



**Briefing on the Proceeds of Crime Bill
House of Commons Second Reading**

October 2001

JUSTICE Briefing on the Proceeds of Crime Bill

INTRODUCTION

1. JUSTICE is an independent all party legal human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. JUSTICE accepts the legitimacy of measures to ensure the confiscation of the proceeds of criminal activity. However, **JUSTICE would emphasise that measures such as those in the Proceeds of Crime Bill should be regarded as exceptional, and can be justified only in relation to serious crimes and to the extent that they represent a proportionate response. It is particularly important that such measures should be subject to appropriate procedural safeguards, in order to avoid the indiscriminate or excessive use of these powers.**
3. As a general principle, JUSTICE is concerned at the use of the civil law and civil law standards of proof, in ways which would appear to circumvent the criminal law and the procedural safeguards guaranteed by it. This Bill, in establishing for the first time a civil law confiscation regime of general application, tests the permeability of the boundary between the civil and criminal laws. **The Bill raises concerns that essential criminal procedural safeguards will be undermined, by the use of more flexible civil procedures, bolstered by typically criminal investigative powers.**
4. **JUSTICE further considers that aspects of the Bill are likely to interfere with key rights in the European Convention on Human Rights (ECHR) as incorporated into UK law in the Human Rights Act 1998. We have concerns that these interferences may not be justifiable and could be found to be unlawful.** Rights in issue include:
 - The right to a fair hearing under Article 6 ECHR and
 - the right to respect for private life protected by Article 8 ECHR.
 - Property rights under Article 1 of Protocol 1 to the ECHR

In accordance with section 19 of the Human Rights Act, the Home Secretary has made a statement that the provisions of the Bill comply with the European Convention on Human Rights. In light of the issues highlighted in this briefing, JUSTICE considers that this section 19 statement requires further explanation.

PART II: CONFISCATION

5. JUSTICE is concerned that the extended and consolidated scheme for the making of confiscation orders as set out in Part II of the Bill may not incorporate sufficient procedural safeguards to comply with the right to a fair hearing under Article 6 ECHR. Although the criminal law protections in Article 6.2 do not apply in relation to confiscation orders,¹ the more general fair hearing rights in Article 6.1 do apply to such orders, as has recently been confirmed by the Court of Human Rights.² This means that the proceedings for the making of a confiscation order will have to comply with the presumption of innocence.³ In JUSTICE's view, the "reverse onus" clauses imposed on defendants under the Bill raise serious concerns, as to the extent to which in their current form they fully comply with this standard.

Compatibility with the right to a fair hearing

6. Under clause 6, a "general criminal conduct" confiscation order (which relates to any previous criminal conduct of the defendant) may be made where the court decides that the defendant has a "criminal lifestyle". This term is broadly defined, and applies, *inter alia* where a "course of criminal activity" is identified, consisting of three or more other criminal convictions in the case before the court, or two separate convictions from which the defendant has benefited within the last six years (clause 75(3)). If a criminal lifestyle is identified, a series of assumptions can be made (Clause 11) to the effect that property held or acquired by the defendant constitutes the proceeds of crime. These assumptions are mandatory, requiring the court to make the presumption, with two provisos: they are not to be

¹ *Phillips v UK*, European Court of Human Rights, 5 July 2001

² In *Phillips v UK* it was held that Article 6.1 applied throughout the entirety of criminal proceedings, including sentencing proceedings, and, by analogy, the making of confiscation orders.

³ In *Phillips*, the court held that "a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6.1."

made where they are shown to be incorrect, or where there would be a serious risk of injustice if they were made (clause 11(6)).

