THE SEIZURE AND FORFEITURE OF PROPERTY ASSOCIATED WITH CRIMINAL ACTIVITY

Memorandum by the Commonwealth Secretariat
and a paper by Dr. NICHOLAS LIVERPOOL of the
Faculty of Law, University of the West Indies,
Barbados

Commonwealth Law Ministers at the last three meetings have expressed concern about the growth of serious organised crime and its increasing sophistication. The particular harm that can be caused to developing economies through serious international commercial crime has been highlighted.

2. Law enforcement agencies are increasingly coming to recognise the practical utility of attacking serious organised crime through its assets. The growth and power of organised crime groups depends in large measure on how effective they are in earning, securing and deploying the financial proceeds of their illegal activities. The mere imprisonment of members of the group without restrictive measures being employed against their property, which in many cases is the source of their power and influence, simply allows the enterprise to be run more or less effectively by surrogates or from prison. The sort of operation we are here considering is relatively sophisticated and is the kind of structure one might expect to encounter in illicit narcotics trafficking.

3. The authorities in the United States of America have given a good deal of attention to the forfeiture and confiscature of property associated with criminal activity as an enforcement technique. It has been restored to with some degree of effect in the case of organised crime penetration of legitimate business and international trafficking operations. There is a practical advantage that monies and other property seized can contribute directly or indirectly to the actual costs of law enforcement.

4. Having regard to the increasing level of interest in the Commonwealth as to the utility of these devices and the interest displayed by ICPO-Interpol and such organisations as the United Nations Commission on Narcotic Drugs, the Commonwealth Secretariat thought it appropriate to commission a general study on forfeiture and confiscature of property associated with criminal activity. Another study has been commissioned focussing specifically on the problems of combatting international trafficking operations in regard to illicit narcotic substances.

5. Dr. Nicholas Liverpool, of the Faculty of Law of the University of the West Indies, who has considerable knowledge of the various legal disciplines involved in any discussion of this complex subject, was commissioned in June 1981 to undertake this study. Given the appointment of a Commonwealth Fraud Officer in November 1981, his terms of reference were slightly amended in the Spring of 1982 to focus attention more on international commercial crime and organised crime aspects.

6. Dr. Liverpool recommends the enactment of legislation which would allow effective confiscatory action to be taken against property associated with criminal activity. He also recommends the enactment of legislation which would facilitate the seizure of property prior to a criminal trial and the forfeiture of property directly related or involved in the crime. He feels that none of the present legislative models are wholly adequate and in the circumstances recommends that the Commonwealth Secretariat should further consider the matter and prepare draft models.

7. The careful criminal may well attempt to put his illicit profit beyond the reach of the courts of the jurisdiction where he commits his crime. In such cases the existence of provisions allowing the seizure, forfeiture and confiscature of his property would not be effective unless they could be enforced against equivalent property within the jurisdiction, or some sort of arrangement could be made with that other State whereby recognition was accorded to these orders. Alternatively,

in certain areas of criminal activity countries may be prepared to take action against property and monies within their own jurisdiction which are the product of or related to the commission of these crimes albeit in another jurisdiction. These questions are raised by Dr. Liverpool, but are more specifically considered in the wider context in the paper prepared by Dr. David Chaikin and the Commonwealth Secretariat on Mutual Judicial Assistance in Criminal Matters within the Commonwealth.

ANNEX TO LMM(83)22

THE SEIZURE AND FORFEITURE OF PROPERTY ASSOCIATED WITH CRIMINAL ACTIVITY

Paper prepared by
Dr. NICHOLAS LIVERPOOL of the Faculty of
Law, University of the West Indies,
Barbados

Introduction

In June 1981 I was commissioned by the Commonwealth Secretariat to prepare a small study which would canvass in general terms the problems of ensuring that crime does not pay by attaching the indirect proceeds of crime. This study was to be regarded as a discussion paper, designed for submission to the 1983 Meeting of Commonwealth Law Ministers to be held in Sri Lanka, and was not intended to go into the details of any particular branch of law, but was to be regarded as the forerunner of a more detailed analysis of precise strategies which were worth considering in this area.

Given the constraints of time I have not been able to examine every aspect of crime and I have chosen for special consideration the two main areas in which urgent attention would seem to be desired viz: white collar crime and drug related offences. Both these areas of economic crimes are a source of concern to most if not all Commonwealth countries, and efforts to eradicate them are most likely to meet with the greatest co-operation.

The constraints of time and the resources available to me have further meant that although the proposals contained in this paper have received considerable thought, there has neither been the time nor the material to provide either as much detailed analysis, or references to the laws of many other Commonwealth jurisdictions, as I would have hoped. Most of the references are to English law.

In preparing this paper I have proceeded on the assumption that there has been an increase in the number of crimes which would necessitate the use of forfeiture proceedings, that there is some difficulty in tracing the proceeds of many serious crimes, and that there is support for the view that the indirect proceeds of certain crimes should be confiscated, at least where they are substantial.

It is recommended that the proceeds of certain types of crime be confiscated on the grounds that the activities of those who penetrate these crimes are very injurious to the moral fabric of society. These crimes are usually highly sophisticated, diversified and increasingly widespread. They tend to drain millions of dollars from the economies of the various territories by unlawful and immoral conduct, corruption, fraud and the illegal use of force. It is unthinkable, therefore that those who engage in such conduct should be permitted to retain any part of their ill-gotten gains. A major portion of the income of such criminals is eventually siphoned off into regular commercial activity thus upsetting the economic prospects of persons who are engaged in normal and legal commercial undertakings.

Forfeiture is an ancient doctrine that has been in existence for hundreds of years yet it plays a surprisingly insignificant role in the struggle against crime.

However, the enormous increase in theft-related (white-collar) and drug-related crimes in recent years has focussed attention on this branch of the law as a means of depriving criminals of the proceeds of their crime by confiscation, and thus discouraging others who may be inclined to participate in such illegal activity by making it clear that crime will not be allowed to pay.

As the law stands at present in most of the countries of the Commonwealth it is not yet equipped to strike at the profits of crime. It is restricted to arresting criminals and seizing the objects of their crime, but even here, as will be seen later, doubt has been expressed as to whether the law permits seizure for the sole purpose of providing evidence at the trial, or whether seizure also exist for the purpose of restoring the goods to their rightful owner, on conviction of the accused. In addition, a recent attempt to enlist the aid of the civil law to assist in the freezing of the assets of the accused until the trial has taken place, has been objected to on the ground that the applicant had no "interest" in the subject matter, thus raising in a different but related manner, the distinction between the direct and indirect proceeds of crime.

It is the purpose of this paper to suggest that the means should exist to seize not only the direct proceeds of criminal activity, but also the indirect proceeds whether it consists of money in hand or in a bank account or other accumulated assets of real and personal property. This may entail a slight alteration to the rules governing the burden of proof in these matters, but the result to the State in revenue and social justice certainly justifies this further step in the drive against crime.

It will also be argued that seizure should extend to a larger number of offences than exist at present, and that confiscation of the proceeds of crime should take place automatically on the conviction of an offender for drug-related offences, and for some of the more serious and profitable crimes.

Reference in this paper to "the Report" are to "The Business of Crime": An evaluation of the American Racketeer Influenced and Corrupt Organisations Statute from a Canadian perspective published in October 1980, by the Criminal Justice Division in the Ministry of the Attorney General of the Province of British Columbia, Canada.

Reference to "the Guide" are to the Drug Agents' Guide to Forfeiture of Assets, First Edition by Harry L. Myers and Joseph P. Brzostowski of the Financial Investigative Section of the Drug Enforcement Administration in the Ministry of Justice, Washington D.C. 1981.

For purpose of clarification I have chosen the following terminology: "Seizure" is used to mean the power to take before conviction or condemnation, property which is reasonably believed to have been stolen or otherwise fraudulently obtained, or which is the subject of crime or other prohibition. "Forfeiture" denotes the power of a court before which an accused has been convicted to order that property which is immediately connected with an offence be retained by the Crown or State. Although this usually takes place as a result of a hearing, property may also be forfeited by default when the claimant has not responded to a notice to justify his claim. "Confiscation" will be used to indicate the power which the court exercises to deprive a convicted person of the proceeds of an offence or its monetary equivalent.

Most jurisdictions do not draw a clear distinction between the concepts of forfeiture and confiscation, and so long as the desired ends are achieved it need not be necessary to do so. But if the indirect proceeds of crime are to be successfully attached long hours and careful investigation will be required before satisfactory evidence can be gathered, and consequently there is a case for initiating separate proceedings for this purpose. One other important factor ought to be borne in mind viz: that Courts constantly refuse to enforce the penal provisions of the laws of other States. If the power to confiscate proceeds along the avenues of the civil jurisdiction of the courts, judgments which have been obtained by this process may prove much easier to enforce under the provisions of legislation which provides for the reciprocal enforcement of judgments.

The need for developing and facilitating co-operation within the Commonwealth and even internationally in regard to serious commercial (white-collar) crime and

drug related offences is urgent. I have therefore attempted to present proposals which would not require lengthy debate or expense. Luckily the Government of Australia has available in its Customs Act, recently strengthened by amendments in 1979, 1980, and 1981, very wide and far reaching powers to detect offences relating to narcotics; and to seize, forfeit and confiscate both the direct and indirect proceeds of narcotic offences. In addition, there is already in place a Commonwealth Fraud Liaison Officer, and a projected Commonwealth Panel of Experts on whose expertise the Liaison Officer may draw as the need arises. Model legislation could therefore be prepared, using the Australian provision as a working model, for circulation to Member States. It is suggested that such legislation should initially be confined to "white-collar" crime and drug related offences, because of the expense which is likely to be involved in the investigatory process of such offences, prior to confiscation.

CHAPTER ONE: SEIZURE

(a) Tangible Assets

Several statutes now provide for the forfeiture of the proceeds of crime after the accused has been convicted, but the power to seize and detain property which has been stolen or is suspected of having been stolen is severely circumscribed, and before the English case of West Mercia Constabulary v Wagner[1] it was doubted whether the courts had the power to seize or detain money in a bank account. In fact Forbes J. opened his judgment with the stunning remark that what was before him was an originating summons of a somewhat novel character, and that at one state he was "extremely troubled about it".

It is very clear, however, that it is exactly in those circumstances, i.e. where the accused still has the proceeds of the crime in his possession, and before he is able to dispose of them that the power to seize and preserve is most needed; since a bare conviction obtained after the assets have been dissipated will certainly not meet the main object in view, which is to deprive him of assets to which he is not justly entitled and to prevent him from putting them beyond the reach of the law, and also of those who are legally entitled to them.

At common law the police are undoubtedly entitled on a lawful arrest (at least on a change of treason or felony) to take and detain property which has been found in possession of the suspect, if it will form material evidence in his prosecution for that crime. The reason for this additional power was clearly and succinctly stated by Pallas C.B. in Dillon v O'Brien and Davis[2] in the following oft-quoted words:

> "... the interest of the State in the person charged being brought to trial in due course necessarily extends, as well as to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form".

In that case Pallas C.B. was also called upon to decide whether this right extended to cases of misdemeanour. He held that it did; and in arriving at this conclusion, the learned Chief Baron traced the history of the matter thus:-

> "The characteristics (by which felony is distinguished from misdemeanour) is that at Common Law the goods of the felon were forfeited upon conviction. The only right, however, to these goods which the books mention as being in the Crown before conviction, by reason of the possible future conviction, is that of taking (and detaining them for a reasonable time) for the purpose of making an inventory. Such a right has nothing in common with that of taking for the purpose of evidence. Forfeiture in felony cannot therefore be the origin of that right. To what then is it to be referred? Its purpose and object viz, to produce the goods in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law".

This vital power of the police to seize or detain goods was considered and extended by the Court of Appeal in Chic Fashions (West Wales) Ltd. v Jones[3]; where it was held that on entering a house with a search warrant or by the occupier's consent, the police had power to seize goods which they reasonably believed to have been stolen or obtained fraudulently by deception. They were empowered to detain the goods for such time as was reasonably necessary to complete their investigations, and if their investigations revealed that the goods had either been stolen or fraudulently obtained, they could detain them further so that they could in due course be produced at the trial as material evidence, if necessary, or be restored to their rightful owner. But once it appeared that the goods were not stolen or fraudulently obtained and not needed as evidence, the police had to restore them to the person from whom they had been taken, even if it was clear to everyone concerned that he was not entitled to them.

