



**Research Paper 03/01**

**15 August 2001**

## **Proceeds of Crime**

This paper considers the forthcoming government Bill dealing with the proceeds of crime. The Bill will create a Criminal Assets Recovery Agency, which will act to deprive persons of the benefits of crime. The Bill will also make certain provisions in relation to money laundering.

Library Research Papers are compiled for the benefit of Members of The Assembly and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public.

## EXECUTIVE SUMMARY

The government will introduce during this parliamentary session a Bill to deal with the proceeds of crime. A draft Bill has already been consulted on.

The Bill will deal with matters that have not been devolved under the Northern Ireland Act 1998, and remain the responsibility of the Secretary of State for Northern Ireland. However, an Ad Hoc Committee of the Northern Ireland Assembly considered the draft Bill and reported to the Assembly on 29<sup>th</sup> May 2001.

The government regards depriving criminals of the financial benefit of their activity as a useful tool in the fight against crime. The Bill is therefore designed as part of the government's general programme of reform in the criminal justice system.

The Bill will establish the Criminal Assets Recovery Agency ('CARA') for England, Wales, and Northern Ireland. A similar agency will be created in Scotland. The CARA is intended to have close parallels with the Irish Criminal Assets Bureau.

£54 million will be provided to the CARA over the next three years.

The CARA's role will be to deprive persons of the proceeds of crime. It will pursue assets by:

- seeking 'criminal confiscation orders', confiscating the assets of persons convicted of crime;
- seeking 'civil recovery orders', recovering assets proven to be the proceeds of crime, from any person, whether convicted or not; and
- taxing persons suspected of having benefited from crime.

The Bill will provide the CARA with five principal powers for investigating the extent or whereabouts of the proceeds of crime.

The Bill will provide five principal money laundering offences, which are intended to simplify and strengthen the existing regime.

The Bill will affect important and fundamental principles of law, including:

- the right to a fair trial;
- the right to privacy;
- the presumption that a person is innocent until proven guilty.

Commentators have suggested that certain elements of the Bill may be incompatible with the Human Rights Act 1998. In particular, it is suggested that:

- criminal confiscation will rely on assumptions which undermine the presumption of innocence; and that
- civil recovery imposes punishment without providing the safeguards of criminal court procedure.

**TABLE OF CONTENTS**

<b>1</b>	<b>INTRODUCTION</b>	<b>1</b>
<b>2</b>	<b>BACKGROUND</b>	<b>1</b>
<b>3</b>	<b>THE DRAFT BILL</b>	<b>4</b>
<b>4</b>	<b>PART I: A NEW AGENCY</b>	<b>5</b>
<b>5</b>	<b>PART IV: CRIMINAL CONFISCATION</b>	<b>8</b>
<b>6</b>	<b>PART V: CIVIL RECOVERY</b>	<b>11</b>
<b>7</b>	<b>PART VI: TAXATION</b>	<b>18</b>
<b>8</b>	<b>PART VII: INVESTIGATIONS</b>	<b>20</b>
<b>9</b>	<b>PART VIII: MONEY LAUNDERING OFFENCES</b>	<b>23</b>
<b>10</b>	<b>COMMENT</b>	<b>25</b>

## 1 INTRODUCTION

As part of the government's extensive programme of reform in criminal justice system, the Home Office will bring forward legislation in this Parliamentary session to deal with the proceeds of crime. Draft legislation<sup>1</sup> (the 'draft Bill') has already been considered by the Northern Ireland Assembly.

This paper considers the background to the legislation. It then examines the legislation itself: the new agency to be created, and the new legal tools which that agency will use to target the proceeds of crime. The paper focuses on two particular tools: criminal confiscation and civil recovery. Finally it makes some closing comments.

## 2 BACKGROUND

Targeting the financial proceeds of criminal activity is an increasingly useful tool in the fight against crime, especially organised crime. The PM has stated that

*'[l]eaving illegal assets in the hands of criminals damages society. First, these assets can be used to fund further criminal activity, leading to a cycle of crime that plagues communities.*

*Second, arrest and conviction alone are not enough to clamp down on crime; they leave criminals free to return to their illegal enterprises, or even to continue their 'businesses' from prison.*

*And third, it simply is not right in modern Britain that millions of law-abiding people work hard to earn a living, whilst a few live handsomely off the profits of crime. The undeserved trappings of success enjoyed by criminals are an affront to the hard-working majority. And it is, of course, often the underprivileged in society who suffer most from crime.'*<sup>2</sup>

The current law may in some cases allow the proceeds of a particular offence to be confiscated – but only from a person who has been convicted of the offence. Thus, prosecuting authorities generally cannot recover the proceeds of crime if they cannot prove an offence. And the criminal law requires guilt of an offence to be proven to the strict standard of proof. And only 9% of recorded crime results in conviction.<sup>3</sup> The PM has observed that the criminal justice system

*'is not designed to take away from criminals the gains they have made from crime. Typically, a court order is made to recover assets following under 1 per cent of convictions. And the amounts recovered fall far short of those sought by the courts. Some criminals have grown very wealthy. They use a variety of tactics including intimidation and complex money laundering ploys to protect themselves from the force of the law. Such criminals provide bad role models for young people.'*<sup>4</sup>

---

<sup>1</sup> *Proceeds of Crime Bill – Publication of Draft Clauses*, Cm 5066, Home Office 2001

<sup>2</sup> Performance and Innovation Unit, *Recovering the Proceeds of Crime*, Cabinet Office, 2000, Foreword

<sup>3</sup> *Criminal Justice: the way ahead*, Cm 5074, Home Office, 2001, Annex A, figure 1

<sup>4</sup> *Recovering the Proceeds of Crime*, Foreword

Some criminals evade conviction and manage to enjoy the benefits of their crime, often in some luxury.<sup>5</sup> A recent RUC report has identified 78 criminal organisations in NI, involving 400 people.<sup>6</sup> And a RUC survey in May 2001 estimated that 180 people in Northern Ireland have substantial assets derived from criminal activity – such as drug trafficking and smuggling of fuel or tobacco.<sup>7</sup> The value of illegal drugs transactions alone in the UK could be as much as 1 per cent of GDP, up to £8.5 billion per year.<sup>8</sup> The problem has worsened as organised crime becomes more sophisticated, and takes advantage of developments in communications technology.

