



**Law
Commission**
Reforming the law

Confiscation of the proceeds of crime after conviction: A consultation paper

Law Commission

Consultation Paper No 249

Confiscation of the proceeds of crime after conviction: A consultation paper



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Glossary

Abscond: Not defined in the Proceeds of Crime Act 2002 ("POCA 2002"), but generally understood to be the act of a defendant failing to attend the Crown Court on a date and time when they are required to do so. The court has certain powers regarding confiscation orders concerning defendants who are absconders (see sections 27 to 30 of POCA 2002).

Apportionment: Where multiple defendants are jointly responsible for a crime, a judge can make findings as to whether each defendant jointly obtained the whole of property obtained in connection with the crime or merely a proportion of it. For example, theft of £1 million may result in a finding that each participant in the offence obtained £1 million or that each obtained a share of that sum.

Assumptions: Four rebuttable assumptions that the court must make for the purpose of deciding whether a defendant has benefitted from their general criminal conduct and, if so, determining the value of the defendant's benefit from that conduct. See section 10 of POCA 2002.

ARIS: The Asset Recovery Incentivisation Scheme ("ARIS") provides that the proceeds obtained from a confiscation order are, once collected, distributed by the Home Office in accordance with an agreed protocol with HM Treasury. The Home Office retain 50%. They pass 18.75% to the prosecuting authority, 18.75% to the investigating authority and 12.5% to Her Majesty's Court Service.

Available amount: An amount lower than the defendant's benefit figure that the defendant is ordered to repay towards his or her confiscation order. See section 9 of POCA 2002.

A1P1: Article 1 of the First Protocol to the European Convention on Human Rights. It provides in summary that every person is entitled to the peaceful enjoyment of their possessions and shall not be deprived of them except in the public interest and subject to the conditions provided for by law.

Benefit: In order to impose a confiscation order, the court must determine whether a defendant has benefited from their general or particular criminal conduct, and quantify that sum. A defendant benefits from conduct if they obtain property or a pecuniary advantage as a result of or in connection with it. All property obtained is included, not just profit. See section 8 of POCA 2002.

Binding determination: A ruling of the court under section 10A of POCA 2002 concerning the extent of a defendant's interest in property where another person holds, or may hold, an interest in that property. In the absence of a serious risk of injustice to a third party, or a failure to give the third party a reasonable opportunity to make representations at the time it was made, it is binding in any future proceedings to enforce the confiscation order.

Certificate of inadequacy: Prior to the introduction of POCA 2002, in lieu of the procedure under section 23 of POCA 2002, certificates of inadequacy could be obtained by application to the High Court. These certificates would enable a defendant to apply to the Crown Court to vary a confiscation order downwards.

Civil recovery: A court order that property obtained through unlawful conduct be forfeited. A conviction is not required and, unlike confiscation orders, the asset in question is removed from a defendant. Civil recovery is governed by Part 5 of POCA 2002 which is not within the terms of reference of this project.

Compensation order: An order for the payment of money to a victim of crime to compensate them for their loss. A compensation order can be made separately to a confiscation order or the court can direct that compensation be paid from sums recovered under a confiscation order. The latter course is only available if a defendant does not have sufficient means to pay both compensation and confiscation orders. See section 13(5) of POCA 2002.

Compliance order: When imposing a confiscation order the court must consider whether it is appropriate to make an order for the purpose of ensuring that the confiscation order is effective. The court must, in particular, consider whether any restriction or prohibition on the defendant's travel outside the United Kingdom ought to be imposed, sometimes called a "travel restriction order". See section 13A of POCA 2002.

Confiscation order: An order following conviction to deprive criminals of the benefit they have obtained from their criminal conduct. An order is made for a sum of money and is effectively a debt owed to the state. Confiscation orders do not "confiscate" assets and therefore a defendant may satisfy a confiscation order from assets of his or her choosing, unless an enforcement receiver (defined below) is appointed. A confiscation order is not an additional financial penalty. See section 6 of POCA 2002.

Criminal conduct: Conduct which constitutes a criminal offence in England and Wales, or which would constitute such an offence if it occurred in England and Wales. See section 76(1) of POCA 2002.

Criminal lifestyle: A defendant will be treated as having a "criminal lifestyle" if any of the conditions in section 75 of POCA 2002 are satisfied. If a defendant has a "criminal lifestyle" the relevant benefit from criminal conduct for the purposes of the confiscation hearing will be the defendant's benefit from "general criminal conduct" (see definition below).

Criminal Practice Directions ("Crim PD"): Directions given by the Lord Chief Justice (the president of the criminal division of the Court of Appeal) as to the practice and procedure of the criminal courts, published under authority of the Courts Act 2003 and the Constitutional Reform Act 2005. These supplement the Crim PR below. The practice directions are compiled into a Consolidated Criminal Practice Direction.

Criminal Procedure Rules ("Crim PR"): A set of rules governing the practice and procedure in criminal proceedings. The rules of the Crim PR are supplemented by the Criminal Practice Directions, see above.

Crown Court Compendium: A resource produced by the Judicial College for judges. It provides guidance on law, evidence and procedure. It also gives examples of what a judge might say in court. Part II of the Compendium (on sentencing) contains a section on confiscation.

Enforcement: Not defined in Part 2 POCA 2002, but generally understood to be the compelling of the satisfaction of a confiscation order.

Enforcement receiver: Where a defendant fails to satisfy a confiscation order as directed, a prosecutor may apply to the court to appoint an enforcement receiver. This is a person to whom the court may grant powers, including the power to take control of any identified assets and realise them, in order to satisfy a confiscation order. See sections 50 and 51 of POCA 2002.

Free property: All property, except property subject to certain court orders such as a forfeiture order, a deprivation order, or an order of a similar nature. See section 82 of POCA 2002.

Financial investigator: Financial investigators are either civilians or police officers who have received accreditation from the National Crime Agency to conduct specialist inquiries in relation to assets suspected of being the proceeds of crime. See section 3 of POCA 2002 and the schedule to the Proceeds of Crime Act 2002 (References to Financial Investigators) (England and Wales) Order 2015.

General criminal conduct: If a defendant has a “criminal lifestyle” the court must determine whether the defendant has benefited from their criminal conduct, whenever the conduct occurred and whether or not it has ever formed the subject of any criminal prosecution.

Hidden assets: Where a defendant cannot explain what has happened to their benefit obtained from crime, the court may find that the defendant has “hidden” his or her assets.

Imprisonment in default: When a court imposes a confiscation order it imposes a term of imprisonment that a defendant must serve if the confiscation order is not paid as ordered. See section 35 of POCA 2002.

In personam: A confiscation is made *in personam* which means that it imposes a personal liability on a defendant to repay the sum specified in the order. Orders are not directed at specific assets.

In rem: An order made over an asset rather than an individual. The civil recovery regime, (see above), is an example of an *in rem* regime. For example, an order may be made that a car obtained through criminality be forfeited.

Instrumentality: An asset used in the commission of crime.

Joint Asset Recovery Database ("JARD"): JARD is the database upon which all restraint, confiscation, cash seizure and civil recovery orders made throughout the United Kingdom are recorded including details of the assets taken into account in making such orders. JARD is maintained by the National Crime Agency. Most law enforcement agencies and HM Courts and Tribunals Service have access to it.

Lifestyle assumptions: See “assumptions”.

Management receiver: Where the Crown Court makes a restraint order it may appoint a management receiver in respect of any realisable property to which the restraint order applies. The court may give the management receiver a number of powers in relation to the property. These are generally intended to facilitate the management of the property to preserve its value for the purpose of any future confiscation order. See sections 48 and 49 of POCA 2002.

Nominal order: Where the court is satisfied that a defendant has benefited from crime but has no assets, the court will record the amount of the benefit and make an order that a defendant repay a nominal sum which is usually £1. If a defendant later acquires assets (or further assets are discovered) the prosecution can apply to the court to increase the amount that a defendant must pay (see reconsideration). See section 7(2)(b) of POCA 2002.

Non-statutory guidance: A document intended to provide a succinct summary of the law as explained and developed in the leading cases. Non-statutory guidance as to “financial needs” in the context of family law was published by the Family Justice Council. The second edition was published in 2018; “Guidance on ‘Financial Needs’ on Divorce”. It is intended to provide a succinct summary of the law. It also includes a number of case studies of common scenarios.

Particular criminal conduct: Where the “criminal lifestyle” provisions are not engaged, a defendant’s benefit from crime is calculated by reference to the offences of which a defendant has been convicted in the proceedings before the court, together with any offences taken into consideration by the court in passing sentence. See section 76(3) of POCA 2002.

Pecuniary advantage: Not defined in POCA 2002. A defendant ordinarily obtains a pecuniary advantage if they evade a liability to which they are personally subject. It is generally understood to be some kind of financial advantage. A temporary evasion of a liability to pay tax has been found to constitute a pecuniary advantage.

Postponement: The power of the court, subject to conditions, to postpone confiscation proceedings for a specified period after a defendant has been sentenced for an offence. See sections 14 and 15 of POCA 2002.

Proportionality: In the context of confiscation, proportionality refers to the need for there to be a reasonable relationship between the aims of the confiscation regime and how the regime is applied. See section 6(5) of POCA 2002.

Prosecutor: The person with the conduct of criminal proceedings, including confiscation proceedings. Often the prosecutor is a public body such as the Crown Prosecution Service, the Serious Fraud office, or a local authority. It may be a private body or an individual.

Realisable property: Any free property held by defendant or the recipient of a tainted gift. See “free property” and “recipient of a tainted gift”. See section 83 of POCA 2002.

Receiver: Generally, a person appointed by the court and given certain powers in relation to property. Under Part 2 of POCA 2002, a receiver may be a management receiver or an enforcement receiver (see definitions above).

Reconsideration: Confiscation orders, or aspects of a confiscation order, may be reconsidered by the court in the circumstances set out in sections 19 to 25A of POCA 2002.

Recoverable amount: The amount that the defendant is ordered to pay under a confiscation order. See section 7 of POCA 2002.

Restraint order: An order to preserve the value of assets pending the making or satisfaction of a confiscation order. See sections 40 and 41 of POCA 2002.

Section 16 statement: A statement prepared by the prosecutor which identifies a defendant's alleged criminal benefit and assets. See section 16 of POCA 2002.

Section 17 statement: A defendant's response to the prosecutor's section 16 statement. A defendant must indicate which matters are accepted, any matters that are disputed and matters that will be relied upon. See section 17 of POCA 2002.

Section 18 statement: A statement that a defendant may be required by the court to make. It contains information specified by the court to help it carry out its functions in making a confiscation order. Often, it takes the form of a witness statement by the defendant setting out details of their finances and is submitted prior to the production of a section 16 statement. See section 18 of POCA 2002.

Section 18A statement: Similar to a section 18 statement, but addressed to an "interested person". Where the court is considering making a binding determination about a defendant's interest in property, it may order a person who it thinks is, or may be, holding an interest in that property ("an interested person") to provide information to help the court carry out its functions in relation to that binding determination. See section 18A of POCA 2002.

Tainted gift: A gift made that was obtained as a result of or in connection with criminal conduct or made by the defendant after a particular date, as set out in section 77 of POCA 2002.

Trustee for confiscation: Following the making of a bankruptcy order against an insolvent individual, a trustee is appointed. The statutory function of a trustee in bankruptcy is to realise the bankrupt's estate and distribute it to the creditors. Assets "vest" or transfer to the trustee to enable them to be sold without the debtor's consent. We propose a similar model whereby a trustee for confiscation may be appointed at the time an order is imposed to realise assets.

Uplift application: This is a term used as shorthand for an application to increase the available amount under section 22 of POCA 2002.

Abbreviations

A1P1: Article 1, Protocol 1 of the European Convention on Human Rights

ACE: Asset Confiscation and Enforcement

ARIS: Asset Recovery Incentivisation Scheme

BCM: Better Case Management

CACD: Court of Appeal (Criminal Division)

CARB: Criminal Asset Recovery Board

CCDCS: See DCS.

CDF: Contractual Disclosure Facility

CHMF: Confiscation Hearing Management Form

CJA 1988: Criminal Justice Act 1988

CMH: Confiscation Management Hearing

CPRC: Criminal Procedure Rules Committee

CPS: Crown Prosecution Service

Crim PR: Criminal Procedure Rules

Crim PD: Criminal Practice Direction

DCS: Digital Case System, also sometimes abbreviated to “CCDCS” (Crown Court Digital Case System).

DLT: Distributed Ledger Technology

DPA: Deferred Prosecution Agreement

DTA 1994: Drug Trafficking Act 1994

DTOA 1986: Drug Trafficking Offences Act 1986

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

ECSB: Economic Crime Strategic Board

EROC: Early Resolution of Confiscation

FATF: Financial Action Task Force

FCC: Firearms Consultative Committee

G8: G8 Intergovernmental Political Forum

HMCTS: Her Majesty's Courts and Tribunals Service

HMRC: Her Majesty's Revenue and Customs

JARD: Joint Asset Recovery Database

MCA: Matrimonial Causes Act 1973

MTIC: Missing Trader Intra-Community

NCA: National Crime Agency

NAO: National Audit Office

PACE 1984: Police and Criminal Evidence Act 1984

PCC(S)A 2000: Powers of Criminal Courts (Sentencing) Act 2000

POCA 2002: Proceeds of Crime Act 2002

PTPH: Plea and Trial Preparation Hearing

RART: Regional Asset Recovery Team

ROCU: Regional Organised Crime Unit

SCA: Serious Crime Act 2015

SFO: Serious Fraud Office

SOCPA 2005: Serious Organised Crime and Police Act 2005

STRO: Slavery and Trafficking Reparation Order

TIC: [Offence] Taken into Consideration

UN: United Nations

UNODC: United Nations Office on Drugs and Crime

UWO: Unexplained Wealth Order

VAT: Value Added Tax

VPS: Victim Personal Statement

Chapter 1: Introduction

FOREWORD

- 1.1 At the time of writing, the world is in the midst of a pandemic resulting from the Coronavirus disease (COVID-19), an infectious illness caused by a newly discovered coronavirus. Tragically, in the UK alone, tens of thousands of people have lost their lives to the virus.
- 1.2 Our review of confiscation began in very different circumstances. In 2018, the Law Commission agreed with the Home Office to review the law on confiscation contained within Part 2 of the Proceeds of Crime Act 2002 (“POCA 2002”). POCA 2002 is a vital tool for law enforcement agencies in disgorging the proceeds of crime, disrupting criminal activity and compensating victims.
- 1.3 Although POCA 2002 had most recently been amended in 2015, there had been no wholesale review of the legislation since its enactment in 2002. As we outline in Chapter 2, there had been growing concern as to its effectiveness in disgorging the proceeds of crime. Consideration of reform was timely, if not overdue. We were tasked with addressing the most pressing problems and considering what an optimal regime would look like.
- 1.4 The Law Commission is well placed to conduct a generational review of POCA 2002. The Law Commission is a statutory independent body with considerable expertise in law reform and public consultation. The objective of the Commission is to ensure that the law is fair, modern, simple and cost effective. Our review of confiscation aims to simplify, clarify and modernise the law on confiscation by considering amendments to the current legislative regime and recommendations for the creation of a new confiscation regime through legislation.
- 1.5 In March 2020, we were in the final stages of writing this paper when emergency measures were taken to lock down the UK. We have completed this paper in highly unusual circumstances.
- 1.6 The current public health situation in the UK and the economic impact on its citizens are both matters on which we have reflected during the latter stages of drafting this paper. We have considered whether now is the right time to publish our paper. We believe that it is right to present our provisional proposals for consultation in accordance with our terms of reference. Opportunities to consider root and branch reform in this way are rare and likely occur only once in a generation. Work formally commenced on the project in November 2018 and the team embraced the broad terms of reference we were given by the Home Office. Considerable research has been undertaken during this period. We have engaged extensively with large numbers of stakeholders across the country over the last eighteen months, marrying our expertise in law reform with their experience and specialist knowledge of POCA 2002, to consider the shape and form of an optimal regime.

- 1.7 We consider that to delay would serve no useful purpose. It may render our work out of date and would not be cost effective. Significant problems with the regime, which we were tasked with addressing, would persist. Although public consultation will be more challenging, we believe that it can still be effective using the many virtual tools at our disposal to garner consultees' views in order to test and challenge our provisional proposals.
- 1.8 In terms of the substantive proposals, we bear in mind that the times we live in are ever-changing. The economy is in a perilous state. HM Treasury is providing unprecedented large-scale economic support to businesses and its citizens. The IMF predicts the global economy will contract sharply by –3 percent in 2020.¹ The UK position is stark: UK gross domestic product (GDP) was estimated to have fallen by 2.0% in the first quarter (Jan to Mar) 2020. This is the largest fall since the financial crisis of 2008 according to the latest statistics from the ONS,² and includes very little of the lockdown period. We recognise that in the short and medium term that any reform will be necessarily limited by the economic implications of the pandemic. It is unclear at this stage what the overall impact will be.
- 1.9 We have also reflected on the impact of our provisional proposals on a justice system which is facing grave challenges. The government, judiciary and HM Courts and Tribunals Service ("HMCTS") are striving to protect the safety of judges, advocates, litigants and court staff whilst continuing to function effectively. It is a difficult task. Our court system is adapting to provide virtual justice in circumstances where it is fair and appropriate to do so. We recognise that this situation will create an inevitable backlog of cases that must await face to face hearings where a virtual hearing would be inappropriate. Moreover, the research being conducted on how virtual justice may impact on the fairness of hearings is still in its infancy. All of these issues bear on our proposals which will introduce additional hearings into the system in order to promote early resolution and make greater use of technology for remote hearings (albeit in the limited context of urgent without notice applications for a restraint order).

THE PROJECT

- 1.10 In 2018 the Law Commission agreed with the Home Office to review the law on confiscation contained within Part 2 of "POCA 2002".
- 1.11 The primary aims of this review are to improve the process by which confiscation orders are made, to ensure the fairness of the confiscation regime, and to optimise the enforcement of confiscation orders.
- 1.12 We agreed the following terms of reference with the Home Office:
- (1) The review will analyse and address the most pressing problems with the law on confiscation, including:
 - (a) the irregular compensation of victims in confiscation proceedings;

¹ International Monetary Fund, *World Economic Outlook*, (April 2020).

² Office for National Statistics, *GDP first quarterly estimate, UK: January to March 2020*.

- (b) the frequent imposition of unrealistic confiscation orders;
 - (c) the ineffective incentives and sanctions of the confiscation regime;
 - (d) the interplay between civil and criminal investigations under POCA 2002;
 - (e) the complexity of the relevant legislative provisions and related case law;
 - (f) the role of restraint; and
 - (g) the insufficient enforcement powers of magistrates' courts and Crown Court.
- (2) The review will also explore and assess a range of solutions to these problems. It will consider:
- (a) alternatives to the current value-based regime;
 - (b) options for a specialist forum for confiscation proceedings; and
 - (c) new ways of preventing the dissipation of assets.
- (3) The review will aim to simplify, clarify and modernise the law on confiscation by considering amendments to the current legislative regime and recommendations for the creation of a new confiscation regime through legislation.
- (4) Finally, the review will consider non-legislative avenues for reform.
- 1.13 This reform process will explore and assess a range of solutions to these problems. It will consider alternatives to the current value-based regime, options for a specialist forum for confiscation proceedings, and new ways of preventing the dissipation of assets. Ultimately, this project will aim to simplify, clarify and modernise the law on confiscation.³
- 1.14 Work commenced on the project in November 2018. Since the project began, stakeholders have been nearly unanimous in the view that there are problems in both the wording and operation of Part 2 of POCA 2002.
- 1.15 We were given very broad scope in relation to this review, although through our pre-consultation we gleaned that the preference is to make amendments to the existing process rather than re-writing the law in its entirety. The proposals made in this paper, therefore reflect this approach.

BACKGROUND

- 1.16 Part 2 of POCA 2002 was brought into force on 24 March 2003.⁴ It sets out the regime under which a “confiscation order” can be made. Following a defendant’s conviction,

³ Memorandum of Understanding between the Law Commission and the Home Office, Annex A, Terms of Reference.

⁴ SI 2003 No 333.

the Crown Court can determine the defendant's benefit from crime and make an order against the defendant that he or she repays a sum of money up to the value of that benefit from crime.

- 1.17 The benefit may be millions of pounds or hundreds of pounds depending on the scale of crime committed by the defendant.
- 1.18 The "confiscation order" is an order made personally against a defendant to pay a sum of money *equivalent to* his or her benefit from crime. The defendant is not obliged to realise any particular asset to satisfy the order, as long as the sum of money is paid.
- 1.19 Part 2 of POCA 2002 sets out the scheme for:
- (1) preparing for a confiscation hearing;
 - (2) calculating the value of a confiscation order;
 - (3) enforcing that confiscation order; and
 - (4) preserving the value of assets pending the making of the confiscation order.
- 1.20 The legal power to deprive an offender of their ill-gotten gains from criminality is of both practical importance and symbolic significance:

As Bullock and Lister note,⁵ confiscation engenders a powerful rhetoric of control over acquisitive crime and, in symbolically embodying and reinforcing the assertion that "crime should not pay," injects a moral authority into the state's response to crime and criminality. Post-conviction confiscation as a strategy of crime control has also been rationalised and defended on the grounds of introducing greater efficiency and effectiveness into the criminal justice system.⁶

- 1.21 However, academics, practitioners, financial investigators and many other groups of stakeholders have questioned whether the current strategy meets its objectives.
- 1.22 There have been a number of reviews of the regime the findings of which have prompted calls for change. In early 2013 the National Audit Office ("NAO") commenced an enquiry into the operation of the confiscation regime. The publication of the report that resulted from this enquiry, on 17 December 2013⁷ was an important moment in the history of the legislation. It has influenced strongly the continuing debate about POCA's effectiveness to the present day.
- 1.23 The NAO's report included eye-catching data which appeared to demonstrate that the regime was not working based on the value of outstanding confiscation debt and the total assets recovered. The NAO's assessment provided a touchstone for all

⁵ K Bullock and S Lister in C King & C Walker (Eds), *Post-conviction confiscation of assets in England and Wales: Rhetoric and Reality in dirty assets: new issues in the regulation of criminal and terrorism assets* (2014).

⁶ K Bullock, "Criminal benefit, the confiscation order and the post-conviction confiscation regime" (2014) 62 *Crime Law Soc Change* 45, pp 45-46.

⁷ Confiscation Orders (2013) HC 738.

subsequent research on the effectiveness of the regime. Their data and conclusions have been used as a yardstick in subsequent reports and the emerging discussion regarding how the regime was perceived to be working.

1.24 The NAO's most striking data is summarised below:

- (1) The NAO estimated the value of confiscation orders successfully enforced as a proportion of estimated total criminal proceeds in 2012 – 2013 as 26p per £100. This is based on an estimate by the National Fraud Authority of the total value of fraud in the UK being £52 billion and taking that as a proxy for the total value of crime. (£133m (see below) / £52 billion = 0.00255 or 25.5p per £100).
- (2) The NAO highlighted that there were only 6,392 confiscation orders made out of a total of 673,000 offenders convicted of a crime in England and Wales between 2012 – 2013.
- (3) The NAO estimated the annual cost of the end-to-end confiscation order process to be £102 million.
- (4) The sum collected by enforcement agencies from confiscation orders in 2012 – 2013 was valued at £133 million. By comparison, over the same period, £48m was collected through civil recovery, cash forfeiture and tax recovery of criminal proceeds.
- (5) At September 2013, the NAO estimated the total confiscation order debt outstanding to be £1.46 billion. Of this, £866 million related to the 200 highest value orders imposed. (Those 200 highest value orders would have an average value of £4.3m therefore. See below for a breakdown of the £1.46 bn figure.)
- (6) Since 1987, 52,029 confiscation orders had been made (including under the predecessor legislation). Of those:
 - (a) 24,011 were for under £1,000 (46% of the total number of orders);
 - (b) 19,202 were for between £1,000 and £25,000 (40% of the total number of orders).

1.25 Following the publication of the NAO's report, the 14 member Public Accounts Committee ("PAC") of the House of Commons began an enquiry into the confiscation regime. Sir Mark Sedwill, then Permanent Secretary of the Home Office⁸, in response to criticism that the system was not working effectively, said that:

- (1) Confiscation orders were just one tool among several in tackling criminal finances and criminality, and that was their purpose.⁹
- (2) The objective of confiscation orders was not to maximise the revenue achieved but to cut crime and have an impact on criminal activity. Although the figures

⁸ Now Sir Mark Sedwill, currently Cabinet Secretary and Head of the Civil Service. He is stepping down at the end of September 2020.

⁹ Confiscation Orders, Report of the House of Commons Committee of Public Accounts (2013-14) HC 942 Evidence 2.

indicated that £100m was spent to recover £130m, that did not represent the full benefit of the confiscation regime. In a similar way, one might ask, what is the value of a five year prison sentence? The confiscation scheme was easy to analyse in monetary terms but that was not necessarily the right analysis.¹⁰

- (3) Simply trying to increase the revenue obtained by the authorities under the Act would create the kind of perverse incentives which were present before, under the previous structure of targets provided.¹¹ It would risk incentivising revenue generation over cutting crime.¹²

1.26 The HMCTS Trust Statement for 2018-19 indicates that the outstanding confiscation order debt stands at over £2 billion, of which it calculates that just £161 million is collectable.¹³ The language used by the government around the time of the enactment of POCA 2002 and since suggests that it was originally perceived as a tool to be used against serious, organised criminals. However, not long after the Act was introduced there seems to have been a concern that it was not being used frequently enough and targets were set in terms of the volume and overall value of orders made. This had consequences in terms of the orders made and the value of historical debt which accrued over the years. Indeed, the higher the level of orders the calculations under the Act produces, the harder it may be to successfully enforce them. The perception that the confiscation regime was ineffective took hold from various media reports and the NAO report of 2013 which drew attention to the high value of unpaid orders.

1.27 Analysis beyond the statistics suggests that the perception that the regime is ineffective is partly based on figures distorted by the overall level of debt which was to a significant extent built up in the early years of the regime. Explicit targets for financial investigators in asset recovery have now been dispensed with.¹⁴ This “legacy” debt, whilst headline grabbing, does not reveal the true picture.

1.28 The Supreme Court also made observations about the challenges faced by the authorities in attempting to disgorge criminal assets underlying the POCA regime. In *R v Ahmad*,¹⁵ the Supreme Court said:¹⁶

The 2002 Act has often been described as poorly drafted. That is a fair criticism, as can be illustrated by the problems which have had to be faced by the courts in a number of cases, some of which are referred to below. However, it is only fair to the drafters of the statute to record that the problems are partly explained by the difficulties inherent in the process of recovering the proceeds of crime from those convicted of offences. Those difficulties are at least threefold and are particularly acute when it comes to sophisticated crimes...

¹⁰ Committee of Public Accounts: Evidence 4 (2014).

¹¹ Committee of Public Accounts: Evidence 2 (2014).

¹² Committee of Public Accounts: Evidence 6 (2014).

¹³ HMCTS, *Trust Statement 2018-2019* (2019) HC 2337, p 8.

¹⁴ See Chapter 4 for discussion of the Asset Recovery Incentivisation Scheme.

¹⁵ *R v Ahmad* [2014] UKSC 36, [2015] AC 299.

¹⁶ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [35] to [36].

First, there are practical impediments in the way of identifying, locating and recovering assets actually obtained through crime and then held by criminals...

Secondly, again owing to the reticence and dishonesty of the defendants, there will often be considerable, or even complete, uncertainty as to (i) the number, identity and role of conspirators involved in the crime, and (ii) the quantum of the total proceeds of the crime, or how, when, and pursuant to what understanding or arrangement, the proceeds were, or were to be, distributed towards the various conspirators.

Thirdly, there will be obvious difficulties in applying established legal principles to the allocation of liability under the 2002 Act, as rules relating to matters such as acquisition, joint and several ownership, and valuation of property and interests in property, and the rights and liabilities of owners, both as against the world and inter se, have been developed by the courts over centuries by reference to assets which were lawfully acquired and owned.

1.29 Furthermore, a straightforward analysis based on costs and revenue may not reveal the impact of disrupting serious and organised crime. This is a matter which can be difficult to identify and quantify. Dr Colin King, then a Senior Lecturer in Law at the University of Sussex, in his evidence before the House of Commons' Home Affairs Committee in 2016 also highlighted that there was a focus on how much money was raised rather than whether the legislation successfully disrupted criminal activity.¹⁷

1.30 The perceived complexity of the legislation has also motivated a desire for change. His Honour Judge Hopmeier, in a guide produced for judges on confiscation, describes the proliferation of appellate judgments over a ten-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.

1.31 There have been comments from several judges, practitioners and commentators in relation to the need for this review and the areas which may be specifically considered. In the case of *R v Guraj*, for instance, the Supreme Court observed that the Law Commission may wish to consider "(1) the best way of providing realistically for the sequencing of sentencing and confiscation and (2) the status of procedural requirements in the Act".¹⁸

1.32 Furthermore, during our pre-consultation engagement a number of stakeholders commented that Part 2 of POCA 2002 was in need of reform.

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

¹⁷ Proceeds of Crime, Report of the Home Affairs Committee (2016-17) HC 771, oral evidence q 14.

¹⁸ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [36].

[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.

1.34 Another stakeholder, an academic, noted the following:

The legislation tries to deal with a wide array of aspects of criminality, perhaps too wide. We need to make things simpler...

1.35 Another stakeholder, also an academic, commented in relation to defendants' experience of the process:

The best way to encourage compliance is to make the whole process more fair...

1.36 All of the stakeholders we spoke to welcomed the review and its objectives to simplify and clarify the law to make the current regime fairer and more effective.¹⁹

THE CONSULTATION PAPER

The purpose of the paper

1.37 The consultation paper has two principal aims: to identify the most pressing problems with Part 2 of POCA 2002; and to propose and consult on the best approaches to reform the regime in ways which serve to simplify, clarify and modernise the law.

1.38 Notably this exercise has also been undertaken against the backdrop of the Supreme Court's observation in *R v Ahmad* that:

When faced with an issue of interpretation of the 2002 Act... it is also very important to bear in mind the overall aim of the statute, the need for practicality, and Convention rights. The overall aim of the statute is to recover assets acquired through criminal activity, both because it is wrong for criminals to retain the proceeds of crime and in order to show that crime does not pay. Practicality involves ensuring that, so far as is consistent with the wording of the statute and other legal principles, the recovery process, both in terms of any hearing and in terms of physically locating and confiscating the assets in question, is as simple, as predictable, and as effective, as possible. Defendants are entitled to their Convention rights, in particular to a fair trial under article 6 and are only to be deprived of assets in accordance with A1P1.²⁰

1.39 We have therefore also been guided by the principal objectives articulated in this important authority.

1.40 Ultimately we have attempted to use this paper to consider ways in which the post-conviction confiscation regime could be rendered fairer in relation to defendants, victims and third parties; more efficient, clearer, and more effective.

1.41 We approach the notion of fairness in three specific ways: in relation to defendants, victims and third parties. As fairness pertains to the defendant, we have attempted to

¹⁹ The perceptions of the regime are explored comprehensively in Chapter 3 of this paper.

²⁰ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [38].

address issues with delay, rehabilitation and ensuring that orders are realistic. As fairness applies to victims, we make a series of proposals in relation to the prioritisation of compensation; and as fairness pertains to third parties, we have made a series of proposals which relate to the making of binding determinations of property interests early in the process and we discuss tainted gifts at length in Chapter 17.

- 1.42 We approach the notion of efficiency and clarity by considering how we can simplify the process for all parties to confiscation proceedings and reduce delay. We make proposals in relation to active case management. We also consider providing a forum for productive negotiation early in the process. We further seek to clarify the process by codifying a number of principles currently spread across the case law.
- 1.43 We approach the notion of effectiveness in a number of ways which overlap somewhat with the other aims. For instance, it is our view that a more effective regime will involve the imposition of more realistic orders which are likely to be recoverable. The imposition of realistic orders will also be fairer to defendants and victims, who are more likely to have a realistic expectation as to compensation. Similarly, a more effective regime is one which is able to be readily understood and applied by stakeholders across the criminal justice system. This overlaps with the notion of improving clarity.
- 1.44 While the concepts of fairness, clarity, efficiency and effectiveness may seem nebulous, we have attempted to articulate and define these through our proposals which are outlined in the following chapters. It is our view that there is not one single proposal which will render the system “fixed”, but rather a series of cumulative changes will deliver an improved overall regime, which is the aim of this review.

Pre-consultation discussions

- 1.45 During our pre-consultation discussions, we met with individuals and held round-table discussions with industry groups, both in London and around the country. In particular, we:²¹
- (1) conducted a confiscation symposium in Northumbria;
 - (2) met with government and law enforcement agencies,²² expert practitioners representing defendants and victims, academics (both from the UK and overseas), and other interested parties;²³
 - (3) visited courts in the North West, North East and London;
 - (4) conducted data analyses in collaboration with the Law Commission economist;
 - (5) sought written responses to several questions which centred on the areas of the legislation perceived to be most problematic;

²¹ For a complete list of pre-consultation contributors, see Appendix 3.

²² Including the Crown Prosecution Service, Serious Fraud Office, Trading Standards departments of Local Authorities and the Environment Agency.

²³ Including the Bar Council, Her Majesty's Courts and Tribunals Service, judges from all levels of the judiciary, victims of crime.

- (6) sought feedback on our preliminary proposals in follow-up meetings with stakeholders; and
 - (7) undertook research into the confiscation regimes of comparable jurisdictions.
- 1.46 Through this engagement we were able to better understand the practical difficulties of applying the current law and to pinpoint the areas in most need of reform.
- 1.47 We have divided the paper into nine substantive parts. This enabled us to tackle each component of the regime sequentially and in detail.

Scheme of the paper

- 1.48 This consultation paper has been structured in a particular and purposeful way. Chapters 1 to 5 place the regime in context, providing a history and overview of the current law. Chapters 6 to 28 mirror the way a confiscation matter would move through the court system. While the order of the paper is deliberate, the paper has been arranged into parts to enable readers to select and focus on areas of particular interest. Each of the parts can be read separately to ensure that stakeholders can engage with specific areas of relevance.
- 1.49 The following paragraphs provide a summary of each part and chapter.

Part 1: Current law in context (Chapters 1 – 4)

- 1.50 This Part aims to provide the context for our review by considering how the current regime has developed, providing an overview of the current law and the overarching influence of the Asset Recovery Incentivisation Scheme which distributes funds recovered under confiscation orders amongst the law enforcement agencies that pursue confiscation proceedings. It sets out why there is a desire for change and the background to the regime which has influenced our provisional proposals.

Chapter 2: History

- 1.51 Chapter 2 of the paper provides an overview of the history of the law of confiscation tracking the evolution of the regime and its culmination in POCA 2002.

Chapter 3: Current Law

- 1.52 Chapter 3 sets out the way in which Part 2 of POCA 2002 operates. It provides an overview of the law governing the making of a confiscation order and the enforcement of confiscation orders. It is non-exhaustive and is intended to provide the reader with a foundation to understand the detailed analysis of the current law in subsequent chapters.

Chapter 4: Asset Recovery Incentivisation Scheme (“ARIS”)

- 1.53 Chapter 4 discusses the operation of ARIS and the perception that incentivisation of law enforcement agencies to pursue confiscation has had unintended consequences, such as a perception of unfairness. This chapter discusses the consequences of this policy and highlights the need for a review of the scheme.

- 1.54 However, it is critical to note that this consultation paper does not make any policy proposals or seek to consult with respect to ARIS as it is outside the scope of the project. This chapter simply seeks to contextualise the regime.

Part 2: Objectives of the Act (Chapter 5)

- 1.55 Chapter 5 of the paper discusses the introduction of an explicit legislative steer for Part 2 of POCA 2002 and the concept of proportionality in relation to the making of confiscation orders.
- 1.56 It considers section 69 of POCA 2002 which provides that certain powers of the court must be exercised (amongst other things):
- (1) with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant;
 - (2) in a case where a confiscation order has not been made, with a view to ensuring that there is no diminution in the value of realisable property;
- 1.57 While this section applies to the making of restraint orders, search and seizure powers and the appointment of and powers that may be granted to receivers, it does not provide a steer in relation to the other sections of Part 2.
- 1.58 Chapter 5 then considers the notion of proportionality in confiscation orders and its relationship with the objectives of the legislation. In *R v Waya*,²⁴ the Supreme Court held that any interference with the right to peaceful enjoyment of possessions²⁵ through a confiscation order must be proportionate to the legitimate objectives of POCA 2002.
- 1.59 In discussing what the objectives of the legislation are, we outline case law which considers the objectives of the regime.²⁶
- 1.60 Ultimately, Chapter 5 contains a series of proposals. Firstly and most significantly, that there should be clearly articulated aims of the regime contained in the statute. Secondly, that "punishment" be omitted from the listed aims. Thirdly, that the principal aim should be to deprive defendants of their benefit from criminal conduct, within the limits of their means. Finally, that the principal objective should be supplemented by secondary objectives, namely deterrence and disruption of crime, and ensuring the compensation of victims, when such compensation is to be paid from confiscated funds.

²⁴ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

²⁵ European Convention on Human Rights, article 1, Protocol 1.

²⁶ Amongst other cases, *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099; *Welch v the United Kingdom* (A/307-A), (1995) 20 EHRR 247; *R v Waya* [2012] UKSC 51, [2013] 1 AC 294; *R v Sekhon* [2002] EWCA Crim 2954, [2003] 1 WLR 1655; *R v Harvey* [2015] UKSC 73, [2017] AC 105.

Part 3: Preparing for the Confiscation Hearing (Chapters 6 – 10)

Chapter 6: Postponement

- 1.61 Chapter 6 of the paper explores the development of the law in relation to the postponement of confiscation proceedings. It discusses problems with the current regime, steps taken to remedy the issues and our proposals for reform.
- 1.62 By way of overview we provisionally propose that:
- (1) Sentence should be imposed prior to confiscation proceedings being resolved unless the court otherwise directs, and the court may impose financial penalties and forfeiture orders prior to confiscation proceedings being resolved.
 - (2) There should be a six month maximum period between sentencing a defendant and the setting of a timetable for confiscation. This would replace the current system based on postponements.
 - (3) The six month statutory maximum period could be extended in exceptional circumstances. Where the six month period elapsed, the court would not be deprived of jurisdiction to impose an order but might decline to make an order if it would be unfair to do so. However, before declining to impose an order, the court would have to first consider whether any unfairness could be cured by measures short of declining to impose a confiscation order.
 - (4) Upon the setting of a timetable the court should actively manage the proceedings. As is the case now, the proceedings would have to be resolved within a reasonable time.
- 1.63 We propose that the absolute prohibition on the imposition of financial and forfeiture orders (listed in section 15(2) of POCA 2002) prior to confiscation should be removed.
- 1.64 To remove a sentencing “trap”²⁷ we propose that the current 28 day period within which the Crown Court is permitted to vary a financial or forfeiture order be extended to 56 days from the date on which a confiscation order is imposed, to align the variation period with that applicable in substantive criminal proceedings.²⁸

Chapter 7: Timetabling and Case Management

- 1.65 In this chapter we discuss the current approach to timetabling, the problems that can arise, and our provisional proposal for a bespoke case management regime for confiscation proceedings.
- 1.66 We discuss the three primary concerns which were expressed to us during pre-consultation. These were:
- (1) that confiscation proceedings are susceptible to “drift”, rather than being subject to active engagement and case management;

²⁷ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22.

²⁸ Powers of Criminal Courts (Sentencing) Act 2000, s 155; see also Sentencing Code (not yet in force), cl 385.

- (2) that sanctions for non-compliance with orders under sections 16 to 18A (of POCA 2002) are rarely, if ever, imposed, adding to the perception that confiscation proceedings are permitted to “drift”; and
 - (3) that section 16 statements are often a confusing mix of pleadings and evidence.
- 1.67 In Chapter 7 we also consider the Supreme Court decision of *R v Guraj* in which it was noted that “confiscation proceedings are particularly susceptible to drift. They must not be allowed to suffer it”.²⁹
- 1.68 Ultimately we propose a process which would be underpinned by Criminal Procedure Rules to ensure that:
- (1) courts adopt a consistent approach to timetabling dependent on clearly defined criteria;
 - (2) material is served promptly;
 - (3) statements of case are in a format prescribed by Criminal Procedure Rules that will assist the court to identify the issues in dispute;
 - (4) appropriate sanctions are in place for non-compliance; and
 - (5) instructed advocates attend a hearing prior to any final hearing. This will ensure that all disputed issues have been identified and all avenues in respect of agreement have been explored.³⁰
- 1.69 We also note that better case management could be achieved if confiscation case material was stored on a digital case system.

Chapter 8: Early Resolution of Confiscation (EROC) Hearing

- 1.70 In this chapter we propose a new hearing, to take place after the exchange of information and before a confiscation hearing is listed, to facilitate the early resolution of the confiscation proceedings. We refer to this hearing as the Early Resolution of Confiscation (“EROC”) hearing.
- 1.71 During our pre-consultation discussions, 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.³¹

²⁹ *R v Guraj* [2016] UKSC 65 at [37], [2017] 1 WLR 22.

³⁰ Although we identify this issue as being part of the procedural framework in Chapter 7, the substance of the proposal is dealt with in Chapter 8.

³¹ Cases on agreed orders include *R v Kaur* [2019] EWCA Crim 695; *R v Yaqoob* [2018] EWCA Crim 1728; *R v Ghulam* [2018] EWCA Crim 1691, [2019] 1 WLR 534; *R v Hockey* [2018] EWCA Crim 1419, [2018] Lloyd’s Rep FC 481; *R v Morfitt* [2017] EWCA Crim 669, [2017] Lloyd’s Rep FC 383; *R v Yaseen* [2016] EWCA Crim 2139; *R v Kelly* [2016] EWCA Crim 1505; *R v Souleiman* [2016] EWCA Crim 124; *R v Fell* [2015] EWCA Crim 667; *R v Onuigbo* [2014] EWCA Crim 65, [2014] Lloyd’s Rep FC 302; *R v McKenna* 13 Feb 2014 QBD (unreported); *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Ayankoya* [2011] EWCA Crim 1488, [2011] Lloyd’s Rep FC; *R v Kennedy* [2011] EWCA Crim 1377; *R v Hirani* [2008] EWCA Crim 1463.

- 1.72 However, during our discussions with practitioners and the judiciary it was suggested that the practice of agreeing confiscation orders should not be codified into statute or procedural rules unless that carried with it clear advantages and did not offend the purpose of the Act.
- 1.73 On the basis of this consultation, we provisionally propose that, when setting a timetable for the exchange of information, an additional date should be set for an EROC hearing to take place.
- 1.74 An EROC hearing would serve two purposes:
- (1) It would provide an opportunity for the instructed advocates to discuss the case and to attempt to reach agreement, subject to judicial approval. When an EROC hearing resulted in an agreed order, the time between initiating proceedings and reaching a resolution could be dramatically shortened.
 - (2) On occasions when an EROC hearing did not resolve all issues, the hearing could be used to case manage preparations for a future contested hearing. This would primarily involve a follow-up Confiscation Management Hearing, at which a Confiscation Hearing Management Form (CMHF) would be completed to assist the court with managing preparations for the final hearing.
- 1.75 Finally, Chapter 8 considers whether provision for “early offers to settle proceedings” should be codified. From our discussions with stakeholders at the early stages of this project, out of court settlements subject to judicial approval do generally have the support of individuals working across the confiscation landscape. For this reason, we seek to consult more broadly on this issue.

Chapter 9: Incentivising the agreement and payment of orders

- 1.76 In this chapter we explore possible reforms to incentivise the agreement and satisfaction of orders. Agreed orders are a useful tool for defendants to retain an element of control, limit their liability and avoid litigation risk.
- 1.77 The chapter discusses how POCA 2002 relies on sanctions for non-compliance to ensure that a defendant co-operates with the confiscation process. The defendant is therefore not “incentivised” to comply in the true sense of the word. Rather, POCA 2002 imposes sanctions for non-compliance which are designed to ensure that a defendant co-operates. The coercive incentives deployed under the regime can be summarised as follows:
- (1) Where a defendant fails to provide information as directed, the court may draw an adverse inference.
 - (2) If a defendant fails to respond to an allegation in a prosecutor’s statement of information they are deemed to have accepted the matter.
 - (3) When imposing an order, the court must consider the imposition of a compliance order (ie an order that the court believes is appropriate for the purpose of ensuring that the confiscation order is effective).

- (4) Interest accrues at the rate of 8% pa on the principal sum if an order is not satisfied as directed.
 - (5) A defendant may be imprisoned if an order is not satisfied as directed.
- 1.78 This chapter considers incentivisation mechanisms in other areas of the criminal justice system. In order to determine whether similar incentives could be applied to confiscation proceedings, we examine criticism of some of the incentives we have detailed. One such criticism is that “reductions” in sentence are viewed as a benefit to the defendant rather than to other participants in court proceedings and in terms of monetary savings.³²
- 1.79 Notwithstanding the potential for resistance on public policy grounds, some stakeholders suggested that a SOCPA style agreement³³ could be utilised in confiscation proceedings.
- 1.80 It was suggested that defendants would be incentivised to agree and satisfy confiscation orders if co-operation enabled them to retain a percentage of the proceeds of their crime(s) and/or resulted in a reduction of the substantive sentence imposed. However, this would be objectionable on the grounds of public policy. To permit a defendant to retain any of the proceeds of crime to reward co-operation would be to subvert the purpose of the legislation.
- 1.81 In Chapter 9 we also discuss the prospect of an incentivisation scheme which permits a reduction to the substantive sentence imposed where a confiscation order is agreed and satisfied as directed. One problem with this proposal is that not all defendants who are subject to confiscation proceedings receive immediate custodial sentences.
- 1.82 Furthermore, permitting a reduction in sentence on account of a defendant’s co-operation in confiscation proceedings could undermine the objective of imposing a sentence which adequately reflects the seriousness of the offence. This will serve to undermine the integrity of the criminal justice system in the eyes of the public at large.
- 1.83 Ultimately, we do not propose that specific provisions should be introduced to incentivise the entering into of agreements or to incentivise the satisfaction of a confiscation order.

Chapter 10: Forum

- 1.84 This chapter considers how reforms could limit the problems created by the current confiscation model by focussing on the following concerns:
- (1) that confiscation should be considered in all appropriate cases;³⁴ and

³² Dawes, Harvey and others, *Attitudes to guilty plea sentence reductions*, Sentencing Council Research Series 02/11 (2011).

³³ Reductions in sentence or immunity from prosecution where a defendant provides assistance to the prosecution by giving evidence against other defendants.

³⁴ Cabinet Office, *Recovering the Proceeds of Crime, a Performance and Innovation Unit Report* (June 2000) p 69; Attorney General's Office Guidance on Section 2A of POCA 2002, January 2018.

- (2) the need for particular expertise in cases of unusual complexity.
- 1.85 The recognition of the fact that confiscation involves complex work of a different type than that usually experienced in the criminal process (family law, property law) has led to three particular concerns, articulated both by judges and practitioners:
- (1) confiscation is not dealt with adequately, or at all, in cases when due consideration should have been given to confiscation;
 - (2) the law is frequently misapplied; and
 - (3) when civil claims or family proceedings arise in connection with matters connected to confiscation, the same issues may be considered multiple times.
- 1.86 In this chapter we consider whether the Crown Court is the appropriate venue for confiscation proceedings and what the possible alternatives may be. We ultimately propose in this chapter that the Crown Court retain jurisdiction for confiscation hearings.
- 1.87 The chapter then considers the provision of training for judges. During our pre-consultation discussions many judges were clear that there was limited judicial appetite for confiscation, which can involve concepts and principles infrequently encountered in the Crown Court.
- 1.88 We then go on to consider the best ways to manage more complex confiscation cases. We propose that:
- (1) a system of “ticketing” would assist Resident Judges to identify and allocate work to any judge with the relevant expertise and the willingness to undertake complex confiscation cases;
 - (2) where the Crown Court considers that it is in the interests of justice to do so, it should be permitted to refer an issue in confiscation proceedings to the High Court for a binding determination;
 - (3) to resolve a complex issue the court should have the discretion to draw on the expertise of an assessor, subject to objections by the parties.

Part 4: Benefit (Chapters 11 – 14)

Chapter 11: The significance of benefit

- 1.89 This chapter discusses the principles which underpin the calculation of benefit under the current confiscation regime. The identification and calculation of “benefit” has real significance throughout the confiscation process and beyond. Pursuant to POCA 2002 it serves as the means by which such gain can be identified. In making a confiscation order a judge must identify a defendant’s “benefit” from crime, and value that benefit.³⁵
- 1.90 Following this detailed introduction, we make proposals regarding the determination of benefit in the following three chapters.

³⁵ Proceeds of Crime Act 2002, s 80.

Chapter 12: Defining and valuing benefit

1.91 In this chapter we:

- (1) outline how benefit is currently defined under POCA 2002 and how that definition has been interpreted by the courts;
- (2) consider problems with the definition raised by the courts, by academics and by stakeholders during our fact-finding for the project;
- (3) analyse the apparent problems with the definition and examine how the definition may be amended to address the matters that we have identified; and
- (4) make provisional proposals about how the definition of benefit could be reformed.

1.92 We discuss how the courts have interpreted section 76(4) of POCA 2002, which provides that “a person benefits from conduct if he obtains property as a result of or in connection with the conduct.” In particular, we discuss the principle derived from the cases of *R v May*³⁶ and *R v Allpress*.³⁷

A person ordinarily obtains property if in law he owns it, whether alone or jointly, or assumes the rights of an owner, which will ordinarily connote a power of disposition or control.

1.93 Chapter 12 then discusses the definition of “obtaining” property in section 84 of POCA 2002, which refers to “obtaining an interest in property... including a right to possession”.³⁸ We note that case law has developed to the effect that the strict existence of a proprietary right arising from possession is not determinative as to whether criminal property has been “obtained”, despite the clear wording of POCA 2002.³⁹

1.94 Our pre-consultation fact-finding identified three perceived problems arising from the current definition of benefit, which are examined in this chapter:

- (1) a lack of clarity in the law arising from the “open-textured” definition of benefit in POCA 2002;
- (2) a perception that the definition of benefit in POCA 2002, as interpreted by the courts, produces inconsistent and unrealistic orders, particularly in connection with money launderers; and
- (3) benefit from a pecuniary advantage through tax evasion has been too broadly interpreted, leading to unjustly inflated orders.

³⁶ [2008] UKHL 28, [2008] 1 AC 1028.

³⁷ [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58.

³⁸ Proceeds of Crime Act 2002, ss 84(2)(b) and 84(2)(h).

³⁹ See, for example, *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58.

- 1.95 We discuss the perception of stakeholders that the application of property law principles in confiscation is inappropriate to an exercise of financial accountability conducted in the criminal courts.
- 1.96 We provisionally conclude that there is an evidential basis for suggesting that the test for benefit should be reframed. We then go on to consider how the test might be reframed and, in doing so, we consider the approaches adopted in other jurisdictions and in the domestic criminal law.
- 1.97 Given that confiscation is imposed in a criminal context, we have considered how concepts similar to “obtaining” are applied in the substantive criminal law.
- 1.98 Finally, this chapter considers three potential new models for the calculation of benefit.
- 1.99 Of the three potential models that we consider, we provisionally propose that potential model 2 is adopted which would require consideration of a narrow range of factors in determining a defendant’s benefit from criminal conduct, including:
- (1) What the defendant gained as a result of or in connection with criminal conduct; and
 - (2) The intended extent of the defendant’s power of control or disposition in connection with that gain.

Chapter 13: Benefit in criminal lifestyle cases

1.100 In this chapter, we:

- (1) consider the rationale behind the “criminal lifestyle” provisions;
 - (2) examine how POCA 2002 identifies a person as having a “criminal lifestyle”;
 - (3) describe the operation of the assumptions which the court will apply when assessing the benefit from crime of someone found to have a “criminal lifestyle”;
 - (4) consider some options for reform.
- 1.101 Under the current confiscation regime, defendants who have been convicted of particular offences, or who have benefited to a certain extent from a particular minimum number of offences, are potentially liable to confiscation orders which include all of their unexplained income and expenditure for a period of years prior to the criminal proceedings that have resulted in their conviction. These are referred to as “criminal lifestyle” cases.
- 1.102 In this chapter we discuss the fact that the prosecution bears the burden of proof to establish that the defendant has obtained property or incurred expenditure.⁴⁰ Having proved the existence of such income or expenditure, the prosecution can then rely on section 10 to assume a link between the property and criminality.⁴¹ The defendant

⁴⁰ *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S).

⁴¹ Proceeds of Crime Act 2002, s 10(1)(a).

then bears the burden of showing, on the balance of probabilities, that the property was not derived from general criminal conduct.⁴²

- 1.103 Whilst there are other terms which might in principle be preferable to “criminal lifestyle”, after significant consideration, we do not propose that the term should be changed in the legislation.
- 1.104 We consider whether the current triggers for the application of the “criminal lifestyle” assumptions are clear, appropriate and necessary. We also consider whether any reform is needed to those triggers.
- 1.105 We consider whether offences should be added to any schedule of offences that trigger the finding of a “criminal lifestyle”, including fraud and bribery offences and the money laundering offence in section 329 of POCA 2002. Whilst we do not provisionally propose that these offences should be included in any future schedule of “criminal lifestyle” offences, we invite consultees to provide further evidence that could inform any recommendations in the final report.
- 1.106 We do provisionally propose that the offence of “keeping a brothel used for prostitution”, contrary to section 33A of the Sexual Offences Act 1956, be added to any schedule of offences that trigger a finding of a “criminal lifestyle”.
- 1.107 We also consider the triggers arising from multiple offending. These comprise cases where there are multiple convictions on the same occasion and cases involving convictions on multiple occasions. Under the current law, a different number of convictions are required for each trigger. We propose that the number of offences be harmonised.
- 1.108 We go on to discuss the fact that, in determining whether the defendant has been convicted of the relevant minimum number of offences to establish a course of criminal activity, the court must only consider actual convictions. However, a defendant who is charged with a criminal offence may wish to “wipe the slate clean”⁴³ and to admit to committing other offences, by asking for them to be taken into consideration (“TIC”). An offender who wishes to do so is not charged with, nor convicted of, such “TICs”, but the court will take the TICs into account when passing sentence.
- 1.109 Offences that are taken into consideration can only be taken into account in determining whether the defendant’s total benefit from crime is more than £5,000. One concern with this approach is that a defendant who has clearly engaged in repeated criminality from which he or she has benefited may avoid the criminal lifestyle assumptions because of the way in which the case is put before the court.
- 1.110 We propose, therefore, that the course of criminal activity trigger should be that a person has been dealt with by the court for a minimum number of offences, whether those offences comprise convictions or offences taken into consideration.

⁴² Proceeds of Crime Act 2002, s 10(6).

⁴³ *R v Miles* [2006] EWCA Crim 256.

- 1.111 Similarly, we discuss the fact that the current regime requires that even where the defendant has been convicted of the relevant number of offences, he or she must have benefited from each offence.⁴⁴ This is problematic where (for example) a defendant who is convicted of four domestic burglaries will meet the requirement under the multiple counts trigger; but a defendant who is convicted of three domestic burglaries and attempted a fourth domestic burglary will not meet the requirement.
- 1.112 We therefore provisionally propose that when the court considers each offence relevant to the trigger the court should consider both offences from which there was benefit and offences for which there was an attempt to benefit.
- 1.113 We provisionally propose that the financial threshold for triggering the lifestyle assumptions be raised from £5,000,⁴⁵ and we invite consultees' views on what the appropriate threshold should be. We also provisionally propose that legislation should require that the threshold be reviewed by the Secretary of State every five years.
- 1.114 Finally, we propose that greater discretion should be permitted even if the triggers are satisfied. Under the current law, if a trigger is satisfied, the court must apply the assumptions.⁴⁶ We propose that:
- (1) prosecutors should be able to exercise discretion as to whether to seek application of the assumptions.
 - (2) the court may determine that, on the face of the application, it is contrary to the interests of justice to apply the assumptions.

Chapter 14: Codifying and clarifying case law on benefit

- 1.115 In this chapter we discuss the ways in which the current law is unclear with regard to benefit. During our fact-finding, 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 consider civil law concepts and principles.
- 1.116 The principles that have developed in case law which we consider in this chapter are in connection with:
- (1) Joint benefit.
 - (2) Assets tainted by criminality.
 - (3) Evasion of import duties on tobacco.
 - (4) Treating benefit to a company as benefit to an individual defendant.
 - (5) Common intention constructive trusts.

⁴⁴ Proceeds of Crime Act 2002, s 75(3).

⁴⁵ Proceeds of Crime Act 2002, s 75(4).

⁴⁶ Subject to the safeguards in the Proceeds of Crime Act 2002, s 10(6).

- 1.117 In considering joint benefit we discuss the fact that multiple defendants can be liable for the same criminal gain. During our pre-consultation discussions, routinely holding a defendant jointly liable for the whole benefit obtained from an offence was criticised as producing unrealistic outcomes.
- 1.118 We note that under an “*Ahmad* direction”,⁴⁷ once benefit is recovered from one defendant it may not be recovered from another defendant. During our pre-consultation discussions, financial investigators involved in enforcing confiscation orders expressed concern that an *Ahmad* direction provides no guidance about who to pursue if co-defendants all have realisable assets, thereby creating uncertainty.
- 1.119 We note that the case law does not require a finding of joint liability for the whole benefit.⁴⁸ We therefore consider that the court would be assisted by a distillation of the principles with regards to apportionment in any amended statute to ensure that the law is clear.
- 1.120 We also propose that there is a legislative requirement that the court should make findings as to apportionment of benefit.
- 1.121 In this chapter we provisionally propose that the Lord Chief Justice considers incorporating a number of principles used in confiscation proceedings into either a Criminal Practice Direction on confiscation or into non-statutory guidance:
- (1) Principles in connection with assets that have been obtained in part through criminality. For instance, when the alleged benefit is in connection with an undertaking, benefit should be calculated with reference to the extent to which criminality taints that undertaking. Only where the entire undertaking is founded on illegality should the court calculate benefit with reference to the entire turnover of the business.⁴⁹
 - (2) Principles connected to calculation of benefit from the evasion of duty in relation to tobacco importation. If a person has evaded the payment of excise duty through the illegal importation of tobacco that evasion is treated as a pecuniary advantage. We propose that principles relating to when a liability to pay duty arises and how the value of such duty evaded should be calculated be incorporated into any practice direction or non-statutory guidance.⁵⁰
 - (3) Principles in connection with when benefit apparently accruing to a company may be treated as accruing to a defendant.⁵¹ Defendants may seek to distance

⁴⁷ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [74].

⁴⁸ See for example *R v Ahmad* itself: [2014] UKSC 36, [2015] AC 299 at [51]. See also *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [45]; *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 80.

⁴⁹ See, for example, *R v Beazley* [2013] EWCA Crim 567, [2013] 1 WLR 3331; *R v King* [2014] EWCA Crim 621, [2014] EWCA Crim 621.

⁵⁰ See *R v Tatham* [2014] EWCA Crim 226, [2014] Crim LR 672; Tobacco Products Duty Act 1979 s 2 and sch 1; Tobacco Products Duty Act 1979.

⁵¹ *R v Seager* [2009] EWCA Crim 1303, [2010] 1 WLR 815; *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415; *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63.

themselves from any supposed benefit by acting through a company, transferring assets to others or hiding behind a trust arrangement.

- (4) Principles for determining beneficial ownership by way of a common intention constructive trust because the Crown Court is being called upon more and more frequently to resolve interests in property using these principles.⁵²

Part 5: Recoverable Amount (Chapters 15 – 17)

Chapter 15: Recoverable Amount

1.122 In this chapter we consider what the “recoverable amount” is and why it is important, and potential issues with separating the recoverable amount from the benefit figure.

1.123 The starting point in calculating the “recoverable amount” is that it is an amount equal to the benefit that a defendant has obtained.⁵³ 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 figure in its entirety.⁵⁴

1.124 If the court is satisfied about the insufficiency of the defendant’s assets to meet the benefit figure, the “recoverable amount” will be reduced from the defendant’s benefit to either:

- (1) the “available amount”; or
- (2) a “nominal amount” if the available amount is nil.⁵⁵

1.125 During our pre-consultation discussions we heard that separating out benefit and the sum to be repaid causes a number of problems arising from the potentially changeable nature of such an amount. One concern was that, by separating out benefit from what a defendant may have to repay in the immediate future, the defendant’s benefit is largely treated as an irrelevance.

1.126 In this chapter we considered the advantages and disadvantages of separating benefit from the recoverable amount. The primary advantage of equating the two is that an order would be made in a single, definitive sum that reflects the benefit from criminality. However, significant disadvantages are that:

- (1) Enforcement mechanisms such as imprisonment in default and accrual of interest would be rendered either ineffective or be unjust if the defendant does not have the means from which to pay back to the benefit figure.

⁵² Such principles can be found in cases including *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 (drawing upon *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432). We note that whilst these cases are the closest to a “guide” that can currently be provided, but they are not comprehensive. We therefore invite consultees views on how to best guide judges who are facing these issues in confiscation proceedings.

⁵³ Proceeds of Crime Act 2002, s 7(1).

⁵⁴ Proceeds of Crime Act 2002, s 7(2).

⁵⁵ Proceeds of Crime Act 2002, s 7(2).

- (2) The overall debt could increase dramatically. Currently the outstanding debt is calculated against the total “available amount”,⁵⁶ which is often considerably lower than the total benefit.

1.127 We ultimately propose that where a confiscation order is made in less than the amount of the defendant’s benefit, judges should explain the disparity and that it will be open for the prosecution to seek to recover more of the defendant’s benefit in future, until it is repaid in full.