At this stage it should be noted that the decision in Chic Fashions extended the purpose - as stated in Dillon's case - for which goods could be detained by the police, because whereas Palles C.B. gave as the ground for seizure and detention, the preservation of material evidence, Diplock L.J. in the Chic Fashions included the additional ground of restoration to the rightful owner. But whatever the grounds which were stated, it is clear that in neither case is the accused legally entitled to the grounds in question; and therefore an order to deprive him of them could by no stretch of the imagination be considered as inequitable if they do not belong to him in the first place.

(b) Intangible Assets

So far, it is clear that the law empowers the seizure of goods or tangible assets. Until recently, however, it was thought that the courts had no power to seize assets of an intangible nature, such as money in a bank account. However, the enormous profits now made by the perpetrators of fraudulent transactions and those involved in drug-related offences demand that a solution be found, first in seizing the property until trial; and then in confiscating it after trial and conviction. It can also be strenuously argued that a prior conviction should not be a mandatory prerequisite to either forfeiture or confiscation. The fact that the property is intangible means that it is more easily disposable, and grave injustice could follow unless an attempt is made to stop this lacuna in the law.

Since tangible property could not have been seized on the authority of Dillon and Chic, it was but a short step to extend seizure to all types of property, tangible or intangible; and this it seems, is the approach which was adopted by Forbes J. in the West Mercia case. In order to do this His Lordship merely adopted the submission of counsel for the plaintiff, that " ... the police have a common law right to seize or preserve property which is the subject of crime", and that the court should lend them support in doing so. Two important points however stem from this decision, viz:- (a) do the police have an interest in seeking civil remedies to restore stolen or fraudulently obtained property, and (b) what is the proper procedure to be adopted to achieve this result? Both these points will be dealt with later.

It was conceded in the West Mercia case that justices of the peace had no power to issue a search warrant to seize and preserve moneys in a bank account, but that seemed to Forbes J. " ... to be a strange lacuna in the armoury of the courts in their endeavour to assist in the prevention of crime that there may be no remedy available to the police in such a circumstance". Strange, it might be, but true it was. The common law did not permit it and equity had never been called in aid of the criminal law in those circumstances. The civil remedy of tracing was obtainable to the owner, but apart from being tedious and time consuming, it too was limited in effect, in that it does not extend to land: a vital omission which must be remedied if it is proposed to devise and maintain an efficient armoury against the perpetrators of organised crime. The West Mercia case is therefore authority for the principle that when it is alleged that a person has obtained money dishonestly and that he has paid such funds into his bank account, the courts are empowered to place an embargo on withdrawals from this account pending the outcome of the trial of the accused.

The decision was upheld by a majority of the Court of Appeal in Chief Constable of Kent v V and Another[4] where the questions of standing and procedure were fully ventilated.

(c) **Standing and Procedure**

Once it is conceded that there is no power in the criminal process to issue a warrant of search and seizure in respect of intangibles resort must be had to civil procedure. In the West Mercia case the court froze the account by virtue of the powers which it claimed had been conferred upon it by Order 29 Rule 2(1) of the Rules of the Supreme Court, which reads as follows:-

> "On the application of any party to a cause or matter the court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter".

This provision clearly contemplates the existence of a "cause" or "matter" between the parties before the court, as a prerequisite to the exercise of its power thereunder. There was obviously no cause or matter in dispute between the parties, and it is this, more than anything else which made Forbes J. extremely troubled about the application, and in particular whether the plaintiffs could arguably be said to have any locus standi to move the Court for the relief which was sought. It was at least doubtful if such locus standi could be said to exist, but the learned Judge founded his decision on the narrower ground that since the police have a common law right to seize or preserve property which is the subject of crime, the court ought to lend its support to them in doing that.

In the case of the Chief Constable of Kent the court had been approached by way of a different procedure probably because of the doubts expressed by Forbes J. in the earlier decision. Here the Chief Constable issued a writ and then applied for an injunction to restrain the accused from withdrawing any moneys from the bank accounts. Even then could it have been said that the Chief Constable had any interest to protect? In agreeing with Lord Denning M.R., Donaldson L.J. reasoned that in:-

> "Chic Fashions Ltd. the common law came to the support of the common weal and invested the police with a right to seize goods which the courts could, if necessary, have enforced by mandatory injunction. In the instant appeal the common law could and should invest the police with a right to 'detain' moneys standing to the credit of a bank account if and to the extent that they could be shown to have been obtained from another in breach of the criminal law".

The matter is not free from doubt, and in a powerful dissenting judgment Slade L.J. concluded that whether or not it might be desirable, he was not convinced that the Chief Constable had any present or contingent legal or equitable right to intervene in such a matter.

Ministers may feel that both the importance and the complexity of the matter are such that clear legislation should be introduced to empower certain police officers, as of right, where they believe on reasonable grounds that moneys standing to the credit of a bank are traceable to property which had been obtained from another in breach of the criminal law, to apply to the court for an order either to prevent withdrawals from that account, or that the moneys should be paid into court.

Such an application could be made in the forum most convenient whether it be a civil or a criminal court. If this recommendation is adopted, it could serve to solve both questions of standing and procedure which raised their heads in the cases discussed above. It is assumed that it is generally conceded throughout the Commonwealth that the principle of Dillon's case as extended by Chic Fashions Ltd. would be accepted as good law.

(d) **The Effect of Seizure**[5]

The right to seize property whether tangible or intangible before the guilt of the accused has been established in a court of law will clearly need to be circumscribed for various reasons. First, it may affect adversely the ability of the accused to carry on his legitimate business either alone or in association with

others; secondly, the money in the account or the tangible assets seized may legally belong to both the accused and some other person who has neither been suspected nor accused of crime, or it may belong exclusively to third parties although it is ostensibly under the ownership control or protection of the accused; and thirdly, such seizure may be in breach of one or other of the rights of the accused which have been guaranteed under a written constitution.

(i) Effect on Accused

The inherent dangers to a bona fide trader from an application to freeze his account must constantly be borne in mind since they are potentially very harmful. The otherwise innocent shopkeeper who is persuaded to permit his place of business to be used as a collection point for the exchange of cash in return for prohibited drugs, may for example have deposited some of these moneys into his account with the intention of paying them over to sellers of those drugs. These funds should clearly be seized and as will be argued later, should also be confiscated. But at least until conviction it would be inequitable to freeze the whole of the trader's bank account since his normal means of livelihood may well be jeopardised.

It would be wrong to ignore the fact that the stopping of a business account, even for only a few days, may well result in commercial disaster for the business concerned. It is imperative therefore, that the proprietor of a business whose account has been frozen pursuant to an ex parte application should be afforded the earliest opportunity to address the court. And even where an order has been made after hearing all the parties concerned, it should be flexible enough to permit the court to vary or discharge it, if new evidence is brought to light which justifies such variation or discharge; because it is only in this way that a fair balance can be maintained between the interest of the community as represented by the prosecutor, on the one hand; and on the other, the right of a trader to operate his business unhindered so long as he does so within the law.

Both these points were accepted in West Mercia and also in Chief Constable of Kent. In the first case the injunction was granted until further order with a clear indication by the learned judge that the words "further order" were not a mere formality, because he could conceive of situations in which the accused might wish to put before the court evidential material which would indicate that some latitude ought to be allowed to the company to trade from its own bank account. In the second case the Master of the Rolls stated that if the accused had any special reason for making payments out of his accounts he had only to ask and proper payments would be permitted. In fact the accused was given leave to apply for the release of such sums as he might need for his defence or otherwise.

(ii) Effect on Third Parties

An order for freezing assets may also affect third parties adversely and for that reason needs to be carefully studied before implementation. It has already been seen that dicta in both West Mercia and Chief Constable of Kent contemplate that in certain circumstances the accused may apply to the court for sums to be drawn out of his account. This power should, for obvious reasons, apply to a third party who had a proprietary interest in the property seized; since it would be unjustifiable and certainly inequitable to seize property which did not belong to an accused where the third party has no knowledge that (in the case of tangible assets) his property has been directly used to perpetrate crime; or, (in the case of intangible assets) that his funds are being seized because they merely happen to be in a joint account with moneys which belong to the accused.

It would seem that in such cases, knowledge by the third party should be a vital factor. If the third party has no knowledge of the criminal nature of the accused, then he should be able to recover his property without question. Where, however, it can be shown that the third party knew or ought to have known of the conduct of the accused, he should be required to go further and show that he was in no way involved in that conduct, nor did he facilitate it. The principles governing the rights of third parties to have their property exempt from seizure apply equally to forfeiture and confiscation, and consequently any discussion of these matters here will take that into account.

Where the accused and the third party bought real property in equal shares and the court is minded to make an order to freeze the property of the accused, the question naturally arises as to the nature of the order which should be made in those circumstances. It is clear that a provision which empowers the court to freeze the entire asset would be so draconian as to border on the unconstitutional. Yet it is important that the accused's share of the asset should be attached lest be disposes of it before the trial. In such a case it is recommended that a charging order would be the appropriate remedy; but it should be borne in mind that even with such an order, difficulties could arise as to the share of the accused in the property, and complicated accounts may have to be taken in order to arrive at a fair solution.

Where the third party himself has a mortgage or charge on the property the problem may be more easily solved, since at any given period of time, a mortgagee or chargee will almost always be in a position to prove what is the accused's indebtedness to him. Any legislation which is contemplated should however, specifically confer on third parties the right to approach the court in a summary way in order to have their rights vindicated; and no unreasonable time limit should be placed on the third party's application, especially where he may not be aware of the fact of seizure. Where the third party's interest is registered e.g. in a case of joint ownership, or a mortgage or change or a bill of sale, the applicant for seizure will be fixed with notice by the mere fact of registration, but provisions could be made for publicising an application for seizure, and no amount of publicity should be regarded as being too extravagant.

Another question which is likely to arise is whether the accused should be allowed to withdraw funds to meet his unsecured debts, for example, to maintain his family or to pay his utility bills. This does not afford of an easy answer. Since in pre-trial procedure the accused is presumed innocent until he has been found guilty and convicted, in theory at least it could be argued that since, if his guilt is not subsequently proved, the assets will have to be returned to him, he should be able to utilise some of them for essential purposes. On the other hand the applicant for seizure may be able to show that the accused had no funds in that particular account before he embarked on his criminal activities, and that even if he is not convicted he should not be entitled to the proceeds or profits of his crime. It is undesirable to lay down any hard and fast rules, each case should be decided on its merits.

In the first instance it is recommended that the application should be made to the court which ordered the seizure, with a right of appeal by the party who is dissatisfied with the decision. This would include the Crown/State and, of course, any third party whose property has been affected by the decision.

(iii) The Constitutional Question

Most countries of the Commonwealth are governed by written constitutions with enshrined fundamental rights and freedoms, among which are for example, protection for the privacy of the home and other property, and from deprivation of property without compensation; and provisions to secure protection of the law. Where the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts, this is not held to be inconsistent with or in contravention of the rights to protection of the law, but care must be taken in passing legislation such as that which has been recommended, to ensure that the clause protecting the deprivation of property without compensation is not breached.

Typical of these provisions is that to be found in the Barbados Constitution.[6] This section states that no property or interest or right over property, shall be compulsorily acquired except by or under the authority of a written law which prescribes the principles on which and the manner in which compensation is to be determined; and which gives a person claiming compensation a right of access to the High Court. However, nothing contained in or done under the authority of any such law is to be held to be inconsistent with or in contravention of the section, to the extent that it makes provision for the acquisition of property by way of penalty for forfeiture in consequence of a breach of the law.

Where, therefore, the person has been convicted, properly drafted provisions could pave the way for forfeiture. But such provisions need to be carefully worded

and distinctly set out in order that the courts which are required to administer them may be able to do this with the minimum of room for error. With this in mind, therefore, it is suggested that the provisions of a recent Bill which is intended to amend the Narcotic Drugs Act of Barbados would seem to be too wide, and consequently open to serious objections.

The Bill is an attempt to provide for the revision of penalties under the Act, and for the forfeiture of all articles used in the commission of an offence as well as any profits arising therefrom; but no guidance is given as to either the procedure to be used in case of forfeiture; or the method to be used in investigating the nature and extent of profits which have been made as a result of the commission of the offence. Consequently, it is likely to face the same restrictive interpretation which has been applied to similar U.K. legislation. In addition, if it is intended to include the provisions for confiscation which have been recommended elsewhere in this paper, then it would also be open to serious constitutional objections.

