states that the reverse onus of proof is satisfied "if the person adduces evidence which is sufficient to raise an issue with respect to the matter" unless the prosecution can prove the contrary beyond reasonable doubt

The police have welcomed the move, as it is very frustrating knowing someone has funded their lifestyle through crime, but have covered their tracks so no evidence can be found against them.

[-]

Seizing the proceeds of criminal activity is reckoned to be one of the most effective deterrents against crime.

Many criminals regard prison as an occupational hazard, and put money aside to keep their partners and families in the style they are accustomed to.

Seize these funds and not only do they lose prestige in the criminal underworld, but their crimes become unprofitable.

Last week, drug dealer Gordon Flett had nearly £ 44,000 of his assets seized by the High Court in Edinburgh. Grampian Police found that the Aberdeen man made more than £ 100,000 from drug trafficking in the three years leading up to his arrest in September last year.

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While the new legislation would have made the police's job easier, an Executive spokesman explained it is not going to be a replacement.

"The priority will remain to secure a criminal conviction, but we have to realise in some cases it will be impossible, for example if there will be intimidation of witnesses.

"In these cases, the individual has rights but you have to be balanced against the rights of communities who do not want drugs in their area.

"The criminal is still made to pay for the misery they inflict on communities.

"Unless the individual can prove beyond the satisfaction of the court that their lavish lifestyle was financed through legitimate means, we think it's right to take the proceeds of criminal activity away from them."

But the Proceeds of Crime Bill has not been universally welcomed. Rosemarie McIllwhair, director of the Scottish Human Rights Centre, has some reservations.

"Our first concern is with the Civil Recovery Unit. They're planning on using it when they cannot get a conviction, but we would say they have no right to take stuff in the first place if they cannot get a conviction.

"That potentially breaches your privacy, as maybe you don't want to reveal you got the money in a legacy from an aunt, or whatever. It should be up to the Crown to prove your guilt.

> "When you have not been prosecuted or convicted, we would have real concerns about your rights to a fair trial.
>
> [-]
>
> "We do recognise the need to address these criminals - it's a very difficult balancing act. Presumably the Crown needs more money to deal with these situations where they need more evidence as if they had more evidence, they should be able to secure a criminal conviction."

C. Civil recovery of the proceeds etc of unlawful conduct

The first two chapters of Part 5 of the Bill introduce the controversial new right of action[56] in the civil courts to recover property which is, or represents, property obtained through unlawful conduct. It is specific to the enforcement authority, which will be the Director of the Assets Recovery Agency in England and Wales and Northern Ireland, and the Scottish Ministers in Scotland. The provisions for all three jurisdictions are grouped together, although there are separate clauses for Scotland for most of the procedures. The essence of the civil recovery scheme is that the enforcement authority may apply to the High Court or Court of Session for a recovery order, and the court must make such an order if it is satisfied, on the balance of probabilities, that any property is recoverable. Chapter 2 contains extensive provisions for interim measures to be taken where necessary, to ensure that property which may ultimately be held to be recoverable will remain available and have its value preserved while the issues are investigated and resolved.

1. How part 5 differs from the published draft clauses

Although the scheme is broadly similar to the draft published for consultation in March 2001, there have been considerable drafting changes with some additions and changes in substance. Probably the most significant of these are:

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[56] Although it is not referred to in the clauses as a right of action

- under clause 267 (3)(b) the court is now expressly barred from making, in a recovery order, any provision which is incompatible with any of the Convention rights[57],
- there are new provisions dealing with the treatment of pension rights and insolvency (clauses 274 and 275,
- there is provision for the court to make consent orders when the parties have agreed terms (clause 276),
- clause 287 now sets a limitation period of ten years within which proceedings for a recovery order must be brought,
- clause 286 paves the way for a financial threshold to prevent recovery proceedings where the total value of the recoverable property is expected to be less than a prescribed amount, and
- Chapter 3, dealing with the recovery of cash in summary proceedings, has been added.

When the clauses were published, the Government was said to be considering what further provisions might be needed:

> Civil recovery is not yet fully integrated into the network of other legal provisions determining priorities for claims over property. There is a particular need to define the relationship between civil recovery and insolvency proceedings, for example, having regard to the risk that holder of criminal assets and their associates may attempt to use insolvency as a means of avoiding civil recovery. The Government is also anxious to ensure that civil recovery fits neatly into the processes governing the administration of the estates of deceased persons. The relationship with other forms of property-related proceedings and law may very well also need to be clarified.
>
> Provision may need to be made for the court to mitigate final recovery orders if, exceptionally, the order could not be made without breaching the court's duty under Section 1 of the Human Rights Act to act in accordance with the ECHR (e.g. for reasons of exceptional hardship to the respondent amounting to an unwarranted interference with a Convention right). It is however intended that any such mitigation will be genuinely exceptional. For example the recovery of the family home, if it represents the proceeds of criminal conduct, should not normally be mitigated unless children or elderly dependants are involved, and not even then if those concerned can reasonably be expected to find accommodation or shelter elsewhere (for example from housing authorities.
>
> Provision is to be made for settlement of claims between the parties and without the need for litigation, where the Director is able to reach an agreement with the respondent on terms which he considers to be in the best interests of his statutory functions and priorities.

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[57] i.e. under the European Convention on Human Rights which was incorporated into domestic law by the Human Rights Act 1998

> The Government is not minded to insert a limit on the period after criminal conduct during which property will be recoverable, but is considering this point carefully.
>
> Further consideration is being given to what powers will be required by interim receivers, and at the final recovery order stage by trustees, in order to discharge their functions, and whether they should be set out more fully than has so far been done in the draft clauses.[58]

2. Recoverable property

The meaning of recoverable property is explained in Chapter 4 (which also applies to proceedings for recovery of cash, under Chapter 3).

The starting point, under clause 302(1) is that:

> Property obtained through unlawful conduct is recoverable property.

The meanings of "**unlawful conduct**" and "**property obtained through unlawful conduct**" are explained in clauses 246 and 247, clause 310 (4) defines "**property**", while clauses 302 to 307 deal with situations where the original recoverable property has been disposed of but is represented by other property, or has been mixed with other property (e.g. in a bank account), and where recoverable property has produced profits. Clause 250 introduces the concept of "**Associated property**", which will be relevant when the court would be unable to make an effective order over recoverable property in isolation from other property which is not recoverable property.

Clause 246 defines conduct as unlawful either if it occurred in the United Kingdom and is unlawful under the criminal law of the part of the United Kingdom in which it occurred, or if it occurred in a country outside the United Kingdom and would be unlawful if it occurred in any part of the United Kingdom as well as being unlawful under the criminal law of the country where it actually occurred. Subsection (3) specifies that:

> The court must decide on a balance of probabilities whether it is proved –
> (a) that any matters alleged to constitute unlawful conduct have occurred, or
> (b) that any person intended to use any cash in unlawful conduct.

Clause 247 provides that:

> (1) A person obtains property through unlawful conduct (whether his own or another's) if he obtains property by or in return for the conduct.

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[58] Proceeds of Crime: Consultation on Draft Legislation: March 2001:Cm 5066

The *Explanatory Notes*[59] provide examples:

- by the conduct - for example by stealing it, or by obtaining it by means of dealing in illicit drugs, or
- in return for the conduct - for example by being paid to commit murder or arson, or taking a bribe to give false evidence or corruptly award a contract.

Clause 247(2) widens the effect, by providing

In deciding whether any property was obtained through unlawful conduct –
(a) it is immaterial whether or not any money, goods or services, were provided in order to put the person in question in a position to carry out the conduct,
(b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.

The *Explanatory Notes*[60] explain the purposes of those provisions:

> The purpose of subsection (2)(a) is to ensure that property counts as having been obtained through unlawful conduct regardless of any investment in that conduct. So if a person buys illicit drugs with honestly come by money, and sells them at a profit, the whole of the proceeds of the sale will count as having been obtained through unlawful conduct, and not just the profit.
>
> Subsection (2)(b) provides that it is not necessary to show that property was obtained though a particular kind of unlawful conduct, so long as it can be shown to have been obtained through unlawful conduct of one kind or another. So it will not matter, for example, that it cannot be established whether certain funds are attributable to drug dealing, money laundering, brothel-keeping or other unlawful activities, provided it can be shown that they are attributable to one or other of these in the alternative, or perhaps some combination.

"**Property**" is widely defined by clause 310(4):

> Property is all property wherever situated and includes –
> (a) money
> (b) all forms of property, real or personal, heritable or moveable,
> (c) things in action and other intangible or incorporeal property.

Clauses 302 provides that if property obtained through unlawful conduct has been disposed of, it is recoverable property only if it is held by a person into whose hands it

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59 *Bill 31–EN*: Home Office October 2001: Para 281
60 *Bill 31–EN*: Home Office October 2001: Para 282

may be "**followed**", which means either a person who obtained it on a disposal by the person who obtained it through unlawful conduct, or a person who obtained it on a further disposal by him, and so on.

The effect of clause 303 is that property which represents the original property obtained through unlawful conduct itself becomes recoverable property. When a person disposes of the original recoverable property (or that which represents it) and receives other property in place of it, that other property also becomes recoverable property. Such representative property may also be "followed".