7. Although such assumptions are not necessarily incompatible with the presumption of innocence, Article 6.1 requires that they must be kept within reasonable limits, and be proportionate, having regard to the importance of fair trial rights.⁴ In JUSTICE's view, it is questionable whether the provisions of clauses 6 and 11 are sufficiently proportionate to comply with Article 6 ECHR, and the Human Rights Act.
8. This is particularly so because of the range of offences to which the provisions apply. Confiscation orders may be made following any conviction in the Crown Court (clause 6(2)). There is also a very broad definition of "criminal lifestyle". Therefore, defendants are likely to be faced with confiscation on the basis of a reverse onus of proof in relation to a very wide range of offences, not necessarily the most serious.
9. A further issue is that the provisions appear to create a persuasive burden of proof (requiring the defendant to prove property is not the proceeds of crime) rather than an evidential burden (requiring only that the defendant raise evidence of this). It is JUSTICE's view that since the objectives of the legislation could equally be achieved by the imposition of an evidential as opposed to a persuasive burden, a persuasive burden would not be a proportionate response. The government should be asked to clarify whether the burden imposed on defendants is evidential or persuasive.
10. It is also notable, in terms of the proportionality of the mandatory assumptions, that the Bill establishes a separate regime for Scotland, which makes the assumptions discretionary rather than mandatory (clause 94). This calls into question the necessity of the mandatory assumptions in England and Wales. It also raises the possibility that the Bill would be found to discriminate, under Article 14 of the ECHR in conjunction with either Article 6 or Article 1 Protocol 1, against those in respect of whom confiscation orders were made in England and Wales.

⁴ *Salabiaku v France* 13 EHRR 379

11. In summary, JUSTICE considers that the wide scope of the orders and the seriously restricted procedural protection available to defendants within the process, risks non-compliance with Article 6. Furthermore, as a matter of general principle, criminal-type procedural safeguards should be available in the imposition of punitive measures such as these orders.

12. In order to ensure procedural fairness, therefore, the circumstances in which the assumptions can be made should be restricted, the onus of proof on the defendant should be made evidential rather than persuasive, and the confiscation order scheme should be limited to specified, serious offences.

PART 5: CIVIL RECOVERY

13. The powers conferred in Part 5 of the Bill, allowing the Criminal Assets Recovery Agency to bring a civil action to recover property which is or represents the proceeds of crime (clause 245(1) (a) and (b)) also raise a number of serious concerns, in relation to fair trial rights, the right to respect for private life (Article 8) and the right to peaceful enjoyment of possessions (Article 1, Protocol 1).

Procedural Safeguards

14. The civil standard of proof applies in the action brought under this Part (clause 246). The burden on the Agency is further lessened by the provision that it is not necessary for the Agency to establish that assets are the proceeds of one particular kind of criminal activity, provided it can be established that they derive from one of several kinds of crime. (clause 247) It is questionable whether this very low standard of proof is adequate to protect defendants from the arbitrary or discriminatory use of these powers.

15. Although the action for civil recovery is not classed as criminal, and indeed is intended to circumvent the criminal process,⁵ in JUSTICE's view, its punitive nature means that, as a matter of principle, criminal type safeguards are warranted. The action entails the imposition of a potentially substantial financial penalty following a determination that the respondent has either engaged in criminal activity, or has received the proceeds of crime. The extensive and

⁵ Consultation Paper, para.5.4

typically criminal investigatory powers available to the Agency in relation to the action (see below) also indicates the need for criminal safeguards. It is JUSTICE's view that, at a minimum, if civil actions are to be pursued by the State in place of prosecutions, then the safeguards applicable in such proceedings should reflect the quasi-criminal nature of the action.

Equality of Arms

16. Additional questions also raised regarding the compliance of the civil recovery order with Article 6.1 fair hearing standards. Article 6.1 and the principle of equality of arms, requires a "fair balance" between the parties to proceedings. Issues arise as to how the principle of equality of arms will be addressed by the courts in such actions, given the extensive powers of the Agency to investigate, under Part 8, require disclosure of documents, and rely in their investigations on information provided by law enforcement authorities.

Scope of the Civil Action

17. As with the powers under Part 2, the provisions allowing for civil recovery apply to a wide range of criminal conduct, including minor offences. The broad reach of the provisions raises concerns as to the extent to which the civil action for recovery will be used in place of a prosecution, thereby undermining criminal procedural safeguards.