CHAPTER TWO: FORFEITURE

(a) Introduction

The concept of forfeiture was based, in feudal England, on the intimate bonds of loyalty and allegiance which existed between the subject and his Lord. Until 1870 all the property whether real or personal, of a person who was convicted of treason or felony was forfeited to the Crown. However, in the case of felonies other than treason, if there was an intermediate Lord, forfeited land escheated to him after a year and a day. Where the accused fled the jurisdiction in order to evade trial, his property was forfeited following his outlawry. As it was a fruitful source of revenue for the Crown, there were strong reasons for retaining it, but the severity of the punishment caused juries to return perverse verdicts, and more knowledgeable offenders to convey their property to trustees in order to evade its effect. Forfeiture on conviction was abolished by the Forfeiture Act, 1870, and forfeiture for outlawry was abolished in 1938.

A similar concept known as "deodand", but which was also loosely referred to as "forfeiture" can be traced as far back as the Old Testament and both the Romans and the ancient Greeks also forfeited things which were involved in certain wrongs. Early Britons also recognised the concept, which in its early stages arose out of a need for revenge against the offending thing, if not against its owner. Over the years the concept of revenge has gradually faded, but the doctrine has remained, and is used principally to protect the public from harmful objects and also to deter crime. Deodand has been abolished since 1846.

The need for forfeiture in relation to certain crimes can easily be justified. In the case of theft or fraud-related offences, it is often quite clear that the victim has been deprived of some tangible objects or valuable consideration to which the accused is not legally entitled, and it is suggested that whatever the outcome of the trial, the accused should not be permitted to retain or claim any part of this property to which he clearly cannot stake a legal claim. As has been stated earlier drug-related offences seriously undermine the moral fabric of society. It has adverse effects on the health of countless persons who make use of those drugs, particularly the young and unsuspecting, and yields huge undeserved monetary rewards to those who make it their business to deal in them. The forfeiture of the proceeds of such crimes can only be of immense benefit to society generally, if successfully and fairly pursued.

Yet the law seems to be strangely and inexplicably unable to attain what are plainly the desired ends; because in some instances it would seem that even legislative provisions does not permit the court to make an order for forfeiture. Three recent examples which are discussed later illustrate the dilemma which the courts have to face.

(b) Legislation on forfeiture

Many statutes confer power on the courts to order forfeiture of articles whose possession is prohibited e.g. acts which govern the publication of obscene

materials. The gist of the offence in this type of case is the possession of the offending article, hence the requirement that it be removed from the possession of the offender by forfeiture, on conviction. But an examination of a random list of statutes reveals that although in some cases the wording may seem to be insignificant; in others the differences may be vital. In some cases for example, a conviction is not required before forfeiture; notable among these is the power of forfeiture conferred for breach of the provisions of various "Customs" legislation, and in others, the court is "permitted" rather than "required" to forfeit, although in such cases the power conferred may in fact be much wider, in that forfeiture is made to apply to anything which relates to the offence. In the U.K. a time limit for making an order of forfeiture has now been imposed.

Section 43 of the Powers of the Criminal Courts Act, 1973, (U.K.) for example, has conferred on the courts a general power of forfeiture, but Section II of the Courts Act, 1971 effectively imposes a time limit within which this power can be exercised. In R v Menocal an order for forfeiture had been made in respect of a sum of money which was found on the person of the accused, and which was admittedly in her possession for the purpose of being handed over for the payment of illegally imported drugs. The Courts Act imposes a time limit of twenty-eight days on a Court's power to vary a sentence after it has been pronounced, but the order in Menocal's case was made more than twenty-eight days after conviction. The House of Lords had no hesitation in holding that there was no justification to make the order. The decision in this case clearly strengthens the submission that confiscation orders could be used to supplement forfeiture orders where the Court is unable to make up its mind at the time of conviction, whether or not to order forfeiture.

Section 27 of the Misuse of Drugs Act, 1971 reads as follows:

"27(1) Subject to subsection (2) below, the court by or before which a person is convicted of an offence under this Act may order anything shown to the satisfaction of the Court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the Court may order;

(2) The Court shall not order anything to be forfeited under this section, where a person claiming to be the owner of or otherwise interested in it applies to be heard by the Court, unless an opportunity has been given to him to show cause why the order should not be made".

This provision applies to property which is in the possession or control of the accused at the time of his apprehension, and is limited to cases where the offender has been convicted of a certain type of offence viz: one which is punishable on indictment with imprisonment for a term of two years or more. But even where it is shown that the property was in his possession and control, the prosecution is required to go further and satisfy the court that the property has been used, or was intended to be used, for the purpose of committing or facilitating the commission of an offence.

Certain specific powers of forfeiture such as that contained in the Firearms Act, 1968 (U.K.), do not require the property to be linked to the offence at all, so that after the conviction of a person for this offence, the court may order the forfeiture of any guns an ammunition which are in his possession. This power may seem reasonable in respect of gun-related crimes, since an offender may have a large selection of firearms, only one of which was used in an attack, but it is certainly unreasonable to conceive of this power being applied to "any offensive weapon" for example, since the variety of things which are capable of falling within this genus are infinitely variable and manifold.

Ministers may wish to consider whether forfeiture should be confined to relate to the specific offence of which the offender has been charged or whether there should be a general power of forfeiture circumscribed by a time limit within which it may be imposed. Where it is not necessary to charge or convict a person before forfeiture, the types of offences are clearly defined and follows a well recognised pattern. It may be felt therefore that all legislation which embody forfeiture provisions should follow these well worn paths, leaving it to new provisions on

confiscation to seize and/or trace any other property which cannot be securely linked to the commission of any specific offence, but which is nonetheless clouded with suspicion. Finally Ministers may also wish to consider whether all powers of forfeiture should not also contain a provision relating to seizure and disposition; or whether a general power as to seizure and disposition should be provided in new legislation, which would include some machinery whereby this power may be effectively utilised.

(c) Analysis of three recent cases

In Regina v Ribeyre,[8] Taylor J, sitting with O'Connor L.J. and Neil J. in the Court of Appeal (Criminal Division) held that an order which had been made under section 27(1) of the Misuse of Drugs Act, 1971 forfeiting the cash proceeds of the sale of drugs was made without jurisdiction where a person had been convicted of having drugs in his possession with intent to supply. Like the House of Lords in R v Cuthbertson,[9] the Court interpreted the words of section 27(1) as relating strictly to the offence of which the person was convicted, and therefore found that since the appellant would not have required his "working capital" for the act of selling drugs, the money was accordingly not "anything shown ... to relate to the offence".

As will be pointed out later one of the aims of national and international policy is to strip the offender of his profits, but most legislation so far passed does not seem to have addressed this specific point with sufficient accuracy. It is in cases of this nature that the tracing provisions contained in legislation which has been enacted in the United States and Australia could be most usefully employed. Under these provisions the assets and bank account of the appellant could have been investigated, the difference in amount over a period noted, this would presumably have raised a presumption on the balance of probabilities that the money was acquired as a result of the sale of drugs, thus throwing the onus on the appellant to prove beyond reasonable doubt that it was not so obtained.

In R v Uxbridge Justices,[10] the accused was found with foreign currency notes on him, and he was charged and convicted on six counts of dishonestly handling, and one count of corruption. The police had seized not only the coins found on the accused but also a considerable quantity of Bank of England, Bank of Clydesdale and Fijian notes which had been found at his home. However, because the owners of the currency found at his home were not known he successfully applied to have those returned to him.

The facts showed clearly that the accused was in the habit of frequenting Heathrow Airport where he unlawfully obtained foreign currency. While the notes found at his home could not have been the subject of seizure on the technical ground that they could not be proved to relate to the offence of which he was convicted, it was, it is suggested, nevertheless as clear a case as any for confiscation. Legislation should provide that in cases of this nature, notice of confiscation should be served on the accused, and the Crown/state should prove on a balance of probabilities that the money had been obtained as a result of criminal activity. The conviction of the accused should be sufficient to raise that presumption. The onus would then shift on the accused to show beyond a reasonable doubt that the currency was not obtained as a result of criminal activity.

The third case which has revealed the weakness of current English legislation is R v Cuthbertson. In that case, the House of Lords, in interpreting s.27 of the Misuse of Drugs Act, 1971 felt that the question of forfeiture should not be approached with any preconception that Parliament must have intended the section to be used as a means of stripping professional drug traffickers of the whole of their ill-gotten gains, however laudable that conclusion might appear to be. Their Lordships accepted the submission that forfeiture under the provisions of the statute was limited to the accoutrements of the crime i.e., the tools, instruments or other physical means used to commit crime.

In the case it was also clear that the accused persons had accumulated considerable sums of money by illegally manufacturing dangerous drugs, yet the proceeds of their crime were kept out of the reach of the forfeiture provisions of

the statute because they had been charged with and convicted of the offence of conspiracy, which was not an offence created by the Act. Their Lordships held that in order to justify forfeiture the accused had to be convicted of an offence under the Act, and that the power of forfeiture would be applied only to tangible things capable of being physically destroyed and not choses in action or other intangibles, even then only to those tangibles which are shown to the satisfaction of the court, to relate to the offence.

There is another instance where the procedure for confiscation could augment that of forfeiture. The court was satisfied that the accused were professional drug traffickers, and consequently, if the legislation which is recommended were in force a notice of confiscation served on them would have placed the onus on them of proving beyond reasonable doubt that those funds were not obtained as a result of trafficking in drugs. If the proceedings in Cuthbertson and Ribeyre had been taken against the appellants under the provisions of the Customs Act of Australia there seems to be no doubt that the provisions of this Act are wide enough to have ensured a forfeiture of the moneys involved.

CHAPTER THREE: CONFISCATION

Once it is accepted as a matter of policy that the criminal should not be allowed to profit from his crime especially where the health of innocent citizens are jeopardized in order to reap these profits, it is but a short step to agree that there is nothing inherently wrong in depriving him of the proceeds (whether direct or indirect) of that crime.

Confiscation, though eminently desirable, is however most likely to be more particularly relevant in two distinct types of situations. The first is where the transaction which yields the profit is itself illegal; and the second situation arises where the transaction itself is lawful, but the profit is boosted by illicit means; the sale of prohibited drugs, the sale of pornographic material and the transportation of illegal immigrants. Attempts to confiscate profits are likely to meet with the approval of a large section of a country's population, especially where the transaction which yields the profit is illegal.

Legislation to deal with the second type of case may not, however, evoke the same level of support. For example the manufacturer who ignores pollution controls, or illegally discharges waste may increase his profits tremendously, so also may the owner of a "listed" building who demolishes it in order to obtain an increased purchase price of the vacant site. But in this type of case the conscience of the community is not similarly aroused to the same degree of reprehension. Nevertheless, it is suggested that these types of cases could at some later stage, also be considered suitable for the application of confiscatory legislation.

Confiscation may in theory be achieved by the simple process of imposing an appropriate fine. But as the Canadian experience has revealed, the expectation of the law maker and the public, may not always be satisfied by the level of fines which have been imposed. In addition a number of problems have been identified which could severely curtail the effectiveness of using fines for this purpose. These can be classified under two headings: ineffective information gathering procedures and means of enforcement.

It need hardly be emphasised that before a suitable fine can be imposed, the procedure for gathering information in most Commonwealth countries would have to be strengthened and improved. The essence of confiscation is that the accused is thought to have acquired assets to which he is not justly entitled; it is of great importance therefore that accurate facts concerning the size of the profits are placed before the Court and this can only be done effectively and satisfactorily by painstaking investigation which is likely to prove costly both in terms of time and money. Since the resources of most Commonwealth countries may be unable to withstand the cost both in terms of finance and in manpower, the result of a poorly undertaken investigation may be to supply the court with inaccurate and/or insufficient facts.

As far as the means of enforcement are concerned, many of these offences are triable summarily and it frequently happens that the profits of the crime far exceed

the maximum fine which the court is empowered to impose. The answer here is surely either to increase the fine which may be imposed or to state a minimum but no maximum leaving it to the discretion of the magistrate, in the light of evidence disclosed at the hearing, to use his discretion in the matter.

