An examination of how the methods employed by the Criminal Assets Bureau move Ireland in a new direction of crime control.

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Abstract.

Thesis Title: An examination of how the methods employed by the Criminal Assets Bureau move Ireland in a new direction of crime control.

This work examines how the concept and operational outcomes achieved by the Criminal Assets Bureau (CAB) reflect a new model of crime control that has emerged and developed to a stage where it is a significant contributor to crime control in Ireland. The approach developed and implemented by CAB is not designed to produce a socially engineered solution to make the deviant better by correctionalist intervention and normalisation. Rather it is an actuarial approach to criminal wrongdoing, one which employs civil, administrative and regulatory mechanisms. The instruments employed by CAB attempt to permanently alter the criminogenic networks that exist around the individual and thereby neutralise the criminal threat. Following a doctrinal and socio-legal methodology this thesis examines the framework and conceptual underpinnings that lead to the establishment of CAB dealing with the long and short causal factors that lead to a refocusing of the overall approach to criminality. It adopts an operation analysis approach to consider the tripart elements of forfeiture, revenue powers and social welfare powers that form the central tenants of the civil approach that CAB adopts. In highlighting the operational approach and actual outcomes achieved by CAB it provides a case study of a modern criminological tool of disruption and discontinuity that operates against the financial base of crime as opposed to the criminal actor.
Declaration.

I declare that this dissertation, submitted in fulfilment of the degree of Doctor of Philosophy, represents my own work.

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There are a number of people who helped, supported and endured me in the completion of this thesis.

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Thesis Introduction.

Introduction.

The nature of criminal law processes and attempts at crime control have changed dramatically over the past number of years. Ireland has, in part, moved away from the traditional model of evidence gathering leading to criminal prosecution, with the ultimate aim of punishing the soul, towards one that is results orientated and concerned with threat neutralisation rather than retribution or rehabilitation. In supporting such an opening assertion it can be contended that this modern re-focus is exemplified through a variety of means including greater use of revenue and welfare audits and the confiscation of the proceeds of crime. These three elements are applied, both individually and collectively, by the Criminal Assets Bureau (CAB) and moreover form the central operating plank and were the key establishment features of that body. The original raison d’être of CAB was to combat organised crime by denying profits that derived or were suspected to derive from criminality. Given the public concern with such criminality and its centrality in political and media discourse this may be part of the reason that dramatic changes were, in the main, accepted by society.

The Bureau was established on a statutory basis under the Criminal Assets Bureau Act, 1996. Its objective is set out in section 4 of the Act and summarised in the Bureau’s annual reports as using ‘all the available remedies and sanctions at its disposal in identifying, depriving and denying persons suspected of criminal activity and their associates of the benefit of that activity.’ It can achieve this without the need for any criminal conviction and operates on the civil balance of probabilities standard. It is a multi-agency body consisting of members An Garda Síochána, officials of the Revenue Commissioners and the Department of Employment Affairs and

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Social Protection together with a Legal Officer and administrative and technical staff. The composition of the Bureau ensures that in addition to specific statutes the totality of legislation under which all the comprising agencies act is brought to bear, by a single co-ordinated and focussed entity, on those engaged in criminal activity. The original focus of the Bureau was on targeting those involved in drug trafficking but it now also applies its remit to the wider criminal field.

The bureau became of age in 2017 and in those 21 years has enshrined itself a key operating partner and moreover leader in the fight against criminality in Ireland. In addition to identified target individuals and specific issues arising in society it now targets areas of criminal cash flows from both crime and wealth transfer. The former would include tax evasion, burglary/theft, drug dealing, bribery/corruption, money laundering, regulatory crime and white collar crime. Whilst the latter includes matters such as cash, loans, cars/jewellery, banking transaction, property transactions, cryptocurrencies and bloodstock/livestock. It has sought to implement assertive authoritarian dominance in its operating sphere by its actions, communication and feedback to the public at large. It meets regularly with regional joint policing committees to discuss its role in dealing with criminality at all operating levels. In asserting moral dominance it has assured the public that any reports of unexplained opulent wealth without a visible source of income to match the lifestyle being maintained will be treated in confidence and investigated independent of the anonymous report. In order to generate such reports and in response to any public concerns about criminality operating in their individual locality it has distilled its investigative process down to simple, but dogmatic, phrases such as:

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2 CAB @criminalassets, 3 Jul 2018, “Pat Clavin, CBO of CAB, explained the role of CAB in denying and depriving people of the proceeds of criminal conduct at todays Financial Crime Prevention Symposium organised by @jibsevents” available at https://twitter.com/criminalassets/status/1014188533513375745 (Last accessed July 5th 2018).

In recent times the bureau has established its own website, however its main direct methods of communication is via tweets with links to its own Facebook page.
“They flaunt it … 
You report it … 
CAB takes it” ³

and

“Do you suspect that someone's lifestyle is funded by crime?
Contact CAB today so we can make them pay and take it away.” ⁴

Whilst this represents a vast over-simplification of the process and procedure carried out by the Bureau in reaching its statutory remit, it none-the-less does reflect the non-conviction civil standard model of governance that has been employed by the Bureau to target modern criminality and the attract-ability of such a model to communities concerned by crime and criminal actors with unexplained wealth. There was a conception that such wealth was being held by individuals that were operating at a level beyond which the traditional concepts and parameters of criminal law were able to penetrate. The above take it away simplification is made possible through the use of proceeds of crime legislation which allows for seizure and forfeiture of assets believed to be the proceeds of crime. Importantly it is the respondent to any such action (ie the original holder of the disputed asset) that must demonstrate that the asset in question does not represent the proceeds of crime. Furthermore the actuarial based revenue and social welfare approach employed by the bureau allows then to further target the financial base and essential cash flow of criminal operations.


⁴ CAB @criminalassets, 12 Nov. 2017, “Do you suspect that someone's lifestyle is funded by crime? Contact CAB today so we can make them pay and take it away”. Available at https://twitter.com/criminalassets/status/9297170851099964800 (Last accessed July 5th 2018).
Research Question and Thesis Structure.

The Bureau strives to deliver a value for money service and whilst it does regularly communicate income derived results – again assisting in accountability and acceptance in the public psyche – it is not formally bound by any financial targets in the form of any requirement to generate particular amounts of revenue in any given accounting period. As a result it has significant flexibility in its approach and choice of operational direction. Resultantly the bureau is now operating at a wide level and is targeting many and varied elements of criminal activity. In so doing it has both established itself as a key player in Irish crime control and has been given continuing support from a public who were faced with a crisis of hegemony and aspects of moral panic in the period immediately preceding the establishment of CAB. It does this whilst being ever cognisant of its own remit and, moreover, as a result of challenges to its authority has had its operational boundaries clarified and approved by the courts.

In that respect this work will consider how CAB is different in its approach to crime control as it rejects the model of catching, deterring and rehabilitating the criminal in favour of a system that doesn’t punish the offender in the traditional way of the criminal law, but rather applies civil sanctions aimed, as noted, at threat neutralisation. In essence the bureau may be seen to be operating in an apersonal way where the focus of crime control is on the asset rather than on establishing any mens rea pertaining to the individual. Thus the central research question is to examine how the concept and operational outcomes achieved by the bureau – through the use of new techniques, approaches and strategies – reflects a new model of crime control. This will allow for a framework of understanding, through a practical consideration lens, of this new realm with respect to the outputs and actual outcomes – in terms of the proceeds of crime denied to criminality – of the bureau after 21 years in operation.
To address this question the thesis will be divided into three parts. The first part will deal with the conceptual framework under which CAB operates. The second part will go on to consider the nature and concept of both criminal law and forfeiture and the establishment of CAB itself in that context. Finally the third part will establish, analysis and contextualise the forfeiture, revenue and social welfare approach and outcomes achieved by the Bureau.

Part One.

In the first part of this thesis consideration is given to the structural and conceptual framework that forms the foundational structure upon which the model of crime control executed by CAB is built upon. By considering the four key pillars of this model we can establish the theoretical basis for this new model of governance. Such a conceptual model allows for the proper framing of the research question and its application to the remainder of the thesis. The nature of governance generally has altered considerable over the last century and we have now witnessed the emergence of many and varied agencies that whilst focussed primarily on compliance have the option of issuing criminal proceedings. As a result elements of criminal law have become much more regulatory in nature. CAB has emerged and developed as a body that, unlike many of the compliance focused agencies, is not concerned with regulation but rather is focused on neutralisation. It achieves this by bringing together here to fore unconnected bodies to work together towards an agreed common goal.

Such goals are primarily achieved by virtue of the fact that the bureau does not rely on or indeed require a criminal conviction in order to operate. Rather it adopts civil mechanisms enforced with authoritative criminal law authority and provides anonymity protection for public staff civilians who might otherwise be potential retaliation targets from criminal actors. The almost side-lining of the individual and the focus instead on the disputed asset is central to the bureau being able to operate and moreover exercise its
considerable powers in the civil realm. Much of the approach taken may be considered regulatory and administrative in nature with the focus not on any question of guilt but rather on unexplained wealth.

This type of approach to crime control which takes account of the overall systemic risk is reflective of a business-like approach to control. It asserts dominance without having any regard to aetiological factors. Thus these pillars of governance, adopting civil standards, taking a de-individualised approach and focusing on the systemic risk form a solid theoretical foundation for the current framework that is built upon in the following two parts.

Part two.

The second part of this work is sub-divided into three chapters. In order to contextualise the emergence of CAB and its place on the crime control continuum this part will commence with an analysis of the expanding and contracting boundaries of criminal law. This will be followed by an analysis of a key feature that is used by CAB – namely forfeiture. The final chapter of this part will then consider the concept and establishment of CAB and its key operating components.

The distinction between civil and criminal law is of critical importance as the standard of proof required between the two main cleavages in Irish law is fundamentally different in nature with criminal law requiring the much higher threshold. Furthermore civil law is less expressive in nature and operates under much lower procedural safeguards. Notwithstanding such key and critical differentiators, and the implications arising therefrom for the subject of the law, the distinguishing line between the systems is not pre-determined or even indeed a clear line. Thus due consideration will be given to jurisprudential marking posts that assist in reaching a determination of where a particular issue should properly be housed.

In establishing the various indicia that influence the determination of an applicable residence for a particular matter due consideration will also be given to matters that may be considered administrative as opposed to punitive.
Maters that fall into the administrative category would then be considered as part of the civil law regime. The application of such definitional guidelines to modern issues such as white collar crime will be discussed on the basis that law does not develop or evolve in neat linear stages. In some instances both criminal and non-criminal sanctions may be appropriate depending on the placement of the issue on the definitional yardstick. This marks a drift to what may be considered as a middle ground system of justice – a ground that in the current context provides ample holding space for the civil model of criminal justice operated by CAB.

In having established such boundaries and their applicability to CAB we will then turn to a key feature of CABs work – namely the concept of seizure and forfeiture of assets. The use of forfeiture was not a novel element in common law. The original concept of forfeiture was centred on the belief that where something did wrong then it was that particular thing or item that must be blamed and held accountable – normally by being forfeited to the crown. This approach of focussing on the property rather than the person – or in rem forfeiture – was recognised in common law as an efficient and effective mechanism for dealing with wrongs as the property (for example, a ship) was often more easily identified and apprehended that an individual.

The use of forfeiture as an instrument found its way into Irish legislation – however it was normally only an option post-conviction. None the less in order to deal with particular issues it was a viable legal option that could be enshrined through legislative enactments. The concept was expanded for use in the absence of a conviction with the introduction of the Offences Against the State (Amendment) Act 1985. This was a very specific piece of legislation that was enacted to deal with a single issue in the extra-ordinary criminal realm. Notwithstanding such specificity it was later cited as a clear model for modern forfeiture that could be enacted for use as an instrument by CAB. Further support for the introduction of this type of feature was found in the use of policy adoption from the United States. Finally as a result of both European Union and international influences the concept of forfeiture was a key feature of the Criminal Justice Act 1994 – introduced a mere two years
prior to the establishment of CAB. Whilst it will be contended that there was key tipping points for the establishment of CAB the above aspects will be used to demonstrate the long and short causal factors that lead to the introduction of non-conviction forfeiture of assets and thus such analysis provides jurisprudential grounding for the work of CAB.

The very concept of CAB was a novel departure for the Irish system. Traditionally different agencies and bodies did not exhibit any level of inter-agency co-operation but preferred to discharge their individual remits on an individual basis. The nature of the bureau is to adopt the remit of its constituent parts and apply them in a pro-active and targeted manner in order to target the proceeds of crime howsoever generated. As traditional methods were not deemed to be suitable to meet the requirements of modern crime control there was a felt need to devise and implement new measures. The bureau is empowered to take all action necessary to identify and deprive any proceeds of crime. Bureau members are seconded from the constituent bodies of its makeup and retain the powers that they originally held in their pre-secondment position. In addition given the nature of the work involved in being a bureau officer non garda members operate under anonymity provisions in order to protect their safety.

As noted above a key aspect of the bureau’s approach is possible because of the proceeds of crime legislation. This allows for civil forfeiture of the proceeds of crime – once objective evidence can be established – and importantly does not require that particular proceeds are linked to a particular crime. The operational results and outcomes of this approach to dealing with the proceeds of crime in considered in the third part of this work.

Part Three.

The third, and final, part of this work will again take a tri-part approach building on the framework and conceptual approach established in the earlier parts. This is achieved in relation to the research question by setting out and
analysing the operational outcomes of the bureau’s activities. The forfeiture approach is now deployed on a macro and micro level and is often regarded as the mainstay of the bureau’s approach. However the revenue activities, which operate primarily on an administrative basis, are also a key element to the bureau discharging its remit. Finally, whilst the social welfare elements of the bureau’s work did not originally generate the same level of financial deprivation for the criminal actor it nonetheless contributes individually and collectively to the crime control methods and is used to deny criminality a source of income.

The operational approach of the bureau is neatly capture by the statement that it is ‘relentless’\textsuperscript{5} in the pursuit of the proceeds of crime at all strata. It now has a presence in all garda divisions by virtue of trained divisional criminal asset profilers. The numbers of such profilers has expanded considerably and they receive training in each of the three core areas of operation of the bureau. This has allowed the bureau to act on local knowledge and to engage with communities at a local level – a factor it deems important in its overall success. Concomitantly with such a local approach it engages with garda units, and international law enforcement agencies, and has undertaken specialised and professional training where appropriate. The combined effect of this overall approach has meant that CAB has returned significant returns to the Irish exchequer. These returns have, in part, been made possible by the judicial acceptance that the bureau’s work falls on the civil side of the criminal/civil divide.

A crucial feature of the bureau’s approach to crime control it the multi-agency nature of implementation at its disposal. The application of taxation measure to income generated is a normal feature of most societies. It traditionally operates as an administrative function and is accepted by most in society as a functional requirement in order for an executive to discharge its remit in terms of running a particular state. Whilst originally in Ireland it was considered immoral to share in the proceeds of crime by taxing it that position has now evolved to a more pragmatic one where all income regardless of source may

\textsuperscript{5} ‘We are relentless says Criminal Assets Bureau boss’ Irish Examiner, July 1\textsuperscript{st} 2013.
be subject to the normal taxation rules. CAB may now operate as a tax inspector and issue tax demands. This represents a considerable power as once the demand is issued it is considered final and must be paid in full prior to any appeal against the validity of the assessment. The bureau does not have unlimited authority and is subject to judicial scrutiny. However, as will be demonstrated, much of the scrutiny arises from a procedural standpoint as opposed to any concerns with the use of revenue powers – of all types including excise duties and vehicle registration tax – as an element of the new model of crime control.

In terms of such a crime control model bringing together the operational focus of various agencies an important feature is the assimilation of data on targeted individuals. As previously noted, the bureau regularly targets individuals that appear to have wealth without a visible source of income. In order to give a façade of legitimacy to such lifestyles those involved often claimed social welfare benefits. Indeed from the criminal perspective to not do so would be a clear indication that they had alternative sources of undeclared income. The structure of the bureau allows it to target any such fraudulent claims, stop them and demand repayment of any overpayments. Further, such social welfare investigations are used as part of the collective approach in combination with revenue and forfeiture powers. Additionally CAB has been an influencer in the development of debt recovery legislation where the debt arises from social welfare overpayments. Finally, its approach is being mirrored in non CAB cases – reflecting the prevailing influence that bureau has had at many different aspects of law and crime control in Ireland.

Methodology.

In adopting this structure it is possible to properly address the research question. As CAB is a creature of statute and uses the authority from various other statutes as a key tool an appropriate methodology to adopt is a doctrinal one. This will allow for an examination of the various positivist legal rules underpinning the changing nature of crime control exemplified by CAB. Other supporting methodology will be employed to counteract any lacuna arising from a doctrinal approach. In particular a socio-legal methodology
will be employed to enrich the doctrinal analysis. Finally aspects of a comparative methodology will be employed to contextualise developments but will not be a central methodology of this work. This pluralist approach allows for an appropriate examination of how CAB has taken Ireland down a new route of crime control.

The nature of doctrinal analysis is ‘complex, multi-layered and distinctive’\(^6\) whilst nonetheless difficult to reduce into descriptive terms as it is routinely and sub-consciously engrained in the law student during their under-graduate careers. However as the ‘working method of the judiciary’\(^7\) in the Irish common law system it carries

> “both a scholarly and practical currency. It has a long and established history. Its epistemic outlook emphasises the logic of law and value of reasoning; the normative character of rules; institutional coherency; technocracy; internalism and self-referential validation; the limiting tendencies associated with rule determination; the ‘last authoritative voice’ position of law; its extensive potential range; legal craft; and the importance of being part of ‘an interpretive community.’”\(^8\)

Such legal reasoning reflects an internal viewpoint that can be analysed in the current work by parsing the theoretical framework and the legislative authority of CAB and the legislation it employs. Furthermore given that CAB is still a relatively new entity, without a direct historical comparator, the synthesis of judgments handed down from the Irish superior courts is an important factor in addressing the research question. In this manner whilst this methodology assumes the normative order of law it is also a comprehensive approach that is authoritative as law is the final arbiter of establishing the operational boundaries of CAB. Adopting this approach requires ‘rigour’\(^9\) and resultantly provides ‘a coherent detailed and nuanced

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\(^7\) Ibid.


\(^9\) Supra n.6 at 23.
picture of what the law is'\textsuperscript{10} in relation to the concept and operational approach of CAB. Thus the approach adopted presents a ‘technical commentary upon and systematic exposition’\textsuperscript{11} of the law as it pertains to this particular area and method of crime control.

Thus it may be concluded that adopting a doctrinal approach offers significant benefit and clarity to the current research. In order to adequately address the research question it has been adopted as the basis and guiding tenant. However as it is a hermetically sealed approach that represents the internal viewpoint it is necessary, on this occasion, to supplement it with other methodologies. Given the structure outlined above it is clear that various factors influenced both the establishment of CAB and its results achieved to date. Whilst the doctrinal approach represents the internal viewpoint the external is represented by the ‘law in practice, of legal institutions at work in society rather than legal rules existing in a social, economic, and political vacuum.’\textsuperscript{12} Taken together the internal doctrinal approach may be seen as a solid basis for the external socio-legal approach \textsuperscript{13} that allows us to view the operations of CAB in both its legal and operational context. According to Allot:

“Law seems to have special status among social phenomena by reason of its forms, its rituals, its specialised language, its special rationality even, and its specific social effects. But on the other hand law is clearly embedded in the totality of the social process which is its cause, and on which it has a substantial determinative effect, not least in providing the continuing structure of society, its hard programme.”\textsuperscript{14}

Thereby whilst supporting the doctrinal analysis the socio-legal methodology will also enhance it by informing the analysis. This is achieved, in practical terms, through consideration of contemporary media reports, Dáil, Seanad and select committee reports, and the annual reports of CAB itself. The later provide the main source of operational information and whilst given the secretive nature of much of the bureau’s work the reports provide a vein of knowledge and are of significant value in analyzing the penological changes that have occurred in society in response to the systemic risk generated by modern criminality. The approach combines the distinction between what has long been referred to as ‘law in action and law in books’\textsuperscript{15} and by presenting the internal coherence and the external societal construction\textsuperscript{16} it avoids any false closure which might occur were a purely doctrinal approach adopted in this particular instance. Additional support for addressing the research question will be garnished from comparative sources without specifically adopting an overall comparative methodology. Whilst forfeiture and the use of taxation powers to target proceeds of crime were known to other common law jurisdictions that concept of CAB itself is a novel one without direct comparators and Ireland has taken the lead in developing this type of approach to crime control. Thereby any comparative elements used are merely supporting in nature of the deconstructed components used to address the research question.

In adopting this approach, to the current research question, is it important to acknowledge that the traditional model of crime control is \textit{post hoc} and reactive in nature. It follows the event and, indeed, that event having actually occurred is the key formation point for the commencement of a criminal investigation which, may, in certain circumstances, lead to a prosecution and punishment of the individual found guilty by the criminal system. It is contended, within this thesis, that CAB marks a new departure on the crime control continuum just outlined. It (CAB) may be seen as a totally new model of crime control. This is due to the fact that it seeks to control the level of

crime within society through a system that employs a risk management and governance\textsuperscript{17} approach that employs regulatory and actuarial justice in order to pre-emptively target and neutralise – as opposed to reactively convict and punish.

From a methodological perspective these aspects will be merely introduced from a conceptual viewpoint at this juncture and, then, the application in the overall context of the current work will be explored in the methodologically based conceptual foundation section that is chapter one and resultantly will be a theme running throughout the remainder of the thesis. In this regard it should be noted that the concept of risk management is not new with its origins forming the entire basis of the insurance law model\textsuperscript{18} that has operated over the last two centuries. In the context of the current work the prevention of crime is often seen as a form of risk management. Rose considers this from a broad viewpoint and notes that:

“[c]ontrol workers … thus have a new administrative function – the administration of the marginalia, ensuring community protection the identification of the riskiness of individuals, actions forms of life and territories. Hence the increasing emphasis on case conferences, multidisciplinary teams, sharing information, keeping records, making plans, setting targets, establishing networks for the surveillance and documentation of the potentially risky individual on the territory of the community.”\textsuperscript{19}

The methodology employed by the Bureau finds credence and grounding with this type of risk management. As will be duly parsed it is a multi-agency body that is legally required to share information that is pre-emptive in focusing on targeted individuals that have been deemed a risk to the safety and security of the community at a local, national and international level. This approach to risk management has a focus on ‘bringing possible future undesired events into calculations in the present, making their avoidance the central object of

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\textsuperscript{17} On the nature of governance see chapter 1 at text around n.2.


decision making processes, and administering individuals, institutions, expertise and resources in the service of that ambition. Understood in this way, risk management has become central to the management of exclusion in post welfare strategies of control. These various threads underpinning such an operational approach will form the central flow of the current work. Moreover, it will be contended that the framework employed by CAB, in the execution of its statutory remit, is based upon this type of an approach which is actuarial in nature that targets regulatory crime.

The concept of actuarial justice was considered by Feeley and Simon and those authors noted that it was ‘replacement of a moral or clinical description of the individual with the actuarial language of probabilistic calculations and statistical distributions applied to populations.’ Other authors noted that the actual application of such an approach is less nuanced or statistically based in reality. The process ‘involves a transition to mores where there is no longer so much concern with justice as with community defence and protection where the cause of crime and deviance are not seen as the vital clue to the solution to the problem of crime. The actuarial stance is calculative of risk; it is wary and probabilistic; it is not concerned with causes but with probabilities, not with justice but with harm minimization. It does not seek a world free of crime but rather one where the best practices of damage limitation have been put in place; not a utopia but a series of gated havens in a hostile world.’ Thus, the central theme of the actuarial approach, and one that is key to the model of crime control used by CAB, is that it is not concerned with the conditions of the offender but rather treats him as a rational choice actor who may be controlled by economic based sanctions.

The employment and outcomes of those sanctions will be considered in parts

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20 Ibid at 332.
22 Supra n.19.
two and three of this particular work. The central thesis of actuarial criminology also reflects a move towards a ‘bureaucratic and management of crime’ method of crime control and thus its importance, in the current context, of its place in the crime control continuum.

This type of approach to dealing with ‘risky populations’ will be conceptually considered in chapter one and then, again, used as a basis for operational analysis within the thesis. The traditional distinction between crimes that were considered ordinary and regulatory was that the former was consider mala prohibita and the later mala in se and thus ‘an instrumental means-ends term[s].’ However the concept of moral repugnance is a difficult one in the modern era and just because a matter was not historically considered criminal does not mean it cannot now be consider ‘true’ crime.

In this regard and of specific relevance in the current work is that the development of a more regulatory approach to crime control has led to hybrid enforcement mechanisms and to suggestions of a ‘blurring of the legal forms’ arising from such developments. CAB targets mala prohibita criminality through the use and application of mala in se regulatory mechanisms and enforcement procedures to neutralise the financial base of crime. Thus in addressing an underpinning operational research question this thesis will, by necessity, employ an operational methodology to the regulatory approach of CAB. The requirement of compliance with administrative based law is thus the overarching link that brings such aforementioned criminological terms to the operational sphere methodology.

26 Supra n.24.
Contribution to Knowledge.

Axiomatically the nature of criminal law is to focus on criminal matters with an overarching concern and focus on establishing *mens rea*, *actus reus*, the requirements of the offence and any possible defenses that may be raised in relevant circumstances. This approach is reflected and followed in the standard works on Irish criminal law.\(^{31}\) CAB operates to target criminality but does so in the civil realm and thus there is, understandably, scant consideration given to either the establishment act or the proceeds of crime legislation. The approach to crime control adopted by CAB employs regulatory and administrative sanctions and operates outside the traditional paradigmatic criminal law. Criminology has long been considered an ‘absentee discipline’\(^{32}\) in Ireland, however, from the operational perspective, in recent times there has been a marked development in the use of regulatory strategies. Whilst the lack of a criminological research tradition will take an epoch to change there is now growing and detailed research on the concept and use of a regulatory approach to control in this jurisdiction.\(^{33}\) However much of the regulatory approach is concerned with compliance and enforcement of standards with the option for a criminal prosecution in the event of a default.

The model adopted and implemented by CAB stands apart from these approaches – it operates exclusively in the civil domain with the sole objective of threat neutralization as opposed to any compliance or rehabilitative ideals. When CAB was established there was a number of

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academic based articles on the concept and later substantial work was completed, by Campbell in placing the model used by the bureau in a theoretical setting.

In particular she has focussed on placing one aspect of the bureau’s work – namely forfeiture – in a theoretical setting. She has considered whether the proceeds of crime forfeiture approach implemented by the bureau is in fact ‘an ersatz civil proceeding’ by adopting a comparative approach to jurisprudence from the United States of America. Furthermore she analyses whether the development of this model of asset forfeiture in Ireland reflects a movement from due process to crime control by applying the thesis of various theorists to the issue and concludes that ‘the growing use of forfeiture may be categorised as a paradigm shift’ in the context of Irish crime control.

Similarly King has focussed on the issue of non-conviction based forfeiture and the concept of middle ground justice. He raises and discusses the normative question of ought the concept of asset forfeiture be rightly considered a civil matter and expressed the viewed that ‘the Irish Judiciary have been overly deferential (acquiescent even) to the legislative intent’.

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36 Ibid at 445.

37 Ibid at 459.


underpinning the proceeds of crime legislation. Indeed he concurs with Campbell’s view that the adoption of civil forfeiture marks a ‘realignment of the approach adopted by the agents of the State in the fight against organised crime, and demonstrate a preference for the needs of the State over the individual's right to due process.’ King contends that such policies are regressive given the ‘inadequate knowledge base concerning organised crime in Ireland.’

Thus, it is submitted that the conceptual and ought question in relation to forfeiture has already been well scrutinised and this work does not seek to recover such ground. Rather, it will build upon, but stand apart from, the existing knowledge base by taking a completely alternative standpoint that is pragmatic in nature. Resultantly it will be accepted that CAB and non-conviction based forfeiture are now part of the Irish criminal justice landscape and will examine how this arose and the operational approach of such a development.

This will be achieved by examining the origins of change through a critique of a perfect storm of societal events that culminated in the establishment of CAB and the adoption of civil asset forfeiture. Additionally this work will go a step further in that it is not just concerned with forfeiture but rather the tri-part interactive armoury of the operational concept and outcomes of forfeiture, revenue powers and social welfare powers as one cohesive and comprehensive unit of approach and thereby research. In addition to the above mentioned forfeiture research Campbell has discussed the revenue side of the bureau’s work from a conceptual standpoint. The current new research builds upon that to bring it up-to-date but again from the alternative operational and longitudinal based outcomes perspective. Finally, and importantly, hit heretofore there has been scant research on the social welfare aspects of the bureau’s work. As a significant element on the tri-part

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40 King C. (2014) Supra n. 38 at 142.
approach of financial neutralisation this work will document its importance from an individual and collective standpoint.

At times of a criminal crisis in Ireland there has been calls for the establishment of ‘mini CAB’s’\textsuperscript{42} to be established. Furthermore on the presumption that the model adopted was successful the minimum amount that may be seized under proceeds of crime legislation has been reduced from €13,000 to €5,000.\textsuperscript{43} Therefore it may be extrapolated that there was a legislative desire to widen the scope of the Bureau. Additionally the bureau originally needed a court order to seize assets but now may now initially seize assets in the absence of any such order.\textsuperscript{44}

Despite such developments and assumptions and the prevailing influence of the bureau in its role as part of the Irish crime control model there has not been comprehensive research on CAB and its operational approach and the actual results that it has achieved to date by following this approach. The work strives to fill that gap in Irish criminological research. It does this by firstly considering the concept and its place on the crime control continuum and then provides comprehensive research and analysis of the tri-part approach of using forfeiture, revenue and social welfare powers combined to target criminality at all levels. Such an approach will provide a new contribution to the current literature by providing an origins grounding with a pragmatic outcomes and outputs based case study of CAB from its inception. In this manner it provides an interesting case study of a crime control model where Ireland was the leader in its adoption and resultantly it is hoped that the research will have a wide interest and add to the body of knowledge in this arena.

\begin{footnotesize}
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\item[\textsuperscript{42}] ‘Seize assets from drug dealers, says campaigner; Call for 'mini criminal assets bureau' in areas worst affected by substance abuse’ \textit{Irish Times} Feb 17\textsuperscript{th} 2016.
\item[\textsuperscript{43}] Proceeds of Crime (Amendment) Act 2016, ss 4, 5 and 6.
\item[\textsuperscript{44}] \textit{Ibid} at s. 3.
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Part One.
Chapter 1.

The Modern Criminal Justice Environment.

Introduction.

In recent years in Ireland we have witnessed a clear movement away from the monopolist position of the Director of Public Prosecutions (DPP) as the augmenter of assessed transgressions into the criminal sanction arena using the traditional police – prosecution – punishment model. It is common to now have multiple agencies involved in regulation, control and risk management and these have the potential for both investigating and initiating criminal sanctions. These type of agencies also have a compliance remit. Whilst they rely on the State for authority they primarily pursue their own goals and objectives and whilst having considerable success in this (limited) arena can often be post hoc focused and not necessarily integrated as part of overall bigger picture of achieving targeted success. In addition to multiple agencies we also have the development of multi-agencies.

The Criminal Assets Bureau (CAB) is the leading example and template for such an agency and it has a unique and specific remit to target the proceeds of crime and is not concerned with adherence to regulatory standards. It both complies with and detracts from a model of disaggregated justice in that it operates outside traditional criminal boundaries and safeguards and does not require a criminal conviction but rather operates criminal justice within the civil realm to civil standards. Due to its singular and thus co-ordinated multi-agency (as opposed to multiple) approach is both cognisant of and an influencer of the strategic plans of its individual members and thus presents a co-ordinated approach in the areas in which it is focussed. It operates as a leader and influencer of strategy for criminal justice goals and legislative enactments and is a finder of legal operational boundaries beneficial to both itself and individual member agencies whilst acting alone.
The question remains whether we are on the precipice of a brave new world or a new element of the continuum in the evolution of policing and enforcement of regulation in the Irish State. The present chapter provides a structural and conceptual foundation of the four pillars that form the theoretical basis for a restructuring in Irish criminal justice – namely the model adopted, developed, defined and refined by CAB. Such a foundation will allow us to consider, in the remainder of the thesis, this model and its operation by the bureau.

The first pillar that will be developed is that of governance. The nature and expectation of governance has changed, developed and been refined over the past number of centuries. Moving from an era of little but harsh governance by the State to an era of criminal law refinement and modern, but primarily non-intrusive, specialised and professional regulation, by multiple agencies, in all aspects of daily life ranging from gun control to levels of lighting in office blocks. Many of these agencies have at their discretion the option to issue criminal proceedings for non-compliance and in the modern era criminality became to be seen as a solution for all problems arising in society. Resultantly and by concomitant necessity criminal law has become much more regulatory in nature and the traditional criminal footings of mens rea, actus reus and establishment in formalised court proceedings of guilt beyond all reasonable doubt is, in some areas, becoming a measure of last resort and in others not an applicable measure in any circumstances. Many regulatory crimes are often considered as instrumental in nature that are ‘decentred’ and ‘at a distance’ and thus different to paradigmatic criminal law. CAB may be considered as a hybrid model that is not concerned with either compliance or prosecution but rather threat neutralisation through the development and use of civil, administrative and regulatory mechanisms. It brings together

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heretofore unconnected agencies and applies the collective authority to targeted individuals at both a national and international level.

This is achieved via a de-centred approach that avoids the structures and inherent protections of the criminal law by operating within the civil realm and it is this key factor that forms the second pillar of our conceptual framework. The adoption of civil mechanisms by the bureau allows it to conduct non-conviction forfeiture and civil application of revenue and social welfare laws as a tri-part procedural mechanism to target the proceeds of crime and achieve threat neutralisation. The bureau has a wide remit to achieve this target and constitutional protection for such an approach based on the overall common good. Following a targeted approach on assets by the bureau the individual holding such assets is left with very little options provided that the bureau can prove, on the balance of probabilities, that the asset constitutes the proceeds of crime. Indeed once this is proven the individual is generally left bereft of any rights notwithstanding the absence of a criminal conviction.

The reason for such a situation is the basis of our third pillar in that the bureau is not concerned with either the individual per se or his or her guilt and potential punishment. Rather the model adopted is concerned with the assets held by that individual and thus it is a framework of justice that is apersonal, non-moral, regulatory and administrative in nature. In essence the bureau is focussed on the financial wealth of the criminal actor rather than the person. This involves specialised investigation, not using traditional policing methods but rather utilising accountancy and administrative tools to discover and follow financial trails and wealth holdings. This information based approach allows for a focus on the systemic risk that may exist.

The bureau adopts an actuarial approach to identify and classify levels of danger that exist with society and does not concern itself with any aetiological factors that may be causing such dangers to exist and regenerate. Rather it adopts a business-like approach to reach and achieve its remit of targeting the
proceeds of crime and deliver those proceeds of crime to the benefit of the exchequer to be expended as the relevant executive deems appropriate. It does not seek to normalise the targeted criminal actor either pre or post application of its powers. It has taken a role in reasserting moral authority over criminality and has begun to become more mainstream and taken a role in shaping the overall landscape by taking part in joint policing initiatives and briefings at various levels in the criminal justice field.

**Governance.**

The nature of how a democratic society is governed or regulated may be considered as a reflection of the standards and demands operating in that particular society. Various events may cause a rupture in the development of such governance and serves to highlight the maxim that law does not develop in neat linear evolutions or straight line precedents and is thus a feature of a society rather than fixed constant. Whilst the overall operating model may remain relatively static in its approach the above mentioned ruptures might be more correctly viewed as societal evolutionary developments that require matching regulation to meet the required demands and standards. This regulation, in turn, may necessitate a departure from the norm. In considering such governance in the specific Irish sense it is necessary to briefly outline the development of criminal regulation and control. Whilst such analysis is of necessity broad and sweeping it nonetheless provides a suitable and applicable context for establishing the first foundation pillar of the modern system of governance that is operated by CAB.

It is acknowledged that by the mid-19th century the state had begun, at least, to monopolise the prosecution and policing function in terms of serious crimes. Concomitantly what was also evolving was a different approach to general and commercial regulation with the emergence of many and varied specialised regulatory bodies. Indeed Braithwaite notes that:

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“From the mid-19th century, factories inspectorates, mines inspectorates, liquor licencing boards, weights and measures inspectorates, health and sanitation, food inspectorates and countless others were created to fill the vacuum left by constables now concentrating only on crime. Business regulation became variegated into many specialist regulatory branches.”

This may be seen, it is submitted, as the initial and very tentative emergence and development of specialism and professionalism in the regulatory arena. Furthermore it provided an orderly environment for commerce to operate and for society to be protected via consistent standards leading to expected outcomes and moreover a familiarity and acceptability of regulatory authority. Whilst this reflected an emerging and evolving form of regulation is was confined to specific areas and, taking a chronological jump, the power to prosecute serious criminal transgressions remained with the Director of Public Prosecutions (DPP) or her predecessor in title. However in modern times it is now apparent that the DPP, whilst still the main prosecuting body for criminal breaches, no longer holds a monopolistic position in the area. Over time agencies have been established that – in contrast to the above solely regulatory bodies – have the option of using prosecution powers. These agencies operate in areas such as Competition law, Health and Safety law, Environmental law; and Corporate compliance.

Importantly, in the current context, in addition to the aforementioned criminal powers – which are considered a last resort strategy – these bodies are often seen as support, compliance and general enforcement agencies over and above being prosecution bodies. Thus the power to guide, support and

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5 The office of DPP was created by section 2 of the Prosecution of Offences Act 1974 – prior to this all serious criminal offences were prosecuted via the Attorney General. On the nature of regulation generally see Scott, C. (2012) ‘Regulating Everything: From Mega- to Meta-regulation’ 60 Administration 57 – 85.
negotiate is similar to the earlier business regulation model of specialised regulatory agencies – but with a final prosecution option available. A distinction is sometimes made between such regulatory instrumental approaches and the expressive\(^6\) nature of traditional criminal law. The former has been considered a ‘quasi administrative matter’\(^7\) that did not stigmatise those convicted. In addition to these multiple regulatory bodies with their own unique competences in particular areas of expertise\(^8\) we have also witnessed the development of *multi* (as opposed to multiple) agencies and CAB is the prime exemplar of such an approach to governance.

As with the departure in the mid-19\(^{th}\) century for the regulation of business CAB is now focussed on the business of crime and how it can be governed and controlled – as opposed to regulated and manged vis-à-vis traditional business. Here control based regulation is still focussed on cash flow, profit and (illegal) earnings generated. CAB may be seen as a hybrid model that departs from both the regulatory and criminal prosecution model in the following ways:

It is not concerned with enforcement, compliance or prosecution but rather targeting and neutralisation. It departs from the police-prosecution-prison model to the regulation of the criminal business (as opposed to the criminal) where the control is not through *post hoc* conviction based sanctions but rather through threat neutralisation achieved through a non-conviction based model of enforcement (and enhancement) of the various individual powers of its member agencies applied collectively through the auspices of its multi-agency approach.

Its multi approach generates a situation whereby the sum of its parts is greater than the individually attainable success of its constituent parts whilst its operational force is attained from the specialised nature of its staff. This


\(^8\) *Supra* n.4 at 177 – 178.
marks a significant departure from the prosecution model of criminal law enforcement and its centralised tendencies. This ‘decentred’ approach is reflective of a networked governance strategy\(^9\) that is founded upon civil, administrative and regulatory mechanisms.\(^{10}\) It is a system whereby:

“Centres of political deliberation and calculation have to act through the actions of a whole range of other authorities, and through complex technologies, if they are to intervene upon the conduct of persons, activities, spaces and objects far flung in space and time … Such ‘action at a distance’ inescapably depends on a whole variety of alliances and lash-ups between diverse and competing bodies of expertise, criteria of judgement and technical devices that are far removed from the ‘political apparatus’ as traditionally conceived. This generates an intrinsic heterogeneity, contestability and mobility in practices for the government of conduct.”\(^{11}\)

CAB in many respects is the embodiment of this particular type of governance. It acts through the authorities and lash-ups of heretofore unconnected and non-co-operating agencies enforcing existing and new civil based remedies in a traditional criminal sphere. It intervenes not through fixed surveillance techniques but rather through targeting (it currently has approximately 700 targets\(^{12}\)) that arises from networks of information generated from divisional asset profilers\(^{13}\) and governs conduct through such mobility of practice. As noted by Rose on such governance generally:

“The securitization of identity is dispersed and disorganised. Problems of the individualization of the citizen have formed in a whole variety of sites and practices of – of consumption, of finance, of police, of health, of insurance – to which securitization of identity can appear a solution. Does this person have sufficient funds to make

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\(^{11}\) Supra n. 1 at 323. Also see generally Rose, N. (2003) ‘Government, Authority and Expertise in Advanced Liberalism’ 22(3) Economy and Society 283-299

\(^{12}\) CAB @criminalassets Tweet 23\(^{rd}\) March 2018 available at https://twitter.com/criminalassets?lang=en (last accessed May 2\(^{nd}\) 2018.)

\(^{13}\) On the nature, role and operational importance of divisional asset profilers see chapter 5 at text around n. 4.
this purchase; … is this person a potential suspect in a criminal case; … Control is [better] understood as operating through conditional access to circuits of consumption and civility: constant scrutiny of the right of individuals to access certain kinds of flows of consumption goods; recurrent switch points to be passed in order to access the benefits of liberty.”

Thus CAB in executing this approach to discharge its remit is reflective of a model whereby governance ‘flows through a network of open circuits.’ The reach for effectiveness of actions is wider, greater and more fluid than traditional models of governance.

“They overcome the barriers of space and time involved in physical surveillance; they are not labour intensive; they are of low visibility; they are of high durability; they are of high transferability across domains; they are largely involuntary or participated in as an uncalculated side effect of some other action”

The manner in which CAB operates is reflected in its extra-territorial reach and moreover impact of its operational approach. By virtue of the definition of “criminal conduct” and “property” in section 13 of the Proceeds of Crime (Amendment) Act 2005 the bureau can exercise its authority to pursue proceeds of crime in this jurisdiction where the offence was committed aboard and can seize assets that are held in a different jurisdiction. Additionally as ‘a front line agency in the fight against criminality’ and ‘using a unique set of legal principles’ the bureau plays ‘an important role in the context of law enforcement at an international level.’ It is the designated asset recovery office for Ireland. The offices share information at a European level to assist in identifying and tracing criminal assets in member states. It

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14 Supra n.1 at 326.
16 Supra n. 1 at 326.
17 This amendment arose following the case of McK v. D [2004] 2 I.L.R.M. 419 where the Supreme Court ruled given the necessity to interpret penal statutes on a strict basis the original Proceeds of Crime Act 1996 could not be assumed to have extraterritorial effect in the absence of an express provision to that effect. At 429.
is also the lead Irish agency in operations co-ordinated by Europol and it utilizes the assistance of Interpol. The bureau was one of the co-hosts of a conference that lead to the establishment of the Camden Asset Recovery Inter-agency Network (CAIRN) which is an ‘informal network of contact and a co-operation group’ with the aim of ‘enhancing the effectiveness of efforts’\(^\text{19}\) to deprive criminality of its profit element.

The specialised network is further enhanced by involvement with bodies such as the Association of Law Enforcement Forensic Accountants (ALEFA) of which the lead partner is *An Garda Síochána* but via the bureau. This is a European funded project which assists in the development of ‘the quality and reach of forensic accountancy throughout law enforcement agencies.’\(^\text{20}\) Individual bureau staff provide training at an international level, based on its core skills and success achieved in its operations. Finally\(^\text{21}\) the bureau has established a ‘unique relationship’\(^\text{22}\) with the United Kingdom as the only country with which Ireland shares a land border. In addition to planning and support via cross border conferences the UK government has recognised the ‘specific and individual powers’\(^\text{23}\) of CAB and resultantly has specifically included and the Bureau in its legislation pertaining to the disclosure of revenue and customs information.\(^\text{24}\) The importance of this approach and ‘acknowledgment of the Bureau’s international investigative function’\(^\text{25}\) was reflected by a joint agreement between the bureau and Her Majesty’s Revenue and Customs (HRMC) in 2016.

Thus, as demonstrated, the nature of the governance model operated by CAB is not defined by the influence of criminal law. It operates in contrast to general paradigmatic criminal law in favour of a regulatory framework that is

\(^{19}\) *Ibid* at 43.


\(^{21}\) The bureau also co-operates with international bodies such as the Asset Recovery Inter-Agency Network – Asia Pacific. Criminal Assets Bureau (2015) *Supra* n.18 at 44.

\(^{22}\) *Supra* n.20 at 66.

\(^{23}\) *Ibid* at 68.

\(^{24}\) *Serious Crime Act* 2007, section 85.

\(^{25}\) *Supra* n.20 at 68.
not concerned with subjective culpability.\textsuperscript{26} As a result ‘the state is steering and regulating rather than rowing and providing.’\textsuperscript{27} The nature of this targeted approach adopted by CAB utilises ‘a multiplication of possibilities and strategies deployed around different problematisations in different sites and with different objectives.’\textsuperscript{28} This model is a clear movement away from the traditional safeguards enshrined in the rubric of traditional criminal law in favour of a flow to civil law and standards for enforcement of its \textit{raison d'etre} at, importantly, both a national and international level.

\textbf{Criminal Law safeguards and the flow to civil power.}

These due process safeguards are enshrined as central and controlling tenants of the rubric of criminal law. The find their justification on the basis of an equality of arms framework and a system of justice that places criminal proceedings as ‘officially designated ceremonies of guilt determination.’\textsuperscript{29} As a result of following such strict strictures and procedures and meeting the high criminal burden of proving – normally to a jury – guilty beyond reasonable doubt the State by complying with the \textit{golden thread} of criminal law maintains the moral authority to exert sanctions for breaches of deemed public wrongs. This ‘social contract’ was encapsulated by Garland where he notes that:

“The offender is defined as a legal subject, a citizen inscribed with rights and duties, entitled to equal treatment before the law. The State which punishes does so by contractual right in accordance with the terms of a political agreement. Its power to punish has its source in the offender’s action - it is the agreed consequences of a contractual breach. The State has here no intrinsic or superior right. It meets the citizen on terms of equality and must not encroach upon his or her rights, person or liberty except in circumstances which are rigorously and politically determined in advance - \textit{nulla poena sine lege}. In this

\begin{footnotes}
\item[26]\textit{Supra} n.2 at 138 – 141.
\item[27]\textit{Supra} n. 1 at 324.
\item[28]\textit{Supra} n. 15 at 240.
\end{footnotes}
penal vision we meet the ideology of the minimal legal state, the liberal dream, guardian of the free market and the social contract.”

Whilst this *post hoc* police – prosecution – punishment model remains the system under which many crimes are dealt with there is also a ‘growing homogeneity between criminal and civil procedures.’ There is not straight line distinctions determining which area of law should have primary governance for particular transgressions.

“Rather than the traditional dichotomist perspective therefore, legal proceedings might better be seen as a continuum, with distinctly civil proceedings at one end and clearly criminal proceedings at the other. Between the two ends of the continuum is a range of possibilities, each of which may be more or less criminal or civil.”

The individual tipping points for change will be considered later in this work, however the framework for change is, in part, based on the fact that multiple strategies are now employed by law enforcement agencies. One of these strategies is to employ civil mechanisms as a crime control strategy. Depending on the perspective taken this may be seen as a move away from the harsh consequences of criminalisation or a necessary move towards the civil realm due to the ‘perceived ineffectiveness of the criminal law mechanism.’

In any event by adopting the civil strategy it is possible to avoid the due process protections of the criminal law. The movement in Ireland is exemplified by the non-conviction forfeiture of assets and civil recovery mechanisms operated by CAB. Moreover the bureau is not concerned with the conduct of the asset holder but rather threat neutralisation through deprivation of the ill-gotten gains. The targeted use of such sanctions in the civil – as opposed to criminal – realm has received judicial imprimatur on a number of occasions. In *M. v. D.* [1998] it was stated by Moriarty J. that:

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32 Ibid at 9.
34 Supra n.2 at 134.
“I am clearly entitled to take notice of the international phenomenon, far from peculiar to Ireland, that significant numbers of persons who engage as principals in lucrative professional crime, particularly that referable to the illicit supply of controlled drugs, are alert and effectively able to insulate themselves against the risk of successful criminal prosecution through deployment of intermediaries, and that the Act of 1996 is designed to enable the lower probative requirements of civil law to be utilised in appropriate cases, not to achieve penal sanctions, but to effectively deprive such persons of such illicit financial fruits of their labours as can be shown to be proceeds of crime.”

Thus where significant wealth is being generated by criminality operating at a distance from the offence enforcement via criminal law mechanisms would be ‘inadequate to the meet the aim of overall deterrence’ that is a feature of criminal sanctions. Resultantly where non-traditional methods are employed it would appear to be constitutionally acceptable to depart from traditional criminal safeguards on the basis of a greater good and necessity argument and any due process concerns are answered by reference to the civil nature and standards of the process. However as has been highlighted in a different context ‘merely redefine any measure which is claimed to be punishment as regulation and, magically, the Constitution no longer prohibits its imposition.’

A feature of this model of civil recovery is that in marked contrast to criminal prosecutions civil forfeiture is revenue generating. Whilst CAB highlights its success with regard to income generated and thus denied to criminality it

35 M. v. D. [1998] 3 IR 175 at 178. The learned justice went on to note the counterbalancing nature of the legislation. He stated that: “I am not concerned with construing the Act of 1996 as a whole, but it is noteworthy that, whilst its scheme indeed introduces significant innovations, a wide discretion is entrusted to the court to ensure compliance with the “audi alteram partem” rule and other precepts of natural justice, and to ensure that injustice is not perpetrated against meritorious respondents, for example by the compensation provisions comprised in s. 16 of the Act of 1996.” Ibid.


37 United States v Salerno (1987) 481 US 739 at 760, per Brennan J.

38 See generally chapters 5, 6 and 7.
does not benefit directly nor is its existence directly dependent upon any such financial results. By implementing its civil powers the bureau is in a position whereby it has the option to confiscate property in the absence of any criminal conviction or even charge. Moreover following any such action by the bureau it is at the behest of the holder of the disputed property to prove that the asset is not the proceeds of crime. If the holder of the asset asserts that the order seizing said property was made in breach of a constitutional right then the bureau must demonstrate, on the civil balance of probabilities, that:

“(i) the asset was not seized in circumstances of unconstitutionality, or
(ii) that, if it was, it is appropriate nonetheless to make the order sought.

In the latter case it is for the Bureau to explain the basis upon which it contends that the order should be made, and to establish any facts necessary to justify such conclusion.”

