Law Commission
Reforming the law

CONFISCATION OF THE PROCEEDS OF CRIME AFTER CONVICTION: SUMMARY OF OUR CONSULTATION PAPER

SUMMARY

Part 2 of the Proceeds of Crime Act 2002 ("POCA 2002") governs the confiscation of the proceeds of crime by the state after a defendant's conviction. The Crown Court determines the defendant's benefit from crime and makes an order against the defendant that he or she must pay a sum of money up to the value of that benefit from crime, subject to his or her means. The benefit may be millions of pounds or hundreds of pounds depending on the scale of crime committed by the defendant.

The "confiscation order" is an order made personally against a defendant to pay a sum of money *equivalent* to some or all of his or her benefit from crime, depending on the assets available to the defendant. The defendant is not obliged to realise any particular asset to satisfy the order, as long as the sum of money is paid.

A confiscation debt running into the billions of pounds has led to a perception that the confiscation regime is ineffective.

As at 31 March 2019, the value of outstanding confiscation orders was £2,065,303,000.[1]

The perceived complexity of the legislation has also motivated a desire for change. A guide produced for judges on confiscation describes the proliferation of appellate judgments over an 11 year period:

"In 2009 the Case List contained 177 Cases. The 2020 Case list contains some 507 cases. Few areas of law have seen such a volume of litigation within such a short period; it is perhaps reflective not only of the importance of this particular area of law but also of its legislative complexity."[2]

In 2018, the Home Office commissioned a Law Commission project with the objective of reforming Part 2 of POCA 2002.[3] Our consultation paper considers how the existing statutory framework could be improved with the following objectives in mind:

1. to improve the process by which confiscation orders are made;
2. to ensure the fairness of the confiscation regime; and
3. to optimise the enforcement of confiscation orders.

During extensive pre-consultation discussions we held events with individuals and organisations both in London and around the country. We met with government and law enforcement agencies (including the police, Crown Prosecution Service, the Serious Fraud Office, Trading Standards, the Insolvency Service and the Environment

[1] HM Courts and Tribunals Service, *Trust Statement 2018-19* (2019) HC 2337 p 8.

[2] HHJ M Hopmeier, *A Guide to Restraint and Confiscation Orders under POCA 2002* (2020).

[3] Part 5 of the Proceeds of Crime Act 2002 which deals with civil recovery of the proceeds of crime is outside our terms of reference.

Agency), expert practitioners and academics (both from the UK and overseas) and other interested parties (including the Bar Council, Her Majesty's Courts and Tribunals Service ("HMCTS"), judges from all levels of the judiciary, and the victims of crime). Through this engagement we were able better to understand the practical difficulties incurred when applying the current law and to identify the areas in most need of reform.

We have suggested reforms to encourage the effective use of powers to prevent assets from being dissipated before a confiscation order is made, to ensure that when confiscation orders are made they realistically reflect what a defendant gained from crime, and to improve the enforcement of confiscation orders.

One stakeholder who is a member of the judiciary summed up a number of the issues encountered succinctly:

"[confiscation] is not prioritised in the criminal justice system, it is an afterthought. There is no continuity and case ownership is a big issue. Counsel and others lose interest tying up the loose ends."

HOW TO APPROACH THE PAPER

Our consultation paper is divided into nine parts:

1. An introduction, to put both the consultation paper and the confiscation regime into context.
2. The objectives of the legislation.
3. Preparing for the confiscation hearing.
4. Calculation of "benefit".
5. The "recoverable amount".
6. Enforcement of the order.
7. Other orders of the court.
8. Reconsideration of the confiscation order.
9. Preserving the value of assets.

The sections of the consultation paper are structured to mirror the stages that a confiscation case follows through the court system. The sections are largely self-contained and can be read separately. Although we encourage interested parties to read the whole paper to gain a comprehensive understanding of our proposals, we recognise that stakeholders may wish to read only those parts which are of greatest relevance to areas of their interest or expertise. For example, the section of the paper on "preparing for the confiscation hearing" contains proposals for procedural and administrative changes which may be of particular interest to readers who work in the court system.[4]

This shorter guide provides an overview of our primary provisional proposals and is also divided to reflect the parts of the paper. As with the consultation paper itself, we encourage readers to digest the whole document. However, individual sections can be read separately to enable readers to focus on the aspects of the confiscation regime which are of most relevance to their expertise or areas of interest.

We invite consultees to submit their views on a wide range of issues relating to the confiscation regime. Detailed and specific questions can be found in the consultation paper itself. There are also summary consultation questions in this document. The summary consultation questions found here are broad and are intended to reflect the general content of our consultation paper. Consultees are invited to respond to as many or as few questions as they wish, whether the broad questions found in this summary or the more detailed questions in the consultation paper itself.

You can access the full consultation report and respond to the consultation **here**.

[4] For example, in Chapter 7 we make provisional proposals relating to confiscation timetables.

PART 1: INTRODUCTION

In Part 1 of the consultation paper we put our project and the confiscation regime in POCA 2002 into context. We discuss the history of the confiscation regime and outline how the confiscation regime works. We also discuss the Asset Recovery Incentivisation Scheme ("ARIS").

ARIS was set up in 2006. The objective of the scheme is "to provide operational partners with incentives to pursue asset recovery as a contribution to the overall aims of cutting crime and delivering justice."[5] Operational agencies receive funding based on their relative contribution to the recovery of assets. The funds are divided between investigative, prosecuting and enforcement agencies.[6] In respect of confiscated funds 18.75% is allocated to participating investigating and prosecuting agencies.[7]

While the ARIS scheme is not within the remit of our review, we devote a chapter of our Consultation Paper to it because:

1. it would be impossible to consider the confiscation framework without understanding this scheme which underpins its operation. It therefore provides important context for our work.
2. it has influenced the practical operation of the confiscation regime and its implementation by agencies.
3. it has been the subject of criticism.
4. the current funding model has shaped and informed some responses received during our pre-consultation discussions. It is understandable that stakeholders working within budgetary constraints must consider any legislative change through the lens of finite resources.
5. the principle of transparency requires an acknowledgment of the pressure points created by an incentivisation scheme in this context.

Any reform would be a political choice rather than a legal decision. However, in Chapter 4 we have made clear the legal consequences of ARIS, most significantly the potential for conflicts of interest (or at the very least perception of such conflicts) arising in prosecutorial decision making. As Lady Justice Hallett, Vice President of the Court of Appeal Criminal Division, has stated:

[5] Home Office, Asset Recovery *Incentivisation Scheme Review* (February 2015).

[6] The current division is in the ratio of investigative (18.75%), prosecuting (18.75%) and enforcement agencies (12.5%).

[7] The Serious Fraud Office does not participate in the ARIS scheme.

"It may come as a surprise to some that there are prosecuting authorities who may benefit financially from their decision to prosecute … where there is a potential conflict of interest, namely a financial interest in the outcome of the prosecution set against the objectivity required of a prosecutor, the prosecutor must be scrupulous in avoiding any perception of bias. The possibility of a POCA order being made in the prosecutor's favour should play no part in the determination of the evidential and public interest test within the Code for Crown Prosecutors."[8]

We have heard from a significant number of stakeholders that there is a compelling case for reconsidering how funds gained from confiscation are distributed. This would remove such issues of potential conflicts of interest and their perception and ensure that realistic and enforceable confiscation orders are made.

The ARIS scheme will be reconsidered as part of the Government's plans to develop a sustainable, long-term resourcing model responding to economic crime.[9] The review will no doubt wish to consider the issues raised in this chapter.

[8] *Wokingham Borough Council v Keith Scott and others* [2019] EWCA Crim 205, [2020] 4 WLR 2, para 62 to 63.

[9] HM Government, Economic Crime Plan 2019-22 (July 2019) at paragraph 5.20.

PART 2: OBJECTIVES OF THE ACT

In Part 2 of the Consultation Paper we discuss the considerations that should guide a court in the exercise of its powers. In particular, we examine the requirement that any confiscation order be "proportionate" to the aims of the legislation. We identify four aims that have been associated with the confiscation regime:

1. taking the profits or proceeds from crime;
2. punishment;
3. deterring and disrupting criminal activity; and
4. the compensation of victims.

Stakeholders told us that there is no clarity as to whether any or all of these aims are intended to be objectives of the confiscation regime, and if they are, what their relative priority should be. We consider that clarity is needed to help the court when making determinations about whether a confiscation order is proportionate and in exercising its powers under the confiscation regime more generally.

In Chapter 5 of the Consultation Paper we provisionally propose that:

1. Objectives of the confiscation regime should be clearly articulated in the statute.
2. the principal objective should be to deprive a defendant of his or her benefit from criminal conduct, within the limits of his or her means.
3. the principal objective should be supplemented by secondary objectives, of deterrence and disruption of crime, and ensuring the compensation of victims (when such compensation is to be paid from confiscated funds).

