

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
(LRC 35-1991)

REPORT
ON
THE CONFISCATION OF THE PROCEEDS OF CRIME

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-four Reports containing proposals for the reform of the law. It has also published eleven Working Papers, two Consultation Papers and Annual Reports. Details will be found on pp.78-81.

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NOTE

This Report was submitted on 17th January, 1991 to the Attorney General, Mr. John L. Murray, S.C., under Section 4(2)(c) of the Law Reform Commission Act, 1975, and, at the Attorney General's request, is being made available to the public at this stage while the proposals it contains are being considered in the relevant Government Departments.

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CHAPTER 1: INTRODUCTION

1. On 6th March 1987, the then Attorney General requested the Commission to undertake an examination of, and conduct research and formulate and submit to him proposals for reform in relation to, a number of aspects of criminal law. This included the topic of confiscating the proceeds of crime. While there has been much concern in recent years as to the absence of an effective law in this area, it is clear that careful thought must be given to the form of any suggested legislation so as to ensure that it is both effective and constitutionally secure.

To assist us in coming to our conclusions, we circulated a Discussion Paper among lawyers and other persons expert in the enforcement of the law. We are very grateful for the observations and suggestions we received. We held a meeting at the Commission's offices on 31st May 1990 at which a number of these experts attended. The meeting considered the policy issues raised in the Discussion Paper and was of the greatest assistance to us in preparing our final proposals.

The Commission expresses its gratitude to the following who assisted it in coming to its conclusions:

Mr Eamon Barnes, Director of Public Prosecutions

Mr Edward Comyn, S.C.

Detective Superintendent Noel Conroy, Garda Síochána

Mr John Cooke, S.C.

Deputy Commissioner Patrick Culligan, Garda Síochána

Ms Muriel Hinch, Office of the Revenue Commissioners

Deputy Commissioner John Paul McMahon, Garda Siochana

Mr Justice Francis D Murphy

Mr Gordon O Briain, Office of the Revenue Commissioners

Mr Fergus O'Callaghan, Department of Justice*

Mr Declan Sherlock, Solicitor, Revenue Solicitor's Office

Mr Frank Sowman, Solicitor

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*Acting in his personal capacity

It is proposed briefly to set out the existing law and to explain where it falls short. Since several other jurisdictions have in recent years introduced measures to deal with the problem, some of these will be examined.¹ In addition, international conventions have been and are being drawn up. The constitutional problems which might arise from the necessarily draconian legislation which is envisaged will be discussed. Finally, alternative measures will be set out which might be adopted, and recommendations made.

2. The principal sanctions available to a court where a person is convicted of a criminal offence are imprisonment, a fine or a suspended sentence. Others are community service, an adjourned sentence, restitution or the payment of compensation.

The Whittaker Committee of Enquiry into the Penal System found that excessive reliance was being placed on imprisonment as a penal sanction and that it would be of more benefit to the community and to offenders if greater use were made of sanctions other than imprisonment. Alternative sanctions, they said, should be made available and greater awareness of the availability

1 E.g. U.K. *Drug Trafficking Offences Act 1986*, *Criminal Justice (Scotland) Act 1987*, *Criminal Justice Act 1988* (Part IV) and the *Criminal Justice (International Co-operation) Act 1990*. U.S. - *Comprehensive Crime Control Act 1984* (Chapter 3) amending parts of the "RICO" Act - the *Organised Crime Control Act of 1970*; Australia - *Customs Act 1901* as amended by the *Customs Amendment Act 1979*, *Proceeds of Crime Act 1987*; Canada - *an Act to amend the Criminal Code, The Food and Drugs Act and Narcotic Control Act* passed on the 13th September 1988; France - Act of 31st December 1987 to combat Drug Trafficking. In addition, the English Law Commission was asked by the Secretary of State to review the law of forfeiture and to consider whether further provision should be made to enable courts to make confiscation orders relating to the proceeds of crime in general. Their provisional conclusions are set out in a Discussion Paper on *Forfeiture and Confiscation* (June 1989).

and efficacy of such alternative sanctions promoted.

3. Among the alternative sanctions recommended by the Committee was the "confiscation of income or assets in certain cases".² The Committee went on to recommend that "there should be clear legal authority for confiscation of income or assets in appropriate cases, including e.g. the confiscation of a motor vehicle pending (or in default of) payment of a substantial fine for non-insurance and non-taxation".³

Underlying these conclusions is the general thrust of the Report: "that society should be less emotional in its response to crime and more aware of the contributions to crime made by the deficiencies in its own structures and operations".⁴

The law relating to fines was singled out as an example of a structural deficiency.

"The defects are generally a consequence of the outdated nature of the relevant rules or statutes. In the case of fines, the sentencing ranges available to the courts are frequently fixed in sums that are far below what would be regarded as reasonable at the present time. Equally important, fines must, under the prevailing rules, be paid in a lump sum, there being no provision for payment by instalments or by phased deductions from wages or other income sources

"Given the cost to the community of imprisonment, it would be sensible to remove from the offender the option of accepting prison and, wherever practicable, to employ other means of enforcement, such as confiscation of property or attachment of income."⁵

The Committee considered that there should be a reliable statutory basis for confiscation of property or assets to enforce fines and that confiscation should be a penalty *in its own right* e.g. as in fisheries legislation, and would be particularly suitable for road traffic offences. Indeed, "confiscation should be the ultimate penalty, not imprisonment in default of payment of a fine".⁶

"Finally", the Committee concluded, "there are cases, such as drug trafficking and white collar crime, where offenders may profit substantially from their criminality and where the victim(s) cannot be identified. It is unacceptable that offenders or their immediate families should be allowed to retain such ill-gotten gains, whether or not the offenders are given prison sentences. The courts should have the power - and access to any financial advice needed - to

2 Para 2.2.

3 Para 2.13.

4 Para 3.3.

5 Para 5.8. The Commission is preparing a report on the indexation of fines.

6 Para 5.15.

ensure the confiscation of assets of this kind".⁷

4. We agree and have no doubt that the then Attorney General had in mind these recommendations when he asked the Commission to examine and report on the law relating to the confiscation of the proceeds of crime.

The Committee referred specifically to drug trafficking. This is probably the aspect of the subject which comes first to mind when the topic of confiscation of proceeds of crime is under discussion. However, provision could be made for the confiscation of assets after conviction for any offence. In addition to drug trafficking, other offences which generate a regular income e.g. receiving stolen goods, protection or unlawful gaming come to mind immediately as appropriate for inclusion in a schedule of "confiscation offences". For example among the "enterprise crime offences" scheduled under the Canadian confiscation legislation are arson, forgery and bribery of officers.

5. Whether the assets sought to be captured are derived from drug trafficking or some other criminal activity, a fundamental problem arises. How is one to identify a particular item of property, such as money in a bank account, as representing the proceeds of a specific crime? There may be evidence that the accused received £50,000 in cash in payment for a consignment of heroin. But how does one establish that the sum of £50,000 standing to his credit in a bank account arose from the lodgment of the proceeds? And that is merely to take the simplest case. The money may have been invested in a house, a car or a yacht. It may have been used to acquire property in the names of wives, relatives and friends or it may have been dispersed in false names in banks or financial institutions inside or outside the State.

6. This analysis suggests that legislation aimed at confiscating the proceeds of crime will be ineffectual unless the State is relieved of the burden of having to establish that specific items of property belonging to the accused represent the proceeds of a specific crime. What would seem to be required, on this view, is a jurisdiction, after conviction for a specified offence, to order the seizure or confiscation of the property of the defendant up to a given amount.

Such a power, however, might well prove insufficient in many cases. Assets and profits from such offences are usually widely dispersed, carefully invested and skilfully laundered. Further profits may have been derived from the original proceeds and the extent of the wealth generated may be very difficult to ascertain. Seizure of or distraint against specific assets of a convicted offender may similarly be inadequate where proceeds have been dispersed through various bank accounts, invested in various properties and transferred to different persons or out of the jurisdiction.

⁷ Para 5.19.

It follows that laws providing for the seizure of the proceeds of crime will also be ineffectual unless the prosecuting authorities are armed with powers to secure the "freezing" of assets *before* any criminal trial takes place or even before the accused is charged. It would accordingly appear essential to provide that when the Gardai have sufficient reason to apply for a warrant to search premises, they should also be entitled to apply for a freezing order.

7. There are different points of view as to whether or not confiscation should be regarded as a punishment. We will explore these later. All sides of the argument are agreed that confiscation would be perceived by *the public* as being *punitive*. The object is to ensure that organised crime does not pay and that accordingly not simply the proceeds of crime, but the proceeds of those proceeds, are confiscated. Where particular items cannot be connected with particular crimes, provision should be made for circumstances in which the assets of criminals can be seized without proving a direct link with particular crimes. Property held by third parties where there was knowledge or reason to believe the property was tainted could also be confiscated. Unless the power of confiscation is thus wide-ranging in nature, crime would continue to pay so long as the network was large enough and people other than the individual offender were prepared to become involved. All this points to the necessity for adequate powers of investigation and search and orders requiring disclosure of assets and permitting the pre-trial freezing of assets.

8. In most cases, forfeiture of *any* kind would be feasible only where property had been 'frozen' in advance. And where property was frozen, presumably it would be because an investigation into drug trafficking or other criminal activity had indicated that this property might be derived from crime. Thus at the conviction stage, it might simply be a matter of ordering that property already frozen or an appropriate part of such property be confiscated. Where the person convicted objects to the freezing or the confiscation of property, the onus should be on that person to establish that the property in question was innocently acquired and held. Presumably at the freezing stage, the prosecution would have given evidence of a belief on reasonable grounds that the suspect had committed a relevant offence or that property of his represented the proceeds of crime, particularly where that property was held by a third party.

9. It is a principle of our law that a convicted person will receive a sentence that is "appropriate to his degree of guilt and his relevant personal circumstances".⁸ If confiscation is regarded simply as an alternative mode of punishment, the Court in sentencing might have to bear in mind similar considerations of proportionality as it would in fining or in fixing a period of imprisonment. However, from one point of view, even though confiscation orders will frequently be to some extent punitive - and not simply vehicles for the recovery of illegally acquired property - making them mandatory in

8 See the judgment of Henchy J in the *State (Healy) v Donoghue* [1976] IR 325 at 353.

defined circumstances is not necessarily constitutionally invalid.

10. While provision can be made for the confiscation after conviction of property *proved* to be the proceeds of particular crimes, in practice, only in isolated cases, e.g. in the unlikely event of an admission that, say, a car was bought with certain proceeds, will it be possible to prove a link. A criminal's assets can derive from a series of small transactions.

It is always extremely difficult to prove a negative. For example, proving that a person does not appear to go to a place of work every day, or that he draws unemployment benefit (which is proof of a positive) does not prove that he is necessarily acquiring an income unlawfully or that he is necessarily acquiring an income from *scheduled* crimes. To meet this difficulty, an alternative to the simple provision of confiscation as a punishment would be to raise a statutory presumption that on conviction for a particular offence, all the property of the person convicted (or all such property 'frozen' in advance of the trial) represents the proceeds of crime and may be forfeited. Whereas it can be argued with force that the legislature can mark its abomination of any crime by providing a mandatory penalty and that deprivation of property per se could not be regarded as any more serious than deprivation of liberty, the Commission would not recommend seizure of assets as a species of forfeiture *simpliciter*. The Court should be unable to confiscate any property the defendant can prove, on the balance of probabilities, was lawfully acquired and, accordingly, principles of proportionality should not affect such a proposal. Provisions on these lines can be found in the English Drug Trafficking Offences Act, 1986. Realistic and effective legislation in this area must focus on the identification of circumstances in which the assets of criminals may reasonably be seized rather than the seizure of property proved to be the proceeds of crime.

CHAPTER 2: THE PRESENT LAW

A. Forfeiture and Seizure Provisions

1. The law at present provides for the seizure and appropriate disposal of stolen goods under the 1861 and 1916 *Larceny Acts*. In this paper, however, we are concerned with the proceeds of crime in general and not simply with the courts' powers over stolen property.

Apart from the Larceny Acts, there are various legislative provisions for the forfeiture of articles and goods.¹ These are based on

- (i) their illegal use,
- (ii) the means by which they were obtained,
- (iii) the fact that they are the property of an unlawful organisation or
- (v) the absence of a requisite licence.

For example, under Section 202 of the *Customs Consolidation Act, 1876*, Customs Officers are empowered to seize all goods liable to forfeiture under the Act (and vehicles used in importing or dealing with them) without any Court Order.

¹ E.g. the *Firearms Acts 1925-1971*, *Fisheries Acts 1959-1980*, s47 *Gaming and Lotteries Act 1956*, s47 *Offences Against the State Act 1939*, s22(a) *Game Preservation Act 1930*, s17(2), *Customs Consolidation Act 1876*, ss42, 177 and 202, *Customs and Excise (Miscellaneous Provisions Act) 1988*, s8 *Wireless Telegraphy Act, 1926* ss3(3), 9(2) and 10(3) as amended s12 *Broadcasting and Wireless Telegraphy Act 1988* s12. There are also provisions for the forfeiture of licences for certain offences e.g. *Road Traffic Act 1961*, s26, *Intoxicating Liquor Act 1927*, s28.

Under Section 86 of the *Excise Management Act, 1827*, distress, rather than imprisonment, is ordered by the Court as the punishment to be suffered in default of payment of the penalty fixed on conviction for an excise offence.

There is also a provision for forfeiture in the context of drugs offences, but this does not deal with the area of trafficking or the confiscation of property which has been obtained as a result of such activity. Section 30 of the *Misuse of Drugs Act 1977* provides for the forfeiture of anything which is seen to relate to an offence under the act. However, the House of Lords in *R v Cuthbertson*,² held that Parliament had not intended the identical British forfeiture section to provide a means "of stripping drug traffickers of the total profits of their unlawful enterprises", the provision was confined to the forfeiture of "tangible property", i.e. the physical means employed rather than the fruits of crime. In *DPP v Kinehan*,³ Judge Moriarty stated that the test in deciding whether section 30 is applicable is whether monies were "intrinsically connected with the actual drugs supply operation". Although *Kinehan* arguably leaves open the way for the section to be used in the forfeiture of the profits of a drug deal, the "relating to the offence" requirement narrows its scope considerably.⁴ Clearly, wider powers are required if the prosecution authorities are to ensure that the penalties imposed for certain offences, (in particular drug trafficking offences) are genuinely effective in ensuring that the commission of the offence is not profitable.

B. Investigatory Measures

(i) Search Powers

3. At present, various powers of inspection and search exist under specific statutory provisions, which usually require an application for a warrant to a

2 [1981] AC 470.

3 [1988] ILRM 156.

4 In various other British cases involving the identical s27 of the *Misuse of Drugs Act 1971*, orders of forfeiture made were quashed even where the court held the money was "no doubt part of the working capital for trade in drugs", *R v Morgan* [1977] Crim LR 488. See also *Haggard v Mason* [1976] 1 WLR 187, *R v Ribeyre* (1982) Crim LR 538. In *Haggard* the offence was "offering to supply a controlled drug" although the defendant was not found in possession of a controlled drug. Thus the money found in his possession could not be shown to relate to that particular offence, so the forfeiture order in respect of the money found was quashed as *ultra vires*. In *Morgan*, the defendant was charged with possession of controlled drugs with intent to supply, and so money simultaneously in his possession was not the product of, or relating to that offence, even though it might well have been part of his "working capital for trade in drugs". Similarly in *Ribeyre*, despite a plea of guilty to possession and an admission that £700 in the defendant's possession was the proceeds of drug sales, a forfeiture order relating to the money was quashed on the grounds that it had not been shown to relate to the offences of which the appellant was convicted, as required by s27. See also *R v Boothe* (1987) 9 Cr App R (s)8.

District Justice or Peace Commissioner.⁵ The application is normally based upon the reasonable suspicion of a Garda of the existence of certain evidence relating to the past or intended future commission of an offence.

A challenge to s42 of the *Larceny Act 1916* as extended by s88(3) of the *Courts of Justice Act 1924* was rejected by Barr J in *Ryan v O'Callaghan* (22nd July 1987). It was claimed there that the Peace Commissioner in issuing a search warrant under the Larceny Act was exercising a judicial power which is a function exercisable only by Judges duly appointed under the Constitution. Barr J rejected this contention in the following terms:

"In short, the search of premises by the police under the authority of a search warrant is no more than part of the investigative process which may or may not lead to the arrest and charging of a person in connection with the crime under investigation or any other crime. In my view the prosecution of any offence commences when a decision is made to issue a summons or prefer a charge against a person in respect of the particular crime alleged. It follows, therefore, that the issue of a search warrant prior to the commencement of a prosecution is part of the process of criminal investigation and is executive rather than judicial in nature."

This holding was applied later in *Berkeley v Edwards*,⁶ in *Byrne v Grey*,⁷ in respect of s26(1) of the *Misuse of Drugs Act 1977*, and in *Farrell v Farrelly*.⁸ However, in *O'Mahony v Shields*,⁹ Lardner J stated, in reference to the issue of a search warrant pursuant to s8 of the *Wireless Telegraphy Act 1926*:

"I accept that the decision which the District Justice makes in deciding to grant or refuse a warrant under that section is a judicial decision."

None of the previous cases was referred to in the decision, although the section in question is essentially the same as the Larceny Act and the Misuse of Drugs Act provisions on search warrants. Emphasis was placed by Lardner J on the particular wording of s8(1) which does not refer to the District Justice granting the warrant if he is *satisfied* there is reasonable cause to believe certain property is held, but says merely that he may grant it "upon the information on oath of ... a member of the Garda Siochana". He expressed some doubt about the constitutionality of that provision since it

5 E.g. *Larceny Act 1861*, s103, *Larceny Act 1916*, s42 *Gaming and Lotteries Act 1956*, s39 *Misuse of Drugs Act 1977*, s26, *Wireless Telegraphy Act 1926*, s8, *Criminal Law Act 1976*, s5. Customs officers also have power to detain and search persons without warrant upon reasonable suspicion, to obtain search warrants and to seize documents and goods under *Customs Consolidation Act 1876*, ss203-209, as extended by *Customs and Excise (Miscellaneous Provisions) Act 1988*, ss3-6.

6 [1988] IR 217.

7 Hamilton P, 9th October 1987.

8 [1988] IR 202.

9 22nd February 1988.

does not require the Justice to have put in evidence before him the facts which constitute the basis for the reasonable grounds of belief. The slightly different phrasing of the *Larceny Act*¹⁰ and the *Misuse of Drugs Act*¹¹ is arguably not so great as to render the Wireless Telegraphy search provisions unconstitutional for failing to use similar wording. Nevertheless, it might indicate a concern to be borne in mind when providing for search and seizure powers to help in tracing and identifying the assets of criminals.

Finally, in *DPP v Kenny*,¹² the Supreme Court decided that an information required to obtain a search warrant under s26(1) of the *Misuse of Drugs Act, 1977* as amended must state facts from which a District Justice or Peace Commissioner could be satisfied there were reasonable grounds for the issue thereof. It was not enough for the Garda seeking the warrant to be satisfied that a warrant should be issued and for the District Justice to act as a rubber stamp. The District Justice or Peace Commissioner must himself be satisfied on stated facts that a warrant should be issued, e.g. be satisfied that a Garda source of information, even if unnamed, has previously proved reliable.¹³

4. There is already under s23 of the *Misuse of Drugs Act 1977* a power given to a member of the Garda Síochána to search any person or vehicle without a warrant where possession of drugs is suspected. A similar provision exists by virtue of s8 of the *Criminal Law Act 1976* where a Garda suspects that an offence has been or is being committed. A power of seizure also exists at common law at the time of arrest, whereby the gardai without a search warrant may seize and retain items for evidentiary purposes, or if it is believed they are stolen property or are not in the lawful possession of the arrested person.¹⁴

(ii) Other Investigatory Powers

5. The procedure for discovery under the Rules of the Superior Courts can be used in the preparation of a civil case¹⁵ but this is qualified by various rules of privilege, such as the legal privilege existing between a solicitor and client which may prevent disclosure even where the solicitor might well hold valuable information regarding that client's property, such as when and from whom it was acquired.