However even if the bureau fails to discharge this burden they will already have seized the asset on the assertion that it constitutes the proceeds of crime. This assertion will have been considered by the Courts prior to the above constitutional rights test and in the event that a constitutional right has indeed been breached in would not automatically result in the ‘return of the asset to the respondent from whom it had been taken, any more than contraband such as firearms, drugs or manifestly stolen property is returned to an acquitted person after trial. There is … no constitutional or legal right to possession of such items.”

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40 CAB v. Murphy [2018] IESC 12 at para 133.
41 *Ibid* at 137.
Whilst bureau activities are undoubtedly carried out with the utmost of integrity this model does serve to highlight the efficiency of actions approach that is available to the bureau through the use of such civil sanctions and powers. There has been some criticisms of the avoidance of criminal procedural safeguards by using the civil standard and realm. However the former Head of the Northern Ireland Asset Recovery Agency has countered that there is a ‘moral imperative’ to deny the proceeds of crime to criminal actors. He opinions that whilst civil sanctions might be more efficient a sovereign State should be allowed to choose the most efficient methods to meet its governance goals – provided that there is sufficient protection for the rights of the individual.\textsuperscript{42} The criminal law provides these protections as of right but without the easy of action, expediency and efficiency associated with non-conviction based forfeiture. Kennedy notes that in the civil context personal liberty is not at risk and the need for protection is not as high.\textsuperscript{43} It should be noted that he was considering the overall UK legislation which provides a statutory hierarchy that provides for criminal proceedings where possible. This is not the case in Ireland and whilst personal liberty is not at issue as above once the bureau has taken action the assed individual is left with few options and thus impecuniosity is a potential outcome.

This may arise as in addition to forfeitue powers the bureau has, as will later be outlined, quite considerable revenue and social welfare powers. In relation to the former it can fully apply all revenue legislation to the proceeds of crime and where an individual wishes to appeal a revenue assessment that has been issued he must first pay that assessment in full. It may also apply all social welfare legislation and both stop payments and demand repayment of any over payments. The combined power to apply all three actions to its targets may undoubtedly be seen as meeting the late modern justice goals of threat neutralisation.\textsuperscript{44} Such actions with the civil methodology allows the bureau

\textsuperscript{42} Supra n. 31 at 14.
\textsuperscript{43} Ibid.
\textsuperscript{44} Kilcommins, S. and Vaughan, B. (2006) “Reconfiguring State- Accused Relations in Ireland” Irish Jurist (ns) 90
to meet its remit by focussing not on the individual actor *per se* but rather to adopt a non-individualised approach.

**The non-individualised approach.**

The traditions of criminal law are encapsulated by the theory and operational concept of *mens rea* – the logical conception that it is unacceptable to sanction those who did not intend to do any wrong. This concept has evolved over time and an accused’s conduct may be assessed based on where it falls on the framework of intent ranging from deliberate to neglect. Where the individual falls on the framework will determine the type of charge and, if proven, sanction that the State will apply to that citizen. Those found guilty will then personally suffer the punishment with the perceived overall traditional criminal justice ideals of retribution, deterrence and rehabilitation being meet. Such an approach matched the penal welfarism ideal of the rehabilitation of the offender.

The development of knowledge around the offender reflects a correctionalist criminology approach being adopted that ‘perceived crime as a social problem that manifested itself in the form of individual criminal acts.’ Such acts were viewed as being symptomatic of ‘criminality’ and ‘delinquency’ that were to be found in ‘poorly socialised’ individuals. The correctionalist approach adopts a criminology of the self approach that allows treatment to be focussed on that individual and their particular needs. This is in stark contrast to a criminology of the other approach which employs a more pragmatic model and rather than view the criminal actor as different it views that person as an ‘illicit opportunistic consumer’ who should not be allowed to reap the benefits of criminal endeavour. The contrast between the two approaches is highlighted by Garland:

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46 Ibid.
“One is invoked to routinize crime, to allay disproportionate fears and to promote preventive action. The other is concerned to demonize the criminal, to excite popular fear and hostilities, and to promote support for state punishment.”

The third pillar of our framework for the model of justice operated by CAB departs from any such correctionalist ideals. ‘Because crime is seen as inevitable and because individualised interventions are viewed with scepticism as to their efficacy, the new penology seeks cost effective methods aimed at regulating groups as part of a strategy of managing and minimising danger.’

Whilst non-conviction targeting may contain elements of the ideals of criminal law the model is primarily a non-moral and apersonal interdisciplinary regulatory and administrative approach that considers the common good over that of the individual. This is achieved by adopting the norms of regulatory law and departing from criminal investigative norms. The use of clear and consistent results based communication by the bureau has significant ‘symbolic effect’ in addition to instrumental goals – based on the assumption that collective society rejects the norm that criminals should be able to enjoy the fruit of their ill-gotten gains. The adoption of new norms is possible on the basis that ‘law is one of the primary ways in which a sustained effort is made to rationalise choices about which solution should be employed to manage social problems.’

Thus the apersonal civil approach is a ‘strategic instrument’ that focus on the ‘bull’s eye of organised crime – its economic power.’

48 Ibid 461.
54 Nikolov, N. Supra n. 51 at 27.
55 Ibid at 17.
concerned with punishment of the soul but rather denial of viability of the environment in which that soul is a key player.\textsuperscript{56}

Its success is achieved by removing the traditional lines of demarcation against different agencies and in this regard the \textit{Disclosure of Certain Information} Act 1996 provides for the sharing of relevant information between the different constituent member agencies of the bureau. The new style of investigation is based around the financial status of the targeted individual and his or her visible sources of income. It involves case management through the expertise of forensic accounting, desk based research and the use of professional assessors such as auditors and consultants\textsuperscript{57} over and above traditional observational methodology. CAB, like a business, is not interested in the individuals \textit{per se}, but rather ‘dividuals’\textsuperscript{58} that occupy particular lifestyle templates. It is primarily an information based approach that involves:

“both public and private sector material, for example taxation records and bank-account information, which demonstrate money movements, together with any relevant information as to lifestyle. Any record that provides information concerning money may be significant. The investigator seeks to discover where money came from, who obtained it, when it was received and where it was stored, deposited, or transformed into other forms of property. Since, those who commit acquisitive crime continuously grow more sophisticated in their laundering activities, this requires investigators to acquire new and specialized financial investigation tools, designed to obtain and interpret information which criminals wish to hide.”\textsuperscript{59}

Devising, creating and following a model which adopts such an approach in conjunction with the fact that for a CAB investigation no conviction or charges are necessary has resulted in Ireland, and the bureau, being at the

\textsuperscript{57} Supra n.10 at 692.
\textsuperscript{58} Supra n.15 at 237.
forefront in Europe for this type of non-conviction targeting of the proceeds of crime. The apersonal approach rejects the notion of normalisation in favour of destroying ‘the criminogenic structures that exist around the wrongdoer.’

Managing Systemic Risk.

It is those structures which the basis of our fourth and final pillar of the current conceptual framework. It is one which is both a support to the other constructs but also in many ways a self-supporting pillar. In using this structure CAB adopts a model that is focussed on considering systemic risk with the offender as a rational actor and the system being indifferent to any aetiological factor. In contrast to traditional aims it has been stated that this new penology ‘has a radically different orientation. It is actuarial. It is concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness. It takes crime for granted. It accepts deviance as normal. It is sceptical that liberal interventionist crime control strategies do or can make a difference.’ Feeley and Simon contend that this movement may be seen ‘as a new strategic formulation in the penal field.’ The same authors note elsewhere that what they are referring to as this new penology is a ‘belated application of risk management, actuarial thinking and systems analysis to the criminal process.’ They highlight that what they are defining as the new penology is not ‘a major paradigm’ in criminology but the movement of well-established bureaucratic practices into the criminal process. In essence, and as exemplified by CAB, combating crime increasingly involves the adoption of business like techniques to deal with the

60 Ibid 10 at 703.
64 Ibid at 77.
developing and sophisticated business of crime. Given the traditional criminal law monopolistic position it had been ‘isolated’ from the administrative techniques of commerce. Increasingly techniques such ‘profiling, auditing and screening’ have been developed in order to improve ‘administrative knowledge and control over penal agents.’

Garland has noted that the administrative subsystem of this type of approach may sometimes be seen as somewhat contradictory in nature. He states that:

[T]here are two contrasting visions at work in contemporary criminal justice – the passionate, morally toned desire to punish and the administrative, rationalistic normalizing concern to manage. These visions clash in many important respects but both are deeply embedded within the social practice of punishment.

Thus whilst the desired end result remained a constant the focus, under this model it moves away from reform of the individual and moves towards a risk management perspective.

“No-one was much interested anymore in the motives and meanings of these people. Instead what was at issue was what they did, how to control them, and how to minimize the harms they generated. Offenders and their offences were coming to be reframed less as the pathological products of societal and psychological breakdowns who needed to be therapeutically reformed, and more as bundles of harmful behaviours and potentialities.”

This is not to suggest that an individual’s past behaviour was being totally disregarded, rather it can be used as a valuable source of information to assess risk and categorise offenders on the basis of calculated dangerousness. As a result of increasing industrialisation and globalisation the late twentieth

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65 Ibid at 79.
68 Ibid at 2.
The challenge of law was to ultimately provide the same desired result – but it was being achieved in a different manner. ‘It is a question not of imposing law on men, but of disposing things; that is to say of employing tactics rather than laws and even laws themselves as tactics – to arrange things in such a way that, through a certain number of means such and such ends may be achieved.’ Thus the adopting of risk management techniques enhances other regulatory mechanisms and in turn ‘these are being moulded and adapted to fit within a risk focussed mentality.’ As a result of this particular mentality it is possible to exclude from normal society certain categories of individual.

Viewing such particular individuals as a risk that needs to be managed serves to highlight the importance of the new penology for establishing the current framework. It is evident that the model operated by CAB does not focus on culpability, rehabilitation and re-integration of the offender – rather

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70 Supra n. 67 at 2.
71 Supra n. 45 at 12.
74 Shearing, Supra n.61 at 212.
it categories and manages. In contrast to the disciplinary approach of altering behaviour the actuarial regime alters the physical and social structures within which individuals behave. ‘The movement from normalisation … to accommodation … increases the efficiency of power because changing people is difficult and expensive.’

CABs model of targeting with the aim of neutralisation is reflective of a focus on the career criminal that is at the core of the new penology. Indeed Feeley and Simon consider this is one of its key features as it is agnostic about the causes of crime and places its concern on the incapacitation of offenders. Through integration in the overall system as part of joint policing initiatives, involvement at local, regional and national levels and results based communication with the public at large it would appear that the public may be more accepting and welcoming of this approach than of the long process ‘cluttered with ceremonious rituals’ that are the bedrock of the traditional criminal process.

Of course such rituals form the bedrock for very valid reasons and it is essential that the entire system does not depart from long held traditions in order to target but one aspect of criminality. The approach taken by the bureau ensures compliance, attains measures of efficiency and effectiveness and resultantly meets demands for public authority through the traditional lens of vengeance. Axiomatically it does mark a movement away from the societal safety measures established by legal liberalism and adopts measures such as information sharers at both a professional and community level. The bureau has a relatively wide remit and has in recent years has begun to depart from its original position of targeting those at the highest end of the

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76 Supra n.62 at 452.
77 Supra n.53 at 773.
78 Supra n.61 at 164 – 165.
80 Supra n. 2 at 130.
criminal chain. In additional to the need to ensure procedural safeguards, Ashworth has highlighted that where there is an over focus on risk based penal policies the underlying problem of the risk may not be targeted or solved. In terms of focusing on and solving the underlying risk the work of CAB is solely to deny the proceeds of crime to criminal actors. Without straying outside the bounds of the current work, whilst this approach does neutralise a particular element on the supply side it does not necessarily affect the demand side for illegal goods. At the time of amendment of the proceeds of crime legislation the decision was made not to ‘ring fence’ funds generated from CAB activities for communities most effected by the individuals targeted by the bureau. To reverse that position simpliciter could be seen as introducing – by the back door – financial targets for the bureau. Given the wide powers available to the bureau under this new penology and its widening and supporting role within the Irish criminal justice system it should be constrained to justifiable criminal targets as opposed to any refocus in order to achieve income targets.

**Conclusion.**

It is undoubted that elements of the criminal justice landscape in Ireland has refocussed, re-assessed and re-asserted itself over the past number of decades. This in not unlike the commercial world where businesses carry a similar exercise in order to regain dominance in a particular market sector. In terms of the criminal justice sector CAB has been to the forefront of focussing upon and reformulating how the system deals with criminality. The connecting, interlocking and overlapping framework for this change forms the conceptual underpinning for considering the work and operational approach of the bureau. By developing upon societal acceptance of regulatory bodies the bureau adopted an instrumental approach to criminality that allowed it to

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focus on threat neutralisation by adopting a networked governance approach that operates at both a national and international level and gives it very broad sweeping tentacles of power.

This considerable power attainment and authority was feasible by adopting civil – as opposed to criminal – strategies to meet its statutory remit. By confining itself to the civil sphere it has been able to neatly side step all the due process requirement inherent in the criminal sphere. Whilst is has judicial imprimatur to operate in this fashion it is primarily a self-controlling, self-regulating body that given the nature of its work must operate with significant elements of secrecy, that totally refocuses the traditional equality of arms provisions and places all the advantages squarely on its own side.

It adopts a business-like approach with legislative authority to target criminality via assets as opposed to individuals. Such a *big picture* approach focuses not on culpability of the individual but rather takes a risk management approach that is focussed on control of the financial wealth of targeted individuals. This is achieved through interaction with society and other bodies in addition to exercise of its own considerable powers. Whilst this thesis will demonstrate the results that it has had to date in targeting organised criminality through the implementation of this approach it is a model whose power must be maintained at appropriate levels.
Part Two.
Chapter Two.

The expanding and contracting boundaries of Criminal Law.

Introduction

In having established the framework in the first part of this thesis we will now contextualise the underpinnings of CAB by considering its place on the crime control continuum. The early development of common law concentrated on matters which were deemed to offend against the King of the time – by default matters that would now be considered as serious criminal issues. It was only later that formal legal mechanisms took control of issues that arose between private individual actors in society and moved such matters to a formalised legal and court structure enforced by the organs of the State. This greater organisational structure emerging in law generally and an encompassing of then non-traditional matters (ie what is now called civil law) resulted in a concomitant cleavage developing between matters of criminal law and those of civil law. The distinction emerged, as per Holdworth, in the medieval common law period. At that juncture in history he notes that:

“The crown has assumed jurisdiction over the more serious crimes – the felonies. … At the beginning of this period many of the smaller wrongs to person and property were dealt with in the local courts. At the end of this period the writs of trespass and deceit and their offshoots enabled the royal courts to offer better remedies for a varied and growing class of wrongs. Consequently new principles both of criminal and civil liability were being evolved.”

As with the entirety of common law the distinguishing lines were not predetermined but rather established in evolving jurisprudence in the reactive precedent based manner that reflects that system of law. Over significant periods of time the prosecution of crimes in society moved from an unstructured victim initiated process

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‘to a structured, adversarial state monopolised event.’ As a result various protections evolved in the criminal law area due to the fact that very often a breach of such a law, at a minimum, denied the accused his personal liberty if found guilty. Thus the framework that is criminal law is now characterised by its punitive purposes, rules of discovery, high burden of proof, high procedural barriers to conviction and harsh modalities of punishment in the event of a conviction.

This can be sharply contrasted with civil law mechanisms which are less expressive, often concerned with compensatory mechanism – over and above any blameworthiness – and have much lower procedural safeguards than operate within the bounds of the criminal law. Thus whether an issue is investigated and/or pursued under the umbrella of criminal or civil law has profound implications for how that particular matter will be treated within the legal system as a whole. It is arguable then that there is a clear temptation for prosecutors – if they have an option – to pursue matters in the civil realm with its associated lower burdens of proof and protections for the accused. Such an argument, by corollary, indicates that breaches of law are not always clearly delineated into neat criminal and civil structures. Rather a decision must be made as to which realm is the most appropriate to use in particular circumstances. There are, as we shall see, a number of factors that both individually and collectively influence and determine such decisions. The very nature of common law means that approaches develop in a piecemeal structure with historical, political and media influences all contributing to the developing and defining of law. Such influences can often be reactionary in nature and without some level of legislature restraint laws may be enacted without proper consideration of criminological and legal philosophical principles.

In this chapter we will deconstruct into individual components the various factors which result in an ultimate determination that a matter is criminal or civil in nature. In so doing we will be mindful of the need to avoid a history of the present analysis or

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4 Ibid.
suggestions that all law can neatly be labelled into structures that have evolved at an
even and continuous pace.\textsuperscript{5} In accepting such provisos we will commence with an
analysis of the various factors that are regarded as key marking posts on the route to
determining what constitutes criminal law. In particular we will consider key Irish
cases that have established jurisprudential groundings in terms of indicators that the
courts will use in determining if a matter rightly rests in the criminal domain. This will
be carried out by considering operational and procedural factors and furthermore from
an abstract analysis perspective. In the same vein we will progress to consider
distinguishing features between criminal sanctions and administrative sanctions as in
the event that a matter falls into the later it is not part of criminal law and as such
criminal law may still be applied without concerns of double jeopardy.

Much of the jurisprudence underpinning this guidance has developed from what might
be regarded as traditional legal issues in society. Thus in the next section we will
move to consider how law has and should deal with emerging and developing issues
in society such as regulatory and white collar crime. This will be achieved by initially
considering how society reacts to non-violent crime and the non-traditional (criminal)
actors who perpetrate such activities. The specific example of competition law will
be used to analyse the legislative and judicial approach to dealing with this nuanced
and evolving area of law.

A logical procession from such specifics will allow us to introduce the concept of
middleground systems of justice and query whether such systems operate in Ireland.
This section both assists with the overall aim of the chapter in seeking to locate the
boundaries of criminal law and introduces a concept that will have relevance in later
 chapters where greater consideration will be given to specific examples of modern
criminal justice in operation in Ireland. In this chapter we will acknowledge the
theoretical underpinnings of such a system that takes from both the criminal and civil
realm and set out examples in an operational setting.

\textsuperscript{5} Supra n.2 at 42 – 43.
What is Criminal Law?

One of the leading writers on criminal law has claimed that in attempting to define criminal law it is only possible to offer a formal definition. He states that ‘in short a crime is an act capable of being followed by criminal proceedings having a criminal outcome.’ Such an internalised axiomatic approach by its very nature leaves many other definitional matters to be considered. Such matters are important considerations by virtue of the fact that where a particular matter is deemed to fall within the rubric of law will determine what legal protections are afforded to an individual that is accused of transgressing the law. In the criminal sphere leading such protections is Article 38 of the Irish Constitution which provides that a person may not be tried on a criminal charge except in due course of law. In applying such a requirement in practice a number of significant protections such as the presumption of innocence, the requirement of guilt beyond doubt and certain rights to silence have evolved as central tenets of a modern criminal trial.

In Ireland, the first significant case to provide doctrinal guidelines with respect to the indicators that would determine a matter to be criminal or civil in nature was that of Melling v. O’Mathghamhna.7 The facts of this case are pertinent for current purposes in order to properly assess the framework of analysis for establishing the key determinative features of a crime that were established by the judgment. The facts relate to charges against the plaintiff for smuggling goods into the State the importation of which was prohibited by section 24 of the Dairy Price (Price Stabilisation) Act 1935. The charges themselves were brought under section 186 of the Custom Consolidation Act 1876 which provided that if a penalty under the Act was not paid then the trial judge must (my emphasis) commit the defendant to prison for a period of between 6 and 12 months. The plaintiff in this case asserted that the proceedings in question were criminal in nature and were not minor and thus should not, as was the case, be brought before a sitting of the district court.

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7 [1962] IR 1
In judgment Kingsmill Moore J. took a somewhat abstract approach and raised the question:

“What is a crime? The anomalies which still exist in the criminal law and the diversity of expression in statutes make a comprehensive definition almost impossible to frame. "The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?" said Lord Atkin in Proprietary Articles Trade Association v. Attorney-General for Canada. A recent text-book, Cross and Jones, suggests as a definition: "A crime is a legal wrong the remedy for punishment of the offender at the instance of the State. "Professor Kenny in the earlier editions of his Outlines of Criminal Law says that "crimes are wrongs whose sanction is punitive and is remissible by the Crown if remissible at all." If we regard the Revenue Commissioners as a branch of the executive acting for the State (and in discharging their functions under the Customs Acts I think they must be so regarded) an offence under s. 186 would fall within both those definitions."8

In this case counsel for the defence had contended that the question (what is a crime?) could be answered by considering, firstly in the abstract, the relevant sections of the act9 and secondly in the specifics of this instance by virtue of the fact that the legislation did not contain words of prohibition but rather that committing certain acts was punishable in a defined manner. As mention whilst Kingsmill Moore J. was taking an abstract approach this may be contrasted with the more procedural approach espoused by Lavery, J. In establishing the approach to be taken to the establishment of what constitutes a criminal offence he applied an approach that involved considering the nature and potential outcomes of procedures. In dealing with the facts at bar he stated that a proceeding that involved detention, a charge under terms appropriate to a criminal offence, searching an individual and presenting a person before a District Court as a person in custody, the normal bail procedure and the possibility of imprisonment for non-payment of a fine were factors that had all the ‘indicia of a criminal charge.’10 This would reflect the application of a traditional

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8 Ibid at 24 – 25.
9 Which here for example did not contain the words ‘criminal charge.’ In relation to the final point made by Kingsmill Moore J. above the role of the Revenue Commissioners in modern criminal justice in Ireland will form the central part of chapter 6 of this work.
10 Supra n.7 at 9.
police, prosecution and punishment type approach and where that approach applies then *ipso facto* it must be a criminal matter. However if we take this approach in a wider setting (ie it was very particular to specifics of the issue under consideration) it is somewhat of a *post facto* rationalisation. Whilst using these operational factors serve to indicate that the matter has the hallmarks of a criminal procedure Lavery J. did refer to indicia and it is these that are more beneficial in establishing currently sought boundaries.

These indicia were a central tenet of the overall judgement and were succinctly set out by Kingsmill Moore J. They could be regarded as key indicia features of a crime in the context of a piece of legislation or common law under consideration and in turn can be been extrapolated from the specific and applied in the general context. These indicia are:

(i) “offences against the community at large and not against an individual;
(ii) the sanction is punitive and not merely a matter of fiscal reparation. … Furthermore, failure to pay, even where the defendant cannot do so by reason of lack of means, involves him in imprisonment;
(iii) such offences require mens rea, for the act must be done knowingly and with intent to evade the prohibition or restriction … Mens rea is not an invariable ingredient of a criminal offence, and even in a civil action of debt for a penalty it may be necessary to show that there was mens rea where the act complained of is an offence "in the nature of a crime": … but where mens rea is made an element of an offence it is generally an indication of criminality.”

These features were applied in various different cases that assist in current context of establishing the mantle for a distinguishing cleavage between matters rightly considered as either civil or criminal. Following on from the above indicia it is a basic premise of modern criminal law that criminal actions concern conduct against the community at large not just one individual thus enforcement is not left to the victim but to the State. On the other hand with civil law any breach of it is purely a matter

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11 *Supra* n.7 at 25.
12 This was not always the case; historically much of the work of seeking a prosecution rested with the victim. *Supra* n.2 at 6 – 14.
for the injured party and they have various options as to whether they wish to pursue a course of action. However with criminal law whether the prosecution of an accused is to go ahead (or not) is at the exclusive determination of the State. The public interest in maintaining the integrity of the State is usually carried out by a public prosecutor, namely, in Ireland, the Director of Public Prosecutions.

The requirement for mens rea – clearly set out above – has long been regarded as a keep requirement to justify a criminal action in a free society. Such a requirement means that the offence must be committed knowingly and with an intent to evade the prohibition or restriction. The absence of such intent normally indicates that an individual did not have a guilty mind and thus ought not be prosecuted for a criminal offence. In the current context then the absence of mens rea would at least indicate that the matter is not one of a criminal nature.

In considering the second indicia above it is important to be cognisant of the lead in statement to these indicia by Kingsmill Moore, J where he quoted a Canadian case:

“The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?”

Thus attracting punishment is only a generalist position however, provision of punishment does not automatically mean the offence is a crime. This point was clearly established in Enright v. Ireland where Finlay Geoghegan, J. stated that “[I]t may therefore be considered that in order that a sanction imposed by a statute on a person convicted of a crime be considered to be a penalty in the criminal sense, requires that it be punitive in nature. However it is clear that the fact that the sanction be punitive does not of itself mean that it will be considered a criminal sanction.” This raises the question of what then does constitute criminal punishment and as result how might

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13 At one point the common law did not concern itself with any matter that was not a traditional criminal issue. This provides an interesting juxtaposition with modern era where many regulatory state bodies have to power to use criminal sanctions. See text around n. 44 – 46.
15 The main exception being offences of strict liability.
16 Melling v. O Mathghamhna and the Attorney General [1962] IR 1 at 25
17 Enright v. Ireland [2003] 2 IR 321
18 Ibid at 332
such an approach be actually applied in the Irish sense. In answering the first point a
theoretical under-pinning was offered by Packer in stating that:

“Criminal punishment means simply and particular disposition or the
range of permissible dispositions that the law authorizes (or appears to
authorize) in cases of persons who have been judged through the
distinctive processes of the criminal law to be guilty of crimes. Not all
punishment is criminal punishment but all criminal punishment is
punishment.”

In addressing what then is a permissible disposition for criminal purposes we may turn
to application of this area in the courts. In *McLoughlin v. Tuite & Ors* the relevant
facts for current purposes concerned section 500 of Income Tax Act 1967. This
imposed a fixed monetary penalty (£500 (Irish pounds)) for failure to comply to
deliver documents and particulars to the Revenue Commissioners. Furthermore
section 508 (of the same Act) provided that Revenue could sue by civil proceedings
for recovery of that penalty. The plaintiff failed to deliver returns of income by the
required time under the legislation and the Revenue Commissioners sought to recover
the prescribed penalties. In turn the plaintiff sought a declaration that s.500 was
repugnant to Constitution in that it imposed a punitive criminal penalty other than in
a manner provided for by the Constitution. In essence the question of key importance
in establishing the current thesis was whether section 500 penalties were criminal or
civil in character.

In reaching judgment Carrol, J. in the High Court applied the indicia as set out in the
*Melling* case above. The learned judge noted that there was an absence of criminal
phraseology used in the section under consideration. The plaintiff’s argument had
been that as there is a penalty then, by corollary, there must be an offence. The learned
judge reach the conclusion that where ‘an offence must of necessity be implied by
reason of the existence of a penalty … it would be an offence against the community
at large and not against an individual.’ She went on to note and accept that the
penalty was punitive; however in the absence of payment there was, in this specific
instance, no provision for imprisonment. Finally, in terms of the *mens rea*

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19 [1986] IR 235
20 [1986] IR 235 at 244. The issue of phraseology is considered at the text around n. 23.
21 *Ibid* at 244
requirement, as the liability for payment continued against ones estate after death then this key criminal element was absent.

In conclusion Carroll, J. accepted ‘the argument that the Oireachtas intended in s. 500 to create a non-criminal penalty recoverable in civil proceedings as shown by the clear power to sue in civil proceedings, the continuation of the liability for penalty after death, the absence of the vocabulary of the criminal law ... It is also in contrast to s. 94 of the Finance Act, 1983, which creates a criminal offence in respect of the same facts.’ In reaching such a conclusion, in a Revenue based case, the court used legislative interpretation to identify mechanisms by which legislation might be regarded as properly falling into the civil as opposed to criminal realm and *ipso facto* identify factors that the Irish legislature should be cognisant of in future drafting of legislation which could be applied on a civil balance of probabilities scale rather than the criminal standard of beyond reasonable doubt. Prior to further analysis we should note that the court put considerable emphasis on the actual vocabulary used in the legislation.

This was also considered previously in the *Melling* case, in particular by O’Dalaigh, J. who first dealt with the matter in a generalist sense by stating that it is not ‘a feature of civil proceedings that the plaintiff can have the defendant detained in jail before the proceedings commence and keep him there unless he can obtain bail. Nor may he obtain a warrant to enter and search the defendant’s house or shop and seize goods and if obstructed break open any door and force or remove any impediment to such search, entry or seizure ... Nor yet is it a feature of civil proceedings that a plaintiff can put the defendant in jail because he cannot pay the damages awarded.’ In having thus established what were central distinguishing operational features and key elements of criminal procedure he went on to apply it in the specific sense of the facts at hand and again are relevant here by virtue of the fact of the type of legislation. He outlined that:

“The vocabulary of s. 186 of the Act of 1876 is the vocabulary of the criminal law; the preliminary detention in jail unless bail be found (s. 197) and the right to enter, search and seize goods in a defendant's house or premises (ss. 204 and 205) are, as yet, unfamiliar features of civil

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22 *Ibid* at 245
litigation. In their initiation, conclusion and consequences proceedings under s. 186 have all the features of a criminal prosecution. Note that Parliament in inserting directions in the form of conviction (set out in Schedule C to the Act and directed by s. 223 of the Act to be used) speaks unequivocally: I quote –

"Where the party has been convicted of an offence punishable by pecuniary penalty and imprisonment in default of payment."

Finally, the mode of withdrawal of proceedings is the time-honoured formula employed by the Attorney General in criminal charges – nolle prosequi."²⁴

It is interesting to note that the court, in this instance, were clearly grounding their interpretation of the legislation in the positivistic intentions of the legislatures and the framework and language that they choose to use in drafting the legislation. This giving effect to the linguistic intentions of the legislative framers over and above general policy considerations was also applied in Director of Public Prosecutions v. Boyle [1994].²⁵ The pertinent facts of which related to a bookmaker falling to pay tax on bets under the relevant legislation. Given the emphasis which is being placed on the exact wording of the legislation it is worth restating that actual wording here:

Section 24, sub-s. 1 of the Finance Act, 1926, as amended by s. 64, sub-s. 1 of the Finance Act, 1982, provides:—

"Every person who fails or neglects to pay any sum payable by him in respect of the duty imposed by this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to an excise penalty of £800."

Section 25, sub-s. 2 of the Act of 1926 as amended by s. 69, sub-s. 1 of the Act of 1982 provides:—

"Every person who contravenes or fails to comply with a regulation made under this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to an excise penalty of £800."

²⁴ Ibid at 40 – 41.
²⁵ Director of Public Prosecutions v. Boyle [1994] 2 IR 221
In reaching judgement Murphy, J. highlighted that the above sections are clearly obligatory in nature and the penalties described there in were indeed punitive in nature.\(^{26}\) Moreover he was very clear in his statement that ‘the crucial factors in the present case are the presence of the words "an offence" and "on summary conviction".’\(^{27}\) He went to consider that it was the absence of those words, or indeed appropriate expressions, in *Melling* and other income tax related cases that necessitated consideration as to whether the legislation was intended to be criminal or civil in nature. Indeed he highlighted that judges in those cases both considered both the absence of expressions in some sections and ‘adverted to contrasting sections in the same legislation and the particular words such as "fine", "offence" and "summary conviction" which, amongst others, would be appropriate to designate a criminal offence.’\(^{28}\) In adopting such strict literal interpretation it should be noted that there is tautological elements at play in that such an approach is based on treating an issue in the manner that it has already been treated rather than a consideration of the underpinnings of that actual issue.\(^{29}\)

**Administrative Sanctions.**

Indeed, specifically on sanctions and their application in the sphere of what constitutes a criminal or civil matter it is necessary to give due consideration to the courts approach to matters deemed to be purely administrative in nature as opposed to punitive. If falling into the previous then they should, rightly, be treated as part of the civil realm. The matter was considered by the Irish courts in *The Registrar of Companies v. District Judge David Anderson and System Partners Ltd.*\(^{30}\) The pertinent facts for current purposes relate to the failure by the second named defendants, System Partners, to file annual returns on time – as required by s. 125 of the Companies Act, 1963 (as amended by s.59 of the Company Law Enforcement Act 2001) – for the calendar years 2000 and 2001. As a result proceedings were issued against System

\(^{26}\) *Ibid* at 226 – 227.

\(^{27}\) *Ibid* at 226.

\(^{28}\) *Director of Public Prosecutions v. Boyle* [1994] 2 IR 221 at 227.


\(^{30}\) *The Registrar of Companies v. District Judge David Anderson and System Partners Ltd* [2004] IESC 103
Partners. However subsequent to the issuing of the summonses but prior to the matter coming before the District Court, the company filed its annual return in respect of each of the years in question. As a result of the late filling they were required to pay a substantially higher fee than if the returns had originally been paid by the required dates. In the normal course of the events the relevant filing fee would have been €30, however arising from the late filling the company was subject to fees of €1,200.00 in respect of the year 2000 and €379.00 in respect of the year 2001. When the matter came before the District Court attention was drawn to the fact that the company had now filled its annual returns and paid the above filing fees which were far in excess of the normal on-time applicable fees. Resultantly the District Judge then concluded that there was a risk that the prosecution before him involved a ‘double jeopardy’ for the company and therefore should be struck out.

The pertinent sections of the legislation state:

- Every company shall, once at least in every year, subject to s. 127, make a return to the Registrar of Companies, being its annual return, in the prescribed form.”

- If a company fails to comply with this section, … the company and every officer of the company who is in default shall be guilty of an offence …”

Notwithstanding the specific use of the traditional criminal term “offence” in the relevant section the Registrar of Companies sought certiorari of the decision on the basis that the late filing fee was designed to ensure timely filing and as such was a civil or administrative sanction and not thereby a criminal penalty. The High Court refused to grant this order and the matter was then appealed to the Supreme Court where Murray C.J. noted that the companies’ office has ‘regulatory responsibility’ for all Irish companies which is a significant administrative task requiring efficient and effective administrative procedures to be in operation. He noted that there is nothing unusual in providing incentives for timely payment of fees generally and by extension

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31 Section 125(1),(2) of the Companies Act, 1963 as amended by s. 29 of the Company Law Enforcement Act, 2001.
charging higher fees to those who do not comply with the required deadlines. In relation to the specific application of the above quoted section he stated:

“In this case the liability to pay higher fees is an automatic (my emphasis) consequence to the objective fact of a certain statutory deadline having passed. The amount or amounts are fixed and there is no discretion. It is a foreseeable, objective and automatic consequence for lateness in filing an annual return by any company. It is clearly designed to encourage timely filing and discourage the dilatory. That is something which is clearly in the interest of good and efficient administration.

It is manifest that the statutory requirement to pay late filing fees is not in any sense something which involves a criminal process let alone a criminal prosecution.

Therefore, from a formal point of view I have no hesitation in concluding that the obligation to pay extra fees for a later return of a company’s annual report is in form an administrative sanction. That is to say a sanction that does not have as its purpose the punishment of an offence but the achievement of a legitimate administrative objective.”

In reaching such conclusions as to the administrative nature of the sanction he did acknowledge that this was not an absolutist position but rather one that was appropriate to the given facts and circumstances in that it was an incentive for timely compliance rather than a punishment. Where the sanction in question was an extreme measure that was completely disproportionate to the actual administrative goal that was been sought then such a measure might rightly be considered a criminal penalty. Whilst such an approach is to be welcomed it would appear to provide further guidance for the legislative framers were they to be inclined to create legislation dealing with quasi-criminal matters and place them in the civil sphere. The learned judge also stated that were the sanction in question to be excessive then it is the legislation itself, rather than the sanction, that should be challenged as to whether it meets the due process of criminal law. In this particular case the outcome was based on the fact that the ‘second respondent was not charged with any offence, no decision or judgment was

33 Geoghan, J. did not concur with this point. Whilst accepting that an excessive penalty would be unfair it would not, he asserted, be a criminal penalty. Ibid at 30.
made by any person or body concerning the individual company, there was no trial of any issue and no conviction or acquittal.”

The issue of whether there was element of double jeopardy at play were dealt with by Geoghegan J. where he stated:

“There is nothing wrong in calling a substantially increased fee for a late return a “penalty” provided that that word is not given the narrow connotation of punishment. It would seem perfectly obvious that the motivation behind imposing substantially increased fees for late filing is one of deterrent rather than punishment. Of course, again difficulty is encountered with terminology because in the criminal jurisdiction a sentence may have a deterrent aspect. Throughout the ordinary commercial world there may often be extra payments imposed for late documents but by no stretch of the imagination could the increased fee be regarded as a punishment for a criminal offence. The charges by their very nature and character are administrative whether they be standard charges or increased charges to deter late applications.

It is true that a statutory summary offence may not require mens rea and may be punishable merely by a fine. But the formalities whereby the defendant is tried are obviously criminal in nature and there is a prison sentence in default of payment of the fine. I cannot see that there is any analogy between that and a perfectly sensible provision that as a deterrent against late filing of returns...”

In thus holding that the fine was a civil sanction and thereby double jeopardy did not apply the case was decided on its facts however it does not provide a significant

36 Ibid at 29 -30. This approach is similar to that in the earlier case of State (Murray) v. McRann ([1979] IR 133) which upheld the authority of a prison governor to impose discipline on inmates notwithstanding that the matter in question might amount to criminal conduct. As per Finlay P. “The essential ingredient of a criminal matter must be its association with the determination of the question as to whether a crime against the State or against the public has been committed. At no stage is the governor of a prison [who operates rules 68 and 69] concerned with the determination of whether the prisoner has committed a crime against the State or against the public. The governor is solely concerned with whether a breach of prison discipline has occurred and, if so, which of the permitted penalties should be imposed. The fact that an act or piece of conduct may constitute both a breach of prison discipline and an offence against the State and the public does not make the investigation an investigation of a criminal matter.” State (Murray) v. McRann ([1979] IR 133) at 135.
signpost as to when a sanction moves from deterring to punishment. Additionally this approach reflects a traditionalist viewpoint, historically tied to that enunciated in Melling, of punishment being a key definer of criminal matters. According to Hart it is not the punishment itself that distinguishes between the two traditional cleavages of legal enforcement; rather it is ‘the judgement of community condemnation which accompanies and justifies its imposition.’ However it would be an over simplification to apply broad-brush strokes and to suggest that this is a reflection of a first principle of democratic law making – that of simply reflecting the peoples’ views in the laws of a particular state and to assume that such a principles applies to the enactment in all aspects of regulation. The labelling of particular activities is much more nuanced and targeted. Not dissimilar to the earlier argument of legislation being written in particular manner in order to ensure it application in a particular arena it has been contended that criminal law is overly focused on a particular type of deviant. In this respect McCullagh has stated:

“The law making process is the means through which the criminal label is distributed in society. As it operates in Ireland, the process of law making distributes this level in an uneven manner. It sanctions some kinds of socially harmful behaviour and ignores others. It is aided and abetted by an enforcement system that devotes more resources to the pursuit of some kinds of law-breaking than others… The end product of this system, is a criminal population which contains a disproportionate number of those who are poor, uneducated and unskilled.”


39 It has been suggested by Foucault that “…it would be hypocritical or naïve to believe that the law was made for all in the name of all; that it would be more prudent to recognise that it was made for the few and that it was brought to bear upon others; that in principle it applies to all citizens, but that it is addressed principally to the most numerous and least enlightened classes; that in the courts society as a whole does not judge one of its members, but that a social category with an interest in order judges another that is dedicated to disorder: Visit the places where people are judged, imprisoned or executed … One thing will strike you everywhere; everywhere you see two quite distinct classes of men, one of which always meets on the seats of accusers and judges, the other on the benches of the accused … Law and justice do not hesitate to proclaim their necessary class dissymmetry.” Foucault, M. (1991) Discipline and Punish: The birth of the Prison, Penguin: London at 276.

The difficulties with labelling and seeking to identify the distinguishing line are clearly evident in the *Anderson* case and is reflective of why that case needed considerable restatement in the context of the establishment of the milieu of factors influencing modern criminal and civil enforcement mechanisms and the associated diving line. We may consider this issue from two primary factors. Firstly, the *Anderson* case is reflective of the blurring of the criminal law as a monopoly mechanism for dealing with criminal matters.\(^{41}\) It reflects what has been referred to as the emergence and development in Ireland of criminal administration.\(^{42}\) In this respect a widening number of agencies and bodies which now have criminal enforcement capabilities. In the international setting this is not novel and Kilcommins and Vaughan have highlighted that the current Irish approach is reminiscent of the approach in the early 20\(^{th}\) century in the common law jurisdictions of the United Kingdom and the United States of America in dealing with public welfare offences.\(^{43}\) Indeed in 1933 in the United States it was contended that the concept of criminality was moving from a focus of individual guilt to one of social danger\(^{44}\) - essentially side-stepping the need for *mens rea*.

In the current Irish setting the *Anderson* case highlighted the criminal enforcement mechanisms that are available to the Revenue Commissioners. There are also many other agencies that now included criminal mechanisms in their own suit of armour. These include the Environmental Protection Agency, the Competition Authority, the Registrar of Companies, the Food Safety Authority, the Health and Safety Authority and the National Consumer Agency.\(^{45}\) All of these serve as concrete evidence of the ending of the exclusivity formally operated by the Irish Director of Public Prosecutions (DPP). However they also represent the fragmentation of enforcement from a single cohesive body to disparate bodies with differing views on the best methods of enforcement to ensure compliance with their unique and particular remit.\(^{46}\)

\(^{41}\) *Supra* n.14 at 12.
\(^{43}\) *Ibid*
\(^{46}\) For the views of the competition authority and competition practitioners on suitable methods of enforcement see text around n. 81 – 82 and n.97.
Notwithstanding, they also, importantly, reflect a need to not only consider ‘crime in
the streets’ but also ‘crime in the suites’\(^{47}\) – an issue that does not neatly fit into the
*Melling* framework of defining a crime.

**Reconstituting real crime: the regulatory and white collar vortex.**

It is undoubted that *Melling* reflects the grounded traditional rubric of justice that is
expressive and symbolic and is enforced by punishment that is reflective of a just
deserts approach. Yet, it is contended that it struggles to encompass the regulatory,
instrumental and utilitarian aspects that must be addressed as they are now a significant
part of the Irish criminal justice system. This is not to suggest a refocus away from
the traditional crimes that are abhorred in society, rather to acknowledge that a first
world modern economy faces (criminal) challenges to its structure and operation in
areas that may need the same focus and treatment as traditional crimes. In this respect,
it has been claimed by Lucey et al, that it is ‘crucial to a proper understanding of
criminal law to see that it has these two aspects, and the balance and interplay between
them is a key to its historical development and contemporary social significance.’\(^{48}\)

That balance has not always been struck as the focus of lawyers, criminologists\(^{49}\) and
academic instructors\(^{50}\) is often consumed by the strict contours of ‘real crime’ such as
homicides, assaults and sexual offences as established though the building blocks of
*mens rea* and *actus reus* and the application of general defences. Kilcommins and
Vaughan assert that this narrow focus is a mistake as there is an ever increasing trend

\(^{47}\) *Supra* n.2 at 138. The issue of double jeopardy has been considered by the Financial Regulator’s
office. It is permitted to impose civil administrative sanctions for ‘prescribed contraventions’ of
relevant legislation. These sanctions include, inter alia, a caution or reprimand, a monetary penalty
(not exceeding €5,000,000 in the case of a corporate and unincorporated body, and not exceeding
€500,000 in the case of a person), and a direction disqualifying a person from being concerned in the
management of a regulated financial service provider (s 33AQ and 33AR of the Central Bank Act
1942). The Financial Regulator also has criminal powers of prosecution and enforcement. However,
and in response to the problem posed by the principle of double jeopardy, no criminal prosecution
will be brought if the Regulator has pursued the administrative sanctions procedure which has resulted

LexisNexis: London at 5.

\(^{49}\) *Supra* n.2 at 138.

\(^{50}\) Scott, C. ‘Regulatory Crime: History, Functions, Problems, Solutions’ in Kilcommins, S. and
to use criminalisation to solve societal concerns.\textsuperscript{51} The very concept of regulation through the criminal law is not new,\textsuperscript{52} what is novel is the ‘exponential growth in the numbers of such [regulatory] agencies in Ireland, many of which have criminal law responsibilities.’\textsuperscript{53}

Given such growth the relevant resulting questions, in the current context, centre around why such crime is treated differently to traditional crime and where such crime now lies in the definitional framework upon which precedent for prosecution in the either a criminal or civil setting is based. Traditional crimes have always been widely reported by the media and have the ability to generate fear and panic and, rightly, shock and appal society who expect protection from and punishment of the exponents of such activities. Equally the executors of white collar crime do not – in the same fear inducing manner at least – tend to upset general society as such crimes are ‘committed by a person of respectability and high social status in the course of his occupation.’\textsuperscript{54} Indeed it is this social status of those involved that has been credited with leading to the situation where the activities they undertake carry the attributes of crime but were not traditionally dealt with as a crime.\textsuperscript{55} There is however evidence of this tradition not being followed in particular areas of law and we will now consider competition law as an example of one of those particular areas. In turn this will provide further contextualisation for the overall destination of the chapter in establishing the modern contours of crime in Ireland.

The issue of both whether and how competition in a marketplace should be regulated is not a new concept.\textsuperscript{56} The freedom of contract approach would suggest that the general position should be to leave competition between businesses unregulated as to do otherwise could result in the danger of law acting as a barrier in the marketplace. In turn such an approach should result in the optimal allocation of scarce resources and ensure effective competition through consumer choice and thus both avoid waste

\textsuperscript{51} Surpa n.2 at 139.
\textsuperscript{52} Braithwaite, J. (2005) Neoliberalism or Regulatory Capitalism, RIN: Canberra at 15 – 16.
\textsuperscript{53} Supra n.50 at 69.
and stimulate efficiency.\textsuperscript{57} In many marketplaces however there has always been a fear that certain competitors will seek to distort free competition. As far back as 1800 the United States introduced the \textit{Sherman Anti-Trust Act}\textsuperscript{58} and it was later stated that:

\begin{quote}
"The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself"\textsuperscript{59}
\end{quote}

Accepting the nonlinear development of law – particular on a global scale – and the logical fallacy of \textit{post hoc, ergo propter hoc}, from this general position it is justifiable in this particular instance to take a large chronological jump in order to consider modern Irish regulation of competition. This is possible because what is being contended is merely that some marketplaces have long acknowledged the necessity for some form of regulation to ensure free competition and that the US legislation succinctly demonstrates that position. The next question is what form that regulation ought properly to take in order to ensure compliance. Ireland’s laws in this respect are significantly influenced by our membership of the European Union.\textsuperscript{60} The Irish \textit{Competition Act} 2002 now provides for what are known as ‘hard-core activities’\textsuperscript{61} and it particular in sections 5 and 6 of the above Act deal with the prevention of cartels and other collusive behaviour and abuse of dominant positions respectively. Specifically it states:

\begin{quote}
S.6.—(1) An undertaking which—

(a) enters into, or implements, an agreement, or

(b) makes or implements a decision, or

(c) engages in a concerted practice,

that is prohibited by section 4(1) or by Article 81(1) of the Treaty shall be guilty of an offence.
\end{quote}

\textsuperscript{57} \textit{Ibid} at 90.
\textsuperscript{59} Spectrum Sports, Inc. v. McQuillan 506 U.S. 447 at 458.
\textsuperscript{60} Article 81 and 82 of the EU Treaty deal with competition law. It has been argued that US completion law tends to focus on the protection of completion whereas EU law protects competitors. See generally Cseres, J. (2005), \textit{Competition law and Consumer Protection}, Kluwer Law International: Bedfordshire at 291–293
\textsuperscript{61} The term hard-core is not actually used in the Act.
(2) In proceedings for an offence under subsection (1), it shall be presumed that an agreement between competing undertakings, a decision made by an association of competing undertakings or a concerted practice engaged in by competing undertakings the purpose of which is to—

(a) directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice,

(b) limit output or sales, or

(c) share markets or customers, has as its object the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State or within the common market,\(^\text{62}\)

S.7.—(1) An undertaking that acts in a manner prohibited by section 5(1) or by Article 82 of the Treaty shall be guilty of an offence.\(^\text{63}\)

Additionally section 8(6) of the same Act makes directors of an undertaking, its management or anyone acting in a similar capacity liable for criminal wrongdoing. In turn section 8(7) makes a presumption that such a person has consented ‘until the contrary is proven’\(^\text{64}\) to the doing of acts amounting to the prevention, restriction or distortion of trade or the abuse of a dominant position. In consideration of the above quoted sections it is apparent then that the system in operation here is much more

\(^{62}\) Competition Act 2002 Section 6.

\(^{63}\) Competition Act 2002 Section 7.

\(^{64}\) Whilst this marks a radical reversal of normal legal procedure it is mirrored in other modern legislation. For example see s. 80 (2) of the Safety, Health and Welfare at Work Act 2005 which provides that Where a person is proceeded against as aforesaid for such an offence and it is proved that “at the material time, he or she was a director of the undertaking concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity, it shall be presumed, until the contrary is proved, that the doing of the acts by the undertaking which constituted the commission by it of the offence concerned under any of the relevant statutory provisions was authorised, consented to or attributable to connivance or neglect on the part of that person” In turn the onus of proof requirement is provided for in s.81 (of the same Act) which provides that: “In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.” The onus of proof requirement was considered in DPP v. P J Carey (Contractors) Ltd ([2011] IECCA 63) where Hardiman, J. ruled that whilst the section created a reverse burden of proof is was an evidential burden that could be discharged by proving the existence of a reasonable doubt. Thus the section represents a less severe onus that might \textit{prima facia} be the case on first reading.
‘exculpatory in orientation than its ordinary criminal counterpart.’\footnote{Butler, M. (ed) (2011), \textit{Criminal Litigation}, Oxford University Press: Oxford at 24.} We will now turn to how this legislation has been applied by the courts.

In \textit{DPP v. Denis Manning}\footnote{Unreported, High Court, 9th February 2007} when dealing with the issue of cartels McKechnie J stated:

“This type of crime is a crime against all consumers and is not simply against one or more individuals. To that extent it is different from other types of crime: and while society has an interest in preventing, detecting and prosecuting all crimes, those which involve a breach of the Competition Act are particularly pernicious. In effect, every individual who wished to purchase, for cash, a vehicle from these dealers over the period which I have mentioned were liable to be de-frauded, and many surely were by the scheme and by the practices which unashamedly this cartel operated. These activities in my view have done a shocking disservice to the public at large.”

At an earlier juncture in this chapter we made a distinction between crimes that are \textit{malum prohibitum} and those that are \textit{malum in se}, the same learned judge, as just quoted, in the later case of \textit{DPP v. Duffy},\footnote{[2009] IEHC 208} when again dealing with cartels, stated that:

“They reduce incentives to compete and hamper invention. They cause a transfer of consumer’s money to themselves. They are offensive and abhorrent, not simply because they are \textit{malum prohibitum}, but also because they are \textit{malum in se}. They are in every sense anti-social. Cartels are conspiracies and carteliers are conspirators.”