The courts have sometimes expressed contradictory views about whether punishment is an objective of the confiscation regime. We provisionally adopt the view taken by the Supreme Court that "reference to punishment needs some qualification".[10]

A defendant who has a confiscation order made against him or her will also be sentenced. That sentence is intended (amongst other things) to punish, and the nature and length of any sentence passed will reflect the defendant's culpability in committing the offence. Whilst confiscation may have harsh effects, it is not meant to be a double punishment based on culpability. Instead, it is meant to remove the defendant's gain from crime.

[10] *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [2].

To reflect both this provisional conclusion and to clarify the mixed messages coming from the courts about punishment as an aim of the regime, we provisionally propose that punishment is omitted from the statutory objectives of confiscation.

A regime which goes no further than is necessary to hold the defendant to account for his or her financial gain from crime should not be perceived as not being "tough on crime". Put plainly, anyone observing a defendant walking out of prison with nothing to show for his or her crime would be apt to question whether the commission of the crime "was worth it"?

Summary Consultation Question 1

Do consultees agree:

1. that there ought to be a statement of the statutory objectives of the confiscation regime set out clearly in law?
2. that the statutory objectives ought to be:
    a. a primary objective of depriving a defendant of his or her benefit from criminal conduct, within the limits of his or her means;
    b. secondary objectives of:
        i. deterring and disrupting criminality; and
        ii. compensating victims (where such compensation is to be paid from confiscated funds)?

PART 3: PREPARING FOR THE CONFISCATION HEARING

In Part 3 of the Consultation Paper we consider the preliminary stages of the confiscation process. These chapters identify what we consider to be overarching problems in the process for the active management and preparation of a confiscation hearing.

Postponement

It was originally envisaged that a confiscation order would be imposed before a defendant was sentenced and the law was drafted with this sequence of events in mind.[11] However, it was soon appreciated that confiscation proceedings often involve complex issues (such as the determination of third party interests in assets) which take time to resolve. Determining confiscation prior to sentence led, in some cases, to substantial delays in sentences being imposed.

To address this problem, POCA 2002 provides that confiscation may take place after a defendant has been sentenced. In Chapter 6 of the Consultation Paper we consider such "postponement" of confiscation proceedings. Under the current law a series of technical requirements apply when confiscation is postponed. For example, a two year time limit applies to any postponement period. Furthermore, financial and forfeiture orders cannot be imposed at sentencing when confiscation is postponed. The rule against imposing financial and forfeiture orders has been described as:

> **"a trap into which even the most experienced and skilled trial judges may fall".[12]**

Procedural irregularities involving the postponement requirements have been considered by the appellate courts on many occasions. During one such appeal, the Supreme Court observed that:

> the Law Commission may wish to consider "the best way of providing realistically for the sequencing of sentencing and confiscation and the status of procedural requirements in the Act".[13]

[11] Criminal Justice Act 1988, s 72(4).

[12] *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [11].

[13] *R v Guraj* [2016] UKSC 65; [2017] 1 WLR 22 at [36].

Summary Consultation Question 2

We provisionally propose that the law is simplified and clarified in the following ways:

1. Legislation should make clear that sentencing should take place prior to confiscation proceedings being resolved unless the court otherwise directs.
2. The court should have a discretion to impose financial penalties and forfeiture orders prior to confiscation proceedings being resolved. This will enable compensation to be awarded far earlier in the process than at present, which will benefit victims. A failure to pay the compensation order by the time of a later confiscation hearing could help the court to decide whether a defendant is likely to co-operate in paying any confiscation order, and so inform decisions about enforcement of the confiscation order.[14]
3. Where a financial or other order is imposed at sentencing prior to the resolution of confiscation proceedings, the court will be required to take the order into account when determining confiscation.
4. There is a six month maximum period between sentencing a defendant and the setting of a timetable for confiscation.[15] This will replace the current system based on postponements.
5. The six month statutory maximum period may be extended in exceptional circumstances. Where the six month period elapses, the court would not be deprived of jurisdiction to impose an order but may decline to make an order if it would be unfair to do so. However, before declining to impose an order, the court must first consider whether any unfairness could be cured by measures short of declining to impose a confiscation order.
6. Upon the setting of a timetable the court should actively manage the proceedings. As is the case now, the proceedings must be resolved within a reasonable time.

Do consultees agree?

[14] See Chapter 21, in which we discuss our provisional proposal to allow the court to make "contingent" enforcement orders at the confiscation hearing where a defendant is likely to wilfully refuse to pay or be culpably negligent in failing to pay their confiscation order during any time to pay period.

[15] Or, in appropriate cases, between sentencing and court the dispensing with the need for a timetable.

Timetabling and case management

Under POCA 2002, once the Crown Court or the prosecution has made the decision to proceed to confiscation, the next step is the timetabling and case management of the confiscation proceedings. In Chapter 7 of the Consultation Paper we discuss three issues that were raised repeatedly during our pre-consultation discussions:

1. that confiscation proceedings are permitted to "drift", rather than being subject to active engagement and case management;
2. that sanctions for non-compliance with orders for the exchange of information in confiscation proceedings are rarely, if ever, imposed, adding to the perception that confiscation proceedings are permitted to "drift"; and
3. that the information that is exchanged is often a confusing mix of pleadings and evidence, adding to complexity and a lack of clarity.

Summary Consultation Question 3

We provisionally propose that:

1. Standard timetables for both "ordinary" and "complex" confiscation cases should be incorporated into the Criminal Procedure Rules, which set out timescales for the provision of information.
2. The timetable for an "ordinary" case should use periods of 28 days. The timetable for "complex" cases should use periods of double this length (56 days).
3. The court should have the power to depart from the standard timetable in the interests of justice, for example where it is clear from the start that the timetable would be unrealistic in all of the circumstances.
4. Judges should be required to give a clear warning about the consequences of non-compliance with the timescale for the provision of information.
5. Information exchanged should comprise separate pleadings, statements and exhibits.

Do consultees agree?

Early Resolution of Confiscation (EROC)

Despite the lack of a formal mechanism to facilitate the agreement of confiscation orders, agreed orders are an accepted part of the confiscation regime. During our initial fact-finding phase, we heard evidence from practitioners and financial investigators that there is a growing trend for courts actively to encourage counsel to agree confiscation orders out of court, before seeking judicial approval. The Court of Appeal has described the practice of "discussion and negotiation" in confiscation cases as "familiar".[16]

In Chapter 8 of the Consultation Paper we identify a number of advantages to reaching agreement prior to the confiscation hearing:

1. Agreement of matters in confiscation insofar as is possible facilitates the efficient making of realistic confiscation orders.
2. When agreement cannot be reached, the process of seeking to reach agreement still has advantages, in that issues in the case that require resolution can be identified and narrowed.
3. Under the current system of informal agreements, it is often alleged by defendants on appeal that they were unaware of certain aspects of the agreement or of the consequences of making the agreement. A formalised process for seeking agreement carries with it the advantage that any final agreement reached should be reached with due consideration by all relevant stakeholders.
4. If a defendant has some say in the order that is made, it is likely to lead to a more realistic and enforceable order than one which is simply imposed.

We therefore propose a new Early Resolution of Confiscation ("EROC") process, to take place after the exchange of information and before a confiscation hearing is listed, to facilitate the early resolution of the confiscation proceedings.

To ensure transparency, we provisionally propose that any agreement will be subject to judicial scrutiny and endorsement to ensure that it is fair, reasonable and proportionate in light of the objectives of the legislation. We also consider that a code of conduct for prosecutors involved in the EROC process may be beneficial, similar to the published code of conduct that already exists in the context of negotiating deferred prosecution agreements.

Summary Consultation Question 4

Do consultees agree that a new stage of the confiscation process should be introduced, known as the Early Resolution of Confiscation (EROC), comprising two stages:

1. an EROC meeting, at which the parties should seek to settle the confiscation order, and in the event that the confiscation order cannot be settled, the issues for the confiscation hearing should be identified.
2. An EROC hearing, at which the judge should consider approving any agreement, or in the event of disagreement, at which case management takes place.

[16] *R v Ghulam* [2018] EWCA Crim 1619, [2019] 1 WLR 534 at [21].

Forum

In determining confiscation cases, specialist criminal court judges are often asked to address issues that fall far outside of the day to day business of the criminal courts. Judges are asked to determine issues connected to family law, matrimonial property and other more general commercial, equitable and property interests. In Chapter 10 of the Consultation Paper we make a series of recommendations intended to facilitate the making of expeditious and robust determinations in cases when such issues arise. For instance, we provisionally propose that:

1. consideration be given to establishing a pool of judges who are trained and authorised (or "ticketed") to deal with complex confiscation cases.
2. the judge should be permitted to draw on the experience of an expert assessor, subject to objections by the parties.
3. the Crown Court may refer an issue in confiscation proceedings to the High Court for a binding determination.

Summary Consultation Question 5

Do consultees agree that, in complex confiscation cases, the use of:

1. ticketed judges;
2. expert assessors; and/or
3. referral to the High Court to make binding determinations on an issue

would help to ensure that cases are dealt with justly and efficiently?