A recent report by the Performance and Innovation Unit (PIU) of the Cabinet Office, called *'Recovering the Proceeds of Crime'*, concluded that the pursuit and removal of criminal assets are under-developed law enforcement tools. The PIU report

*'had its origins in a developing consensus that the techniques available to law enforcement to follow the criminal money trail were falling behind the resources available to criminals to help them conceal their illegal gains. It was thought that failing to remove criminal gains from offenders left individuals in a position to fund a life of crime after punishment, or even to continue to control criminal enterprises from inside prison. In the creation of a safe and just society it could not be tolerated that criminals should continue to benefit from the proceeds of their crimes, thereby showing contempt for the rule of law. It was also considered important to understand the money flows in criminal economies, in order to identify and build evidence against those who sit at the top of criminal organisations, but who remain far removed from the criminal acts carried out at their instruction.'*<sup>9</sup>

The government's intention to bring forth legislation on the proceeds of crime is part of its extensive programme to reform the criminal justice system. It states that the reform programme will focus mainly on the following policies.<sup>10</sup>

- *'catching and convicting more offenders – so starting to increase the proportion of crimes reported to the police which end up with a criminal being brought to justice;*
- *providing more resources than ever for the fight against drugs to break the link between drugs and crime;*
- *ensuring that punishments fit the criminal as well as the crime to break cycles of repeat and persistent offending;*
- *putting the needs of victims more at the centre of the CJS to raise public confidence and ensure just outcomes for all;*
- *supporting the police in their twin aims of reducing crime and improving public reassurance;*
- *combating international and organised crime to make the UK one of the least attractive countries for organised criminal groups; and*

---

<sup>5</sup> See for example *Villains stand to lose fortunes*, Daily Telegraph, 15.06.2000

<sup>6</sup> *The threat to Northern Ireland society from serious and organised crime*, RUC Analysis Centre, 2001

<sup>7</sup> Evidence given by the RUC to the Assembly Ad Hoc Committee on the Proceeds of Crime Bill: Report on the Proceeds of Crime Bill, Northern Ireland Assembly, Report Ad Hoc 4/00/R, Minutes of Evidence, paras 155 to 162

<sup>8</sup> Estimated by the Office for National Statistics and quoted in *Recovering the Proceeds of Crime*

<sup>9</sup> *Recovering the Proceeds of Crime*, para 2.4

<sup>10</sup> *Criminal Justice: the way ahead*, pp 9 and 10

- *joining it all up, securing better information and communications technology (ICT), promoting skills, equality and diversity within the CJS to improve its performance and the service it offers to the public.'*

The draft Bill will target the proceeds of crime. It will establish a Criminal Assets Recovery Agency ('CARA') before 2003.<sup>11</sup> The CARA's role will be to deprive persons of the proceeds of crime. It will be given a range of investigatory powers to identify assets as the proceeds of crime. It will pursue assets by:

- seeking 'confiscation orders' in the criminal courts, confiscating the assets of persons convicted of crime
- seeking 'recovery orders' in the civil courts, recovering assets proven to be the proceeds of crime; and
- taxing persons suspected of having benefited from crime.

The draft Bill will also provide specific new laws governing money laundering offences.

The draft Bill will ensure that depriving persons of the proceeds of crime is much more easy than at present. One method of achieving this will be the application of the civil standard of proof – lower than the criminal standard – to questions of confiscation and recovery. However, applying a lower standard of proof will inevitably mean that more mistakes and miscarriages will occur: a greater number of innocent people will have their assets taken from them unfairly than at present.<sup>12</sup>

The draft Bill has attracted criticism, as it affects important and fundamental principles of law, including:

- the right to a fair trial;
- the right to privacy;
- the principle that a person is considered innocent until proven guilty beyond a reasonable doubt.

John Wadham, director of Liberty,<sup>13</sup> recently wrote:

*'These proposals undermine the presumption of innocence, 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 authorities 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 have their private life dragged through the newspapers. There will be no jury and the judge will base decisions on the "balance of probabilities" - a person will be "convicted" on the basis they are "probably" guilty.*

*The danger is that if no action is taken now to stop this it will be too late to recover the rights that have been cut away, slice by slice.'*<sup>14</sup>

---

<sup>11</sup> Downing Street press release, *Proposals to remove criminals' ill-gotten gains*, 15.03.01

<sup>12</sup> See for example the reasoning in Liberty press release, *Targeting criminals' profits is fine; civil confiscation is not*, at <http://www.liberty-human-rights.org.uk/>

<sup>13</sup> Liberty is an independent human rights organisation which works to defend and extend rights and freedoms in England and Wales

<sup>14</sup> *Bad laws, little order*, Guardian, 15.03.2001

### 3 THE DRAFT BILL

In March 2001 the Home Office published for consultation its incomplete draft legislation on the Proceeds of Crime,<sup>15</sup> accompanied by commentary. It considered that work was sufficiently advanced to indicate how a finalised Bill would approach the main issues. It has now closed the consultation, and is considering the responses. A Bill will be presented to Parliament this session.<sup>16</sup>

The consultation document was larger than most, running to 336 pages. The draft Bill contains 325 clauses and 6 schedules – with further clauses to be added. It embodies what the Government describes in the introduction as ‘*ground-breaking proposals*’.<sup>17</sup> The consultation period, however, was limited to 12 weeks. That period meets only the minimum required by the Cabinet Office’s code of practice on written consultation.<sup>18</sup>

The consultation document deals with criminal justice, a reserved matter under the Northern Ireland Act 1998. It also covers excepted matters, such as taxation. The draft Bill therefore deals with matters that have not been devolved, and remain the responsibility of the Secretary of State for Northern Ireland.

However, the Northern Ireland Assembly established an Ad Hoc Committee to consider the draft Bill and report to the Assembly. Chaired by Mr A Maginness MLA, it reported to the Assembly on 29<sup>th</sup> May 2001.<sup>19</sup> The Assembly resolved to submit the report to the Secretary of State as a report of the Northern Ireland Assembly.<sup>20</sup>

The draft Bill is divided into nine parts, as follows:

- I The Criminal Assets Recovery Agency
- II Criminal Confiscation (i.e. Criminal Confiscation in England and Wales)
- III Scotland (i.e. Criminal Confiscation in Scotland)
- IV Northern Ireland (i.e. Criminal Confiscation in Northern Ireland)
- V Civil Recovery
- VI Taxation
- VII Investigations
- VIII Money Laundering
- IX General Provisions

The following sections of this paper analyse the draft Bill as it relates to Northern Ireland – Parts II and III are therefore not covered. The paper considers Parts I, and IV to VIII in sequence. Part V, which as drafted applies only to England and Wales, is covered on the basis of the statement in the consultation document that equivalent provision will be made for NI.<sup>21</sup>

---

<sup>15</sup> *Proceeds of Crime Bill – Publication of Draft Clauses*, Cm 5066, Home Office 2001

<sup>16</sup> The Queen’s Speech on the Opening of Parliament, 20 June 2001

<sup>17</sup> Cm 5066, Introduction, para 17

<sup>18</sup> *Code of practice on written consultation*, Cabinet Office, 2000, Criterion 5

<sup>19</sup> Ad Hoc Committee Report on the Proceeds of Crime Bill, Northern Ireland Assembly, Report Ad Hoc 4/00/R

<sup>20</sup> Debates, NI Assembly, 29<sup>th</sup> May 2001

<sup>21</sup> Cm 5066, para 5.2

## 4 PART I: A NEW AGENCY

### FUNCTION

A Criminal Assets Recovery Agency will be established for England, Wales, and NI.<sup>22</sup> Its role will be to use powers of financial investigation and asset recovery in order to reduce crime and increase public confidence in the criminal justice system. It will:

- apply to court for confiscation or recovery of criminal assets;
- investigate the extent and whereabouts of the proceeds of crime;
- exercise taxation functions in relation to persons suspected of benefiting from crime;
- promote the use of financial investigation and asset recovery generally;
- prepare and monitor a national Asset Recovery Strategy;
- be under a duty to exchange information with other enforcement agencies;<sup>23</sup> and
- provide for the training and accreditation of specialist financial investigators.