Such an approach then would seem to clearly meet the \textit{malum in se} requirements of the \textit{Meeling} framework. This is of itself is an interesting development as it highlights what might constitute \textit{malum in se} wrongs in modern society and how that has evolved from earlier understandings of the phrase – at least from the perspective of the legislature and judiciary. It is still open to question whether society generally has adopted such a position as ‘[s]ociety tends to be more concerned about the potential harms caused by drug addicts wielding knives or syringes than by businessmen signing dodgy deals.’\footnote{Kilcommins, S., O'Donnell, I, O'Sullivan, E. and Vaughan B. (2004), \textit{Crime, Punishment and the Search for Order in Ireland}, IPA: Dublin at 229 – 230.} Indeed the facts of the \textit{Duffy} case clearly highlight the modern
challenges that such dodgy deals bring to bear on economic well-being of society and also provide a classic example of white collar crime.

Those facts related to an association known Citroen Dealers Association (the “C.D.A.”) whose members consisted of the authorised dealers for Citroen motor vehicles and operated for almost 10 years. During that time it had in operation scheme which had the following as its objects:-

(i) The setting of maximum discounts from the retail dealers recommended price list for new Citroen motor vehicles;
(ii) The setting of delivery charges in respect of such vehicles;
(iii) The setting of accessory prices;
(iv) The setting of prices for metallic paint;
(v) The setting of prices for trade-ins and for used stock; and,
(vi) The setting of export prices and parts.69

Following meetings of the association card were issued to members detailing exact prices to be charged and independent assessors were hired to ensure all members were complying with the agreed pricing and fines were issued for any breach thereof. Thus the association was clearly setting out to distort the market and interfere with and moreover prevent free competition. The facts of the case serve to highlight the typical nature and operation of white collar crime with none of the traditional violence and levels of intimidation often associated with traditionally understood “real crime.” Yet it is clear that such price fixing is effectively a modern form of organised theft as it takes more money from purchasers of that car brand that would be the case if the association did not exist and dealers were free to negotiate their own pricing structure.

In judgment on the case McKechnie J cited, with approval, Weldon where he viewed that:

“Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition. Cartel activity is never efficient or otherwise

69 Supra n.68 at para. 14.
socially desirable; cartel participants can never gain more than the public loses. Cartel activity, therefore, is not like tortious conduct, which is redressed with a liability rule focussing on the harm to victims and providing the incentive to take due care. Like other property crimes, cartel activity should be prohibited rather than merely taxed. As Judge Richard Posner explained of criminal sanctions generally, they ‘are not really prices designed to ration the activity; the purpose so far as possible is to extirpate it.”

This in turn raises a further issue in that if we define certain unlawful white collar activities as crime, then as a key determinant in our definitional matrix of crime is that of punishment and thus should we use the punishment of last resort – imprisonment – in relation to white collar crime. The widely accepted purpose underpinning sanctions is that of punishment, incapacitation, deterrence, rehabilitation and reparation. Yet the effectiveness of imprisonment for the deterrence of recidivism to general crime is low in that many of those imprisoned in the main Irish prisons are repeat offenders. Indeed O’Mahoney claims that the figure could be high as 90% where as other authors suggest it may be closer to the 50% mark. In any event it is accepted that levels of recidivism is highest amongst those with the lowest social standing. The very nature of white collar crime automatically means that the perpetrators come from a high social standing and have to a degree established themselves in a position of power with decision making authority. It is this polar-opposite social status to that of the majority of the prison population that might result in imprisonment being a much greater deterrence as the white-collar criminal has much more to lose in terms of business acceptability and social standing. However the traditional approach to imprisonment in Ireland would suggest that it is ideologically opposed to the use of imprisonment for white collar crime.

A central tenant in the establishment of an appropriate sanction is that ‘sentences must be proportionate to the crime and also to the personal circumstances of the applicant.’\(^7^6\) In applying this approach to white collar offences the first element is significantly influenced by how the crime is actually viewed and whether the current focus of this chapter is meet, namely whether it constitutes a crime and then is it viewed on the same mantle as ordinary crime. As already noted and as will shortly be returned to the position here is not an agreed one and they may be some divergence between different strata of society. With regard to the second criteria – the personal circumstances of the applicant – it has been noted by O’Malley that the conduct of the offender will be an aggravating factor:

“(1) if the offence is premeditated or planned,
(2) the offender procures a weapon in contemplation of committing the offence,
(3) if vulnerable victims are targeted,
(4) if the victim's home is invaded,
(5) if the offence has been committed as part of a criminal gang,
(6) if it involves the abuse of trust or power,
(7) if the offender has used more violence than necessary to commit the offence or degraded the victim in so doing,
(8) if committing the offence for profit or personal gain, or
(9) if the offence was motivated by the victim's race, religion, etc.”\(^7^7\)

It is clearly evident that the majority of these factors simply do not apply to the white collar criminal. Indeed even the profit element is often consumed by the corporate entity rather than for personal gain. Whilst the white collar crime is usually carefully and meticulously planned and may involve an abuse of trust the businessperson perpetrator has a mitigating factor that may operate in their favour to dispel the dis-benefit of meeting two of the above requirements. This is namely that most white collar offenders will not have previous convictions which is ‘a well-recognised

\(^7^6\) DPP v Sheedy [2000] 2 I.R. 184 at 192
\(^7^7\) Supra n.71 at 140.
mitigating factor." Additionally the courts are usually reluctant to imprison those on a first offence who have a good character and employment record. These are all significant operational factors that could be used to justify not using imprisonment against those convicted of white collar crime, notwithstanding the seriousness, of the crime and as result skewing our understanding of imprisonment as being a key indicator in defining a crime and, moreover, questioning the very essence of whether regulatory crime should indeed then be still classified as crime.

Indeed some senior law officers of the State have offered the opinion that it should not be so classified. Speaking in 2010 the then DPP was of the opinion that:

“…there is an argument from principle that the statute book should not be cluttered up with criminal law provisions in areas which were not traditionally the preserve of criminal law and which do not carry the same moral stigma as convictions for core criminal offences do.”

His views were shared at the time by a former Attorney General who stated:

“…it became increasingly clear to me that fundamental issues as to … how Ireland’s laws were complied with and where responsibility for enforcement and compliance with the law in Ireland lay, were being ignored, or, perhaps more fairly, avoided because of the profound difficulties in adapting traditional methods of enforcement and compliance with the demands of a complex, regulated market economy. The issue is whether Ireland can continue to rely exclusively on criminal sanctions enforced by criminal warrants to secure compliance with the huge array of regulatory laws which are an essential part of our sophisticated, compliant economy.”

It is trite to acknowledge that there is undoubted merit in this approach. However as already alluded to the concept of moral stigma may be evolving with modern society

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78 Ibid at 141.
79 Ibid.
82 In 2012 the then DPP also stated that; “……it may be seriously questioned whether a jury trial is necessarily the best way to deal with complicated regulatory issues which are criminal in name only. …. While it may be possible to explain to a jury why price-fixing or bid-rigging are harmful practices
and as result of the economic crash in Ireland many in society feel aggrieved towards those in the corporate sector that they feel aided in the economic downfall and were the sanction of imprisonment to be available following a conviction it might, now, be considered by the wider public to be an appropriate sanction. It should be acknowledged that this view may be transient and may alter as we enter a cycle of economic growth and it would be regrettable if the over-use of imprisonment was a consequence from the demise of the celtic tiger economy. Of course the existing jurisprudence of the court in ensuring fairness and proportionality may operate to prevent such a vista occurring.

There is however a more balanced – and it is submitted effective – approach that has been identified by Kilcommins and Vaughan. They argue that there is undoubted room for both compliance and civil strategies to operate in the regulatory field, however they go on to contend that the State must be willing to use criminal sanction where the seriousness of the case dictates. They assert that this will ensure that white collar criminals and potential white collar criminal are keenly aware that their wrongdoing will be treated seriously by society and may result in imprisonment in the same manner than imprisonment is used for street crimes. They offer a number of further compelling arguments to support this view. Firstly they ground it in the historical perspective that the criminal justice system is found on the notion that public protection and security are key attributes for a functioning society. In that society people expect to be able to operate without fear from what we have referred to as street crime. They acknowledge, with some surprise, that society still does not see white collar crime as threat to society. They argue that it clearly is as it has the potential to effect large numbers of people in a wide variety of fashions and that a compliance model in the regulatory sector must be supported by a sanctioning model that has at its disposal the use of imprisonment.

which should be illegal, much of competition law would be difficult for those who are neither lawyers or economists.” (Hamilton J: (2010) Supra n.81 at 21. With respect, it could be contended that this is more of an argument as to operation and composition of jury trials more than whether regulatory offences should be civil or criminal. Of course the operation of Article 38.5 of the Irish Constitution should be acknowledged in relation to jury trials.


Ibid.
Equally not to have the option of imprisonment for serious white collar crime would destroy the notion of citizens being equal before the law and would endorse a two-tier system of justice.\textsuperscript{85} If as a society we accept the use of imprisonment for street crimes then by extension we should also accept it for 	extit{suite} crimes. Additionally the proper application of criminal law can have a very significant cathartic effect. It can both uphold ‘moral sensibilities and … act[s] as an important safety valve, limiting the demoralising effects on society of the consequences of serious misconduct.’\textsuperscript{86}

The current direction of the Irish courts in relation to such assertions may be measured from the outcome of the above discussed 	extit{Duffy} cartel case. The learned trial judge stated that there was no place in Irish criminal justice system for ‘vengefulness or vindictiveness’\textsuperscript{87} but that there was for the concept of deterrence. He then went on to quote Welden that:

“Cartel activity materially differs from other property crimes only with respect to the purpose of sanctions. Rehabilitation and incapacitation are important purposes for most criminal sanctions, but deterrence is the only significant function of sanctions for cartel activity, and the specific deterrence of convicted offenders clearly is secondary to the general deterrence of potential offenders.”\textsuperscript{88}

In acknowledging that normally the courts use a custodial sentence only if it was felt that a fine would be ineffective, in this area he stated that the courts should as a general rule consider a mixed sanction that involves both imprisonment and fines. In particular, in relation to the use of imprisonment for white collar offences, he stated:

“…I see no room for any lengthy lead in period before use is commonly made of this supporting form of sanction. If previously our society did not frown upon this type of conduct, as it did in respect of the more conventional crime, that forbearance or tolerance has eroded swiftly, as the benefits of competition have become clearer. Every purchaser of goods or services now has a strong and definite appreciation of what competition

\begin{footnotesize}
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\item[	extsuperscript{85}] Supra n.65 at 21.
\item[	extsuperscript{86}] Ibid.
\item[	extsuperscript{87}] Supra n.67 at para. 36.
\end{itemize}
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can do for him or her. Therefore it must be realised that serious breaches of the code have to attract serious punishment.”

Of course it should be acknowledged that this is just once case but nonetheless it is a particularly interesting development as it suggests focusing on the harm caused by the offence rather than the character of the offender and thus succinctly bypasses the earlier mentioned concerns of mitigating factors coming into play for white collar offenders. Additionally it draws a distinction between what might traditionally have been seen as *malum in se* and what modern society might now considered as morally reprehensible behaviour. At a minimum it opens up the possibility of imprisonment as a sanction to be considered against the next wave of serious white collar offenders. In the current context it also widens our understanding of the concept of crime in modern Irish society and further questions whether *Meeling* is any longer a complete precedent for defining crime in Ireland.

**A middle-ground system of justice.**

This movement away from the individual and the focus on mental culpability and towards a concern with social danger can be seen as a feature of the changing nature of criminality. Indeed Mann contends that there is an evolving middleground that takes its influence from both the criminal and civil arena. He argues this ‘forms a hybrid jurisprudence in which the sanction’s purpose is punishment, but its procedure is drawn primarily from the civil law.” He contends that the traditional criminal and

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89 *Supra* n.67 at para. 43.
90 The same judge, now in the Supreme Court, ruled in DPP v Pat Hegarty ([2011] IESC 32) that an officer of an undertaking can be found guilty notwithstanding the fact that no judgment was made against the employer undertaking. However must make a finding of fact that the undertaking did commit an offence.
91 In relation to the usual mitigating factors that would apply around character for white collar offenders McKechnie J stated that “in general have less weight because of the type of individual likely to be involved and the type of conduct maintained.”
93 *Supra* n.3 at 1799. In the Irish courts there was a question as to whether fraudulent trading in company law such rightly be classified as criminal or civil. The Supreme Court declared that it was a civil offence but more interestingly in the context of changing approaches Flaherty J stated: “It is true that the proof of fraud will be to the civil standard but it is also so that the more serious the allegation made in civil proceedings, then the more astute must the judge be to find that the allegation in question has been proved”. O’Keeffe v Ferris [1997] 3 IR 463
civil processes no longer provide complete coverage of the range of sanctioning available. This is due to the fact that they ‘fail to capture the special combination of punitive purposes and civil procedural rules that characterizes (sic) hybrid sanctions’ and that these sanctions now occupy a significant middle ground that lies between the traditions of criminal law and civil law. Furthermore he contends that:

“The middleground is not sui generis in the sense that it possesses distinctive characteristics found in neither of the paradigms; rather, it mixes the characteristics of these paradigms in new ways. Against the background of strongly perceived conventional paradigms, the middleground represents a truly hybrid sanction.”

Whilst later chapters in this thesis will consider whether modern civil forfeiture in Ireland (by the Criminal Assets Bureau) may rightly be considered as middleground justice as criminal administration at this interim juncture it is important to acknowledge that there are hybrid enforcement mechanisms at work under current Irish legislation. As previously acknowledged criminal action may be initiated in this jurisdiction against a breach of competition law. However section 8(10) of the Competition Act 2002 provides that notwithstanding whether or not a criminal prosecution has been brought there is an opportunity for an individual (under section 14(1) of the same Act) or the competition authority (under section 14(2)) to bring a civil enforcement action. It has been argued that it is necessary to have the civil option available in completion law as the ‘imposition of criminal sanctions may, paradoxically, hinder the enforcement of competition law because it sets too high a standard which must be met so that effectively only the most serious and most easily proven cases are instituted and others are left unprosecuted.’ In turn the competition authority have contended that due to such an approach there is little incentive for undertakings to comply with the provisions of competition law that do not relate to hard-core activities and thus civil sanctions should be employed in the enforcement of competition law. In may also be noted briefly that the Revenue Commissioners

94 Supra n.3 at 1813
may bring both criminal proceedings against defaulters and have civil powers to impose fixed penalties.\(^98\)

Mann contends that if middleground approaches were employed then it would prevent both over-enforcement and under-enforcement. The former would be achieved as there would be the opportunity for a non-criminal sanction where the circumstances of the cases would normal carry it to the criminal domain. The latter would be achieved by providing sanctions in the event of a breach where the use of criminal law would traditional have been deemed excessive. Importantly, however he goes on to caution against the over use of middleground justice in the absence of clear procedural safeguards and protections.\(^99\) This point is reinforced by Kilcommins and Vaughan who contend that the move away from criminal sanctions and towards operating in the civil arena is in reality as a result of the perceived ineffectiveness of criminal law mechanisms. The state that the well-established, and justified, protections of the criminal law can neatly be sidestepped by moving to a system of civil justice. Their concern with such movement is that the due process procedures remain steadfastly fixed to the contours of criminal law. Furthermore they 'remain enmeshed in the fixity of definition and are incapable of contending with the plasticity and fluidity of the flow of power into civil spheres.'\(^100\)

**Conclusion.**

The traditional areas of criminal law are well known and includes homicides, assaults and offences against property. A breach of such law is deemed an offence against society the sanction for which is some form of state administered punishment. Due to the serious consequences of a finding of criminal guilt against an individual and the significant resources and tools available to the State to pursue a prosecution it is necessary to create an equalling balance of arms for the individual citizen. This is achieved by setting in place high standards of proof and protection in the form of due

\(^98\) These powers are available under s.1078 and s.1053 of the *Taxes Consolidation Act* 1997. For further consideration of the powers of the Revenue Commissioners see chapter 6. Additionally under the *Consumer Protection Act* 2007 there is a range of both criminal and civil enforcement powers, see Clark, B. (2013) *Supra* n.45 at 265 -268.

\(^99\) *Supra* n.3 at 1862 – 1865.

\(^100\) *Supra* n.42 at 111.
It is only when the State has proved all elements of the offence in question and when the defendant has no lawful defences available to them that the courts will allow the state to take retribution against one of its members. As a result it is essential to be able to identify the boundaries of criminal law in order that law may operate as an effective tool in reaching its mantle of supporting and protecting society.

In that process of identification we commenced with an acknowledgment that operational factors such as detention, charge, penalty and imprisonment were all reflective indicators of whether a matter was in the criminal realm. However this was a consideration of where the issue now rested rather than why it rested in that realm. In terms of the why question the central indicia were that it was an offence against the community at large, with the required mens rea that had available a punitive sanction.

In conjunction with these indicia a further significant contributing factor is the phraseology used in a particular piece of legislation. The Irish Courts are mindful of the intention of the legislature in the role as representative law makers. It is felt that this should be a contributing factor in determining the resting place of a particular piece of legislation rather than the authoritative or exclusive factor as to do otherwise risks a particular legislature at any place in time being overly deterministic – for example, because of a societal or media driven backlash – and drifting towards the edge of their separation of powers responsibilities. The use of language is again a factor in determining if a matter should rightly fall within the administrative as opposed to criminal realm. This can cause labelling difficulties and moreover move us away from a traditional individual guilt consideration of criminal law towards a system more focused on social danger. In turn that leads to a reassessment of the need for mens rea at all (for a matter to be considered criminal) and a review of what is meant by punishment as an indicia. In the administrative realm if the sanction is in the form of a deterrence then the matter is not one of a criminal nature. The issue that is yet to be fully determined by the Irish Courts is whether a penalty can ever be so excessive as to move it from a deterrence to a punishment – that is from administrative to criminal.
This is further complicated by the expanding number of administrative and regulatory agencies that now have criminal enforcement tools in their armoury and who may use penalties as both a deterrence and a sanction. Taking the regulatory example of competition law, breach of certain aspects thereof are firmly placed in the criminal realm. Notwithstanding this in terms of the indicia of punishment there remains concerns as to whether the punishment of last resort should rightly be used for such white collar crime. By its very nature it is an activity that deprives members of society, in a structured and organised way, of their wealth. By not using the tool of imprisonment it queries where this is somehow a different type of crime and if so why is this the case. In answering such concerns the current jurisprudence has clearly indicated that the courts are now willing to use imprisonment as a sanction in the white collar arena and thus treat it as any ordinary crime.

The movement of focus from the individual to social danger introduces a further feature in that respect – that is the emergence and expansion of what is now termed middleground justice. This is a form of justice that takes elements from the criminal realm but does not yet take any of the procedural protections that guarantee fairness in the criminal justice system. Over the course of the following chapters we will consider how this represents a paradigm shift in a bid by the state to counteract modern criminality. What is clear is that the boundaries of criminal law have altered significantly in Ireland in recent times. It has moved towards the use of civil law – and its less expressive nature – in the criminal area. This more instrumental variegated approach may mark a hollowing out of the criminal law. In the next chapter we will now move to consider such elements in a more specific sense- that of the use of forfeiture as a crime control mechanism.
Chapter 3.

The Environment for Forfeiture and Seizure in Ireland prior to 1996.

Introduction.

It is a reasonable expectation of a modern, open and free democracy that individuals should not benefit from the proceeds of criminal activity. Whilst the traditional approach of criminal law enforcement was primarily, and understandably, concerned with evidence gathering leading to criminal prosecution it was not overly concerned with the actual proceeds that arose from that criminal activity. However, it may be contended, that in recent times, Ireland has moved away, in part at least, from this traditional model towards one that is concerned with forfeiture of assets and neutralisation of the criminal threat as opposed to the traditional leanings toward retribution and potentially rehabilitation. This is evidenced in particular by the work of CAB.\(^1\) The objective\(^2\) of CAB is summarised in the Bureau’s annual reports as using ‘all the available remedies and sanctions at its disposal in identifying, depriving and denying persons suspected of criminal activity and their associates of the benefit of that activity.’\(^3\) A key element of its armoury is the ability, under the Proceeds of Crime Acts 1996 (as amended), to confiscate assets in the absence of a criminal conviction pertaining to those particular assets.

This movement into the civil realm, with its associated lower burden of proof, is a key element of the refocus of the Irish criminal justice system. In 1985 both the Whitaker

\(^1\) CAB established on an ad hoc basis for the period August 1\(^{st}\) 1996 to October 4\(^{th}\) of that year and placed on a statutory footing by the Criminal Assets Bureau Act 1996.


Report\(^4\) and the Select Committee on Crime Lawlessness and Vandalism\(^5\) had supported the introduction of a scheme of forfeiture for the proceeds of crime. However the Law Reform Commission (LRC) in 1991 recommended against the introduction of civil forfeiture due to both the possibility of either constitutional challenge to such an approach or the ineffective nature of such a system.\(^6\) Notwithstanding these reports, and in the absence of any detailed discussion,\(^7\) the tipping point for the major changes in the Irish system was the murders of Detective Garda Gerry McCabe and crime journalist Veronica Guerin in the summer of 1996. These cataclysmic events were undoubtedly shocking for a nation that traditionally had a low level of crime\(^8\) and thus the emergence, however temporary, of a crisis of hegemony was not surprising. However it is contended by O’Donnell and O’Sullivan that it was not inevitable that these events would result in a paradigm shift in Irish criminal justice policy.\(^9\) As such a shift did occur, in attempting to parse the reasons behind the underpinning the change it is necessary to consider both the historical and immediate factors surrounding the events.

The aforementioned journalist was writing on a weekly basis about the activities of the criminal underworld in Ireland, who, it appeared, were operating with impunity from any legal consequence. Whilst it is unquestionable that any such activities are an anathema to the rule of law, when considering them from a change perspective, this must be balanced with the aforementioned traditional low levels of crime in Ireland. The emergence of extensive media reporting of criminal underworld activities may lead to a belief, in some sections of society at least, that serious crime is running at a much higher level than is actually the reality of the situation. In turn where such

\(^7\) Indeed it was suggested that there was not a need for an in-depth consideration as during the debate on the *Proceeds of Crime* Bill one member of the Dáil queried ‘[h]ow can anyone seriously suggest the Bill is unconstitutional, unless he has an ulterior motive?’ Dáil Debates, 2\(^{nd}\) July 1996, Vol. 467, Col 2473 *per* Mr. O’Donoghue.
beliefs are widespread they may ultimately lead to a level of hysteria that both demands authoritative action and concomitantly cause the unthinking acceptance of draconian legal positions – that are effectively impossible to repeal from a political standpoint as to do so might be termed ‘weak on crime’ – as the only solution to a perceived crisis. This is not to suggest that media organisations were attempting to distort the news or present an untrue picture but rather they may, as has been suggested be ‘entertaining’ rather than ‘informing’ the consumers of their respective media outlets. The public in general have a long fascination with crime itself, its aftermath and punishments from early models of punishments as a public spectacle of enjoyment through to modern true crime novels and television shows and thus it is understandable that media outlets strive to meet that desire in a commercially competitive market place. The criminological concern is whether such reporting causes an exaggerated degree of public alarm with, the aforementioned, support for extreme solutions with any alternatives becoming marginalised.

In the specific Irish sense a survey in 1996 found that 50% of respondents identified crime and law and order as the most critical issue facing the government – up from only 3% in 1994. It is widely accepted that the results of the 1996 survey were significantly influenced by the aforementioned killings. Further the use, by journalists, of nicknames (such as The Monk and The Penguin) to protect the identities of those suspected to be involved in serious organised crime had made it easy for the public at large to associate with such individuals and consequently suffer disproportionate fear with a felt need for legal change in order to tackle the issue. It was a reversal of Bentham’s panopticon where the many were now watching the activities of the few. If this legal change was to be enacted them the impetus had to come from the Oireachtas.

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12 See generally ibid at 326.
13 Supra n.9 at 47.
The main political parties in Ireland had not diverged to any significant degree on criminal justice issues and there was what may be termed a second order consensus on the topic. In the early part of the 1990s efforts were made to form strategic plans for the management of criminal justice policy in Ireland\textsuperscript{14} and the Management of Offenders – A Five Year Plan\textsuperscript{15} was published in 1994. It took the type of approach that suggested, \textit{inter alia}, prison should be used to the least extent necessary whilst still compatible with ensuring public safety.\textsuperscript{16} However in the summer of 1996 \textit{Fianna Fail}, in opposition, abandoned any commitments there was to such managed and planned reform. In particular their justice spokesperson, John O’Donoghue lead demands for radical reform and within a year he was making comments such as:

\begin{quote}
“The task of the next government will be to use the human and physical resources in this country to confront the malaise of crime and to foster, in the Ireland of the twenty first century, an environment in which the traditional Irish values of community, compassion and caring can flourish. That task will not be easy. It is not a task amenable to glib or shallow solutions. But it is a task which cannot be shirked or circumvented. The social fabric of this country is being destroyed. The next government must wage war on crime. It must wage war on the causes of crime – the social causes, the economic causes, the educational causes. Each must be identified, isolated and eradicated. This is the challenge which faces the next government”\textsuperscript{17}
\end{quote}

It is submitted that such an approach is an example of the politicisation of law and order and was directly influenced by the ‘mediaisation’ of the law and order debate in Ireland. The aforementioned tragic deaths lead to concerns about the ability of the State to effectively counteract organised crime and drug dealers within the existing legal mechanism. As such they are accepted as defining moments in the law and order debate in Ireland\textsuperscript{18} leading to a level of ‘moral panic’\textsuperscript{19} and a sense of helplessness and a desire \textit{to do something} in the face of concerns expressed about the ability of the State to govern itself. This perfect storm of societal events underpinned the crisis of

\textsuperscript{14} Supra n. 9 at 30
\textsuperscript{16} Supra n. 9 at 30
\textsuperscript{17} As quoted in O’Donnell and O’Sullivan \textit{supra} n.9 at 32
\textsuperscript{18} Supra n. 9 at 48.
hegemony as evidenced by political parties grappling to gain the mantle of the party of law and order.\textsuperscript{20} In essence a fear of crime had been established resulting in elements of populist punitiveness in an attempt to regain authority. Within five weeks of these aforementioned deaths the normally slow moving legislature had introduced a series of measures to deal with the ‘godfathers’\textsuperscript{21} of organised crime.

In accepting that the deaths were the undoubted tipping point for reform this chapter will contend that there were significant other causal factors that resulted in the repositioning of elements in the Irish criminal law landscape. There were many degrees of causal contribution that had both long and short histories and impacts on the legal framework that ultimately established CAB. These highlight that the legal landscape was much more complex than might be considered if the tragic deaths of the summer of 1996 were deemed to be the only significant catalyst of change. Whilst accepting that these other factors were operating under entirely different momentumsm it is contended that they contributed to a schema of causal factors that impacted on the ultimate outcome of legislative reform. We will consider these factors of course on their own basis as at the time at which they occurred they were simply the standard development of common law, however it is this series of individual, but related, events that will form the evolutionary matrix that was in place when the above tipping point occurred.

In this regard the chapter will now commence with a consideration of forfeiture as it evolved in common law. This will allow us to consider the historical underpinnings of the concept, including \textit{in rem} proceedings, which are still quoted today in support of modern day forfeiture of criminal assets as a crime control measure. Further it will demonstrate the emergence, and judicial acceptance, of forfeiture of assets without consideration of the guilt or otherwise of the owner of such assets. The chapter will then go on to consider legislative imperatives which existed enshrining forfeiture as a concept in this jurisdiction and moreover its use and acceptance by the judicial system. In particular anti-drugs legislation made use of the concept and forms a basis for

\textsuperscript{20} \textit{Supra} n.8
\textsuperscript{21} \textit{Dáil Debates}, 3\textsuperscript{rd} July 1996, Vol. 468, Col 376 \textit{per} Mr. Haughey.
understanding the legislatures changing approach to forfeiture from a very narrow concept to an ultimately all-encompassing one.

A further piece of legislation which is often given credence as forming a strong statutory and constitutional basis for the emergence of confiscation of criminal assets is the Offences Against the State (Amendment) Act 1985. However this piece of legislation was aimed at terrorist groups and as such operated exclusively in the extraordinary arena and further was only ever intended to have a very short lifespan. Whilst this legislation passed constitutional muster it is because of this short-intend life span – with an associate specific individual target – and the fact that it operated in the extraordinary realm that it will be contended that the 1985 legislation is not be as highly ranked, as might otherwise be the case, on the hierarchy of causal factors that contributed to the major legislative reforms of the mid-1990s. This is not to suggest that the Act did not have a role to play and as such must be given due consideration.

In asserting the urgent need to establish stringent laws to deal with the spectre of organised crime in Ireland much reference was made to the benefit of United States of America (U.S.) anti-mafia type laws. However the original raison d’être of the American approach was somewhat different to the Irish one in that the main aim of the former was to remove the influence of organised crime from legitimate business interests. Nonetheless the U.S. provisions highlighted the potential for use of traditional common law in rem proceedings as modern criminal law techniques. Further in sharing a common legal system tradition the U.S. provided an ideal area for this jurisdiction to adopt policy from in the forfeiture arena in a time of crisis.

In addition to such precedent and policy adoption for dealing with individuals who were putting themselves beyond the reaches of the traditional criminal law, further impetus for change came from international covenants and European Union initiatives all of which will be outlined in this chapter from the perspective of how

22The main American laws in this regard included the Racketeer Influenced and Corrupt Organisations (RICO) Act, being title IX to the Organised Crime Control Act 1970 21 USC § 1961 and the Continuing Criminal Enterprise Act being part of the Comprehensive Drug Abuse Prevention and Control Act 1970, 21 USC § 848. It may be briefly noted that the original legislation required a criminal conviction prior to forfeiture.

23 See text around n. 138 – 153
they influenced the emerging Irish model. In particular we will consider how the *Criminal Justice Act* 1994\(^{24}\) implemented European directives and provided for restraint, confiscation and forfeiture orders. However, and importantly, these latter two orders could only operate post criminal conviction. In outlining this legislation we will be in a position to consider the Irish judiciary’s response to emerging forfeiture provisions as the legislation was constitutionally challenged.

The legislation reforms of 1996 therefore, whilst undoubtedly reactionary, may not arguably have been the complete knee jerk reaction that *prima facia* might appear to be the case. There were significant legal mechanisms already in place and indeed the need for co-operation amongst organs of the State in tackling organised crime, and the growing drugs problem, had been recognised by the so called rainbow government in 1995.\(^{25}\) This is not to take away from our suggested *tipping point* above as the murders in 1996 were undoubtedly a definitive and irruptive point in our history which caused the major changes – in particular the ability to confiscate assets without a criminal conviction – to move at a pace which would otherwise have been unthinkable. However for the tipping point to exist it is contended that this significant series of historical and immediate factors over long and short time periods all had varying degrees of causal contribution to the milieu and thus are essential contributors in understanding the legislative sea change which occurred in Ireland in 1996. Furthermore in terms of this causal history it is obvious that there was not a rational deliberative model being adopted in promulgating such radical changes. Whilst a whig interpretation of history would suggest that history is progress it is contended that the measures enacted in 1996 were more revolutionary than evolutionary while also having a grounding in history. This history did allow for forfeiture but primarily in the criminal, as opposed to civil, realm. A movement to the civil realm was defended generally on the basis of the extraordinary nature of the offences occurring which in turn called for extra-ordinary legal solutions. Whilst concurrently arguing for such a movement a justification was offered on the basis of similar mechanisms already existing (in specialised areas) in our legal history and not to now adopt such

\(^{24}\) Implementing EU Directive 91/30 See text around text n. 155

measures to responded to the fear generators would be to allow anomalies to operate in the legal system.\textsuperscript{26}

Finally legal change only occurs with some form of human intervention and notwithstanding the aforementioned possibility of politicisation of law and order it must also be offered that the morality\textsuperscript{27} of politicians may also have had a role to play. They may have felt that the activities of criminal gangs were \textit{malum in se} and that in order to effectively deal with the issue it was necessary to implement laws that were essential apersonal and concentrated on the non-moral regulatory aspects of law that triumphed societal interests over that of the individual. It would appear however that at least a degree of political rhetoric\textsuperscript{28} was being used in an effort to assure the public that political parties were effectively dealing with the issues. At a political level in England and Wales and America phrases such as “tough on crime, tough on the causes of crime” and “zero tolerance”\textsuperscript{29} were seen as very successful from a voter support perspective and thus policy adoption from Anglo-American common law was easy to offer – without considering the very detailed measures necessary to ensure its success. Whilst the success or otherwise of policy adoption is a factor to be considered in later chapters we will now consider in detail the varying aforementioned historical factors that contributed to such significant – and effectively irreversible – reform in the Irish criminal justice system. In establishing this framework for change we will now commence with the concept of forfeiture in the traditional common law.

**Forfeiture the Historical Context.**

At common law the term \textit{deodand} was used to describe the forfeiture of a sum which represented the value of a personal chattel that had caused accidental death.\textsuperscript{30} In the

\begin{footnotesize}
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\item \textsuperscript{26}For progress in law see generally; Aldridge, P. (2003) \textit{Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and the Taxation of the Proceeds of Crime} Hart Publications: Portland at 9 – 10. For further consideration of normalisation mechanisms see text around n. 114
\item \textsuperscript{27}On the nature of morality generally see Aldridge, P. \textit{ibid} at 18 – 19.
\item \textsuperscript{28}For example see text at n. 7 and n. 17.
\item \textsuperscript{30}Holmes in 1881 noted that “[I]t has been a rule of criminal pleading in England down into the present century, that an indictment for homicide must set forth the value of the instrument causing the death in order that the King or his grantee might claim forfeiture of the deodand.” Holmes, O. \textit{The}
\end{itemize}
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context of the current work this raises the issue of attributing blame for a wrongful act, not to an individual, but rather it is the inanimate object that is accused of the wrong doing. The example that is most often quoted to explain the concept is that of a man falling from a horse, where in the subsequent event of forfeiture it is the horse that must take the blame and be forfeited irrespective of any potential guilt of its owner.\textsuperscript{31} It has been suggested by Blackstone that the former and ‘more superstitious’ origins of the concept lie in a passage from Exodus 21:28:

“If an ox gore a man or a woman, and they die, he shall be stoned, and his flesh shall not be eaten … but the owner of the ox shall be quit.”\textsuperscript{32}

Whilst this passage is often quoted as the basis upon which forfeiture law is structured,\textsuperscript{33} it is contended by Finkelstein that this is not an accurate description of forfeiture as the ox is not ‘offered to God’\textsuperscript{34} as it would be in the strict concept of the doctrine. Notwithstanding this last contention the point is established that the concepts of both forfeiture and of the potential guilt of an object existed in common law. The original rationale of the deodand was that the value could be put towards offering masses for the deceased or put to other charitable uses. However this noble practice would appear to have been superseded by a process whereby the deodands simply became a source of revenue for the King.\textsuperscript{35} It has been noted that over time forfeiture became ineffective as a source of revenue and the Crown found that taxation was a more effective revenue gathering agent.\textsuperscript{36}

\textsuperscript{31} “… if a person fell from a horse the horse was forfeited: and if a man fell from a horse into the water and was carried down a millrace and killed by the wheel of the mill, the horse and the mill wheel were both forfeited.” \textit{77 Hansard} 1028 (1885) as quoted in Finkelstein, J. ‘The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty’ (1973) 46 \textit{Temple Law Quarterly} 169 at 185.
\textsuperscript{34} \textit{Supra} n.31 at 180. It has been noted by Levy that “[T]echnically the forfeiture derived from a deodand only when the death resulted from “misadventure” or sheer accident.” See Levy, L. (1996) \textit{A license to Steal: The forfeiture of Property}, University of North Carolina Press: Chapel Hill at 13.
\textsuperscript{36} \textit{R. v Cuthbertson} I A.C. 470 at 473.
The concept of deodands grew in popularity due to the socio-economic conditions surrounding the industrial developments of the nineteenth century. In particular the development of the railways caused numerous accidental deaths and resulted in juries awarding large sums in lieu of the forfeiture of a locomotive or carriage that had caused the death. In due course, and in order to develop more suitable remedies, the concept of deodands was abolished in 1846 by the Deodands Abolition Act and an Act for Compensating Families of Persons Killed by Accidents (more commonly known as Lord Campbell’s Act) was introduced. The aim of this later Act was, as the title suggests, to provide compensation for the families of those killed by accidents. In the context of our current overall scene setting for the concept of modern day forfeiture in Ireland it is worth noting the comments of Lord Campbell on the abolition of deodands:

“[t]he wonder was that a law so extremely absurd and inconvenient should have remained in force down to the middle of the nineteenth century; especially as that did not arise from the law having become obsolete or slipped from their recollection from never having being in force; for the law of deodands was called into force almost weekly.”

The nature of such comments relating to the whole concept of forfeiting assets as an absurd one is an interesting opening gambit in the context of the current work. Despite such agreements in favour of the abolition of deodands this was not the only type of forfeiture exercised at common law. Of the other types, common law forfeiture resulted from conviction for a felony or treason on the basis that breach of the criminal law justified denial of the right to hold property. The final example that of

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38 9 & 10 Victoria, c 62.
39 9 & 10 Victoria, c 93.
40 77 Hansard 1027 (1845) as quoted in Finkelstein supra n. 11 at 171. Subsequent to the abolition Act various pieces of legislation were implemented that allow for the seizure of goods in specific circumstances. For example the Customs Consolidation Act 1876, (section 202); Firearms Act 1925, (section 23); Censorship of Publications Act 1929, (section 10).
41 “The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown.” As per Brennan J. in Calero – Toledo v. Pearson Yacht Leasing Co. (supra n.13) at 682
admiralty forfeiture\textsuperscript{42} was based on – and indeed existed – for very pragmatic reasons. It involved the forfeiture of a ship for breaching maritime laws. Holmes records that:

“A manuscript of the reign of Henry VI. … discloses the fact that, if a man was killed or drowned at sea by the motion of the ship, the vessel was forfeited to the admiral …”\textsuperscript{43}

The reason for the development of such provisions may lie in the fact that where an accident happened on the high seas the issue of who had jurisdictional control arose. The normal courts did not have authority to act and so the courts of admiralty were left to deal with the situation. The forfeiture of the actual vessel was a very pragmatic way of ensuring the presence of the owner of the vessel in court. This type of forfeiture is a further example of holding the vessel (or thing) as the guilty party. This type of forfeiture is an \textit{in rem} – against a res or thing – proceeding, as opposed to an \textit{in persona} – against the person – proceeding.\textsuperscript{44} This strange legal fiction of holding the inanimate object as the guilty party seems to be a long accepted tradition. In a noteworthy American case, where the owners of a yacht had been exonerated the vessel in question was still forfeited as a result of the dicta of Story J., where he quoted Marshall J.:

“This is not a proceedings [sic] against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report.”\textsuperscript{45}

\textsuperscript{43} I Black Book of the Admiralty, 242 as quoted in Holmes, \textit{supra} n.14 at 26.
\textsuperscript{44} The courts of admiralty did not have \textit{in persona} jurisdiction but did have \textit{in rem} jurisdiction. In the modern context and for our later purposes the attractiveness of such an approach is clearly evident when dealing with major organised criminals who may be many levels away from the actual committing of the crime and thus almost impossible to prosecute in traditional \textit{in persona} proceedings. However it may be much easier to pursue the trappings of such activity.
\textsuperscript{45} \textit{Harmony v. United States}, 43 U.S. 210 (1844) at 234.
Whilst very clearly accepting that the inanimate object itself cannot commit a criminal offence, the Court, and very many subsequent Courts, had no difficulty in accepting the guilt of the object or thing whilst effectively ignoring the guilt or otherwise of the owner. The attractiveness of such an approach in the modern setting of dealing with international criminals who tend to be a number of levels removed from the actual committing of the offence is very understandable. The opportunities to ignore effective due process traditionally inherent in the criminal justice system in favour of a results output penchant is also very apparent. However it would also appear to be long recognised that that criminals have no right to benefits accruing from their particular crime. Notwithstanding the absence of such a legal right it has been maintained that the purpose of forfeiture was not to deprive the offender of the benefits of crime but rather it was used as a consequence for the violation of societal obligations and as an incentive to loyalty and obedience.

Moreover regardless of the original rationale behind the concept it was enshrined as both an accepted and used element of the armoury of law enforcement. In this respect and in terms of considering the actual use and application of forfeiture in Irish jurisprudence we will now consider the concept from both the general and the specific level. This will allow us to further consider the contribution of precedent as a causal factor in the emergence of civil forfeiture as a crime control mechanism through demonstrating of the longevity of forfeiture as an accepted concept in the Irish State. Additionally it will ultimately allow a consideration of the related issue of whether forfeiture may be considered as an actual punishment in Irish law or an as ancillary to a penalty.

46 The modern United States position on in rem forfeiture is generally taken to be that as established in *Calero – Toledo v. Pearson Yacht Leasing Co.* (416 US 663 (1974)). The Court ordered forfeiture of a yacht found to contain a controlled substance, namely the remains of one marijuana cigarette. This judgement was given despite the fact that the yacht had been chartered to a third party and the resulting complete innocence of the actual owner of the yacht.


The concept of forfeiture is available for use in many statutes. However, case law that is pertinent to consider in the application of the concept of a penalty is that of *The State (Gettins) v. Judge Fawsitt.* The facts related to Customs legislation which provided that in the case of an offence an offender was liable to forfeit either treble the value of the goods in question of the sum of £100. In this case a question arose as to whether proceedings under the legislation were criminal or civil in character. The Court followed a line of reasoning which established that where proceedings are taken by the Revenue Commissioners by way of complaint in the District Court then they are criminal in nature. However where proceedings are taken by the Attorney General in the High Court then they are civil in nature. In particular Murnaghan J. stated:

“The information at the suit of the Attorney General is civil because it is a relic of mediaeval procedure, while the proceedings before the District Justice have all the marks of criminal proceedings for which the punishment is a penalty with imprisonment in default of payment.”

Thus, whilst leaning on the historical acceptance at common law of the concept of forfeiture (for example of goods illegally exported under customs law) the rationale that a summons at District Court level may constitute a criminal procedure is tenable under certain circumstances. In addressing this issue and in continuing our sketch of the evolution in forfeiture to the point of determining whether it constitutes a punishment it is worth considering in some detail the case of *Attorney General v. Southern Industrial Trust Ltd & Simons* as it raises a number of interesting issues concerning both the rationale and raison d’etre of forfeiture. The facts – which again highlighted the application of the concept to innocent parties and the use of *in rem*

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49 For example the following, non-exhaustive, list is outlined in DPP *Guidelines for Prosecutors* (2010) at chapter 15 (available at www.dpp.ie): section 23 Firearms Act, 1925 - certain firearms may be forfeit where a person is convicted of a firearms or certain other offences; section 28 Intoxicating Liquor Act, 1927 - the licence may be forfeit; section 10 Censorship of Publications Act, 1929 - prohibited publications may be confiscated; section 2 Offences Against the State (Amendment) Act, 1985 - monies believed to belong to unlawful organisations lodged in a bank may be seized; section 28 Video Recordings Act, 1989 - tapes may be forfeit; section 13 Firearms and Offensive Weapons Act, 1990 - weapons and other articles used in the commission of an offence may be seized; section 6 Criminal Justice Act, 1993 - a court may order compensation to be paid to victims as well as imposing a penalty; sections 38 and 39 Criminal Justice Act, 1994 - cash believed to be imported or exported from the State and believed to be associated with drug trafficking may be seized and forfeit; section 41 Road Traffic Act, 1994, as amended - seizure and disposal of vehicles while driving without licence, tax or insurance; section 6 Customs and Excise (Miscellaneous Provisions) Act, 1988.

50 [1945] I.R. 183

51 *Supra* n. 35 at 183.

52 (1960) 94 I.L.T.R. 161
forfeiture – concern the purchase of a motor car by the second defendant, Simons, using traditional hire purchase facilities provided by the first defendant. Simons was required to make a down payment and a prescribed number of monthly installments before he would be the legal owner of the vehicle. He wished to export the car temporarily to the United Kingdom. However when he did so it was seized and returned to this jurisdiction as it was suspected that it had been unlawfully exported on the basis that Simons had not been – as was required – resident in this jurisdiction. Subsequently the Attorney General sought forfeiture of the vehicle under section 5 subsection 1 of the *Customs (Temporary Provisions) Act 1945* which provides that

(1) If any goods (being goods the exportation of which is prohibited or restricted by any enactment or statutory instrument) have been or are being dealt with in any of the following ways, that is to say:—

(a) have been exported in contravention of such enactment or statutory instrument,

the goods shall be forfeited.54

At the time of forfeiture the second defendant had ceased making the required repayments on the vehicle and as he had not completed the required number of repayments, ownership was still vested in the first defendant hire purchase provider. It was conceded by the plaintiffs that the first named defendants were an innocent party and in no way to blame for the illegal export of the vehicle.55 The defendants contended, *inter alia*, that the aforementioned subsection 1 was unconstitutional in that it purported to authorise the forfeiture of the goods of an innocent party. This argument was based primarily on Article 40.3 and Article 43. Davitt P. in the High Court viewed that if the matter were *res integra* he would be of the view that whilst Article 40.3 does protect individual rights to property it is not an absolute guarantee

53 As continued in force by the *Customs (Temporary Provisions) Act 1945 (Continuance) Act 1950.*
54 Subsection 3 goes on to say: Where (a) proceedings are taken, in pursuance of section, 207 of the Act of 1876, for the forfeiture and condemnation of any goods, the exportation of which is prohibited or restricted by any enactment or statutory instrument, and (b) it is averred in the information that the goods were seized for being dealt with in a specified way (being a way mentioned in subsection (1) of this section), and (c) it is proved in the proceedings that the goods were seized on suspicion of being dealt with in the way so specified, it shall, until the contrary is proved, be presumed that the goods, at the date of seizure were being or had been dealt with in the way so specified.
55 *Supra* n.38 at 165.
and is qualified in a number of areas and any legislative interference with this right could include the Constitutional objective of achieving the common good. Further while Article 43 does recognise the natural right to own property it does not guarantee that law will not be passed that may have the effect of depriving an individual of some or all of his property.\textsuperscript{56}

However the Supreme Court had already considered Article 43 in \textit{Buckley and Others v. The Attorney General and Another}\textsuperscript{57} where it had held that the exigencies of the common good was not a matter peculiarly for the legislature in order to balance the rights between the plaintiff’s property and the common good. In attempting to apply and distinguish such precedent to the case at hand Davitt P. held that:

“Forfeiture of the goods concerned, as well, indeed, as of the vehicle used to transport them, no matter how valuable, has long been considered by successive legislatures to be an appropriate penalty. I do not think it can be reasonably contended that the customs code, severe and unpopular though it may seem to those who have most experience of it as transgressors, has not been enacted with a view to the promotion of the common good, nor do I think that it can be contended that a person who takes the risk of illegally importing or exporting his own property has any reasonable cause to complain of injustice if it is forfeited in consequence of his offence.”\textsuperscript{58}

He went on to note that the practicalities of the situation would dictate that were the property of an innocent 3\textsuperscript{rd} party not subject to forfeiture then all smugglers would simply use hire purchase vehicles. Be this as it may he did highlight that there was a power of mitigation exercisable by the revenue commissioners to deal with hardship and injustice as a result of seizure. Furthermore he stated that it was not the fault of the legislature if this power was seldom exercised.\textsuperscript{59} Indeed in this case the Revenue Commissioners accepted that had the first defendant requested the return of the car they would, most likely, have acceded to that request. However as it was claimed as of right they stood on their right to forfeiture. In the words of the Lavery, J. in the Supreme Court: [T]his attitude may appear rather childish but, as has been said, the

\textsuperscript{56} \textit{Ibid} at 168 – 169.
\textsuperscript{57} [1950] I.R. 65.
\textsuperscript{58} \textit{Supra} n. 38 at 171.
\textsuperscript{59} \textit{Ibid} at 172.
parties concurred in agreeing to strip the case of reality in order to present the issues to the Court.”

It would appear that this power to mitigate struck the balance between undue hardship and the use of forfeiture as a deterrent in the achievement of the common good. Whilst is has since been stated by the Supreme Court that this case ‘cannot be regarded as correctly stating the law … relating to private property guarantee’ it does demonstrate the Irish Courts acceptance of the concept of in rem proceedings and the use of forfeiture as a deterrent despite the potential harsh consequences which might ensue.

It is thus worth highlighting a specific use – drug control – of the concept before returning to the general rationale of the concept. The original legislation in this area was the Dangerous Drugs Act 1934 which provided in section 33 for the forfeiture of ‘all articles in respect of which the offence was committed.’ Notwithstanding this, the first Irish policy document that related to drug use did not appear until the 1966 Report of the Commission on Inquiry on Mental Illness. To put the early legislation and the 1966 report in context it has been noted that in 1965 there were only two charges for drug offences in the entire country but by 1970 this had risen to 71 and by 1973 to 285. The issue of illegal drug use may be considered from the perspective of being a health issue or criminal justice matter but in practice the responsibility for this area is generally shared between the two systems. In this regard and following on from the 1966 report the Report of the Working Party on Drug Abuse was published in 1971 and recommended that any anti-drugs legislation should not unduly infringe on individual civil liberties and that there should be an option to use treatment

60 Ibid at 173.
61 As per Keane, C.J. in Murphy v. G.M. [2001] 4 IR 113 at 140.
facilities rather than imprisonment for convicted offenders. Butler identifies that the report failed to consider the traditional policy divergence – it had diminished somewhat by the time of the reports publication – between the United States of America (U.S.) and the United Kingdom (U.K.) on this issue of control of illegal drug use. Traditionally the U.S. had let the criminal justice system deal with the issue and the U.K. had looked to the medical practitioners. He suggests that the benefit in considering the policy divergences lies not in the advantages of one over the other but in acknowledging the ‘need for subtlety and an avoidance of dogmatism.’ Finally, for our current purposes, in terms of policy analysis he claims that the ‘American ideals of the need for an all-out ‘War on Drugs’ was taken as self-evidently right and sufficient.’

