



QUEEN ANNE'S GATE LONDON SW1H 9AT

10 June 1985

*Dear Sir,*

CONFISCATION OF THE PROFITS OF DRUG TRAFFICKING

The Government has, of course, announced its intention of introducing legislation for enactment this session to deal with some aspects of the problem of football hooliganism in England and Wales. Following a discussion which David Mellor and I had with the Prime Minister last week, we would like to take the opportunity to include in that legislation measures dealing with another urgent problem, that of drug trafficking. I am therefore writing to seek colleagues' agreement to the inclusion in the forthcoming Bill of provisions enabling the courts in England and Wales to confiscate the proceeds of drug trafficking, and making it an offence knowingly to receive such proceeds. I should also be grateful if the Lord Privy Seal could give drafting authority for this purpose.

I fully appreciate that this is an exceptional course to propose, and that it would be quite impossible to proceed unless the Opposition agree with the two proposals and their inclusion in the football hooliganism Bill. I believe that it is worth at least trying to secure such agreement. We lose nothing if we fail, and may even secure a tactical advantage. I also realise that we must do nothing to delay the football legislation, and I do not believe that what I am now proposing will do so. I would propose, in consultation with the business managers, that the Opposition should be approached immediately if these proposals are agreed within Government.

The need for urgent action

The Minister for Health (in 1984) and I (in 1983) have given Party Conference commitments to legislation during this Parliament for the confiscation of the proceeds of crime, with special reference to drug trafficking. The eventual aim must be to introduce powers of confiscation which would be applicable to all profitable crime but, given the pressure on the legislative timetable, and also on the courts, that may not be feasible in the immediate future. Such provisions would best form part of a wider Criminal Justice Bill, but there is now no prospect of that until 1986-87. I believe it to be vital to our strategy for containing the drugs problem that legislation dealing specifically with the enormous profits made from drug trafficking should be introduced well before then. Pressure for urgent action on such profits is growing, as was shown in the debate on Keith Raffan's Bill to increase the maximum penalty for trafficking in class A drugs and, as you know, the Home Affairs Committee in its recent interim report on the misuse of hard drugs called unanimously for legislation. Given the pressure on next session's programme, the alternative to including the necessary provisions in the forthcoming Bill would be to prepare a separate Bill in the hope that a suitable and willing Private Member would emerge near the top of the ballot to take it up next Session, but this seems to me to leave too much to chance.

/I believe

The Rt Hon Viscount Whitelaw, CH, MC

I believe that we should not lose the opportunity offered by the forthcoming football Bill for immediate Government action. We could, I believe, have a useful and practicable package which would enact a scheme making the confiscation of the proceeds of drug trafficking possible. This could then be supplemented in a later session.

#### Proposals for legislation

I believe that the aim of depriving drug traffickers of their illegally acquired gains can be achieved most simply and effectively by building on the existing power of the Crown Court to fine without limit. This power would be backed by new provisions enabling the courts to seize and dispose of any assets held by the offender in order to secure immediate payment in full of any fine imposed.

In outline, the measures I would like to include in the forthcoming legislation are as follows:

1. The creation of a new offence of acquiring, possessing, using or laundering the proceeds of drug trafficking, while knowing or believing that such proceeds derived from drug trafficking, wherever in the world such trafficking occurred. This is a proposal which has been discussed in the United Nations and the Pompidou Group and has a very wide measure of support. There is advantage in keeping our legislation in line with action being contemplated in other countries. In my view, the courts should have substantial penalties available to deal with this type of offence, and I therefore propose *Too high.* a maximum of 14 years' imprisonment, which would be the same as for handling stolen goods. There would be no limit on the fines which could be imposed.
2. A provision requiring the Crown Court to consider, in all cases where an offender had been convicted of trafficking, attempting or conspiring to traffic, or acquiring, possessing, using or laundering the proceeds of trafficking, the amount of the gain made by the offender and to impose a fine which takes account of such gain in addition to whatever term of imprisonment the offences would justify.
3. A provision enabling the Crown Court, in assessing what profit the offender had made, to draw inferences from his apparent means, subject to his having the opportunity to show that the assets did not represent the proceeds of drug trafficking.
4. Power for the courts to confiscate and, if necessary, dispose of the offender's assets to secure immediate payment of the fine in full, without waiting to see whether he defaulted.
5. An enabling provision whereby Supreme Court Rules could empower a High Court judge on application from the prosecution, to freeze an offender's assets from his arrest (or just before) until the end of the trial, to prevent him putting them beyond the reach of the courts.