One further problem is also very real, as local experience shows. The fine is expressed in terms of a sum of money. The offender may choose not to pay it, preferring instead to serve a term of imprisonment and hope that he will be able to enjoy the fruits of his crime in addition to accrued interest on his release from prison. In order to avoid this, the procedure for confiscation should be set in motion in order that a full-scale investigation may be undertaken.

One of the most crucial aspects of any attempt to confiscate property is to be found in the procedure to be followed by the court which is required to order confiscation. In examining the procedure adopted both in the United States of America and also in Australia, it will be seen that great care has to be taken to evolve a set of rules which will deal with the multifarious problems which can arise in interpreting legislation which confers general powers of confiscation. The Australian legislature has adopted a fairly detailed code which is specifically geared to the confiscation of drug related offences; and it would seem that a procedure which is aimed at a specific type of offence is easier to administer.

The power of confiscation would be restricted to the more serious offences since elaborate and expensive procedures are generally required for purposes of computing the illegal gains to be confiscated. But where it can be shown that substantial profits are being made from what are still regarded as relatively minor offences, the power of confiscation could be extended to them.

Ministers may wish to consider generally whether legislation providing for the confiscating of the proceeds of certain crimes ought to be introduced, and for what types of crimes. The Commonwealth Fraud Officer could be requested to consult and to prepare a draft to be circulated among Members. It is suggested that confiscation should aim initially at the illicit profits of transactions where the transaction is illegal per se. Where the immediate proceeds are sold, exchanged or transferred that other property should also be subject to confiscation, with adequate safeguard to protect the interest of innocent third parties and creditors of the accused.

It ought to be borne in mind that confiscation could be opposed as a matter of principle. There will be many persons who, though not applauding the activities of those whose property is to be confiscated, nevertheless feel that it is wrong in principle to confiscate property after the offender has been suitably punished for his crime. And this line of attack is likely to be even more vocal when attempts are made to confiscate the proceeds of crime even where, as is recommended, the accused is not found guilty of any recognised crime.

There is a school of thought which subscribes to the view that the criminal law should proceed on the assumption that persons should be found guilty of offences in open court, and the sentence determined there and then in order that the criminal may know what price he has to pay to expunge his debt to society; and that at completion of the sentence that should be the end of the matter. It is also felt that in many instances an attempt to attach the indirect proceeds of crime may prove unworkable in practice; an obvious example being where the criminal who has served his sentence subsequently decides to describe his criminal activities in print or write his memoirs. In addition, it has been urged that confiscation aimed at the indirect proceeds of crime in certain cases such as the publication of past criminal activities could lend to a great number of undesirable effects if, in order to circumvent confiscation provisions, details of a crime could be passed to and published by the criminal's children or other relations.

These points of view, justifiable though they may be, should not be permitted to detract from the great social ills which are inflicted on society generally by the perpetrators of drug-related and white-collar crimes; and although it may not prove possible to bring every conceivable serious crime within the pale, these criticisms should not deter Governments from passing legislation, with adequate safeguards, to combat the spread of these dangerous activities.

CHAPTER FOUR: UNITED STATES EXPERIENCE

The two main legislative provisions which provide for forfeiture, as a result of criminal offences, in the United States are contained in the Racketeer Influenced and Corrupt Organisations Act (18 U.S.C. 1962, 1963), and the Controlled Substances Act, Continuing Criminal Enterprise Offense (21 U.S.C. 848). They are provisions which were inserted in two Federal statutes, and are absolutely dependent upon a conviction of the accused of the substantive offences created by the particular piece of legislation.

(a) The Racketeer Influenced and Corrupt Organisations Act, (RICO)

This Act was enacted by the Congress of the United State on October 19, 1970. Its aim was to seek the eradication of organised crime in that country by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organised crime.

Although the Act has been drafted very broadly, both writers and courts in the United States have, on the basis of its legislative history, attempted to limit its application to situations where a legitimate business (as opposed to an unlawful or illegal business) is used or acquired in violation of the statute, and its forfeiture provisions have been confined to the holdings of the accused in legitimate business enterprises. This interpretation is sought to be justified on the additional ground that when the Bill was being debated, the Congress of the United States expressed deep concern about the effect which organised criminal activities were having on the country's economy.

The statute provides that any person who commits certain crimes as part of a pattern of racketeering activity from which he acquires, with dirty money, or by illegal acts, or illegally uses, an interest in an enterprise affecting commerce, shall, upon conviction, forfeit that interest in the enterprise and everything which affords a source of influence over the enterprise. It creates several new offences, and provides substantial criminal penalties, including mandatory forfeiture of interest acquired in violation of the Act.

Each criminal provision of RICO expressly applies to "any person", defined as: "any individual or entity capable of holding a legal or beneficial interest in property". Based on this language, the courts have held that RICO is not limited in its application to members of traditional organised crime families. The conduct of the accused is punished irrespective of his status.

RICO lists twenty-four Federal and eight State felonies which are considered to be "racketeering activities" within its provisions. These were chosen because they were thought to be typical of organised crime. They are:

State Felonies

1. Murder
2. Kidnapping
3. Gambling
4. Arson
5. Robbery
6. Bribery
7. Extortion
8. Dealing in Narcotics or Dangerous Drugs

Federal Felonies

9. Bribery
10. Sports Bribery
11. Counterfeiting
12. Theft of Interstate Shipment
13. Embezzlement of Pension and Welfare Funds
14. Extorting Credit

15. Transmitting Gambling Information
16. Mail Fraud
17. Wire Fraud
18. Obstructing Justice
19. Obstructing Criminal Investigation
20. Obstruction of State or Local Law Enforcement
21. Interference with Commerce through Robbery or Extortion
22. Racketeering
23. Transporting Wagering Paraphernalia
24. Unlawful Welfare Fund Payments
25. Conducting Illegal Gambling Business
26. Interstate Transportation of Stolen Property
27. White Slave Traffic
28. Illegal Payments to Labour Organisations
29. Embezzlement from Union Funds
30. Bankruptcy Fraud
31. Fraud in Sale of Securities
32. Felonious Manufacturer or Other Dealing in Narcotic or Dangerous Drugs

Any combination of these crimes can form a "pattern of racketeering" activity, which is defined as:

> " ... at least two acts of racketeering activity, one of which occurred after the (Act was passed) and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior set of racketeering activity".

The definition does not discuss the need for some connection between the crimes used to form a pattern, but it is submitted that simply proving that two of the thirty-two crimes listed were committed with a ten-year period should not be enough to establish "a pattern" of racketeering. There should have been some continuing activity. It is also suggested that the separate acts of racketeering must have had a similar method of commission, or must otherwise be related and not isolated events in order to form a pattern.

One line of authority in the United States holds that something more than accidental or related instances of prescribed behaviour is required, whereas another view is that any two acts of racketeering activity are sufficient for a conviction if they fall within the time limits set out in the Act. It would seem that by failing to define the word "pattern" the draftsmen left the matter to be decided by the trail Court as a question of fact, but this lack of definition has itself created problems.

The word "enterprise" which is very significantly one for the purpose of the Act, is not exhaustively defined, but it includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity. Business and labour unions, Government units, and even foreign enterprises are considered to fall within the definition.

Courts disagree over whether the term "enterprise" includes illegal combinations of individuals associated solely to engage in racketeering activity. But although the expression has received a very liberal interpretation, it is doubtful if it could be held to extend to strictly criminal organisations, on the ground that in passing the legislation, Congress would obviously have had in mind the infiltration by racketeers of legitimate business activities.

The Statute in effect creates three new main offences. They are:

(i) Using or investing, directly or indirectly, any income or proceeds of income, derived directly or indirectly from a pattern of racketeering activity; or collection of an unlawful debt or to acquire an interest in or to establish or operate, an enterprise

This provision which is loosely referred to as the "dirty money" section makes it an offence to invest the proceeds of racketeering activity in an enterprise, and it was designed to penalise the "laundering" of money. The invested funds must be derived from a pattern of racketeering activity or collection of an unlawful

debt, and the investing party must have participated in the predicate crime as a principal. Canadian researchers found that only a proportion of those who knowingly invest "dirty money" are subject to prosecution, and state that the section has been largely unsuccessful in dealing with the problem at which it was aimed, principally because of the difficulty of proving the offence. It contains no investigative aids or legal presumptions to assist in proving the offences.

Proving this offence requires tracing, and the method of tracing is to show a direct connection between the dirty money and the acquisition of the interest in the legitimate business enterprise. But since RICO is a criminal statute, and since every element of a crime must be proved beyond reasonable doubt, the tracing requirements of this provision have proved to be very demanding, and at times, well nigh impossible.

(ii) Acquiring an interest in, or control of, any enterprise through a pattern of racketeering activity or collection of an unlawful debt

This provision covers the illegal acquisition or maintenance of an interest in an enterprise. Examples in which has variously been used to prosecute offenders who have been caught in illegal acts include: the taking over of a business by a loan shark; a massive mortgage fraud scheme; extortionate "muscling in" on legitimate companies; and a system of "kickbacks" involving medical laboratories.

Basically, this provision makes it a crime to acquire an interest in, or control of, an enterprise by illegal acts of racketeering. "Elbowing" into an enterprise by extortion, bribery, or by any combination of the thirty-two crimes listed above is the gist of this offence.

(iii) Being employed by, or associated with, an enterprise and participating in the conduct of its affairs through a pattern of racketeering activity, or collection of an unlawful debt.

This sub-section is widely drawn, and it has been interpreted equally widely. It covers situations where a person is operating inside a legitimate enterprise on behalf of a syndicate, and is also used successfully to prosecute criminal gangs, or strictly illegal enterprises. Actual prosecutions under this provision have been concerned with corruption of public officials, labour racketeering groups of persons who are regarded to be "associated in fact" with such illegal activities.

The criminal forfeiture provision under RICO is mandatory, but narrow. Unlike section 848 the convicted person does not forfeit his profits, but only his interest in the enterprise and everything affording a source of influence over the enterprise.

(b) The Controlled Substances Act, Continuing Criminal Enterprise Offence, (Section 848)

This piece of legislation was passed on 27 October 1970, eight days after RICO was enacted. Its main aim was strengthen law enforcement authority in the field of drug abuse, and in particular to severely punish the professional drug trafficker, hence the mandatory criminal forfeiture provision which it contains. It provides that a "lender", who in concert with five or more followers commits a Federal drug felony as part of a continuing series of Federal drug crimes from which he obtains substantial income or resources, shall forfeit upon conviction, his profits, any interest in, and everything affording a source of influence over, the enterprise.

Unlike RICO, which can apply to any person in a criminal enterprise, section 848 is strictly limited to organisers, supervisors or managers. An organiser is a person who puts together people engaged in separate activities and arranges them in one operation or enterprise, whereas a supervisor is regarded as one who manages, directs, or oversees the activities of others. An accused need occupy only one of these three positions, but a criminal organisation can have more than one organiser, supervisor or manager, so that it is possible to find more than one leader in an organisation, who may be liable to prosecution.

Before he can be found guilty of a violation of section 848, the "Leader" must commit certain crimes "in concert" with five or more of his followers, and the words "in concert" have been interpreted by the Supreme Court of the United States to require an agreement between the "Leader" and five or more of his followers to commit drug crimes. The lack of personal contact between them is no defence if they agree to act in concert, and the "Leader" and his followers need never be present in the same location, nor need the crimes which they are accused of having committed in concert, occur at the same place. Similarly, they need not be acting together at any precise moment in time, it is sufficient if they work in concert during the life of the enterprise.

Unlike RICO which relies on a wide variety of Statute and Federal crimes in order to establish a pattern of racketeering activity, section 848 depends entirely upon the repeated commission of Federal drug felonies to establish a continuing criminal enterprise. The drug felony relied on by the prosecution must be part of a continuing series (i.e. three or more) of Federal drug violations which must endure or span a definite period of time, with a single or substantially similar purpose.

The final criminal element of a section 848 offence requires proof that the accused obtained substantial income or resources from the continuing criminal enterprise. The word "substantial" means of real worth and importance, and "income" includes money or other property. Gross income is sufficient proof that the accused obtained substantial income, it is not necessary to identify any accumulated gain or net profit made by him. The jury is invited to conclude that the accused obtained substantial income from the drug enterprise simply by considering his position in the organisation, the volume and value of drugs transferred, and the sums of money which have changed hands.