### INDEPENDENCE AND STRUCTURE

The CARA will be headed by a Director and is intended to be '*operationally independent*' of government.<sup>24</sup> However, it is to be funded by the Home Secretary.<sup>25</sup> Furthermore, if the Home Secretary is satisfied that the Director is '*unable or unfit to exercise his functions*', he may remove him from office.<sup>26</sup>

The Director must also lay an annual plan before the Home Secretary for approval.<sup>27</sup> If it is not approved, the Director is obliged to revise it. The Home Secretary may require the director to revise it in a specified manner. It would therefore appear that the Cara is not intended to be *strategically* independent of government. It can be anticipated that a lack of strategic independence would have an effect on the degree of operational independence.

The Ad Hoc Committee recommended that '*the Director should be autonomous and the Agency should be allowed to work free from political interference*'.<sup>28</sup>

The annual plan must set out in particular how CARA will operate in NI.<sup>29</sup> The draft Bill does not state what influence the Secretary of State for Northern Ireland will have on the Home Secretary's power over the annual plan.

An annual report will be presented at the end of each year to the Home Secretary and published.<sup>30</sup>

---

<sup>22</sup> A similar but separate agency will be established in Scotland. Justice and criminal law are devolved matters there, and it has different judicial and legal institutions.

<sup>23</sup> Including the Police, HM Customs and Excise, the Inland Revenue, other government departments and agencies, local authorities and statutory bodies

<sup>24</sup> Cm 5066, para 1.6

<sup>25</sup> Cm 5066, Schedule 1, para 6 (1)

<sup>26</sup> Cm 5066, Schedule 1, para 1 (3)

<sup>27</sup> Cm 5066, Schedule 1, para 8

<sup>28</sup> Ad Hoc Committee Report, para 12

<sup>29</sup> Cm 5066, Schedule 1, para 8 (2)

<sup>30</sup> Cm 5066, Schedule 1, para 9



A senior official will have specific responsibility for NI.<sup>31</sup> The Ad Hoc Committee recommended<sup>32</sup> that that person *'must be at Deputy Director level, based locally and must have sufficient seniority to take decisions on behalf of the Agency in Northern Ireland'*.

£54 million will be provided to CARA over the next three years.<sup>33</sup> Under a standard application of the Barnett formula, this represents approximately £1 million per year for NI.

The Director will carry out his functions in whatever way he considers best calculated to contribute to the reduction of crime.<sup>34</sup> He is required to establish a system for the training and accreditation of financial investigators. Financial investigators are currently used by the Police and HM Customs to trace the proceeds of crime. The draft Bill will give them new powers to apply for:

- production orders, search warrants and monitoring orders (see Part VII); and
- restraint and charging orders (see Part II).

It is intended that the Director will establish a training centre (a 'Centre for Excellence') for financial investigators.<sup>35</sup> This was a key recommendation of the PIU report.

#### THE CRIMINAL ASSETS BUREAU OF THE REPUBLIC OF IRELAND

Several other common law jurisdictions have similar agencies to the CARA, with similar powers: for example the USA, Australia, Canada and the Republic of Ireland. The NIO gave considerable attention to the Irish Criminal Assets Bureau ('CAB') when assisting in the development of the draft Bill, and the Rt Hon Mr Adam Ingram, MP, Security Minister at the NIO, visited the CAB on 25 October 2000. The CARA is intended to have close parallels with the CAB.<sup>36</sup> The Ad Hoc Committee also visited the CAB, on 1<sup>st</sup> May 2001, describing the visit as *'very useful'*. The Chairman reported that

*'Members were impressed by the professionalism and the dedication shown by the bureau staff, often in the face of personal threat from criminal elements. The Committee was also impressed by the Criminal Assets Bureau's evident success.'*<sup>37</sup>

The CAB was established in October 1996<sup>38</sup> and is under the control of an Assistant Garda Commissioner. Its stated objectives include the identification of assets of persons which derive or are suspected to derive from criminal conduct, and the taking of appropriate action to deprive those persons of the benefit of those assets. The CAB may seek, in the Irish High Court, orders freezing property proved to be the proceeds of crime, and vesting it in the Minister for Finance after 7 years.<sup>39</sup>

<sup>31</sup> Cm 5066, Schedule 1 para 4 (b)

<sup>32</sup> Ad Hoc Committee Report, para 12

<sup>33</sup> Cm 5066, Introduction para 6

<sup>34</sup> Cm 5066, Clause 2

<sup>35</sup> Cm 5066, para 1.5

<sup>36</sup> NIO press release, *Crackdown on Money Laundering will benefit Northern Ireland*, Minister says, 05.03.2001, <http://www.nio.gov.uk/010305a-nio.htm>

<sup>37</sup> Deb, NI Assembly, 29<sup>th</sup> May 2001, Mr A Maginness MLA

<sup>38</sup> By the Criminal Assets Bureau Act 1996 (Republic of Ireland). The latest annual report of the CAB is at <http://gov.ie/garda/angarda/othdocs.html>

<sup>39</sup> Proceeds of Crime Act 1996 (Republic of Ireland)

The CAB has adopted a multi-agency approach and is staffed by officers from An Garda Síochána, Revenue Commissioners Taxes, Revenue Commissioners Customs and the Department of Social, Community & Family Affairs. The Ad hoc Committee, which was *'impressed by the professionalism and the dedication shown by the bureau staff'*<sup>40</sup>, recommended that the staff of CARA *'should possess a broad level of investigative experience, criminal, financial and legal, and the Agency should operate on a holistic basis, ensuring a multi-agency approach'*.<sup>41</sup>

---

<sup>40</sup> Deb, NI Assembly, 29<sup>th</sup> May 2001, Mr A Maginness MLA

<sup>41</sup> Ad Hoc Committee Report, para 12

## 5 PART IV: CRIMINAL CONFISCATION

Part IV<sup>42</sup> consolidates and enhances the law of Northern Ireland governing the confiscation of the assets of criminals.<sup>43</sup> It allows a court, following a criminal conviction, to confiscate assets which represent the benefit from any conduct which is an offence in NI, or would be an offence if it had happened here.