6. Provision for the High Court's power to order pre-trial restraint, and the Crown Court's to order confiscation, to extend to assets which had been in the hands of the offender but which had since been passed to a third party otherwise than 'for value'. In all such cases, both the offender and the third party would be given opportunities to demonstrate that 'value' had been given.
7. An enabling power to provide by statutory instrument for fines, confiscation orders or equivalent orders imposed by courts outside England and Wales to be enforced by English and Welsh courts. (Our intention would be to secure bilateral agreements on mutual enforcement wherever possible.)
8. An increase in the terms of imprisonment which the Crown Court may order to be served in default of very large fines, and provision for such terms to be served consecutively to the 'main' prison sentence, except where that sentence is of life imprisonment. At present, the statutory maximum term of imprisonment for default in England and Wales is 12 months. In view of the very large fines likely to be imposed for drug trafficking offences, I believe that this maximum should be raised substantially, and proposed a sliding scale should be introduced leading to a maximum of 3 years for sums in excess of £100,000, and 5 years for sums in excess of £250,000.

... The proposed operation of these powers is set out in more detail in the attached annex.

Given the particularly evil nature of drug trafficking, and the skill which its perpetrators have shown in covering their tracks, I believe such powers to be essential if we are to prevent traffickers from retaining access to the greater part of their ill-gotten gains, and I also believe that they are likely to be generally acceptable.

#### Resource implications

While the primary object of the proposals is to assist in the suppression of drug trafficking by eliminating the profits there from in as many cases as possible, the secondary object is to collect as much money as possible from offenders who have the means to pay it. The new powers should therefore be revenue-producing overall, and I envisage that the scheme will operate on that basis. The provisions as to fines may produce a slight increase in the work of the Crown Court and of the prosecution and defence, but this is unlikely to be measurable. The main resource problem arises in relation to pre-trial restraint which will be new work for the High Court. In particular, it will be necessary to ensure when the proposed Rules are made that the 'new' money which it produces is not inadvertently dissipated in prosecution costs, legal aid costs, administrative expenses, etc. Pre-trial restraint will, however, be optional so far as the prosecution is concerned, and the introduction of the Crown Prosecution Service provides a means of issuing central guidance as to the factors including financial factors to be taken into account before an application is made. The number of cases in which the procedures fall to be used will be small, probably of the order of 100 per year. I am not seeking additional resources for the police or other enforcement agencies for investigative work leading to restraint or confiscation.

/Conclusion

### Conclusion

I believe that measures on the lines I have described are vital in the battle against drug misuse, and that it will be very much better for the Government to introduce them now than to leave matters to chance in the Private Member's ballot. Subject to colleagues on H agreeing the policy, I propose to seek to introduce the measures as part of the forthcoming Bill. In view of the tight timescale, I am afraid I must ask for policy clearance and drafting authority by the end of this week.

If colleagues agree, I would hope that the Bill as a whole could be drafted by the end of next week. I also hope that Legislation Committee would then be willing to consider the draft Bill on 26 June, with a view to immediate introduction if, and only if, Opposition agreement can be secured for its passage before Parliament rises for the Summer Recess.

I am sending copies of this letter to the Prime Minister, members and Secretaries of both Committees, the Attorney General, the Lord Advocate, and to First Parliamentary Counsel.

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## PROPOSALS FOR LEGISLATION

### Creation of a new offence

1. The proposed offence would consist in possessing the proceeds of drug trafficking, or in undertaking (or assisting in) the retention, removal, disposal or realisation of such proceeds by or for the benefit of another person, or arranging to do so, provided that the person receiving etc knew or believed that they were the proceeds of drug trafficking. (Receiving, retention etc are concepts already established as elements in the offence of handling stolen goods.) Proceeds would include all forms of property - money, goods, land and buildings, securities, and any rights in such property, and (as under the law on handling stolen goods) would also include property representing or derived from such proceeds. Trafficking would include unlawful production, unlawful supply, unlawful importation and unlawful exportation.

2. The proposed offence would also extend to activities in this country relating to proceeds located in other countries and to drug trafficking in other countries. In this context drug trafficking would be defined by reference to international conventions to which the United Kingdom is a party (of sections 20 and 36(1) of the Misuse of Drugs Act 1971).