PART 4: BENEFIT

Under POCA 2002, the acquisition of wealth, resources or property through the commission of crime and the resulting gain to the offender is referred to as "benefit". We consider "benefit" in Part 4 of the Consultation Paper.

The identification and calculation of "benefit" has real significance throughout the confiscation process and beyond. Defendants will be required to repay their benefit in full, if they have the means to do so. If they do not have the means to repay the benefit in full when the confiscation order is made, the court can order that they do so at a later date:

"The assessment of benefit imposes a lifelong liability upon a defendant to pay it, should his finances permit."[17]

Defining benefit

The way in which benefit is currently defined has been heavily criticised because:

1. it applies civil property law principles to a regime which forms part of the criminal justice process; and
2. it is perceived to lead to unrealistic and highly punitive confiscation orders being imposed, that do not reflect what would be regarded by a member of the public as a defendant's "benefit" from crime.

We considered carefully how "benefit" from crime is defined, looking at earlier confiscation regimes and the experience of other countries. In Chapter 12 of the Consultation Paper we provisionally propose that a new approach is taken, under which the court would consider two issues:

1. What the defendant "gained" as a result of or in connection with his or her criminal conduct; and
2. The defendant's intention in relation that gain.

"Gain" is a term of longstanding application in the context of criminal law, which is defined simply as "keeping what one has, as well as … getting what one does not have".[18] As a new term in the context of confiscation, it would come without the legacy of being linked to a large volume of case law that has sought to attach principles of property law to confiscation and which has been littered with caveats and exceptions that the courts have used to seek to achieve the "right" result.[19]

A defendant might have gained a quantity of money, but might only intend to have a limited power to control or dispose of that money, for example because he or she is a courier who is being paid to move the money from one place to another. By examining the defendant's intention in connection with the gain, a court will be a better position to make a reasoned determination as to what that defendant's "benefit" from crime actually was.

[17] A Campbell-Teich, "Whither confiscation: May Revisited" [2019] 5 *Archbold Review* 4

[18] Fraud Act 2006, s 5(3). See also Theft Act 1968, s 34. Although note that the wording used in s 34 is slightly different from that quoted from the Fraud Act.

[19] This is notwithstanding the lack of discretion given to the court by the prescriptive terms of the legislation.

Summary Consultation Question 6

Do consultees agree that, that in determining a defendant's "benefit" the court should:

1. Determine what the defendant gained as a result of or in connection with the criminal conduct for which he or she was convicted; and
2. Make an order that defendant's benefit is equivalent to that gain, unless the court is satisfied that it would be unjust to do so because of the defendant's intention to have a limited power of control or disposition in connection with that gain?

Benefit in criminal lifestyle cases

If a defendant is found to have a "criminal lifestyle", their "benefit" from crime will not be limited to what they have obtained from the offences for which they appeared before the court. Instead, the court will consider any benefit obtained from their wider "general criminal conduct".

An enquiry into benefit could be very broad in a case involving general criminal conduct. Trying to determine all the benefit a defendant has obtained from all their criminal activity would be a very difficult exercise to undertake. To assist, the court is required to make assumptions when considering a defendant's benefit from their general criminal conduct. In essence, the court will look back six years before the proceedings that led to the conviction began and assume that all property held since that date came from crime, unless the defendant can show otherwise.

Because such a calculation of benefit extends beyond the proceeds of the offences for which the defendant was brought before the court, it is sometimes referred to as "extended confiscation".[20]

In Chapter 13 of the Consultation Paper we consider whether the triggers that can lead to the defendant being found to have a "criminal lifestyle" are appropriate. During our pre-consultation discussions, we were asked to consider including a number of offences in the list of "trigger" offences that is currently found in Schedule 2 of POCA 2002. We have considered carefully the arguments in favour of and against including the offences in the schedule.

[20] Framework Decision on the Confiscation of Crime-Related Proceeds, Instrumentalities and Property 2005/212/JHA, Official Journal L 68/49; Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union 2014/42/EU, Official Journal L 127/39.

Summary Consultation Question 7

Do consultees agree with our provisional conclusions that the schedule of offences which trigger the "criminal lifestyle" provisions:

1. should not be amended to add:
    a. fraud offences;
    b. bribery offences; and
    c. the money laundering offence in section 329 of POCA 2002.
2. should be amended to add the offence of "keeping a brothel used in prostitution", contrary to section 33A of the Sexual Offences Act 1956.

A defendant might also be found to have a "criminal lifestyle" if he or she is convicted of a certain number of offences, whether on one, or multiple occasions before the court. To have a "criminal lifestyle" the cumulative benefit must be £5,000. The law in this regard has been described as

"absurdly, and unnecessarily, complex."[21]

We both invite views and make a number of provisional proposals as to how this trigger for criminal lifestyle can be made more simple and effective.

Summary Consultation Question 8

We invite consultees to give us their views on the following issues:

1. How many offences should a defendant have committed to trigger a finding of a "criminal lifestyle"?
2. Should the £5,000 financial threshold be raised, and if so to what amount?
3. Do consultees agree with our provisional conclusion that the offences relevant to triggering a lifestyle should include both:
    a. convictions; and
    b. other offences for which the defendant is not convicted but that he or she asks the court to formally "take into consideration" when sentencing?
4. Do consultees agree with our provisional conclusion that the court should be permitted to consider both offences from which the defendant benefited and offences from which the defendant has attempted to benefit as being relevant to a finding that a defendant has a criminal lifestyle? For example, should a defendant who commits 3 domestic burglaries and is stopped whilst attempting to commit a fourth be treated as having a "criminal lifestyle"?

[21] Rudi Fortson QC, Misuse of Drugs and Drug Trafficking Offences, (6th edn 2012) p 655.

Under the Criminal Justice Act 1988 the prosecutor had to elect to apply the lifestyle assumptions. The court also had the discretion only to apply the assumptions if it thought fit. This discretion was removed in the confiscation regime under POCA 2002. Whilst the court may disapply an assumption where it would lead to a serious risk of injustice,[22] this discretion has been narrowly construed.

We were told during pre-consultation discussions that prosecutors sometimes disregard the mandatory nature of the assumptions to achieve a result that is both realistic and proportionate, for example, where a defendant has clearly only engaged in a single offence or where the defendant is bankrupt and has no assets that could be realised towards the order after an extensive enquiry. If prosecutors feel that they must take steps to reach a just outcome in spite of the wording of the legislation, this suggests that the legislation is inappropriately framed.

Prosecutors are trusted to exercise judgement in determining whether a criminal charge should be brought, weighing up various public interest factors. We consider that there is no reason why prosecutors should not be trusted to exercise such judgement with regards to the application of the assumptions.

We further consider that it would be appropriate to reintroduce a judicial power to consider whether it might be unjust to apply the assumptions. Judges already have a discretion to consider injustice in relation to each individual assumption, but not the assumptions as a whole. The law as currently framed does not allow "front-end" consideration as to whether the assumptions should apply at all.

Summary Consultation Question 9

Do consultees agree that the question of whether the "lifestyle assumptions" should apply should be subject to the exercise of appropriate prosecutorial and judicial discretion?

Codifying and clarifying case law on benefit

Since POCA 2002 was introduced there have been over one hundred appellate decisions connected to the calculation of benefit. The appellate courts have made clear their exasperation with the large numbers of confiscation cases before them. During our pre-consultation discussions, the ever-expanding body of case law was cited as creating uncertainty in the law, leading to inappropriate or improperly made orders, particularly when criminal judges are required to cross-over into consideration of cases from the civil courts.

In Chapter 14 of the Consultation Paper we consider how an accessible consolidated source of guidance on key issues that arise in the calculation of benefit could assist the courts and other stakeholders.

We recognise that it will not always be appropriate to include such guidance in primary legislation. We therefore provisionally propose:

1. the creation of non-statutory guidance on confiscation; or alternatively
2. the creation of a part of the Criminal Practice Direction relating to confiscation.

[22] Proceeds of Crime Act 2002, s 10(6)(b).

We consider carefully aspects of confiscation that have generated appeals and which are prone to add to the complexity of proceedings.

Summary Consultation Question 10

We provisionally propose that guidance ought to assist stakeholders in approaching the issues of:

1. assets that are part-tainted by criminality;
2. benefit in tobacco importation cases; and
3. transfers to trusts and companies.

Do consultees agree?

In *R v Ahmad*,[23] the Supreme Court noted that it is not always the case that, where there are multiple defendants, each defendant has benefited from the whole of the proceeds of crime. Each defendant might play a different role in the criminality, and expect to get a different share of the proceeds of crime. However, during our pre-consultation discussions we heard that treating each defendant as being liable for the whole benefit from a crime has become the default position adopted by the courts, without any reflection of what might in fact have been obtained by an individual defendant.

We therefore consider that, in accordance with *R v Ahmad,* "judges in confiscation proceedings should be ready to investigate and make findings as to whether there were separate obtainings".[24] A requirement for a court to consider the benefit accruing to each defendant ought to be a matter for primary legislation, rather than guidance, and we invite consultees' views on this provisional proposal.