This last point provides an interesting policy consideration for our analysis on the current day use of forfeiture, and its evolutionary process in this jurisdiction. It also establishes the legislative thinking and policy influence on the development of crime control mechanisms. Further it is pertinent at the current juncture as the Irish legislature’s response to the developing issue of illegal drug abuse in the 1970s lay with the Misuse of Drugs Act 1977. This Act began life as the Misuse of Drugs Bill 1973 and did not receive its second reading until February 1975 and it was not promulgated into law until March 1977. It finally received its commencement order in 1979. The Dáil debates on this legislation seemed to reflect a desire for a balance to be struck between the need for punishment on the one hand and the care and rehabilitation of drug offenders on the other. Indeed one deputy suggested that whilst even though drug use was as ‘old as mankind’ and the need to deal with it had taken on new urgency he was still conscious of the fact that:

67 Supra n.48 at 214.
68 Ibid at 224.
71 Dáil Debates 20th February 1975 Vol 278 Col 919. Also there was a belief that the drug problem in Ireland in 1975 was very small by international standards. (at 925 – 926.) See also O’ Mahoney, P. ‘The Phenomenon of Crime: Introduction’ in O’Mahoney (2002) Supra n. 10 at 143 who suggests that [H]eroin and other hard drug use was almost unknown in Ireland before 1979.”
“There is always a danger in this regard that we would allow the urgency of some particular problem to allow us to brush aside the fundamentally important things in our society. We might, in our anxiety to deal with this drug problem, urgent and important and widespread as it is, overlook the necessity to protect civil liberty and the legal rights of the individual citizen.

I want to direct the Minister’s attention to this danger. We might agree that it is right and proper to give the Garda special arbitrary powers where drugs are concerned and the community might be prepared to waive certain rights to enable this problem to be dealt with, but how can we ensure or how can we guarantee that if the Garda are given certain draconian powers to deal with the drug situation those powers will not be used in other situations”\textsuperscript{72}

This indicates that there was some realisation of the need for a level of restraint and an avoidance of knee jerk policy adoption without due consideration to the wider precedents that might be established. However, in contrast, nine years later the debate on the subsequent Misuse of Drugs Act 1984 ‘reflected a pre-occupation with law and order and drug control’\textsuperscript{73} and the concept or use of forfeiture seems to be been accepted as a given in the legislation. This is an interesting change of policy direction fuelled presumably by the fact that it was estimated that by 1983 trafficking in drugs was worth between IR£20 – IR£25 million.\textsuperscript{74} This represented a societal sea change since the 1970’-s that would continue throughout the 1980’-s and 1990’-s ultimately culminating in a legislative sea change in the mid-1990s.

Whilst the introduction of this legislation is important from the perspective of policy adoption in relation to the use of forfeiture, it is the application of the legislation in the court system that will now be considered in establishing the current framework from the perspective of judicial acceptance and interpretation of forfeiture. In this respect the section of primary interest is section 30 which provides:

(1) Subject to subsection (2) of this section, a court by 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 thinks fit.

\textsuperscript{72} Dáil Debates 20\textsuperscript{th} February 1975 Vol 278 Col 927, 931.
\textsuperscript{73} Butler (1991) supra n.43 at 221. See also Dáil Debates 1\textsuperscript{st} May 1983 Vol 342 Col 1554 – 1559.
\textsuperscript{74} Dáil Debates 18\textsuperscript{th} May 1983 Vol 342 Col 1557 \textit{per} Deputy Durkan.
(2) A court shall not order anything to be forfeited under this section if 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 is identical to section 27 of the English and Welsh Misuse of Drugs Act 1971 and prior to considering Irish case law on the area we will first consider some relevant judgments from that particular jurisdiction. In *Haggard v. Mason*\(^75\) the defendant was convicted of offering to supply a controlled drug and in addition to sentence was ordered to forfeit a sum of money in his possession which was the remainder of the proceeds of a drug sale. However on appeal the forfeiture order was quashed as being *ultra vires* as the money did not relate to the offence – in this case offering to supply – as specifically required under section 27. A similar situation arose in *R v. Cuthbertson*\(^76\) where the defendants pleaded guilty to conspiracy to contravene section 4 – produce or supply – of the Act. The trial judge subsequently ordered forfeiture of, *inter alia*, monies and monies held in foreign bank accounts. On appeal to the House of Lords, the defendants did not dispute that the forfeited assets were acquired from the manufacture and supply of a particular prohibited drug\(^77\) rather they questioned whether the forfeited assets could be shown to ‘relate to the offence’ as required under section 27 (1). The House of Lords stated that they did not so relate as it was not appropriate to apply an overly broad interpretation to the section in light of the overall Act. Furthermore in giving a purposive construction of the section in question Lord Diplock stated that it was ‘only apt to deal with things that are tangible …[T]o ascribe to the section any more extended ambit would involve putting a strained construction on the actual language that is used.’\(^78\) He went on to state that as it was necessary to show that what is forfeited must relate to the offence for which a person has been convicted then a conviction of conspiracy does not empower a court to make an order of forfeiture.\(^79\)

Further he noted and rejected the argument which had seemed to influence the court of appeal – namely that the intention of parliament in constructing section 27 was to

\(^75\) [1976] I WLR 187
\(^76\) [1981] 1 A.C. 470
\(^77\) Ibid at 470.
\(^78\) Ibid.
\(^79\) Ibid at 483.
‘strip drug traffickers of the whole of the profits of their crime whatever might be the way in which they had invested those profits.’\textsuperscript{80} Lord Diplock countered that it was not possible or plausible or indeed practical to ‘follow the assets’ as no mechanism had been provided for effecting charges over real or personal property and ‘orders of forfeiture can never have been intended by parliament to serve as a means of stripping the drug traffickers of the total profits of their unlawful enterprises.’\textsuperscript{81}

Finally, from the English and Welsh case law interpretation, we may note briefly the case of \textit{R v. Ribeyre}\textsuperscript{82} where the appellant was convicted of, \textit{inter alia}, possession with intent to supply and was ordered to forfeit drugs and a quantity of money. The appellant accepted that whilst the money in question did relate to the sale of previous drugs it did not relate to the particular offence before the court. Furthermore as the offence was ‘intent to supply’ that inferred that he was going to sell the drugs and thereby would not have required the money as working capital and this, again, did not relate to the offence. The Crown argued that the conviction for possession and the provenance of the monies was ‘evidential nexus’ enough to relate to the offence. The Court however ruled that such a wide interpretation of the words ‘relate to the offence’ was untenable and reversed the forfeiture order in terms of the monies.\textsuperscript{83} Whilst the sections in both jurisdictions are similar the House of Lords seemed to establish clearly defined boundaries on the use of forfeiture as a mechanism to target drug traffickers. In accepting the use of the concept they indicated that it was far from a \textit{catch all} mechanism that could be allowed an overly broad interpretation.

In terms of application of section 30 of the Irish Act the defendants in \textit{DPP v. Christopher Kinehan and Rabah Serier}\textsuperscript{84} (a Circuit Court case) pleaded guilty to charges of possession of drugs for supply. In addition to the drugs a quantity of cash in Irish and foreign currency was found at the same location. The defendants queried whether the State was entitled to the forfeit of these monies with the first named defendant claiming that the money had come from legitimate business interests. The

\textsuperscript{80} Ibid at 484.
\textsuperscript{81} Ibid
\textsuperscript{82} [1982] 4 Cr. App. R. (S.) 165
\textsuperscript{83} Ibid at 167
\textsuperscript{84} (1988) 6 ILT 156
State contended that the monies were part of the stock in trade of a drug dealer and were, thereby, no different to a weighting scales or other paraphernalia which might be legitimately subject to forfeiture. Moriarty J. accepted this argument and ruled that the Irish currency ‘was intrinsically connected with the actual drugs supply operation’ and ought therefore to be properly forfeited. In terms of the (lesser) foreign currency he went on to rule that there was a possibility – but not a probability – that the currency came from legitimate business interests and therefore ought not to be forfeited.

The matter was considered, in greater detail, in Bowes v. Devally. Here the applicant had been convicted, in the District Court, of possession of drugs contrary to the legislation. At the time of her arrest a quantity of money was also found and forensic evidence demonstrated that there were trace elements of cannabis resin on the money. The applicant claimed she was merely holding the money for her mother but did not explain why there might be such traces on the money. The Court ordered forfeiture of the money under section 30. Following an appeal the applicant took judicial review proceedings seeking to have the forfeiture order quashed. Geoghegan J. in the High Court, having reviewed the persuasive case law of Cuthbertson and Ribeyre, considered that even if there was an inference that the money in question was to be used to acquire further drugs this did not ‘relate to the offence’ (possession) of which the applicant had been convicted. Further he noted that had she been convicted of selling then it might have been contended that the money represented the proceeds of that sale and thereby under such a hypothesis the money might properly have been forfeited. In reaching the conclusion that the forfeiture order should be reversed the learned justice also stated that ‘forfeiture is part of the penalty and the circumstances in which forfeiture can be made must be strictly construed.’

The Irish High Court adopted a similar viewpoint to the House of Lords establishing that is was necessary to establish a direct connection between the item in question and the actual offence committed. However, notwithstanding the narrow interpretation of this particular piece of legislation the Court again accepted the use of forfeiture and

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85 [1995] 1 I.R. 315
86 Ibid at 318 -319.
87 Ibid at 319.
thus is a contributor to our causal contributions for the ultimate emergence of wider civil forfeiture. Indeed the concept of the forfeiture of assets was, as demonstrated, well established in both historical and modern Irish jurisprudence. From its unique development of establishing *in rem* proceedings against an inanimate object as a practical (if semi-illogical) method of deterrence (and indeed potentially a punishment) it appears that for a period the use of forfeiture as merely a source of revenue developed as the mainstay of the concept. In more modern Irish history the courts seemed willing to accept the concept of forfeiture – where legislation allowed –on the basis of achieving a greater good.

Much of the current day thinking on forfeiture cites anti-drug use legislation as the touchstone of its applicability. Whilst Ireland seems to have drifted towards a U.S. “war on drugs” type of approach the Irish judiciary, taking heed of their English and Welsh brethren, have given relatively narrow interpretations of the *Misuse of Drugs* legislation. In particular strict requirement that the forfeited asset “must relate” in a real and substantive sense to the actual offence which was committed. Of course the Dáil debates on the original Misuse of Drugs Act called for balance and the need to exercise caution to ensure that the “draconian” powers did not permeate the entire legal system. Indeed where the powers of forfeiture were used under the Misuse of Drugs legislation it appears to have been targeted at the ‘physical means employed rather than the fruits of the crime.’

The aforementioned drugs related cases were used to highlight the fact that the only constraint that the judiciary appeared to put on the concept of forfeiture was that of legislative interpretation and legislative intent. The prevailing view was that it could not be used to target the wider financial accruals of the drug trade merely because such a power was not obvious from the drafting of the legislation. Thus, the restraint on the wider use of forfeiture at this juncture appeared to be the intent of the legislature. This in turn raises the question of what traditionally forfeiture was trying to achieve and whether it is an actual primary punishment or merely a secondary ancillary one. We are faced with two primary decisions that are somewhat competing and, thereby,

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difficult to reconcile. The first is that of *Kostan v. Ireland*\(^89\) which concerned an offence triable summarily under the *Fisheries (Consolidation) Act* 1959. The penalty for such an offence was a fine not exceeding £100 and the mandatory forfeiture of the fish catch and the fishing gear. Here, the plaintiff, having contravened the legislation, was fined the maximum penalty and his fishing gear, valued at £102,040 was confiscated under the forfeiture provision. In turn he claimed that the forfeiture constituted a penalty that was so severe that it could not constitute a minor offence triable summarily.

In reaching a decision McWilliams, J. stated that ‘[N]o one can deny that a punishment involving the loss of property to the value of anything in the region of £100,000 is severe.’\(^90\) In so doing he reached a decision that the forfeiture was a direct consequence of a conviction and therefore was a penalty. It could be argued that the learned judge seems to have reached his decision in this case based on its own facts rather than on a principle of law as it may be submitted that the value, or moreover the potential lack of value, of the item in question (fishing gear in this instance) should be irrelevant in establishment of the law.\(^91\) Indeed there is an inconsistency between this case\(^92\) and that of *Cartmill v. Ireland*,\(^93\) which despite the fact that it was on a similar matter did not even consider the *Kostan* case. In Cartmill, the principle that the category of the offence was determined by the level of punishment was re-iterated, but it was held that forfeiture (in this instance under the *Gaming and Lotteries Act* 1956) of machines worth approximately £120,000 was merely a secondary punishment that needed an ‘administrative or executive power to deprive a citizen’\(^94\) of the object in question.

It has been suggested, by Casey, that an exceptionally narrow distinction between the two competing cases is that in *Kostan* the forfeiture was mandatory but in *Cartmill* it

\(^{89}\) [1978] I.L.R.M. 12  
\(^{90}\) *Ibid* at 13  
\(^{91}\) McWilliams, J. felt that the *Southern Industrial Trust* case was not a relevant precedent as it dealt with a civil offence.  
\(^{92}\) In *The State (Clancy) v. Wine* ([1980] I.R. 288) and *L’Henryenat  v. Ireland* [1983] I.R. 193 the severity of a particular punishment was confirmed as the main test as to the *category* of an offence.  
\(^{93}\) [1978] 1 I.R. 192  
\(^{94}\) *Ibid* at 193 -
was discretionary. The same author goes on to suggest that a more tenable distinction may be rooted in the fact that in Kostan the property was lawful in itself but was used in the commission of an offence, whereas in Cartmill it was forfeiture of property designed for the commission of an offence.\footnote{Casey, J. (2000) Constitutional Law in Ireland, Roundhall: Sweet and Maxwell: Dublin at 318 - 319.} In considering the inconsistency, Hamilton draws attention to the fact that in the earlier case of O’Sullivan v. Hartnett\footnote{[1981] I.L.R.M. 496} the accused was convicted of being in possession of 900 unlawfully captured salmon and the penalty included forfeiture of the catch. McWilliam, J. held that the offence itself was not a minor one, but, more importantly in the current context, ruled that as the accused was never actually lawfully in possession of the fish then forfeiture could not in reality constitute a penalty. Hamilton goes on to contend that the clarification by the Supreme Court – that the High Court decision related to the specific facts of the case rather than a general principle of law\footnote{[1983] I.L.R.M. 79.} – was ‘unsatisfactory’ on the basis that it seemed to give credence to the actual value of the item (fish) without giving any reasons for such an approach.\footnote{Hamilton, J. (2004) “The Summary Trial of Indictable Offence”, Judicial Studies Institute Journal 4:2 154 at 171 -172.}

In this respect the Courts seem to be drawing a distinction between property that is not lawfully in the defendant’s possession and property lawfully held but actually used for unlawful purposes. In the current context these cases are important in that they have assisted in establishing and providing authority for the development of forfeiture as modern crime control mechanism. Further they demonstrate that forfeiture was also used in the mainstream areas of law and was not always given the narrow interpretation highlighted in the misuse of drugs cases. Moreover they highlight the possibility for forfeiture to be used a secondary or ancillary element which widens considerably its scope as a mechanism for dealing with modern criminality. Notwithstanding, for the interim only, the divergence on whether forfeiture was a primary or secondary punishment it was widely used as a concept in both the civil and criminal realm. Indeed as it had been used in the civil arena for prosecutions in contravention of customs, fishing and revenue law its acceptance and use – in the broad sense – for much more serious criminal issues could hardly be denied.
The Offences Against the State (Amendment) Act, 1985.

In terms of outlining the position of forfeiture prior to the 1996 reforms and prior to considering some international influences on the development of Irish forfeiture we will now turn to what is sometimes referred to as a key piece of legislation which was already in place in this jurisdiction. In introducing the Proceedings of Crime Bill in 1996 its proposer stated that a clear precedent already existed for such legislation in this jurisdiction. Indeed he went as far as stating that:

“The suggestion that this Bill is in some unspecified way unconstitutional is ... unsustainable. A clear and direct precedent exists for legislation of this type. The Offences Against the State (Amendment) Act, 1985, permits the freezing of assets of illegal organisations. The constitutionality of that Act was tested in the High Court in the case of Clancy v Ireland …”

In terms of establishing the context for the introduction of one of the significant reforms of the mid 1990s, namely – the Proceedings of Crime Act 1996 – it is worth considering this ‘clear and direct precedent.’ The 1985 Act was underpinned by the Offences Against the State Act 1939. This latter Act provided that where a particular organisation was deemed to be an unlawful organisation the government could make a suppression order where upon, under section 22, ‘all the property (whether real, chattel, real or personal and whether in possession or in action) of such organisation shall become forfeited to and vested in the Minister for Justice.’ This was supplemented by section 2 of the Offences Against the State (Amendment) Act 1985 which provided the Minister for Justice with the authority to freeze monies held by a bank which he believed – but for the operation of section 22 of the 1939 Act – to be the property of an unlawful organisation and cause them to be paid into the High Court. Further after a period of six months the Minister may make an ex parte application for the money to be paid out to him and into the exchequer. An individual claiming to be the owner of the monies may also make an application within six months to have that money paid to him. However, the caveat in this legislative approach is that the traditional onus of proof is reversed and placed on the individual

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100 Section 18 of the 1939 Act.
101 Section 19 of the 1939 Act.
102 Section 3 of the 1985 Act.
to establish ownership. It was felt that the 1985 Act was necessary because the original 1939 Act did ‘not contain a significantly precise formula or mechanism by which the Minister can seize the property while at the same time giving anybody who may claim to be the legitimate and bona fide owners of it the right to have their claims determined by the Courts.’

Interestingly, in terms of its remit, the legislation was introduced to deal with a very specific circumstance which it was felt had ‘serious implications for the maintenance of public order’ in the State. In particular the movement of a specific sum of money, which it was claimed had already moved across ‘international frontiers and may, to an extent at least, have been “laundered”’

In addition to both enshrining the concept of forfeiture in legislation and indicating a willingness to deal with one off extraordinary issues – through enshrining procedures in the ordinary realm – this is also an example of the early approaches of the Irish legislature to deal with internationally laundered money, albeit limited to the extent of monies controlled, or for the use of, unlawful suppressed organisations under the 1939 Act. Indeed during the Dáil debates on the legislation concern was expressed with regard to the need for such legislation in the ordinary criminal realm. In particular the concerns of Deputy Prendergast are noteworthy:

“What provision, if any, is there for extending the provisions of this Bill to money which might have been robbed from banks by other than organisations mentioned in the Act and which might be the proceeds of illicit operations in this country by people involved in international crime? There are disconcerting rumours that there are agencies and outlets being used here to launder that kind of money.”

The proposer of the bill, the then Minister for Justice Michael Noonan, confirmed that the bill was directed solely at organisations suppressed under the 1939 Act. In terms of the overall approach to crime control this is an interesting individualistic approach. As noted above, the 1985 Act was introduced to deal with an individual specific issue

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103 Dáil Debates, 19th February 1985, Vol. 356, Col 133 per Mr. Noonan.
104 Ibid 132.
105 Ibid at 133.
106 Dáil Debates, 19th February 1985, Vol. 356, Col 144 per Mr. Prendergast.
and the relevant section 2 of the Act would only be in operation for 3 months. It was felt that this limited time span would be an ‘important limitation on the power of the Minister and [would] … act as a safeguard.’ It appears that whilst there was a felt need for such so-called ‘draconian legislation’ it was not believed that there was a need for such legislation to continue in force on a permanent basis, even in the extraordinary realm. The proposing Minister did note that whilst the Act provided a method for dealing with a particular issue it might also provide a framework for future issues of a similar nature, thereby holding open the door to potential expansion of this form of crime control.

Indeed in terms of using such – or more importantly similar – legislation as a framework for civil forfeiture it is essential to note that the 1985 Act is what may be referred to as an extra-ordinary measure. That is a measure specifically designed to deal with a terrorist threat to the safety or security of the State. However as further noted by Kilcommins and Vaughan, such extraordinary measures were used as a justification for the introduction of measures into the ordinary realm without any detailed consideration given to their potential effects. Indeed in referencing the above quote from 1996 regarding suggestions as to whether the Proceeds of Crime Bill was in some way unconstitutional the authors offer a detailed contribution as to the potential effects of such an approach. They contend that there is an “obfuscation” of the divide between ordinary and extraordinary provisions with an associated reduction in due process ideals and constitutional values. They suggest that it is unacceptable to legitimise a Bill by reference to extraordinary powers designed to combat a subversive threat to the State and that it is only by resulting necessity of being an extraordinary measure that the ‘draconian’ powers in the 1985 legislation passed constitutional muster.

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108 It could however be renewed by government order.
110 Seanad Debates, 19th February 1985, Vol 107, Col 326 per Mr. Ferris.
111 Dáil Debates, 19th February 1985, Vol. 356, Col 133 per Mr. Noonan.
113 Ibid at 67.
Thereby the emphasis that is sometimes placed on the 1985 Act as ‘a clear precedent’ is, at a minimum, a questionable approach. Whilst the Act is undoubtedly a causal factor in our framework it was only ever intended as a short term approach to a specific issue in a specific realm as opposed to a century of tradition and ongoing use in other areas where forfeiture was applied. Notwithstanding this short term rationale it appears to have had a long term effect as, inter alia, it provided the legislature with a platform upon which to construct a more long term structure on the road to normalisation of an originally extra ordinary provision. This somewhat shaky foundation was strengthened, to a degree, by the fact that the importance of the 1985 Act in establishing a modern framework and legislative precedent for forfeiture in Ireland does not stop at the introduction of the Act. As just alluded to, its constitutionality was subsequently tested in the High Court in Alan Clancy and David McCarthy v. Ireland and the Attorney General.114

The day following the enactment of the legislation115 the Minister for Justice directed the Bank of Ireland branch in Navan Co. Meath to pay to the High Court the sum of £1,750,816.27 that was standing to the credit of the plaintiffs in a joint account. In seeking to reclaim the money the plaintiffs sought declarations that certain section of both the 1939 Act and the 1985 Act were unconstitutional. In reaching its decision the Court made a number of interesting distinctions in terms of the effect of the Act. Despite the fact that section 2116 specifically mentions the word ‘forfeited’ the Court held that ‘[T]he effect of s. 2 is not therefore to confiscate monies standing in the name of an account holder in a bank but to require those monies to be paid into the High Court.’117 In the same vein they went on to declare that:

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114 [1988] 1 I.R. 326
115 In terms of the use of forfeiture as a measure in Ireland the Minister noted, during the Seanad Debates on the 1985 Act, that he only aware of one recent precedent in the area. This occurred in 1978 in County Sligo where individuals were unsuccessful in reclaiming approximately £5,400 which the Gardaí had taken from them in car. (Seanad Debates, 19th February 1985, Vol 107, Col 341 – 342 per Mr. Noonan.) As the relevant section in the Act was only to continue in force for a mere 3 months it does not appear that the Minister expected that forfeiture would become a regular part of the armoury of criminal law in Ireland.
116 It is provided at section 2(1)(a)(i) “that, in the opinion of the Minister, moneys described in the document and held by the bank would, but for the operation of section 22 of the Principal Act, be the property of an unlawful organisation and that those moneys stand forfeited to and vested in the Minister by virtue of the said section 22,”
117 Supra n. 99 at 334.
“The Act of 1985 admittedly provides for the freezing (my emphasis) of a bank account and the payment of the funds in it into the High Court without notice to the account holder but it does not confiscate (my emphasis) his property or deprive him of a fair hearing.”

The Court seemed to put considerable weight on the fact that a claimant was entitled to regain the money if, with the reversed onus of proof, he could prove bona fide ownership. This would appear to be the rationale for holding that section 2 does not confiscate the property in question but merely freezes it for a period of time until true ownership, or indeed actual forfeiture, can be established by the courts. In determining that the Act did not offend the traditional due process guarantees the Court looked to the case referred to earlier – in considering the development of forfeiture provisions – of Calero – Toledo v. Pearson Yacht Leasing Co. The relevant section considered in the Irish Court was that:

“First, seizure under the Puerto Rican statutes serves significant governmental purposes: Seizure permits Puerto Rico to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, pre seizure notice and hearing might frustrate the interests served by the statutes, since the property seized - as here, a yacht - will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.”

In seeing the inherent advantages of establishing in rem jurisdiction and the parallels with the risk of the property moving to a different jurisdiction the Court was referencing case law that clearly established both the concept and the potential unique application of forfeiture as a crime control measure. As a result the Court was of the opinion that the Act simply allowed a temporary freezing of funds and that the matter could subsequently be resolved with the due process of law and was not therefore unconstitutional but rather a permissible delimitation of property rights in the interests of the common good. Finally in terms of providing a framework for forfeiture provisions in Ireland, as the Act provided for the payment of compensation the Court

118 Ibid 335.
119 Interestingly, for future purposes, the Court did accept that when dealing with unlawful organisations the reversal of the traditional onus of proof may be an important factor. Ibid at 335.
reasoned that this was enough to rebut any suggestions of an unjust attack on private property.\textsuperscript{121} Thereby both the legislation itself and its subsequent passing of constitutional muster provided solid foundations upon which forfeiture provisions might, at an appropriate future time, be introduced as a crime control strategy, although this was not contemplated at the time.

Thus whilst an exemplar of forfeiture of criminal assets did exist in Ireland it was designed to deal exclusively with the extraordinary realm. The Act highlighted both the willingness of the legislature to deal with serious crime issues (albeit extraordinary crime) in a flexible manner\textsuperscript{122} and the willingness of the Irish courts to accept forfeiture, albeit in this instance in very limited circumstances restricted to certain unlawful organizations, as an acceptable strategy to deprive, in the absence of any criminal convictions, those benefiting from criminal activity. When the later 1996 reforms relied on this template it moved the notion into the ordinary realm – or normalised the activity – without any detailed consideration as to its constitutional appropriateness.

Permitting a precedent from the extraordinary realm to act as a justification for a much wider refocus of the mechanism and framework to target modern criminality in the ordinary realm represents, reflected to a degree at least, both a re-ordering of the relationship between the citizen and the State and a break from the past. Combined such a thesis represents a broad reflective position on the long term outcomes of this one particular and unique case. The actual case report itself has been referred to by a Supreme Court Justice as ‘laconic and unsatisfactory’\textsuperscript{123} in that it did not deal with the arguments advanced at trial. Such a comment and the fact that the legislation was intended as a short term mechanism to deal with issues of a very specific nature in the

\textsuperscript{121} Supra n. 99 at 336. Following the High Court decision it was indicated that the matter would be appealed to the Supreme Court. However it was never progressed and the funds remained frozen by virtue of court orders. Due to the unacceptably long delay and the fact that the estates of neither plaintiff were making a claim on the monies the High Court ordered in March 2008 that the funds be paid out to the Minister for Justice. At this stage with interest the amount in question had risen to some €5.9 million. (See ‘€6 million in frozen bank account believed to belong to the IRA goes to the State’ Irish Times 15\textsuperscript{th} March 2008.) It is interesting to note that almost 23 years after the legislation was enacted to deal with this specific offence the money was released to the State. This is in sharp contrast with the six month period outlined in legislation.

\textsuperscript{122} We should also be cognisant that problems may arise as a result of knee jerk legislation.

\textsuperscript{123} Keane, C.J. in Murphy v. G.M. [2001] 4 I.R. 113 at 144
extraordinary realm – and passed constitutional muster on that basis – makes it somewhat surprising that it is considered a central tenet in the evolution of Irish forfeiture provisions. Its importance as template for forfeiture is accepted, but the almost automatic unquestioned adoption into the ordinary realm represents a blurring of the – necessary – line between ordinary and extraordinary provisions. The whole basis of extraordinary provisions is that they are a proportionate, if draconian, response to an emergency threat.¹²⁴

Despite these short-giving’s both the legislation itself and the judicial acceptance thereof are important causal factors in our framework as they indicate that the State had used forfeiture as a mechanism for dealing with criminality in circumstances where a crime is not proven. As a short term measure targeted at the extraordinary realm however it is submitted that the long term effect on current Irish forfeiture is often overstated when juxtaposed with the reality of other immediate and long term historical factors that contributed to the milieu. The State had used – as opposed to was using – forfeiture and this fact combined with the brief High Court judgment would not, it is submitted, have been significant enough to justify the emergence of a wider concept of forfeiture were it not for the long history of forfeiture already outlined and a number of international factors which we will now consider.


In the Dáil debates prior to the enactment of the Proceeds of Crime Act 1996 United States (U.S.) “RICO” provisions were cited as an approach to organised crime that should be adopted in this jurisdiction.¹²⁵ As mentioned previously RICO¹²⁶ is the acronym for the Racketeering and Influenced Corrupt Organisation provision of the U.S. legislation which introduced a new penalty of forfeiture allowing the State to confiscate the property of those convicted of crimes under the Act. The rationale for the introduction of such law may be gleaned from a Senate Report on what would later become RICO. It stated that the aim of the legislation was the ‘elimination of the

¹²⁵ Dáil Debates, 2nd July 1996, Vol. 467, Cols 2372-2373 per Mr. Ahern; Col 2444 per Mr. Shatter; and Col 2473 per Mr. O’Dea.
¹²⁶ Supra n.12
infiltration of organised crime and racketeering into legitimate organisations operated in interstate commerce.\textsuperscript{127} Whilst the targets of this legislation and the later Irish model may be similar it would appear that the original rationale was couched in very different terms. The US legislation allowed for both the forfeiture of property used in RICO crimes and any proceeds acquired from that activity. In addition to such provisions in 1970 the congress also passed the Continuing Criminal Enterprise Act\textsuperscript{128} (CCE) which provided for imprisonment and the imposition of large fines and the forfeiture of the profits of the criminal enterprise. Importantly in terms of the development of forfeiture as a mechanism to remove the profits from crime both of these pieces of aforementioned legislation required a criminal conviction prior to any forfeiture of property.

However the possibility of civil forfeiture did exist in relation to the seizure of narcotics and raw materials or equipment used in their production, handling or transportation. This was essentially the forfeiture of ‘instruments’ of drug related offences. In addition the later Psychotropic Substances Act 1978\textsuperscript{129} allowed for in rem proceedings and as such it effectively ignored the innocence or otherwise of the owner of the property in question as it did not require a pre-existing conviction. This Act thereby allowed for the civil forfeiture of all proprietary proceeds of illegal drug activity. The legislation was amended again with the Comprehensive Forfeiture Act 1984\textsuperscript{130} which, in addition to allowing for application for a warrant, authorised seizure of real property for the first time. Such seizure was permitted where the real property in question was used or intended to be used to commit, or facilitate, the commission of a relevant offence. In justifying such an approach it was noted in the U.S. congress that:

\begin{itemize}
  \item \textsuperscript{127} S.Rep. No. 617, 91st Cong., 1st Sess. 76 (1969)
  \item \textsuperscript{128} \textit{Supra} n.12
  \item \textsuperscript{129} 21 USC § 881 (a) (6). In terms of the need for the legislation it had been noted in congress “that in the drug fight we are losing the battle as well as the war.” 124 Cong. Rec. 23,005 (1978)
\end{itemize}
“If law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.”

It would thus appear that the U.S. approach to dealing with such activity had graduated from an approach based on the offence itself to one focussed on the outputs of such offences in an attempt to reduce – with the ultimate aim presumably of elimination – such offences by removing their profit element. This aim of eliminating profit and thereby eliminating, or deterring in the first instance would-be, offenders, was also a clear motivation of the Irish legislature. Thereby it is apparent that the modern development and application of forfeiture provisions in the US was incremental in nature progressing from forfeiture of instruments used in the offence; to forfeiture of profit following conviction; and finally to in rem forfeiture which did not need a prior conviction. As already outlined, in this jurisdiction there already existed the concept of in rem forfeiture and forfeiture of items ‘related to the offence’ under misuse of drugs legislation and thus a wider policy adoption from the U.S. would not have been a wholly unexpected evolutionary development.

In addition a system of administrative forfeiture that does not require any judicial intervention has also developed in the US. This allows for forfeiture of property valued at less than $500,000, (excluding real property) money in any amount and any conveyance used to import, export, transport, or store any illicit drugs. Following seizure of any such property the seizing agency must notify the owners and any other interest parties of the intent to forfeit that asset. Such parties may submit a claim of interest – accompanied by a cost bond – in the asset. This essentially ends the administrative procedure as the claimant has effectively requested judicial intervention. The use of such an administrative system might encounter difficulties in this jurisdiction due to our separation of powers. However, it may be noted that

132 19 USC § 1607
133 A notice of the intent to forfeit must also be placed in newspapers. Over the longer term it is intended that internet publication of such notices will replace the newspaper notices. See www.forfeiture.gov (last accessed 17th February 2017)
penalty points for driving offences, some public order offences and potential application of the aforementioned gaming and lotteries legislation do not need any judicial intervention and thus, potentially at least, forfeiture could be exercised in this manner in Ireland.

In terms of looking to the U.S. for approaches to specific elements of crime control it must be noted that there has been much criticism of the U.S. system of forfeiture.\textsuperscript{135} In the US, historically, forfeiture has been a much more divisive issue as it was used in the past as an instrument by the government to obtain, without trial, property belonging to Southern rebels\textsuperscript{136} and may therefore have negative historical connotations not evident in the Irish system. An often expressed general criticism is that the proceeds of assets forfeited are often redistributed to the law enforcement agency responsible for initiating the forfeiture mechanism and thus there is a concern that forfeiture might be used a simply a revenue enhancement mechanism and might lead to selectivity on the part of some agencies.\textsuperscript{137} In the more specific sense there have been many instances whereby it is questionable whether the use of forfeiture is being used to remove the economic power base of criminals. In \textit{Bennis v. Michigan}\textsuperscript{138} the plaintiff was joint owner with her husband of a Pontiac car. The vehicle was forfeited as it was the site of an act of prostitution involving the plaintiff’s husband. Despite her pleas of innocence that whilst she was obviously aware that her husband

\textsuperscript{135} See for example Levy, L. \textit{Supra} n.34 and Chew, M. (1994) ‘Can Something this Easy, Quick, and Profitable also be Fair? Runaway Civil Forfeiture Stumbles on the Constitution’ 39 \textit{New York Law School LR} 1. From a constitutional perspective in \textit{United States v. Ursery} (518, U.S. 267 (1966)), based on the fact that forfeiture is a remedial action against property rather than a punitive one against an individual it was held that it is not in breach of the 5\textsuperscript{th} amendment double jeopardy clause. In \textit{Caplin and Drysdale Chartered v. United States} (491 U.S. 617 (1989)), civil forfeiture did not breach the 6\textsuperscript{th} amendment right to counsel as there was not a threat of imprisonment. In \textit{Austin v. United States} (509, U.S. (1993)) it was held that forfeiture is subject to the 8\textsuperscript{th} amendment excessive fines clause.

\textsuperscript{136} Meade, \textit{supra} n. 23 at 10. A number of issues such as the lack of criminal conviction, the status of the asset owner and the remedial nature of civil forfeiture have also been presented as advantages to civil forfeiture; see Jaipaul, S. \textit{Supra} n.37


\textsuperscript{138} 516 U.S. 442 (1996)
used the family car, she had no knowledge of her husband’s infidelity the Supreme Court of the United States held that the car facilitated and was used in criminal activity and should, therefore, be forfeited.\textsuperscript{139} The approach of the Court is perhaps best summed up by the quote that:

“It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien, the power of a vendor of chattels in possession to sell and convey good title to a stranger, are familiar examples . . . [T]hey suggest that certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril . . . . [I]t has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment.”\textsuperscript{140}

A similar justification was used in affirming the forfeiture of a vehicle in \textit{United States v. 1990 Toyota 4Runner} where it was reasoned that:

“In order to import the heroin into the United States and place it in Oloko’s [the conspirator’s] possession, someone had to go to Manila, get it, and bring it back. In order for someone to go to Manila for this purpose, arrangements for the trip had to be made … In order to make these arrangements, the conspirators had to meet, and Oloko’s presence at the meeting was “facilitated” by the Toyota, his mode and conveyance to and from the meeting.”\textsuperscript{141}

These cases serve to highlight the extent to which the use of forfeiture has developed in the U.S. and moreover the tangential extremes to which the courts seem willing to travel in order to justify forfeiture of assets many significant steps detached from the criminal act and without which the criminal act could still have continued and of course the wide options open to a jurisdiction that might adopt such forfeiture practices.\textsuperscript{142}

\textsuperscript{139} \textit{Ibid} at 453.

\textsuperscript{140} \textit{Ibid} at 448 citing Van Oster 272 U.S. at 467 – 68. There was however a dissenting judgment noting that the car did not fit any of the traditional items that would be seized – contraband, proceeds of criminal activity, or tools of the trade – and that the Court was granting too much power to forfeit property that had only a tangential relationship to the crime.

\textsuperscript{141} 9. F. 3d 651 (7th Cir. 1993) at 652.

\textsuperscript{142} Some changes did occur as a result of the \textit{Civil Asset Forfeiture Reform Act 2000}, (Pub. L. No. 106 – 85 (H.R. 1658) 114 Stat.) but as this was post 1996 it is not directly relevant to the current framework. See generally: Worall, J. (2004) ‘The Civil Asset Forfeiture Reform Act of 2000: A sheep in wolf’s clothing?’ 27 (2) \textit{PILPSM} 220; Cassella, S. (2001) ‘The Civil Asset Reform Act of
The concept of forfeiture, and indeed civil forfeiture, was well established in the common law tradition of the US and policy adoption from that jurisdiction is another significant and important causal factor in the development of the concept in this jurisdiction. This is due to the fact that there was a general *prima facia* understanding that the concept was getting results in the US and in the crisis of hegemony that surrounded the Irish political establishment in the summer of 1996 there was a desire to rapidly implement methods that could offer reassurance and had a resonance of authority. The US system – notwithstanding that it was receiving some criticism in that country – appeared to do just that. As established, the concept of *in rem* proceedings were already established in Irish jurisprudence and the US system appeared to give an indication of the possibilities for the growth of such proceedings to deal with a new era of criminal actors. Thus the US forfeiture laws had a concomitant historical and immediate influence in the hierarchy of factors that shape the Irish 1996 reforms.

**International Influence on the Development of Irish Forfeiture.**

The rationale for noting the US concept of forfeiture was due to the fact that there was a felt need by the Irish legislature to implement RICO like provisions notwithstanding the fact that the original RICO itself had no actual civil forfeiture components. The US provisions were not, of course, the only international influences on the development of forfeiture in Ireland. The State’s requirements under International and European Conventions provided the immediate backdrop to the introduction of, for example, the *Criminal Justice Act* 1994.

Whilst it is sometimes asserted that Ireland was a driving force in the development of civil forfeiture it is imperative not to overlook the significance of the multi-layer and multi-actor international arena in respect of the rational development of forfeiture laws in this particular State. The nature of political debate in 1990s’ Ireland, fuelled by a number of competing paradigms, might have left citizens with the impression that

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international organised crime was a relatively recent phenomenon. This was not the
case and it had long been accepted that organised crime was no longer a national
problem and had gone beyond the competencies of any individual state and this in turn
resulted in multi-lateral and multi bi-lateral agreements. Indeed as far back as 1909
thirteen states met to consider narcotics problems in what was the genesis of the
signing of the International Opium Convention at The Hague 1912. Following a
raft of conventions and agreements the 1961 Single Convention on Narcotic Drugs –
amended by protocol in 1971 – consolidated earlier instruments into a simpler and
more streamlined approach.

There was a growing consensus at an international level that in order to tackle
organised crime effectively it would be necessary to deprive those involved of the
pecuniary benefits of that activity. Thus in addition to adopting mechanisms designed
to combat money laundering it was felt necessary to facilitate the actual confiscation
of the proceeds of crime. The rationale for the introduction of such agreements and
conventions was multifaceted. The free movement of capital at a European level had
increased the opportunities for the channelling of illegal money and indeed made cross
border crime more difficult to detect and deter. It may also be premised that the
increasing adoption of emerging technologies made the international movement and
moreover control of money significantly easier for the end – in this instance criminal
– user. In international commerce and governmental sectors there was increasing
concern at the volume of money laundering and the necessity to take the profit out of
crime. Further it was recognised that many money laundering schemes by their nature
would involve several jurisdictions and thus a single state approach would not be
sufficient to effectively apprehend the proponents of such activities. The concern
with taking the pecuniary profit out of crime was also a new approach as traditionally
financial information uncovered during the course of a criminal investigation was used

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143 Convention of Jan 23, 1912 relating to the Suppression of the Abuse of Opium and Other Drugs,
only to substantiate the allegations.\textsuperscript{146} Of course allied to this emerging approach was the fact that the volume of revenue that was now being generated by illegal activities was now also a serious concern as it had the potential to have a destabilising effect on some financial institutions\textsuperscript{147} and could possibly engender a lack of confidence in the banking system by the public at large.\textsuperscript{148}

By the 1980’s a clear approach was identifiable at an international level. Firstly, it had been accepted that following the actual money trail, or profit, from crime was an effective mechanism for dealing with organised crime. According to Nadelmann:

...[I]nsofar as criminals, and particularly organized criminals, act as they do for the money, the best deterrent and punishment is to confiscate their incentive. A second rationale is that, while the higher-level and more powerful criminals rarely come into contact with the illicit goods, such as drugs, from which they derive their profits, they do come into contact with the proceeds from the sale of those goods. That contact often provides a "paper trail," or other evidence, which constitutes the only connection with a violation of the law.\textsuperscript{149}

Secondly, the United Nations General Assembly supported the formulation of efforts to complement early conventions with a comprehensive and long-term approach to be used at an international level. A major exemplar of such an approach is the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. The aim of this convention was to criminalise the laundering of the proceeds of drug trafficking and to provide for the confiscation of monies arising from such activities. In particular the convention provides for:

(a) The taking of appropriate measures by a state to facilitate the confiscation of assets which represent the proceeds of crime.\textsuperscript{150}

\textsuperscript{146} It has been noted that in the Irish sense the possible exception to this was the \textit{Offences Against the State (Amendment) Act} 1985. See Murphy, F. and Galvin, B. (1999) ‘Targeting the Financial Wealth of Criminals in Ireland: The Law and Practice’ (1999) \textit{9 Irish Criminal Law Journal} 133 at 135.


\textsuperscript{148} Supra n.129.


\textsuperscript{150} Article 5 of the Convention.
(b) The setting aside of the traditional banker/customer secrecy during criminal investigations.\(^{151}\)

c) Extradition between countries party to the Convention for the purposes of the Convention.\(^{152}\)

d) Mutual legal Assistance\(^{153}\)

e) The transfer of criminal prosecutions from one signatory state to another.\(^{154}\)

Further, in addition to the Basle Statement of Principles 1988\(^{155}\) and the Financial Action Task Force\(^{156}\) there were two significant European Initiatives. These were, firstly; the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990 which required signatories to adopt legislative measures to make international money laundering a criminal offence under domestic law and to prevent banks using confidentiality as a ground for refusing to co-operate with investigating authorities. Secondly, the E.C. Directive on Money Laundering,\(^{157}\) that was a significant influence on later Irish legislation in the area. The directive defines money laundering in a wide sense to include not only the proceeds of drug trafficking but also of other types of criminal activity. The preamble to the directive notes that where institutions are used for money laundering it has the potential to undermine confidence in the financial sector as a whole. Further, taking action at community level ensured that any one member state would not become a haven for the proceeds of money laundering activities. In Ireland much of the directive was given effect by the Criminal Justice Act 1994 and it is to this Act that we now turn.

\(^{151}\) Articles 5 & 7 of the Convention.
\(^{152}\) Article 6 of the Convention.
\(^{153}\) Article 7 of the Convention.
\(^{154}\) Article 8 of the Convention.
\(^{155}\) This provided for measures to prevent banks being used for money laundering, including requirements for clear identification of customers and greater co-operation between banks and law enforcement authorities.
\(^{156}\) The financial Action Task Force on Money Laundering 1989 contained over 40 recommendations for improvements in laws combating money laundering.

In addition to Ireland’s requirements under the aforementioned directive, the 1994 Act was a key component in reform of Irish law as it allowed for the confiscation and seizure of the proceeds of drug trafficking – going further than the existing Misuse of Drugs legislation¹⁵⁸ – created an offence of money laundering and also facilitated Ireland’s participation in international co-operation in these areas.¹⁵⁹ In the Dáil debates on the legislation the then Minister for Justice claimed that the bill provided the ‘opportunity to strike at the very heart of drug trafficking and other serious crime.

By enabling criminals to be deprived of their ill-gotten gains we will help remove, to a significant extent, the incentive which draws people into this type of crime and, in addition, ensure that money which might otherwise have been used for criminal purposes is no longer available for such purposes.¹⁺⁶⁰ The legislation was considered to be both ‘radical’ and ‘draconian’ but still required in order to deal effectively with the ‘aristocrats of crime.’¹⁺⁶¹ Furthermore it was considered necessary as pre-existing forfeiture provisions, such as those in the aforementioned Misuse of Drugs Act, had been considered by the LRC to be too limited in nature to deal effectively with the issues¹⁺⁶² and indeed the Commission had suggested that penalties imposed should remove the profit element associated with the offence in question if they were to be an effective crime control measure. In terms of the actual legislation the pertinent sections for our current purposes deal primarily with the post trial stage of the criminal process. In particular it allows for restraint orders and subsequent confiscation and forfeiture orders following conviction for drug trafficking and other serious offences.

Restraint Orders.

The LRC had recognised that where an accused becomes aware that they are the subject of a criminal investigation there is a likelihood that the assets of the suspect

¹⁵⁸ See text around n. 176 –n. 178
¹⁺⁶⁰ Ibid at 19.
¹⁺⁶¹ Ibid at 39 – 41 as per Deputy Ms. O’Donnell.
¹⁺⁶² Supra n.6 at 8.
will ‘disappear.’\textsuperscript{163} Notwithstanding the use of both Mareva\textsuperscript{164} and Anton Piller\textsuperscript{165} orders to prevent the disposal of assets during ongoing legal proceedings the commission felt that legislation was necessary in order to avoid ‘the vagaries of the law on injunctions’\textsuperscript{166} when seeking to effectively “freeze” assets which were believed to be the proceeds of crime. Under section 23 of the Act the High Court may issue a restraint order to prohibit any person dealing with any realisable property. Such an order seeks to prevent the disposal or dispersal of assets which would have the intent of frustrating any potential future confiscation orders. An order may be granted where proceedings against a defendant are already ongoing but not concluded; or are due to be instigated for a drug trafficking or other indictable offence; or where it appears to the Court that there are reasonable grounds to believe a subsequent confiscation order may be made or indeed of course where such a confiscation order has already been made.\textsuperscript{167} The Director of Public Prosecutions (DPP) may bring an application for such an order to the High Court on both an \textit{ex parte} and \textit{in camera} basis. However there is a requirement to give notice to any person affected by such an order.\textsuperscript{168}

Whilst such an approach is clearly designed to prevent an accused usurping any potential future direction of the Court the legislation is balanced to a degree by providing that any restraint orders granted shall be discharged where proceedings for the offence in question are not actual instituted or where the relevant application is not made within such time as the Court considers reasonable.\textsuperscript{169} In order to make such restraint orders ultimately effective it was also necessary to provide for confiscation orders. Prior to considering these it may be noted that restraint orders represent an interesting juxtaposition with the enactment of the \textit{Offences Against the State Act 1985} which\textsuperscript{170} was enacted in just one day and almost under a level of secrecy to ensure that certain suspects would not be alerted to the possibility of their property becoming the subject of legal restraint. The use of \textit{in camera, ex parte} restraint orders would appear

\textsuperscript{163} Ibid at 13.
\textsuperscript{164} \textit{Mareva Compania Naviera SA v. International Bulk Carriers SA} [1980] 1 All ER 213
\textsuperscript{165} \textit{Anton Piller KG v. Manufacturers Process Ltd} [1976] Ch 55
\textsuperscript{166} Supra n.6 at 15.
\textsuperscript{167} Section 23 (1)
\textsuperscript{168} Section 24 (4)
\textsuperscript{169} Section 23 (3)
\textsuperscript{170} See text around n. 84 – n. 100
Confiscation Orders.

The use of these orders is provided for by section 4\textsuperscript{171} which, subsequent to conviction, requires the court to countenance whether an individual, convicted on indictment for a drug trafficking offence, has benefited from that offence and if so to what extent. The court must then make a confiscation order for the value of the proceeds. In considering the benefits the court may take into account any payment or other reward received at any time in connection with the drug trafficking.\textsuperscript{172} There is effectively a mandatory requirement to consider such an order where the accused has benefited from drug trafficking. The task of calculating such benefits is made significantly easier by a number of statutory presumptions. First, that in assessing any benefit the required standard of proof is that of civil proceedings.\textsuperscript{173} Secondly, that any property held by the defendant within the previous six years was held as a result of drug trafficking. Thirdly, that any expenditure in that period was met by payments from drug trafficking and finally, for valuing any property under these assumptions that property shall be assumed to have been received free of any other interest.\textsuperscript{174} However these latter three presumptions shall not be made if the court is satisfied that the presumption is incorrect in a particular case or that serious injustice would result if the presumptions were made.\textsuperscript{175} Further where the amount that can be realised is less than the full amount that the court had assessed as the value from the proceeds of drug trafficking then the order is to be for the realisable amount.\textsuperscript{176}

\textsuperscript{171} As amended by section 5 of the Criminal Justice Act 1999.
\textsuperscript{172} Section 5 (1). In dealing with the equivalent English legislation in R. v. Banks [1997] 2 Cr. Appeal R. (s.) 10 at 113 Lord Bingham C.J. noted that proceeds were to be equated with gross payments rather than profits.
\textsuperscript{173} Section 4 (6)
\textsuperscript{174} Section 5 (4)
\textsuperscript{175} Section 5 (2)
\textsuperscript{176} Section 6 (2)
In a similar manner section 9 provides that a confiscation order may be made requiring a convicted individual, who has benefited from an offence other than drug trafficking, to pay the value of that benefit. This is a discretionary requirement that may be imposed following application by the DPP and in assessing the benefit the court in this instance is limited to the particular offence for which that individual has been convicted. Once a confiscation order has been made it may be enforced by the DPP as if it were a judgement debt for the payment to the State of the amount specified in the order. In the event that the order is not complied with (not paid) the DPP may then apply to the High Court to have the individual imprisoned. The Act provides a schedule of penalties which must be served and they are relative to the amount outstanding on the order.\footnote{177} The term of imprisonment (for default) is to be served consecutive to any term imposed for the offence itself but shall be reduced in proportion to any sum actually recovered under the order.

Forfeiture Orders.

In conjunction with confiscation orders the Act provides that a forfeiture order may be made in respect of any property used for the purpose of committing or facilitating the commission of an offence, or for the purpose of enabling another person to avoid apprehension or detection.\footnote{178} Further the narrowness of section 30(1) of the Misuse of Drugs Act 1977 has been replaced by section 62 of the 1994 Act which provides that where a person is convicted of an offence under the 1977 Act (or a drug trafficking...}

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
Amount outstanding under confiscation order & Period of imprisonment \\
\hline
Not exceeding £500 & 45 days \\
Exceeding £500 but not exceeding £1,000 & 3 months \\
Exceeding £1,000 but not exceeding £2,500 & 4 months \\
Exceeding £2,500 but not exceeding £5,000 & 6 months \\
Exceeding £5,000 but not exceeding £10,000 & 9 months \\
Exceeding £10,000 but not exceeding £20,000 & 12 months \\
Exceeding £20,000 but not exceeding £50,000 & 18 months \\
Exceeding £50,000 but not exceeding £100,000 & 2 years \\
Exceeding £100,000 but not exceeding £250,000 & 3 years \\
Exceeding £250,000 but not exceeding £1 million & 5 years \\
Exceeding £1 million & 10 years \\
\hline
\end{tabular}
\end{table}

\footnote{177}{Section 19 provides the following schedule:}

\footnote{178}{Section 61. This provision is modelled on the Powers of Criminal Courts Act 1973 in England and Wales, which has now been replaced by the Powers of the Criminal Courts (Sentencing) Act 2000 s.s. 143 – 145.}
offence under the 1994 Act) the court may order anything which relates to the offence
to be forfeited and either destroyed or dealt with in such a manner as the court
determines. An order may also be made if the offence, or an offence taken into
consideration in determining sentence, consists of unlawful possession of property
which had been lawfully seized or was in possession or control of the offender at the
time of apprehension or summons.  