Chapter 16: Hidden assets

1.128 In this chapter we consider the issue of “hidden assets”, which describes the difference in value between a defendant’s known assets at the time of confiscation and the defendant’s benefit.

1.129 Hidden assets have been described as one of “the many ills that beset the confiscation regime”.⁵⁷ During our pre-consultation discussions, financial investigators reported that inappropriate hidden assets orders contribute to the large outstanding confiscation debt. By their nature, the location and form of a hidden asset will be unknown to the authorities, making enforcement difficult (if not impossible).⁵⁸

1.130 Financial investigators informed us that the preferred approach is now to seek orders for an available amount referable to known assets, even if the order is in a relatively low amount. Having obtained such an order, “uplifts” under section 22 of POCA 2002 are then sought if and when further assets come to light. In this way, orders are made which are more readily enforceable.⁵⁹

1.131 Whilst financial investigators may seek hidden assets findings in fewer cases, ultimately the decision is not one for the financial investigator or the prosecution.⁶⁰ Hidden assets findings arise from the burden of proof being on the defendant. In the current regime, the burden is placed upon the defendant to show what has become of his or her benefit because “the size of his realisable assets at the time of conviction [is] likely to be peculiarly within the defendant’s knowledge”.⁶¹

1.132 In this chapter we consider alternatives that involve placing the burden of proof on the prosecution to satisfy the court about the existence of hidden assets to different standards of proof, but ultimately we do not propose such a change. Instead, we propose:

- (1) A residual safeguard to the effect that, where a defendant fails to satisfy the court to the civil standard as to his or her available assets, the court is not obliged to make a hidden assets finding if it is otherwise satisfied that the

⁵⁶ HMCTS Trust Statement 2018-19 (July 2019) HC 2337.

⁵⁷ A Campbell-Tiech, “Whither confiscation: May revisited” [2019] 5 *Archbold Review*, p 4-5.

⁵⁸ In its written submissions to the 2016 to the Parliamentary 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.

⁵⁹ We discuss applications under the Proceeds of Crime Act 2002, s 22 in more detail in Chapter 22.

⁶⁰ *R v Summers* [2008] EWCA Crim 872, [2008] 2 Cr App R (S) 101; *R v Tanveer* [2013] EWCA Crim 360.

⁶¹ *R v Dickens* [1990] 2 QB 102 at p [105] per Lord Lane CJ, [1990] 2 WLR 1384.

available amount is less than the benefit figure. Therefore, in deciding whether to make a hidden assets finding the court should take account of all of the circumstances of the case.

- (2) Relevant principles derived from case law be incorporated into a Criminal Practice Direction.⁶²

Chapter 17: Tainted gifts

1.133 Section 9 of POCA 2002 provides that a defendant's "available amount" includes both "free property" and the value of all "tainted gifts" made by the defendant.

1.134 Under section 77, whether a gift is "tainted" depends on whether a defendant has a "criminal lifestyle"⁶³ within the legal meaning of that term.⁶⁴ In either case, the only link required between the defendant and criminality is one of the timing of the gift:

- (1) Where the court has found that the defendant does not have a "criminal lifestyle", a gift is "tainted" if it was made by the defendant at any time after the date on which the offence for which the defendant was convicted was committed.⁶⁵
- (2) Where the defendant has a "criminal lifestyle"⁶⁶, a gift will be tainted if it was made at any time after the "relevant day".⁶⁷ The relevant day is generally first day of the period of six years, ending with the day when proceedings for the offence for which the defendant was convicted were started.⁶⁸

1.135 In "criminal lifestyle" cases, a gift will also be "tainted" if it

- (1) was obtained by the defendant as a result of or in connection with his general criminal conduct; or
- (2) in whole or part, whether directly or indirectly, represented in the defendant's hands property obtained by him as a result of or in connection with his general criminal conduct.⁶⁹

1.136 This chapter then discusses the purposes of the tainted gifts regime. The first rationale is defendants should not benefit from any attempt to put assets beyond the ambit of the calculation of their available amount by disguising true ownership. The second rationale is that (whether or not an attempt was made to disguise true ownership), defendants should not be permitted to avoid liability to repay their benefit

⁶² See cases including *R v Barnham* [2005] EWCA Crim 1049 at [41], [2005] 1 Cr App R (S) 16; *R v McIntosh* [2011] EWCA Crim 1501, [2011] 1 Cr App R (S) 60; *R v Hartshorne* [2010] EWCA Crim 1283.

⁶³ Proceeds of Crime Act 2002, s 75.

⁶⁴ See Chapter 13.

⁶⁵ Or, if his particular criminal conduct consists of two or more offences and they were committed on different dates, the date of the earliest. Proceeds of Crime Act 2002, s 77(5).

⁶⁶ Or no court has made a decision as to whether the defendant has a "criminal lifestyle".

⁶⁷ Proceeds of Crime Act 2002, s 77(1).

⁶⁸ Proceeds of Crime Act 2002, s 77(9). See also s 10(8), as discussed in Chapter 13.

⁶⁹ Proceeds of Crime act 2002, s 77(3).

from crime by making gifts of assets and then having their “available amount” reduced because they cannot recover the gift. Therefore, as a matter of public policy, the defendant is taken to have the value of any tainted gift available to him or her to pay towards the confiscation order.

1.137 During our pre-consultation discussions, practitioners suggested that findings of tainted gifts have led to orders being made against defendants which require them to account for tainted gifts, even though they have no means from which to do so. However, no stakeholder considered that this was not appropriate.

1.138 We consider how the tainted gift regime reflects a strong public policy need to discourage defendants from seeking to reduce the amount of a confiscation order by putting their assets beyond the reach of the authorities. Reflecting this public policy, ultimately, we propose that:

- (1) Where the value of a tainted gift is included in the defendant’s confiscation order, the term of imprisonment imposed on the defendant for defaulting on payment may be adjusted downwards if the court is satisfied that no enforcement measure would be effective in the recovery of the value of that tainted gift.
- (2) In making such a determination the court must consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.

1.139 We further provisionally propose that other relevant principles found in the case law be incorporated into any revised statute, to ensure that the tainted gift regime is clear.

1.140 Finally, we propose that the wording of section 77(5)(a) be amended to provide that a gift is tainted if it was made by the defendant at any time after “the commission of the offence” rather than “the date on which the offence was committed” to place the decision in *R v Lehair*⁷⁰ on a statutory footing.

1.141 In Chapter 22 we discuss putting orders that can no longer be enforced into abeyance. We consider that in cases where the court determines that no enforcement measure would be effective in the recovery of the value of a tainted gift, the ability to stay the enforcement of the confiscation order will clarify the position with regards to the statistics.

Part 6: Enforcement of the confiscation order (Chapters 18 – 22)

Chapter 18: The current enforcement regime for confiscation

1.142 In this chapter we consider the current law on how a confiscation order is made and enforced. We discuss the factors the Crown Court must consider when making a confiscation order as pertains to its enforcement:

- (1) How long the defendant will need to satisfy the order;

⁷⁰ *R v Lehair* [2015] EWCA Crim 1324, [2015] 1 WLR 4811.

- (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”.⁷¹

Chapter 19: Problems with the current enforcement regime

1.143 There is a widely held perception that enforcement is not successful. This perception largely stems from the fact that approximately £2 billion owed by defendants in respect of confiscation orders remains outstanding. We examine the causes of the debt and the issues that stakeholders have identified with the current regime, including:

- (1) Placing the onus on the defendant to satisfy a confiscation order:
 - (a) is open to abuse by defendants who do not wish to co-operate; and
 - (b) may place a heavy burden on defendants who do wish to co-operate but who (for whatever reason) cannot.
- (2) The infrequent use of receivers.
- (3) The use of alternative orders such as charging orders which may involve costly proceedings across multiple jurisdictions.
- (4) The use of the fines enforcement regime which was not drafted with confiscation orders in mind.

Chapter 20: Reforming the confiscation enforcement regime

1.144 We consider whether approaches to asset forfeiture adopted overseas could inform radical reform of the confiscation regime, with a view to optimising enforcement. In particular, we consider:

- (1) Whether replacement of value-based confiscation with asset-based confiscation would be appropriate to optimise enforcement; and
- (2) Whether a confiscation order should continue to be a judgment that requires the defendant to pay a sum of money representing the value of the proceeds of crime, but that to satisfy the order assets belonging to the defendant should vest automatically in the state (whether through a receiver or otherwise) thus eliminating the need for a defendant’s co-operation.

Chapter 21: Contingent orders

1.145 We consider whether, as an alternative to automatic vesting of assets in the state, the current “compliance order” provisions in section 13A of POCA 2002 could be enhanced to make the process of divestment of assets simpler and easier in appropriate cases.

⁷¹ Proceeds of Crime Act 2002, s 13A.

1.146 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.

1.147 We therefore propose that in addition to a power to make automatic vesting orders in appropriate cases, the Crown Court should have the power to make, at the time a confiscation order is imposed, contingent enforcement orders. Such orders would:

- (1) take effect only where a defendant fails to satisfy a confiscation order as directed; but
- (2) be put in place, and therefore at the forefront of the parties' minds, at the time the confiscation order is made.

1.148 By way of example, when imposing a contingent order, the court could direct that if the order is not satisfied as directed:

- (1) an asset, such as a property, will vest in a trustee for confiscation;
- (2) funds held in a bank account will be forfeited;
- (3) seized property will be sold; or
- (4) a warrant of control will take effect.

1.149 These proposals will 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.

Chapter 22: Provisional proposals for an optimal enforcement regime

1.150 In this chapter we consider the current system of sanctions and enforcement powers under POCA 2002 and discuss potential reforms to those sanctions and powers.

1.151 We ultimately make the following proposals:

- (1) The Crown Court has discretion to retain enforcement proceedings but may remit enforcement to a magistrates' court.
- (2) A defendant who has served a term of imprisonment in default will no longer be released unconditionally but will remain on licence and may be returned to custody in the event of further default.
- (3) Defendants are compelled to provide financial information and supporting documentary evidence as directed. The information provided would be housed on the courts' digital case management system to maintain an audit trail to assist enforcement.
- (4) Where the supervising enforcement court is satisfied there are sufficient grounds to do so, the court may pause interest to incentivise continued compliance.

- (5) If the Crown Court is satisfied that a defendant is unable to satisfy an order, and all methods of enforcement have been exhausted, it may direct that further enforcement be stayed pending further order of the court. If a magistrates' court is supervising enforcement, it would have power to commit the case to the Crown Court to consider staying future enforcement.
- (6) A confiscation order should also have the same effect as a judgment debt imposed by a civil court. Accordingly, an unpaid confiscation order should be placed in the Register of Judgments in all cases.

Part 7: Other orders of the court (Chapters 23 – 24)

Chapter 23: Multiple confiscation orders

- 1.152 In this chapter we consider concerns that were expressed at the pre-consultation stage about how well POCA 2002 operates in relation to defendants who become subject to more than one confiscation order.
- 1.153 We discuss that where more than one confiscation order has been made against a defendant, and all the confiscation orders concerned are based on particular criminal conduct, the determination of the benefit of the defendant from their particular criminal conduct for the purposes of each is straightforward. Each order will be based on the benefit obtained from the offences with which those proceedings were concerned.⁷²
- 1.154 Where there is more than one confiscation order against a defendant, assets making up the available amount are only taken into account once.⁷³
- 1.155 Where two or more confiscation orders are made against a defendant which are based on general criminal conduct, the determination of the defendant's benefit for the purposes of the second confiscation order becomes more complicated.
- 1.156 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, with confiscation orders (and uplifts on those orders) potentially being sought by different prosecution authorities or different branches of the same prosecution authority; and
 - (2) the statutory provisions are complex.
- 1.157 Reforms are therefore required to address:

⁷² This proposition is implicit in s 8 of the Proceeds of Crime Act 2002.

⁷³ Proceeds of Crime Act 2002, s 9.

- (1) the complexity of the statutory provisions;
- (2) a “race to judgment” when multiple confiscation orders or uplifts are sought;
- (3) how multiple confiscation orders should be prioritised (for example when there are victims who require compensation only in a second confiscation order case).

1.158 We provisionally propose that:

- (1) Where there are multiple confiscation orders sought against the same defendant, the court should have the power to consolidate the applications for confiscation.
- (2) Where a defendant already has a confiscation order made against him, the court should have the power to amend any earlier confiscation order and to consolidate any amount outstanding under it into the new confiscation order.
- (3) 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.

Chapter 24: Compensation

1.159 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.

1.160 In Chapter 24, we explore the statutory regimes governing both compensation and confiscation orders. We consider the extent to which the law prioritises compensation and the interrelationship between the two types of orders. We then examine the difficulties with the present system; and make provisional proposals for reform.

1.161 Compensation can be ordered to be paid out of confiscated funds when the defendant has insufficient means to satisfy separate compensation orders and confiscation orders⁷⁴.

1.162 We note that sums recovered under a confiscation order are retained by the state unless a direction is made that compensation is to be paid from sums recovered under a confiscation order.⁷⁵

1.163 We discuss the fact that the bar on imposing financial orders during a period of postponement means that compensation orders will be delayed in every case in which confiscation proceedings are postponed.

⁷⁴ Proceeds of Crime Act 2002, s 13(6).

⁷⁵ Proceeds of Crime Act 2002, ss 13 (5) and (6).

1.164 We explain that under section 22 of the Proceeds of Crime Act 2002 the court has a power to uplift the amount payable pursuant to a confiscation order.⁷⁶ However, the section does not make any provision for revisiting compensation orders to permit an uplift to compensation.

1.165 Our provisional proposals for consultation include:

- (1) a power for the court to direct that the sums due under a compensation order, be paid out of funds collected under a confiscation order. This would apply whether or not the defendant has the funds to pay both the compensation order and the confiscation order in full. This amendment allows the greater enforcement powers (including the vesting of assets) to apply to compensation and simplifies the law.
- (2) that adjustments to confiscation orders pursuant to s 22 of POCA 2002 should permit adjustments to the compensation element of an order.

1.166 The proposals in Chapter 24 should be considered alongside proposals that:

- (1) the legislative steer includes explicit reference to the principle that the compensation of victims is a priority (see Chapter 5).
- (2) the court should have a power to make ancillary orders, such as a compensation order, prior to imposing a confiscation order (see Chapter 6).

Part 8: Reconsideration (Chapter 25)

1.167 In this chapter we explore the law in relation to the reconsideration of the amount a defendant must pay under a confiscation order and perceptions of unfairness with the current regime, and we make proposals for reform.

1.168 Our proposals regarding the reconsideration of confiscation orders focus on section 22 of the Act. This is the power of the Crown Court to reconsider and increase the available amount, and therefore the confiscation order, to a figure “that is just”, provided it does not exceed the benefit figure. Applications under section 22 may be made at any time after the making of the original confiscation order.

1.169 Some stakeholders, particularly police financial investigators, considered that the current regime is positive in that it:

- (1) Fulfils POCA 2002’s key objective of requiring a defendant to repay a sum equivalent to his or her benefit from criminality;
- (2) Does not encourage the short-term hiding of assets. If assets cannot be realised pursuant to a confiscation order after a particular date, a defendant may well seek to put his or her assets beyond the reach of the authorities until after that date.
- (3) Keeps the “pressure” on a defendant to satisfy his or her confiscation order.

⁷⁶ See Chapter 25.

- (4) Ensures fairness by giving the court discretion to make such uplifts as it considers “just”.

1.170 There were two negative perceptions of the current regime which were related to confiscation as part of the sentencing process.⁷⁷ In particular, it was perceived that the current regime for uplifts is incompatible with rehabilitation and the timescales for payment of fines and compensation orders.

1.171 Furthermore, the discretion which was seen as a positive factor in achieving a just outcome was also perceived to lead to the prospect of inconsistent results.

1.172 We considered how best the positive and negative perceptions of uplift applications should be balanced in an optimal confiscation regime.

1.173 We discuss and reject the imposition of a prohibition on uplift applications by reference to:

- (1) periods laid down in the Rehabilitation of Offenders Act 1974, which would vary the time limit according to the sentence imposed; or
- (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.

1.174 Instead, we propose that, to assist the court in determining a “just” uplift of a confiscation order, the court should be invited to weigh factors including:

- (1) The legislative priorities of
 - (a) depriving a defendant of his or her benefit from criminal conduct;
 - (b) any need to compensate victims from confiscated funds;
 - (c) deterrence from criminality by encouraging the pursuit of a legitimate lifestyle;
 - (d) disruption of criminality, whether through assistance provided to the authorities or otherwise.
- (2) Undue hardship that would be caused through the granting of the uplift.
- (3) Diligence of the prosecution in applying for an uplift.

⁷⁷ *Phillips v United Kingdom* (2001) 11 BHRC 280, [2001] Crim LR 817; *R v Rezvi* [2001] UKHL 1, [2003] 1 AC 1099; *R v Silcock* [2004] EWCA Crim 408, [2004] 2 Cr App R (S) 61; *R v May* [2005] EWCA Crim 97, [2005] 1 WLR 2902. A confiscation order is a sentence for the purposes of the Criminal Appeal Act 1968; the Criminal Appeal Act 1968 s 50 was amended by POCA 2002 s 456, sch 11 para 4(3).

1.175 In weighing up undue hardship, we provisionally propose that the court should consider factors including:

- (1) The use ordinarily made, or intended to be made, of the property; and
- (2) The nature and extent of the defendant's interest in the property.

Part 9: Preservation of Value (Chapters 26 – 28)

Chapter 26: Restraint

1.176 In this chapter, we discuss the current approach taken to restraining a defendant's assets in order to safeguard against dissipation. POCA 2002, like the legislation that preceded it,⁷⁸ permits the granting of a restraint order at any time after the commencement of a criminal investigation.

1.177 There are several pre-requisites before any restraint can occur depending on the stage that the investigation or proceedings have reached.

1.178 Even if a prosecution authority is able to satisfy the statutory test for the granting of restraint pre-charge or after proceedings have been commenced, the courts have introduced an additional test that must be satisfied before a restraint order can be granted. The additional test was summed up by Lord Justice Moses in the case of *R v B*:

There can be no justification for such a restraint unless the prosecution establish that there is a real risk that assets will be dissipated which might otherwise meet a confiscation order.⁷⁹

1.179 We discuss the primary concern with the test for restraint which is the risk of dissipation test. Some prosecutors reported that the test makes it difficult to obtain restraint orders. However, *R v B*⁸⁰ articulates the position that the test provides an important safeguard.

1.180 It is therefore provisionally proposed that the risk of dissipation test should be retained. However, we provisionally propose that the common law test be refined by setting criteria from which the courts might be able to determine the existence and extent of any risk. For instance, where there has been actual dissipation of assets or clear preparatory steps have been taken towards dissipation of assets, the risk of dissipation speaks for itself.

1.181 We considered carefully whether there are cases in which there should be mandatory or automatic restraint of assets in particular categories of case, but we conclude that to ensure that restraint is a proportionate interference with the right to peaceful enjoyment of property a careful weighing of indicative factors in each case is required.

⁷⁸ Drug Trafficking Offences Act 1986 s 8; Criminal Justice Act 1988 s 77; Drug Trafficking Act 1994 s 26.

⁷⁹ *R v B* [2008] EWCA Crim 1374, [2009] 1 Cr App R 14 at [13], citing *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182.

⁸⁰ *R v B* above.

- 1.182 We also propose a series of indicative factors that should be considered when determining whether criminal proceedings have been started within a reasonable time frame after obtaining a restraint order to inform the court's approach to applications to discharge a restraint order.
- 1.183 This chapter also discusses applications to vary restraint orders, particularly in relation to meeting reasonable legal expenses. We provisionally propose that the legal aid exception to restraint orders should be altered to permit the payment of lawyers in confiscation proceedings and related criminal proceedings. We also propose that the current test for release of funds for legal expenses be varied to permit the payment of legal expenses connected with criminal proceedings and confiscation and that legal expenses should be subject to scrutiny and approval by a judge.
- 1.184 With regards to releasing funds from restraint to meet reasonable living expenses, we propose that a standard form should be used to provide information as to a defendant's finances. There would then be an obligation on the defendant to provide copies of any documents which support the assertions they make on the form about their finances.
- 1.185 We further consider the costs implications of restraint orders, particularly prosecutors' costs liabilities. The risk of a substantial costs order has been cited as a factor that impacts upon the decision to apply for a restraint order.⁸¹ We propose that, when considering costs orders, the court should consider a series of factors in order to assess the reasonableness of the prosecution's restraint application. If reasonableness is established, we propose that costs be capped at legal aid rates. We seek to achieve a balance between the legitimate aim of encouraging restraint applications whilst safeguarding defendants' rights. We note that similar systems are utilised in civil cases and substantive criminal proceedings. We invite consultees to express views about alternatives.
- 1.186 We also consider third party interests and when in the process conclusive determinations can and should be made. We ultimately propose that the ability of the court to make a conclusive determination on third party interests be extended not just to restraint but to any stage of the confiscation process. We consider that this will expedite the making of contingent vesting orders (see Chapter 21).
- 1.187 Finally, we consider how urgent applications for restraint can be dealt with efficiently. Financial investigators repeatedly highlighted difficulties in accessing courts for restraint applications, whether because of geographical location or because of the workload before the court. We provisionally propose that:
- (1) Applications for without notice restraint orders should be made to a duty judge, accessible nationally.
 - (2) The application should be dealt with by the judge on the papers where possible.

⁸¹ Confiscation Orders, Report of the House of Commons Committee of Public Accounts (2013-2014) HC 942 p 9.

- (3) If the judge requires further information, that judge should be permitted to hold a hearing remotely.
- (4) Should the judge decide that there is a need for an inter partes hearing, the hearing should be listed at a court centre local to the parties.

Chapter 27: Effective Asset Management

1.188 In this chapter we consider issues surrounding steps that can be taken to prevent the diminution of the value of assets.

1.189 We consider whether methods other than restraint that are used to manage or preserve the value of assets are effective. Such methods include seizure, detention and realisation by investigatory authorities and management receivership. Section 47C of POCA 2002, for instance, permits an “appropriate officer” to exercise the power to seize property if that officer has reasonable grounds for suspecting that:

- (1) the property may otherwise be made unavailable for satisfying any confiscation order that has been or may be made against the defendant, or
- (2) the value of the property may otherwise be diminished as a result of conduct by the defendant or any other person.⁸²

1.190 No maximum period for detention is specified. However, if a person who has had their assets seized after arrest does not have criminal proceedings started against them within a reasonable time the magistrates’ court must discharge the order for detention.⁸³

1.191 During our pre-consultation discussions, we heard from police officers and financial investigators that the powers available to investigatory authorities under POCA 2002 are not well known, well understood or routinely used. This has the potential to undermine the preservation of the value of assets pending a confiscation order.

1.192 In this chapter, we provisionally propose therefore that the National Police Chiefs’ Council gives renewed consideration to the training needs of all police officers in connection with POCA 2002.

1.193 This chapter also discusses realisation of held property. When a confiscation order has been made and no receiver has been appointed, the magistrates’ court may order that an “appropriate officer” realise the property.⁸⁴ If the court has made a restraint order, it may appoint a management receiver in respect of any realisable property.⁸⁵

1.194 In consideration of the use of management receivers, we also discuss the criticisms levelled at this course of action. The first is the fact that a management receiver’s remuneration and expenses are paid from the assets over which he or she is

⁸² Proceeds of Crime Act 2002, s 47C(1).

⁸³ Proceeds of Crime Act 2002, s 47N(3).

⁸⁴ Proceeds of Crime act 2002, s 67A.

⁸⁵ Proceeds of Crime Act 2002, s 48.

appointed.⁸⁶ The costs incurred (even if entirely reasonably incurred) therefore impact on the amount that could ultimately be recovered to satisfy a confiscation order.

- 1.195 The second criticism of the use of management receivers is closely related to the first. The cost of using management receivers is sometimes prohibitive in the sense that it is more than the value of the asset or reduces the amount able to be reclaimed by the state after the asset is sold such that it renders this option pointless.
- 1.196 We do not consider that a “one-size fits all” approach to asset management, which involves cherry-picking from a range of existing bodies, is appropriate.
- 1.197 Consequently, we then discuss the merits of creating a Criminal Asset Recovery Board (“CARB”) with responsibility for developing a national strategy for asset management and realisation.
- 1.198 It is our proposal that CARB would, as a collective entity, develop a national asset management strategy consisting of policy guidelines to be applied when determining how assets are to be managed and realised.
- 1.199 We ultimately propose that the power to appoint a management receiver should be extended to cover assets which are subject to an order of further detention (currently found in section 47M of POCA 2002).

Chapter 28: Cryptoassets

- 1.200 In this chapter 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.
- 1.201 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.
- 1.202 In considering the volatility of cryptoassets, we recognise that this may well lead to an application to vary the available amount. However, we note that the provisions for the variation of the confiscation order either upwards or downwards exist primarily to deal with such changes in value after the making of the confiscation order.
- 1.203 We therefore consider that POCA 2002, as currently framed, has adequate provisions relating to both the calculation of “benefit” and the “available amount” to deal with the volatile nature of the value of cryptoassets.
- 1.204 During our pre-consultation discussions the issue was raised as to whether, in circumstances where there has been a successful application for conversion of a cryptoasset into sterling and its payment into an interest-bearing account, the prosecution ought to be protected from having to compensate defendants if they miss a gain they would otherwise have made in the value of the cryptoasset as a result. Given that cryptoassets are often subject to significant fluctuations in value, the potential liability to the prosecution authority could be considerable.

⁸⁶ Proceeds of Crime Act 2002, s 49(2)(d); Criminal Procedure Rules, r 33.61(5).

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

1.206 Ultimately this chapter does not make policy proposals but 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). We invite consultees to submit any concerns that they have about the interrelationship between cryptoassets and the confiscation regime, which may inform our final report.

Annexes

1.207 The consultation paper contains three appendices:

- (1) analysis undertaken by the Law Commission of data in connection with confiscation orders made at Liverpool Crown Court;
- (2) a table of statutory provisions in Part 2 of POCA 2002;
- (3) a list of contributing stakeholders.

BROADER REFORMS

1.208 Given that this is a consultation paper and not a final report, it is premature to suggest broader areas of reform which may be prompted by this review.

1.209 However, there were a number of matters which were raised by stakeholders during our pre-consultation stage which we acknowledge here. We do so to signpost that these issues have been considered while undertaking the research for this project, but are outside our terms of reference.

The disparity between the powers in Parts 2 and 5 of POCA 2002

1.210 Part 5 of POCA 2002 sets out the regime for the detention and forfeiture of assets using civil powers. The civil forfeiture regime in part 5 of POCA 2002 differs from the confiscation regime in part 2 of POCA in two major respects.

- (1) Orders under Part 2 are made “in personam”, which means that they are made against the person in respect of a general sum of money.⁸⁷ Orders made under Part 5 are made “in rem” in respect of identified property deemed to have been obtained through unlawful conduct.

⁸⁷ Part 2 does enable the restraint and realisation of assets for the purposes of fulfilling the order, but the order is not made against the specific assets.

- (2) Part 2 applies to defendants post-conviction, and confiscation proceedings generally follow sentence. Conversely, Part 5 involves civil proceedings and therefore can be employed in the absence of a criminal conviction.

1.211 During our pre-consultation discussions, stakeholders questioned whether civil asset forfeiture proceedings should be available after an acquittal in the Crown Court before the same judge that presided over the trial. In such proceedings, it was suggested that a judge may decide that although the jury could not be satisfied so that they were sure of guilt, he or she could be satisfied to the civil standard that property had come from crime and should be forfeited.

1.212 Whilst our terms of reference ask us to consider the “interplay between civil and criminal investigations under POCA 2002”, Part 5 is outside of the scope of this review and as such we do not make any such proposals or seek to consult on this issue.

Alternatives to a confiscation order

1.213 There are other types of orders which may be considered more efficient alternatives to confiscation orders. These include other types of forfeiture and deprivation orders and costs orders, the regimes for which are sometimes less convoluted than the confiscation regime.

1.214 Chapter 5 on the Asset Recovery Incentivisation Scheme details some of the alternatives to the confiscation regime in the context of the incentive mechanisms which support the law enforcement funding model:

One of the other effects of offering a funding advantage as an incentive to pursue confiscation is that other useful orders which are not incentivised may be underused. Property frequently comes into the police’s possession in connection with their investigations into criminal offences.

There are alternative ancillary orders to confiscation orders which are targeted at the removal of property, for example, a deprivation order under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000. The court may make an order to deprive an offender of property used for the purpose of committing or facilitating the commission of an offence, whether or not it deals with the offender in any other way. These ancillary orders can be made at the sentencing hearing and are quicker and less labour-intensive than confiscation orders. Items forfeited under section 143 are ultimately sold and the money given to charity. However, the funds received are not included within ARIS receipts therefore there is greater incentive to pursue a confiscation order. This can produce inefficiency when a simpler, cheaper and quicker alternative is available.⁸⁸

1.215 However, given that this review is focussed on Part 2 of POCA 2002, the in-depth analysis is limited to the confiscation regime.

Victims’ Rights

1.216 During our pre-consultation engagement, we received feedback from some practitioners that victims were not adequately represented or supported throughout

⁸⁸ ARIS is discussed at length in Chapter 5.

confiscation proceedings. Often criminal matters which warrant confiscation action involve a victim (for example, a person who has had their house burgled or been the victim of fraud).

- 1.217 Confiscation action, like other criminal proceedings is brought by a prosecution agency on behalf of the state. The defendant is a party to the proceedings, but is ordinarily represented by a defence practitioner. Victims are not represented and if they play a part in the proceedings at all, it is through their provision of evidence as a witness.
- 1.218 During our fact-finding, a suggestion was made that victims' participation and representation should be reviewed.
- 1.219 Furthermore, we received feedback in relation to the lack of clarity concerning the interrelationship between confiscation and restitution orders. One particular aspect is the disparity between the restraint provisions available for courts to employ in relation to confiscation orders and the lack of similar provisions available to ensure the satisfaction of restitution orders.
- 1.220 Finally, a further discrepancy which was highlighted during pre-consultation was the fact that while the confiscation regime considers and prioritises compensation orders in relation to victims who have a proprietary claim, this same consideration is not afforded to unsecured victim claimants.
- 1.221 While Chapter 24 on compensation discusses the compensation regime in the context of POCA 2002, compensation and restitution are largely outside the scope of this review. For this reason, we acknowledge these issues but do not make proposals in their regard or seek to consult on them specifically.

ACKNOWLEDGEMENTS

- 1.222 In order to ensure we had a thorough grasp on the practical problems inherent in the current regime, we have engaged with a large number of stakeholders in our pre-consultation discussions. We are grateful to them for identifying some of the issues of concern and their ideas on how to improve the current system. A full list of contributors can be found at Appendix 3.
- 1.223 First and foremost, we acknowledge and thank Professor David Ormerod QC who was Commissioner of Criminal Law prior to the appointment of Professor Penney Lewis. Without Professor Ormerod's insight and guidance during the pre-consultation, policy development and early writing stages, this project could never have reached completion. The final recommendations should not be taken to represent Professor Ormerod's views.
- 1.224 We thank Stefan D Cassella, former US federal prosecutor, now associated with Asset Forfeiture Law, LLC, for his assistance with our comparative analysis of the US federal jurisdiction.
- 1.225 We are deeply indebted to Rudi Fortson QC (Visiting Professor at Queen Mary, University of London and practising barrister, 25 Bedford Row) who has acted as a consultant on this project.

1.226 This report has been prepared by David Connolly (team manager), Alexander Mills (project lead lawyer), Lucy Corrin (lawyer), Michael Oliver (lawyer), David Allan (lawyer), Holly Brennan (research assistant), Dominic Bowes (research assistant) and Tessa Donovan (research assistant). Alice Lepeuple (research assistant) undertook invaluable preparatory work during our initial fact-finding stage.

Part 1: Current law in context

INTRODUCTION TO PART 1

In Part 1 of this paper we begin by tracing the confiscation regime's historical origins in targeting the proceeds of drug trafficking to its expansion into the regime we have today. To provide a complete picture, we then outline key reforms that have been made to the confiscation regime under POCA 2002 since its original enactment. Having examined previous iterations of the confiscation regime, we outline the main provisions of the current law that we go on to consider in more detail in subsequent chapters.

We go on to analyse what happens to the funds generated from confiscation orders which are distributed under the Asset Recovery Incentivisation Scheme.

Chapter 2: History of Part 2 of the 2002 Act

INTRODUCTION

- 2.1 In this chapter, we summarise the historical background to Part 2 of POCA which informs our proposals for reform. We seek to explain how confiscation has developed since its inception in the 1980s. As was observed by the Supreme Court in *R (Gibson) v Secretary of State for Justice*, the confiscation regimes that led to the introduction of POCA are “not...of merely historical interest”.¹ Throughout the consultation paper we refer to the earlier legislation to help put POCA 2002 and any proposed reforms to it into context.
- 2.2 We begin by discussing the long path to the all-crimes confiscation regime enacted under POCA 2002. We then set out an overview of the most significant amendments to POCA that have been made since 2002.

HISTORY OF CONFISCATION LAW IN ENGLAND AND WALES

Taking the profits from drug trafficking – the first confiscation legislation

- 2.3 In the 1980s, tackling drug-related criminality was one of the most fundamental strands of public policy, both in the UK² and internationally.³ The supply and trafficking in drugs generated vast sums of money.⁴ It was argued that if such money could be taken away from criminals there was the potential to deter and disrupt drug offending.⁵
- 2.4 The power of forfeiture under section 27 of the Misuse of Drugs Act 1971 was, and remains, restricted to tangible items which are shown to relate to the offence for which the defendants had been convicted. The limited scope of this provision was exposed by the decision of the House of Lords in *R v Cuthbertson*⁶. It concerned “Operation Julie” (a police investigation into a lucrative criminal enterprise of manufacturing and supplying lysergic acid diethylamide (LSD)). Their Lordships held that section 27 was not apt to strip professional drug-traffickers of the whole of their ill-gotten gains.
- 2.5 The Secretary of State for the Home Department gave another example of the problems caused by the absence of a regime for “following the assets” in the House of Commons:

a group of five offenders were convicted at the Crown Court at Maidstone of the importation of heroin with a street value of £2 million. They were sentenced to a total

¹ *R (Gibson) v Secretary of State for Justice* [2018] UKSC 2, [2018] 1 WLR 629.

² *Hansard* (HC) 21 January 1986, vol 90, cols 241 to 242.

³ G7 Summit, *Political Declaration: Securing Democracy*, Toronto Summit, June 20 (1988).

⁴ *Hansard* (HL) 30 January 1985, vol 459, cols 660-1; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 19 December 1988) 28 ILM 493 (1989), preamble.

⁵ *Hansard* (HC) 21 January 1986, vol 90, cols 241 to 242; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances above, art 5.

⁶ *R v Cuthbertson* (1980) 2 Cr App R (S) 214.

of 146 years imprisonment. Before passing sentence, the judge inquired into the assets of one of the principals. It emerged that this offender, while awaiting trial, had transferred all his property to his wife. She had then sold the house, put the money into a building society and left the country. The judge was satisfied that the house had been bought partly from the proceeds of drug smuggling, and said that he would have liked to order the confiscation of the money in the building society; he regretted that he had no power to do so.⁷

The Hodgson Committee report

- 2.6 The case of *Cuthbertson*⁸ led to the establishment in 1984 of a committee set up by the Howard League for Penal Reform and chaired by Sir Derek Hodgson. The committee considered the sufficiency of existing powers to deprive defendants of the “fruits of crime”⁹ and published a report entitled “The Profits of Crime and their Recovery”.¹⁰
- 2.7 The committee suggested a system of financial orders that it described as “confiscation” orders.¹¹ The confiscation order was intended to put the defendant back into the position that he or she would have been in prior to committing the offence¹² by taking away his or her profits from crime.
- 2.8 Around the same time, the House of Commons Home Affairs Committee visited the United States of America to observe its growing problem with illegal drugs. The observations made by committee members from the visit reinforced government policy that taking the profit from drug trafficking offences should be a top priority for the UK’s criminal justice system.¹³

Post-Hodgson Reform: 1986 to 2000

- 2.9 The impetus from the Home Affairs Committee, and many of the ideas of the Hodgson Committee, led to the introduction of the Drug Trafficking Offences Act 1986 (“DTOA 1986”).¹⁴ In any case where a defendant was convicted of a drug trafficking offence, the court was required to calculate whether the defendant had benefited from drug trafficking.¹⁵ If so, a confiscation order was to be made against the defendant to repay his or her benefit from crime, or as much of the benefit as the defendant could.¹⁶
- 2.10 The effect of the new provisions prompted the court to ask three questions, which in essence have been carried through in the 2002 Act, namely:

⁷ *Hansard* (HC) 21 January 1986, vol 90, col 243.

⁸ *R v Cuthbertson* [1981] AC 470.

⁹ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [7].

¹⁰ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984).

¹¹ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 5.

¹² Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 74.

¹³ *Hansard* (HC) 21 January 1986, vol 90, col 242.

¹⁴ *R v Cuthbertson* [1981] AC 470; *Hansard* (HC) 21 January 1986, vol 90, col 242.

¹⁵ Drug Trafficking Offences Act 1986, s 1.

¹⁶ Drug Trafficking Offences Act 1986, s 4.

- (1) Has the defendant benefitted from their relevant criminal conduct?
 - (2) If so, what is the value of the benefit?
 - (3) What sum is recoverable from the defendant?
- 2.11 In the 1986 Act, benefit was defined as “any payment or other reward in connection with drug trafficking carried on by him or another”.¹⁷
- 2.12 Drug trafficking was viewed as a “uniquely heartless and destructive offence”¹⁸ perpetrated over time to make profit. The corresponding confiscation regime was expansive in its scope. As we set out in Chapter 13, it required the court to examine not only the benefit from the offending for which the defendant had been convicted, but also to look back over a period of six years for the profits of other drug-related offending. It was assumed that the defendant had acquired assets over that period from criminality, unless he or she could show otherwise.¹⁹ This went further than the recommendations of Mr Justice Hodgson.²⁰
- 2.13 Although at the time that the DTOA 1986 was introduced the government “was committed to the idea of attacking the profits of crime in a way that goes beyond drugs offences”,²¹ the government felt that whether confiscation needed to be extended to other offences in precisely the same way required further consideration.²²

Extension of confiscation to other offending

- 2.14 The extension of confiscation to all other indictable offences came in the Criminal Justice Act 1988 (“CJA 1988”),²³ along with a limited jurisdiction to make confiscation orders in relation to a narrow range of summary offences which were seen as generating profit. These included offences relating to the illegal supply of unclassified video recordings and to the running of unlicensed cinemas.²⁴
- 2.15 The CJA 1988 used a different definition of benefit. It provided that a person benefited if they had obtained property as a result of or in connection with the commission of the offence or offences or had derived a pecuniary advantage from the offence(s). This definition of benefit was substantially reproduced in the 2002 Act.
- 2.16 Thus, following the introduction of the CJA 1988, there were two similar but not identical regimes for making confiscation orders: one relating to drug-trafficking offences; the other relating to other offences.

¹⁷ Drug Trafficking Offenders Act 1986, s 1(3).

¹⁸ *Hansard* (HL) 27 April 1987, vol 486, col 1269.

¹⁹ Drug Trafficking Offences Act 1986, s 2.

²⁰ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) pp 82 and 83.

²¹ *Hansard* (HC) 21 January 1986, vol 90, col 242.

²² *Hansard* (HC) 21 January 1986, vol 90, col 242.

²³ Criminal Justice Act 1988, s 71.

²⁴ Criminal Justice Act 1988, sch 4.

2.17 As anticipated during the passage of the DTOA 1986, the confiscation regime under the CJA 1988 as originally enacted did not replicate precisely the “strongest powers to trace and confiscate”²⁵ required in relation to drug trafficking. For example:

- (1) The court had a discretion as to whether to make a confiscation order.²⁶
- (2) Whilst the DTOA 1986 applied equally to “the street corner pusher, living in a squat on supplementary benefit, as to the major suppliers”, the CJA 1988 was intended to focus on taking the proceeds from “highly profitable” offences.²⁷ A minimum threshold for benefit was set at £10,000.²⁸
- (3) The court was confined to examining the defendant’s benefit from the crime for which they were convicted. The court could not look into a defendant’s benefit from previous offending.²⁹

Consolidation of the legislation

2.18 Over time, the legislation was amended³⁰ and consolidated.³¹ The two regimes also began to converge in their scope. For example, the Proceeds of Crime Act 1995 amended the CJA 1988 by removing all of the differences set out in the previous paragraph. It:

- (1) replaced the discretion to proceed to confiscation with a duty to do so;³²
- (2) abolished the minimum threshold of £10,000;³³
- (3) introduced the power for the court to look back over a period of 6 years at the profits from other offending.³⁴

2.19 Nevertheless, differences between the two regimes remained. For example, it was mandatory to make specified assumptions that the defendant had benefitted from drug trafficking,³⁵ but was discretionary in other cases.³⁶ Such legislative differences created complexities in confiscation that had the potential to “lay traps for the sentencer”.³⁷

²⁵ *Hansard* (HL) 27 April 1987, vol 486, col 1286.

²⁶ Criminal Justice Act 1988, ss 71(1) to (3).

²⁷ *Hansard* (HL) 27 April 1987, vol 486, cols 1269 and 1270.

²⁸ Criminal Justice Act 1988, s 71(7).

²⁹ *Hansard* (HL) 27 April 1987, vol 486, col 1287.

³⁰ Criminal Justice (International Co-operation) Act 1990; Criminal Justice Act 1993; Proceeds of Crime Act 1995; Crime and Disorder Act 1998.

³¹ Drug Trafficking Act 1994.

³² Proceeds of Crime Act 1995, s 1.

³³ Proceeds of Crime Act 1995, sch 2 para 1.

³⁴ Proceeds of Crime Act 1995, s 2.

³⁵ Drug Trafficking Act 1994, s 4(2).

³⁶ Criminal Justice Act 1988, s 72AA(3).

³⁷ *Hansard* (HL) 27 April 1987, vol 486, col 1287.

2.20 In 2000, the Performance and Innovation Unit of the Cabinet Office (“PIU”) identified all of the legislation that had been passed since 1986 affecting confiscation. The following table has been adapted from its report:³⁸

Year	Legislation	Nature of provisions
1986	Drug Trafficking Offences Act	Confiscation provisions for drug trafficking offences.
1988	Criminal Justice Act	Confiscation provisions for all non-drug indictable offences and specified summary offences.
1990	Criminal Justice (International Co-operation) Act ³⁹	Introduced: (a) the requirement to pay interest on sums outstanding under confiscation orders. ⁴⁰ (b) the court’s power to increase the amount a defendant is required to pay under a confiscation order in light of new information. ⁴¹
1993	Criminal Justice Act ⁴²	Enhancements to drug trafficking and all crime confiscation provisions. ⁴³
1994	Drug Trafficking Act	Consolidating the drug provisions and removing mandatory confiscation.
1994	Criminal Justice and Public Order Act	Minor amendments to CJA 1993 provisions.
1995	Proceeds of Crime Act	Further alignment of all crime confiscation provisions with DTA 1994; notably the use of assumptions in criminal lifestyle cases
1998	Crime and Disorder Act	Amendment to CJA 1988 for confiscation orders on committal for sentence

2.21 As of December 2018, 1,135 confiscation orders made prior to POCA 2002 remained unsatisfied.⁴⁴

THE PROCEEDS OF CRIME ACT 2002

2.22 The PIU proposed that any new confiscation legislation should introduce a single, confiscation regime for all types of offending.⁴⁵ This was accepted by the

³⁸ Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), table 4.1, Crown Copyright.

³⁹ These amendments were introduced to give effect to the United Kingdom’s obligations under the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

⁴⁰ Criminal Justice (International Cooperation Act) 1990, s 15.

⁴¹ Criminal Justice Act 1993, s 12; Criminal Justice (International Cooperation Act) 1990, s 16.

⁴² Enacted partially to meet the United Kingdom’s obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990.

⁴³ Criminal Justice Act 1993, ss 7 to 13 and 27 to 28.

⁴⁴ Data provided to the Law Commission by Her Majesty’s Courts and Tribunals Service (“HMCTS”).

⁴⁵ Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), para 8.1.

government,⁴⁶ and POCA 2002 now permits the Crown Court to consider making a confiscation order in any case under a single regime, regardless of the nature of the criminality.⁴⁷

- 2.23 Part 2 of POCA 2002 came into force on 24 March 2003 and applies to offences committed after that date.⁴⁸ Because of the time it takes for a case to proceed through the stages of investigation, prosecution and confiscation, cases have continued to feature pre-POCA confiscation legislation.⁴⁹
- 2.24 We discuss the confiscation process in greater detail in Chapter 3 and throughout the paper.
- 2.25 In *R v May* the House of Lords observed that the making of a confiscation order under POCA 2002 requires the court to answer three distinct questions:
- (1) Has the defendant benefited from the relevant criminal conduct?
 - (2) What is the value of the benefit that the defendant has so obtained?
 - (3) What sum is recoverable from the defendant?⁵⁰
- 2.26 Having made the confiscation order, the court must set a time period within which the order must be satisfied. As originally enacted, the maximum total period permissible for satisfaction of a confiscation order was 12 months.⁵¹ Upon expiry of the “time to pay” period, the defendant is liable to imprisonment in default of payment.⁵² The judge must set the period for the default sentence at the time of making the confiscation order.
- 2.27 There is little point in making a confiscation order if a defendant has already dissipated his or her assets. Accordingly, Part 2 of POCA permits the Crown Court to make a “restraint order”, preventing any named person from dealing with assets that might be realised to satisfy a confiscation order.⁵³ Such an order may be made from the moment that an individual becomes subject to a criminal investigation.⁵⁴
- 2.28 A defendant may be reluctant to realise his or her assets, or may have assets that require management (such as a business or rental property). Part 2 of POCA

⁴⁶ Home Office, *Proceeds of Crime Bill Publication of Draft Clauses* (March 2001) Cm 5066, para 2.2.

⁴⁷ Proceeds of Crime Act 2002, ss 6(2) and 70.

⁴⁸ Proceeds of Crime Act 2002 (Commencement No 5 Transitional Provisions, Savings and Amendment) Order 2003; SI 2003 No 333 (subject to transitional arrangements).

⁴⁹ *Re Ojebode* [2020] EWHC 923 (Admin); *Re Nixon* [2020] EWHC 410 (Admin); *re Khan* [2019] EWHC 2683 (Admin); *R (Ludlam) v Hinkley Magistrates' Court* [2019] EWHC 1884 (Admin); *Re Austin* [2019] EWHC 2574 (Admin); *re G* [2019] EWHC 1737 (Admin); *re Somaia* [2019] EWHC 1227 (QB), [2019] 2 Cr App R 24.

⁵⁰ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [8].

⁵¹ Proceeds of Crime Act 2002, s 11.

⁵² Proceeds of Crime Act 2002, s 35.

⁵³ Proceeds of Crime Act 2002, s 41.

⁵⁴ Proceeds of Crime Act 2002, s 40(2).

therefore also permits the Crown Court to appoint a receiver to sell or manage such assets.

AMENDMENTS TO POCA 2002

- 2.29 The regime under Part 2 of POCA 2002 has been amended. Such amendments have sought both to clarify the regime⁵⁵ and to make it more effective. The most significant amendments are outlined in the next part of this chapter.

Serious Organised Crime and Police Act 2005

- 2.30 Section 97 of the Serious Organised Crime and Police Act 2005 provides an order-making power for the Home Secretary to enable confiscation orders to be made in the magistrates' court.⁵⁶ The Home Secretary has not yet exercised this order-making power.⁵⁷

Serious Crime Act 2007

- 2.31 The Serious Crime Act 2007 made amendments to increase the effectiveness of the confiscation regime. For example, the court was empowered to permit receivers to dispose of perishable goods or goods of diminishing value, without having to delay for representations from affected parties.⁵⁸ This was intended to maximise the financial return that could ultimately be used to satisfy a confiscation order.

Policing and Crime Act 2009

- 2.32 On 1 June 2015 Part 5 of the Policing and Crime Act 2009 ("PCA 2009") was brought into force. Prior to this there were very limited powers for police officers or accredited financial investigators to seize property in order to prevent its removal from England and Wales.⁵⁹ The PCA 2009 introduced a new range of search, seizure⁶⁰ and detention⁶¹ powers that could be exercised in anticipation of a confiscation order being made. The PCA 2009 also gave a magistrates' court the power to order the sale of seized property, with the proceeds paid towards the satisfaction of a confiscation order.⁶²

⁵⁵ Amendments have been made to define the relationship between confiscation and other legislation. For example, amendments were made to define the relationships between confiscation orders and unlawful profit orders (Prevention of Social Housing Fraud Act 2013, sch 1 paras 11 to 23); slavery and trafficking reparation orders (Modern Slavery Act 2015, sch 1 para 15) and account freezing and forfeiture orders (inserted into Part 5 of POCA 2002 by the Criminal Finances Act 2017 sch 1 paras 17 to 22).

⁵⁶ Serious Organised Crime and Police Act 2005, s 97(1).

⁵⁷ Although Serious Organised Crime and Police Act 2005, s 97(1ZA) was inserted by Serious Crime Act 2015 s 40(3), specifying that magistrates' court confiscation, if permitted, would be permitted up to a limit of £10,000. It therefore appeared that magistrates' courts confiscation orders were a step closer.

⁵⁸ Serious Crime Act 2007, s 82(1), inserting ss 49(8A) and 51(8A) in the Proceeds of Crime Act 2002.

⁵⁹ Proceeds of Crime Act 2002, s 45.

⁶⁰ Policing and Crime Act 2009, s 55, inserting ss 47A to 47S into the Proceeds of Crime Act 2002.

⁶¹ Policing and Crime Act 2009, s 52, inserting ss 41A and 44A into the Proceeds of Crime Act 2002.

⁶² Policing and Crime Act 2009, s 58, inserting ss 67A to 67D into the Proceeds of Crime Act 2002.

Serious Crime Act 2015

- 2.33 The Serious Crime Act 2015 made a series of changes to Part 2 of POCA 2002. The amendments, like those made by the PCA 2009, came into force on 1 June 2015.
- 2.34 The Government's 2013 Serious and Organised Crime Strategy recognized that "POCA is under sustained legal challenge from criminals who are constantly seeking new ways to avoid its reach and frustrate asset recovery".⁶³ The Serious Crime Act 2015 sought to close loopholes, ensure that assets could not be hidden with third parties, enable assets to be frozen more quickly, significantly reduce the time given to defendants to pay their orders and reduce opportunities to avoid paying confiscation orders.⁶⁴ Many of the provisions were brought into force on 1 June 2015.⁶⁵ Those provisions were intended to:
- (1) Expedite the confiscation process. The time within which a defendant was required to pay their confiscation order was reduced from a maximum of 1 year to a maximum of 6 months.⁶⁶
 - (2) Encourage a defendant to pay their confiscation order through the strengthening of sanctions for non-payment. The maximum sentence to be served by defendants who defaulted on paying their confiscation orders was increased from 10 to 14 years' imprisonment⁶⁷ with the general statutory eligibility for early release removed in relation to confiscation orders worth more than £10 million.⁶⁸ The Crown Court was also empowered to make any order it considers necessary to secure compliance with the confiscation order (a "compliance order"). This includes a requirement to consider the imposition of a travel restriction.⁶⁹
 - (3) Remove barriers to obtaining restraint orders. The threshold for the granting of a restraint order was lowered from "reasonable cause to believe" to "reasonable grounds to suspect" that a defendant has benefited from criminal conduct.⁷⁰
 - (4) Expedite consideration of third party interests. The Crown Court was given the power to make a binding determination as to the extent of a defendant's interest in an asset held by a third party at the time of making a confiscation order, rather than having to wait until an application was made to appoint a receiver over the particular asset in question.⁷¹
 - (5) Increase control over enforcement of the confiscation order. The court was permitted to "stagger" deadlines for payment, rather than allowing the defendant

⁶³ *Home Office, Serious and Organised Crime Strategy, Home Office (2013) Cm 8715, para 4.46.*

⁶⁴ Above, paras 4.47 to 4.49.

⁶⁵ SI 2015 No 820, bringing ss 1-12, 14, and 40 of the Serious Crime Act 2015 into force.

⁶⁶ Serious Crime Act 2015, s 5, amending the Proceeds of Crime Act 2002, s 11.

⁶⁷ Serious Crime Act 2015, s 10(1), inserting s 35(2A) into the Proceeds of Crime Act 2002.

⁶⁸ Serious Crime Act 2015, s 10(3), inserting s 258(2B) into the Criminal Justice Act 2003.

⁶⁹ Serious Crime Act 2015, s 7, inserting s 13A into the Proceeds of Crime Act 2002.

⁷⁰ Serious Crime Act 2015, s 11, amending s 40(2)(b) of the Proceeds of Crime Act 2002.

⁷¹ Serious Crime Act 2015, s 1, inserting s10A into the Proceeds of Crime Act 2002.

complete freedom to realise his assets at any stage before the expiry of a single “time to pay” deadline.⁷² Magistrates courts were also given the power to order that any of the defendant’s money that is held in a third party’s bank account be paid over to the court in satisfaction of the defendant’s confiscation order.⁷³

- (6) Strengthen the regime that applied to defendants who had absconded. For example, absconding defendants who are neither convicted nor acquitted may now have a confiscation order made against them after 3 months, rather than the 2 years previously prescribed.⁷⁴

2.35 Although these amendments to Part 2 of POCA sought to address the need to tackle serious and organised crime effectively, the Serious Crime Act 2015 also brought a significant concession to balance the impact of confiscation order. An important amendment was made to section 6(5), to the effect that a court may only make a confiscation order to the extent that it is proportionate to do so.⁷⁵ This qualification gave statutory effect to the decision of the Supreme Court in the case of *R v Waya*,⁷⁶ which required that a confiscation order must appropriately balance the public interest in confiscation of the proceeds of crime with a person’s right to enjoyment of property as guaranteed by article 1 of the First Protocol to the European Convention on Human Rights. The impact of the requirement of proportionality is discussed in Chapter 5.

Conclusion

2.36 Notwithstanding that Part 2 of POCA was designed to consolidate and to improve the confiscation regimes that preceded it, the Act required substantial amendment. Although in some cases our law already complied with international norms (EU Council Framework Decision 2005/212/JHA; EU Directive 2014/42/EU), reforms were perceived to be required to make it more effective. Therefore for the reasons set out in this consultation paper, a critical evaluation of Part 2 of the Act, and proposals for reform, are warranted.

⁷² Serious Crime Act 2015, s 5, amending the Proceeds of Crime Act 2002, s 11.

⁷³ Serious Crime Act 2015, s 14(2), inserting s 67(5B) into the Proceeds of Crime Act 2002.

⁷⁴ Serious Crime Act 2015, s 9(3), amending the Proceeds of Crime Act 2002, s 28(2)(c).

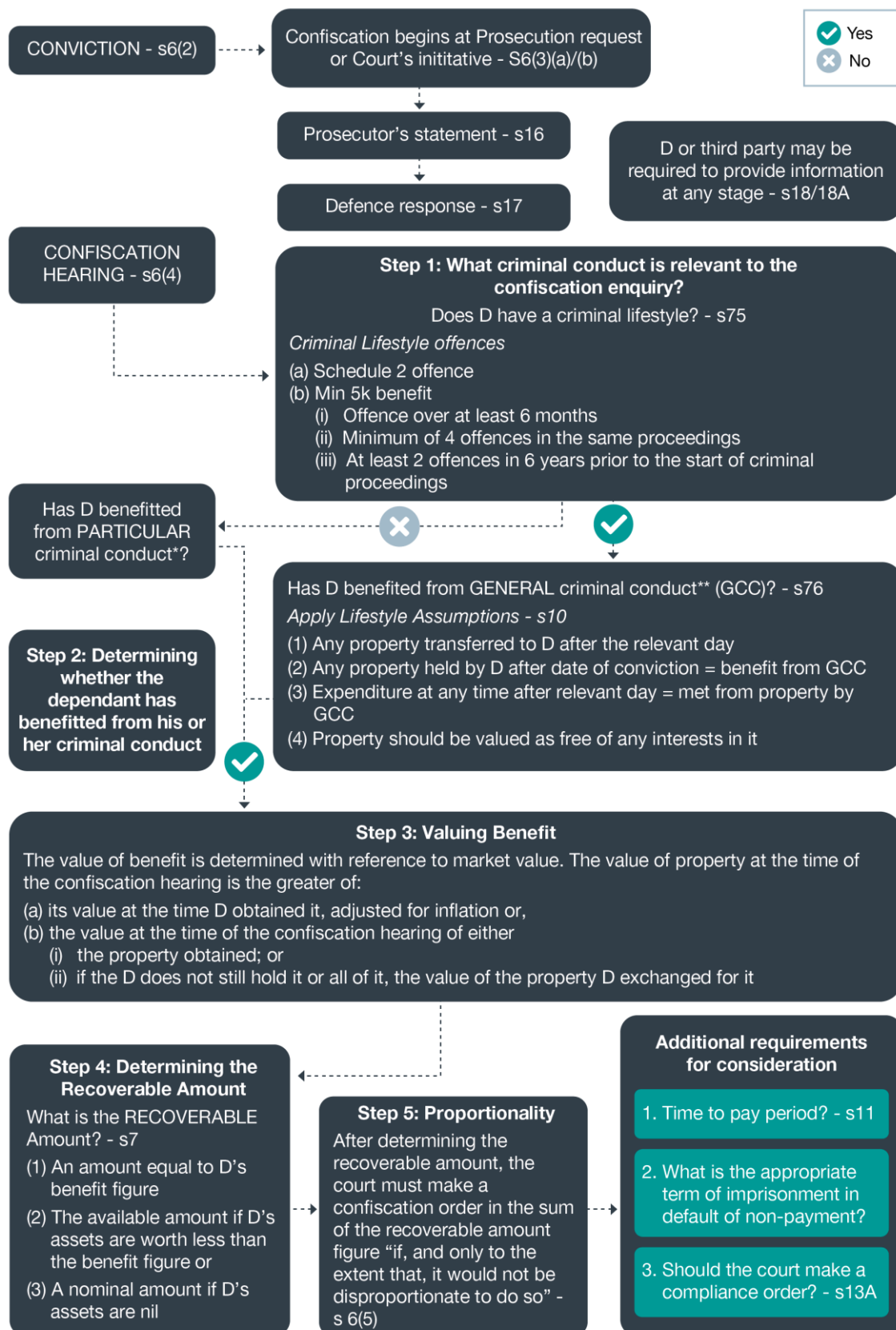
⁷⁵ Serious Crime Act 2015, sch 4 para 19.

⁷⁶ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

Chapter 3: An overview of the confiscation regime

INTRODUCTION

- 3.1 In this chapter we provide a general overview of the confiscation regime contained in Part 2 of POCA 2002 both in narrative form and in a flowchart. This summary is not intended to be exhaustive. Greater detail of each aspect of the confiscation regime is provided in the relevant chapters of the consultation paper.
- 3.2 Part 2 of POCA 2002 was drafted to enact a comprehensive code for confiscating the proceeds of crime following conviction. The effect of the provisions can best be understood as a five-step approach, supplemented by procedural rules regarding the service of information in order to assist the judge in making findings at each stage. The flowchart below depicts the legal and procedural steps from conviction to the making of a confiscation order. A list of the provisions most likely to be encountered during confiscation proceedings in England and Wales is set out in Appendix 2:



* All the offences for which the defendant was convicted in the criminal proceedings that led to the application for a confiscation order.

** All of a defendant's criminal conduct, irrespective of when it occurred.

STARTING CONFISCATION PROCEEDINGS

- 3.3 If the prosecutor asks the Crown Court to consider making a confiscation order, the court must do so,¹ unless it concludes that it would be disproportionate² or otherwise an abuse of the court's process.³
- 3.4 Even if the court is not asked to proceed to confiscation by the prosecutor, the court must proceed to consider confiscation "if the court believes it is appropriate".⁴
- 3.5 The prosecutor is whoever conducts the proceedings for the offence.⁵ Whilst the prosecutor may be a public prosecutor such as the Crown Prosecution Service, it may be a private prosecutor.⁶
- 3.6 The duty to begin confiscation proceedings becomes a power where any victim of the defendant's crimes has or intends to start a civil claim against the defendant arising out of their crimes.⁷

PREPARING FOR THE CONFISCATION HEARING

The timing of the confiscation hearing

- 3.7 POCA permits both proceeding with the confiscation order prior to imposing sentence⁸ or postponing confiscation and proceeding to sentence.⁹ The usual sequence of events is to impose sentence and deal with confiscation at a later date.¹⁰
- 3.8 Proceedings may be postponed for up to two years from the date of conviction and for a longer period if there are exceptional circumstances.¹¹ Where a court postpones confiscation proceedings and proceeds to sentence, financial penalties and forfeiture orders may not be imposed.¹² A confiscation order must not be quashed only on the

¹ Proceeds of Crime Act 2002, s 6(3)(a).

² Proceeds of Crime Act 2002, s 6(3)(a).

³ See (amongst other cases) *Bullen v United Kingdom* 3383/06; *R v Shabir* [2008] EWCA Crim 1809, [2009] 1 Cr App R (S) 84; *R v Farquhar* [2008] EWCA Crim 806, [2008] 2 Cr App R (S); *R v Morgan* [2008] EWCA 1323, [2008] 4 All ER 890; *R v Lowe* [2009] EWCA Crim 194, [2009] 2 Cr App R (S) 81; *R v Paulet* [2009] EWCA Crim 288; *R v Nelson* [2009] EWCA Crim 1573, [2010] QB 678; *R v Spears* [2009] EWCA Crim 2875; *R v Crisp* [2010] EWCA Crim 355, [2010] 2 Cr App R (S) 77; *R v Piper* [2010] EWCA Crim 638; *R (DWP) v Croydon Crown Court* [2010] EWHC 805, [2011] 1 Cr App R (S) 1; *R v Beazley* [2013] EWCA Crim 567, [2013] 1 WLR 3331; *Piper v UK* (2015) 61 EHRR 38.

