

Liberty (the National Council for Civil Liberties)

PROCEEDS OF CRIME:

CONSULTATION ON DRAFT LEGISLATION

May 2001

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. It is the largest organisation of its kind in Europe and is democratically run.

1. INTRODUCTION

1.1 LIBERTY'S response¹ deals primarily with Part II (confiscation orders) and Part V (recovery of the proceeds of unlawful conduct) and their implications under the Human Rights Act ("HRA"). What the government describes as "confiscation orders" relates to the confiscation of criminal assets, after a person has been convicted of a qualifying criminal offence. What the government describes as "recovery of the proceeds of unlawful conduct" is a new form of civil confiscation that will take place before and regardless of whether any criminal conviction is obtained.

1.2 LIBERTY accepts that the government's purpose in proposing legislation designed to disable the criminal economy is a valid one.² However, in both the criminal and civil sphere, LIBERTY submits that the proposed measures

¹ This response has been drafted by Mathew Ryder, Danny Freedman and Clare Montgomery QC.

² It also supports the aim of rationalising the current confiscation system in bringing together the provisions of the Drug Trafficking Act 1994 and the Criminal Justice Act 1988 and creating the so-

adopted by the government would constitute an excessively draconian means of achieving the aim and in that respect would not comply with the United Kingdom's obligations under the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA). In summary LIBERTY have two overriding concerns:

- (i) In relation to criminal confiscation orders, it is wrong to place a burden of proof on a defendant to show on the balance of probabilities that his assets are not derived from criminal conduct. The current proposals not only destroy the essence of the presumption of innocence, but also have the capacity to lead to arbitrary and irrational results.
- (ii) In relation to civil confiscation it is wrong to give the state a power to opt for extensive confiscation of defendants assets in circumstances where it does not have sufficient evidence to prosecute them in the criminal courts and where the sums involved do not constitute significant revenue from criminal conduct. Conversely, assuming that there is sufficient evidence to prosecute them, it would be wrong to allow the state to opt for an easier path of pursuing someone in the civil courts. While LIBERTY is generally opposed to the introduction of a system confiscating assets in circumstances where a person has not been convicted of a crime, it is submitted that if such a system is to be introduced into UK law, it must incorporate far more extensive safeguards for defendants and third parties.

1.3 LIBERTY'S proposals in relation to criminal confiscation are set out at paragraph 6, and those in relation to civil recovery are set out at paragraph 13.

called one-stop-shop in the crown court as opposed to dividing proceedings between the High Court and the Crown Court.

2. THE BACKGROUND TO CRIMINAL CONFISCATION

- 2.1 The confiscation of assets, in the aftermath of certain specified criminal offences, is not new to the UK. “Forfeiture” is a common law concept that renders a piece of property guilty of wrongdoing. Thus the particular property can be seized as part of the punishment for the offence which the property was used to commit or was somehow intrinsically connected to (see feudal term “*deodand*” meaning in Latin “given to God”).
- 2.2 However, the modern wide ranging confiscation system is less grounded in domestic legal traditions, deriving its impetus from the United Kingdom’s ratification of **United Nations Convention Against Illicit Traffic in Narcotic Drugs And Psychotropic Substances 1988** and **Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990**. Both conventions are largely non-prescriptive treaties, each permitting its parties to “take necessary measures in conformity with the fundamental provisions of their domestic legislative systems”. For reasons outlined below, LIBERTY takes the view that these non-prescriptive treaties are predicated upon the supposition that neither Parliament nor the Court will act incompatibly with fundamental domestic legal values. In the context of the HRA, the non-prescriptive dimension of the treaties must now be balanced with fundamental rights contained in the ECHR, in particular Articles 6, 8 and Article 1 of the First Protocol.
- 2.3 The principle legislation enacted to implement the treaties was the **Drug Trafficking Act 1994** (“DTA”) and the **Criminal Justice Act 1988** (“CJA”). Section 2 of the DTA, deals with the confiscation of the proceeds of drug trafficking in the event that a person comes to be sentenced for a drug trafficking offence. Section 71 of the CJA does the same in relation to a person who is to be sentenced for two or more offences triable on indictment. In both instances the legislation reverses the burden of proof in relation to a defendant being required to show on the balance of probabilities that his entire

assets are not derived from criminal acts (see section 4(3) DTA and section 72AA (4) of the CJA). Part II of the draft bill is designed to combine and rationalise these two pieces of legislation and to provide certain important innovations.

3. THE QUALIFYING THRESHOLD FOR CRIMINAL CONFISCATION

3.1 In assessing the overall effect of the Draft Bill, it is particularly important to note that it proposes that wide reaching criminal confiscation may be triggered by a potentially much lower and more trivial qualifying threshold of offending behaviour.