Mandatory forfeiture of all profits is one of the penalties imposed by section 848, and the burden is on the Government to prove what property, interests or contractual rights of the accused are forfeitable. Since the provision is directed too high for him to continue in operation, he is required to forfeit all illegal profits no matter how disguised or where invested. The section does not define "profits", but the likely interpretation should include all financial gain of any kind realised by the accused from the illegal drug enterprise. The method of proof most likely to be acceptable in forfeiture proceedings under the section would be one which would measure the net worth of the accused over a given period of time. Unless this gain can be proved to be attributable to legitimate sources of income, it is presumed to represent profits from illegal drug trafficking.

The forfeiture provisions of section 848 also extend to any interest which the accused has in, or claim against, the enterprise; and also to any property or contractual rights of any kind which afford him a source of influence over the enterprise. This provision has proved to be extremely useful in obtaining convictions against the "Leaders" of crime who amass fortunes, rather than the street pedlars who are constantly being caught and prosecuted, but easily replaced by virtue of the vast resources available to the "Leaders".

(c) Comparison of the two Statutes

A comparison of the effect of the two statutes is shown here at a glance.

RICO	848
ANY PERSON who commits	A LEADER who IN CONCERT WITH 5 OR MORE FOLLOWERS commits
CERTAIN CRIMES As part of a	A FEDERAL DRUG FELONY As part of a
PATTERN (2 or more) of RACKETEERING from which he	CONTINUING SERIES (3 or more) of FEDERAL CRIMES from which he
ACQUIRES WITH DIRTY MONEY	

confiscation to seize and/or trace any other property which cannot be securely linked to the commission of any specific offence, but which is nonetheless clouded with suspicion. Finally Ministers may also wish to consider whether all powers of forfeiture should not also contain a provision relating to seizure and disposition; or whether a general power as to seizure and disposition should be provided in new legislation, which would include some machinery whereby this power may be effectively utilised.

(c) Analysis of three recent cases

In Regina v Ribeyre,[8] Taylor J, sitting with O'Connor L.J. and Neil J. in the Court of Appeal (Criminal Division) held that an order which had been made under section 27(1) of the Misuse of Drugs Act, 1971 forfeiting the cash proceeds of the sale of drugs was made without jurisdiction where a person had been convicted of having drugs in his possession with intent to supply. Like the House of Lords in R v Cuthbertson,[9] the Court interpreted the words of section 27(1) as relating strictly to the offence of which the person was convicted, and therefore found that since the appellant would not have required his "working capital" for the act of selling drugs, the money was accordingly not "anything shown ... to relate to the offence".

As will be pointed out later one of the aims of national and international policy is to strip the offender of his profits, but most legislation so far passed does not seem to have addressed this specific point with sufficient accuracy. It is in cases of this nature that the tracing provisions contained in legislation which has been enacted in the United States and Australia could be most usefully employed. Under these provisions the assets and bank account of the appellant could have been investigated, the difference in amount over a period noted, this would presumably have raised a presumption on the balance of probabilities that the money was acquired as a result of the sale of drugs, thus throwing the onus on the appellant to prove beyond reasonable doubt that it was not so obtained.

In R v Uxbridge Justices,[10] the accused was found with foreign currency notes on him, and he was charged and convicted on six counts of dishonestly handling, and one count of corruption. The police had seized not only the coins found on the accused but also a considerable quantity of Bank of England, Bank of Clydesdale and Fijian notes which had been found at his home. However, because the owners of the currency found at his home were not known he successfully applied to have those returned to him.

The facts showed clearly that the accused was in the habit of frequenting Heathrow Airport where he unlawfully obtained foreign currency. While the notes found at his home could not have been the subject of seizure on the technical ground that they could not be proved to relate to the offence of which he was convicted, it was, it is suggested, nevertheless as clear a case as any for confiscation. Legislation should provide that in cases of this nature, notice of confiscation should be served on the accused, and the Crown/state should prove on a balance of probabilities that the money had been obtained as a result of criminal activity. The conviction of the accused should be sufficient to raise that presumption. The onus would then shift on the accused to show beyond a reasonable doubt that the currency was not obtained as a result of criminal activity.

The third case which has revealed the weakness of current English legislation is R v Cuthbertson. In that case, the House of Lords, in interpreting s.27 of the Misuse of Drugs Act, 1971 felt that the question of forfeiture should not be approached with any preconception that Parliament must have intended the section to be used as a means of stripping professional drug traffickers of the whole of their ill-gotten gains, however laudable that conclusion might appear to be. Their Lordships accepted the submission that forfeiture under the provisions of the statute was limited to the accoutrements of the crime i.e., the tools, instruments or other physical means used to commit crime.

In the case it was also clear that the accused persons had accumulated considerable sums of money by illegally manufacturing dangerous drugs, yet the proceeds of their crime were kept out of the reach of the forfeiture provisions of

the maximum fine which the court is empowered to impose. The answer here is surely either to increase the fine which may be imposed or to state a minimum but no maximum leaving it to the discretion of the magistrate, in the light of evidence disclosed at the hearing, to use his discretion in the matter.

One further problem is also very real, as local experience shows. The fine is expressed in terms of a sum of money. The offender may choose not to pay it, preferring instead to serve a term of imprisonment and hope that he will be able to enjoy the fruits of his crime in addition to accrued interest on his release from prison. In order to avoid this, the procedure for confiscation should be set in motion in order that a full-scale investigation may be undertaken.

One of the most crucial aspects of any attempt to confiscate property is to be found in the procedure to be followed by the court which is required to order confiscation. In examining the procedure adopted both in the United States of America and also in Australia, it will be seen that great care has to be taken to evolve a set of rules which will deal with the multifarious problems which can arise in interpreting legislation which confers general powers of confiscation. The Australian legislature has adopted a fairly detailed code which is specifically geared to the confiscation of drug related offences; and it would seem that a procedure which is aimed at a specific type of offence is easier to administer.

The power of confiscation would be restricted to the more serious offences since elaborate and expensive procedures are generally required for purposes of computing the illegal gains to be confiscated. But where it can be shown that substantial profits are being made from what are still regarded as relatively minor offences, the power of confiscation could be extended to them.

Ministers may wish to consider generally whether legislation providing for the confiscating of the proceeds of certain crimes ought to be introduced, and for what types of crimes. The Commonwealth Fraud Officer could be requested to consult and to prepare a draft to be circulated among Members. It is suggested that confiscation should aim initially at the illicit profits of transactions where the transaction is illegal per se. Where the immediate proceeds are sold, exchanged or transferred that other property should also be subject to confiscation, with adequate safeguard to protect the interest of innocent third parties and creditors of the accused.

It ought to be borne in mind that confiscation could be opposed as a matter of principle. There will be many persons who, though not applauding the activities of those whose property is to be confiscated, nevertheless feel that it is wrong in principle to confiscate property after the offender has been suitably punished for his crime. And this line of attack is likely to be even more vocal when attempts are made to confiscate the proceeds of crime even where, as is recommended, the accused is not found guilty of any recognised crime.

There is a school of thought which subscribes to the view that the criminal law should proceed on the assumption that persons should be found guilty of offences in open court, and the sentence determined there and then in order that the criminal may know what price he has to pay to expunge his debt to society; and that at completion of the sentence that should be the end of the matter. It is also felt that in many instances an attempt to attach the indirect proceeds of crime may prove unworkable in practice; an obvious example being where the criminal who has served his sentence subsequently decides to describe his criminal activities in print or write his memoirs. In addition, it has been urged that confiscation aimed at the indirect proceeds of crime in certain cases such as the publication of past criminal activities could lend to a great number of undesirable effects if, in order to circumvent confiscation provisions, details of a crime could be passed to and published by the criminal's children or other relations.

These points of view, justifiable though they may be, should not be permitted to detract from the great social ills which are inflicted on society generally by the perpetrators of drug-related and white-collar crimes; and although it may not prove possible to bring every conceivable serious crime within the pale, these criticisms should not deter Governments from passing legislation, with adequate safeguards, to combat the spread of these dangerous activities.

status quo, but then the other question which arises is why should the accused be permitted to retain funds if he can't make use of them for example to meet his attorney's fees? In the Chief Constable of Kent, Lord Denning, M.R., gave it as his opinion that the accused could apply for funds for reasonable expenses, including attorney's fees, and it is suggested that this interpretation of the powers of the court on an application by the accused, is to be preferred.

The provisions which the statutes contain for Civil forfeiture are worthy of adoption. In fact the Court of Appeal in the Chief Constable of Kent had no doubts that the procedure adopted in that case was proper. As has been stated the matter is not free from doubt for various reasons, and consequently clear legislation on the matter is required. Every act of seizure should be followed by formal condemnation either in forfeiture proceedings or by confiscatory action and it should clearly be stated that forfeiture or confiscation should relate back to the date of the act or event from which the forfeiture accrued.

The RICO Statute authorises the Attorney General of the United States to seize all property or interests which have been declared to be forfeited under the statute. It is recommended that such a formal step be also included in any proposed legislation relating to forfeiture or confiscation. One of the criticisms levelled at s.27(1) of the Misuse of Drugs Act, 1971 is that no machinery whatever is provided by the section for affecting the assignment of choses in action or creating and realising the charges on real and personal property which following the assets in this kind of way would entail. It is suggested that clear guidelines be laid down in any proposed legislation.

CHAPTER FIVE: CANADIAN EXPERIENCE

A Canadian evaluation of RICO was published in October 1980 under the heading "Business of Crime", by the Ministry of the Attorney-General of the Province of British Columbia. It's purpose was to examine the United States legislation and to assess the desirability of incorporating provisions similar to those contained in the RICO Statute into Canadian law. The study was undertaken in four parts: first, the extent of enterprise crime found in Canada was examined; secondly, consideration was given to existing provisions in Canadian law which could be used against that type of criminal activity in a way similar to the RICO statute; thirdly, an analysis was made of the RICO Statute in order to determine its effectiveness and also to identify problems in its operation; and fourthly, an assessment was made and recommendations formulated.

(a) The Extent of Enterprise Crime

The Report suggests that there are four essential elements included in the concept of a criminal enterprise, namely:

(1) Planning and organisation of criminal activity;
(2) A succession of criminal acts, and some degree of continuity of organisation;
(3) Rational behaviour, i.e., a conscious acceptance of the risks inherent in the activity; and
(4) the pursuit of financial gain.

It then goes on to examine seven major criminal activities for which RICO had been designed and for which it had been extensively used, viz: Narcotics; Loansharking; Gambling; Labour corruption; Criminal gangs, such as motorcycle gangs; "White-Collar" or Commercial crime; and the "Laundering" of money and infiltration of legitimate business. In the case of narcotics, for example it quoted police source as estimating that nearly $1.5 million per day is spent in Canada to purchase narcotics, and pointed out that the criminal justice system in that country does not provide any adequate means of confiscating the immense profits made by drug importers and traffickers.

Loansharking, the lending of money at usurious rates of interest, was found to be one of enterprise crime's most lucrative activities in Canada, with estimated

profits of over $40 million in the Montreal urban community in 1976. The researchers were of the view that although a 1980 amendment to the Canadian Criminal Code, when proclaimed could be an effective tool in dealing with loansharking activities, there was still room for improvement in that area, and gave as an example the fact that the the amending Bill did not deal with the taking over by loan sharks of legitimate business.

It was found that there was a tendency for the courts to treat gamblers leniently, partly because the gambling laws permit and even encourage certain types of gambling under certain circumstances, and also because gambling cases are not presented to the courts as one part of a possible multi-faceted criminal enterprise. Labour corruption was regarded as being less common in Canada, however this type of corruption could increase beyond its current level, since historically social and criminological phenomena often appeared in the United States several years before they were visible in Canada.

In examining the activities of motorcycle gangs, the report pointed to the profitability of the legal activities undertaken by gang members, and lamented the fact that the criminal law did not focus on the activities of the gang itself, but rather on the activities of the individuals who form part of that gang. It was found that "white-collar" crimes are very lucrative, so that if the estimated losses to business which was projected by United States law enforcement authorities (valued at three per cent of the gross National Product) were applied to Canada, this would amount to $6.3 billion annually. It was also felt that the incidence of this class of crime, namely: stock market frauds, fraudulent bankruptcies, frauds on Government and computer crimes was bound to increase, because of the increased opportunities provided by the growing complexity of the economic system and an increasing reliance on technology.