Summary Consultation Question 11

Do consultees agree that, in assessing benefit to multiple defendants, confiscation legislation should require the court to make findings as to apportionment of that benefit?

[23] *R v Ahmad* [2014] UKSC 36, [2015] AC 299

[24] *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [51].

PART 5: RECOVERABLE AMOUNT

Before a confiscation order can be made the court must determine what is known as the "recoverable amount". The confiscation order will require the defendant to repay that "recoverable amount".

We consider issues relating to the "recoverable amount" in Part 5 of the Consultation Paper.

Recoverable Amount

The starting point is that the recoverable amount is equal to the benefit that a defendant obtained. The starting point can be displaced if the defendant satisfies the court that the value of his or her assets is insufficient to repay the benefit in its entirety.

The burden is on the defendant to show what has become of the benefit obtained because "the size of his realisable assets at the time of conviction [is] likely to be peculiarly within the defendant's knowledge". [25]

If the court is satisfied that the defendant's assets are insufficient to meet the benefit figure, the "recoverable amount" will be reduced from the total benefit figure to either:

1. the "available amount"; or
2. a "nominal amount" (usually £1) if the available amount is nil.

By making an order in a lower amount than the benefit figure, a defendant is only ordered to repay what he or she can afford to repay. However, because the proceeds of crime have not been fully repaid the prosecution may keep the defendant's means under review and if appropriate apply at a later date for an "uplift" to the amount to be repaid, to recover more of the benefit. These provisions, taken together, are intended to strike a just balance in the recovery of the proceeds of crime.

In Chapter 15 of the Consultation Paper we note that making the order in an amount lower than the benefit figure can cause confusion, generate a perception that the criminal is being "let off", and distract from close scrutiny of the calculation of benefit (because it is the "recoverable amount" that is perceived to matter). To address these problems, we consider carefully the issue of whether it is appropriate to make a confiscation order in the "recoverable amount" rather than the benefit figure.

We set out in detail why we consider the current approach to be the correct one. However, we provisionally propose that judges should provide greater clarity to those who have an interest in the confiscation hearing.

Summary Consultation Question 12

We provisionally propose that where a confiscation order is made in less than the benefit figure, judges should explain:

1. why the two figures are different; and
2. that it will be open for the prosecution to seek to recover more of the benefit figure in future, until it is repaid in full.

Do consultees agree?

[25] *R v Dickens* [1990] 2 QB 102 at [105] per Lord Lane CJ.

Hidden Assets

The term "hidden assets" is not used in POCA 2002, but is used by judges and practitioners to describe any unexplained difference in value between the defendant's benefit and the value of his or her known assets at the time of confiscation. "Where a discrepancy between identifiable assets and the supposed benefit arises, the implication is that an unknown amount of assets is hidden."[26]

Hidden assets have been described as:

> one of "the many ills that beset the confiscation regime".[27]

During our pre-consultation discussions, financial investigators reported that inappropriate hidden assets orders contribute to the large outstanding confiscation debt:

> In March 2019 nearly half a billion pounds of the outstanding confiscation debt (£493,830,000) comprised assets assessed as "hidden with no other assets against which enforcement action can be taken".[28] This equates to approximately a quarter of the amount still owed.

By their nature, the location and form of a hidden asset will be unknown to the authorities, making enforcement difficult (if not impossible).[29]

Hidden assets findings arise from the burden of proof being on the defendant to show what has become of his or her benefit.

The reverse burden of proof means that a defendant will be required to produce financial records, which may not have been kept or may not be in good order. Further, a defendant who is at the end of what may have been lengthy criminal proceedings, during which he or she may have already been disbelieved on oath, is required to give yet more evidence before the court.

We considered carefully whether the burden of proof in connection with hidden assets should be on the prosecution, rather than the defence. In Chapter 16 of the Consultation Paper we set out in detail why we have provisionally concluded that it should not. Instead, we consider that a more nuanced approach should be taken to evaluating the evidence provided by the defendant, which reflects the case law on hidden assets.

[26] J Fisher and J Bong-Kwan "Confiscation: deprivatory and not punitive – back to the way we were" (2018) *Criminal Law Review* 3 192.

[27] A Campbell-Tiech, "Whither confiscation: May revisited" [2019] 5 *Archbold Review*, p 4-5.

[28] Trust Statement 2018-2019 of Her Majesty's Courts and Tribunals Service (2018-2019) HC 2337, p 8.

[29] In its 2016 written submissions to the House of Commons Committee on Home Affairs, the Serious Fraud Office acknowledged that it was harder to enforce confiscation orders which were not based on any identified assets.

Summary Consultation Question 13

We provisionally propose that:

1. The law should provide a residual safeguard by requiring that the court makes an order in a sum less than the benefit figure where, having regard to all the circumstances of the case, the defendant shows *or the court is otherwise satisfied* that the available amount is less than the defendant's benefit. This provisional proposal would require a court to go beyond a simple analysis of whether the defendant has satisfied his or her burden of proof, and instead must consider all of the circumstances and all of the evidence (regardless of which party adduced it).
2. A criminal practice direction should set out a list of non-exhaustive factors for the court to consider when determining whether to make a hidden assets finding and when assessing the evidence (if any) given by the defendant. We consider that this provisional proposal would assist the court in carrying out its task fairly and effectively.

Do consultees agree?

Tainted Gifts

When a defendant makes a gift of property to another person, that defendant cannot generally take any steps to recover that gift if he or she wants to take the gift back. However, under POCA 2002, when a gift is "tainted" it is nevertheless treated as part of the amount that the defendant will be required to pay back under his or her confiscation order. Under section 77 of POCA 2002, whether the gift is tainted depends on the timing of the gift.

Although generally a defendant can only be required to repay what is within his or her means to repay, "a tainted gift" is treated as recoverable because:

1. A supposed gift may in fact be an attempt at disguising the true ownership of an asset, and defendants should not benefit from any attempt to put assets beyond the ambit of the calculation of their available amount by disguising true ownership.
2. Whether or not an attempt was made to disguise true ownership, defendants should not be permitted to avoid liability to repay their benefit from crime by making gifts of assets and then having their "available amount" reduced because they cannot recover the gift.[30]

The inclusion of tainted gifts in the amount to be repaid has been criticised on the grounds that it has the potential to add to the outstanding confiscation debt and to cause injustice to the individual defendant through his or her imprisonment for non-payment.

[30] *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57.

Proposed Confiscation Regime

Yes
No

Investigation commences

***NOTE**: Third party interests in assets can be determined at any stage of the process from "restraint" onwards*

Restraint application
(can happen any time from now)

PTPH - the court is notified that a confiscation application may be brought at the conclusion of substantive criminal proceedings

Conviction and Sentence

Confiscation begins at Prosecution Request or Court's initiative

Prosecutor's statement

Defence response

A confiscation management hearing will be held to determine the issues in dispute in preparation for the confiscation hearing

Early Resolution of Confiscation (EROC) Hearing

Enforcement

Confiscation hearing

Step 1: What criminal conduct is relevant to the confiscation enquiry?

Does D have a criminal lifestyle?

Criminal lifestyle offences

(a) Schedule 2 offence
(b) ***Min £ benefit***
(i) – Offence over at least 6 months
(ii) – Min no. of offences in the same proceedings or same no. of offences over multiple proceedings
(iii) – Min no. of offence/offences "taken into consideration"
(iv) – Where multiple offences are being considered, relevant "attempt" offences should also be considered

Step 2: Determining whether the defendant has benefited from his or her relevant criminal conduct

NO - has benefitted from PARTICULAR criminal conduct?

YES - Has D benefitted from GENERAL criminal conduct?

Lifestyle Assumptions (if sought by prosecution/at discretion of judge)

1. Any property transferred to D after the relevant day
2. Any property held by D after date of conviction = benefit from GCC
3. Expenditure at any time after relevant day = met from property obtained by GCC
4. Property should be valued as free of any other interests in it

***NOTE:** When considering the appropriate term of imprisonment in default, consider whether there are "tainted gifts"*

Step 3: Valuing Benefit

The value of benefit is determined with reference to market value. The value of property at the time of the confiscation hearing is the greater of:

a. its value at the time D obtained it, adjusted for inflation; or
b. the value at the time of the confiscation hearing of either
i. the property obtained; or
ii. If the D does not still hold it or all of it, the value of the property D exchanged for it

Step 4: Determining the recoverable amount

What is the recoverable amount?

1. An amount equal to D's benefit figure
2. The available amount if D's assets are worth less than the benefit figure; or
3. A nominal amount if D's assets are nil

Step 5: Proportionality

After determining the recoverable amount, the court must make a confiscation order in the sum of the recoverable amount figure "if, and only to the extent that, it would not be disproportionate to do so." Multiple recovery will be disproportionate.