Criminal confiscation can only follow conviction – this distinguishes it from civil recovery which is considered below. It can only occur once a person has been proven guilty of a criminal offence beyond a reasonable doubt (the criminal standard of proof). The provisions of the draft Bill relating to criminal confiscation do not affect this principle. However, once guilt is proven, questions of confiscation – such as the amount of assets deemed to be the proceeds of crime – are decided in the balance of probabilities (the civil standard of proof).<sup>44</sup>

The draft Bill provides for two types of confiscation,<sup>45</sup> only one of which may apply in any particular case. They are confiscation of

- benefit from ‘particular criminal conduct’: the court may confiscate the benefit from the offence of which the defendant has just been convicted, and any offences taken into consideration by the court in sentencing him; or
- benefit from ‘general criminal conduct’: the court may – if it makes a further finding that the defendant has ‘a criminal lifestyle’ – calculate and confiscate the defendant’s benefit from his *entire* past criminal conduct. Confiscation will occur whether or not the defendant has ever been convicted for that conduct.

### GENERAL CRIMINAL CONDUCT: CRIMINAL LIFESTYLE

Whether the defendant has ‘a criminal lifestyle’ is determined solely by whether the offence of which the defendant has been convicted is of a type listed in the draft Bill, i.e.:<sup>46</sup>

- a drug trafficking offence;
- a money laundering offence;
- of a type specified in regulations by the Home Secretary;<sup>47</sup>
- part of a course of criminal conduct;<sup>48</sup> or
- committed over the course of at least six months.

<sup>42</sup> Parts II and III make similar provision for England, Wales and Scotland.

<sup>43</sup> The existing NI legislation is the Proceeds of Crime (NI) Order 1996. A draft Financial Investigations (Northern Ireland) Order is before Parliament, having been considered by the Assembly: see the Ad Hoc Committee Report on the Financial Investigations (NI) Order 2001, Northern Ireland Assembly, Report Ad Hoc 2/00/R

<sup>44</sup> Cm 5066, Clause 154 (7)

<sup>45</sup> Cm 5066, Clause 154

<sup>46</sup> Cm 5066, Clause 220

<sup>47</sup> Cm 5066, para 108 offers the examples of offences of arms trafficking or trafficking in human beings

<sup>48</sup> I.e., if the defendant has been convicted in the current proceedings of four or more acquisitive offences, or has been convicted in the current proceedings of one acquisitive offence and has other convictions for acquisitive offences on at least two separate occasions in the last six years: see Cm 5066, clause 220 (3)

GENERAL CRIMINAL CONDUCT: ASSUMPTIONS AS TO AMOUNT OF PROCEEDS OF CRIME

In calculating the benefit from general criminal conduct, the Crown Court *must* in most cases make four assumptions:<sup>49</sup>

- that any property transferred to the defendant in the six years before the commencement of the prosecution was transferred as a result of his conduct;
- that any property held after conviction is held as a result of his conduct;
- that any expenditure incurred in the six years before prosecution was paid for by assets which were the result of his conduct; and
- that, for the purposes of valuing any property, the defendant took it free of any other interests.

If the CARA can show that property exists which falls into one of these categories, it will be confiscated unless the defendant can prove in the balance of probabilities that he received it from some non-criminal source. The assumptions therefore have the effect of reversing the burden of proof: it is no longer for the CARA to make its case for confiscation, but for the defendant to prove that it should not occur.

The use of such assumptions may not be consistent with the presumption of innocence until guilt is proven – a right long guaranteed by the common law. The right to that presumption, stated also in the European Convention on Human Rights<sup>50</sup> is now enshrined in the Human Rights Act 1998. An English case<sup>51</sup> challenging similar assumptions, is currently before the European Court of Human Rights. The decision in that case will have a bearing on whether the assumptions remain in the draft Bill.

The Northern Ireland Human Rights Commission commented on the assumptions to the Ad Hoc Committee. Prof Brice Dickson stated that

*‘it is a distinct possibility that, under the ECHR, the draconian nature of those assumptions would be held to be in breach of article 6 [of the ECHR]. They are draconian because they extend for 6 years and to all property and expenditure acquired, or spent, during that period’.*<sup>52</sup>

Liberty has gone further. It has published an Opinion of Counsel<sup>53</sup> stating that the proposals for criminal confiscation should not be certified as compatible with the Human Rights Act 1998,<sup>54</sup> explaining that

*‘it is wrong to place a burden of proof on a defendant to show on the balance of probabilities that his assets are not derived from criminal conduct. The current proposals not only destroy the essence of the presumption of innocence, but also have the capacity to lead to arbitrary and irrational results.’*

---

<sup>49</sup> Cm 5066, Clause 159

<sup>50</sup> Article 6 (2)

<sup>51</sup> Phillips v the United Kingdom

<sup>52</sup> Ad Hoc Committee Report, Minutes of Evidence, 24.04.2001, para 13

<sup>53</sup> Montgomery, C, QC, Ryder, M, Friedman, D, *Opinion of Counsel on Part II of the draft Bill – Criminal Confiscation*, Matrix Chambers, London, 24.05.2001, at <http://www.liberty-human-rights.org.uk/>

<sup>54</sup> Such certification is required from the Home Secretary by s 19 of the HRA 1998

The net result of these provisions will be to make confiscation after a finding of 'criminal lifestyle' an exceedingly powerful weapon. For example, a person convicted of a drug trafficking offence may lose every item of property shown to have been transferred to him in the 6 years before prosecution began, unless he can show a legitimate source. This could occur even where the CARA agrees that the drugs offence is a first offence. Liberty suggest that

*'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'.<sup>55</sup>*

#### RETROSPECTIVE EFFECT

The draft Bill also provides for a certain amount of retrospective confiscation. If it has new evidence, the CARA may apply to the Crown Court within six years of a conviction, *in relation to which* no confiscation order was made. Where a confiscation order was made, the CARA may apply to vary the amount.<sup>56</sup> These provisions would allow the CARA to take action to recover assets obtained by a person before the draft Bill becomes law.

---

<sup>55</sup> Proceeds of Crime: Consultation on Draft Legislation - Liberty's response, 2001, para 3.5, at <http://www.liberty-human-rights.org.uk/>

<sup>56</sup> Cm 5066, Clauses 168-175

## 6 PART V: CIVIL RECOVERY

Part V of the draft Bill introduces a new concept to the law of the UK: it establishes an entirely new civil right of action. The right is vested only in the Director of the CARA<sup>57</sup> and allows him to sue for the recovery of property which has been obtained through conduct contrary to the criminal law. Claims will be heard in the High Court by a judge alone: there will be no jury.<sup>58</sup>

Civil recovery will be entirely governed by the civil standard of proof. A criminal conviction is not required to trigger it.

This may be the most controversial matter in the draft Bill. Civil recovery is a fundamentally different matter from criminal confiscation, due to the different standards of proof required. The criminal law requires that guilt be proven 'beyond a reasonable doubt'. The civil law requires only that a case be proven 'in the balance of probabilities'. Many lawyers would regard civil recovery as a dangerous principle to introduce to the law, as it undermines the fundamental principle of the presumption of innocence.<sup>59</sup> These issues are discussed below.