Clause 304 provides that if a person's recoverable property is "**mixed**" with other property (not necessarily his own) that portion of the "mixed" property which is attributable to the recoverable property represents the property obtained through unlawful conduct. Four illustrations are given in subsection (3). These are where recoverable property is used:

> (a) to increase funds held in a bank account,
> (b) in part payment for the acquisition of an asset,
> (c) for the restoration or improvement of land,
> (d) by a person holding a leasehold interest in the property to acquire the freehold.

As these are expressed as "examples" (possibly the most obvious or common examples) the list is not exhaustive and there may be many other situations in which recoverable property becomes "mixed" with other property.

Clause 305 provides that where profits accrue in respect of recoverable property, the profit will also be treated as representative property.

Both the "tracing" and the "following" provisions could start ripple effects or chains as a result of which vast quantities of property in the hands of numerous people would be rendered technically "recoverable". However, this is subject to general exceptions in clause 306, which provide stops to the spreading effect. Property ceases to be recoverable property when it:

(1) passes to a person who obtains it in good faith, for value and without notice that it is recoverable property,
(2) is vested, forfeited or otherwise disposed of in pursuance of Part 5 powers,
(3) it is recovered by a claimant in civil proceedings based on the defendant's unlawful conduct,
(4) it is paid to a person under a compensation order, or
(5) it is paid to a person under a restitution order under specified statutes.
Subsections (8) and (9) prevent property from being recovered if it is already subject to a restraint order, or has been taken into account in making a criminal confiscation order.

Additionally, clause 277 prevents the court from making a recovery order beyond that which the court thinks necessary to satisfy the enforcement authority's right to recover the original property [61] .

"**Associated property**" is defined by clause 250(1) to mean:

> property of any of the following descriptions (including property held by the respondent) which is not itself the recoverable property –
> (a) any interest in the recoverable property,
> (b) any other interest in the property in which the recoverable property subsists,
> (c) if the recoverable property is a tenancy in common, the tenancy of the other tenant,
> (d) if (in Scotland) the recoverable property is owned in common, the interest of the other owner,
> (e) if the recoverable property is part of a larger property, but not a separate part, the remainder of that property.

The *Explanatory Notes*[62] give the following examples:

> In paragraph (a) the associated property might be a tenancy in a recoverable freehold. In paragraph (b), where a lease in a freehold block of flats had been purchased with recoverable property, another lease in the same block bought with legitimate money would be associated property. In paragraphs (c) and (d) where two people buy a car together, one with recoverable cash and one with legitimate cash, the share of the person who bought with legitimate cash is the associated property. In paragraph (e), where a painting is recoverable property but it had been framed using legitimate money, the frame would be associated property.

As mentioned above, the existence of "associated property" will affect enforcement: it is not relevant to the identification of "recoverable" property.

3. Limitation

Clause 287 sets a limitation period within which proceedings for a recovery order must be brought, through amendments to the limitation legislation in the three jurisdictions. Proceedings must be brought within twelve years of the original property being obtained through unlawful conduct.

This is in line with the present twelve year limitation period which applies to actions for the recovery of land, and certain other actions. The usual limitation period for actions based on civil wrongs (not involving personal injury) is six years.

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[61] This limitation does not prevent a court which makes a recovery order in respect of property from also ordering recovery of profits which have accrued in respect of it.

[62] *Bill 31–EN*: Home Office October 2001: Para 289

The Law Commission recently recommended[63] the introduction of a single, core limitation regime, which will apply, as far as possible, to all claims for a remedy for a wrong, claims for the enforcement of a right and claims for restitution. That would be tighter than the limitation provisions in the Bill. The new regime proposed by the Law Commission will consist of:

- · A primary limitation period of three years starting from the date on which the claimant knows, or ought reasonably to know (a) the facts which give rise to the cause of action; (b) the identity of the defendant; and (c) if the claimant has suffered injury, loss or damage or the defendant has received a benefit, that the injury, loss, damage or benefit was significant.
- · A long-stop limitation period of 10 years, starting from the date of the accrual of the cause of action or (for those claims in tort where loss is an essential element of the cause of action, or claims for breach of statutory duty) from the date of the act or omission which gives rise to the cause of action (but for personal injuries claims see below).

We recommend that the above core regime should apply without any qualification to the following actions: the majority of tort claims, contract claims, restitutionary claims, claims for breach of trust and related claims, claims on a judgment or arbitration award, and claims on a statute.

The core regime will be modified in its application to claims in respect of personal injuries. The court should have a discretion to disapply the primary limitation period, and no long-stop limitation period will apply. All personal injury claims will be subject to this modified regime, whether the claim concerned is made in negligence or trespass to the person.

We recommend that claims to recover land and related claims, though not subject to the core regime, should be subject to a limitation period of the same length as the long-stop limitation period, running from the date on which the cause of action accrues.

We also recommend that the core regime should extend, but with some qualifications, to the following claims: claims under the Law Reform (Miscellaneous Provisions) Act 1934, the Fatal Accidents Act 1976 and the Consumer Protection Act 1987; claims for conversion; claims by a subsequent owner of damaged property; claims in relation to mortgages and charges; and claims under the Companies Act 1985 and in insolvency proceedings. Subject to a few exceptions, we do not propose to alter other specific limitation periods laid down in enactments other than the Limitation Act 1980.

4. Financial threshold

Clause 286 provides:

(1) At any time when an order specifying an amount for the purposes of this section has effect, the enforcement authority may not start proceedings for a recovery order unless the authority reasonably believes that the aggregate value

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[63] Limitation of Actions: Law Com No 270, 9 July 2001

> of the recoverable property which the authority wishes to be subject to a recovery order is not less than the specified amount.
> (2) The power to make an order under subsection (1) is exercisable by the Secretary of State after consultation with the Scottish Ministers.
> (3) If the authority applies for an interim receiving order or interim administration order before starting the proceedings, subsection (1) applies to the application instead of to the start of the proceedings.
> (4) This section does not affect the continuation of proceedings for a recovery order which have been properly started or the making or continuing effect of an interim receiving order or interim administration order which has been properly applied for.

The effect is explained in the *Explanatory Notes*[64] as follows:

> 383. Subsection (1) provides that the enforcement authority may not take proceedings for a recovery order unless it reasonably believes that the total value of the recoverable property is not less than an amount to be specified in an order. This ensures that civil recovery will not be used in minor or trivial cases. The order will be made by the Secretary of State following consultation with Scottish Ministers (subsection (2)). The threshold applies only at the time the enforcement authority starts proceedings, or applies for an interim receiving order or interim administration order (subsection (3)). As long as the threshold is observed at the start of the proceedings, it will not matter if for example the Director subsequently discontinues proceedings in respect of certain property and the value of the remaining property is less than the amount specified in the order. The proceedings will be able to continue (subsection (4)).

5. Interim receiving orders and interim administration orders

An interim receiving order (in Scotland an interim administration order) may be made on the application of the enforcement authority. It is an order for –

> (a) the detention, custody or preservation of property, and
> (b) the appointment of an interim receiver/administrator.[65]

An interim receiving or administration order may be granted before proceedings have been started, and the application may be made without notice

> if the circumstances are such that notice of the application would prejudice any right of the enforcement authority to obtain a recovery order in respect of any property.[66]

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64 *Bill 31–EN*: Home Office October 2001: Para 383

65 clauses 251 and 259

66 clauses 251(3) and 259(3)

The *Explanatory Notes* offer the explanation that:[67]

> It may be necessary to act swiftly and without alerting potential parties, for example, to prevent the property from being concealed or disposed of.

Before making an order, the court must be satisfied, in every case, that there is "a good arguable case"[68] or (in Scotland) a "*probabilis causa litigandi*"[69]

> (a) that the property to which the application for the order relates is or includes recoverable property, and
> (b) that, if any of it is not recoverable property, it is associated property.

If the property to which the application relates includes property alleged to be associated property and the enforcement authority has not established the identity of the person who holds it, the court must also be satisfied that the authority has taken all reasonable steps to do so.

The "good arguable case" requirement reflects the test developed in the context of Mareva[70] injunctions, where the applicant must show that he has a "good arguable case" on the main issue of liability (not necessarily one which the judge believes to have a better than 50 per cent chance of success) before the court will grant an injunction freezing the defendant's assets.

Chapter 2 and Schedule 8 contain detailed provisions about interim orders and their effect, and the powers of interim receivers or administrators. An interim order must prevent any dealing with the property to which it applies, subject to any exclusions made in accordance with clause 255 (263 in Scotland). Provision to meet reasonable living expenses, or to carry on a trade, business, profession or occupation may be permitted, but

> An exclusion may not be made for the purpose of enabling any person to meet any legal expenses in respect of proceedings under [Part 5].[71]

6. Recovery orders

The effect of a recovery order being made is to vest the recoverable property in the "trustee for civil recovery" who will be a suitably qualified person nominated by the

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67 Bill 31 – EN:Home Office October 2001: Para 294
68 clause 251(5)
69 clause 259(5)
70 now known as "freezing injunctions in England and Wales.
71 Clauses 255(4) and 263(4)

enforcement authority and appointed by the court to give effect to the recovery order.[72] There are detailed provisions in chapter 2 (and Schedule 4) dealing with powers and points of enforcement, e.g. where property is subject to a right of pre-emption, or joint or associated property is involved.

Clause 276 confers express power on the court to make a recovery order on terms agreed by the parties, provided that any person who is a party to the agreement must be, or be joined as a party to the proceedings. There is no provision for out of court settlement.