Additional Requirements for Consideration

1. If the CO is not made in the benefit figure, explain why and confirm D's liability for full benefit figure
2. Time to pay period?
3. Identify the assets which will vest if order not paid and consider automatic vesting, contingent orders or other compliance orders
4. What is the appropriate term of imprisonment in default non-payments
5. Consider any other orders to be paid (eg compensation orders)

Enforcement

1. If order is not paid within "time to pay" period - Consider activating the contingent order to vest the assets
2. If order is still not satisfied - Consider imprisonment in default
3. If order still not paid, power to recall D to prison to serve remainder of sentence and/or direct that order be held in abeyance

We consider that the public policy rationales in favour of including tainted gifts in the available amount are good ones. However, a balance must be struck that ensures fairness when it comes to the enforcement of the confiscation order. The courts have already sought to achieve such a balance when setting and activating default sentences in light of the irrecoverability of a tainted gift.

Summary Consultation Question 14

Do consultees agree that where the value of a tainted gift is included in the defendant's confiscation order, if the court is satisfied that no enforcement measure would be effective in the recovery of the value of a tainted gift, the court should have the power to:

1. adjust downwards the period of imprisonment imposed on the defendant for defaulting on payment of the confiscation order; and
2. stop interest from accruing on the value of the tainted gift. As we discuss in Part 6 of the Consultation Paper, the accrual of interest on the confiscation order is also used as an enforcement tool?

In Part 6 of the Consultation Paper we also propose a system of putting unenforceable confiscation orders into abeyance. We consider that this may be appropriate in a case where no enforcement measure would be effective in the recovery of the value of a tainted gift. This would not only assist law enforcement in targeting resources at orders which remain enforceable but also improve the accuracy of the data.

PART 6: ENFORCEMENT OF THE CONFISCATION ORDER

In Part 6 of the Consultation Paper we consider how confiscation orders might be most effectively enforced.

Having made the confiscation order, the Crown Court must consider issues relevant to its enforcement. In particular, the court must consider:

1. how long the defendant will need to satisfy the order;
2. how long any period of imprisonment should be if the defendant fails to satisfy the order; and
3. whether any further order (known as a compliance order) is "appropriate for the purpose of ensuring that the confiscation order is effective".

The steps that must be taken by the Crown Court reflect the fact that POCA 2002 places the onus of satisfying a confiscation order on the defendant.

Enforcement of the confiscation order then passes to the Magistrates' court, which can use its powers to enforce fines to attempt to ensure that the order is satisfied.

There is a widely held perception that enforcement is not successful. This perception largely stems from the fact that over £2 billion owed by defendants in respect of confiscation orders remains outstanding. In Chapter 19 of the Consultation Paper we examine the causes of this confiscation debt and the issues that stakeholders have identified with the current regime, including perceptions that:

1. Placing the onus on the defendant to satisfy a confiscation order is open to abuse by defendants who do not wish to co-operate; and may place a heavy burden on defendants who do wish to co-operate but who (for whatever reason) cannot.
2. Whilst a receiver can be appointed by the Crown Court to sell assets belonging to the defendant to satisfy the confiscation order, such appointments are made infrequently.
3. The use of alternative orders such as charging orders may involve costly proceedings across multiple jurisdictions.
4. The fines enforcement regime was not drafted with confiscation orders in mind.

In Chapters 20 to 22 of the Consultation Paper we consider potential reforms, both radical and minor, to address the perceived difficulties with the current enforcement regime.

Taking enforcement action against particular assets

We consider whether the current confiscation regime which requires the defendant to repay the value of his or her crime should be replaced with a regime which requires the defendant to forfeit particular assets that have come from crime. However, we conclude that wholesale replacement of the value-based system would not be appropriate. A defendant who had already dissipated his or her proceeds of crime would not be held accountable, because he or she would no longer have any assets which could be linked to criminality. It is also a requirement of a number of international conventions that countries take steps to ensure that the value of the proceeds of crime can be forfeited. We note that other jurisdictions which appear to have a focus on asset-based forfeiture ultimately make confiscation judgments against the defendant which are based on value.

Whilst not advocating a wholesale move away from a value-based to an asset-based system of confiscation, we do consider that a greater focus on assets within a value-based system would be appropriate.

We therefore provisionally propose that, when a confiscation order is made the Crown Court should consider whether there is a realistic prospect of the defendant satisfying his or her confiscation order within any time-to-pay period that the court could impose. It could be, for example:

1. that in light of the defendant's conduct the court finds that there are reasonable grounds to believe that the defendant will fail to satisfy the order through wilful refusal or culpable neglect; or
2. that third party interests, or expected challenges by third parties, mean that it is more likely than not that the defendant's share of an asset will not be made available for realisation.

In such cases, we provisionally propose that when making the confiscation order the Crown Court should have the power to impose an order that the assets vest in a receiver or "trustee for confiscation" who can realise the value of the defendant's share of the asset. Such an order might:

1. take effect immediately, if the court considers that there is no reasonable likelihood that assets would be realised during a time-to-pay period; or
2. be made on a "contingent" basis, taking effect in the event of non-payment of the confiscation order by the deadline set by the court.

We consider that this proposal gives the court discretion on the facts of each case to strike an appropriate balance between giving a defendant a reasonable opportunity to satisfy his or her confiscation order where appropriate and ensuring that enforcement is effective.

Before making such an order, the court would be required to make any necessary determinations of third party interests and undue hardship that would be caused by vesting.

Making enforcement orders at the time that the confiscation order is imposed.

Having provisionally proposed that orders could be made to ensure the timely divestment of assets, we also explore whether other types of enforcement orders to take effect forthwith or on a contingent basis could be utilised to improve enforcement. In particular, we consider whether the "compliance order" provisions in POCA 2002 could be enhanced to make the process of divestment of assets simpler and easier in appropriate cases.

Because orders are imposed by the Crown Court and enforced by a Magistrates' court, there is inevitable delay in enforcement orders being made. The delay and lack of continuity of tribunal serves to hamper effective enforcement. We therefore provisionally propose giving the Crown Court the power to make, at the time a confiscation order is imposed, contingent enforcement orders which:

1. take effect only where a defendant fails to satisfy a confiscation order as directed within the time set by the court; and
2. subject the defendant to such orders as can be imposed by the Magistrates when such default occurs in any event.

Further or alternatively to directing that assets vest in a trustee for confiscation, the court could direct that if the order is not satisfied as directed:

1. funds held in a bank account will be forfeited;
2. seized property will be sold; or
3. a warrant of control empowering bailiffs to take possession and sell property will take effect.

Rather than contingent orders, orders might be imposed forthwith in appropriate cases. For example, where a defendant was ordered to pay compensation at sentencing but has failed to do so by the end of the confiscation hearing, the court may consider that there are real prospects that the defendant will fail to pay his or her confiscation order. In such circumstances a contingent order which takes effect on only expiry of time to pay would serve no useful purpose.

These proposals would enable a court to tailor enforcement to the facts of the case, to ensure effective and proactive enforcement action is taken in the event of default. The enforcement regime would become proactive rather reactive.

Summary Consultation Question 15

Do consultees agree that the Crown Court should have the discretion, upon imposing a confiscation order, to direct that enforcement orders could be made (i) forthwith or (ii) on a contingent basis if:

1. there are reasonable grounds to believe that the defendant will fail to satisfy the order through wilful refusal or culpable neglect; or
2. in light of any third party interests, whether established through a declaration or otherwise, there are reasonable grounds to believe that, without a contingent order, it is more likely than not the defendant's share of the asset will not be made available for realisation by the expiry of the time to pay period?

Other enforcement tools

In Chapter 22 of the Consultation Paper we consider carefully other tools that could optimise enforcement.

Confiscation orders are enforced as if they were fines. Under the fines regime, a defendant who serves a term of imprisonment in default is released unconditionally halfway through that period. On release the defendant is no longer liable to pay the fine. A defendant who is subject to a confiscation order for less than £10 million is also released unconditionally halfway through the period of imprisonment.[31] However, he or she is still liable to pay the confiscation order. The default term of imprisonment can be imposed only once and stakeholders told us repeatedly that after a defendant has served the term in default and been released unconditionally, future enforcement of the confiscation order is very difficult.

We provisionally propose that a defendant who has served a term of imprisonment for non-payment of his or her confiscation order should no longer be released unconditionally but should remain on licence subject to conditions which facilitate the enforcement of the confiscation order, and may be returned to custody during the licence period in the event that those conditions are breached.

Summary Consultation Question 16

Do consultees agree that defendants who are released from a default term imposed for failing to pay their confiscation order should be released on licence and subject to conditions which facilitate the enforcement of the confiscation order?

We make other provisional proposals that are intended to facilitate effective enforcement of confiscation orders:

Summary Consultation Question 17

Do consultees agree that:

1. the courts should have a bespoke power to direct a defendant to provide information and documents as to his or her financial circumstances and a failure to do so should be punishable by a range of sanctions including community penalties and imprisonment? This would replace the rudimentary form which is currently submitted to Magistrates on the day of an enforcement hearing, provide a clear audit trail of a defendant's financial circumstances and give law enforcement authorities an opportunity to investigate the assertions made.
2. unpaid confiscation orders should be placed in the Register of Judgments, to give them the same effect as a judgment debt imposed by a civil court.