3.2 The successor in the draft bill to section 71 CJA and section 4 DTA is Clause 4 read in conjunction with clauses 72 and 73. It proposes that the Court should consider confiscation by reference to newly defined criteria. In essence, the court is required to go through the following process:

- (1) it must first decide whether the defendant has a "criminal lifestyle"
- (2) if it decides that he does has a "criminal life style" it must make a confiscation order if it decides that he has benefited from his general criminal conduct.
- (3) if it decides that he does not have a "criminal lifestyle" it must make a confiscation order if it decides that he has benefited from his particular criminal conduct.

3.3 "Criminal lifestyle" is defined in clause 72 (2) and includes:

- (a) a drug trafficking offence
- (b) a money laundering offence
- (c) an offence specified by the secretary of state
- (d) it constitutes conduct forming part of a "course of criminal activity"

(e) it is an offence carried out over a period of six months

3.4 A “course of criminal activity” is defined in clause 72(3) and includes **four** offences of conduct from which a defendant has benefited which result in convictions in the same proceedings, or convictions **on at least two separate occasions** of an offence constituting conduct from which he has benefited. According to clause 73, criminal conduct is conduct which constitutes an offence in England and Wales or would constitute an offence in England and Wales. The fact that the qualifying offence need not be indictable is a marked change from the s.71(9) (c) of the CJA.

3.5 Thus the combined effect of clauses 72 to 73 is to extend the scope of confiscation to two offences in a six year period regardless of their nature. In addition, specific powers are given to magistrates’ courts to commit a person to the crown court for a confiscation hearing (see clause 67). Thus the criminal courts will now theoretically have the power to embark on wide ranging confiscation proceedings in circumstances where a person is convicted of nothing more than two shoplifting offences over a two-year period.

3.6 The fact that the system will apply to any type of offence, which a defendant is convicted of twice, represents a new lower threshold for triggering criminal confiscation and can be contrasted with many practices around the world. The scheme appears to be unique in the world in terms of justifying such stringent measures on the basis of such a minimal qualifying offences. The following are examples of reverse burden schemes, which confiscate the proceeds of crime beyond those profits directly relating to formal convictions, but which have a higher qualifying threshold:

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

- (ii) In Finland a court cannot exercise its discretion to confiscate proceeds beyond the trigger offences unless the particular offence is habitual or professional (no further definition given).
- (iii) The closest system in Europe to that which the Draft Bill proposes is in Denmark where a new Bill empowers the Courts to order partial or total confiscation of property where a person is convicted of offences with a 6 year maximum (clause 76a) or of “*a particularly aggravated nature*” (clause 236).
- (iv) The Australian Federal provisions relate to serious offences namely (a) a serious narcotics offence, (b) an organised fraud offence or (c) a money laundering offence in relation to the proceeds of a serious narcotics offence or an organised fraud offence (Proceeds of Crime Act 1987 s. 7).
- (v) The New Zealand Proceeds of Crime Act 1991 generally requires an evidential link to the offences that form the basis for the conviction, save in relation to drug convictions which occasion a reverse burden in relation to property and expenditure in the previous two years (s. 28(4)).
- (vi) The Canadian confiscation provisions are contained in Part X11.2 of the Criminal Code. They apply to any “enterprise crime offence”, and a list of such offences is contained in section 462.3, which includes drugs offences, frauds, breaches of trust by public officers and laundering offences.

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

4. CRIMINAL CONFISCATION AND REVERSE BURDENS

- 4.1 Clause 9 of the draft bill reproduces the provisions of sections 4 DTA and 72AA CJA, which oblige the court to assume that property constitutes a benefit from general criminal conduct, save where according 9(6)(a) “the assumption is shown [by the defendant] to be incorrect” or according to clause 9(6)(b) “there would be a serious risk of injustice if the assumption were made”. Where the property in question has previously passed through the defendant’s estate, the assumptions are only able to apply to the previous six years from the date of the earliest conviction. However, if the defendant still hold the property at the time of his conviction, it can be subject to the reverse burden assumption regardless of when it first came into his possession: ***R v Clark and Bentham* (1997) 2 Cr App R (S) 99** (at 105 per Lord Bingham CJ) and ***R v Chrastny* 12 Cr App R (S) 715**. The Privy Council has favourably considered the legality of the reverse burden system in ***McIntosh v HM Advocate*, 5th February 2001**. However, at time of writing the legality of the reverse burden provisions has been appealed in the House of Lords (***R v Benjafield and Rezvi* 21st December 2000**) and the European Court of Human Rights (“EctHR”) (***Phillips v UK*, 5th November 2000 (41087/98)**). Judgement is awaited in all three cases.
- 4.2 LIBERTY believes that the use of reverse burdens in the Draft Bill repeats an existing legislative mechanism which is incompatible with either Article 6(2) of the Convention and Article 1 of the First Protocol to the Convention.
- 4.3 In looking at the reality of confiscation proceedings, a defendant is effectively tried for completely unspecified allegations of criminal conduct that are made against his entire estate once the trigger convictions are obtained. It is submitted that in order to justify the use of a reverse legal burden of proof in terms of human rights law it is necessary from the point of view of public policy to conclude that a defendant convicted of no more than two offences on

separate occasions in a six year period must forfeit a right of equality before the law **in relation to his entire estate**.