7. Reactions to the proposals

In the commenting on the proposals as outlined in the PIU Report[73], the Law Society objected that:

> Complex draconian legislation already exists to deprive convicted offenders of the profits of crime. Despite seemingly sufficient legal provisions to secure this objective the rate of recovery is low. It does not seem sensible therefore to introduce further legislation which merely adds to the existing weight of legislation provisions in the form of civil forfeiture. When we are clearly unable to cope with the current task in hand. It would be better to focus on properly informed reasons as to why the current system does not work effectively. It is suggested that training, legislation consolidation, greater resources and centralisation are appropriate, but not at this stage the introduction of civil forfeiture bearing in mind that existing legislation is judicially recognised as "draconian".

In its briefing prepared for Second Reading of the Bill, it added:

> In civil recovery proceedings there are some protections for the innocent third parties, for example, recovery will not be ordered if recovery of property obtained in good faith would be detrimental to the third party.
>
> However, it is clear that innocent third parties could be caught in this Bill's net. A worse case scenario could be that a honest trader had assets or property restrained as part of a larger investigation. The investigation could take a year to complete before it was decided whether charges were to be laid or not. In the meantime he may become bankrupt. The only route to compensation would be to prove evidence of 'serious default' on the part of the investigating authorities, an almost impossible task.

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[72] clauses 267-8

[73] *Recovering the Proceeds of Crime:* June 2000

> For this reason the Law Society believe that must be protections for the interested third parties. These could include:
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> I. Legal aid for applications to vary restraint orders;
> II. Time limits on investigations;
> III. Subject to existing law on proprietary rights, there should be consistency in excluding property obtained and held in good faith from recovery by any procedure

Commenting on the draft clauses, the Law Society for Scotland said that a protocol should be developed to ensure that consideration was only given to an application for civil forfeiture after a determination had been reached in relation to the criminal proceedings by the Lord Advocate. They said that the relationship between civil and criminal proceedings should be examined further and clear guidance given in the legislation as to when civil forfeiture would be appropriate.

In commenting on the draft clauses, the civil liberties organisation Liberty made clear its objection to the concept of civil recovery as put forward in the draft clauses. Its response is quoted at length below:

> 7.2 Conceptually, the focus of civil recovery is purportedly on the property and not the individual holding the property (Notes for Guidance para 5.6). In this regard, LIBERTY observes that far from being a modern innovation, this is a partial return to an archaic principle of forfeiture 'in rem', which disappeared in English law shortly after the 17th century, due in part to the absurdity of the legal fiction upon which it was based - namely that property itself could be sued . It is respectfully submitted that as a legal concept, it sits alongside other dubious 17th century principles, such as the right to bring criminal prosecutions against property . It is, at best, a dubious concept that requires substantial protection for the holder of property, in order to provide modern protections to the property holder's rights.
>
> 7.3 LIBERTY is fundamentally opposed to the proposed system as a whole because the pursuit of criminal property necessarily involves direct or indirect findings of guilt on the part of the property holder or persons connected to the property. These proposals undermine the presumption of innocence, and will create a system in which accusations by the police will be enough to force people to disclose all their private financial affairs first to the police and then in public at the trial. Even if they are not found "guilty" they will have been humiliated, had to pay for lawyers and had their private life dragged through the newspapers. When it comes to the decision itself there will be no jury and the judge will take the decision on the "balance of probabilities" - a person will be "convicted" on the basis they are "probably" guilty.

7.4 The danger is that individuals will be "convicted" by the civil courts in the eyes of the public without the protections that would be available in the criminal courts (that is precisely why these new proposals are being created). The government's own report states:

"Civil forfeiture would be a significant extension in the powers available to the State to deal with the proceeds of crime. It can be expected to be viewed as controversial by some, because it extends the circumstances where assets can be forfeited by the State without a conviction to the criminal standard."

Civil forfeiture as proposed at the very least it contravenes the spirit of the presumption of innocence by providing an expedient path to findings of criminal guilt with lesser protection. It is submitted that with the safeguards enjoyed by defendants in criminal law being dismantled in this way, it will be easier and cheaper for the State to deal with suspected criminal activity in the civil courts.

7.5 The Notes for guidance themselves indicate that it is the Government's view that is the very protections in place within the criminal justice system, provided by rules of criminal evidence, rules of criminal jurisdiction or the standard of proof that provide the impetus for the proposed method of civil recovery (Notes for Guidance 5.5).

7.6 LIBERTY has approached the proposal by considering Article 6 ECHR, Article 1 Protocol 1 ECHR and section 10 Bill of Rights and by analogy the 8th Amendment to the US Bill of Rights (prohibition on excessive fines and punishment), both of which call for a discrete consideration of proportionality . It is LIBERTY's general submission that the current proposals lack sufficient protection for defendants and third parties.

8. THE THRESHOLD FOR DETERMINING WHEN CIVIL FORFEITURE PROCEEDINGS SHOULD BE BROUGHT IN PREFERENCE TO CRIMINAL PROSECUTION

8.1 Under clause 239 the Director of the Criminal Assets Recovery Agency (CARA) will initiate civil actions in the High Court in order to divest suspected criminals of their unlawfully obtained assets.

8.2 LIBERTY is concerned that the discretion by the Director to bring proceedings is essentially unfettered. In this respect it is noteworthy that in the original Cabinet Office Paper, "Recovering the Proceeds of Crime" that formed the blue print for the current draft it was stated at paragraph 5.26:

"The introduction of civil forfeiture must not perversely affect the priority of law enforcement activity, i.e. the prosecution and conviction of criminals. It is imperative that it is not used as a substitute for criminal proceedings where there is a reasonable chance of securing conviction. And performance measures for civil forfeiture must not drive the system to pursue a civil route for high-value cases regardless of the additional benefits of following the criminal route. There should be a rigorous process to determine the reasons why a criminal prosecution

is not appropriate before civil forfeiture proceedings alone are instigated (emphasis added)".

8.3 LIBERTY therefore submits that a threshold criteria should be incorporated into the scheme, which considers the following four points:

(1) Clause 239 should be modified to prevent the Director from bringing proceedings where there is "no reasonable prospect of obtaining sufficient evidence to charge". This would go some way to ensuring that the priority of law enforcement activity - namely criminal liability - was not being undermined by civil confiscation being deliberately chosen as an easier option.

This is also important in ensuring that civil proceedings were not brought inappropriately simply to exert pressure on a defendant in circumstances which were merely a prelude to criminal proceedings. To that end, LIBERTY notes that the use of civil proceedings as a deliberate public prelude to criminal proceedings may have the effect of the denying a defendant's right to be presumed guilty for the purpose of a criminal investigation (see Allenet de Ribemont v France 20 EHRR 557 , where a public statement by senior police officer that a defendant was guilty of an offence prior to his trial violated the presumption of innocence)

(2) LIBERTY is again concerned that the scheme has been left open to include any type of criminal conduct in which an unspecified amount of benefit has been obtained however minimal. The effect of civil forfeiture proceedings upon the assets of a respondent are substantial and the Government should not be entitled to invoke the power of civil forfeiture other than in the important cases. LIBERTY proposes that clause 239 should therefore have further threshold criteria that the Director can only act "where suspected criminal offences have generated significant revenue". The mechanism for determining 'significant revenue' could be through a minimum amount (e.g. £10,000) that is adjusted upwardly in line with inflation, periodically by statutory instrument. Alternatively, the threshold could be index linked to the Level fines.

(3) The ECtHR has held that a collateral attack on an acquittal would violate a defendant's rights to silence . Accordingly, the proposed civil forfeiture scheme should give the courts the power to prevent proceedings where a defendant has recently been acquitted of criminal charges which then form essentially the same subject matter of the Director's application.

9. SERIOUS RISK OF INJUSTICE SAFEGUARD

9.1 LIBERTY notes that one of the "issues under consideration" (Notes for Guidance para. 5.32) is the question of giving the High Court power not to make an order where to do so would amount to an unwarranted interference with a Convention right. LIBERTY submits that a clause specifically preventing serious risk of injustice is necessary for that reason ..

9.2 However, LIBERTY further submits that the hardship caused by the initiation of proceedings requires a "serious risk of injustice" clause to also be necessary in being a specific factor that the Director should be required to consider in

determining whether to initiate proceedings. it is not merely the is concerned that there is no safeguard of a "serious risk of injustice" clause to stop the Director from pursuing proceedings.

9.3 Examples of serious risk of injustice might include, where the defendant is unable to give evidence because of illness, extreme age, loss of memory or loss of a particular accountancy trail . Given that the scheme applies to conduct outside the jurisdiction it would also be important for the court to prevent proceedings in circumstances where the defendant is unable to obtain evidence because he is exiled from the country for political reasons or is otherwise unfairly prejudiced in amounting a defence.

9.4 LIBERTY notes that the omission to insert a "serious risk of injustice" clause fails to implement the original advice of the Cabinet Office Paper (para 5.21 and 5.22):
"Civil forfeiture would be a significant extension in the powers available to the State to deal with the proceeds of crime. It can be expected to be viewed as controversial by some, because it extends the circumstances where assets can be forfeited by the State without a conviction to the criminal standard. There is of course a careful balance to be struck between the civil rights of the individual and the need to ensure that the State has the tools to protect society by tackling crime effectively…"

9.5 It is for this reason that LIBERTY also submits that it must be presumed that after a number of years, the fairness of proceedings is compromised by the difficulty in adducing evidence. Civil claims usually contain a limitation period for that reason, and it is submitted that there should accordingly be a time limit on the period after alleged criminal conduct during which property may be recovered.