[31] Serious Crime Act 2015, s 10(3), inserting s 258(2B) into the Criminal Justice Act 2003.

Interest

£748,882,000 in interest on unpaid confiscation orders was outstanding as of March 2019.[32] Stakeholders repeatedly told us about cases whereby the instalments paid by the defendant did not meet the interest that was accruing. A defendant facing an ever-mounting debt that cannot be satisfied is unlikely to be incentivised to pay down that debt: rather, any payments made towards the confiscation order are a "drop in the ocean":[33]

> A defendant who had a confiscation order made against her for £849,300 was ordered to pay £20 a month from her benefits towards the confiscation order. Interest was accruing at the rate of £150 per day and the outstanding confiscation debt had risen from £849,300 to £1,352,911.
>
> The judge described how "the order, whilst accruing interest exponentially … has a sort of mere abstract or symbolic quantity to it only".[34]

Furthermore, the current regime does not permit the court discretion where a defendant is not at fault for failing to realise an asset. For example, a defendant unable to sell a property in a stagnant property market during a recession would have interest applied to the principal sum even where the court is satisfied that the defendant has taken all reasonable steps to realise the asset. The accrual of interest is therefore a blunt enforcement tool.

Summary Consultation Question 18

We provisionally propose that where the supervising enforcement court is satisfied there are grounds to do so, the court should be permitted to pause or reduce the accrual of interest to incentivise continued compliance with the enforcement of the confiscation order.

Do consultees agree?

The appropriate venue for enforcement

Currently all confiscation orders are imposed in the Crown Court but are enforced in a Magistrates' court. In some cases, the ability to hold enforcement hearings in the Crown Court could be a useful tool. A Crown Court judge who imposes a confiscation order will be aware of the facts of the underlying offending and a defendant's financial circumstances.

Magistrates' courts have vast experience of enforcing financial penalties and activating terms of imprisonment in default where appropriate. It is plainly desirable to utilise this skill and expertise and ensure that the burden of enforcing orders is not shifted wholly to the Crown Court, which could be wasteful of resources and finite court time.

We consider that a "one-size fits all" approach to the venue for enforcement may not be appropriate. This is reinforced by the fact that representations are often made in the Magistrates' court to the effect that an application will be pursued in the Crown Court, either for the appointment of a receiver or to vary the amount to be paid under

[32] HMCTS Trust Statement 2018-2019, p 8.

[33] *Re G* [2019] EWHC 1737 (Admin) at [3].

[34] Re G [2019] EWHC 1737 (Admin) at [3].

the confiscation order. If and when such applications are made and dealt with in the Crown Court, enforcement of the confiscation order still lies with the Magistrates' court.

Summary Consultation Question 19

We provisionally propose that the Crown Court and the Magistrates' courts should have flexible powers to transfer enforcement proceedings to best enforce a confiscation order on the facts of each case.

Do consultees agree?

We also propose that where enforcement might have an effect on or be affected by family law financial remedy proceedings, the Crown Court should have discretion to transfer the matter to the High Court. The power would be discretionary and guidance could be issued to assist the judiciary as to when it would be appropriate to transfer proceedings. For example, if financial remedy proceedings were near their conclusion it may be appropriate for the enforcement proceedings to be adjourned to await their conclusion.

Summary Consultation Question 20

We provisionally propose that if there are concurrent confiscation enforcement and financial remedy proceedings, the Crown Court should have a discretionary power to transfer proceedings to the High Court to enable a single judge to determine both matters.

Do consultees agree?

Putting unenforceable confiscation orders into abeyance

The £2 billion gross confiscation order debt is currently skewed by an enormous legacy debt which is steadily rising as mandatory interest at the rate of 8% is applied. HMCTS estimates that only £161 million of the outstanding sum is recoverable.[35]

Enforcement staff at HMCTS told us that when all avenues have been exhausted it is wasteful of finite resources to make continued fruitless attempts to enforce a confiscation order. We consider that resources should be targeted where there is a real likelihood of successfully enforcing an order.

We provisionally propose that the Crown Court may direct that enforcement action be held in abeyance until further order of the court. This is similar to the mechanism that exists to permit substantive criminal charges to "lie on file". Where enforcement is held in abeyance, the court should be entitled to:

1. direct that a case be listed before the court for review; and
2. direct a defendant to provide periodic updates and supporting information as to their financial position.

[35] HMCTS Trust Statement (2018-19) p 8.

Where new assets or income are disclosed or discovered or the court was misled, enforcement proceedings may be commenced with leave of the court. In determining whether enforcement action should be re-opened, we consider that the court should be informed by the indicative factors that we outline in connection with "uplifts" of confiscation orders in Chapter 25 (see Part 8, below).

Summary Consultation Question 21

Do consultees agree that the court should be able to direct that enforcement be placed in abeyance where it is satisfied that an order cannot be enforced?

PART 7: OTHER ORDERS OF THE COURT

In Part 7 of the Consultation Paper we discuss other orders of the court in two different contexts. First, where a defendant becomes subject to more than one confiscation order in separate proceedings. Secondly, the inter-relationship between compensation orders and confiscation orders.

This part of the paper is likely to be of particular interest to practitioners and members of the judiciary.

Multiple confiscation orders

A defendant may be subject to more than one confiscation order. When a defendant has a "criminal lifestyle", the court calculates the benefit with reference to his or her "general criminal conduct". Because "general criminal conduct" encompasses all of the defendant's criminal conduct whenever it occurred, benefit that was taken into account in an earlier confiscation order may potentially fall to be taken into account in a later confiscation order. Section 8 of POCA 2002 is intended to prevent double counting by providing a mechanism to calculate a "running total" of the defendant's confiscation liability. However:

1. obtaining of confiscation orders can be a more granular process than is envisaged by Section 8. Different prosecution authorities may seek confiscation orders to different ends (for example, in some cases the order may be sought to compensate the victim).
2. the statutory provisions are complex.

In Chapter 23 of the Consultation Paper we propose reforms to address these issues.

Summary Consultation Question 22

Do consultees agree with our provisional proposals that:

1. where there are multiple confiscation orders sought or made against the same defendant, the court should have the power to consolidate the applications for confiscation;
2. payments from money obtained pursuant to a consolidated confiscation order should reflect the following priority:
    a. compensation of victims (when such compensation is ordered to be paid from confiscated funds); followed by
    b. each confiscation order in the order in which it was obtained?

Compensation

Our Terms of Reference are limited to confiscation orders under Part 2 of POCA 2002. In this chapter, therefore, we consider compensation orders in so far as such orders inter-relate with confiscation orders.

Throughout the Consultation Paper we make proposals that are intended to give priority to the compensation of victims. For example, we provisionally propose that:

1. ensuring victims of crime are compensated is included as a specific objective of the confiscation regime;
2. a court may impose ancillary orders, such as a compensation order, forfeiture or similar orders, at sentencing rather than having to wait until after the making of the confiscation order;

3. a court may impose enforcement orders at the time of the confiscation hearing, including vesting orders, to expedite the payment of compensation where such compensation is to be paid from confiscated funds.

In Chapter 24 of the Consultation Paper we discuss how, under the current law, confiscation orders and compensation orders are enforced differently. How and whether a compensation order is paid may depend on whether the compensation is ordered to be paid from confiscated funds or whether a standalone compensation order is made.

We consider that where confiscation and compensation orders are made in the same proceedings, all outstanding compensation should be recovered in the same manner to create a simpler and more efficient system and to rectify what the Court of Appeal has identified as a perceived flaw in the process.[36] To achieve this objective, we consider that the court should be required to direct that where compensation is imposed at the same time as making a confiscation order, compensation should be collected from sums recovered under the confiscation order irrespective of an offender's means.

In Chapter 25 of the Consultation Paper we discuss the powers of the Crown Court to vary the amount that a defendant can be required to pay pursuant to a confiscation order, depending on his or her means. Currently, the legislative framework is such that when such variations are made to the confiscation order, the compensation ordered to be paid from confiscation is not varied accordingly. It is unsatisfactory that a confiscation order (which is paid to the state) is capable of being increased, but compensation (which is payable to victims) is not.

We provisionally propose that, when making orders to vary the amount that the defendant is required to pay under a confiscation order, the Crown Court should have the power to adjust the compensation element of the order.

Summary Consultation Question 23

Do consultees agree with our provisional proposals that:

1. where a compensation order is imposed at the same time as a confiscation order, the Crown Court should be required to direct that compensation should be paid from sums recovered under a confiscation order, irrespective of a defendant's means; and
2. when making orders to vary the amount that the defendant is required to pay under a confiscation order, the Crown Court should have the power to adjust the compensation element of the order?

