



WORKING PARTY PAPERS

**Outline Response to the Home Office Working Group on
Confiscation of Criminal Assets**

CHAPTER 1

Introduction

- The Working Group's third report is welcome and timely.
- The Sub-committee support the overall objectives of improving on and eliminating inconsistencies in the existing regime, and expanding the jurisdiction relating to the forfeiture of criminal assets.
- The initiative of a National Confiscation Agency is also timely although the Sub-committee has concerns about the practical feasibility of such a body.

CHAPTER 2

The Enforcement of Criminal Confiscation Orders

- In order to properly understand and appreciate the disparity between the amounts ordered to be confiscated and sums actually remitted, it is necessary to also understand the practical aspects of enforcement. It is proposed to take a small number of case studies covering the whole spectrum of enforcement.
- The Working Party relies on anecdotal evidence only concerning receiver's costs.
- The case studies will give actual evidence of the wide range of levels of complexity and difficulty experienced.
- It is noted that the group made only passing reference to the substantial costs expended by way of defendant's legal costs and living expenses and again these case studies will assist the group in gaining a greater insight into this significant aspect of the workings of enforcement.
- The Report does not address the perceived lack of resources within various government agencies to deal with both the collation of financial information by the case officers and the subsequent legal process.
- There is still a perceived lack of awareness and detailed knowledge of the legislation at all levels. An essential part of any extension of this legislation must be the educative process.
- The Report makes no attempt to deal with a number of crucial legal and practical issues which tend to depress recoveries and to increase the associated costs. Criminals tend not to have well organised, legitimate and transparent financial affairs and those with significant assets derived from criminal activity will typically make extensive use of nominees, limited companies, trusts or other entities (often based offshore) to shelter those assets. The process of unravelling these arrangements is inevitably difficult and therefore expensive. Consideration should be given to making stricter provision requiring full disclosure of information by criminals and their associates allied to stricter powers to require co-operation in the handing over (including repatriation from abroad) of such assets. The process of obtaining such vital co-operation from recalcitrant defendants and their associates at present seriously hinders and adds to the expense of the recovery process.
- The proposal that judges should explain how the sum specified in the confiscation order is arrived at is particularly welcome.
- The Sub-committee supports the initiative to limit the defendant's time to pay and to make clear the defendant's obligations. There is a common misunderstanding amongst defendants (and at times, their advisers) firstly that they are not required to comply with the confiscation order at

all, until the time to pay has expired (and that any receiver should therefore take no action during that period) and that the default sentence is an optional alternative to compliance with the confiscation order. The Report's recommendations regarding interest are also welcome. We believe that the Judgement Rate is appropriate.

CHAPTER 3

Other Confiscation and Money Laundering Issues

Thought on the Overall Approach

Before commenting on and dealing with the five recommendations made by the Working Group, we would wish to set out our views on the existing legislation and the manner in which it should be approached.

The flaws and faults with the current confiscation regime have come about because of a piece meal development of asset forfeiture legislation. There are at present three different approaches (all crimes, drugs and terrorism) and as long as the three approaches exist there will continue to be anomalies. With the thought now being given to the extension and development of civil forfeiture the time is ripe for consolidating legislation.

We would suggest that thought be given to the introduction of an all embracing "Criminal Proceeds Confiscation Act". The elevation of drug trafficking over other crimes, to the extent that is still discernible from the final state of the three schemes, can still be achieved in a single act (by exception or addition) but a single act has the benefit of ensuring a uniform approach. The existence of separate acts will always mean that there will be separate developments and the great risks of anomalies developing. There will have to be a continual process of updating and unifying the legislation, a single consolidating act will allow uniformity to be achieved at the same time as development.

The Working Group in reviewing the existing law dealing with criminal confiscation, make five recommendations to align the existing legislation and develop some uniformity between the drug confiscation regime and that surrounding the non drug related offences.

We will deal with those recommendations in the order that the Working Group has dealt with them.