⁴ Proceeds of Crime Act 2002, s 6(3)(b).

⁵ *R v Zinga* [2014] EWCA Crim 52, [2014] 1 WLR 2228 at [21].

⁶ *R v Zinga* above.

⁷ Or unlawful profit orders, either civil or criminal, either have or are likely to be made pursuant to the Prevention of Social Housing Fraud Act 2013.

⁸ Proceeds of Crime Act 2002, s 14(1)(a).

⁹ Proceeds of Crime Act 2002, s 14(1)(b). See Chapter 6 for a more detailed analysis.

¹⁰ *R v Guraj* [2017] 1 Cr App R (S) 32, [2016] UKSC 65 at [8] and [13].

¹¹ Proceeds of Crime Act 2002, s 14; see *R v Iqbal* [2010] EWCA Crim 376, [2010] 1 WLR 1985; *R v T* [2010] EWCA Crim 2703; *R v Johal* [2013] EWCA Crim 647, [2014] 1 WLR 146; *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22; *R v Halim* [2017] EWCA Crim 33, [2017] Lloyd's Rep FC 186; *R v Hall* [2019] EWCA Crim 662.

¹² Proceeds of Crime Act 2002, s 15(2); *R v Donohoe* [2006] EWCA Crim 2200, [2007] 1 Cr App R (S) 88 and *R v Paivarinta-Taylor* [2010] 2 Cr App R (S) 64, [2010] 2 Cr App R (S) 64; *R v Kakkad* [2015] EWCA Crim 385,

ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.¹³

Case management

3.9 To assist the court in making determinations at the confiscation hearing, sections 16 to 18A of POCA 2002 facilitate the provision of information. The sequence is often as follows:¹⁴

- (1) A defendant¹⁵ may be ordered to provide such information as would assist the court in carrying out its “functions” in connection with confiscation;¹⁶
- (2) The prosecution will then provide a “statement of information” setting out its contentions relevant to the confiscation enquiry;¹⁷
- (3) The defendant will then provide a response to the prosecution statement of information.¹⁸

THE MAKING OF A CONFISCATION ORDER: A FIVE STAGE PROCESS

3.10 The making of a confiscation order requires the court to answer five questions:¹⁹

- (1) What criminal conduct is relevant to the confiscation enquiry?
- (2) To what extent has the defendant “benefited” from that criminal conduct?
- (3) What is the value of the benefit that the defendant has so obtained?
- (4) What amount is recoverable from the defendant?
- (5) Is it proportionate to make a confiscation order equal to the recoverable amount?

[2015] 1 WLR 4162; *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22; *R v Sachan* [2018] EWCA Crim 2592, [2019] 4 WLR 67.

¹³ Proceeds of Crime Act 2002, s 14(11). See *R v Soneji* [2006] 1 AC 340, [2005] UKHL 49 in addition to the cases cited in the previous two footnotes.

¹⁴ See Chapter 7 for a more detailed analysis.

¹⁵ And a third party who may allegedly have an interest in property alongside the defendant, pursuant to the Proceeds of Crime Act 2002, s 18A.

¹⁶ Proceeds of Crime Act 2002, s 18; Criminal Procedure Rule 33.13(2).

¹⁷ Proceeds of Crime Act 2002, s 16; Criminal Procedure Rule 33.13(1); *R v Tanveer* [2013] EWCA Crim 360.

¹⁸ Proceeds of Crime Act 2002, s 17; Criminal Procedure Rule 33.13(2).

¹⁹ In *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [8] the House of Lords described a three stage process. However, the first stage involved the two part enquiry into criminal lifestyle. Stage 5 was only introduced following the Supreme Court’s decision in *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 and the amendment of POCA 2002, s 6(5) to include a requirement to consider proportionality by the Serious Crime Act 2015, sch 4 para 19.

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

- 3.11 “Criminal conduct” is conduct which constitutes an offence in England and Wales, or would constitute an offence if it occurred in England and Wales.²⁰
- 3.12 The criminal conduct that is relevant to the confiscation enquiry will depend on whether the defendant is found to have what is referred to as a “criminal lifestyle”.²¹ The explanatory notes to the 2002 Act provide that the criminal lifestyle provisions are designed to “identify offenders who may be regarded as normally living off crime”.²²
- 3.13 A defendant will have a “criminal lifestyle” if one of three “gateways” is satisfied:
- (1) He or she has been convicted of an offence set out in schedule 2 of POCA 2002. The offences set out in schedule 2 are offences that are “associated with professional criminals, organised crime and racketeering...and which in some cases are also of major public concern (for example, arms trafficking [and] trafficking for the purposes of sexual exploitation”.²³
 - (2) The offence resulting in confiscation proceedings constitutes conduct forming part of a “course of criminal activity”, the total benefit from which is at least £5,000.²⁴ Conduct forms part of a “course of criminal activity” if:
 - (a) the defendant is convicted of at least four offences from which he or she has benefited; or
 - (b) during the six years prior to the start of proceedings for the offence that led to the current confiscation enquiry, the defendant was convicted on at least two other separate occasions of offences from which he or she had benefited.
 - (3) He or she has committed any offence which has taken place over at least 6 months, the total benefit from which is at least £5,000.²⁵
- 3.14 If the defendant *does not* have a criminal lifestyle, that defendant’s relevant criminal conduct will be limited to what is known as his or her “particular criminal conduct”.²⁶ A defendant’s “particular criminal conduct” is all the offences for which the defendant was convicted in the criminal proceedings that led to the application for a confiscation order, and any other offences the defendant admits and asks the court to “take into consideration” in sentencing him.²⁷

²⁰ Proceeds of Crime Act 2002, s 76(1).

²¹ Proceeds of Crime Act 2002, s 6(4) and s 75. See Chapter 13 for a more detailed analysis.

²² Proceeds of Crime Act 2002 explanatory notes para 135.

²³ Proceeds of Crime Act 2002 explanatory notes para 156.

²⁴ Proceeds of Crime Act 2002, s 75(2)(b), 75(3) and 75(4).

²⁵ Proceeds of Crime Act 2002, s 75(2)(c) and 75(4); *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601; *R v Odamo* [2013] EWCA Crim 1275, [2014] 1 Cr App R (S) 44; *R v Molloy* [2013] EWCA Crim 682.

²⁶ Proceeds of Crime Act 2002, s 6(4)(c); see, for example, *R v Panayi* [2019] EWCA Crim 413, [2019] 4 WLR 85.

²⁷ Proceeds of Crime Act 2002, s 76(3).

- 3.15 If the defendant *does* have a “criminal lifestyle” the relevant criminal conduct will be much broader, encompassing what is known as his or her “general criminal conduct”.²⁸ A defendant’s “general criminal conduct” is defined as “all his criminal conduct, and it is immaterial whether conduct occurred before or after the passing of this Act”.²⁹

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

- 3.16 Having established whether the confiscation enquiry is into either:

- (1) benefit from the *particular criminal conduct* for which the defendant was convicted, or
- (2) all of the defendant’s benefit from *general criminal conduct* irrespective of when it occurred

- 3.17 the court must then go on to conduct that enquiry into benefit.

Benefit

- 3.18 When enquiring into benefit, POCA 2002 provides that:

- (1) A person benefits from conduct if he or she obtains³⁰ property as a result or in connection with it.³¹
- (2) If a person obtains a financial or “pecuniary” advantage through criminal conduct, for example by evading payment of a levy or duty that is due³² the

²⁸ Proceeds of Crime Act 2002, s 6(4)(b).

²⁹ Proceeds of Crime Act 2002, s 76(2).

³⁰ See Chapter 12 for a more detailed analysis. For judicial interpretation of “obtaining” see *R v May* [2008] UKHL 28, [2008] 1 AC 1028; *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 5 at [64]; *R v Ahmad* [2014] UKSC 36, [2015] 1 AC 299 at [42] – to the effect that “a person ordinarily obtains property if in law he owns it, whether alone or jointly, or assumes the rights of an owner, which will ordinarily connote a power of disposition or control.” For application of this test see (amongst other cases) *R v Chahal* [2015] EWCA Crim 816, [2015] Lloyd’s Rep FC 601; *R v Mehmet* [2015] EWCA Crim 797; *R v Hussain* [2014] EWCA Crim 2344, [2015] Lloyd’s Rep FC 102; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Warwick* [2013] NICA 13; *R v Ramdas* [2012] EWCA Crim 417; *R v McIlravey* [2011] EWCA Crim 2815; *R v Clark* [2011] EWCA Crim 15, [2011] 2 Cr App R (S) 55; *R v Sewell* [2009] EWCA Crim 488.

³¹ Proceeds of Crime Act 2002, s 76(4). For case law discussing whether property was obtained “as a result of” criminal conduct see *R v Del Basso* [2010] EWCA Crim 1119, [2011] 1 Cr App R (S) 41; *Sumal & Sons (Properties) Ltd v Newham London Borough Council* [2012] EWCA Crim 1840, [2013] 1 WLR 2078; *R v McDowell* [2015] EWCA Crim 173, [2015] 2 Cr App R (S) 14; *R v Palmer* [2016] EWCA Crim 1049, [2017] 4 WLR 15. For discussion on whether property was obtained “in connection with” criminal conduct, see *R v Osei* (1988) 2 Cr App R (S) 289 and *R v Ahmad* [2012] EWCA Crim 391, [2012] 1 WLR 2335.

³² Cases involving pecuniary advantage include (amongst others) cases involving liability to pay tax following the evasion of duty on tobacco, see *R v Parker* [2018] EWCA Crim 1057; *R v Doran* [2015] EWCA Crim 384, [2015] All ER (D) 186; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Tatham* [2014] EWCA Crim 226, [2014] Crim LR 672; *R v Young* [2013] EWCA Crim 302; *R v Taylor and Wood* [2013] EWCA Crim 1151, [2013] All ER (D) 209; *R v James* [2011] EWCA Crim 2991, [2012] 1 WLR 2641; *R v Kullar* [2011] EWCA Crim 420; *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601; *R v Redmond* [2011] EWCA Crim 203, [2011] All ER (D) 256; *R v Bell* [2011] EWCA Crim 6, [2011] All ER (D) 115; *R v Varsani* [2010] EWCA Crim 1938, [2010] All ER (D) 32; *R v White* [2010] EWCA Crim 978, [2010] All ER (D) 45; *R v Khan* [2009] EWCA Crim 588, [2009] All ER (D) 136; *R v Mitchell* [2009] EWCA Crim 214, [2009] All ER (D) 64; *R v Waller* [2009] 1 Cr App R (S) 1096, [2010] 1 Cr App R (S) 33; *R v Smith (David)* [2001] UKHL 68, [2002] 1 WLR 54. Cases of pecuniary advantage not connected with tobacco importation include *R v Morgan* [2013] EWCA Crim 1307, [2014] 1 WLR 3450; *R v Chahal* [2015] EWCA Crim 816, [2015] Lloyd’s Rep FC 601; *R v*

court must regard him or her as having obtained a sum of money equal to the value of the pecuniary advantage.³³

- (3) Property is obtained by a person if he or she “obtains an interest in it”.³⁴

The “lifestyle assumptions”

3.19 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 (subject to two caveats below), to make four assumptions when considering a defendant’s benefit from their general criminal conduct. Those four assumptions are that:

- (1) All property transferred to the defendant since the “relevant day” has been obtained as a result of their general criminal conduct.³⁵
- (2) All property held by the defendant since the date of conviction was obtained by them as a result of their general criminal conduct.³⁶
- (3) All expenditure by the defendant after the “relevant day” was met from property obtained as a result of their general criminal conduct.³⁷
- (4) All property transferred to, held or spent by the defendant was free from any interests belonging to anyone else in it.³⁸

3.20 The court is required not to make any of the assumptions set out above in relation to particular property or expenditure if that assumption is shown to be incorrect;³⁹ or there is a serious risk of injustice if the assumption were to be made.⁴⁰

Davey [2013] EWCA Crim 1662, [2014] 1 Cr App R (S) 34; *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663; *R v Takkar* [2011] EWCA Crim 646, [2011] 1 WLR 3062.

³³ Proceeds of Crime Act 2002, s 76(5).

³⁴ Proceeds of Crime Act 2002, s 84(2)(b).

³⁵ Proceeds of Crime Act 2002, s 10(2). See Chapter 13 for a more detailed analysis.

³⁶ Proceeds of Crime Act 2002, s 10(3).

³⁷ Proceeds of Crime Act 2002, s 10(4).

³⁸ Proceeds of Crime Act 2002, s 10.

³⁹ By the defendant (See *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83). See (amongst other cases) *R v Brack* [2007] EWCA Crim 1205, (2007) 104(19) LSG 26; *R v Agombar* [2009] EWCA Crim 903; *R v Harris* [2010] EWCA Crim 2515; *R v Steed* [2011] EWCA Crim 75, [2011] Lloyd’s Rep FC 238; *R v Williams* [2011] EWCA Crim 275; *R v Rowsell* [2011] EWCA Crim 1894; *R v Mahmood* [2013] EWCA Crim 325; *R v Halliday* [2014] EWCA Crim 620; *R v Ernest* [2014] EWCA Crim 1312, [2014] Lloyd’s Rep FC 595; *R v Khan* [2016] EWCA Crim 1760; *R v Briggs* [2018] EWCA Crim 1135.

⁴⁰ Proceeds of Crime Act 2002, s 10(6). What is contemplated by the risk of serious injustice caveat to the assumptions is some injustice in the mechanics of the operation of those assumptions (for example double counting of the same sum of money). Hardship caused by their operation overall is not “injustice” for the purposes of the caveats to the assumptions. See *R v J* [2001] 1 Cr App R (S) 273; *R v Jones* [2006] EWCA Crim 2061, [2007] 1 WLR 7; *R v Neuberg* [2007] EWCA Crim 1994, [2008] 1 Cr App R (S) 84; *R v Singh* [2008] EWCA Crim 243, [2008] 2 Cr App R (S) 69; *R v Bagnall & Sharma* [2012] EWCA Crim 677, [2013] 1 WLR 204; *R v O’Shea* [2015] EWCA Crim 1395, [2015] Crim LR 995.

- 3.21 The assumptions about property obtained and spent by the defendant apply to any time after “the relevant day”. The relevant day is the first day of the period of six years ending with the day the criminal proceedings concerned started.⁴¹ Proceedings are taken to have started on the day the defendant was charged or received a summons requiring them to attend court to answer the allegations.⁴² So, if a defendant was charged on 1 January 2020 the relevant day would be 1 January 2014, and the assumptions would apply to property obtained and spent by the defendant from, and including, 2 January 2014.

Step 3: Valuing benefit

- 3.22 The value of benefit is determined with reference to market value.⁴³ The value of property obtained from criminal conduct at the time of the confiscation hearing is the greater of:
- (1) its value at the time the defendant obtained it, adjusted for inflation; or,
 - (2) the value at the time of the confiscation hearing of either
 - (a) the property obtained; or
 - (b) if the defendant does not still hold it or all of it, the value of the property the defendant exchanged for it.⁴⁴

Step 4: Determining the recoverable amount.

- 3.23 “However great the payments a defendant may have received or the property he may have obtained, he cannot be ordered to pay a sum which it is beyond his means to pay”.⁴⁵ Therefore, having determined the value of the defendant’s benefit from crime, the court must then determine the recoverable amount.⁴⁶
- 3.24 The recoverable amount is equal to the defendant’s benefit from the conduct concerned unless the defendant shows that the “available amount” is less than the benefit from the conduct concerned.⁴⁷ If the court is satisfied about the insufficiency of the defendant’s assets to meet the benefit figure, the “recoverable amount” will be reduced from the total benefit figure to either:
- (1) the available amount, or

⁴¹ Proceeds of Crime Act 2002, s 10(8).

⁴² Proceeds of Crime Act 2002, s 85.

⁴³ Proceeds of Crime Act 2002, s 79(2). See *R v Islam* [2009] UKHL 30, [2009] 1 AC 1076; *R v Carnall* [2014] EWCA Crim 287; *R v Eddishaw* 10 November 2014 (unreported); *R v Elsayed* [2014] EWCA Crim 333, [2014] 1 WLR 3916; *R v Hussain* [2014] EWCA Crim 1181; *R v Lister* [2014] EWCA Crim 2290; *R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162.

⁴⁴ Proceeds of Crime Act 2002, s 80; See Chapter 13 for a more detailed analysis.

⁴⁵ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [41].

⁴⁶ See Chapter 15 for a more detailed analysis.

⁴⁷ Proceeds of Crime Act 2002, s 7(1).

(2) a nominal amount, if the available amount is nil.⁴⁸

3.25 The available amount is the value of the “free” property the defendant has at the time of the confiscation order, plus the value of any “tainted gifts”, minus the value of any “obligations which have priority.”⁴⁹

Free property

3.26 Free property is all the defendant’s property unless it is subject to a forfeiture order, such as an order under section 27 of the Misuse of Drugs Act 1971, or similar.⁵⁰

Tainted gifts

3.27 A tainted gift is defined as property that a defendant has transferred to someone else, over a certain period, in return for significantly less than the property’s true value.⁵¹ As such, the definition includes property that a defendant has “given” to someone else for nothing in return. It also includes property that a defendant has transferred to another person in return for something that is worth less than the property transferred.

3.28 To ensure that confiscation proceedings cannot be defeated by a defendant giving away assets to others, the value of tainted gifts is included when calculating the defendant’s “available amount”,⁵² being the difference between the true value of the property the defendant transferred to the third party, and the value of what the defendant received in return for it.⁵³

Obligations which have priority

3.29 An obligation which has priority is:

- (1) A pre-existing obligation to pay a sum of money arising out of an earlier conviction, for example a fine or (although it not stated explicitly) an earlier confiscation order.⁵⁴

⁴⁸ Proceeds of Crime Act 2002, s 7(2).

⁴⁹ Proceeds of Crime Act 2002, s 9.

⁵⁰ Proceeds of Crime Act 2002, s 82.

⁵¹ Proceeds of Crime Act 2002 s 78(1).

⁵² See *R v Morrison* [2019] EWCA Crim 351, [2019] 4 All ER 181; *R v Hulland* [2018] EWCA Crim 691; *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060; *R v Box* [2018] EWCA Crim 542, [2018] 4 WLR 134; *Re Somaia* [2017] EWHC 2554 (QB); *Kelly* [2016] EWCA Crim 1505; *R v Johnson* [2016] EWCA Crim 10, [2017] 4 WLR 104; *R v Lehair* [2015] EWCA Crim 1324, [2015] 1 WLR 4811; *R v Smith* [2013] EWCA Crim 502, [2014] 1 WLR; *R v Craft* [2012] EWCA Crim 1356; *Re: Ford-Sagers* [2011] EWHC 2217; *Re L* [2010] EWHC 1531 Admin; *R v Odurah* [2010] EWCA Crim 279; *R v Vickers* [2010] EWCA Crim 3246, [2010] All ER 204; *R v Liverpool Magistrates Court, ex parte Ansen* [1998] 1 All ER 692; *R v Tighe* [1996] Crim LR 69; *R v Smith* [1996] 2 Cr App R 1, [1996] Crim LR 329; *R v Dickens* [1990] 2 QB 102.

⁵³ Proceeds of Crime Act 2002, s 78(2).

⁵⁴ Proceeds of Crime Act 2002, s 9(2). For further discussion of obligations that have priority see Chapter 23.

- (2) A debt the defendant owes which would be a “preferential debt” were the defendant entering bankruptcy. This includes obligations such as debts to pension schemes and certain debts to employees.⁵⁵

Nominal orders

- 3.30 Where a defendant has no assets available to him or her from which the confiscation order can be satisfied, a nominal order should be made, which will often be in the sum of £1.⁵⁶
- 3.31 The reason why an order might be made in a nominal sum can be found in section 22 of POCA. Section 22 is intended to strike a balance between the making of an order which the defendant can pay and the recovery of a defendant’s benefit from crime.⁵⁷ It provides that where an order has been made in *any* amount lower than the defendant’s benefit, a prosecutor or a receiver can apply for an increase in the available amount⁵⁸ “should the [defendant] come into further funds”.⁵⁹ The available amount can be revised upwards to require payment up to the total value of a defendant’s benefit.⁶⁰
- 3.32 Because section 22 is applicable when the order is made in *any* amount lower than the benefit figure, as long as a confiscation order is made in even a nominal sum, the court retains the ability to revisit the amount which a defendant should be required to pay should he or she come into assets at a later date.⁶¹

Step 5: Proportionality

- 3.33 Once the court has determined the recoverable amount, it must make a confiscation order for the recoverable amount “if, and only to the extent that, it would not be disproportionate to do so”.⁶²
- 3.34 The requirement of proportionality is derived from the application of article 1 of Protocol 1 (“A1P1”) to the European Convention on Human Rights, (“ECHR”) to confiscation proceedings. A1P1 provides for the right to peaceful enjoyment of possessions.
- 3.35 In *R v Wya* the Supreme Court held that any interference with the right to peaceful enjoyment of possessions through a confiscation order must be proportionate to the legitimate aims of POCA 2002. It observed that “the purpose of the legislation is

⁵⁵ Proceeds of Crime Act 2002, s 9 (which cross-refers to Insolvency Act 1986, s 386). Insolvency Act 1986, s 386 in turn refers to the Insolvency Act 1986, sch 6 which sets out categories of preferential debt.

⁵⁶ *R v Byatt* [2006] EWCA Crim 904, [2006] 2 Cr App R (S) 116; *R v Siaulys* [2013] EWCA Crim 2083; *R v Gunn* [2014] EWCA Crim 1758; *R v Ahmad* [2014] UKSC 36, [2015] AC 299 (in the context of a co-defendant’s confiscation order); *R v Ayinde-Azeez* [2015] EWCA Crim 2165; *R v Khan* [2016] EWCA Crim 1760 (in the context of the co-defendant’s confiscation order); *R v Malhi* [2016] EWCA Crim 2025, [2017] 4 WLR 27; *R v Cole* [2018] EWCA Crim 888, [2018] Lloyd’s Rep FC 321.

⁵⁷ Whether such a balance actually is struck is discussed in Chapter 25.

⁵⁸ Proceeds of Crime Act 2002, s 22(1)(b).

⁵⁹ *R v Ayinde-Azeez* [2015] EWCA Crim 2165 at [7]; see also *R v Spears* [2009] EWCA Crim 2875 at [7].

⁶⁰ Proceeds of Crime Act 2002, s 22(4)(b).

⁶¹ *R v Malhi* [2016] EWCA Crim 2025, [2017] 4 WLR 27.

⁶² Proceeds of Crime Act 2002, s 6(5) See Chapter 5 for a more detailed analysis.

plainly, and has repeatedly been held to be, to impose upon convicted defendants a severe regime for removing from them their proceeds of crime”.⁶³

- 3.36 The Supreme Court in *R v Waya* said confiscation orders based on general criminal conduct would very rarely be disproportionate because of the court’s duty not to apply the criminal lifestyle assumptions to the extent that they created a risk of serious injustice.⁶⁴
- 3.37 In applying the test of proportionality, the courts have held that multiple recoveries of the same benefit from a defendant may be disproportionate. The courts have adopted the following principles:⁶⁵
- (1) A confiscation order will be disproportionate where a defendant either had repaid or stood to repay the victim in full, or where the benefit obtained by the defendant had otherwise been wholly restored to the loser (for example through performance of a contract).⁶⁶
 - (2) Where defendants had “jointly” received a benefit and were made subject to confiscation orders, each defendant could be ordered to pay the whole of the benefit figure. However, each confiscation order should be endorsed as “not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit.”⁶⁷
 - (3) VAT charged to customers which had been accounted for to the state could not to be included in a confiscation order, in order to prevent the state making a “double-recovery”.⁶⁸

ADDITIONAL REQUIREMENTS ON MAKING A CONFISCATION ORDER

- 3.38 When the court makes a confiscation order it must take three additional steps. It must consider:
- (1) whether the defendant requires time to pay his or her confiscation order;
 - (2) what the appropriate term of imprisonment should be in the event that the defendant fails to pay his or her confiscation order;

⁶³ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [21].

⁶⁴ *R v Waya* above at [25].

⁶⁵ We cite further examples throughout the paper and in particular in Chapter 5, which specifically addresses the issue of proportionality.

⁶⁶ *R v Axworthy* [2012] EWCA Crim 2889; *R v Hursthouse* [2013] EWCA Crim 517; *R v Jawad* [2013] EWCA Crim 644, [2013] 1 WLR 3861; *R v Harvey* [2013] EWCA Crim 1104, [2014] 1 WLR 124; *R v Chapman* [2013] EWCA Crim 1370, [2014] 1 WLR 1376; *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663; *R v Reynolds* [2014] EWCA Crim 621, [2014] 2 Cr App R (S) 54; *R v Davenport* [2015] EWCA Crim 1731, [2016] 1 WLR 1400; *R v Andrewes* [2020] EWCA Crim 1055.

⁶⁷ *R v Ahmad* [2014] UKSC 36, [2015] 1 AC 299; Compare *R v Dad* [2014] EWCA Crim 2478, [2015] Crim LR 356 as to when such an endorsement may not be required.

⁶⁸ *R v Harvey* [2015] UKSC 73, [2017] AC 105.

- (3) whether to make a “compliance order”.⁶⁹

Time to pay

- 3.39 If the court is satisfied a defendant is unable to pay the full amount of a confiscation order on the day it is made, it may order what cannot be paid on the day to be paid within a specified period or by instalments.⁷⁰
- 3.40 The maximum time to pay the court may allow initially is three months from the making of the confiscation order.⁷¹ Within that time the defendant may apply for an extension. The maximum overall time that may be allowed to pay the confiscation order is six months.⁷²

Setting a term of imprisonment in default of payment

- 3.41 At the time of making the confiscation order, the Crown Court must fix a period of imprisonment to be served in default of satisfying it.⁷³ The maximum terms of imprisonment in default are set out in section 35 of POCA 2002:

Amount	Maximum term
£10,000 or less	6 months
More than £10,000 but no more than £500,000	5 years
More than £500,000 but no more than £1 million	7 years
More than £1 million	14 years

Compliance orders

- 3.42 The Crown Court may make any order it believes is appropriate for the purpose of ensuring that a confiscation order is effective. Such orders are as known as “compliance orders”.⁷⁴
- 3.43 The court must consider whether to make a compliance order when it makes a confiscation order, or later, on the application of the prosecutor.⁷⁵ In particular, the court must consider whether to make an order restricting the defendant’s foreign

⁶⁹ See Chapter 18 for a more detailed analysis.

⁷⁰ Proceeds of Crime Act 2002, s 11(2).

⁷¹ Proceeds of Crime Act 2002, s 11(3).

⁷² Proceeds of Crime Act 2002, s 11(5).

⁷³ Powers of Criminal Courts (Sentencing) Act 2000, s 139(2); Proceeds of Crime Act 2002, s 35; *R v Smith* [2009] EWCA Crim 344; *R v Pigott* [2009] EWCA Crim 2292, [2010] 2 Cr App R (S) 16; *R v Price* [2009] EWCA Crim 2918, [2010] 2 Cr App R (S) 44; *R v Mahmood* [2010] EWCA Crim 1749; *R v Aspinwell* [2010] EWCA Crim 1294, [2011] 1 Cr App R (S) 54; *R v Castillo* [2011] EWCA Crim 3173, [2012] 2 Cr App R (S) 36; *R v Patel* [2012] EWCA Crim 2736; *R v Lyons* [2014] EWCA Crim 1306; *R v Mills* [2018] EWCA Crim 944, [2019] 1 WLR 192; *R v Morrissey* [2019] EWCA Crim 244.

⁷⁴ Proceeds of Crime Act 2002, s 13A.

⁷⁵ Proceeds of Crime Act 2002, s 13A(3).

travel.⁷⁶ There is no maximum duration of a compliance order. The question is what would be “appropriate”. An indefinite travel restriction order would only be justified in an exceptional case.⁷⁷ Breach of a compliance order may be dealt with as a contempt of court.⁷⁸

CONSEQUENCES OF DEFAULT

3.44 If a defendant defaults on paying his or her confiscation order, enforcement action will be taken. We discuss enforcement in detail in Chapters 18 – 22. For the purposes of this overview we highlight four specific consequences of default in payment.

Imprisonment in default

3.45 Confiscation orders are enforced as if they were fines.⁷⁹ Fines imposed by the Crown Court are treated, for enforcement purposes, as if they had been imposed by a magistrates’ court.⁸⁰ Therefore, enforcement of a confiscation order generally falls to the magistrates’ court.

3.46 If the magistrates’ court is satisfied that the defendant has failed to satisfy his confiscation order as a result of wilful refusal or culpable neglect, it may activate the warrant committing the defendant to prison for non-payment of his or her confiscation order.⁸¹

Accrual of interest

3.47 Interest accrues from the date for payment on any part of a confiscation order which remains outstanding at that time.⁸² The interest rate is the same as the rate set pursuant to the Judgments Act 1838,⁸³ currently 8% a year. Accrued interest does not affect the period for which a defendant may be sent to prison in cases where the defendant has paid off part of a confiscation order.⁸⁴

Appointment of an enforcement receiver

3.48 Where a defendant fails to satisfy an order, the prosecutor may apply to the Crown Court for the appointment of an enforcement receiver who may be empowered to sell

⁷⁶ Proceeds of Crime Act 2002, s 13A(4).

⁷⁷ *R v Pritchard* [2017] EWCA Crim 1267 [2017], 2 Cr App R (S) 54.

⁷⁸ Criminal Procedure Rules, r 33.70.

⁷⁹ Proceeds of Crime Act 2002, s 35.

⁸⁰ Powers of Criminal Courts (Sentencing) Act 2000, s 140.

⁸¹ Magistrates’ Court Act 1980, ss 82(4)(b); *R (Beach) v Folkestone Magistrates’ Court* [2018] EWHC 2843 (Admin), [2019] Lloyd’s Rep FC 245; *Cooper v Birmingham Magistrates’ Court* [2015] EWHC 2341 (Admin); *R (Sanghera) v Birmingham Magistrates’ Court* [2017] EWHC 3323 (Admin); *R (Popoola) v Westminster Magistrates’ Court* [2015] EWHC 3476 (Admin); *R (Jestin) v Dover Magistrates’ Court* [2013] EWHC 1040 (Admin); *R v Harrow Justices, ex p. DPP* (1991) 1 WLR 395, [1991] 3 All ER 873; *R v City of London Justices, ex p. Garotte* [2003] EWHC 2909 (Admin); *Barnett v DPP* [2009] EWHC 2004 Admin.

⁸² Proceeds of Crime Act 2002, s 12(1).

⁸³ Proceeds of Crime Act 2002, s 12(2); Judgments Act 1838 s 17.

⁸⁴ Magistrates Courts Act 1980, s 79(2); *R (Gibson) v Secretary of State for Justice* [2018] UKSC 2, [2018] 1 WLR 629.

assets belonging to a defendant.⁸⁵ Where assets are realised the proceeds are apportioned firstly to cover the receiver's expenses; secondly to payments directed by the Crown Court and thirdly towards the confiscation order.⁸⁶

Specific enforcement tools available to the magistrates' court

- 3.49 A magistrates' court may (providing a receiver has not been appointed) order that sums held in bank accounts or cash which has been seized be paid to the court in satisfaction of the money owed under a confiscation order.⁸⁷ Similarly, the magistrates' court may order that seized personal property be sold and the proceeds used to satisfy a confiscation order.⁸⁸

RESTRAINT ORDERS

- 3.50 A confiscation order is intended to require a defendant to account for his or her benefit from crime. A priority of the courts and of law enforcement agencies must be to ensure that as much of the proceeds of crime as possible (or the equivalent value) are available when a confiscation order is ultimately made.⁸⁹
- 3.51 A restraint order is intended to prevent realisable property being dissipated or put beyond the reach of the court before a confiscation order is made or enforced by prohibiting any person from dealing with any realisable property.⁹⁰ "Realisable property" is any free property held by the defendant, or by the recipient of a tainted gift.⁹¹

The test for obtaining a restraint order

- 3.52 The Crown Court may make a restraint order where a confiscation order, or the extension of a confiscation order, is anticipated. Thus, if one of five statutory conditions are satisfied. The two most commonly used statutory conditions are
- (1) a criminal investigation has been started for an offence and there are reasonable grounds to suspect that the defendant has benefited from his or her criminal conduct; or
 - (2) proceedings for an offence have been started and there is reasonable cause to believe that the defendant has benefited from his or her criminal conduct.⁹²
- 3.53 Even if a prosecuting authority is able to satisfy the statutory test for the granting of restraint pre-charge or after proceedings have been commenced, the courts have introduced an additional test that must be satisfied before a restraint order can be

⁸⁵ Proceeds of Crime Act 2002, ss 50 and 51. See Chapter 27 for a more detailed analysis.

⁸⁶ Proceeds of Crime Act 2002, s 54.

⁸⁷ Proceeds of Crime Act 2002, s 67.

⁸⁸ Proceeds of Crime Act 2002, s 67A. The property must be seized pursuant to a "relevant seizure power" as defined in Proceeds of Crime Act 2002, s 41A(4).

⁸⁹ Proceeds of Crime Act 2002, s 69.

⁹⁰ Proceeds of Crime Act 2002, s 41. See Chapter 26 for a more detailed analysis.

⁹¹ Proceeds of Crime Act 2002, s 83

⁹² Proceeds of Crime Act 2002, s 40.

granted. The prosecution must “establish that there is a real risk that assets will be dissipated which might otherwise meet a confiscation order”.⁹³

- 3.54 The rationale for this test begins with a person’s right to property. “It is beyond dispute”⁹⁴ that a restraint order is an order that interferes with the right to peaceful enjoyment of property, enshrined in article 1 of the First Protocol to the European Convention on Human Rights. Therefore, a restraint order must only interfere with the right to peaceful enjoyment of property to the extent that such interference is necessary.
- 3.55 The extent to which interference with a property right through restraint is necessary has been inferred by the courts⁹⁵ through consideration of what has become known as the “legislative steer”⁹⁶ in confiscation legislation. Currently found in section 69(2)(a) of POCA 2002, it provides that the powers to make a restraint order must be exercised with a view to the value of property being made available to satisfy any confiscation order. A property right should therefore only be interfered with to the extent that it is necessary to do so in order to preserve the value of assets for confiscation.⁹⁷ The courts have reasoned that if there is no risk to the value of assets, then any interference with property rights through a restraint order is unnecessary and unjustifiably disproportionate.

Application, variation and discharge of restraint orders

- 3.56 Applications for a restraint order may be made without notice to affected persons⁹⁸ if the application is urgent or there are reasonable grounds for believing that giving notice would lead to dissipation of the property concerned.⁹⁹
- 3.57 As much notice as possible should be given of an application for a restraint order, particularly when coupled with an application to appoint a receiver. There should be an estimate of the time-required for pre-reading and the hearing.¹⁰⁰ Such applications should be determined by the Resident Judge or a judge nominated by them.¹⁰¹
- 3.58 The applicant for the restraint order, or anyone affected by it, may apply for it to be varied or discharged.¹⁰² Realisable property may be released from restraint to:
- (1) meet reasonable living expenses;

⁹³ *R v B* [2008] EWCA Crim 1374 at [9], [13], citing *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182.

⁹⁴ *R v B* [2008] EWCA Crim 1374, [2009] 1 Cr App R 14 at [9].

⁹⁵ *R v B* [2008] EWCA Crim 1374; *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182.

⁹⁶ *Re Peters* [1988] QB 871; *Re S* [2010] EWHC 917 (Admin).

⁹⁷ *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182, citing *Re Peters* [1988] QB 871.

⁹⁸ Proceeds of Crime Act 2002, s 41(1).

⁹⁹ Proceeds of Crime Act 2002, s 42(1); Criminal Procedure Rules, r 33.51.

¹⁰⁰ *Barnes v Eastenders Cash & Carry Plc* [2014] UKSC 26, [2015] AC 1, and see *R v Windsor* [2011] EWCA Crim 143, [2011] 2 Cr App R 7.

¹⁰¹ Criminal Practice Direction, para G9 Div XIII. See further *Director of SFO v Lexi Holdings Plc* [2008] EWCA Crim 1443, [2009] QB 376.

¹⁰² Proceeds of Crime Act 2002, s 42(3).

- (2) meet reasonable legal expenses;¹⁰³
- (3) meet reasonable expenses in the carrying on of a business, trade or occupation; and
- (4) enable the payment of relevant legal aid payments;¹⁰⁴

Breach of a restraint order

3.59 A breach of a restraint order is treated as contempt of court, for which the maximum punishment is two years' imprisonment for contempt of court.¹⁰⁵ When there are "serious aggravating features" to the breach,¹⁰⁶ the defendant may be charged with perverting the course of justice.¹⁰⁷ Perverting the course of justice carries a maximum of life imprisonment.

Management Receivership

3.60 If the court has made a restraint order, it may appoint a management receiver in respect of any realisable property.¹⁰⁸ That receiver may, amongst other things, take possession of the property and manage or otherwise deal with that property.¹⁰⁹ "Managing or otherwise dealing with property" includes "selling the property or any part of it or interest in it".¹¹⁰

RECONSIDERATION OF CONFISCATION ORDERS

3.61 The Crown Court's powers to reconsider issues regarding confiscation are as follows:

- (1) Where no confiscation order was made, but new evidence comes to light within 6 years from the date of the conviction, the court has the power to make a confiscation order.¹¹¹
- (2) Where no confiscation order was made because the defendant was found not to have benefitted from their relevant criminal conduct, but new evidence comes to light within 6 years from the date of the conviction, the court has the power to reconsider the issue of benefit and make a confiscation order.¹¹²

¹⁰³ Where the legal expenses are expenses of the defendant or the recipient of a tainted gift, these must be for proceedings other than those relating to the offence which has led to the restraint order being made (Proceeds of Crime Act 2002, s 41(4)).

¹⁰⁴ Proceeds of Crime Act 2002, s 41(2A), (2B), (3).

¹⁰⁵ Contempt of Court Act 1981, s 14; *R v Adewunmi* [2008] EWCA Crim 71, [2008] 2 Cr App R (S) 52; *R v M* [2008] EWCA Crim 1901, [2009] WLR 1179; *R v Roddy* [2010] EWCA Crim 671, [2010] 2 Cr App R (S) 107; *R v Kirby* [2010] EWCA Crim 877; *R v AA* [2010] EWCA Crim 2805, [2011] Lloyd's rep FC 71; *R v Shepherd* [2012] EWCA Crim 1716; *R v Samra* [2014] EWCA Crim 2748; *R v Patel* [2017] EWCA Crim 820.

¹⁰⁶ *R v Kenny* [2013] EWCA Crim 1, [2013] QB 896 at [36].

¹⁰⁷ *R v Norman* [2013] EWCA Crim 1397.

¹⁰⁸ Proceeds of Crime Act 2002, s 48.

¹⁰⁹ Proceeds of Crime Act 2002, s 49(2).

¹¹⁰ Proceeds of Crime Act 2002, s 49(10)(a).

¹¹¹ Proceeds of Crime Act 2002, s 19.

¹¹² Proceeds of Crime Act 2002, s 20.

- (3) Where a confiscation order has been made, but new evidence comes to light within 6 years from the date of the conviction, the court has the power to increase the benefit figure.¹¹³
- (4) Where a confiscation order has been made, the court has the power to increase the available amount to an amount which it considers to be just and which does not exceed the benefit figure. There is no time-limit on when such an application may be made.¹¹⁴
- (5) Where a confiscation order has been made, the court has the power to go back at a later date and recalculate the available amount and reduce it. The court must be satisfied that, at that later date, the available amount is inadequate for the payment of the sum outstanding under the confiscation order. This power cannot be used by a defendant to re-open findings made at the confiscation hearing.¹¹⁵
- (6) Where a confiscation order has been made, and the amount outstanding is less than £1,000, the court has the power to recalculate the available amount. If the court finds it is inadequate to meet the outstanding amount, and where that inadequacy is for certain reasons, the court may discharge the confiscation order.¹¹⁶
- (7) Where the amount outstanding on a confiscation order is £50 or less, and the designated officer of the magistrates' court so applies, the court may discharge the confiscation order.¹¹⁷
- (8) Where the defendant dies, and it is not reasonable to make any further attempt to recover anything from the estate of the deceased defendant, the court may discharge the confiscation order.¹¹⁸

¹¹³ Proceeds of Crime Act 2002, s 21.

¹¹⁴ Proceeds of Crime Act 2002, s 22; *R v Bates* [2006] EWCA Crim 1015, [2007] 1 Cr App R (S) 2; *R v Griffin* [2009] EWCA Crim 569, [2009] 2 Cr App R (S) 89; *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164; *R v Padda* [2013] EWCA 2230, [2014] 1 WLR 1920; *R v John* [2014] EWCA Crim 1240, [2014] 2 Cr App R (S) 73; *R v Mundy* [2018] EWCA Crim 105, [2018] 4 WLR 130; *R v O'Flaherty* [2018] EWCA Crim 2828; *R v S* [2019] EWCA Crim 569, [2019] Crim LR 883.

¹¹⁵ Proceeds of Crime Act 2002, s 23; *Nevitt v SFO* [2019] EWHC 252 (QB); *Re Adams* [2017] EWCA Civ 185, [2017] 1 WLR 3732; *R v Yaseen* [2016] EWCA Crim 2139; *R v Sandford* [2016] EWCA Crim 810; *Price v Crown Prosecution Service* [2016] EWHC 455 (Admin); *Re Stannard* [2015] EWHC 1199 (Admin); *R v Mundy* [2014] EWHC 819 (Admin); *R v Adams* [2014] EWHC 2639; *R v Alves* [2011] EWCA Crim 1375; *R v Graves* [2011] EWCA (Civ) 69; *Re L* [2010] EWHC 1531 (Admin); *Re R* [2009] EWHC (Admin) 1700; *Telli v Revenue and Customs* [2007] EWCA (Civ) 1385; applications to the High Court are for "certificates of inadequacy" pursuant to the pre-POCA 2002 equivalent of section 23. *R v Younis* [2008] EWCA Crim 2950, [2009] 2 Cr App R (S) 34.

¹¹⁶ Proceeds of Crime Act 2002, s 24.

¹¹⁷ Proceeds of Crime Act 2002, s 25.

¹¹⁸ Proceeds of Crime Act 2002, s 25A (added by the Serious Crime Act 2015).

Chapter 4: The Asset Recovery Incentivisation Scheme

INTRODUCTION TO THE ASSET RECOVERY INCENTIVISATION SCHEME (ARIS)

- 4.1 Operational agencies which investigate, prosecute and enforce confiscation orders receive a proportion of funds recovered at the conclusion of proceedings. This means that, exceptionally, those agencies who investigate, prosecute and enforce cases which result in confiscation orders are funded, in part, by revenue from confiscated assets.
- 4.2 This arrangement is known as 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.”¹
- 4.3 While the ARIS scheme is not within the remit of our review, we devote a chapter of this 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.
- 4.4 For these reasons, it is right that we reflect the views of stakeholders both at the front-line of confiscation and in strategic roles. It is also important to highlight where resourcing issues may influence stakeholder responses to proposals for reform so that the true picture can be understood and the best outcome achieved. It is outside our remit to comment on the broad policy of offering direct financial incentives to investigate and prosecute criminal offences based on the financial benefit to the offender. However, in the discussion which follows we reflect on and offer our impressions of how such a policy impacts the confiscation regime.

¹ Home Office, *Asset Recovery Incentivisation Scheme Review* (February 2015).

HOW ARIS OPERATES

- 4.5 Under the current scheme for distribution of funds, operational agencies receive funding based on their relative contribution to the recovery of assets. The funds are divided between investigative, prosecuting and enforcement agencies. In respect of confiscated funds,² 18.75% is allocated to participating investigating and prosecuting agencies and 12.5% is allocated to HM Courts and Tribunals Service (“HMCTS”) as the enforcement authority. The Serious Fraud Office (“SFO”) is not part of ARIS and opted to receive core funding. ARIS receipts from the SFO go to HM Treasury. The reason given for this was greater consistency and predictability in receipt of funding:

Up to 2013-14, the SFO received a proportion of the sums recovered from confiscation orders and civil recovery proceedings under the Asset Recovery Incentivisation Scheme (ARIS). However, because this income stream was extremely difficult to manage – consisting of infrequent and highly unpredictable sums – the SFO agreed with HM Treasury that from April 2014 all ARIS receipts on SFO cases would go to central funds, with a fixed sum added to the SFO’s core funding. This amount covers the approximate cost of running the Proceeds of Crime Division.³

- 4.6 The Home Office retains a proportion of recovered funds which form part of the Department’s core budget. According to a Home Office review in 2015, the Department’s core budget was used to provide £8.2 billion of funding to the police; £54 million to tackle serious and organised crime, of which £37 million was provided to Regional Crime Enforcement Units (“ROCU”) in 2014-2015.
- 4.7 A review of the ARIS scheme in February 2015 considered a number of options including retention. The scope of the review was limited to changes that could be made within current arrangements as ARIS receipts are interwoven in departmental core funding for a number of agencies.⁴ Therefore the aims of the review were to ensure that ARIS “continues to incentivise activities that contribute directly to tackling criminal finances and is used to support communities, and improve the transparency of the scheme.”⁵
- 4.8 In 2014/15, the Government introduced a “top-slice” of funding which was ringfenced for projects that contributed towards improving national asset recovery performance.⁶ Funds are also distributed locally to fund crime reduction and community projects.
- 4.9 In 2015/16, 88% (£72.9m) of the £83m ARIS funds were used to support further asset recovery work; a figure greater than the £54 million allocated to tackle serious organised crime. The remainder of the funds were used for crime reduction and

² The division of funds is different depending on whether funds are recovered through confiscation, civil recovery in the High Court or civil forfeiture in the magistrates’ court. See Home Office, *Asset Recovery Incentivisation Scheme Review* (February 2015) p 2.

³ Serious Fraud Office, *What we do*, <https://www.sfo.gov.uk/about-us/> (last visited July 2020).

⁴ Home Office, *Asset Recovery Incentivisation Scheme Review* (February 2015) p 2.

⁵ Home Office, *Asset Recovery Incentivisation Scheme Review* (February 2015) p 2.

⁶ Home Office, *Asset Recovery Action Plan* (2019) para 83.

community projects.⁷ In 2018/19, the Government expanded the “top-slice” to provide for greater operational investment in areas such as the Regional Asset Confiscation Enforcement (“ACE”) teams and enforcement.⁸

- 4.10 ARIS funding has been deployed in various ways by recipients. It has been used to fund core activity such as additional financial investigators, equipment or training.⁹ However, recipients may link distribution of funding within their organisation with ARIS receipts. For instance, Sussex Police have reported that distribution of funding within the organisation is directly linked to performance:

Within Sussex Police, the funds are distributed to Divisions (Basic Command Units) and Departments based on the proportion of assets that they recover. This methodology acts as an incentive for those working in asset recovery and rewards good performers with tangible benefits. Likewise, poor performance in this area generates increased scrutiny and an expectation that improved performance will follow in subsequent periods.

- 4.11 The scheme will be reconsidered as part of the Government’s plans to develop a sustainable, long-term resourcing model responding to economic crime. In the Government’s most recent Economic Crime Plan,¹⁰ it states that the “SARs¹¹ Transformation Programme” (intended to improve the regime for reporting suspicions of money laundering) will require an ongoing sustainable resourcing model which will require exploring sources of funding from both the public and private sectors. This work will also include a review of the current ARIS model and the “criteria for which funds are used, with particular consideration of whether the funds collected should be ring-fenced by the Home Office to be spent on economic crime projects.”¹²
- 4.12 In the Asset Recovery Action Plan 2019, some concerns were evident regarding top-slice ARIS funding¹³ being used to support core business rather than innovation:

The Home Office will therefore work with operational partners to identify whether further changes are necessary to ARIS to encourage use of ARIS receipts to be ringfenced, wholly or partly, to directly fund those projects and resources that drive

⁷ Home Office, *Asset Recovery Statistical Bulletin 2013/14 – 2018/19* (2019) p 9.

⁸ Home Office, *Asset Recovery Action Plan* (2019) para 85.

⁹ Sussex Police and Crime Commissioner, *Submission on Home Office; Asset Recovery*, <https://www.sussex-pcc.gov.uk/media/2503/home-office-asset-recovery-incentivisation-scheme-review.pdf> (last visited July 2020).

¹⁰ The Economic Crime Plan 2019-22 references the Law Commission’s *Anti-Money Laundering: The SARs Regime* (2019) Law Com No 384 report, insofar as it discusses the approach to SARs reform generally.

¹¹ Suspicious Activity Reports (“SARs”), are an electronic or paper document in which the reporter discloses their suspicions of money laundering to the United Kingdom Financial Intelligence Unit, (which sits within the National Crime Agency) in accordance with their obligations under sections 330 to 332 or voluntarily pursuant to 338 of the Proceeds of Crime Act 2002.

¹² HM Government, *Economic Crime Plan 2019-22* (July 2019) para 5.20.

¹³ The funding described above as being ringfenced for projects that contributed towards improving national asset recovery performance.

business as usual asset recovery and denial. Doing so will free up top-slice funding to support testing of genuinely innovative and collaborative ways of working.¹⁴

ISSUES ARISING FROM INCENTIVISATION

ARIS and the aims of the confiscation regime

- 4.13 ARIS cannot be considered in isolation from the underlying principles and aims of the confiscation regime. The House of Commons Public Accounts Committee ("PAC") was critical of ARIS in its 2014 report. In response to questioning, Mark Sedwill, then Permanent Secretary of the Home Office, stated that ARIS was partly aimed at the cross-departmental incentivisation of confiscation orders.¹⁵ However, he re-iterated in evidence before PAC that confiscation orders are a tool for reducing crime not for generating revenue.¹⁶ Therefore the objective of pursuing confiscation is not to maximise the revenue recovered. As the Supreme Court remarked in *R v Harvey*, "it should be emphasised that such confiscation is not designed to restore money to the state...it is designed to deprive the offender".¹⁷
- 4.14 From our discussions with stakeholders at the early stages of this project, we were struck by the number of different objectives that were attributed to the pursuit of criminal assets through confiscation.¹⁸ The existence of ARIS complicates this picture of multiple objectives for confiscation as it introduces an incentive for an agency to pursue confiscation for its own benefit.
- 4.15 Section 2A of POCA 2002 requires a relevant law enforcement authority to "exercise its functions under this Act in the way which it considers is best calculated to contribute to the reduction of crime." The retention of a proportion of sums collected under confiscation orders could be considered to be consistent with this objective.
- 4.16 Academic commentators have also highlighted the risk of tension between efforts to increase the use of POCA as a tool to reduce crime and first, the provision of direct financial incentives to operational agencies, secondly, the correlation between the amount recovered and the funds received by the agency. Professor Peter Alldridge observes that there may well have been an impact on the volume of POCA cases from the distribution of a percentage of recovered funds to operational agencies:

In the early years of POCA, prosecutors were relatively unambitious in confiscation cases. No real attempts were made to extend the boundaries of confiscation in ways which, because of the breadth of the drafting, were clearly then permitted. There were, at the time, fewer prosecutions for tax offences and offences of corruption to provide tests. Whether by accident or design, perhaps coinciding with the introduction of the Assets Recovery Incentive Scheme (which gives the prosecuting

¹⁴ Home Office, *Asset Recovery Action Plan* (2019), para 87.

¹⁵ Confiscation Orders, Report of the House of Commons Committee of Public Accounts (2013-14) HC 942, evidence 4.

¹⁶ Confiscation Orders, Report of the House of Commons Committee of Public Accounts (2013-14) HC 942, evidence 2.

¹⁷ *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [55].

¹⁸ In Chapter 5 we discuss this topic in further detail.

authorities a percentage of any awards), a number of cases arose, from around 2006-2008 testing the boundaries.¹⁹

- 4.17 During our pre-consultation discussions, we found that ARIS funding arrangements sometimes made it difficult for stakeholders to contemplate reform. ARIS was, more often than not, the principal focus of stakeholder concerns rather than how the overall effectiveness of the regime could be improved.

Conflict of interest

- 4.18 For all the benefits that may accrue from redistributing funds obtained from the proceeds of crime, using ARIS to achieve this creates the potential for conflicts of interest. This is perhaps the principal objection to the system as it currently exists.
- 4.19 Early on in our pre-consultation discussions we identified a perception amongst a broad cross-section of stakeholders that ARIS affected operational decisions at the margins. One stakeholder described “the malign influence of targets and incentive schemes on investigations and prosecutorial decisions.”
- 4.20 There are existing examples in the public domain which raise questions about the influence of ARIS on operational decisions. Barristers at 2 Bedford Row detailed the inner workings of a mortgage fraud case in which they had acted for the defence in a Chambers’ blog post. ARIS became the focus of a defence disclosure application, providing material for cross-examination of the police force involved in the case. An internal police report estimated a benefit figure of £8 million. The barristers involved in the case perceived that their cross-examination of officers in the case revealed that “ARIS had been a constant theme from the outset of the investigation.”²⁰
- 4.21 During our fact-finding process, a series of meetings were held with stakeholders. Practitioners observed that defendants often feel that law enforcement agencies and prosecutors are incentivised to seek large orders from which they will directly benefit. An article in Inside Time (a magazine for prisoners) submitted that the incentivisation scheme is where the risk of injustice in confiscation proceedings begins.²¹
- 4.22 There has been some judicial disquiet as to the operation of incentives on the decision to prosecute. One area that has resulted in recent judicial scrutiny is local authorities’ use of confiscation orders under the Proceeds of Crime Act 2002 to recover monies from individuals prosecuted for breaches of planning control.
- 4.23 The courts have observed the ARIS scheme is: “...surprisingly called an “incentive scheme...”²² and have recently made plain that the decision to prosecute should in no

¹⁹ P Allridge, “Proceeds of Crime Law since 2003 – two key areas” [2014] 3 *Criminal Law Review* 171 at 174.

²⁰ 2 Bedford Row, *Are the police taking the ARIS*, <https://www.2bedfordrow.co.uk/are-the-police-taking-the-aris/> (last visited July 2020).

²¹ See, for example, Inside Time, *Confiscation: Taking the profit out of crime or just taking the Mickey?*, <https://insidetime.org/confiscation-taking-profit-crime-just-taking-mickey/> (last visited March 2020).

²² *R v Innospec* [2010] Crim LR 665, [2010] Crim LR 665.

way be influenced by the prospect of financial advantage to the prosecuting authority.²³

- 4.24 The Court of Appeal considered a case involving an agreement that police were to receive a donation (25% of any compensation awarded) in return for assistance provided to a private company conducting a private prosecution and confiscation proceedings.²⁴ It was contended by the private company that they had wanted to put police in a position similar to that in which they would have been placed if a confiscation order had been made and payment had been provided under the ARIS funding model. Ultimately, the compensation claim had been abandoned but the court noted: “[the agreement] did in fact provide an incentive for the police to devote resources to assisting [the company] in their claim for compensation and gave rise to a perception that their independence was being compromised.”
- 4.25 In *R v The Knightland Foundation*²⁵ the trial judge, HHJ Simon, stayed the criminal proceedings as an abuse of the process of the court. He made a finding that the prosecution “had as its focus maximising the returns to the authority from a POCA order”.²⁶ The prosecuting authority applied for leave to appeal against that ruling under section 58 of the Criminal Justice Act 2003. On the permission application, Hallett LJ made the following observations:

The judge found that report to be flawed and that the decision to prosecute and to continue the prosecution based on it had an improper motive namely the financial advantage to the applicant of a POCA order. Those who advised the person who took the decision to prosecute failed to take into account a relevant factor, namely, the possibility that the respondents’ position could be regularised and allowed an irrelevant factor, namely, the possibility of their obtaining a POCA order to the authority’s financial advantage, to carry significant weight. On the judge’s findings, having taken the decision to prosecute, officers of the same authority then attempted, improperly, to influence the determination of the planning application so that it would not impact adversely upon the prosecution and/or the prospects of their obtaining a POCA order. In their eyes the grant of planning permission was intrinsically linked to the prosecution and possible penalty. The judge agreed and so do we. Had planning permission been granted and the respondents’ position regularised, this could have been a significant factor in mitigation and any attempt by the respondents to persuade the court that it would not be proportionate to make a sizeable POCA order.

- 4.26 In *Wokingham Borough Council v Keith Scott and others*,²⁷ the prosecution applied for leave to appeal against a terminating ruling under section 58 of the Criminal Justice Act 2003. The Respondents were charged with offences emanating from an enforcement notice from their alleged unlawful use of land. The trial judge stayed proceedings as an abuse of the court’s process. One of the judge’s significant concerns was the

²³ *Wokingham Borough Council v Scott* [2019] EWCA Crim 205, [2020] 4 WLR 2 at [63] – [67].

²⁴ *R v Zinga* [2014] EWCA Crim 52, [2014] 3 All ER 90.

²⁵ *R v The Knightland Foundation* [2018] EWCA Crim 1860.

²⁶ *R v The Knightland Foundation* above at [20].

²⁷ *Wokingham Borough Council v Scott* [2019] EWCA Crim 205, [2020] 4 WLR 2.

extent to which the possibility of an order being made under POCA contributed to the decision to prosecute the Respondents in order to claw back public money expended on the case. If the prosecution resulted in a conviction and a POCA order was made, the Council would have received 37.5% of the fruits of the order. The trial judge was concerned that taking into account the possibility of a financial benefit “ran contrary to an objective analysis of the merits of the case as required under the Code for Crown Prosecutors.”²⁸

- 4.27 Hallett LJ, the Vice President of the Court of Appeal Criminal Division acknowledged the role played by a POCA order as one of the most important issues in the application and stated:

It may come as a surprise to some that there are prosecuting authorities who may benefit financially from their decision to prosecute. It certainly came as a surprise to the members of the court in *Knightland* that a body given the power to prosecute should consider the possible financial advantage to itself as a relevant factor in the decision to prosecute. As the court held in *Knightland*, this flies in the face of the clear provisions of the Code for Crown Prosecutors, accepted by all prosecuting authorities as the applicable Code, that a prosecutor must be independent, fair and objective.

We endorse and repeat the observations of the court in *Knightland*. The decision to prosecute is a serious step and one that must be taken with the utmost care. We understand the argument that the making of a POCA order on conviction may act as a deterrent to offending and has the effect of extracting ill-gotten gains from offenders. This was no doubt Parliament’s intent in enacting the POCA. But 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. We hope that this message will be relayed to all those making charging recommendations and decisions as soon as possible.²⁹

- 4.28 These cases demonstrate the potential conflict of interest which arises on a decision to prosecute where a prosecutor stands to benefit financially if the person is convicted and made subject to a confiscation order under POCA 2002.
- 4.29 Because of the potential for there to be a perceived conflict of interest, law enforcement authorities must be absolutely transparent about decisions that are taken. For example, the 2018 revision to the Code for Crown Prosecutors now requires prosecutors to choose charges that (amongst other things) allow a confiscation order to be made in appropriate cases, where a defendant has benefitted from criminal conduct.³⁰ It follows from the comments of Hallett LJ in *Wokingham Borough Council v Keith Scott and others* that there is a real risk of challenges being made to charging decisions, alleging that charges were only framed in a particular

²⁸ *Wokingham Borough Council v Scott* [2019] EWCA Crim 205, [2020] 4 WLR 2 at [31].

²⁹ *Wokingham Borough Council v Scott* [2019] EWCA Crim 205, [2020] 4 WLR 2 at [62] to [63].

³⁰ CPS Code for Crown Prosecutors (2018) para 6.1.

way to, for example, engage the criminal lifestyle assumptions³¹ on benefit which may increase the size of a confiscation order.

- 4.30 Similarly, the CPS has a team dedicated to dealing with applications to reconsider the amount that must be paid towards a confiscation order after it is made. We discuss such applications for reconsideration under section 22 of POCA in Chapter 25. The court may order the uplift of a confiscation order if it considers such an uplift to be “just”³² and no doubt any prosecutorial decision about whether to pursue such an application will turn on an analysis of justice in any given case. However, the CPS team which supports such applications is known as the “ARIS team”.³³ It perhaps invites a perception of injustice to afford the team which decides whether to pursue uplift applications with a name which reflects the direct financial incentive available to the CPS in pursuing the application.

Inefficiency

- 4.31 One of the other effects of offering a funding advantage as an incentive to pursue confiscation is that other useful orders which are not incentivised may be underused.
- 4.32 Property frequently comes into the police’s possession in connection with their investigations into criminal offences. There are alternative orders to confiscation orders which are targeted at the removal of property, for example, a deprivation order under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000. The court may make an order to deprive an offender of property used for the purpose of committing or facilitating the commission of an offence, whether or not it deals with the offender in any other way. These orders can be made at the sentencing hearing and are quicker and less labour-intensive than confiscation orders. Items forfeited under deprivation orders are ultimately sold and the money given to charity.³⁴ However, the funds received are not included within ARIS receipts therefore there is greater incentive to pursue a confiscation order. This can produce inefficiency when a simpler, cheaper and quicker alternative is available.
- 4.33 There is also a risk in pursuing a confiscation order on weak grounds or evidence due to the potential impact on any future confiscation cases, if the defendant goes on to commit more serious offences. In Chapter 23 on multiple orders we discuss the case of *R v Chahal*.³⁵ In that case the Court of Appeal confirmed that sections 8(3) and (4) of POCA 2002 require a subsequent court to accept and act on a prior confiscation order in determining benefit from general criminal conduct. In that case a finding that the defendant had benefited from criminal conduct to the sum of £140,000 was

³¹ Discussed in Chapter 13.