In considering whether to make a forfeiture order in the first instance the court shall have regard to the value of the property in
question and the likely financial and other effects on the offender of making the
order. The overall effect of a forfeiture order is to deprive the offender of his rights
in the property. In terms of the actual use of the legislation as the subsequent Proceedings
of Crime Act 1996 provided for forfeiture in the absence of a criminal conviction it
was a more attractive crime control measure. Further because of this need for a
conviction under the 1994 Act the 1996 Act cannot be said to be an example of direct
causal progression. However in terms of the 1994 Act a number of pertinent issues,
for current purposes, were raised when the constitutionality of the legislation was
tested.

**Challenges to the Legislation.**

The challenge arose in the case of *Gilligan v. Special Criminal Court* where the
plaintiff, following conviction, was served with a confiscation order to the tune of
€17,679,833. He challenged that order, not by way of appeal, but rather by
challenging a number of the provisions of the legislation. Specifically he contended
that the order constituted a criminal procedure and was thereby unconstitutional due
to the fact that the legislation specifically refers to the civil standard of proof in
providing for confiscation orders. Is assessing this issue of whether the provisions
of the Act constituted a criminal process the High Court noted that issues of ‘due
process’ and ‘natural justice and human rights’ had arisen in many cases, and in

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179 Section 6 (1) (b)
180 Section 61 (2)
181 *John Gilligan v. The Special Criminal Court, The Director of Public Prosecutions, Ireland and the Attorney General* [2006] 2 I.R. 389. The plaintiff in this case had been convicted of offences contrary to the *Misuse of Drugs Act 1977 – 1984* and had been sentenced to 28 years imprisonment. As will be considered in the following chapter he mounted a number of challenges to the emerging model of crime control in Ireland.
182 *Ibid* at 391.
183 The plaintiff also contended that the Special Criminal Court did not have jurisdiction to hear the case. *Ibid* at 403 – 406.
particular in *Attorney General v. Southern Industrial Trust Ltd.*\(^{184}\) proceedings to forfeit a vehicle that had been used for smuggling were held not to constitute criminal proceedings.\(^{185}\) In the case currently under consideration the court concluded that the amended section 4 mechanism did not create a criminal charge as it did not require the court to make a finding that the person had committed any offence other than that for which they were convicted. Rather the court was required to consider whether the individual benefited from drug trafficking and if so then it was clearly constitutionally permissible to deny the individual the enjoyment of any such benefits. Thus the court was of the opinion that the Act was not penalising individuals for having committed the offence but merely denying any benefits that had accrued from the offence. Moreover in establishing that the order did not constitute a criminal procedure the Court placed considerable emphasis on the fact that the section 4 order did not in any way relieve the defendant from liability for the original offence and thus a court was not imposing a punishment or penalty. Finally the amount of an order is limited to the amount of benefit received\(^{186}\) – limited by the individual’s means – and as such is unlike financial penalties for offences which are absolute irrespective of the defendant’s means. Thus the Court ruled that the order is not in the nature of a punishment and thereby not criminal in nature,\(^{187}\) it is merely depriving individuals of the benefit of crime.

In reaching its decision the Court relied on case law upholding the constitutionality of the *Proceeds of Crime Act 1996*\(^{188}\) and in particular the judgment of O’Higgins J. in *Murphy v. G.M.*\(^{189}\) where in relation to the legislation under review in that case he stated:

> “Is the sanction punitive and not merely a matter of fiscal reparation? It is clear that if there is not title to the goods, confiscation could not rightly be said to be punishment. In many, if not all, circumstances a person will not have

\(^{184}\) (1960) 94 I.L.T.R. 161

\(^{185}\) The court also noted that in the case of McLoughlin v. Tuite ([1989] I.R. 82) penalties under the income tax code did not amount to criminal offence.

\(^{186}\) Section 6.

\(^{187}\) *Supra* n.177 at 401 – 402.

\(^{188}\) These cases will be considered in greater detail in chapter 4 in analysing the Proceeds of Crime legislation.

\(^{189}\) Unreported High Court 4th June 1999.
any right to the proceeds of crime. A person has no title to stolen goods, and, no punishment therefore accrues.”

In adopting such precedent the Court took the very pragmatic view that section 4 confiscation orders under the Criminal Justice Act 1994 were designed to enable reparation of any benefits from an offence as opposed to applying a further sanction for the actual commission of the offence. The objective of the legislation may thereby be seen to one of reparation by denying the offender the enjoyment of the benefit derived from the offence (drug trafficking in this instance). It appears logical to suggest that if someone did not actually legally own the property in question then mutatis mutandis forfeiture could not be a penalty to deprive that individual of something their wasn’t legal theirs in the first instance. However in reaching such simplifying conclusions we must also be cognisant of the view of the European Court of Human Rights in Welch v. United Kingdom in 1995.

This case is pertinent in the current context as it concerns a confiscation order issued, following conviction, under the English Drug Trafficking Offences Act 1986. The applicant was not challenging the actual confiscation provisions themselves but rather that the retrospective nature of the provisions was in conflict with Article 7 of the European Convention on Human Rights. This provides that an individual should not be held guilty of an offence which was not actually an offence at the time it was committed. In so doing he sought to establish that confiscation orders were punitive

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190 Ibid at 62. In the subsequent Supreme Court Appeal (Murphy v. G.M. [2001] 4 I.R. 113, which also heard the appeal from Gilligan v. Criminal Assets Bureau [1998] 3 I.R. 185) despite the ‘unquestionably draconian’ nature of the legislation it was held not to be unconstitutional. At 136.

191 On appeal the Supreme Court held that the Special Criminal Court did not have jurisdiction to impose confiscation orders as it was established for the trial of offences. Supra n. 181 at 412 – 413.

192 In DPP V. Gilligan (unreported Special Criminal Court 22nd March 2002) the following issues were held to be relevant in reaching a determination of the benefit: (i) the cost to the plaintiff of purchasing the drugs; (ii) the amount of drugs involved in the plaintiffs activities; (iii) the expense of the shipment, sale and distribution of such drugs; (iv) the consideration received by the plaintiff when disposing of those drugs; and (v) the net profit accruing to the plaintiff as a result of drug trafficking.

193 20 EHRR 247

194 Article 7 of the Convention provides that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognised by civilised nations.
in nature and thereby constituted a penalty for the purposes of the convention. He
asserted that as an order could not be made in the absence of a criminal conviction and
that as the degree of culpability was taken into account in deciding the amount of an
order then these factors suggested that the order was in the form of a punishment. 195
In seeking to deny the application the respondents claimed the purpose of the
legislation was to both deprive individuals of profits derived from drug trafficking and
to remove such monies from potential future use in the drugs trade and thereby was a
preventative measure that was reparative in nature. 196 In concluding that the
confiscation order did indeed constitute a penalty the Court was influenced by a
number of factors including the ‘sweeping statutory assumptions’ that all property
passing through the hands of the offender in the six years preceding an order was the
result of drug trafficking unless the offender could prove the contrary. Further the fact
that the order related to proceeds from drug trafficking and not just profit; the ability
to take into account the culpability of the accused and the opportunity for
imprisonment in the event of a default all suggested a form of punishment. 197 However
it is important to note that the Court emphasised that its decision specifically and
exclusively referred to the retrospective nature of the legislation and did not ‘question
in any respect the powers of confiscation conferred on the courts as a weapon in the
fight against the scourge of drug trafficking.’ 198

In setting such a precedent this case presents a number of interesting considerations
for similar Irish forfeiture provisions in the Criminal Justice Act 1994. In upholding
the constitutionality of this legislation the Irish court made reference to later legislation
which allowed confiscation even in the absence of criminal convictions. This is a
considerable step further down the line of limiting the rights of the accused and
moreover highlights the acceptance of forfeiture in the Irish criminal justice
system. However at this juncture we may note that the Welch case was concerned with
confiscation which was post-conviction and indeed the 1994 Act, just mentioned,

195 Supra n.193 at para. 23
196 Ibid at para 24.
197 Ibid at para 33. In a concurring judgement De Meyer J. did not need to take these factors into
account for something which was ‘self-evident’ to have the nature of a penalty.’ At para 41.
198 Ibid at para 36.
bears striking similarities with the legislation considered in Welch. In particular both contained statutory presumptions that all property passing through the offenders hands in the previous six years could be considered the result of drug trafficking; further both provided for imprisonment in the event of default. The significant element of the Welch judgement, from the point of view of protecting the Irish legislation, may be that the judgement referred specifically to the retrospective nature of the legislation. The court appeared to welcome confiscation type legislation that counteracted drug trafficking. In a similar vein the Irish court in upholding the 1994 Act gave considerable credence to the reparation element of the legislation and in so doing – and possibly limiting rights, which would otherwise be available, in the name of the greater good – concurred with the obiter comments of the European court where it welcomed confiscation as tool in modern legal environment.

Thus, as a result of the acceptance that serious crime bosses were a number of steps away removed the actual commission of offences the international community had adopted measures to counter-act such a position. Whilst such measures developed under a different momentum the presence of these International and EU agreements – and specific implementing Irish legislation – provided yet further strong foundations for the construction of further civil forfeiture mechanisms in Ireland that would target areas heretofore which were exclusively dealt with in the criminal arena. Furthermore both the Irish and European Courts had accepted the need to target the financial element in order to deal effectively with modern criminality. In 1994 in Ireland the concept of civil forfeiture of assets following conviction had been enshrined in our law. This combined with a governmental realisation and acceptance of the need for multi-organ cooperation\textsuperscript{199} provided immediate causal factors for the introduction of the 1996 reforms. The legislation of 1994 and Irish and EU judicial acceptance of the concept marked a new approach to effective criminal control and an acceptance that viewing the pecuniary elements of criminality as an ancillary issue was no longer an appropriate response. It may be submitted that such acceptance was a further significant and immediate causal factor in the emergence of Irish civil forfeiture.

\textsuperscript{199} See text around n. 15
Conclusion.

Over the past two decades Ireland has witnessed a move, in part, away from the traditional criminal law to a model that is concerned with the confiscation of criminal assets and thereby the pecuniary neutralisation of threats. This is evidenced on a regular basis by media outlet reports on the activities of CAB through its tri-part approach of forfeiture and revenue and social welfare compliance. Each of these activities will form a central element in future of this particular work. In this respect the objective of this chapter was to establish a framework of the position in relation to forfeiture prior to the introduction of CAB and to establish how that framework facilitated the emergence of an alternative model of criminal justice in Ireland.

Thus whilst the murder of a member of the Gardaí and a crime journalist in 1996 undoubtedly caused our often mentioned tipping point from which we reached a point of no return as a society and demanded swift and decisive action from our regulators, it is also important to be cognisant of the fact that law does not operate in a vacuum. For law to be effective it needs to be cognisant of its history as the very model of a common law system is that it is reactionary in nature. Whilst the merits of such a system remain to be evaluated later in this work this chapter was, as aforementioned, concerned with establishing the legal basis that already existed in Ireland for dealing with the forfeiture of assets.

The old common law concept of forfeiture was discussed in order to highlight the historical acceptance of in rem proceedings where it was the ‘object’ or ‘thing’ that was found guilty and thereby subjected to punishment in the form of forfeiture. Thus either the availability, or moreover guilty or otherwise, of the owner of the ‘thing’ was effectively irrelevant. Not only was there this common law support for forfeiture, the concept had actual been enshrined in legislation in Ireland. The most often quoted example of such is that of anti-drugs legislation. However, whilst this did allow for forfeiture it was limited to assets that were directly related to the actual offence for which a conviction was gained. It appears that there was a belief that this legislation was not designed to remove all the profit from the crime. Further the Offences Against
The State (Amendment) Act 1985 provided for the forfeiture of monies believed to belong to ‘suppressed organisations.’ It was introduced to deal with one very specific instance and moreover it applied exclusively in the terrorist realm as opposed to the ordinary criminal justice realm. Indeed there were concerns expressed at the time as to whether the draconian powers in the legislation could ever find their way into the ordinary criminal justice realm. As noted briefly, and as will be revisited subsequently, this legislation was still used in support of the introduction of a forfeiture mechanism in general legislation.

In respect of targeting modern criminals policy adoption from the U.S. was encouraged as an effective mechanism of striping criminals of their economic power bases. In that jurisdiction forfeiture had evolved from a position of forfeiture of assets used in an offence following criminal conviction to *in rem* civil forfeiture of assets where a criminal prosecution might not be even contemplated. Also in the U.S. one of the weapons used in targeting organised criminality are the revenue laws. This option was not available in Ireland as a result of a High Court decision that ruled, in the absence of express provisions, tax legislation could not be supposed to be applicable to activities that were clearly illegal. This position however was reversed by the *Finance Act* 1983 which allowed for the taxation of criminal activities. These new provisions however do not appear to have been used to any great extent prior to the introduction of CAB and this will be considered in the following chapters.

The *Criminal Justice Act* 1994 had provided for confiscation and forfeiture orders for criminal assets. However this legislation only applies post criminal conviction and thus doesn’t ease the burden of having to gain a criminal conviction against offenders who inevitably are many levels detached from the actual commission of any offence. Thereby whilst being an effective piece of legislation in situations where it could be used it was not a significant weapon against modern organised crime. On the other hand however this Act does mark the movement of the mechanism into mainstream crime control for use as a much more generalised approach. In an overall context forfeiture, based on historical and judicial development and policy adoption, has moved from forfeiture of the actual object or thing that caused the offence, to very
specific forfeiture or seizure of items – for failure to comply with, for example, customs laws or anti drug law – to one that by 1994 is drifting towards general seizure of a wider variety of assets.

It has been pointed out by Holmes, in considering *in rem* proceedings, that:

“principles of this nature may outgrow their origins in a different historical era and would now find justification in considerations of public policy or the common good”

In the Irish sense it has been demonstrated that forfeiture has a secure place in our jurisprudence. It has evolved from somewhat dubious origins to be enshrined in legislation, originally with a somewhat specific remit to a much wider based remit. Such evolution combined with international influences results in forfeiture now meeting a public policy mantle for dealing with modern criminality. These causal contributors where influenced by a significant tipping point marking somewhat of a discontinuity with a resultant rapid movement into the civil realm where forfeiture could be used prior to any consideration of criminal prosecution.

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200 Holmes (*supra* n. 16) as quoted in Murphy v. G.M. [2001] 4 I.R. 113
Chapter 4.

The nature of the Criminal Assets Bureau and its primary options under Proceeds of Crime legislation.

Introduction.

In the previous chapter the milieu of casual factors that directly and indirectly resulted in the establishment of CAB and the introduction of significant enabling legislation for the bureau to carry out its functions were considered. In the Irish State prior to the introduction of CAB there was a marked reluctance of various governmental and state bodies to co-operate with each other in the execution of their various functions. Whilst this may not have been to the extent where there was an active distrust between such bodies, there did seem to exist, to a degree at least, a culture of guarding of territories in various domains without any significant consideration of shared benefits. Bodies such as the Gardaí Síochána, the Revenue Commissioners and the Department of Social Protection concentrated on their own traditional lines of enforcement and discharge of their respective duties. Of course in so doing the bodies were meeting their various remits and in significant part effectively carrying out their statutory functions.

The aforementioned casual factors and the changing criminal landscape resulted in a need to deal with a new type of organised and internationally mobile criminal actor and associated activities. This challenge was met with a refocusing of ideals from institutional favoured bias to overall net outputs from combined activity law enforcement. In such respects the establishment of CAB in 1996 marked the coming together of An Garda Síochána, the Revenue Commissioners and the Department of Social Protection\(^1\) in a fashion that was, hit heretofore, not considered organisationally

\(^1\) At the time of formation of CAB this was the Department of Social Welfare, it was renamed the Department of Social and Family Affairs in 2002 and the Department of Employment Affairs and Social Protection in 2012.
feasible or indeed possible. As will now be demonstrated this coming together was a traditionally atypical approach. In that sense CAB might be regarded as a facilitating organisation. Of course it could not have operated effectively without a significant piece of new enabling and supporting legislation (the Proceeds of Crime Act) which radically altered the balance between the state and the accused in the Irish judicial system. It will be submitted that this legislation was a key factor that enabled CAB to be effective in its operations. In order to effectively consider this submission in the context of the overall remit – of this work – of considering the changing nature, in particular areas, of law enforcement in the Irish State this chapter will firstly consider the objectives and the establishing legislation of CAB. Secondly we will consider the main powers available to CAB under proceeds of crime legislation which allow CAB to carry out its remit.

Specifically, in asserting that CAB represents a new model of criminal justice in Ireland, we will begin by considering the rationale under-pinning this new agency. This is a model that is reflective, to a degree at least, of penal modernity in Ireland. As a result we will discuss whether CAB is rightly a constituent component of the Gardaí or a stand-alone independent law enforcement agency. In continuing the theme, of considering the individual specifics of change, we will outline the actual detail of the various functions of the bureau as set out in the enabling legislation. It (CAB) was designed to be both pro-active and task orientated in nature by targeting specified criminality. In setting out the precise functions it will allow a later complete assessment of both the departure from the pre-existing norm and the intentions of the legislature in initiating radical change. Furthermore, the legislation details not only the movement towards civil confiscation as an enhanced crime control mechanism but additionally, and importantly, the use of revenue and social welfare powers as equal crime control armoury in the arsenal of the new agency.

This chapter will then consider that the staffing make-up of the bureau, as part of its multi-agency approach, is a key factor in the structure of this changing approach of targeted enforcement of specific legislative enactments. In seconding staff from An Garda Síochána, the Revenue Commissioners and the Department of Employment Affairs and Social Protection and then using their combined skills and respective legal duties under a single umbrella (operating from the same physical space) the Bureau
created a level of co-operation far in advance of anything that previously existed. Further, consideration will be given to the model where the manner of staffing allowed for a situation whereby seconded staff retained pre-existing powers and duties from their respective original positions and now applied them for the benefit of the Bureau.

As this model of staff utilisation allowed civilians to be involved in targeting assets derived from organised criminality (and targeting particular revenue and social welfare fraudulent activities) next we will consider the level of anonymity that is provided for non-garda CAB officers. There was a concern that such officers could be subjected to intimidation and, potentially, physical violence. As a result the establishing legislation for CAB provides for anonymity for non-garda bureau officers in the carrying out of their duties. Indeed a level of anonymity that they would not normally receive in the execution of revenue and social welfare functions. As this represents a specific individualised case of departure from the norm consideration will be given to the application of this element of the legislation by the courts. As the bureau was designed to target assets as opposed to individuals the establishing legislation provides specific rules in relation to the issuing of search warrants and this will be duly acknowledged.

In establishing a new agency, be it either independent or co-dependent a key question is how that agency should be funded. Given the remit of CAB, were it to be successful, it is possible that it could be a considerable cash cow. As such options for funding of the bureau will be examined, in particular whether it should receive funding from the State on an on-going basis or whether it should be self-financing from income generated from its activities.

Finally, in relation to CAB itself, this chapter will then provide an overview of the specific revenue and social welfare matters pertinent to its remit. In particular emphasis will be placed on the unique powers such officers receive by virtue of being officers of CAB and, again, how this marks a discontinuity from the norm. The final section of this chapter will then consider how the Proceeds of Crime Act is a key piece of legislation in facilitating CAB in its functions. Whilst legislation facilitating the confiscation of a convicted offenders property had been in place since 1994\(^2\) under

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\(^2\) Criminal Justice Act 1994. See chapter three at text around n.158.
this 1996 Act property may be forfeited in the absence of a criminal conviction. At this juncture – of the overall thesis – we will consider the types of court order that CAB may seek under this legislation. Again this facilitates the objective of the chapter in critiquing key legislative changes that both provided for the establishment of the CAB and facilitated its work.

Establishment of the Criminal Assets Bureau.

CAB was established on an ad-hoc basis for the period 1st August 1996 to the 14th October 1996 before being put on a permanent statutory footing on the 15th October 1996.3 It was established as a separate legal entity and as such it has perpetual succession, an official seal, the power to sue and be sued, and the power to acquire, hold and dispose of land or an interest in land or any other property.4

It is well established at this juncture that CAB is a multi-agency body5 which consists of members of An Garda Síochána, officials the Revenue Commissioners (comprising both Taxes and Customs officials) and officials from the Department of Employment Affairs and Social Protection. These are supported by a bureau legal officer and administration and technical staff. The long title to the Criminal Assets Bureau Act 1996 refers primarily to making provision for the establishment of the Bureau, defining its functions and amending certain finance related legislation. In establishing the Bureau under the Act there was a felt need to deal with emerging and changing criminality in a more focussed manner which targeted the assets and profits resulting from criminal activity as juxtaposed to targeting the actual criminal. This desire for such an altered approach is best espoused by Deputy O’Donnell who, when considering the changing nature of criminality, stated:

“If traditional methods fail we must devise new ones. If we cannot punish, deter or reform these people we must set a new aim, to stop them from operating their evil trade. This Bill, which forms the basis of that new approach, is long overdue. We have given the courts power to

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4 Criminal Assets Bureau Act 1996, s. 3.
seize the assets of those convicted of certain crimes and to restrain the assets of those facing certain criminal charges, but given the difficulties experienced in getting convictions, or even gathering evidence, a new power is needed to restrain the use of assets outside the context of criminal proceedings. To date we have dealt only with assets which are the fruits of past crimes. What we need to do now is prevent assets being used as the seeds of future crimes. To put it another way, if we cannot arrest the criminals, why not confiscate their assets?"  

In tandem with the causal factors previously demonstrated and within the perfect storm of societal events it was necessary to demonstrate that there was not a crisis of hegemony within the Irish criminal justice system. It appears to have been accepted that the traditional model of criminal law enforcement of reactive post event measures aimed at punishment of the soul were no longer a catch all panacea for the entire spectrum of criminal activity that was now occurring in modern Ireland.

In introducing the Criminal Assets Bureau Bill before the Dáil the proposing Minister acknowledged that the resources of the Gardaí, the Revenue Commissioners and the then Department of Social Protection would be channelled in the most effective manner to target particular assets through this new agency. Indeed in the Seanad it was stated that the purpose of bringing forward the Bill was ‘to create a task oriented agency which will focus the resources, skills and courageous public service of people from a variety of agencies on the task of combating crime, specifically to ensure that people who have gained from crime are not allowed to hold those gains.’ The same Minister went on to note in relation to the crime-control issue in Ireland that if ‘ever a problem required a task oriented approach to its solution, this is one.’

Such an approach by the legislature clearly represents a refocusing, in some areas, away from traditional policing methods. This raises the question of whether CAB is an extension of the existing police body in Ireland or something entirely new. In regard to the nature of the Bureau Walsh is of the opinion that CAB is a distinct unit

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6 Dáil Debates 2nd July 1996, Vol. 467, Col. 2435 per Ms. O’Donnell. A similar approach was encouraged by Deputy Byrne: “The conventional criminal justice system is simply not equipped to bring the so-called crime bosses to justice since they can rarely be directly linked with the execution of a crime. They can, however, be linked with the enormous profits generated by their crimes. Targeting their financial resources demands a multi-pronged approach, highly intensive policing and …” Dáil Debates 2nd July 1996, Vol. 467, Col. 2463 per Mr. Byrne.
7 Dáil Debates 25th July 1996, Vol. 468, Col. 1025 per Mr. Quinn.
9 Ibid at 1528
but nonetheless is still a unit within An Garda Síochána. He suggests that bodies such as CAB (and Europol) ‘could almost be described as a police force within a police force.’

Further in this regard under section 7(6) of Criminal Assets Bureau Act there is a requirement for the head of the Bureau (Chief Bureau Officer) to be a Garda Síochána of the rank of Chief Superintendent or above. In CAB’s own annual report of 2010 it highlights its distinctiveness where it states that the Bureau ‘continues to co-ordinate its strategy in line with the Policing Plans of An Garda Síochána and the strategies of the Revenue Commissioners and the Department of Social Protection.’

The nature of the Bureau has also been considered by the courts in a number of cases. In the context of establishing the actual basis for this new approach to criminal justice in Ireland it is worth outlining in some detail the judgment of McCraken J. in Murphy v. Flood where when considering the nature of the Bureau he stated that:

“The CAB is a creature of Statute, it is not a branch of An Garda Síochána. It was set up by the Oireachtas as a body corporate primarily for the purpose of ensuring that persons should not benefit from any assets acquired by them from any criminal activity. It is given power to take all necessary actions in relation to seizing and securing assets derived from criminal activity, certain powers to ensure that the proceeds of such activity are subject to tax, and also in relation to the Social Welfare Acts. However, it is not a prosecuting body, and is not a police authority. It is an investigating authority which, having investigated and used its not inconsiderable powers of investigation, then applies to the Court for assistance in enforcing its functions.

The Oireachtas, in setting up the CAB, clearly believed that it was necessary in the public interest to establish a body which was independent of the Garda Siochana, and which would act in an investigative manner. However, I do not think it is the same as An Garda Siochana, which investigates with an aim to prosecuting persons for offences. The CAB investigates for the purpose of securing assets which have been acquired as a result of criminal activities and indeed ultimately paying those assets over [sic] the State.”

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13 *Ibid* at para 16 -17.
In a similar vein the differing approach of the Bureau from normal policing activities was explained by the then Chief Bureau Officer in *Gilligan v. CAB*\(^\text{14}\) where he accepted that:

“the activities of the Criminal Assets Bureau were unlike normal police work where investigations started from the actual commission of a crime and a person was charged with that crime only if sufficient evidence was assembled against him. The main function of the Criminal Assets Bureau was the identification of assets derived from criminal activities and in the course of that activity they decided, on the basis of past convictions, police intelligence, and other available information that a person was a criminal and they moved to seize his assets.”\(^\text{15}\)

These points serve to highlight again that CAB itself marks a discontinuity from traditional policing activities towards a refocusing of existing powers into a dedicated high profile unit focused on criminal administration with significant public, political and media expectations of success. Whilst this marks a departure, nonetheless, as highlighted by Walsh, the Gardaí have always carried out administrative functions as part of their normal duties\(^\text{16}\) in addition to criminal enforcement. Importantly however the discontinuity is concerned with the new makeup of administrative actions. CAB was an extension of a nationwide body with pre-existing moral authority in the criminal and administrative fields. Such moral authority provided an ideal base in which to ground CAB and by linking the Bureau to the Gardaí it both avoided the necessity of a stand-alone organisation and ensured acceptability by the public at a time when fear of crime was at an all-time high.\(^\text{17}\)

Whilst the activities of CAB complement\(^\text{18}\) the general work of the Gardaí it (CAB) has, as shall be outlined, an entirely different *raison d’être*. By focusing on the seizure of criminal assets CAB represents a type of panoptican. It moves away from punishment of the soul and indeed from the criminal actor directly to an outputs based

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\(^{14}\) [1998] 3 IR 185

\(^{15}\) Ibid at 203.

\(^{16}\) Walsh, *op cit* at 170.


focus and approach where the success of the Bureau might be judged primarily on high profile seizures and income generated more than less criminality in society. In this regard the type of pro-active measures that CAB was established to employ against organised criminality will, where successful, deprive those involved in such activities of the pecuniary benefits of their labours. However, as noted by Kilcommins et al, the ‘substitution effect’ in criminal trades such as the illegal drugs market, due to the high profit margin, means that there will be a ready supply of new actors willing to replace those who have been successful targeted by an operation of CAB.

Such operations and measures of success will be considered later in this work. In critiquing the partial move towards new methods of policing we have established that CAB is a distinct body, potentially albeit within the structures of An Garda Síochána. As noted, it has its own corporate structure with Gardaí and non-garda personnel, albeit with the largest number of personnel coming from the ranks of the Gardaí. It retains the moral authority of the Gardaí and the enforcement functions of the Revenue Commissioners and Department of Social Protection whilst operating with a very specific focus and employing different methods than, for example, in traditional criminal law investigations.

**Functions of CAB.**

In having considered the general nature and structure of CAB as a new organisation working in the Irish criminal justice field we will now consider the actual specifics of the Bureau. We will commence with the objectives and functions as provided for in the enabling legislation. In the context of the overall research question it is worth restating here the actual detail from that legislation. The objectives are set out in section 4 as follows:

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19 The balance that the Bureau has sought to achieve in its various areas of activity will be considered in future chapters. The annual reports of CAB outline the value in monetary terms achieved by the Bureau in their various actions.


(a) the identification of the assets, wherever situated, of persons which derive or are suspected to derive, directly or indirectly, from criminal activity,

(b) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and

(c) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the objectives mentioned in paragraphs (a) and (b). 22

Whilst section 5(1) provides that the functions of the Bureau are the taking of all necessary actions

(a) in accordance with Garda functions, for the purposes of, the confiscation, restraint of use, freezing, preservation or seizure of assets identified as deriving, or suspected to derive, directly or indirectly, from criminal activity,

(b) under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, to ensure that the proceeds of criminal activity or suspected criminal activity are subjected to tax and that the Revenue Acts, where appropriate, are fully applied in relation to such proceeds or activities, as the case may be,

(c) under the Social Welfare Acts for the investigation and determination, as appropriate, of any claim for or in respect of benefit (within the meaning of section 204 of the Social Welfare (Consolidation) Act, 1993 ) by any person engaged in criminal activity, and

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22 Criminal Assets Bureau Act 1996, s. 4
(d) at the request of the Minister for Social Welfare, to investigate and
determine, as appropriate, any claim for or in respect of a benefit, within
the meaning of section 204 of the Social Welfare (Consolidation) Act,
1993, where the Minister for Social Welfare certifies that there are
reasonable grounds for believing that, in the case of a particular
investigation, officers of the Minister for Social Welfare may be subject
to threats or other forms of intimidation,

and such actions include, where appropriate, subject to any international
agreement, cooperation with any police force, or any authority, being a
tax authority or social security authority, of a territory or state other than
the State. 23

Additionally there is an opportunity for the Minister for Justice and Equality – after
consultation with the Minister for Finance – to confer additional functions and
powers24 on either the Bureau itself or Bureau officers. The rationale for conferring
such a strong power on the Minister was justified in the following manner:

"It is important to have this power to ensure that the bureau can respond
to new situations or circumstances that may emerge in the conduct of
its operations. Given the nature of the enemy to society with which we
are dealing, we should equip ourselves with the necessary powers to
respond speedily and flexibly." 25

Such a provision prima facie gives significant flexibility to an individual Minister for
Justice to initiate significant changes. However, the power is not an unfettered one.
Any such orders made must be laid before each House of the Oireachtas ‘as soon as
may be’26 after the order is made. Furthermore within 21 days sitting days after the
order is put before either House that House can pass a resolution annulling the
order. This does not affect anything that was previously carried out under the order.27 Thus
such power allows the relevant Minister to deal with emergency situations where

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23 Criminal Assets Bureau Act 1996, s. 5 (1)
24 Criminal Assets Bureau Act 1996, s. 6(1)
25 Dáil Debates 25th July 1996, Vol. 468, Col. 1028 per Mr. Quinn.
26 Criminal Assets Bureau Act 1996, s. 6(3)
27 Criminal Assets Bureau Act 1996, s. 6(3)
immediate action may be required. In a situation of moral panic\textsuperscript{28} by the public at large it is not an opportunity for an individual Minister to affect knee-jerk change without the entire legislature as all orders must, ultimately, be laid before both Houses.

In executing the statutory remit of the Bureau as a pro-active agency targeting the assets of particular identified suspects the collection of documentation pertaining to such suspects was recognised, at formation stage, as a key component of a successful outcome for the Bureau. It was stated that the gathering of such documentation would be ‘complex and painstaking’\textsuperscript{29} so that sufficient evidence could be amassed ‘to support administrative proceedings.’\textsuperscript{30} In order to facilitate such requirements it was felt that the bureau ‘should have adequate powers to investigate reasonable suspicions of the existence of criminal assets and to uncover financial trails of evidence leading to and from those assets.’\textsuperscript{31} Such powers were proved by section 14\textsuperscript{32} of the Act.

Under this section an officer of the Bureau who is a member of An Garda Síochána may apply to a district court judge for a search warrant. The important proviso is that there is not a requirement that an offence is suspected. Rather the judge may grant the warrant where ‘there are reasonable grounds for suspecting that evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts, is to be found in any place.’\textsuperscript{33} Additionally in emergency situations, where it is felt impracticable to apply to the judge for such a warrant then a Garda Superintendent may issue a 24 hour warrant based on the same reasonable belief as just outlined.\textsuperscript{34} This again awards significant power to the Bureau vis-à-vis traditional warrants and the need for an actual offence to be suspected. There is, of course, again the counter-balance that the district court judge, or superintendent, must be reasonably satisfied that evidence may exist in the place in question. Nonetheless this marks a

\textsuperscript{29} \textit{Dáil Debates} 25\textsuperscript{th} September 1996, Vol. 469, Col. 616 per Mr. Quinn.
\textsuperscript{30} \textit{Ibid}
\textsuperscript{31} \textit{Seanad Debates} 9\textsuperscript{th} October 1996, Vol. 148 Col. 1523 per Mr. Quinn.
\textsuperscript{32} Section 14 was first inserted at report stage in the Dáil.
\textsuperscript{33} \textit{Criminal Assets Bureau Act} 1996 s. 14 (1)
further departure for the existing norm and a significant new power exercisable by the Bureau.

The functions of the Bureau, as outlined above, again highlight that the aim of establishing the Bureau was to engage in pro-active disruptive type activities in order to effectively neutralise any benefits accruing from criminal activities in various spheres. Such objectives were enabled by the nature of the staff of the Bureau and its resulting interagency approach.

**Staffing of CAB and the Multi-Agency Approach.**

As previously alluded to, the staffing requirements of CAB are filled by staff seconded from membership of An Garda Síochána, officers from the Revenue Commissioners and officials the Department of Social Protection. The 2016 annual report of the Bureau informs that the total authorised staffing level of the Bureau, as at 31st December of that year was 71.\(^\text{35}\) This is comprised of 36 Gardaí Bureau officers, 12 Revenue Bureau officers and 6 officers from the Department of social protection.\(^\text{36}\) In addition to this compliment the Chief State Solicitor assigns two solicitors, two legal executives and two clerical officers.\(^\text{37}\) In the current context it is worthy of note that the individual powers and functions of Bureau officers are those that the person obtained by virtue of being a member of the Gardaí, or an officer of the Revenue Commissioners or an official of the Department of Social Protection. That is a Bureau officer continues to have all the powers and duties that they held in their respective, pre-secondment, positions. Individual Bureau officers do not receive extra powers by virtue of being appointed to the Bureau.\(^\text{38}\)

This approach again supports the overall objectives of establishing a new agency. These objectives to be achieved by the focused implementation of new legislation, to


\(^{36}\) The remainder comprises administrative and technical bureau analysis unit, a bureau legal officer and a chief bureau officer.

\(^{37}\) Supra n.35 at 5.

\(^{38}\) Section 58 of the Criminal Justice Act 2007 (amending section 8 of the Criminal Assets Bureau Act 1996) provides that in certain circumstances non-garda officers may participate in the questioning of a detained person.
be considered shortly, and, as alluded to above, the multi-nature agency of its composition targeting the assets of particular individuals using these new and pre-existing powers in a different manner than hit heretofore. This was the first time that such bodies were required to co-operate in the stated ‘mutually supportive manner.’ The grounding theory underpinning such an approach was to support and allow the three separate organisations ‘transcend old bureaucratic territoriality and displace it with a single minded cross agency co-operation at the highest level.’

In brief the Bureau was designed ‘to produce a more effective weapon to combat organised crime.’ By combining elements form the three existing bodies it was possible for the combined whole to be a more significant player in the structured fight against organised crime than the separate components operating individually. As, for example, prior to the establishment of the Bureau the Revenue Commissioners had felt that there was ‘legal constraints’ on the manner in which they could share amassed information with the Gardaí.

Furthermore, were the supporting legislation for CAB to have been implemented without the establishment of the Bureau then there could potentially have been a lack of specific focus on that particular piece of legislation in the myriad of general laws to be enforced. The establishment of the Bureau gave a unique and particular focus to targeting the proceeds of crime, moreover with demonstrable – or lack thereof – outputs which could easily be assessed. Such developments mark a departure from rehabilitation and normalisation ideals to a threat neutralisation system. Such an approach with resultant high profile seizures does, to an extent at least, satisfy the public and media demands that something is being done about the issue of crime control in Ireland. Indeed there may be an element of quid pro quo about such an

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42 It has been suggested that in recent times there is a movement towards such inter-agency partnerships. Kilcommins, et al, considers that agencies such as The Revenue Commissioners, The Competition Authority, The Health and Safety Authority and the Office of the Director of Consumer Affairs all now have the power to investigate crime. The same authors go on to note the greater level of responsibility to report criminally suspicious conduct now being legislatively enshrined for auditors, banks, building societies and solicitors. See Kilcommins, S. et al, (2004) Supra n.21 at 166 – 167.
43 In the 2010 Annual Report of CAB it was stated that:
approach in that the annual reports of CAB regularly acknowledge the ‘excellent co-operation and support from the general public and from commercial and financial institutions.’ In addition to demonstrable outputs the establishment of the Bureau seems to have created a heightened sense of awareness of the potential weaponry available to the State to seize assets tainted with criminality. Finally the annual reports highlight the success of the multi-agency multi-disciplinary partnership approach embodied by the Bureau in tackling organised crime in Ireland and acknowledge that the model chosen at inception has proven effective and fruitful.

**Anonymity of CAB officers.**

A direct consequence of the decision to establish the Bureau on a multi-agency footing was that ordinary civilians from the ranks of the Revenue Commissioners and the Department of Social Protection would, at an administrative level, be investigating targeting individuals suspected of being involved in serious organised criminality. The safety of such individuals seconded to such roles was a concern to the legislators at the pre-establishment phase. In the Houses of the Oireachtas examples were offered of intimidation that had occurred against State officials whilst attempting to carry out their official duties. In the Dáil it was recorded that an officer from the then Department of Social and Family Affairs was ‘kidnapped from his home, brought to a railway track, shot in both legs and left to die.’ Whilst in the Seanad an example was given of a Revenue investigation that had ceased as a result of ‘an intolerable level of intimidation.’ As a result there was an acceptance that it would be ‘unfair and unrealistic’ to expect non-gardaí officials of the Bureau to engage with potentially dangerous individuals without an extra layer of protection from the State. That protection was outlined by Minister Quinn where he stated:

> “While maintaining a focus on major criminal targets, the Bureau still continues its policy of also targeting lower value assets. It is the Bureau’s view that this policy, while not necessarily returning a significant income to the State, does engender public confidence in the criminal justice system as a whole and acts as a deterrent in general. The Bureau proposes to continue to effect such an approach and deliver active support to local communities.” Supra n.11 at 11.

44 Supra n.11 at 6.  
45 Supra n.11 at 3.  
46 Dáil Debates 25th July 1996, Vol. 468, Col. 1033 per Mr McCreevy.  
"We cannot expect them to be heroes on behalf of the State. That is not fair. It is not reasonable or practicable. One protection we can give them is anonymity, and it is essential."\textsuperscript{49}

Thus anonymity for non-garda personnel is provided for by section 10 of the establishing Act.\textsuperscript{50} In particular it requires that all reasonable care must be taken to ensure that the identity of such personnel and staff of the Bureau is not revealed.\textsuperscript{51} In a situation where such personnel would normally be required to identify themselves (for example under relevant Revenue or Social Welfare legislation) that requirement is effectively waived in respect of the personal details of the individual. Instead the individual in question shall be accompanied by a Garda member of the Bureau who shall, upon request, identify themselves as a member of the Gardaí and state that they are accompanied by a Bureau officer.\textsuperscript{52} Additionally where a non-garda bureau officer acts in writing this is done in the name of the Bureau as opposed to that of the individual officer\textsuperscript{53} – which would be the normally be the case.

The anonymity provision also extends, in certain circumstances, to court or other proceedings. If an officer is required to give evidence during such proceedings the Chief Bureau Officer may apply to the court to preserve the anonymity of that individual. Such a request may be allowed where the court is satisfied that there are reasonable grounds in the public interest to grant the application.\textsuperscript{54} In circumstances where the order is granted it may extend to restricting the circulation of affidavits or certificates, deleting the name of the person in question from such documentation or allowing that persons evidence to be given out of sight of any person.\textsuperscript{55}

To date this chapter has been considering the nature of CAB and its composition in order to fully develop its uniqueness as a new model of approach to criminal justice in Ireland. Whilst other provision of the legislation as outlined will be pertinent to the

\textsuperscript{49} Seanad Debates 26\textsuperscript{th} July1996, vol. 148, Col 1567 per Mr Quinn.
\textsuperscript{50} Criminal Assets Bureau Act 1996 s. 10.
\textsuperscript{51} Criminal Assets Bureau Act 1996 s. 10 (1).
\textsuperscript{52} Criminal Assets Bureau Act 1996 s. 10 (2). Similar provisions apply for Bureau staff whilst accompanying or assisting a Bureau officer; Criminal Assets Bureau Act 1996 section 10 (3)
\textsuperscript{53} Criminal Assets Bureau Act 1996 s. 10 (4)
\textsuperscript{54} Criminal Assets Bureau Act 1996 s. 10 (7).
\textsuperscript{55} Criminal Assets Bureau Act 1996 s. 10 (7) (b)
activities of the Bureau to be considering in the remainder of this work the anonymity provisions mark a specific departure from the norm thus worthy of individual consideration at this juncture.

It is a constitutional requirement that ‘save in special and limited cases’ justice shall be administered in public.56 Such special and limited cases may be provided for by the legislature and their reasons behind so providing in the Criminal Assets Bureau Act were outlined at the commencement of this section. However such provisions arguably place considerable power in the hands of anonymous individuals. Such concerns are counter-balanced by the fact that the provisions do not apply to Garda personnel. Further there is a requirement to apply to the court for any such anonymity and significantly the actions of a Bureau officer are not determinative in themselves. The provisions of section 10 above have been considered by the courts in a number of instances, two of which are of immediate interest.

The first such case is *Criminal Assets Bureau v. PMcS*,57 which concerned an application, by the Chief Bureau Officer, for anonymity for two officials who had signed documents in the name of the Bureau. He offered both general and specific reasons as to why the request should be granted. From the perspective of both the current and potential both future bureau staff and investigations he stated:

“that it was his belief that in the event of the identity of the two officers becoming known, it would hinder the work of the Bureau in the general sense that other enquiries would be affected if the people in question were known. He said it would be difficult to get a suitable applicants [sic] to come and work in the Bureau if their identity was not protected.”58

In terms of the specific case at hand as the defendant was suspected of being involved in the drugs trade the Chief Bureau officer felt that this was ‘an activity which by its very nature was likely to pose safety and security risks to Bureau officials if their identity became known, although he was not aware of any specific threats in the instant

57 [2001] IEHC 162
58 *Ibid* at para 14
His beliefs in this regard were based on information received from drug squad officers based in the region in question and from investigations carried out by the Bureau since 1996.

In reaching a decision on the matter Kearns, J. based his ruling on the general ground rather than any specific threat from the individual involved in this case. In particular he stated that the ‘efficient functioning’ of the Bureau’s activities required anonymity. In the circumstances at hand he felt it unnecessary to rely on the specific information pertaining to the defendant. However he did state that as the objectives of the Bureau related to suspected criminal activity then hearsay evidence would be admissible in establishing reasonable grounds in the public interest were no evidence to the contrary was provided. This would appear to establish a very wide test where applications for grants of anonymity could be based on a general efficient running of the Bureau basis as opposed to any specific individual threat to an officer. Even if such a wide test was not satisfied the learned judge did provide for that a defendants suspected involvement in criminal activity (prima facia in the absence of specific threat) would likely suffice for a successful granting of a request for anonymity. He held that the provisions of section 10 (7) – discussed above – ‘merely provide an additional measure of protection of bureau officers.’ It would thus appear that where a request for anonymity is made it is almost certain to succeed. Such measures of protection are of course understandable when civilians are dealing with those involved in serious organised criminality. However were the Bureau to target other lower level suspected criminal activities then this might be viewed as an overly strong stance in favour of the State and against the individual.

The anonymity provisions also passed constitutional muster in Criminal Assets Bureau v. PS where the court re-affirmed that there is no constitutional bar to granting

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59 Ibid.
60 Ibid.
61 Ibid at para 80.
62 Ibid.
63 Ibid.
64 Ibid at 79.
65 Supra n.34.
anonymity in special and limited cases. In this particular case the application for anonymity was based on specific grounds. The Chief Bureau Officer was of the opinion that as the defendant was suspected of being involved in organised crime and, thereby, were he to discover the identity of the bureau officer in question there was a risk he would inform others, involved in that trade, of the information. The trial judge stated that intimidation of witnesses was one of the traits of organised crime and assented to the application on the basis that there was reasonable grounds in the public interest to grant anonymity. Further, he went on to clarify the constitutional basis of the provision on the general ground by stating that:

“I am satisfied that the provisions of s. 10 of the Act of 1996 operate in special and limited cases within the meaning of the Constitution. There is the safeguard of the provisions of s. 10(7) of the Act of 1996 that the judge must be satisfied that there were reasonable grounds in the public interest before granting anonymity. It is conceivable that in a particular case the grant of anonymity might work an injustice: however the fact that the operation of the section might work an injustice does not render the provision unconstitutional and a defendant has the safeguard that in the event that the operation of the section worked an injustice then the operation of the section, although not the section itself, would be unconstitutional. The court in considering the constitutionality of a statutory provision will assume that the same will be operated in a constitutional manner.”\textsuperscript{67}

Thereby it would appear that where the Chief Bureau officer requests a granting of anonymity for a Bureau officer on either the general ground of efficient and effective running of the Bureau, or on specific grounds pertaining to the circumstances of a particular defendant then it is most likely that the order of anonymity will be granted. Finally in terms of anonymity, it is an offence to identify non-garda personnel of the Bureau or to publish, or cause to be published, the names and addresses of either current or former non-garda personnel of the Bureau.\textsuperscript{68} It is also an offence to threaten, intimidate, menace, assault or attempt to assault any level of Bureau staff member or any person of that member’s family.\textsuperscript{69} These latter offences however do not give carte

\textsuperscript{67} \textit{Ibid} at 32 -33.
\textsuperscript{68} Criminal Assets Bureau Act 1996 s. 11.
\textsuperscript{69} Criminal Assets Bureau Act 1996 s. 13 and s. 15.
blanche unfettered power to the Bureau as no charge in these areas can be progressed without the consent of the Director of Public Prosecutions.

**Funding of the Bureau.**

To date this chapter has made numerous references to the multi-agency approach of CAB. Furthermore it has been noted that this new body would be pro-active, targeting certain individuals and chasing the *paper trail* of assets suspected to derive from criminal activities. This leads to the question of how should the Bureau be funded and moreover given its narrow and specific remit – compared to general law enforcement by the Garda Síochána– should it be self-financing. As outlined in the previous chapter the tipping point for the initial establishment of the bureau was the murders of Detective Gerry McCabe and journalist Veronica Guerin. In the desire to regain the public trust at the time and prove that criminal justice problems were not spiraling out of control it would have undoubtedly been popular to provide that assets seized from ‘overlords’\(^70\) and ‘drug barons’\(^71\) would be used to fund the bureau.

Furthermore there was indeed reflected and detached independent support for such a system of funding. The Select Committee on Crime, Lawlessness and Vandalism had previously recommended that were an agency established to examine and trace assets of suspected drug dealers (this envisaged agency effectively became CAB) then that body should be funded from the proceeds of confiscation orders.\(^72\) Additionally, as also previously outlined one of the causal factors contributing to the establishment of CAB was the experience and success of asset forfeiture in the United States of America. In that jurisdiction both state and federal law permit law enforcement agencies to share directly in profits obtained as a result of civil forfeiture.\(^73\) This so called ‘equitable sharing’\(^74\) could, conceivably, incentivise the seizure of assets over and above the equitable enforcement of law. In Ireland under the model being

\(^70\) *Dáil Debates* 2\(^{nd}\) July 1996, Vol. 467, Col. 2473 *per* Mr O’Dea.
\(^71\) *Dáil Debates* 3\(^{rd}\) July 1996, Vol. 468, Col. 376 *per* Mr. Haughey.
developed the seizure of assets would not be carried out by the police body of the State
_per se_, rather through a corporate body of which certain members of the police force
were to be a constituent part. Nonetheless once the bureau was established it would
be a law enforcement agency with significant potential revenue generating powers and
the temptation ‘to displace concerns of justice with those of revenue flows’\(^75\) could
not be entirely eliminated.

In establishing CAB the Irish legislature took the safer and indeed the preferable route.
Section 19 of the establishing Act\(^76\) allows the Oireachtas to make available monies
for the purpose of expenditure by the Bureau in the performance of its functions. The
amount, or continued provision of the funding, is not dependent on any monies accrued
by the bureau in pursuit of its statutory remit. Seven years after the establishment of
the Bureau the funding issue was again raised. It was suggested by opposition deputies
in the Dáil that returns from confiscation of assets should ‘not go into the Exchequer
and get washed away but [be] specifically ring fenced for those communities who have
suffered the most at the hands of the drug barons.’\(^77\) However the government of the
day rejected such suggestions\(^78\) and continued with the model where the Bureau is
funded independently of any income generated and that income is ultimately paid to
the exchequer.

Notwithstanding such an approach, given the high profile nature of the bureau it would
appear that monetary issues play a role in maintaining the acceptability of the Bureau
as a unique style law enforcement agency. In its 2010 Annual Report the Bureau
highlighted that revenue generation is not a key concern for the bureau. It
stated that the economic downturn will cause a reduction in the income generated by it actions,
however ‘the ultimate outcome of the Bureau’s actions remain the same vis-à-vis the
criminal targeted, namely that any interest they may have held in the proceeds of crime
is eliminated. This is the primary function of the Bureau.’\(^79\)

www.bunker8.pwp.blueyonder.co.uk
\(^{76}\) Criminal Assets Bureau Act 1996, s. 19.
\(^{77}\) Dáil Debates 21st October 2003, Vol. 572, Col. 1437 – 1438 per Mr O’Dowd.
\(^{78}\) Dáil Debates 21st October 2003, Vol. 572, Col. 1454 per Mr Smith.
\(^{79}\) Supra n.11 at 37.
Revenue and Social Welfare Matters.