Finally under this head, the report examined various ways in which "laundering" of money obtained by crime takes place in order that it be made to appear that it was obtained legally, and its subsequent investment in legitimate business enterprises. As a secondary activity which flows from prior criminal activity, the researchers found that the criminal justice system is mainly directed towards the predicated criminal offences to the exclusion of these secondary activities, and warns that if left unchecked, these avenues could be used to monopolise complete sectors of the economy and to influence and corrupt politicians.

(b) Existing Criminal Law in Canada

The report states (not altogether surprisingly) that nothing in existing Canadian criminal law is expressly designed to provide for the types of remedies needed for the forfeiture of illicit profits on conviction. It points to a number of provisions in the Criminal Code which are designed only to remove from the hands of convicted persons, objects whose possession is unlawful, but all those mentioned are tangible objects. And even the general forfeiture provision contained in section 446 of the Criminal Code itself was seen to refer to a tangible and portable object. Intangibles, such as shares in a company, or an interest in a partnership or money in a bank account cannot be forfeited. Similarly things which are not portable, (i.e., capable of being brought before a Justice) such as real estate do not appear to fall within the terms of the section.

(i) Narcotic Control

Under the provisions of the Narcotic Control Act there is a limited power to forfeit the proceeds of illegal narcotic sales, for a police officer may seize any thing by means of or in respect of which he reasonably believes an offence under the Act has been committed, or any thing which may be evidence of the commission of such an offence. Since the primary purpose of such seizure is to gather evidence for the prosecution of the accused, it would seem that only things which are capable of being tendered in evidence may be seized. Moreover the Report points out that since the language of the Act appears to require proof that the actual bills seized were obtained from the purchaser of the narcotics; a money order, into which the cash had been converted could not be seized, with the result that large quantities of cash seized from persons who have been convicted of drug trafficking or importation, frequently had to be returned to the accused or his lawyer.

Other statutes mentioned which create criminal offences containing forfeiture provisions which are also equally limited in effect are the Food and Drugs Act, the Customs Act and the Excise Act. The Criminal Code contains a general provision which provides for the forfeiture of tangible portable objects which have been seized pursuant to the issue of a search warrant under the Code; but the object must be brought before a Justice of the Peace who, on being satisfied that it is no longer required for purposes of investigation or trial, and that it is in the unlawful possession of the person from whom it was seized and that the lawful owner is not known, may issue an order for forfeiture. Here again this general power is severely limited, as it excludes intangibles, such as shares in a corporation or an interest in a partnership, and in fact anything which cannot be physically brought before a Justice of the Peace.

(ii) Laundering Money

The Report examines the difficulties which are encountered in successfully prosecuting persons who have been accused of "laundering" money. An amended provision of the Criminal Code is identified as the anticipated antidote.

The section reads as follows:-

"s.312 (I) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment, or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment."

The purpose of the amendment was to provide an offence which would cover the laundering of funds and the importation of "dirty money" into Canada; but no evidence of its use for this purpose has been found. It is however frequently used to prosecute persons who are found in possession of stolen property, because of the difficulty of proving the origin of the funds, and the absence of a provision which places the onus on the accused to prove beyond reasonable doubt that the funds were legally acquired. It has been found that two further weaknesses limits its usefulness viz:- it depends on the concept of possession, and it does not contain any forfeiture provisions.

(iii) Sentencing forms

Despite the fact that there is no limit in Canadian criminal law to the size of fine which may be imposed for an indictable offence, the Report did not find frequent use being made of this power even when truly serious enterprise crimes had been committed. Judges were reluctant to impose fines in addition to lengthy jail sentences even where the evidence revealed that the profit from the crime must have been enormous.

The following illustrations are given:-

For example, in a case in which the convicted persons were "the wholesale supply source of capped heroin for the Vancouver market" the Trial Judge sentenced two of them to 15 years' imprisonment and a fine of $10,000. The British Columbia Court of Appeal increased these sentences to life imprisonment but two of the three judges refused to impose any fine at all on the men. In another case, a man who was caught importing between $1 million and $2 million worth of marijuana was sentenced to imprisonment for eight years, but neither the trial Judge nor the Newfoundland Court of Appeal imposed a fine. A group of people found in possession of between $3.5 million and $4.5 million worth of heroin were each sentenced to 20 years' imprisonment, no fine was imposed although the evidence had demonstrated that at least $261,000 had been sent by the group to Hong Kong within a five-week period.

(c) Application of RICO to Canada

The researchers identified certain advantages, disadvantages and difficulties in implementing a statute similar to RICO in Canada. It was felt that it would be an advantage to be able to focus criminal proceedings on an organisation rather than on an individual as at present, and that this could be effectively used to combat the use or acquisition of legitimate business enterprises by persons involved in criminal activities. They also regarded the forfeiture provisions as helpful to the State, both as a means of removing the profit incentive from criminal activity and of depriving organised crime of its ill-gotten gains, and also in permitting the State to recover from criminal organisations at least part of the cost of investigations and prosecutions. The civil forfeiture provisions of RICO were also considered to be advantageous as they allowed action to be taken in cases where the evidence was insufficient for a criminal prosecution, they compensated the victim, worked as an economic punishment to the accused and most importantly they prevented the unjust enrichment of the individual.

The disadvantages were considered to be the cost in court time and money of prosecutions, and the constitutional difficulty which could be encountered because of the absence of jurisdiction in the Federal Government either, if civil forfeiture provisions were passed on their own, or if they were engrafted on to the criminal provisions as part of the penalty. The researchers perceived one area of particular difficulty in the high burden of proof placed on the Crown to prove the origin of funds involved in racketeering activity since the "tracing" of the money back to the criminal activity is well nigh impossible. In order to obviate this difficulty the Report recommended the introduction of a reverse-onus provision, which would place on the accused the burden of proving on the balance of probabilities that the money was not derived from racketeering activity once the Crown had demonstrated that the accused had participated in racketeering, and had accumulated assets of substantial value during that period.

(d) Recommendations of Evaluators

The Report found that the RICO statute had the potential to become an effective weapon in the fight against crime, because it provided the prosecution with a novel way of illustrating to the court and the public the economic underpinnings of organised crime, and recommended that Canada adopt similar legislation. The enactment of the RICO Statute as a separate piece of legislation did not find favour, it was recommended instead that the new legislation be incorporated into the Criminal Code. The Researchers did not favour the adoption of the Civil provisions, and warned that since the possibility of inappropriate or abusive prosecutions will always exist, consideration should be given to a requirement that the Attorney-General of a Province or his deputy must consent to any such prosecution. This last recommendation is one which requires careful consideration if the lack of investigatory support is not to detract the attention of the police away from the "leaders" to the "small men".

CHAPTER SIX: AUSTRALIAN EXPERIENCE

(a) Introduction

Recent amendments to the Customs Act of Australia, and in particular those effected by the Customs Amendment Act, 1979 (No.92) have greatly strengthened the hands of the law enforcement agencies in that country, by introducing stricter methods of investigation and proof, and tougher methods of seizure and confiscation for offences relating to narcotic drugs. The use of listening devices has been authorised, subject to certain safeguards which are designed to protect the right of the citizen; the forfeiture proceedings have been strengthened by shifting the burden of proof; and stringent provisions are made for confiscating the indirect proceeds from dealings in narcotic drugs by the recovery of pecuniary penalties.

(b) Use of Listening Device

A member of the Australian Federal Police who is making narcotic enquiries is empowered to use a listening device to listen to or record words while they are being spoken if the speaker would reasonably expect the words to be heard by the Officer; or if either the speaker's consent or a warrant has been obtained.

A Judge may issue a warrant authorising the use of a listening device if he is satisfied by information on oath given orally or otherwise, that a person has committed, or is reasonably suspected of having committed, or is likely to commit a narcotics offence; and that enquiries are being made in relation to the likely commission of that crime. A warrant, which must state at what times entry is authorised, and specify the period (not exceeding 6 months) during which it is to remain in force, may authorise entry into any premises (anywhere in Australia) in which the subject is, or is likely to be, in order to install, maintain, use or recover the device. the authority of such a warrant must be exercised by the Commissioner of Police himself, or by officers approved directly or indirectly by him; and it may be discontinued before the date of expiry if the Commissioner is satisfied that the grounds on which it was issued have ceased to exist.

The secrecy of information obtained in this manner is partially preserved for it is an offence under the Act to divulge or communicate that information to any other person; or to record or use it except for the purpose of those inquiries. But the Commissioner or any other officer authorised by him may communicate the information to other police officers for the purpose of investigating any offence committed against the laws of the country, which is punishable by a term of not less than three years imprisonment; and he may also communicate it to the Director-General of Security if he thinks that activities which are prejudicial to the security of Australia are disclosed by any information so obtained. Here indeed is a very wide power of eavesdropping; albeit for a morally justifiable purpose.

The wide power given to the police is partly limited by the duty imposed on the Commissioner to account to the Minister in respect of the use made of information obtained by them. The Commissioner must furnish the Minister with a copy of all documents obtained as a result of the issue of a warrant, and also a report in writing in respect of each warrant, indicating the use made of any information obtained by the use of a listening device, and where applicable, the persons (other than members of the police) to whom information so obtained had been communicated. This provision may have the salutary effect of restraining any excesses feared by members of the public, since questions may be addressed to the Minister where it is feared that the powers of the police are being abused.

All warrants and other instruments and documents must be retained in the records of the Australian Federal Police and are to be destroyed when no longer required.

(c) Forfeiture provisions

The forfeiture provisions allow for the proceeds of narcotic goods to be seized and forfeited. The section defines a "prescribed narcotics dealing" and then goes on to provide that any money or goods (which includes cheques) in the possession or under the control of a person, and which came into his possession or control by reason of a prescribed narcotics dealing are deemed to be forfeited goods and must be seized. If the money had been exchanged for goods or vice versa it must still be regarded in its new form to have been obtained by engaging in such a dealing. But goods must not be taken to have been purchased with, or out of such moneys unless the whole, or substantially the whole of the moneys were obtained by engaging in a prescribed narcotics dealing.

To this very drastic and comprehensive provision there are two main exceptions. Where the owner of the money or goods can prove to the satisfaction of the court that when the money or goods were seized he did not know and had no reason to suspect that the moneys or goods had been obtained by engaging in a prescribed narcotics dealing, the court must direct its return to him. Similarly, if the licensee of a warehouse can satisfy the court that he did not know either that goods stored in his warehouse were narcotic goods or that they had been imported

into Australia in contravention of the Act, any moneys or goods which have been seized must be returned to him.

In both these exceptions, it is suggested that the onus of proof which must satisfy the court should be proof beyond reasonable doubt; since the scheme of the Act seems to be geared towards raising presumptions in favour of the Crown where certain primary facts are shown to exist; seizing the property which is subject of the enquiry, and placing the onus squarely on the shoulders of the suspect to satisfy the court that his hands are really clean.

(d) **Recovery of pecuniary penalties**

The Act has perfected a very detailed procedure for imposing on drug offenders a pecuniary penalty which is designed to confiscate the proceeds of their crimes. It is not limited to offences for which the defendant has been convicted and extends to property acquired outside Australia. The court can hear evidence of the market value of the kinds of narcotics involved or the kinds of services provided; and it can take the difference in value of all the defendant's property before and after the transaction, or period of the transaction, as the value of the benefit derived from the sales of the narcotics. The onus is placed on the defendant of proving that the gains during that period were lawfully made; and the pecuniary penalty is fixed by reference to the defendant's turnover - not his net profit.

The court is empowered to appoint the Official Receiver to take all the defendant's property, and the Official Receiver may examine him in order to discover details of his property. The evidence disclosed cannot however be used against the defendant except for fixing the pecuniary penalty or for a prosecution for perjury. Where the court makes an order directing the Official Receiver to take control of any property, there is created on that property a charge to secure the payment of any pecuniary penalty which may subsequently be imposed. This charge is subject to any prior encumbrance on the property but it takes priority over all other encumbrances whatsoever, and is not affected by any change of ownership of the property.

This pecuniary penalty appears to be in substitution for, and not in addition to seizure. So that where the court makes an order directing a person to pay a pecuniary penalty in respect of goods which have already been seized, the penalty is deemed to be reduced by an amount equal to the value of the property at the time of seizure. If the penalty is paid the Government becomes liable to pay the person an amount equal to the value of the property, but the goods themselves are not returned.