- 4.4 The crown have previously argued in *R v Benjafield* and *McIntosh v HM Advocate*, that confiscation proceedings do not constitute a criminal charge. The matter is likely to be ultimately determined by the case of *Phillips v UK* and *R v Rezvi and Benjafield* which is currently on appeal to the House of Lords. LIBERTY takes the view that the proceedings do constitute a criminal charge. Given the fact that the issue is currently being considered by the higher courts it would clearly be wrong for the secretary of State to issue a section 19 certificate of compatibility in relation to this part of the Act.

5. REASONS FOR OBJECTIONS TO THE USE OF REVERSE BURDENS IN CRIMINAL CONFISCATION

- 5.1 LIBERTY submits that Parliament should not employ the reverse burden system in the way proposed by the Draft Bill, since to do so will result in a system which is too draconian in nature and cannot be justified on the basis of necessity and fairness. Three concerns are raised in relation to the use of reverse burdens:

- 5.2 The reverse burden scheme is historically anomalous in the context of the English legal history and tradition

5.2.1 The need for the burden of proof to remain on the state is a fundamental principle of English law, and was described by Lord Sankey in *Woolmington*³ as a "golden thread". Accordingly, reverse burdens, must be narrowly constrained to be compatible with that principle. Historically, the majority of reverse burden provisions deal with narrow and contemporary issues (either involving a need to prove a licence/exemption or in relation to matters which constitute a significant public danger) which are not only exclusively within the defendant's knowledge but relatively easy to provide explanations for. The development of exceptions to the "golden thread" principle is as follows:

- (1) **Exemption Clauses e.g. possession of a licence:** In *R v Edwards* [1975] 1 QB 27 the CA justified such clauses on the basis that not only does the knowledge of whether a person qualifies for the exemption lie peculiarly within his knowledge, but proof of the exemption is relatively uncomplicated. These provisions are characterised by their regulatory nature and relatively minor penalties and degree of social stigma pertaining to a conviction: *State v Manamela* [2000] 5 LRC 65, paragraph 29.

- (2) **"Exceedingly rare" cases:** In *R v Hunt* [1987] 1 AC 352 at 375H Lord Griffiths did not accept that exemption clauses were to be the only justifiable exception to Lord Sankey's golden thread but emphasised that the instances when a statute should be read as imposing a burden of proof on a defendant other than in the case of proving an exemption "*are likely to be exceedingly rare*". He adopted the *Edwards* formula as "*an excellent guide to construction*".

³ "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained": *Woolmington v DPP* [1935] AC 462, 481-482

- (3) **Cases involving dangerousness:** The ambit of exceptionality would therefore potentially include possession of dangerous drugs, weapons, explosives and/or terrorist paraphernalia albeit in a context where a narrow contemporary question was being asked about the otherwise unlawful possession of dangerous items.
- (4) **Shifting burdens in relation to straightforward explanations from Defendants:** This system of proof involving, shifting legal burdens between the prosecution and the defence activated by the proof of one element of an offence, thereby shifting the onus on to the other party to disprove another, has developed albeit within the context of explaining the possession of dangerous items or the engagement in conduct subject to a licence requirement. It is to be noted that before any legal burden shifted to a defendant in relation to articles found in his possession under s.16A of the Prevention of Terrorism Act 1989, the Crown had to prove that such possession gave rise to “*reasonable suspicion of a terrorist purpose*”.

5.2.2 In contrast, to the historical development of reverse burdens, the statutory assumptions under Clause 9 of the draft bill may be triggered by very minor offences, and deals with a wide range of historical issues, the proof of which may be made difficult because of the passage of time, loss of audit trail and unavailability of third parties. While it may be easier for a defendant to account for his finances than the prosecution, it does not follow that it is fair to oblige him to do so. In justifying the system in terms of defendants being asked to provide explanations easily within their knowledge and the balance between their assets and their obligations, the system is predicated upon a model of rational economic behaviour, which cannot be safely assumed by society on a case-by-case basis.

5.2.3 The presumption of innocence is particularly designed as a means of avoiding social generalisations about human conduct and obliging the state to prove that specific conduct has occurred. In this respect general consideration must be given to the social position of any defendant and the likelihood of him keeping records of a wide variety of what may be informal transactions. The South African Constitutional Court has focused upon this issue recently in *State v Manamela* [2000] 5 LRC 65 paragraph 44. dealing with legislation which places the burden of proof upon a people found in possession of stolen goods to prove that they had no reasonable cause to suspect that they were stolen. Whilst generalisation about guilt may be permissible because of the logic surrounding a set of circumstances which make them objectively easy to prove, or because there exists a public interest in preventing an imminent discrete social evil, the scheme applies to relatively trivial “individual” thieves, burglars, fraudsters and robbers who notch up sufficient qualifying offences as well as persons involved in serious, long term organised crime whose activities may indeed threaten the social and economic well-being of a significant section of society.