Whilst much of the focus on CAB is centred on the confiscation elements of its work, the rationale for outlining section 5 above in full detail was that CAB also has significant Revenue and Social Welfare powers. Section 5 of the establishing Act enhances that ability to apply the tax codes not only to proceeds of criminal activity but also to proceeds of suspected criminal activity.\textsuperscript{80}

As outlined by virtue of being seconded a CAB an officer retains the powers and duties that they held in their respective pre-exiting roles and use those to carry out CAB functions. It has been noted that in comparison to the normal Revenue authorities CAB has extraordinary powers.\textsuperscript{81} This is due to the fact that in a normal revenue investigation officers would be required to identify themselves whereas with a CAB investigation, as outlined, there is no such requirement and all non-garda officers are covered by the above anonymity provisions.\textsuperscript{82} Additionally Bureau officers may impart information to other Bureau officers and indeed to the Revenue Commissioners.\textsuperscript{83} In a situation where were officers to fail to so do it has been stated in Criminal Assets Bureau v Craft\textsuperscript{84} that they would be in dereliction of their duty. This exchange of information is both a key change in the workings of the Revenue Commissioners and a key facilitator in CAB investigations. In this respect Donnelly and Walsh note that ‘[c]ommunication and the exchange of information between Revenue and CAB … is an essential precursor to the investigations conducted by CAB.’\textsuperscript{85} Finally the overall Revenue powers of CAB are significant in that that their remit is not limited to assessments based on property believed to be the proceeds of

\begin{itemize}
\item [\textsuperscript{80}] The Taxes Consolidation Act 1997 at section 58(2) provides that bodies other than the Revenue Commissioners may charge illegal gains to tax.
\item [\textsuperscript{82}] The Taxes Consolidation Act 1997 at section 859 provides for the anonymity of Bureau officers in raising tax assessments.
\item [\textsuperscript{83}] Criminal Assets Bureau Act, s. 8(7)
\item [\textsuperscript{84}] [2001] 1 I.R. 113 at 133.
\item [\textsuperscript{85}] Supra n.81 at 106 – 107.
\end{itemize}
crime.\textsuperscript{86} In \textit{AS v. Criminal Assets Bureau}\textsuperscript{87} it has held that an assessment need not relate to proceeds of crime where the assessment is based on criminal activity.

A further important element of the functions set out in section 5 above\textsuperscript{88} related to the ability of CAB to investigate welfare claims by persons involved in criminality and to seek the return of any monies so acquired. An important distinction between the revenue powers and the welfare powers of CAB however is that 5(1)(b) above dealing with revenue powers specifically mentions “suspected” activity whereas the welfare section (5(1)(c)) does not use the word “suspected.” In \textit{McGinley v. Deciding Officer Criminal Assets Bureau}\textsuperscript{89} it was held that the absence of the word “suspected” from the relevant paragraph clearly indicated that that part of the section was not intended to apply to persons merely suspected of criminal activity. Nonetheless as with Garda members and Revenue members any members seconded from the Department of Social Protection retain all their existing powers and may carry them out in the name of the Bureau and for the Bureau’s benefit. These include the power to enter any premises, at a reasonable time, without notice to make any enquires to ensure compliance with relevant welfare legislation.\textsuperscript{90}

In the context of establishing the altered approach to criminal justice that CAB moved Ireland towards it was necessary to consider how that agency differed from what exist heretofore. In considering the main elements of the establishing legislation it was possible to provide an overview of the agency that is central to this thesis and moreover to highlight and consider the main changes introduced by the Act. Whilst consideration will be given in due course to the combined implications of such changes we will first outline the primary tools that are part of the armoury of the Bureau as a result of a significant piece of legislation – namely the Proceeds of Crime Act 1996, as amended. The immediately following chapter will consider the application of confiscation, by CAB, under this later Act and various challenges to the legislation and whether it should rightly be considered in the criminal or civil realm. In this


\textsuperscript{87} Unreported, High Court, 10\textsuperscript{th} October 2005. [2005] IEHC 318

\textsuperscript{88} Supra text at n. 25

\textsuperscript{89} Unreported, Supreme Court, 30\textsuperscript{th} May 2001. [2001] 5 JIC 3001.

\textsuperscript{90} Social Welfare (Consolidation) Act 1993, section 212(3) and (4) as amended by the Social Welfare Act 1999, section 26.
section we will now outline the primary options available under the Act which are key facilitation tools in the fulfilment of CAB’s statutory remit. When CAB and the Proceeds of Crime Act are considered in unison they represent, it has been suggested, ‘Ireland’s adaption to the phenomenon of organised and global crime.’

Indeed the same authors go on to state:

“This model of policing that inspires CAB is different from the typical methods of reactive enforcement where police are called to a crime scene, and gather evidence with the aim of detecting, prosecuting and convicting a guilty party. CAB represents a form of proactive policing more often used by commercial security entities, intended to permanently disable the capacity of designated persons to participate in criminal enterprises. This technique of disruption may be the equivalent of the incapacitation paradigm within the ‘new penology’ through which crime is reduced without altering the behavioural tendencies of individuals to any great extent.”

At the time of creation of the Bureau and enactment of the original Proceeds of Crime Act there were suggestions that the measures were necessary in order to protect democracy. Additionally it was offered that the innocent would have nothing to fear from such tough measures. The espousal of such an approach highlights the dichotomy between “us” and “them” in modern political ideologies. Furthermore it accentuates the notion that the (respectable) majority must be protected at all costs, including the erosion of liberties, against the “other” vicious criminal. The approach subsequent taken by CAB has been deemed ‘moral policing’ that guards between the ordinary decent citizen and the criminal “other.”

**The Proceeds of Crime Act.**

Taken together the establishment of CAB and the Proceeds of Crime Act reflect the employing of new and existing methods in a different arena to target specific criminality. However, they may also operate without some of the procedural

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92 Ibid at 227 – 228.
93 *Dáil Debates* 2nd July 1996, Vol. 467, Col. 1206 per Mr. O’Donoghue.
94 *Dáil Debates* 2nd July 1996, Vol. 467, Col. 2473 per Mr. O’Dea.
safeguards operating in the traditional model of justice. The Proceeds of Crime legislation is concerned with property that constitutes, either directly or indirectly, the proceeds of crime. Importantly there is no necessity for an individual to be convicted of an offence prior to CAB taking action under the legislation. This is because of the fact that the Proceeds of Crime Act operates in the civil sphere – the aforementioned different arena. Specifically the Act allows for the making of an order against property deemed to be the proceeds of crime, essentially any property obtained as a result of or in connection with the commission of an offence.\textsuperscript{96}

The phrase ‘proceeds of crime’ has been given a wide literal interpretation by the courts. In particular it has been held that the act applies to proceeds of crimes that were committed prior to the act coming into force.\textsuperscript{97} In the same vein there is no requirement that particular proceeds be related to a particular crime. It was stated that such a requirement would make the act ‘useless and unworkable.’\textsuperscript{98} This is predicated on the fact that the legislation specifically does not use a definite or indefinite article prior to the word ‘crime’ in ‘proceeds of crime.’ Such drafting was seen to indicate an intention on behalf of the legislature that the act should apply in the absence of a nexus between individual proceeds and a particular crime.\textsuperscript{99}

**Orders under the Proceeds of Crime Act.**

Under the legislation CAB may apply to the High Court to impose confiscation or forfeiture orders on the assets of an individual. In particular under section 2 any application may be made for an interim order which prohibits the respondent, or another specified person, from disposing of or dealing with property that is worth at least €5,000\textsuperscript{100} for 21 days. In order to ensure that assets cannot be dissipated in advance of an order the order may be issued on an \textit{ex-parte} basis where the court is satisfied that an individual is in possession or control of property which either constitutes the proceeds of crime or was acquired with or in connection with such

\textsuperscript{96} Proceeds of Crime Act 1996, s. 1 as amended.

\textsuperscript{97} \textit{Murphy v. GM} [2001] 4 IR 113 at 129.

\textsuperscript{98} \textit{McK v F and McK v H} [2005] 2 IR 163 at para 15.

\textsuperscript{99} \textit{Ibid} at para 5.

\textsuperscript{100} Proceeds of Crime Act 1996, section 2 as amended. (This figure has been reduced from €13,000)
proceeds.\textsuperscript{101} The nature of such orders was accepted to be onerous but nonetheless justifiable in the context of the remit of the Act in \textit{FMck v. D.S., S.T. and B.H. Ltd.} where it was ruled that:

"The nature of such orders is undoubtedly onerous. It will be made without giving the defendant an opportunity to be heard. The jurisdiction to make such an order without notice is undoubtedly justified by reference to the risk that may well arise in such cases that assets which may be the proceeds of crime might disappear prior to the hearing of an application on notice."\textsuperscript{102}

The only balancing right is that a notice of any such order granted must be given to the respondent or any other person who appears to be affect by it.\textsuperscript{103} This does not, however, swing the balance back to the respondent as the Act introduces a reversal of the traditional onus on the respondent. Any such respondent – or indeed any person claiming ownership of the property that is subject to an interim order – may apply to the court to have the order discharged or varied on the grounds that the property is not the proceeds of crime or that the value is actually less than the required €5,000.\textsuperscript{104} Importantly before the granting of any such application the court must be satisfied that the property concerned – or part of it – does not represent the proceeds of crime. Whilst this does place an onus on the respondent as noted prior to the granting of the original interim order the court must be satisfied that the property represents the proceeds of crime. There is a requirement that there must be sufficient objective evidence to support the application.\textsuperscript{105} The act does allow for opinion evidence of a member of An Garda Síochána not below the rank of Chief Superintendent or an authorised officer of the Revenue Commissioners. However such evidence alone may not lead the court to be satisfied.\textsuperscript{106}

Where an interim order is granted it will lapse after 21 days unless an application for an interlocutory order is made under section 3\textsuperscript{107} of the Act. A section 3 interlocutory order operates under similar requirements as a section 2 order save that there is no

\textsuperscript{102} Ibid at para 2.4.
\textsuperscript{103} Proceeds of Crime Act 1996, s. 2 (2) (a)
\textsuperscript{104} Proceeds of Crime Act 1996, s. 2 (3)
\textsuperscript{105} Proceeds of Crime Act 1996, s. 8 (2) as amended.
\textsuperscript{106} \textit{M. v. D.} Unreported High Court December 10, 1996.
\textsuperscript{107} Proceeds of Crime Act 1996, s.3.
discretionary element available to the court. Additionally where the court may grant a section 2 interim order where it is ‘satisfied’ that the property constitutes directly or indirectly the proceeds of crime for a section 3 interlocutory order it may be granted if “appears to the court” to be such property. This establishes a lower standard than that required for an interim order. The distinction would appear to be based on the fact that a section 3 application is done with notice to the respondent. Where the requirements for a section 3 interlocutory order are met then the court must make the order unless the respondent refutes the contention that the property represents the proceeds of crime or if the court is satisfied that there would be a serious risk of injustice. The effect of an interlocutory order is to prohibit the disposing, dealing with or diminishing the value of the property concerned.\textsuperscript{108}

In terms of such orders a section 3 order has been ruled not to be an interlocutory order as one would be normally be defined due to the fact that proceedings for a later disposal order is not the trial of the action. An interlocutory order under this Act is deemed to be a substantive remedy as it is a free standing measure which is not ancillary to a later disposal order.\textsuperscript{109} In effect an interlocutory hearing in this instance constitutes the actual trial of the issue.\textsuperscript{110} A further significant power available to CAB under the Act is the ability during either a section 2 order or section 3 order to apply to the court to compel the respondent to file an affidavit specifying all property in his control or possession and all sources of income.\textsuperscript{111}

The interim and interlocutory orders are key tools in achieving the ultimate aim of permanent confiscation of property which is the proceeds of crime.\textsuperscript{112} That aim is achieved through section 4 of the Act which originally provided for the making of a disposal order by the court where an interlocutory order had been in place for a period of not less than seven years. Such an order may now be made after a shorter period provided that the application for same is made with the consent of all parties.\textsuperscript{113}

\textsuperscript{108} Proceeds of Crime Act 1996, s.3 (1).
\textsuperscript{109} McK v AF and JF [2002] 1 IR 242 at 256 – 257.
\textsuperscript{110} McK v. FC and McK v MJG [2001] 4 IR 521 at 523.
\textsuperscript{111} Proceeds of Crime Act 1996, section (9).
\textsuperscript{112} Supra n.40 at 154.
\textsuperscript{113} Proceeds of Crime Act 1996, s. 4(a) as inserted by s. 7 of the Proceeds of Crime (Amendment) Act 2005.
Where a disposal order is made the respondent is permanently deprived of all right in the property\textsuperscript{114} and the property may be sold or disposed of with any financial return to be paid to the exchequer.\textsuperscript{115} Any person claiming rightful ownership of the property has a right to heard and show cause why the property should not be the subject of a disposal order.\textsuperscript{116} Further the court will not grant the order where there is a serious risk of injustice.\textsuperscript{117} In cognisance of the possibility of detrimental effects from such orders the courts have clarified the rights of respondents.

In \textit{Murphy v. GM, PB, pc Ltd\textsuperscript{118}} the court held that whilst the structure of section 4 does not provided for a rehearing of the grounds on which the interlocutory order was made that does not mean that a respondent ‘is precluded from presenting to the Court such evidence as may be relevant.’\textsuperscript{119} Additionally, in that case, the respondent had argued that seven years was an excessive delay between an interlocutory order and a disposal order in which to wait for an opportunity to assert his rights. The court clarified that this was not the position and that the respondent could have taken action at any time. As noted by O’Higgins, J:

“In fact, the seven year period is intended to be in ease of the Respondents. It provides a period of a full seven years in which the Respondent can seek to demonstrate that the assets frozen are not the proceeds of crime, or that it would be otherwise unjust to continue the Section 3 Order. That is the only case they can make on an application for a Disposal Order under Section 4. They are not deprived or prevented or delayed from making their case because it is open to them, any time after the Section 3 Order is made, to make the same case that they could make on the Disposal Order.

The contention of the Respondent is based on the misconception as to the structure of the Act, as explained. The misconception is that the hearing under Section 4 will be akin to the usual form of trial in a civil action. However, the structure of the Act, as has been pointed out, is different.”\textsuperscript{120}

\textsuperscript{114} Proceeds of Crime Act 1996, s. 4 (4).
\textsuperscript{115} Proceeds of Crime Act 1996, s. 4 (5).
\textsuperscript{116} Proceeds of Crime Act 1996, s. 4 (6).
\textsuperscript{117} Proceeds of Crime Act 1996, s. 4 (8).
\textsuperscript{118} [1999] IEHC 5
\textsuperscript{119} Ibid at para. 149.
\textsuperscript{120} Ibid at para 150 -151
Where a respondent is successful in his application to prevent an order then section 16 provides that he is entitled to compensation. It has been suggested that the level of protection offer by this section is actually greater than that normally associated with an undertaking to damages in mareva injunctions.\textsuperscript{121}

In addition to these orders the power of the State in the fight against organised criminality was further strengthened by the \textit{Proceeds of Crime (Amendment) Act} 2005. This provides, \textit{inter alia}, that property shall include property that is situated outside the State where the respondent is domiciled, resident or present in Ireland or where any part of the criminal conduct occurs within the State. Further criminal conduct is now deemed to include any conduct which occurred outside Ireland which would be an offence if it occurred within Ireland, if it was an offence under the law of the state concerned, and if, at the time an application for an order is made, any property obtained or received in connection with the conduct is situated in Ireland.\textsuperscript{122}

This amendment effectively reverses the decision in \textit{McK v. D}\textsuperscript{123} which had concluded that the original Act only had effect within the State. A further change was introduced by the \textit{Proceeds of Crime (Amendment) Act} 2016. This provides for administrative seizure and detention where if a bureau officer has reasonable grounds to do so he may seize non land assets for 24 hours.\textsuperscript{124} Further if the Chief Bureau officer is satisfied that that there is reasonable grounds for suspecting that the asset may be the proceeds of crime, that the bureau is investigating whether it has the grounds to apply for a court order and he has reasonable grounds to believe that the asset may be disposed of or reduced somehow in value then he may extend the detention of the asset for a further 21 days. This new power may offer considerable practical value to the bureau in its future endeavours. Any individual affected by such a seizure of assets does have the right to apply to the High Court to revoke or vary the decision of the Chief Bureau Officer.\textsuperscript{125} In the event that an order is not

\begin{flushleft}
\textsuperscript{121} \textit{Supra} n.40 at 154.
\textsuperscript{122} \textit{Proceeds of Crime (Amendment) Act} 2005, s. 3.
\textsuperscript{123} [2004] 2 IR 470
\textsuperscript{124} \textit{Proceeds of Crime Act} 1996, s. 1(a) as amended.
\textsuperscript{125} \textit{Proceeds of Crime Act} 1996, s. 1(b) as amended.
\end{flushleft}
ultimately obtained against the asset the affected owner has the right to apply for compensation.\textsuperscript{126}

It is clear that the changes introduced by the Proceeds of Crime Acts marked a new departure for the Irish criminal justice system. Prior to concluding it is worth considering, firstly, how the legislation differs vis-à-vis the powers available under the Criminal Justice Act 1994 that were outlined in the previous chapter. Secondly the manner in which the courts have accepted, in a general sense, the new approach to criminal justice.

The primary difference between the Criminal Justice Act of 1994 and the Proceeds of Crime legislation is that the former required a conviction prior to operation and proceedings arise from a criminal conviction whilst the later operates in the civil realm in the absence of any conviction. All that is now required is that the court be satisfied, on a civil balance of probabilities scale, that particular property constitutes the proceeds of crime in order for a forfeiture procedure to commence. Additionally whilst the 1994 Act operated\textit{ in personam} the 1996 Act operates against property, or as an\textit{ in rem} procedure. Where a respondent is subject to an application under both Acts then the 1994 effectively takes precedence.\textsuperscript{127}

However in different circumstances it is possible for CAB to take concurrent actions. In\textit{ CAB v. Kelly}\textsuperscript{128} the respondent claimed that he was unable to make a tax return under CAB’s assessment as his monies were subject to an interim order under section 2 of the Proceeds of Crime Act 1996. The court rejected such claims on the basis that section 6 of that Act\textsuperscript{129} allowed for “necessary expenses” which could include a tax assessment. Thus it would appear that the imposition of an order under the 996 Act does not preclude CAB taking other action or exclude respondents from making tax returns.

\textsuperscript{126} Proceeds of Crime Act 1996, s. 1(c) as amended. The introduction of these new powers and the reduction of the minimum values (\textit{supra} n.94) were again caused by a tipping point. On this occasion it was a feud and murders occurring in Dublin. \textit{Seanad Debates}, 5\textsuperscript{th} July 2016, Vol 246 at 650.

\textsuperscript{127} Proceeds of Crime Act 1996, s. 3 (7)

\textsuperscript{128} Unreported Supreme Court, 11\textsuperscript{th} October 2002.

\textsuperscript{129} Proceeds of Crime Act, 1996, s. 6.
At this juncture it is worth recording the responses, of a general nature, of the Irish Courts to this new model of justice. The views of McGuinness J in *Gilligan v. Criminal Assets Bureau*\(^{130}\) are worth outlining in some detail. She stated that the legislature was justified in restricting certain rights under Proceeds of Crime Act and that there was a certain amount of balance achieved by the safeguards in the legislation.\(^{131}\) Further, based on evidence from senior members of the Gardaí she accepted that there now existed:

“an entirely new type of professional criminal who organises, rather than commits, crime and who thereby renders himself virtually immune to the ordinary procedures of criminal investigation and prosecution. Such persons are able to operate a reign of terror so as to effectively prevent the passing on of information to the gardaí. At the same time their obvious wealth and power causes them to be respected by lesser criminals or would be criminals.

It emerged during the cross-examination of these witnesses by counsel for the plaintiff that the number of such leading criminals is small by international standards and that the sums of money involved in their operations are very much smaller than similar sums in such jurisdictions as the United Kingdom, Holland and the United States. I would accept that certain elements of the media, both written and broadcast, tend to exaggerate the comparative level of this and other types of crime in this country and to create in regard to crime an undesirable form of hysteria which has its own dangers. Nevertheless, in the context of a relatively small community, the operations carried out by major criminals have a serious and worsening effect. This is particularly so in regard to their importation and distribution of illegal drugs, which in its turn leads to a striking increase in lesser crimes carried out by addicts seeking to finance their addiction.

In theory this type of threat to public order and the community at large may seem less serious than the threat posed to this State by the operation of politically motivated illegal organisations. In practice major and minor drug-related crime is probably perceived by ordinary members of the community as more threatening and more likely to affect the everyday lives of themselves and their children.”\(^{132}\)


\(^{131}\) *Ibid* at 242.

\(^{132}\) *Ibid* at 241.
It is interesting that in clarifying the position the learned justice acknowledged the difficulty in apprehending modern sophisticated criminals who are able to operate many levels distant from the actual commission of offence and the problems that can arise as a result of moral panic. Further the court’s acceptance of the legislation would seem to be ground in an acceptance that it is a proportional response to the challenges that modern Irish society faces, and, media exaggerations accepted, the increasing levels of crime at various different strata of Irish society. Indeed a similar approach was espoused by Moriarty J. in an earlier case where he stated:

“It seems to me that I am clearly entitled to take notice of the international phenomenon, far from peculiar to Ireland, that significant numbers of persons who engage as principals in lucrative professional crime, particularly that referable to the illicit supply of controlled drugs, are alert and effectively able to insulate themselves against the risk of successful criminal prosecution through deployment of intermediaries, and that the Act of 1996 is designed to enable the lower probative requirements of civil law to be utilised in appropriate cases, not to achieve penal sanctions, but to effectively deprive such persons of such illicit financial fruits of their labours as can be shown to be proceeds of crime.”

Thus the enactment of the Proceeds of Crime Act marked a significant departure from the tools available to the State heretofore. The ability to permanently confiscate assets in the absence of any criminal conviction and the reversal of the onus of innocence to the respondent marks a significant ‘tooling up’ by the Irish State. It gives to CAB significant new powers not traditionally available to law enforcement agencies prior to its establishment.

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135 Prosecution under the Act is also available to a member of An Garda Síochána not below the rank of Chief Superintendent.
Conclusion.

It is asserted that the nature of law enforcement and criminal justice in Ireland has, in part, moved to a new space. The establishment of CAB is the key facilitator in that move and key representative of the power of the State in that space. CAB has been conferred with considerable powers in the areas of asset forfeiture, revenue compliance and social welfare claims. A triple-pronged opportunity, such as this, to target, where necessary, single issues is central to the ability of the bureau to succeed in its remit.

In that regard the rationale of this chapter was to consider the actual legislative underpinnings of CAB and the powers available to the bureau under the Proceeds of Crime Act. Such consideration allowed for an examination of the main changes that occurred and the significant departures from the pre-existing model. As CAB was a creation of statute it was essential to view both that statute itself and the expressed views of the legislature – accepting that the proposing bills had exceptionally short gestation periods. In particular consideration was given to the establishment of a new agency as opposed to extending the powers of the Gardaí. This approach was based on an underlying current of concern towards a crisis of hegemony in the criminal justice system. The expressed belief was that a task orientated agency was the only option to solve such a crisis.

In turn it was outlined that the bureau was multi-agency in nature with staff from the three aforementioned bodies and in turn would target specified areas from the remit of the Revenue Commissioners and Department of Social Protection and the confiscation of assets suspected to derive from criminal activity. This again was a significant departure for Irish law enforcement as traditionally such bodies would not have considered working in unison. Such unison however, allows target application of relevant legislation at equally targeted issues. In essence a movement towards pro-active law enforcement carried out by both civilian staff and Garda personnel.
Yet further departures were highlighted by the specific provision of anonymity protection for non-garda officers of CAB. Whilst such protection is understandably necessary in certain situations, it nonetheless grants to seconded revenue and social welfare officers a protection not available in their previous roles. As such it marked an additional ‘tooling up’ by the Irish State in the fight against organised criminality. In highlighting such departures it was necessary to examine how this new law enforcement agency should be funded. As unlike any of its three constituent parts, CAB has a specific and relatively narrow remit consideration was given to whether the bureau should ultimately aim to be self-funding and self-rewarding. This was a departure that the Irish State did not take and any income accrued by CAB ultimately goes to the central fund of the Irish exchequer. Whilst in some respects it might have been opportune to allow CAB to have been self-funding this could only serve to raise concerns about the rationale behind the targeting of specified assets of high net worth. The current situation of being funded by the State and all income going to the exchequer seems to assist in maintaining of popular public support for the bureau.

This chapter finally outlined the various types of orders that are available to CAB under the Proceeds of Crime Act. Whilst the application of these orders and the activities of CAB will now be considered in the future chapters, it was essential to consider the actual types of order at this juncture. This was to facilitate a critique of the legislative supports available for Ireland’s new model of targeted criminal justice.
Part Three.
Chapter 5.

**CAB and Confiscation – The Operational Approach.**

**Introduction.**

The historical underpinnings and casual factors leading to the establishment of CAB have been documented in the earlier chapters of this thesis. It will be recalled that there was a felt societal need to establish mechanisms to target and defeat organised criminality which, it was claimed, was beyond the ordinary operational procedures and traditional tools of the criminal justice system then in operation. The entire focus of such concerns was directed towards the ‘overlords’ and ‘kingpins’ of crime and indeed in the early years of CABs establishment that was its primary focus.¹

However the bureau is now operating at a much wider level and is targeting many and varied elements of criminal activity. In so doing it has both established itself as a key player in Irish law enforcement and has been given continuing support from a public who were faced with a crisis of hegemony and aspects of moral panic in the immediate period preceding the establishment of CAB. There are various examples of the wide approach taken by the bureau in its evolutionary expansion into territory which was traditional the exclusive domain of An Garda Síochána. It does this whilst being ever cognisant of its own and the latter’s remit² and, moreover, as a result of challenges to its authority has had its operational boundaries clarified and approved by the courts. It is that operational approach that is the primary focus of this particular chapter.

The general nature of the criminal/civil dichotomy, the historical approach to forfeiture in Ireland and the nature of both CAB – as an instrument of statute – and the main features of the proceeds of crime legislation (as a key tool in CAB’s approach) have all been dually considered at this juncture. This chapter will now depart from

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the approach in those chapters heretofore and will apply the operational workings of CAB to that presented theory. As such it will adopt a more operational and procedural based approach. A structure such as this allows us to fully address the socio-legal applications of the overall research question under consideration – namely, how CAB has, in part, moved Ireland to a new model of criminal justice. This model, it will be submitted, reflects a society that is both adopting to the reality of a changed landscape and grappling with dexterity, mobility and evasive tools of criminality in a modern globally connected world.

As such CAB’s operational approach is, by resultant necessity, quite wide. In 2009 it was involved in an investigation into corruption and corrupt payments pertaining to the rezoning of land. Whilst the ultimate charge in this instance arose under specific corrupt practices legislation\(^3\) it is operations using powers under proceeds of crime legislation that will be the primary focus of this particular chapter. Whilst as noted in chapter four the staff of the bureau remains relatively low and static it has made use, as will be shortly outlined, of training and criminal profilers to ensure it effectively carries out its remit at a national level.

In turn this has allowed the bureau to be cognisant of any developments in criminality at both a micro and macro level and to relate and react to the societal needs in the community at large. Gaining the trust and resultant help of the community at all levels has been a key part in the bureau’s development and it is evident that it (the bureau) is acutely aware of the key role that communication and trust can have in helping to achieve success and public – and resultant political – acceptance of its operational approach. Any such success is communicated back to the public (general and professional) who are thanked for their assistance and reassured of the authority that criminal justice retains in society.

The Bureau strives to deliver a value for money service reflective somewhat of a managerialist approach. Whilst it does regularly communicate income derived results – again assisting in accountability and acceptance in the public psychic – it is not formally bound by any financial targets in the form of any requirement to generate particular amounts of revenue in any given accounting period. As a result it has

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\(^3\) The Public Bodies Corrupt Practices Act 1889 (as amended by The Prevention of Corruption Act 1916)
significant flexibility in its approach and choice of operational direction – given the societal needs at any particular time – and its overall financial returns to the exchequer are not consistent whilst its actual success would appear to be consistent. In part this is due to targeting criminality at all levels, further placing it at the centre of general society who see directly the benefits of neutralisation of low and middle level criminality in their communities.

As a result of the power of civil forfeiture many challenges have been brought against the approach of CAB and their use the proceeds of crime legislation. In this chapter due consideration will be given to the operational boundaries that have been established by such precedents and how protection against injustice has been achieved. The operational approach to the bureau’s activities will continue in the next chapter where consideration is given to the revenue and social welfare approach that has been adopted and the considerable levels of success in those areas. This chapter however will now continue by considering the use of particular trained personnel by the bureau in pursuit of its remit to deny all levels of criminality the opportunity to benefit from the fruits of their unlawful activities.

Divisional Criminal Asset Profilers.

In 2004, in a collaboration with the Garda National Drugs Unit, the concept of Divisional Criminal Asset Profilers was created. The establishment of such a unit and training of the profilers was, again, originally linked to targeting those involved in the illegal drugs trade – however with a refocus to those operating at a middle ranking level of such activities. The profilers would be trained in all areas of asset forfeiture and relevant revenue and social welfare legislation. This was to be done in order to ‘compliment[s] and enhance[s] the Bureau’s role in relation to the identifying, tracing and seizing of criminal assets of persons engaged in criminal conduct.’ It was originally envisaged that a full complement of divisional profilers would amount to 25 – that being one from each Garda division. Thus allowing CAB to have, at an operational minimum, at least one direct link in each of those divisions. At once this allows CAB to both have a national focus and be cognisant and informed of various

\[\text{4 Supra n.2 at 21.} \]
\[\text{5 Supra n.2 at 22.} \]
aspects, and indeed levels, of criminality when adopting an operational focus plan or when reacting to needs in the community. However the number grew substantial from that original full complement in the intervening years since the unit’s establishment as is now demonstrated the table below: 6

Table 1. Number of Divisional Criminal Asset Profilers per reporting year.

<table>
<thead>
<tr>
<th>Year</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Divisional Profilers.</td>
<td>25</td>
<td>25</td>
<td>25</td>
<td>28</td>
<td>93</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Divisional Profilers.</td>
<td>115</td>
<td>167</td>
<td>158</td>
<td>199</td>
<td>196</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Divisional Profilers.</td>
<td>194</td>
<td>203</td>
<td>208</td>
</tr>
</tbody>
</table>

At the time of writing the most recent full data available is that for 2016. This shows that the number of trained divisional profilers then stood at 208. The growth pattern demonstrated in the above table looks set to extend even further with the expectation that another 110 profilers will be trained. 7 In the early years of training such profilers the annual reports referred to the ‘full complement’ of 25 trained staff. 8

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6 The table has been compiled by the current author from data available in each of the relevant annual reports of CAB. The 2007 increase was that of three revenue customs profilers - the first non-Gardaí members to be trained - Criminal Assets Bureau (2008) Criminal Assets Bureau Annual Report 2007, Stationary Office: Dublin at 9.


expansionary developments allow CAB to be ‘more visible’\(^9\) in local communities. An early evidence based example of this being the search of 163 properties on the same day in Limerick in 2007.\(^10\) The focus on lower value assets and concomitant more middle ranking criminals does not have the same opportunity to return the high level financial benefits to the State (and the associated positive public and media support) as targeting higher order criminals. Nonetheless the Bureau regularly reiterates that it still remains an effective and valuable use of its resources.

Thus, as demonstrated, there has been a clear and significant expansionary development of this division even if such development was not formally or specially acknowledged, prior to 2016, in the reports from which the data is extracted. It is submitted that the reason for such expansion can be seen from the policy positions of the Bureau which indicate a ‘shift towards lower value assets’\(^11\) and a reaction to local community concerns being acknowledged as an effective use of the resources of the Bureau. Such an approach reflects, not a complete refocusing of CAB but rather an evolutionary expansion to the limits of its statutory remit.\(^12\) The original purpose of divisional asset profilers was ‘enhanced from intelligence gathering to a more proactive investigative role’ in 2016.\(^13\) In conjunction with this development:

“Senior Bureau Officers briefed all Divisional and Regional Detective Superintendents who are responsible for the tasking of the Divisional Asset Profilers Network in targeting local Tier 2 and Tier 3 criminals.”\(^14\)

This expansionary development has allowed such profilers to ‘develop and progress investigations that have significant financial impact on local criminals and, in turn, provide positive feedback within local communities that suffer from the activities(sic) of these criminals.’\(^15\)

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\(^10\) *Ibid* at 3.


\(^12\) On the nature of CAB remit see generally chapter 4.

\(^13\) *Supra* n. 7 at 5.

\(^14\) *Ibid*.

\(^15\) *Ibid* at 6.
CAB and the Community.

The use of regional divisional profilers allows the bureau to react to concerns around various criminal activities occurring in the community and subsequently interacts with that community through regularly thanking the public for their ongoing support and assistance.  

A number of examples may be offered to demonstrate that the bureau attempts and, and indeed seems to have been successful, in gaining widespread support. In terms of the community and law enforcement, the National Crime Council has previously called for greater communication and consultation between the Gardaí generally and the public. Whilst the bureau’s primary objective of targeting the proceeds of crime is, by its nature, conducted in private with high levels of secrecy and confidentiality it does adopt a post hoc communication – if not consultation – strategy with local communities. In so doing it meets the suggestion by the National Crime Council that governmental agencies need to change and develop effective interfaces with the community. CAB as a developing agency, without historical constraints on its direction, appears to have adopted, from an early stage, this approach as an element of its organisational structure and communication strategy.

Further examples of CABs approach in achieving its remit in the context of establishing itself as a criminal justice agency in Ireland will shortly be proffered from both practical examples and the discovery through the courts of its operational boundaries. The bureau is reflective of the fact that reactive law enforcement is no longer the sole method of criminal justice in operation and their approach is reflective of paradigmatic shift in policy. Indeed using coercive law may be part of an ‘acting out’ strategy as described by Garland. He states that:

“Policymaking becomes a form of acting out that downplays the complexities and long term character of effective crime control in favour of the immediate gratifications of a more expressive alternative. Law making becomes a matter of retaliatory gestures intended to reassure a worried public and to accord with

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common sense, however poorly those gestures are adapted to dealing with the underlying problem.”

Additionally, and importantly in the current context, the same author is of the opinion that community safety is becoming the paramount requirement and thus enforcement of law is a way of ‘preventing the convergence of factors that precipitate criminal events.’ It is widely asserted that Garland’s culture of control theory does not completely fit the Irish criminal justice model. However aspects of CABs development and approach in the aforementioned communication and entrenchment as part of society is noteworthy in the context of Garland’s above summation. The approach of CAB reflects a situation whereby it is no longer the State from which individuals must be protected but rather from each other. Such a drift towards a focus on the criminal ‘other’ has been described as a form of moral policing.

In terms of the direction of policing it has been asserted that the bureau does not usurp the power of the Gardaí but rather operates in parallel with the normal investigative procedures of the Gardaí. The 2014 annual report of the bureau departs from earlier reports that maintained that it was not an investigative body. It now states that:

“The strategy of the Bureau to co-ordinate its activities in a manner which takes cognisance of the Policing Plans of the Garda Síochána and the strategies of the Revenue Commissioners and the Department of Social Protection has been continued in 2014. As a result, the Bureau has become involved in the investigation of criminal offences. (my emphasis) In all cases involving alleged criminal law breached, the Bureau’s role is carefully managed having regard to the primary functions of the Garda Síochána and in some instances, the Revenue Commissioners in ensuring that the appropriate remedies are pursued in respect of criminal conduct.”

The immediately preceding report had stated that whilst there was high levels of liaison with the relevant bodies ‘the bureau is not (my emphasis) primarily engaged in

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20 *Ibid* at 171.
22 *Ibid* at 229.
23 *Gilligan v. Criminal Assets Bureau* [1998] 3 IR 185 at 204.
24 *Supra* n.2 at vii.
the investigation of criminal offences.’ 25 This would appear however to have been a then reflection of operational focus rather than requirement as when the status of the bureau was first considered, in 1999, McCracken, J. stated that ‘[I]t is an investigative authority which, having investigated and used its not inconsiderable powers of investigation, then applies to the Court for assistance in enforcing its functions.’ 26 Thus CAB’s clear and explicit statement reflects new departure for the agency and reinforces the thesis that it has become – and may exponentially develop as – a significant part of the legal investigation and enforcement mechanisms in Ireland. Furthermore it brings its own unique approach and options for civil forfeiture 27 not traditionally available to the Gardaí.

In this respect and as previously noted the Bureau has widened its focus from solely targeting the assets of those involved in the illegal drugs trade. It now deals with issues such as fuel laundering 28 and arising issues in society at a given time such as travelling gangs using the motorway network to engage in multiple and widespread cross-country burglary and robbery. 29 Thus as both a proactive and reactive body 30 it is able to combine the traditional Garda response with its own expertise and approach as exemplified, for example, by the prior established knowledge of the divisional regional profilers. The Bureau receives support and assistance from a number of Garda units including:

- Garda Bureau of Fraud Investigation (GBFI),
- Garda National Drugs Unit (GNDU),
- National Bureau of Criminal Investigation (NBCI),
- Special Detective Unit (SDU) and the
- Security and Intelligence Section. 31

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27 Infra n. 86 – 107.
28 Targeting the illicit trade in oils not only disrupts the cash flow to criminality but also reduces both direct revenue losses to the State and the environmental rectification costs associated with waste products generated from fuel laundering.
29 Supra n.2 at v.
31 Supra n.24 at 9.
Additionally a unit under the control of the Garda National Drugs and Organised Crime Bureau was seconded to the bureau in 2016 to assist in the tracing and targeting of assets connected to organised crime gangs operating in the Dublin region.\(^{32}\) Notwithstanding the expansionary developments of the Bureau\(^{33}\) it does clearly state that its core focus remains the targeting of assets of serious organised national and international criminality. Key support for such focus lies in its ‘enhanced’ communication with both the public and professional bodies through for example the use of social media.\(^{34}\) This core priority is also ‘matched by the Bureau’s policy to support efforts to combat criminal conduct at local community level’\(^{35}\) – again demonstrating an explicit reflection of the widening and pervasive influence that the Bureau now holds in the Irish criminal justice landscape.

That importance is set to expand even further as bureau management felt that there was a need for ‘structured and recognised training for specialised financial investigators’.\(^{36}\) As a result a new training programme has commenced, namely: the Asset Confiscation and Tracing Investigators Course.\(^{37}\) The stated aim of this course is to

“... ensure all Bureau investigators are skilled to the best international practices; will promote a standardisation of work practices across the investigation teams; and will increase the overall professionalism of the Bureau. It will also give a professional qualification to investigators which will assist, in conjunction with other measures, to enable investigators give expert evidence in court.”\(^{38}\)

It is evident that this more structured and professional approach – for what is now operating as an investigatory body – reflects a very targeted and business-like approach to the execution of the bureau’s widening remit.

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32 Supra n. 7 at 4.
33 With exceptions of the divisional profilers it continues to operate with the relatively low staff numbers and a relatively modest annual budget of in the region of €6.6 million – Supra n.2 at 1.
34 Supra n.2 at vii.
35 Supra n.2 at viii.
36 Ibid at 6.
37 Bureau members have also taken part in International training courses.
38 Supra n.24 at 14.
CAB: the Business Case.

Whilst focusing on low and medium value assets – in addition to its core function high value assets – it is evident that there is considerable emphasis placed on developing the bureau as an agency that is very conscious of delivering value for money despite the fact that it was not established as a self-funding body.\(^{39}\) For instance the bureau notes that whilst the number of cases actually commenced by the Bureau in 2013 was reduced comparable to the previous year the value of assets frozen – with an ultimate intended valued to the exchequer – increased by a margin of 33\%.\(^{40}\) Similarly the figure for 2014 reflects an increase in value in the region of 140\%.\(^{41}\) In some instances where the Bureau is able to settle proceedings it is necessary to apportion amounts to repay improperly claimed social welfare or discharge tax liabilities and thus are not recorded as incoming revenue for the Bureau. However from a business sense the Bureau treats it as a success as ‘such course of action avoids costly High Court proceedings both in terms of legal costs incurred by the Bureau but also in costs to the State in payments under the Legal Aid scheme.’\(^{42}\) Thus the benefits of not adopting a self-financing model allows for a focus on wider markers of success.

In a similar vein the Bureau has attempted to enhance its moral authority and acceptability and popularity in the public physic through the use of various strands of the media to promote its success. It has used a large online auction site to dispose of criminal assets, gain a financial return to the exchequer and provide an interesting counter-balance to issues of moral panic through asserting its own moral authority. The use of the auction site (ebay) for disposal\(^{43}\) of an asset (in this instance a Rolex watch) ‘generated a great deal of publicity and highlighted the attention of the public to the public disposal of the proceeds of crime.’\(^{44}\)

\(^{40}\) \textit{Supra} n.25 at 11.
\(^{41}\) \textit{Supra} n.2 at 13.
\(^{42}\) \textit{Ibid} at 17.
\(^{43}\) Disposal is provided for by s.7 of the Proceeds of Crime Act.
\(^{44}\) \textit{Supra} n.25 at 14.
In terms of overall impacts in the period 1996 to 2014 the bureau has achieved the following levels of operational success

- Interim orders\(^{45}\) (freezing orders) amounting to over €79 million, (with an additional £18,783,372STG and US$6,633,049);
- Interlocutory Orders\(^{46}\) (final restraint orders) amount to over €50 million, (with an additional £3,080,498 STG and $6,077,710 USD)\(^{47}\)

However as discussed in chapter 4 the final step of the forfeiture process arises under sections 4 and 4(a) of the Proceeds of Crime legislation. These allow for a transfer to the relevant Minister (after seven years) – or a consent disposal order (and subsequent transfer) – to be made over property which has been deemed to be the proceeds of crime. Since its inception the following amounts have been generated as returns to the exchequer in this manner:\(^{48}\)

Table 2: Amounts generated from disposal orders.

<table>
<thead>
<tr>
<th>Year</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
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<tbody>
<tr>
<td>Amount</td>
<td>€275,875.43</td>
<td>€2,002,738.41</td>
<td>€3,221,584.14</td>
<td>€1,435,340.59</td>
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<table>
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<tr>
<th>Year</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
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<tbody>
<tr>
<td>Amount</td>
<td>€2,802,460.37</td>
<td>€1,263,388.69</td>
<td>€2,810,902.52</td>
<td>€3,431,728.26</td>
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<table>
<thead>
<tr>
<th>Year</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount</td>
<td>€4,850,540.17</td>
<td>€1,038,680.52</td>
<td>€467,152.37</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount</td>
<td>€1,642,962.29</td>
<td>€1,412,920.41</td>
</tr>
</tbody>
</table>

\(^{45}\) On the nature of interim orders see chapter 4 text around n.97.
\(^{46}\) On the nature of interlocutory orders see chapter 4 at text around n. 107.
\(^{47}\) See http://www.justice.ie/en/JELR/Pages/PR16000015. (last accessed June 18th 2016.)
\(^{48}\) Table compiled by current author from data available in the annual reports of the Bureau. The table is presented using the actual figure given in the appropriate report. The reporting is not consistent with respect to rounding. The figures for 1997 – 2000 have been converted from Irish pounds.
As a result of the economic downturn, experienced in Ireland, in the years following 2007 proceeds of crime that had been invested in the property market have ‘either been lost or significantly reduced.’\textsuperscript{49} However the potential that property might be in negative equity did not affect CAB’s overall approach of ensuring ‘that those involved in serious organised crime are not put in the advantageous position by being able to remain in the property and thereby benefit from the proceeds of crime.’\textsuperscript{50} Additionally as a result of its actions the bureau occasionally obtains assets which result in a major success in the fight against criminality but from which a direct monetary gain cannot be extracted. For instance in 2007 two bullet proof BMW vehicles, that had been seized, were assigned for use of An Garda Síochána.\textsuperscript{51}

The aforementioned targeting of lower and middle ranking criminal actors and associated also has an impact on the overall monetary return by the bureau. However with such assets – for instance motor vehicles – it is necessary to make early applications to ensure that the value of the asset does not depreciate. Yet again the bureau feels that such targeting gives it ‘a higher visibility’ at local levels. It also reflects an efficiency of output approach where matters can be fully concluded in a short time period. In 2007 an order was sought over a vehicle, the applications heard and the vehicle subsequent disposed of all within a five month period.\textsuperscript{52} The beneficial effect, in the bureau’s opinion, that such an approach has on society in general can be gleamed from the following statement:

“While maintaining a focus on major criminal targets, the Bureau still continues its policy of also targeting lower value asset. … the effect of this policy is resulting in less return for a higher number of Orders. It is the Bureau’s view that this policy, whilst not necessarily returning a significant income to the State, does engender public confidence in the criminal justice system as a whole and acts as a deterrent in general. [my emphasis] It is for this reason that the Bureau proposes to continue to effect such an approach and deliver active support to local communities.”\textsuperscript{53}

\textsuperscript{49} Supra n.9 at 6.
\textsuperscript{50} Supra n.25 at 15.
\textsuperscript{51} Supra n.16 at 17.
\textsuperscript{52} Supra n.11 at para 5.1.
\textsuperscript{53} Supra n.16 at 39.
As is discussed below the returning of monies to identifiable victims of crime – and the repayment of fraudulent social welfare claims and outstanding tax liabilities - also serve to reduce the figures displayed in table 2. Nonetheless these figures represent significant success for the bureau in its operations. Given that all of such monies were accumulated without the need for any criminal finding and the nature of its work it was to be expected that the Bureau would face many legal challenges during its early years of operation. These however have helped to establish its operation boundaries which have, inter alia, aided in preventing risks of injustice and assisted in ensuring fairness towards those tangentially affected by its action. The courts first considered the risk of serious injustice in this area in *FJMcK v. GWD* \(^{54}\) where McCracken J. set out the following seven step approach that a trial judge should take when any such question of injustice arise:

“(1) he should firstly consider the position under s. 8. [pertaining to evidence] He should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief;

(2) if he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised officer is evidence;

(3) only then should he go on to consider the position under s. 3. [pertaining to interlocutory orders] He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the member or authorised officer under s. 8 and indeed the evidence of the other police officers;

(4) he should make a finding whether this evidence constitutes a *prima facie* case under s. 3 and, if he does so find, the onus shifts to the defendant or other specified person;

\(^{54}\) [2004] 2 IR 470.
(5) he should then consider the evidence furnished by the defendant or other specified person and determine whether he is satisfied that the onus undertaken by the defendant or other specified person has been fulfilled;

(6) if he is satisfied that the defendant or other specified person has satisfied his onus of proof then the proceedings should be dismissed;

(7) if he is not so satisfied he should then consider whether there would be a serious risk of injustice. If the steps are followed in that order, there should be little risk of the type of confusion … case.”\textsuperscript{55}

These principle were subsequently applied in \textit{CAB v. SR and Christopher Russell}.\textsuperscript{56} The facts here pertained to a property that the bureau were asserting representing the proceeds of crime. The spouse of the second defendant (whose whereabouts were unknown) asserted that her husband was not engaged in criminality and if her belief was erroneous it was still a genuinely held belief and she had no knowledge of his criminality. The property in dispute was in fact the family home of the couple which had been purchased by a third party and gifted (gift tax had been paid) to the spouse of the second defendant. In relation to the factual matrix the court noted:

“Notwithstanding the complete absence of significant criminal convictions recorded, cogent evidence has been put before the courts of links that are both close and extensive between the second named respondent and persons involved at the upper levels of serious crime. There has also been evidence linking him directly to the seizure of 40kg of cannabis on the 11th June, 2009, though it must be appreciated that Mr Russell has never been convicted or even charged in relation to that incident.”\textsuperscript{57}

The court concluded that on the balance of probabilities the second defendant had indeed been involved in serious criminality to a degree and extent that would have generated significant financial rewards. Furthermore the lifestyle of the defendants was deemed to be inconsistent with the income level within which the couple claimed to operate.\textsuperscript{58} In applying the above seven step approach\textsuperscript{59} the court concluded upon

\textsuperscript{55} \textit{Ibid} at 491 – 492.
\textsuperscript{56} Unreported, High Court 16\textsuperscript{th} July 2014.
\textsuperscript{57} \textit{Ibid}.
\textsuperscript{58} \textit{Ibid}.
\textsuperscript{59} The principle were reviewed and endorsed in McKenna v. David P. Beltion, Unreported, 14\textsuperscript{th} March 2008.
whether the orders sought by the Bureau would lead to a serious risk of injustice for the spouse and the minor children who lived with her at the property. Birmingham J. stated that he accepted that the spouse ‘may have made some degree of contribution through whatever very limited earnings she had ... and through her child benefit payments. I am also prepared to accept that [the spouse] as a stay at home mother, or a largely stay at home mother, would have contributed to the upkeep of the household indirectly. I also cannot ignore the fact that the property is a modest one in what would once have been described as a local authority area. I make that observation because it seems to me that quite different considerations would apply if one was looking at so called trophy homes.’ As a result he concluded that the best interests of justice would be served by the spouse receiving 12.5% of the equity that existed in the property in the question.

The Bureau now mirrors this approach in its work and is conscious that, as a result of it work, criminals may not display their wealth in such an ostentatious manner as may have been the case heretofore and prior to the establishment of the bureau. In this respect the bureau have reacted to criminals using lower value vehicles in an attempt to avoid detection and have continued their policy of targeting all assets (irrespective of value) believed to the proceeds of crime.

In terms of balancing the dyads between property rights and the actions pursued by the bureau the Supreme Court has noted that there is a strong public policy dimension to the application of proceeds of crime legislation used by CAB. That policy ‘is to ensure that persons do not benefit from assets which were obtained with the proceeds of crime irrespective of whether the person benefiting actually knew how such property was obtained with the proceeds of crime but subject to whether or not such person may have been a bona fide purchaser for value, where different considerations may arise.’