³² Proceeds of Crime Act 2002, s 22(4)(a).

³³ See CPS Proceeds of Crime (CPSPoC), <https://www.cps.gov.uk/cps-proceeds-crime-cpspoc> (last visited July 2020).

³⁴ Section 1 of the Police (Property) Act 1897 permits a court of summary jurisdiction to make an order for delivery of property in the police’s possession to the owner. If the owner cannot be ascertained, the court can make any order with respect to the property that seems “meet”. Section 2 permits the making of regulations with respect to the disposal of unclaimed property not subject to a further court order. The Police (Property) Regulations 1997 provide for such cash or property to be ultimately put to charitable causes selected by the police force concerned.

³⁵ *R v Chahal* [2014] EWCA Crim 101, [2014] 2 Cr App R (S) 35.

binding in a subsequent case, when it was discovered that the defendant's benefit in fact ran to millions of pounds.

4.34 The Public Accounts Committee has also raised the issue of the efficiency of the ARIS scheme:

The previous Committee concluded that the incentive scheme used to encourage the many bodies involved to confiscate proceeds of crime, the Asset Recovery Incentivisation Scheme (ARIS), was opaque and ineffective.... Following changes made since 2014, the Home Office insisted that it had since reformed ARIS. It explained that it had allocated £5 million (out of the £175 million confiscated in 2015–16) to invest in specific proceeds of crime projects such as enhancing the main database, JARD, and setting up dedicated asset confiscation enforcement teams. But the Home Office has not addressed the weaknesses identified by the previous Committee:

- (i) it is still aligned to just one of the objectives of confiscation orders (income collection) and does not reward any impact made by confiscation orders on disrupting crime;
- (ii) it still does not link effort and reward. For example, the Home Office retains 50% of all amounts confiscated although it has no operational role; and
- (iii) it does not allow for effective, long-term investment by individual bodies using ARIS funding because it requires money to be spent in year. The police told us that forces were not affected due to a different budgetary process. But the Serious Fraud Office left the scheme in 2014 in return for an increase in its core budget and hence the ability to plan long term.

The Home Office did acknowledge that there was ongoing work to reform ARIS further. For example, in response to the government's manifesto commitment, it was looking at providing more funding to police forces, in particular the regional asset recovery teams. Such increased funding may potentially reflect more of the efforts made by police forces in investigating confiscation cases and assisting in enforcement. The proposals were with ministers and the Home Office expected to be able to implement changes by the 2017–18 financial year.³⁶

Conflict between confiscation and victim compensation

4.35 A scheme already exists in this jurisdiction to raise funds for victims of crime. When an offender is sentenced, courts are, in most cases, obliged to impose a statutory surcharge. The amount of the order varies depending on the age of the defendant and the type of sentence imposed.³⁷ Revenue raised from the surcharge is used to fund

³⁶ Confiscation orders: progress review, House of Commons Committee of Public Accounts (2016-17) HC 124. The Government manifesto referred to is the Conservative Party manifesto 2015, p 59.

³⁷ The Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2016 for current amounts payable. For a full list of the groups supported see, <https://www.gov.uk/government/publications/victims-and-witnesses-funding-awards> (last visited July 2020).

victim services through the Victim and Witness General Fund. However, this does not cover compensation for a victim's losses as a result of the crime.

- 4.36 Ian Smith and David Shepherd have highlighted the conflict that arises when confiscation and compensation are at stake. As the state stands to benefit from confiscation, as do investigating and prosecuting authorities through the ARIS scheme, victims' needs may not be prioritised:

Worse still, there is a risk that the police will have other priorities, not least because they operate under targets to obtain financial orders – known as confiscation orders – for the benefit of the state rather than victims. Indeed it may well be a policy of the police force that would deal with your case to favour prosecuting cases that give them the opportunity to obtain confiscation or forfeiture orders in favour of the state...That problem was highlighted by an academic study in which one fraud officer quoted a neighbouring police force:

we'll only do the ones where we don't have an identified victim, because we get to keep the money, if you've got a victim and the victim is going to get the money, then, we're not interested.³⁸

Operational impact

- 4.37 Earlier in this chapter we discussed the potential for ARIS funding to affect determinations as to whether to pursue uplift applications. Looking backwards, stakeholders warned that ARIS risks the creation of perverse incentives against making a meaningful and realistic confiscation order in the first place because this would restrict subsequent applications for uplifts.
- 4.38 It was also recognised that it was beneficial to agencies to seek "softer" targets in order to generate revenue rather than career criminals whose assets might be more difficult to ascertain and recover.
- 4.39 Furthermore, stakeholders reported that despite sustained efforts to promote greater inter and intra agency co-operation, ARIS has the potential to encourage siloed working. As each operational agency stands to gain funding from recovered assets, attempts to consolidate greater co-operation between agencies is inevitably undermined, thus reducing the effectiveness of the regime overall. This development has two important consequences:
- (1) It reduces co-operation and engagement between agencies who may be able to share expertise and best practice.
 - (2) Two or more agencies may seek to recover the same assets resulting in duplication and therefore wasted resources. We were told that this type of competition over assets (which will ultimately fall to the state if recovered)

³⁸ I Smith and D Shepherd, *Commercial Fraud, A Legal Guide to Justice for Victims* (September 2017), p 188 quoting M Button, C, Lewis, D Shepherd, G Brooks, and A Wakefield, *Fraud and punishment: enhancing deterrence through more effective sanctions* (2012). The witness was repeating a conversation they had had four years previously with an officer from a neighbouring force. The witness described themselves as taken aback, saying "surely we're here to look after victims" but they added they were not sure if the words were spoken out of mere bravado. In Chapter 24 we explore the interrelationship between confiscation and compensation orders.

impacts on the efficiency of the system and potentially wastes limited resources. Speaking at a conference in 2010, Andrew Bodnar of Matrix Chambers observed:

On any view the apparent contradictions and conflicts between especially criminal prosecution and confiscation proceedings on the one hand and the recovery by victims of their losses in private law proceedings on the other have the potential to lead to the unedifying spectacle of law enforcement agencies and victims of fraud engaging in contested litigation against each other rather than acting in concert. It is the stated aim of the law enforcement agencies and politicians of all parties within the United Kingdom that the interests of the victims of crime should be placed at the heart of the criminal justice system. However, the statutory framework in place and the case law which has built up around it yields the very real potential for precisely the opposite result.³⁹

- 4.40 In Chapter 23 we discuss the issue of multiple confiscation orders against the same defendant obtained by different law enforcement agencies and the potential “race” to be the first to judgment.
- 4.41 While greater awareness and use of POCA 2002 is a laudable aim of the scheme, it can create competition between agencies who might seek to pursue the same assets. However, it can also lead to wasted resources where multiple agencies are pursuing the same assets, perhaps even under different regimes.

CONCLUSIONS

- 4.42 It is outside our remit to make any recommendations on the continued operation of ARIS. Any reform would be a political choice rather than a legal decision. However, in this Chapter 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.
- 4.43 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 forthcoming ARIS review will no doubt wish to consider the issues raised in this chapter.
- 4.44 We have also concluded that there is a strong case for clarifying the objectives of confiscation in the legislation, a key theme that runs throughout this paper. In Chapter 5, we identify objectives and provisionally propose the introduction of an overarching legislative steer into the confiscation regime to ensure that operational agencies and the courts have clear guidance as to objectives. This would simplify the regime and bring much needed clarity.

³⁹ Speaking at the Off Shore Alert Conference 2010.

Part 2: Objectives of the Act

INTRODUCTION TO PART 2

In this section of the paper, we consider the pros and cons of introducing an explicit legislative steer to apply to the whole of Part 2 of POCA 2002 which incorporates the principle of proportionality already developed in case law. There is only one chapter (Chapter 5) in this section of the paper.

Chapter 5 begins by examining the existing limited steer in section 69 of POCA 2002 before analysing significant case law in which the courts have considered the objectives of the regime.

In this section, we provisionally propose the amendment of POCA 2002 to include a clear legislative steer applicable to the whole of Part 2 which articulates the objectives of the regime. We argue that the principal objective should be to deprive a defendant of a sum equivalent to the value of his or her benefit within the limit of his or her means. We provisionally propose the inclusion of a number of secondary but important factors, such as deterrence and disruption of crime, and ensuring the compensation of victims. We provisionally propose that the concept of punishment should be excluded from the aims of the regime.

Chapter 5: The purpose and objectives of the confiscation regime and “proportionality”

INTRODUCTION

- 5.1 In this chapter we discuss the considerations that guide a court in the exercise of its powers. In particular, we examine the requirement that the court must make a confiscation order that is “proportionate” to the aims of the legislation.
- 5.2 We identify four aims that have been associated with the confiscation regime throughout its evolution:
- (1) Taking the profits or proceeds from crime.
 - (2) Punishment.
 - (3) Deterring and disrupting criminal activity.
 - (4) The compensation of victims.
- 5.3 We consider the priority of those objectives under the current confiscation regime and the priority that should be afforded to those objectives in any optimal confiscation regime, when making a determination about proportionality, and in relation to decision making under Part 2 more generally.

PROPORTIONALITY

The introduction of a safeguard in confiscation proceedings

- 5.4 As initially drafted, the Criminal Justice Act 1988 afforded the court some discretion¹ in the making of a confiscation order. Such discretion was almost completely removed when the Criminal Justice Act 1988 (“CJA 1988”) was amended by the Proceeds of Crime Act 1995. As the Supreme Court observed in *R v Waya*:
- That remains the position under POCA [2002]. The Crown Court no longer has any power to use its discretion so as to mould the confiscation order to fit the facts and the justice of the case, even though a confiscation order may arise in every kind of crime from which the defendant has benefited, however briefly.²
- 5.5 Section 6(5) of the Proceeds of Crime Act 2002 (“POCA 2002”), as originally enacted, provided that where the court decided that a defendant had benefited from crime, it “must” determine the recoverable amount and make an order requiring the defendant to pay that amount.

¹ Criminal Justice Act 1988, s 71(1). The ability to make a confiscation order was couched in terms of a “power” until the implementation of the Proceeds of Crime Act 1995, s 1 of which changed the power to a “duty”.

² *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [4].

5.6 It appeared therefore that the court had no option but to impose an order for the recoverable amount. This led to difficulties in practice and the Court of Appeal intervened where the operation of the statutory scheme led to disproportionate results. By way of example:

- (1) Where a defendant's benefit was limited to loss occasioned to a victim and that victim had been repaid, the court said it would be wrong in principle to impose a confiscation order in respect of the defendant's benefit as the sum had already been repaid.³
- (2) Where a pharmacist's fraudulent transactions provided a gain of £464, but a confiscation order in excess of £400,000 was sought as the defendant had obtained the £446 together with much larger sums to which he had been entitled.⁴

5.7 The Court of Appeal found that, in the circumstances described, the only way to prevent injustice was for the court to stay proceedings on the grounds of abuse of process, though this power should only be exercised in exceptional circumstances.⁵

5.8 In *R v Waya*,⁶ the Supreme Court observed that:

The better analysis of such situations is that orders such as those there considered, ought to be refused by the judge on the grounds that they would be wholly disproportionate and a breach of A1P1. There is no need to invoke the concept of abuse of process.

5.9 To understand this observation, some explanation of what is meant by "proportionality" and "A1P1" is required.

Proportionality and A1P1

5.10 "A1P1" is article 1 of Protocol 1 of the European Convention on Human Rights. The European Convention on Human Rights ("ECHR") was formally ratified by the United Kingdom in 1951. The following year, the United Kingdom signed and ratified Protocol 1 to the Convention. The Protocol provided a mechanism for additional rights to be recognised as being "fundamental".⁷ Article 1 of Protocol 1 provides for the right to peaceful enjoyment of possessions. It states:

- (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

³ *R v Morgan and R v Bygrave* [2008] EWCA Crim 1323, [2009] 1 Cr App R (S) 60.

⁴ *R v Shabir* [2008] EWCA Crim 1809, [2009] 1 Cr App R (S) 84.

⁵ *A-G's Ref (No. 1 of 1990)* [1992] QB 630; *DPP v B* [2008] EWHC 201 (Admin), [2008] Crim LR 707; *R v F (S)* [2011] EWCA Crim 1844, [2012] QB 703; *R v Lowe* [2009] EWCA Crim 194, [2009] 2 Cr App R (S) 81; *R v Nelson* [2009] EWCA Crim 1573, [2010] QB 678; *DPP v Fell* [2013] EWHC 562 (Admin); *R (Barons Pub Co. Ltd) v Staines Magistrates' Court* [2013] EWHC 898 (Admin), [2013] LLR 510; *DPP v Gowing* [2013] EWHC 4614 (Admin), (2014) 178 JP 181.

⁶ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [18].

⁷ For a history of the European Convention on Human Rights and Protocol 1, see W Schabas, *The European convention on human rights: a commentary* (2015) – Oxford Commentaries on International Law.

interest and subject to the conditions provided for by law and by general principles of international law.

- (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

5.11 Paragraph 1, which protects the rights of the individual to peaceful enjoyment of property, may appear to be at odds with paragraph 2 which permits the state to abridge that right in the public interest.

5.12 The European Court of Human Rights (“ECtHR”) has implied that there must be a “just balance” or “fair balance” between the public interest and the rights of an individual as protected by the Convention.⁸

5.13 In assessing whether a measure which deprives a person of the right to enjoy property strikes a just or fair balance, the ECtHR asks three questions:

- (1) What is the aim of the measure?
- (2) Is the aim legitimate in the eyes of the Convention? and
- (3) Does the measure represent a reasonably proportionate way to achieve that legitimate aim?⁹

The application of A1P1 to confiscation proceedings

5.14 The question of the compliance of the UK confiscation regime with the concept of proportionality was considered by the House of Lords in 2002 in the cases of *R v Rezvi*¹⁰ and *R v Benjafield*.¹¹ In those cases (which were heard together), the House of Lords held that the confiscation regime under the Criminal Justice Act 1988 was a “fair and proportionate”¹² response to the problem which it addressed and therefore compliant with A1P1.

5.15 In 2008, the House of Lords recognised that there “might be circumstances” in which a confiscation order might be disproportionate and therefore breach the right to peaceful enjoyment of property,¹³ for example if multiple defendants were each ordered to pay the full amount of benefit obtained.¹⁴

⁸ For example, *The Belgian Linguistic Case* (1968) 1 EHRR 252, *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35.

⁹ For example, *Pressos Compania Naviera SA v Belgium* (1996) 21 EHRR 301; *Jahn v Germany* (2006) 42 EHRR 1084.

¹⁰ *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099.

¹¹ *R v Benjafield* [2002] UKHL 2, [2003] 1 AC 1099 at [8].

¹² *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099 at [17]; *R v Benjafield* [2002] UKHL 2, [2003] 1 AC 1099 at [8].

¹³ *R v May* [2008] UKHL 28, [2008] 1 AC 1028.

¹⁴ *R v May* [2008] UKHL 28 [2008] 1 AC 1028 at [45].

- 5.16 The theoretical application of proportionality as a safeguard in confiscation proceedings became practical when the principle was applied by the Supreme Court in *R v Waya*.¹⁵ The case concerned a defendant who had obtained a mortgage by fraud, but who had also made legitimate contributions to the purchase price of a property. The Supreme Court was faced with competing arguments about what the defendant's "benefit" from crime might be. That benefit could have been (amongst other things):
- (1) the whole of the value of the property, which could not have been purchased without the fraudulent mortgage;
 - (2) the value of the money advanced by the mortgage lender;
 - (3) the value of the percentage of the property that was purchased with the fraudulent mortgage;
 - (4) the value of the proportion of the property that the defendant had truly "gained" from crime, in the sense that when the mortgage was repaid, the value that the defendant would retain, which was derived from crime.
- 5.17 On its interpretation of POCA 2002, the majority of the Supreme Court decided that the fourth approach was the correct one.¹⁶ Furthermore, the Court held that it was possible to read section 6 of POCA 2002 (which governs the making of a confiscation order) as being subject to a qualification that it applied "except in so far as such an order would be disproportionate and thus a breach of article 1, Protocol 1". The Supreme Court found it was necessary to read such a qualification into section 6 in order to ensure that the statute remained ECHR-compliant.¹⁷ The Supreme Court found that the fourth approach was compatible with article 1, Protocol 1.

Statutory codification of the principle of "proportionality"

- 5.18 In October 2014, the Parliamentary Joint Committee on Human Rights recommended that the government considered bringing
- greater legal certainty to the legal regime governing the proceeds of crime by inserting into the statutory framework express language which would give clear effect to the judgment of the Supreme Court in *R v Waya*.¹⁸
- 5.19 Pursuant to this recommendation, POCA 2002 was amended to include express reference to proportionality.¹⁹ Rather than requiring the court to make an order that the defendant pay the whole of his or her "recoverable amount"²⁰ in all circumstances, the

¹⁵ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

¹⁶ We discuss the decision in *R v Waya* again in Chapter 12.

¹⁷ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [16].

¹⁸ House of Lords and House of Commons Joint Committee on Human Rights Second Report of Session 2014-15, HL Paper 49 HC 746 paragraph 1.23.

¹⁹ Serious Crime Act 2015, sch 4 para 19.

²⁰ As to which see Chapter 15.

court must make an order that the defendant repay the recoverable amount “only if, or to the extent that, it would not be disproportionate to require the defendant” to do so.²¹

When is a confiscation order disproportionate?

- 5.20 It being accepted that the legislation should be read to prevent a confiscation order being disproportionate, in *R v Waya* the Supreme Court said that “the difficult question is *when* a confiscation order sought may be disproportionate”.²²
- 5.21 The requirement to consider proportionality in the amended section 6(5) of POCA 2002 closely reflects the wording used by the Supreme Court in *R v Waya*. The explanatory notes to the Serious Crime Act 2015 make it clear that the amendment was made to place the decision in *R v Waya* “on a statutory footing”.²³ Therefore, it can be inferred that when Parliament used the word “proportionality” in section 6(5) of the 2002 Act it intended that word to be understood as it was used by the Supreme Court in *R v Waya*.
- 5.22 The Supreme Court followed rulings of the ECtHR to the effect that determining whether a confiscation order is proportionate requires a court to consider the relationship between the aim of the confiscation regime under POCA 2002 and its effect on the peaceful enjoyment of property.²⁴
- 5.23 The Supreme Court therefore regarded the statutory aim as fundamental to any enquiry into proportionality, referring to (emphasis added):
- (1) “the *legitimate aim* which is sought to be realised by the deprivation” of property by confiscation;²⁵
 - (2) “examination of the relationship between *the aim of the legislation* and the means employed to achieve it”;²⁶
 - (3) how “interpretation must recognise and respect *the essential purpose, or “grain” of the statute*”;²⁷
 - (4) how “*the Parliamentary objective must*, so long as proportionately applied, be respected”.²⁸
- 5.24 Proportionality therefore has a relatively narrow meaning, focussing on statutory aims of the confiscation regime. Proportionality is “not the same as the re-creation by

²¹ Proceeds of Crime Act 2002, s 6(5).

²² *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [24] (emphasis added).

²³ Serious Crime Act 2015, explanatory note 352.

²⁴ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [12].

²⁵ Above at [12].

²⁶ Above at [20].

²⁷ Above at [20].

²⁸ Above at [24].

another route of the general discretion once available to judges but deliberately removed”.²⁹

- 5.25 The logical issue that must precede the determination of whether a confiscation order is proportionate is the identification of the aims or objectives to which that order must be proportionate.

THE OBJECTIVES OF CONFISCATION LEGISLATION

- 5.26 Part 2 of POCA 2002 does not contain a provision which sets out an overarching objective to which the courts should have regard during confiscation proceedings. Any objectives that the court should bear in mind when exercising its powers in connection with confiscation are largely derived from two sources, namely the “legislative steer” in section 69 of POCA 2002 and case law.

The “legislative steer”

- 5.27 Some guidance as to how the court should exercise certain powers in connection with the confiscation regime can be found in section 69 of POCA 2002.³⁰ Section 69(1) provides, in broad terms, that the section applies to: restraint orders, search and seizure powers and the appointment and powers that may be granted to receivers. It does not therefore provide a steer as to the factors to take into account when imposing confiscation orders under section 6 of POCA 2002.
- 5.28 Section 69(2) provides, as far as relevant, that the powers of the court must be exercised:
- (1) with a view to the value for the time being of realisable property being made available (by the property’s realisation) for satisfying any confiscation order that has been or may be made against the defendant;
 - (2) in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property;
 - (3) without taking account of any obligation of the defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the defendant.
- 5.29 The legislation therefore provides a “legislative steer”³¹ to assist the court in discerning how to exercise its powers of restraint, search and seizure and the appointment of a receiver. For example, as long ago as 1988, the Court of Appeal relied on the steer

²⁹ Above at [24].

³⁰ The pre-POCA “legislative steers” can be found in s 13(2) of the Drug Trafficking Offenders Act 1986, s 82(2) of the Criminal Justice Act 1988 and section 31(2) of the Drug Trafficking Act 1994.

³¹ See references to the “legislative steer” under POCA 2002 and under previous confiscation regimes in (amongst other cases): *R v S* [2019] EWCA Crim 1728, [2020] 1 WLR 109; *Re Austin* [2019] EWHC 2574 (Admin); *Re Smith* [2017] EWHC 3332 (Comm), [2018] Lloyd’s Rep FC 239; *Liscott v CPS* [2013] EWHC 501 (Admin), [2013] Lloyd’s Rep FC 262; *SFO v Lexi Holdings Plc (In Administration)* [2008] EWCA Crim 1443, [2009] QB 376; *RCPO v S* [2008] EWHC 2214 (Admin), [2008] Fam Law 1188; *RCPO v Briggs-Price* [2007] EWCA Civ 568, (2007) 104(26) LSG 32.

then in force in holding that a restraint order should not have been varied to accommodate an order by consent in divorce proceedings.³²

- 5.30 In *Director of the Serious Fraud Office v Lexi Holdings Plc (in administration)* and another, the Court of Appeal described section 69 as a “vitally important section”.³³

Case law

- 5.31 Whilst the legislative steer has some utility for applications that fall outside of the main confiscation hearing, it does not assist the court when making the main confiscation order itself. Some guidance can be found within the many appeals that POCA 2002 has generated arising out of the making of the substantive confiscation order.

- 5.32 In *R v May*, the House of Lords described the primary purpose of the confiscation regime as being to deprive defendants of the benefit they have gained from their relevant criminal conduct, within the limit of their means.³⁴

- 5.33 By depriving a defendant of his or her benefit from crime, the confiscation regime may give effect to a number of secondary purposes that have been identified by the courts, as articulated by Lord Steyn in *Rezvi*:³⁵

The provisions of [the confiscation regime in the CJA 1988] are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises.

- 5.34 The reference to punishment has been subject to additional clarification because “a confiscation order is not an additional fine”.³⁶ As the Court of Appeal emphasised in *R v Boyle Transport (Northern Ireland) Ltd*:

it is essential to bear in mind the principle that the confiscation process under the 2002 Act is not of itself aimed at punishment. On the contrary, it is aimed at recovery of benefit: to ensure that criminals do not retain for themselves their ill-gotten gains... Necessarily judges in confiscation cases are dealing with persons who have been criminally convicted after a trial or on a plea. But appropriate punishment for the criminality is to be addressed and will have been addressed by the sentence. That punishment is not thereafter to be, as it were, topped up by the confiscation process.³⁷

³² *Re Peters* [1988] QB 871, [1988] 3 WLR 182.

³³ *Director of the Serious Fraud Office v Lexi Holdings Plc (in administration)* [2008] EWCA Crim 1443, [2009] QB 376 at [12].

³⁴ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [48].

³⁵ *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099 at [14].

³⁶ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [2].

³⁷ *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63 at [90]. See also *R v Jennings* [2008] UKHL 29, [2008] 1 AC 1046 at [13], and *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [55]; *R v Andrewes* [2020] EWCA Crim 1055 at [85].

- 5.35 The deprivation of property may nevertheless have a, punitive or “swingeing”³⁸ quality to it.³⁹ As the Hodgson committee noted: “condign measures are justified to ensure that [a defendant] enters prison stripped of all his ill-gotten gains”.⁴⁰

PERCEIVED PROBLEMS WITH THE CURRENT LAW

- 5.36 The absence of an overt statement as to the purpose of the regime means that the overriding objective which the legislation seeks to achieve, the disgorgement of the proceeds of crime, can be influenced by other objectives (such as punishment). Furthermore, it is unclear which objective carries the greatest weight and ought therefore to be prioritised.

- 5.37 The lack of clarity can:

- (1) lead to inconsistency;
- (2) affect the assessment of proportionality; and
- (3) affect the exercise of confiscation powers more generally.

Inconsistency

- 5.38 In *R v Omorgieva* the defendant had been convicted of benefit fraud and appealed against her confiscation order on the basis that the order imposed should have been adjusted to reflect the fact that the local authority intended to recover the overpayment from the benefits she was still receiving.

- 5.39 The local authority had undertaken not to make any deductions, thus disposing of any issue of double recovery⁴¹ but the court observed:

The fact that a local authority might seek to recover benefits fraudulently paid may not serve the same end or purpose as a confiscation order, which is designed not to plug a gap in local authority finance *but to serve a wider policy of being punitive and of ensuring that crime does not pay*.⁴²

- 5.40 Furthermore, in *R v X* the Court of Appeal described POCA 2002 as a “penal statute whose effect is intended to be draconian”.⁴³ In both cases the Court of Appeal formed the view that the regime was designed to be punitive in nature.

³⁸ *R v Harvey* above at [55]. The word “draconian” has often been used, see (amongst other cases) *R v Dickens* [1990] 2 QB 102; *R v Comisky* (1991) 93 Cr App R 227; *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601; *R v Zinga* [2014] EWCA Crim 52, [2014] 3 All ER 90, at [33].

³⁹ *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63; *R v Smith (David Cadman)* [2001] UKHL 68; [2002] 1 WLR 54, para 23.

⁴⁰ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 82.

⁴¹ If double recovery was inevitable the argument that the confiscation order was disproportionate would have been strong (*R v Jawad* [2013] EWCA Crim 644, [2013] 1 WLR 3861; *R v Ahmad* [2014] UKSC 36; [2015] AC 299).

⁴² (Emphasis added), *R v Omorgieva* [2015] EWCA Crim 382 para 12.

⁴³ *R v X* [2007] EWCA Crim 2498, (2007) 151 SJLB 1434 at [9].

- 5.41 However, as we set out earlier in this chapter, in other cases both the Supreme Court and the Court of Appeal have made clear that punishment is not an objective of the legislation.⁴⁴

The impact of a lack of clarity on the assessment of proportionality

- 5.42 A lack of clarity of objectives has the potential to affect any assessment of proportionality. For example, if punishment is an objective of the regime, a more “draconian”⁴⁵ order may be proportionate than would otherwise be the case.
- 5.43 A further criticism is that in the absence of clear objectives to guide the determination of whether the application of a statutory provision is proportionate, the mere application of the statutory provisions themselves is considered to be proportionate.
- 5.44 Rudi Fortson QC has summed up the position in the *Criminal Law Review*,⁴⁶ saying that, outside of the confiscation regime, it has been made clear that an assessment of proportionality “inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon”. In exercising this value judgment, the courts have applied the test in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, namely whether:
- (1) the legislative objective is sufficiently important to justify limiting a fundamental right;
 - (2) the measures designed to meet the legislative objective are rationally connected to it; and
 - (3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.⁴⁷
- 5.45 However, as Rudi Fortson QC has gone on to argue, the Court of Appeal has not applied this approach (or not applied it fully) to confiscation orders. Instead, it has approached the question of proportionality with reference to a two-limb proposition:
- (1) that the statutory aim is the recovery of the proceeds of crime; and
 - (2) a confiscation order calculated in accordance with the provisions of the 2002 Act is proportionate to that aim.⁴⁸
- 5.46 Therefore, as Rudi Fortson QC concludes, “on that basis, a court order of any kind that is designed to achieve a particular result and which is made in accordance with

⁴⁴ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [2]; *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63 at [90]. See also *R v Jennings* [2008] UKHL 29, [2008] 1 AC 1046 at [13] and *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [55]; *R v Andrewes* [2020] EWCA Crim 1055 at [85].

⁴⁵ *R v Smith (David Cadman)* [2001] UKHL 68, [2002] 1 WLR 54; *R v X* [2007] EWCA Crim 2498, (2007) 151 SJLB 1434.

⁴⁶ R Fortson QC, “Commentary on *R v Box*” [2018] 7 *Criminal Law Review* 581.

⁴⁷ *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 WLR 675 at [80].

⁴⁸ *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57.

the relevant statute is 'proportionate'.⁴⁹ It was unsurprising therefore, he adds, that in *R v Box*⁵⁰ the Court of Appeal concluded that "in almost all cases an order made in accordance with the provisions of the Act will satisfy that test".

- 5.47 Following this case law, the essence of the criticism is that by focussing almost exclusively on whether the second limb of the test from the *de Freitas* case is satisfied, the importance of the third limb of the test is reduced to such an extent that the safeguard of proportionality really provides little safeguard at all.

The impact of a lack of clarity on the exercise of confiscation powers more generally

- 5.48 A lack of clarity of objectives can also affect decisions about how confiscation powers should be exercised more generally. For example, section 69 of POCA 2002 guides a court that it should exercise its powers "with a view to" the value of property being made available to satisfy the confiscation order.
- 5.49 In *Re L*⁵¹ the defendant owed just over £12,000 towards his confiscation order. The money was tied up in the form of a "tainted gift" made to a third party, the mother of the defendant's child. The money was used as a deposit on a property, and to pay solicitors' fees. As a matter of civil law, the gift could not be recovered by the defendant. The only avenue open to recover the money was for the prosecution to apply for an enforcement receiver to be appointed to realise the property.
- 5.50 The prosecution did not seek to appoint an enforcement receiver in connection with tainted gift, apparently because it was not considered to be "commercially worthwhile" to do so.⁵²
- 5.51 Not appointing a receiver may have been in accordance with section 69 if there would have been little left over after the receivership fees to be paid towards the confiscation order. However, what is arguably the primary objective of the confiscation regime would have been ignored, in that the value of defendant's proceeds of crime would still not have been recovered.

ANALYSIS: ARTICULATION OF STATUTORY AIMS

- 5.52 The courts have, on many occasions, identified the purpose(s) of the confiscation regime. As the issue has been well litigated, it could be argued that placing the objectives on a statutory footing would do no more than codify what is well-established principle and would therefore serve no useful purpose.
- 5.53 It is noteworthy, however, that because the objectives of the confiscation regime have not been placed on a statutory footing, the courts have variously described the legislation's objectives as being the deprivation of criminal benefit, deterrence, the disruption of crime and even punishment.⁵³

⁴⁹ R Fortson QC, "Commentary on *R v Box*" [2018] 7 *Criminal Law Review* 581 at [585].

⁵⁰ *R v Box* [2018] EWCA Crim 542, [2018] 4 WLR 134.

⁵¹ *Re L* [2010] EWHC 1531 (Admin).

⁵² *Re L* [2010] EWHC 1531 (Admin) at [15].

⁵³ See paragraphs 5.31-5.35 above.

- 5.54 To ascertain the objectives of the regime one has to consider a myriad of authorities, while adding qualifications to references to punishment that have been made.⁵⁴ If the appellate courts vacillate, it is perhaps safe to infer that the precise aim of the regime is not entirely clear.
- 5.55 We therefore consider that placing the aims of the regime on a statutory footing would serve not only to ensure that courts exercise their powers under the Act with a view to achieving those aims, but would also provide clarity and consistency as to the purpose of the regime.
- 5.56 Furthermore, placing the aims of the regime on a statutory footing would serve to assist the court in determining whether an order imposed is aligned with clearly stated aim(s) of the Act thus ensuring that any order imposed is proportionate.
- 5.57 In considering whether the codification of objectives into a confiscation statute would be an appropriate solution to inform the test of proportionality and to steer the exercise of confiscation powers, we first consider the extent to which there is precedent for the codification of aims to guide the courts. In doing so, we consider:
- (1) Articulations of legislative aims and steers within POCA 2002 itself.
 - (2) Legislative aims and steers articulated in other areas of the criminal law.
 - (3) Legislative aims articulated in proceeds of crime legislation in Australia and New Zealand.

Legislative aims and steers in POCA 2002

- 5.58 Earlier in this chapter, we explored the legislative steer found in section 69 of POCA 2002 to guide the court in its exercise of its powers in connection with restraint orders and receivership orders. There are two other sections within POCA 2002 (both outside of Part 2) which set out legislative objectives.

Section 240 of POCA 2002

- 5.59 Section 240 of POCA 2002 explains the purposes of Part 5 of POCA 2002.⁵⁵ Part 5 provides for the civil recovery of the proceeds of crime. The two purposes are:
- (1) to enable civil proceedings to be brought in the High Court to recover property that is, or represents, property obtained through unlawful conduct.
 - (2) to provide for the forfeiture of cash in summary proceedings before the magistrates' court.
- 5.60 Section 240(2) provides that the powers in Part 5 are exercisable "whether or not proceedings have been brought for an offence in connection with the property".

⁵⁴ In *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [2], the Supreme Court observed that the observations of Lord Steyn in *R v Rezvi* had been cited and followed many times, although Lord Steyn's reference to punishment needed some qualification.

⁵⁵ Proceeds of Crime Act 2002, explanatory notes 287 to 290.

- 5.61 Part 5 of POCA 2002 represented an extension of civil recovery powers. Such an extension was proposed in 2000 by chapter 5 of the Cabinet Office Performance and Innovation Unit Report on “Recovering the Proceeds of Crime”. That report noted that the powers were expected to be controversial because they concerned the forfeiture of assets from individuals to the state without a criminal conviction or finding to the criminal standard. The report referred to human rights safeguards that would be required to take the proposals forward and said that they should not perversely affect the priority of law enforcement agencies which should remain the prosecution and conviction of criminals.⁵⁶
- 5.62 It was perhaps this concern that led to the genesis of section 240, introducing the new powers and explicitly providing that they could be exercised independently of proceedings for an offence, and section 2 of the Act (which was replaced by section 2A) which provided for guidance to be given which stressed the importance of criminal investigations and proceedings.
- 5.63 Whilst section 240 sets out an intermediate purpose – to establish mechanisms for the civil forfeiture of the proceeds of crime – it does not identify the purposes that the mechanisms are to be employed to serve.

Section 2A POCA 2002

- 5.64 Section 2A, (which is in Part 1 of POCA 2002) was inserted into the Act by the Serious Crime Act 2007. It provides that the relevant authorities which are given powers under the Act (including prosecution authorities and law enforcement agencies) must exercise their functions in a way which they consider “best calculated to contribute to the reduction of crime.”
- 5.65 The section provides that the relevant authorities must have regard to certain guidance given to them, and that such guidance must indicate that the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings.⁵⁷
- 5.66 The Attorney-General and the Home Secretary have issued joint guidance pursuant to section 2A entitled “asset recovery powers for prosecutors: guidance and background note 2009”.⁵⁸ This guidance focusses on the question of when civil asset recovery powers should be used instead of seeking to obtain criminal convictions. Therefore, it provides little further insight into the aim of the 2002 Act overall or how it relates to the aim of contributing to the reduction of crime.⁵⁹

⁵⁶ Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000) p 72.

⁵⁷ Proceeds of Crime Act 2002, ss 2A(3) and (4).

⁵⁸ Attorney-General’s Office, *Asset recovery powers for prosecutors: guidance and background note 2009*, <https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009> (last visited July 2020).

⁵⁹ Reduction of crime may be achieved though by any or all of the aims of disruption, deterrence, punishment and disgorgement of the proceeds of crime. It does not follow that each must be standalone objectives of the confiscation regime.

Legislative aims and steers in other areas of the criminal law

Section 142 of the Criminal Justice Act 2003

5.67 Subsection 142(1) of the Criminal Justice Act 2003 provides that “any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing”:

- (1) the punishment of offenders;
- (2) the reduction of crime (including its reduction by deterrence);
- (3) the reform and rehabilitation of offenders;
- (4) the protection of the public; and
- (5) the making of reparation by offenders to persons affected by their offences.

5.68 The explanatory notes to the Act confirmed that this was the first time that the purposes of sentencing adults had been identified in statute.⁶⁰

5.69 There appears to have been little litigation generated by the introduction of this section. Section 142(1) was referred to in *AG’s reference no.43 of 2009 (Craig Joseph Bennett)*.⁶¹ In that case the Court of Appeal dealt with a number of cases relating to sentencing for firearms offences. Lord Judge CJ referred to the section and said that in it, none of the purposes of sentencing were pre-eminent. All applied to every case but as a matter of sentencing reality, whenever a gun was made available for use or used, public protection was the paramount consideration.⁶²

Rule 1 of the Criminal Procedure Rules 2015

5.70 Part 1, rule 1 of the Criminal Procedure Rules 2015⁶³ (as amended) contains what is referred to as the “overriding objective”:

- (1) The overriding objective of this procedural code is that criminal cases be dealt with justly.
- (2) Dealing with a criminal case justly includes –
 - (a) acquitting the innocent and convicting the guilty;
 - (b) dealing with the prosecution and defence fairly;
 - (c) recognising the rights of a defendant, particularly those under article 6 of the European Convention on Human Rights;

⁶⁰ Criminal Justice Act 2003, explanatory notes para 54.

⁶¹ *AG’s reference no.43 of 2009 (Craig Joseph Bennett)* [2009] EWCA Crim 1925, [2010] 1 Cr App R (S) 100.

⁶² Above at [3].

⁶³ SI 2015 No 1490.

- (d) respecting the interests of witnesses, victims and jurors, and keeping them informed of the progress of the case;
- (e) dealing with the case efficiently and expeditiously;
- (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
- (g) dealing with the case in ways that take into account –
 - (i) the gravity of the offence alleged,
 - (ii) the complexity of what is in issue,
 - (iii) the severity of the consequences for the defendant and the others affected, and
 - (iv) the needs of other cases.

5.71 The “overriding objective” in the Criminal Procedure Rules is not a standalone “purpose” provision, but it does provide a steer as to how the court should approach the day to day management of cases.⁶⁴ The court must further the overriding objective when exercising its powers under the procedure rules, applying a practice direction or interpreting a rule or practice direction.⁶⁵ Participants in a case are required to prepare and conduct the case in accordance with the overriding objective.⁶⁶ However, the overriding objective is not intended to influence how the courts might interpret or give effect to primary legislation.⁶⁷

5.72 The existence of the overriding objective is sometimes significant. In *R (Director of Public Prosecutions) v Sunderland Magistrates’ Court*⁶⁸ the High Court quashed a magistrates’ court’s refusal to grant an adjournment. The circumstances were that the prosecution and court had believed that a witness had not attended court on the day of trial. The defendant (who was the witness’s ex-partner) was aware she was present in the building but “in flagrant breach of his duties to the court under the combination of Crim PR rr 1.1 and 1.2.... he deliberately chose not to alert the court to the true position.” The obligation on a defendant to alert the court and prosecution of the availability of a witness against him is not something that would have been likely to be found to exist prior to the introduction of the overriding objective.

⁶⁴ Criminal Procedure Rules, r 3.2.

⁶⁵ Criminal Procedure Rules, r 1.3.

⁶⁶ Criminal Procedure Rules, r 1.2.

⁶⁷ *Hubner v Czech Republic* [2009] EWHC 2929 (Admin).

⁶⁸ *R (Director of Public Prosecutions) v Sunderland Magistrates Court* [2018] EWHC 229 (Admin) [2018], 1 WLR 2195.

Legislative aims articulated in other jurisdictions

Australia

5.73 In Australia, section 5 of the Proceeds of Crime Act 2002 (Commonwealth) details the “principal objects” of the Act as follows:

- (1) to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth or the non-governing Territories; and
- (2) to deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and
- (3) to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived or realised, directly or indirectly, from certain offences; and
- (4) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and
- (5) to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and
- (6) to undermine the profitability of criminal enterprises; and
- (7) to enable law enforcement agencies effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; and
- (8) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and
- (9) to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the self-governing Territories to be enforced in the other Territories.

5.74 The legislation clearly details the purpose of the regime, which is focussed on stripping criminals of their assets, deterring crime and punishing offenders. There are numerous examples of the courts using the principal objects of the regime to derive assistance as to how to exercise their powers under the Act.⁶⁹

5.75 In *Commonwealth Director of Public Prosecutions v Little*⁷⁰ Robin J indicated explicitly that the court was entitled to consider the principal objects of the Act as a means to interpret the legislation. Ultimately, Robin J concluded her judgment in the following

⁶⁹ See, for example, *Commissioner of the Australian Federal Police v Hart*; *Commonwealth of Australia v Yak 3 Investments Pty Ltd*; *Commonwealth of Australia v Flying Fighters Pty Ltd* [2018] HCA 1 and *The Commissioner of the Australian Federal Police v Pharmacy Depot Hurstville Pty Ltd (in liq)* [2019] NSWSC 643.

⁷⁰ *Commonwealth Director of Public Prosecutions v Little* [2006] QDC 129.

manner: “Mr Little correctly says that he is being punished twice over for this offence. That is what the Act clearly intends”.

New Zealand

5.76 In New Zealand, section 3 of the Criminal Proceeds (Recovery) Act 2009 details the purpose of the Act:

- (1) The primary purpose of this Act is to establish a regime for the forfeiture of property—
 - (a) that has been derived directly or indirectly from significant criminal activity; or
 - (b) that represents the value of a person’s unlawfully derived income.
- (2) The criminal proceeds and instruments forfeiture regime established under this Act proposes to—
 - (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and
 - (b) deter significant criminal activity; and
 - (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; and
 - (d) deal with matters associated with foreign restraining orders and foreign forfeiture orders that arise in New Zealand.

5.77 There are several examples of the New Zealand courts referring to the purpose of the Act to guide their determinations.⁷¹ In 2016 the New Zealand Supreme Court relied upon section 3 of the Act to frame its judgment in the matter of *Marwood v Commissioner of Police*.⁷² It was held that:

the aspirational language of s 3(2)(a) gives a clear and emphatic signal as to the legislative purpose...⁷³ section 3(2) shows that the CPRA’s objective is to eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity or to deter such activity. The evidence in question tends to prove Mr Marwood’s participation in significant criminal activity. Forfeiture of benefits derived from that activity would be entirely consistent with the statutory purpose.

5.78 This decision focuses heavily on the purpose of the Act and relies on this provision to aid in the interpretation of the legislation more broadly.

⁷¹ *Elliott v R* [2011] NZCA 386, [2011] NZLR 811; *Hayward v Commissioner of Police* [2014] NZCA 625.

⁷² *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260.

⁷³ *Marwood v Commissioner of Police* [2016] NZSC 139 at [12], [2017] 1 NZLR 260.

Conclusion

- 5.79 There are clear precedents for the express articulation of the purposes or aims of a statute (or part of a statute) both within and outside criminal law within this jurisdiction. This includes an express articulation of the “purpose” of legislation in connection with the civil forfeiture regime under Part 5 of POCA 2002.
- 5.80 Outside this jurisdiction, both Australia and New Zealand have incorporated a series of “principal objects” or “purposes” of their respective proceeds of crime legislation, which have informed the judgments of their courts.
- 5.81 The articulation of the “purpose” of the proceeds of crime legislation overseas has meant that courts do not need to spend time considering whether (for example) preventing people from profiting from crime is the primary purpose of the statute or whether the purpose is punitive. The purposes are clearly articulated and the courts are able simply to apply those purposes in coming to their judgments.
- 5.82 We consider that, for the reasons set out earlier in this chapter, not only is it desirable for the objects of the legislation to be expressly incorporated into statute, but also that there is no fundamental impediment to doing so.

Consultation Question 1.

- 5.83 We provisionally propose that any amended confiscation legislation should include the objectives of the regime.
- 5.84 Do consultees agree?

ANALYSIS: WHAT SHOULD THE PURPOSES OF THE REGIME BE?

- 5.85 Having provisionally proposed that it is desirable to place on a statutory footing the aims of the regime, we now consider what those objectives or purposes should, and should not be. For the reasons that we set out below, our provisional proposal is that the aims:
- (1) should include
 - (a) depriving a defendant of his or her benefit from criminal conduct, within the limits of his or her means.
 - (b) the compensation of victims, where such compensation is to be paid from confiscated funds; and
 - (c) the deterrence and disruption of criminality.
 - (2) should not include punishment;

Depriving defendants of their benefit from criminal conduct, within the limits of their means.

- 5.86 We consider that it is largely uncontroversial that the primary objective of every confiscation regime to date has been to take away from a defendant a sum equivalent

to that which has been gained from crime, thereby holding the defendant to account for his or her criminal gains.⁷⁴ We therefore consider that such a primary objective ought to be articulated in any confiscation legislation. We have provisionally framed this objective with three component parts:

- (1) “depriving”;
- (2) “of...benefit from criminal conduct”; and
- (3) “within the limits of their means”

Depriving

- 5.87 An important distinction in framing any objective in connection with holding a defendant to account for his or her proceeds of crime is that between deprivation (in the sense of taking money from the defendant) and recovery (in the sense of payment over of money to the state or restoration of money to a victim).
- 5.88 There are cases in which the distinction between deprivation and recovery is minimised, because the disgorgement will result in the recovery of the proceeds of crime by the state or by victims.⁷⁵
- 5.89 However, in other cases the distinction bears greater significance. For example, in the case of *Re L* cited earlier in the chapter, the prosecution was reluctant to consider appointing an enforcement receiver to recover £12,000 of equity in a property because it was not commercially viable to do so.⁷⁶ The cost of receivership is a factor that may impact on the ultimate *recovery* of the proceeds of crime. If a high percentage of the value realised by a receiver is taken up in receivership fees (however justifiably), little will actually be recovered to be paid towards the confiscation order. However, in the absence of the appointment of a receiver the defendant would not be *deprived* of his proceeds of crime.
- 5.90 It is arguable that had a clear aim of the statute been *deprivation* of the proceeds of crime the position would have been different the case for appointment of an enforcement receiver would have been stronger.
- 5.91 A focus on deprivation rather than recovery would serve to assist with the perceptions of the Asset Recovery Incentivisation Scheme (“ARIS”) highlighted in Chapter 4. In that chapter we detail how the ARIS scheme allocates 18.75% of confiscated funds to the investigation and prosecution authority undertaking a case and how the scheme

⁷⁴ *Hansard* (HL) 4 March 1986, vol 472, col 91; *Hansard* (HL) 27 April 1987, vol 486, col 1269; Criminal Justice: The Way Ahead (2001) Cm 5074.

⁷⁵ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294; *R v Jawad* [2013] EWCA Crim 644, [2013] 1 WLR 3861; *R v Hursthouse* [2013] EWCA Crim 517, [2013] WTLR 887; *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663; *R v Louca* [2013] EWCA Crim 2090, [2014] 2 Cr App R S 9; *R v McGarry* [2014] EWCA Crim 2252; *R v Harvey* [2015] UKSC 73, [2017] AC 105.

⁷⁶ *Re L* [2010] EWHC 1531 (Admin) at [15].

has been perceived by the Bar⁷⁷ and the judiciary⁷⁸ as creating the perception of potential conflicts of interest in decision-making.⁷⁹ As the Supreme Court remarked in *R v Harvey* “it should be emphasised that such confiscation is not designed to restore money to the state...it is designed to deprive the offender”.⁸⁰

- 5.92 Restoration of money to the state may be a side-effect of the deprivation, but it should not be the primary driver behind confiscation. The House of Lords and Supreme Court have repeatedly emphasised the importance of deprivation to the confiscation regime.⁸¹ A clear legislative statement emphasising the importance of deprivation would clarify the position. Such a clarified position would guide the exercise of powers under Part 2 and could serve to ameliorate concerns about conflicts of interest.
- 5.93 A focus on deprivation rather than recovery may have an impact on the compensation of victims. However, later in the chapter we consider whether such concerns could be met through a specific provision relating to victims.

The defendant's benefit from criminal conduct

- 5.94 As we discuss in part 4 of this Consultation Paper, POCA 2002 refers to what is obtained from criminal conduct as “benefit”. We consider that it is important that any definition of benefit should stand alone as a clear and comprehensive definition and that therefore any statement of objectives should simply refer to, rather than seek to define, benefit. We consider the precise definition of benefit in Chapter 12.

Deprivation within a defendant's means

- 5.95 In Chapter 15 we discuss in detail why the law should continue to seek to deprive a defendant of their benefit from their criminal conduct within the limits of his or her means. As the House of Lords observed in *R v May* it is a “very important” principle that “however great the payments a defendant may have received or the property he may have obtained, he cannot be ordered⁸² to pay a sum which it is beyond his means to pay”.⁸³
- 5.96 Reflecting the observations of the House of Lords, we consider that appropriate reference to the defendant's means would serve to set the boundaries of the regime and reflect the fact that the regime is not punitive.

⁷⁷ See, 2 Bedford Row, *Are the police taking the ARIS?*, <https://www.2bedfordrow.co.uk/are-the-police-taking-the-aris/> (last visited July 2020).

⁷⁸ *R v The Knightland Foundation* [2018] EWCA Crim 1860; *Wokingham Borough Council v Scott* [2019] EWCA Crim 205, [2020] 4 WLR 2.

⁷⁹ *R (Kombu) v The Crown Court at Wood Green* [2020] EWHC 1529 (Admin).

⁸⁰ *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [55].

⁸¹ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at 48(6); *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [9]; *R v Harvey* above at [55].

⁸² This statement appears to be intended to reflect section 9(1)(a) of POCA 2002, which prescribes that the amount to be repaid reflects the value of the defendant's “free property”. However, it neglects s 9(1)(b), by virtue of which the value of “tainted gifts” in the hands of third parties must be repaid by the defendant. This is so regardless of whether the defendant has independent means to do so.

⁸³ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [41].

Consultation Question 2.

- 5.97 We provisionally propose that the principal objective of the regime should be “depriving defendants of their benefit from criminal conduct, within the limits of their means.”
- 5.98 Do consultees agree?

Compensation

- 5.99 The objective of compensating victims was never initially considered an objective of the confiscation regime. Although one of the statutory aims of sentencing includes the making of reparation by offenders,⁸⁴ when the Hodgson Committee recommended the introduction of a confiscation regime it considered that victims could seek redress through a separate relevant compensation regime.⁸⁵
- 5.100 Compensation was not addressed in the Drug Trafficking Offences Act 1986. However, even at that time there was a recognition that victims may have suffered financially as a result of criminality, and that the confiscation regime could go some way in redressing the balance between the financial position of the criminal and the victim.⁸⁶
- 5.101 The Criminal Justice Act 1988 was the first confiscation regime to involve non-drug offending, and was therefore more likely to encompass cases involving an identifiable victim who had suffered financial loss. The CJA 1988 and POCA 2002 both recognised that victims should be compensated for their losses, even when a confiscation order was made.
- 5.102 The movement away of the confiscation regime from a process entirely separate and distinct from a compensation regime is recognised in the Home Office 2018 Serious and Organised Crime Strategy, which states that “the power to locate and seize money made by criminals (known as asset recovery) can...compensate victims for their ordeals”.⁸⁷
- 5.103 In broad terms, POCA 2002 prioritises compensation over confiscation:
- (1) One of the only circumstances in which a judge may reduce the amount payable under a confiscation order is where a victim intends to pursue civil proceedings to recover their losses. This discretion ensures that funds are available to pay the victim.⁸⁸

⁸⁴ Criminal Justice Act 2003, ss 142(1)(b) and (e).

⁸⁵ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 71. The statutory aims of sentencing articulation of sentencing aims in the Criminal Justice Act 2003 came nearly 20 years after the Hodgson Committee Report.

⁸⁶ *Hansard* (HC) 18 January 1988, vol 145, col 736.

⁸⁷ *Home Office*, Serious and Organised Crime Strategy (2018) Cm 9718, para 65.

⁸⁸ Proceeds of Crime Act 2002, s 6(6).

- (2) Where a defendant has insufficient funds to satisfy both a compensation order and confiscation order, funds may be deducted from the confiscation order to pay compensation.⁸⁹
- (3) Sums collected under an order are paid first towards compensation and are only credited against the order itself if other priority debts have been satisfied.⁹⁰

5.104 Taken together, it is evident that the Act prioritises compensation over confiscation but there is no standalone provision to this effect. The current legislative steer in section 69(2) of POCA 2002 makes no mention of preserving value to pay any compensation order that may be imposed. This is perhaps unnecessary because compensation is prioritised over confiscation and if the value of an asset is maintained a victim will be compensated in any event. Nevertheless, we believe that it is important that the priority status of victims is properly reflected in the legislative aims.

5.105 A stark example of the court slipping into error serves to highlight the point that the position of victims is perhaps not adequately made plain by the statutory provisions.⁹¹ The victim's employee had stolen £15,000 and a confiscation order was made for £15,000 but no direction was made that the funds be paid to the victim. Accordingly, the money recovered would be retained by the state.⁹² The judge had erred in believing that the Act required him to take account of the confiscation order he had made, and erroneously believed that a compensation order would involve paying the same sum twice over.

5.106 The victim challenged the decision by judicial review on the basis that the Crown Court judge had imposed a confiscation order but failed to impose a compensation order due to an error of law. The challenge was unsuccessful because it concerned the Crown Court's jurisdiction in matters relating to trial on indictment; a matter not susceptible to judicial review. The victim's remedy was to seek a judgment in the civil court.

5.107 The proposals we detail at Chapter 24, will go some way to ensuring that an error of this type does not occur in future. However, we believe there is force in strengthening the statutory provisions to ensure a greater focus is placed on the compensation of victims.

5.108 Enshrining in law a duty to consider victims is particularly important in light of our provisional proposal (detailed at Chapter 26) that judges ought to be afforded a discretion to release restrained funds to meet a defendant's legal expenses. The power is subject to judicial oversight and again judges would benefit from an articulation of statutory objectives to assist them in discharging their functions under Part 2 of POCA 2002. A judge would be required not only to consider preserving an asset to meet any confiscation order but must also consider if the dissipation of funds

⁸⁹ Proceeds of Crime Act 2002, ss 13(5) and (6).

⁹⁰ Proceeds of Crime Act 2002, s 55(5).

⁹¹ *R (Faithfull) v Ipswich Crown Court* [2007] EWHC 2763 (Admin), [2008] 1 WLR 1636.

⁹² See Chapter 4.

via legal expenses would adversely impact on the likelihood of a victim receiving compensation.

Consultation Question 3.

5.109 We provisionally propose that an objective of the regime should be ensuring the compensation of victims, where such compensation is to be met from confiscated funds.

5.110 Do consultees agree?

The disruption and deterrence of criminality

5.111 The draconian impact of a confiscation order is often aligned with an express aim of sentencing, namely the reduction of crime through deterrence.⁹³ In the case of *R v Sekhon*, Lord Woolf CJ observed that:

One of the most successful weapons which can be used to discourage offences that are committed in order to enrich the offenders is to ensure that if the offenders are brought to justice, any profit which they have made from their offending is confiscated.⁹⁴

5.112 The comments of the Lord Chief Justice are an accurate reflection of the rationale for introducing proceeds of crime legislation in both the law of England and Wales and internationally,⁹⁵ namely to act as a deterrent to criminality.

5.113 The Drug Trafficking Offences Act 1986 was introduced as part of the government's strategy to tackle drug offending. When the Bill was put before the House of Commons, the "fight against drugs"⁹⁶ was described as the most important strand of public policy, and confiscation was viewed as a "sharp new weapon"⁹⁷ in that fight. As one MP put it:

This measure will put a chill on the master criminal. It is no good him working for nothing. If we make it hot enough for him, he may try another country or decide to turn to legal work, although I doubt it.⁹⁸

5.114 The Criminal Justice Act 1988 was similarly intended to focus on serious criminality. The purpose of a minimum threshold of £10,000 for a confiscation order was to allow the courts to "confine their attention to the bigger fish."⁹⁹

⁹³ Criminal Justice Act 2003, ss 142(1)(b).

⁹⁴ *R v Sekhon* [2002] EWCA Crim 2954, [2003] 1 WLR 1655.

⁹⁵ See the summary in *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [1]; *R v Harvey* [2015] UKSC 73, [2016] 2 WLR 37.

⁹⁶ *Hansard* (HC) 21 January 1986, vol 90, col 241.

⁹⁷ Above.

⁹⁸ Above.

⁹⁹ *Hansard* (HL) 27 April 1987, vol 486, col 1287.

5.115 The report of the Cabinet Office Performance and Innovation Unit that preceded POCA 2002 recognised that deterrence also has a place at a lower level:

Local criminals are dangerous in many ways...in the absence of better alternatives, they act as the role models for local young people and define youth attitudes to crime...by taking from these criminals the profits they make from crime, the basis of their lifestyle is removed. In this way, “a comprehensive, effective and routine application of asset removal will reinforce the message...that crime does not pay.”¹⁰⁰

5.116 Proceeds of crime legislation therefore has a clear role to play in deterring criminality,¹⁰¹ both of a serious and more “routine” nature. This has been recognised most recently in the Home Office 2018 Serious and Organised Crime Strategy.¹⁰²

5.117 Crime may also be reduced through disruption of criminal activity. The report of the Cabinet Office Performance and Innovation Unit that paved the way for POCA 2002 summed up the impact that effective confiscation of criminal assets could have in this regard:

Removing assets from criminals can disrupt criminal organisations in much the same way that excessive taxation undermines legitimate business, by cutting into profits, reducing the availability of working capital for existing enterprises and removing reserves for start-up of new criminal enterprises.¹⁰³

5.118 Confiscation has therefore been recognised by the Home Office in its two most recent Serious and Organised Crime Strategies¹⁰⁴ and by the courts¹⁰⁵ as a potentially valuable tool to disrupt criminality.

5.119 We are of the provisional view that the deterrence and disruption of crime are important aspects of the regime and so ought to be included in any express statement of aims.

¹⁰⁰ Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), paras 3.6 to 3.7.

¹⁰¹ *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099 at [14].

¹⁰² Home Office, Serious and Organised Crime Strategy (2018) Cm 9718, para 65.

¹⁰³ Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), para 3.10.

¹⁰⁴ Home Office, Serious and Organised Crime Strategy (2013) Cm 8175, p 34, Home Office, Serious and Organised Crime Strategy (2018) Cm 9718, para 65;.

¹⁰⁵ *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099 at [14].

Consultation Question 4.

5.120 We provisionally propose that the statutory objectives of the confiscation regime should include:

- (1) deterrence; and
- (2) disruption of crime.

5.121 Do consultees agree?

Punishment

5.122 The notion that confiscation is a form of punishment may be a reflection of its place as “part of the sentencing process”.¹⁰⁶ The statutory aims of sentencing expressly include the punishment of offenders.¹⁰⁷

5.123 As the ECtHR ruled in the context of drug trafficking in *Welch v the United Kingdom*, the confiscation regime does have aspects to it which provide a “strong indication of punishment”:

- (1) The sweeping statutory assumptions...that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise;
- (2) the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit;
- (3) the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused [for example, a minor conspirator may not gain as much from crime as a key conspirator]; and
- (4) the possibility of imprisonment in default of payment by the offender.¹⁰⁸

5.124 Early confiscation case law treated confiscation akin to punishment, in the sense that when determining the length of any default term of imprisonment for non-payment of a confiscation order, the Court of Appeal considered the severity of the defendant's overall punishment (or “totality” of the overall punishment) to be relevant.¹⁰⁹

5.125 Nevertheless, punishment is only one aspect of sentencing. The case law generally recognises this and draws a distinction between a financial penalty by way of a punishment (a fine) and a financial order to disgorge the profits from crime (a

¹⁰⁶ *R v Rezvi* above at [13]; *R v Benjafield* [2002] UKHL 2, [2003] 1 AC 1099 at [56].

¹⁰⁷ Criminal Justice Act 2003, s 142(1)(a); see Sentencing Bill 2019-21 (HL) 105, clause 57.

¹⁰⁸ *Welch v the United Kingdom* (1995) 20 EHRR 247, [1995] CLY 2650.

¹⁰⁹ See Rudi Fortson QC, “Commentary on *R v S*” [2019] 10 *Criminal Law Review* 883 at 887, citing *R v Siddique* [2005] EWCA Crim 1812; *R v Qema* [2006] EWCA Crim 2806; *R v Valentine* [2006] EWCA Crim 2717; *R v Cukovic* (1996) 1 Cr App R (S) 131; *R v Walpole* (19 June 1997, unreported) and *R v Atlan* (20 February 1997, unreported).

confiscation order), which may have punitive effects.¹¹⁰ Such punitive effects “may not be out of place in a scheme for stripping criminals of the benefits of their crimes”.¹¹¹

5.126 More recent case law has distanced itself from the earlier approach that required consideration of totality.¹¹² The newer approach was summed up by Rudi Fortson QC in the following way:

when fixing the default term the court was not to be influenced by the overall totality of the sentence passed for the crime plus the default term. The purpose of a sentence of imprisonment is to punish the defendant for an offence; the purpose of the default term of imprisonment is to ensure compliance with the confiscation order.¹¹³

5.127 We are therefore of the view that although confiscation may have a draconian impact upon a person and his or her lifestyle, it is erroneous to consider punishment to be a specific “objective” of the confiscation regime. The confiscation regime is “not intended to be retributive”.¹¹⁴ As the Supreme Court noted in the case of *R v Waya* “Lord Steyn’s reference to punishment [in *Rezvi*]¹¹⁵ needs some qualification”.¹¹⁶

5.128 Punishment for the criminality before the court is achieved by sentencing the substantive offence(s) before the court. As we discuss in Chapter 12, criticisms have been made that inflated determinations of “benefit” under the current regime muddy the waters of culpability (dealt with through sentencing) and financial accountability (which should be dealt with by confiscation).¹¹⁷

5.129 Whilst stripping the proceeds of crime has a punitive quality, we are of the provisional view that punishment should not be a driving force behind the confiscation regime. To reflect both this provisional conclusion and to clarify the mixed messages coming from the courts about punishment as an aim of the regime set out earlier in the chapter, we provisionally propose that punishment is omitted from any statutory “aims” set out in any amended confiscation legislation.