10 UNCERTAINTY IN ALLEGATIONS OF CRIMINAL CONDUCT

10.1 Clause 241 defines unlawful conduct upon which a civil recovery order can be based. It is essentially conduct which is unlawful under the criminal law in England and Wales regardless of whether it takes place in the jurisdiction (Clause 241(2)). Clause 241(6)(b) states that "it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct". LIBERTY does not accept that an allegation of unspecified criminal conduct can ever be a sufficient basis of confiscating a person's assets. Criminal conduct involves both a guilty act and a guilty mind. An allegation cannot fairly be met in circumstances where the nature of the allegation is opaque.

10.2 On a more practical basis the clause will provide a sanction for deliberate non-disclosure in order to protect confidential sources and then claim public interest immunity. Generally, LIBERTY submits that the burden of proof should be on the Director to give all disclosure available in order to specify the nature of the alleged conduct. In circumstances where the Director is unable to provide sufficient details of the nature of the alleged conduct the Court should be

empowered to evoke the serious risk of injustice clause at an early stage in the proceedings (see paragraph 3.5).

11 THE STANDARD OF PROOF

11.1 Clause 241(3) states that "the court must decide on a balance of probabilities whether it is proved that any matter alleged to constitute unlawful conduct have occurred". LIBERTY firstly submits that the fact that the proceedings are civil in form should not necessarily mean that the standard of proof should be on the balance of probabilities. This is because the allegation that makes up the subject matter of the proceedings is criminal in nature. If the government are successful in their proposal that the Director should not be forced to specify the suspected offence in his allegation of criminal conduct, then it may be all the more important to balance out such an advantage to the State, by requiring a standard of proof beyond reasonable doubt (see paragraph 3.7 above).

11.2 In any event LIBERTY has concern over the use of the phrase "balance of probabilities" in clause 241(3) because it has the potential to interfere with a long line of common law development that has articulated the so-called "flexible standard" where criminal allegations are made in civil proceedings. The extensive case law emphasises that a high degree of probability is required before allegations of criminal conduct can be made good in the civil courts .

12. INFORMATION ORDERS

12.1 Clause 264 empowers the court to order that information be given in the civil recovery proceedings by the respondent to proceedings. This may be done on its own motion, or on application by the Director. The court's power is essentially unfettered.

12.2 LIBERTY submits that this power is oppressive and there are no safeguards to prevent its misuse as a "fishing expedition". In essence, once proceedings have been brought, the respondent may be summoned to give evidence in those proceedings and risks contempt of Court in failing to do so. This power amounts to a duty to give information to the government, at risk of contempt of court, in circumstances where there is not yet any reasonable suspicion that a criminal offence has been committed.

12.3 The fact that such answers cannot be usually used against the respondent in subsequent criminal proceedings (Clause 264(5)), is not an adequate safeguard against improper "fishing expeditions". It is of further concern that even the protections of Clause 264(5) may be withdrawn (see Clause 264(5)(b)), and that there is no safeguard to prevent statements given in information orders being used in criminal proceedings against other parties. e.g. the police wish to prosecute A, but there is no reasonable suspicion that he has committed a criminal offence. Proceedings are issued against his associate, B, even though there is no reasonable suspicion that B has committed a criminal offence or that he has any information to that end. However, through the use of a Clause 264 information order, B can be compelled to give a statement about his assets which may not

only assist criminal investigations against A and B, but would be admissible in the prosecution case against A.

12.4 Accordingly, LIBERTY submits that a minimum threshold requirement should be imposed that prevents an information order from being obtainable other than in circumstances where the court is satisfied that the respondent is able to give relevant information that indicates that there is a reasonable suspicion that criminal conduct has been committed in relation to the property in question.

13. CONCLUSIONS IN RELATION TO CIVIL RECOVERY

13.1 LIBERTY objects to the concept of civil recovery as put forward in the draft Bill. Notwithstanding that objection, LIBERTY proposes that any scheme for civil recovery would require the following safeguards.

(1) A minimum requirement of 'reasonable suspicion that a criminal offence has been committed in relation to the property in question', that would need to be satisfied before the Director could bring proceedings.

(2) A minimum financial value to the claim of the assets sought to be recovered, before the Director could bring proceedings.

(3) Full disclosure of what alleged offence had been committed before any requirement was imposed on the respondent to proceedings to answer any claim brought.

(4) The burden of proof to be imposed on the Director that a particular offence had been committed.

(5) The standard of proof that such an offence had been committed not merely to be the balance of probabilities, but "beyond reasonable doubt", or at the very least "the flexible civil standard".

(5) A requirement that there was reasonable grounds to believe that a person against whom an information order was sought could give information that demonstrated that a specified criminal offence had been committed in relation to the property in question.

(6) The same protections in relation to any answers to questions afforded to defendants to be afforded to third parties.

The all party legal human rights organisation Justice added:

Procedural safeguards
16. The civil standard of proof applies in the action brought under this Part. The Consultation Paper (para 5.25) further suggests that the court should be permitted to draw inference from the respondent's failure to provide evidence of the legitimate origins of the property at issue. On the current draft Bill, the burden on

the Agency is further lessened by the provision that it is not necessary for the Agency to establish that assets are the proceeds of one particular kind of criminal activity, provided it can be established that they derive from one of several kinds of crime (clause 241 [247]). It is questionable whether this very low standard of proof is adequate to protect defendants from the arbitrary or discriminatory use of these powers.

17. Although the action is intended to circumvent the criminal process, it is arguably criminal for the purposes of Article 6, since it entails the imposition of a potentially substantial financial penalty following a determination that the respondent has either engaged in criminal activity or has received the proceeds of crime. The extensive and typically criminal investigatory powers available to the Agency in relation to the action also indicates the need for criminal safeguards. In addition to the investigatory powers available under Part VII of the Bill (see below), it is provided that the Agency may draw on information obtained from law enforcement authorities, in bringing the action. Furthermore, it is provided that information obtained in the course of an investigation leading to a civil action for recovery, can later be used in any confiscation proceedings following a criminal conviction.

18. Irrespective of whether the action under Part V is considered criminal in nature, however, it is in Justice's view highly undesirable as a matter of policy for the protections of criminal procedure to be circumvented to this extent. AT a minimum, if civil action are to be pursued by the State in place of prosecutions, then the safeguards applicable in such proceedings should reflect the quasi-criminal nature of the action.

[-]

Scope of the Civil Action

20. As with the powers under Part II, the provisions allowing for civil recovery apply to a wide range of criminal conduct, including minor offences. The broad reach of the provisions raises concerns as to the extent to which the civil action for recovery will be used in place of a prosecution, thereby undermining criminal procedural safeguards.

21. Of particular concern is the lack of any specification, in the Bill, as to the circumstances in which the civil action under Part V may be taken. The Bill does not make the civil action a secondary measure to be taken when a prosecution is impossible or difficult. Furthermore, it would seem that there is nothing in the Bill to prevent a civil action being brought against a person who has already been acquitted in the criminal courts of the crime from which he is alleged to have profited, allowing what amounts to criminal culpability to be redetermined on the basis of a lower standard of proof. Separate issues would arise where a criminal prosecution was brought following a successful civil action by the Agency to recover the proceeds of the criminal conduct at issue, with the risk that the presumption of innocence could be undermined in the criminal proceedings.

D. Recovery of Cash in Summary Proceedings

1. Extension of existing powers

Chapter 3[74] of Part 5 extends the existing powers[75] of seizure and civil forfeiture of cash, so that they will apply:
(a) inland as well as at points of import or export, and
(b) to cash related to all unlawful conduct.

2. Seizure

Clause 293(1) authorises a customs officer or constable to seize cash:

> if he has reasonable grounds for suspecting that it is –
> (a) recoverable property, or
> (b) intended by any person for use in unlawful conduct.

3. Cash which is recoverable property

The introductory provisions in Chapter 1 and the general provisions in Chapter 4 apply to the recovery of cash provisions as well as to the provisions for civil recovery of the proceeds of unlawful conduct. So "**recoverable property"** and "**unlawful conduct**" have the same meanings, and the courts must decide the issues on the balance of probabilities.

"**Cash**" is defined by clause 288(6) to mean

> (a) notes and coins in any currency,
> (b) any other kind of instrument which is within a description set out in an order made by the Treasury.

4. Threshold

There will be a threshold, "the **minimum** amount" below which the powers will not be available. The minimum amount is to be specified in an order under clause 301. According to the *Explanatory Notes*[76] :

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74 These clauses were not published in draft for consultation.
75 Under Part II of the Drug Trafficking Act 1994.
76 *Bill 31–EN*: Home Office October 2001: Para 281

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

The order making power is separate from the power (under clause 286) to specify a minimum amount in the scheme for recovery of the proceeds of unlawful conduct.

5. New search powers

Clauses 288-290 introduce new powers to search for cash, intended to support the powers of seizure. They will be exercisable by a constable or customs officer who is lawfully on any premises and has reasonable grounds to suspect that there is on the premises any cash which is recoverable property or is intended for use in unlawful conduct (clause 288(1)). A suspect may be required to permit a search of his person, but not to submit to an intimate search or a strip search.