10 "If it is made to appear by information on oath before a Justice of the Peace that there is reasonable cause to believe that any person has in his custody or possession or on his premises any property whatsoever ... the Justice may grant a warrant to search for and seize the same."

11 "If a Justice ... is satisfied by information on oath ... that there is reasonable ground for suspecting that a person is in possession in contravention of this Act on any premises of a controlled drug ... such Justice ... may issue a search warrant."

12 [1990] ILRM 569.

13 See p17 footnote 2, *infra*.

14 See *Jennings v Quinn* [1968] IR 305.

15 See *Nolan v Irish Land Commission* [1981] IR.

Section 7 of the *Bankers' Books Evidence Act 1879* as amended by s2 of the *Bankers' Books Evidence (Amendment) Act 1959* provides for the inspection of bankbook entries by a party to a proceeding, including criminal proceedings. However, the stage at which such a facility is most useful to prosecution authorities is *prior* to the initiation of proceedings when an investigation is being conducted. In view of this, s131 of the *Central Bank Act, 1989* amends the Act of 1879 by inserting section 7a which provides:

"If, on an application made by a member of the Garda Síochána not below the rank of Superintendent, a court or a judge is satisfied that there are reasonable grounds for believing -

- (a) that an indictable offence has been committed; and
- (b) that there is material in the possession of a bank specified in the application which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence;

a court or judge may make an order that the applicant or another member of the Garda Síochána designated by him be at liberty to inspect and take copies of any entries in a banker's book for the purposes of investigation of the offence."

In addition, section 126 of the *Building Societies Act 1989* extends the definition of "bank" in the 1879 Act to include a building society.

A defendant could raise the privilege against self-incrimination to resist such an application for inspection¹⁶ but the simple discovery of assets is not necessarily incriminating.

(iii) Tax Legislation

6. There are also powers of inspection under Irish tax legislation. The following provisions are applicable for the purposes of income tax, corporation tax, capital gains tax and value-added tax:

- (a) Section 59 of the *Finance Act, 1974* allows certain information to be sought regarding tax avoidance transactions connected with the "transfer of assets" abroad.
- (b) Section 34 of the *Finance Act 1976* allows an authorised officer to enter any premises where anything is done in connection with a trade or

¹⁶ The problem was raised in *Rank Film Distributors Ltd v Video Information Centre*, [1982] AC 380. However, in *Waterhouse v Barker*, 40 TLR 805, the defendant objected to producing her bankers' books under the 1879 Act on the ground that they might tend to incriminate her, and by a majority the Court of Appeal allowed her claim of privilege.

profession and examine any books, records, accounts, documents or property related to the trade, remove such books etc. and retain them for a reasonable period, and may require any person employed on the premises to produce books etc. subject to the rules of professional privilege. However, it does not extend to third parties.

- (c) Section 539(1) of the *Income Tax Act, 1967* requires a person after due notice to deliver any books or papers relating to income tax in his custody or possession to the Revenue Commissioners.
- (d) Section 31 of the *Finance Act, 1979* allows an authorised officer, after due notice, to require third parties to disclose particulars of business transactions with the person under investigation and to make available documents specified by the inspector except where professional privilege applies or banking transactions are involved.
- (e) Section 175 of the *Income Tax Act, 1967* requires banks, on due notice, to furnish returns in respect of interest paid giving the names and addresses of the persons to whom the interest was paid.
- (f) Section 176 of the *Income Tax Act, 1967*, obliges persons in receipt of money or value or of profits or gains from any source mentioned in the Act belonging to any other person chargeable in respect thereof to furnish information in respect of chargeable persons. The section could apply to profits or gains derived from unlawful sources.
- (g) Section 19 of the *Finance Act, 1983* makes profits unlawfully derived assessable to tax.
- (h) Section 53 of the *Income Tax Act, 1967* provides that "tax in respect of any annual profits or gains not falling under any other Case of Schedule D and not charged by virtue of any other Schedule" shall be charged to tax.
- (i) Section 21 of the *Finance Act, 1983* requires that on due notice nominee holders of securities shall furnish information as to the identity of the beneficial owner and details of the securities themselves.
- (j) Section 18 of the *Finance Act, 1983* allows an authorised officer, where a person has failed to deliver a statement regarding his income or delivered an unsatisfactory statement, to apply to the Court for an order requiring a financial institution to furnish him with full details of all accounts maintained by that person, either solely or jointly with another person, and the financial transactions of that person for the preceding ten years where the officer is of the opinion that the person maintains or maintained an account or accounts, the existence of which has not been disclosed to the Revenue Commissioners, with that financial institution. The Court may also make an order prohibiting for

such period as it considers proper any transfer of or dealing with any assets of the person to whom the order relates.

- (k) Section 94 of the *Finance Act, 1983* makes provision inter alia for the imposition of penalties on persons who knowingly or wilfully fail to comply with any provision of the Tax or Customs Acts relating to the making of returns, the production of books and documents, or obstructs or interferes with Revenue officers carrying out their statutory duties or exercising their statutory powers.
- (l) Where there is a tax liability and a taxpayer defaults in payment of any tax, interest or penalty, section 73 of the *Finance Act, 1988* permits the Revenue Commissioners to issue a notice of attachment to a third party whom they have reason to believe may have, at the time he receives the notice, a debt due to the taxpayer. A debt includes, in the case of a third party who is a financial institution, any amount of money, together with any interest thereon, which is on deposit with the financial institution to the credit of the taxpayer for his sole benefit. When the third party receives the notice of attachment, he is precluded from making any disbursement out of the debt due by him to the taxpayer unless it is made on foot of a court order or does not reduce the debt to an amount less than the taxpayer's default.

C. Pre-trial Restraint

7. The effectiveness of forfeiture provisions or confiscation orders is largely diminished by the likelihood that once the suspect or defendant is made aware of the investigation, the assets will quickly disappear. Indeed, we have no doubt that a large percentage of the proceeds of crime in Ireland is already being efficiently laundered. There is no legislative provision in Irish law giving power to prosecution authorities to immobilise property prior to and pending trial. The rapid growth of the *Mareva*¹⁷ and *Anton Piller*¹⁸ orders in civil cases indicates a judicial understanding of the likelihood of awards remaining unsatisfied despite the existence of assets, a likelihood multiplied considerably in the context of vastly lucrative criminal activities, particularly that of drug trafficking. These orders "seek to ensure that, in advance of the litigation proper, the defendant does not deprive the proceedings of their efficacy by removing assets from the jurisdiction of the court, or even dissipating them within the jurisdiction, or by destroying or concealing the evidence on which the plaintiff hopes to rely".¹⁹

8. A recent series of cases in Britain attempted to develop, in line with the increasing popularity of the *Mareva* injunction, a police power to obtain an

¹⁷ *Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213.

¹⁸ *Anton Piller KG v Manufacturers Process Ltd* [1976] Ch 55.

¹⁹ Keane, *Equity and the Law of Trusts in the Republic of Ireland* 205 (1988).

injunction to prevent the proceeds of crime being dissipated.²⁰ The problem which arose in those cases was whether an accurate identification of specified sums and property which would be liable to forfeiture on conviction was a necessary prerequisite to establishing an existing cause of action or 'enforceable right', as it was referred to in *Chief Constable of Hampshire v A*.²¹ In his judgment in *Chief Constable of Kent v V*²² Donaldson LJ considered "that the common law can and should ... invest the police with a right to 'detain' moneys standing to the credit of a bank account if and to the extent that they can be shown to have been obtained from another in breach of the criminal law".²³

9. Although numerous *Mareva* injunctions have been granted in the High Court in Ireland, when the Supreme Court considered the issue in *Caudron v Air Zaire*,²⁴ it did not grant the particular injunction sought, and their basis in Irish law is not yet firmly established. In addition, any interlocutory injunction sought must be ancillary to an existing cause of action and the problems experienced in the English cases would have to be faced. Specific identification of the suspected proceeds of a criminal offence will rarely, if ever, be possible, especially at the preliminary investigatory stage.

10. More recently in the High Court in England,²⁵ Ognall J held that the police had no *locus standi* to obtain an interlocutory injunction restraining defendants from dealing with assets which had been obtained by fraud. Confiscation was recognised only when it was the creature of a particular statute, and he cited the *Drug Trafficking Offences Act 1986* as an example. Similarly in *Chief Constable of Leicestershire v M*,²⁶ Hoffman J held that the court would not grant an injunction to prevent the proceeds of crime being dissipated unless they could be identified as having been obtained in breach of the criminal law. The money, being profits made from the use of property obtained by dishonest means, was not obtained "in breach of the criminal law", in the absence of specific legislation such as the *Drug Trafficking Offences Act 1986* and the *Criminal Justice Act 1988*.

However, it might be noted that in a recent Irish case, an interlocutory injunction was granted by Barrington J against three defendants and against Anglo Irish Bank, restraining them from disposing other than to the purported owner of certain stolen cash, where proceedings had been instituted against the defendants in Britain in connection with the burglaries.²⁷

20 *West Mercia Constabulary v Wager* [1982] 1 WLR 127, *Chief Constable of Kent v V* [1982] 3 All ER 36 and *Chief Constable of Hampshire v A* [1984] 2 WLR 954.

21 [1984] 2 WLR 954.

22 [1982] 3 All ER 36.

23 *Id* at 44.

24 [1986] ILRM 10.

25 The Times, October 27, 1988, QB.

26 [1988] 3 All ER 1015.

27 Irish Times, 7 November 1988.

11. It is nonetheless clear that it is undesirable to leave the question of freezing the proceeds of crime to the vagaries of the law on injunctions, *Mareva* or otherwise. If such pre-trial restraint is considered constitutional and desirable, a sound legislative basis is required to spell out clearly the powers involved, what must be proven or shown by the prosecution and what redress, if any, there might be for any person affected.

CHAPTER 3: A COMPARATIVE VIEW

1. It might be useful to analyse the measures that have been adopted in various jurisdictions under four distinct headings, rather than looking at each enactment individually, and to compare the respective provisions on each issue. These are:

- A. The Investigatory Stage
- B. Pre-trial Restraint
- C. The Procedure Leading to Confiscation
- D. The Process of Execution

A. The Investigatory Stage

(i) *The United Kingdom*

2. The *Drug Trafficking Offences Act 1986* introduced measures to provide for the tracing, seizure and confiscation of the proceeds of drug trafficking. Under s27 of the Act, an application to the court may be made for an order seeking access to, or production of, material which is believed to be of value to an investigation into drug-trafficking. This order requires several conditions to be fulfilled before the court will grant it, including reasonable grounds for suspecting that a person has carried on or benefitted from drug trafficking and reasonable grounds to believe that the material does not include items which are subject to legal privilege. The defence of legal privilege might well be restricted by the nature of the information concealed. A recent attempt to resist a s27 order in Britain was rejected by the House of Lords since the documents in question, held by a solicitor, were intended

to be used in furtherance of a criminal purpose.¹

It was held not to be necessary that the purpose be that of the client or the solicitor for the claim of legal privilege to be rejected.

The next step, if a s27 order would be unsuitable or has not been complied with when made, is to apply for a search warrant under s28. This is available on various grounds, including a reasonable suspicion that entry to the premises would not be granted without such, and that the investigation would be prejudiced unless immediate entry could be gained. These relatively strict statutory safeguards against unreasonable searches do not appear to operate in a manner unduly restrictive of police investigation, however, due to the judicial interpretation which they have been given.²

3. Section 33 of the 1986 Act and s100 of the *Criminal Justice Act 1988*³ provide for the disclosure of information kept on the Land Register relating to a specific person or property to prosecution authorities on the production of the appropriate certificate. Presumably, the Registrar could not claim any privilege in respect of such disclosure.⁴

Other measures to facilitate investigation contained in the British legislation are s24(3) of the 1986 Act and s98 of the 1988 Act, which provide protection for a person who provides the police with information as to property, enacting that such disclosure will not be seen as a breach of any contractual restriction on disclosure. S24(1) of the Drug Trafficking Act also creates a new offence of assisting another to retain the benefit of drug trafficking, but no offence is committed if it is done with the knowledge and consent of a police constable. These provisions are meant to discourage passive participation in drug trafficking and to operate as an encouragement to those who might aid police investigation. S19 of the 1986 Act and s89 of the 1988 Act allow for compensation where the defendant is not subsequently convicted, or is pardoned, and there has been both serious default on the part of prosecution

1 *R v Central Criminal Court ex parte Francis, Francis (a firm)*, [1988] 3 All ER 775 (HL), aff'g [1988] 1 All ER 677 (CA).

2 In *In re a Defendant* The Times, April 7, 1987 Webster J in the High Court held that the reference to unnamed drug squad officers, who had seen people known to be heroin addicts visit the defendant's house, sufficiently identified the source of information for the purposes of a reasonable belief under s7(c) of the 1986 Act. This is also consistent with Australian and Canadian authorities which state that search warrants may be obtained on the basis of information from unidentified sources so long as they can be established to the court to be reliable; *Coghill v McDermott* [1983] 1 VR 751 and *Re Newfoundland & Labrador Corporation Ltd* (1974) 6 Nfld & PEIR 274. See Feldman "Freezing Defendants assets before Drugs Trials" 137 NLJ 457 (1987).

3 Part VI of this Act extends many of the confiscation provisions of the Drug Trafficking Act to crimes in general.

4 The position vis a vis inspection of the Land Registry in England and Ireland is different in that in Ireland the register itself is open for inspection, though not instruments which have been lodged in the Land Registry. In England, neither the Registry nor instruments are available for inspection.

authorities and substantial loss caused.

(ii) *Australia*

5. The *Customs (Amendment) Act 1979*, amending the *Customs Act 1901*, introduced forfeiture and pecuniary fines to remove the proceeds of drug-related crime from offenders.

Since it deals with offences in the context of the *Customs Act*, a customs or police officer under s229A(6) can seize moneys or goods representing the proceeds of various drug trafficking offences on reasonable suspicion without obtaining a warrant at all. Seizure without a warrant is usually for evidentiary purposes only,⁵ but the property seized under this legislation is to be treated as forfeited property and to be subject to the provisions of the *Customs Act* dealing with condemnation and recovery proceedings.

6. The *Proceeds of Crime Act 1987* introduced a wide range of investigatory measures to assist in the tracing of proceeds, the prosecution of offences and the making and enforcement of confiscation orders. Part IV of the Act deals with information gathering and contains measures similar to those enacted in the British legislation. An initial application may be made for a production order, requiring a person who is believed to have committed an offence and to have derived profit therefrom to make available to a police officer for inspection any documents relevant to identifying or locating property in the control of that person. Contravention of the production order is an offence. Where a judge is satisfied that a production order has not been complied with or would be ineffective, or that a document cannot be described with sufficient particularity to obtain a production order, or that the investigation would be seriously prejudiced if immediate access to a document could not be gained, a warrant to search premises and to seize relevant documents may be issued. Searches and seizures may also be carried out without a warrant in certain cases of emergency, such as where a police officer reasonably believes it necessary to prevent the concealment or destruction of property.

In addition to this, a 'monitoring order' may be obtained to keep track of financial transactions conducted through accounts in banks and other institutions, where the judge is satisfied that the person whose account is in question has committed or benefitted from a 'serious offence'. It is an offence for the financial institution to disclose the existence of a monitoring order.

And finally, there is an obligation imposed on financial institutions to retain essential 'customer-generated' financial documents for a certain period or to maintain a register of such documents they may be required to release. The institution is immune from suit in respect of any disclosure made pursuant to

5 This is the case under s23 of the *Misuse of Drugs Act 1977* in Ireland, whereby Garda powers of seizure without warrant of items other than the drugs themselves are for evidential rather than for confiscation purposes.

this obligation. Neither will it be liable for any money-laundering offence under the Act where it disclosed the relevant information as soon as reasonably practicable after forming the belief that the information might be relevant to the investigation of an offence or of assistance in enforcing the Act.

(iii) *United States of America*⁶

7. The US has an extensive and complex system of civil and criminal forfeiture statutes to deal with the proceeds of drug abuse and crime. In criminal cases, routine investigative methods are supplemented by the use of the Grand Jury subpoena *duces tecum*, obliging persons to appear before the Grand Jury and produce documentary evidence of tax information obtained from the IRS and from reports filed pursuant to the *Bank Secrecy Act* and other data obtained under exceptions to the *Right to Financial Privacy Act*.

8. Part 3 of the *Comprehensive Crime Control Act 1984* broadens and adds to the provisions on forfeiture of RICO, otherwise, the *Racketeering Influenced and Corrupt Organisations Act*,⁷ the *Comprehensive Drug Abuse Prevention and Control Act 1970* as amended.⁸ The latter Act authorises the Federal Government to seize articles of value furnished or intended to be furnished in exchange for illegal drugs - now expanded by the 1984 Act to include any property or proceeds obtained or derived directly or indirectly as a result of specific violations. The 1984 Act also enables the Government to apply for a warrant to seize all such property in the same manner as it would apply for a search warrant. These governmental powers are constrained by the requirements of the Fourth Amendment to the US Constitution, whereby they must not be unreasonable and must be based on probable cause, describing the place to be searched and the things to be seized. The warrant may be applied for pursuant to Rule 41 of the Federal Rules of Criminal Procedure. The FBI have a realistic attitude to RICO:

"... since RICO is a criminal statute and since every element of a criminal statute must be proved 'beyond a reasonable doubt', the tracing requirements of RICO are much more demanding [than in proceedings for civil forfeiture]. Tracing dirty money to a business beyond a reasonable doubt is very rarely possible."⁹

However, an exception to the constitutional requirements which was developed in the context of searching suspected armed and dangerous persons,¹⁰ based

6 Much of this information was provided by Michael Zeldin, Director of the Asset Forfeiture Office at the US Department of Justice, by letter to the Commission of October 18th, 1988.

7 RICO 18 USC 1961-68 (1982).

8 21 USC 801 (1982).

9 US Department of Justice: Drug Agents Guide to Forfeiture of Assets (1987 Revision) p247.

10 See *Terry v Ohio* 392 US 1 (1968).

on a standard of less than probable cause was expanded *obiter* to an investigative search for drugs in a later case.¹¹ The majority there also suggested that "temporary detention for questioning on less than probable cause" would be permitted "where the public interest involved is the suppression of illegal transactions in drugs".¹²

9. Other provisions of the US code and further case law have recognised situations where property can be seized without any kind of warrant, including seizure incident to arrest, or where it is mandated by "exigent circumstances" such as imminent removal, or where there is probable cause to believe property is subject to civil or commercial forfeiture.

There are also extensive measures both at state and federal level designed to curb money-laundering by requiring financial institutions to report certain large domestic currency transactions to the IRS, and by creating a wide range of offences including almost any dealing with the proceeds of a wide range of "specified unlawful activities where such dealing is aimed at concealing or disguising the source, ownership, location or nature of the proceeds".¹³ The Supreme Court has held that there is no legitimate expectation of privacy in deposited cheques and that they are not confidential communications; thus it upheld the federal disclosure requirements.¹⁴

(iv) *Canada*

10. The recently enacted amendment to the Criminal Code, *The Food and Drugs Act* and *Narcotic Control Act*¹⁵ introduces the relevant Canadian measures to provide for forfeiture of the proceeds of crime.

S420.12 entitles a judge, on application by the Attorney General, to issue a search warrant where the judge is satisfied there are reasonable grounds to believe there is in a certain place any property in respect of which forfeiture may be ordered. There are substantial safeguards surrounding a seizure of any such property, including the obligation to file within seven days a report specifying the location of the property, and identifying what was seized. There is also provision for prior notice to interested parties (at the judge's discretion, under s420.12(5)) and for requiring the Attorney General to give appropriate undertakings regarding damages and costs.

S420.28 allows the Attorney General to apply for disclosure of information from the Minister of National Revenue for Taxation. This must be grounded on a sworn affidavit, and provision is made for an objection by the Minister

11 *Florida v Royer* 460 US 491 (1983).