5.130 We see no contradiction between excluding “punishment” as an aim of the regime and our provisional proposal to include “deterrence and disruption” as an aim. Whilst a punitive regime is likely to deter and disrupt criminality, ultimately deterrence and disruption may also result from a regime which goes no further than is necessary to hold the defendant to account for his or her financial gains from crime. Put plainly,

¹¹⁰ *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63.

¹¹¹ *R v Smith (David Cadman)* [2001] UKHL 68, [2002] 1 WLR 54 at [23].

¹¹² See Rudi Fortson QC, “Commentary on *R v S*” [2019] 10 *Criminal Law Review* 883 at 887, citing *R v Mills* [2018] EWCA Crim 944, [2019] 1 WLR 192; *R v Castillo* [2011] EWCA Crim 3173, [2012] 2 Cr App R (S) 36, [2012] *Criminal Law Review* 401; *R v Pigott* [2009] EWCA Crim 2292, [2010] *Criminal Law Review* 153; *R v Price* [2009] EWCA Crim 2918, [2010] *Criminal Law Review* 522 and *R v Smith* [2009] EWCA Crim 344.

¹¹³ R Fortson QC, “Commentary on *R v S*” [2019] 10 *Criminal Law Review* 883 at 887.

¹¹⁴ Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), para 4.11.

¹¹⁵ *R v Rezvi* [2003] [2002] UKHL 1, 1 AC 1099.

¹¹⁶ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [2].

¹¹⁷ R Fortson QC, “Commentary on *R v Fulton*” [2019] 7 *Criminal Law Review* 636 at 638.

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”.

Consultation Question 5.

5.131 We provisionally propose that punishment is omitted from any statutory objectives of any amended confiscation legislation.

5.132 Do consultees agree?

Relationship between the objectives

5.133 We consider that compensation, deterrence and disruption are secondary objectives, which are indirectly and positively achieved when the primary objective of recovering the defendant’s benefit from criminal conduct is satisfied.

5.134 The secondary objectives may also serve to guide the court in its application of the primary objective. For example, in Chapter 12 we set out our proposed model for determining a defendant’s “benefit” from crime. Under our proposed model, the court should consider:

- (1) what the defendant gained as a result of or in connection with the criminal conduct for which he was convicted; and
- (2) the defendant’s intention in connection with that gain.

5.135 On the face of it, the second limb of our proposed “benefit” test could mean that a court is permitted to reduce a defendant’s benefit figure with reference to the expenses that he or she incurred in committing crime. As we set out in Chapter 12 (and reflecting the current law)¹¹⁸ we do not propose an alteration to the existing law to permit the offsetting of expenses.

5.136 Whilst the primary objective of facilitating recovery of benefit taken alone could potentially allow the defendant to offset expenses, the secondary objective of deterring and disrupting crime serves to guide and inform. For example, a drug-dealer who submitted that the purchase of weapons to protect his or her business, or a company’s use of bribes should be offset against the cost of his or her criminality should not be permitted to do so, because crime must be deterred and disrupted.

THE PROPOSALS IN CONTEXT

Does the proposal to put the aims of confiscation on a statutory footing affect proportionality?

5.137 Our reforms would serve to guide the courts in the exercise of their powers under the Act. A court would still be required to impose an order that is proportionate in accordance with the aims of the Act. The purpose of the legislation would, however,

¹¹⁸ *R v Smith* [1989] 1 WLR 765, (1989) 89 Cr App R 235; *R v Simpson* [1998] 2 Cr App R (S) 111, [1998] *Criminal Law Review* 292.

be clear and the court would be assisted in discharging its functions in a proportionate manner.

Would this mean that the legislative steer in section 69 (2) would be confined to history?

5.138 At paragraphs 5.127 – 5.130 above, we discussed the longstanding legislative steer now found at section 69(2) of POCA 2002. The steer has assisted courts, over many years, to discharge its functions in respect of restraint, search and seizure and the appointment of receivers. The steer is widely accepted to be an important provision and has operated effectively without controversy.

5.139 We recognise that the exercise of discrete powers under POCA 2002 may require a more nuanced and targeted legislative steer. Accordingly, our proposal to place the objectives of the regime on a statutory footing would serve to supplement, rather than replace, the legislative steer in section 69(2).

Part 3: Preparing for the Confiscation Hearing

INTRODUCTION TO PART 3

In this section of the consultation paper we consider the preliminary stages of the confiscation process. The section comprises chapters on:

Postponement of confiscation (Chapter 6);

Timetabling of confiscation (Chapter 7);

Early resolution of confiscation (Chapter 8);

The incentivisation of agreements (Chapter 9) and

The appropriate forum for determination of confiscation proceedings (Chapter 10).

These chapters, when taken together, identify what we consider to be overarching deficiencies in the process for the active management and preparation of a confiscation hearing. We consider criticisms of the legislative and procedural framework for the active management and preparation of the confiscation hearing. We then make proposals about how the law and procedure could be better used to make more efficient use of time and resources and to facilitate the making of realistic and enforceable confiscation orders.

Chapter 6: Postponement

INTRODUCTION

- 6.1 This chapter considers what is currently known as “the postponement” of confiscation proceedings, pursuant to the Proceeds of Crime Act 2002 (“POCA 2002”).
- 6.2 Procedural irregularities involving the current 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”.¹
- 6.3 In this chapter we explore the development of the law, problems with the current regime, steps taken to remedy the issues and our proposals for reform.
- 6.4 By way of overview, we provisionally propose that amended legislation would state that:
- (1) Sentencing will take place prior to confiscation proceedings being resolved unless the court otherwise directs.
 - (2) The court will have a discretion to impose financial penalties and forfeiture orders prior to confiscation proceedings being resolved.
 - (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 should be a six month maximum period between sentencing a defendant and the setting of a timetable for confiscation, or dispensing with the need for a timetable and making a confiscation order. 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 a confiscation order but might decline to make an order if it would be unfair to do so. However, before declining to impose an order, the court would have to 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.

¹ *R v Guraj* [2016] UKSC 65, [2016] 1 WLR 22 at [36].

THE LAW ON POSTPONEMENT OF CONFISCATION PROCEEDINGS

- 6.5 To understand properly the difficulties with the present system it is necessary to examine the current position and how the law has evolved to reach it.

Sequence of events under the original confiscation regimes

- 6.6 It was originally envisaged that a confiscation order would be imposed before a defendant was sentenced and the legislation was drafted with this sequence of events in mind.² 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. Delay in imposing sentence offends established principles that sentencing ought to take place as soon as possible after conviction to provide finality for both defendants and victims.³
- 6.7 To address this problem, legislation was enacted in 1993 which permitted confiscation proceedings to be postponed and sentence to be imposed far earlier in the process.⁴ Legislation was required because confiscation proceedings are ancillary to the main criminal proceedings⁵ and as such the court does not have any powers at common law to postpone confiscation proceedings.⁶

Features of the Pre-POCA 2002 postponement regimes

- 6.8 The legislation prior to the Proceeds of Crime Act 2002 obliged the court to proceed with confiscation proceedings if the prosecutor served written notice. However, if no notice was served, the court could still proceed of its own motion.⁷ Proceedings could be postponed if the court required further information before considering whether the defendant had benefitted from crime or the recoverable amount. The court was able to, "...for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify".⁸
- 6.9 The power to postpone was for a maximum of six months unless there were exceptional circumstances.⁹
- 6.10 Confiscation proceedings are criminal proceedings within the meaning of article 6(1) of the European Convention on Human Rights.¹⁰ They are part of the process of

² Criminal Justice Act 1988, s 72(4).

³ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8]; *R v Sekhon* [2002] EWCA Crim 2954, [2003] 1 WLR 1655 at [10].

⁴ Criminal Justice Act 1993.

⁵ *R v Sekhon* [2002], above, at [21(i)].

⁶ *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340.

⁷ Criminal Justice Act 1988, s 71.

⁸ Criminal Justice Act 1988, s 72A.

⁹ Criminal Justice Act 1988, s 72A(3) and Drug Trafficking Act 1993, s 3.

¹⁰ Article 6(1) provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

sentencing after conviction¹¹ and a defendant is therefore entitled to a fair and public confiscation hearing within a reasonable time.¹² In order to respect the defendant's fair trial rights, the confiscation legislation imposed time limits for the postponement of confiscation.¹³ The original confiscation regimes prescribed that confiscation proceedings could be postponed for a maximum of six months but a longer period was permissible if there were exceptional circumstances.¹⁴

- 6.11 Prior to the enactment of POCA 2002, there were certain financial penalties and forfeiture orders that could not be imposed until confiscation proceedings were resolved.¹⁵ This prohibition was intended to ensure that all financial orders were made at the same time, once the court had detailed information as to a defendant's finances.
- 6.12 The complexity of the process led to a series of appeals based on non-compliance with the statutory scheme. Examples included exceeding the permitted period to resolve proceedings in the absence of exceptional circumstances, defects in the prosecutor's written notice and postponement to a mention hearing as opposed to a final hearing.¹⁶ The series of appeals led to uncertainty in relation to the operation of the regime.
- 6.13 In one notorious case involving a large timeshare fraud, a confiscation order exceeding £32 million was quashed.¹⁷ The quashing of a substantial confiscation order owing to a procedural defect in the process could be considered to be contrary to the fundamental aims of the confiscation regime: the recovery of the financial benefit obtained from criminal conduct, the deterrence of the commission of further offences and the reduction of the profits available to fund further criminal enterprises.¹⁸
- 6.14 It has been observed that the postponement of confiscation proceedings (under the regimes prior to POCA 2002) "gave rise to a small mountain of conflicting case law, which led to confiscation orders being quashed, sometimes for bizarre reasons."¹⁹
- 6.15 In *R v Soneji*²⁰ the House of Lords held that the plain purpose of the postponement provisions under the pre-POCA 2002 legislation was to ensure the overall effectiveness of the sentencing process and to enable sentencing to take place

¹¹ A confiscation order is a sentence for the purposes of the Criminal Appeal Act 1968; Criminal Appeal Act 1968, s 50 was amended by Proceeds of Crime Act 2002, s 456, sch 11 paragraph 4(3). In Chapter 5 we discuss the objectives and purpose of the confiscation regime.

¹² *R v Briggs-Price* [2009] UKHL 19, [2009] 1 AC 1026.

¹³ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [30].

¹⁴ See, for example, Criminal Justice Act 1988, s 72A(1)(3) (as amended).

¹⁵ Proceeds of Crime Act 2002, s 72A and s 72(5)(b) and (c).

¹⁶ *R v Knights* [2005] UKHL 50, [2006] 1 AC 368 at [17] – [20]; and *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [13] for summaries of reported appeals.

¹⁷ *R v Palmer* [2002] EWCA Crim 2202, [2003] 1 Cr App R (S) 112.

¹⁸ Proceeds of Crime Act 2002, explanatory notes, para 4; and *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [2].

¹⁹ Dr David Thomas QC, "Case commentary on CPS Swansea v Gilleeney" [2009] *Criminal Law Review* 455.

²⁰ *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340 at [36] and [68].

promptly. The House of Lords held that a confiscation order may still be made where there has been a failure to comply with the statutory procedural provisions, if making the order has not caused injustice to the defendant.

6.16 This approach did not render the effect of the statutory time limit to complete proceedings (then six months) entirely redundant. The court, where necessary, could stay proceedings as an abuse of process.²¹ Ultimately, the public interest in not allowing a convicted criminal to evade confiscation proceedings due to procedural errors had to be considered.²²

6.17 Parliament also reacted by enacting section 14(11) of POCA 2002 which provides:

a confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.²³

6.18 There was no equivalent to section 14(11) in the previous regimes. The purpose of section 14(11) was explained by the Lord Chancellor who, in the course of moving the Proceeds of Crime Bill in the House of Lords,²⁴ explained that section 14(11) was:

designed to stop confiscation orders from being quashed merely because some procedural error has taken place in the application of the postponement procedures. I shall, if I may, provide your Lordships with a little background on this occasion, as it is directly relevant to the amendments.

As your Lordships will be aware, the Bill amends the postponement regime in the existing legislation... . It is important to understand, however, that the basic mechanics of the postponement regime envisaged by the Bill remain rather similar to those in the existing legislation.

Unfortunately, it is becoming increasingly clear that the courts are finding this legislation difficult to operate. A string of appeal cases testifies to the fact that defendants regularly attempt to have the confiscation order overturned on the ground that the postponement procedures were not applied properly by the court. Confiscation orders are being lost as a result. The case of *Woodhead*²⁵ is a good example. In that case, the postponement procedures had been followed to the letter. However, the Court of Appeal overturned a confiscation order of £200,000 on the grounds that the judge had not shown that he was exercising his discretion when agreeing to the postponement.

6.19 It may have been thought that the decision of the House of Lords and the enactment of section 14(11) addressed the problems with postponement. However, difficulties have continued to arise.

²¹ Above at [24] and [42].

²² Above at [24].

²³ Proceeds of Crime Act 2002, s 14(11).

²⁴ Debates, *Hansard* (HL), 25 June 2002, vol 636, col 1241.

²⁵ *R v Woodhead* [2002] EWCA Crim 45, [2002] 2 Cr App R (S) 54.

Postponement under POCA 2002

6.20 POCA 2002, like the legislation that preceded it, continues to permit both proceeding with the confiscation matter prior to imposing sentence²⁶ or postponing the confiscation matter and proceeding to sentence.²⁷

6.21 The key features of postponement are:

- (1) Proceedings may be postponed for a specified period.
- (2) A period of postponement may be extended.²⁸
- (3) The court may postpone for any reason and it may order more than one postponement, but the postponed period (including one as extended) must not exceed two years from the date of conviction unless there are exceptional circumstances.²⁹
- (4) Any application to extend a period of postponement must be lodged before the previous period of postponement has expired. The application can, however, be determined after the period has expired.³⁰
- (5) A period of postponement may be granted without holding a hearing.³¹
- (6) Where a court postpones confiscation proceedings and proceeds to sentence, financial penalties and forfeiture orders may not be imposed.³²
- (7) When a period of postponement expires, a court may, within 28 days, vary sentence and impose financial and forfeiture orders.³³
- (8) A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.³⁴

6.22 The usual sequence of events is to impose sentence (except financial and forfeiture orders) and deal with confiscation at a later date.³⁵

6.23 Judges should clearly specify if they are proceeding with confiscation prior to sentence (section 14(1)(a)) or postponing (section 14(1)(b)). The distinction between proceeding and postponing is important: where a decision is taken to proceed with

²⁶ Proceeds of Crime Act 2002, s 14(1)(a).

²⁷ Proceeds of Crime Act 2002, s 14(1)(b).

²⁸ Proceeds of Crime Act 2002, s 14(2).

²⁹ Proceeds of Crime Act 2002, s 14.

³⁰ Proceeds of Crime Act 2002, s 14(8); and *R v Iqbal* [2010] EWCA Crim 376, [2010] 1 WLR 1985.

³¹ Criminal Procedure Rules, r 33.13(4).

³² Proceeds of Crime Act 2002, s 15(2).

³³ Proceeds of Crime Act 2002, s 15 (3).

³⁴ Proceeds of Crime Act 2002, s 14(11).

³⁵ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8] and [13].

confiscation prior to sentence (section 14(1)(a)) as opposed to postponing (section 14(1)(b)), it has been observed that there is no requirement that the confiscation proceedings must be completed within the two year time limit.³⁶

- 6.24 Where the court begins confiscation proceedings prior to sentence, there is no requirement to conclude the confiscation proceedings before sentence is imposed; it is sufficient merely to commence proceedings by, for example, imposing a timetable for the service of statements.³⁷
- 6.25 Where confiscation proceedings are postponed (section 14(1)(b)) the court cannot order a statement from the prosecution³⁸ detailing a defendant's alleged benefit from crime.³⁹ However, if the court decides to proceed with confiscation proceedings, it can do so by ordering statements, and can then impose sentence (subject to the prohibition on imposing financial and forfeiture orders).

PERCEIVED PROBLEMS WITH THE POSTPONEMENT REGIME UNDER POCA 2002

Imposing financial or forfeiture orders at sentence prior to a postponed confiscation hearing

- 6.26 As can be seen from the lengthy nature of the foregoing list, the process connected with postponement is overly complex and in need of simplification.
- 6.27 In *R v Guraj*⁴⁰ the Supreme Court described the procedural rule in section 15(2) of POCA 2002 as “a trap into which even the most experienced and skilled trial judges may fall”.⁴¹ Section 15(2) contains a blanket prohibition on the imposition of a fine, compensation, forfeiture, deprivation, surcharge or unlawful profit order where confiscation proceedings have been postponed and sentence is imposed. The section is mandatory and no discretion is afforded to a sentencing judge.
- 6.28 The rationale of the legislation appears to be to ensure that all financial orders are imposed at the same time when the court has all of the relevant information. However, as we discuss in Chapter 24, this serves to delay the imposition of compensation orders.
- 6.29 Furthermore, the prohibited orders under section 15(2) include orders for the forfeiture and destruction of illegal drugs seized from convicted defendants. Whilst the rationale behind delaying the imposition of financial orders may be relatively clear, no legitimate purpose appears to be served by requiring, for example, large quantities of drugs to be stored for many years pending the resolution of confiscation proceedings. As the Supreme Court observed in *R v Guraj*, many such forfeiture orders “will not be in the least controversial and are inevitable whatever the outcome of confiscation

³⁶ *Crown Prosecution Service (Swansea) v Gilleeney* [2009] 2 Cr App R (S) 80 at [15] and [16].

³⁷ *Crown Prosecution Service (Swansea) v Gilleeney* above.

³⁸ Proceeds of Crime Act 2002, s 16.

³⁹ Proceeds of Crime Act 2002, ss 16(1)-(2) and s 14(1)(b); and Millington and Sutherland, *The Proceeds of Crime* (5th ed 2018), para 8.108.

⁴⁰ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22.

⁴¹ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [11].

proceedings may be”.⁴² Nevertheless, the imposition of a forfeiture order prior to a confiscation order is impermissible by virtue of section 15(2).

6.30 In *R v Guraj* the Supreme Court was also called upon to consider the effect of a second issue of procedural irregularity, namely a failure on the part of the Crown to make an application for an extension of the postponement period before it expired (as required by section 14(8)).

6.31 The Supreme Court concluded that, notwithstanding section 14(11), the correct approach to a failure to observe procedural provisions was to ask whether Parliament must have intended that the confiscation order would be invalid, even if there was no injustice or unfairness to the defendant. Potential unfairness might ensue after a long period of inactivity, and is especially likely if the two year period was exceeded in the absence of exceptional circumstances. Such unfairness could be cured by:

- (1) Determining that the confiscation order be adjusted to achieve proportionality.
- (2) Varying an inadvertently imposed sentence within the 56 days permitted by section 155 of the Powers of Criminal Courts (Sentencing) Act 2000.⁴³
- (3) Quashing an incorrectly imposed order (such as forfeiture) by way of appeal rather than quashing the confiscation order.

6.32 Taken together, the statutory provisions and case law indicate:

- (1) The Crown Court retains jurisdiction to impose a confiscation order, notwithstanding a procedural irregularity.⁴⁴
- (2) Where there has been a failure to follow the statutory procedure, the question to be considered is whether the irregularity raised the very real possibility that it would be unfair to make an order.⁴⁵
- (3) Where the court proceeds with confiscation proceedings prior to sentence (section 14(1)(a)), the court need not conclude those proceedings before imposing sentence and the two year time limit to conclude proceedings does not apply.⁴⁶
- (4) The court should make plain if it is proceeding with confiscation proceedings (section 14(1)(a)) or is postponing them (section 14(1)(b)).⁴⁷

⁴² *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [11].

⁴³ See also Sentencing Code (not yet in force), cl 385.

⁴⁴ *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340; and *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [36].

⁴⁵ *R v Guraj* above at [36].

⁴⁶ *Crown Prosecution Service (Swansea) v Gilleeney* [2009] EWCA Crim 193, [2009] 2 Cr App R (S) 80 at [15].

⁴⁷ Above at [16].

- (5) A confiscation order may not be quashed on appeal owing solely to a defect or omission connected with the application for the granting of a postponement.⁴⁸

Varying sentence to impose a financial or forfeiture order

- 6.33 Presently, if sentence is imposed during the postponement period, the court may, at the end of the postponement period or within 28 days thereafter, vary the sentence by imposing a fine, compensation, forfeiture, deprivation, surcharge or unlawful profit order.⁴⁹ The limit of 28 days to vary sentence is another “trap” for the unwary because usually a period of 56 days is permitted to vary sentence.⁵⁰ Until 2008, the Crown Court was only permitted 28 days to vary sentence.⁵¹ It appears that the power to amend sentence in POCA 2002 was based on the previous regime and POCA 2002 was not amended to reflect the changes made by subsequent sentencing legislation.⁵²

A lack of clarity between postponement and proceeding when setting a timetable

- 6.34 As we observed at paragraph 6.23, the distinction between proceeding and postponing is important. Where a decision is taken to proceed with confiscation prior to sentence (section 14(1)(a)), as opposed to postponing (section 14(1)(b)), then the two year time limit does not apply, and only requirement is that the confiscation proceedings are concluded within a reasonable time.
- 6.35 In the case of *CPS (Swansea) v Gilleeney*,⁵³ following conviction the trial judge ordered the prosecutor to produce a statement of information for confiscation proceedings within six months. No mention was made of the term “postponement”. However, a second judge subsequently found that this was, in effect, what the trial judge had done by ordering a statement of information for six months later. No application to extend that period of postponement had been made and so, a month after the apparent expiry of the postponement period, the second judge found that the court could no longer deal with the application for confiscation.
- 6.36 On appeal, the Court of Appeal held that where a judge had ordered the Crown to supply a section 16 statement of information the judge had *proceeded* with confiscation as opposed to *postponing* it, and therefore the time limitation did not apply.
- 6.37 The possibility of confusion between granting a postponement under the statute, and fixing a timetable for case management purposes is clear.⁵⁴ The possibility of confusion is perhaps exemplified when cases prior to *Gilleeney* are considered. In a case involving postponement pursuant to a regime prior to POCA 2002, the House of Lords observed:

⁴⁸ Proceeds of Crime Act 2002, s 14(11).

⁴⁹ Proceeds of Crime Act 2002, s 15(3) and 15(4).

⁵⁰ Powers of Criminal Courts (Sentencing) Act 2000, s 155.

⁵¹ Criminal Justice and Immigration Act 2008, sch 8(3), para 28(2)(a).

⁵² Criminal Justice and Immigration Act 2008, sch 8, para 28(2)(a); and SI 2008 No 1586, art 2(1), sch 1, para 26 (with para 13).

⁵³ *Crown Prosecution Service (Swansea) v Gilleeney* [2009] EWCA Crim 193, [2009] 2 Cr App R (S) 80.

⁵⁴ David Thomas, “Commentary on CPS (Swansea) v Gilleeney” [2009] 6 *Criminal Law Review* 455.

To my mind it is sufficient, when postponing the proceedings, to give directions for the service of statements and to specify a date when the proceedings are next to be listed, whether for disposal, or for such further directions as may be needed, or to fix a final hearing date.⁵⁵

Drift of confiscation proceedings

- 6.38 As we set out in Chapter 7, the Supreme Court in *R v Guraj* observed that confiscation proceedings are susceptible to “drift”.⁵⁶ During our pre-consultation discussions we heard repeatedly from practitioners that a regime which anticipates the postponement of confiscation proceedings for 2 years or longer contributes to this perception.

Failures to extend a postponement period

- 6.39 Considering the pre-POCA 2002 position, the House of Lords observed that a judge is required to specify the length of the postponement and cannot simply adjourn the proceedings generally; but a judge was not bound to specify the very date when the substantive confiscation hearing is to begin.⁵⁷
- 6.40 Section 14(1)(b) of POCA 2002 permits a court to postpone proceedings for a specified period. The statutory scheme permits further extensions up to a maximum of two years and for longer if there are exceptional circumstances.⁵⁸ There can, therefore, be repeated applications.
- 6.41 Section 14(11) provides that an order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.
- 6.42 It appears that Parliament intended that an irregularity in postponement would never justify the quashing of an order. However, section 14(11), as drafted, cannot be invoked before the Crown Court.⁵⁹ Instead, it prevents an order being quashed on appeal. Nevertheless, in a succession of cases the courts have held that procedural irregularities do not deprive the Crown Court of the power to impose a confiscation order.⁶⁰

⁵⁵ *R v Knights* [2005] UKHL 50, [2006] 1 AC 368 at [20].

⁵⁶ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [37].

⁵⁷ *R v Knights* [2005] UKHL 50, [2006] 1 AC 368 at [20].

⁵⁸ The court may only proceed after the two year permitted period has expired if an application for postponement is made within that period: see *Revenue and Customs Prosecution Office v Iqbal* [2010] EWCA Crim 376, [2010] 1 WLR 1985 at [26], but see the observations of the Supreme Court in *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [33].

⁵⁹ Above at [14].

⁶⁰ See for example *R v Soneji* [2005] UKHL 49, [2005] 3 WLR 303; *R v Knights* [2005] UKHL 50, [2006] 1 AC 368, *Crown Prosecution Service v Neish* [2010] EWCA Crim 1011, [2010] 1 WLR 2395.

ANALYSIS

Postponing confiscation until after sentence

6.43 In *R v Soneji*, the House of Lords described the postponement regime introduced in 1993 as something of an afterthought.⁶¹ As the Supreme Court went on to explain in *R v Guraj*, it was introduced:

...initially as an exception to a general practice of dealing with confiscation first. Although the general practice has rapidly, and inevitably, become to sentence promptly and to deal with confiscation subsequently, the terms of some of the statutory provisions have not, in this respect, altered.⁶²

6.44 The original postponement regime was amended in 1995⁶³ and section 14 of POCA 2002 has been amended by various statutes including the Serious Crime Act 2007, the Prevention of Social Housing Fraud Act 2013 and the Serious Crime Act 2015. Despite this, as the Supreme Court observed in 2016,⁶⁴ the sequencing of sentencing and confiscation and the status of procedural requirements in POCA 2002 require review.

Imposing certain orders prior to confiscation

6.45 Despite the absolute prohibition on the making of certain financial and forfeiture orders in section 15(2) of POCA 2002, the court has observed that, where an order is imposed in breach of section 15(2), the court retains jurisdiction to impose a confiscation order but must consider whether it would be unfair to do so. If there is no unfairness a confiscation order should be imposed. Consideration must also be given to curing any unfairness by, for example, adjusting the confiscation order to ensure it is proportionate, varying the sentence imposed to remove the offending order or quashing the offending order on appeal.⁶⁵ In particular the court observed:

...If, however, the defect gives rise to no unfairness, or to none that cannot be cured, there can be no obstacle to the making of the order, and this is what the duty of the court under POCA requires.

6.46 In *R v Sachan*,⁶⁶ a compensation order was imposed in error before confiscation proceedings had been resolved. The Court of Appeal found that the compensation order was not a nullity. Instead, the Crown undertook that it would not seek to enforce both the confiscation and compensation orders. This undertaking ensured that the offender would not be exposed to double liability for the same sum and the appellant's appeal was therefore dismissed. It is evident that, provided there is no danger of double recovery, compensation orders can legitimately be made prior to the resolution of confiscation proceedings.

⁶¹ *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340 at [6].

⁶² *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8].

⁶³ Proceeds of Crime Act 1995.

⁶⁴ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [36] – [37].

⁶⁵ Above at [31].

⁶⁶ *R v Sachan* [2018] EWCA Crim 2592, [2019] 4 WLR 67.

- 6.47 In the case of *R v Kakkad*⁶⁷ a forfeiture order was made prior to the imposition of a confiscation order contrary to section 15(2) POCA 2002. It was held on appeal that the failure to adhere to the correct procedure in the making of a confiscation order does not deprive the court of the power to make the order. Rather, the court is “entitled and may be obliged” to leave out any assets counted in relation to the earlier forfeiture order, when calculating the confiscation order. This is to avoid double counting and thus double penalty.

Drift, postponement and proceeding to the setting of a timetable

- 6.48 The practical problems posed by the postponement provisions have diminished over time, particularly in light of the decision in *Gilleeney* to the effect that setting a timetable for confiscation amounts to proceeding to confiscation.⁶⁸ The decision in *Gilleeney* could add to the perception of drift, because, as the Court of Appeal observed in that case, once proceedings are in progress the time limitation specified in section 14 no longer applies. Subject to a general requirement of a fairness, that proceedings should conclude within a reasonable time,⁶⁹ it could therefore take far longer than 2 years for a confiscation case to be resolved.
- 6.49 We make proposals for the active management of cases in the remaining chapters of this part of the consultation paper. However, such proposals alone have the potential to be undermined if two years can elapse before case management is undertaken through the setting of a confiscation timetable.

Variation of sentence

- 6.50 The 28 day period for variation of sentence imposed during the postponement period to permit the imposition of financial or other orders differs from the general 56 day period for variation of sentence in criminal proceedings and therefore may constitute a “trap” into which sentencing judges could fall. We consider that there is no legitimate justification for the differing time limits.

PROPOSALS FOR REFORM

- 6.51 As set out at the beginning of this chapter, we are of the view that the legislation should be redrafted to provide that:
- (1) Sentencing should take place prior to confiscation proceedings being resolved unless the court directs otherwise.
 - (2) The court has a discretion to impose financial penalties and forfeiture orders prior to confiscation proceedings being resolved.

⁶⁷ *R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162.

⁶⁸ *Crown Prosecution Service (Swansea) v Gilleeney* [2009] EWCA Crim 193, [2009] 2 Cr App R (S) 80 was of course determined before the decision of the Supreme Court in *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 in which the overriding consideration was held to be whether it would be unfair to impose an order in light of a procedural defect.

⁶⁹ *Bullen v United Kingdom, Soneji V United Kingdom* 3383/06, [2009] Lloyd's Rep FC 210.

- (3) Where a financial or other order is imposed at sentencing prior to the resolution of confiscation proceedings, the court must 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, or dispensing with the need for a timetable and making a confiscation order. 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.
- 6.52 The statutory amendments we propose would serve to simplify the process, make the law more accessible, and reflect a modern approach.
- 6.53 The law has developed such that it is now clear that an irregularity in the application of the postponement provisions is not a legitimate basis upon which to quash a confiscation order; nor does an irregularity deprive the court of the power to impose an order.
- 6.54 We consider that a simplified legislative scheme would ease the procedural burden on the court and prosecution while safeguarding the interests of defendants.

Creating a starting point that a defendant is sentenced prior to confiscation.

- 6.55 We provisionally propose that POCA 2002 should be amended to make plain that an offender must be sentenced before confiscation proceedings are resolved unless the court directs otherwise.
- 6.56 Our proposal is intended to make the legislation reflect modern practice and fit for purpose by removing procedural traps for the unwary.
- 6.57 This proposal must be considered with our proposals detailed at Chapter 24, in which we propose the removal of the restriction on imposing certain orders (such as compensation and forfeiture) prior to the resolution of confiscation proceedings.
- 6.58 There may be situations where it is prudent to resolve confiscation prior to sentence. For example, in a simple case where an offender has been found in possession of a sum of money and it is accepted that that sum represents the defendant's entire benefit. If the court needed further information or reports prior to sentencing, the court might nonetheless wish to proceed to impose an agreed confiscation order. The legislation should, of course, provide the flexibility to do so.

Consultation Question 6.

- 6.59 We provisionally propose that confiscation legislation should provide that a defendant must be sentenced before confiscation proceedings are resolved unless the court directs otherwise.
- 6.60 Do consultees agree?

Removal of the prohibition on the imposition of financial and forfeiture orders prior to confiscation

- 6.61 We also propose that the absolute prohibition (found in section 15(2) of POCA 2002) on the imposition of financial and forfeiture orders prior to confiscation should be removed.
- 6.62 As we have discussed at paragraphs 6.26 to 6.42, the current regime is overly complex and creates traps for the unwary. Additionally, there may be circumstances where an order is plainly merited and will have no material impact on the confiscation proceedings.
- 6.63 We are of the view that the court should be permitted to impose any order that is appropriate. The discretion afforded to the court will permit uncontroversial orders being imposed, of the type we have described. A compensation order (which may not be uncontroversial) could also be imposed prior to confiscation, which would:
- (1) permit compensation to be paid earlier, benefiting victims; and
 - (2) put the court in a position whereby it can consider, at the later confiscation hearing, whether that compensation order has been paid. This could assist the court in determining whether pre-emptive enforcement steps need to be taken against the defendant in connection with the confiscation order. A wilful refusal to pay his or her compensation order may be indicative of a likely lack of co-operation in satisfying any confiscation order made.
- 6.64 We do not envisage that the imposition of orders prior to confiscation will occur in every case, but the power to do so will permit a sentencing judge to make orders appropriate to the individual facts of any given case. The removal of the prohibition will simplify the process and remove a legislative trap.
- 6.65 Any order imposed prior to confiscation must be taken into account if relevant to confiscation. As we observe at in Chapter 3, the court has recognised that in some instances “double recovery” may be disproportionate and the same principles would apply under our proposed regime.
- 6.66 We note that POCA 2002 already caters for what could be considered to be analogous situations:

- (1) Where a Crown Court decides not to impose a confiscation order the prosecution has a right of appeal.⁷⁰ If, following appeal, a confiscation order is imposed, the court must have regard to any financial orders imposed.⁷¹
- (2) If a confiscation is not made and new evidence becomes available within six years of the date of conviction, the Crown Court may impose a confiscation order⁷² but must have regard to any financial orders imposed.⁷³
- (3) The Crown Court may, within six years of the date of conviction, reconsider if a defendant has benefitted from crime if new evidence has become available⁷⁴ but must have regard to any financial orders imposed at sentence.⁷⁵

Consultation Question 7.

6.67 We provisionally propose that:

- (1) The absolute prohibition on financial, forfeiture and deprivation orders being imposed prior to the making of a confiscation order be removed; and
- (2) Where a court imposes a financial, forfeiture or deprivation order prior to making a confiscation order, the court must take such an order into account when determining the confiscation order.

6.68 Do consultees agree?

6.69 Our proposal does no more than grant the court a discretion to impose a currently prohibited order earlier in the process. A sentencing judge may well conclude that an order is not appropriate and may defer imposition until confiscation proceedings have been resolved.

6.70 It is not inconceivable that an error will be made that will require correction. For example, the court may omit to order forfeiture and destruction of seized drugs, omit to impose a mandatory surcharge⁷⁶ or miscalculate a financial order.

⁷⁰ Proceeds of Crime Act 2002, s 31.

⁷¹ Proceeds of Crime Act 2002, s 32. We also discuss the issue of double recovery in Chapter 24 on compensation.

⁷² Proceeds of Crime Act 2002, s 19.

⁷³ Proceeds of Crime Act 2002, s 19(7).

⁷⁴ Proceeds of Crime Act 2002, s 20.

⁷⁵ Proceeds of Crime Act 2002, ss 20(11) and (12).

⁷⁶ Criminal Justice Act 2003, s 161A. As a financial order made prior to the confiscation order, a surcharge would become an "obligation which has priority" under section 9 and so would be deductible from the available amount.

- 6.71 As we set out earlier in the chapter, the limit of 28 days prescribed by POCA 2002 to correct such an error is potentially a trap for the unwary because a period of 56 days is permitted to vary sentence under what is referred to as the “slip rule.”⁷⁷
- 6.72 Once “the slip rule” period has expired, the Crown Court no longer has power to amend a sentence even if it is unlawful.⁷⁸ Additionally any alteration must be made by the judge who imposed sentence. In *R v Filer*⁷⁹ the original sentencing judge was away and not due to return until after the expiry of the 56 day period. Although the parties agreed, for reasons of pragmatism, that the matter could be heard by a different judge, the Court of Appeal ultimately had to hold that the orders imposed by the different judge, at the subsequent hearing under the slip rule, were unlawful.
- 6.73 The rectification of errors places a significant burden on the Court of Appeal (Criminal Division) and incurs unnecessary costs. In *R v Hoggard*⁸⁰ the court observed:
- [where an error] was not corrected within the 56 day period provided by section 155 of the 2000 Act it could only be corrected on appeal – which would inevitably involve the use of valuable administrative time, court time and expense.
- 6.74 We consider that there is no legitimate justification for the differing timescales. We therefore provisionally propose that the Crown Court be permitted 56 days, from the date a confiscation order is imposed, within which to vary a financial or forfeiture order. This would:
- (1) align the timeframes under POCA 2002 and the PCC(S)A 2000, bringing clarity and consistency to the law; and
 - (2) ensure that any errors can be rectified by the court at first instance rather than using the valuable time and resources of the Court of Appeal.

Consultation Question 8.

- 6.75 We provisionally propose that the current 28 day period within which the Crown Court is permitted to vary a financial or forfeiture order be extended to 56 days from the date on which a confiscation order is imposed.
- 6.76 Do consultees agree?

Replacing postponement with a time limit to run between sentencing and setting a confiscation timetable (or dispensing with a timetable)

- 6.77 We consider that the focus on “postponements” and “proceedings” under the current law has made it unnecessarily complicated. However, we consider that it is

⁷⁷ Powers of Criminal Courts (Sentencing) Act 2000, s 155.

⁷⁸ *R v Thompson and Others* [2018] EWCA Crim 639, [2018] 1 WLR 4429 at [62].

⁷⁹ *R v Filer* [2018] EWCA Crim 2346.

⁸⁰ *R v Hoggard* [2013] EWCA Crim 1024, [2014] 1 Cr App R(S) 42 at [16].

appropriate to set some time limit in relation to confiscation proceedings to try to avoid drift.

6.78 We considered whether the time limit should run to:

- (1) the conclusion of confiscation proceedings;
- (2) when the prosecution indicates that it wishes to pursue confiscation;
- (3) the setting of a confiscation timetable (or dispensing with such a timetable).

6.79 We do not consider that setting the time limit to be the conclusion of confiscation proceedings is the best way to promote fairness and avoid drift. There is already an implied time limit on the conclusion of confiscation proceedings⁸¹ through the requirement under article 6 of the ECHR that the case be concluded within a reasonable time. What is reasonable depends on the facts of each case. This reflects the liberal approach⁸² of the courts to time limits and confiscation in light of Parliament's intention "to ensure that confiscation proceedings go ahead and are effective without technical problems of timing and timetabling acting as a bar to recovery".⁸³ We consider that by not prescribing a time limit on the conclusion of proceedings, the court will be able to continue to adopt the flexible approach consistent with the case law to date, and article 6, to ensure that confiscation is dealt with justly on the facts of each case. Furthermore, "drift" should be managed through active case management.⁸⁴

6.80 Furthermore, we do not consider that setting the time limit with reference to when the prosecution indicates that it intends to proceed with confiscation is satisfactory, because it would not provide a clear and unambiguous end-point. Such an indication may take different forms. For example, the prosecution may indicate in a letter to the defence or to the court that there is an intention to proceed with confiscation, or the prosecution advocate may do so in open court.

6.81 In contrast, the court setting a timetable for confiscation would provide a clear and unambiguous end-point to our proposed time period. An express requirement for a deadline for the setting of a timetable would not only reflect the current legal position as articulated in *Gilleeney*, but it would also serve a useful purpose. Prosecutors could use the time period to make a thoroughly reasoned determination about whether it is appropriate to proceed to confiscation in any given case. Financial investigation, which may form the basis of this determination, may take time to resolve. With the benefit of such a financial investigation, the prosecution will be in position to assist the court with a meaningful timetable for confiscation and that timetable may be

⁸¹ Arguably, in the absence of *Crown Prosecution Service (Swansea) v Gilleeney* [2009] EWCA Crim 193, [2009] 2 Cr App R (S) 80, section 14 of POCA 2002 would be interpreted as an express limitation.

⁸² See *R v Chuni* [2002] EWCA Crim 453, [2002] 2 Cr App R (S) 82 and *R v T* [2010] EWCA Crim 2703. Furthermore, the Court of Appeal has said that "the question for decision on appeal is not whether we would ourselves have held the circumstances to be exceptional...the judge must be allowed what is sometimes called a margin of appreciation. The question therefore is whether the judge was entitled to conclude that the circumstances here were exceptional." *R v Gadsby* [2001] EWCA Crim 1824 at [25].

⁸³ *R v Johal* [2013] EWCA Crim 647, [2014] 1 WLR 146 at [39].

⁸⁴ As to which see Chapter 7.

somewhat shorter than would otherwise have been the case. In the next chapter we discuss what we propose setting a timetable for confiscation should comprise.

- 6.82 We therefore consider that the article 6 requirement to dispose of cases within a reasonable time together with the desirability of a time period within which to set a confiscation timetable, provides a suitable framework within which to manage the efficient disposal of a confiscation case. As will be seen in the next chapter, from the point of setting the timetable, the court will be in a position to exercise powers to actively manage the case to ensure that the confiscation proceedings are disposed of efficiently.
- 6.83 Whilst in most cases a confiscation timetable will be required for the exchange of information and the service of statements, in very straightforward cases the court may be able to proceed to confiscation forthwith. In such circumstances a timetable is not needed. Accordingly, any time limit which refers to the setting of a timetable should also refer to the court formally dispensing with the setting of a timetable.

Setting a time limit from the date of sentencing

- 6.84 We considered whether the time limit should be measured from the date of conviction, as is currently the case under section 14(5) of POCA 2002. However, such a time limit would not be appropriate for cases in which there are multiple trials involving defendants who are allegedly involved in related criminality but who are tried separately.⁸⁵ Any convicted defendants are then usually sentenced together at the end of all trials, so that the court may sentence in light of all relevant evidence. Where a defendant pleads guilty, or is convicted in the first of a series of trials, there will be an inevitable lengthy delay between conviction and sentencing. Any time limit for confiscation running from the date of conviction would therefore have to either be lengthy or would almost inevitably have to be extended. Therefore, we propose starting the time limit from the date of sentencing a defendant instead of the date of conviction.
- 6.85 Taken together, we provisionally propose that the current procedural requirements relating to postponement be replaced with requirements that:
- (1) The court must set a timetable for confiscation or formally dispense with the setting of a timetable within a fixed period from the date the defendant is sentenced.
 - (2) It must conclude proceedings within a reasonable time.
- 6.86 To reduce the risk of a time limit being inadvertently overlooked, the relevant date should be endorsed on the Crown Court Digital Case System.⁸⁶ We are of the view

⁸⁵ Indictments Act 1915, s 5(3); see *R v Novac* (1977) 65 Cr App R 107 at 119: "If multiplicity of defendants and charges threatens undue length and complexity of trial then a heavy responsibility must rest on the prosecution in the first place to consider whether joinder is essential in the interests of justice or whether the case can reasonably be sub-divided or otherwise abbreviated and simplified. In jury trial brevity and simplicity are the hand-maidens of justice, length and complexity its enemies."

⁸⁶ The Crown Court Digital Case System ("CCDCS", commonly shortened to "DCS") is a web-based platform that allows users to view and print off case documents that have been uploaded to it. Each Crown Court case has its own digital file.

that with this safeguard in place, a time limit between the date of sentencing and the setting of a timetable in connection with confiscation, or the formal dispensing with that timetable, will remove a needlessly technical process.

- 6.87 We discuss our proposals regarding the circumstances in which this time limit might be extended below.

Selecting a maximum period of six months before the setting of a confiscation timetable, with a power to extend in exceptional circumstances

- 6.88 We propose that the maximum allowed period between sentencing or setting a confiscation timetable be set at six months.
- 6.89 As interpreted by the Court of Appeal in *Gilleeney*,⁸⁷ the legislation currently provides for a two year period between the date of conviction and the date when the court make a direction requiring the service of a prosecutor's statement (in cases where such a statement has been required). We consider that to be unnecessarily long.
- 6.90 We bear in mind that the two year period provided for in POCA 2002 is considerably longer than the six month period in the predecessor legislation.⁸⁸ In passing the Bill that became POCA 2002, Parliament clearly regarded the six month period provided as being too short. However, we infer that this was in the belief that the then six month period applied to the conclusion of the confiscation proceedings, as opposed to the first step taken by the court in the proceedings.⁸⁹
- 6.91 In New South Wales, applications for confiscation must be brought within six months of conviction, unless leave of the court is given. Leave will only be given if, for example, necessary evidence only became available after the end of the six months, or it is otherwise in the interests of justice to do so.⁹⁰
- 6.92 We consider that a six month period within which to make the determination as to whether to proceed and for the setting of a timetable would give a reasonable opportunity for financial investigations as described at paragraph 6.81 to be carried out, thereby affording prosecutors an opportunity to consider carefully whether it is appropriate to proceed to confiscation and to allow any timetable which is set for confiscation to be both realistic and as short as possible. We consider that six months from the date of sentencing should be more than sufficient in most cases, not least because the process of identifying potential benefit from crime should have begun as early as the initial substantive investigation, when a restraint order might be granted.

⁸⁷ *Crown Prosecution Service (Swansea) v Gilleeney* [2009] EWCA Crim 193, [2009] 2 Cr App R (S) 80.

⁸⁸ Criminal Justice Act 1993, s 8, introducing s 1A(3) into the Drug Trafficking Offences Act 1986

⁸⁹ In 2001, the Cabinet Office Performance and Innovation Unit report "Recovering the Proceeds of Crime" (p 8.22) recommended a relaxation of the time limit in the terms now found in POCA 2002. It stated: "The practical implications of this limit are that confiscation orders cannot be obtained in a number of cases due to simple administrative delay. For example, lack of court time, unavailability of counsel, trial judge or defendant, or the ongoing trial of a co-defendant have each caused confiscation hearings to collapse following postponement beyond the time limit. And there have also been cases in which defendants have deliberately delayed the inquiry to take advantage of the six month time limit".

⁹⁰ Confiscation of Proceeds of Crime Act 1989 (NSW), ss 4 and 13.

6.93 We consider that there is a balance to be struck between encouraging compliance with time limits and permitting confiscation orders to be made in appropriate cases where it is just to do so. Therefore, as in New South Wales, and reflecting the Supreme Court's decision in *R v Guraj*,⁹¹ we consider that:

- (1) the court should have the power to extend the six month statutory maximum period in exceptional circumstances;
- (2) where the six month period elapses, the court should not be deprived of jurisdiction to impose a confiscation order but may decline to make an order if it would be unfair to do so;
- (3) 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.⁹²

6.94 We consider that these principles should be placed on a statutory footing.

Consultation Question 9.

6.95 We provisionally propose that confiscation legislation should no longer refer to "postponement". Instead, "drift" in confiscation proceedings should be managed through:

- (1) a statutory requirement that confiscation proceedings are started within a prescribed time; and
- (2) active case management following the commencement of confiscation proceedings, pursuant to the Criminal Procedure Rules (as to which see Chapter 7).

6.96 Do consultees agree?

⁹¹ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8]. In coming to this conclusion, the Supreme Court analysed earlier case law including *R v Iqbal* [2010] EWCA Crim 376, [2010] 1 WLR 1985; *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340; *R v T* [2010] EWCA Crim 2703; *R v Johal* [2013] EWCA Crim 647, [2014] 1 WLR 146.

⁹² As to which see 6.31 above.

Consultation Question 10.

6.97 We provisionally propose that

- (1) the maximum statutory period between the date of sentencing and the date on which a confiscation timetable is set or on which a confiscation timetable is formally dispensed with should be six months; and
- (2) the period may be extended by the Crown Court in exceptional circumstances even if an application has not been made expiry of the six month period.

6.98 Do consultees agree?

Consultation Question 11.

6.99 We provisionally propose that the statutory scheme should provide that:

- (1) the court retains jurisdiction to impose a confiscation order even if no timetable is set or dispensed with during the six month period;
- (2) in determining whether to proceed after the permitted period has expired, the court must consider whether any unfairness would be caused to the defendant;
- (3) if there is unfairness, the court must consider whether measures short of declining to impose a confiscation order would be capable of remedying any unfairness; and
- (4) in reaching a decision, the court must consider the statutory objectives of the regime (which we discuss at Chapter 5).

6.100 Do consultees agree?

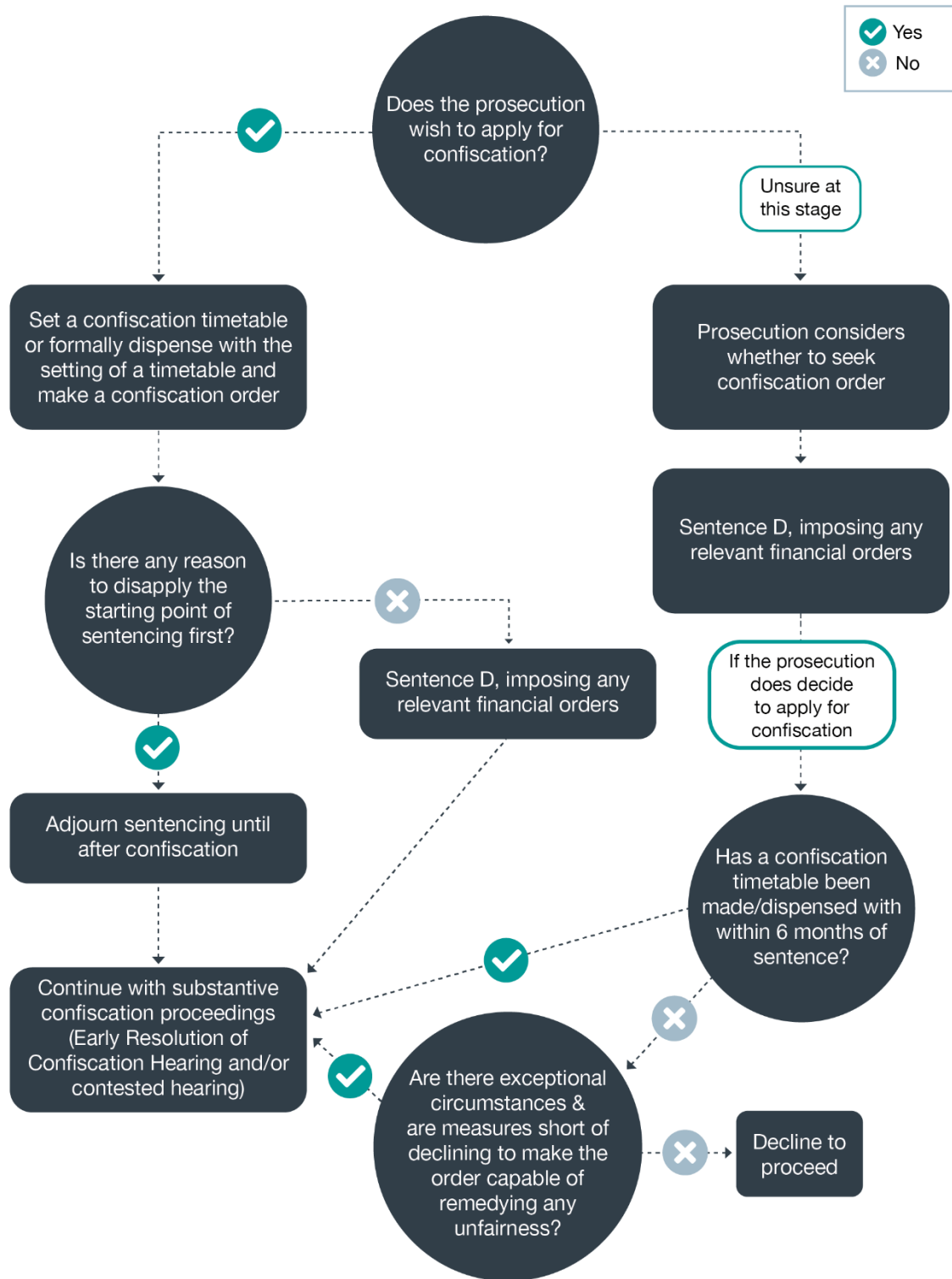
Once a confiscation timetable is set

6.101 In the next chapter, we consider active case management steps that can and should be taken by the courts in progressing the confiscation case and we provisionally propose that such steps, together with enhanced judicial training,⁹³ will facilitate the efficient progression of a confiscation case.

AN OUTLINE OF HOW OUR PROVISIONAL PROPOSALS ARE INTENDED TO WORK:

6.102 On the next page we set out an outline of how our provisional proposals are intended to work:

⁹³ As to which see Chapter 10.



Chapter 7: Timetabling and case management

INTRODUCTION

- 7.1 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.
- 7.2 In this chapter we discuss the current approach to timetabling, the problems that can arise, and our provisional proposal for a bespoke case management regime for confiscation proceedings. Our proposed national process would be underpinned by Criminal Procedure Rules to ensure that:
- (1) courts adopt a consistent approach to timetabling, dependent on clearly defined criteria;
 - (2) material is served promptly;
 - (3) statements of case are in a format prescribed by Criminal Procedure Rules that will assist the court to identify the issues in dispute;
 - (4) appropriate sanctions are in place for non-compliance; and
 - (5) instructed advocates attend a hearing prior to any final hearing. This will ensure that all disputed issues have been identified and all avenues in respect of agreement have been explored.

CURRENT LAW

- 7.3 The parties have a duty to assist the court in furthering the just resolution of a criminal case.¹ According to the overriding objective of the Criminal Procedure Rules, “dealing with a case justly” includes (amongst other things):
- (1) dealing with the prosecution and the defence fairly;
 - (2) dealing with the case efficiently and expeditiously; and
 - (3) ensuring that appropriate information is available to the court when ... sentence [is] considered.
- 7.4 Confiscation is treated as an extension of the sentencing process,² and appropriate information should therefore be made available to the court to resolve confiscation

¹ Criminal Procedure Rules, r 1.2.

² *Phillips v United Kingdom* (2001) 11 BHRC 280, [2001] Crim LR 817; *R v Rezvi* [2001] UKHL 1, [2003] 1 AC 1099; *R v Silcock* [2004] EWCA Crim 408, [2004] 2 Cr App R (S) 61; *R v May* [2005] EWCA Crim 97, [2005] 1 WLR 2902.

fairly, efficiently and expeditiously, pursuant to the overriding objective.³ POCA provides for the provision of information to the court in sections 16 to 18A.

- 7.5 During our pre-consultation discussions it was clear that, in practice, the statements produced pursuant to sections 16 to 18A are usually referred by the section number of POCA under which they were ordered to be made. For example, a statement produced pursuant to section 16 is referred to not as prosecutor's "statement of information", as the document is named in the statute, but as a "section 16 statement".

The provision of information by a defendant (section 18 POCA 2002)

- 7.6 This is usually the first stage in the process leading up to the making of a confiscation order. The court may order a defendant to provide information (such as bank account details, cash held, details of safe deposit boxes etc) to assist the court in carrying out its "functions" in connection with confiscation.⁴
- 7.7 Although POCA 2002 provides that "an order under [section 18] may require all or a specified part of the information to be given in a specified manner",⁵ neither POCA 2002 nor the Criminal Procedure Rules provide any further direction as to the format in which the information should be provided.
- 7.8 If a defendant fails to comply with the order without a reasonable excuse, the court may draw any inference that appears appropriate.⁶ The drawing of an inference does not prevent the court dealing with non-compliance as a contempt of court, which is punishable by committal to custody.⁷
- 7.9 Section 18(9) of POCA 2002 anticipates that a defendant might seek to invoke the privilege against self-incrimination as a "reasonable excuse" for non-compliance with an order under section 18. In order to prevent the privilege against self-incrimination acting as justification for non-compliance, section 18(9) provides that information provided by a defendant pursuant to an order under section 18 cannot be used "in proceedings for an offence".⁸

The provision of information by third parties (section 18A)

- 7.10 Pursuant to section 10A of POCA 2002, at the confiscation hearing the Crown Court may, if it thinks it appropriate to do so, make a binding determination as to the extent of the defendant's interest in property. To assist the court in deciding whether it should make such a determination and, if so, what such a determination should be, the court

³ See *R v Comiskey* (1991) 93 Cr App R 227, (1990-1991) 12 Cr App R (S) 562 on the procedural advantages of the filing of a prosecutor's statement in the context of pre-POCA 2002 confiscation legislation.

⁴ Proceeds of Crime Act 2002, s 18(2).

⁵ Proceeds of Crime Act 2002, s 18(3).

⁶ Proceeds of Crime Act 2002, s 18(4); *R v Bhanji* [2011] EWCA Crim 1198, [2011] Lloyd's Rep FC 420.

⁷ Proceeds of Crime Act 2002, s 18(5).

⁸ This does not necessarily exclude the use of the statement for the limited purposes of cross-examination as to credit (*R v Martin and White* [1998] 2 Cr App R 385).

may direct a third party⁹ to provide information to assist in determining the extent of that third party's interest in property.¹⁰

- 7.11 As with a section 18 order, both section 18A and the Criminal Procedure Rules leave the format for the provision of information as a matter of complete discretion for the court.¹¹

The prosecutor's statement (section 16)

- 7.12 Although a court is not required to order that a defendant or a third party provides information pursuant to sections 18 and 18A of POCA 2002, it is desirable for the court to do so, because the information provided by a defendant or third party can be used to inform the prosecutor's "statement of information", produced pursuant to section 16 of POCA 2002.¹²
- 7.13 Section 16 statements are usually drafted by financial investigators who have investigatory powers at their disposal.¹³ However, the process of providing all relevant information to the court in a timely manner, as envisaged by the overriding objective of the Criminal Procedure Rules, is facilitated by the provision of information by a defendant himself or herself. The defendant is likely to be best placed to provide information readily about his or her assets and the extent of any ownership of such assets.¹⁴
- 7.14 Section 16 and the Criminal Procedure Rules are more prescriptive about the content of a section 16 statement. The statement should detail the prosecutor's case and identify the issues to be determined. It should include information relevant to the making of the assumptions if the prosecutor believes that the defendant has had a criminal lifestyle,¹⁵ the amount of benefit it is asserted a defendant has obtained, and whether any third party holds an interest in a relevant asset.¹⁶
- 7.15 Section 16 statements are mandatory where the prosecutor has asked the court to proceed to confiscation. Where a court proceeds with confiscation of its own motion, a section 16 statement is not mandatory but the court may direct that a statement be served.¹⁷

⁹ For example, a defendant's partner who resides in the matrimonial home.

¹⁰ Proceeds of Crime Act 2002, s 18A.

¹¹ Proceeds of Crime Act 2002, s 18A(3).

¹² Proceeds of Crime Act 2002, s 16.

¹³ For example, production orders, account monitoring orders and search and seizure warrants (Proceeds of Crime Act 2002, ss 345, 370 and 352).

¹⁴ *R v Dickens* [1990] 2 QB 102 at [105] per Lord Lane CJ; *R v Barwick* [2001] 1 Cr App R (S) 129 at [35], (both in the context of the reverse burden of proof in connection with realisable assets).

¹⁵ See Chapter 13.

¹⁶ Proceeds of Crime Act 2002, s 16(3) to (6A); and Criminal Procedure Rules r 33.13(5).

¹⁷ Proceeds of Crime Act 2002, s 16(1) to (2).

Defence response to the prosecutor's statement (section 17 statement)

- 7.16 A defendant may be ordered to indicate which matters within the section 16 statement are accepted and to particularise matters which are not accepted in a section 17 statement.¹⁸
- 7.17 The purpose of a section 17 statement is “to identify the areas in dispute for a confiscation hearing”.¹⁹ If a defendant accepts any allegation in the prosecutor's statement, the court may treat that acceptance as determinative in relation to the defendant's general or particular criminal conduct.²⁰ Both to encourage a full and frank response to the section 16 statement, and to avoid the invocation of the privilege against self-incrimination as a justification for not responding to the section 16 statement, a defendant's acceptance of a matter within a section 17 statement cannot be used against him or her in criminal proceedings for an offence.²¹
- 7.18 A defendant who fails to respond to an allegation in a section 16 statement may be treated by the court as having accepted the allegation.²² Before the court can do so, it must be satisfied that the consequences of not responding have been explained to the defendant in terms that he or she can understand.²³
- 7.19 The ability of the court to treat an allegation as accepted applies to a range of assertions, for example that “the defendant spent x sum on y date”,²⁴ and that the defendant has a particular asset available to him or her to satisfy the confiscation order. However, the court cannot treat a failure to respond to an allegation about the defendant's benefit as an acceptance of the allegation.²⁵ As we set out in Chapter 11, the calculation of a defendant's benefit is at the heart of the confiscation order, and therefore it is not “thought appropriate that the defendant's silence should be conclusive of these matters”.²⁶

Provision of a further prosecutor's statement

- 7.20 The prosecution is at liberty to serve an additional statement of information at any time, and may also be ordered by the court to provide an additional statement within such period as it specifies.²⁷

¹⁸ Proceeds of Crime Act 2002 s 17.

¹⁹ Proceeds of Crime Act 2002, explanatory note 41.

²⁰ Proceeds of Crime Act 2002, s 17(2).

²¹ Proceeds of Crime Act 2002, s 17(6).

²² Proceeds of Crime Act 2002, s 17(3); *R v Layode* (Unreported, 12 March 1993).

²³ *R v Leeming* [2008] EWCA Crim 2753; Criminal Procedure Rules, r 33.13(7)(b).

²⁴ Proceeds of Crime Act 2002, explanatory note 41.

²⁵ Proceeds of Crime Act 2002, s 17(3)(b).