6. Safeguards

Clause 289 provides that the powers may normally be exercised only with "the appropriate approval", which will be the approval of a justice of the peace or sheriff, or if that is not practicable, the approval of a senior officer. But the power may be exercised without prior approval if it is not practical to obtain it. If the power has been exercised without the approval of a justice of the peace or sheriff, and either no cash was seized, or cash was detained for less than 48 hours, the officer or constable must submit a detailed report to an independent person who has been appointed for the purpose. This will explain why he thought the powers were exercisable, and why it was not practicable to obtain the approval of a judicial officer. There will be codes of practice setting out how the powers are to be exercised (clauses 291 and 292)

7. Detention and forfeiture

The seized cash may not be held for more than 48 hours except by order of a justice of the peace or sheriff. A magistrates' court or sheriff may order forfeiture of the cash or any part of it if satisfied, on the balance of probabilities, that it is recoverable property or is intended by any person for use in unlawful conduct.

E. Money laundering

1. Introduction and background

Part 7 of the Bill creates a unified scheme of money laundering offences. As was noted earlier, money laundering provisions were initially adopted in the UK in response to policy priorities. This led to separate provision being made for drug-related laundering (in

the *Drug Trafficking Offences Act 1986* and later the *Drug Trafficking Act 1994*) and terrorism-related laundering (in the *Prevention of Terrorism (Temporary Provisions) Act 1989* and the *Terrorism Act 2000*). A general set of anti-laundering offences later appeared through 1993 amendments to the *Criminal Justice Act 1988*. As the explanatory notes prepared by the Home Office observe, the result of this history, combined with the fact that Scotland and Northern Ireland have had specific legislation in some cases for their jurisdictions, means that at the time the Bill is introduced, 'there are five sets of money laundering offences in force, each applying to a different range of predicate offences and/or jurisdictions'.[77]

UK money laundering controls have sought to back up strong criminal sanctions with a regime which compels those who work in the financial sector to provide intelligence of suspected money laundering transactions to the authorities. The regulated financial sector is also required to have adequate procedures in place so that it is able to identify and act on suspicious transactions in a manner which will assist the authorities in bringing prosecutions.

The main instrument for the financial sector is the *Money Laundering Regulations 1993*. Like the sections which the *Criminal Justice Act 1993* added to the *Criminal Justice Act 1988*, the Regulations implement the first EC Directive on Money Laundering (91/308/EEC).[78] Their effect is to require financial institutions to verify the identity of all customers opening business relations with them including high value one-off transactions. Firms must also keep records of their identification. Financial sector staff have to be trained in anti-money laundering practices and suspicions of money laundering must be reported through a designated officer in the business. Suspicious transactions are then reported by that Officer to the National Criminal Intelligence Service.

The Performance and Innovation Unit (PIU), in its June 2000 report on *Recovering the proceeds of crime*, noted that despite a fairly high number of reports of suspicious transactions prosecutions in England and Wales for money laundering are comparatively low:[79]

> **9.7** Historically, however, there have been very few prosecutions and convictions for money laundering in England and Wales. In the period 1987 to 1998, there were only 357 prosecutions and 136 convictions. There has, however, been an increase in both prosecutions and convictions since 1994 owing to increased awareness and education around the enhanced provisions of CJA 1993 which extended money laundering offences to cover the proceeds of all indictable offences.

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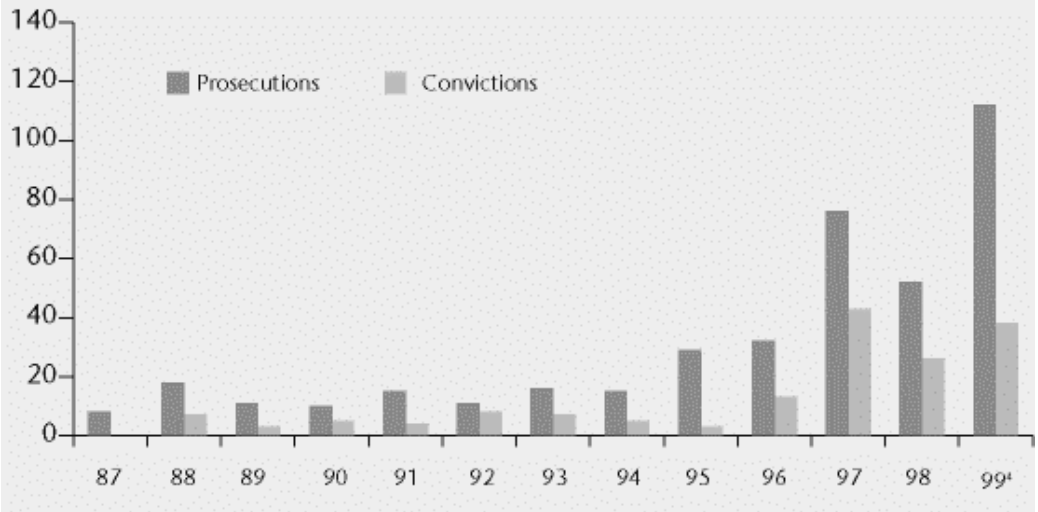
77 A predicate offence is the initial offence whose proceeds are later laundered. Bill 31 EN 2001-02, p 2

78 SI 1993 No 1933. These regulations, in the form in which they were first enacted, are available on the HMSO website, www.hmso.gov.uk

79 *Recovering the proceeds of crime*, Performance and Innovation Unit, June 2000, paras 9.7-8; Figure 9.1 http://www.cabinet-office.gov.uk/innovation/2000/crime/recovering/contents.htm

Figure 9.1: Money laundering prosecutions and convictions[3]



9.8 Despite recent increases in the number of UK prosecutions, they are still relatively few in number. By contrast, Italy had 538 prosecutions and the USA 2,034 prosecutions in 1995 alone.[6] And the conviction rate of 44 per cent is also low by comparison with an average Crown Court conviction rate of 76 per cent,[7] indicating the difficulties of dealing with the complexity of money laundering offences in court.

3 Source: Crime and Criminal Justice Unit (RDS), Home Office.
4 Provisional 1999 data.
5 Source: Crown Prosecution Service (CPS).
6 Source: FATF.
7 1998 figure per Digest 4, Home Office RDS.

More recent figures show that the number of suspicious transaction reports has increased after remaining static at the end of the last decade:

	Number
1997	14,148
1998	14,129
1999	14,500
2000	18,408
January to September 2001	19,981

The Government is now cautious to discourage direct correlation between the absolute number of reports and prosecutions. In the written answer from which these figures are taken, the Economic Secretary to the Treasury observed that:

> suspicious transaction reports may be only one small part of a complex investigation that ultimately leads to the arrest and conviction of individuals and

> the confiscation of assets. Suspicious transaction reports can provide new information and intelligence that can substantially move an investigation forward as well as providing an invaluable insight into the presence or whereabouts of assets for later confiscation. On occasions they may also simply provide confirmation of information already known to the investigators.[80]

The PIU's report noted that the majority of crime is committed for financial gain and the report proceeds on the principle that it is harmful to society to allow criminal gains to remain in the hands of criminals. It made a number of detailed recommendations specifically on money laundering of which the key themes are:

- improving the use of disclosures in helping law enforcement to attack criminal profits and markets;

- increasing the quantity and quality of disclosures across all institutions where money launderers do business, including bureaux de change and money transmission agents; and

- increasing the money laundering prosecution and conviction rates so that the full force of the legislation is brought to bear in attacking criminal operations.[81]

This Part of the Bill implements one of the PIU report's main recommendations, that the UK's money laundering offences should be consolidated:

> 8.17 Currently there are three types of money laundering offence, depending on whether the underlying crime (or 'predicate offence') was drug trafficking, terrorism or other crime. This creates unnecessary complexity, as prosecutors often have to allege three different offences as alternative counts. And defendants are able to plead to the CJA offence in order to avoid invoking the assumptions under [the Drug Trafficking Act 1994] when it comes to making a confiscation order.
>
> 8.18 A single money laundering offence covering the proceeds of all crime should replace the existing offences, mirroring the proposed changes in confiscation law.[82]

Another PIU recommendation addressed the question of whether the tests for money laundering in the current legislation are inappropriately weighted in favour of defendants. The PIU thought they were:

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80 HC Deb 23 June 2001 c204W
81 PIU report, Chapter 9 Summary, para 9.2
82 PIU report, paras 8.18-19

> **Conclusion 45**: In consolidating the money laundering offences (see Chapter 8), the test for money laundering should be simplified so as to remove obstacles weighting the test unacceptably in the defendant's favour. The Home Office should consider whether this can be achieved by extending all money laundering offences to cover circumstances in which the defendant had reasonable grounds to suspect that he or she was dealing with the proceeds of crime.[83]

The Bill, in clauses 321 to 323, does not adopt this test. The clauses which specify the three main money laundering offences refer only to 'criminal property'. The required mental element ('mens rea') for these offences is contained in c. 329(3) ('Interpretation') which defines criminal property as property which constitutes or represents a person's benefit from criminal conduct. To commit the offences, a person must 'know or suspect' that the property constitutes or represents such a benefit. The test therefore remains a subjective test for the main offences. The PIU report had observed that this standard is hard to prove without an admission of guilt.