12 *Ibid.*, p498-499.

13 31 USC s5313 (1982), 18 USC s1957-1957 (1986) and 18 USC s981-982 (1986).

14 *United States v Miller*, (1976) 425 US 435. Cf Abramovsky 'Money-Laundering and Narcotics Prosecution' 54 Fordham L Rev 471 (1986).

15 Passed on the 13th September 1988.

to such disclosure, based on grounds including privilege and the public interest. There is provision for an appeal from the determination of the objection.

S420.27 of the Canadian legislation states that any person is "justified" in disclosing to the Attorney General any facts on which the person reasonably suspects that any property is the proceeds of crime or that any person has committed a specified offence. This might encourage the disclosure of information by those who would otherwise fear legal ramifications.

B. Pre-trial Restraint

(i) *United Kingdom*

11. The problems experienced by the English Courts with injunctions in this area¹⁶ led to the introduction of restraint and charging orders in the 1986 and 1988 legislation.¹⁷ These are to apply both after the institution of proceedings *and* before, where the court is satisfied a person is to be charged and that there is reasonable cause to suspect he or she has benefited from drug trafficking.¹⁸ The effect of a restraint order is to prevent a person from dealing with the property in question and it may authorise the actual seizure of property. If property subject to such an order is in danger of being removed from the country, it may be seized by a constable without further authorisation from the court.¹⁹ There is provision for the giving of notice to persons affected²⁰ and there is an opportunity for any such person to apply to court under s8(5)(a) for the discharge or variation of the order.²¹

A receiver can be appointed to deal with or take possession of property which is subject to a restraint order.²²

(ii) *Australia*

12. S243E of the *Customs Act 1901* as amended by the 1979 Act²³ provides that where a civil proceeding to pay a "pecuniary penalty" relating to certain narcotics dealings is instituted, an *ex parte* application may be made to court to empower the Official Trustee to take control of some or all of the

16 See p11, footnote 16, *infra*.

17 *Drug Trafficking Offences Act 1986*, ss7-10 and *Criminal Justice Act 1988*, ss76-79.

18 *Drug Trafficking Offences Act 1986*, s7(2), as amended by s2 of Schedule 5 to the *Criminal Justice Act 1988* and the *Criminal Justice Act 1988*, s76(2).

19 S8(8) of the 1986 Act and s77(10) of the 1988 Act.

20 S8(4)(c) of the 1986 Act.

21 See *Re Peters* [1988] 3 WLR 182, where variation of a restraint order to meet ordinary school fees and miscellaneous expenses was upheld. However, variation to allow for a lump sum payment for future liabilities was disallowed, not as a punishment but because it would reduce the defendant's assets below what was required to meet a final judgment.

22 S8(6) of the 1986 Act and s79(8) of the 1988 Act.

23 *The Customs (Amendment) Act 1979*.

property of a defendant.²⁴ The statute provides for the court to refuse a "control" order if the Commonwealth fails to give undertakings for damages and costs, and to set out conditions in the order relating to its variation or review.²⁵

The application for a "control" order must be supported by affidavit setting out the grounds on which the police or customs officer believes that the defendant was engaged in drug dealing and derived benefits therefrom, and that the property of which the Official Trustee wishes to take control is the property of the defendant. The Trustee is to take control of the property subject to the conditions which the court may impose. There is no specific provision as to notice in the Act, but this is a civil rather than a criminal proceeding and the "control" order can only be made after the institution of proceedings against the defendant.

13. Under Part 3 of the *Proceeds of Crime Act 1987*, a restraining order may be applied for under certain conditions where a person has been convicted of or charged with or is about to be charged with an indictable offence. The court may make the order on such terms as it sees fit, making allowances for reasonable living expenses, for example. An application for a restraining order must be supported by affidavit and notice must be given to the person affected save where the court decides it would be in the public interest to delay giving notice. It is made an offence to contravene a restraining order.

Various other orders may be made by the Court after granting a restraining order, including an order for the examination on oath of any person, an order directing the owner of property to furnish a statement on oath and an order requiring the carrying out of any undertaking as to costs or damages given by the Commonwealth in connection with the making of the restraining order. Provision is also made in the Act for the making of restraining orders in respect of serious foreign offences.

(iii) *United States of America*

14. On the application of the United States in criminal forfeiture cases the court can enter a "restraining order or injunction" or take "any other action to preserve the availability of property ... for forfeiture under this section".²⁶ If the order is made prior to the commencement of the criminal proceedings, it must provide for notice to interested parties, any potential hardship must be outweighed by the need for the availability of the property, and the order lasts only for 90 days. A temporary order *without* notice, prior to proceedings, can only be obtained if probable cause is shown that the property would be forfeited upon conviction, and that the giving of notice would

24 S243E of *Customs Act 1901* as amended by *Customs Amendment Act 1979*.

25 S243E(2) and (4) and s243F of *Customs Act 1901* as amended. These enable any person, with the leave of the court, to apply for a variation, etc. of the original order.

26 *Comprehensive Crime Control Act 1984*, Chap III PART B s413(f).

jeopardise its availability. Such an order will expire after ten days.²⁷ In addition to these safeguards, there is provision for a hearing *prior* to the expiration of such a temporary order, enabling potentially interested or affected parties to be heard at the earliest possible time. Even in the case of the 90-day order, the onus is on the State to show by probable cause that it will prevail on the issue of forfeiture and that the property will be destroyed or unavailable in the absence of an order. There is also a judicially recognised power of seizure mandated by exigent circumstances, such as the need to act promptly to prevent removal, destruction or concealment of forfeitable property.

In cases of civil forfeiture, a "warrant of arrest in rem" can be used to seize and immobilise forfeitable real and intangible personal property which is not susceptible to actual physical seizure.

(iv) *Canada*

15. S420.13 of the Canadian Act provides for an *ex parte* application to be made by the Attorney General for a restraint order. This may be made when a matter is under investigation only and before any proceedings have been instituted, but the application must be supported by a sworn affidavit including the grounds for belief that the property may be forfeited and a description of the property. The order is to be subject to such conditions as the court thinks fit and the judge may require notice to be given to an interested party and an opportunity for such person to be heard, unless this would result in the disappearance or reduction of the property.

The Attorney General may be required to give such undertaking as the Court thinks proper as to damages and costs, before the order is made. Provision is also made in s420.14 for an application for review of the order, which may then be varied or revoked. The order will expire in any case after six months unless it is established to the judge's satisfaction that the property will be required after that period.

On application to the court, a person may be appointed to take control of and to manage or deal with property in accordance with the judge's directions.

C. The Procedure Leading to Confiscation

16. Differing approaches have been taken in the various jurisdictions to the question of what procedure is most appropriate for the imposition of a forfeiture or confiscation order. The central issues are whether the proceedings should be civil or criminal, and if the latter, whether as part of the sentencing process a confiscation order should be mandatory or optional.

²⁷ *Id.*, S413(f)(1). Extension of these "preliminary" restraint orders may be obtained upon consent or for good cause, or upon the commencement of proceedings (filing an indictment).

A further issue to be considered is the internal procedure to be adopted, specifically the allocation of the burden of proof and the standard which is to be required.

(i) *United Kingdom*

17. The approach adopted by the *Drug Trafficking Offences Act 1986* in the UK is to require the court in a criminal proceeding to determine *before* sentencing a person in respect of a drugs offence whether and to what extent he or she has benefitted from drug trafficking and to order such amount to be paid. Account cannot be taken of the order made when determining the subsequent sentence, except in the case of a fine or other payment or forfeiture. Thus the court by s1(5) and (6) is unrestricted when deciding what size or length of sentence to impose except that the procedure for consideration and imposition of a confiscation order is prior and mandatory.

18. Under the *Criminal Justice Act 1988* the procedure is discretionary and merely empowers the court to make an order as it sees fit.²⁸ Like the 1986 Act, however, any such order must be made prior to sentence, and cannot be taken into account when imposing any sentence other than a payment or forfeiture.

The confiscation process involves a three-stage inquiry by the court: first as to whether the defendant has "benefited" from drug trafficking, secondly assessing the value of the proceeds, and thirdly assessing the amount to be recovered, which is otherwise referred to in s4(3) of the 1986 Act as "the amount that might be realised". Each of these steps involves factual matters which require determination, and although the Act does not indicate what procedure will be used for the giving of evidence, the rules of court govern the procedures for tendering statements and responding in writing to statements made. By virtue of section 3(2)(b), the court should be satisfied that a copy of the prosecution's statement alleging that a certain amount of proceeds have been derived from specified offences has been served on the defendant and that he has had sufficient time to consider it. It might also be the case that the defendant may require a hearing to rebut allegations.²⁹

The problem with the mandatory procedure under the 1986 Act can be seen from the case of *R v Bragason*³⁰ where the court had to go through the procedure of determining whether the accused had benefitted and assessing

28 S1 of the *Criminal Justice (Scotland) Act 1987* also makes the procedure discretionary for the court, on application by the prosecutor when moving for sentence.

29 The procedure laid down under the 1988 Act specifies that the defence may reply to an "allegation" by the prosecution either orally or in writing; see s73(5) of the *Criminal Justice Act 1988*.

30 [1988] Crim LR 778. However, the likelihood of increasing use being made of the provision in s26 for enforcement of external orders and the considerable developments in the field of international mutual assistance should go some way towards rectifying situations like this. See Chapter 6 *infra*.

the value of the proceeds, even though the defendant had no realistic assets *within* the jurisdiction. No confiscation order was made.

19. As regards the onus of proof that the property belonged to the defendant and represented the profits from drug trafficking, it is up to the court to determine whether the defendant has benefitted from drug trafficking and if so, to assess the value of the proceeds.³¹ No specific procedure is detailed for the making of the determination, but the court may make certain "assumptions" under s2 as to the source of the defendant's property, except to the extent that they are shown to be incorrect. These are that any property appearing to be held by him since his conviction or transferred to him within a six year period before the institution of the proceedings, was received as a payment in connection with drug trafficking carried on by him. This appears to place the onus on the defendant to show that such property was not a benefit received from drug trafficking, although the only procedure referred to in the Act for doing so is under s3. Here the prosecution may make a "statement" relevant to the determination of benefit, which is conclusive on the matter to which it relates if the defendant accepts it. However, if the defendant does not accept it, the court may "require" him (insofar as he does not accept it) to indicate what matters he proposes to rely on. If he fails to do this he may be treated as accepting any allegation made, except for an allegation that he has benefitted from drug trafficking.

The latter exception presumably was intended to protect the defendant's right to silence, but the effect of these prosecution "statements" can mean that if the defendant does not produce evidence in rebuttal, e.g. that he does not possess certain property, he may be taken as accepting that he does possess it. Once this is established, the court can make an "assumption" under s2 that such property was received in connection with drug trafficking.³² The net effect of this is that the onus is shifted to the defendant, upon the making of a statement or mere allegation by the prosecution, to prove that he has not benefitted from drug trafficking or that certain property did not represent the proceeds of such.³³

20. The procedure under the *Criminal Justice Act 1988* is similar as to the making of statements by the prosecution but does not refer to "assumptions"

³¹ Ss1 and 2 *Drug Trafficking Offences Act 1986*.

³² It seems that the prosecution may allege that the defendant has benefitted from offences which were not the subject of those proceedings. Here, the court may deprive the defendant of property on the unproven assumption that he is guilty of offences which have not been charged or taken into consideration. If the allegations are accepted, however, this acceptance by the defendant will not be admissible in evidence in any proceedings for an offence - s3(b) *Drug Trafficking Offences Act 1986*.

³³ In *R v Small*, *The Times*, April 16, 1988, the Court of Appeal held that the trial Judge was justified in holding that the applicant had benefitted from drug trafficking and in assessing that amount at £10,000 though the defendant had denied this. The attitude of the defendant had made it impossible to analyse his financial affairs, and since the Judge had disbelieved his evidence, he was justified in his holding having regard to the assumptions under the Act he was entitled to make.

which the court may make. Rather, under s73(6) the court may certify its opinion on the matters concerned "if the court is satisfied as to any matter relevant for determining the amount that might be realised". It is not clear who must satisfy the court, although in line with the 1986 Act and the provisions of s73 on prosecution statements, it would seem that the burden is the defendant's to displace.

In Britain it appears that the normal principles of proof and the benefit of the doubt apply to the determination of a factual basis for sentence,³⁴ but on the other hand the confiscation process appears to be something which is separate from and prior to sentencing and which cannot be taken into account when imposing sentence.³⁵

The assumptions which the court may make certainly appear to have the same effect as a presumption, since they may be accepted "except to the extent that the assumptions are shown to be incorrect in the defendant's case".³⁶

(ii) *Australia*

21. The Australian *Customs Act*, on the other hand, adopts a civil procedure for the imposition of a pecuniary fine where benefits have been derived from certain prescribed narcotics deals.³⁷ This procedure is independent of any criminal proceedings. The Act provides in s243B(3) that the court may order a pecuniary penalty to be paid in relation to prescribed narcotics dealings "whether or not the person has been convicted of an offence, or proceedings have been instituted in respect of any offence, committed in relation to any of those dealings".

Regarding the onus of proof, property which has been seized (being moneys or goods representing the proceeds of a drug deal), where the court is "satisfied" the particular drugs are reasonably suspected of having been imported into the country in contravention of the Act, may be treated by the court as such until it is established to its satisfaction that they were not so imported.³⁸ This provides that the burden of proof, upon the demonstration of a "reasonable suspicion" by the relevant authorities, shifts on to the defendant to establish his innocence. Should he fail to so satisfy the court, his property will be deemed to be forfeited.

And in the civil action under the same legislation, certain guidelines are laid down for the court for the assessment of the value of the benefits derived

34 Thomas, *Principles of Sentencing*, (2nd ed, 1979) p370. However, from *R v Bragason*, [1988] Crim LR 778, it appears there is a distinction between what can be taken into account when sentencing and what can be taken into account when assessing for the purpose of making a confiscation order.

35 S1(4) and 1(5)(c) of *Drug Trafficking Offences Act 1986*.

36 S2(2) of the 1986 Act.

37 Division 3, Part XIII of *Customs Act 1901* as amended.

38 S229A(7) of *Customs Act 1901* as amended by the *Customs (Amendment) Act 1979*.

from drug dealing. One of the *mandatory* assumptions it must make is that where the value of the defendant's property exceeded what it was before a particular narcotics deal (or period of narcotics dealing), the value of the benefits derived from such is to be taken as not less than that excess. Again it is up to the defendant to "satisfy" the court otherwise.

Confiscation Orders

22. Under Part 2 of the *Proceeds of Crime Act 1987*, the DPP may apply for a confiscation order where a person is convicted in criminal proceedings of an indictable offence. There are two types of confiscation order, (i) a forfeiture order against 'tainted' property and (ii) a pecuniary penalty order against the person in respect of benefits derived from the offence. The DPP is empowered to apply either for one or for both.

Forfeiture Order

As "tainted" property is confined by definition to property used in the commission of an offence and to the proceeds of an offence, one assumes that forfeiture orders are seldom made. The making of a forfeiture order has the effect of vesting the property concerned in the Commonwealth of Australia. Notice of the application for a forfeiture order must be given to anyone who is believed to have an interest in the property, to allow such person to be heard.

Pecuniary Penalty Order

The pecuniary penalty order requires the defendant to pay an amount assessed by the court to equal the value of benefits derived from the commission of an offence. Detailed provisions are laid down for this assessment. There may be a reduction by an amount equal to the value of any property that has already been forfeited. Any excess in the value of a person's property after the commission of an offence is to be treated as benefit derived from the offence until the person satisfies the court that the excess was due to unrelated causes. The difficulty which must arise is that of assessing the value of the defendant's assets before the offence was committed.

Serious Offence

The 1987 Act has a special category of "serious offence" defined as:

- (a) a serious narcotics offence;
- (b) an organised fraud offence;
- (c) a money laundering offence in relation to the proceeds of a serious narcotics offence or an organised fraud offence.

Where a person is convicted of a serious offence, all property (whether "tainted" or not) previously restrained (or frozen) by order of the Court will be automatically forfeited to the Commonwealth if the restraining order is still in force 6 months after the conviction. Where an application is made for a pecuniary penalty order after conviction for a serious offence,

- (a) all property of the person at the time the application is made and
- (b) all property held by the person between the time of the offence and the time of the application or in the 5 year period before the application

is presumed, unless the contrary is proved, to have come into the person's possession by reason of the commission of the offence.

A confiscation order can also be made against a person who has not been convicted of an offence but who has died or has absconded in connection with that offence. The court must be satisfied on the balance of probabilities (a) that the person has absconded and (b) has been committed for trial for the offence or that, having regard to all the evidence, a reasonable jury properly instructed could lawfully find the person guilty of the offence.

(iii) *United States of America*

23. The *US Comprehensive Crime Control Act 1984* creates a mandatory procedure similar to the 1986 British Act, whereby a court imposing sentence on an offender under the particular enactment "shall order in addition to any other sentence imposed pursuant to this title ... that the person forfeit to the United States all property described in this subsection".³⁹ Under the Act's provisions, a presumption is created that any property of the defendant who has been convicted of a relevant offence, is subject to forfeiture under the Act once the prosecution establishes two things by a preponderance of the evidence: (1) that the property was acquired during or within a reasonable time after the period of the offence, and (2) that there was no other likely source for it. Although this imposes certain requirements on the prosecution which are more specific and onerous than the making of an "allegation" or "statement" under the British legislation, the standard of proof is less than the criminal one, and ultimately the burden will fall on the defendant to rebut the presumption created. Although a conviction has been entered at this stage, the order is part of a criminal proceeding and this shifting of the onus of proof on to the defendant relieves the prosecution of the obligation to prove a direct link between the property of the defendant and the proceeds of a

39 S303 of Part B, Chapter III *Comprehensive Crime Control Act 1984* amending s413 of Part D, Title II *Comprehensive Drug Abuse Prevention and Control Act 1970*. That includes the proceeds or property directly or indirectly representing the proceeds of a drug offence, the instrumentalities of the crime and also any interest, property in or rights over a "continuing criminal enterprise" where the conviction related to engaging in such an enterprise.

crime.⁴⁰

24. In civil forfeiture cases under 21 USC §881, since the action is against the property, the burden is shifted to the claimant after an initial showing by the Government of probable cause for instituting the proceedings. The claimant must defend his interest in the property on a preponderance of the evidence. However, in forfeiture actions under specific statutes, courts have not been prepared always to hold that the burden-shifting standard applies, and some have held that the burden of proving the forfeiture by a preponderance of the evidence remains squarely on the Government.

(iv) *Canada*

25. The Canadian Act of 1988 makes the procedure, upon application by the Attorney General, mandatory for the court when sentencing an offender in respect of a specified offence, but it is not stated whether the forfeiture can be taken into account when imposing a normal sentence. A confiscation order may also be made by the court where a person charged has died or absconded and the judge is satisfied beyond reasonable doubt that the property represents the proceeds of crime.

It provides in §420.17 that where the court, in imposing sentence on the offender, on application of the Attorney General, is satisfied on a balance of probabilities that any property represents the proceeds of crime and that the "enterprise crime offence"⁴¹ was committed in relation to that property, the court shall order the property be forfeit. Thus, the civil standard suffices to remove the property from the offender.

In addition, the court may, under §420.19, infer that certain property was derived from an enterprise crime offence where there is evidence that the value of the property of the alleged offender after the commission of the offence exceeds what it was before the offence, and other income of that person unrelated to criminal conduct cannot reasonably account for the increase. This inference, like the British "assumption", is discretionary, but can greatly assist in relieving the prosecution of the burden of proof on the issue. It is unlike the presumptions which the court must make pursuant to the Australian *Proceeds of Crime Act 1987*. The Australian legislation provides, for example, that the court "shall" presume all of the person's property acquired within a five year period to be the proceeds of crime until the contrary is proven.