CHAPTER SEVEN: THE INTERNATIONAL DIMENSION

The poor record of many countries in successfully prosecuting crimes which span the boundaries of more than one country is very marked in relation to drug-related and white-collar crimes. A concerted effort is therefore required if successful attempts are to be made to stamp out the incidence of these and similarly serious offences. National legislation and local law enforcement efforts seem to be adequate to cope with the small offender. It is, however, true to say that such legislations as at present exists in most countries fails to catch individuals or gangs which operate across national boundaries. And even where such individuals or gangs are eventually caught and specific items are seized, it is generally conceded that their profits remain by and large beyond the reach of the law.

Resolution 1980/21 passed by the Economic and Social Council of the United Nations which deals with financial assets and transactions related to illicit drug trafficking requested the Division of Narcotic Drugs to convene a working group of International Organisations and Bodies and Member States to examine the pertinent legislation, administrative measures, and law enforcement action already taken by some Governments, and to collate these in a form which could provide; and also to serve as a basis for improved international co-operation in this connection (See Appendix III).

This resolution had in mind the provisions of the single Convention on Narcotic Drugs, 1961 which was amended by a Protocol of 1972; Article 4 of which placed on the signatory States an obligation to take such legislative and administrative measures as may be necessary, to carry out the provisions of the Convention within their territories; to co-operate with other States in the execution of the provisions of the Convention; and to limit exclusively to medical and scientific purposes, the production, manufacture, export, import, distribution of, trade in, use and possession of drugs. Article 35 sketches out the action which is recommended to be taken against the illicit drug traffic, and Article 36 contains an outline of the penal provisions which could be incorporated in any legislation passed. (See Appendix I).

The Committee on Narcotic Drugs had already invited Governments by a circular letter in 1979 to provide information on existing legislation, and other law enforcement action against direct or indirect illicit activities involving narcotic drugs (See Appendix II). The response to this invitation revealed that the general practice appeared to be that the legislation was generally contained in the Penal or Criminal Code and also in Customs legislation; and there was an almost universal provision for the seizure and forfeiture of the drugs and other articles used in the actual trading operations; but that the trend was for the sanctions to apply only to the persons who were directly involved in the illicit operations, and did not normally extend to those who indirectly supported them whether financially or otherwise.

It is proposed that the ideal solution to the form of any new legislation should be that of an enactment which would deal specifically, and only, with the multifarious problems related to the stamping out of illicit drug traffic in all its forms; and it recommended that some sort of machinery should be set up for the inter-governmental exchange of information relating to convicted criminals, and of suspects, involved directly or indirectly in illicit drug trafficking. The matters which were suggested for inclusion in the proposed legislative and administrative measures are contained in Appendix IV.

Meanwhile the International Criminal Police Organisation (INTERPOL) has been paying growing attention to this matter. At the 49th INTERPOL General Assembly Session which was held in Nairobi in 1979, a resolution was passed assigning to the General Secretariat of the Organisation, the responsibility of gathering all available information from member countries regarding existing legislation which would allow for the seizure of assets derived from drug trafficking. The response to a questionnaire sent out in June 1980 indicated to the Secretariat that many countries were interested in working through the INTERPOL system to examine the greater use of existing legislation and/or to study new investigative approaches already existing; and contained the text of forfeiture legislation in force in many countries. The 50th INTERPOL General Assembly held in Nice in 1981, adopted a resolution which called on the Secretariat to organise a working seminar to discuss financial assets derived from drug trafficking, and this was convened in Saint-Cloud, France in February 1982.

Among the problems which will have to be faced in any attempt to enlist the international community in a concerted effort to eliminate or at least to reduce considerably the profitable activities of organised crime are those of definition and drafting. It is not generally agreed what sort of crimes (with the possible exception of narcotics and white-collar crimes involving fraud of large sums of money) should fall within this sphere; and it does not seem likely that there will be agreement on the attachment or confiscation of the indirect proceeds of criminal activity, especially where third parties are involved. In fact, but for the glaring evidence that drug trafficking is severely endangering the health and safety of our young, it is doubtful if consensus would have been reached on efforts to restrict the activities of illicit drug dealers.

As far as defining the criminal activity goes, probably to a greater extent in these cases than other areas of criminal activity, the determination of what activities should or should not be brought within the criminal law calls for a series of value judgments. And specifically with regard to legislation which would confiscate the indirect proceeds of crime there are certain to be many and conflicting views, as we have already seen. But an attempt must be made and the fact that many Commonwealth countries have seen it fit to pass legislation (albeit in

varying degrees) to combat drug-trafficking for example, is a clear indication that co-operation at that level could be confidently expected.

Many criminals nowadays, particularly those who are associated with organised crime, operate at an international level. The ease of modern communication permits almost instantaneous communication with most parts of the world. International travel is, in many instances, as free from restrictions as internal travel, and many countries of the Commonwealth depend on unrestricted travel for their economic survival. Trade patterns have also changed, and the move towards the formation of regional and sub-regional trading blocks operate in favour of the international operator whether legitimate or illegitimate. It is also a fact of life that certain organised criminal groups possess an international infrastructure and capability which permits them to function with ease in more than one country at the same time.

The Canadian evaluation revealed that the economic and social systems of the United States which have provided a fertile breeding ground for organised criminal groups are closely comparable to those in that country; and feared that organised crime was poised to take root there as well. The same may be said for many other Commonwealth countries. It is very important, therefore, that nations combine both their investigative and law enforcement efforts in order to meet the challenges posed by these well-organised groups.

Some of the obstacles to closer co-operation in combating organised crime on an international or even a Commonwealth basis are provided by the cases of R v Cuthbertson and Attorney General of New Zealand v Ortiz.[11] As the Cuthbertson case revealed, there could be a competing claim to the proceeds of crime both by the court of the country in which the criminal is tried and by that of the country in which the assets or other property is to be found. It has been suggested that this complication may be considered to be of lesser importance since the philosophical basis of confiscation is that the accused ought not to profit from his crime; and that the State need not benefit from it.

The problem will necessarily have to be resolved at some time and it may be that diplomatic rather than legal channels could provide the best avenue for a solution.

CHAPTER EIGHT: THE ROLE OF THE COMMONWEALTH FRAUD OFFICER

At their meeting held in Barbados in 1980, Ministers resolved to create the post of Commonwealth Fraud Officer with the following terms of reference:-

(i) to develop criminal intelligence systems between Commonwealth police forces and between Commonwealth and such other police forces as may be appropriate and to this end in a catalytic manner engender and enhance the flow of information to and between Commonwealth law enforcement agencies from both official and unofficial sources;

(ii) to liaise with ICPO-Interpol and such other international organisations as may be appropriate, and work closely with the liaison officers within the organisations concerned with the same areas of crime;

(iii) to gather and disseminate relevant information with particular regard to modus operandi and targeting exercises;

(iv) to assist in the development of appropriate training programmes, exchanges of police personnel and the publishing of existing training opportunities both within countries and organised by other international agencies;

(v) to assist in the facilitation of international investigations, inter alia with a view to the elimination of duplication of effort;

(vi) to assist in the creation of a Commonwealth Panel of Experts and to liaise as necessary between individual Commonwealth governments and members of the Panel.

The office has been approached for and has rendered assistance on several occasions in assisting to trace money in various countries. It has, for example, joined with the International Maritime Bureau in tracing the sum of U.S.$800,000 which was obtained by fraud. The matter was discussed with the Director of the Bureau and he has given preparatory assistance as to the people with whom the Bureau might work. The office did not get directly involved with tracing the money because no Commonwealth country was involved.

The officer is currently assisting the Government of Malaysia in tracing the individuals who have been involved in a fraudulent transaction amounting to $2.7 million (Malaysian) against the Malaysian Government. He is considering a request from the Government of Indonesia for assistance in tracing a very large sum of money which was fraudulently obtained in the context of a Development Aid Programme and which probably involves a Commonwealth country.

The office, at present, lacks the resources which are necessary to enable it to act as an effective tool in assisting the smaller Commonwealth territories in undertaking investigations, and to improve liaison with Member countries of the Commonwealth generally. By and large, therefore, the priority so far seems to have been in developing good relations with various Non-Commonwealth Governments and relevant International institutions, which in the long run will stand Member governments in good stead.

If, however, any of the recommendations made in this paper are adopted, Ministers may wish to consider what supporting staff are required and also whether the Commonwealth Panel of Experts ought to be activated. In the light of the decision of the Court of Appeal in Attorney-General of New Zealand v Ortiz, it is also suggested that the office should initiate co-operation among Member States of the Commonwealth so that legislation similar to that contained in the Fugitive Offenders Acts may be passed in order to facilitate the handing back of treasures which are illegally removed from one, and taken to another Commonwealth country.

CHAPTER NINE: SUMMARY OF RECOMMENDATIONS

Having considered the present English legislation; the Racketeer Influenced and Corrupt Organisations Act (RICO) and the Controlled Substances Act, of the United States of America; the Canadian Evaluation of RICO undertaken by the Ministry of the Attorney General of the Province of British Columbia, Canada; the Customs Act of the Commonwealth of Australia as amended; and other relevant materials, it is recommended that Law Ministers consider enacting legislation which will deal effectively with the forfeiture and confiscation of the proceeds, both direct, and indirect (where possible) of white-collar and drug related crimes. Neither the powers available under the common law, nor some recent endeavours at passing legislation have managed (with few exceptions) to provide the Crown/State with any significant weapon in its struggle against enterprise or organised crime, and in particular, in its attempt to confiscate the proceeds of criminal activity.

The legislation should make the important distinction between seizure, which is the process whereby before trial, property (both tangible and intangible) may be seized and preserved until the trial for the purpose of providing evidence of the crime, or for restoration to its legal owner or for the purposes of forfeiture or confiscation on the one hand; and forfeiture and confiscation, which should take place after trial, on the other. Forfeiture should be confined as at present to things which are used to commit crime and are before the court at the time of trial; whereas confiscation should refer to the means of tracing and attaching the indirect proceeds through changes in the character or destination of the property being followed.

Provision should be made after the property has been seized for the accused and innocent third parties whose property is affected to be permitted on application to make use of part of the property, where feasible, for limited purposes to be approved by the Court.

For the purposes of this special legislation an order of forfeiture should, as at present, be made at the trial and should be subject to such right of appeal as

may be allowed. A recommendation for confiscation could be made by the trial court and thenceforth the practice and procedure mentioned below should be followed. It should be stressed that the cornerstone of the confiscatory process will have been laid by the efficiency of the investigatory process which should begin even before seizure.

Where it is intended to confiscate property, notice to that effect should be given to the accused and to any other person who is known to have, or claim an interest in the property to be confiscated. The interests and the property should be specifically described and the party should be informed in order that he may be represented at the hearing by his legal representative if he so desires. A hearing should follow at which the Crown or State should prove on the balance of probabilities that the property or interest which has been recommended for confiscation was obtained by the defendant from the proceeds of, or in exchange for, other property or interests which have been proved to be the subject matter of a crime. It should not be mandatory for the defendant to have been convicted before the process of confiscation can be initiated.

Once the Crown/State has proved its case, the onus should then shift to the defendant to prove beyond reasonable doubt that the property or interest was not obtained as a result, direct or indirect, of criminal activity. Both parties should be given a right of appeal, and the decision of the first appellate court should be regarded as final. Provision should also be made for the third party who can prove that he was not aware of the proceedings for confiscation to apply to have the matter re-opened within a reasonable period of time.

The confiscatory process should take the form of summary civil proceedings without pleadings. Jury trial should not be available in these proceedings. Once notice of forfeiture is given in the stipulated manner, the matter should be adjourned to await the outcome of the criminal proceedings. But the acquittal of the accused on the criminal charge should have no bearing on the civil action for confiscation, since the reverse-onus clause would place the burden on the accused to prove beyond reasonable doubt that the moneys or other property were not obtained as a result of the forbidden illegal activity. Care should be taken to ensure that the judgment obtained will be enforceable in other jurisdictions on the basis of reciprocity.

The Fraud Liaison Officer with the assistance of the Panel of Experts could be asked to undertake the initial drafting for submission to Ministers. It is also recommended that the assistance of the International Police Association should be enlisted in the investigative process, since the resources of many Member States may not be able to bear the expenses involved in investigation.