The consultation document provides the following reasoning for the need for civil recovery:

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

- *rules of criminal procedure or evidence, having no bearing on the issue of the attribution of assets to criminal conduct, protect a respondent from conviction, with the result that no prosecution ensues or that the case results in an acquittal;*
- *there may be convincing evidence that particular property was obtained through criminal conduct, but insufficient evidence to establish which of a group of identified individuals were involved in the crime, with the result that no prosecution has proved possible;*
- *the respondent is wholly beyond the reach of prosecution, perhaps because he is abroad in circumstances in which he cannot be extradited, or because he has died;*
- *the crime in question was committed abroad in circumstances where there is no extra-territorial jurisdiction to prosecute.*

*The Government believes that a means of recovery of the proceeds of crime, focusing not primarily on the criminality of an identified individual but on the characterisation of the property itself, is required in order to fill that gap.<sup>60</sup>*

The Government acknowledges that civil forfeiture

<sup>57</sup> Cm 5066, Clause 245

<sup>58</sup> Part V as drafted applies only to England and Wales, but it is intended that equivalent provision will be made for Northern Ireland. This section considers the proposals and draft clauses in that context

<sup>59</sup> *Unconvicted criminals made to pay*, The Daily Telegraph, 01.10.1998

<sup>60</sup> Cm 5066, paras 5.5 and 5.6

*'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.'*<sup>61</sup>

The introduction of civil forfeiture in the Republic of Ireland appears to have led to a flight of the heads of half a dozen organised crime groups out of the jurisdiction.<sup>62</sup>

#### BURDEN OF PROOF: THE PRESUMPTION OF INNOCENCE

The protection of the innocent is one of the prime concerns of the criminal courts. For example, they allow certain victims to give evidence by video link to protect them from the adversarial atmosphere of the courtroom, and they prohibit the reporting of the identity of certain witnesses.

Accused persons, however, are also regarded as innocent. The courts safeguard 'the presumption of innocence': the principle that an accused is considered innocent until proven guilty. The burden of proving that guilt lies on the prosecution: the accused does not normally have to prove that he is innocent. In the leading case on the issue, the presumption was described as *'the golden thread'* of the criminal law:

*'no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.'*<sup>63</sup>

The presumption derives from a fundamental rule of the criminal law: that the innocent shall not be punished.<sup>64</sup> It has long been a standard of the criminal law that

*'it is better that ten guilty persons escape than one innocent suffer.'*<sup>65</sup>

#### STANDARD OF PROOF: CRIMINAL OR CIVIL?

A prosecution must prove guilt to the criminal standard of proof, i.e. 'beyond a reasonable doubt'. This is a high and demanding standard, applied because

*'the higher the probability that we require for the proof of past events, the less likely it is that our conclusions will be at variance with reality.'*<sup>66</sup>

A mistake in a criminal court may result in an innocent person being unfairly deprived of his liberty: jailed or, in the past, executed. For this reason, the law regards error as a more important matter in the criminal courts than in the civil. The level at which the standard of proof is fixed is therefore representative of the view of society as to who should bear the risk of any mistake. Lord Devlin commented that

*'[s]ince we know that the ascertainment of guilt cannot be made infallible and that we must leave room for a margin of error, we should take care to see as*

---

<sup>61</sup> *Recovering the Proceeds of Crime*, para 5.3

<sup>62</sup> *Recovering the Proceeds of Crime*, para 5.9, note 7

<sup>63</sup> *Woolmington v DPP*, 1935 All ER 1, per Viscount Sankey LC, at 8 D

<sup>64</sup> Meade, J, *The Disguise of Civility – Civil Forfeiture of the Proceeds of Crime and the presumption of Innocence in Irish Law*, *Hibernian Law Journal*, Vol 1.1, 2000

<sup>65</sup> *Blackstone's Commentary on the Laws of England*, Book iv. 27

<sup>66</sup> Zuckerman, A, *The Principles of Criminal Evidence*, Clarendon Press, 1989, p122

*far as humanly possible the margin is all on the side of the defence. How big a margin should it be? ... Until the point is reached when the system ensures with as much certainty as is possible in human affairs that no innocent man is ever convicted, the margin should be as great as the nation can afford.'*<sup>67</sup>

Various other rules of criminal court procedure protect the presumption of innocence and the criminal standard of proof. Thus, for example, the rule against hearsay requires real and direct evidence of an event, rather than the mere reporting of what someone else says has occurred. Another example is the right against self-incrimination.

#### CIVIL RECOVERY UNDER THE DRAFT BILL, HAVING REGARD TO THE BURDEN AND STANDARD OF PROOF

The draft Bill will apply the civil standard of proof – i.e. proof ‘in the balance of probabilities’ – to its scheme of civil recovery. When property is proven in the balance of probabilities – i.e., slightly more likely than not – to be the proceeds of crime, a court may order that it be forfeited to the CARA.

#### REPARATIVE OR PUNITIVE? SETTING THE BURDEN AND STANDARD OF PROOF

The civil recovery scheme of the draft Bill will focus on items of property rather than individuals. The Home Office states that the decision will be one of whether property is the proceeds of crime, rather than one of the guilt of an individual. It characterises civil recovery as reparative rather than punitive.

The consultation document points out that the civil recovery scheme focuses

*‘not primarily on the criminality of an identified individual but on the characterisation of the property itself....the proceedings will not seek to determine the criminal guilt or innocence of any person, but will focus on whether the property can be shown to have been obtained through some person's unlawful conduct.’*<sup>68</sup>

In its 2000 report ‘*Recovering the Proceeds of Crime*’<sup>69</sup> (the proposals of which are given effect by the draft Bill), the Cabinet Office presented the same view by stating that

*‘the proposed civil forfeiture regime is intended to provide ... a reparative measure, taking away from individuals that which was never legitimately owned by them ... civil forfeiture is not intended as a punitive measure.’*<sup>70</sup>

The United States Supreme Court,<sup>71</sup> and the Irish courts,<sup>72</sup> generally agree with the Home Office view that recovery represents nothing more than the removal of property which, being the proceeds of crime, a person has no right to possess, and that it cannot therefore be regarded as a punishment.