However, pursuant to §420.17(2), where the court is not satisfied that the enterprise crime offence was committed in relation to property which would

40 Part B, §303 of *Comprehensive Crime Control Act 1984*, amending title II, Part D, §413 of the *Comprehensive Drug Abuse Prevention and Control Act 1970*.

41 This is defined in detail in §420.1 of the Canadian Criminal Code, as amended by the Act of 1988 and it covers over twenty-five different offences.

otherwise be forfeited, it may yet make an order of forfeiture against that property where it is satisfied *beyond a reasonable doubt* that that property represents the proceeds of crime. In such circumstances, at least, the criminal standard of proof remains firmly on the prosecution.

D. The Process of Execution

26. The execution process is essentially a matter of policy and practicality which depends on the methods available in the jurisdiction in question. One problem which is posed concerns the potential rights of third parties in the property confiscated.

(i) *United Kingdom*

27. S6 of the *Drug Trafficking Offences Act 1986* and s75 of the *Criminal Justice Act 1988* require confiscation orders to be treated more or less like fines imposed, i.e. instalment payments may be ordered, there is to be imprisonment in default of payment and the provisions of the UK *Powers of Criminal Courts Act 1973* are to apply with some amendments. The legislation defines the proceeds which may be confiscated as any payments or rewards received in connection with drug trafficking.⁴² This in turn is stated to include property received, and "property" is defined, in s38, to include "money and all other property, real or personal, heritable or moveable, including things in action and other intangible or incorporeal property".

Since the fine procedure might not be effective in all cases, there are alternatives for enforcement provided for in ss11-13 of the 1986 Act,⁴³ whereby a receiver may be appointed in respect of realisable property, pursuant to a charging order already made, or where a receiver is already appointed to manage property subject to a restraint order. The receiver in question may enforce charges and take possession of property and realise it, as directed by the court. These powers allow for the execution of a confiscation order on real property, interests in property, securities, gifts by the defendant (including transfers at less than full consideration) and various other assets, making them a useful and broad-ranging alternative to enforcement by fine.

As regards the possible rights of third parties, the Acts provide that the value of property for the purpose of satisfying an order made, where any other person holds an interest in the property, is its market value less the amount required to discharge any incumbrance. And where a receiver has been appointed to realise property or a charge, the powers of such receiver are to be exercised with a view to allowing any person other than the defendant to

42 S2(1) of *Drug Trafficking Offences Act 1986*. There are detailed provisions in s15 to deal with the case of a defendant who has been adjudged bankrupt.

43 Sections 80-82 of the *Criminal Justice Act 1988*, in the case of other crimes.

return or recover the value of any property held by him.⁴⁴ However, no account is to be taken of any possible obligations of the defendant which conflict with the obligation to satisfy the confiscation order. Protection is given to the receiver under the Acts where any action is taken reasonably and in good faith in relation to property which turns out not to be "realisable" within the terms of the legislation. There will be no liability for loss or damage occurring due to such action, in the absence of negligence.⁴⁵

(ii) *Australia*

28. S203 of the *Customs Act 1901*, as amended by the *Customs (Amendment) Act, 1979*, gives power to a customs or police officer to seize goods which may be subject to forfeiture on reasonable suspicion of their having been illegally imported. Thus in the context of criminal proceedings for such customs offences, the problem of execution will not arise.

After the institution of proceedings for an order to pay a pecuniary penalty under the civil procedure of s243B, the court may direct the Official Trustee to take control of the property of the defendant, and once the order is made, may direct the Trustee to pay an amount equal to the penalty out of that property to the Commonwealth. In addition to this, the making of an order by the court to take control of property creates a charge upon that property to secure payment, which can only cease to have effect upon the happening of certain events specified in s243J(2).

The charge created is to be subject to every other charge or encumbrance to which the property was subject before the order was made, but once the new pecuniary penalty charge is registered, any subsequent purchaser of the property will be fixed with notice.⁴⁶

The Act provides protection for the Official Trustee, where control has been taken of a person's property under a court order without notice of any claim by another person in respect of that property. Again, in the absence of negligence there will be no liability for loss or damage sustained.⁴⁷ Recourse to the court is provided for, where there has been an order to the Official Trustee to take control of property, on the part of any person who may wish the court to determine "any question relating to the property to which the original order relates".⁴⁸

44 Ss5 and 13(4) of *Drug Trafficking Offences Act 1986*. S74(4) and s82(4) of *Criminal Justice Act 1988*. Also under s11(8) of the 1986 Act and s8(8) of the 1988 Act, a receiver appointed to enforce a charge or to realise property shall not exercise these powers until reasonable opportunity has been given to persons holding any interest in the property to make representations to the court.

45 S18 of the 1986 Act and s88 of the 1988 Act.

46 Section 243J(4).

47 S234N.

48 S243F(1)(c).

29. As we have seen, the *Proceeds of Crime Act 1987* provides that where a court makes a forfeiture order against property, the property vests absolutely in the Commonwealth. If it is registrable property, the Minister has power to do anything necessary to have the Commonwealth registered as owner. Otherwise the property will be disposed of in accordance with the directions of the Minister or in certain circumstances of the court.

Third parties claiming an interest in property may apply to court before the forfeiture order is made or after the making, if that party was not given notice earlier or else has obtained the leave of the court. If the court is satisfied the person was in no way involved in the commission of the offence and acquired the interest for sufficient consideration, without knowing, and in circumstances such as not to arouse reasonable suspicion that the property was tainted, it may declare the nature of the applicant's interest and direct it to be transferred or paid over. Where a conviction is subsequently quashed, the quashing has the effect of discharging the forfeiture order.

In the case of a pecuniary penalty order, once the court has assessed the value of benefits derived, it may order the person to pay to the Commonwealth a pecuniary penalty equal to that amount. The amount payable is then a civil debt due by the person to the Commonwealth and can be enforced as a judgment debt.

In either case, be it a forfeiture order or a pecuniary penalty order, enforcement will be easier where the property which is subject to confiscation has already been seized or restrained or placed, by virtue of a restraining order, under the control of the Official Trustee pending the confiscation proceedings. Where a pecuniary penalty order is made in relation to property which is subject to a restraint order the effect of the second order is to create a charge on the property to secure to the Commonwealth the amount of the payment.

(iii) *United States of America*

30. In both civil and criminal cases, many of the problems associated with execution are relieved by the fact that seizure may already have taken place, either under a warrant, by summary seizure, or pursuant to a restraining order.

31. The *Comprehensive Crime Control Act 1984* is similar to the Australian *Proceeds of Crime Act* in that it provides that property liable to be forfeited vests, upon the commission of a relevant offence, in the US. The Act authorises the Attorney General, upon the making of a forfeiture order, to seize all property ordered forfeit, and upon such terms as the court might order, to sell or otherwise dispose of it.

Property transferred to a third party after the commission of an offence giving rise to forfeiture will be ordered forfeit to the State unless the third party can

show he is a *bona fide* purchaser for value who was "reasonably without cause", at the time of purchase, "to believe that the property was subject to forfeiture".⁴⁹ Then there is a general power under the same provisions for the Attorney General when directing the disposition of property seized, to make "due provision for the rights of any innocent persons".

There is provision for notice of a forfeiture order to be published and for direct written notice to anyone known to have an alleged interest in the property to be furnished to enable them to avail of the petition procedure set out in the Act. This enables a person to petition the court within 30 days of the time of notice for a hearing to adjudicate upon the validity of the alleged interest in the property.

32. In civil forfeiture proceedings, only those with a possessory interest have a right to make a claim seeking relief against forfeiture, with specific statutory exceptions created by the *Drug Abuse Prevention and Control Act*⁵⁰ for persons with a legal or equitable interest in the money or property. A petition for remission or mitigation of an order is ancillary to the forfeiture proceedings themselves and the petitioner must satisfy the court that he or she is entitled to the relief claimed.

After the conclusion of civil forfeiture proceedings, those with an interest in the property may seek relief based on the unconstitutional conduct of the Government in pursuing the forfeiture, either claiming costs or a return of the property.

(iv) *Canada*

33. S420.13(3) of the 1988 Act provides that the court may appoint someone to take control of property pursuant to a restraint order. Property may also have been seized pursuant to a search warrant under s420.12. Where the property subject to a forfeiture order has not already been seized or taken control of, however, and it cannot be located or for other specified reasons escapes seizure, s420.17(3) provides for the imposition of a fine equal to its value. In default of payment of the substituted fine, there are mandatory sentences of imprisonment set out.

Under s420.21, the court may require notice to be given to a person who might have a valid interest in property in respect of which a forfeiture order is to be made. If satisfied that a third party is the lawful owner or lawfully entitled to possession and is "innocent of any complicity in an offence referred to ... or of any collusion in relation to such an offence" the court may order the property to be returned.

49 S413(c) of *Comprehensive Drug Abuse Prevention and Control Act 1970* as amended by s303, Part B of Chapter III of *Comprehensive Crime Control Act 1984*.

50 21 USC s881(a).

In addition, once the property has been forfeited, a third party may apply under s420.22 to have the court declare his or her interest not affected by the forfeiture. There is also provision for an appeal from a refusal of such declaration, and an application procedure to a judge for the release or return of property seized or dealt with pursuant to a warrant or a restraint order.

E. Confiscation Procedures in Various European Jurisdictions

I. Confiscation

34. Most States have confiscation provisions for the proceeds of crime in general and some also have specific legislation to deal with the proceeds of particular offences. France, Sweden, Spain, Portugal and Greece have laws dealing specifically with drug trafficking offences. The confiscation of 'proceeds' as opposed to the instruments used in, and direct products (e.g. stolen goods) of, an offence are not provided for under Belgian law. Italy has special additional provision for "anti-mafia" confiscation where a person is suspected of membership of such an association.

Most countries allow for confiscation of all kinds of property, although many do not permit confiscation of proceeds which have been mingled with lawfully acquired property. In the case of mingled property, German law allows for a fine up to the value of the illegal proceeds to be paid instead, and under Swiss law the goods will be confiscated only if they can be separated from the 'innocent' property without harm being caused to the latter. Immovable property is not subject to confiscation under Dutch law.

35. In general, a *direct* relationship between the offence and the confiscated property is required. Thus in some countries, substituted proceeds (i.e. goods purchased with the original proceeds) and interest or benefits derived from the proceeds cannot be confiscated. This is the case in France and Germany. In Sweden and Turkey, however, there need be no relation between the property and the offence, once a profit has been made. Any property of the offender may be confiscated.

36. Most States assess the proceeds on the basis of gross profit, with the exception of Germany and Sweden, which take only net profit (i.e. minus the costs incurred by the offender) into account. Protection exists in many States for third parties by way of appeal or participation in the proceedings, but property belonging to or in the possession of third parties is not, in general, subject to confiscation. Exceptions in this regard are France, Switzerland and Italy, where property may be confiscated regardless of ownership. In the other States, *bona fide* third parties are protected, although there are varying degrees of intent in relation to the illegal origins of the property. In Sweden, for example, if the third party had "knowledge or reason to assume the property was connected with crime", it may be confiscated, whereas in Germany all that is required is "some knowledge of the offence" and in Denmark confiscation may be ordered so long as the third party "knew of the

connection with the offence or was grossly negligent in this respect".

37. On the issue of the burden of proof, in the majority of States, the onus of proving the origin of proceeds rests, in line with the rest of the criminal law, upon the Public Prosecutor. In Italy, "anti-mafia" confiscation proceedings, however, involve a reversal of the usual onus, obliging the defendant to prove a lawful source for the property. Reverse-onus provisions are unconstitutional under West German law, although the court may make assumptions as to the source of the property where the circumstances point to this. Similarly in the Netherlands, a shifting of the onus of proof to some extent occurs once the Prosecutor states a reasonably possible link between the offence and the proceeds. The presumption of innocence is accorded constitutional status in both Portugal and Spain, but in Turkey there is no requirement at all to prove the source of the proceeds. All that need be shown is that it has not been proven that they do *not* belong to a perpetrator of the offence.

38. With respect to the proceedings in which confiscation is ordered, most States permit only a court in criminal proceedings to make such an order. In Sweden and the Netherlands, the Prosecutor may also ask for an order of confiscation in separate proceedings. Generally it is an additional penalty which may be imposed after conviction, although there are certain exceptions to this: e.g. in Switzerland where proceeds of a drug offence committed outside the jurisdiction are found within the jurisdiction; in West Germany where the offender has died, absconded or cannot be identified; in Italy in special "anti-mafia" confiscation proceedings and in Denmark where the property of a third party is being confiscated. In all these cases the confiscation is ordered in proceedings independent of a criminal proceeding in respect of the offence.

39. There is no order of priority of penalty in most countries, with the exception of Luxembourg, where confiscation will be ordered before any other fine or penalty. With the exception of Sweden, where confiscation is ordered, it does not appear to be taken into account when fixing any other sentence. Confiscated property generally goes to the State although in France, Denmark, Spain, and Switzerland it may be applied to satisfy the claim or right to damages of third parties and victims of the offence.

40. Normal appeal remedies exist in most countries, and in the Netherlands a confiscation order can be reviewed on the application of a third party within a certain time. Imprisonment in default of payment is not permitted except in the case of the Netherlands, France, Turkey and to a limited extent in Germany. A fine of up to the value of the proceeds may be paid in Germany, Switzerland and in certain circumstances, Portugal, if confiscation is not possible. In Sweden, on the other hand, the confiscation order is to be satisfied by payment and only in default of payment will there be distraint.

41. In the case of offences committed abroad, most States would confiscate

only if they have jurisdiction in relation to the offence. There is no such limitation regarding anti-mafia confiscation in Italy. In Denmark the Minister for Justice (exercising a function similar to that of the Order in Council under the provisions of the British *Drug Trafficking Offences Act 1986*) may decide on the enforcement of a foreign confiscation order. States which have become signatories to the UN Convention Against Illicit Traffic in Narcotic Drugs of December 1988 may change their position on the enforcement of foreign orders.

42. Many States, with the exception of France and Switzerland, allow for the possibility in principle of confiscation of goods that are situated abroad where the offence was committed within the jurisdiction of the State itself. However, practical problems of execution would often militate against this practice.

II. Investigation

43. In most countries, the investigation can take place only if there is reason to believe that an offence has been or will be committed. In France and West Germany, an investigation may be opened where for example a person's apparent income does not correspond with what has been declared for tax purposes. However, in Italian anti-mafia cases, suspicion of belonging to an organisation suffices for an investigation into the person's property to be commenced. In Switzerland, before an investigation into property commences there must be a link between the suspect property and the offence being investigated. Banks in Denmark are obliged to report on all bank accounts to the tax authorities.

44. The usual investigation authorities are the Prosecutor and the investigating Magistrate or Judge, but tax, customs and other such officials also have a role to play in information gathering and there appears to be close co-operation between these authorities, e.g. in Sweden, Turkey, Denmark and Portugal in particular. In Belgium a law was passed in 1986 to regulate relations between judicial and fiscal authorities. There, however, tax officials are prohibited from taking part in the investigation. In France, all public officers and officials are obliged to furnish any information acquired in connection with a crime or offence to the prosecution authorities.

45. Ordinary investigatory methods for criminal offences are used in most countries. Special legislation concerning inspection, search and seizure exists in France for matters concerning drug trafficking offences. Investigation into bank documents is provided for in Switzerland, Italy, Germany, Portugal, Belgium, Spain and, in certain circumstances, Denmark and Turkey. In the Netherlands, consideration is being given to the establishment of new pre-trial financial investigations involving production orders and monitoring orders, which would help in gaining access to bank and other financial records.

46. Undercover agents are permitted in many countries but not in Luxemburg or Sweden. In Belgium, their employment is limited to cases where the agent does not provoke, incite or encourage the commission of the offence, and in Denmark it is permitted only under strict conditions and in serious cases such as drug trafficking. In Portuguese law, undercover agents and surveillance are not provided for and thus will only be permitted where there is no encroachment upon the moral integrity of the individual, particularly through the invasion of the privacy of the home or of correspondence or telecommunications. Phonetapping is not legal in Belgium.

47. Pretrial investigation in most States is secret, although where investigatory methods include the questioning of witnesses (as in the Netherlands, Greece, Sweden, Portugal, Denmark, Turkey, Germany and Belgium) the accused or the accused's lawyer are normally entitled to be present. Their presence however may be disallowed in the interests of the investigation.

48. Privileges of various persons are protected in most countries, including that of spouses, clergy, lawyers and in some cases, of doctors also. In Italy there is no testimonial privilege unless the witness is a close relative of the party concerned. In West Germany there are wide privileges afforded, *inter alia*, to spouses, fiancés, certain family members, clergy, lawyers, notaries, auditors, accountants, tax advisors and doctors.

49. Most States, with the exception of Luxemburg can use information obtained in the investigation of an offence in proceedings of a different nature and against different suspects. In the Netherlands, such information will not be admissible where it was obtained by an abuse of power. Where a person has given information, that may be used in later proceedings against him or her, except that as soon as the person becomes a suspect, he or she may not be required to provide any further information. West Germany is considering limiting the extent to which use may be made of information obtained by methods which encroach on the rights of individuals.

III. Provisional Measures

50. Most States provide for the advance seizure of property which is subject to confiscation to ensure its availability at a later stage. Wide reforms are planned in Germany where the evidential requirements to obtain such an order are quite strict and unduly hamper the police investigation and prosecution authorities.

51. In Belgium, although powers of provisional seizure exist, these are said not to be for the purpose of rendering goods available for confiscation but solely to aid the investigation and to assist in reaching the truth. Turkey, Portugal, Germany, the Netherlands and Denmark allow for seizure to take place to secure the replacement value of property, or in certain cases, to cover costs and expenses. Freezing of bank accounts is specifically mentioned

in the case of Luxembourg and Portugal. Seizure to guarantee the payment of a fine is provided for in French law and is being considered in the Netherlands.

52. In general, any kind of property which is subject to confiscation in the various States will be subject to provisional seizure. In Turkey and Italy, even property which has been mingled with "innocent" property may be subject to injunctive measures. Spain, Portugal and Germany permit the seizure of all kinds of property so that confiscation up to the value of the proceeds may take place. In the Netherlands it is being proposed to widen the property available for seizure to include immovable property, which is at present excluded.

53. All States require judicial authorisation for the use of provisional measures, although in Sweden, Germany, Turkey, Italy, Denmark and Portugal, prosecution and police authorities are entitled to seize property where the urgency of the situation or other such circumstances require it. In the latter case, judicial confirmation of the action taken is required within a certain period of time (ranging from 24 hours in the case of Denmark to 3 days in the case of Turkey). In Switzerland and Germany, tax authorities investigating fiscal matters have powers of provisional 'restraint' or seizure also.

54. The provisional measures provided for in the various States usually continue in force until the decision of the court is given or until they are revoked by a competent authority. In France this would be by whatever authority took the action, in the Netherlands and Belgium by the Public Prosecutor and in most other States, by the court. In Italy, anti-mafia confiscation must take place within a year from the date of the seizure of the property.

55. In Luxemburg, the Netherlands, Switzerland, Italy, Germany, Turkey and Portugal perishable goods may be sold while under restraint or seizure and under certain other circumstances (e.g. the high cost of preservation or the dangerous character of the property) they may similarly be disposed of. Apart from these, property is carefully preserved pending proceedings. Where a security has been put up, or a note put in the Land Register, or if the owner in certain situations needs to use the property, this will be permitted in the cases of the Netherlands, Switzerland, Italy (in criminal rather than anti-mafia confiscation), Sweden and West Germany.

56. Most countries allow any interested or affected party, generally a third party claiming an interest in the property, to bring the issue of the provisional seizure before the court. However, in Luxemburg only the accused or the owner of the property can appeal to court and in Turkey it is the owner or possessor of property who may request its release. Most countries (France, Luxemburg, Italy, Sweden, Germany, Belgium, Spain and Portugal) provide for an appeal against refusal and both Switzerland and West Germany specifically provide for the payment of damages to a person whose property

was wrongfully placed under restraint.