5.3 The reverse burden scheme endorses potentially irrational assumptions

5.3.1 The application of the statutory assumptions creates a mandatory forensic exercise where there is potentially no rational connection between the facts proved by way of the trigger convictions and the ultimate facts presumed.

5.3.2 LIBERTY acknowledges that at common law the majority of authorities in both England and Scotland have rejected any requirement that the initial application of the assumptions must be rationally based: *R v Dickens* [1990] 2 All ER 626 (no basis for rational suspicion); *R v Rose* [1993] 1 WLR 844 (followed Dickens); *Donnelly v HM Advocate* (Appeal Nos C511/97) 5th May 1999 the High Court; *HM Advocate v McLean* 1993 SCCR 917; *R v Benjafield* 21st December 2000, paragraph 91; *McIntosh v HM Advocate*

(PC) 5th February 2001. The exception is *R v Redbourne* [1992] 1 WLR 1182, CA, in which Staughton LJ emphasised that a judge “*must have some reason to suspect that the defendant has benefited from drug trafficking*”. This principle has not been followed.

5.3.3 LIBERTY submits that the common law position is no longer an acceptable one. It is noted that Lord Prosser described the assumptions (presumably in the abstract) in *McIntosh* in the Scottish High Court of Justiciary at paragraph 31 as “*in a quite literal sense baseless*” and suggested that there must be “*proved criminative circumstances*” before assumptions could be applied to any piece of property.

5.4 The reverse burden system is incompatible with a generally shared international approach

5.4.1 It is submitted that the debate concerning an obligation on the Crown to establish *prima facie* suspicion is of considerable importance, given that the answer to whether reverse burdens constitute a violation of Article 6(2) lies in determining whether the legislation is a reasonable and proportionate device for achieving the legitimate aim of combating serious crime.

5.4.2 LIBERTY places emphasis on the fact that while other countries have developed confiscation systems aimed at criminal proceeds not linked to a conviction, many have deemed it necessary to incorporate a *prima facie* suspicion safeguard. It cannot therefore be said in justifying the draconian nature of the UK system that this country has not acted in accordance with “a generally shared approach” of other contracting states or other jurisdiction subject to human rights instruments: *Tyler v UK* 2 EHRR 1, paragraph 31. See generally the endorsement of an international perspective, albeit with consideration of the different jurisprudential issues, as emphasised in *Brown v Stott* [2001] 2 WLR 817, 855-856 (“*The solution which section 172 has*

adopted is not the same, but it stands up to comparison with that which has been adopted in other countries”.)

5.4.3 It is the lack of any prima facie basis for applying the assumptions that principally causes LIBERTY to submit that current proposals not only destroy the essence of the presumption of innocence, but also have the capacity to lead to arbitrary and irrational results.

5.4.4 Various jurisdictions have considered what test should be applied to determine when it is appropriate for reverse burden assumptions to be permitted. This has been expressed in different terms, albeit amounting to a similar requirement that the initial application of the assumptions by a Court is devoid of arbitrariness or irrational foundation:

- “rational connection” (*Tot v United States (1943) 319 US 463*)
- “substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend” (*Leary v United States (1969) 395 US 463* cited by Lord Woolf in *AG General of Hong Kong v Lee Kwong-Kut [1993] AC 951, 969G-970A* as a minimal safeguard without which it would be “difficult to justify” any reverse burden provision);
- “a reasonable and rational presumption flowing from the facts proved” (*State v Chogugdza [1996] 3 LRC 683, 692e*);
- “the fact to be presumed rationally and realistically follows from that proved” (*R v Sin Yau-Ming [1992] 1 HKCLR 127* at 145);
- “rational and realistic” (*R v Ko Chi-Yuen [1994] HKCLR 66, 68*);
- “sufficient circumstantial evidence concerning the unlawful origin of the property” (*Pipitone*, Judgement 4th January 1985 approved in *M v Italy* 70 DR 1991, 91);
- “justified only when based on the objective establishment and assessment of facts which reveal the behaviour and lifestyle of the

person concerned” (Constitutional Court Judgement no 23 of 1964 approved in *Raimondo v Italy* 18 EHRR 237, paragraphs 19).