---

<sup>67</sup> Devlin, *The Criminal Prosecution in England*, Oxford University Press, 1960, 113

<sup>68</sup> Cm 5066, paras 5.6 and 5.10

<sup>69</sup> Performance and Innovation Unit, *Recovering the Proceeds of Crime*, Cabinet Office, 2000

<sup>70</sup> Cm 5066, paras 5.12 and 5.13

<sup>71</sup> E.g., *Calero-Toledo v Pearson Yacht Leasing Co.* 416 US 663 (1974)

<sup>72</sup> E.g., *Gilligan v CAB* 1998 3 IR 185



The Ad Hoc Committee also agreed with this view. It stated that

*'persons cannot regard as punishment the loss of assets to which they were not entitled in the first place'.<sup>73</sup>*

There is, however, an ongoing debate as to whether civil recovery is not in fact reparative, but punitive. It is an important debate: if civil recovery is a punishment, then the common law and the HRA may require that it should only follow a criminal trial, with all its safeguards, including the burden and higher standard of proof. In a recent commentary on the similar civil recovery scheme in Ireland,<sup>74</sup> Meade characterises the recovery of the proceeds of crime as a punishment, which should only follow a finding of guilt in a criminal trial. He comments that

*'civil forfeiture of the proceeds of crime involves the removal by the State of property linked to a criminal act without obtaining a criminal conviction. The forfeiture action is conducted in a civil forum, ignoring the criminal process, its standards and safeguards. The result is the imperilment of the substance of the presumption of innocence in our society.'*

He concludes that

*'[t]he net effect of this process is the infliction of a retributive sanction by the State on one of its citizens for a criminal act that has not been proved beyond a reasonable doubt... This would seem to be a punishment without justification, an attempt by the State to ignore 'due process' in the imposition of a criminal sanction by utilising a civil ... proceeding ... to effect the aims of the criminal law.'*

Liberty has recently called for a restatement of the basic principles of the presumption of innocence, the criminal standard of proof, the right to a fair jury trial on the facts of the case, and for

*'an end to the recent trend to use [sic] civil law standards and the lower burden of proof as a 'shortcut' in measures intended to tackle crime (e.g. anti-social behaviour orders, civil confiscation of assets).'<sup>75</sup>*

It observed that the draft Bill

*'removes the basic protection that you will only have your belongings and finances investigated and seized if you are proved to have done wrong to the criminal standard. Mr Straw's Bill proposes that people who are deemed by a judge (with no jury) to be 'probably' criminals can have their assets seized.'<sup>76</sup>*

Liberty has also stated that

---

<sup>73</sup> Ad Hoc Committee Report, para 11

<sup>74</sup> *The Disguise of Civility – Civil Forfeiture of the Proceeds of Crime and the presumption of Innocence in Irish Law*, Meade, J., *Hibernian Law Journal* Vol 1:1, 2000. The article also contains an illuminating review of the history of the legal fictions behind *deodand* and civil recovery.

<sup>75</sup> *Liberty's ten-point plan for urgent change*, Liberty, 28.03.2001, at <http://www.liberty-human-rights.org.uk/>

<sup>76</sup> Liberty press release, *Targeting criminals' profits is fine; civil confiscation is not*, at <http://www.liberty-human-rights.org.uk/>

*'it is likely the provision may violate the right to a fair trial contained in Article 6 of the European Convention on Human Rights which the government incorporated into domestic law in the Human Rights Act'.<sup>77</sup>*

In relation to the right to the presumption of innocence as protected by the European Convention of Human Rights, the European Court of Human Rights has said:<sup>78</sup>

*'the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty.'*

It is possible that if the draft Bill becomes law, the civil forfeiture provisions may be challenged as incompatible with the European Convention. Similar provisions have been unsuccessfully challenged in the Republic of Ireland as incompatible with certain human rights protected under its constitution.<sup>79</sup>

The government does not appear to have considered applying the criminal standard of proof to recovery: i.e. deciding beyond a reasonable doubt that certain assets are the proceeds of crime, and recovering them on that basis, without requiring the trigger of a conviction.

#### THE STANDARD OF PROOF: INCREASED LIKELIHOOD OF MISCARRIAGE OF JUSTICE

The civil standard of proof is lower than the criminal standard. The draft Bill proposes applying that lower standard to decisions on civil forfeiture. It is thus more likely that a decision will be 'at variance with reality': i.e. in error.

Liberty has also commented on the increased likelihood of mistakes under the draft Bill:

*'Of course the police will say that they "know" who is guilty and the current rules prevent them from obtaining sufficient evidence in obtaining a conviction. However, we base our system of justice not on the opinions of police officers, but on proper evidence given by witnesses in person in court. We only "know" that someone is guilty once they have been convicted. Of course often the police do "know" but sometimes, and this is the crucial point, they make mistakes. All too often the innocent are wrongly accused and even with the current protections sometimes the innocent are convicted and imprisoned. These proposals will increase the likelihood of innocent people being "convicted".'<sup>80</sup>*

#### ABUSE OF CIVIL FORFEITURE

Meade states that

<sup>77</sup> In its *Statement on Crime Finance Bill*, 30.11.2000, at <http://www.liberty-human-rights.org.uk/>

<sup>78</sup> *Minnelli v Switzerland* A 62 (1983)

<sup>79</sup> See for example *M v M*, Unreported, High Court, 4 June 1999

<sup>80</sup> *Statement on Crime Finance Bill*

*'no discussion of the present forfeiture practices in the United States would be complete without adverting to the widespread abuses of the system and the allegations, by many commentators, that it has become a modern form of bounty hunting ... certain law officers, especially in the southern States, have earned a reputation for selective, even racist, operation of the civil forfeiture provisions'.<sup>81</sup>*

The potential for abuse might be increased where the body tasked with seeking to confiscate assets benefited directly from assets confiscated.

#### HEARSAY

The rule against hearsay is a principal rule of evidence in criminal trials. It states that

*'[f]ormer statements of any person, whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them'.<sup>82</sup>*

As the draft Bill characterises recovery as a civil procedure, hearsay will be admissible.<sup>83</sup>

#### RETROSPECTIVE EFFECT

The draft Bill provides that civil recovery will apply retrospectively to existing criminal proceeds, i.e. to property which was obtained through criminal conduct that occurred before the civil recovery law came into force.<sup>84</sup>

Liberty<sup>85</sup> and the NIHRC<sup>86</sup> have stated that this provision may violate Article 7 of the European Convention on Human Rights, which prohibits retrospective penalties.

The draft Bill allows for civil recovery by giving the Director of CARA a right of civil action: a right to sue. In most normal civil actions, the law imposes a 'limitation period': a period of time after which the action is barred and will not normally be allowed. Thus, for example: a bank cannot generally sue on a mortgage if payments are more than 12 years in arrears; and a person cannot generally sue for damages in negligence for personal injuries the cause of which was known more than 3 years before. The draft Bill proposes no such limitation on the civil right of action it will create, although the consultation document states that the Government is *'considering this point carefully'.<sup>87</sup>*

---

<sup>81</sup> *The Disguise of Civility*, Meade, J

<sup>82</sup> Phipson on Evidence, 14<sup>th</sup> ed., 1990, para 21-02. Thus, if Ms A states that Mr B made a statement, Ms A's evidence is admissible as to the fact that Mr B did indeed make such a statement. But it is not admissible as evidence that whatever is contained in Mr B's statement is true

<sup>83</sup> Cm 5066, para 5.8

<sup>84</sup> Cm 5066, paras 5.8 and 5.32

<sup>85</sup> *Statement on Crime Finance Bill*

<sup>86</sup> *Evidence submitted to the Ad-Hoc Committee on the draft Proceeds of Crime Bill, NI Assembly on 24 April 2001*, NIHRC, para 9, at [http://www.nihrc.org/files/proceeds\\_of\\_crime\\_bill\\_01.htm](http://www.nihrc.org/files/proceeds_of_crime_bill_01.htm)

<sup>87</sup> Cm 5066, para 5.32

## REPUTATION, AND PREJUDICE OF FUTURE PROSECUTION

The court in a civil recovery action will make a decision only as regards the origins of particular assets. However, its decision may also imply criminality on the part of the defendant. Criminal recovery cases may be widely covered by the media. Even though a decision does not determine guilt on the criminal standard, nor declare any person to be have committed an offence, it may generate the perception that the defendant is a criminal.

