

ACCESS TO ASSETS DERIVED FROM CRIMINAL OFFENDING

Memorandum by
THE GOVERNMENT OF NEW ZEALAND

Although New Zealand had long had on its books a provision (now s.403 of the Crimes Act 1961) giving the Courts the power to award compensation to any person who suffers loss by reason of any criminal offence, this relatively narrow provision could not readily be adopted to stripping offenders of their ill-gotten gains.

2. The pressure to implement such a regime arose with the increasing incidence of serious drug offending. In 1978 the Misuse of Drugs Act 1975 was amended to allow, among other things, a Court to impose a fine on a person convicted of a drug dealing offence which not only reflected the seriousness of the offence (a factor which also determines the sentence of imprisonment to be imposed), but which also has regard to assets or money owned by the offender which on the balance of probabilities are proved to have been acquired as a result of the offence. This provision, s.38 of the Amendment, has been used to some effect.

3. Section 39 of the Amendment was designed to take matters much further into the field of "asset stripping". It provides that where a person has been convicted of a drug dealing offence he may be fined an amount that reflects not only the assets derived from the particular offence but also reflects assets gained from other drug dealing offences. These, however, must be proved beyond reasonable doubt although not as the subject of fresh indictments.

4. This approach was taken after anxious consideration of the questions of justice raised by a scheme which in effect tried and sentenced a suspected drug dealer without a proper trial before a jury. At the end of the day it was decided that the dangers presented by the traffic in "hard drugs" justified an exception to the ordinary rules of criminal procedure. This was acceptable, however, only if the other drug dealing offences were proved to the criminal standard.

5. Unfortunately this latter requirement highlights the difficulty with the whole concept. If the previous other drug dealing offences can be proved to the criminal standard there is no good reason why this cannot be done before a jury under the ordinary rules of a criminal trial. Also, in practice, the Police have not yet generally considered themselves to be in a position in a major drug-dealing trial to prove other offences to the required standard. The power has been used only once.

6. Although various alternative schemes to get around the difficulties in s.39 have been considered from time to time there was no further development in the field of assets derived from criminal offending until the publication of the Report of the Penal Policy Review Committee later in 1981.

7. That Committee on the strong representations of the then Secretary for Justice recommended in essence that the assets of "major" drug and property offenders should be capable of being frozen after their arrest, on application made to the High Court. If a conviction followed the assets, including those acquired or discovered after conviction, should be disposed of by a statutory trustee.

8. These recommendations, which owe something to the "criminal bankruptcy scheme" that operates in England, are currently under study. As attractive as these proposals may seem they are not without their difficulties. Setting aside questions of principle (which must nevertheless be weighed along with other considerations), a number of practical considerations arise. These are particularly evident in the proposed asset "freeze" to apply after an arrest has been made.

9. Once an answer has been obtained to the question of what type of offending will allow an application to be made (drug dealing offences are an obvious candidate but the nature of any property offending is a much more difficult area), the nature of a freeze order must be delineated.

10. In tackling this question the Justice Department must find answers to the following questions:-

- (a) Should the proceedings be ex parte or on notice?
- (b) As a freeze order may have profound consequences for an accused and others and applies before conviction should the Crown be required to establish a prima facie case before an order may be made?
- (c) What provision is required to allow an order to be varied to avoid hardship to the accused or others?
- (d) How will the interests of innocent third parties be taken into account?
- (e) Will special provision be required for continuing periodic payments made by the accused?
- (f) What access and under what conditions will there be to solicitor's trust accounts?
- (g) What allowance will there be for the accused's legal costs?
- (h) Will there be a moratorium on the accused's debts?

11. The nature of the liability of those who breach the terms of any order will also have to be considered, in particular whether there will be specific criminal sanctions or a reliance on the law of contempt.

12. There is also the question of the appropriate person to administer such a regime, and the asset stripping order. Any trustee will require considerable resources in terms of staff and other facilities.

13. The proposed asset stripping order throws up fewer problems but control among them is the question that has caused the difficulties with s.39 of the Misuse of Drugs Amendment Act, namely whether there should be proof of other offending before assets beyond those acquired through the particular offence may be seized and, if so, to what standard. Indeed, if such an order was to be effective the question of a presumption that all of a convicted person's assets were derived from drug or property offending would have to be carefully considered.

14. The other major question in such a regime for a small country such as New Zealand concerns the costs of administration. The suggested trigger point for the application of the scheme is a sentence of imprisonment of or exceeding five years. Such a sentence may be imposed in respect of relatively small amounts of drugs and in respect of those whose asset backing is not larger. In such cases it is quite possible that the costs of trustee and his staff would not be met once all the assets had been liquidated and distributed among innocent third parties and in payment of any fine that might have been imposed.

15. Accordingly, the cost effectiveness of such a proposal must be carefully evaluated before it can be implemented.

16. The Report of the Penal Policy Review Committee also tentatively supported the introduction of a "criminal bankruptcy scheme", not so much as an asset stripping device but as an additional procedure to aid in the enforcement of a fine.

17. As indicated earlier, the Misuse of Drugs Amendment Act 1978 introduced with the concept of a fine the notion that the profits or assets from the particular offence could be taken into account in setting the level of the fine. This has been used to good effect as the ordinary mechanism for enforcing a fine, notably the warrant of distress has been supplemented by powers which make it clear that money held in a bank may be attacked, and which allow for the seizure and sale of real property.

18. Accordingly, any need for a criminal bankruptcy regime as an aid in fines enforcement, or for use on the wider field of asset stripping, must be assessed against total crime, and not merely against drug offending.

19. Taking the wider view, there must be some doubts about the efficiency of a criminal bankruptcy scheme as envisaged by the Penal Policy Review Committee simply because outside of the field of drug offending few criminals in New Zealand would have substantial assets.

20. It is this point which also assumes considerable importance in considering a criminal bankruptcy scheme along the lines of that in the Powers of Criminal Courts Act 1973 (UK). Ordinary bankruptcy proceedings require relatively significant co-operation from the bankrupt for their success. Without this the task of the official assignees would become well nigh impossible. Similar co-operation from an offender, especially one who had been sentenced to a long term of imprisonment, could not be assured. The additional costs of enforcement would thus be significant.

21. As an additional factor for consideration there is some evidence to suggest that even in the field of reparation a criminal bankruptcy scheme would not be the most effective option, again because of the costs and because any person who suffered loss through the offence would rank only as an unsecured creditor.

22. In essence, then, the New Zealand Government is faced with a number of difficult decisions in the field of denying the criminal the fruits of his endeavours. Although the scheme outlined in the Report of the Penal Policy Review Committee for the freezing and realisation of an offenders assets has considerable attraction, the practical and financial difficulties are significant.

23. The enforcement of penalties in the field of drug offending is in the New Zealand experience, much more satisfactory than the general law relating to fines enforcement and compensation. It may well be that any further moves into the field of asset stripping will be based on that experience and legal structure.