[36] *R v Jawad* [2013] EWCA Crim 644, [2013] 1 WLR 3861 at [13] and *R v Davenport* [2015] EWCA Crim 1731, [2016] 1 WLR 1400 at [70].

PART 8: RECONSIDERATION

The law provides for the reconsideration of confiscation orders in a number of situations.

During our pre-consultation discussions, the concerns raised by stakeholders centred exclusively around applications to increase a defendant's available amount, which are often referred to as "uplift" applications. It is therefore the focus of our attention in Chapter 25.

Applications for an uplift may be made at any time after the making of the original confiscation order. If the Crown Court is satisfied that the amount available to the defendant from which to pay back his or her benefit from crime is higher than it was at the time of the making of the confiscation order, the court can increase the amount to be repaid by such amount as it thinks is "just". The court's discretion is a broad one.

In exercising its discretion, competing interests might arise. On the one hand, if the court makes an uplift, a defendant is better held to account for his or her proceeds of crime. A message is also sent that a defendant cannot hide his or her assets until after a confiscation hearing and then be permitted to keep them. On the other hand, an uplift application made years after the confiscation order was imposed in connection with assets obtained through entirely legitimate employment may have a negative impact on rehabilitation. We have considered carefully how an appropriate balance might be struck.

We do not provisionally propose that uplift applications are restricted with reference to particular criteria, such as:

1. periods laid down in the Rehabilitation of Offenders Act 1974, which would vary the time limit according to the sentence imposed;
2. any set time limit, regardless of the sentence imposed;
3. whether assets were obtained after the making of the confiscation order; or
4. whether the prosecution could have discovered the existence of assets and brought an application for an uplift with the exercise of reasonable diligence.

We would nonetheless welcome consultees' views about whether there should be statutory restrictions on making an application to "uplift" a confiscation order and if so, what such restrictions should be.

Instead, we provisionally propose that, to assist the court in determining a "just" uplift of a confiscation order, the court should be required to weigh factors articulated in a statutory provision.

During our pre-consultation discussions the issue of practicality was raised. Prosecutors identified that a number of defendants had wished to enter into arrangements whereby they repaid their confiscation order way of instalments, for example, from future pay cheques. Currently, there is no mechanism to permit this. Payment by instalments could soften any issue of rehabilitation or hardship. It therefore could provide a "just" compromise between making no order for an uplift and ordering an uplift in the full amount, payable within a short time. We therefore consider that any time-to-pay period for an uplifted sum should be either to a prescribed deadline or by way of payment in instalments.

Summary Consultation Question 24

Do consultees consider that there should be statutory restrictions on making an application to "uplift" a confiscation order?

If so, what should such restrictions be?

Summary Consultation Question 25

Do consultees agree that the court ought to consider indicative factors in determining whether an uplift application is "just", including:

1. the extent to which the uplift complies with the legislative objectives;
2. undue hardship that would be caused through the granting of the uplift, in light of the use ordinarily made or intended to be made of the property and the nature and extent of the defendant's interest in the property; and
3. the diligence of the prosecution in applying for an uplift?

Summary Consultation Question 26

Our provisional proposals in connection with the reconsideration of confiscation orders focus exclusively on reconsideration of the available amount. We invite consultees to submit their views about problems with any of the other reconsideration provisions in Part 2 of POCA 2002.

PART 9: PRESERVING THE VALUE OF ASSETS

The courts and law enforcement agencies must take steps to mitigate the risk that property may be placed beyond the reach of law enforcement agencies, or lost, damaged, destroyed or diminished in value in any other way, thereby frustrating the fulfilment of a confiscation order in the event that one is made. In this part of the Consultation Paper we consider the steps that can be taken to this end and issues that have arisen in connection with them.

Restraint orders

A restraint order operates to preserve assets at any stage after a criminal investigation has commenced. There may be a considerable lapse of time between the moment an investigation begins and the day on which a confiscation order is made, during which assets could be subject to dissipation. A restraint order is therefore an invaluable tool as a protective measure. Without the opportunity to restrain assets, the potential to preserve value to satisfy a confiscation order and to compensate victims would be diminished. Providing a defendant with an opportunity to spend his or her criminal gains is also likely to undermine any potential deterrent effect that a confiscation order could have.

The risk of dissipation

Before a restraint order can be obtained, a court must be satisfied that there is a real risk that, without the restraint order being in place, the defendant's assets would be dissipated.

The risk of dissipation test was the primary focus of concern amongst stakeholders. Some prosecutors reported that the test makes it difficult to obtain restraint orders. In its 2018 report, the Financial Action Task Force identified that:

> In the 57% of cases where restraint is sought at the post-charge stage, if the subject has not attempted to move or conceal the unrestrained assets, it can be more difficult to show risk of dissipation and meet the threshold for restraint. In such cases, the CPS would typically have to wait until some dissipation occurs before restraint can be pursued.[37]

[37] Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures*, United *Kingdom mutual evaluation report* (December 2018) para 191.

We consider the test to be an important safeguard to ensure that restraint orders are only made in cases where they are necessary and appropriate and that it ought to be retained. However, stakeholders across the criminal justice system may benefit from greater guidance as to what might suggest a risk of dissipation. This would:

1. alleviate the need to wait for actual dissipation to occur.
2. encourage greater (and responsible) use of restraint powers. Because prosecutors and the courts would have a clear list of indicative factors to be taken into account, the reasonableness of the arguments on the risk of dissipation may be more readily established, leading to a reduced risk of an adverse costs order.
3. Assist the court in its duty to consider the restraint application carefully before interfering with the peaceful enjoyment of property.
4. Assist the parties in considering whether a prosecutor has complied with his or her duty to make full and frank disclosure of matters relevant to the risk of dissipation.

Summary Consultation Question 27

We provisionally propose that the court should consider the following factors, amongst any other factor that it considers relevant, in determining the risk of dissipation:

1. The actions of the person whose assets are to be restrained, including:
    a. any dissipation that has already taken place;
    b. any steps preparatory to dissipation that have already taken place;
    c. any co-operation in the furtherance of the just disposal of the case.
2. The nature of the criminality alleged; including (but not limited to) whether the defendant is alleged to have committed an offence:
    a. involving dishonesty;
    b. which falls within Schedule 2.
3. The value of the alleged benefit from criminality.
4. The stage of proceedings.
5. The person's capability to transfer assets overseas.
6. The person's capability to use trust arrangements and corporate structures to distance themselves from assets.
7. The person's previous good or bad character.
8. Other sources of finance available to the person.
9. Whether a surety or security could be provided.

Do consultees agree?

Without notice applications

It is important that restraint orders are obtained without undue delay to ensure that assets are preserved for the purposes of satisfying any confiscation order. During our pre-consultation discussions we heard that there are difficulties in bringing urgent applications before busy courts, who may not have time to consider the application immediately or, if they can, with sufficient time allocated to the application to give it proper scrutiny. To address this issue, we consider that all applications should be dealt with by a national remotely accessible "duty" judge, who does not have the time pressures of a usual criminal courtroom.

Summary Consultation Question 28

We provisionally propose that applications for without notice restraint orders should be made to a duty judge, accessible nationally, who may:

1. Determine the application on the papers;
2. Hold a virtual "without notice" hearing to obtain further information; or
3. Refer the matter to a court centre local to the parties where the judge considers that an inter partes hearing is needed.

Do consultees agree?

Permitting legal expenses to be drawn from restrained funds

Under the current law, a defendant or recipient of a tainted gift cannot use restrained funds to challenge any matter related to the criminal offence or offences that he or she is suspected of having committed. This includes funding to challenge any proceedings connected to confiscation. The restriction on the use of restrained funds was an attempt to reduce what was referred to by the Cabinet Office's Performance and Innovation Unit (PIU) as the "reckless dissipation of restrained assets in legal fees".[38]

[38] Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000) p 72.

During our scoping exercise, the legal expenses exception was described as unsatisfactory in two different ways:

1. Restraint orders restrain both legitimately and illegitimately obtained assets for confiscation. Therefore, a defendant may be prohibited from using their restrained but legitimately obtained money to fund their defence. This contrasts with the position in civil recovery proceedings before the High Court. Civil recovery proceedings are brought with a view to forfeiting assets that are alleged to have been obtained as a result of criminality.[39] Any property freezing order obtained in connection with civil recovery proceedings therefore freezes property alleged to have been obtained through illegitimate means.[40] Nevertheless, a defendant is permitted to draw from such funds for their defence.[41]
2. Third parties other than recipients of a tainted gift who can establish an interest in the restrained funds may be permitted to draw on those funds. Therefore, we have heard that there is a disparity between the position in relation to defendants and others.

Because a defendant cannot access his or her legitimate funds to pay legal expenses, the defendant is restricted in his or her choice of practitioner in both the criminal case and the confiscation proceedings to those willing to be paid by way of legal aid. The different funding regimes in civil recovery and criminal restraint create a disparity in the range of legal representation to which a defendant has access. A defendant's choice of legal representative may depend on a decision of the prosecution agency, namely whether asset forfeiture is pursued through civil proceedings in the High Court or criminal asset forfeiture proceedings (confiscation) in the Crown Court. The complete prohibition on the release of legal fees in connection with confiscation also places a burden on the state to fund proceedings via legal aid on behalf of defendants, regardless of their apparent wealth.