- Generally the South African Courts have kept open the possibility that a limitation upon the presumption of innocence “may be justifiable as being rational in themselves...”: *State v Zuma* [1995] 1 LRC 145, at 166 and *State v Manamela* [2000] 5 LRC 65, 82.⁴

5.5. The scheme includes a number of additional limitations upon fundamental principles of the criminal law, which cumulatively render the use of reverse burden provisions substantial unnecessary and more than a minimal impairment of the presumption of innocence :

5.5.1 **Inferences from silence** - under clause 16(3), notwithstanding the absence of a requirement to show a *prima facie* case, all aspects of a prosecution statement may be deemed to be admitted by the defendant save those which are not challenged. Under clause 17 (3) the court can draw adverse inference from a failure of a defendant to comply with an information order. In the circumstances that a Court requires a defendant to reply to the prosecutor’s statement under Clause 17(3), for the accused to remain silent “*is not simply*

⁴ The Canadian confiscation provisions are contained in Part X11.2 of the Criminal Code. They apply to any “enterprise crime offence”, and a list of such offences is contained in section 462.3, which includes drugs offences, frauds, breaches of trust by public officers and laundering offences. Canada does not have any system of reverse burdens. Under s. 462.37(1) the Court first has to be satisfied whether the property of a person convicted of an enterprise crime is the proceeds of the crime or the crime was committed in relation to that property. In those circumstances the property is forfeited. Where the evidence does not establish that the property is related to the crime, but there is evidence beyond reasonable doubt that the property is nevertheless proceeds of crime, then the property will also be forfeited. Under section 464.39, the court can infer that the defendant’s property was obtained or derived as a result of the commission of an enterprise offence where evidence establishes that the value of the defendant’s property is higher after the commission of the offence than before. The Court is also required to be satisfied that the income of the defendant from legitimate sources cannot reasonably account for the increase in value. Without necessarily stating so in terms, this provision places an evidential burden of a defendant to explain his assets.

The Canadian system is comparable to the Italian mafia cases considered by the EctHR The key basis for justifying those particular systems were (a) confiscation can only take place where there is sufficient circumstantial evidence concerning the unlawful origin of the property and (b) the onus of rebuttal upon a defendant is couched precisely in the terms that LIBERTY seeks to argue for, namely an evidential burden (onere di allegazione) as opposed to a persuasive burden (onere della prova): *M v Italy*, page 91., *Raimondo v Italy*, paragraph 19. The approach justified by Strasbourg is precisely the same as the approach justified recently in the *Manamela* case in South Africa, paragraphs 57-58.

to make a hard choice which increases the risk of an interference of culpability. It is to surrender to the prosecution case and provoke the certainty of conviction”: State v Manamela [2000] 5 LRC 65, paragraph 24.

- 5.5.2 **Privilege against self-incrimination** – although the power of compelled disclosure cannot be used in the trial of the trigger conviction, the Crown benefit from the power of the High Court to order such disclosure in relation to assisting them in their burden of proof in the confiscation hearing: Re O (Restraint Order: Disclosure of Assets) [1991] 2 QB 520, 528
- 5.5.3 **The rule against presuming a general predisposition to commit offences on the basis of particular wrongdoing** – the combined effect of Clauses 4 and 9 is such that a person can be shown to have benefited from previous criminal conduct from the fact of his current convictions.
- 5.5.4 **The rule against punishing a convicted offender for matters outside the indictment that formed the basis of the conviction** – under clause 9(8) the assumptions apply to property previously disposed of by the defendant in a period of six years ending when the proceedings were instituted against the him.
- 5.5.5 **The application of reasonable rules of limitation upon liability** – under clause 9(3) the assumptions apply to property held by the defendant regardless of when the property came into his possession and any other property disposed of within the proceedings six years.
- 5.5.6 **The principle of finality** - under clauses 18 and 20 the prosecution can apply to the court within 6 years after the date of conviction and make a first time or new determination as to a benefit from criminal conduct and the available assets.

- 5.5.7 **The civil standard of proof in criminal proceedings** – the fact that the Crown bears only the civil standard of proof in relation to the issue of whether the accused has benefited from relevant criminal conduct and the amount, already diminishes the protection enjoyed by an accused in normal criminal proceedings.
- 5.5.8 The above departures from basic common law principles applicable in the field of criminal law mean that in reality the Crown would be able to confiscate sizeable amounts of a defendant’s realisable assets on the basis of the above provisions without the need to rely on the statutory assumptions. In the event that ‘hidden assets’ are actually later discovered the matter could be returned to court in accordance with clause 18 and 20. Under the regime, “hidden assets” are assumed to exist, but cannot actually be confiscated without an application to re-determine a person’s realisable assets. In such circumstances the Crown would be entitled to draw inferences from the original non-disclosure of assets by a defendant during his restraint proceedings and the crown court proceedings [need marking up as a point earlier in the text].
- 5.5.9 LIBERTY therefore submits that the combined application of the limitations noted in paragraph 2.6.6 and the continuing option available to the Crown to apply for a re-determination of the confiscation order, renders the additional application of the reverse legal burden of proof substantially unnecessary. Therefore, as a matter wholly independent of the question whether repeat criminal conduct is a serious threat to society, the current system violates Article 6 on the basis that it does not fulfil a test of “strict necessity” (see Van Mechelen v Netherlands 25 EHRR 647 paragraph 58) or “minimal impairment” (see *R v Oakes* [1986] 1 SCR 103).