IV. Laundering Offences

57. Specific "laundering" offences exist in France, Italy, Spain and Denmark. In France and Spain, the offence exists in relation to drug trafficking. Other countries have offences to deal with the problem of concealing and transforming the proceeds of crime. In Luxemburg and Belgium, however, there is no provision at all for such an offence at present. Preparatory work for such legislation is underway in West Germany and Switzerland.

58. In the Netherlands various provisions of the Criminal Code create different offences, all of which pertain to assisting, concealing or profiting from the proceeds of crime. In Portugal, Greece and Sweden, there are "receiving" type offences directed towards the proceeds of crime and narcotics offences, whereas in Turkey there is a specific offence of "assisting a person to procure a benefit from a felony or to mislead the investigation conducted by Government officers".

59. Most of the offences require a specific intent although in the Netherlands for example, it is capable of commission through negligence also. In some States the offence can only be committed by someone other than the author of the principal offence. States which take a contrary view on this point are Sweden, Germany and the Netherlands. In the latter countries, the principal offence and the laundering offence are not necessarily mutually exclusive.

60. Most countries, with the exception of France, consider that both the laundered property and any profits made therefrom should be subject to confiscation.

61. The European Commission is proposing new Community legislation to combat money laundering. It has put forward a draft directive which would ask all Member States to make money laundering a criminal offence and impose an obligation on banks and other financial institutions to report financial transactions which were suspected of deriving from drug trafficking, terrorism or other crime, particularly organised crime.

The Commission proposals are made in the context of the Vienna Convention of 1988. This UN Convention envisages international action against illicit traffic in drugs and commits signatory countries to attack money laundering associated with the drugs trade. The Community as such has signed the Convention, together with most Member States.

62. The directive is put forward under Art 57 of the EEC Treaty and will be a companion to the Directive on Insider Trading, which has already been adopted by the Council. It would cover not only banks, but also other credit and financial institutions. The European Commission proposes that the directive should be introduced into national law by January 1, 1992.

Member States would impose an obligation on these institutions to report to the authorities any transactions which they suspect to be associated with drugs, terrorism or other criminal offences. Fiscal offences would not be included for the purposes of the directive.

63. The directive would require institutions to identify customers when entering into transactions, taking reasonable measures in cases of doubt to establish the real identity of the persons on whose behalf an operation is carried out or an account is opened. Any unusual transaction should be carefully examined and the institutions should refrain from entering into any suspected operation. Where facts are discovered which could be related to a money laundering offence, the institution should inform the judicial or law enforcement authorities and provide these authorities with all the information they request.

64. The Commission propose that money laundering should be treated as a criminal offence in all Member States. Rules on the protection of banking secrecy are to be lifted, so there would be no breach of its obligations if a bank reported suspicions of criminal activity. Special conditions would explicitly exempt employees and directors of financial institutions from liability if a client whose business was disclosed to the authorities tried to make a claim against them.

The system proposed by the Commission to combat money laundering is based on the principle that the banks and other institutions are the best judges of whether laundering may be taking place and uses a different approach from that in the US, where all transactions over \$10,000 are automatically reported to the authorities which must then analyse the data. The US system is expensive to administer - it covers several million transactions a year - and does not differentiate between normal and suspect transactions.

65. Australia's new money laundering legislation, the *Cash Transaction Reports Act 1988*, commenced on January 1, 1990. The legislation requires persons to operate accounts only in the names by which they are commonly known. Banks, building societies and credit unions are required by the Act to report suspect transactions.

In the terms of the Act, a "cash dealer" must complete a report where there are, inter alia, reasonable grounds to suspect that information gained by the dealer may be of assistance in the enforcement of the *Proceeds of Crime Act 1987*.

In addition, new strict identification procedures are to be applied to all persons opening accounts with financial institutions and cash transactions over a certain figure have to be reported.

CHAPTER 4: PROPOSALS FOR REFORM

1. In a US Supreme Court case, Powell J stated that -

"The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit The profits are enormous As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement."¹

The task of legislation is to ensure that in catering for this "compelling interest", a constitutionally acceptable balance between the need to detect and deter crime and the guaranteed rights of the individual is maintained.²

The implications for Irish law, Constitutional and otherwise, of adopting provisions such as those introduced in other jurisdictions will be examined under the four headings previously set out and under a fifth which considers miscellaneous issues.

A. The Investigatory Stage

2. The Irish Constitution, unlike that of the United States, contains no specific provisions relating to unreasonable searches and seizures. However, the protection afforded to the personal rights of the citizen under Article

¹ *US v Mendenhall* 446 US 544 at 561-62 (1980).

² See Report 27 of the Law Reform Commission of Canada on the *Disposition of Seized Property* p5: "Seizure powers are obvious and necessary tools for meeting the demands of criminal law enforcement ... the legitimate interest of the State in enforcing criminal law must be balanced carefully against the rights to privacy of individuals to use and control their own property. In appropriate circumstances it is justifiable for the property rights of individuals to be subordinated to the state's interest in effective law enforcement".

40.3.1 includes the protection of privacy.³ This, combined with the guarantee of the inviolability of the dwelling in Article 40.5 and the protection of property rights under Articles 40 and 43, makes it necessary that legislation conferring powers of this general nature on the Garda or other law enforcement agencies take these rights carefully into account. Thus, while Article 40.5 allows for the "violation" of the dwelling provided that this is "in accordance with law", it remains the case that any powers of search, inspection or seizure which might be given under the proposed legislation must avoid any unreasonable intrusion into the privacy or property rights of any person. It is true that the Constitution envisages the abridgment of rights of property in particular in the interest of the common good,⁴ but it is equally clear that whether particular legislation is justified by the exigencies of the common good is not simply a question for the Oireachtas and may be an issue for the courts to resolve.⁵

3. While there is precedent in the *Misuse of Drugs Act 1977* for the search and seizure without a warrant of goods or drugs required for evidential purposes, it seems desirable that, in the case of property allegedly constituting the proceeds of crime, a warrant should first be obtained. It would seem in general preferable that, where wide-ranging powers of this nature which constitute an interference with people's rights are being conferred, an application through a court should be an essential preliminary. The special considerations which are relevant in framing powers of search for and seizure of goods or drugs required for evidential purposes do not necessarily arise in the case of the more general powers we are proposing.

4. As we have seen, in the case of drugs, s27 of the 1986 British Act provides for an order, which gives access to, or requires the production of, material believed to be of value to an investigation into drug trafficking. Once the Court is satisfied that there are reasonable grounds for making the order, such legislation should be constitutional and we *recommend the introduction of a similar provision into Irish legislation.*

That legislation could also usefully incorporate certain requirements in the relevant Canadian legislation. This provides for the filing of a Report with

3 See *McGee v Attorney General*, [1974] IR 284, *Norris v Attorney General*, [1984] IR 36, *Kennedy v Ireland*, [1988] ILRM 472.

4 *Buckley v Attorney General*, [1950] IR 67, *Foley v Irish Land Commission*, [1952] IR 118, *Attorney General v Southern Industrial Trust*, (1960) 94 ILTR 161 on property rights, and *Kennedy v Ireland*, [1987] IR 587 on the right to privacy.

5 See Kenny J in *Central Dublin Development Association v Attorney General*, (1975) 109 ILTR 69. On the question of whether investigatory search powers are justified by the common good, see the *dicta* of Barr J in *Ryan v O'Callaghan*, 22 July 1987:

"I am satisfied that it is in the interest of the common good that there should be a simple procedure readily available to the police whereby in appropriate cases they may obtain search warrants relating to premises, including the dwellings of citizens, so as to facilitate them in the investigation of larceny and allied offences."

the court containing the identity and location of the property seized after the search. Thus, while it is possible under that legislation for a search warrant to be granted without notice to prevent the destruction or removal of material, the Judge may require notice of the application for a warrant to be given where an innocent third party is involved, thus affording that person an opportunity to be heard.

5. Access to information contained in bank accounts, revenue returns, and authority to inspect instruments in the Land Registry would obviously be extremely useful. However although the privilege against self-incrimination may not have been given firm constitutional status here, (particularly at the pre-trial stage), other constitutional problems might arise. The right to privacy, which was clearly enunciated in *Kennedy v Ireland*,⁶ would require careful safeguards to be placed upon such powers of investigation if they are not to be seen as "a deliberate, conscious and unjustifiable interference by the State through its executive organ ... (which) ... constitutes an infringement of the constitutional rights to privacy of the plaintiffs".⁷ To justify an investigation of a person's bank account or other private sources of information, something more than mere conjecture is called for.

The Canadian Act sets out the conditions which must be satisfied before an order for disclosure of tax information under s420.28 will be given, and these provide useful criteria which could be followed. The application must be accompanied by an affidavit deposing to the matter under investigation, the person about whom information is required, the type of information sought and the facts grounding the reasonable belief as to the offence and the value of the material to the investigation. The order for disclosure is to be served on the addressee before any action is taken and the Minister of Revenue may designate a person to object to the disclosure on application to the Federal Court.

We recommend that

- (i) *On application to a District Justice, a member of the Gardai should be able to obtain a search warrant where it is shown*
 - (a) *that there are reasonable grounds to suspect that a scheduled offence has been committed and*
 - (b) *that there are reasonable grounds to suspect that there is in a particular place (including land, buildings, vehicles etc)*
 - (i) *specified property in respect of which confiscation may be ordered or*
 - (ii) *specified material which would be relevant to the investigation of the offence or to confiscation proceedings.*

⁶ [1988] ILRM 472.

⁷ *Id.*, at 477.

- (ii) *The warrant should also empower the Garda to seize and retain material coming within (b)(ii) above, but there should be an obligation on the Garda to file a record within a certain period, specifying the materials taken and where they are being kept. The District Justice to whom the application is made should have a discretion to order that notice of the search be given to any specified person. Provision should also be made to empower the Gardai, in cases of emergency, to conduct a search without a warrant. Such cases should include situations where there is reasonable cause to fear that the concealment of material is imminent or that the investigation would be seriously prejudiced if an immediate search were not carried out.*
- (iii) *Where the Gardai are not in a position to specify with sufficient particularity the property or material to which access is sought, it should be possible to apply for an initial order for access to or production of material which is believed to be relevant to the investigation.*

B. Pre-trial Restraint

6. Although the reality is that forfeiture of assets will not be effectively accomplished without the introduction of some form of temporary detention or freezing of assets in anticipation of the forfeiture, these proposals raise some constitutional issues.

Legislation facilitating this pretrial restraint might encounter arguments relating to preventive justice, i.e. subjecting someone who has not been convicted of any offence to a punishment. The leading case which deals with this problem in the context of bail, *People (AG) v O'Callaghan*,⁸ contains various pronouncements on the topic. The statement of Walsh J that "in this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted" would seem to raise serious problems as to the introduction of any pre-trial restraint, even in the context of legislation seeking to confiscate the proceeds of crime.

On the other hand, all the Judges agreed that detention before trial was legitimate where the object was to ensure that the defendant would be present at the trial and it was the punitive element rather than the necessary restriction that rendered the refusal of bail on any other ground unconstitutional. Such refusal, according to O Dalaigh CJ -

"seeks to punish [the appellant] in respect of offences neither completed nor attempted. I say 'punish' for deprivation of liberty must be considered a punishment unless it is required to ensure an accused will stand trial when called upon."

8 [1966] IR 501. The statement of the law in that case was recently reaffirmed in *DPP V Ryan*, [1989] IR 399.

7. Two points should be noted. First, the freezing of assets prior to trial is *not* a deprivation of liberty in the sense that imprisonment is. Since the order does no more than prevent a person from disposing of his property it is a limited restriction of the property rights of the suspect which, in any reasonable hierarchy of constitutional rights, must rank below the right to personal liberty. It is beyond argument that the latter right can be substantially abridged in order to ensure that an accused person stands trial. By analogy, it would seem constitutionally permissible to allow the temporary suspension of certain property rights in order to ensure that the proceeds of criminal activity are ultimately impounded.

Secondly, if the restraint is merely to ensure that the property in question will remain amenable to legal process rather than to confiscate it by way of punishment, it would seem that the punitive element which rendered the denial of bail in *O'Callaghan* unconstitutional is missing. In this context, it is relevant to observe that the judgments in that case do not at any stage say that 'preventative justice *per se* is unconstitutional. Rather the denial of bail on the ground of the likelihood of commission of further offences is, in the words of Walsh J,

"a *form* of preventative justice which has no place in our legal system and is quite alien to the true purpose of bail."

The particular form of preventive justice in question there was found impermissible, but that is not to say that preventative justice in all its forms is unconstitutional.⁹ The decision in *O'Callaghan* was followed recently in the Supreme Court in *Ryan v DPP*¹⁰ in which the Court held that the case law negated the existence of a discretion at common law to refuse bail for preventive detention which would be an invasion of the presumption of innocence. It was held by McCarthy J, Walsh J agreeing, that the right to bail is not a specified constitutional right but the right to liberty is such a right qualified only in so far as detention, which is the infringement of the right, is in accordance with the law.

It is to be noted that Article 5 of the European Convention on Human Rights, which provides that no one shall be deprived of his liberty save in certain specified cases "in accordance with a procedure prescribed by law", lists in Article 5.1(c) as one of these cases "when it is reasonably considered necessary to prevent his committing an offence ...".

8. In this jurisdiction the enactment of the *Offences Against the State (Amendment) Act 1985* led to an examination of some of the constitutional issues posed by pre-trial restraint legislation, in *Clancy and McCartney v Ireland and the Attorney General*.¹¹ The *Offences Against the State Act 1939*, it

9 Cf Ronan Keane, *Preventive Justice*, (1967) 2 Ir Jur (ns) 233.

10 [1989] IR 399.

11 [1988] IR 326. The case is under appeal to the Supreme Court.

will be recalled, provides in s22 for the vesting in the Minister for Justice of the property of any unlawful organisation which has been the subject of a "suppression order" by the Government. The 1985 Act enables the Minister for Justice to require a bank to pay into the High Court any such property consisting of funds in a particular bank. The Act contains machinery enabling any person claiming to be the owner of the funds to apply to the court within six months from the payment in of the funds for an order paying the money out to him with interest. In addition, there is provision for the payment of compensation by the Minister where the court orders the money to be repaid.

The Minister for Justice made use of the powers purportedly conferred on him by the Act in respect of a sum of £1,750,816.27 in the Bank of Ireland, Navan, Co. Meath. The plaintiffs, who claimed to be entitled to the money, issued proceedings in the High Court seeking a declaration that the legislation was invalid having regard to the provisions of the Constitution. The legislation was clearly an *ad hoc* response to particular circumstances and is not necessarily to be regarded as a model for permanent legislation, but the challenge to its constitutionality did result in a consideration of some of the principles applicable in determining the constitutionality of such legislation.

9. While the Act placed the onus of proving that the money did not belong to an unlawful organisation on the claimants, Barrington J accepted the submission of behalf of the State that this did not render the legislation constitutionally improper. Referring to the fact that the Act contemplated no more than a temporary freezing of funds and provided for the resolution of the question of ownership with due process of law and the payment of compensation, he concluded that it represented a permissible delimitation of property rights within the meaning of Article 43 and, accordingly, could not be regarded as a unjust attack on such rights contrary to Article 40.3. Barrington J, cited with approval the US decision of *Calero-Toledo v Pearson Yacht Leasing Company*,¹² where it was held that the seizure of a yacht discovered to be carrying illegal drugs without prior notice to the innocent owner did not offend the guarantees of due process contained in the US Constitution and that a statute authorising such seizure was not unconstitutional. He referred with approval to the following passage from the judgment of Brennan J:

"Thus, for example, due process is not denied when postponement of notice and hearing is necessary to protect the public from contaminated food ...; from a bank failure ...; or from misbranded drugs ...; or to aid the collection of taxes ...; or the war effort"¹³

Brennan J, also referred to the considerations that justified the legislature in postponing both the giving of notice and a due hearing until after the seizure had been effected. These were, first, the fact that the seizure served

12 (1974) 416 US 663.

13 *Id.* at 679.

"significant governmental purposes"; second, the possible frustration of the object of the statute by pre-seizure notice and a hearing which might lead to the removal or destruction of the relevant property; and third, the initiation of the seizure by public officials rather than "self interested private parties".

10. *Clancy and McCartney* thus affords support for the view that pre-trial restraint orders of the nature under consideration are not *per se* unconstitutional. It may be arguable whether legislation under which a person's property could be the subject of a pre-trial restraint order *must* provide for the payment of compensation to such person in the event of his being subsequently acquitted, in order to survive constitutional challenge. It is obvious, however, that such a provision would be a desirable safeguard. At the least, we think there would be little dissent from the view that the court should be given power to permit the withdrawal from any sequestered funds of amounts sufficient to discharge reasonable living expenses etc, a procedure followed in the case of the civil *Mareva* injunctions.

11. We accordingly recommend that

- (i) *It should be provided that, where a District Justice is satisfied by an information on oath by a member of the Garda Síochána that there are reasonable grounds for suspecting that a scheduled offence has been committed, he may make a restraint order against the property of a person both prior to the institution of criminal proceedings and afterwards.*
- (ii) *The court should be empowered to make the order on such terms as it sees fit. This would include appointing a receiver to manage property, or making an order freezing or placing a charge on assets, or simply ordering the physical seizure of the goods or property and preventing any person from dealing or interfering with them. It should also be possible to register the order, and a report of the property affected should be filed in court.*
- (iii) *The court should have a discretion as to whether to require notice of the restraint order to be given to any person who might have an interest in the property, having regard to the likelihood of the destruction, removal, disappearance or reduction in value of the property if such notice were given.*
- (iv) *There should be an opportunity for anyone affected by a restraint order to apply to court to have it revoked, varied or amended (e.g. to enable the applicant to meet reasonable expenses).*
- (v) *It should be an offence to act in contravention of a restraint order.*
- (vi) *Where a court is proceeding to make a confiscation order in accordance with the procedure recommended at a later stage in this Report and the property is subject to a restraint order, the court should be empowered to set aside at its discretion any conveyance of the property other than to a*

bona fide purchaser for value without notice.

12. As to the payment of compensation, there is obviously room for argument as to whether a person who is subsequently acquitted or pardoned should be entitled as of right to compensation or whether that right should arise only where there has been both serious default on the part of the prosecution authorities and substantial loss caused. (The latter is the position under the relevant UK legislation).

13. The argument against giving an automatic right to compensation is that there should not be an unnecessary inhibition on the bringing of applications of this nature. The defendant, it is urged, is sufficiently protected by a provision entitling him to apply to the court for relief from the order where, for example, he has to meet bills. In most cases, the only damage which he might sustain of a permanent nature would be the loss of a possible sale and for this he could be compensated. But it would be wrong, it is said, to allow such compensation in cases where the defendant was subsequently acquitted on a technicality or because a witness had been intimidated. It may also be pointed out that a defendant who is acquitted, even where the acquittal is on the merits and not simply due to a technicality, is not entitled as of right to have his costs paid by the State and it has never been suggested that this is a constitutionally dubious position.

14. The argument in favour of having a broader provision for compensation than that contained in the English legislation is that it makes it more likely that the legislation would survive a constitutional challenge. In this connection, it may be noted that the procedure under consideration is similar to a *Mareva* injunction which would never be granted in the absence of an undertaking as to damages by the plaintiff. There seems no reason why the defendant in criminal proceedings - who suffers the additional indignity of resting under the suspicion of being a criminal - should be in any worse position than the defendant in civil proceedings. It is extremely unlikely that the State will be deterred from using the procedure because of the fear that compensation might be payable. It is very rarely that one finds a plaintiff in civil proceedings (invariably with far less resources than the State) put off by being advised that he will have to give an undertaking as to damages. In the overwhelming majority of cases, the defendant will in any event be unable to show any loss, since if a sale of the asset is being impeded, he can always come to court and ask for the restraint to be lifted. It is clear that any potential liability to the State will, in the overall context of State expenditure, be minuscule.

15. It must be recognised that there are cases such as the *Attorney General v Southern Industrial Trust*¹⁴ and *O'Callaghan v Commissioners of Public Works*¹⁵ where an interference with a person's property rights in the interests of social

¹⁴ (1957) 94 ILTR 161.

