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*2. Wain,*

CONFISCATION OF THE PROCEEDS OF DRUG TRAFFICKING

I am grateful to my colleagues for their helpful comments on the proposals for legislation set out in my letter of 10 June. I was glad to receive general endorsement of the need for early legislation on this subject and once formal policy demand has been given I shall be considering urgently how best we can honour the public undertakings that have been given concerning the timing of the legislation. My officials have been discussing a number of the detailed points arising in our correspondence with their opposite numbers in other Departments, and this process has enabled us to develop and improve the proposals in a way which meets in substance, I believe, all the points that have been raised.

Use of the power to fine

I have looked again at my proposal to build on existing powers to fine, rather than introducing a new forfeiture or confiscation order. This was of particular concern to the Prime Minister, the Attorney General, and the Lord Advocate.

I have considered the options very carefully, and I still think it right to build on existing powers because I believe that they will provide us with a more flexible and very much more effective means of depriving drug traffickers of their proceeds. Forfeiture powers operate to deprive an offender of specific property related in some way to the offence of which he has been convicted. If forfeiture applied only to the proceeds of trafficking as such, then an offender who had spent the proceeds or put them beyond the reach of the court would be immune. By relying on the power to fine, we will avoid this result. The amount of the fine will be based on the value of the proceeds; but to satisfy the fine any assets which the offender has, up to the value of the gains made from drug trafficking, will be liable to confiscation. Thus, if an offender has been careful to place his "drug" income overseas somewhere where we cannot reach it, and has retained in this country only assets which he can show to have legitimately acquired, the courts will still have power to deprive him of assets equivalent to his gains. Moreover, this will not be the ordinary power to fine enjoyed by the courts as one of a number of sentencing options: courts will be required to consider the amount of the gains made by the offender and to impose a confiscatory fine which has regard to them, in addition to whatever penalties would otherwise be thought appropriate. I would

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now like to tighten up my proposals on this point by providing that, where anyone is convicted of drug trafficking, the whole of his assets are to be taken to represent the proceeds of trafficking except in so far as he shows that they were legitimately acquired. I also accept that in the presentation of these proposals it will be important to emphasise these and other novel elements which mean that the total effect of the confiscation scheme will be very different from that of the ordinary power to fine.

Once any appeal had been settled, the offenders' assets would be subject to immediate confiscation and disposal to pay the fine in full. I have taken Quintin Hailsham's point about the lack of enforcement machinery in the Crown Court, and propose that it will normally be for the prosecuting authority to apply to the High Court for the appointment of a receiver to realise the assets, using, as the Attorney General suggested, procedures based on the criminal bankruptcy model. There would be no question of leaving payment to the initiative of the offender. Similarly, where assets were held in a country with which we had agreed reciprocal enforcement arrangements, immediate steps would be put in hand to realise those assets too. It would certainly not be the intention to leave the offender with a choice between paying up or going to prison in default. The only circumstances in which such a choice would apply would be where a trafficker had assets in a country with which we had not at the time negotiated reciprocal enforcement. Like the Prime Minister, I attach importance to securing agreements for this purpose; as the number of such agreements increase, so the scope for a trafficker to avoid full confiscation will diminish. It is difficult to see that any alternative forfeiture procedure would provide a more effective way of recovering assets held overseas.

#### Pre-trial restraint

Michael Havers raised the question whether the Crown Prosecution Service should be involved in the procedures for securing the pre-trial restraint of assets. I would certainly agree that they should; and my reference to "the prosecution" was simply a convenient shorthand for the police, Customs, or Crown Prosecution Service.

The Lord Advocate raised the question of the circumstances in which pre-trial restraint orders would be granted. As he supposes, the power to apply for such orders would come into operation as soon as criminal proceedings had started - by arrest without warrant, or the grant of a warrant of arrest - in connection with a drug trafficking offence. The judge would need to be satisfied that there was reasonable cause to believe that the defendant had made a profit from one or more drug trafficking offences, and if he was not so satisfied, it would certainly be open to him to call for further information or to refuse to grant the order. The initial order would be granted ex parte, but there would be a subsequent hearing at which the accused and any other persons affected by any order could seek to have it varied or rescinded. The Prime Minister has suggested that the burden should be placed upon the defendant to show good reason if he wished to have any part of his assets unfrozen before the conclusion of his trial. This is very much what I have in mind. It would be open to the judge, if granting a restraint order covering an offender's assets generally, to exempt whatever amount he thought fit to cover legitimate living and legal expenses and, in cases where a receiver is appointed to supervise the assets, he might be given delegated authority to release limited amounts for

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similar purposes. but requests for any substantial variation would have to be referred back to the High Court, with the burden firmly on the defendant to show good cause.

I accept Michael Havers' view that receivers might be necessary in circumstances other than the example given in my letter. Certainly they might also be required to look after or dispose of perishable assets; they could also (where the order relates to the defendant's assets collectively) be given the job of identifying and taking control of assets not previously discovered.