The Bill does, however, contain a revised offence of failing to report information about another person's money laundering which applies to the regulated financial sector only (c.324). That offence requires information to be disclosed not only where there is knowledge or suspicion of money laundering, but also where a person has reasonable grounds for knowing or suspecting money laundering. Thus the 'failure to report' offence will now be subject to a less strict negligence-based test.

2. Action outside the Bill

Other PIU recommendations are being taken forward outside this Bill. These recommendations include the introduction of a regulatory regime for bureaux de change and the consideration of whether companies should be obliged to disclose or register the identity of their beneficial owners.

On 15 October 2001, the Chancellor Gordon Brown announced an action plan to combat terrorist finances. He said:

> If fanaticism is the heart of modern terrorism, finance is its lifeblood, and I believe that the whole House will agree on the need to move expeditiously to cut off the supply of terrorist finance.[84]

The action plan sets out the steps which the UK is taking both at home and in international forums to target the transmission of funds to terrorist organisations. A new multi-agency taskforce is to be set up within the National Criminal Intelligence Service with responsibilities for tracing terrorist funds. An investigation is also being launched

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83 PIU report, Chapter 9, conclusion 45

84 HC Deb 15 October 2001 c942

into informal money transmission systems and underground banking and their possible role in facilitating terrorist funding.[85]

When the Financial Action Task Force (FATF - see below) last reported on Britain's anti money laundering regime, it identified the lack of controls on bureaux de change as a weakness of the regime. This point was reiterated in the Performance and Innovation Unit's report. The Treasury has now issued a consultation document on setting up a regulatory regime for bureaux, money transmission agents and cheque cashers ('money service businesses').[86] The consultation period lasts only until 5 November 2001 and the regulatory regime is intended to come into effect from 15 November 2001. The consultation document proposes a regulatory regime operated by Customs and Excise. These businesses are already subject to the *Money Laundering Regulations 1993* but are not regulated by the Financial Services Authority. Customs will create a register, provide training and advice, and ensure that the 1993 Regulations are being properly observed by money service businesses. Customs will gain powers of entry, inspection and prosecution. The document estimates that between 14,500 and 17,000 outlets will fall within the regime.

The Chancellor also announced that consideration is being given to requiring companies to provide information on their beneficial ownership. A consultation document has been promised.

3. Notes on clauses

The money laundering clauses retain many of the elements of the existing provisions but create a single set of offences which are to apply throughout the UK. They make it an offence to:

- conceal, disguise, convert, or transfer criminal property or remove criminal property from the jurisdiction (**c. 321**)

- enter into or become concerned in an arrangement which a person knows or suspects facilitates the acquisition, retention or use of criminal property by or for another person (**c. 322**)

- to acquire, use or have possession of criminal property (**c. 323**)

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85 See Action plan, paras 11, 12 (www.hm-treasury.gov.uk/speech/cx_151001.html)

86 *A consultation document on a regulatory regime for Bureaux de change, money transmission agents and cheque cashers (money service businesses)*, HM Treasury, 15 October 2001

The maximum penalty for each offence on conviction on indictment is fourteen years imprisonment or an unlimited fine or both. For summary conviction, the maximum penalty is six months imprisonment or a £5,000 fine, or both (**c. 326**).

The consolidation of money laundering offences into a single scheme has been welcomed by among others the British Bankers' Association.[87] Concern has been expressed, though, about the breadth of the definition of the offences which could potentially include many types of conduct which would more normally be prosecuted under Theft Act provisions.[88] Several responses to the draft Bill pointed to the great increase in the range of predicate offences as a result of which money laundering may be committed: it now extends to any conduct which is an offence in the United Kingdom or which would be an offence in the UK if the conduct had occurred there (c. 329(2)). Hitherto money laundering has applied mainly to indictable offences only.

The three offences of cc. 321-3, together with attempts, conspiracy and incitement, and secondary participation (aiding, abetting, counselling and procuring their commission), are defined as 'money laundering' (c. 329(10)). This definition is important since it defines the scope of other offences in the Bill, such as failing to disclose suspicions (c. 324), and the extent of the protection offered for breach of restrictions on disclosing confidential information where that information relates to money laundering. It gains greater significance as part of the Bill's confiscation regime. Under clause 75, any money laundering offence is conclusive evidence that a defendant has a 'criminal lifestyle'. Where a court decides that a defendant has a criminal lifestyle, there is scope for it to make a confiscation order which is based on mandatory assumptions about the degree to which the defendant has benefited from his general criminal conduct.[89]

Intelligence is a key tool in addressing money laundering. For that reason the main offences are backed up by structures which require information to be made known to the investigating authorities. Since money laundering offences are necessarily transacted through the financial sector special obligations to report suspicious transactions are placed on that sector ('the regulated sector').

If a person within the regulated sector fails to make a report ('disclosure') in the appropriate circumstances to an appropriate person they themselves commit an offence (**c. 324**). This provision builds on a requirement which currently exists for drug trafficking-related laundering under s.52 of the *Drug Trafficking Act 1994*. That section applies to all who receive information about drug money laundering in the course of their trade, profession, business or employment. Clause 324 narrows the community for whom

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87 Responses to the Proceeds of Crime Bill: Publication of Draft Clauses, Deposited Paper 01/1466, No. 31

88 See the response of the Lord Chief Justice, Deposited Paper 01/1466, No 26

89 See above for the confiscation regime. Money laundering offences are defined in each of Parts 2, 3 and 4 for the UK jurisdictions (see e.g. c. 155). This outline is based on that for England and Wales under Part 2.

disclosure is required but widens the range of predicate offences in relation to which such disclosures must be made.

The positive disclosure obligation of clause 324 has raised a number of concerns among those to whom it may apply. It applies to the regulated financial sector ('regulated sector'), as defined by **Schedule 6**. The Government has based the definition of the regulated sector on the scope of the *Money Laundering Regulations 1993*.[90] Those Regulations, which are described in more detail below, create record keeping and reporting obligations for banks, building societies and investment businesses. The obligations stem from the first EC Money Laundering Directive. Some concern was expressed during the consultation on the draft Bill about that definition and the consequences that stem from it. Currently, many accountants and lawyers will be outside the 'regulated sector', whilst others will conduct a mixture of regulated and non-regulated business. Responses to the draft Bill worried that the latter might be placed under an obligation to make reports in respect of their non-regulated business merely because they also carry out regulated business. The Government in response points out that a regulated business is in the regulated sector 'to the extent that it engages in regulated activities' (Schedule 6).

Another point which has been raised is whether the regulated sector will face greatly increased reporting obligations under the new provision. The obligation now extends to all money laundering offences. Since the range of predicate offences is now much larger, several bodies have argued that the regulated sector will now have to make reports for almost any criminal activity which they encounter in their work even if it is relatively trivial. Both the Law Society and the Institute of Chartered Accountants in England and Wales argue that reporting obligations should be limited to serious crimes and that the obligation should mirror the scope of the EC's Money Laundering Directive.[91] The Government acknowledges that the number of reports may increase but believes that this is desirable as part of the drive against money laundering.[92]

Often, the type of information which is most useful for the investigating authorities would otherwise be confidential. The Bill contains protections for those who disclose confidential information in the course of reporting money laundering suspicions from actions for breach of any restrictions on that disclosure, subject to specified conditions. The conditions for those in the regulated sector are set out in **c. 327** ('protected disclosures'); otherwise the relevant conditions are contained in **c. 328** ('authorised disclosures'). The Government has described the protections as 'wide' but the balance of these two protections has attracted criticism. 'Protected disclosures' are compulsory, because of the offence in c. 324; such disclosures appear to attract protection where the discloser (at the lowest) has reasonable grounds for knowing or suspecting money

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90 SI 1993 No. 1933

91 Deposited Paper 01/1466, Nos 27, 30

92 Draft Proceeds of Crime Bill, para 8.5

laundering. 'Authorised disclosures', on the other hand, appear only to attract protection where a money laundering offence is actually committed. Several responses to the draft Bill objected that this appeared to discourage voluntary reports of suspicious transactions, since it could expose a voluntary discloser to civil actions for breaching confidentiality. The protections are also worded in such a way as to appear to give less protection to those who are not 'employed' - perhaps including partners, consultants and agency workers.[93]

Mention should also be made of **clause 325** which makes it an offence to prejudice an investigation where a report of money laundering has been made (tipping off). This is an offence which previously existed in the *Criminal Justice Act 1988* and the *Drug Trafficking Act 1994*. The British Bankers' Association argues that the new wording is unclear and may cause confusion.[94] The offences in clauses 324 and 325 attract maximum penalties on conviction on indictment of five years imprisonment and an unlimited fine. Some respondents presented scenarios where legitimate behaviour might potentially be treated as 'tipping off'.

4. Further areas of anti-money laundering controls

It was noted earlier that the UK's anti money laundering provisions are not limited to the criminal regime which this Bill sets out. Regulations which implement the EC Money Laundering Directive, the *Money Laundering Regulations 1993*, set up a structure of record keeping and reporting for the broad financial sector. The Financial Services Authority, which from 1 December 2001 will be the single regulator of most financial services businesses, includes additional money laundering provisions in its rule book. Moreover, it has broad duties to reduce financial crime.

The *Money Laundering Regulations* require financial institutions to verify the identity of all customers opening business relations with them (and to keep records of their identification). Staff have to be trained in anti-money laundering practices and suspicions of money laundering must be reported through a designated officer (usually referred to as the Money Laundering Reporting Officer). The penalties for breaching the Regulations are potentially severe: employees can be jailed for up to two years or fined.