Drug trafficking and white-collar crime are big business, organised to earn huge profits. The statistics relating to these crimes are staggering. The tendency of most enforcement procedures has been to seize the illegal products such as narcotics and other dangerous drugs; but the profits made have largely been ignored. The vast profits made from drug-related offences are used, for example, to buy silence from witnesses, to pay bribes, to expand into other illegal activities to move into new locations, to seduce more citizens into joining the ranks, and to pay for illegal expenses.

So long as these profits go untouched, lost workers and lost products can always be quickly replaced. Even with the leaders in jail their confederates continue the illegal practices with the profits left behind; and those who have been imprisoned quickly return to their old habits after release. They regard a period of imprisonment as an acceptable risk as long as their earnings are kept intact. Any serious attempt to stamp out these illegal practices must, therefore, have as its ultimate aim the seizure and confiscation of the profits and property which are the proceeds of these crimes.

Footnotes

1. [1981] 3 All E.R. 378

2. (1887) 16 Cox C.C. 245

3. [1968] 1 All E.R. 229

4. [1982] 3 All E.R. 26

5. See D.W. Fox, Applications to freeze Bank Accounts: Justice of the Peace (1982), p.229

6. Section 16

7. [1979] 2 All E.R. 510

8. Times Law Reports, 1 May 1982

9. [1980] 2 All E.R. 401

10. [1981] 3 All E.R. 129

11. [1982] 2 W.L.R. 10

Acknowledgements

I wish to acknowledge with thanks my indebtedness to the following individuals and sources for information contained in this paper:

Mr. David Chaikin, Lecturer in Law, London School of Economics and Political Science.

Mr. A.G. Nicol, Lecturer in Law, London School of Economics and Political Science and Secretary of the Committee on Forfeiture of Criminal Property of the Howard League for Penal Reform, who made available to me a copy of his "Introductory Memorandum" and his "Consultation Paper."

Mr. L.E. Sawyer, Director of Information Services, Ministry of the Attorney General of the Province of British Columbia, Canada, for providing me with a copy of the report entitled The Business of Crime - An evaluation of the American Racketeer Influenced and Corrupt Organisations Statute from a Canadian Perspective.

The Drug Agents' Guide to Forfeiture of Assets 1st edition by Harry L. Myers and Joseph P. Brzostowski Washington D.C. (1981).

Mr. Jeremy D. Pope and Dr. Barry A.K. Rider of the Legal Division of the Commonwealth Secretariat.

APPENDIX I

Single Convention on Narcotic Drugs, 1961
(as amended by the 1972 Protocol)

Article 4: General Obligations

1. The parties shall take such legislative and administrative measures as may be necessary:

   (a) To give effect to and carry out the provisions of this Convention within their own territories;

(b) To co-operate with other States in the execution of the provisions of this Convention; and

(c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

Article 35: Action Against the Illicit Traffic

Having due regard to their constitutional, legal and administrative systems, the Parties shall:

(a) Make arrangements at the national level for co-ordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination;

(b) Assist each other in the campaign against the illicit traffic in narcotic drugs;

(c) Co-operate closely with each other and with the competent international organisations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic;

(d) Ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner; and

(e) Ensure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel;

(f) Furnish, if they deem it appropriate, to the Board and the Commission through the Secretary-General, in addition to information required by Article 18, information relating to illicit drug activity within their borders, including information on illicit cultivation, production, manufacture and use of, and on illicit trafficking in, drugs; and

(g) Furnish the information referred to in the preceding paragraph as far as possible in such a manner and by such dates as the Board may request; if requested by a Party, the Board may offer its advice to it in furnishing the information and in endeavouring to reduce the illicit drug activity within the borders of that Party.

Article 36: Penal Provisions

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed internationally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment,

education, aftercare, rehabilitation and social reintegration in conformity with paragraph 1 of Article 38.

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

(ii) International participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connection with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;

(iii) Foreign convictions for such offences shall be taken into account for the purpose of establishing recidivism; and

(iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given.

(b) (i) Each of the offences enumerated in paragraphs 1 and 2 (a)(ii) of this article shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them;

(ii) If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences enumerated in paragraphs 1 and 2(a) (ii) of this article. Extradition shall be subject to the other conditions provided by the law of the requested Party;

(iii) Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences enumerated in paragraphs 1 and 2(a)(ii) of this article as extraditable offences between themselves, subject to the conditions provided by the law of the requested Party;

(iv) Extradition shall be granted in conformity with the law of the Party to which application is made, and, notwithstanding subparagraphs (b)(i)(ii) and (iii) of this paragraph, the Party shall have the right to refuse to grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

3. The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction.

4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

APPENDIX II

COMMISSION ON NARCOTIC DRUGS
TWENTY-EIGHTH SESSION

Resolution 3 (XXVIII)

Final assets and transactions related to illicit drug traffic

The Commission on Narcotic Drugs

Recalling Resolution 2002 (LX) of 12 May 1976 of the Economic and Social Council, Article 4, 35 and 36, particularly Article 36 (2)(a)(ii), of the Single Convention on Narcotic Drugs, 1961, as well as those articles as amended by Articles 13 and 14 of the 1972 Protocol, and Articles 21 and 22 of the 1971 Convention on Psychotropic substances.

Noting that the illicit drug traffic involves large sums of money, significant financial transactions and the acquisition of assets by members and financial supporters of trafficking groups, or by other persons, although they may not be themselves engaged in the illicit movement of drugs.

Convinced that close attention to the financial transactions and acquisition of assets by persons involved in the illicit drug traffic may lead to the dismantling of major trafficking groups.

Aware that some Governments have already enacted legislation and taken other adminstrative measures to attack the financial resources and illegally acquired assets of illicit drug traffickers.

Believing that this policy would considerably contribute to reducing illicit drug traffic.

1. Requests the Division of Narcotic Drugs, in consultation with the International Criminal Police Organisation, the Customs Co-operation Council and other international organisations and bodies and interested Member States, to examine the pertinent legislation and administrative measures and law-enforcement action already undertaken by some Governments and to synthesize these in a form which could provide practical guidelines for other Governments concerned which are facing similar problems, and serve as a basis for improved international co-operation in this connexion.

2. Invites Governments to co-operate fully with the Division of Narcotic Drugs in this endeavour.

3. Authorises the Division of Narcotic Drugs to convene, if necessary, a small working group in pursuit of the above objective.

4. Recommends that, where necessary, any expenses which this may involve should be borne by the United Nations Fund for Drug abuse Control.

APPENDIX III

Financial assets and transactions related to illicit drug trafficking

(Resolution 1980/21)

The Economic and Social Council

Recalling its Resolution 2002 (LX) of 12 May 1976, and Articles 4, 35 and 36, particularly paragraph 2 (a)(ii), Article 369 of the Single Convention on Narcotic

Drugs, 1961, as well as those articles as amended by Articles 13 and 14 of the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, and Articles 21 and 211 of the Convention on Psychotropic substances, 1971,

Mindful that illicit trafficking in drugs requires large sums of money, usually in the form of currency, and involves financial transactions of significant size,

Noting that the members and financial backers of trafficking organisations are involved in the acquisition of assets by means of profits generated from such illicit activities, although they may not be directly involved in the actual movement of illicit drugs,

Convinced that close attention to financial transactions and the acquisition of assets involving persons who may be members or financial backers of trafficking organisations is valuable in identifying and prosecuting international drug traffickers and in dismantling major trafficking organisations,

Aware that some Governments have already enacted legislation and have undertaken enforcement activities to attack the financial resources and assets acquired by means of the illegal profits of major drug traffickers,

Believing that co-operation between Governments focusing on such financial activities can lead to the destruction of international criminal enterprises engaged in illicit drug trafficking,

Endorsing Commission on Narcotic Drugs Resolution 3 (XXVIII) of 21 February 1979, in which the Commission requested the Division of Narcotic Drugs of the Secretariat, in consultation with the International Criminal Police Organisation, the Customs Co-operation Council and other international organisations and bodies and interested Member States, to examine and synthesize pertinent legislation, administrative measures and law-enforcement action already undertaken by some Governments as a means of providing guide-lines and furthering co-operation among governments facing these problems,

1. *Requests* the Division of Narcotic Drugs to endeavour urgently to complete the action requested by the Commission on Narcotic Drugs in its Resolution 3 (XXVIII);

2. *Invites* the Secretary-General to convene, as soon as feasible thereafter, a meeting of international financial and legal experts, police experts in illegal financial activities and criminal conspiracies and officials familiar with the prosecution of those involved in international criminal conspiracies for the purpose of preparing guide-lines for the negotiation of treaties that would facilitate and promote the co-operative investigation of financial activities involving illicit drug trafficking and that would lead to the prosecution of major traffickers;

3. *Recommends* that if necessary, the expenses incurred in holding the meeting envisaged in paragraph 2 above should be borne by the United Nations Fund for Drug Abuse Control;

4. *Invites* the Secretary-General to report to the Commission on Narcotic Drugs at its twenty-ninth session on the action taken pursuant to the present resolution, including in his report any draft model agreement that is elaborated for the consideration of the Commission and to consider possible transmission of any such draft agreement to Governments.

MATTERS TO BE INCLUDED IN LEGISLATION AND ADMINISTRATIVE MEASURES TO ATTACK FINANCIAL RESOURCES AND ILLEGAL GAINS OF DRUG TRAFFICKERS AND THEIR SUPPORTERS AND BACKERS

1. Scope of measures:

To extend to include persons directly and indirectly engaged in illicit narcotics dealings, including (but not exclusively) -

(i) importation, including precursors;

(ii) manufacture, including processing;

(iii) distribution;

(iv) sales;

(v) exportation;

(vi) possessing;

(vii) financing any of the above, or related, functions;

(viii) procuring, or conspiring with, any other person or persons to engage in any of the above functions;

(ix) aiding and abetting, advising, procuring or being in any other way concerned in the illicit dealing in narcotic drugs, whether imported or produced in-country.

2. Type of sanction

(i) Imprisonment; AND

(ii) Fine and/or pecuniary penalty related directly to the quantum of illicit gains; AND

(iii) Forfeiture of all goods and property involved in the illicit traffic, including drugs, constituents thereof which after processing would become dangerous drugs, all equipment, vehicles,marine craft, aircraft, furniture, plant, buildings, and any other property fixed or movable of any nature whatsoever, used in the trade. Such forfeiture must be done in proper manner so as to ensure the immediate and permanent removal of the items seized from the control of the person or persons from whom seized. (In this context, it appears that the Code of Criminal Procedure of the Federal Republic of Germany (s.111), requires "seizure and attachment" to achieve this object); AND

(iv) Forfeiture of all monies used directly in and for the importation, manufacture, sale, distribution, and any other form of illicit dealing in the drugs concerned; together with all monetary and other profits acquired, not only during the dealings which are the subject of the legal processes in hand but also accruing from previous dealings of a similar or related nature. Power should be taken to "follow through" gains accrued from dealings in drugs which have been converted into assets other than cash, e.g. otherwise legal enterprises, holdings of stocks, shares, bonds and other securities; holding of immovable property; and deposits in banks and similar institutions: this power should extend to cash and other assets removed from the country in which they were acquired or from which they accrued. Similarly, power should be taken to seize and forfeit illicit gains accruing not only, within the country concerned but also in foreign countries.

3. Administration

As the detection, investigation and arraignment of persons engaged in criminal activities related to the illicit drug traffic on an indirect basis, i.e. in the financing, planning, procuring or in any other way indirectly aiding and abetting the direct participation in the trade will present many difficulties, it will be necessary to take powers in any proposed legislation to ensure that the widest possible coverage of law enforcement agencies and officers are empowered to initiate action leading to the indictment of suspects; these should include not only Police and Customs officers but also Income Taxation and Exchange Control officers (where applicable). The method of dealing with unexplained accretions of wealth discovered by investigations conducted into a suspect's financial position will, naturally, depend to a large extent on the political philosophy of the Government concerned, but it is thought that, where evidence attaching to unexplained surpluses points to their having accrued directly or indirectly from illicit drug dealings, there should be a presumption of guilt and the surplus should be forfeited to the State unless the suspect can prove an alternative source. Such forfeiture should not, of course, preclude prosecution for any criminal action arising from the same set of circumstances.

4. Specimen legislation

The Government of Australia, in its Customs Amendment Act 1979, has gone into very great detail on the comprehensive penal law and administrative measures required to deal with direct and indirect illicit trafficking in drugs and related substances. This enactment could well serve as an extremely useful guide to other Governments preparing new legislation in this sphere.