As regards liability for damages for losses suffered as a result of restraint of assets, my view is that a receiver should be liable where he was shown to have been negligent in carrying out his duties. In those cases where there was no negligence, but the subject of an order was subsequently acquitted or had the charges against him dropped, the question is more difficult. In civil cases, a party seeking restraint of another's assets is generally required to give an undertaking to pay compensation if the case goes against him; and I understand that this has been the practice in those few cases where the police sought to restrain assets pending a criminal trial. It is therefore difficult to avoid the view that the applicants for a restraint order should be prepared to accept some responsibility, and I therefore suggest that the High Court judge, in considering applications for such orders, should be empowered to require undertakings for compensation at his discretion.

#### Tracing of assets

A number of my colleagues referred to the difficulties of tracing movement of the proceeds of drug trafficking, and of identifying the full range of an offender's assets. These are problems to which we have been devoting a great deal of thought. I have already referred to the potential role of the receiver in identifying assets not previously discovered. Consultations are under way with the police, Customs, Inland Revenue, the banks and others about what further measures may be desirable to enable the effective tracing of proceeds and assets. As Michael Havers points out, the special procedure provisions of the Police and Criminal Evidence Act 1984, when brought into operation, will provide greater access to bank records than exists under the Bankers Book Evidence Act 1879. Taking up his point, I intend to provide specifically in the Bill that the new offence of handling the proceeds of drug trafficking should be regarded as a serious arrestable offence for the purposes of the 1984 Act to ensure that the special procedure provisions will be applicable. I also consider it desirable to include in the Bill an additional provision, directed specifically against suspected drug traffickers, and modelled on the special procedure provisions of the Police and Criminal Evidence Act, but whereby the police or Customs would seek from a circuit judge an order or warrant giving access to information held by banks or others about assets, when there were reasonable grounds to believe that a person was involved in drug trafficking but insufficient evidence to link him or her with any specific offence.

/Inland Revenue

Inland Revenue also hold information likely to be helpful in tracing the proceeds of drug trafficking. I believe there are strong grounds for extending the provision under section 127 of the Finance Act 1972 by which Inland Revenue may share information with Customs "for the purpose of assisting them in the performance of their duties", to allow Inland Revenue to pass directly to the police or the DPP information relevant to the investigation of drug trafficking and the disposals of its proceeds. I hope that John Moore may be willing to agree to this proposal. I should also be grateful for his views on the suggestion that we should include a provision, based on section 187 of the current Insolvency Bill, to enable the High Court to require the Inland Revenue to disclose information for the purpose of assisting in tracing a trafficker's assets.

#### New offence

Several colleagues asked for clarification of the proposed new offence of handling or "laundering" the proceeds of drug trafficking. The offence would consist in possessing the proceeds of drug trafficking, or in undertaking (or being concerned in) the retention, removal, disposal or realisation of such proceeds, knowing or suspecting that they represented the proceeds of drug trafficking. Retention, removal, disposal and realisation are concepts recognised by the law of England and Wales in the context of handling stolen goods. I take the Lord Advocate's point that the problems of proving knowledge that specific assets represented the proceeds of drug trafficking are likely to be considerable, and I am therefore proposing to provide in the Bill that, where it is proved that the defendant had reason to suspect that the person from whom he acquired property was engaged in drug trafficking, he should be presumed to know or suspect that it represented the proceeds of drug trafficking unless he proved to the contrary.

The Lord Advocate pointed out that it would be necessary to justify giving courts in Scotland jurisdiction where the proceeds were held or derived in other countries, when they do not have equivalent jurisdiction in relation to other serious offences. I believe this step can be justified by the international ramifications of drug trafficking, and the fact that under section 20 of the Misuse of Drugs Act 1979 it is already an offence throughout the United Kingdom to assist in the commission of offences against the drug laws of other States. The more nations agree to deal with the proceeds of drug trafficking, wherever they are held and wherever that trafficking occurred, the more difficult it will be for the trafficking rings to find safe havens and avoid prosecution.

#### Scotland and Northern Ireland

I will of course keep George Younger and Douglas Hurd in close touch with the development of the proposals so that they may consider further the question of applying these or similar provisions to Scotland and Northern Ireland. Whatever the outcome of their deliberations on this, I very much hope that it will be possible to ensure that orders made by English and Welsh courts against offenders who hold assets in Scotland or Northern Ireland will be enforceable against those assets.

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Resources

I very much share the concern expressed by Quintin Hailsham and Peter Rees that the demands made on resources should not outstrip the likely revenue from the proposals. I would certainly regard such an outcome as unsustainable, and I think it important for the police, Customs and Crown Prosecution Service to direct their energies to those cases where the amount to be confiscated was likely to cover the expenditure involved. I have asked for further work to be done to establish how the self-financing character of this scheme can best be realised within the general framework of PES and vote accounting. Subject to satisfactory outcome of this work, I hope that it will now be possible to give policy approval to the proposed legislation.

Although I was grateful for Michael Havers' suggestion that we might proceed by way of some simpler amendment to the Misuse of Drugs Act, should it prove impossible to introduce the full package of proposals next session, I feel very strongly that public opinion will expect us to provide comprehensive and effective legislation and that we should make very effort to meet that expectation.

I am copying this letter to those who received the earlier correspondence, and to the Financial Secretary to the Treasury.

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