The purpose of the regulations is to require financial institutions to have procedures in place so that if attempts are made to launder criminal proceeds through them they can recognise what is happening and provide valuable information to the authorities. To that end, records of transactions need to be retained and the identity of all customers has to be verified when a new account is opened. Suspicious transactions are reported to the National Criminal Intelligence Service (NCIS).

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93 See the responses of Ernst & Young and PricewaterhouseCoopers, for example, Deposited Paper 01/1466, Nos 38,37

94 Deposited Paper 01/1466 No 31

NCIS describes its role in combating money laundering as follows:

> The Economic Crime Unit at NCIS acts as the UK Financial Intelligence Unit. This is the central unit responsible in a country for receiving, analysing and disseminating financial disclosures to law enforcement for investigation. These disclosures relate in the main part to money laundering, and are made to the Economic Crime Unit by any institution in the UK which deals with financial transactions.
>
> The section also provides a central advice, consultatory and educational service on issues relating to financial investigation and money laundering. This includes liasing with organisations in the training of in-house Money Laundering Reporting Officers.[95]

The *Money Laundering Regulations* have been supplemented by detailed industry-produced advice, promulgated by the Joint Money Laundering Steering Group (JMLSG).[96] The JMLSG is composed of leading financial sector trade associations, including the British Bankers' Association and the Association of Private Client Investment Managers and Stockbrokers. Its *Guidance Notes* have been provided since 1990 to aid in the interpretation of the Regulations and to disseminate good practice. Whilst they do not have an official status currently, their value is expressly endorsed by the Financial Services Authority.

The Bill includes a provision for industry guidance, where it has been approved by the Treasury, to be taken into account by the court in deciding whether a person in the regulated sector had reasonable grounds for knowing or suspecting that a person is engaged in money laundering (see c.324, failure to disclose).

5. Financial Services Authority

The Financial Services Authority (FSA) will take on new legislative powers under the *Financial Services and Markets Act 2000* (FSMA) from 1 December 2001. Until then, the FSA is delivering the regulatory functions of the previous financial regulators under contract.

The FSA's role in respect of money laundering is substantial. One of the four regulatory objectives which the 2001 Act gives the FSA is 'the reduction of financial crime'.[97] Then, the FSA is given the power to prosecute money laundering offences within the *Money*

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95 www.ncis.gov.uk/ec.html
96 www.bba.org.uk/html/2090.html
97 s.6, *FSMA 2000*

Laundering Regulations 1993.[98] The FSA has also made its own regulatory rules on money laundering obligations, *Money Laundering Rules*.[99]

Firms which seek authorisation either under the *Financial Services and Markets Act 2000* or under the banking legislation will need to demonstrate as a requirement of authorisation that they have appropriate systems for preventing money laundering through their firm. Those requirements will also apply to firms on an ongoing basis once they are registered.

There are areas where the FSA's reach is less than uniform - for example, some firms are within the scope of the 1993 regulations (but are not covered by the FSA rules) whereas others are regulated by the FSA but are not covered by the 1993 regulations. The FSA hopes, however, to maximise its influence, for example by taking into account the risks to regulated firms from unregulated businesses over which they have control.

The FSA in early 2000 chose money laundering as the subject of one of the first of its 'themed' regulatory projects. Its report was published in July 2001.[100] The FSA adopts a risk-based approach to regulation. It has identified six areas of activity which it believes are most vulnerable to money laundering - international banking, domestic banking, independent financial advisers who handle money from overseas, on-line broking, spread betting and credit unions. The nature of the risks which these areas face varies and the FSA proposes different approaches to address each risk.

As well as enforcing those rules for which it has responsibility, the FSA works with outside bodies including the National Criminal Intelligence Service (with whom it signed a partnership agreement in July 2001) and the Joint Money Laundering Steering Group, whose Guidance Notes will retain their former importance (the FSA chose to scale back the detail of its own rules in order to avoid confusion with the Guidance Notes on such matters as the identification requirements in the 1993 regulations). The FSA's own rules also require specifically that regulated firms take account of published information from Governments and the international Financial Action Task Force (FATF) in their approach to money laundering.

6. Second Money Laundering Directive

As has been seen, key elements of the UK's anti-money laundering regulations implement European legislation, specifically the Money Laundering Directive.[101] The

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98 The FSA does not have this role in Scotland.

99 See *Money laundering: The FSAs new role: Policy statement on consultation and decisions on Rules*, Financial Services Authority, January 2001 and the FSA's Handbook

100 www.fsa.gov.uk/pubs/other/money_laundering/index.html

101 Directive on the prevention of the use of the financial system for the purpose of money laundering (91/308/EEC)

European Community identified in its 1999 Action Plan for Financial Services the need to revise the first Money Laundering Directive. The Commission introduced a new Directive in July 1999 which will expand the scope of the earlier Directive, address new problems which have evolved since 1991 in the field of money laundering, and clarify some points of the first directive.

The European Parliament and the Council did not find it easy to reach agreement on the final wording of the Directive. In April 2001, the Parliament made 15 amendments to the text none of which the Commission was able to accept. The UK also indicated its objection to some of these amendments on the grounds that they could weaken the UK's anti-money laundering controls. The Directive has now passed through Conciliation Committee and is currently awaiting approval from the European Parliament which is anticipated in mid November 2001. The *Financial Times* reports:

> The directive will extend existing EU legislation against drugs trafficking to the proceeds of other serious crimes.
>
> The legislation, which has been subject to prolonged wrangling between ministers and parliament, will also extend rules on client identification, record-keeping and the reporting of suspicious transactions to accountants and auditors, real estate agents, notaries, casino owners and fund transporting companies.
>
> While classic legal advice will remain subject to professional secrecy, lawyers will have to report their clients if they know they are engaged in laundering..[102]

7. Financial Action Task Force (FATF)

The Financial Action Task Force (FATF) was set up in 1989 by the G-7 countries, and its membership includes all the world's leading financial centres:

> The Task Force was given the responsibility of examining money laundering techniques and trends, reviewing the action which had already been taken at a national or international level, and setting out the measures that still needed to be taken to combat money laundering. In April 1990, less than one year after its creation, the FATF issued a report containing a set of Forty Recommendations, which provide a comprehensive blueprint of the action needed to fight against money laundering.
>
> During 1991 and 1992, the FATF expanded its membership from the original total of 16 to 28 members. Since that early period, the FATF has continued to examine the methods used to launder criminal proceeds and has completed two rounds of mutual evaluations of its member countries and jurisdictions. FATF has

[102] 'Ministers clear way on money laundering laws', *Financial Times*, 17 October 2001

> updated the Forty Recommendations to reflect the changes which have occurred in money laundering and has sought to encourage other countries around the world to adopt anti-money laundering measures.[103]

On 22 June 2000, FATF published a review of the anti-money laundering regimes of a number of jurisdictions worldwide, measured against twenty five criteria which the FATF had earlier identified as practices which impede international action to combat money laundering.[104] In the report (see paragraph 64 especially), fifteen jurisdictions are identified as having serious systemic problems in their controls. Those jurisdictions are elsewhere referred to as non-co-operating jurisdictions.
The UK Treasury endorsed the report; at the same time it noted that the Cayman Islands, which features on the list and which is a UK overseas territory, is on course to meet international standards when a current review is implemented.[105]

In June 2001, FATF reported on progress with the non-co-operating countries initiative.[106] The Cayman Islands, Bahamas, Liechtenstein and Panama have been removed from the list and new countries have been added to the list. Three countries have been singled out as being of particular concern: Nauru, the Philippines and Russia. The full list of non-co-operating countries and territories is now: Cook Islands; Dominica; Egypt; Guatemala; Hungary; Indonesia; Israel; Lebanon; Marshall Islands; Myanmar; Nauru; Nigeria; Niue; Philippines; Russia; St. Kitts and Nevis; and St. Vincent and the Grenadines.

After the events of 11 September, several governments including that of the UK, have suggested that FATF should be given an expanded brief to include terrorism. A meeting of FATF has been convened for 29-30 October 2001 at which its members will discuss how it can prevent the use of the international financial system by terrorists and those who fund them.[107]

The FATF carries out assessments of the effectiveness of money laundering procedures among its members through 'mutual evaluations' carried out by inspectors from other FATF members. The second evaluation of the UK was reported in the 1997 annual report from FATF:

> The United Kingdom remains a drug consumer country, with relatively little production or transiting of drugs, and the estimated level of drug consumption in the United Kingdom has probably not changed significantly since the first mutual

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[103] www.fatf-gafi.org/AboutFATF_en.htm#What is

[104] *Review to identify non-co-operative countries or territories: Increasing the worldwide effectiveness of anti-money laundering measures*, Financial Action Task Force on Money Laundering, 22 June 2000

[105] 'Tackling money laundering: UK welcomes identification of non-co-operating jurisdictions', HM Treasury release 79/00, 22 June 2000

[106] Review to identify non-co-operative countries or territories: Increasing the worldwide effectiveness of anti-money laundering measures, FATF, 22 June 2001
http://www.fatf-gafi.org/pdf/NCCT2001_en.pdf

[107] 'FATF to hold extraordinary meeting', FATF press release, 5 October 2001

evaluation. Although drugs is still the major source of illegal proceeds for laundering, proceeds of other offences such as financial fraud and the smuggling of excise goods appear to have become increasingly important. Amongst the money laundering trends that have been observed since the first evaluation are :

- an increasing use by money launderers of smaller non-bank financial institutions and non-financial businesses such as lawyers, accountants and bureaux de change;
- an increasing tendency to smuggle cash out of the United Kingdom for easier placement abroad;
- greater investment of illegal proceeds into high value assets; and
- an increasing inflow of funds from the former Soviet Union.