¹⁵ [1987] ILRM 391.

justice was upheld even though no compensation was payable. In *Dreher v The Irish Land Commission*,¹⁶ moreover, Walsh J said:

"It may well be that in some particular cases social justice may not require the payment of any compensation upon a compulsory acquisition that can be justified by the State as being required by the exigencies of the common good."¹⁷

As against this, in *ESB v Gormley*¹⁸ the Supreme Court held that, although the interference with property rights was required by the common good, in the circumstances of the case the absence of a provision for compensation rendered the provision unjust.

16. One can safely conclude, therefore, that the absence of a provision for compensation would not of itself necessarily render the suggested legislation unconstitutional. At the same time, the balance of the argument would seem to favour the inclusion of a more generous provision for compensation than that contained in the UK legislation, having regard to the constitutional dimension absent in that jurisdiction. We have had some difficulty in coming to a conclusion on this issue, but on balance we are inclined to the view that the best solution would be to enable the courts to award compensation where it was just and reasonable to do so. This would not automatically entitle every defendant to compensation, but would avoid the constitutional dangers inherent in an entitlement hedged round with specific restrictions. In particular, it could encompass a case where a defendant may not be contemplating an actual sale, but may for his own good reasons wish to be in a position to demonstrate to another person the extent of his wealth. He is hardly going to be in a strong position to do that if he has to tell the person concerned that it is subject to a court order because it is suspected of being the proceeds of crime. A provision along the lines we have suggested would enable the court to award compensation in such a case while not going to the extreme of entitling every person to compensation, although in the event he may have sustained no real loss. We recommend that *there should be a provision enabling any person claiming an interest in property affected by a restraint order to apply to the court within a specified period for an order returning the property to such person or ordering the payment by the State to that person of a sum equivalent to the value of the property. In addition, the court should have power to order the payment of compensation to any such person where it is satisfied that it is just and reasonable so to do.*

17. The nature of the assets which are required to be frozen is likely to vary widely. They are likely to include, in addition to bank accounts and valuables of many types, stocks and shares, the latter in private as well as in quoted companies, whether in Ireland or abroad, and other securities and investments

16 [1984] ILRM 34.

17 *Id* at 96.

18 [1985] IR 129.

in properties. Many of these would require active management during the period for which they were frozen. Accordingly it would appear that in many cases it would be necessary to appoint a person or body to act as a receiver or administrator over the assets while they are frozen.

18. We recommend that "property" should be widely defined to include (whether within the jurisdiction or not) all benefits, interests and property, real and personal, tangible and intangible, and gifts made for the purpose of avoiding detection or forfeiture. Property which is held by a third party should also be capable of being subject to a restraint order except in the case of a bona fide purchaser for value without notice of the origin of the property.

C. The Procedure Leading to Confiscation

19. The Select Committee of the Dail on Crime, Lawlessness and Vandalism, in its Sixth Report, recommended the introduction of an administrative process for the confiscation of assets illegally acquired through drug trafficking.¹⁹ As we have made clear, our concern in this Report is of a broader nature. The machinery employed in other jurisdictions for confiscating the proceeds of drug trafficking may in some respects provide a useful model, but the essential object is to provide a machinery which extends to other relevant crimes capable of yielding profit on a significant scale. Hence, our approach is broadly similar to that adopted in Canada where, as we have seen, the court may order the confiscation of property which represents the proceeds of "enterprise crime".²⁰

(i) A Civil Procedure

20. A procedure of this nature could be available to the prosecution after the conviction of a person for a "enterprise crime" or (if we employ a more familiar terminology) a "scheduled offence". Alternatively, it could take the form of a civil procedure operating independently of the commission of any criminal offence. Thus, in the case of drug trafficking offences, the Dail Committee recommended a provision to be applied to "any person who is suspected by law enforcement agencies of being engaged in drug trafficking and who is unable to prove that he acquired his assets through legitimate means".²¹

21. If a similar procedure were to be adopted, the legislation could provide that the onus of proving that specific items were innocently acquired was on the defendant. Alternatively, the onus could be placed on the applicants for such an order who presumably would have to meet the lower standard applicable in civil proceedings, i.e. proof on the balance of probabilities. (It would seem that this would be the appropriate standard of proof in a

19 PL 2925 para 6.3.

20 See p29, para 25 *supra*.

21 6th Report, para 45.

forfeiture proceeding of this nature, although the matter is not free from doubt).²²

22. While a civil procedure of this nature is not without its attractions, it also presents serious constitutional difficulties. The court would, in effect, be depriving someone of their property on the basis of allegations of criminal activity, in respect of which there had been no conviction or proof. In addition, the procedural safeguards surrounding a criminal trial leading to confiscation are absent in civil proceedings. Hence, it might well be held that legislation of this nature would constitute an "unjust attack" on property rights in contravention of article 43 of the Constitution.

23. Unless there was a presumption or a shifting of onus to the defendant, proof even on the balance of probabilities that a particular item represented the proceeds of crime could present almost insuperable difficulties. In a typical case, there would simply not be the evidence necessary to support such an order. One can be reasonably certain that there will be no accounts in financial institutions or securities registered in the suspect's name, nor will there be any business records available. There will indeed be little more than bald information to the effect that a named individual living at a particular address is, for example, dealing in drugs. In the result, in our Discussion Paper, we concluded that a civil procedure would either be ineffective or encounter the risk of a serious constitutional challenge. Our consultations have satisfied us that we were correct in this view and, accordingly, we do not recommend the adoption of such a procedure.

(ii) *Criminal Proceedings*

24. The alternative to civil proceedings is a confiscation order in a criminal prosecution where the defendant is convicted of a scheduled offence. If it was thought desirable to provide for such an order, the question would then arise as to whether it should be mandatory where the defendant is convicted of such an offence or whether the court should be given a discretion as to when it should be imposed. At the outset, however, it is necessary to address the question as to whether such a confiscation order in criminal proceedings is desirable and, in particular, the difficulties of proof that may arise.

25. A confiscation option would undoubtedly be a useful addition to the options open to the court at the sentencing stage for serious criminal offences. Its availability at that stage would also obviate the need to bring separate civil proceedings at a later stage after the imposition of a custodial sentence or any other action taken. It would also seem particularly

22 It has been held in the US in two Federal appeals cases that civil forfeiture proceedings do not require proof beyond a reasonable doubt - *Bramble v Richardson* 498 F 2d 968 (10th Circuit) and *United States v \$2500* 698 F 2d 10 (2nd Circuit 1982). Cf *Petrov Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions* [1984] Duke LJ 822.

appropriate to have such an order made as part of the criminal process.

26. We accordingly favour in principle the adoption of a confiscation procedure in criminal prosecutions. We consider first the onus of proof in an application for a confiscation order and second the question as to whether the order should be mandatory or discretionary.

(a) Onus of Proof

27. In Chapter 1 above (para 10) we set out the difficulties involved in linking property with crime. In Chapter 3, we examined ways in which the same problem had been tackled in other jurisdictions. In England, as we have seen (pp25-26) the prosecution may make a "statement" as to the amount by which the accused has benefitted from drug trafficking which is conclusive evidence unless the accused can produce evidence rebutting the statement. If he does not, the court can make an "assumption" that such property constituted the proceeds of crime. The net effect is to shift the onus of proof on to the accused. In Australia as we have seen, under the *Proceeds of Crime Act*, 1987, in a prosecution for a "serious offence" a presumption arises that all the property of the accused held within a five year period or since the commission of an offence, represents the proceeds of that offence.

Under the *Comprehensive Crime Control Act*, 1984 in the US, a presumption is created that any property of a convicted defendant is liable to forfeiture, subject to the prosecution proving it was acquired after the offence or that there was no other likely source for it on a preponderance of the evidence. In all these jurisdictions, the reality, i.e. that drug traffickers or other experienced criminals do not as a rule make admissions and certainly not as to the provenance of particular property, is acknowledged by legislation which alternately raises presumptions and shifts the onus of proof.

28. In this jurisdiction, there are many areas of the criminal law where the burden of proof on an issue is shifted to the defendant. This applies to the "legal burden" on the main issue and not solely to what is known as the "evidential burden" or merely having to adduce some evidence on a point.²³ In addition to statutory allocation of the burden the "peculiar knowledge"

23 Under s78 of the *County Officers and Courts (Ireland) Act 1877*, in summary cases, any exception or proviso to an offence need not be mentioned or disproved by the prosecution or complainant, unless the defendant introduces evidence relating to it. Another example is s56(4) of the *Road Traffic Act 1961*, where failure by a person to produce a certificate of insurance when the same was lawfully demanded of him under the Act is to be *prima facie* evidence that the vehicle was driven uninsured. See also s15(2) of the *Misuse of Drugs Act 1977*; s1(3) of the *Vagrancy Act 1898* as amended by *Criminal Law Amendment Act 1912*; s41(4) of *Intoxicating Liquor (Licensing) Act 1872*; s259 of *Customs Laws Consolidation Act 1876*; s9 of the *Customs and Excise (Miscellaneous Provisions) Act 1988* s17 of *Prevention of Crime Act 1871*; ss42 and 43 of the *Gaming and Lotteries Act 1956* and ss23(9) and 71 of *Wildlife Act 1976* and s9 of the *Customs and Excise (Miscellaneous Provisions) Act 1988*.

principle has also gained certain judicial acceptance in some Irish cases.²⁴

We pointed out in our *Report on Receiving Stolen Goods*²⁵ that, under the law as it stands, when the prosecution proves that the defendant was in possession of recently stolen property without explanation, a presumption of fact is raised which shifts the evidential burden from prosecution to defence. Although it has been held²⁶ that, once it was established that there was reasonable cause to believe that a defendant had been trafficking in drugs, there was an *almost* inevitable inference that there was reason to believe he had benefitted from drug trafficking, proving that a convicted defendant was in possession of property, *simpliciter*, without any evidence as to its origin, would, we are satisfied, give rise to no presumption without some form of statutory provision.

29. However, whatever reservations there may be about burden-shifting devices in criminal cases such as the "peculiar knowledge" principle, there are several recent statutory provisions which specifically place the legal burden on the defendant to satisfy the court on a central issue, notably in the context of drug offences.²⁷ S15(2) of the *Misuse of Drugs Act 1977* provides that, where a person is proved to have been in possession of certain drugs and the court, having regard to quantity and other factors, is satisfied they were not intended for immediate personal use, he will be presumed, until the court is satisfied to the contrary, to have been in possession of the drugs for the purpose of selling or supplying them. This is a clear imposition on the defendant in criminal proceedings of the burden of proof in relation to an issue with regard to which the prosecution has not been obliged to adduce evidence.

Under s22 of the same Act, once possession has been proven against the

24 *Mahony v Waterford, Limerick and Western Railway Co.* [1900] 2 IR 273, *Attorney General v Duff* [1941] IR 406, *Minister for Industry & Commerce v Steele* [1952] IR 304. However, in *McGowan v Carville*, [1960] IR 330, the majority of the Supreme Court interpreted the principle not as a *rule* by which "the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge" but accepted the dicta in *R v Burdett* 4 B & A 95, at 140 "that the rule is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged, but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, rebutted or not weakened, by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true".

25 LRC Report No. 23 Chapter 2, para 43 *et seq.*

26 By Webster J, in *Re a Defendant*. 1987 *The Times*, April 7.

27 For road traffic offences see also s18(1) and (2) of the *Road Traffic (Amendment) Act 1978*, where it is up to the *defendant*, if he wishes to introduce evidence that he consumed alcohol between the time of the alleged offence and the taking of the specimen to *satisfy* the court that, but for such alcohol consumed, he would not have been over the limit. This relieves the prosecution not only of the obligation to prove the defendant did not drink during that period, but also of the obligation to adduce evidence in rebuttal of the defendant's claim, unless the defendant actually succeeds in satisfying the court of the facts of his defence.

defendant, the onus is again upon him to prove lawful possession (e.g. the existence of a licence). S9 of the *Misuse of Drugs Act 1984* provides that, where importation of a controlled drug is proven, and again, having regard to relevant matters, the court is satisfied it was not intended for immediate personal use, the person will be regarded by the court, until satisfied to the contrary, as having imported for the purpose of selling or supplying.²⁸

30. In the US the presumption of innocence is part of the due process clause of the 14th Amendment, and is strictly observed in criminal proceedings.²⁹ In *Oakes*,³⁰ a recent Canadian case, a statutory provision which imposed the burden on a defendant to prove that he or she was not in possession of drugs for the purpose of trafficking was held to violate the presumption of innocence guaranteed by the Charter of Rights. Although the court (at p.229) stated that "the objective of protecting our society from drug trafficking ... is ... one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases" nevertheless the burden-shifting presumption in s8 did not satisfy the "proportionality test" of being rationally connected to the objective and impairing as little as possible the right in question.

31. More recently this topic was considered by Costello J in *Donal O'Leary v Attorney General*,³¹ where the constitutionality of s24 of the *Offences Against the State Act 1939* and s3(2) of the *Offences Against the State (Amendment) Act, 1972* was in issue. The first of these sections provides that, where a person is charged with being a member of an unlawful organisation, proof to the satisfaction of the court that an incriminating document relating to the organisation was found on him or on premises owned or occupied by him is to be evidence that he was a member until the contrary is proved. The second section provides, in relation to the same charge, that where a specified officer of the Garda Síochána in giving evidence states that he believes that

28 See also s9 of the *Customs and Excise (Miscellaneous Provisions) Act 1988*.

29 See *Re Winship* (1970) 397 US 358. And in our own jurisdiction, according to O'Connor, (1982 76 Gazette of the Incorporated Law Society of Ireland 53), "the obligation imposed on the prosecution to prove its case beyond all reasonable doubt is so fundamental to our system of criminal justice that it should only be departed from for the weightiest of reasons". This has now been authoritatively confirmed by the decision of Costello J referred to at para 31.

30 *Regina v Oakes*, (1986) 26 DLR (4th) 200, where s8 of the *Narcotic Control Act 1970* was found to be inconsistent with s11(d) of the Charter. The presumption involved was "an important element of the offence in question", whereby the accused could be convicted despite the existence of reasonable doubt. S1 of the Canadian Charter guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society". The onus is on the party seeking to justify the limit to show on the balance of probability (i) that it comes within this exception, (ii) what alternative methods there were open to the legislature, (iii) that the objective served was of sufficient importance and (iv) that the means chosen were reasonable. S8 failed this test since on the facts in question there was no rational connection between the basic fact of possession and the presumed fact of possession with a purpose of trafficking.

31 Unreported; judgment delivered 29th October 1990.

the accused was at a material time a member, the statement is to be evidence that he was such. It was argued on behalf of the plaintiff, who had been charged with being such a member, that the sections were unconstitutional because they deprived the accused of his right to the presumption of innocence. Costello J said that he had little difficulty in construing the Constitution as conferring on every accused in every criminal trial "a constitutionally protected right to the presumption of innocence". The learned judge, having pointed to the widespread recognition of the presumption of innocence as a fundamental human right, said that a trial held otherwise than in accordance with the presumption would, *prima facie*, be one which was not held "in due course of law" as required by Article 38 of the Constitution. In the instant case, however, he concluded the impugned legislation did not remove the presumption of innocence. *Oakes* was distinguished on the ground that the sections in that case were entirely different.

32. Would a provision placing on the accused the burden of satisfying the court, on pain of forfeiting his property, that it did not represent the proceeds of a crime, also be consistent with the "due course of law" guaranteed in Article 38.1? As the confiscation procedure will form part of the criminal trial, that requirement must be observed. Since, however, in the statutory scheme we are considering, conviction of the defendant of a scheduled offence is a necessary pre-condition to the imposition of a confiscation order, the presumption of innocence will no longer be a relevant consideration. At the same time, it is to be borne in mind that Henchy J in the *State (Healy) v Donoghue*, indicated that the combined effect of Articles 38.1, 40.3.1, 40.3.2 and 40.4.1 was to imply a guarantee that even "where guilt has been established or admitted", a citizen will receive a sentence that is "appropriate to this degree of guilt and his relevant personal circumstances".³²

33. If any property of the accused was liable to be forfeited on conviction, irrespective of how it was acquired, such an order would have to be regarded as a form of punishment. We do not envisage so draconian a procedure: under our proposed scheme, a confiscation order would not be made where the defendant satisfied the court that the property or any part of it did not represent the proceeds of a scheduled offence. Even with that safeguard, however, the confiscation procedure would still retain a punitive element. There are different views within the Commission as to the nature of a confiscation order. On one view, when the accused is convicted of a scheduled offence the conviction operates to divest him retrospectively of all property held by him for which he cannot prove a lawful origin. Society

32 *State (Healy) v Donoghue*, [1976] IR 329, at 353. This appears to lend support to the view that constitutional protections apply equally at the sentencing stage. See also *State (Stanbridge) v Mahon* [1979] IR 214 where Gannon J stated: "The failure to hear the convicted person and his representative on substantial matters pertinent to sentence is, I think, a failure in procedure affecting one of the basic principles of the administration of justice".

would decree through its laws that a person could never enjoy ownership of the proceeds of criminal activity. No one would argue that a person has a right to the proceeds of a robbery and the fact that drug-trafficking may, to an extent, constitute a victimless crime does not make the source of the proceeds any less tainted. The long title of the English *Drug Trafficking Offences Act of 1986* refers to the *recovery* of the proceeds of crime.

If we proposed that, on conviction for particular crimes, an accused was to be liable to have his property forfeited, irrespective of origin, in an amount to be determined by the Court, such forfeiture would clearly be a form of punishment and principles of proportionality would apply.

We propose something different. Whereas, *prima facie*, we are proposing the forfeiture of *property*, in fact, on conviction, all assets of the accused are presumed to be the proceeds of crime and never to have become his lawful property unless he proves otherwise, in which case the property cannot be touched. The legislation established a self-contained mechanism and considerations of proportionality are irrelevant. On this view of the legislation, on conviction, the accused automatically is divested of all assets which have flowed from crime, and they are recovered or retrieved by the State. An element of restoration is not necessary. What is relevant is the interest, if any, of the convicted person in the assets appearing to constitute his property. The presence or absence of such interest is determined by the legislation.

A majority of the Commission regards confiscation as a punishment in that the procedure makes the offender contribute to the State in amelioration of the offence which he has caused to society by his activities. The holding of the proceeds is legal in the first place and there is no parallel with the restitution of stolen property as confiscation is not the same as restoration. It would be essential for the legislation to observe the constitutional criteria as to proportionality mentioned by Henchy J but these would not present a problem. The Commission is recommending that in relation to particularly serious crimes which do great harm to society there should be a procedure for confiscation of the assets of a criminal who has been convicted of that sort of crime. The proportionality principle means that a convicted defendant is not to be given a heavy sentence which is out of all proportion to the crime which he has committed. The presumption which we are raising, namely that a defendant convicted of one of these crimes who has substantial assets has acquired those assets through similar activities, implies that he must have been involved in other serious crime. That being the case we fail to see how a very substantial Confiscation Order would cause a proportionality difficulty. If the defendant possesses very substantial assets these constitute his "relevant personal circumstances", in the words of Henchy J.

All Commissioners are agreed that the confiscation procedure should be confined to scheduled offences tried on indictment.

The Supreme Court have said that the phrase "due course of law" requires "a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society".³³ Similarly, the European Commission on Human Rights, upholding a reverse onus provision in United Kingdom legislation on living on the earnings of prostitution, decided that such a provision was reasonable "in the interests of an efficient maintenance of the legal order".³⁴ We are satisfied that similar considerations exist in the context of seizing the proceeds of crimes which are universally recognised as having a serious and destabilising effect in society generally. Hence, a presumption that the assets of persons convicted of scheduled offences represent the proceeds of such offences, thus rendering them liable to a confiscation order, would be "reasonable in the interest of an efficient maintenance of the legal order" and not an unwarranted infringement of personal rights.