5.6 LIBERTY'S final concern is that the scheme does not afford sufficient protection to third parties in relation to self-incrimination. Although under clause 16(6) no acceptance that the defendant has benefited from conduct is admissible in proceedings for an offence, the same protection is not afforded to third parties. It follows that in addition to the onerous burden of having to prove that property is not derived from criminal conduct, a third party who might explain the truth about the origins of property cannot be called to assist the defendant without running the potential risk of criminal prosecution. While it can be said that defendants are often faced with such a situation in mounting defences based on the unlawful conduct of others, it is peculiarly unfair to face such a handicap in the context of such an all embracing reverse burden system.

6. CONCLUSIONS ON CRIMINAL CONFISCATION

6.1 The Draft Bill proposes a lower qualifying threshold for the Court to engage in considering confiscation. This makes the new proposals even more far reaching and draconian and therefore would require greater justification.

6.2 LIBERTY submits that the imposition on the accused of a reverse burden in relation to all essential elements of the confiscation hearing violates the presumption of innocence, because it permits the assumption that a accused's entire estate is derived from the proceeds of criminal conduct in spite of the existence of probable (as opposed to reasonable) doubt in the mind of the trier of fact that this is the case.

6.3 There can be no question of permitting such a state of affairs by reference to some public interest, because it cannot be in the public interest to confiscate assets where there is an insufficient rational evidential connection between the facts proved and the facts assumed with the consequential imposition of a substantial sentence of imprisonment in default on the basis of an irrationally determined order.

6.4 Even if recourse is made to public interest considerations, there should be no question of permitting a draconian legislation, when the legitimate aims of such legislation may be properly achieved by recourse to substantially less arbitrary and less irrational limitations upon the rights of the accused. It is LIBERTY's submission that this can be achieved by a requirement on the accused to provide an explanation to displace rationally rather than irrationally applied assumptions that particular assets are derived from criminal conduct.

6.5 LIBERTY therefore puts forward the following four proposals:

- (1) The confiscation system should only apply to people convicted of serious offences. One way of achieving this aim is to schedule the offences and include offences such as drug trafficking offences, a course of serious economic offending or other specified serious offences such as terrorism or assisting illegal immigration. Other legislation such as the Police Act 1997 and the Regulation of Investigatory Powers Act 2000 has defined "serious offences" as offences which would carry a sentence of three years or over. Clause 72 should therefore be altered to incorporate a higher threshold for triggering the scheme. It follows that there should be no provision for magistrates to commit a person to the crown court for confiscation proceedings on the basis of summary only offences (Clause 1 and clause 67)
- (2) In order for the assumptions to apply to any property in the first place, the court must be satisfied there is a sufficiently rational connection between the facts proven by way of the trigger conviction and the property in question (Clause 9(1)).
- (3) In any event, the assumptions should only apply to property going back 6 years from the day of conviction, regardless of whether it remains in

the defendant's possession at the time of the conviction or not (Clause 9(8) and 9(3)).

- (4) Thereafter, the defendant should bear only an evidential burden to provide an explanation of the origins of his property as opposed to a legal burden of proof which should remain on the crown (Clause 9(6)).

7. BACKGROUND TO CIVIL CONFISCATION

7.1 Part V of the draft bill proposes to introduce a system of so-called “civil recovery” into UK law for the first time. According to the Government the scheme “will not seek determine the criminal guilt or innocence of any person, but will focus on whether the property can be shown to have been obtained through some person’s unlawful conduct” (Notes for Guidance para 5.11).

7.2 Conceptually, the focus of civil recovery is purportedly on the property and not the individual holding the property (Notes for Guidance para 5.6). In this regard, LIBERTY observes that far from being a modern innovation, this is a partial return to an archaic principle of forfeiture *'in rem'*, which disappeared in English law shortly after the 17th century, due in part to the absurdity of the legal fiction upon which it was based – namely that property itself could be sued⁵. It is respectfully submitted that as a legal concept, it sits alongside other dubious 17th century principles, such as the right to bring criminal prosecutions against property⁶. It is, at best, a dubious concept that requires substantial protection for the holder of property, in order to provide modern protections to the property holder's rights.

7.3 LIBERTY is fundamentally opposed to the proposed system as a whole because the pursuit of criminal property necessarily involves direct or indirect findings of guilt on the part of the property holder or persons connected to the property. These proposals undermine the presumption of innocence, and will create a system in which accusations by the police will be enough to force people to disclose all their private financial affairs first to the police and then in public at the trial. Even if they are not found "guilty" they will have been humiliated, had to pay for lawyers and had their private life dragged through

⁵ See Dennis R Hewitt *Civil Forfeiture and Innocent Third Parties* 3 N. Ill U.L.Rev. 323 at 325 (1983) "civil forfeiture statutes that treat property itself as a wrongdoer are extensions of archaic concepts"

⁶ An analysis of civil forfeiture in the United States prompted Justice Holmes in the case of *United States v 785 St Nicholas Ave.* 983 F. 2d 396, 401 (1993) to quote Scripture: "When an ox gores a man

the newspapers. When it comes to the decision itself there will be no jury and the judge will take the decision on the "balance of probabilities" - a person will be "convicted" on the basis they are "probably" guilty.