Failure to Disclose Knowledge or Suspicion of Money Laundering

- The recommendation to extend the unique drug trafficking act offence of non disclosure of knowledge or suspicion that a person is engaged in drug or terrorist money laundering to cover laundering of proceeds of other crimes must, in our view be correct. It is a nonsense to limit such an offence to the laundering of the proceeds of drug trafficking and terrorism alone.
- This offence is designed to put a stop to the sophisticated manipulation of the financial system by persons who are in a responsible position placing on them an obligation to disclose to the authorities such a scheme if they suspect or know of its assistance. The mens rea is the knowledge or suspicion of the existence of a "dirty money" scheme. It does not matter, it seems to us, that the predicate offence is drugs/terrorism as opposed to other serious crime.
- To maintain the present position would simply present an uneven and illogical approach to the way certain crimes are viewed. It would create a two tier approach and appear to suggest that the laundering of the proceeds of crimes other than those connected to terrorism or drugs be of a lesser criminality.
- The implications of the 40 Recommendations is important in maintaining the United Kingdom's position in the fight against organised crime. The compliance with FATF recommendations by

the United Kingdom is essential to the confidence of London as a financial centre and the integrity of its many markets.

- The recommendations made by the Working Group has, in our view, the flaw of creating a third offence of failing to disclose. The present two offences allow those charged with a drug money laundering offence to claim that they thought it was money to be used in terrorism and vice versa. The introduction of a third offence extends this “avenue” currently open to those charged.
- The aim of the legislation is to ensure that those who are in a position through business to deal with large sums of money, report any suspicion they have to the authorities. This is achieved by this approach and it prevents a person so charged from claiming that they thought it was money being used for “car ringing” etc.
- The conviction of those charged with failure to disclose a suspicion should in our view, be dependent on proof that money laundering of a criminal offence was occurring. This still has the effect of ensuring the duty exists to report the suspicion, but provides a check and balance on conviction of those charged with the duty.

Sub Group Recommendation

Thus there should be an all encompassing offence of failing to disclose knowledge or suspicion of the existence of a money laundering scheme, whatever the predicate crime.

Confiscation: Dead and Absconders (Non Drug Crime)

- There is a clear anomaly at present between the treatment for those convicted of a drug trafficking crime, who either die or abscond prior to a confiscation order being imposed, and those convicted of a crime to which the Criminal Justice Act 1988 applies. This anomaly is exacerbated by the fact that those convicted of a non drug crime in Northern Ireland, who die or abscond, are treated in the same way as those convicted of drug related crime, that is a confiscation order can be made against them.
- Although it has yet to be used at all, so far as we are aware, it remains an important part of the duty of the legislature to ensure that those who have benefited from crime are not permitted to leave those benefits to their next of kin.

Sub Group Recommendation

The fact that the position in Scotland is that, irrespective of the type of crime, there is no provision to allow for the making of a confiscation order against convicted persons who die or abscond, highlights the need for uniformity. The disparity in approach in the United Kingdom must be rectified and we would support the Working Group’s recommendation.

Confiscation: Lack of Power to make Assumptions in Drug Money Laundering Cases

- The assumptions apply in drug cases and in all crime cases where there is a trigger following a conviction for more than one qualifying offence. The assumptions operate to effectively place the burden on a defendant that unexplained income and assets are not the proceeds of crime. At the moment if the unexplained income is shown in a drug case to be other than criminal proceeds and vice versa, in Criminal Justice Act cases the proceeds are not recoverable. This is an anomaly that needs addressing if the operation of the assumptions is to be extended.

- There are however plainly Human Rights problems with the assumptions. For the effect of them is to give the State the right to seize assets from an individual who is not able following conviction to explain his interest in assets or income. This is a matter that has to be examined with care. There needs to be clear reasoning on this as to why the State should be allowed in these given circumstances to in effect seize such assets. The answer may lie in the fact that once a person is convicted of offences that would trigger the assumption that they lose the right to the protection afforded to an unconvicted and law abiding citizen.

Sub Group Recommendations

It has never been very clear why the assumptions are not available to the Court when dealing with a defendant who has been convicted of drug money laundering. We agree with the recommendation that would have the effect of permitting the assumptions to be made in drug money laundering offences.