²⁶ Proceeds of Crime Act 2002, explanatory note 41.

²⁷ Proceeds of Crime Act 2002, s 16(6).

When must material be served

- 7.21 The timeframe for compliance with an order under sections 16 to 18A of POCA 2002 is left to the discretion of the court.²⁸ The statutory scheme is supplemented by the Criminal Procedure Rules,²⁹ but the rules do not provide any suggested timeframe for service of material. For example, rule 33.13(2) refers to service “within such periods as the court directs”.

PERCEIVED ISSUES WITH THE EXISTING CASE MANAGEMENT FRAMEWORK

- 7.22 During our pre-consultation discussions, three issues with the existing case management framework were raised repeatedly:
- (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 under section 16 to 18A are rarely, if ever, imposed, adding to the perception that confiscation proceedings are permitted to “drift”; and
 - (3) that section 16 statements are often a confusing mix of pleadings and evidence.

[1] Drift in confiscation proceedings

- 7.23 The statutory regime in sections 16 to 18A of POCA 2002 envisages the timely provision of information to the court to assist the court in reaching an informed judgment in the confiscation proceedings. However, in 2009, the Court of Appeal observed in the case of *R v Lowe* that:

It is evident that many confiscation hearings are not prepared in advance as they should be. There are many complaints that defence statements are inadequate. Timetables set out in the Criminal Procedure Rules or the court's directions frequently slip. Sometimes it is only at the last minute, either immediately before the court sits or even in the course of a hearing, that some matters are agreed and the real issues emerge, considerably burdening the task of the judge hearing the proceedings. If identifying the issues is left to the last minute, then insufficient attention is paid to ensuring that any procedural steps needed for the evidence to be admissible are taken. In an occasional case, where difficult issues arise, it may be the case that counsel with more experience of such issues is needed. Difficulties are from time to time compounded by a lack of a properly paginated bundle.³⁰

- 7.24 It is noteworthy that in 2016, some nine years later, the Supreme Court noted in *R v Guraj* that “confiscation proceedings are particularly susceptible to drift. They must not be allowed to suffer it”.³¹

²⁸ Proceeds of Crime Act 2002, ss 16(1) and (2), 17(1), 18(2) and 18A(3).

²⁹ Criminal Procedure Rules, r 33.13.

³⁰ *R v Lowe* [2009] EWCA Crim 194, [2009] 2 Cr App R (S) 81 at [21].

³¹ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [37].

- 7.25 To demonstrate the difficulties that can arise, here we summarise a recent judgment from the Court of Appeal³² in which the proceedings became somewhat protracted. The defendant pleaded guilty on 25 February 2013 and was sentenced on 19 September 2013. A confiscation timetable was imposed as follows:
- (1) section 18 provision of information by the defence by 29 November 2013;
 - (2) section 16 statement by the prosecution by 31 January 2014;
 - (3) section 17 response by the defence by 30 April 2014; and
 - (4) a hearing on 28 May 2014 to schedule the final hearing.
- 7.26 The section 18 information was provided over 10 weeks late and a section 16 statement was served on 3 March 2014. The defendant then changed solicitors and a new timetable was imposed. A mention hearing was fixed for 19 December 2014 by which time a section 17 response had not been lodged. An amended timetable was put in place. The final hearing was listed on 15 May 2015 but was adjourned to August 2015. The adjournment was for two reasons. Firstly, because there was insufficient time to hear the matter as other cases had overrun. Secondly, the prosecution counsel had been instructed late and was unable to proceed. It was at this hearing that the defence contended that the two year limit had expired in February 2015. It was apparent that the prosecution incorrectly believed the time limit ran from the date of sentence as opposed to the date of conviction. The hearing was then adjourned and on 12 November 2015 the judge found that the two year limit had expired and an extension was refused. The prosecution appealed and the Court of Appeal allowed the appeal. On 10 February 2017 (four years after conviction) the case was remitted to the Crown Court for a final determination of confiscation.
- 7.27 Confiscation proceedings may “drift” for a number of reasons. Whilst it may be that evidence is taking longer to gather than was initially anticipated, there may be other, less justifiable reasons for such “drift”, in particular because:
- (1) confiscation is seen as a complicated annex to the criminal process;
 - (2) confiscation is seen as likely to settle;
 - (3) a defendant may be disengaged with the process.

The perception of confiscation in the criminal justice process

- 7.28 During our pre-consultation discussions, a repeated issue that arose was that the perception of confiscation contributes to its delay in reaching court. As we set out in Chapter 10 the regime is widely perceived as a complicated annex to the substantive criminal proceedings. The primary focus of participants in the criminal justice process is on the prosecution and sentencing of the defendant for his or her criminality, rather than on what is often perceived to be additional complex proceedings for asset forfeiture arising from the criminality. As the Supreme Court appeared to recognise in *R v Guraj*, it may therefore be understandable (although not necessarily justifiable)

³² *R v Halim* [2017] EWCA Crim 33, [2017] Lloyd’s Rep FC 186.

that the focus of the courts and parties is elsewhere rather than on ensuring compliance with directions for the expeditious resolution of confiscation:

[Confiscation proceedings] need not always be complicated, and efforts should be made by the Crown, as well as the courts, to simplify them. In overstretched police and CPS offices it may often be tempting to give priority to something other than confiscation.³³

- 7.29 Stakeholders also informed us that a high proportion of cases result in agreement. We were told anecdotally of one judge at a busy confiscation court centre who has only presided over two contested confiscation hearings in 15 years.
- 7.30 As is implicit in the judgment in *R v Lowe*³⁴, there is also a perception that confiscation proceedings will often “settle” and that, therefore, there is no real need to comply with directions that will assist the court in preparing for a contested hearing. We deal with this in more detail at 7.23.

Disengaged defendants

- 7.31 The issue of disengaged defendants has three elements: Firstly, as the Supreme Court observed in *R v Guraj*, defendants may be disengaged with the preparation of a confiscation hearing because it “is often in their interests to delay”.³⁵ The longer it takes to resolve a confiscation case, the longer a defendant is likely to retain the benefit of his or her assets and the more opportunity the defendant has to put those assets beyond the reach of the courts.
- 7.32 Secondly, cases proceeding to confiscation inevitably involve defendants convicted of crimes, and who may have already been made subject to a substantive sentence, such as imprisonment or a community order. Those who are frustrated by the outcome, or consider their circumstances to be unfavourable, may approach confiscation proceedings with a defensive mindset. They may be extremely reluctant to co-operate with proceedings in which they are likely to be ordered to relinquish the proceeds of their crimes, in addition to their liberty.
- 7.33 Thirdly, academics with whom we engaged during our pre-consultation discussions shared concerns that the defendant is often overlooked as a stakeholder in the process. As Rudi Fortson QC has observed:

if a defendant has a credible case to present, it will almost always be in his/her interest to plead the response fully and carefully... . The burden of rebutting the statutory assumptions [see Chapter 13] falls on the defendant. He also carries the burden of showing that the available amount [see Chapter 15] is less than the value of the benefit he obtained (if that is the case).³⁶

- 7.34 The Criminal Procedure Rules require that:

³³ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [37].

³⁴ *R v Lowe* [2009] EWCA Crim 194, [2009] 2 Cr App R (S) 81.

³⁵ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [37].

³⁶ R Fortson QC, *Misuse of Drugs and Drug Trafficking Offences* (6th ed 2012) p 13-050.

The court must satisfy itself that there has been explained to the defendant, in terms the defendant can understand (with help, if necessary)—

(a) that if the defendant accepts to any extent an allegation in a prosecutor's statement of information, then the court may treat that as conclusive for the purposes of deciding whether the defendant has benefited from general or particular criminal conduct, and if so by how much;

(b) that if the defendant fails in any respect to comply with a direction to serve a response notice, then the court may treat that as acceptance of each allegation to which the defendant has not replied, except the allegation that the defendant has benefited from general or particular criminal conduct; and

(c) that if the defendant fails without reasonable excuse to comply with an order to give information, then the court may draw such inference as it believes is appropriate.³⁷

- 7.35 Whilst this rule goes some way to setting out the consequences of non-compliance with the process of preparing the confiscation case, it does not go any way to engaging the defendant in the process by explaining the benefits of compliance. The confiscation process may be better supported if the defendant has input and agency in the process. It was the view of stakeholders (particularly academics and practitioners) that the fairer the process is perceived to be, which includes spelling out the advantages of co-operation, the greater the likelihood of a defendant complying with court orders.

[2] Ineffective sanctions for non-compliance

- 7.36 During our pre-consultation discussions we asked practitioners about how often they have been aware of sanctions being imposed for non-compliance with directions to file and serve information in connection with confiscation proceedings. Nearly all were unaware of any case in which a sanction had been applied. Similarly, we asked judges how often they had applied sanctions for non-compliance. Again, the answer was rarely, if ever. The lack of imposed sanctions for failure to comply was perceived to add to the perception that confiscation proceedings are permitted to “drift”.

[3] Content of a section 16 statement

- 7.37 Section 16 statements are intended to provide “information” to the court about the prosecutor's position as part of its enquiry into confiscation. The term “information” is a broad one, and section 16 statements must set out the relevant legislation, the facts relied upon along with the writer's opinion and comments on the evidence.³⁸ However, we were told that very often these portions of the statement are muddled together, making the identification of the prosecutor's case difficult.
- 7.38 The financial investigators we met had detailed knowledge of the legislation, but during pre-consultation stakeholder events we were told on multiple occasions that the quality of section 16 statements can vary. An unfocussed statement of case leads to difficulties in identifying the salient issues and hampers the court's ability to case-

³⁷ Criminal Procedure Rules, r 33.13(7).

³⁸ Pursuant to Criminal Procedure Rules, r 33.13(5) and s 16.

manage proceedings. We were given examples in which the section 16 statement lacked clarity and was needlessly lengthy.

ANALYSIS

[1] Drift in confiscation proceedings

Case management: lessons from other areas of the criminal justice system

- 7.39 The legislation and Criminal Procedure Rules grant a large degree of discretion to the court in fixing the appropriate timetable. This discretion reflects the fact that the complexity of confiscation proceedings is highly variable and therefore the court must be able to tailor directions to the individual circumstances of each case. However, the discretion is largely left unchecked. There is no formal case management regime³⁹ governing confiscation proceedings; there are no suggested timetables for the service of material; there are no prescribed forms to record information other than confiscation orders themselves; there are no mandatory case management hearings; and there is no Criminal Practice Direction applicable to confiscation proceedings.
- 7.40 By way of comparison we have examined the case management regimes in place for defendants charged with substantive criminal offences and for matters within the civil jurisdiction.
- 7.41 When a defendant's criminal case is first sent to the Crown Court there is a single national process in place for trial management which is designed to ensure robust case management, a limited number of hearings, the early resolution of pleas and the identification of the issues in the case:
- (1) the magistrates' court records the trial issue and likely plea in a form which is sent to the Crown Court;
 - (2) all cases are listed for a Plea and Trial Preparation Hearing ("PTPH"), usually within 28 days of the case being sent from the magistrates' court.
 - (3) The Criminal Procedure Rules place a duty on the parties to communicate with one another⁴⁰ and a prescribed form must be completed.⁴¹
 - (4) Thereafter there are set stages and timeframes for the service of material.
 - (5) Evidence is lodged on a Digital Case System which can be accessed by the parties.⁴²

³⁹ Other than to the extent that is provided for in the Criminal Procedure Rules, Part 33.

⁴⁰ Criminal Procedure Rules, r 3.3.

⁴¹ Justice.gov, *Plea and Trial Preparation Hearing Form*, <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/october-2015/cm008.pdf> (last visited May 2020).

⁴² Crown Court DCS, *Crown Court Digital Case System*, <https://crowncourtdcs.caselines.co.uk/> (last visited September 2020).

- 7.42 The process is supplemented by 38 pages of guidance entitled “Better Case Management” (BCM).⁴³ The guidance details why changes were made to the earlier system:

BCM with the Plea and Trial Preparation Hearing (PTPH) and related procedures provide a single national process to be used in all Crown Courts....

The vast majority of cases do not go to trial but result in guilty pleas. Where there is to be a guilty plea it should be entered sooner rather than later...

For cases that go to trial it has been decided as a matter of principle that there must be a uniform, national scheme. It is accepted that in the past individual courts developed systems that have, for them, worked well. However, the use of a single national process using forms with standard directions will greatly assist both prosecution and defence in developing systems to respond to them...

The use of a single national process with largely standard directions is essential to the future development of systems for the court, prosecution and defence that work one with another. This single national approach is embodied in the Criminal Procedure Rules and Criminal Practice Directions.⁴⁴

Differences between case management regimes

- 7.43 As we have described above, a national system is in place to case manage matters involving substantive criminal charges. By contrast, in confiscation proceedings:

- (1) there is no national framework as to listing of hearings within a prescribed period of time;
- (2) there are no standardised timetables or prescribed case management forms; and
- (3) confiscation papers are not uploaded to the Crown Court Digital Case System.⁴⁵

- 7.44 We believe that the need for a national case management system to govern confiscation proceedings is evident. As we discussed above, the courts have repeatedly noted that confiscation proceedings are susceptible to drift. This is problematic because it is plainly in the public interest for criminals to be stripped of their benefit from crime as swiftly and efficiently as possible, particularly where the sums recovered are to be repaid to the victims of crime.

- 7.45 With these objectives in mind we believe that a centrally administered process would offer some guidance to the court and promote consistency.

⁴³ See Criminal Practice Direction I, para 3A and the Judiciary of England and Wales, *Better Case Management Handbook* (2018).

⁴⁴ Judiciary of England and Wales, *Better Case Management Handbook* (2018) p 4.

⁴⁵ The Crown Court Digital Case System (“CCDCS”, commonly shortened to “DCS”) is a web-based platform that allows users to view and print off case documents that have been uploaded onto it. Each Crown Court case has its own digital file. Users of the system must be registered to gain access to it.

A single national process

- 7.46 Substantive criminal proceedings and confiscation proceedings are very different. Consequently, a tailored approach to confiscation proceedings is necessary.
- 7.47 The Better Case Management initiative discussed above formed part of the implementation of Sir Brian Leveson's Review of Efficiency in Criminal Proceedings.⁴⁶ Sir Brian Leveson's report did not specifically address confiscation but it is our view that the core principles identified in the report are equally applicable to confiscation proceedings. Sir Brian observed:

The underlying approach to this Review has been to consider ways of encouraging better communication between the agencies involved in criminal justice, encouraging better communication between the parties to criminal litigation and maximising the opportunities to improve effectiveness and efficiency with the use of modern IT.⁴⁷

- 7.48 Sir Brian went on to identify the importance of:

- (1) *Case ownership*: an identified person should be responsible for the case.⁴⁸
- (2) *A duty of direct engagement*: The Criminal Procedure Rules should impose a duty of direct engagement between the parties who must attempt to narrow the issues and reach agreement. Sir Brian Leveson noted: "In a civil case, it would be inconceivable that the lawyers for the parties would not voluntarily engage with each other in an effort to narrow issues and, potentially, settle the dispute."⁴⁹
- (3) *Consistent judicial case management*: Sir Brian Leveson observed "the court must be prepared robustly to manage its work. In the Crown Court, this might require a number of judges taking on the responsibility of case management but this cannot be seen as a tick-box exercise ..."⁵⁰

[2] The perception of ineffective sanctions

- 7.49 During our pre-consultation discussions, it was suggested that because confiscation proceedings are civil in nature, we should consider proposing that a sanction equivalent to a default judgment in civil proceedings be introduced.
- 7.50 If a defendant fails to file an acknowledgment of service or a defence within the time limits prescribed in the Civil Procedure Rules the court may enter judgment against the defendant without a trial ("default judgment")⁵¹

⁴⁶ Sir Brian Leveson P, *Review of efficiency in criminal proceedings* (January 2015).

⁴⁷ Above para 24.

⁴⁸ Above para 26 to 32.

⁴⁹ Above para 33 to 37.

⁵⁰ Above para 38 to 39.

⁵¹ Civil Procedure Rules, part 12; Civil Practice Direction 12.1.

7.51 We do not consider that default judgment would be appropriate in confiscation proceedings because entering default judgment would mean that the court would make no enquiry at all into the defendant's means and simply accept the submissions of the prosecution by reason of the default. This would have the following consequences:

- (1) Default judgment could lead to the calculation of a benefit figure which would not have withstood proper scrutiny.
- (2) If the benefit figure would not have withstood proper scrutiny, the amount of the confiscation order may be higher than the defendant's actual benefit from crime. This could lead to disproportionate recovery from the defendant, thereby interfering with the defendant's right to the peaceful enjoyment of property. POCA 2002 provides that an order should not be imposed in an amount that is disproportionate.⁵²
- (3) The amount of the confiscation order will be lower than the benefit figure only if the defendant can show that his or her assets are insufficient to satisfy the confiscation order.⁵³ If default judgment is entered, the confiscation order will be for the whole of the benefit figure. This is likely to result in a confiscation order that the defendant will not be able to satisfy, thereby compounding the total unpaid confiscation debt.
- (4) If the defendant is unable to repay a confiscation order which was unrealistically made by virtue of default judgment, he or she would still be liable to serve the sentence in default of payment of the order. We do not consider that it can be just to commit a person to prison for non-payment of an order that was made without due consideration of the evidence.

7.52 Furthermore, if a system of default judgment were introduced, it is arguable that a similar sanction for non-compliance by the prosecution would be required on the grounds of fairness. In civil proceedings the court may strike out a claim where there has been non-compliance with a rule, practice direction or court order.⁵⁴ Adopting a similar system in confiscation proceedings would have the potential to leave the proceeds of crime unrecovered because of a procedural irregularity. Both the Court of Appeal and POCA 2002 itself have emphasised that procedural irregularity should not lead to the circumvention of a legitimate public policy expectation.⁵⁵ If the prosecution was exempt then the defence would be subject to a potentially hugely draconian sanction when the prosecution would not.

⁵² Proceeds of Crime Act 2002, s 6(5).

⁵³ Proceeds of Crime Act 2002, s 7(1) and (2).

⁵⁴ Civil Procedure Rules, r 3.4 (2)(c).

⁵⁵ See for example s 14(11) POCA 2002; *R v Hall* [2019] EWCA Crim 662; *R v Sachan* [2018] EWCA Crim 2592, [2019] 4 WLR 67; *R v Halim* [2017] EWCA Crim 33, [2017] Lloyd's Rep FC 186; *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22; *R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162; *R v Constantine* [2010] EWCA (Crim) 2406, [2011] 1 WLR 1086.

- 7.53 Default judgment in civil proceedings is not the end of the matter. Applications may be made to set aside default judgment,⁵⁶ and appeals can be lodged against a refusal to set aside default judgment. The introduction of default judgment would likely increase the number of hearings and appeals. As we discuss in Chapter 1, the case list that supports the judicial guide to restraint and confiscation refers to 507 cases in connection with confiscation. It is undesirable to add to their number. We have therefore decided not to propose the introduction of default judgment in confiscation proceedings.
- 7.54 We also heard from practitioners that the threat of an inference being drawn after non-compliance is sometimes enough to prompt late compliance with the obligation to file a statement. This suggests that the current provision with regards to warning at the time that an order for provision of information is made is insufficient.
- 7.55 The requirement in the Criminal Procedure Rules as set out at para 7.34 is only that the court be satisfied that the consequence to the defendant “has been explained to the defendant, in terms the defendant can understand”. There is no requirement that the judge must give the explanation, only that the judge must be satisfied that an explanation has been given, for example because he or she has been assured by counsel that the consequences of non-compliance have been explained to the defendant. The Crown Court Compendium, which contains example directions for judges, contains no direction to a defendant about the failure to comply with an order to provide information in connection with confiscation.⁵⁷
- 7.56 It is often argued that words spoken by a judge in open court carry an authority that places pressure upon a defendant.⁵⁸ Whilst this may be negative in certain contexts, it may be positive in cementing the defendant’s understanding of the importance of his or her obligations.
- 7.57 Furthermore, as we set out at paragraph 7.34, we consider that the Criminal Procedure Rules require the judge to be satisfied only that the defendant understands that a potential adverse inference can be drawn from non-compliance.⁵⁹ What is not necessarily explained to a defendant is that it is in fact in the defendant’s own interests to comply, because the burden is on him or her to rebut the statutory assumptions and to show what his or her available amount is. If the defendant provides such information, it is more likely to lead to a more realistic confiscation order over which the defendant will have had some input.

[3] Statements of case

- 7.58 The provision of “information” in confiscation proceedings, rather than “evidence” is arguably reflective of the decision in *R v Silcock*⁶⁰ that confiscation proceedings are

⁵⁶ Civil Procedure Rules, r 3.9 and part 13. See also Civil Procedure Rules, r 27.11 and 39.3 (2)

⁵⁷ Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2019).

⁵⁸ See for example the discussion by Lord Woolf CJ and Judge LJ in *R v Goodyear* [2005] EWCA Crim 888, [2005] 1 WLR 2532.

⁵⁹ Criminal Procedure Rules r 33.13(7).

⁶⁰ *R v Silcock* [2004] EWCA Crim 408, [2004] 2 Cr App R (S) 61.

intended to be “far reaching...with the aim of separating criminals from the proceeds of their crimes” and so the ordinary rules of evidence do not apply.⁶¹

- 7.59 Nevertheless, a judge must still seek to ensure that the confiscation proceedings are conducted fairly⁶² and in doing so must “of course, examine both the evidence and the information obtained judicially and with great care as to its weight”.⁶³ To do so, it is important that all parties and the court are able to clearly understand the nature of each party’s case, and to separate that which is evidence from that which is assertion.
- 7.60 The importance of clarity and concision has been emphasised repeatedly by the courts⁶⁴ and in procedural guidance that has been issued to both criminal and civil practitioners.
- 7.61 Clear guidance is available to criminal practitioners:
- (1) in the Criminal Practice Direction in connection with the drafting of skeleton arguments and citation of authorities;⁶⁵
 - (2) in the Criminal Procedure Rules in connection with the drafting grounds of appeal.⁶⁶
- 7.62 The precision with which the Criminal Practice Direction and Criminal Procedure Rules detail what is required is in stark contrast to the rules governing statements of case in confiscation proceedings.
- 7.63 Similarly, in civil cases, under the Civil Procedure Rules “prolix pleadings are no longer encouraged.”⁶⁷ The Civil Procedure Rules prescribe precisely what is required of a statement of case.⁶⁸ Particulars of Claim must include “a concise statement of the facts on which the Claimant relies.”⁶⁹
- 7.64 Precision and clarity are essential to the efficient and just disposal of proceedings. In *Mahon v Rahn* the court observed that amended proposed particulars of claim were
- so prolix, detailed and confusing in the way they are developed that the burden imposed on the respondents and the court in dealing with them would be wholly unreasonable. The length[y] process of unravelling, understanding, answering and adjudicating on them would defeat the overriding objective and would constitute an

⁶¹ See also *R v Clipston* [2011] EWCA Crim 446, [2011] 2 Cr App R (S) 101.

⁶² *R v Clipston* above at [64(iv)].

⁶³ *R v Silcock* [2004] EWCA Crim 408, [2004] 2 Cr App R (S) 61 at [60].

⁶⁴ *R v James* [2016] EWCA Crim 1639, [2017] Crim LR 228; *Tombstone Ltd v Raja*, [2008] EWCA Civ 1441, [2009] 1 WLR 1143; *Standard Bank PLC v Via Mat International* [2013] EWCA Civ 490, [2013] 2 All ER (Comm) 1222; *Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1333, [2015] 1 WLR 838, at [10].

⁶⁵ Criminal Practice Direction XII part D.

⁶⁶ Criminal Procedure Rules r 39.3(2).

⁶⁷ *Mahon v Rahn* [2000] 1 WLR 2150 at [135].

⁶⁸ Civil Procedure Rules, r 16.4 and 16.5.

⁶⁹ Civil Procedure Rules, r 16.4(1)(a).

abuse of the process of the court. This proposed pleading would not allow the case to be dealt with expeditiously and fairly.⁷⁰

- 7.65 We consider that there is a legitimate basis for Criminal Procedure Rules to prescribe, as far as possible, the content and format of statements of case in confiscation proceedings to promote precision and clarity.

PROVISIONAL PROPOSALS

[1] An appropriate timetable

- 7.66 We consider that the inclusion of standardised and relatively short but realistic timetables in the Criminal Procedure Rules or a Criminal Practice Direction would provide the court and parties with a clear indication that confiscation proceedings should not be permitted to drift for lengthy periods and should be subject to robust time limits.
- 7.67 The current system's approach of allowing a judge a discretion in setting a timetable has the advantage of permitting a court to tailor a timetable to the complexity of any given case, and we consider that the court must be able to ensure that any timetable is realistic.
- 7.68 For these reasons we have provisionally concluded that:
- (1) The Criminal Procedure Rules and/or Criminal Practice Direction should provide timetables for the provision of information and the service of statements of case.
 - (2) The timetables should reflect the complexity of the case. 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. This might be the case if it is known that evidence is overseas and will not be sent to the prosecution until the end of the period for service envisaged in the timetable.
 - (3) As under the current Criminal Procedure Rule 33.13(4)(a), the court should be permitted to extend the time limit which it has set where the court considers it appropriate to do so.
- 7.69 As we set out in Chapter 10 (Forum), the assessment of whether a case is "complex" is likely to include consideration of the factors that are considered by the family courts in allocating financial work to the Financial Remedy Unit. Such factors include whether potential allegations or issues involve:
- (1) complex asset structures;
 - (2) complex income structures;

⁷⁰ *Barnes v Handf Acceptances Limited* [2004] EWHC 1095 (Ch).

- (3) assets that are or were held through the medium of offshore trusts or settlements or otherwise held offshore or overseas;
- (4) assets that are or were held through the medium of family or unquoted corporate entities;
- (5) the value of family assets, trust and/or corporate entities;
- (6) expert accountancy evidence;
- (7) complex or novel legal arguments.⁷¹

A proposed standard timetable

7.70 Because section 18 orders are often the first step in the process, we begin our consideration of a proposed standard timetable with reference to defence submissions.

7.71 In proposing a standard timetable for less complex cases, we have considered the guidance given in the Guide to Restraint and Confiscation, which is made available to judges online. The Guide states that, in the context of a section 18 order, “unless the request is particularly complex then usually 28 days should be sufficient”.⁷² This reflects the general position in civil cases, when parties may agree that a defence to a claim can be filed up to 28 days after service of the particulars of the claim⁷³. It also reflects the position in substantive criminal proceedings, where a defendant is ordinarily permitted 28 days⁷⁴ to serve a defence statement:

- (1) setting out the nature of the accused's defence, including any particular defences on which he intends to rely;
- (2) indicating the matters of fact on which he takes issue with the prosecution;
- (3) setting out, in the case of each such matter, why he takes issue with the prosecution;
- (4) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence; and
- (5) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

7.72 During our pre-consultation discussions, some stakeholders were sceptical about whether a period as long as 28 days was really required. We consider that a standardised timetable setting out a period of 28 days within which to file and serve defence responses would be appropriate in striking a balance between efficiency and

⁷¹ Certificate of Financial Complexity in the Financial Remedies Unit of the Central Family Court.

⁷² HHJ Hopmeier, *A Guide to Restraint and Confiscation Orders under POCA 2002* (2020).

⁷³ Civil Procedure Rules 15.4(1)(a) and 15.5(1).

⁷⁴ Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations (SI 2011 No. 209) rr 2(3), 3; form PTPH NG2.

realism, particularly where a defendant is in custody and may not be able to access information quickly. A 28 day period would reflect the periods anticipated as necessary for responses as to matters of substance in both civil and criminal law.

- 7.73 The guide for judges on restraint and confiscation also suggests that a period of 28 days is appropriate for service of a prosecutor's section 16 statement in simple cases.⁷⁵ This period is considerably shorter than the 70 days generally permitted for service of prosecution evidence relied upon at trial in cases where a defendant is on bail.⁷⁶ However, we consider that in many straightforward cases a period of 28 days should be sufficient, particularly in light of the fact that consideration should have been given to a defendant's assets earlier in the investigation at the restraint stage. This was supported by evidence that we received from financial investigators that in cases involving everyday assets such as houses, cars and bank accounts, enquiries can be conducted in less than a day or within days.
- 7.74 By including a starting period of 28 days for service of a section 16 statement from the date of the direction, investigation of assets at an early stage (and therefore effective restraint of assets) should also be facilitated.
- 7.75 We consider that, to ensure that cases are conducted efficiently whenever possible, a starting point of double the standard period would be appropriate in complex cases. This could be extended either at the outset or during the period for service if the court considered it appropriate to do so.
- 7.76 There are many factors which will inform a decision as to complexity and the time required for each stage of the process. Each case is inevitably fact specific and therefore the court is given a wide discretion as to the appropriate timetable. The standardised timetables we provisionally propose will, however, serve to promote consistency in approach.

Consultation Question 12.

- 7.77 We provisionally propose that the Criminal Procedure Rules Committee should consider providing timetables for the provision of information and service of statements of case in confiscation proceedings.
- 7.78 Do consultees agree?

⁷⁵ HHJ Hopmeier, *A Guide to Restraint and Confiscation Orders under POCA 2002* (2020).

⁷⁶ Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005 (SI 2005 No 902); Form PTPH NG2.

Consultation Question 13.

- 7.79 We provisionally propose that the Criminal Procedure Rules Committee should consider a timetable for a case where no complex factors have been identified which uses periods of 28 days for the service of statements regarding confiscation.
- 7.80 Do consultees agree?
- 7.81 If not, what periods would consultees consider to be appropriate for the service of statements regarding non-complex confiscation cases?

Consultation Question 14.

- 7.82 We provisionally propose that the Criminal Procedure Rules Committee should consider a timetable for a case where complex factors have been identified which uses periods of 56 days for the service of statements regarding confiscation.
- 7.83 Do consultees agree?
- 7.84 If not, what periods would consultees consider to be appropriate for the service of statements regarding complex confiscation cases?

[2] Warnings to defendants in connection with non-compliance

- 7.85 We provisionally propose that the current provision for the drawing of an inference in the event of non-compliance should continue. However, we consider that the provision needs to be brought to the forefront of the minds of all participants in the confiscation process, including the defendant and the judge. We therefore consider that the obligation upon a judge to satisfy him or herself that the defendant has been informed of the consequences of non-compliance should be reframed as a positive obligation upon the judge to inform the defendant that:
- (1) This is an order of the court that must be complied with.
 - (2) It is in the defendant's interests to comply with the requirement because the burden of proof relating to the assumptions and the available amount rests on him or her.
 - (3) The defendant will find it hard to discharge that burden without providing the information.
 - (4) The court can go further and use the failure to provide the information against the defendant when making its decisions in the confiscation hearing.
 - (5) If the defendant fails to provide the information, he or she may face an order that is far larger than he or she might have expected, and may face imprisonment or forfeiture of specific assets if that order is not paid.

- 7.86 We consider that such a warning should be incorporated into guidance for judges, which is contained in a Criminal Practice Direction, and which is referred to in the Crown Court Compendium.
- 7.87 We consider that, having been in receipt of such a direction in open court, the defendant will have a better understanding than at present of the real possibility of adverse inferences being drawn.

Consultation Question 15.

- 7.88 We provisionally propose that judges should be required to give a direction in every case when service of documents is ordered pursuant to a confiscation enquiry to the effect that:
- (1) The order is an order of the court and it must be complied with.
 - (2) It is in the defendant's best interests to comply with the requirement because the burden of proof relating to the assumptions and the available amount rests on him or her.
 - (3) The defendant will find it hard to discharge that burden without providing the information.
 - (4) The court can go further and use the failure to provide the information against the defendant when making its decisions in the confiscation hearing.
 - (5) That ultimately a failure to provide information may result in the defendant facing an order that is far larger than he or she might have expected, and that he or she may face imprisonment or forfeiture of specific assets if that order is not paid.
- 7.89 We provisionally propose that:
- (1) the Criminal Procedure Rules Committee should consider including such a direction in a Criminal Practice Direction on confiscation; and
 - (2) that such a direction should be included in the Crown Court Compendium.
- 7.90 Do consultees agree?

[3] Greater precision and clarity in the provision of information to the court

- 7.91 To identify the disputed issues in confiscation proceedings, we provisionally propose that the Criminal Procedure Rules should prescribe the format of a section 16 statement. We envisage the service of separate documents as follows:
- (1) Concise pleadings as to the matters upon which the prosecutor relies, which would be a separate document akin to the Particulars of Claim lodged in civil proceedings;
 - (2) Statements and any exhibits upon which the prosecutor relies; and

(3) If required, a skeleton argument.

- 7.92 The purpose of the proposal is to ensure that evidence, submissions and the factual basis upon which a case is put are readily discernible. Section 17 responses should be drafted in similar format and must address the pleadings raised.
- 7.93 Our proposed change is largely procedural as the legislation envisages a similar process (see above) and therefore any such change could be implemented via the Criminal Procedure Rules. It appears, that despite the intention of the legislative provisions, concise statements of case are not served as a matter of course. We believe that clear rules detailing the format of material to be served will improve the quality of statements of case which in turn will assist the court in identifying the issues in dispute, thereby facilitating the efficient disposal of the case.
- 7.94 We do not consider that the provision of documents as we propose requires departure from the current position that the rules of admissibility in confiscation are broad. Rather, the separation of documents will facilitate the court's task of evaluating the weight to be attached to information through clear identification of evidence, opinion and pleadings.

Consultation Question 16.

- 7.95 We provisionally propose that the Criminal Procedure Rules Committee should consider prescribing the content and form of statements exchanged in confiscation proceedings to ensure that they assist the court in identifying issues in dispute.
- 7.96 Do consultees agree?

Consultation Question 17.

- 7.97 We provisionally propose that a prosecutor's statement in confiscation proceedings should comprise concise pleadings, statements and exhibits which must be lodged as separate documents.
- 7.98 Do consultees agree?

- 7.99 As we discuss in Appendix 1, there is clear evidence that higher value orders are satisfied less often. Anecdotally, we understand that the content of prosecutor's statements in such cases reflects the fact that they are usually drafted by those whose primary role is in investigation as opposed to the drafting of legal documents. We wish to explore to what extent, in high value cases, changing the way in which a prosecutor's statement is drafted might improve the outcome, for example by express provision for a lawyer to oversee or have direct input into the prosecutor's statement before it is served.
- 7.100 The input of a lawyer into the drafting of a prosecutor's statement would bring the benefit of the direct involvement of someone with experience in ensuring that applications are made to a court as clearly and persuasively as possible. It may serve

to narrow the issues from the start of the confiscation process, while ensuring that resources are appropriately deployed where they may have greatest benefit. On the other hand, the enhanced training of financial investigators in the drafting of prosecutor's statements might go some way to achieving the same end. Liverpool John Moore University is currently conducting a review into the Proceeds of Crime Centre (which provides training for financial investigators). The anticipated date of completion of the review is unknown. However, it is anticipated to result in a set of recommendations to inform the future development and improvement of the financial investigator training and development regime.

Consultation Question 18.

7.101 We invite consultees' views on:

- (1) Whether the drafting of the prosecutor's statement has contributed to problems in confiscation proceedings.
- (2) Whether consultees believe that it would be beneficial for a lawyer to have oversight or input into the drafting of the prosecutor's statement, and if so whether it would be beneficial to have a lawyer's oversight or input in:
 - (a) all cases;
 - (b) higher-value cases;
 - (c) cases of particular complexity; and/or
 - (d) some other category of cases; and if so which other category?

DIGITAL DATA STORAGE

Confiscation data is not stored digitally

7.102 As we noted earlier in this chapter, neither the statements produced at this stage of proceedings, nor any other documents relating to confiscation, are stored electronically on the Digital Case System ("DCS").

7.103 Many stakeholders with whom we engaged were perplexed that confiscation documents are not already digitally maintained. Practitioner support for this approach in our pre-consultation discussions was virtually unanimous.

7.104 It has been suggested to us that the decision not to store confiscation material within the DCS could have been taken with a view to protecting personal data which is provided pursuant to sections 17, 18 and 18A of POCA 2002.

7.105 An inability to access digital case files may not have an immediate impact on the conduct of the case when parties have access to the paper documents. However, it became apparent during our initial scoping exercise that one of the issues which arises in relation to delayed enforcement of confiscation is the lack of clarity provided

to magistrates as to the material which was relied upon by the Crown Court judge who made the original order.

- 7.106 We spoke to magistrates who shared their concerns about the value of the information they received when the matter was transferred to the magistrates' court for enforcement. The same magistrates described only receiving the "bare bones" of the benefit calculation with no supporting documentation such as bank statements or witness statements.
- 7.107 Currently, in order to access more detailed information, requests for original court files (including the section 16-18 statements)⁷⁷ can be made to the police, prosecuting authority and/or through the Regional Asset Recovery Team ("RART"), but the process is not necessarily timely. Delays could be avoided if the documents were accessible to magistrates prior to enforcement hearings.
- 7.108 Difficulties also arise in the higher courts in accessing documentation relating to confiscation proceedings. For example, it is very difficult to obtain papers in historical cases where an order is revisited some years later in the Crown Court or challenged in the appeal courts. The documents which were relied on to make the original order may have been lost or destroyed.
- 7.109 It is with this difficulty in mind that we provisionally propose that all documents relevant to confiscation should be stored on the court's digital case management system along with the material from the substantive criminal proceeding. This includes the preparatory form (proposed above) and all section 16-18 statements.⁷⁸

Perceived disadvantages and advantages of digital storage of confiscation data

- 7.110 During our pre-consultation discussions concerns were raised about privacy, litigants in person, and volume.
- 7.111 First, we heard that documents pertaining to confiscation have been excluded from digitalisation at least partly on the basis of concerns related to defendants' privacy. The information recorded in statements often contains personal information including sort codes, bank details and details relating to the defendant's mortgage. Additionally, sensitive spousal data and that belonging to other third parties, neither accused nor convicted of a criminal offence, could be relevant for the purposes of determining confiscation matters. The digital retention of this data is contentious. The storage of this material on the Digital Case System may make this data more widely accessible.
- 7.112 Secondly, we also heard that storing information on the online Digital Case System poses challenges for defendants who represent themselves as litigants in person in confiscation proceedings.
- 7.113 Thirdly, we heard concerns that the volume of confiscation material that may be present in an individual case poses potential problems for the digital system.

⁷⁷ Proceeds of Crime Act 2002, ss 16 to 18.

⁷⁸ Proceeds of Crime Act 2002, ss 16 to 18.

- 7.114 While concerns about sensitivity are valid, we are not ultimately persuaded that they outweigh the benefits of confiscation matters being digitally managed. Highly sensitive information including complainants' witness statements, along with interview transcripts and other case materials are currently stored securely on the DCS for the purpose of criminal trials.
- 7.115 In order to address concerns about the storage of sensitive material, we consider it possible to devise appropriate safeguards. Firstly, data would be stored and processed in compliance with general data protection legislation.⁷⁹ Secondary to this, access to cases can be restricted. It is worth noting that the DCS data is not generally available and is primarily accessed by practitioners and judges bound by stringent professional codes of conduct;⁸⁰ and court staff who are already privy to information of comparable sensitivity, such as names and addresses of witnesses.
- 7.116 Whilst digitalisation may create access issues in connection with litigants in person, this has not prevented the digitalisation of material in substantive criminal proceedings, in which litigants in person also appear.
- 7.117 It is also our view that the suggestion that the volume of confiscation material renders digital storage prohibitive is not persuasive given that the significantly greater volume of material generated by substantive criminal proceedings is currently able to be managed.
- 7.118 If data were to be stored electronically, documents could be accessed by magistrates, newly instructed counsel, senior judges and other third parties⁸¹ with relative ease. It would mean that paperwork would no longer go missing and magistrates with responsibility for enforcement would be better prepared for cases. Likewise, judges reviewing confiscation orders on appeal would crucially have access to the information relied on by the judge at first instance.

JARD

- 7.119 The Joint Asset Recovery Database ("JARD") holds information related to confiscation matters. It also records cash, account and listed asset forfeitures. JARD was created in 2003 and is used to manage the investigative and enforcement stages of the confiscation process. It is accessible by the Home Office and is used to determine the division of confiscation proceeds amongst law enforcement and prosecution agencies. JARD is also used by HMCTS for enforcement purposes.
- 7.120 JARD is populated by financial investigators who add information accumulated during the investigation and the confiscation proceedings such as the details of any assets, any cash seized and the information related to the final order. However, financial

⁷⁹ Data Protection Act 2018; and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁸⁰ Barristers Code of Conduct, <https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/the-bsb-handbook.html> (last visited July 2020); Solicitors Code of Conduct <https://www.sra.org.uk/solicitors/handbook/code/> (last visited July 2020).

⁸¹ Third parties in this context may include financial investigators.

investigators are not responsible for updating JARD in respect of the progress of enforcement; this task is undertaken by the enforcement agency, HMCTS.

- 7.121 It is important to note that JARD operates separately to DCS and exclusively holds information pertaining to confiscation proceedings. It is also accessible to a limited number of parties, namely HMCTS, financial investigators and the Home Office. It is not accessible to the parties in the proceedings. The National Audit Office report indicates that the information on JARD is reliant on manual data entry, which leads to errors.⁸² In recent years work has been done to improve the quality of data uploaded into JARD, however, it is our understanding that there is still significant regional variation as to the precise data recorded. Such concerns were expressed to us during our pre-consultation discussions by confiscation enforcement staff at HMCTS and by financial investigators.

A single database for confiscation material

- 7.122 After considering the concerns with the current system and the discrepancies between JARD and the DCS, it is our view that the most efficient way to effect improvement would be for all of the material pertaining to a criminal matter (including confiscation proceedings) to be uploaded and stored on one centralised database.
- 7.123 We are aware that there is a current project underway to achieve uniformity in data management across the courts and CPS called the Common Platform Programme (CPP). This project is designed to incorporate the existing HMCTS and CPS case management systems into one single system containing all of the substantive case material, accessible by HMCTS, CPS, judiciary, police and practitioners. We have not been able to discover whether this system is intended to supersede JARD. It seems logical though, that confiscation material should also be included on this database.
- 7.124 The issue of the best way to store and to appropriately disseminate confiscation material may be as much of an IT question as a legal one. As such we have not included a consultation question regarding it. We have not identified any fundamental legal impediment to storing confiscation material on the current Digital Case System. Doing so, or using a design such as the CPP, would appear to solve some of the issues identified by our stakeholders with regards to inadequate access to the relevant material in confiscation proceedings. Were the material to become available to magistrates' courts through being stored digitally, that might considerably assist enforcement of confiscation orders.

⁸² Confiscation Orders, Report of the National Audit Office (2013-14) HC 738 fig 17 p 34.

Chapter 8: Early Resolution of Confiscation (EROC)

INTRODUCTION

- 8.1 In the last chapter we discussed the framework for the exchange of information leading up to the confiscation hearing. In this chapter we propose a new 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. We refer to this as the Early Resolution of Confiscation (“EROC”).

CURRENT LAW

- 8.2 There are currently no provisions in the Proceeds of Crime Act 2002 (“POCA 2002”) to direct that parties attempt to reach any agreement on confiscation. After the exchange of information pursuant to sections 16 to 18A of POCA 2002 as described in the last chapter, parties must attend a hearing in the Crown Court for determination of the confiscation order. At this hearing, the process discussed at length in Chapter 7 will be employed to determine the defendant’s benefit figure and the sum they will be immediately liable to pay, pursuant to the confiscation order.
- 8.3 Depending on the nature and complexity of the case, a confiscation hearing may last anywhere from a few hours to up to week. In rare cases, confiscation proceedings may take a number of weeks to resolve.⁸³

ISSUES WITH THE CURRENT POSITION

- 8.4 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.⁸⁴ As the Court of Appeal observed in *R v Ghulam*:

We should at this point note that as a matter of law, the parties to confiscation proceedings cannot “settle” them in the sense of agreeing the terms of an order between themselves. It is for the court to determine what order is appropriate, whether or not the parties would prefer an order in different terms. In practice, however, it is of course commonplace for the prosecution and defence, by sensible discussion and negotiation, to determine the figures upon which they can agree and

⁸³ For example, the original confiscation hearing in the case of *Ahmad* lasted 31 days and resulted in a 110-page judgment, *R v Ahmad* [2012] EWCA Crim 391, [2012] 1 WLR 2335 at [11].

⁸⁴ Cases on agreed orders include *R v Kaur* [2019] EWCA Crim 695, [2019] 4 WLUK 358; *R v Yaqoob* [2018] EWCA Crim 1728; *R v Ghulam* [2018] EWCA Crim 1691, [2019] 1 WLR 534; *R v Hockey* [2018] EWCA Crim 1419; *R v Morfitt* [2017] EWCA Crim 669; *R v Yaseen* [2016] EWCA Crim 2139; *R v Kelly* [2016] EWCA Crim 1505; *R v Souleiman* [2016] EWCA Crim 124; *R v Fell* [2015] EWCA Crim 161; *R v Onuigbo* [2014] EWCA Crim 65; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Ayankoya* [2011] EWCA Crim 1488; *R v Kennedy (John)* [2011] EWCA Crim 1377; *R v Hirani* [2008] EWCA Crim 1463.

to invite the court to approve an order in those terms. In the majority of cases, the court does so approve.⁸⁵

8.5 The Court of Appeal went on to describe the practice of “discussion and negotiation” in confiscation cases as “familiar”.⁸⁶ In *R v Mackle*, the Supreme Court described, but did not criticise, the confiscation orders in question as “not only made on consent; they were the product of discussions between the parties.”⁸⁷ The Court further cautioned that “sentencing judges should be astute to ensure that they are satisfied that agreements on the amount to be recovered by way of confiscation orders are soundly based.”⁸⁸

8.6 The absence of a formal mechanism for agreement well in advance of a confiscation was criticised during our pre-consultation discussions as resulting in last minute agreements, as the courts have also noted:

Sometimes it is only at the last minute, either immediately before the court sits or even in the course of a [confiscation] hearing, that some matters are agreed and the real issues emerge, considerably burdening the task of the judge hearing the proceedings.⁸⁹

8.7 We heard from judges about how court time had been set aside to deal with confiscation cases, only for them to settle in advance. We also heard from financial investigators who have been instrumental in investigating a defendant’s alleged proceeds of crime that agreements are often reached between lawyers “at the door of the court”. A number of financial investigators told us that when they arrive for a hearing they often find themselves presented with agreements into which they have had no input and which they may not consider to be appropriate.

ANALYSIS

8.8 During our pre-consultation discussions it was suggested that the practice of agreeing confiscation orders should not be codified into statute or procedure unless that practice is one which carries with it clear advantages and does not impinge upon the primary objective of POCA 2002 to remove a defendant’s benefit from crime.

Advantages to a formalised system of agreement.

8.9 We do consider that the practice of agreeing confiscation orders does carry with it clear advantages. As we observed in Chapter 7, all participants in criminal proceedings must seek to further the overriding objective of the criminal procedure rules, namely dealing justly with a case. Dealing justly with a case includes (amongst other things):

- (1) dealing with the prosecution and the defence fairly;

⁸⁵ *R v Ghulam* [2018] EWCA Crim 1619, [2019] 1 WLR 534 at [21].

⁸⁶ Above.

⁸⁷ *R v Mackle* [2014] UKSC 5, [2014] AC 678 at [47].

⁸⁸ Above.

⁸⁹ *R v Lowe* [2009] EWCA Crim 194, [2009] 2 Cr App R (S) 81, at [21].

- (2) dealing with the case efficiently and expeditiously;
- (3) ensuring that appropriate information is available to the court when...sentence [is] considered; and
- (4) dealing with the case in ways that take into account the needs of other cases.⁹⁰

8.10 In *R v Ghulam*⁹¹ the Court of Appeal appeared to link the advantages of reaching agreement to the overriding objective:

This familiar course of discussion and negotiation has obvious and important advantages: it can achieve a very substantial saving of court time and resources, thus enabling other cases to be heard: and it may also assist in identifying what proceeds of crime can in practice be recovered, thus avoiding the expenditure of time and money in seeking unsuccessfully to recover further sums. The reaching of agreement between prosecution and defence as to appropriate figures can therefore very frequently serve the wider public interest.

8.11 Agreement of matters in confiscation insofar as is possible and identification of what is really in dispute is therefore a matter of importance in complying with the overriding objective.

8.12 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. This too furthers the overriding objective.

8.13 A formalised process for seeking agreement also carries with it the advantage that any final agreement reached is reached with due consideration by all relevant stakeholders. A formalised structure for the early resolution of confiscation can stipulate which parties should be present (for example, the defendant and the financial investigator as well as the lawyers for each party). It can also ensure that a formalised process is put in place for the judge to scrutinise any agreement and ensure that the terms of any agreement are appropriate.

8.14 A formalised structure for judicial endorsement of a provisionally agreed order is intended to ensure that any agreement is reached with the clear consent of the defendant and on a sound legal and factual basis. Many of the cases before the Court of Appeal on agreed confiscation orders have arisen as a result of allegations that the order had been agreed to because of advice that was legally or factually incorrect.⁹² Whilst the Court of Appeal has emphasised that in such cases the agreement will only be overturned in exceptional circumstances,⁹³ appeals continue to be brought on that basis.⁹⁴

⁹⁰ Criminal Procedure Rules, r 1.1 and 1.2.

⁹¹ *R v Ghulam* [2018] EWCA Crim 1619, [2019] 1 WLR 534, at [21].

⁹² *R v Ghulam* above; *R v Yaqoob* [2018] EWCA Crim 1728; *R v Hockey* [2018] EWCA Crim 1419; *R v Morfitt* [2017] EWCA Crim 66; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Perkes* [2010] EWCA Crim 101; *R v Hirani* [2008] EWCA Crim 1463.

⁹³ *R v Hirani*, above.

⁹⁴ *R v Kaur* [2019] EWCA Crim 695.

- 8.15 A further advantage to a formalised process for agreement involving the defendant is that, to some extent, it meets the criticism raised in the last chapter at paragraph 7.33 that the defendant is often overlooked as a stakeholder in the process. If a defendant has some say in the order that is made against them, it is likely to lead to a more realistic and enforceable order than one which is simply imposed upon them.⁹⁵

Holding the defendant to account for his or her proceeds of crime

- 8.16 It is undoubtedly the case that a system of seeking to reach agreement is a “compromise”⁹⁶ that “can have pragmatic advantages for the [defendant] in a particular case”.⁹⁷
- 8.17 As the case law indicates, agreements by the parties must be endorsed by the court. In *R v Kelly*,⁹⁸ the Court of Appeal emphasised that, regardless of any agreement reached by the parties, the decision as to whether the order should be made in the terms sought by the parties lies with the court. In that case, the judge made a confiscation order involving “hidden assets”,⁹⁹ despite the parties agreeing to the contrary. Therefore, ultimately the court retains the power to ensure that any compromise is one which holds the defendant to account.
- 8.18 Furthermore, if the defendant is involved in reaching a compromise, that compromise is likely to lead to a more realistic and enforceable order than might otherwise be the case.
- 8.19 If the process is perceived to be fair and values the contribution of a defendant as a stakeholder in proceedings, commitment to the result is more likely. Furthermore, defendants have a vested interest in actively participating in the negotiation of the benefit figure. The incentives to do so include:
- (1) a speedier resolution will allow a defendant to progress with their life, subject to payment, without the demand of future court proceedings; and
 - (2) defendants not in receipt of legal aid will face a cheaper legal bill at the end of the process if confiscation can be resolved at this stage.
- 8.20 The making of a realistic and enforceable order is what was described as one of the “ample benefits” that comes from “good sense on the part of all parties, including the prosecution and, in the give and take of compromise”.¹⁰⁰
- 8.21 It is notable that Hodgson Committee, which in 1984 first proposed that a confiscation regime be adopted, considered that “not infrequently the prosecution and defence will

⁹⁵ We explore this issue further in the next chapter.

⁹⁶ *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Morfitt* [2017] EWCA Crim 66; *R v Davenport* [2015] EWCA Crim 1731, [2016] 1 WLR 1400; *R v Bestel* [2013] EWCA Crim 1305, [2014] 1 WLR 457; *Edwards v CPS* [2011] EWHC 1688; *R v Hirani* [2008] EWCA Crim 1463.

⁹⁷ *R v Ghulam* [2018] EWCA Crim 1619; [2019] 1 WLR 534 at [21].

⁹⁸ [2016] EWCA Crim 1505.

⁹⁹ As to which see Chapter 16.

¹⁰⁰ See *R v Farquhar* [2008] EWCA Crim 806 at [13] in the context of voluntary repayment of the proceeds of crime.

be able openly to compromise on an agreed figure...we can see no objection to this".¹⁰¹

PROVISIONAL PROPOSALS ON THE EROC PROCESS

8.22 We provisionally propose that an EROC process be adopted. We now discuss the form that we consider that such a process should take. In doing so, we have considered approaches to out of court resolution and case management in family law, where financial dispute resolution and active case management with a view to settlement are commonplace.

Forum and nature of the EROC process

8.23 In family law proceedings involving an application for a financial remedy, cases are listed for a Financial Dispute Resolution (FDR) appointment. "The appointment is treated as a meeting held for the purposes of discussion and negotiation",¹⁰² facilitating settlement.¹⁰³ Family Practice Direction 9A states that the court expects:

- (1) parties to make offers and proposals;
- (2) recipients of offers and proposals to give them proper consideration";¹⁰⁴ and
- (3) that legal representatives attending have full knowledge of the case.

8.24 Judges play an active role in the FDR process. "The role of the judge falls into two phases: early neutral evaluation followed by mediation in an attempt to bridge remaining gaps between the parties".¹⁰⁵ The Family Justice Council has suggested that the judge's role is to:

- (1) provide a concise overview of the broad principles to be applied;
- (2) identify, if appropriate, any factual matters of a "magnetic" importance and/or (if in dispute) the determination of which is likely to lead to a particular outcome at trial plus any matters in issue the determination of which is unlikely to impact on the outcome at trial;
- (3) Identify and (where possible) comment upon any differences between the asset and income schedules produced on each side;
- (4) Identify the remaining issues between the parties based upon consideration of their most recent offers;

¹⁰¹ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p75.

¹⁰² Family Procedure Rules, r 9.17(1).

¹⁰³ Family Practice Direction 9A at para 6.1.

¹⁰⁴ Family Practice Direction 9A at para 6.3.

¹⁰⁵ Family Justice Council, *Financial Dispute Resolution Appointments: Best Practice Guidance* (2012) p 10.

- (5) When appropriate (see above), express an opinion as to the possible/probable outcomes on each of the remaining issues between the parties or give reasons why it is not possible (or, perhaps, desirable) to do so;
 - (6) Consider and express a view upon the proportionality of continuing litigation in light of the issues and amounts remaining in dispute.¹⁰⁶
- 8.25 An alternative approach in family proceedings is that adopted in care cases. Before any substantive hearing, an Issues Resolution Hearing (“IRH”) takes place. No later than 7 days prior to the IRH an advocates’ meeting must be held. Advocates may receive legal aid payments for attending such meetings.¹⁰⁷ The advocates’ meeting is used (amongst other things) to review evidence and the positions of the parties and to identify how issues may be resolved or narrowed at the IRH. The court must be notified “immediately” of the outcome of the discussions at the meeting. At the IRH itself the judge will explore the extent to which the case may resolved.¹⁰⁸
- 8.26 We consider that a hybrid of these two systems would appear to be appropriate. Any EROC system would benefit from an FDR-type requirement for those familiar with the case to approach the EROC process in a constructive way. Early resolution will be largely dependent on the will of parties to cooperate. For the process to be productive and worthwhile, all parties attending an EROC will need to have a genuine intention to settle the confiscation matter. Economically rational defendants are likely to recognise the benefits of early resolutions without being encouraged to participate, whereas others will be reliant on practitioners for sound advice. It is imperative, therefore, that counsel are familiar with the complexities of confiscation and appreciate that defendants who fail to take an EROC hearing seriously will forfeit the advantages that being an active participant in the process may bring.
- 8.27 However, we consider that the FDR process is not entirely suited to confiscation. Whilst the FDR process may encourage settlement through a steer as to a judge’s viewpoint, it may also lead to the judge hearing about offers and concessions made in the spirit of settlement that would be prejudicial to any final hearing if agreement is not ultimately forthcoming. Therefore, in the event of agreement not being reached a judge is likely to have to recuse himself or herself from dealing with subsequent contested hearing. This is recognised in the Family Procedure Rules, which state that “the judge hearing the FDR appointment must have no further involvement with the application, other than to conduct any further FDR appointment or to make a consent order or a further directions order.”¹⁰⁹
- 8.28 In Chapter 10 we set out why it is often important that a judge who heard the trial hears the confiscation proceedings. An FDR type-process could undermine such an approach where an EROC negotiation is unsuccessful and the trial judge has to recuse himself or herself from dealing with the case.

¹⁰⁶ Family Justice Council, *Financial Dispute Resolution Appointments: Best Practice Guidance* (2012) p10.

¹⁰⁷ Civil Legal Aid (Remuneration) Regulations SI 2013/422, sch 3.

¹⁰⁸ Family Procedure Rules, PD12A, Public Law Outline.

¹⁰⁹ Family Procedure Rules, r 9.17(2).

- 8.29 An IRH style EROC meeting between the parties to confiscation¹¹⁰, after which a judge is informed of the outcome, reduces the risk that a judge will have to recuse himself or herself. When the EROC meeting does then result in an agreed sum for confiscation, the time between initiating proceedings and reaching a resolution could be dramatically shortened.
- 8.30 Depending on the complexity of a case it may be appropriate for an EROC meeting to be held within a court centre. In other cases, it may be appropriate for the meeting to be conducted virtually.¹¹¹ We consider that this is a matter that should be resolved when the confiscation timetable is set. Even when the meeting is held in a court centre, there is no necessity for the hearing to be conducted in a courtroom itself, thereby freeing up courtroom space to deal with other matters.
- 8.31 A meeting conducted out of court could afford a defendant greater control over the process, including the opportunity to speak on their own behalf in a less formal and less daunting environment. Whilst a defendant who is in prison may not be able to benefit from such advantages of an out of court meeting.

Transparency in reaching agreements during the EROC meeting

- 8.32 During our pre-consultation discussions, some concerns were raised about whether a system of reaching agreements could lead to the suggestion that confiscation orders are resolved for the purpose of expediency rather than because they reflect an appropriate outcome in the case.
- 8.33 Such concerns were also anticipated when deferred prosecution agreements (“DPAs”), were introduced by the Crime and Courts Act 2013.¹¹² Through a DPA, an organisation can enter into an agreement with the prosecution authority for a prosecution to be deferred pending satisfaction of certain requirements. If those requirements are satisfied, the prosecution will be discontinued. The terms of the DPA are subject to judicial oversight,¹¹³ but are agreed in private negotiations between the parties.¹¹⁴ There is therefore some similarity with the proposed EROC process.
- 8.34 The similarity is even greater when it is noted that one condition that can be attached to a DPA is the disgorgement of the profits made from a crime.¹¹⁵ Therefore, a calculation of how much profit was made from crime and how much must be disgorged may be a matter for private discussion between the parties in DPA proceedings.

¹¹⁰ We consider that legal representatives should be in attendance as well as the financial investigator and the defendant. Where necessary, any third party whose interests are to be determined as part of the confiscation should also be included in the process.

¹¹¹ For example, consideration will have to be given to the most appropriate way for an EROC meeting to be conducted where a defendant is in prison.

¹¹² See Hansard (HL) 30 Oct 2012 Vol 740 Col 569; 13 Nov 2012 Vol 740 Col 1497

¹¹³ Crime and Courts Act 2013, sch 17.

¹¹⁴ Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice* (2014), part 3, 4.

¹¹⁵ Crime and Courts Act 2013 sch 17 para 5(3)(d). See, for example, *SFO v Airbus Plc* (31 January 2020).

- 8.35 To ensure transparency in the DPA process, paragraph 6(1) of schedule 17 of the Crime and Courts Act 2013 provides that the Director of Public Prosecutions and the Director of the Serious Fraud Office must jointly issue a code for prosecutors giving guidance on the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case.
- 8.36 A public consultation on a draft code of practice took place between June and September 2013¹¹⁶ and the final version of the code of practice was issued in February 2014. The code of practice sets out relevant factors to be considered in determining whether it is appropriate to enter into a DPA and how the negotiation process is to be conducted.¹¹⁷
- 8.37 To ensure transparency and fairness, it is likely that a similar code of practice would be needed for the EROC process. Such a code of practice would serve a useful purpose in supplementing the general guidance which is currently available to prosecutors in connection with confiscation.¹¹⁸ This comprises:
- (1) CPS guidance for prosecutors on the discretion to instigate confiscation proceedings¹¹⁹; and
 - (2) the CPS Proceeds of Crime Legal Guidance.¹²⁰

An EROC hearing after the EROC Meeting

- 8.38 As in the IRH process, following the EROC meeting, we consider that an EROC hearing should be held. The issue of transparency and fairness is not confined to the stage of discussions between the parties. Ultimately any agreed order is an order of the court and so a transparent process of judicial oversight and endorsement is required.
- 8.39 It should be remembered that confiscation is part of the sentencing process,¹²¹ and section 172(2) of the Criminal Justice Act 2003 requires that “the court must state in open court, in ordinary language and in general terms, the court’s reasons for deciding on the sentence”. As the Court of Appeal observed in *R v Billington*, a requirement to publicly articulate the outcome and the reasoning for it “is to ensure that the public at

¹¹⁶ Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice* (2014), <https://www.sfo.gov.uk/2013/06/27/deferred-prosecution-agreements-consultation-draft-code-practice/> (last visited September 2020).

¹¹⁷ Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice* (2014).