3. The maximum penalties proposed would be an unlimited fine and 14 years' imprisonment.

### Pre-trial restraint

4. The first step available in the confiscation procedure, would be a pre-trial restraint order, freezing assets which might otherwise be put beyond the reach of the court. The procedure would follow closely the existing civil procedures for Mareva injunctions.

5. The order would be granted ex parte by a High Court judge on application from the prosecution, who would have to show reasonable cause to suspect that an offence of trafficking in drugs, conspiring or attempting to traffic in drugs or handling proceeds of drug trafficking, had been committed by the person against whom the order was sought. Orders would normally be granted at or just before the time of arrest, and might apply either to particular assets - where it was not necessary to freeze the whole of an offender's

property to ensure that sufficient use was available to meet any fine or compensation order likely to be imposed for the purpose of confiscating profits - or to the offender's assets generally. In cases where the whole of the offender's property was frozen, it would be open to the High Court to direct, either at the time of granting the order or subsequent on application, that an amount should be released to meet reasonable living and defence expenses. Where necessary - for example where there was a business to be run - a receiver would be appointed to administer the frozen assets.

6. Banks and others thought to hold the assets would be notified of the order, and anyone who knowingly undertook or assisted with the disposal or restrained assets would be guilty of contempt of court.

7. Pre-trial restraint orders would also be available in respect of assets which had been passed by the offender to a third party and which were liable to confiscation (see para 11 below). The order could be sought at the same time as the order restraining the offender's assets or, if the third party's involvement emerged later, at any time up to the end of the trial.

8. The restraint orders would be rescinded once any confiscation orders imposed by the court of trial had been met.

#### General confiscation procedures

9. In the light of evidence given during the trial or following conviction about the amount gained by the offender as the result of his illegal dealings the judge, without being required to make any detailed calculation, would set the fine so as to confiscate the whole of the offender's profits or, where that did not seem possible, all that remained. The Bill would enable the judge, in assessing the likely level of profit, to draw inferences from the extent of the offender's assets, provided that the offender was given an opportunity to show that he had acquired those assets by means other than drugs offences.

10. If necessary, once any appeal procedures were completed, an offender's goods could be disposed of (by an appropriate officer appointed by the court) to meet the fine. It would not be necessary to prove that particular assets represented the proceeds of crime nor would confiscation be confined to assets which had been subject to pre-trial restraint. Any assets in the offender's possession would be liable to confiscation.

11. Where the court had reason to believe that assets which had been in the offender's hands had been transferred to a third party without value being given in return, the court could order the confiscation of the property from the third party. If it had been sold by a third party for value, then other assets to that amount could be confiscated from the third party concerned.

12. It would be open to the offender or the third party, before the making of a confiscation order, to seek to prove that the suspect transaction between them had in fact been for value; and where it was not practicable for the third party to present his case before the confiscation order was made, it would be open to him to apply to the sentencing court during the following six months to challenge the order on similar grounds. The standard of proof required either from the offender or the third party that the transaction had been for value would be that required in civil proceedings generally, ie the balance of probabilities. Legal aid would need to be available in appropriate cases to those wishing to challenge confiscation orders made by the court.

#### Other aspects of the legislation

##### International dimension

13. The Secretary of State would be empowered to provide by statutory instrument for fines, confiscation orders and similar ~~orders~~ *orders imposed* by courts outside England and Wales to be enforced by English and Welsh courts. This power would be used in implementing agreements with other countries on mutual assistance in recovering the proceeds of crime, which would be essential to gain access to assets salted away overseas.

##### Imprisonment in default

14. Where an offender received a prison sentence and a fine intended to

deprive him of the profits he had made, the Crown Court would have power to order an appropriate sentence of imprisonment to be served consecutively to the original sentence (other than where that was life imprisonment) in case of default. The present maximum period of imprisonment for default in England and Wales - 12 months for any sum exceeding £5000 - would be increased as follows:

<u>Sum in default</u>	<u>Maximum prison term</u>
£5,000 ≤ £20,000	12 months
£20,000 ≤ £50,000	18 months
£50,000 ≤ £100,000	2 years
£100,000 ≤ £250,000	3 years
£250,000 ≤	5 years



HOME AFFAIRS : Drugs : PE 2.