18. Of particular concern is the lack of any specification, in the Bill, as to the circumstances in which the civil action under Part 5 may be taken. The Bill does not make the civil action a secondary measure to be taken where a prosecution is impossible or difficult. Furthermore, it would seem that there is nothing in the Bill to prevent a civil action being brought against a person who has already been acquitted in the criminal courts of the crime from which he is alleged to have profited, allowing what amounts to criminal culpability to be re-determined on the basis of a lower standard of proof. The government should be asked to provide clarification on how the Bill would apply in these circumstances. Separate issues would arise where a criminal prosecution was brought following a successful civil action by the Agency to recover the proceeds of the criminal conduct at issue, with the risk that the presumption of innocence could be undermined in the criminal proceedings.

Recovery of Cash in Summary Proceedings

19. Further, summary powers for the recovery of cash are provided for in Chapter 3 of Part 5. These provisions allow police or customs officers to search for and seize cash which they reasonably suspect to be the proceeds of crime (clause 288, clause 293). Significantly, they may also seize cash which they reasonably suspect is intended by any person for use in unlawful conduct. Except in cases of urgency, these powers are to be exercised with the prior approval of either a justice of the peace or a senior police officer (clause 289). In JUSTICE's view, such powers, which have the capacity to significantly intrude upon privacy rights, should be subject to judicial authorisation only.

20. Cash seized under the above provisions may initially be held for a period of 48 hours. This period may be extended by order of a magistrate's court to three months initially, and by a further order of the court for up to two years (clause 294). For an order extending the period of detention to be made, it is sufficient that either there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct, or that "its continued detention is justified which its intended use is further investigated." (clause 294(7)) For cash to be confiscated on these very broad terms, for a period of up to two years, risks arbitrary or discriminatory interference with property rights. The provisions raise issues regarding compliance with property rights under the Human Rights Act (Article 1 of Protocol 1 ECHR).

21. Where cash is withheld under the above provisions, an application for its permanent forfeiture may be made to a magistrates' court (clause 297), by the Commissioners of Customs and Excise or the police. The cash may be permanently forfeited where the magistrates' court is satisfied on the balance of probabilities that it either is or represents the proceeds of crime, or is intended for use in unlawful conduct. This action, similarly to the action for civil recovery in the High Court, raises concerns about the imposition of punitive measures in a civil action the circumvention of criminal safeguards. It is a matter of particular concern, in relation to the Article 6.1 principle of the equality of arms, that the police or customs authorities will have to establish only to a civil standard of proof that money is intended for use in unlawful conduct.

PART 8: INVESTIGATIONS

22. The Bill provides for five investigatory powers, all potentially seriously intrusive of property rights. The powers are to be exercisable in relation to confiscation order investigations, civil recovery order investigations, and money laundering investigations. They include production orders, search and seizure warrants, and disclosure orders. Two orders are particularly directed at financial institutions: Customer Information Orders (requiring banks and other financial institutions to provide details of any accounts of a person under investigation)⁶ and Account Monitoring Orders (requiring banks and other financial institutions to provide details of a particular account over a specific period: e.g. bank statements).
23. The effect of this Part of the Bill is to apply a range of characteristically criminal investigatory powers to the civil law. These investigatory powers will, for example, be available to the Agency in the making of a civil claim for the recovery of money that may derive from crime. Whilst measures such as customer information orders may, for example, be justifiable in some circumstances in relation to terrorist crime,⁷ they are considerably more difficult to justify in the context of a civil action seeking to recover the proceeds of crime which may not involve the exceptional public interest considerations that apply in relation to more serious crime and/or terrorist offences. It is therefore questionable whether the use of these powers in the civil context constitutes a proportionate interference with Article 8 rights to respect for private life.

CONCLUSIONS

24. In conclusion, JUSTICE's view is that the Bill runs the risk of unnecessarily undermining important criminal procedural safeguards. In JUSTICE's view, the Bill risks interference with Article 6 fair trial rights, as well as with privacy rights under Article 8, property rights under Article 1 of Protocol 1, and the prohibition on discrimination under Article 14. In light of this, further explanation of the section 19 statement made in respect of the Bill should be provided. In JUSTICE's view, a number of the measures in the Bill should be re-considered, and additional safeguards imposed.

⁶ Powers similar to those in the Terrorism Act, Sched.6 section 7.1

⁷ Terrorism Act 2000, schedule 6, section 7.1.