¹¹⁸ Given that “agreed orders” are not a formal part of the current confiscation regime it is understandable that the guidance does not deal with the issue of settling confiscation proceedings.

¹¹⁹ CPS, *Guidance for prosecutors on the discretion to instigate confiscation proceedings* (2009). For the background to the institution of this guidance on the use of prosecutorial discretion in the institution of confiscation see *R v Paulet* [2009] EWCA Crim 288, [2009] 2 WLUK 489.

¹²⁰ CPS, *Proceeds of Crime*, <https://www.cps.gov.uk/legal-guidance/proceeds-crime> (last visited April 2020).

¹²¹ *Phillips v United Kingdom* (2001) 11 BHRC 280, [2001] Crim LR 817; *R v Rezvi* [2001] UKHL 1, [2003] 1 A.C. 1099; *R v Silcock* [2004] EWCA Crim 408, [2004] 2 Cr App R (S) 61; *R v May* [2005] EWCA Crim 97, [2005] 1 WLR 2902. A confiscation order is a sentence for the purposes of the Criminal Appeal Act 1968; s 50 of the Criminal Appeal Act 1968 was amended by s 456 POCA 2002, schedule 11 paragraph 4 (3).

large...are made fully aware of the reasons... . Transparency in the working of the justice system is integral to the maintenance of public confidence in that system".¹²²

- 8.40 Returning to the DPA process, when an agreement is reached, a judge holds a hearing in private to determine if the agreement is fair, reasonable and proportionate and gives reasons.¹²³ The reasons and agreement are then made public. There is no reason why a similar regime could not apply to the EROC process, with the court being required to consider the legislative aims set out in Chapter 5.

Case management in the event of a failure to resolve the case at the EROC hearing

- 8.41 In recent years a series of non-legislative "Better Case Management" initiatives, implementing Sir Brian Leveson's review of Efficiency in Criminal Proceedings,¹²⁴ have been introduced to change the way advocates prepare for trials in criminal cases.¹²⁵ As we set out in the previous chapter, it is our view that these principles should extend to confiscation proceedings.
- 8.42 We consider that, upon the conclusion of an EROC meeting at which there is not full agreement on the confiscation order, the EROC hearing should be used for case management. All of the parties will have just applied their minds to the issues in the case and will be well placed to assist the court with the future management of the confiscation proceedings.
- 8.43 A Confiscation Hearing Management Form ("CHMF"), should be completed in all cases where confiscation remains unresolved following the EROC meeting. The form will be used to assist the court and the parties in ensuring that the case is dealt with efficiently. It might require the parties to:
- (1) identify any remaining disputed issues to be determined at a final hearing;
 - (2) formally record matters that are agreed (akin to section 10 admissions);¹²⁶
 - (3) identify third-party interests that may require determination and what steps are to be taken to ensure that a relevant third party is able to make representations at a final hearing;
 - (4) identify whether there are any related proceedings ongoing in other jurisdictions (matrimonial etc); and

¹²² *R v Billington* [2017] EWCA Crim 618, [2017] 4 WLR 114. The court also suggested that it ensures that parties are in a position to fully evaluate the merits of an appeal. This is of greater relevance to the passing of substantive sentences than to the EROC process. Substantive sentences are imposed by the court and not the product of an agreement, whereas as a result of the EROC process the confiscation order is not unilaterally imposed by the court but is concluded by agreement.

¹²³ Crime and Courts Act 2013, sch 17 para 8.

¹²⁴ Sir Brian Leveson P, *Review of Efficiency in Criminal Proceedings* (2015).

¹²⁵ For example, see the early guilty plea scheme and the Pre-trial Preparation procedure.

¹²⁶ Criminal Justice Act 1967, s 10.

- (5) establish whether the case is of such complexity that a specialist judge is required and whether any ongoing proceedings are relevant to the determination.¹²⁷

8.44 The introduction of these measures would align the case management of confiscation proceedings with substantive criminal matters in which a PTPH is listed in every case and the parties are required to complete a PTPH form which is uploaded to the digital case system. A uniform national process would also serve to promote greater consistency in approach.

Offers and concessions made during the EROC meeting

8.45 Each party to an EROC meeting may make a number of offers and concessions. The EROC meeting should encourage settlement. However, parties may be reluctant to do so if offers and concessions made during the meeting could be used against them, whether in future criminal prosecutions or in the event that a final confiscation hearing becomes necessary.

8.46 Offers made at an FDR “cannot be relied on subsequently (for example, in relation to making or resisting an application for costs) unless re-stated in open correspondence after the hearing [...Evidence of anything said at an FDR is not admissible in evidence at the final hearing, save at the trial of a person for an offence allegedly committed at the appointment or in very exceptional circumstances].¹²⁸ We consider that a similar principle that information given by the defendant during the EROC process should not be admissible in evidence without the agreement of the parties.

¹²⁷ See Chapter 10 for our provisional proposals on the appropriate forum and authority for confiscation.

¹²⁸ Family Justice Council, *Financial Dispute Resolution Appointments: Best Practice Guidance* (2012) p 6, citing *Re D (minors) (conciliation: privilege)* [1993] 1 FLR 932; [1993] 2 WLR 721.

Consultation Question 19.

8.47 We provisionally propose that:

- (1) A new stage of the confiscation process be introduced, known as the Early Resolution of Confiscation (EROC).
- (2) The EROC process should comprise two stages:
 - (a) 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.
 - (b) An EROC hearing, at which the judge should consider approving any agreement, or in the event of disagreement, at which case management would take place.

8.48 Do consultees agree?

Offers to settle

8.49 We have considered whether early offers to settle proceedings, akin to Part 36 offers¹²⁹ and Calderbank offers,¹³⁰ would be an appropriate addition to the confiscation regime.

8.50 The advantages of out of court settlements are threefold:

- (1) Expense is spared, particularly by a defendant (who may not be in receipt of legal aid).
- (2) In addition to monetary savings, the efficiency saving for HMCTS and Crown Court judges would be considerable.
- (3) An accepted early offer to settle is a quick and final resolution for a defendant who wants to move on with their life.

8.51 “Part 36 offers” are offers made pursuant to Part 36 of the Civil Procedure Rules. A Part 36 offer is an offer made by a party in a genuine attempt to settle a dispute.¹³¹ The offer is made “without prejudice save as to costs”,¹³² meaning that the offer cannot be used as evidence against a party in the main proceedings. The offer may only be considered when the court is deciding the issue of costs in the event that the offer is not accepted. A failure to accept a Part 36 offer may lead to specific cost

¹²⁹ Civil Procedure Rules, r 36.1.

¹³⁰ *Calderbank v Calderbank* [1975] 3 All ER 333.

¹³¹ Civil Procedure Rules, r 36.17(3) and (4).

¹³² Civil Procedure Rules, r 36.16(1).

consequences if the party who fails to accept the offer then loses the case. A Calderbank offer is similar, but is not as strict in its cost consequences.

- 8.52 An early offer to settle proceedings would permit a defendant to initiate the agreement process by supplementing their response to a prosecutor's statement with a written offer to resolve the confiscation matter. Even if this proposal were agreed by the prosecution, it would need to be scrutinised and approved by a judge before it could be formally approved. It was our preliminary view that the process for submitting, settling, or rejecting such an offer could sit within Part 33 of the Criminal Procedure Rules.
- 8.53 However, introducing early offers to settle within the confiscation regime poses some significant challenges:
- (1) The case will have been listed for an EROC which is intended to result in a collaborative settlement of the confiscation proceedings and collaborative case management in the event of no agreement being reached. If a tactical offer with potential cost consequences for non-acceptance is made and has not been accepted, the collaborative nature of the EROC and case management process is likely to be undermined.
 - (2) A reasonable offer to settle could be accepted before third party interests have been established or adequately considered. This would be problematic in relation to ensuring just outcomes and managing appeals.
 - (3) Early offers to settle could complicate confiscation proceedings by driving a dispute about the cost consequences of failing to accept reasonable offers.
- 8.54 From our discussions with stakeholders at the early stages of this project, out of court settlements do generally have the support of individuals working across the confiscation landscape. The issues described above were often noted, but dismissed as no more likely to create difficulties than many other aspects of the confiscation regime. It is for this reason that we seek to consult on this issue more broadly.

Consultation Question 20.

- 8.55 Do consultees consider that any criminal procedure rules and/or practice direction on confiscation should include a provision for "early offers to settle" to allow a defendant to supplement their response to a prosecutor's statement with a written offer to resolve the matter of confiscation?

Chapter 9: Incentivising the agreement and payment of orders

INTRODUCTION

- 9.1 In the last chapter we discussed how agreement between the parties, if approved by the court, saves court time and resources. Furthermore, where an order is satisfied, costly enforcement proceedings are not required. In this chapter we explore possible reforms to incentivise the agreement and satisfaction of orders.
- 9.2 Whilst we touch on enforcement of confiscation orders in this chapter, we explore issues relating to enforcement in greater detail in Part 6 of this consultation paper.

“INCENTIVES” THAT ARE CURRENTLY IN PLACE UNDER POCA 2002

Agreeing a confiscation order

- 9.3 As we discussed in the last chapter, where a defendant agrees the terms of a confiscation order he or she maintains a degree of control over the process.
- 9.4 A defendant is able to negotiate and agree a benefit figure that may be less than would be the case if matters were contested. However, the court must impose an order that is compliant with POCA 2002 and reflects the reality of the situation. A judge is not therefore obliged to impose an order pursuant to the terms of the parties' agreement.¹ However, as we discuss in Chapter 8, during our pre-consultation discussions, we were told that where the terms of an order have been sensibly agreed, judges invariably endorse the terms of the agreement.
- 9.5 Agreed orders are therefore a useful tool for defendants to retain an element of control, limit their liability and avoid litigation risk. The Court of Appeal recognised this to a certain extent in *R v Morfitt* observing:
- [the appellant] did not have to consent to the confiscation order being made in the terms which were agreed. He did not have to accept that the value of his benefit was £250,000. But he did accept that. He was, it seems, advised that it was in his best interests overall to negotiate the benefit figure to as low a level as could sensibly be achieved – which is evidently what happened.²
- 9.6 POCA 2002 imposes requirements, or what might be called coercive incentives, on a defendant to cooperate in the process of making a confiscation order and to satisfy a confiscation order once made, and sanctions for non-compliance. Aside from the implicit benefit to be gained in reaching agreement on the terms of a confiscation

¹ *R v Kelly* [2016] EWCA Crim 1505.

² *R v Morfitt* [2017] EWCA Crim 669, para 41, [2017] Lloyd's Rep FC 383.

order, there are no positive benefits, or rewards, available to a defendant who cooperates with the confiscation process.

9.7 The coercive incentives deployed under the regime can be summarised as follows:

- (1) Where a defendant fails to provide information as directed, the court may draw an adverse inference.
- (2) If a defendant fails to respond to an allegation in a prosecutor's statement of information he or she is deemed to have accepted the matter.
- (3) When imposing an order, the court must consider the imposition of a compliance order (ie an order that the court believes is appropriate to ensure that the confiscation order is effective).
- (4) Interest accrues at the rate of 8% on the principal sum if an order is not satisfied as directed.
- (5) A defendant may be imprisoned if an order is not satisfied as directed.

Failure to provide information or to respond to a matter in a prosecutor's section 17 statement

9.8 In Chapter 7 we discussed the timetabling of confiscation proceedings. In summary, the court may order a defendant to provide information (such as bank account details, cash held, details of safe deposit boxes etc) to assist the court in carrying out its confiscatory functions.³ Information provided by a defendant may be utilised by the prosecution in drafting a statement of information (section 16 statement) which details the prosecution's case and identifies the issues to be determined.

9.9 If, without reasonable excuse, a defendant fails to comply with a request for information, the court may draw any inference that appears appropriate.⁴ The drawing of an inference does not prevent the court dealing with non-compliance as a contempt which is punishable by committal to custody.⁵

9.10 Once a section 16 statement has been served, a defendant may be ordered to indicate (in a section 17 statement) which matters in the section 16 statement are accepted and to particularise matters that are not accepted.⁶ The purpose of a section 17 statement is to identify the areas of dispute for a confiscation hearing. A defendant who fails to respond may be treated as having accepted every allegation in the section 16 statement.⁷

³ Proceeds of Crime Act 2002, s 18(2).

⁴ Proceeds of Crime Act 2002, s 18 (4).

⁵ Proceeds of Crime Act 2002, s 18 (5).

⁶ Proceeds of Crime Act 2002, s 17.

⁷ Proceeds of Crime Act 2002, s 17 (3).

Compliance orders

- 9.11 In accordance with section 13A of POCA 2002, the court making a confiscation order has the power to make such order it believes appropriate for the purposes of ensuring that confiscation is effective.⁸
- 9.12 In particular, the court must consider whether any restriction or prohibition on the defendant's travel outside of the United Kingdom ought to be imposed.⁹ This may include the defendant surrendering his or her passport or a prohibition on applying for a passport or international travel document.¹⁰ The court must strike a careful balance between the need to ensure that the confiscation order in question is effective, and the impact on the individual defendant if a travel restriction is made.¹¹

Accrual of interest

- 9.13 A defendant who fails to pay his or her confiscation order in full before the time to pay date¹² risks accruing interest at a rate of 8% on his or her outstanding balance for the period for which the order remains unpaid.¹³ Any interest accrued forms part of the amount payable under the confiscation order.¹⁴

Imprisonment in default of payment

- 9.14 The court has the power to activate a term of imprisonment of up to 14 years if an offender fails to pay his or her order in full before the expiry of the time to pay period.¹⁵
- 9.15 When fixing the appropriate term, the court must not exceed the relevant maximum specified in section 35 of the Act.¹⁶ Activation of the default term is reserved as a measure of last resort where a defendant has failed to satisfy an order as a result of his or her wilful refusal or culpable neglect.
- 9.16 The House of Commons Public Accounts Committee's examination of confiscation concluded that default terms are limited in their success, finding "many criminals,

⁸ Proceeds of Crime Act 2002, s 13A; the court may act on an application from the prosecutor, or by its own initiative. We discuss compliance orders in greater detail in Chapter 22.

⁹ Proceeds of Crime Act 2002, s 13A(4).

¹⁰ See *R v Pritchard* [2017] EWCA Crim 1267, [2018] 1 WLR 1631.

¹¹ *R v Pritchard* above at [26].

¹² As a general rule a confiscation order must be paid on the day the order is made, unless the court is satisfied that the defendant is unable to realise the full amount on that day. In that case, the court may make an order for the balance to be paid in full within a specified period, not exceeding three months; Proceeds of Crime Act, s 11.

¹³ Proceeds of Crime Act 2002, s 12. We discuss the accrual of interest in greater detail in Chapter 22.

¹⁴ Except to the extent that accrued interest is not included in the starting point for the purpose of the calculation of the reduction in days of imprisonment when giving proportionate credit for part-payment of the order in accordance with Magistrates Court Act 1980 s 79(2).

¹⁵ Proceeds of Crime Act 2002, s 35(2A); the default term is initially fixed at the time the order is made and reduced pro-rata to reflect any payments made towards to outstanding balance.

¹⁶ For orders set at £10,000 or less the maximum term is 6 months, up to £500,000 the term in default may not exceed 5 years. Orders between the sum of £500,000 – 1 million warrant a maximum of 7 years imprisonment, extended to 14 years for orders in excess of £1million. A defendant can expect to serve half of the term save for those with orders in excess of £10 million, who are no longer automatically entitled to release at the halfway point of the term, as per Serious Crime Act 2015, s 10(3).

particularly those with high-value orders are willing to serve a prison sentence rather than pay up”.¹⁷

- 9.17 The total outstanding debt continues to grow at a startling rate. Realistically collectable debt amounts to approximately £161 million, just under 8% of the total outstanding debt.¹⁸

INCENTIVES FOR CO-OPERATION IN OTHER AREAS OF THE CRIMINAL JUSTICE SYSTEM

- 9.18 It is noteworthy that other areas of the criminal justice system reward compliance rather than simply penalising non-compliance
- 9.19 Before considering whether the confiscation regime could feasibly offer reductions to incentivise compliance, it is necessary to consider in greater detail how co-operation is incentivised in other areas of the criminal justice system. We consider:
- (1) Reductions in sentence where a defendant pleads guilty, thus ensuring a trial is not necessary.
 - (2) Reductions in sentence or immunity from prosecution where a defendant provides assistance to the prosecution by giving evidence against other defendants (SOCPA agreements¹⁹).
 - (3) Reductions in sentence for providing information to the state (texts).
 - (4) Deferred Prosecution Agreements (DPAs) where a corporate defendant may avoid prosecution if certain requirements are met.
 - (5) Contractual Disclosure Facilities Agreements in tax-related cases specific to HMRC.

Credit for guilty plea

- 9.20 The credit for guilty plea system is perhaps the most well-known incentive of the criminal justice system. Defendants who plead guilty will usually receive a reduction in their sentence in exchange for their admission. When determining the appropriate sentence for an offender who has pleaded guilty, section 144(1) of the Criminal Justice Act 2003 makes it mandatory for a court to take into account:
- (1) the stage of proceedings at which the offender indicated his intention to plead guilty; and
 - (2) the circumstances in which this indication was given.

- 9.21 Section 144 does not confer a statutory right to a “discount”; a reduction is granted at the discretion of the court. However, the Sentencing Council has published a

¹⁷ Confiscation orders, Report of the House of Commons Public Accounts Committee (2013-14) HC 942 p 5.

¹⁸ HMCTS, *Trust Statement 2018-19* (2019) HC 2337 p 8.

¹⁹ Such agreements are known as “SOCPA” agreements because they are reached pursuant to the Serious Organised Crime and Police Act 2005.

guideline²⁰ which courts must follow unless it would be contrary to the interests of justice to do so.²¹ The Guideline details the key principles as follows:²²

Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt:

- a) normally reduces the impact of the crime upon victims;
- b) saves victims and witnesses from having to testify; and
- c) is in the public interest in that it saves public time and money on investigations and trials.

9.22 A reduction is given on a sliding scale dependent on the stage of proceedings at which a guilty plea is tendered. The rationale is “to encourage those who are going to plead guilty to do so as early in the court process as possible.”²³ Defendants are encouraged to indicate their guilt at the “first reasonable opportunity”; in exchange, a reduction of one third is usually granted. After the first stage of proceedings this should be reduced on a sliding scale from one quarter to a tenth for a plea entered on the first day of trial.

Assisting the prosecution: SOCPA agreements

9.23 Sections 71 to 75 of the Serious Organised Crime and Police Act 2005 (“SOCPA”) established a statutory framework to replace earlier arrangements governing agreements with defendants who had offered to assist the prosecuting authorities. Prior to SOCPA, the courts had taken any assistance into account (via a “text” discussed below) when sentencing.²⁴

9.24 A prosecutor may provide a defendant with conditional immunity from prosecution in exchange for his or her co-operation. Undertakings can also be given to the effect that the information provided will not be used in evidence in civil recovery proceedings under Part 5 of POCA 2002 (the removal of criminally acquired assets).²⁵ An immunity notice specifies the offence for which the individual is immune from prosecution and will normally include a condition of breach, which would result in the immunity being revoked.

9.25 Aside from immunity, a defendant may also enter into a SOCPA agreement and receive a reduction in his or her sentence in exchange for his or her co-operation.²⁶ A sentence previously imposed may be the subject of “review” and downward adjustment following a post-sentence SOCPA agreement.

²⁰ Sentencing Council, *Reduction in Sentence for a Guilty Plea Definitive Guideline* (2017).

²¹ Coroners and Justice Act 2009, s 125.

²² Sentencing Council, *Reduction in Sentence for a Guilty Plea Definitive Guideline* (2017) p4.

²³ Sentencing Council, *Reduction in Sentence for a Guilty Plea Definitive Guideline* (2017), p 4.

²⁴ *R v A and B* [1998] EWCA Crim 3529, [1999] 1 Cr App R(S) 52.

²⁵ Serious Organised Crime and Police Act 2005, ss 71 and 72.

²⁶ Serious Organised Crime and Police Act 2005, ss 73 and 74.

9.26 A SOCPA agreement is available only where:

- (1) The assistance is in relation to the investigation or prosecution of an offence triable in the Crown Court.²⁷ A Memorandum on Post-Legislative Assessment of SOCPA explains: “this amendment was considered desirable to make explicit the intention that the provisions are to be used only in obtaining assistance in respect of serious offences.”²⁸
- (2) The defendant must plead guilty in proceedings before the court.²⁹
- (3) A written agreement must be in place.³⁰

9.27 A reduction should reflect the value of the assistance to the effective administration of justice. In circumstances where an individual provides information of significance a “normal” reduction in the region of 50% to 66% should be applied to their sentence.³¹

9.28 A reduction can be made even in cases where a minimum sentence is required. For example, a mandatory minimum sentence of five years’ imprisonment must be imposed in respect of certain firearms offences.³² SOCPA permits a sentence below the statutory minimum to be imposed.³³

9.29 Where applicable, the appropriate reduction will be calculated separately and be in addition to any reduction awarded under the credit for guilty plea scheme.³⁴ Crucially, the statutory framework provides for the court to increase the sentence to which the referral relates in the event that the defendant reneges on the agreement.³⁵

9.30 The rationale underpinning the regime was explained by the President of the Queen’s Bench Division who observed:

[assisting the prosecution] provides something of a check against the belief, deliberately fostered to increase their power, that gangs of criminals, and in particular the leaders of such gangs, are untouchable and beyond the reach of justice.³⁶

Texts

9.31 It has always been the position at common law that a defendant convicted of a crime would receive credit against his or her sentence for any assistance provided to the

²⁷ Serious Organised Crime and Police Act 2005, ss 71(1), 72(1), 73(1) and 74(1).

²⁸ Memorandum to the Home Affairs Committee, Post-Legislative Assessment of the Serious Organised Crime and Police Act 2015 (2010), p3.

²⁹ Serious Organised Crime and Police Act 2005, s 73(1).

³⁰ Serious Organised Crime and Police Act 2005, ss 71(1), 73(1)(b) and 74(2)(c).

³¹ *R v P* [2007] EWCA Crim 2290; [2008] 2 Cr App R (S) 5.

³² Firearms Act 1968, s 51A.

³³ Serious Organised Crime and Police Act 2005, s 73(5).

³⁴ *R v Wood* [1997] 1 Cr App R (S) 347, [1996] Crim LR 916.

³⁵ Serious Organised Crime and Police Act 2005, s 74(5).

³⁶ *R v P* [2007] EWCA Crim 2290, [2008] 2 All ER 684; *R v Blackburn* [2008] Cr App R 5 at [22].

state. A “text” (effectively a letter from the prosecution detailing the assistance provided) is given to the sentencing judge who may reduce the sentence imposed. A discount is given to encourage assistance from defendants who are prepared to act as informants or to give evidence for the prosecution. The extent of the discount will ordinarily depend on the value of the help given or expected to be given.³⁷

9.32 Despite the enactment of SOCPA this common law framework remains in place.³⁸ Indeed it appears that far greater use is made of the system established under the common law than the statutory scheme.³⁹

9.33 The statutory regime under SOCPA and the text regime differ primarily in that a defendant is not required to admit the full extent of his or her criminality in order to gain a reduction in sentence under the latter. It is for this reason that the court in *R v H* considered the formal SOCPA style agreements to benefit the administration of justice to a greater extent.⁴⁰ Any potential reduction awarded under the text regime will therefore be less than would be allowed in relation to a SOCPA style agreement. In that sense, reduction for assisting the prosecution is awarded on a tapering scale to reflect the level that the defendant’s assistance will benefit the public in the administration of justice.

Deferred Prosecution Agreements (“DPAs”)

9.34 In Chapter 8 we provide a brief outline of DPAs. DPAs were brought into being by the Crime and Courts Act 2013.⁴¹ A DPA is a mechanism whereby, for certain economic or financial offences,⁴² a body corporate can avoid prosecution by entering into an agreement on negotiated terms with a designated prosecutor. An arrangement requires the approval of the court, must be in the interests of justice and its terms must be fair, reasonable and proportionate.⁴³

9.35 DPAs may impose, but are not limited to, the following requirements:

- (1) to pay to the prosecutor a financial penalty;
- (2) to compensate victims of the alleged offence;
- (3) to donate money to a charity or the third party;
- (4) to disgorge any profits made from the alleged offence;

³⁷ *R v A and B* [1999] 1 Cr App R (S) 52.

³⁸ *R v P* [2007] EWCA Crim 2290, [2008] 2 All ER 684; *R v Blackburn* [2008] Cr App R 5 at [22].

³⁹ *R v AXN* [2016] EWCA Crim 590 at [1], [2016] 1 WLR 4006.

⁴⁰ *R v H, D, Yasser Chaudhury* [2009] EWCA Crim 2485, [2010] 2 Cr App R (S) 18 at [3].

⁴¹ Crime and Courts Act 2013, s 45 and sch 17.

⁴² The applicable offences are listed in Crime and Courts Act 2013, part 2 of sch 17.

⁴³ Crime and Courts Act 2013, sch 1, paras 7 and 8.

- (5) to implement a compliance programme or make changes to an existing compliance programme relating to policies or to the training of employees or both;
- (6) to co-operate in any investigation related to the alleged offence;
- (7) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.⁴⁴

9.36 Under a DPA, a prosecutor charges a company with a criminal offence but proceedings are automatically suspended if the DPA is approved by the judge.

9.37 The Serious Fraud Office cites the main benefits of a DPA as:

- (1) they enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people);
- (2) they are concluded under the supervision of a judge, who must be convinced that the DPA is “in the interests of justice” and that the terms are “fair, reasonable and proportionate”;
- (3) they avoid lengthy and costly trials;
- (4) they are transparent, public events.⁴⁵

Contractual Disclosure Facility

9.38 A lesser punishment may be offered as an incentive to certain individuals suspected to have committed tax fraud. In cases where a criminal investigation is not currently underway, the Commissioners of Her Majesty’s Revenue and Customs (“HMRC”) may choose to proceed using the Code of Practice 9 (“COP9”) procedure.

9.39 Under the COP9 procedure, a taxpayer is given the offer of an opportunity to make an accurate disclosure of all conduct, including deliberate conduct⁴⁶ which has led to irregularities within their tax affairs, under a contractual arrangement known as a Contractual Disclosure Facility (“CDF”). Individuals who receive a CDF are afforded 60 days to respond.

9.40 There are two potential benefits for an individual who complies with a CDF. First, if HMRC believes that an individual has been full and frank in his or her disclosure they will not pursue a criminal investigation against the recipient of the CDF. Secondly, a

⁴⁴ Crime and Courts Act 2013, sch 17, para 5.

⁴⁵ Serious Fraud Office, *Deferred Prosecution Agreements*, <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/> (last visited April 2020).

⁴⁶ “The term ‘deliberate conduct’ means that the recipient knew that an entry or entries included in a tax return and/or accounts were wrong, but the recipient submitted it/them anyway, or that the recipient knew that a liability to tax existed but chose not to tell HMRC at the right time” (HMRC 06/14 Code of Practice 9 p2).

complete and honest disclosure will also ensure the greatest possible reduction in any subsequent penalty that may be due.⁴⁷

COULD SIMILAR INCENTIVES BE APPLIED TO CONFISCATION PROCEEDINGS?

- 9.41 Recognising that incentives offered to defendants in other areas of the criminal justice system go further than those currently in place pursuant to POCA 2002, we considered whether similar incentives could be offered in confiscation proceedings to foster greater compliance from defendants.
- 9.42 In order to determine whether similar incentives could be applied to confiscation proceedings, we have examined criticism of some of the incentives we have detailed.
- 9.43 In 2011, the Sentencing Council conducted a comprehensive study to assess where public opinion lay on the issue of the reduction in sentence for a guilty plea. The report made several observations:
- (1) While the general public were largely unsupportive of a reduction in sentence for a guilty plea, those surveyed who had previously witnessed, or been a victim of crime, were more likely to be supportive of the policy.
 - (2) The public generally perceived the policy to exist as a money saving mechanism, but would rather it operated as a mechanism to spare victims and witnesses the emotional ordeal of going through court proceedings.
 - (3) The general public disliked a common approach to calculating reductions. Pleading guilty to an offence should mean that an offender received a more lenient sentence in *some* cases. A reduction of a third, for a guilty plea at the earliest opportunity, could potentially be too lenient. It was felt that the appropriate reduction should depend on facts or circumstances specific to the case.
 - (4) The concept of a “reduction” in sentence was viewed seemingly as a benefit to the offender rather than to participants in court proceedings and in terms of monetary savings.⁴⁸
- 9.44 Notwithstanding public concern, reductions in sentence following a plea of guilty are well established and it is accepted that the scheme serves legitimate purposes. In *R v Caley* the Court of Appeal acknowledged its benefits to victims of crime, who know from an early stage both that the defendant has acknowledged his or her guilt and that they will be spared the need to give evidence at some unknown date in the future. The Court of Appeal also acknowledged its benefits to the public interest more generally in terms of limiting the time, financial and court resources needed to resolve a case.⁴⁹

⁴⁷ See GOV.UK, *Admit tax fraud to HMRC using the Contractual Disclosure Facility*, <https://www.gov.uk/guidance/admitting-tax-fraud-the-contractual-disclosure-facility-cdf> (last visited April 2020).

⁴⁸ Dawes, Harvey and others, *Attitudes to guilty plea sentence reductions* Sentencing Council Research Series 02/11.

⁴⁹ *R v Caley* [2012] EWCA Crim 2821, [2013] 2 Cr App R (S) 47.

- 9.45 Similarly, the prospect of bringing the leaders of criminal gangs within the reach of justice provides a degree of legitimacy to the SOCPA regimes, at least in the view of the court.⁵⁰
- 9.46 It has been long established that a discount is appropriate where a defendant has assisted in the investigation, detection, suppression and prosecution of serious crime.⁵¹ A defendant who so assists has placed him or herself and his or her family at potential risk of harm and has arguably done something over and above simply agreeing to pay back the proceeds of his or her criminality.
- 9.47 However, in the absence of a study into the public perception of reductions in sentence in exchange for providing assistance to the prosecution we cannot say with certainty whether the provisions are viewed as a valuable component of the criminal justice system by the public at large.

Is a reduction in the amount of a confiscation order to incentivise co-operation desirable?

- 9.48 Some stakeholders have suggested that a SOCPA style agreement could be utilised in confiscation proceedings.
- 9.49 It was suggested that defendants would be incentivised to agree and satisfy confiscation orders if co-operation enabled them to retain a percentage of the proceeds of their crime(s) and/or resulted in a reduction of the substantive sentence imposed.
- 9.50 As we have already discussed in Chapter 5, the primary aim of the statutory regime is to remove the proceeds of crime from offenders. In *Ahmad* the Supreme Court observed:
- The overall aim of the statute is to recover assets acquired through criminality, both because it is wrong for criminals to retain the proceeds of crime and in order to show that crime does not pay.⁵²
- 9.51 We detail at Chapter 5 our proposals to place the aim of the regime on a statutory footing. In that chapter we also observe that a secondary objective of the confiscation regime is to deter and disrupt criminality.⁵³
- 9.52 Any scheme permitting a defendant to retain a proportion of the proceeds of crime would lead to greater co-operation in some cases and would save court time and

⁵⁰ *R v P* [2007] EWCA Crim 2290, [2008] 2 All ER 684; *R v Blackburn* [2008] Cr App R 5 at [22].

⁵¹ *R v Sinfield* (1981) 3 Cr App R(S) 258; *R v King* (1985) 7 Cr App R (S) 227; *R v Sivan* (1988) 10 Cr App R (S) 282.

⁵² *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [38]. Similar observations were made in *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [12] and *R v Revzi* [2002] UKHL 1, [2003] 1 AC 1099, at [14].

⁵³ *R v Rezvi* above at [14]; *R v Sekhon* [2002] EWCA Crim 2954, [2003] 1 WLR 1655; Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), para 3.10; *Home Office, Serious and Organised Crime Strategy* (2018) Cm 9718, para 65; *Home Office, Serious and Organised Crime Strategy* (2013) Cm 8175, p 34.

public resources. Such a scheme could, however, be contrary to the purpose of the legislation and may also impinge upon its deterrent effect.

9.53 As we have noted, the current SOCPA regime is considered to be of utility because it facilitates the prosecution of defendants who may not otherwise be brought to account. The public interest is therefore served to a greater extent than a defendant who saves court time and public funds by agreeing and satisfying a confiscation order. Immunity from prosecution (and post-conviction confiscation proceedings) or undertakings not to use evidence provided in civil recovery proceedings are undoubtedly reserved for assistance provided to facilitate the prosecution of grave crimes.

9.54 The magnitude of such a decision is borne out by the steps that must be undertaken where immunity is being considered. CPS guidance states:

The Attorney General should be consulted by the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, the Director of the Serious Fraud Office or a prosecutor designated by them, before any decision is made on the granting of a full immunity under section 71 of the 2005 Act.⁵⁴

9.55 The CPS guidance acknowledges that an immunity notice, or undertaking which impedes or removes the ability to confiscate the proceeds of crime may provide powerful motivation for a defendant:

The granting of immunity or the issuing of a restricted use undertaking can result in the loss of opportunities to confiscate criminally obtained assets following conviction or recovery under Part 5 of the Proceeds of Crime Act 2002. Section 72(2) of the 2005 Act provides that the issuing of a restricted use undertaking can prevent the use of the information obtained as a result of the undertaking in both criminal proceedings and for the purposes of civil recovery action or cash seizure under Part 5 of the Proceeds of Crime Act 2002.

The desire to avoid confiscation through co-operation may be a powerful incentive for some offenders, but this motive can substantially reduce their credibility as witnesses by providing a considerable benefit in return for their testimony. It would also damage public confidence in the criminal justice system if criminals were routinely being allowed to keep the profits of their criminal activities in return for co-operation with the prosecution.

Prosecutors must always take into account the potential impact on the ability to recover the proceeds of criminal conduct when deciding if it is in the interests of justice to issue an immunity, a restricted use undertaking or to enter into an agreement with a potential assisting offender that results in the dropping of offences that would otherwise trigger the confiscation provisions or invoke the “criminal lifestyle” presumptions. Only in very exceptional circumstances will it be absolutely necessary in the public interest to agree to apply the undertaking to Part 5 proceedings. Further, it should be made clear that if the undertaking is extended to

⁵⁴ Crown Prosecution Service, *Queen’s Evidence – Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005*, para 44, <https://www.cps.gov.uk/legal-guidance/queens-evidence-immunities-undertakings-and-agreements-under-serious-organised-crime> (last visited April 2020).

Part 5 proceedings it is restricted to the benefits derived from the investigation and charges specified in the agreement.⁵⁵

- 9.56 The guidance goes on to note that where a defendant is eligible for a reduction in sentence by virtue of assistance provided under a SOCPA agreement (as opposed to having been granted immunity):

it will rarely, if ever, be appropriate as part of an assisting offender agreement under section 73 or 74 to agree that the prosecutor will not ask the court to proceed to consider confiscation under section 6 of POCA. Such an agreement could not in any event bind the court which, under section 6(3)(b), must proceed if it considers it appropriate to do so.⁵⁶

- 9.57 Although assisting the prosecution serves the public interest, the guidance makes plain that the ability to recover the proceeds of crime is an important factor for prosecutors to consider in deciding whether to enter into an agreement. We consider that the current statutory regime and guidance strikes the right balance; SOCPA agreements are reserved for serious cases and an undertaking not to pursue the recovery of the proceeds of crime will rarely, if ever, be appropriate.
- 9.58 We consider that a reduction for simply agreeing and satisfying a confiscation order does not serve the public interest to the same extent as a SOCPA agreement and accordingly a reduction to a confiscation order cannot be justified.
- 9.59 A further difficulty with any such scheme arises where there are identified victims who fall to be compensated. It would be wrong in principle to permit a defendant to retain funds at the expense of victims who incurred losses from the criminality in question. This difficulty could perhaps be addressed by prohibiting a reduction for co-operation where there are insufficient funds to satisfy any compensation order imposed or devising a scheme whereby the benefit figure was reduced to reflect the assistance given. Such a scheme would, however, be complex particularly if the only benefit obtained by a defendant was from identified victims. We have therefore provisionally concluded that: (i) the primary aim of the regime would be undermined by any scheme that permitted a defendant to retain a portion of the proceeds of his or her criminality; and (ii) the level of cooperation in agreeing and satisfying a confiscation order does not serve the public interest to such an extent that a reduction can be justified.
- 9.60 We consider that there is no contradiction between the conclusion that a defendant should not be permitted to retain his or her proceeds of crime by way of an incentive to agree a confiscation order and the provisional proposal in the last chapter that a formalised regime be introduced within which a confiscation order may be agreed.
- 9.61 The proposed regime for agreement of confiscation orders is intended to facilitate the making of realistic and enforceable confiscation orders. Whilst the process may involve some compromise, ultimately any agreement must be approved by a judge as being an order that appropriately holds the defendant to account for his or her benefit

⁵⁵ As above, paragraphs 34-36

⁵⁶ Crown Prosecution Service, *Queen's Evidence – Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005*, para 106, <https://www.cps.gov.uk/legal-guidance/queens-evidence-immunities-undertakings-and-agreements-under-serious-organised-crime> (last visited April 2020).

from crime. The proposed agreement regime does not discount a proportion of the defendant's criminal gains "as of right" for reaching an agreement.

Consultation Question 21.

- 9.62 Do consultees agree that it would be wrong in principle to allow a defendant to retain a portion of the proceeds of his or her criminality as an incentive to agree and satisfy a confiscation order?

Would a reduction of the substantive sentence to incentivise co-operation be desirable?

- 9.63 A defendant convicted of supplying drugs may be sentenced to a term of imprisonment (the substantive sentence), and be subject to a confiscation order removing the proceeds of his or her criminality.
- 9.64 Where a confiscation order is agreed and satisfied, a reduction in the substantive sentence could potentially be justified. Whilst the public at large may find it less than palatable that a convicted defendant may receive a reduction in his or her sentence for merely paying back the proceeds of his or her criminality, the position does not appear to be readily distinguishable from a reduction in sentence where a defendant pleads guilty. Court time and resources are saved if agreement is reached and money is recovered by the state without the need for potentially costly enforcement action.
- 9.65 We have, however, provisionally concluded that a reduction in the substantive sentence cannot be justified. The tangible benefits in facilitating agreement and satisfaction of confiscation orders are:
- (1) court time and public funds are saved;
 - (2) the proceeds of crime are recovered without the need for costly enforcement action;
 - (3) voluntary repayment is potentially indicative of remorse and could be considered to be evidence of a defendant making reparation for his or her offending.
- 9.66 We consider that the benefits we have identified are insufficient to justify a reduction in the substantive sentence as the public interest is not served to the same extent as other schemes. Furthermore, as we discuss at paragraphs 1.81 – 1.82, although confiscation is part of the sentencing process, it is a separate and discrete part.
- 9.67 A DPA applies only to corporate defendants who cannot be imprisoned. A DPA not only saves public expense in prosecuting potentially complex cases but also requires any profits to be disgorged and victims to be compensated.
- 9.68 In addition to a saving of resources, a plea of guilty also negates the need for victims of crime to attend court to give evidence which can reduce the impact of crime upon victims. A reduction can therefore be justified.

- 9.69 Assisting in the prosecution of offenders has a tangible benefit to society at large by bringing serious criminals to account. SOCPA agreements are used sparingly after a thorough review of the public interest. Accordingly, a grant of immunity or reduction in sentence can be justified.
- 9.70 Additionally, permitting a reduction in the substantive sentence for co-operation with a confiscation order would present further difficulties including:
- (1) revisiting sentence may cause additional distress to victims;
 - (2) revising sentence offends the principle of finality;
 - (3) defendants subject to a confiscation order, unlike other defendants, would be able to have their sentence reviewed in light of post-sentence conduct;
 - (4) a reduction would be available only to a discrete category of defendants;
 - (5) the substantive sentence imposed may not be commensurate with the seriousness of the offence;
 - (6) the scheme may have reduced impact upon defendants who receive (or are likely to receive) a sentence other than immediate imprisonment;
 - (7) any such scheme would be complex and would add a further layer of complexity to the sentencing process.

Potential impact on victims and on finality in criminal proceedings

- 9.71 Confiscation orders are usually made after sentence has been imposed.⁵⁷ Revisiting sentence after its imposition may:
- (1) cause additional distress to victims; and
 - (2) offend the principle of finality (essentially a principle that there should be a degree of certainty that the determinations reached in criminal proceedings are final).⁵⁸
- 9.72 Any scheme permitting a reduction would mean that victims may not be aware of the final outcome despite sentence having been imposed. Furthermore, reductions to sentence pursuant to a SOCPA agreement are subject to a right of appeal.⁵⁹ Any scheme permitting a discount on account of cooperation in confiscation proceedings would also require a right of appeal. A defendant would therefore have a right to seek leave to appeal the substantive sentence and any reduction. Any scheme may therefore prolong criminal proceedings thus preventing finality and a sense of closure for victims of crime.

⁵⁷ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8] and [13]

⁵⁸ See K Malleon, *Appeals against Conviction and the Principle of Finality* (1994) 21 (1) *Journal of Law and Society* 151.

⁵⁹ Serious Organised Crime and Police Act 2005, s 74(8).

A mechanism to review sentence

9.73 A defendant who pays compensation or offers assistance to authorities after sentence is not entitled to a reduction. The Court of Appeal acts as a court of review and does not ordinarily reward a defendant for good behaviour during his or her sentence.

9.74 In *R v ZTR*⁶⁰ the court considered whether a defendant who was serving a life sentence and provided assistance to the prosecution (but not through a formal SOCPA agreement) was entitled to a reduction in his sentence. The court declined to modify the common law and observed:

We can see no good reason to depart from the established principles... . First this court would not be acting as a court of review, but rewarding someone for good behaviour during his sentence. That is not this court's function. Second, experience has shown that some may be motivated to manufacture assistance after conviction in the hope of a reduction in a long sentence. Nothing should be done which might encourage this.

9.75 Absent a display of remorse and reparation prior to sentencing, we do not consider that a reduction should be made for agreeing and satisfying a confiscation order. In *Inwood* the court observed:⁶¹

Compensation orders were not introduced into our law to enable the convicted to buy themselves out of the penalties for crime. Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable the compensation to be paid.

9.76 We consider that satisfaction of a confiscation order does not warrant derogation from established principles. SOCPA agreements are a statutory exception, but, as we have observed, the public interest is well-served and an agreement is only entered into after a vigorous assessment of the circumstances of the case.

A reduction would be available only to a limited category of defendants

9.77 A reduction in sentence following a plea of guilty is available in all cases before the court whereas a reduction for agreeing and paying a confiscation order would be available only in cases where a defendant has benefited from crime and a confiscation order has been imposed. A reduction in sentence would therefore be available only for a discrete category of offenders. For example, a defendant convicted of an offence of violence would not be able to avail themselves of a reduction. It is undesirable that a limited class of defendants would be eligible for a reduction.

9.78 Importantly, because a confiscation order is an order *in personam* (effectively a debt owed by a defendant) it may be satisfied from funds or assets that are not tainted by criminality. Defendants with affluent friends or relatives may therefore be able to obtain a reduced sentence by utilising their privileged status which is undesirable.

⁶⁰ *R v ZTR* [2015] EWCA Crim 1427 at [19].

⁶¹ *R v Inwood* (1974) 60 Cr App R 70 at [73]

The link between confiscation and the sentence imposed for the substantive offending

9.79 Section 142(1) of the Criminal Justice Act 2003 provides; “Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing”. The purposes of sentencing are listed as:

- (1) the punishment of offenders;
- (2) the reduction of crime (including its reduction by deterrence);
- (3) the reform and rehabilitation of offenders;
- (4) the protection of the public; and
- (5) the making of reparation by offenders.

9.80 The substantive sentence imposed must be assessed by considering the seriousness of the offence by reference to the defendant’s culpability and the harm caused by the offending.⁶²

9.81 Although it is accepted that confiscation is indeed part of the sentencing process, it is separate and discrete from it. The regime is not designed to punish a defendant; that objective is met by the substantive sentence imposed. As the Court of Appeal has emphasised:

it is essential to bear in mind the principle that the confiscation process under the 2002 Act is not of itself aimed at punishment. On the contrary, it is aimed at recovery of benefit: to ensure that criminals do not retain for themselves their ill-gotten gains. As stated by Lord Bingham in *Jennings*⁶³ at paragraph 13:

The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. That must ordinarily mean that he has obtained property so as to own it...

Necessarily judges in confiscation cases are dealing with persons who have been criminally convicted after a trial or on a plea. But appropriate *punishment* for the criminality is to be addressed and will have been addressed by the sentence. That punishment is not thereafter to be, as it were, topped up by the confiscation process.⁶⁴

9.82 The repayment of sums improperly obtained may evidence the reform and rehabilitation of an offender and, if compensation is to be paid, involves reparation. However, confiscation is not directed at punishment. It is designed to remove the proceeds of crime and permitting a reduction in sentence on account of a defendant’s

⁶² Criminal Justice Act 2003, s 143.

⁶³ *Jennings v Crown Prosecution Service* [2008] UKHL 29, [2008] 1 AC 1046.

⁶⁴ *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63 at [90]. Emphasis in original.

co-operation in confiscation proceedings could mean that a sentence imposed does not adequately reflect the seriousness of the offence.

The efficacy of a system where an immediate custodial sentence is not imposed

9.83 Where a defendant has been subject to a term of immediate imprisonment, a reduction in sentence for compliance with a confiscation order may seem an attractive way for the defendant to secure his or her liberty. However, the reduction may not serve as an incentive in the same way where a defendant is not deprived of his or her liberty in the first place. Many crimes that are likely to lead to a confiscation order being imposed do not necessarily require that a sentence of immediate imprisonment be passed.⁶⁵ By way of example, the sentencing guideline for Benefit Fraud provides that where £75,000 has been obtained, the sentencing range is from a high-level community order up to two years and six months imprisonment.⁶⁶ A suspended sentence of imprisonment may also be appropriate in many cases. A term of imprisonment not exceeding two years may be suspended for up to two years with or without requirements (such as unpaid work) attached.⁶⁷ Providing a defendant does not commit a further offence and complies with any requirements imposed, the term of imprisonment will not be served. There may therefore be many cases in which a reduction in sentence for compliance with a confiscation order may serve as a limited incentive.

The practical difficulties involved

9.84 Many variables may apply which could influence the extent of any reduction in sentence. Relevant factors may include:

- (1) the stage of proceedings at which agreement was reached;
- (2) the amount of the order: the more that is recovered the larger the reduction;
- (3) the complexity of the matter. If a defendant is found with a quantity of cash and the confiscation proceedings relate solely to the cash recovered the proceedings may not be complex and a reduced reduction may be appropriate;
- (4) how expeditiously any order was satisfied; and
- (5) the type of substantive sentence imposed.

9.85 Whilst guidance could be issued, any such scheme would be complex. For example, a defendant who satisfied a large proportion of an order outside the allotted time to pay period may well argue that they should be entitled to a discount. Any scheme would

⁶⁵ *R v Farquhar* [2008] EWCA Crim 806, [2008] 2 Cr App R (S) 104; *R v Beaumont* [2014] EWCA Crim 1664, [2015] 1 Cr App R (S) 1; *R v Reynolds* [2017] EWCA Crim 1455, [2018] 4 WLR 33; *R v Reid* [2018] EWCA Crim 628, [2018] Lloyd's Rep FC 328; *R v Newell* [2020] EWCA Crim 351.

⁶⁶ The Sentencing Council, *Benefit Fraud*, <https://www.sentencingcouncil.org.uk/offences/crown-court/item/benefit-fraud/> (last visited September 2020).

⁶⁷ Criminal Justice Act 2003, ss 189 and 190.

add an additional layer of complexity to the sentencing process which is already recognised as overly complex⁶⁸

Conclusion

- 9.86 A scheme to reduce a sentence which is dependent upon co-operation during the confiscation process would offend the aim of the statute, be far from straightforward to administer, would apply to a limited class of offender, has scope to operate unfairly and could undermine public confidence in the criminal justice system.
- 9.87 On balance we have provisionally concluded that a reduction from the substantive sentence imposed where a confiscation order is agreed and satisfied is not desirable.

Consultation Question 22.

- 9.88 Do consultees agree that a scheme permitting a reduction to the substantive sentence imposed where a confiscation order is agreed and satisfied as directed is not desirable?

CONCLUSION

- 9.89 We consider that the system of agreements proposed in the last chapter, in and of itself, will provide an incentive to reach agreement. As we set out in the last chapter, if the defendant is involved in reaching a compromise, that compromise is likely to lead to a more realistic and enforceable order than might otherwise be the case, thereby better holding the defendant to account for his or her proceeds of crime than if an unrealistic and unenforceable order is made after a contested hearing.
- 9.90 If the process is perceived to be fair and values the contribution of a defendant as a stakeholder in proceedings, commitment to the result is more likely. Furthermore, defendants have a vested interest in actively participating in the negotiation of the benefit figure. The incentives to do so include:
- (1) a speedier resolution will allow a defendant to progress with his or her life, subject to payment, without the demand of future court proceedings; and
 - (2) defendants not in receipt of legal aid or defendants who must make contributions to any legal aid paid to them will face a cheaper legal bill at the end of the process if confiscation can be resolved at this stage.

⁶⁸ *R v Thompson* [2018] EWCA Crim 369, [2018] 1 WLR 4429 at [82]. The Law Commission's work on a Sentencing Code to provide clarity has been welcomed, and as of July 2020 is currently before Parliament.

Chapter 10: Forum

INTRODUCTION

- 10.1 The core business of judges in the criminal courts in England and Wales is managing the process to determine the guilt of defendants, ensuring a fair trial and procedure takes place and, if defendants are convicted, imposing appropriate sentences and any other ancillary orders. Confiscation is a necessary but distinct adjunct to the system which arises post-conviction. While the aims of sentencing include the punishment of offenders, the reduction of crime, the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences, the objectives of the confiscation regime are distinct.¹ The primary focus of the regime is to deprive a convicted offender of the financial benefits of their crime using a value-based system. Likewise, the foundational principles of confiscation are drawn not only from criminal law principles, but also from civil law and practice, invoking concepts that are unfamiliar to specialist criminal lawyers.
- 10.2 However, as the confiscation regime is part of the criminal process, criminal judges at all levels of seniority deal with confiscation on a regular basis. Necessarily, there is a proportion of cases in which confiscation proceedings will immerse a specialist criminal judge, whose daily experience is in criminal law, in complex non-criminal legal issues. Judges are asked to tackle these complex non-criminal legal issues as part of the ordinary business of the criminal courts. In particular, these include family law, matrimonial property and other more general commercial, equitable and property interests.
- 10.3 Making decisions which involve consideration of multiple areas of law simultaneously is complex, onerous and time consuming for specialist criminal judges. We will go on to consider whether it may be a task to which judges from other jurisdictions are better suited. This chapter considers how reforms could limit the problems created by the current confiscation model by focussing on the following concerns:
- (1) that confiscation should be considered in all appropriate cases;² and
 - (2) the need for particular expertise in cases of unusual complexity. There is a proportion of cases in which the confiscation provisions will necessarily involve the judge in consideration of complex non-criminal legal issues. In particular these include family law, matrimonial property and other more general commercial, equitable and property interests. The task is an onerous one, and may be one to which the Crown Court judge in the criminal court is ill-suited.

¹ Criminal Justice Act 2003, s 142.

² Cabinet Office, *Recovering the Proceeds of Crime, a Performance and Innovation Unit Report* (June 2000) p 69; Attorney General's Office, *Guidance on Section 2A of POCA 2002* (January 2018).

CURRENT LAW

Crown Court jurisdiction

- 10.4 In order to understand how the current confiscation regime operates in practice, it is necessary to consider the manner and jurisdiction in which confiscation orders are made and enforced.
- 10.5 POCA 2002 confers exclusive jurisdiction on judges sitting in the Crown Court to make confiscation orders. Confiscation proceedings can come before a Recorder, a Circuit judge, or a High Court or Deputy High Court judge sitting in the Crown Court in one of three ways. Section 6(2) of POCA 2002 applies to a defendant:
- (1) convicted of an offence or offences in proceedings before the Crown Court; or
 - (2) committed to the Crown Court for sentence in respect of an offence or offences under specified sections of the Powers of the Criminal Courts (Sentencing) Act 2000;³ or
 - (3) committed to the Crown Court under section 70 of POCA 2002 itself for specific consideration of the confiscation order.⁴
- 10.6 The Crown Court is also the forum for applications for restraint orders,⁵ the appointment of management and enforcement receivers⁶ and reconsideration of orders imposed under POCA 2002.⁷

Magistrates' courts jurisdiction

- 10.7 Prior to POCA 2002 the magistrates' courts had a limited jurisdiction to make confiscation orders,⁸ applicable only to cases involving convictions for a very limited range of offences specified in schedule 4 of the Criminal Justice Act 1988.
- 10.8 POCA 2002 was intended to end the spread of confiscation proceedings between different forums by making the Crown Court a "one-stop shop"⁹ for confiscation. Accordingly, section 6 of POCA 2002 vested power to make confiscation orders solely in the Crown Court. The magistrates' courts were given the power to commit appropriate cases to the Crown Court for the making of a confiscation order.¹⁰ Because POCA 2002 provides for confiscation orders to be enforced as fines,¹¹ the magistrates' courts retain primary responsibility for enforcement of confiscation orders once they have been made.

³ Powers of Criminal Courts (Sentencing) Act 2000, ss 3, 3A, 3B, 3C, 4, 4A or 6.

⁴ Proceeds of Crime Act 2002, ss 6, 70.

⁵ Proceeds of Crime Act 2002, s 41.

⁶ Proceeds of Crime Act 2002, ss 48 and 50.

⁷ Proceeds of Crime Act 2002, ss 19-26.

⁸ Criminal Justice Act 1988, s 71(3).

⁹ Proceeds of Crime Bill Publication of Draft Clauses CM5066 March 01 para 2.7.

¹⁰ Proceeds of Crime Act 2002, ss 6, 70.

¹¹ Proceeds of Crime Act 2002, s 35; see Chapter 18 on enforcement.

10.9 Although the Crown Court has exclusive jurisdiction in relation to making confiscation orders, magistrates may in future be able to make confiscation orders in a particular set of circumstances. Section 97 of the Serious Organised Crime and Police Act 2005 provides an order-making power for the Secretary of State to enable confiscation orders up to the value of £10,000¹² to be made in the magistrates' courts.¹³ The Secretary of State has not yet exercised this order making power.

High Court jurisdiction

10.10 Under the Drug Trafficking Offences Act 1986 ("DTOA"), the Criminal Justice Act 1988 ("CJA") and the Drug Trafficking Act 1994 ("DTA"), the High Court dealt with applications for restraint and receivership¹⁴ because the judges in the High Court were considered to have the "authority and experience"¹⁵ to deal with complex issues of property ownership and realisation of assets which might be likely to arise.

10.11 However, in 2000, the Cabinet Office Performance and Innovation Unit review of asset forfeiture concluded that the concentration of High Court judges in London, and the relatively small number of such judges in total, was a barrier to ensuring restraint applications could be sought in a timely and convenient manner in all appropriate cases.¹⁶

10.12 When publishing the draft clauses of the Bill that became POCA 2002, the government suggested that, in addition to increasing the accessibility of confiscation powers, it was desirable both to decrease the expense involved in applications to the High Court and to concentrate all matters in the Crown Court as a "one-stop shop" for confiscation.¹⁷ Accordingly, POCA 2002 transferred the powers to make restraint and receivership orders to the Crown Court.¹⁸

PERCEIVED PROBLEMS WITH THE CURRENT APPROACH TO JURISDICTION

10.13 Since commencing this project, we have met with Crown Court judges from courts across England and Wales. We have met judges who regularly conduct confiscation hearings, and those who have had only passing interactions with the POCA 2002 regime. A recurring concern, even amongst those judges who deal with confiscation regularly, was that confiscation proceedings can take Crown Court judges into unfamiliar territory when compared with their criminal law background and their day-to-day experience.¹⁹ This is largely based on a perception that confiscation is not truly

¹² Serious Organised Crime and Police Act 2005, s 97(1ZA).

¹³ Serious Organised Crime and Police Act 2005, s 97(1).

¹⁴ Drug Trafficking Offences Act 1986, ss 8 and 11; Criminal Justice Act 1988, ss 77-78 and 80; Drug Trafficking Act 1994, ss 26-27 and 29.

¹⁵ Hansard (HC), 21 January 1986, Vol 90, Col 244.

¹⁶ Cabinet Office, *Recovering the Proceeds of Crime, a Performance and Innovation Unit Report* (June 2000) p 69.

¹⁷ Proceeds of Crime Bill Publication of Draft Clauses CM5066 March 01 paras 2.7 and 2.8.

¹⁸ Proceeds of Crime Act 2002, ss 41(1), 48(2) and s50(2).

¹⁹ Confiscation Orders, Report of the National Audit Office (2013-14) HC 738 para 3.16.

a criminal process, but a quasi-civil set of proceedings annexed to a substantive criminal process.²⁰

10.14 At all levels, the courts have described the confiscation provisions of POCA 2002 as far from straightforward. The Supreme Court has described POCA 2002 as “a statute which is complex and difficult to interpret”,²¹ with “extremely involved statutory language”.²² The Court of Appeal has reflected this language, calling POCA 2002 “technical and complex.”²³ Circuit judges have written about the complexities of the regime.²⁴ Practitioners and academics²⁵ have criticised the language used in the legislation, with Rudi Fortson QC describing provisions for triggering a criminal lifestyle in section 75 of POCA 2002 as “absurdly, and unnecessarily, complex.”²⁶

10.15 Practitioners and academics have observed that the legal complexities may extend beyond the confiscation legislation itself.²⁷ For example, the court may be required to consider legal and beneficial interests; lifting the corporate veil; trusts; contract law; insolvency and matrimonial property. As the Court of Appeal noted in *re Stanford International Bank Ltd*:

The legal complexities may be of property law or equity...but are not limited to those issues. They may be of insolvency and cross-border recognition, as here. In some cases they may relate to tax law or the law of matrimonial property and ancillary relief.²⁸

10.16 During pre-consultation discussion with stakeholders across the criminal justice system we were told that such complexities are most often encountered in “high value” cases. This is reinforced by the 2016 analysis by the National Audit Office of the 10 largest outstanding orders. Approximately 28% of the sums involved (£81m) were in dispute because of third party claims.²⁹ On its analysis, this was in part because those proceedings are more likely to involve sophisticated criminal actors. The NAO observed:

Criminals often make great efforts to hide their gains, by using third parties such as partners or companies to “legally” own the assets on their behalf. For example, in

²⁰ As to perceptions of the regime more generally, see Chapter 1.

²¹ *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [30].

²² *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [4].

²³ *R v Spencer (Raymond)* [2008] EWCA Crim 2870.

²⁴ HHJ Michael Hopmeier (with Polly Dyer), “Confiscation: an update: Part 2 procedure and practicalities” [2017] 6 *Archbold Review* 9.

²⁵ Peter Alldridge, “The Limits of Confiscation” [2011] *Criminal Law Review* 827, 829; Jonathan Fisher QC, “Part 1 of the Serious Crime Act 2015: strengthening the restraint and confiscation regime” [2015] 10 *Criminal Law Review* 754.

²⁶ Rudi Fortson QC, *Misuse of Drugs and Drug Trafficking Offences*, (6th ed 2012) p 655.

²⁷ Karen Bullock, “Criminal Benefit, the confiscation order and the post-conviction confiscation regime” (2014) 62 *Crime, Law and Social Change* 45.

²⁸ *In re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] 1 Ch 33.

²⁹ Confiscation: Progress Review, Report of the National Audit Office (2015-16) HC 886 p 29.

one large order, an offender sold £40 million of property to a property company in a sham sale to hide their assets.³⁰

10.17 In *Serious Fraud Office v Lexi Holdings*, the SFO appealed against a decision varying a restraint order where related civil proceedings involved a complex issue concerning the existence of a constructive trust. As a postscript to the main judgment, the Court of Appeal stated that:

There can be little doubt that the issues which arose in this case concerning beneficial interests, equitable charges and tracing were far from straightforward. They are not part of the daily work of most Crown Court judges.³¹

10.18 The recognition of the fact that confiscation involves complex work of a different type than that usually experienced in the criminal process has led to three particular concerns, articulated both by judges and practitioners.

10.19 First, judges and practitioners that we spoke to felt that all too frequently confiscation is not dealt with adequately, or at all, in cases when due consideration should have been given to confiscation.

10.20 Secondly, the law is frequently misapplied, as evidenced by a significant number of appeals. As we have noted the jurisdiction can be complex and on occasion the court at first instance, Court of Appeal Criminal Division and Supreme Court have reached differing conclusions on how the law should be applied.³²

10.21 Thirdly, when civil claims arise in connection with matters connected to confiscation, the same issues may be considered multiple times. Sheena Cassidy Hope, a Managing Associate in the Family Department at Mischoon de Reya, described how consideration of interrelated family and confiscation matters by different courts can lead to apparently inconsistent outcomes, or duplicated outcomes, thereby creating uncertainty and leading to wasted time and expense.³³ Section 10A of POCA 2002 has the potential to alleviate this concern by permitting the Crown Court to make binding determinations about interests in assets in the course of confiscation hearings. However, the CPS observed that where particularly complex issues are raised, the discretion to make such determinations is not exercised, leaving the issue to be litigated at the enforcement stage. The CPS raised the issue of whether it should be open to a Circuit Judge sitting in the Crown Court to invite a judge from the Chancery Division of the High Court to sit and hear a discrete ownership dispute where it is of high value and complexity. It was suggested that, once resolved, the Circuit Judge could then resume the remainder of the hearing. It might be advantageous to refer such a discrete issue to a specialist judge as it would reduce delay, inconsistency and generate certainty by imposing a ruling that would be binding in any further criminal or civil proceedings.