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

"Civil forfeiture would be a significant extension in the powers available to the State to deal with the proceeds of crime. It can be expected to be viewed as controversial by some, because it extends the circumstances where assets can be forfeited by the State without a conviction to the criminal standard."⁷

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

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

or woman to death, the ox must be stoned, and its flesh shall not be eaten. The owner of the ox, however, will go unpunished." – Exodus 21:28

⁷ Point 5.21, Recovering the Proceeds of Crime: A Performance and Innovation Unit Report, published by the Cabinet Office, June 2000.

7.6 LIBERTY has approached the proposal by considering Article 6 ECHR, Article 1 Protocol 1 ECHR and section 10 Bill of Rights and by analogy the 8th Amendment to the US Bill of Rights (prohibition on excessive fines and punishment), both of which call for a discrete consideration of proportionality⁸. It is LIBERTY's general submission that the current proposals lack sufficient protection for defendants and third parties.

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

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

⁸ An interference with property must not only be in the public interest but must also satisfy the requirement of a reasonable relationship of proportionality between the means employed and the aim pursued: Air Canada v. the United Kingdom paragraph 36. Expressed in other terms, the Court must assess whether, taken overall, the applicants can be said to have suffered an "individual and excessive burden": James v. UK 8 EHRR 123, paragraph 50; Sporrong and Lonnroth v Sweden 5 EHRR 35, paragraph 69. Clearly these tests give rise to a ruling on proportionality. Likewise, the American Supreme Court recognises that the right not to be subjected to excessive fines or punishment is engaged by the application of civil confiscation proceedings. In Austin v United States, 509 US 602 (1993) the Supreme Court held that the excessive fines clause contained in the 8th Amendment (which is identical to s.10 of the Bill of Rights 1688) applies to provisions regardless of whether they are "criminal" or "civil", where it can be said that the measure is predominantly designed to be punitive and to act as a deterrent. See also Halper v United States, 490 US 435 (1989) at page 448 "A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment, as we have come to understand the term."

See also the reasoning in Halper v United States, 490 US 435 (1989) at page 449-450:

"Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceedings bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment".

In terms of the developing US test for what is meant by "excessive" under the 8th Amendment see US v Bajakajian:

"The touchstone of the constitutional inquiry under the Excessive Fines clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the offence which it is designed to punish....Excessive means surpassing the usual, the proper or the normal measure of proportion (page 13)".

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

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

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

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

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

defendant was guilty of an offence prior to his trial violated the presumption of innocence)

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

(3) The ECtHR has held that a collateral attack on an acquittal would violate a defendant's rights to silence⁹. Accordingly, the proposed civil forfeiture scheme should give the courts the power to prevent proceedings where a defendant has recently been acquitted of criminal charges which then form essentially the same subject matter of the Director's application.

9. SERIOUS RISK OF INJUSTICE SAFEGUARD

9.1 LIBERTY notes that one of the "issues under consideration" (Notes for Guidance para. 5.32) is the question of giving the High Court power not to make an order where to do so would amount to an unwarranted interference

⁹ Minnelli v Switzerland 5 EHRR 554 (failure to make a defendant's costs order after an acquittal violated the presumption of innocence)

with a Convention right. LIBERTY submits that a clause specifically preventing serious risk of injustice is necessary for that reason¹⁰..

9.2 However, LIBERTY further submits that the hardship caused by the initiation of proceedings requires a "serious risk of injustice" clause to also be necessary in being a specific factor that the Director should be required to consider in determining whether to initiate proceedings. It is not merely the fact that there is no safeguard of a "serious risk of injustice" clause to stop the Director from pursuing proceedings.

9.3 Examples of serious risk of injustice might include, where the defendant is unable to give evidence because of illness, extreme age, loss of memory or loss of a particular accountancy trail¹¹. Given that the scheme applies to conduct outside the jurisdiction it would also be important for the court to prevent proceedings in circumstances where the defendant is unable to obtain evidence because he is exiled from the country for political reasons or is otherwise unfairly prejudiced in mounting a defence.

9.4 LIBERTY notes that the omission to insert a "serious risk of injustice" clause fails to implement the original advice of the Cabinet Office Paper (para 5.21 and 5.22):

"Civil forfeiture would be a significant extension in the powers available to the State to deal with the proceeds of crime. It can be expected to be viewed as controversial by some, because it extends the

¹⁰ R v Benjafield, 21st December 2000. In the context of a criminal confiscation case, which does include a serious risk of injustice clause, the Court of Appeal held per Lord Woolf, CJ:

As to the weight that has to be given to the word "serious", any real as opposed to a fanciful risk of injustice can be appropriately described as serious. The court, at the end of the confiscation process, has therefore a responsibility not to make a confiscation which could create injustice (paragraph 41(4))....