To address these issues, we consider that the blunt approach adopted under POCA 2002 should be amended, and that defendants should be permitted to draw on legitimate funds to pay legal expenses. As with civil recovery proceedings, we consider that expenses should not be unchecked. Instead, they should be subject to judicial approval and calculated with reference to a statutory instrument, which sets out a table of fees. We consider that this strikes a balance to ensure that any fees that are released are reasonable.

Summary Consultation Question 29

Do consultees agree that the legal expenses connected with criminal proceedings and confiscation should be payable from restrained funds, subject to:

1. Approval of a costs budget by the judge dealing with the case.
2. The terms of a table of remuneration, as set out in a Statutory Instrument?

Costs in restraint proceedings

The general rule in restraint proceedings is the civil costs rule that an unsuccessful party will be ordered to pay the costs of a successful party. Therefore, in every case in which a

[39] Proceeds of Crime Act 2002, s 243(1) and 304(1).

[40] Proceeds of Crime Act 2002, s 245A(5).

[41] Proceeds of Crime Act 2002 s 245C(5).

restraint order is discharged, the general rule means that there is a real risk of costs being awarded against a prosecution authority, even though a restraint order may have been obtained reasonably and appropriately. The risk of a substantial costs order has been cited as an incentive not to apply for a restraint order. This has the potential to undermine the effectiveness of the restraint regime.

To address this issue, in Chapter 26 we provisionally propose that a court should be required to consider whether a restraint application was reasonably brought and, if so, costs against the prosecution should be capped at legal aid rates. This would align the position on costs in restraint proceedings with the costs in criminal proceedings generally, and costs in the main confiscation proceedings, which are treated as part of the criminal proceedings.[42]

We note that costs capping is used in some civil cases[43] and that our proposal is more favourable to defendants than the approach taken in asset forfeiture proceedings before the Magistrates' court, where no costs are awarded against an unsuccessful law enforcement authority as long as the application was brought "honestly, reasonably, properly and on grounds that are sound".[44]

We consider that our proposal strikes a balance between encouraging restraint (which is an essential tool to ensure that there are assets against which a confiscation order can be enforced)[45] and safeguarding the rights of a defendant, with costs protection being afforded only where a prosecution agency has acted reasonably.

Summary Consultation Question 30

Do consultees agree that, if a court determines that an application for restraint was reasonably brought, costs should be capped at legal aid rates?

If not, how (if at all) should costs be limited where restraint applications are reasonably brought?

Effective Asset Management

In Chapter 27 we consider issues surrounding steps that can be taken to prevent the diminution of the value of assets, whether or not subject to a restraint order, sometimes referred to as "asset management" steps. We consider whether methods other than restraint that are used to manage or preserve the value of assets are effective.

Search and seizure to prevent a risk of dissipation.

Although there are powers to search for and seize assets that are at risk of dissipation, during our pre-consultation discussions many police officers were unaware of such powers. We provisionally propose that the National Police Chiefs' Council reconsider the training needs of all police officers in connection with POCA 2002, and in particular those front-line police officers who may need to exercise the powers of search and seizure in connection with confiscation.

[42] Criminal Practice Direction X: Costs, Part 7.1.1.

[43] Civil Procedure Rules r 27.14(2)(g), r 45.39(7).

[44] *(R (Perinpanathan) v City of Westminster Magistrates' Court,* [2010] EWCA Civ 40, [2010] 1 WLR 1508 at [33].

[45] Thereby ensuring that criminal profits are disgorged and, where appropriate, paid over to victims

We also provisionally propose that any non-statutory guidance produced on the confiscation regime should specifically reference the search and seizure powers connected with confiscation and refer stakeholders to the statutory code of practice issued by the Secretary of State in this regard.

When an asset is subject to a restraint order, a management receiver may be appointed to preserve the value of that asset. However, an asset might be seized because of a risk of dissipation and detained pursuant to an order of the Magistrates' court. The powers that a management receiver would have are not exercisable in relation to such assets. To ensure the ability to manage such assets comparably, we provisionally propose that the Crown Court should have the power to appoint a management receiver where assets are detained by the Magistrates' court following seizure because of a risk of dissipation.

Development of a national asset management strategy

During our pre-consultation discussions we were told that individual prosecution agencies and police forces have their own policies about:

1. whether an external agent is used to enforce a confiscation order, or manage assets pending such an order (whether a receiver or an auction house);
2. who that external agent is;
3. the rates that are charged by that agent; and
4. the enforcement approach by that agent (for example, whether a minimum value must be obtained for an asset).

Having a single, central organisation maximises the prospect of a uniform enforcement strategy. Such an organisation could develop national policies on asset realisation and enforcement. This would end what might be perceived as arbitrary variations and allow for an "economy of scale" approach for procurement. Such an organisation could evaluate how and in what circumstances best use could be made of the public and private sector where necessary and appropriate.

We therefore propose that a new Criminal Asset Recovery Board be established to develop a national asset management strategy. We consider that it should include representatives of the principal agencies that undertake confiscation, as well as law enforcement representatives and HMCTS. During our pre-consultation discussions we heard that the private sector offers distinct specialisms (whether receivers, insolvency specialists or auction houses) and can offer a different approach and mindset to the identification and recovery of assets. Drawing on its input is likely to assist in developing strategies for asset identification management and realisation.

Summary Consultation Question 31

Do consultees agree that:

1. a national asset management strategy should be established, to determine by whom and how assets should be managed; and
2. a new Criminal Asset Recovery Board, comprising stakeholders from the public and private sectors should establish that strategy?

Cryptoassets

In Chapter 29 we consider whether specific reforms of the confiscation regime are required in connection with cryptoassets, given that such assets have only emerged as a type of property since POCA 2002 was enacted.

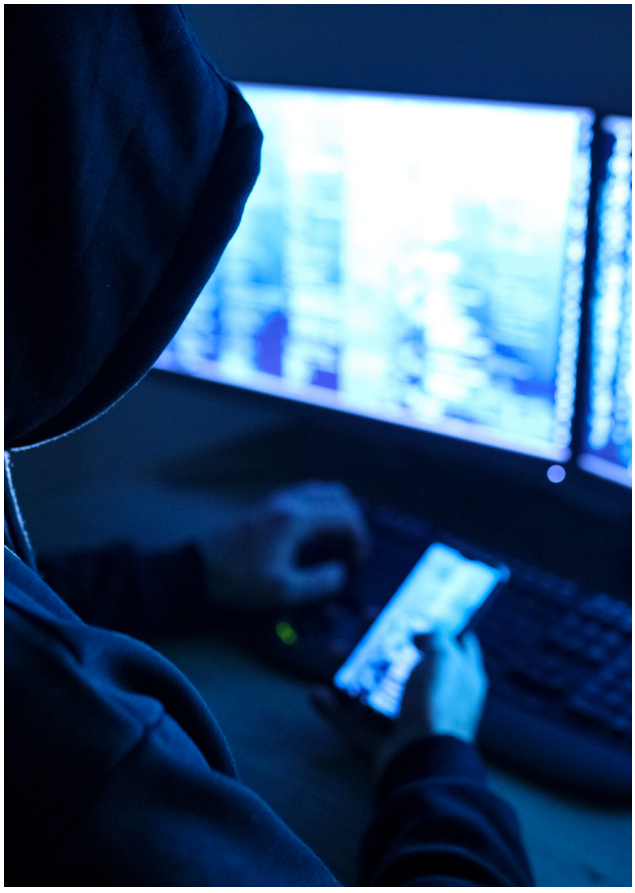
The chapter generally aims to highlight some relevant considerations that arise in connection with POCA 2002 that may inform any wider review of cryptoassets and the criminal justice system (which is beyond the scope of this Consultation Paper). In particular, we consider the impact of cryptoassets on the way in which benefit is calculated and on how restraint and seizure are effected. We also consider the implications of the extraterritoriality of the virtual space.

We consider the issue of fairness to the prosecution and the defendant given how frequently and extensively these types of assets fluctuate in value. If such assets are converted to pounds sterling to preserve their value, they may subsequently lose value as a result. This may expose the prosecution to an adverse financial risk and penalise a genuine attempt at asset preservation.

We do not make a provisional proposal relating to indemnification for the prosecution following the conversion of cryptoassets into sterling, preferring to apply the general test of reasonableness of action articulated in Chapter 26. Nevertheless, we invite consultees to comment on whether they consider such an indemnification to be appropriate.

Summary Consultation Question 32

Do consultees consider that prosecutors should be protected from having to compensate defendants in relation to losses arising when cryptoassets are restrained and converted into sterling and then subsequently lose value? If so, in what circumstances?



You can access the full consultation report and respond to the consultation **here**.