There have been significant changes since the first evaluation. Several major pieces of penal legislation have been enacted, creating new all crimes money laundering offences and strengthening the confiscation legislation. The Money Laundering Regulations 1993 lay down requirements as to customer identification, record-keeping, supervision and the reporting of suspicious transactions for a wide range of businesses. Active measures have also been taken with respect to international co-operation and many new bilateral confiscation agreements have been entered into. These measures have been complemented by administrative steps such as improving the guidance notes for financial institutions and the procedures relating to the reporting and investigation of suspicious transaction reports, improving feedback to financial institutions, and increasing the awareness of money laundering for non-financial businesses.

Several refinements could make the system even more impressive. The National Criminal Intelligence Service has an important role in the United Kingdom's anti-money laundering initiative, and it is important that it has the human and technological resources which are necessary for it to operate effectively. In addition, the lack of statistical information on the results from the suspicious transaction reports makes it difficult to properly analyse how effective the reporting system is, and this could be rectified. Other small areas for improvement could include widening the scope of the legislation dealing with the seizure and forfeiture of drug cash being smuggled across the border, and an extension of the Money Laundering Regulations 1993 to cover all financial activity conducted by lawyers. A thorough analysis should also be made of the situation regarding all the bureaux de change and whether there needs to be some form of formal registration or supervision.

Overall though, the United Kingdom anti-money laundering system is an impressive and comprehensive one, which has been subject to consistent review and improvement, which meets the FATF forty Recommendations and indeed in many areas goes beyond them. Many parts of the United Kingdom system provide a model which could be followed by other countries, with the system of education, training and Guidance Notes for the financial sector seeming to be particularly successful. The active system of supervision, co-operation, education

> and training in the financial sector are complemented by strong and effective penal legislation. The attitude and measures taken in regard to co-operation and co-ordination, and the willingness to review the existing measures, even if they are relatively recent, could also provide a lead to other countries.[108]

F. Revenue functions

Part 6 empowers the Director of the Assets Recovery Agency to exercise functions of the Inland Revenue in relation to income, gains and profits arising or accruing as a result of criminal conduct.

1. What the Director may do

Under clause 311, the Director may, if the "qualifying condition" is satisfied, serve on the Commissioners of Inland Revenue (The Board) a notice which states that he intends to carry out, in relation to a specified person and in respect of a specified period, such of the general Revenue functions as are specified in the notice. Service of the notice has the effect of vesting those functions in him concurrently with the Board.

The "qualifying condition" is defined in clause 311(1), which provides:

> (1) For the purposes of this section the qualifying condition is that the Director has reasonable grounds to suspect that –
> (a) income arising or a gain accruing to a person in respect of a chargeable period is chargeable to income tax or is a chargeable gain (as the case may be) and arises or accrues as a result of the person's or another's criminal conduct (whether wholly or partly and whether directly or indirectly),or
> (b) a company is chargeable to corporation tax on its profits arising in respect of a chargeable period and the profits arise as a result of the company's or another person's criminal conduct (whether wholly or partly and whether directly or indirectly).

Clause 320 defines "**criminal conduct"**[109] as conduct which

> (a) constitutes an offence in any part of the United Kingdom, or
> (b) would constitute an offence in any part of the United Kingdom if it occurred there.

And property is "**criminal property**" [110]–

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[108] Extract from FATF-VIII Annual Report (1996-1997), 19 June 1997, pp. 12-13
[109] Subsection (1)
[110] subsection (4)

> If it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly); and it is immaterial –
> (a) who carried out the conduct;
> (b) who benefited from it.

It is immaterial whether conduct occurred before or after the passing of the Act.

2. Special provision which applies when the Director exercises revenue functions

Clause 313 provides:

> (1) For the purpose of the exercise by the Director of any function vested in him by virtue of this Part it is immaterial that he cannot identify a source for any income.
>
> (2) An assessment made by the Director under section 29 of the Taxes Management Act 1970 (c.9) (assessment where loss of tax discovered) in respect of income charged to tax under Case 6 of Schedule D must not be reduced or quashed only because it does not specify (to any extent) the source of the income.
>
> (3) If the Director serves on the Board a notice of withdrawal under section 311(4) any assessment made by him under section 29 of the Taxes Management Act 1970 is invalid to the extent that it does not specify a source for the income.

The *Explanatory Notes* say[111]:

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

The purpose was described in the consultation[112] as follows:

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[111] *Bill 31–EN*: Home Office October 2001: Para 433

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

A further explanation is provided in the Cabinet Office PIU Report:[113]

> 10.21 Whilst the Revenue can raise a tax assessment against an individual undertaking a trading activity (the provision of goods and services, whether legal or not), tax cannot be collected where a source of the income (including criminal activity) cannot be identified.
>
> 10.22 A change in the law is needed so that tax assessments raised on income cannot be defeated simply because a source cannot be identified. This would place the onus on the person assessed to demonstrate that the profits were not derived from a taxable source. If that person displaced a tax assessment by successfully arguing that the profits from which his or her unexplained wealth derived came from criminal activities, then clearly that wealth would be a target for confiscation. Confining the power to raise such assessments to Inland Revenue officers seconded to the NCA[114] would help ensure that use of this tool was limited to targeting the suspected proceeds of crime and used effectively in contributing to the national Asset Confiscation Strategy.
>
> Conclusions
> Conclusion 54: Tax law should be amended to allow tax assessments to be raised even when the source of the income cannot be identified.
>
> Conclusion 55: This power should be reserved to Inland Revenue officers seconded to the NCA for the purpose of taxation of suspected criminal profits. Prosecution of tax crimes should remain with the Inland Revenue.

G. Investigations and information

Part 8 contains an array of existing and new powers which will be available on court order, for use in investigations which may lead to confiscation or recovery orders being made under the Act.

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[112] *Proceeds of Crime: Consultation on Draft Legislation*, March 2001:: Cm 5066

[113] *Recovering the Proceeds of Crime*: June 2000; p.95

[114] "National Confiscation Agency": see now "Asset Recovery Agency" in Part 1 of the Bill.

1. What are investigations

The three kinds of investigation are defined in clause 330:

> (1) For the purposes of this Part a confiscation investigation is an investigation into –
>
> (a) whether a person has benefited from his criminal conduct, or
> (b) the extent or whereabouts of his benefit from his criminal conduct.
>
> (2) For the purposes of this Part a civil recovery investigation is an investigation into–
>
> (a) whether property is recoverable property or associated property,
> (b) who holds the property, or
> (c) its extent or whereabouts.
>
> [-]
>
> (4) For the purposes of this Part a money laundering investigation is an investigation into whether a person has committed a money laundering offence.

Once proceedings have been started (or an interim order has been made) or cash has been seized and detained, the investigation ceases to qualify as a civil recovery investigation.

2. Powers which may be sought

The powers are available through:

(1) **production** orders (clause 334 and, for Scotland, clause 367), which may be supplemented by orders to grant entry (clause 336 and, for Scotland, clause 369),
(2) **search and seizure**[115] warrants (clause 341 and, for Scotland, clause 374),
(3) **disclosure orders** (clause 346 and, for Scotland, clause 378),
(4) **customer information orders** (clause 352 and, for Scotland, clause 384),
(5) **account monitoring orders** (clause 359 and, for Scotland, clause 391).

Disclosure orders are not available in money laundering investigations. Otherwise, the powers are all available in each kind of investigation.

3. Offences in connection with investigations

Part 8 includes a number of offences which may be committed in connection with investigations, either by prejudicing an investigation (e.g. by falsifying or destroying relevant documents) or by failing to comply with an order which has been made.

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[115] The equivalent in Scotland is a search warrant.

4. Information

Part 10 provides, subject to specified restrictions, that the Director of the Assets Recovery Agency may use information obtained in connection with any of his various functions in connection with the exercise of any other of his functions, and for gateways for the exchange of information between him and:

(a) a constable
(b) the Director General of the National Criminal Intelligence Service
(c) the Director General of the National Crime Squad,
(d) the Director of the Serious Fraud Office,
(e) the Commissioners of Inland revenue (subject to special safeguards),
(f) the Commissioners of Customs and Excise (subject to special safeguards),
(g) the Director of Public Prosecutions,
(h) the Director of Public Prosecutions for Northern Ireland, and
(i) other persons designated as "permitted persons" by the Secretary of State.

The principal restrictions relate to disclosures which are not be permitted by virtue of the provisions of the Data Protection Act 1998 or Part I of the Regulation of Investigatory Powers Act 2000.

Appendix: The European Convention on Human Rights

The provisions of the *European Convention on Human Rights*[116] which may have relevance are set out below.

Article 6
Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2.Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3.Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7
No punishment without law

[116] incorporated into domestic law by the *Human Rights Act 1998.*

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2.This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2.There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14
Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 1 of Protocol No. 1
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.