The government has not indicated how the difficult distinction between a civil recovery decision, and a finding of guilt in a criminal court, will be made clear to the public.

Nor does it deal with the problem of potential prejudice to a future criminal prosecution. A person who is accused of an offence may be able to show that he cannot obtain a fair trial because of media coverage of an earlier civil recovery action against him: the result may be an acquittal.

## 7 PART VI: TAXATION

Where the CARA cannot claim assets either by criminal confiscation or civil recovery, it can as a last resort assess those assets for tax. This has been referred to as the 'Al Capone route' to depriving criminals of the proceeds of crime.<sup>88</sup> The CARA may take responsibility for a person's tax affairs from the Inland Revenue. It may only do so where it has reasonable grounds to suspect that any income, gain or profit is the proceeds of crime.<sup>89</sup>

The consultation document states that

*'[t]he intention here is to counter the efforts of persons to protect their criminal assets by arguing they were accumulated from legitimate sources. In many such cases the income, gain or profits are in fact unknown to the Revenue. Since they have not been declared the subject will be exposed not only to the collection of tax, but also to interest and penalties on it. This means that much, and in some cases all, of a subject's illegally gained wealth can be recovered by taxation'.<sup>90</sup>*

The CARA will be able to exercise functions in relation to:

1. income tax;
2. capital gains tax;
3. corporation tax,
4. inheritance tax; and
5. a taxpayer's role as an employer in respect of PAYE and National Insurance contributions.<sup>91</sup>

Which tax functions in any particular case CARA will exercise will be for the Director to decide, in consultation with Inland Revenue. Functions the CARA does not exercise will remain with Inland Revenue.<sup>92</sup> CARA will become responsible for all stages in the process of taxing a person for a particular period. This will include the recovery of the tax, plus interest, and any penalties. Responsibility will then be returned to Inland Revenue to handle the liability for other years.<sup>93</sup> The Consultation document does not indicate how a dispute between Inland Revenue and the CARA will be resolved.

The Director will be able to raise a tax assessment which does not identify the source of income. The government states that this

*'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'.<sup>94</sup>*

Information in relation to a person's tax affairs, obtained by CARA through its general investigation powers,<sup>95</sup> will also be used to assess whether there are reasonable

<sup>88</sup> *Asset strippers need no proof to target crooks*, Daily Telegraph, 15.06.2000. Mr Capone was a notorious American criminal, jailed not for his criminal enterprise but for tax evasion

<sup>89</sup> Cm 5066, Clauses 272, 273 and 275, and para 6.3

<sup>90</sup> Cm 5066, para 6.1

<sup>91</sup> Cm 5066, para 6.4

<sup>92</sup> Cm 5066, para 6.5

<sup>93</sup> Cm 5066, para 6.6

<sup>94</sup> Cm 5066, para 6.11

<sup>95</sup> Set out in Part VII of the draft Bill and considered below at XXX

grounds to suspect that income, gains or profits were derived from criminal conduct, facilitating claims for confiscation or recovery.

Information obtained by CARA under these powers will not be passed to Inland Revenue.<sup>96</sup> This means that Inland Revenue will not hold any information about a taxpayer beyond what it could have obtained itself, had CARA not been involved.

However, the Inland Revenue will be aware that CARA had reasonable grounds for suspecting that any income, gain or profit was the proceeds of crime. The consultation document does not indicate how Inland Revenue will be allowed to react to that knowledge. It is foreseeable that this could have an effect on the way the Inland Revenue treats a taxpayer's affairs in future.

In the Republic of Ireland, the Criminal Assets Bureau is similarly empowered to raise tax assessments. It is interesting to note that its taxation power has yielded far more financial success than its recovery powers: since 1996 it has demanded IR£38m in tax, but taken only IR£17m of civil recovery actions.<sup>97</sup> It has been observed that there has been a '*major shift of emphasis*' in the activity of the CAB towards tax collection.<sup>98</sup>

The CAB settles many of its tax demands. For example, in 1999 it settled an income tax assessment with a Dublin man for approximately IR£2m. When the man applied for a taxi licence two years later, the CAB gave evidence that he was '*fully tax-compliant and has no outstanding liabilities to CAB*'.<sup>99</sup>

---

<sup>96</sup> Cm 5066, para 6.13

<sup>97</sup> Information provided by the CAB to the Ad Hoc Committee, 01.05.2001

<sup>98</sup> McDermott, P A, (1999) *The Proceeds of Crime Act, 1996: A Review of the Past 12 Months*, Dublin, Bar Review 4 p413

<sup>99</sup> *Court grants Hutch right to become taxidriver*, Irish Times, 06.06.01

## 8 PART VII: INVESTIGATIONS

The draft Bill provides five powers for investigating the extent or whereabouts of the proceeds of crime, and whether a person has benefited from criminal conduct. The powers may be used in any investigation concerning the proceeds of crime. Information obtained may be used in any subsequent action by the CARA: civil recovery, criminal confiscation, or tax assessment.

The CARA will be able to apply to court for:

- i) production orders
- ii) search warrants
- iii) disclosure orders
- iv) customer information orders; and
- v) account monitoring orders.

### PRODUCTION ORDER

The production order (an order to a named person requiring that he produce specified material) is not new to the law of the UK. It can apply to any material, for example accounts, records, correspondence, or computer hard drives.

### SEARCH WARRANT

The search warrant (an order permitting a named officer to enter and search premises, and to seize any material likely to be of substantial value to an investigation) is not new to the law of the UK. Standard procedural safeguards<sup>100</sup> which apply to ordinary police searches will apply to searches under the draft Bill.

### DISCLOSURE ORDER

The disclosure order will be a powerful device. A similar power has been available in NI since 1996,<sup>101</sup> but this power will be new to the rest of the UK. It is a court order which authorises the Director to require anyone who he considers to have relevant information, whether under investigation or not, to:

- answer questions at interview;
- provide information; or
- produce documents.