34. We do not think that the English *Drug Trafficking Offences Act 1986* provides a suitable model for such a Confiscation Order procedure. This procedure, which has already been outlined, is an unwieldy combination of statements of notional benefit, accepted and unaccepted, rebuttals, assumptions, requisitions and ever shifting burdens. We note that, according to a press report, these provisions have proved peculiarly difficult to operate in practice: in at least two cases, attempts to seize assets collapsed because it was held that the police had not proved that the assets were the proceeds of crime. We think that the underlying philosophy of those provisions could be more simply and, as we would hope, effectively embodied in an enactment that, where a person is convicted of a scheduled offence, all the assets held by him or disposed of by him between specified dates, will be presumed to represent the proceeds of such offences, unless the defendant proves otherwise, and are hence liable to confiscation. But, however difficult it may be in some cases, the State must at least prove that the defendant is, or was within a specified period and subject to the operation of this law, the owner of the property in question. This would enable the property itself to be seized if it was still in the defendant's possession or the proceeds, if it had been disposed of within the specified period.

(b) A Mandatory or Discretionary Order

35. Perhaps the most difficult question we have addressed in preparing this Report is as to whether or not confiscation should be mandatory on conviction or left to the discretion of the court. In our Discussion Paper, our approach was to provide for mandatory confiscation in any case where a clear link was established between assets and crime, but in other cases, e.g. where the presumption of lawful origin was relied upon, to leave confiscation to the discretion of the court of trial. Since, however, we have now come to the conclusion that it should not be necessary for the State to prove a link between the crime and the property of the defendant, that distinction will not

33 *Re Article 26 and the Criminal Law Jurisdiction Bill* [1977] IR 129, 152.

34 *X v UK* Application No. 5124/71, Collection of Decisions ECHR 135.

be relevant. It remains to be considered whether the best approach would be to

- (a) make the confiscation order mandatory in every case where the defendant is convicted of a scheduled offence;
- (b) make the order mandatory where it is sought by the DPP but not otherwise;
- (c) make the order mandatory, but only in cases where the assets of the defendant exceed a specified sum in value;
- (d) make the order discretionary in all cases.

We have come to the conclusion that the last approach, i.e. making the Order discretionary in all cases, would not be satisfactory. It would mean that the State, having spent much time and effort in tracing assets, obtaining a freezing order or appointing a receiver, could find that the court, applying its discretion, was not prepared to do any more than impose a prison sentence or fine. Such deterrent effect as the possibility of imposing a confiscation order possesses might be significantly reduced if it were to be at the discretion of the trial judge. Nor could these difficulties be avoided in practice by providing for mandatory confiscation, but leaving the amount to be fixed by the trial judge in each case. The whole purpose of the scheme could be effectively frustrated by the trial judge deciding to make a nominal confiscation order relating to assets of trivial value.

We think that there are insuperable constitutional difficulties in (b). In *Deaton v Attorney General*,³⁵ the Supreme Court struck down a provision which allowed the Revenue Commissioners to elect which of the penalties prescribed by the section was to be imposed by the District Court on conviction of a customs offence. It was made clear in this and subsequent cases that, while it is perfectly permissible for the legislature to prescribe a mandatory penalty for an offence, it is not permissible to allow a body other than a court to choose the total punishment. The State might, accordingly, be driven to arguing that the confiscation was not a form of punishment, a view rejected by the majority of the Commission.

Having regard to these considerations, we have concluded that the best course is (c) i.e. to provide that a confiscation order should be mandatory in all cases where the estimated value of assets exceeded a certain figure. The presumption of a criminal origin which we have already recommended would then apply to the excess value of assets over such a threshold figure.

³⁵ [1963] IR 170.

(c) Taking the Confiscation Order into Account when Sentencing

The next question that arises is as to whether any confiscation measure imposed should be taken into account when sentencing. The danger is that so to provide would introduce a system of "paying one's way out of prison". While a confiscation order, as we have pointed out, will be punitive in its nature in some cases, its objective is not primarily punitive. As with any forfeiture type order, including those already in use, the objective is either to restore property to those to whom it belongs or to deprive the defendant of property which he would not have were it not for some criminal activity. Most people would see no injustice in imposing a sentence of imprisonment or a fine in addition to ordering the confiscation of the proceeds of the crime. The removal of the property of itself would hardly be such a punishment as would normally deter repetition of the crime or its commission by other possible offenders. It could not be plausibly suggested, for example, that seizure of stolen goods is a satisfactory penalty for the offence of theft or robbery. The fact is that the seizure or confiscation of any property is not commonly seen as primarily punishment for the crime and so the imposition in addition of a conventional sentence will in general be thought to be desirable. It is true that the Hodgson Committee Report³⁶ on The Profits of Crime and their Recovery in the UK suggested that orders for the payment of money should be taken into account in determining punishment. But this would be viewed by many as allowing criminals to buy their way out of punishment for crime. The Commission share this view. It follows that any confiscation order made should not be taken into account in imposing sentence.

36. We accordingly recommend that

- (1) *When it is proved that a person convicted of a scheduled offence owns property, or has owned property within the period of ten years preceding his conviction, it should be presumed that such property represents the proceeds of a scheduled offence or offences. The person convicted should be able to rebut the presumption by proving on the balance of probabilities that the property did not represent such proceeds.*
- (2) *To ensure that procedures are fair to the convicted person, it should be provided that any evidence adduced by the defendant to explain the provenance of property should not be admissible in evidence against that person in any other proceedings, civil or criminal.*
- (3) *It should be provided that, where property is subject to such a presumption which has not been rebutted, the court must order the forfeiture to the State of such property to the extent that it exceeds in value the sum of £1,000.*

36 *Profits of Crime and Their Recovery* (1984), Cambridge Studies in Criminology Vol L11, Heinemann Educational Books Ltd, 165pp.

- (4) *The offences in respect of which pre-trial restraint and forfeiture may be ordered should be set out in a schedule. It should include drug trafficking, handling of stolen or smuggled goods, demanding money with menaces and fraud related offences.*
- (5) *Where the person accused of a scheduled offence has died or absconded, the court should have a discretion, on the application of the prosecution, to make a forfeiture order in respect of his property.*
- (6) *Where it is proved that any property in the possession of another person was acquired from a person convicted of a scheduled offence within the period of ten years preceding such conviction, the court must order the forfeiture of such property to the State unless such other person proves as a matter of probability that he had acquired the property bona fide for reasonable value.*
- (7) *The Court, in imposing a sentence in respect of a scheduled offence, should not have regard to the fact that a forfeiture order will be or has been made.*

D. Execution

(i) *Methods of Execution*

37. There are various modes of execution of judgment available in Ireland. Due to the nature of forfeiture, involving as it does the removal of property, the methods of execution of civil judgments could apply equally to it even though ordered in criminal proceedings. [Some of these are listed in the Introductory Chapter to the Law Reform Commission Report on *The Law Relating to Sheriffs*³⁷].

The Scottish and English systems which treat confiscation orders in the same manner as fines imposed may fall somewhat short of the desired objective of confiscation - the removal of the financial incentive from crime - by allowing for imprisonment in default of payment. In addition, the seizure of particular items and goods may be far more immediate and effective than a drawn-out method of instalment payment and would directly deprive the owner of the ill-gotten gains themselves, in whatever form they may be.

Another related question gave us great difficulty. Should the defendant be able to 'buy his way' out of the confiscation order by paying over a sum equal to the total value of assets to be confiscated? If he has the wherewithal to achieve this, he would be able to replace (or buy back) his assets in any event. If he has not, the question will not arise and one will be left with a choice between confiscation and nothing. As we assume a sentence will be

37 LRC 27-1988.

imposed in any event, we see little point in providing for additional imprisonment in default of "fruitful" confiscation. We are also advised that a "money in lieu" provision facilitates international enforcement of confiscation orders. *We recommend that it be possible to satisfy a confiscation order by payment of the money value of the total of assets to be confiscated.*

38. Rather than confine the process of execution to one particular method, a general provision such as that in the US legislation might be advisable. This would allow for the immediate seizure of the assets, yet would give discretion to the court as to the particular method and terms of the execution.

Thus intangible property could be realised by a charge and the appointment of a receiver, or a garnishee order requiring a third party to pay over a sum due, or a charging order on securities.³⁸ If the court thought it practical and just in the case, it could use a procedure like that provided for in the UK Acts - ordering payment by instalment with imprisonment in default of compliance - or like that in the Canadian Act, where if property cannot be located, a fine can be imposed instead with imprisonment in default. This might be most useful where a custodial sentence had not been imposed in addition to the confiscation order. The seizure of real property could possibly be facilitated by registering the order made as a judgment mortgage and securing a well-charging order.

39. It may be assumed that the procedures for confiscation are likely to be used largely in cases where the accused is believed to have profited significantly from the commission of scheduled offences. Such a person is likely to have taken steps, perhaps quite sophisticated ones, to protect those assets from immediate discovery. Even where a freezing or restraining order is made at a preliminary stage in the prosecution process, a significant amount of enquiry work may be needed in order to trace and identify the person's assets. Such enquiries do not fall within the normal remit of the Garda Síochána and there does not seem to be any strong case for adding these functions to their existing ones. The situation differs significantly from that in the United States where the functions of the United States Attorney's Office have historically been a great deal wider than those of a prosecuting agency in other jurisdictions.

There appear to be two procedures which have been adopted in other jurisdictions and which are worthy of serious consideration.

1. The first is the appointment of an Official Trustee whose function it would be to trace and acquire control of property under a Restraint

³⁸ Although the making of a garnishee order is not normal in criminal proceedings, it might be noted that in a recent Circuit Court case, Judge Martin granted a conditional order of garnishee, although not in a criminal proceeding, to the victim of the civil defendant's criminal activities. This garnishee order was to attach to a court award that had been made to the defendant in a separate matter earlier. (Evening Herald, 15 November 1988).

Order. The cost of establishment of an Official Trustee with suitable staffing might not be justified by the number of occasions on which the services of an Official Trustee would be required and it is not immediately obvious to the Commission that there already exists any State Official to whose functions the duties of an Official Trustee might be added.

2. The appointment of individuals to act under supervision as Receivers and Managers of the restrained property. There already exists a body of professionals in this State who have significant experience in acting as liquidators and receivers and managers of property. It is suggested that the expertise of these individuals would be of considerable assistance in tracing and getting control of assets both within this jurisdiction and in other jurisdictions. Their operation could be monitored by the Court in the same way as the Court would monitor such persons when they act as Official Liquidator. It has to be acknowledged that the fees of such individuals are likely to be significant. As against that it may be vital to the collection of the assets that expertise of a high level be available to the State. The appointment of an accountant to act on a part time basis, on payment of an annual honorarium, or on payment of a percentage of the value of assets seized, could be explored.

The Commission therefore recommends that legislation be introduced to provide for the appointment of suitably qualified persons to act, as Receivers and Managers of the property which is subject to a freezing order with full powers to trace and acquire control of the relevant assets whether in this jurisdiction or abroad and in the latter case to have power to call in any reciprocal powers that may be available through United Nations or European Conventions.

(ii) Third Party Rights

40. The other difficulty which arises in the enforcement of judgments or orders is how the rights of third parties in the property confiscated may be affected. Insofar as the powers of seizure of the Sheriff (or County Registrar) are concerned, the Commission has recommended that the position should be clarified to enable goods to be seized where the "debtor" has a right to possession and to transfer his interest in them.³⁹ Regarding goods which may be claimed to belong to members of the debtor's (or in this case, the defendant's) family, s13 of the *Enforcement of Court Orders Act 1926* provides that the member to whom they belong may recover from the *debtor*. The constitutionality of this provision was challenged in the High Court, and the Commission has recommended awaiting the outcome before making any suggestions as to the use of s13.

³⁹ *Op cit.*, Chapter 7.

The possibility of goods in which third parties have an interest being made subject to confiscation is heightened in the case of seizure of the proceeds of crime and drug offences, since legislation in other jurisdictions has tended to include, in property which is liable to forfeiture, property which has been the subject of a gift⁴⁰ or sale at an undervalue to a third party. In addition, the difficulty inherent in identifying the actual assets of a defendant which represent the proceeds of certain offences carried with it the risk that innocent third parties may be deprived of their rights to and interest in specific property. Provision is made for the protection of these interests under the various statutes.

(iii) *Notice and Compensation*

41. The dual concerns of execution provisions would seem to be the protection of the property rights of third parties and the converse protection from liability of the agent of execution, be it the Sheriff, the receiver, Official Assignee, Attorney General or any other. The US Act provides the most protection for potentially interested parties: possibly the most constitutionally justifiable provisions, since the onus there appears to be on the State to provide notification of the forfeiture both in general *and*, as far as practicable, directly to those known to have an alleged interest in the property. This is also the position in Australia by virtue of the *Proceeds of Crime Act 1987*.

42. A notice provision along these lines might avoid the risk of the legislation being treated as an unjust attack upon property rights contrary to Articles 40.3 and 43 of our Constitution. A general power could also be given to the Court, in directing the appropriate method of enforcement, to authorise the enforcement authorities to provide for the rights of innocent third parties when disposing of the confiscated property. It appears from the American legislation⁴¹ that, in a petition to court following the making of an order, if a person established a claim of *bona fide* purchaser for value without reasonable cause to believe the property was subject to forfeiture, the court could amend the order made. But assuming the right is not a superior one or is an encumbrance or other such charge, for example, this might be better dealt with by paying to the person affected a sum out of the proceeds of the disposition of the property. This should equally satisfy our constitutional requirements.

43. We have already discussed in paras 12 to 18 above the question of compensation. We concluded that, while the absence of such a provision in the case of pre-trial freezing orders would not necessarily render the legislation unconstitutional, it would seem desirable that compensation should be payable where the court considers it just and reasonable. We would take the same view in relation to an execution order made against an innocent

40 S6 of the *Criminal Justice (Scotland) Act 1987* contains a very broad concept of an "implicative gift".

41 See p32 *supra*.

third party who satisfied the court, within a specified time of the making of the order, that his rights had been infringed by the confiscation order.

E. Miscellaneous Provisions

(i) *Revenue Powers*

44. It was urged upon us in the course of our consultations that the various powers available to the Revenue Commissioners might provide a suitable model for a statutory scheme of tracing and confiscating the proceeds of crime. It should be noted, however, that none of these provisions enable the Revenue Commissioners to freeze a person's assets or appoint a receiver over them without at least some pre-conditions being satisfied. For example, before a person can be required to make a return of particulars of relevant property under s20 of the *Finance Act 1983*, he must either fail to make a return of income or must make a return with which the Inspector is not satisfied. Similarly, the power to obtain information from third parties about business transactions may be invoked only where the Revenue Commissioners are not satisfied with a return of income. The powers in s34 of the *Finance Act 1976* presuppose that a trade or business is being carried on in premises and that books or records are being kept.

45. The Revenue have certainly been given extensive powers by the legislature to collect taxes and duties. The tracing of income and the sources of income is a similar exercise to the tracing of income from crime, its disposal and translation into assets. But it is a mistake to assume that the Revenue Commissioners are possessed of or endowed with a type of Constitutional "carte blanche". For example, as we have noted in our Report on *Debt Collection: The Law Relating to Sheriffs*,⁴² the power given to the Revenue themselves in s480 of the *Income Tax Act, 1967*, to distrain the goods of a defaulting taxpayer is seldom used because of doubts as to its constitutionality.

46. Similarly, we must not forget that the powers given to the Revenue relate to the collection of income tax and not to the confiscation of assets. If the Revenue were given additional powers they should relate to the better collection of the appropriate tax from income derived from drug dealing.

47. The Revenue Commissioners have emphasised to us that it is a fundamental principle of the tax code that taxpayers are entitled to expect that any information provided by them is treated in confidence for tax purposes only and that such information and their tax affairs will not be disclosed to third parties.

They have urged that any changes to facilitate the limitation of the property

42 LRC 27-1988, para 9.

rights of accused or convicted persons or the identification of their property should be weighed carefully against the advantages in securing tax compliance through public confidence in the restricted uses to which information supplied for tax purposes may be put. They have expressed the opinion that if material is procured by virtue of a court order under section 18 of the *Finance Act, 1983* its sole purpose must be that which was advanced to the court when the application was made. They fear that it could be a contempt of the judicial process to make that information available for any other purpose.

48. The Revenue are anxious to preserve the integrity of the tax collection code and would not wish it to be distorted or made any less acceptable than it is for a purpose foreign to their essential functions. These concerns, which we appreciate, will not be in any way affected by the scheme of search, investigation, pre-trial restraint and confiscation orders we have already recommended. There is, however, room for co-ordination of the activities of the Revenue and the criminal law without affecting the integrity of the tax collection code. We would accordingly make the following recommendations.

1. *The existing tax laws should be enforced with vigour against drug dealers, handlers of stolen goods, or others obtaining a living from crime. The powers given in the various Finance Acts, particularly in sections 18 and 19 of the Finance Act 1983 should be employed as extensively as possible.*
2. *While we appreciate and endorse the wishes of the Revenue to maintain confidentiality in tax matters in the ordinary run of cases, no law, practice or custom should in any way shield persons who profit from crime. As the Revenue themselves rely on information and informants, it could be argued that they should, in turn, give the Gardai all information in their possession which might assist in confiscating the proceeds of crime. Similarly, the Gardai, where they have information which might not suffice for a prosecution should pass it on to the Revenue in the hope that they may be able to expose a trafficker and at least recover some arrears of tax from him or a penalty for non-compliance with the Revenue's lawful requirements.*
3. *Any powers given to the Revenue, such as those of obtaining information on income from financial institutions or from receivers of income on behalf of others or concerning holders of securities⁴³ should be available to the prosecution or to any receiver appointed for that purpose. Accordingly, provision should be made for the disclosure of tax information by the Revenue Commissioners and of bank accounts and other transactions by any bank or financial institution to the prosecution authorities on production of a court order. An application for such order should have to set out the type of information which is required. A provision similar*

43 See pp12-13, *supra*.

to that in s6 of the Offences Against the State (Amendment) Act 1985 should be included whereby no civil liability will be incurred by any person, bank or institution in complying with these disclosure requirements. An obligation should be placed on certain financial institutions to disclose information concerning any account or transaction where it has reasonable grounds to believe that the information may be relevant to the investigation of a scheduled offence.

As to the stage at which information should be made available by the Revenue to the prosecution authorities, we favour the enactment of a provision enabling the prosecuting authority to obtain from a Court an order to make Revenue "material" available to the prosecution when proceedings are imminent, or, at the latest, when a freezing order is being obtained. A requirement first to obtain a Court order on reasonable grounds would ensure that Revenue confidentiality would be maintained except where the public interest required otherwise.

(ii) Compensation to Victims

49. Apart from a general power in the court to authorise the satisfaction of the rights of third parties, the confiscation procedure provides an opportunity to use the proceeds for other purposes. The US Federal Act authorises the Attorney General, out of the property forfeited, to protect the rights of innocent persons, to compromise claims and to award compensation to those who provided information. In the Whittaker Report it was suggested several times that certain non-custodial penalties, including confiscation of assets and restitution, should be used by the courts.⁴⁴

50. In the context of drug trafficking offences in particular, it might be noted that there is not usually a "victim" in the sense that is meant when discussing crimes of violence against persons or property, for instance. (A possible victim would be the drug user, but it is not suggested here that such a person be compensated). However, there may well be victims in the case of other profit-making crimes for which confiscation legislation could be introduced. It is hoped that such offences will eventually be covered by legislation providing for the compensation of victims of crime generally, if the Commission's recommendations are followed in those and other areas of the criminal law. This need not prevent the legislation we envisage from providing for the compensation of victims out of the property seized.

⁴⁴ See Chapter 1 *supra*.