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60 Unreported, High Court 16th July 2014.
61 Supra n.25 at 15.
Additionally the court approved the reasoning established in *CAB v. H*. In this instance the respondents were again married and the female contended that neither she nor the children were accused of any criminal wrongdoing and were the bureau to be allowed take possession of the property it would render her and her dependent children homeless. However Feeney J did not accept the validity of any such argument. He asserted that:

“The fact that the notice party and her family need a home cannot of itself operate to defeat the public interest requirement identified in the legislation of depriving a person of property representing the proceeds of crime. There is no basis for treating a person in a position such as the notice party and her family on a more favourable basis, than a family who lose their home as a result of a possession order following inability to discharge mortgage repayments or as a result of an inability to pay rent. The notice party and her family have no entitlement to the use of a particular premises. If it were not for the use of the premises obtained from the proceeds of crime the notice party would have to have provided for herself or have provided for her alternative accommodation. The fact that the notice party and her family will be placed in a position if a disposal order is made … where she would have to seek alternative accommodation is of itself not a basis for discharging … orders or refusing the relief sought by the plaintiff herein. A person in possession of premises representing the proceeds of crime has no constitutional grievance if deprived of their use …”

Furthermore he noted that whilst article 8 of the European Convention on Human Rights (ECHR) does protect legitimate interest in a family home a delimitation from any such interest is permitted in the interests of good governance. The aforementioned public policy underpinning the proceeds of crime was an example of such governance in action. It is suggested that these cases serve to demonstrate a refocusing and hollowing out of aspects of criminal justice in Ireland and a rebalancing in favour of the State over its citizens. A further example may be offered in that of *CAB v. John Kelly* which again concerned a family home which was the subject of a forfeiture order. However in this instance the unique factor was that the couple in question had instigated family law proceedings for separation as a result of marital breakdown. These proceedings were held *in-camera* and CAB were not put on notice of the

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64 Ibid.
65 Ibid.
66 [2012] IESC 64
proceedings despite the fact that there was an ongoing claim by the bureau over the family home. The Supreme Court stated that the Bureau should indeed have been put on notice of the proceedings - highlighting again the prevailing influence that the bureau now has once it has initiated proceedings against a property believed to be the proceeds of crime. Additionally the court reaffirmed the need for such orders over property as necessary ‘in the pursuit of a legitimate aim for the prevention of crime and for the protection of the rights and freedom of others. In such circumstances, these orders may be necessary in a democratic society where the objective pursued in the legislation is to ensure that individuals do not benefit from assets obtained from the proceeds of crime and are divested of such assets.’ Furthermore any such orders do not breach any constitutional rights as exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.

In terms of the Bureau’s operational approach in achieving such common good the courts have complimented it on the manner in which it conducts its investigations. Again the bureau’s business approach of delivering value for money is evident where it conducts work ‘in a cost effective manner’ and ‘is conscious of the extreme financial pressures on public finances.’ This credit and approach means that the Irish legislature is unlikely to attempt to restrict the bureau in its activities and approach. Furthermore the bureau has on occasion used its powers to return money that was defrauded from them to victims.

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67 Ibid at para 19.
68 Ibid at para 34.
71 Ibid at 12.
72 Ibid at 13.
73 Indeed there have been calls for the establishment of “mini CABs” (that could potentially make use of the divisional criminal asset profilers) to target particular aspects of criminality. “Fitzgerald seeks extra resources for Garda to control feud” Irish Times May 31st 2016.
The case of *CAB v. Eamon Kelly*\(^74\) can be taken to demonstrate an example of the Bureau being involved in restitution to victims.\(^75\) Here the respondent had been the organiser of a ‘ponzi’ scheme where investors bought into what was in fact a non-existent investment portfolio. The process of investigation followed by the bureau meant that individual investment amounts could be traced and returned to the victims. In this regard the bureau have noted that the exercise was conducted in a cost effective manner thereby ‘avoiding potential costs which victims may have been exposed to using alternative remedies.’\(^76\) A similar approach to controlling costs arose from the case of *CAB v. Routeback Media AB*\(^77\) where the State was allowed to discharge its legal costs from monies the remainder of which was to remain frozen, as normal, for a further seven years. This was the first application under section 3(3a) which was introduced under the *Proceeds of Crime (Amendment)* Act in 2005.\(^78\) This has the potential to not only recover costs incurred by the State but also to, in the words of the bureau, discourage respondents making wasteful applications to the Court.\(^79\) It is respectfully suggested however that this may not be the case as respondents may still adopt the view that their proceeds will be lost in any event thus the proceeds going to cover the State’s cost – as opposed to being ultimately forfeited to the State – may not be a huge deterrent.

\(^74\) [2012] IEHC 595.
\(^75\) The bureau has also being involved in return funds to victims in other jurisdictions. This serves the dual purpose of denying those involved in criminality the opportunity to benefit from the proceeds of crime (regardless of whether the ultimate benefactors are the Irish exchequer, victims, or the exchequer of different jurisdictions) but also ‘enhances the effectiveness of the International Co-operation between the Bureau and the authorities’ in other jurisdictions. Criminal Assets Bureau 2008, *Criminal Assets Bureau Annual Report 2007*, Stationary Office: Dublin at para 5.6.
\(^76\) *Supra* n.70 at 13.
\(^77\) Unreported, High Court 20\(^{th}\) January 2011.
\(^78\) The section provides that:

‘(3A) Without prejudice to sections 3(7) and 6, where an interim order is in force, the Court may, on application to it in that behalf by the applicant or any other person, vary the order to such extent as may be necessary to permit—
(a) the enforcement of any order of a court for the payment by the respondent of any sum, including any sum in respect of costs,

\(^79\) *Supra* n.70 at 13. The bureau also takes steps to protect assets which may come under its control such as insuring property.
In adopting these types of operational approaches the bureau is, in certain ways, mirroring the community safety partnership approach that has been trialled in England and Wales. It has been summarised that this approach:

- Accepts that there is no single agency solution to crime and disorder
- Recognises the need for social responses to crime
- Allows for a holistic approach to crime, community safety and associated issues which is ‘problem focussed’ rather than ‘bureaucracy focused’
- Affords the potential coordination and pooling of knowledge, capacity and resources.80

It is suggested that the operational approach of CAB as set out to this point reflects significant aspects of this approach. CAB is, as discussed, a multi-agency unit that also gains support from other Garda units. It takes both a proactive and reactive stance dealing with actual problems in society in new and novel ways. Finally it regularly notes that is success lies, in part, in the fusion of its individual components working as a cohesive unit.81 The approach however has potential far reaching consequences for the overall criminal justice landscape. It reflects restructuring of the approach to dealing with organised criminality. A structure whereby the needs of the State triumph the individual citizens due process rights.82 Indeed Kilcommins and Vaughan raise the question of whether modern criminality is moving from one of individual guilt to one of social danger and whether ‘the delicate equilibrium between freedom from government and public protection is being unsettled by an anxious State determined to show strength by “tooling up” in the fight against crime.’83

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81 It has stated that: ‘[I]n many respects, the level of commitment to co-operation between the staff of the various state bodies represented at the Bureau has been the key to the success achieved to date. This level of co-operation remains the cornerstone of the Bureau’s effectiveness in facing the challenges which lie ahead.’ Criminal Assets Bureau (2011) Criminal Assets Bureau Annual Report 2010, Stationary Office: Dublin at 7.
Giving the overall context of this chapter it is applicable to again consider such analysis from a procedural viewpoint. As reflected elsewhere one of the main tools in CAB’s arsenal is the power of forfeiture exercised under the Proceeds of Crime Act 1996 (as amended). In chapter two of this particular piece of work due consideration was given to the criminal/civil divide as it operates in this jurisdiction. It is now appropriate to revisit that concept from the operational standpoint of CAB and consider where the Proceeds of Crime Acts lie within that framework.

**CAB, Proceeds of Crime and the Criminal/Civil Divide.**

It has been established, in the aforementioned chapter, that the characteristics of criminal law were identified as being, *inter alia*, punishment of offenders (as opposed to restitution or compensation), prevention and deterrence. Thus the characteristics of criminal law, generally, are reflected in its coercive, controlling nature and its function as society’s formal method of social control. The underpinning reasoning behind the divide is considered by Mann, where he states that it is ‘because of the different public interests implicated by wrongful conduct and because of the fear of the intrusive and punitive use of state power.’ Thus given the operational approach of CAB, as just outlined, and the above concerns pertaining to the rebalancing of the equilibrium between the State and the individual questions arose about the ‘Kafkaesque’ nature of the legislation. Further it was asserted by those seeking to deny the validity of the proceeds of crime legislation – which operates under the civil balance of probabilities requirement – that it was in fact ‘an ersatz civil proceeding’ that was merely a disguise for ‘an attempt by the Oireachtas to impose a criminal sanction in a civil context.’

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84 The approach that CAB takes in the Revenue and Social welfare arena will be considered in the next two chapters.
The seminal question for CAB’s future operational direction arose in two cases (which later became joined in the Supreme Court). In *Gilligan v. CAB* the plaintiff contended that the Proceeds of Crime Act 2006:

> was “Kafkaesque” in that on the word of a chief superintendent or a revenue official an individual can have his assets frozen, put into receivership and disposed of on the basis of assumed criminality, without charge, indictment, trial or conviction. He emphasised, in regard to this general aspect as well as to other particular aspects of the Act, that the Act is in essence a criminal or quasi-criminal statute and demanded what he described as strict scrutiny from a constitutional point of view. The Act, he said, enabled the Garda Síochána to short circuit and circumvent ordinary criminal procedures and to abandon normal methods of criminal investigation. As far as the plaintiff himself was concerned there was no current charge against him in this jurisdiction.”

Amongst its responses the State adopted a *real politick* argument setting out the factual background to the introduction of the act and the changing and evolving nature of criminal activity in Ireland. The then acting Chief Bureau Officer stated that during the 1980’s and 1990’s major criminal figures had been able to distance themselves from any direct involvement in the commission of actual offences and thus only the lower level ‘agents’ in the criminal association could be charged and prosecuted despite the fact that the offences in question were having an ‘extremely detrimental effect on Irish society.’

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88 [1998] 3 IR 185
89 Ibid at 197.
90 For detail on the legislation see chapter 4, text around n.96.
91 *Supra* n.69 at 205. A Deputy Commissioner of the Gardai stated that: “During the 1980's there had been a rather high level of serious armed robbery and the Gardai had been reasonably successful in dealing with those who were actually committing those crimes. Quite a number of those particular criminals served prison sentences. However the Gardai were not so successful in recovering the proceeds of the armed robberies and when the persons who had been convicted of the crimes were released from prison they "diversified" and eventually moved into the area of supplying drugs. Over time they completely removed themselves from the actual movement of drugs in that they had … "a number of runners on the ground, trusted people that would courier the drugs, not alone through Ireland but through mainland Europe". The principals in this trade were able to pay cash to various international traffickers in drugs and then make very large profits on re-selling the drugs in Ireland. … Both the principals and the leading couriers became extremely wealthy and were able in a sense to command respect within the criminal community. *Supra* n.69 at 204 – 205.
92 Ibid at 205.
With the benefit of hindsight of the subsequent operation approach taken by the Bureau it worth noting the summation comments of this situation by Garda Deputy Commissioner Conroy where the stated that it was ‘an example and an inducement to other would-be criminals to embark on a life of crime, as leading to wealth and power.’\(^93\) Furthermore that ‘it caused frustration and disillusionment among other citizens together with a tendency for the criminal justice system as a whole to fall into disrepute. He felt that that made ordinary people less likely to co-operate with the Gardaí either by coming forward as witnesses or by generally partaking through the giving of information.’\(^94\) Importantly he was of the opinion that the work of the bureau and the application of the Proceeds of Crime Act ‘levelled the playing field a little bit’ as between major criminal figures operating in Irish society and that society.\(^95\)

In reaching a decision on whether the legislation should be more correctly considered under the criminal rather than civil law the importance of the factual situation as just outlined was considered by McGuinness J where she noted that the:

> “… court must, as matter of proportionality, consider whether the situation as regards major crime in this country described in the evidence of the two garda witnesses and referred to in the various submissions, in fact justifies the enactment of measures which are, if not draconian, at least out of the ordinary run of civil legislation.”\(^96\)

In adopting this approach the court went on to apply the facts at bar to the indicia for identification of a criminal law – as set out in chapter two of this work – that were established in the *Melling* case.\(^97\) However in relation to the proceeds of crime legislation McGuiness J. stated that:

> “It is quite clear from the evidence of both the garda witnesses that they perceive the procedures under the Act of 1996 as being a method of attacking a certain form of criminality. By divesting major criminals of their ill-gotten

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\(^93\) *Ibid.*

\(^94\) *Ibid.*

\(^95\) *Ibid* at 206 – 207.

\(^96\) *Ibid* at 214.

\(^97\) *Melling v. O’Mathghamhna and the Attorney General [1962] IR 1.* See chapter 1, text around n. 16 – n. 27.
gains, they hope to reduce their power and influence and to render them more vulnerable to arrest, trial and conviction. The means used in the procedures under the Act of 1996 do not, however, have "all the features of a criminal prosecution". The action is strictly speaking an action "in rem" rather than "in personam"; … More importantly, there is no question of the arrest of a respondent or his remand in custody or on bail and there is no specific penalty of fine or imprisonment. It is true that money or property may be removed from the possession or control of a respondent, but if this money or property can be shown to the satisfaction of the court to be the proceeds of crime, its removal could well be viewed in the light of reparation rather than punishment or penalty."98

The learned justice thus concluded the legislation did not indeed meet the indicia from *Meelling* and the forfeiture procedures – at the heart of cab’s disruptive neutralisation approach – were civil matters and not criminal. This finding was confirmed in the Supreme Court, on appeal, where it was held that under the legislation ‘there is no provision for the arrest or detention of any person, for the admission of persons to bail, for the imprisonment of a person in default of payment of a penalty, for a form of criminal trial initiated by summons or indictment, for the recording of a conviction in any form or for the entering of a nolle prosequi at any stage,’99 and thus forfeiture orders under the legislation were in fact civil matters. However Keane J. did go a step further than the High Court and acknowledged the unusual nature of the ‘radically new’100 type of legislation that the State had adopted in its fight against modern criminal methods of operation. He stated that:

“this unquestionably draconian legislation was enacted by the Oireachtas because professional criminals had developed sophisticated and elaborate forms of what had become known as "money laundering" in order to conceal from the authorities the proceeds of their criminal activities.”101

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99 Murphy v. GM, ph, PC Ltd, GH; Gilligan v. CAB [2001] 4 IR 113 at 147.
101 *Supra* n.199 at 136. He also asserted that had the forfeiture provisions been found to be criminal in nature then it ‘is almost beyond argument that … they would be invalid having regard to the provisions of the Constitution.’ *Supra* n.99 at 135.
This approach by CAB – receiving authority under statute and passing Constitutional muster – represents an adoption to reality by the Irish State. At the original *Gilligan* trial McGuiness J. had noted that the forfeiture of the proceeds of crime ‘could well be viewed in light of reparation rather than punishment or penalty’. Similarly at the *Dáil* debate on the introduction of the legislation the true intent and purpose underpinning the legislation was offered, per Deputy O’Donnell, in the following terms:

“If we cannot punish, deter or reform these people we must set a new aim, to stop them from operating their evil trade … If we cannot arrest the criminals, why not confiscate their assets?”

The result of this refocus, and reduction of the burden on the State in its attempts to control criminality, and its potential consequential effect on the nature of the Irish criminal justice landscape is perhaps best encapsulated by O’Higgins J. When considering the Proceeds of Crime Act he stated that there ‘is no offence, there is no finding of guilt or innocence, there is no necessity for *mens rea* and there is not always, and perhaps not even usually, a penalty.’ There is of course the opportunity to neutralise criminality by such civil forfeiture.

**Conclusion.**

CAB was established as creature of statute that could have been removed by statute at any juncture. However in this chapter it is contended that the Bureau has been successful in proving, through is operations and approach that it is a rational – rather than emotional – response to the challenges of modern criminality and that, resultantly, its future is secure and its importance is expanding. Prior to its establishment, the legal focus had been on assets arising from previous criminal activity. However the intent underpinning the Bureau and the proceeds of crime legislation was to ‘prevent assets being used as the seeds of future crimes.’ Following such wide assertions CAB has now established itself as a significant contributor to criminal control and societal wellbeing in Ireland. It has targeted all levels of criminality in an attempt to reassure

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102 *Supra* n.70 at 218.
104 Murphy v. GM PB PC Ltd. [1999] IEHC 5 at para 125.
105 *Dáil Debates* July 2, 1996 vol.467, col.2435
A concerned society of the State control that still exists in Ireland. It is not restrained by financial demands and so can be ‘relentless’ in its pursuit regardless of the time taken to pursue a matter. Its current Chief Officer has stated that:

“One message I would say … is that we are relentless. The time aspect is something we’re not particularly concerned with, it’s the relentless pursuit of criminal assets that we’re concerned about. Our main focus is never deflected, we will pursue cases from beginning to end.”

Such a strategy allows it to target low and middle ranking criminal agents in addition to the more significant principal agents – which are still one of the main priorities for the bureau. To date it has returned over €26 million – in direct funds from forfeiture of assets – to the Irish State as well as other assets and significantly more than that figure from revenue demands and social welfare repayments and savings. It also claims significant social success in aiding with community safety and deterring would-be criminality. CAB has also been in a position to return value to individuals where they can be directly identified as the victims of financial criminality. It has achieved all of this success with a relatively small staff and small budget but has engaged in professional training and now has a team of 215 divisional criminal asset profilers operating to support its work. Such profilers would appear to be key elements in CAB’s now accepted role as an investigatory body working in conjunction with An Garda Síochána.

The operational approach of the Bureau and its actions using the proceeds of crime legislation have been challenged in the Irish courts. In this chapter consideration was given to the operational implications of those challenges and how operational fairness has been achieved. Whilst balancing fairness the courts have stated that there is a strong public policy dimension to the civil forfeiture used by CAB and have asserted that persons benefitting from proceeds of crime can have no legal grievance when that benefit is removed. There is a potential for the amount of legal challenges against the action of CAB to decreases. One of the most regular litigants against CAB was one of the original ‘targets’ when the Bureau was first established. However at this juncture the High Court have stated that:

106 ‘We are relentless says Criminal Assets Bureau boss’ Irish Examiner, July 1st 2013.
“As Dr. Paul McDermott points out in the introductory chapter to *Res Judicata and Double Jeopardy*, the notion that there should be some finality to litigation is a fundamental principle of the common law. It is also, as he points out to be found in Roman Law, Hindu Law, African Tribal Law, Native American Indian Law, Canon Law, and many modern civil codes. I do not doubt that the plaintiffs are greatly distressed at what the Criminal Assets Bureau (CAB) has been seeking to achieve. That they would seek to resist and indeed frustrate CAB in their endeavours is scarcely surprising. In a situation where they believe they have identified a point of major significance, that they would wish to pursue it and would be reluctant to let go of it is entirely to be expected. However, there is a limit to how often and in how many different ways the same point can be argued. There is a limit to how long and how often any drum can be banged. That limit has now been reached, if indeed not exceeded.”

Given the overall approach of CAB using civil forfeiture and its attendant implications as set out in this chapter it is axiomatic to suggest that this represents a major discontinuity and atypical approach to dealing with criminality in Ireland representing an apersonal, non-moral approach to law. Yet this departure from the golden thread of criminal law in not entirely new in the common law world. As far back as the 1920s concerns were being raised (in the US) that ‘[t]he function of securing social interest through punitive justice seems to be insensibly slipping away from courts and hence from law and in substance, if not in form, to be coming more into the hands of administrative agencies.’

In the specific terms of the context of this chapter this new development as it applies to CAB has been considered by Kilcommins and Vaughan. They refer to the use of the proceeds of crime legislation, by CAB, as ‘criminal administration as opposed to criminal justice where the notion of mens rea becomes secondary to the push for the State to assert its authority and neutralise criminality’.

Based on the acceptance by the courts of this new regulatory type approach – with a focus on efficient and security over rights – and the legislatures broad based support for a hollowing out of criminal law it would appear that the move from ‘individual guilt to one of social danger’ is an approach that is now firmly entrenched in the criminal justice landscape of Ireland.

109 *Supra* n.84 at 92.
Chapter 6.

*CAB and Revenue – The Operational Approach.*

**Introduction.**

This chapter will continue with the framework established in the last chapter *vis-à-vis* the operational and procedural based approach. In this instance the focus will be on the revenue aspects of the Bureau’s work – allowing again for demonstration of how Ireland has, in part, moved to a new model of criminal justice and the targeting of certain aspects of criminality. In respect of the multi-disciplinary nature of CAB the revenue actions have developed to play a key role in achieving the Bureau’s remit of depriving criminality of the proceeds of crime. The use of revenue powers to target, deprive and discombobulate criminals of their ill gains is not a new departure in the wider common law world but its use in Ireland as a tool of disruption, discontinuity and financial neutralisation was a new departure for the Irish State. The old adage that nothing is certain but *death and taxes* is a useful axiom to demonstrate the enshrined position that taxes have in the general psychic. It is accepted (by most) that a tax will be levied or charged on income generated and must be paid to the relevant taxing authority – or risk further sanction. It is an independent function that is applied to all citizens and is administered on behalf of the State. It is only when questions of fairness or default arise that it is necessary to resort to judicial intervention – which is the norm with a civil administrative function.

This of course also represents the legal position that is long established, over many epoch, for the payment of taxes. The novel development for the use of revenue powers as a tool of criminality in Ireland centres, firstly, on what actually constitutes income. This chapter commences with this particular conundrum. The original position in Ireland was that it would be morally unacceptable for the State to in anyway benefit from the proceeds of crime and would be akin to condoning crime. However we have, as shall now be outlined, evolved to a more pragmatic position where all income – regardless of its legitimacy or otherwise – may be subject to tax.
CAB now has the power, *inter alia*, to act as the tax inspector for an individual and resultanty issue tax assessments. As a result of this power we will continue the chapter by specifically viewing CAB’s revenue approach from a results based perspective. This will be considered in terms of actual income generated from such tax assessments issued by CAB and the significant power and benefit (in terms of remit) that this approach gives to the Bureau. The chapter will continue with its operational focus by considering the limited and narrow appeal options that are available to the assessed tax payer. This will serve to further highlight the very significant power that CAB has to operate independent of any specific court direction to target specific criminal individuals and thus disrupt criminal enterprise via deprivation of a key component. Finally, the chapter will then conclude with a consideration of how the Bureau's activities in this particular area have been subject to judicial scrutiny and how that scrutiny has demanded precise compliance with tax statutes (from both enforcer and assessed) as opposed to raising any conceptual or indeed moral considerations.

**The Taxation of Illegal Assets.**

We will now establish how from a position whereby traditionally profits from trading which was known to be completely illegal were not taxable as to do so was considered to be the State profiting from illegal activities and as being akin to condoning such activities to one where taxation is a major power of the authorities in targeting criminal activities. We will trace the development of Irish case law in this regard and consider why a similar approach was considered, but not adopted by our nearest common law neighbour. The section will concluded with the introduction of legislation that reversed the common law position and made, in the long term, the adoption of revenue powers to tackling modern criminality a relatively painless and moreover a legally sound transition.

The original position in Ireland in regard to the taxing of illegal assets was established in *Hayes v. Duggan* [1929] where the question arose as to whether profits from an

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illegal sweepstake were assessable for the purpose of income tax. It was contended by the respondent bookmaker that he could not be assessed for tax on the sweepstake because it was, *inter alia*, an ‘unlawful’ and ‘criminal’ enterprise and as such the state could not gain from such proceeds. In arguing this case, in addition to a number of very pertinent persuasive precedents, consideration were given to range of factors which provide an ideal context for establishing a framework for the traditional perspective on the taxation of illegal activities in this jurisdiction.

In considering whether it was appropriate to assess the respondent for tax the Supreme Court were primarily concerned with the interpretation of the relevant legislation and whether it applied in the circumstances of the case. This may be distinguished from the respondent’s moral arguments concerning the question of whether the state could benefit from the proceeds of crime. In delivering judgment Kennedy C.J. did not appear to give credence to such issues of morality but instead felt that ‘[I]t is competent for the sovereign Legislature to require crime to yield a quota out of its profits to the national revenue. The question is whether, upon construction of the statute, the Legislature has done so.’ Thus the question was not whether it was acceptable to tax criminal activities – the then Chief Justice seemed to accept without question that such a proposition was possible – but whether it could be reasonably implied into the legislation that it was the intention of the legislature that the relevant act would apply to criminal activities. He held that it did not. This was due to the fact that he felt an activity that is prohibited and punishable by the state could not, in the absence of express provisions, be supposed to be within the contemplation of the legislation. He went on to reason that such an approach was tenable as it could not be contemplated that the legislature expected activities to be carried on in contravention of its own criminal code. If the opposite were the case then the criminal law would be violated at every stage of the tax enforcement process. Interestingly Fitzgibbon J. whilst concurring with the overall view of the Chief Justice admitted that his mind had fluctuated on the matter and he was still not free from doubt but still felt that it was

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2 He also claimed that the profits were not profits for the purposes of the income tax acts and that it was not a trade, profession or occupation also as required by the relevant legislation. The Inspector of Taxes contended that the sweepstake was only technically illegal as it was tolerated by the government. *(Ibid at 409)* The Supreme Court emphatically rejected this latter argument. *(Ibid at 417)*

3 *Ibid* at 416.

4 *Ibid* at 417
not within the contemplation of the legislature to take profits that came ‘exclusively’ from criminal acts.\(^5\)

It is this concept of *exclusive* criminal trading that provides a limitation on what might otherwise be a very wide judgement. Fitzgibbon J. made a clear distinction between trades where a portion of the profits were derived from illegal activities and trades where the entire activity was illegal.\(^6\) In the latter the entire *raison d’être* is to carry out criminal activity where as in the former significant elements of the profit made arise from legal activities and it may be difficult to distinguish such profit from any that is illegally acquired. However any such problems of distinguishing are resolved by the maxim *nemo allegans suam turpitudinem est audiendus*. This essentially provides that once the revenue have raised a tax assessment against an activity that is *prima facia* legal then the respondent taxpayer may not claim an exception on the basis that some of their activities are illegal.\(^7\) To do otherwise would be to allow such an individual rely on their own illegal activities to avoid paying tax on their legal activities. The important factor here is of course that in order to be assessable for tax purposes the enterprise in question must, from the revenue’s perspective, be *prima facia* legal. Thus whilst the *Hayes v. Duggan* case did establish a precedent preventing the taxation of illegal activities it only applied where the entire enterprise was illegal and where the revenue knew that it was illegal.\(^8\) Further such an approach was based exclusively on statutory interpretation and the court clearly indicated that if such an interpretation was inaccurate then the legislature could quite easily clarify the situation in any subsequent finance act.\(^9\) Thus the Supreme Court did not rule out the taxing of illegal assets *per se*. Despite this the legislature did not act and when a similar situation arose in *Collins v. Mulvey* [1956]\(^10\) the trial court found that profits derived from an illegal enterprise (illegal gambling machines) could not be taxed because it had

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\(^5\) *Ibid* at 418

\(^6\) *Ibid* at 419 – 420. See also the judgement of Murnaghan J. where he noted that ‘there is a clear distinction between the carrying on of a lawful business in the course of which acts prohibited by a statute may or may not be committed and the setting up of an enterprise every act and step of which is a criminal offence.’ (*Ibid* at 421)


\(^8\) Profits that arise from contracts that are illegal due to the fact of being unenforceable are taxable. See *Partridge v. Malladine* (1886) 18 Q.B.D. 276

\(^9\) *Supra* n.4 at 421.

\(^10\) [1956] I.R. 233
become known to the revenue as a result of an earlier assessment that the business was an illegal one.\(^\text{11}\) Thereby the revenue in complying its assessment could not meet the second leg of *Hayes* of presuming that the enterprise was, *prima facia*, a legal one.

Further consideration was given to the *Hayes* decision in a number of cases in the English courts but the Irish precedent was not followed. In particular in *Mann v. Nash* [1932],\(^\text{12}\) the facts of which concerned the use of gaming machines, the court could not see a reason for distinguishing between a trade that was entirely illegal and one which contained some illegal transactions.\(^\text{13}\) In establishing this initial schism between the positions of the two jurisdictions the court went even further in considering and ultimately rejecting the Irish position. As it was an outright rejection of the Irish principle by a common law court it is of value to recount the views of the English court. In considering whether the State should be in a position to take a benefit from crime Roulatt J. rejected the argument that the State could not profit from an activity that it had itself prohibited. He raised the query:

> “Does the State keep its revenue eye open and its eye of justice closed? I must say, I do not feel the force of that observation at all. Would it have made any difference, I ventured to ask in the argument, if the State had kept both its eyes open and prosecuted the man for the lottery and taxed him for profits at the same time?”\(^\text{14}\)

He continued with the opinion that in raising a tax assessment the revenue was merely looking at an accomplished fact and not actually condoning it. If that fact is a trade for the purposes of income tax legislation then it should be subjected to tax. In referring back to the Irish case and again addressing whether the State is to take a share of an unlawful gains he concluded that:

> “It is mere rhetoric. The State is doing nothing of the kind; they are taxing the individual with reference to certain facts. They are not partners; they are not

\(^{11}\) Corrigan notes that if the *nemo allegans suam turpitudinem est audiendus* maxim had been applied correctly then the disclosure would not have been allowed at the appeal of an earlier assessment. *Supra* n.7 at 1059

\(^{12}\) (1932) 16 T.C. 523. It has been noted that this is one of the first cases in which an Irish decision was considered by an English court. See Hunt, P. (2001) ‘The Criminal Assets Bureau and Taxation – Recent Developments’ 14 *Irish Tax Review* 573 at 573.

\(^{13}\) (1932) 16 T.C. 523 at 528.

\(^{14}\) *Ibid* at 530.
principals in the illegality; they are merely taxing a man in respect of those resources. I think it is only rhetoric to say that they are sharing in his profits, and a piece of rhetoric which is perfectly useless for the solution of the question which I have to decide.”

In so asserting the English court emphatically rejected the Irish position on the taxing of illegal activities from a number of fronts. It based its position on the basis that a tax assessment can only be raised after the fact, where that fact happens to be illegal the State is not condoning it but merely subjecting it to the tax code. Further they ruled that the State is in no way an element of the illegal activity (presumably in much the same way as it would not be an element of legal activity) and again is merely applying the legislation to an activity which may be considered a trade.

Thus from this 1932 decision it was possible in England and Wales to tax the proceeds of illegal activity and the knowledge or otherwise of the revenue authorities as to the legal or illegal source of the income was effectively irrelevant. Despite this development and the clear indication by the Irish judiciary in Hayes that their judgment was one of statutory interpretation only – as opposed to a moral or legal imperative – which could easily be changed, the position of it being unlawful to tax a trade or activity where it was entirely illegal and known to the revenue authorities to be so remained in Irish law until 1983. It was altered by section 19 of the Finance Act of that year. The reversal of position was welcomed in Dáil on the grounds that it would be a ‘weapon’ of the Revenue Commissioners that would be of assistance in ‘clearing up some of the big criminal operators’ and ‘putting them out of business altogether.’ There was however some criticism from the opposition of the day who suggested that a better approach would be to confiscate all profits from illegal activity and punish those engaged in such activities. Indeed it was stated that ‘[T]he very idea of putting such a provision in legislation seems to suggest an acceptance and blessing of such illegal activities.’

15 Ibid
17 Dáil Debates 11th May 1983, Vol. 342 Col 1022 per Mr. Ahern. These statement were somewhat ironic given that they came from Fianna Fail and given that party’s latter support for the Proceeds of Crime Act 1996 and the Criminal Assets Bureau Act 1996 as they attempted to regain the mantle of the party of law and order in Ireland. See O’Donnell, I. and O’Sullivan E. (2003) ‘The Politics of Intolerance – Irish Style’ 43 British Journal of Criminology 41. As we have seen Fianna Fail were in
Notwithstanding such concerns the bill was enacted. Section 19, which has now been replaced by section 58 of the *Taxes Consolidation Act* 1997, provides that profits or gains shall be liable to tax in the following circumstances. Firstly, where the source of such profit is unknown; secondly where it is not known that the profit or gain arose from lawfully activity; and finally where it is actually known that the profit arose from an unlawful activity. Thus the legislation completely overrules each of the elements that had been established by the *Hayes* decision and clearly enshrined in Irish law the possibility of taxing illegal activities. Such legislation meant that the foundations had been established – in a legal sense – for the subsequent activities of CAB and indeed it would not be until some 13 years later when CAB was established that the potential of these changes to target criminal activities was utilised. It now has a statutory power under this section 58 to raise assessments and demand the relevant tax\(^\text{18}\) and it is a power which it has extensively used – as will now be outlined – generating considerable returns to the Irish exchequer.

**Revenue and CAB – The Monetary Results.**

The revenue option for CAB is specifically provided for in section 5 (b) of the 1996 Act as taking all necessary actions

“under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, to ensure that the proceeds of criminal activity or suspected criminal activity are subjected to tax and that the Revenue Acts, where appropriate, are fully applied in relation to such proceeds or activities, as the case may be,”\(^\text{19}\)

This particular section combined with the *Disclosure of Information Act* 1996 has facilitated the use of revenue powers to be a key tool in Ireland’s modern criminal justice landscape and, furthermore, a stark departure from the common law principles,


\(^{19}\) Criminal Assets Bureau Act 1996, s. 5 (b).
outlined, that had existed heretofore. The departure from the traditional norm and the emergence of a new role for revenue officials and application of tax related statutes was clearly acknowledged in the Seanad debates on the CAB Act. In that house it was stated that the revenue officers are protected under the anonymity provisions\(^\text{20}\) of the legislation and the sharing of information between the various agencies is a key tool and indeed ‘failure to do so would be a dereliction of duty.’\(^\text{21}\) Thus the targeting of financial wealth, as a criminological tool, is clearly enshrined in Irish legislation and is ‘recognised by many other countries and agencies as the most appropriate way forward.’\(^\text{22}\) Moreover in the specific Irish sense in now policy with any bureau investigation that the tax position will be investigated ‘of all those linked with that investigation with a view to assessing their tax liabilities where appropriate.’\(^\text{23}\)

The application of taxation legislation from this policy will be shortly outlined but firstly we will consider the actual operational results that have arisen in this area \textit{vis-à-vis} the financial income that has been derived for the benefit of the Irish exchequer and concomitantly denied to and deprived from the collective criminal actor. The following table sets out the actual income derived as a result of revenue enforcement following CAB investigations.

\(^{20}\) See chapter 4 at text around n.46. 
\(^{21}\) Senead Debates Wed 19th Oct 1996 Col 148 at 1536 as per Mr. Bourke. 
Table 3 – Tax, Interest and Penalties collected by CAB.  

<table>
<thead>
<tr>
<th>Year</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
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</thead>
<tbody>
<tr>
<td>Amount realised in €</td>
<td>251,701.13</td>
<td>789,458.79</td>
<td>2,998,207.13</td>
<td>8,595,133.86</td>
<td>23,561,666</td>
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<table>
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<tr>
<th>Year</th>
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<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount realised in €</td>
<td>10,003,816</td>
<td>9,991,022</td>
<td>16,408,649</td>
<td>16,376,598.71</td>
<td>19,192,906.56</td>
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</tbody>
</table>

<table>
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<tr>
<th>Year</th>
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<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
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<tbody>
<tr>
<td>Amount realised in €</td>
<td>10,009,459.27</td>
<td>5,891,624.85</td>
<td>5,100,494.72</td>
<td>4,084,498</td>
<td>3,804,867</td>
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<table>
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<tr>
<th>Year</th>
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<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount realised in €</td>
<td>1,967,925</td>
<td>5,418,000</td>
<td>3,017,000</td>
<td>2,038,000</td>
<td>2,106,000</td>
</tr>
</tbody>
</table>

Thus in its operational lifespan to the end of the calendar year 2016 CAB has generated tax income (including interest and penalties) of an amount to the figure of €178,590,838 and equally, as aforementioned, denied the use of such money to criminality generally and in the black economy – thus clearly meeting the original *raison d’être* of the bureau. This figure is over 7.5 times the income generated\(^25\) from forfeiture of

\(^{24}\) Table compiled by current author from data available in the annual reports of the Bureau. The table is presented using the actual figure given in the appropriate report. The reporting is not consistent with respect to rounding. The figures for 1997 – 2000 have been converted from Irish pounds

\(^{25}\) See chapter 5 and text around n.48.
assets but the revenue powers of the bureau do not always receive the same attention and exposure in general discourse as forfeiture. Furthermore, whilst it is regularly asserted by the bureau that revenue generation (generally as opposed to the specific tax sense) is a secondary function to the primary objective of the deprivation of the proceeds of crime it is manifestly clear that these figures demonstrate both significant success, or a performance indicator, in the achievement of that primary function.

The ability of CAB to achieve such results via the use of revenue is assisted in a significant way by virtue of the fact that it can operate ‘simultaneously as the Inspector of Taxes, the Collector General, the effective Prosecution Authority and the Authority with sweeping powers to confiscate the documents and assets of the taxpayer.’ The cumulative effect of such authority is likely to be a causing factor in the situation that developed after a mere decade in existence where many CAB launched revenue investigations and assessments do not need to resort to enforcement provisions and are ‘concluded by agreement providing for the payment of tax, interest and penalties.’

A further causing factor influencing the decision to reach such agreements may be gleaned from a tax appeal commissioner decision which had reached the conclusion that if a person who was the subject of a tax appeal assessment wished to appeal a decision then the onus was on that person to demonstrate that the assessment was in fact incorrect and moreover they were not entitled to notes used in the preparation

26 Acknowledging that such activities also clearly help achieve the objective of the bureau.
Later reports were slightly more nuanced with regular statements that: “[T]he Bureau is empowered under the Act to apply, where appropriate, the relevant powers of the Taxes Acts to the profits or gains derived from criminal conduct and suspected criminal conduct. The application of these powers enables the Bureau to carry out is statutory remit and is an effective means of depriving those engaged in criminal conduct and suspected criminal conduct, of such profits or gains.” (Criminal Assets Bureau (2009) Criminal Assets Bureau Annual Report 2008, Stationary Office: Dublin at 17.)
More recent reports have become more neutral and factual with statements that: “[T]he role of the Revenue Bureau Officers attached to the Bureau is to perform duties in accordance with all Revenue Acts and Regulations to ensure that the proceeds of crime or suspected crime, are subjected to tax. This involves the gathering of all available information from the agencies which comprise the Bureau and from the Office of the Revenue Commissioners. The primary legislation used in this regard is the Disclosures of Certain Information for Taxation and Other Purposes Act 1996.” (Criminal Assets Bureau (2016) Criminal Assets Bureau Annual Report 2014, Stationary Office: Dublin at 19.)
29 Hunt, P op cit at 576.
30 Supra n.27 at para 4.20.
31 For further discussion see text around n. 70.
of the assessment. This approach was subsequently judicially approved in *TJ v. Criminal Assets Bureau (2008)* where it was confirmed that there was no requirement for a tax inspector to provide notes used by him in the raising of an assessment. This was on the basis that the assessment is based on information that is either known, or ought to be know, to the applicant. In terms of stabiling the operational boundaries for such tax assessments and its implications for CAB it is worth setting out in some detail the judgment from Gilligan J. where he stated that:

“This whole basis of the Irish taxation system is developed on the premise of self-assessment. … the applicant … is the person who is best placed to prepare a computation required for self-assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self-assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self-assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents.”

In respect of balance and fairness the learned justice continued:

“There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event it has to be borne in mind that since an assessment can only relate to the applicant's own income and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant.

I do not accept that the applicant has been put in an impossible situation and effectively cannot deal with bare and unexplained assessments. … The allegations being made against the applicant by way of the assessments as raised are that he earned income and made gains which he has not previously declared to the respondent pursuant to the basic self-assessment system that pertains in this country. Nobody is better placed to know what income he received or what gains were made than the applicant himself.

… I do not consider that there is anything unfair in the procedure that is applicable pursuant to the relevant legislation, and further do not consider that

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32 *Supra* n.30 at para 5.10.
34 *Ibid* at para 50.
the position adopted by the respondents is in any way obstructive of the applicant.\textsuperscript{35}

The implications of such an approach – which also explicitly acknowledge the various avenues of appeal open to an assessed taxpayer – have been reflected on by the bureau and considered as not only a positive step in the application of their own remit but also positive for the collection of taxes generally by the revenue commissioners.\textsuperscript{36}

In the specific context of the current work the latitude which is available to the bureau is demonstrated by the case of \textit{Criminal Assets Bureau v. H & H} (2003).\textsuperscript{37} It was confirmed, \textit{inter alia}, that under the Criminal Assets Bureau Act 1996 the bureau is entitled to apply revenue provisions not only where assets have derived from criminal activity but also where they are \textit{suspected} to derive from such activity.\textsuperscript{38} Such power is enshrined even further following the decision in \textit{AS v. Criminal Assets Bureau} \textsuperscript{[2005]}\textsuperscript{39} where it was confirmed that an officer of the bureau retained the powers that had been vested in him as a result of being an officer of the Revenue Commissioners. Thus the revenue powers of CAB could be exercised to enforce an assessment against property which was of itself ‘not shown to be the proceeds of crime but where the assessment was made on the basis of criminal activity.’\textsuperscript{40} In the \textit{AS} case the applicant contended that the assessment was arbitrary and \textit{ultra vires} as there was no evidence of criminality for the years forming the basis of the assessment. In this regard Finnegan P. relied on the earlier decision of \textit{Deighan v. Hearne & Others} (1986).\textsuperscript{41} This had ruled that the revenue function in this regard was an administrative one based on the application of statutory provisions to information which the taxpayer in question is obliged to provide. In that instance Murray J. had went on to say:

“Where the taxpayer neglects to make any return the Inspector is forced to resort to the default procedure. In that event the Inspector must exercise his best judgment on whatever information is available to him and as a consequence the task of the Inspector may be more difficult and certainly the danger of an error in the assessment is increased immeasurably. However at
the end of the day the legal effect of each procedure is the same. The taxpayer on being given notice of the assessment made on him either acquiesces to it or disputes it in accordance with the statutory procedures …

… an assessment even where mistaken becomes final and conclusive is not a direct consequence of the assessment made by the Inspector but rather of the failure of the taxpayer to dispute the assessment.*

In applying such an approach (to the AS case) Finnegan P. accepted that the assessment was in a sense arbitrary but that situation was resultant from the fact that the applicant had failed to engage with the revenue officers. In this particular case the applicant had not exercised his right to appeal within the statutory timeframe that is allowed for any such appeal. In respect of the initial appeal process and its functional merit it was noted in Criminal Assets Bureau v. McDonnell (2000) that the tax inspector dealing with the appeal is ‘invariably the person who made the challenged assessment in the first place’ and this could ‘hardly be viewed as a detached and independent arbitrator.’

Where the initial appeal application is unsuccessful, there is then the opportunity to appeal the refusal to an appeals commissioner within 15 days of the date of issue.

**Tax Assessment and the Appeals Process.**

In order to avail of the appeals process there is a number of significant statutory prerequisites that must be completed.

(i) The appeal must be lodged within 30 days of the notice of the assessment.*

(ii) Prior to any appeal occurring the taxpayer must first pay in full the amount assessed (ie the amount that they are now seeking to appeal on the basis that it is somehow in error)

(iii) If the amount is not paid within 30 days then the assessment is rendered final and conclusive.*

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* As restated in AS v. Criminal Assets Bureau (Unreported) [2005] IEHC 318.
* S. 933 (1) (a) Taxes Consolidation Act 1997.
* S. 957 (2) (a) Taxes Consolidation Act 1997.
* Ss. 965 (1) (b) & 966(5)(a)(i) Taxes Consolidation Act 1997.
It has been contended by Smith\textsuperscript{47} that, \textit{prima facia}, the time limits and the requirement to pay the assessment prior to appeal that very assessment might be seen to be overly onerous. However by taking both a holistic wide lens perspective and a narrower specific juridical perspective it is possible that a different perspective may be sketched. Smith notes that in both revenue and non-revenue areas it is a matter of public policy for the legislature to prescribe statutory limitation periods during which an appeal must be lodged. For instance it provides a longer period for appeal when compared to the 21 day time period to appeal the refusal of a refugee status by a Refugee Appeal Commissioner.\textsuperscript{48} In a similar vein under the rules of the Superior Courts an appeal of a judgement or order of the High Court must be brought within 21 days.

Axiomatically the over-arching and fundamental difference between such time limits and the revenue appeal limits is that in the latter the assessment must firstly be paid in full. Moreover, non-payment, as noted, renders the assessment final and conclusive – an effective \textit{Scylla} and \textit{Charybdis} zero sum game for the assessed individual in that in either course of events the assessment must be paid in full. In terms of those that have not made any initial return (the primary focus of CAB), as required by law, it is contends\textsuperscript{able}\textsuperscript{49} that all the relevant dates for submission of tax returns are set out by statute and the Revenue Commissioners issue timely reminders to all relevant taxpayers of these particular deadline dates and thus, whilst difficult to comply with, the assessment investigation results from the initial non engagement.

The requirement to discharge the assessment (and any outstanding returns) prior to an appeal was considered in \textit{Criminal Assets Bureau v. Kelly} [2002].\textsuperscript{50} In this instance the taxpayer in question was contesting, \textit{inter alia}, the ‘tight 30 day deadline’ period in which an appeal had to be lodged. However the court viewed the issue of tax


\textsuperscript{48} Refugee Act 1996 section 13 (2) (b). An even shorter period of 10 days is provided for where the view is taken that the application is “manifestly unfounded.” - Section 12 (5)

\textsuperscript{49} Smith \textit{op cit.}

\textsuperscript{50} [2002] 3 I.R. 421
collection as a quintessentially administrative function the boundaries of which were clearly established by the procedural rules. Moreover these deadline boundaries were regularly communicated in advance to all taxpayers. Murray J. concluded that:

“the defendant knew, or must have known, at all times that he had tax liabilities to the Revenue Commissioners in respect of his earnings over the years concerned. He was under a duty to discharge those liabilities and to be in a position to discharge those liabilities. …

… he had 30 days from the raising of the assessments … to appeal the inspectors' assessments. He could have made such an application promptly in that period. The requirement that he pay the tax due on foot of his own income tax return was not something which was sprung upon him at the last moment or in the last few days of the period for appealing by the tax inspector. That requirement is a statutory one of long standing in the appeals procedure concerning assessments to tax.”

From a jurisprudential perspective the matter did not end at that juncture. In turn the requirement to pay any amounts assessed due prior to having the right to lodge an appeal was considered by the Supreme Court in Keogh v. Criminal Assets Bureau [2004]. The pertinent facts being that the applicant had been the subject of a tax assessment raised by CAB (acting as his tax inspector) and he wished to appeal the assessment. He had not paid the amount demanded and contended that as a result of not doing so the assessments raised against him were not final and conclusive – a key requirement of a legitimate and valid assessment. The tortured wording of tax related legislation has been variously judicially described as “complex” and “fraught with difficulty”.

In this case the applicant was, inter alia, basing his appeal on the interpretation of the concluding part section 957 (2) (appeals section) of the Taxes Consolidation Act 1997 which provides that:

“… and the time for bringing an appeal against the assessment shall be treated as commencing at the earliest date on which both the return has been delivered and that amount of tax has been paid,…”

It was the applicant’s contention that as a result of this section the time period for bringing an appeal did not commence until the tax assessed had actually been paid.

51 Ibid at 435 – 436.
53 Supra n.52 at 83.
Resultantly, on this logic, as the 30 day time period had not yet commenced his notice of appeal would remain valid. The Supreme Court concluded that were such an interpretation to be adopted it would mean that an assessed party ‘could ensure that the assessment served on him never became final and conclusive simply by refraining from delivering any return and paying any tax. This would make the whole of section 957(2) entirely pointless.’\textsuperscript{55} The Chief Justice concluded that to allow the appellants interpretation would result in the enactment being a ‘meaningless absurdity.’\textsuperscript{56} He concluded that the correct approach was the long standing tradition where by the duty of the court as ‘to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed.’\textsuperscript{57}

In this particular instance that intention was to not allow an appeal until the assessment had been fully discharged by mean of payment. We will shortly consider constraints that have been placed on the revenue powers exercised by CAB but this statutory interpretation might be considered quite wide and accepting of clumsy draftsman-ship. Additionally in the calendar year prior to this judgement the Revenue Powers Group had called for enhanced protections and safeguards for taxpayers.\textsuperscript{58} The latitude shown in this instance would appear to sway the dyad in favour of the State collection agency and against the individual taxpayer.

The significance of revenue powers to CAB in meeting its remit and achieving, albeit semi circuitous, results may also be gleaned from the aforementioned case of \textit{Criminal Assets Bureau v. Kelly} [2002].\textsuperscript{59} In this instance the defendant was the subject of a freezing order, under section 2(1) of the \textit{Proceeds of Crime} Act 1996,\textsuperscript{60} which prevented him from disposing, dealing with or diminishing either a Dublin based dwelling house or monies to the amount of over €112,000. He was subsequently issued with a tax assessment in excess of €480,000.\textsuperscript{61} The defendant claimed that he

\begin{enumerate}
\item [55] [2004] 2 I.R. 159 at 172.
\item [56] Ibid at 172.
\item [57] Ibid at 170.
\item [59] [2002] 3 I.R. 421
\item [60] On the nature of section 2 orders see chapter 4 at text around n. 96.
\item [61] Supra n.58 at 424 – 426. The defendant contended that whilst he a certain income from his work as a street trader it did not amount to a level that formed that basis of the assessment and thus there was a clear basis for appeal. Ibid at 433 – 434.
\end{enumerate}
wished to appeal this assessment but could not do so as he was unable to firstly pay the amount demanded due to his funds being frozen by the above order. He asserted that the resultant position he found himself occupying meant that the combined implications of the *Proceeds of Crime Act*, the *Criminal Assets Bureau Act* and the *Taxes Consolidation Act* contrived to deny his constitutional right of appeal.

The Supreme Court rejected such assertions on a numbers of basis. Firstly, that from a generalist perspective tax assessments are a statutory obligation and any taxpayer must take steps to meet such obligations. In the specific sense of the instant facts the court viewed that where an applicant can show that the property which is the subject of a freezing order is not directly or indirectly the proceeds of a crime he can apply, under section 2(3) of the *Proceeds of Crime Act*, to vary or discharged that particular order. Where he is unable to demonstrate that the frozen assets did not represent the proceeds of crime then, *mutatis mutandis*, he is not in a position to utilise those funds for other activities. Additionally the court considered section 6 of the *Proceeds of Crime Act* which provides that a section 2 order may be varied in circumstances where it is essential for the purpose of discharging 'reasonable and other necessary expenses.' The litmus test of acceptability of such expenses and the interaction of the above mentioned three statutes at issue in this case was provided by Murray J:

“The defendant was restricted by an order of the High Court from dealing with or diminishing the assets in question because it had been satisfied that they were the proceeds of crime. That order was obtained on the application of an agency of the State. At the same time he is under a statutory obligation to discharge his tax liabilities to the State and, for the purpose of exercising his statutory right of appeal, he was required by statute to pay the amount of tax which he had admitted to be due. This section refers to "reasonable living and other necessary expenses". Self evidently, "necessary expenses" refers to matters other than "reasonable living expenses". Although the phrase "necessary expenses" is somewhat ambiguous, it clearly must include, in the context of this case, monies due and payable to the State pursuant to a statutory obligation. Assuming that the defendant was unable or failed to satisfy the court in an application under s. 2(3) of the Act of 1996, that the monies in

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62 Ibid at 436.
64 Supra n.58 at 436.
question were not the proceeds of crime, there is no reason why he should not have concurrently with the s. 2(3) application, or as an alternative, sought an order under s. 6 of the Act.”