It should be noted that the court itself does not make the order requiring disclosure: instead it makes an order authorising the Director to require disclosure. There is a low threshold for the making of the court order.<sup>102</sup> It need only be satisfied that there are reasonable grounds:

- for suspecting that the person under investigation has benefited from criminal conduct;

---

<sup>100</sup> I.e., Articles 17 and 18 of the Police and Criminal Evidence (Northern Ireland) Order 1989: see clause 290

<sup>101</sup> Proceeds of Crime (NI) Order 1996, SI 1996 No 1299

<sup>102</sup> Cm 5066, Clause 292

- believing that information may be obtained that is of substantial value to the investigation.

The person believed to have the relevant information need not be the person under investigation.

#### ACCOUNT MONITORING ORDER

An account monitoring order will require a bank or other financial institution to provide transaction information on a suspect account for a specified period. This is an entirely new power. Similar monitoring can be performed under present legislation but only by means of a series of production orders.

As with the compulsory disclosure order, an account monitoring order can apply widely to any person, even a person who is not under investigation or suspicion.

#### CUSTOMER INFORMATION ORDER

A customer information order will also be a powerful tool. It is a circular to any or all banks and other financial institutions, requiring them to provide details of any accounts held by a named person (who must be under investigation). This power will be new to England and Wales, although a similar power has existed in NI since 1996.<sup>103</sup>

The customer information order will apply only to financial institutions. It will not generally apply to solicitors. The draft Bill does not propose to allow for requests to be issued to solicitors requiring them to provide details of a named client. However, such a power (to issue a 'solicitor circular') will shortly be available in NI under different legislation.<sup>104</sup> The Home Office in its consultation document does not explain why such a power, considered necessary by the Northern Ireland Office, is not required by the rest of the UK.

The Northern Ireland Human Rights Commission has referred to this lack of parity. The Commission has stated<sup>105</sup> that it is

*'not persuaded that [the power to issue a solicitor circular] is yet required, especially in view of the fact that the Government has not explained why it is required in Northern Ireland but not elsewhere in the United Kingdom.'*

The solicitor circular power was considered carefully by the Assembly Ad Hoc Committee – Financial Investigations (NI) Order 2001.

Its report<sup>106</sup> states that

*'[t]he Committee's majority view was to accept [the power to issue a solicitor circular] but some members had serious concerns reflecting those of Liberty,*

---

<sup>103</sup> Proceeds of Crime (NI) Order 1996, SI 1996 No 1299

<sup>104</sup> The draft Financial Investigations (NI) Order 2001 has been laid before Parliament

<sup>105</sup> *Views On The Proposed Financial Investigations (NI) Order 2001*, NIHRC, 2001, para 4 (f), [http://www.nihrc.org/files/financial\\_investigations\\_1a.htm](http://www.nihrc.org/files/financial_investigations_1a.htm)

<sup>106</sup> Ad Hoc 2/00/R, the Report and Proceedings of the Ad Hoc Committee – Financial Investigations (NI) Order 2001, para 16. See also RLS papers Fin/22/00 and Cnt/63/00



*the Human Rights Commission and The Law Society of Northern Ireland on solicitor/client confidentiality and legal professional privilege. The Committee agreed to recommend that the Secretary of State enter into full and meaningful consultations with the relevant organisations before implementation.'*

## 9 PART VIII: MONEY LAUNDERING OFFENCES

Money laundering is the means by which criminals bring the profits from their criminal enterprises within the legitimate financial sector, with a view to disguising their true origin and avoiding confiscation. The draft Bill provides five main money laundering offences which are intended to simplify and strengthen the existing regime:

- i) failure to report;
- ii) laundering;
- iii) arrangements which assist laundering;
- iv) acquisition, use or possession; and
- v) tipping off.

The offences fit into the current approach to money laundering in the UK, which has three main elements:

- criminalisation – providing criminal offences with severe penalties.
- regulation – of the financial sector so that it maintains systems to detect and prevent money laundering; and
- reporting – making compulsory the reporting of known or suspected money laundering.

However, despite an annual average of 15,000 reports about suspicious transactions, the number of prosecutions for money laundering is currently very low.<sup>107</sup> The five new offences,<sup>108</sup> which will apply cross the entire UK, attempt to remedy this and are as follows:

### FAILURE TO REPORT

It will be an offence for a person employed in the financial sector<sup>109</sup> to fail to report suspicions of money laundering to the authorities, where:

- he knows or suspects that another person is involved in money laundering, or
- *he should know or suspect* that another person is involved in money laundering.

A person convicted of this offence is liable to up to 5 years imprisonment.

This offence is distinct from the others in that it may be committed not only where the person knows or suspects involvement, but also where he carelessly does not know or suspect. This means that a person may commit an offence even where he does not in fact know of or suspect that money laundering is occurring.

### LAUNDERING

It will be an offence to conceal, disguise, convert, transfer or remove from the jurisdiction the proceeds of crime. A person convicted of this offence is liable to up to 14 years imprisonment.

<sup>107</sup> *Recovering the Proceeds of Crime*

<sup>108</sup> Cm 5066, Clauses 311 to 315

<sup>109</sup> I.e., in a business as described in Schedule 5 to the draft Bill

#### ARRANGEMENTS WHICH ASSIST LAUNDERING

It will be an offence for a person to enter into or become concerned in an arrangement which he knows or suspects facilitate the acquisition, retention, use or control of the proceeds of crime by another person. A person convicted of this offence is liable to up to 14 years imprisonment.

#### ACQUISITION, USE OR POSSESSION

It will be an offence to acquire, use or have possession of the proceeds of crime. A person convicted of this offence is liable to up to 14 years imprisonment

#### TIPPING OFF

It will be an offence to tip off another in a way likely to prejudice an investigation or a pending investigation into money laundering. A person convicted of this offence is liable to up to 5 years imprisonment.

## 10 COMMENT

The consultation document *'Proceeds of Crime – Consultation on Draft Legislation'* does indeed, as the government stated,<sup>110</sup> contain 'ground-breaking' proposals. They include the introduction of an entirely new right into the civil law of Northern Ireland, and a recasting of the relationship between the civil and the criminal law. It proposes new and innovative tools to deal with the modern face of crime.

These tools have been used with some success elsewhere. In the Republic of Ireland, large sums of money have been taken out of the control of criminals. This has been said to have an effect on their ability to continue in criminal enterprise.

Commentators have suggested that certain elements of the proposals may be incompatible with the Human Rights Act 1998. In particular, it is suggested that:

- criminal confiscation will rely on assumptions which undermine the presumption of innocence; and that
- civil recovery imposes punishment without providing the safeguards of criminal court procedure and the criminal standard of proof.

But similar powers have been tested against the human rights-based constitutions of the Republic of Ireland and the United States, and found compatible with them. Furthermore, the Northern Ireland Assembly has expressly approved the thinking behind civil recovery by agreeing that no-one has the right to retain property to which they have no legal entitlement.

However, difficult issues remain to be tested. While it can be anticipated that the new, innovative law may have an impact on the levels and type of crime in Northern Ireland, it can also be anticipated – if the proposals in the draft Bill are enacted into law – that they will be challenged both in the domestic courts and in the European Court of Human Rights.

---

<sup>110</sup> See note 17