51. It is not suggested that this be a substitute for comprehensive legislation dealing with the area of compensation and restitution by an *offender*,⁴⁵ but for the sake of convenience and practicality, where it appears to the judge making a confiscation order that it would be suitable, it should also be possible to order compensation to be paid to the victim out of these proceeds.⁴⁶ As an alternative, a general power could be given to the State to whom the proceeds would be forfeit to make provision for victims and other third parties out of the same. Unlike a compensation provision which would impose upon the defendant an obligation to pay a sum to the victim, the award out of the proceeds of a profit-making offence need not be taken into account as part of the sentence and would be entirely separate from it.⁴⁷

(iii) *Assisting Others to Retain the Proceeds of Crime*

53. The UK legislation creates a new offence of "assisting another to retain the benefit of drug trafficking". We think that this might be introduced in this jurisdiction, but extended to the proceeds of crime generally. This would include concealment, removal from the jurisdiction and transfer to nominees of the proceeds of crime. Provision could be made that it would be a defence for a person to establish that he did not know or could not have reasonable cause to suspect that the proceeds concerned were in fact the proceeds of

45 This area has been the subject of detailed examinations and reports in other jurisdictions including *The Hodgson Committee Report on Profits of Crime and their Recovery* (1984), *The Dunpark Committee Report on Reparation by the Offender to the Victim in Scotland*, (1977); *Review of the Criminal Injuries Compensation Board* (in the UK) (1978); *The Widgery Committee Report on Reparation by the Offender*, (1970); *Report on the Federal-Provincial Task Force on Justice for Victims of Crime*, (Ottawa 1983); Canadian Law Reform Commission *Studies on Sentencing* (1974) and *Survey of 27 Victim Compensation Programs* (Hoelzel, 63 *Judicature* 485, 1980).

46 The idea of combining civil and criminal sanctions in the same proceedings is put forward by Professor Casey as a convenient and beneficial one. He points out, however, that s57 of the *Road Traffic Act 1961*, which entitled a court in criminal proceedings, where it was satisfied a person present and represented was entitled to recover damages in civil proceedings, to impose a fine equal to such damages, was struck down in *Cullen v Attorney General*, [1979] IR 395. This was not because of the "compensation" provision but because the section referred to the jurisdiction of the District Court and in effect it allowed non-minor offences to be tried summarily - see Casey, *Constitutional Law in Ireland*, 252-253 (1987). In many of the British reports, (fn 45, *supra*) it was considered better not to restrict compensation orders to cases where there was civil liability, since it would involve criminal courts deciding on the availability of a civil remedy. It has also been argued that the purpose of a compensation order is to compensate victims of crime, not to short-circuit civil procedure - see Wasik, [1984] *Crim LR* 708, at 714. Another option exists under the *Tasmanian Criminal Code*, where the prosecution, on consent of the victim, may claim in respect of the loss the recovery of money from, or damages against, the person who committed the crime. The court can then either adjudge damages after conviction or adjourn the matter to be assessed under civil litigation - see s425A of the Code.

47 By s107 of the *Criminal Justice Act 1988* in the UK, s43 of the *Powers of Criminal Courts Act 1973* is amended to enable a court make an order that any proceeds from the disposal of property forfeited by the defendant, due to its use for the purpose of crime, be paid to a person who suffered personal injury, loss or damage as a result of the offence in question.

crime. The UK provision may be too narrowly drawn in that it might not capture the enjoyment of property to which there was no legal entitlement and therefore, in the circumstances, no benefit to retain.

We recommend the enactment of a similar provision (extended as suggested) in this jurisdiction.

(iv) Immunity of Banks and Other Institutions

54. Section 6 of the Offences Against the State (Amendment) Act 1985 gives banks immunity against proceedings in respect of certain acts done by them in compliance with certain requirements of the Act. These include the requirement that the bank should, when required by the Minister for Justice so to do, pay specified monies into the High Court. We have already pointed out that this particular legislation was an *ad hoc* response to particular circumstances and would not necessarily provide a model for legislation of a more general nature. It has occurred to us, however, that the provision to which we have referred might be usefully adapted in any proposed legislation so as to confer immunity on banks who are required under the legislation to furnish the Garda or other law enforcement agency with information as to particular monies. Nor is there any reason why the provision should not be extended to other financial institutions, such as building societies.

(v) Immunity for Informants

55. We have noted that in other jurisdictions provision is made for a defence for persons who assist in the disposal of proceeds with the knowledge and consent of the police. There might be some reluctance to give a statutory benediction to the use of *agents provocateurs*. It would not, however, be unreasonable to provide and *we recommend that there should be no civil liability for the disclosure of information to the Gardai concerning the commission of a crime or the existence of proceeds of a crime.*

CHAPTER 5: INTERNATIONAL COOPERATION IN CURBING PROFITABLE CRIME

1. Although the threat posed within any country by the existence of organised crime calls for effective domestic legislation as a necessary starting point, this is an area of the criminal law that has a significant international dimension. Organised crime depends largely for its success on money-laundering, i.e. the concealment and transfer of assets to avoid detection and confiscation. The absence of international cooperation to facilitate investigation and enforcement of foreign orders can be exploited by large-scale criminals, most notably drug traffickers, who manage to operate very successful international criminal enterprises.

In recent years, however, there has been much activity on an international level both to coordinate domestic measures and to provide assistance between countries with a view to tracing, investigation, seizure and confiscation of the proceeds of crime. Domestic confiscation measures increasingly provide for the possibility of the enforcement of foreign orders,¹ and various measures of mutual assistance, including legislation, treaties and conventions, have been adopted to provide a framework for international cooperation.

Significant developments have taken place within the United Nations, the Council of Europe and the Commonwealth respectively. Any proposals for Irish legislation on confiscation of the proceeds of crime should be considered in the light of these developments.

1 S26 of the UK *Drug Trafficking Offences Act* and s96 of the *Criminal Justice Act 1988*, for example, make provision for the enforcement of "external orders". This allows the orders of foreign courts which are similar to restraint, charging or confiscation orders to be enforced in Britain. The countries to be included within these provisions are to be designated by Order in Council, which Order may specify any particular conditions to be fulfilled before the foreign court order can be registered as an enforceable external order.

A. The United Nations

2. Following the publication of a report on *Active Cooperation in the Struggle Against Drug Abuse and Illicit Trafficking*, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was signed in Vienna on December 20th, 1988 by some 40 states. Article 5 of the Convention requires each party thereto to enact measures to facilitate the confiscation, among other things, of the proceeds of drug offences. Parties must also adopt such measures as are necessary to enable its authorities to "identify, trace, freeze or seize proceeds, property, instrumentalities" and to empower its authorities to order that "bank, financial or commercial records be made available or be seized".

3. The Convention also requires each party to give effect to confiscation orders made by other parties where property to which such an order applies is within the territory of the former. There are various other provisions in Article 5 requiring the application of domestic seizure, tracing, disclosure and enforcement measures where a request for assistance is received from another party to the Convention. There is also a paragraph dealing with situations where the tainted property has been intermingled with property derived from legitimate sources, requiring that it be liable to confiscation up to the assessed value of the proceeds.

4. The Convention requires parties to consider reversing the onus of proof regarding the lawful origin of alleged proceeds to the extent that such action is consistent with the principles of their domestic law. It stipulates also that they should seek to conclude bilateral and multilateral treaties and agreements, to enhance the effectiveness of international co-operation pursuant to Article 5.

B. The Council of Europe

5. The Council of Europe in 1986 set up the Select Committee of Experts on *International Cooperation as regards Search, Seizure and Confiscation of the Proceeds from Crime*. Its terms of reference were to examine the applicability of European Penal Law Conventions to search, seizure and confiscation of the proceeds from crime. Much of its work stemmed originally from the Pompidou Group which was established to combat illicit drug trafficking. The work of the UN in this area was also taken into consideration. The Committee asked the Secretariat to prepare a draft Convention on the recognition and enforcement of foreign confiscation orders in respect of proceeds from crime. The Final Activity Report was adopted by the European Committee on Crime Problems in June 1990. It is anticipated that the final convention will closely resemble the Vienna Convention of December 1988 in that the parties will agree to adopt similar legislation with respect to the confiscation of the proceeds or instrumentalities of crime, the tracing and freezing of assets derived from crime and in respect of the laundering of the proceeds of crime. In addition, we anticipate that the Convention will provide for mutual enforcement by the parties of each others confiscation orders.

C. The Commonwealth

6. After 3 years' negotiations between Commonwealth Governments and Ministers with a view to countering the growth of crime with an international dimension, a formal Scheme for Mutual Assistance in Criminal Matters was adopted at a meeting in Harare in 1986. For the first time it expanded the field of international cooperation within the Commonwealth beyond the extradition of fugitives to cover two new areas:

- (1) International judicial assistance and
- (2) The tracing, seizure and forfeiture of the proceeds of crime.

Initially, negotiations on this second matter were concerned primarily with drug-trafficking but it was subsequently felt that the problem of organised crime was much wider and that the proceeds of criminal activities of any kind should be covered by the Scheme.

7. Essentially, the Scheme provides that a country can seek assistance when proceedings have been instituted in respect of an offence or when there is reasonable cause to believe that an offence in respect of which proceedings could be instituted has been committed. There are various specified grounds on which assistance can be refused but otherwise the requested country will comply and bear any expenses incurred.

Assistance may be sought in identifying, locating and assessing the value of property believed to be the proceeds of criminal activities and to be located within the requested country. A request may also seek assistance in the seizure and forfeiture of proceeds. Seizure is defined to include taking measures to prevent any dealing in, transfer or disposal of, or the creation of any charge over property pending the determination of forfeiture proceedings. The Scheme also provides for the possibility of assistance in the review, recognition and enforcement of forfeiture orders and it suggests this might be done on the analogy of foreign maintenance orders which require confirmation.

8. Although the Scheme lays down guidelines, e.g. in its definition of "the proceeds of criminal activities", much of the detail and substance is left to the various Commonwealth countries to deal with and decide in their respective legislative acts. Two pieces of suggested legislation are set out with the Scheme: a draft Bill to provide for confiscation of proceeds and a draft Bill to provide for mutual assistance. The first, the *Serious Offences (Confiscation of Profits) Act*, is modelled on enactments which are already in force in various Commonwealth jurisdictions² setting out a framework for the confiscation of proceeds and allowing for the enforcement of orders made abroad. The second, the *Mutual Assistance in Criminal Matters Act*, suggests

2 Such as the *UK Drug Trafficking Offences Act, 1986* and the *Bahamas Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986*.

a legislative basis for giving effect to the Scheme. It is drafted on the assumption that the relevant country has in force an Act along the lines of the *Serious Offences (Confiscation of Profits) Act* and it draws on developments which had occurred in other Commonwealth jurisdictions.³

9. Since the Scheme was concluded, there have been legislative developments in many Commonwealth countries, providing both for confiscation of the proceeds of crime⁴ and for mutual assistance.⁵ In addition to this, various workshops have been held (and continue to be held) to consider and refine the draft model legislation. A model bilateral treaty was also developed for use in negotiations with non-Commonwealth countries and several such treaties have been signed.⁶

Co-operative Measures

Provision should be made for the enforcement of search, restraint and confiscation orders of other countries with whom agreement may be reached by the Irish Government, upon the application of the relevant foreign authorities to the Court in Ireland. [This should include orders made pursuant to existing forfeiture provisions such as that in s30 of Misuse of Drugs Act 1977, which provide for the forfeiture of items relating to the offence].

3 These include in particular the preparation of a Model Treaty in Australia, the negotiations which had taken place between Canada and Jamaica and the US, and the work of the Asian-African Consultative Committee.

4 These include the Australian *Proceeds of Crime Act 1987*, the Canadian *Act to amend the Criminal Code, Narcotic Control Act and the Food and Drugs Act 1988*, the Malaysian *Dangerous Drugs (Forfeiture of Property) Bill 1988*, the Bermuda *Drug Trafficking Suppression Act 1988* and the Guyana *Narcotic Drugs and Psychotropic Substances (Control) Act 1988*.

5 These include the Australian *Mutual Assistance in Criminal Matters Act 1987*, the Canadian *Mutual Legal Assistance in Criminal Matters Act (Bill C-58 of 1987)*, the Bahamas *Mutual Legal Assistance (Criminal Matters) Act 1988*, and the Nigerian *Draft Mutual Assistance in Criminal Matters within the Commonwealth Decree 1988*.

6 Bilateral Treaties were concluded between the US, and the Bahamas, Mexico and the UK (concerning the Cayman Islands) respectively; Australia concluded treaties on Mutual Assistance in Criminal Matters with Austria, Italy, Luxembourg and the Netherlands respectively, and the USA concluded an agreement with the UK (on behalf of Bermuda) concerning the exchange of information regarding criminal tax liability.

CHAPTER 6: SUMMARY OF RECOMMENDATIONS

Search (ch 4, paras 2-5)

1. *On application to a District Justice, a member of the Garda should be able to obtain a search warrant where it is shown*
 - (a) *that there are reasonable grounds to suspect that a scheduled offence has been committed and*
 - (b) *that there are reasonable grounds to suspect that there is in a particular place (including land, buildings, vehicles etc)*
 - (i) *specified property in respect of which confiscation may be ordered or*
 - (ii) *specified material which would be relevant to the investigation of the offence or to confiscation proceedings.*
2. *The warrant obtained under (1) should empower the Garda to seize and retain material coming within (b)(ii) above, but there should be an obligation on the Garda to file a record within a certain period, specifying the materials taken and where they are being kept. The District Justice to whom the application is made should have a discretion to order that notice of the search be given to any specified person. Provision should also be made to empower the Garda, in cases of emergency, to conduct a search without a warrant. Such cases should include situations where there is reasonable cause to fear that the concealment of material is imminent or that the investigation would be seriously prejudiced if an immediate search were not carried out.*
3. *Where the Gardai are not in a position to specify with sufficient particularity the property or material to which access is sought, it should be possible to apply for an initial order for access to or production of material which is believed to be relevant to the investigation.*

Restraint (ch 4, paras 6-10)

4. *It should be provided that, where a District Justice is satisfied by an information on oath by a member of the Garda Síochána that there are reasonable grounds for suspecting that a scheduled offence has been committed, he may make a restraint order against the property of a person both prior to the institution of criminal proceedings and afterwards.*
5. *The court should be empowered to make the order on such terms as it sees fit. This would include appointing a receiver to manage property, or making an order freezing or placing a charge on assets, or simply ordering the physical seizure of the goods or property and preventing any person from dealing or interfering with them. It should also be possible to register the order, and a report of the property affected should be filed in court.*
6. *The court should have a discretion as to whether to require notice of the restraint order to be given to any person who might have an interest in the property, having regard to the likelihood of the destruction, removal, disappearance or reduction in value of the property if such notice were given.*
7. *There should be an opportunity for anyone affected by a restraint order to apply to the court to have it revoked, varied or amended (e.g. to enable the applicant to meet reasonable expenses).*
8. *It should be an offence to act in contravention of a restraint order.*
9. *Where a court is proceeding to make a confiscation order in accordance with the procedure recommended at a later stage in this Report and the property is subject to a restraint order, the court should be empowered to set aside at its discretion any conveyance of the property other than to a bona fide purchaser for value without notice.*
10. *There should be a provision enabling any person claiming an interest in property affected by a restraint order to apply to the court within a specified period for an order returning the property to such person or ordering the payment by the State to that person of a sum equivalent to the value of the property. In addition, the court should have power to order the payment of compensation to any such person where it is satisfied that it is just and reasonable so to do.*

Property (ch 4, para 18)

11. *"Property" should be widely defined to include (whether within the jurisdiction or not) all benefits, interests and property, real and personal, tangible and intangible, and gifts made for the purpose of avoiding detection or forfeiture. Property which is held by a third party should also be capable of being subject to a restraint order except in the case of a bona fide purchaser for value without notice of the origin of the property.*

Presumption (ch 4, paras 27-34)

12. *When it is proved that a person convicted of a scheduled offence owns property, or has owned property within the period of ten years preceding his conviction, it should be presumed that such property represents the proceeds of a scheduled offence or offences. The person convicted should be able to rebut the presumption by proving on the balance of probabilities that the property did not represent such proceeds.*
13. *To ensure that procedures are fair to the convicted person, it should be provided that any evidence adduced by the defendant to explain the provenance of property should not be admissible in evidence against that person in any other proceedings, civil or criminal.*

Mandatory Confiscation for Scheduled Offences (ch 4, paras 33, 35)

14. *It should be provided that, where property is subject to such a presumption which has not been rebutted, the court must order the forfeiture to the State of such property to the extent that it exceeds in value the sum of £1,000.*
15. *The offences in respect of which pre-trial restraint and forfeiture may be ordered should be set out in a schedule. It should include drug trafficking, handling of stolen or smuggled goods, demanding money with menaces and fraud related offences.*
16. *Where the person accused of a scheduled offence has died or absconded, the court should have a discretion, on the application of the prosecution, to make a forfeiture order in respect of his property.*
17. *Where it is proved that any property in the possession of another person was acquired from a person convicted of a scheduled offence within the period of ten years preceding such conviction, the court must order the forfeiture of such property to the State unless such other person proves as a matter of probability that he had acquired the property bona fide for reasonable value.*
18. *The Court, in imposing a sentence in respect of a scheduled offence, should not have regard to the fact that a forfeiture order will be or has been made.*

Satisfaction (ch 4, para 37)

19. *It should be possible to satisfy a confiscation order by payment of the money value of the total of assets to be confiscated.*

Execution: Receivers (ch 4, paras 38, 39)

20. *Provision should be made for the appointment of suitably qualified persons to act as Receivers and Managers of the property which is subject to a freezing order with full powers to trace and acquire control of the relevant assets whether in this jurisdiction or abroad and in the latter case to have power to call in any reciprocal powers that may be available through United Nations or European Conventions.*

Confiscation and the Revenue (ch 4, paras 44-48)

21. *The existing tax laws should be enforced with vigour against drug dealers, handlers of stolen goods, or others obtaining a living from crime. The powers given in the various Finance Acts, particularly in sections 18 and 19 of the Finance Act 1983, should be employed as extensively as possible.*
22. *While we appreciate and endorse the wishes of the Revenue to maintain confidentiality in tax matters in the ordinary run of cases, no law, practice or custom should in any way shield persons who profit from crime. As the Revenue themselves rely on information and informants, it could be argued that they should, in turn, give the Garda all information in their possession which might assist in confiscating the proceeds of crime. Similarly, the Gardai, where they have information which might not suffice for a prosecution, should pass it on to the Revenue in the hope that they may be able to expose a trafficker and at least recover some arrears of tax from him or a penalty for non-compliance with the Revenue's lawful requirements.*
23. *Any powers given to the Revenue, such as those of obtaining information on income from financial institutions or from receivers of income on behalf of others or concerning holders of securities, should be available to the prosecution or to any receiver appointed for that purpose. Accordingly, provision should be made for the disclosure of tax information by the Revenue Commissioners and of bank accounts and other transactions by any bank or financial institution to the prosecution authorities on production of a court order. An application for such order should have to set out the type of information which is required. A provision similar to that in s6 of the Offences Against the State (Amendment) Act 1985 should be included whereby no civil liability will be incurred by any person, bank or institution in complying with these disclosure requirements. An obligation should be placed on certain financial institutions to disclose information concerning any account or transaction where it has reasonable grounds to believe that the information may be relevant to the investigation of a scheduled offence.*
24. *There should be a provision enabling the prosecuting authority to obtain from a Court an order to make Revenue "material" available to the prosecution when proceedings are imminent, or, at the latest, when a freezing order is being obtained.*

Assisting (ch 4, para 53)

25. *An offence should be created of assisting another to enjoy or dispose of the proceeds of scheduled offences. The offence would include concealment or removal of proceeds from the jurisdiction and transfer to nominees.*

Informants (ch 4, para 55)

26. *There should be no civil liability for the disclosure of information to the Garda concerning the commission of a crime or the existence of proceeds of a crime.*

International Cooperation (ch 5, para 9)

27. *Provision should be made for the enforcement of search, restraint and confiscation orders of other countries with whom agreement may be reached by the Irish government, upon the application of the relevant foreign authorities to the Court in Ireland. [This should include orders made pursuant to existing forfeiture provisions such as that in s30 of the Misuse of Drugs Act 1977, which provide for the forfeiture of items relating to the offence].*