Thus the phrase *necessary expenses* is deemed wide enough to encompass monies falling due as a result of a tax assessment. The implications of this for CAB are significant. As aforementioned it has become routine practice for a revenue review to be launched following freezing orders. Where that review results in a tax demand being issued it is, as noted, considered final and conclusive where it is not paid. Whilst the freezing order of itself does not mean that the prosecuting authority has use or control of said assets it does provide for an effective interplay between different aspects of CAB’s work and moreover makes the bureau an extremely potent force where it combines its enforcement options with its administrative functions.

Furthermore it has had wider implications than merely its own operational boundaries. The use of revenue powers by the bureau has highlighted and distinguished the scope of the powers available to the Revenue Commissioners generally. As aforementioned, following an Appeal Commissioners ruling the case of *TJ v. Criminal Assets Bureau* [2008] arose. The applicant was seeking evidence that had lead the revenue officers to make their tax assessment. However the Court noted that the applicant was:

“…not a person entitled to assert a legitimate expectation to be provided with the evidence which the respondent may have access to in respect of the applicant’s own personal tax affairs against a background of a self assessment system. It is not the situation in the present instance that the respondent has made a statement or adopted a position amounting to a promise or representation express or implied as to how it will act in respect of furnishing all information in its possession which forms the basis of an assessment made according to the best of an Inspectors judgment. … no expectation has been created by the respondents whereby the applicant could reasonably anticipate that he would be provided with the information sought herein. [I] do not consider that there is anything unfair in the procedure that is applicable pursuant to the relevant legislation, and further do not consider that the position adopted by the respondents is in any way obstructive of the applicant.”

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65 Ibid at 436.
67 Supra n.33.
68 Supra n.33 at para 54.
Thus in a reversal of much of the traditional evidential burden the onus still remains on the taxpayer to prove that the assessment is incorrect. CAB holds, as noted, the power of the collector general and thus has quite substantial operational approaches through which to execute their remit in the pursuit of tax debts. These include:

- The issuing of demands.
- The power of attachment.
- The use of sheriffs.

Thus there is substantial procedural avenues for the Bureau to pursue all of which serve to highlight the benefits (to the Bureau) of a revenue based approach over just a forfeiture simpliciter based approach. Finally there is also the option to instigate High Court proceedings in order to receive any debts assessed and not paid – again a substantial power where a freezing order is already in existence over assets of the assessed individual. The assessed individual does have the option to seek protection under the *reasonable case saver* which allows the taxpayer up to 12 months to appeal where he is unable to give notice “owing to absence, sickness or other reasonable cause.” What might constitute ‘reasonable cause’ was considered in *Criminal Assets Bureau v. D(K)* [2002]74 where the taxpayer had paid the outstanding tax returns but had not paid the overdue tax. He claimed he was unable to do so as he was incarcerated and claimed this constituted *reasonable cause*. Finnegan J. stated that he was:

> “satisfied that the phrase "other reasonable cause" must be read *ejusdem generis* with the words absence and sickness so that the other cause relied upon must be similar in nature to absence or sickness.”

Whilst the case was decided on other grounds the learned justice viewed that incarceration was capable of being *ejusdem generis* with absence or sickness.

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72 S. 960 (2) Taxes Consolidation Act 1997.
73 S. 933 (7) (a) Taxes Consolidation Act 1997.
74 [2002] ITR 179
Judicial Scrutiny.

As has been demonstrated the Bureau has, and moreover highly utilises, considerable administrative revenue functions – with the option to apply for judicial enforcement. However it has been subject to judicial scrutiny on its formative years. Such scrutiny is primarily in the procedural, functional and operational sphere as opposed to any conceptual constraints. Furthermore such attention has aided in discovering and defining the operational boundaries of this significant element of modern criminal justice enforcement in Ireland.

The issue of defining what constitutes a chargeable person for the purpose of a tax assessment was considered in Geraldine Gilligan v. Criminal Assets Bureau & Others [1997]. In this instance the plaintiff had been the subject of a tax assessment to the tune of £1.6million (Irish pounds) and her appeal had been denied by the bureau. Subsequently, a substantial amount of property was seized by the Bureau and as a result of non-payment of the tax debt that had become final and conclusive. In the High Court Morris J. was conscious that whilst ‘significant consequences may flow from my determination of these issues. It is no part of my function to consider any such consequences and I confine my judgment entirely to the issues before me which are matters of law arising out of a consideration of the income tax code.’ Resultantly the Court upheld the plaintiff’s contention that she was not a chargeable person for the period under assessment as she was married and had not elected to be separately assessed – as was an option under section 195 of the Income Tax Act 1967. Whilst it has been contended that this reflects an “unease” with CABs approach it could equally be contended that it was an error by the Bureau in their formative months in operation and first foray into acting as Inspector of Taxes and application of tax codes. The Court were conducting their normal rule of ensuring compliance with statute. In this instance the actual target of the Bureau was primarily the plaintiff’s husband. The tax assessment was issued to the wrong person and the judgement does ‘strictly

77 [1997] 1 I.R. 526
78 Ibid at 530.
79 Op cit Hunt at 576.
80 Hunt does concluded by suggest the courts were seeking to ensure “fair play.” Ibid at 578.
delineate[s] the procedures to be adhered to by the Bureau"\(^{81}\) in that it does not have *carte blanche* and must, as with all agencies, operate within the normal confines of the relevant statute.

A further restraint on potential overzealous activities by the Bureau may be found in the judgement from *Criminal Assets Bureau v. McDonnell* [2000].\(^{82}\) On this occasion CAB had treated an assessment as final and conclusive at a stage where there was still an open appeal against the assessment with the Appeal Commissioner. In this respect Murray J. held that:

> “The appeal process envisaged by the statute did not terminate until the determination and rejection of the Defendant’s appeal … It is as and from that date of final determination that the appeal against assessments maybe considered to be no longer in being. It is only at that point that the taxpayer may be considered to be a person who is in default of appeal …”\(^{83}\)

The Bureau was also held to have acting outside the parameters for treating assessments as having become final and conclusive in both *Criminal Assets Bureau v. Craft* [2001]\(^{84}\) and *Criminal Assets Bureau v. Hunt* [2003]\(^{85}\) were proceedings were premature as they were instigated prior to a demand being issued to relevant taxpayer. The Court adopted a similar approach in the matter of *Criminal Assets Bureau v. Kieran Byrne* [2001]\(^{86}\) where again a tax assessment had been raised by the Bureau and following default of payment they had moved to seize assets of the plaintiff. Previously, in what had “purported” to be an appeal the defendant’s accountants had responded to CAB in writing stating:

> “We are unable to quantify the liability or even an estimate of same as all books and records of bank statements, invoices, receipts, till receipts, creditors listings, cash on hand, petty cash records, cheque stubs, cheque journals, cash books, accounts, nominal ledgers, trial balance, balance sheet, profit and loss account etc. are all in your possession”.\(^{87}\)

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\(^{81}\) *Op cit* Campbell at 317.  
\(^{83}\) *Ibid* at para 46.  
\(^{85}\) *Supra* n. 37.  
\(^{86}\) Unreported. [2001] IEHC 93.  
\(^{87}\) *Ibid* at para 6.
The Bureau did not accept this reasoning as a valid excuse not to make the payment demanded. However the High Court held that whilst the defendant did not within the relevant time period attempt to obtain copies of the documents at issue, it was questionable whether there was sufficient time to do so and to make a return.\textsuperscript{88} The opportunities available to the defendant were further exasperated by the fact that a worldwide injunction had been imposed on his assets and there would not have been time to have it lifted in order to comply with the assessment. Thus the Court ruled that the defendant had the reasonable possibility of a real and \textit{bona fide} defence which legitimately could only be determined at a plenary hearing.\textsuperscript{89}

Finally in this respect, we can again turn to the matter of \textit{Keogh v. Criminal Assets Bureau} \textsuperscript{90} where, on this occasion, the matter of interest is the manner in which the Bureau provided information the applicant. The then operable Taxpayers Charter of Rights undertook to provide ‘full, accurate and timely information and [your] entitlements and obligations under it.’\textsuperscript{91} Here, the Bureau, acting as the Inspector of Taxes, had not made any reference or given any details as to the appeals procedure when they had refused an initial appeal. The Supreme Court noted that some of the undertakings in the charter were ‘no more than praiseworthy statements of an aspirational character.’\textsuperscript{92} Notwithstanding, a taxpayer should still expect to be given some information pertaining to ‘the provisions of a notoriously opaque and difficult code’\textsuperscript{93} without having the expectation that such information would constitute advice. The response from CAB on this occasion would have left the applicant ‘in the dark as to his rights.’\textsuperscript{94}

\begin{quote}
“While it is manifestly not the function of the second respondents or their inspectors to give gratuitous advice in all circumstances to members of the public as to their legal position, it was not asking too much of them in the
\end{quote}

\begin{itemize}
\item \textsuperscript{88} \textit{Ibid} at para 11.
\item \textsuperscript{89} \textit{Ibid} at para 17.
\item \textsuperscript{90} \textit{Supra} n.56.
\item \textsuperscript{91} \textit{Ibid} at 165.
\item \textsuperscript{92} \textit{Ibid} at 175.
\item \textsuperscript{93} \textit{Ibid} at 176.
\item \textsuperscript{94} \textit{Ibid}.
\end{itemize}
present case not to respond to a letter such as that from the applicant in a manner which they must have known could have left him in the dark as to his rights. That would seem to me to be at variance with both the letter and the spirit of the undertaking in the charter. In the result, I am satisfied that the fair procedures which it was reasonable to suppose the respondents would observe were not applied in his case.”

In practice this has led to an extra procedural step whereby information is now included in notices of assessment. From this series of judgments it is clear that the Courts are ensuring that CABs revenue actions are legitimate by ensuring precise adherence to the relevant procedural steps – in essence ensuring a fairness of procedure for the assessed taxpayer without, it is contended, usurping the significant operation revenue powers now available to CAB. Since 2012 the revenue functions of the Bureau have widened and they are now in a position to conduct excise duty assessments. They also continue to pursue investigations pertaining to vehicle registration tax irregularities and work closely with ‘their customs colleagues in Revenue in order to avail of all investigate opportunities and to use all the States resources in the most efficient way on tackling criminals.”

Conclusion.

In modern society the nature of criminality has changed and indeed has evolved to a level where it is sophisticated, nuanced and somewhat business like with various levels of control. Those that were making the greatest financial gain were not those that were physically committing the offences. In response to a changing environment it was incumbent upon the legal mechanism to also evolve and develop to meet these threats in society. Targeting the financial wealth of criminals via the tax system was not a new approach outside of Ireland. The infamous Al Capone in the United States had successfully evaded a number of prosecutions for racketeering but was successfully

95 Ibid.
96 Smith op cit.
convicted of tax evasion and fined $50,000\textsuperscript{98} (US Dollars) – a considerable sum in depression era 1931 America.

In Ireland prior to 1983 it was not possible to tax the proceeds of crime as it was felt that the State did not expect activities to be carried on in contravention of its own criminal code. Tax and criminality were essential separate matters as far the legal framework was concerned. They were enforced and applied by different State bodies with different remits. The situation was changed in 1983 whereupon it was hoped that revenue powers could be used to target and eliminate aspects of criminality operating in Ireland. However the Revenue Commissioners acting alone did not seem to pursue such matters – presumably not having the necessary wherewithal to implement the new provisions against those operating outside the law in serious criminality. With the arrival of CAB it had the benefit of a skill base from a police based investigatory approach and a Revenue Commissioners administration approach and the authority to tax income – combined with significant legislative authority. Resultantly in the period 1996–2016 the Bureau has generated tax income to the tune of €178,590,838. Whilst the Bureau is not a profit driven organisation and does not have financial targets \textit{per se} this represents a significant disruption to criminality and a return for the State of monies which hit heretofore would not have fallen with the normal taxation parameters of the Revenue Commissioners acting alone.

The Bureau does not have \textit{carte blanche} authority to act as it so pleases and the courts have ensured that all tax assessments must fall within the procedural requirements of the relevant tax legislation. Nonetheless, as tax is a requirement levied on all income a tax assessment resultantly carries in and off itself significant authority. Once assessed it can only be appealed where the amount under dispute has already been fully paid. This has been of significant benefit to the model that is operated by CAB as where they are of the belief that criminality is occurring there is the option to raise an assessment on the basis of ‘miscellaneous income’\textsuperscript{99}. This is the terminology used to refer to earnings from a source that is unknown to the tax inspector – in essence illegal earnings. Whilst in the past the Revenue Commissioners may not have had the

\textsuperscript{98} Hunt \textit{op cit} at 576.  
\textsuperscript{99} Section 58 Taxes Consolidation Act 1997.
appropriate resources and skill base to target such income it provides a perfect operating basis for the Bureau – whilst still, importantly, being able to pursue other options such as freezing orders. In the event that the amount is fully paid the onus remains on the assessed individual to demonstrate that the assessment was in fact incorrect. In attempting to do so he is not entitled to any notes used on the compilation of the assessment. Thus the pendulum is swinging very much in favour of the bureau. Further they are entitled to raise an assessment where the income is only suspected to derive from criminality. Once an assessment is raised that is either derived or suspected to derive from the proceeds of crime then, in the event of non-payment, they are entitled to enforce it against any property, including legitimately held property of the individual. It would appear that the combined effect of these measures results in CAB truly being a potent force.
Chapter 7.


Introduction.

The multi-agency structure of CAB and its nature as both a central operating and success enabling feature has often been referred to within the context of this work and elsewhere. It is considered a ‘vital ingredient’ in the assimilation of data on targets of the bureau and the subsequent application of relevant legislative enforcement remedies to the proceeds of crime. This chapter will consider the third, and final, component of this structure – namely the social welfare approach of the bureau. The approach taken will be consistent with that of the previous two chapters and will consider the operational approach and subsequent results arising from the social welfare activities of the bureau and thereby seek to demonstrate yet a further (collaborative) element that has evolved in the new model of criminal justice in Ireland.

There was not any significant focus or debate time given to the rationale for including social welfare as an element of the multi-agency structure at its inception. Rather as there was individuals in society operating without a declared income there were, ceteris paribus, entitled to apply for and receive social welfare payments. It was felt however that criminals were using social welfare payments to hide their criminal activities and income. Furthermore these said individuals seemed to be living lifestyles that could not be funded from the relatively low fixed income social welfare

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2 In one of the very few references – during the establishment debates – to the social welfare element of the Act it was stated in the Seanad that:
“I am glad to see the co-operation between the Revenue Commissioners, the Department of Social Welfare and the Garda. We need to deprive these criminals of their assets and to show that crime does not pay. …I am glad that much of the Bill is highly technical. The more technical it is the better because we do not want to find legal loopholes in it later. We need to close such loopholes now before criminals — some of whom draw social welfare payments in order to hide their other activities — who live a life of luxury off the misery of others are brought to justice for their crimes. We need to combat this in the way the Minister is going about it.” Seanad Debates Oct 9th 1996, No.14 Vol 148 at Col. 1545.
payments that they were receiving from the Irish State. Thus the structure and approach of the bureau was considered to be the ideal vehicle to deal with such fraudulent claims, eliminate an income stream from those involved in criminality and make financial savings and return fraudulently obtained monies to the Irish exchequer.

As will be outlined the social welfare approach of the bureau is a significant tool for the enforcement of statutory social welfare operational entitlement limits and the disruption of criminality whereby people are clearly living outside their means and have access to unexplained wealth. Thus the bureau has moved the enforcement of social welfare provisions into a new realm. It has, to a reasonably significant degree, prevented the scare resources of the State being inappropriately used and, as mentioned, has reduced an element of cash flow to criminality. The social welfare activities of the bureau do not operate on a standalone basis and are often focused on targets that are also of interest to other elements of the bureau. This approach, both singularly and collectively, assist the Bureau in reaching its statutory remit of depriving those involved of the fruits of criminal activity.

This chapter will consider the legislative underpinning from which social welfare inspectors receive their power to issue determinations. This power was in turn extended to CAB officers to be employed against those engaged in criminal activities and further legislative support was given to all those involved in CAB related social welfare determinations. Finally it will be noted that the CAB model seems to have influenced and inspired the legislative enactment which provides that members of the Garda Síochána may be seconded to the department of social protection for a period of time.

Whilst traditionally it was difficult to recover social welfare debt the bureau utilises various pieces of legislation to aid with debt recovery. Indeed the bureau was a significant influencer in the enactment of one of the pieces of legislation – both demonstrating the influence that it has on the development of criminal justice in Ireland and a movement towards more administrative sanctions. The use to which such legislation has been put will be viewed through an operational lens to garnish an overview of the results that have been achieved by the social welfare component of
the bureau. Indeed the approach that has generated such results has necessitated that personnel at the appeals stage of determinations are also protected in a similar vein to the anonymity provisions available to bureau officers. Finally the chapter will conclude with a brief overview of the individual type of cases that have been the subject of recent bureau social welfare determinations.

The Legislative Underpinnings.

Once appointed to CAB a social welfare inspector retains the powers which were previously available to him as such an inspector. In particular the inspector has a wide power at his disposal under section 212 (2) of the Social Welfare Consolidation) Act 1993. This provides that:

“Every social welfare inspector shall investigate and report to the Minister upon any claim for or in respect of benefit and any question arising on or in relation to such benefit which may be referred to him by the Minister…” (emphasis added)

The inspector also has a wide power, under this section, to require information and the documents within a reasonable timeframe. Furthermore the inspector may, at all reasonable times, enter premises without notice for the purpose of making enquires and ensuring compliance with social welfare legislation. These functions are in turn brought under the auspices of the Bureau, with its associated considerable authority, by sections 5 (1) c & d of the Criminal Assets Bureau Act 1996 which provided for the taking of all necessary action

“(c) under the Social Welfare Acts for the investigation and determination, as appropriate, of any claim for or in respect of benefit (within the meaning of section 204 of the Social Welfare (Consolidation) Act, 1993) by any person engaged in criminal activity, and

(d) at the request of the Minister for Social Welfare, to investigate and determine, as appropriate, any claim for or in respect of a benefit, within the meaning of section 204 of the Social Welfare (Consolidation) Act, 1993, where the Minister for Social Welfare certifies that there are reasonable grounds for

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3 On the nature of CAB staff see chapter 4 at text around n.35.
4 Section 212 (3) and (4) of the Social Welfare Consolidation) Act 1993. (As amended by section 26 of the Social Welfare Act 1999.)
believing that, in the case of a particular investigation, officers of the Minister for Social Welfare may be subject to threats or other forms of intimidation,”

Whilst the revenue powers of CAB under the above section 5 pertain to “suspected” criminal offences the same phraseology is not used for the social welfare elements of the section. This anomaly was considered in McGinley v. Deciding Officer and the Criminal Assets Bureau [2001]5 whereby by means of a case stated the contention was made that the above section 5(1) (c) could only be invoked following a criminal conviction or in the alternative ‘in the investigation of a person who is actually engaged in criminal activity; in other words, it cannot apply to the investigation of a person who is merely suspected of engaging in criminal activity.’6 However Fennelly J. rejected such assertions with the conclusion that

“any reasonable interpretation of the words "engaged in criminal activity" envisages investigating persons who have not been convicted. First, the word convicted in not used. Further, the whole thrust of the said Act of 1996 is to enable the Bureau to investigate persons who have not been subject to a criminal conviction, and, that, therefore, this submission should fail.”7

In relation to the second contention above the learned justice ruled that as the word suspected was absent from the provision then it was not apparent that the legislature had intended this section to apply to persons merely suspected of being engaged in criminal activities. However on the facts he ruled that in this instance the point was ‘moot as there was evidence that the appellant most likely (emphasis added) had been engaged in such activity.’8 Thus this decision reflects the wide operational boundaries of the Bureau whilst operating on the social welfare sphere of its work. Additionally it demonstrates the limited opportunities to challenge the decision to be included in a bureau based investigation given the wide operating scope it commands in reaching its overall remit of targeting those that have not been the subject of a criminal conviction.

Further legislative support was given to both social welfare bureau staff and the nature of bureau social welfare investigations by elements of the Social Welfare Act 1999.

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5 [2001] IESC 49
6 Ibid at 10.
7 Ibid.
8 Ibid.
In particular, section 28\(^9\) provides that civil proceedings arising from the exercise of social welfare powers may be brought by or against the bureau. This section was necessary to circumvent an anomaly that could arise in the application of social welfare enforcement provisions. Whilst the identity of bureau officers whose work involved the investigation and determination of social welfare entitlements would be protected by the standard anonymity provisions,\(^{10}\) civil proceedings could only be brought by the relevant Minister or an authorised officer of that Minister. Accordingly such officers would not have been under the protection of the CAB Act.\(^{11}\) Thus whilst ostensibly under the auspices of protection and continuity this section 28 does widen the scope of the bureau’s activities whilst concomitantly extending the same protection to all social welfare officers at all stages of the investigation and prosecution process.

In a similar vein of offering protection but also extending the scope of bureau powers section 30 (of the above 1999 Act) empowers social welfare bureau officers to investigate and decide claims – made by people involved in criminal activity – to supplementary welfare allowance. Prior to the introduction of this section such claims would routinely have been assessed by health board officials who again would not have fallen under the anonymity provision of the CAB Act.\(^{12}\) Whilst this section is only directly applicable to those involved in criminal activity it does bring a further element for potential action under the social welfare arm of the bureau.

The nature of social welfare investigations has been considerably widened with introduction of section 15 of the Social Welfare and Pensions Act 2014. This provides that members of the Garda Síochána may be seconded to the department of social protection with the powers and duties of social welfare inspectors. The proposing Minister for this section stated that:

“[S]econdees will undertake the full range of investigative duties in detecting and combating social welfare fraud. They will retain the powers of gardaí throughout secondment and will work closely and collaboratively with other compliance and fraud investigation agencies to ensure social welfare fraud is

\(^9\) This inserted a new section 224 into the Social Welfare Consolidation) Act 1993.
\(^{10}\) See chapter 4, text around n. 46.
\(^{12}\) Select Committee on Family Community & Social Affairs Debate, 10th March 1999.
comprehensively deterred and detected. In serious cases of fraud the gardaí assigned to my Department will be actively engaged in the detection and prosecution of such cases.”¹³

There was acknowledgment from opposition deputies of the growing importance of multi-agency task forces but also a concern that there was the possibility of overlap and duplication of work already being conduct by CAB. In particular Deputy O’Snodaigh felt that whilst there was a need for more social welfare inspectors but under the existing format. ‘Undercover social welfare inspectors investigate specific fraud cases. If social welfare inspectors have that level of evidence that they would require to go undercover with members of An Garda Síochána and Customs and Excise, they should hand it over to An Garda Síochána because it is a criminal matter at that stage.’¹⁴

However the Minister stated that under the bureau model ‘social welfare officers work with and within the CAB and are seconded to it.’ Whilst under the new model

“…the gardaí are coming into the Department of Social Protection to beef up the capacity of the Department in investigations and detection. It will allow the members of the Garda Síochána to exercise the powers and duties of a social welfare inspector and it facilitates them being seconded to the Department to assist with and undertake fraud investigation work. The gardaí who are seconded will be provided with powers. This will enable them to work as and with inspectors from the Department’s special investigation unit. They will perform relevant social welfare investigation functions but will remain gardaí as well. Officers will investigate, collate and assemble suitable evidence to enable a deciding or designated officer to review an entitlement to social welfare payments and in certain circumstances to use this in legal proceedings.”

In essence this would appear to be a style over substance argument and this model is, in reality, an extension of the style of work that originated with the bureau and has striking similarities to the operational model developed by the bureau. This contention is evidenced by the fact that in ‘serious cases of identity fraud or multiple

¹³ Select Sub Committee on Social Protection, 11th June 2014 at p. 26.
¹⁴ Ibid at 26.
claiming of allowances, Gardaí assigned to the Department will be actively engaged in the detection and prosecution of such cases.\textsuperscript{15}

Nonetheless the secondment does allow for the targeting of welfare tourism and the engagement with bodies such as the taxi regulator and national employment rights agency.\textsuperscript{16} Whilst a CAB type approach, with its associated anonymity provision, is undoubtedly necessary for serious cases the secondment of Gardai, as provided for under the above section, may provide more efficient and cost effective measure as – following the CAB model – secondees retain their garda powers and duties.

Two other elements of legislation assist in moving social welfare activities further into the administrative realm and away from traditional court proceedings. The first of these, which is of significant benefit and widely used by the bureau but is also available to social welfare enforcement generally, is section 13 of the Social Welfare Act 2012. This provides that where a social welfare debt exists, a deduction of up to 15\% of the individual’s current social welfare payments can be made in order to recover said debt. This is a development from a situation whereby it was only possible to recover €2 a week in arrears from an individual’s basic primary social welfare payment. Thus whilst the bureau could make savings by ceasing payment of fraudulent claims it did not have an administrative options to recover debts. However the 15\% is an upper limit that may be imposed rather than a standardised figure. The introducing Minister was

“anxious to send out a message that if people owe money to the social welfare system, they will have to repay it at a reasonable rate. I believe that a rate of up to 15\% of the individual’s primary payment, but not any other payments in respect of children, dependent spouses or other adults in the household, is a reasonable arrangement. It would max out at about €26. This would send out a strong signal. At the moment, the Department of Social Protection is owed, according to the recent report from the Comptroller and Auditor General, somewhere in the region of €350 million because of fraud, overpayments and so forth. I do not think it is realistic to expect that we will be able to recover most of that but if we could recover even half of it over a three- to five-year

\textsuperscript{15} Dáil Debates 18th June 2014, No. 2 Vol. 844 at 81.
\textsuperscript{16} Ibid
period, it would take the pressure off other areas of the social welfare budget.”\textsuperscript{17}

Thus this section allows for a greater level of debt recovery than was hit heretofore possible and both meets the target of reducing debt owed to the department and provides an active discouragement to fraud and a signal to those complying with social welfare rules that fraud is being tackled. However in terms of greater powers of social welfare debt recovery for larger amounts of money that is owed the bureau has stated that it was ‘instrumental in the introduction of additional powers’\textsuperscript{18} by way of notice of attachment proceedings. The power is now provided by section 15 of the Social Welfare and Pensions Act 2013. The provision was not in the original bill and it was introduced, without notice, during committee stage in the Dáil. The late introduction was accredited to the time needed by the attorney general’s office to consider the implications of the provision. Whilst the bureau is not specifically mentioned as a potential user of the section its potential is that arena is blatantly clear from the statements of the then Minister for Social Protection. She noted that the section ‘provides for money held by the overpaid person in a financial institution to be attached for the purpose of offsetting the overpayment. This measure will be used in circumstances where a person has been actively engaged with by the Department but still refuses to co-operate in the repayment of the debt and where there is evidence of an ability to repay. In addition, a final demand must have issued to the person concerned and there must be no other or alternative recovery option available.’\textsuperscript{19}

There was also a stated intention that the section was a measure of last resort and would only be invoked against those that have received ‘substantial overpayments’.\textsuperscript{20} The Minister also stated that she ‘did not anticipate that this power will be used frequently, it is important that the Department is able to avail of it.’\textsuperscript{21} Of course this is merely a statement of intention and the actual level of usage will be an operational matter for the department and/or the bureau and given the latter’s instrumental influence in the introduction of the measure it is likely to become a normalised part of

\begin{itemize}
  \item \textsuperscript{17} Dáil Debates 12th Dec. 2012, No. 2 Vol. 786 at 554.
  \item \textsuperscript{19} Dáil Debates 11th June 2013, Vol. 806 at 48 – 49.
  \item \textsuperscript{20} Seanad Debates 25th June 2013, No. 4 Vol 214 at 254 – 256.
  \item \textsuperscript{21} Ibid at 259.
\end{itemize}
at least the bureau’s social welfare activities. The Bureau was already using powers of attachment to recover revenue debts\textsuperscript{22} and during the course of their investigations were discovering significant levels of social welfare overpayments as demonstrated in the following table. \textsuperscript{23}

Table 4 – Social Welfare Overpayment Assessed.

<table>
<thead>
<tr>
<th>Year</th>
<th>1996</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overpayments assessed in €</td>
<td>42,199.43</td>
<td>235,878.35</td>
<td>356,888.62</td>
<td>416,163</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2000\textsuperscript{24}</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overpayments assessed in €</td>
<td>--</td>
<td>317,404</td>
<td>350,347</td>
<td>518,885</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overpayments assessed in €</td>
<td>269,049</td>
<td>338,296</td>
<td>439,703.77</td>
<td>531,957.71</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overpayments assessed in €</td>
<td>358,725.63</td>
<td>790,517</td>
<td>1,765,203.73</td>
<td>439,703.77</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overpayments assessed in €</td>
<td>531,957.71</td>
<td>358,725.63</td>
<td>790,517</td>
<td>1,765,203.73</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overpayment assessed in €</td>
<td>1,054,161.27</td>
</tr>
</tbody>
</table>

An overpayment is defined as a payment received by an individual over a period(s) for which that person has no entitlement to the claim. Accordingly the payments received in respect of the claim creates a debt to the Department of Social

\textsuperscript{22} The use of attachment orders is provided for Section 1002 of the Tax Consolidation Act 1997.

\textsuperscript{23} Table compiled by current author from data available in the annual reports of the Bureau. The table is presented using the actual figure given in the appropriate report. The reporting is not consistent with respect to rounding. The figures for 1997 – 2000 have been converted from Irish pounds.

\textsuperscript{24} A figure for the year 2000 was not provided by the bureau.
Protection.\(^{25}\) Whilst the bureau exercises varies measure such as repayments, instalments and deductions to recoup debts due given the high level of overpayments that have been assessed in the reference period of the above table the power of attachment adds a significant recovery instrument to the bureaus arsenal. Whilst there was some concern expressed around the potential wide authority that powers of attachment provides\(^{26}\) the measure was not confined to just CAB and was introduced as a general social welfare measure without any reference or connection being made to the bureau or its influence or the opportunities that it provided for the bureau to recover elements of the overpayments assessed and demonstrated in the above table.

The measure does reflect a further move towards administrative enforcement measures and away from traditional legal proceedings. The Minister noted that the ‘only other option available to the Department in these circumstances is civil court proceedings. This provision will be used as a more efficient and cost effective alternative to civil legal proceedings.’\(^{27}\) Thus the powers of attachment are an additional option to the bureau in the discharge of its remit, whilst – as with all debt recover – ‘[u]nderpinning these new provisions is the principle of the capacity of the overpaid person to repay.’\(^{28}\) It is that type of individual that has unexplained wealth and thus the capacity to pay that are the subjects of bureau investigations rather than the normal social welfare recipient. Thus, as outlined, the bureau has quite wide and sweeping legislative powers of investigation and determination, anonymity and recovery available to it in the execution of its social welfare remit.

**Social Welfare and CAB – Results achieved.**

It is only in recent years that the bureau has started to disclose the number of individuals against whom actions under the social welfare remit have been taken. The following table demonstrates those numbers.

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\(^{26}\) *Dáil Debates* 11\(^{th}\) June 2013, Vol. 806 at 49 – 55.

\(^{27}\) *Ibid* at 49. Civil proceedings were also described as ‘expensive, lengthy and onerous.’ *Ibid* at 51.

\(^{28}\) *Seanad Debates* 25th June 2013, No. 4 Vol 214 at 263.
Table 5 – Individual actions under taken the Social Welfare Remit of the Bureau.

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of actions</td>
<td>85</td>
<td>120</td>
<td>102</td>
<td>102</td>
<td>86</td>
<td>74</td>
<td>70</td>
</tr>
</tbody>
</table>

These figures represent a far great number than those that are subject to revenue investigations\(^{30}\) and thus reflect the wider impact that the social welfare function of the bureau can have on criminality generally and a reflection of the bureau’s approach of targeting all levels of criminality. In terms of income generated and saved by the social welfare actions of the bureau it should be noted that, unlike revenue figures, social welfare is a relatively low fixed income payment and thus the figures in the following table represent significant social welfare cost savings to the exchequer. The table is presented using both savings achieved and recoveries achieved as both reflect the remit of the bureau and cost saving vis-à-vis the situation that existed heretofore with the status quo ante.

\(^{29}\) Table compiled by current author from data available in the annual reports of the Bureau.

\(^{30}\) During the same period the numbers subject to tax assessment by the bureau were as follows:

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of actions</td>
<td>31</td>
<td>35</td>
<td>28</td>
<td>19</td>
<td>33</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>

Table compiled by current author from data available in the annual reports of the Bureau.
### Table 6 - Social Welfare Savings and Recovery.  

<table>
<thead>
<tr>
<th>Year</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Savings by Scheme in €</td>
<td>296,634.86</td>
<td>281,213.97</td>
<td>341,526.53</td>
<td>137,145.68</td>
<td>192,803</td>
</tr>
<tr>
<td>Recovery of Monies in €</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>196,208</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Savings by Scheme in €</td>
<td>155,481</td>
<td>109,654</td>
<td>222,921</td>
<td>216,054</td>
<td>297,743.80</td>
</tr>
<tr>
<td>Recovery of Monies in €</td>
<td>51,910</td>
<td>199,703</td>
<td>273,074</td>
<td>293,948</td>
<td>139,524.42</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Savings by Scheme in €</td>
<td>550,976.80</td>
<td>712,615.60</td>
<td>720,425</td>
<td>633,698.20</td>
<td>616,512</td>
</tr>
<tr>
<td>Recovery of Monies in €</td>
<td>136,623.59</td>
<td>182,198.30</td>
<td>160,335</td>
<td>181,272</td>
<td>454,037.49</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Savings by Scheme in €</td>
<td>612,670</td>
<td>497,403</td>
<td>190,190</td>
<td>483,121.40</td>
<td>269,981.60</td>
</tr>
<tr>
<td>Recovery of Monies in €</td>
<td>393,797</td>
<td>287,380</td>
<td>335,911</td>
<td>185,354.32</td>
<td>297,430.12</td>
</tr>
</tbody>
</table>

Thus in its operational life span to the end of the calendar year 2016, CAB through its social welfare activities has generated savings to the exchequer to the tune of €7,808,753.04 and received recovery payments to the tune of €4,066,136.36. When the indirect (savings) and direct (recovery) figures are combined the figure of

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31 Table compiled by current author from data available in the annual reports of the Bureau. The table is presented using the actual figure given in the appropriate report. The reporting is not consistent with respect to rounding. The figures for 1997 – 2000 have been converted from Irish pounds.
€11,874,889.40 represents a significant measure of success in enforcing the deprivation of assets derived from criminality and has been primarily achieved through the use of administrative sanctions.\textsuperscript{32} Whilst considerably less than the financial income generated from forfeiture of assets it nonetheless represents a significant denial of cash flow to criminality from an area of the bureau that does not receive significant attention in wider academic or media discourse.

**Appeals.**

Where an assessed individual is unhappy with a social welfare determination (either generally or via the bureau) they are entitled to appeal to an independent agency (Social Welfare Appeals Office) which is headed up by a chief appeal officer. This officer in turn has the option to invoke section 253 (a) (1) of the *Social Welfare Consolidation* Act 1993.\textsuperscript{33} This provides that where the chief appeals officer certifies that the ordinary appeals procedures are inadequate to secure the effective process of the appeal he can direct that the appeal be submitted to the Circuit Court. This section was introduced to the enabiling bill at report stage in the Dáil. The rationale given for the section\textsuperscript{34} was based on the work of CAB and assurances were given that the section would only be invoked where there was a danger of threat or intimidation to appeals staff. Thus the section would give the same level of protection and safeguards to appeals staff as existed for social welfare bureau staff. Furthermore the proposing Minister stated that the referral power was also necessary as:

“The service provided by the social welfare appeals office would not be adequate to cope with appeals which might require, for example, special arrangements for the anonymity of witnesses, at an appeal hearing; neither would it be possible, under existing arrangements, to provide necessary safeguards similar to those available to officers of the Criminal Assets Bureau for the appeals officer hearing such appeals”\textsuperscript{35}

\textsuperscript{32} The bureau can and does use civil proceedings on occasion.
\textsuperscript{33} As inserted by section 34 of the Social Welfare Act 1997.
\textsuperscript{34} The rationale was given in the Seanad as the Bill was guillotined in the Dáil before the debate reached the amendment dealing with this particular section.
\textsuperscript{35} *Seanad Debates* 25\textsuperscript{th} March 1997, No. 13 Vol 150 at 1079.
Using a similar rationale he went on to note that:

“We are providing that the chief appeals officer can refer an appeal to the Circuit Court in certain cases to deal with situations referred to us by the Criminal Assets Bureau. Circumstances have arisen where we have allocated deciding officers to the Criminal Assets Bureau. They have certain protections under legislation, given the nature of the work they are dealing with. We have made this provision because there may be cases where the appeals officer would not be in a position to decide a case due to the risk of threat or intimidation. It is an unfortunate reality; nevertheless, I do not expect it will be used widely.”36

Thus whilst the social welfare activities of CAB were the clear rationale underpinning the need for the section it is not confined to determinations made by the bureau. This again reflects the impact that the bureau can and does have on general legislative powers. Following this section the chief appeals officer has the power to refer the appeal of any determination to the Circuit Court. Whilst it was not the enacting legislature’s intention that the power would be widely used such constraints are not included in the legislation itself. The Minister rejected a suggested amendment that the appeals should be brought to the District Court and not the Circuit Court. The amendment was rejected on the following ground:

“The Attorney General looked closely at this proposal and is of the opinion that the Circuit Court is a better option than the District Court for a number of reasons. First, the Circuit Court is a court of record while a District Court is not. In other words, all decisions made in the Circuit Court are recorded whereas they are not necessarily recorded in the District Court. In addition, the proof required for or against is not as stringent as in the Circuit Court. It may well be in the interests of the person who is appealing to have a Circuit Court hearing rather than a District Court one.”37

The Minister also reiterated that it was envisaged that the power would only be used in exceptional circumstance and that there was no automatic reason why the appeal should be any more expensive than if it were processed in the normal way by the appeals office. The nature of the appeals process was further developed – and constrained from the appellant’s perspective – by section 29 of the Social Welfare Act 1999. This provides that where the above section 253 (a) has been invoked – directing

36 Ibid at 1102.
37 Ibid at 1128.
that the appellant submit their appeal to Circuit Court – that appeal must be submitted within 21 days from receipt of the appeal officer’s decision. Whilst the rationale for the section was given in the context of CABs work it is worth again noting that the section is not confined to CAB. The Minister justified the necessity for the section on the basis that the time limit brings the appeal process in line with other appeals procedures in the social welfare system.

In practice all appeals to bureau issued social welfare determinations are deemed not suitable for the ordinary appeals process and the applicants are directed to submit their appeals to the Circuit Court. In many instances the appeals are withdrawn, others are settled and very few actually reach the court process. Of those that have proceeded to appeal hearing in the period up to 2016 none appear to have been successful from the applicant's perspective.

**Recent Cases.**

Traditionally, whilst the general overview data is provided by the bureau, little specific individual information has been provided or disclosed pertaining to the social welfare cases that have been determined under the auspices of the bureau. However, in the annual report for 2016, for the first time, details of the type of cases that the bureau have pursued under its social welfare remit were provided. The details were not individualised by name, but rather to the individual specifics of the case that was determined. In one instance 11 members of one family – of known drug dealers – had their social welfare claims reviewed. As a result of this one investigation:

- The sum of €426,000 was calculated as overpayments.
- A saving of €270,000 was made via both a reduction and cessation of payments.

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38 The section has been described as ‘appalling’ and the Minister’s statement that ‘it is unlikely that a person in genuine difficulty would neglect to submit or appeal within the appropriate time’ (Seanad Debates 25th March 1997, No. 13 Vol 150 Col 1280) as ‘risible’ given that the majority of social welfare claimants would have limited access to professional advice. See Clark, R. (1999) Social Welfare Act 1999 Annotated, *Irish Current Law Statutes Annotated* 99 – 3.01 at section 29.
- Over €23,000 has been recovered from the targets of the investigation and further monies were expected to be recovered in due course.\textsuperscript{39} 

In a further case an organised crime family, amounting to five people, were the subject of an investigation which yielded:

- Savings of over €54,000 from the cessation of social welfare claim.
- Overpayment of €350,000 which is now the subject of recovery actions.

Such cases demonstrate the significant use to which the bureau has put the aforementioned social welfare powers available to it under statute. Furthermore it demonstrates the level of success of the bureau in targeting criminality and fraud. Indeed the nature of the social welfare activities of the bureau may take on an increased role given the future further intended focus on level 2 and level 3\textsuperscript{40} targets and the significant expansion and importance of divisional asset profilers to the bureau’s overall co-ordinated multi-agency approach.

**Conclusion.**

The social welfare aspects of CABs work might be considered as the forgotten child of the bureau. However a central tenet in the establishment of the bureau was to target those who were clearly living a lifestyle not compatible with their declared means – and in many instances those means were social welfare payments. CAB social welfare officers have the power to target persons engaged in criminal activities whilst also claiming social welfare entitlements. To date, as a result of such an approach, the bureau has generated savings to the tune of €7,808,753.04 and has recovered fraudulent received payments in the amount of €4,066,136.56. Such direct and indirect savings represent, it is submitted, significant success for this model of criminal justice in Ireland.

It is a model that offers protection for all those involved in deciding determinations and appeals and further enhances the model of administrative sanctions in Ireland.

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\textsuperscript{40} *Ibid* at 4.
The bureau utilises and was influential in the introduction of attachment orders for the recovery of social welfare debts. This may prove particularly useful for the bureau given the high level of overpayments it has assessed and comments from the Minister for Social Protection that the court system is onerous and expensive – a clear indication of a preference for an administrative model of justice. Further evidence of the belief in the model operated by CAB may be gleaned from the fact that secondment opportunities are now available for Gardaí to join the Department of Social protection for a period of time whilst also retain their garda powers.

Whilst, as noted, the social welfare aspects of the bureau’s work does not garner significant attention, it is submitted that it is a vital element of the multi-agency approach and provides significant linkages and support for other aspects of the bureau’s operational activities. Given the stated intentions of the bureau to target criminality at a local and community level, the social welfare powers may prove to be an ongoing key feature in a model of justice that is not concerned with income generation but rather deterrence and neutralisation.

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41 *Ibid* at v.
Conclusion.

The rationale for this work was to examine how the concept and operational outcomes achieved by CAB reflect a new model of crime control. In this respect the thesis has clearly shown that a new model of crime control has emerged and developed to a stage where it is a significant contributor to crime control in Ireland. The approach conceived and implemented by CAB is not designed to produce a socially engineered solution to make the deviant better by correctionalist intervention and normalisation. Rather it is an actuarial approach to criminal wrongdoing, one which employs civil, administrative and regulatory mechanisms. The instruments employed by CAB attempt to permanently alter the criminogenic networks that exist around the individual, thereby neutralising the possibility of future bad choices. There was a long history in terms of the developmental underpinnings of a new agency to deal with modern criminality however the establishing of CAB was caused by a serious tipping point that resulted in elements of moral panic with an associated demand for authoritative legislative action to deal with the felt pervasive influence that criminality was having on the functioning of Irish society. The contention was that the normal and well established rules and boundaries of the traditional criminal law matrix were no longer appropriate or moreover effective in terms of dealing with sophisticated modern criminality and its associated professional and business like structures. This demanded a new framework and new approaches in order for the re-establishment of legal authority over criminality.

That authority came in the form of CAB which is a multi-agency comprised of seconded officers from An Garda Síochána and officials from the Revenue Commissioners and the Department of Employments Affairs and Social Protection – who brought their pre-secondment powers to this new agency. In the past such bodies would have carefully confined themselves to their own unique areas and it might have been considered unprofessional to seek assistance from an outside body. However the bureau departed from any such constraints and employed the powers in unison to target the financial base of criminality. This, as mentioned, was a regulatory type approach – a model that was well established in other areas in Ireland. What was novel was the multi-agency approach and its operation in the civil sphere. This was part of a networked rather than hierarchical model of governance, one that is not limited by
national boundaries. Furthermore this networked approach adopts a fluid arrangement which ensures that it can penetrate most aspects of everyday life, making resistance very difficult. This decentralised, at a distance type of approach was made possible by operating in the civil sphere with its associated lower standards of proof requirements. The focus of the Bureau is not on establishing personal guilt of the individual but rather adopts an in rem approach to target the assets of the individual rather than the individual themselves. In following such a framework the bureau is able to engage in a business-like approach to target ostentatious unexplained wealth and thereby strive to counter any concerns of systemic risk arising from a public concerned with the threat of criminality within their society.

This framework allows the bureau to both build upon and depart from common law tradition. It is a long grounded principal that a criminal actor should not be allowed to benefit from the proceeds of their criminal adventures. This raises two questions. First, what constitutes a criminal matter and, secondly; by what procedure should an individual be deprived of any ill-gotten gains. The modern boundaries of criminal law can be difficult to define and what has emerged is a middle ground justice. It is a more instrumental variegated approach and one where CAB is housed. In terms of the actual proceeds of crime the concept of forfeiture has a long history in the common law and the model of crime control implemented by CAB has again placed it in a central role. In Ireland the concept had been used as an extra-ordinary measure a decade before the establishment of CAB to deal with a specific and single issue that was occurring where application of traditional criminal law was likely to be usurped. Notwithstanding the specificity of that measure it nonetheless formed an important part in the ultimate emergence of the forfeiture approach of CAB as it had passed constitutional muster. Furthermore forfeiture, following conviction, had been introduced in 1994 and thus marked a willingness, by the Irish legislature, to use the concept for crime control in a much more generalised way than was possible under the 1985 legislation.

Its use in the absence of a criminal conviction was originally introduced in 1996 as an element of the proceeds of crime legislation. This was enacted in conjunction with the establishment of CAB to be a key support of its activities in reaching its remit of target the proceeds of crime. It allows for seizure of assets and/or orders to be issued – in the absence of criminal convictions – that prevent the use or disposal of the asset.
Where the orders stand the bureau may then apply for a disposal order over the asset causing it to be sold. In this way the proceeds of crime legislation has radically altered the balance between the State and accused in favour of the former. Due to such repositioning, the nature of such orders and the type of individual who may be effected by them it was foreseen that CAB would need to be a robust agency with due regard and protections in place for the safety and security of its staff.

The staff are tasked with depriving those involved from benefiting from the proceeds of crime. However where a disposal order is issued any income generated is returned to the benefit of the exchequer and not to the bureau. Thus it is neither constrained nor incentivised by any financial targets but rather required to discharge its statutory remit. It has aimed to achieve this my adopting a managerialist approach and has engaged in professional training for its staff. As a result it now has asset profilers in each garda division and can operate at both the micro and macro level to target various aspects of concern to either local communities or an issue at national or international level. It also partakes in joint policing initiatives and co-ordinates its overall strategy with that of An Garda Síochána and is now an investigative body in its own right and supports and assists garda units and international investigatory agencies. Thereby it is clear that the bureau now plays a key role in overall crime control in Ireland. From an operational perspective it has been involved in returning monies – at a national and international level – to those that have been the victims of financial fraud. In terms of achieving its remit it has to date returned in excess of €26m to the Irish exchequer arising from the forfeiture of assets. It is impossible to directly quantify any deterrent effect that the activities of the bureau may have had on the criminal community but this amount represent a tangible result in terms of monies denied to criminality and instead available for the benefit of the exchequer.

Whilst much of the focus arising from the bureau’s activities is given to forfeiture its revenue and social welfare powers are also a significant element. Furthermore they have achieved considerable measures of success and play key roles in the new crime control model that has been established. The use of revenue powers against organised criminality was legally possible prior to the establishment of CAB but practically was not feasible for revenue officers to execute given the risk to their own personal safety.
The bureau now has the power to act as the Inspector of Taxes. In addition once a tax assessment has been raised it must be paid in full prior to any appeal against its accuracy and in that appeal the onus is on the (criminal) taxpayer to demonstrate that the assessment is in fact incorrect. This disequilibrium in power relations represents a significant practical challenge for the assessed individual to discharge. The courts can exercise oversight of the bureau’s approach, but, due to the fact that the requirement to pay tax on (any) income is an accepted administrative fact much of the oversight is concerned with strict adherence to the procedural steps. Thus the operational power available to CAB is quite significant. By raising assessments on income derive or suspected to derive from criminality the bureau has to date generated tax income to the tune of €178.5m. Whilst the primary function of the bureau is deprivation this secondary implication of such monies secured and denied to criminality and available to the State reflects significant success in reaching its remit.

As an administrative based approach it highlights the changing nature of crime control where traditional policing methods are enhanced and expanded by the use of forensic accounting and auditing to focus on the criminal money trail and, in turn, use this as a tool of deprivation of the essential food chain in the criminological network.

A similar accounting and data management and analysis approach is employed in relation to the social welfare activities of the bureau. Given that many criminals do not have a visible source of income they use the social welfare system to generate legitimate income. In response to this by operating both in conjunction with the forfeiture and revenue approaches and independently the bureau denies an income stream and source of legitimacy by ceasing any fraudulent claims. It has the authority to enforce social welfare legislation against any person engaged in criminal activity and may seek an attachment order to recover any assessed overpayments. In conjunction with the bureau’s recent operational decision to focus on lower level criminality (whilst maintaining the focus at higher levels) and the growth and use of regional asset profilers the ability to target social welfare fraud is an important function in dealing with criminality through illuminating non legitimate income streams and the facades of normality and legitimacy attached to such streams. Through both saving and recovering of such overpayments the bureau has returned in excess of €11.8m to the exchequer. This is a key tool of disruption and discontinuity against criminal
income stream and again represents a significant measure of success in regard to an individual component of the overall remit of the bureau.

Collectively the tri-part approach of using forfeiture with revenue and social welfare powers and operating against criminality using civil standards and an *in rem* approach reflects a sea change in the approach to modern crime control in Ireland. It is a model that faced many legal challenges but these have helped to define the boundaries of CAB. Whilst the model may mark a *hollowing out* of Irish criminal justice the Irish courts have, primarily, been accepting of this model – with its penchant for threat neutralisation – being implemented on public policy grounds. The bureau adopts a business-like approach that is not focused on profit but rather success whilst being conscious of delivering a cost effective approach. Thus whilst being a creature of statute it does not appear that there is any expectation that it will be removed by an act of parliament. Overall it marks a significant departure from the more traditional approach and, based on the operational approach demonstrated herein, will continue to play a significant and growing role in the modern criminal justice landscape.
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