Increase in Realisable Property (Non Drug Crime)

- Section 16 of the Drug Trafficking Act 1994 allows the Court on an application to increase the amount that might be realised if more realisable property comes to light after the making of a confiscation order against an offender. Section 7 of the Proceeds of Crime Act 1995 inserted provisions allowing revaluation of the amount that might be realised in Criminal Justice Act cases.

Sub Group Recommendations

Again this is an example of piecemeal development resulting in a slightly different approach by the draftsman having a completely different effect on the practical application of the law. There should be a uniform approach to the increase of realisable property where fresh realisable property comes to light in drug trafficking cases and non drug related crimes.

Imprisonment in Default: External Confiscation Orders

- This is another example of a clear discrepancy caused by differing acts dealing with differing offences, but aiming to address the same purpose. Should the approach to the enforcement of confiscation orders made abroad be the same as when being enforced in this country as for a domestic confiscation order?
- The Working Group observations are not absolutely clear. What they appear to mean is that in the case of a domestic confiscation order, the service of a term in default does not any longer expunge debt. The DTA provides that where a term in default has been served abroad in respect of another country's drug confiscation order, the order is not regarded as satisfied for the purposes of its enforcement in England and Wales. There is no equivalent provision in Criminal Justice Act 1988 and part VI would have to be amended to bring non drug offences in to line with drugs if this recommendation was implemented.

Sub Group Recommendation

However we do not consider that the same rules of "IOU" should apply to orders being enforced on behalf of designated countries unless that is part of that countries' domestic legislation. This would need to be considered on a country by country basis. The rationale for this is that when we enforce an external confiscation order in this country we are acting as a representative of the State that has made the original confiscation order; if they do not have the "IUO" policy, it would in our view be excessive to include it as part of the enforcement process of an external confiscation order. Again we consider that there are potential Human Rights hazards in adopting such an approach.

Chapter 4

Civil Forfeiture

- In general terms there is clearly public support for the idea of depriving “criminals” of their ill-gotten gains. However the experience in the USA, and the adverse comments in certain quarters (e.g. the leader columns of at least one broadsheet national newspaper), taken with the obvious implications for personal privacy and property rights and the concomitant Human Rights aspects, require that these proposals be treated with particular caution.
- The cases cited (in paragraph 4.12 of the Report) may provoke outrage but what of the case which will occur once this proposal has become law, of the individual whose assets are forfeited, but who is innocent of any crime (in the sense recognised by the criminal law) and who has simply elected not to disclose the source of his wealth, perhaps out of principle, or perhaps because of fears that to do so would effectively abandon his privilege against self-incrimination, and open the possibility of successful criminal proceedings to which he could not otherwise have been exposed?
- Indeed the interplay of the proposals with the criminal process in general and the privilege against self-incrimination in particular clearly requires further thought.
- Subject to such considerations, however, the Sub-committee supports Option 2 and Option 3 (paragraph 4.14 of the Report).
- The distinction drawn by the Report between permitting the use of assets for legal expenses and not for living expenses is not clear.
- The provision for compensation (paragraph 4.70 of the Report) should surely have some limitations, perhaps up to the value of the property itself adjusted to take into account interest earned or movements in asset values.
- A civil forfeiture regime will by definition generate civil litigation. Many defendants who would have rightly devoted their efforts primarily to defence of criminal proceedings in cases of that nature will undoubtedly fight vigorously to protect their assets where they have been convicted of no crime. If the new regime is to succeed it will need significant resources to deal with civil litigation on this scale.

Chapter 5

A National Confiscation Agency

- Whilst stressing the need to ensure that the creation of such an agency does not weaken the existing expertise within the various FIUS the Working Group, with respect, offers no solution. It proposes the nucleus of the agency as the skills within the CCB, a department which is sadly under resourced at present and which, it is doubted, could cope with the additional burden of work envisaged.
- The Working Party ignores the current mistrust and lack of co-operation between the various prosecuting agencies at operational levels. Whilst this is to be abhorred, to ignore the reality of this long ingrained unease that exists, is to ignore a fundamental problem.
- Even under the existing regime, there can be a lack of liaison between prosecutors and confiscation agencies and this must be avoided at all costs if the system is to function. The problem could become even more acute if a separate agency were created.