¹¹ In R v Benjafield [2], 8th March 2001 the Court noted per Collins J:

"...quite clearly, as a matter of common sense, the longer ago a defendant has to remember the more difficult it may be for him to produce the necessary material and, of course, such material may no longer exist if one is going back for too long a period. In those circumstances undoubtedly a court would make allowances for that situation, and if satisfied that a defendant was trying but unable to succeed in showing how he came to acquire a particular property because of that lapse of time, then the court would look more sympathetically on such explanations as were given".

circumstances where assets can be forfeited by the State without a conviction to the criminal standard. There is of course a careful balance to be struck between the civil rights of the individual and the need to ensure that the State has the tools to protect society by tackling crime effectively...”

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

10 UNCERTAINTY IN ALLEGATIONS OF CRIMINAL CONDUCT

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

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

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

11 THE STANDARD OF PROOF

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

11.2 In any event LIBERTY has concern over the use of the phrase "balance of probabilities" in clause 241(3) because it has the potential to interfere with a long line of common law development that has articulated the so-called "flexible standard" where criminal allegations are made in civil proceedings. The extensive case law emphasises that a high degree of probability is required before allegations of criminal conduct can be made good in the civil courts¹².

¹² The correct position is to be found in the judgment of Lord Denning in *Bater v Bater* [1951] P 35, 36-37: “A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established”. In other words, although the standard is the balance of probabilities/’more likely than not’, the more serious the allegation the more significant (or weighty or cogent) the evidence must be before the allegation is proved. This position was affirmed in *Tredaway v Chief Constable of West Midlands* (28th July 1999), where on a charge of serious assault and misconduct, McKinnon J directed himself to only find for the claimant if there was a “high degree of probability” that officers had committed what amounted to criminal offences. McKinnon J’s approach was not disputed in the subsequent judicial review of the CPS’s refusal to prosecute; indeed, the Divisional Court found that it was perverse for the CPS to have found that McKinnon J had reached a conclusion on a “much lower standard of proof” than would be required in order to secure criminal convictions: *R v DPP ex p Tredaway*, 31st July 2000.

12. INFORMATION ORDERS

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

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

12.3 The fact that such answers cannot be usually used against the respondent in subsequent criminal proceedings (Clause 264(5)), is not an adequate safeguard against improper "fishing expeditions". It is of further concern that even the

A similar approach has been adopted in other areas, for example, judicial review cases on illegal entry: *Khawaja v Secretary of State* [1984] AC 74, at 113-114 (the House of Lords identified the need for 'probability of a high degree' or 'convincing proof'). In *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, the House of Lords, reasserted the proposition that the civil standard applied, albeit in a manner which took account of the seriousness of the allegation. See also *Hornal v Neuberger Products* [1957] 1 QB 247. Most recently, Lord Bingham dealt with the issue in *B v Chief Constable of Avon and Somerset*, 5th April 2000, paragraphs 30 to 31:

“30. It should, however, be clearly recognised, as the justices did expressly recognise, that the civil standard of proof does not invariably mean a bare balance of probability, and does not so mean in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters: *Bater v Bater* (1951) P 35, *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, and *Khawaja v Secretary of State for the Home Department* [1984] AC 74.

31. In a serious case such as the present the difference between the two standards is, in truth, largely illusory. I have no doubt that, in deciding whether the condition in section 2(1)(a) is fulfilled, a magistrates' court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard. In deciding whether the condition in section 2(1)(b) is fulfilled the magistrates' court should apply the civil standard with the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them”.

protections of Clause 264(5) may be withdrawn (see Clause 264(5)(b)), and that there is no safeguard to prevent statements given in information orders being used in criminal proceedings against other parties. e.g the police wish to prosecute A, but there is no reasonable suspicion that he has committed a criminal offence. Proceedings are issued against his associate, B, even though there is no reasonable suspicion that B has committed a criminal offence or that he has any information to that end. However, through the use of a Clause 264 information order, B can be compelled to give a statement about his assets which may not only assist criminal investigations against A and B, but would be admissible in the prosecution case against A.

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

13. CONCLUSIONS IN RELATION TO CIVIL RECOVERY

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

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

- (3) Full disclosure of what alleged offence had been committed before any requirement was imposed on the respondent to proceedings to answer any claim brought.
- (4) The burden of proof to be imposed on the Director that a particular offence had been committed.
- (5) The standard of proof that such an offence had been committed not merely to be the balance of probabilities, but "beyond reasonable doubt", or at the very least "the flexible civil standard".
- (5) A requirement that there was reasonable grounds to believe that a person against whom an information order was sought could give information that demonstrated that a specified criminal offence had been committed in relation to the property in question.
- (6) The same protections in relation to any answers to questions afforded to defendants to be afforded to third parties.

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