³⁰ Confiscation: Progress Review, Report of the National Audit Office (2015-16) HC 886 p 30.

³¹ *SFO v Lexi Holdings Plc* [2008] EWCA Crim 1443, [2009] 1 Cr App R 23.

³² R Fortson QC, "Case Comment on Proceeds of crime: *R v Harvey*" [2016] 5 *Criminal Law Review* 356, 358.

³³ Law Commission practitioner round-table, 21 February 2019.

10.22 We go on to examine these three broad concerns in greater detail in the next section.

Confiscation not dealt with adequately or at all

10.23 The concern about confiscation not being dealt with before the courts appears to be borne out in the statistics. Across England and Wales, ten Crown Court centres accounted for a third of total hearings and 40% of the entire court time spent on confiscation.³⁴

10.24 During our pre-consultation discussions we travelled to Liverpool and arranged a consultation event with practitioners hosted at a convenient location after court hours. Not a single practitioner attended. The following day, a practitioner approached us at court and told us that the reason that no-one attended was because “everybody hates confiscation, none of us want to do it, and when we do, we try to settle it and get out quickly”. This sentiment was echoed in other anecdotal evidence that we received. This included evidence of what was described as routine practice by one judge to avoid confiscation hearings by encouraging settlement. The judge sought to encourage this by only dealing with confiscation cases late on a Friday afternoon. We have also been told anecdotally of one judge at a busy confiscation court centre who has only presided over two contested confiscation hearings in 15 years.

10.25 The primary focus of Crown Court work involves, unsurprisingly, dealing with criminal offences themselves. During our pre-consultation discussions, judges and practitioners reported that the courts often lack the time to focus on confiscation cases, particularly when the case is complex. The pressure arising from a lack of preparation time is most regularly encountered in connection with applications for restraint orders and connected applications for the appointment of a “management receiver” to preserve the value of restrained assets. In the Supreme Court case of *Barnes v Eastenders*, Lord Toulson JSC noted:

In the judgment of the Court of Appeal...Hooper LJ deplored the fact that the original application was made at short notice to a judge who was in the middle of conducting a heavy trial and with only a limited time available for considering it. It should be axiomatic that, as he said, an application of this complexity should be listed before a judge with sufficient time to read and absorb the papers and with sufficient time to conduct a proper hearing....³⁵

Difficulties with interpreting the law.

10.26 The complexity of the statutory provisions and the volume of case law can make the law difficult to apply in practice.³⁶ In 2013, the National Audit Office reported that:

Judges need to set order values at the right level to increase chances of successful enforcement and reduce the chances of successful offender appeals. In order to do this, judges need to be able to properly assess criminal benefit and available assets in complex situations often with absent or disruptive offenders. Senior officials from

³⁴ Data provided by HMCTS on confiscation hearings.

³⁵ *Barnes v The Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [118].

³⁶ See, for example, *R v Parveaz (Mohsin)* [2017] EWCA Crim 873, [2017] Crim LR 981; *R v Odamo* [2013] EWCA Crim 1275, [2014] 1 Cr App R (S) 44; *Revenue and Customs Prosecutions Office v May* [2010] EWCA Civ 521, [2010] 3 All ER 1173; *R v Spires* [2007] EWCA Crim 773; *R v Bello* [2015] EWCA Crim 731.

prosecuting authorities and senior judges familiar with proceeds of crime cases told us that some judges' lack of expertise and experience in cases adversely impacted on enforceability through setting order amounts at the wrong level.³⁷

10.27 In *R v Bukhari*³⁸ a confiscation order was made under the CJA 1988 when it should have been made under POCA 2002. An attempt was made by the Crown Court to vary the order nine months later, far outside of (what was then)³⁹ the 28 day period permitted under the Powers of Criminal Courts (Sentencing) Act 2000 to rectify errors without the need for an appeal.⁴⁰ The variation had to be made on appeal.

10.28 Despite the Court of Appeal repeatedly emphasising a rigorous step-by-step approach to confiscation,⁴¹ in *R v Moss*, the Recorder dealing with confiscation proceedings in the Crown Court failed to consider each step in the confiscation process in turn, to consider all of the relevant evidence in determining whether the defendant had a "criminal lifestyle", including as to the duration of the offence and as to the amount obtained. The Recorder also failed to consider fully whether money obtained was "as a result of or in connection with" criminal conduct.⁴²

10.29 As Rudi Fortson QC observed in the Criminal Law Review when commenting on the case:

In the "heat" and "fog" of forensic "battle", it is all too easy to pass over an aspect of the proceedings that perhaps (with the benefit of hindsight) warranted closer attention. ...Given the complexities of the confiscation regimes, the developing jurisprudence, and an astonishing amount of case law, it is little wonder that practitioners might be inclined to say in many confiscation cases, "But for the grace of God go all of us".⁴³

Consideration of the same issues in different jurisdictions.

10.30 We are told by judges and practitioners that an increasingly common challenge that arises is where there is an overlap with other proceedings concerning the same assets. A good example of this is in connection with family law proceedings and confiscation. In many contested confiscation cases, the most valuable asset available to a defendant to satisfy the *in personam* order will be the matrimonial or former matrimonial home. In resolving the confiscation proceedings, a number of related questions will often arise in relation to that real property:

- (1) Does the non-convicted spouse have a beneficial interest in the property? If so, what is the extent of that interest?

³⁷ Confiscation Orders, Report of the National Audit Office (2013-14) HC 738 para 3.15.

³⁸ *R v Bukhari* [2008] EWCA Crim 2915, [2009] 2 Cr App R (S) 18.

³⁹ The period is now 56 days (Criminal Justice and Immigration Act 2008, sch 8(3) para 28(2)(a)).

⁴⁰ Powers of Criminal Courts (Sentencing) Act 2000, s 155(1).

⁴¹ *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83; *R v Moss* [2015] EWCA Crim 713.

⁴² *R v Moss*, above.

⁴³ Rudi Fortson QC, "R v Moss, case commentary" [2015] 9 *Criminal Law Review* 724, 727 and 729.

- (2) Notwithstanding the position in equity or in law, does the manner in which the non-convicted spouse's interest was acquired render it a tainted gift for the purposes of confiscation proceedings?⁴⁴

10.31 It is unsurprising that where a defendant is convicted and confiscation proceedings are pending many marriages end. The combined impact on family life of the commission of a criminal offence, the sentence for the substantive offending and the potentially disastrous financial consequences of a confiscation order are likely to strain any marriage. Aside from genuine marital breakdowns, stakeholders have also noted that there are instances where "sham" divorces are used as a device to try and frustrate the enforcement of the confiscation orders and preserve assets.

10.32 In cases where the couple are legally separating, two further important questions arise in the context of confiscation:

- (1) will the imposition of any financial orders in the family jurisdiction put any portion of the convicted spouse's assets out of scope for the purposes of confiscation? and/or
- (2) what impact should the pending or actual confiscation order have on deciding what, if any, financial orders should be made in the family proceedings?

10.33 In resolving these questions, a tension exists between the appropriate final order in family proceedings and the pursuit of the benefit from crime in confiscation proceedings, as we now consider.

Beneficial interest

10.34 The extent of a non-convicted spouse's beneficial interest in property may be relevant to the granting of a financial remedy in family law proceedings, in particular to whether, and to what extent, any powers in connection with the redistribution of assets need to be exercised.⁴⁵ In deciding whether to make any financial order, under section 25 of the Matrimonial Causes Act 1973 the court must have regard to "all of the circumstances of the case", including the property...which each party to the marriage has".⁴⁶ Beneficial interests of the non-convicted spouse are likely to be particularly pertinent for short marriages where there are no dependent children. Where the marriage has produced children, the welfare of the children will be a paramount consideration⁴⁷ and the longer the duration of the marriage the more likely it is that factors such as contributions to the family will be relevant.⁴⁸ The beneficial interests of third parties may also be relevant, because the court will need to assess the extent to which assets form part of the overall matrimonial finances.

10.35 Beneficial interests may be determined during confiscation proceedings. Section 10A of POCA 2002 permits any party claiming an interest in property to be heard in the

⁴⁴ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060; *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25.

⁴⁵ Sheena Cassidy, "Divorce and Crime – A Dangerous Partnership" (20 August 2015) *Rayden Solicitors blog*.

⁴⁶ Matrimonial Causes Act 1973 s 25(2)(a).

⁴⁷ Matrimonial Causes Act 1973 s 25(1).

⁴⁸ Matrimonial Causes Act 1973 s 25(2)(f).

Crown Court on that question. Determinations made by the Crown Court as to interests in property are generally binding in connection with the confiscation, meaning that there should be no relitigating of the beneficial interest issue either on appeal or in applications to appoint an enforcement receiver.⁴⁹ However, the Crown Court does not have jurisdiction to resolve the issues of financial remedies that may arise in family proceedings.⁵⁰

10.36 Beneficial interests in family law proceedings and in confiscation will be determined in the same way, applying commonly used civil authorities such as *Jones v Kernott*⁵¹ and *Stack v Dowden*,⁵² which we deal with at 10.76 below and in Chapter 14. During our pre-consultation discussions, we heard about cases in which the same issues had been rehearsed in the Crown Court and in the Family Court, often with the prosecution authority intervening as a third party. Inevitably, time and expense is incurred in doing so.

Tainted gifts

10.37 The issue of “tainted gifts” is one which also must be considered in relation to confiscation proceedings. We deal with tainted gifts in more detail in Chapter 17. However, in essence, a gift may be “tainted” by its association with the defendant’s general or particular criminal conduct.⁵³ The consequence of making a tainted gift is that the value of the tainted gift is deemed to form part of a defendant’s available assets for the purposes of confiscation and the defendant is therefore liable to repay in confiscation the value of that gift.⁵⁴

10.38 Section 78(1) of POCA 2002 provides that:

If the defendant transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer he is to be treated as making a gift.⁵⁵

10.39 In the case of *R v Hayes*,⁵⁶ the appellant was an ex-trader convicted of conspiracy to defraud arising from the manipulation of LIBOR rates with the intention of boosting commission payments. He appealed against a confiscation order imposed following his conviction. The defendant had provided the funds to purchase a family home. However, the property was registered in the joint names of the defendant and his wife and a declaration of trust was made to the effect that they were beneficial joint tenants. The appeal focused on this property. The judge had found it to be a “tainted gift” and therefore had included its total value in the available amount. The issue was

⁴⁹ Proceeds of Crime Act 2002, ss 10A(3), 31 and 51(8B).

⁵⁰ Sheena Cassidy, “Divorce and Crime – A Dangerous Partnership” (20 August 2015) *Rayden Solicitors blog*.

⁵¹ *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

⁵² *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

⁵³ Proceeds of Crime Act 2002, s 77.

⁵⁴ Proceeds of Crime Act 2002, s 78.

⁵⁵ Proceeds of Crime Act 2002, s 78(1).

⁵⁶ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060.

to what extent the “family services” provided by the appellant’s wife constituted valuable consideration when determining the issue of a tainted gift.

10.40 The Court of Appeal found that the defendant’s wife’s interest in the property was a tainted gift. Applying section 78(1) of POCA 2002, the court was primarily concerned with the question of the value of any contribution made by the appellant’s partner as wife and mother to their son. Those contributions were said to be non-financial support, including running the house, cooking, food shopping, cleaning and ordering goods in anticipation of the arrival of the couple’s baby.

10.41 It was contended that the defendant’s wife’s share of the property was derived from non-financial contributions as a wife and a mother. The Court of Appeal observed that:

the argument advanced before us on behalf of the appellant as to “value” seemed at stages to reflect arguments of a kind that might perhaps be raised in the Family Court. But what has to be decided in the Family Court, in the context of matrimonial proceedings, has no part to play in what has to be decided by the Crown Court in confiscation proceedings under the 2002 Act by reference to tainted gifts.

In family proceedings, the Family Court is not concerned with “consideration”. The Family Court is concerned to decide as to what is the fair and just division of assets, having regard to the respective contributions (financial and non-financial) of the parties, the respective means of the parties, the respective needs of the parties, the needs of any children and so on. That, most emphatically, is not the function of the Crown Court in making its assessment....in confiscation proceedings.⁵⁷

10.42 The court therefore concluded that the defendant’s wife’s share of the property was a tainted gift and its value could be included in the amount that the defendant was required to repay under his confiscation order.

10.43 Had divorce and financial remedy proceedings been brought prior to confiscation, the different considerations of the family courts as articulated by the Court of Appeal would have led to more weight being placed on the non-financial contributions made by the defendant’s wife. The likely outcome would have been that a clear proportion of equity in favour of the wife would have been identified and allocated to her. Accordingly, when the available amount was considered in any subsequent confiscation proceedings, the wife’s share of the property would have been disregarded. The defendant would therefore have been in a more favourable position.⁵⁸

10.44 The decision demonstrates how confiscation and family law principles may involve consideration of different tests, but relate to the same people and the same assets. In essence, the same parties will rehearse the same facts before different courts. The outcomes of the application of those different tests may be seemingly inconsistent, and in the absence of careful explanation, parties may fail to understand why this is so.

⁵⁷ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [47].

⁵⁸ Matrimonial Causes Act 1973, s 24. David Corker, “Stand by your man? The clash of criminal law and family law concerning inter-spousal transfers of assets” (2018) *Corker Binning blog*.

Priorities

10.45 The decision in *R v Hayes* illustrates the concerns raised during our pre-consultation discussions about a lack of legal priority between legislative regimes where there are parallel proceedings concerning the same property under POCA 2002 and the Matrimonial Causes Act 1973 (“the MCA”).⁵⁹

10.46 In the leading (albeit pre-POCA 2002) case of *Customs and Excise Commissioners v A*, Lord Justice Schiemann stated that:

there is nothing in the provisions of either the MCA 1973 or the Drug Trafficking Act 1994 which requires the court to hold that either statute takes priority over the other when the provisions of each are invoked in relation to the same property.⁶⁰

10.47 The legislative steer in section 69 of POCA 2002 might be thought to provide some guidance. It applies to “to any court in which proceedings are pending in respect of realisable property and which is considering whether to stay its proceedings or whether to allow them to continue.”⁶¹ Section 69 requires a court to act in such a way as preserves the value of realisable property for confiscation.

10.48 Although the legislative steer in section 69 of POCA 2002 differs from the equivalent provision in the predecessor legislation, it has been observed:

There is nothing in the wording of POCA 2002 to suggest that the meaning of those words is different, or should be applied differently, from the interpretation of the Administrative Court in *Customs and Excise v A*. The cases decided after the coming into force of POCA 2002 do not suggest that it causes different considerations to arise.⁶²

10.49 Having regard to the case law, in *Webber v Webber*,⁶³ the President of the Family Division observed:

It was plainly preferable that the ancillary relief application should be disposed of first. By that means, on restoration of the adjourned hearing of the confiscation proceedings in the Crown Court [the judge] would be in a position to judge whether the amount available was 50% of the proceeds of sale, as conceded by the CPS or required adjustment in light of the findings of the High Court judge hearing the ancillary relief application.

⁵⁹ D Chidgey, “For better or for worse: financial remedies and the proceeds of crime” [2014] *Family Law Review* 984.

⁶⁰ *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039 (Fam), [2003] 1 FLR 164.

⁶¹ *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime*, (Vol 2) III.027; Proceeds of Crime Act 2002 ss 69(1), 58(5), 59(5) and 60(5).

⁶² *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) at [16.143]; See also *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime*, (Vol 2).

⁶³ *Webber v Webber* [2006] EWHC 2893 Fam at [49], [2007] 1 WLR 1052.

- 10.50 In other cases, it may be desirable for the confiscation matter to be resolved first “so that the wife and prosecution can know whether there is genuinely likely to be a dispute between them.”⁶⁴
- 10.51 In determining whether confiscation should take priority, the knowledge of the non-convicted spouse about the illegal conduct of his or her partner will play a significant, but not determinative role in the court’s consideration. This knowledge is sometimes referred to in the case law as “tainting” the asset. The term “taint” in this context is used to refer to the knowledge of the spouse about the criminal origins of funds, or funds used to purchase assets, rather than in the sense of “tainted gifts” for the purpose of assessing the available amount. In cases where a spouse is aware of their partner’s criminal endeavours, it will be rare that the court would exercise its discretion in favour of the applicant for ancillary relief.⁶⁵
- 10.52 In the case of *Crown Prosecution Service v Richards*, the trial judge had found that “the wife knew that the husband was involved in criminal activities...from the word go.” The Court of Appeal, upholding the first instance decision, held “the whole of the tainted assets should be subjected to confiscation procedures and simply not distributed to satisfy any ancillary relief order.”⁶⁶
- 10.53 *Customs and Exercise Commissioners v A*⁶⁷ is a case at the other end of the spectrum. In that case, it was found likely that the relevant offending took place after the parties had separated, and in circumstances where the (separated) wife had no knowledge of the criminal conduct. It was also relevant that the non-convicted spouse legally owned a significant portion of the matrimonial assets.
- 10.54 Whilst the case law provides an indication of the approach to priority that is likely to be adopted by the courts, the extent of a non-convicted spouse’s knowledge of the relevant criminality will not oblige the court to exercise its discretion in a particular way. For example, in the *Richards* case the court suggested that even if the wife had knowledge of the criminal conduct, confiscation may be a secondary consideration if funds were necessary for the care of a disabled child.⁶⁸
- 10.55 In *Stodgell v Stodgell*⁶⁹ the Court of Appeal held that it was not appropriate to make a financial order that would have reduced the assets available to satisfy the confiscation order, despite the wife not having knowledge of the defendant’s offending. The defendant had evaded income tax over a significant period. The value of the confiscation order represented the tax owing, interest and penalties. At the time of the family law financial remedy hearing, the value of the confiscation order exceeded the value of all the defendant’s available assets. In coming to its decision to prioritise confiscation over any financial remedy, the Court of Appeal considered that in the circumstances HMRC could have pursued the tax owed by Mr Stodgell as a civil debt

⁶⁴ *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) at [16.154].

⁶⁵ *Crown Prosecution Service v Richards* [2006] EWCA Civ 849 (Fam), [2006] 2 FLR 1220.

⁶⁶ [2006] EWCA Civ 849 (Fam), [2006] 2 FLR 1220 at [25].

⁶⁷ [2002] EWCA Civ 1039; [2003] Fam 55.

⁶⁸ *Crown Prosecution Service v Richards* [2006] EWCA Civ 849 (Fam), [2006] 2 FLR 1220 at [26].

⁶⁹ *Stodgell v Stodgell* [2009] EWCA Civ 243, [2009] 2 FLR 244.

and bankrupted him. Had they done so, no assets would have been available from which to provide any financial remedy. Confiscation ultimately had no different an effect to such a bankruptcy.

- 10.56 Ultimately, whether family law financial remedies or confiscation takes priority is determined upon the facts of each case.

ANALYSIS

- 10.57 In considering whether the Crown Court is the appropriate venue for confiscation proceedings we consider what the alternatives might be.

A separate confiscation court

- 10.58 Allocation of cases involving complex income and asset structures to a specialist court is a process adopted in the family justice system. The Financial Remedies Unit is a specialist court within the Central Family Court. Its purpose is “the efficient handling of complex financial issues”. As with confiscation, it arose from a need to “improve significantly both the application of procedural justice and the delivery of substantive justice”⁷⁰ by recognising the specialist nature of work involving assets and ownership.⁷¹ It has been described by the Law Society as “incredibly successful”.⁷² The expansion of the Unit to a more general Financial Remedies Court is at the pilot stage.

- 10.59 In a confiscation context, in 2016 the Home Affairs Committee concluded that the creation of a confiscation court “would combat the current lack of interest in confiscation orders” and benefit the Crown Court. Ultimately, the Committee recommended “that the Government take the necessary steps to establish confiscation courts to allow for serious and/or complex confiscation hearings.” It envisioned that such a court would take on cases “featuring cross-border financial transactions, use of corporate vehicles or very high value proceeds.”⁷³

- 10.60 Rejecting this call, the Government cited the inflexibility of such an approach and potentially unintended consequences:

The Government does not believe that the provision of specialist confiscation courts would assist in enabling confiscation hearings to be dealt with more efficiently and there are likely to be unintended adverse consequences. Restricting the available venues to a few specialist centres is likely to lead to far greater waiting times because of the limited number of court rooms, judges and staff. Additionally, these courts are likely to prove expensive to set up and run, even if they do not involve any

⁷⁰ Sir James Munby, “18th View from the President’s Chambers: the on-going process of reform – Financial Remedies Courts” (2018) <https://www.judiciary.uk/wp-content/uploads/2014/08/view-from-the-president-of-family-division-20180123.pdf>.

⁷¹ O’Dwyer, Hess and Miles, “The recognition of money work as a speciality in the family courts by the creation of a national network of Financial Remedies Units” [2016] *Family Law* 1335; O’Dwyer, Hess and Miles, “Financial Remedies Courts” [2017] *Family Law* 625.

⁷² Stuart Clark, *Specialisation in the Financial Remedy Court with a new proposed Form A* (the Law Society website 2018) <https://www.lawsociety.org.uk/support-services/advice/articles/specialisation-in-the-financial-remedy-court-with-a-proposed-new-form-a/> last accessed 11 December 2019.

⁷³ Proceeds of Crime, House of Commons Home Affairs Committee, (2016-17) HC 25 p 15.

new, separate premises, because they would require separate administration and listing arrangements.

Requiring cases to be listed before specialist judges in a specialist court will result in a lack of listing flexibility which will result in unnecessary delay. It will also involve duplication of work: where there has been a trial, the trial judge is better equipped than anyone else to deal expeditiously with the issues arising in relation to confiscation, because he or she has heard all the evidence at trial. If the confiscation proceedings are transferred to a specialist court, the judge there will have no prior knowledge of the evidence at trial, and will have to start from scratch. This duplication of work also introduces the undesirable risk that the confiscation judge's assessment of the limited evidence they hear may differ from that taken by the judge who had the advantage of hearing all the evidence at trial.⁷⁴

10.61 The desirability of keeping the case with the judge who dealt with the trial was emphasised repeatedly from many quarters during our pre-consultation discussions and is reflected in the decisions of the Court of Appeal. In *R v Sangha*⁷⁵ the appellants tried to argue that, based on the way the facts were determined at trial, they could not be said to have benefited at all from their criminal conduct. The Court of Appeal noted that this submission sought to “place unwarranted limitations upon the confiscation proceedings by reference to the verdict and its factual basis.” While those matters “of course have an important part to play”, the questions determined in a confiscation hearing are different and it is open to a judge “in light of the evidence as a whole, to make additional and more extensive findings of fact than those upon which the verdict was based.”⁷⁶ This is a significant practical consideration and one that underscores the efficiency of having the trial judge manage and resolve confiscation. A judge who is familiar with the factual background to a case, who has heard the evidence and who has formed an opinion of the credibility of the defendant is better placed to preside over a confiscation matter than a judge coming to the matter fresh.⁷⁷

10.62 It could be argued that hiving a case off to a separate confiscation court is no different to having a trial determined at the magistrates' court and then committed to the Crown Court for confiscation. In both cases the judge is considering the case for the first time. However, the key distinction is that magistrates' courts trials will most often involve less serious and less complex offences than those held at the Crown Court. The evidence from a trial that has been conducted in the magistrates' court is therefore likely to be easier to assimilate by a fresh judge sitting in the Crown Court than if a complex Crown Court trial were then transferred to a confiscation court.

10.63 As the government identified in its response to the House of Commons Home Affairs Committee, transferring the case out of the Crown Court is likely to lead to duplication

⁷⁴ Proceeds of Crime: Government's response to the Committee's Fifth Report, House of Commons Home Affairs Committee (2016-17) HC 805 p 5-6.

⁷⁵ *R v Sangha* [2008] EWCA Crim 2562, [2009] 2 Cr App R (S) 17.

⁷⁶ *R v Sangha* above at [30].

⁷⁷ See also HHJ M Hopmeier, A Mills, “Post-conviction Confiscation in England and Wales” in C King, C Walker and J Gurule (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (2018), p 456.

of work in assimilating information and therefore to what could arguably be said to be an inefficient use of judicial time.

High Court confiscation

- 10.64 As was recognised in the pre-POCA 2002 confiscation legislation, the High Court has the “authority and experience”⁷⁸ to deal with issues of property ownership and realisation. Therefore, restraint and receivership proceedings connected with confiscation were dealt with before the High Court.⁷⁹
- 10.65 However, similar considerations to those identified above in transferring complex confiscation cases to a separate confiscation court would arise if complex cases were transferred to the High Court.
- 10.66 Furthermore, moving substantive confiscation hearings to the High Court may pose difficulties including, for example, the perceived shortage of judges to deal with the volume of work. In 2000, the Cabinet Office Performance and Innovation Unit review of asset forfeiture concluded that the concentration of High Court judges in London and the relatively small number of such judges in total was a barrier to ensuring restraint applications could be sought in a timely and convenient manner.⁸⁰ This problem would be compounded if all principal confiscation hearings of complexity were sent to the High Court.
- 10.67 It is of note that even when the High Court had jurisdiction, that did not extend to the main confiscation proceedings themselves, which were to be dealt with by the Crown Court.⁸¹ There was therefore a recognition that Crown Court judges were able, and best placed, to dispose of the substantive confiscation hearing.

Magistrates’ court confiscation

- 10.68 Any case in which a confiscation order should be considered and which is before the magistrates’ court has to be committed to the Crown Court for sentencing and, potentially a confiscation hearing.⁸² It would be possible to change the law to permit magistrates’ courts to deal with confiscation. As we noted at paragraph 4.9. although section 97 of the Serious Organised Crime and Policing 2005 was enacted with the ultimate aim of facilitating the making of confiscation orders in the magistrates’ court, an order permitting magistrates’ court confiscation has yet to be made.
- 10.69 Any return to a system of confiscation in the magistrates’ court, as existed under the CJA 1988 will generate problems:

- (1) In 2007 the Home Office observed that “given the sort of crimes tried in magistrates’ courts, the size of the orders made is unlikely to be large, and

⁷⁸ Hansard (HC), 21 January 1986, Vol 90, Col 244.

⁷⁹ Drug Trafficking Offences Act 1986, ss 8 and 11; Criminal Justice Act 1988, ss 77-78 and 80; Drug Trafficking Act 1994, ss 26-27 and 29.

⁸⁰ Cabinet Office, *Recovering the Proceeds of Crime, a Performance and Innovation Unit Report* (June 2000) p69.

⁸¹ Drug Trafficking Offences Act 1986, s 1; Criminal Justice Act 1988, s 1 (there was also a limited power for magistrates’ courts to deal with confiscation); Drug Trafficking Act 1994, s 2.

⁸² Proceeds of Crime Act 2002, s 70.

there are considerable implications for costs and training”.⁸³ A cost-benefit analysis therefore did not favour magistrates’ court confiscation.

- (2) Magistrates do hear civil cases brought under POCA 2002 to recover specific property that is said to have come from crime, or that is intended for use in crime.⁸⁴ However, such cases often turn on the factual question of the source or intended use of that property⁸⁵ rather than requiring resolution of all of the complex principles outlined above. Whilst some magistrates may have relevant experience in dealing with such issues, the difficulties experienced by legally qualified Crown Court judges is perhaps evidence of the complex nature of some confiscation proceedings which may involve the determination of third party interests in property. We have proposed a system whereby identified assets can be vested in a trustee for confiscation and we consider that the appropriate forum for such decisions is the Crown Court.
- (3) The benefits in the Crown Court of having a judge both hear a trial and determine confiscation will not necessarily apply in the magistrates’ court even if magistrates were empowered to hear confiscation cases. This is largely due to the way the workload of magistrates is managed. In addition to policy decisions about workload management, difficulties may arise as a result of the differing diary commitments of individual magistrates. In short, the same bench that dealt with the trial might not be able to deal with confiscation.
- (4) In civil proceedings, to recover the proceeds of crime before the magistrates’ court, and in substantive criminal matters dealt with by the magistrates, there is an automatic right for a defendant to appeal to the Crown Court. The case is then heard afresh. If magistrates’ court confiscation orders carried the same automatic right of appeal, any potential cost and time savings in shifting hearings from the Crown Court to the magistrates’ court may prove illusory. Such appeals would add to the already seemingly large burden upon the Crown Court in dealing with appeals from the magistrates’ courts. In 2018, 9,019 such appeals were dealt with across England and Wales.⁸⁶ Given the tendency for defendants to seek to appeal from Crown Court confiscation findings, it is highly likely that defendants would seek to exercise an automatic right of appeal to have matters determined before a Crown Court judge. Delaying or frustrating confiscation proceedings by engaging in prolonged litigation is a problem that has been identified by both the courts and Parliament in connection with confiscation. We discuss this issue further in Chapter 19 on problems with the current enforcement regime.

10.70 Having considered what the alternatives might be, the rationale for the retention of Crown Court jurisdiction for confiscation hearings remains compelling.

10.71 In a significant majority of confiscation matters it is appropriate that confiscation is heard by the Crown Court judge who presided over the substantive trial to ensure that

⁸³ Home Office, Asset Recovery Action Plan: A Consultation Document (2007).

⁸⁴ Proceeds of Crime Act 2002, Part 5 Chapters 3, 3A and 3B.

⁸⁵ Proceeds of Crime Act 2002, ss298, 303O and 303Z14.

⁸⁶ Ministry of Justice, *Crown Court Statistics (Quarterly) January to March 2020* (Tables) (25 June 2020).

all relevant evidence is taken into consideration in a way that is as time and as cost efficient as possible.

Consultation Question 23.

10.72 We provisionally propose that the Crown Court should retain jurisdiction for determining confiscation cases.

10.73 Do consultees agree?

10.74 Having considered whether the Crown Court should retain jurisdiction over confiscation matters, we now consider whether judges sitting in the Crown Court require specific expertise or guidance to facilitate the making of determinations. We break down our considerations into two types of case:

- (1) “straightforward” cases, which require only the application of knowledge and the use of skills ordinarily used by judges in the Crown Court; and
- (2) cases with an enhanced degree of complexity.

STANDARD CASES

10.75 During our pre-consultation discussions, judges, practitioners and financial investigators reported that a significant proportion of confiscation hearings involve relatively simple calculations of benefit and consideration of what assets a defendant has.⁸⁷ Resolving such matters involves judges having to use their everyday competencies of assimilating and clarifying information, possessing and building knowledge and exercising judgement.⁸⁸

10.76 Even where issues of civil law arise, a Crown Court judge may well be equipped to resolve the issue. For example, whilst determinations as to the extent of a defendant’s interests based on trust law principles as to “common intention” constructive trusts may be outside of the day-to-day work of the criminal courts,⁸⁹ as we set out in Chapter 14 the parties’ common intentions must be determined from all of the evidence. “Judges routinely weigh the assertions, exculpations, accusations and excuses made by defendants in the course of the criminal process.”⁹⁰

10.77 The Court of Appeal therefore has been clear that:

⁸⁷ As to which see *Re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] 1 Ch 33.

⁸⁸ Courts and Tribunals Judiciary, *Judicial Skills and Abilities Framework* (2014).

⁸⁹ *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432; *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776; *CPS v Piper* [2011] EWHC 3570 (Admin); *R v Alom* [2012] EWCA Crim 736.

⁹⁰ Andrew Campbell-Tiech QC, “Whither Confiscation: May revisited” (2019) 5 *Archbold Review* 4-5.

Crown Court judges should not...shrink from deciding issues of civil law where they properly can, even if they are less familiar to them than is the daily round of the criminal jurisdiction.⁹¹

10.78 There is therefore no reason why Crown Court judges could not and should not deal with the majority of confiscation cases

10.79 Historically, proceedings for restraint orders were brought before the High Court and the justification for this was the specific expertise of High Court judges. During pre-consultation discussions with stakeholders, we heard that many restraint applications can in fact be dealt with readily by a Crown Court judge. In *Barnes v Eastenders Group* the Supreme Court observed that in restraint applications the problems that arise will commonly be as a result of inadequate time to assimilate the papers rather than inadequate judicial expertise at Crown Court level.⁹² As with the confiscation order itself, there is therefore no reason why Crown Court judges could not deal with applications connected to restraint of assets.

Provision of training to judges on confiscation.

10.80 In most confiscation cases complication generally arises because of the apparent complexity of the legislative provisions and their judicial interpretation.⁹³ It is therefore important that judges develop an understanding of the provisions and the case law. We now consider whether adequate judicial training is provided to assist a Crown Court judge to determine what might otherwise be straightforward confiscation cases.

10.81 In 2013 the National Audit Office recommended that judicial training be strengthened. It observed that:

Judges hearing confiscation order cases are advised to go on a dedicated two-hour training course that forms part of the required three days of national training each year, but although the course is widely praised, it is optional.⁹⁴

10.82 In its follow-up review in 2016, the National Audit Office observed there had been limited implementation of this recommendation. It noted that “although the Judicial College has since updated its training module on confiscation orders to reflect the new legislation, training remains optional”.⁹⁵

10.83 The Judicial College offers judicial training on confiscation and every judge who sits in the Crown Court (whether salaried or fee-paid) will be given 2 days of residential training each year. That training may cover confiscation, however, judges may have other training needs and we were told that it is possible for judges “to sidestep” confiscation training. When confiscation training is offered, it is for approximately 2 hours. It is worth noting that the Judicial College coverage of confiscation is similar to

⁹¹ *In re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] 1 Ch 33.

⁹² *Barnes v The Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [118].

⁹³ Rudi Fortson QC, “R v Moss” (case commentary) [2015] 9 *Criminal Law Review* 724,727 and 729.

⁹⁴ Confiscation Orders, Report of the National Audit Office (2013-14) HC 738 p 9.

⁹⁵ Confiscation Orders: Progress Review, Report of the National Audit Office (2015-16) HC 886 p 30.

the coverage of other aspects of law, evidence or procedure which inform the work of the criminal courts, such as expert evidence.

- 10.84 During the three year period ending on 31 October 2019, 58 appellate decisions on confiscation orders were recorded. In addition, 24 High Court decisions connected with confiscation have been recorded, along with one decision of the Crown Court on third party interests.⁹⁶ A judge who delivers confiscation training estimates that judges need to be aware of approximately 10% of the case law. Taking this 10% figure, a case law update for the three year period 2016-19 would require the coverage of at least eight cases during the two hour training, during which time there must also be discussions on practice and procedure. This would appear to be achievable, and is achieved, in the two hour training window.
- 10.85 It should also be noted that materials on confiscation are available for judges on the judicial Learning Management System. These include a confiscation case list and guide, which are prepared by a member of the judiciary.
- 10.86 Nevertheless, during our pre-consultation discussions many judges were clear that there was little judicial appetite for confiscation which can involve concepts and principles infrequently encountered in the Crown Court. In light of this indication we consider that it is important that all Crown Court judges receive a thorough grounding in and regular updates on confiscation.
- 10.87 More extensive training should facilitate a change of perception of confiscation from a “bolt-on” in the criminal justice system in two ways. Firstly, by emphasising that confiscation is a mainstream part of the criminal justice process and secondly by equipping judges to make greater and more accurate use of confiscation in day to day court business. The latter reflects the ambition of Sir James Munby in 2018. As President of the Family Division, he considered that substantive justice could be better achieved in financial remedy proceedings through “an improved programme of judicial training”.⁹⁷
- 10.88 We provisionally propose that the government consult with the Lord Chief Justice to institute enhanced confiscation training for all Crown Court judges.

Consultation Question 24.

- 10.89 Do consultees consider that the Lord Chancellor should consult with the Lord Chief Justice to institute enhanced POCA 2002 training for judges eligible to sit in the Crown Court?

⁹⁶ Westlaw UK database search, 31 October 2019

⁹⁷ Sir James Munby, 18th View from the President’s Chambers: the on-going process of reform – Financial Remedies Courts, <https://www.judiciary.uk/wp-content/uploads/2014/08/view-from-the-president-of-family-division-20180123.pdf> (last visited September 2020).

CASES WITH A DEGREE OF ADDED COMPLEXITY

10.90 As we have discussed above, the preference should be as far as possible to keep cases with the Crown Court judge who dealt with any trial. However, there may be cases which have a degree of added complexity to them. In this section we consider ways in which a judge sitting in the Crown Court could retain conduct of the confiscation case but be assisted in the determination of the confiscation proceedings by those with specialist knowledge.

Identifying a single judge with relevant expertise to conduct the confiscation proceedings

10.91 As Lord Keen of Elie observed, when introducing the Bill which became the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018,⁹⁸ it is of course important to ensure “the best use” is made of judges’ “experience, expertise and time”, and, where appropriate, to remove any legislative barriers that would hinder that aim. In light of the apparent complexities of certain confiscation cases, the higher courts have repeatedly commented on the need to use members of the judiciary with experience outside of the criminal law. On occasion, the Criminal Division of the Court of Appeal itself has been “deliberately arranged so as to ensure that appropriate expertise in matters normally falling within the jurisdiction of the Chancery Division was available”.⁹⁹

10.92 Ultimately the allocation of cases among judges within a court is a matter for the judiciary. Under the Senior Courts Act 1981, the allocation of matters in the Crown Court (and other matters of court business) is determined in accordance with practice directions of the Lord Chief Justice (with the concurrence of the Lord Chancellor).¹⁰⁰ We therefore make a number of provisional proposals about matters that the Lord Chief Justice and Lord Chancellor may wish to explore.

Making appropriate use of High Court judges

10.93 One option in cases where potential complexity in confiscation is identified is to allocate the confiscation to a High Court judge. High Court judges may sit in the Crown Court by virtue of section 5(1) of the Courts Act 1971. The courts have frequently identified that High Court judges may be needed to deal with confiscation matters and that the criminal courts should not be reluctant to draw upon their experience.¹⁰¹ Whilst the case law makes this clear, there is no practice direction or protocol to facilitate the use of High Court judges in complex applications.

10.94 A single High Court judge may not only be able to consider issues of complexity but also be able to resolve overlapping issues from different jurisdictions. As we noted at paragraph 10.30 there has been a “steady trickle of cases”¹⁰² in which issues in

⁹⁸ *Hansard* (HL), 20 June 2018, vol 791, col 2029.

⁹⁹ *SFO v Lexi Holdings Plc* [2008] EWCA 1443, [2009] QB 376.

¹⁰⁰ Senior Courts Act 1981, s 75(1).

¹⁰¹ *SFO v Lexi Holdings Plc* [2008] EWCA 1443, [2009] 1 WLR 905; *CPS v Windsor* [2011] EWCA Crim 143, [2011] 1 WLR 1519. *CPS v The Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [119] - [120]; *Re Stanford International Bank Ltd* [2010] EWCA Civ 137; [2011] 1 Ch 33.

¹⁰² *W v H* [2004] EWHC 526 (Fam/Admin); [2006] 2 FLR 258 at [1].

confiscation have potential overlap with issues connected to the granting of financial remedies before the family courts. Each may require consideration of the same facts and involve the same parties, for example as to “ownership” or the “innocence” of a spouse. Rehearsing the evidence and arguments twice is neither time nor cost effective.

10.95 Prior to the enactment of POCA 2002, where the High Court was required to determine a restraint or enforcement matter connected to confiscation, and when financial remedy proceedings were also brought before the High Court, a practice developed of using a single High Court judge with appropriate expertise to determine both matters. In *Webber v Webber*, Sir Mark Potter, President of the Family Division remarked that this was a “thoroughly sensible, convenient, and cost-saving procedure.”¹⁰³

10.96 Under POCA 2002, the High Court’s jurisdiction in connection with confiscation was moved to the Crown Court. However, the potential to make joint confiscation determinations still remains. Section 8(1) of the Senior Courts Act 1981 provides that the jurisdiction of the Crown Court is exercisable by any judge of the High Court. In *T v Revenue and Customs Prosecutions Office*,¹⁰⁴ Sir Mark Potter addressed the power to sit as a Crown Court judge in the context of an application to require disclosure in child maintenance proceedings of a document filed in restraint proceedings in the Crown Court under POCA 2002:

Whilst I lack the power to entertain the application sitting as a Judge of the Family Division, I could nonetheless do so pursuant to s 8(1) of the [Senior Courts] Act 1981 if I thought it appropriate. In principle...I would have been in as good a position as a Crown Court Judge sitting at Nottingham to consider an application.¹⁰⁵

10.97 In the family jurisdiction, the power to make the financial orders identified in the MCA is conferred upon “the court”, defined by section 52 as the High Court or Family Court.¹⁰⁶ Essentially, the jurisdiction of the Family Court is exercisable by a wide number of judges and is not venue specific.¹⁰⁷

10.98 It is arguably preferable that where determinations need to be made in both jurisdictions, proceedings should run in the same court, and before the same judge.

10.99 We have already discussed the overwhelming preference amongst stakeholders during our fact-finding for the judge who conducted the trial to deal also with confiscation. This may mean that, in contested trials where a complex confiscation is likely to ensue, a High Court judge would be obliged to hear the criminal trial itself.

¹⁰³ *Webber v Webber* [2006] EWHC 2893 Fam at [49], [2007] 1 WLR 1052.

¹⁰⁴ [2008] EWHC 3000 (Fam), [2009] 1 FLR 1231.

¹⁰⁵ Above at [27].

¹⁰⁶ Matrimonial Causes Act 1973, ss 23 and 52.

¹⁰⁷ Matrimonial and Family Proceedings Act 1984, ss 31B and 31C.

Using a High Court judge to conduct a Crown Court trial is more costly and so should be limited to only those cases where it is necessary to do so.¹⁰⁸

10.100 However, in most cases we consider that High Court judges would be best used to determine particular issues or applications in a small proportion of cases where there is a complex issue that requires specialist knowledge. Such an approach ensures that, in most cases, the trial judge will also hear the confiscation proceedings. Our provisional proposal, as set out in consultation question below, is therefore for a flexible approach to the use of High Court judges which is consistent with the approach taken by the Court of Appeal (discussed at paragraph 10.92) in deploying specialist expertise only where the case involves an element of complexity.

“Ticketing” judges in the Crown Court

10.101 A lack of availability of High Court judges was a key reason for moving restraint and enforcement proceedings in confiscation from the High Court when POCA 2002 was introduced.¹⁰⁹ An alternative would be to identify a pool of judges who sit more regularly in the Crown Court who have relevant expertise to deal with complex confiscation cases.

10.102 In the criminal courts certain judges are authorised or “ticketed” to conduct certain types of work. For example, in criminal cases, judges must be “ticketed” to conduct murder cases, attempted murder cases, and serious sexual cases. In 2013 the National Audit Office recommended that specific consideration should be given to “whether confiscation hearings should be heard by judges with specific expertise in this field.”¹¹⁰

10.103 In its follow-up report in 2016, the National Audit Office reported that the judiciary had “rejected introducing specialist judges... with the necessary expertise to hear confiscation order cases, believing it to be unnecessary and too restrictive.”¹¹¹

10.104 Unlike the implicit suggestion in the National Audit Office report, we do not consider that confiscation cases should *only* be dealt with by “ticketed” judges. As we discussed above, not all cases require a specialist; they require a well-trained criminal judge. However, we consider that there are cases of particular complexity that would merit being dealt with by judges whose knowledge and experience goes beyond that which would be gained through the minimum training identified in our provisional proposal at paragraph 10.89 above.

10.105 A system of “ticketing” would assist Resident Judges in ready identification of, and allocation of work to, any judge with the relevant expertise and the willingness to undertake complex confiscation cases. As we observed earlier in the chapter,

¹⁰⁸ For salary comparators see Ministry of Justice Judicial Salaries Scale https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831874/judicial-salaries-revised-14-nov-2018.pdf (last visited September 2020).

¹⁰⁹ Cabinet Office Performance and Innovation Unit *Recovery of the Proceeds of Crime* (2001) 8.29.

¹¹⁰ Confiscation Orders, Report of the National Audit Office (2013-14) HC 738 p 9.

¹¹¹ Confiscation: Progress Review (2016), Report of the National Audit Office (2015-16) HC 886 p30.

specialist judges with such expertise are already identified for the purposes of financial remedy proceedings in the family courts.

10.106 There are full time judges and Recorders who sit part-time in the Crown Court whose background from practice is civil law. When we attended a Judicial College confiscation seminar a number of those present were from a such a background. We consider that some such judges would be likely to apply for ticketing and that those judges could be readily deployed to deal with many matters that stray beyond the day-to-day work of the Crown Courts.

10.107 Using a ticketed judge to determine a complex confiscation matter and, if necessary, to hear any trial preceding the confiscation hearing would be more cost-effective than using a High Court judge.

10.108 We therefore provisionally propose that consideration should be given to creating a confiscation “ticket” for full-or part time judges who apply for such. From our preliminary consultation discussions, we are confident that there is an appetite for further training and development in this area of the law, including in the form of a confiscation ticket, and that members of the judiciary would likely find it useful.

Determining whether a specialist judge is necessary

10.109 Because it is desirable that the judge who hears a trial also hears the confiscation, we consider that whether a specialist judge may be necessary for confiscation should be considered at the stage of the Plea and Trial Preparation Hearing (“PTPH”).

10.110 At the PTPH, if a defendant pleads “not guilty”, the court will go on to consider all aspects of case management in preparation for the defendant’s trial. This may include identification of the judge to whom the case is allocated.¹¹² We consider that at the PTPH the prosecution should be required to indicate, for case management purposes, whether confiscation proceedings are contemplated. We do not consider the requirement to provide an indication at the stage of PTPH to be an onerous one:

- (1) Under the current law, prosecutors should consider the potential for confiscation at an early stage. The Code for Crown Prosecutors requires the possibility of confiscation to be considered when determining the appropriate charge to bring against a suspect. Furthermore, consideration should be given to obtaining a restraint order in contemplation of confiscation from the outset of the investigation.
- (2) Whether the defendant is alleged to have “benefited” from his or her alleged criminal conduct is likely to be evident from the nature or substance of a charge, with it often being evident whether a crime has been committed for financial or other advantage.
- (3) What should be required should only be treated as an indication for the purposes of case management, and not a binding representation of whether the prosecution will ultimately pursue confiscation.

¹¹² For example, when issues of handling a vulnerable witness arise – Form PTPH NH2 pages 12 to 13.

10.111 If confiscation proceedings are contemplated, judges should consider whether particular expertise will be needed to hear the trial. This is likely to include consideration of the factors that are considered by the family courts in allocating financial work to the Financial Remedy Unit. Such factors include whether potential allegations or issues involve:

- (1) complex asset structures;
- (2) complex income structures;
- (3) assets that are or were held through the medium of offshore trusts or settlements or otherwise held offshore or overseas;
- (4) assets are or were held through the medium of family or unquoted corporate entities;
- (5) the value of family assets, trust and/or corporate entities;
- (6) expert accountancy evidence;
- (7) complex or novel legal arguments.¹¹³

10.112 In addition to the factors identified in this list, in confiscation cases concurrent proceedings in another area of law (such as before the family courts) may be an added complexity. We consider that if such complexities are identified, the Crown Court judge should consult with the Resident Judge about allocation of the work to an appropriately experienced judge. This may, for example, be a circuit judge who is able to preside over both criminal and family law matters. We understand that a number of judges who have worked in the criminal courts are currently being cross-ticketed to the family jurisdiction and so more such judges should be available in the near future.

10.113 It may be that complexities come to light after the PTPH. If such complexities come to light prior to the confiscation and it is unnecessary for the trial judge to hear the confiscation we consider that the case could still be allocated to an appropriately experienced judge for confiscation.

10.114 If the trial judge is required to resolve the confiscation, we consider that he or she should be able to benefit from appropriate assistance at the confiscation hearing. In the next part of the chapter we consider ways in which that assistance could be provided.

¹¹³ Certificate of Financial Complexity in the Financial Remedies Unit of the Central Family Court.

Consultation Question 25.

10.115 We provisionally propose that:

- (1) Potential complexities in the confiscation hearing should be identified through questions at the Plea and Trial Preparation Hearing, or when the complexity comes to light.
- (2) A clear practice direction be issued that where there is added complexity in the confiscation hearing, the Crown Court judge should consult with the Resident Judge about allocation of the case to an appropriately experienced judge.
- (3) The Lord Chief Justice considers the institution of “ticketing” of suitable judges to deal with complex confiscation cases.

10.116 Do consultees agree?

Assisting the judge (1) - Permitting the judge to sit with others

10.117 We considered with some care whether a Crown Court judge should be able to convene a specialist “panel” over which he or she would preside, in order to determine cases of complex confiscation. We considered whether that could be sitting as part of the Crown Court or as a “confiscation chamber” of the First Tier Tribunal.

A First-Tier Tribunal (Confiscation Chamber).

10.118 The tribunal system allows for appropriate expertise to be deployed to assist a legally qualified person (which might include a judge of the Crown Court)¹¹⁴ in the determination of a case. The First Tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 gives flexibility to the Senior President of Tribunals to determine the composition of a Tribunal. In particular, the Senior President of Tribunals “must have regard to the need for members of tribunals to have particular expertise, skills or knowledge”.¹¹⁵ To that end, the Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008 permits professionals who are not lawyers to form part of a Tribunal. Arguably a Crown Court judge could be assisted by professionals who are already included in the order such as accountants, or by professionals who could be added to such an order. For instance, some stakeholders we spoke to suggested greater use could be made of forensic accountants in confiscation proceedings.

10.119 We do not consider that a “confiscation chamber” of the First-tier Tribunal should be created, for a number of reasons:

¹¹⁴ Tribunals, Courts and Enforcement Act 2007, s 4 and sch 2(6).

¹¹⁵ SI 2008 No 2835, art 2(2).

- (1) The perception that confiscation is a “bolt on” part to the criminal justice system would likely be reinforced, rather than lessened, if confiscation cases are taken out of the “court” system and put into a separate tribunal.
- (2) Confiscation is ultimately part of the sentencing exercise (although it is distinct aspect of that exercise).¹¹⁶ It is therefore appropriate that it remains before the criminal courts.
- (3) Only a portion of confiscation matters require the application of different expertise. The small volume of cases involved would not justify the cost (and additional burdens) of a specialised forum.
- (4) The benefit of specialised assistance can be used within the criminal court system without recourse to a specialised tribunal. We consider this in more detail when discussing assessors at the end of this chapter.

“Composite Bench”

10.120 Having discounted the creation of a bespoke Tribunal Chamber, we have also considered whether a “composite Bench” could determine confiscation proceedings, comprising a tribunal-style panel convened in the Crown Court. This would permit a Crown Court judge to sit with other judges or with persons with relevant expertise, drawn from a panel of experts, when it is appropriate to do so.

A composite Bench comprising experts or other judges.

10.121 A composite Bench, comprising a judge and experts, may be useful where, for example, complex questions arise about tax liabilities or insolvency.

10.122 As with a Tribunal, panel members could be selected based on their expertise and suitability for a particular case. In the Tribunal Service, expert panellists are appointed by the Judicial Appointments Commission using competencies that are aligned to the Judicial Skills and Abilities Framework.¹¹⁷ Types of professional eligible to sit in the Tribunal Service are identified in a statutory instrument.¹¹⁸ Importing such an approach to a panel of experts for confiscation would ensure that panellists have not only the relevant expertise but the relevant skills to contribute to any determination. This would be particularly important because the panel would essentially be sitting at “circuit” judge level.

10.123 There are some attractions to using a composite Bench involving judges and experts. If a trial has taken place the Crown Court judge is able to lend his or her knowledge of the case and the evidence to the determination, alongside appropriate expertise, for example from forensic accounting. However, we do not recommend that such an approach be adopted. It is likely to be costly to recruit and to train such panellists, who may ultimately be needed only in very few cases.

¹¹⁶ *Phillips v United Kingdom* (App No 41087/98); *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099.

¹¹⁷ Courts and Tribunals Judiciary, *Judicial Skills and Abilities Framework* (2014)

¹¹⁸ SI 2008 No 2692

10.124 The costs in training and recruitment of expert panellists could be ameliorated by the use of a composite Bench comprising judges from the criminal courts and judges from other jurisdictions. Such judges will have already been recruited and trained in their specialist areas of law and would deploy that expertise in reaching a determination on the confiscation matter. However, we consider that appropriate expertise may be deployed in confiscation hearings in more efficient and established ways, such as through the use of single judges who already have relevant expertise or through the use of assessors.

10.125 We therefore do not propose the introduction of a composite Bench for the sole purpose of assisting the judge in making a confiscation determination.

Assisting the judge (2) - permitting the judge to draw on the assistance of others

10.126 Having discounted permitting the judge to sit with others to make the confiscation determination, we consider whether the judge should be permitted to draw on the assistance of others. In particular, we consider whether a judge should be permitted to:

- (1) make use of an assessor; or
- (2) refer discrete matters to the High Court for resolution.

Assessors

10.127 Under section 70(1) Senior Courts Act 1981 and the Civil Procedure Rules, rule 35.15, “assessors” may provide expert assistance on discrete points of law in the civil courts. Similar assistance may be provided to Tribunals under section 28 of the Tribunals, Courts and Enforcement Act 2007.

10.128 Assessors can be lawyers or other professionals who may have a particular area of expertise and are able to provide advice to the judge. For example, the assessor may be a barrister who practices in property or family law and therefore has practical expertise. Alternatively, an assessor could be an academic or someone who has a comprehensive knowledge of a discrete legal principle that has arisen in a specific matter.

10.129 Assessors can be directed by the court to prepare a report on a particular matter, in relation to which the judge requires guidance, and then attend the whole or any part of the court proceedings.¹¹⁹

10.130 The assessor in question could be a judge with relevant expertise. For example, in the case of *Mastercigars Direct Ltd v Withers LLP*, Mr Justice Morgan was assisted in his determination on costs by a report prepared by the senior costs judge acting in the capacity of a costs assessor.

10.131 Under the Civil Procedure Rules, rule 35.10(2), a party may object to an assessor, either personally or in respect of that person's qualification.

¹¹⁹ Criminal Procedure Rules, r 35.15(3).

10.132 During our pre-consultation fact-finding the general feedback was that assessors would be a welcome addition to the confiscation process, so that judges with limited time, are able to seek concise advice on discrete areas of law which arise during the course of proceedings.

Consultation Question 26.

10.133 We provisionally propose that when seeking to resolve a complex issue in confiscation proceedings the court should be permitted to use an assessor, subject to objections by the parties.

10.134 Do consultees agree?

Creating a formal mechanism to refer an issue to judges at the High Court.

10.135 There may be some circumstances in which complex issues can only be resolved appropriately through recourse to another court. As we noted earlier, the cases with the highest value of orders are often those in which there are complex issues to be determined.

10.136 It may be apparent, for example, that a defendant will seek to frustrate the confiscation process in any way possible. For example, in the case of *R v Heron* the Court of Appeal described the appeal in connection with property registered in the name of the defendant's partner as the "latest in a series of applications made... with the object of impeding the due enforcement of a confiscation order... The number of other applications made beggars belief."¹²⁰ Appeals had been attempted to the Court of Appeal (Criminal Division), to the High Court (by way of judicial review), to the House of Lords and apparently to the European Court of Human Rights.

10.137 In such a case, it may be better for a single, binding determination on third party interests to be made in the High Court (rather than by a High Court judge sitting in the Crown Court) and for the decision to be binding upon the Crown Court. This would have two advantages.

10.138 First, it would prevent re-litigation of the issue. For example, although a determination of third party interests by the Crown Court judge under section 10A of POCA 2002 may be binding in connection with confiscation, there is nothing to stop proceedings being launched for declarations in connection with the interests at the High Court, although the High Court retains a discretion as to whether to hear those proceedings.¹²¹ If the High Court and only the High Court is to adjudicate on the issue, with the outcome being binding upon the Crown Court, then it is only litigated once.

10.139 Secondly, it would prevent multiple appeals. Because the issue will only be adjudicated in the High Court, there will only be a single route of appeal on that issue,

¹²⁰ *R v Heron* [2014] EWCA Crim 925.

¹²¹ Proceeds of Crime Act 2002, s 59(5).

namely to the Court of Appeal (Civil Division). It will not be possible to challenge two decisions on the same point before two different divisions of the Court of Appeal.

10.140 We therefore provisionally propose that, where the Crown Court considers that it is in the interests of justice to do so, it may refer an issue in confiscation proceedings to the High Court for a binding determination. We envisage such a step being taken in a small proportion of cases where complex or novel issues fall for determination.

10.141 It is clearly not in every case where it would be in the interests of justice to refer an issue to the High Court. Where a defendant is ostensibly co-operative and the likelihood of seeking recourse to other courts to frustrate the confiscation order is minimal, there may be little need to seek recourse to the High Court for a binding determination. Furthermore, where the interest is of minimal value or the issue is not complex, a proportionate determination may be reached through one of the other methods of assistance outlined in this chapter.

Consultation Question 27.

10.142 We therefore provisionally propose that, where the Crown Court considers that it is in the interests of justice to do so, it may refer an issue in confiscation proceedings to the High Court for a binding determination.

10.143 We provisionally propose that, in considering the interests of justice, the court should consider, amongst any other factors that it considers to be relevant:

- (1) the value of the asset or interest that is subject to the dispute;
- (2) the complexity of the issue; and
- (3) the conduct of the parties.

10.144 Do consultees agree?

PARALLEL PROCEEDINGS

10.145 We have considered a third option: that in cases where connected proceedings are running in parallel in different jurisdictions, the proceedings could be heard together. For example, where confiscation proceedings were going on in the Crown Court at the same time as matrimonial proceedings were going on in the Family Court, the two judges could sit together to try the issues.

10.146 However, we have dismissed this possibility as impractical. Likely issues such as what to do if the judges concerned disagreed on a point that affected both sets of proceedings, advocates with different specialisms seeking to represent a single party in the proceedings and questions of the avenue of appeal would appear to create as many avenues for further issues as they would solve.

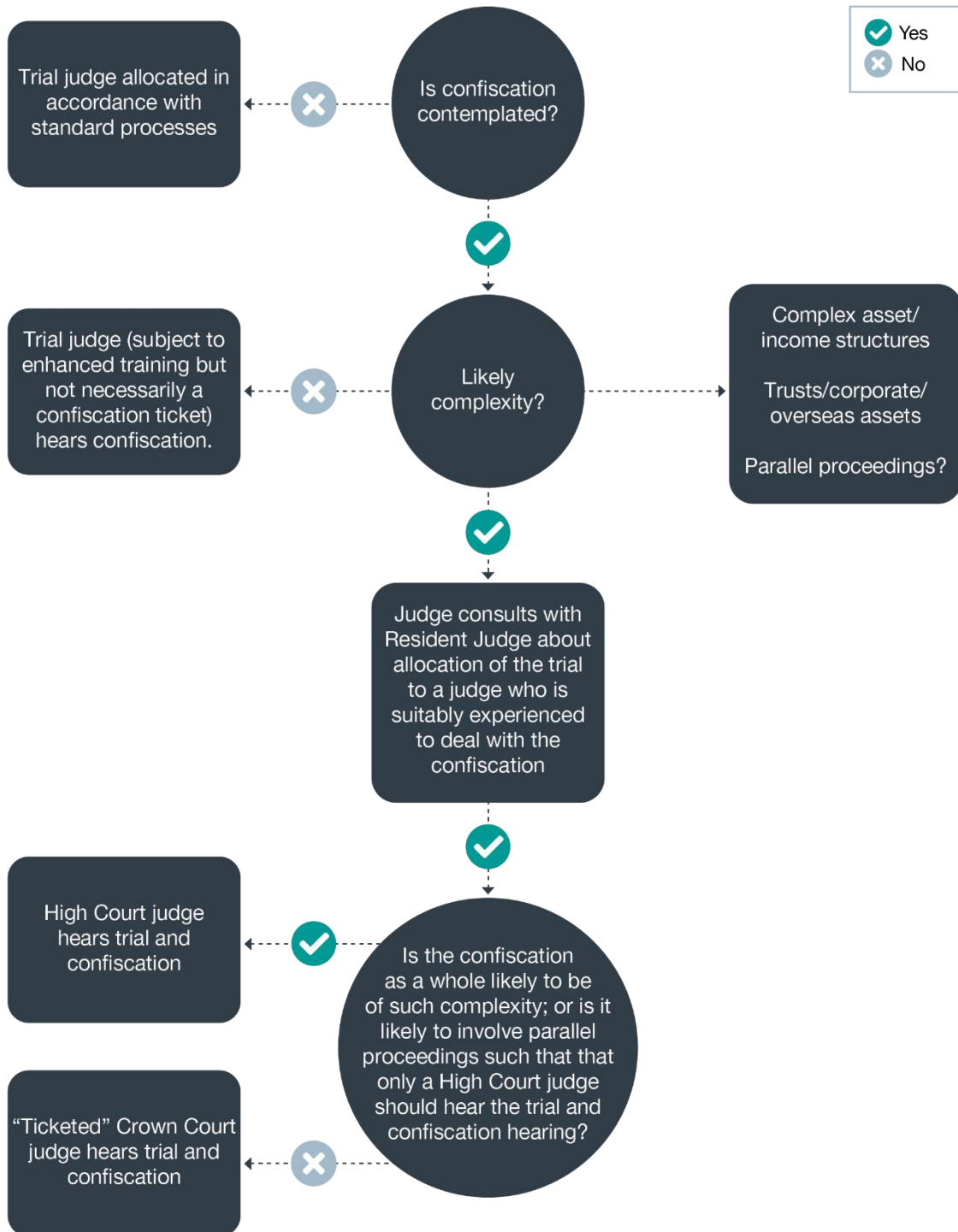
10.147 Instead, we consider that our proposals set out earlier in this chapter, namely a suitably qualified single judge hearing both proceedings,¹²² or the transfer of the case to the High Court,¹²³ would provide better solutions.

¹²² See paras 10.91 – 10.116 above.

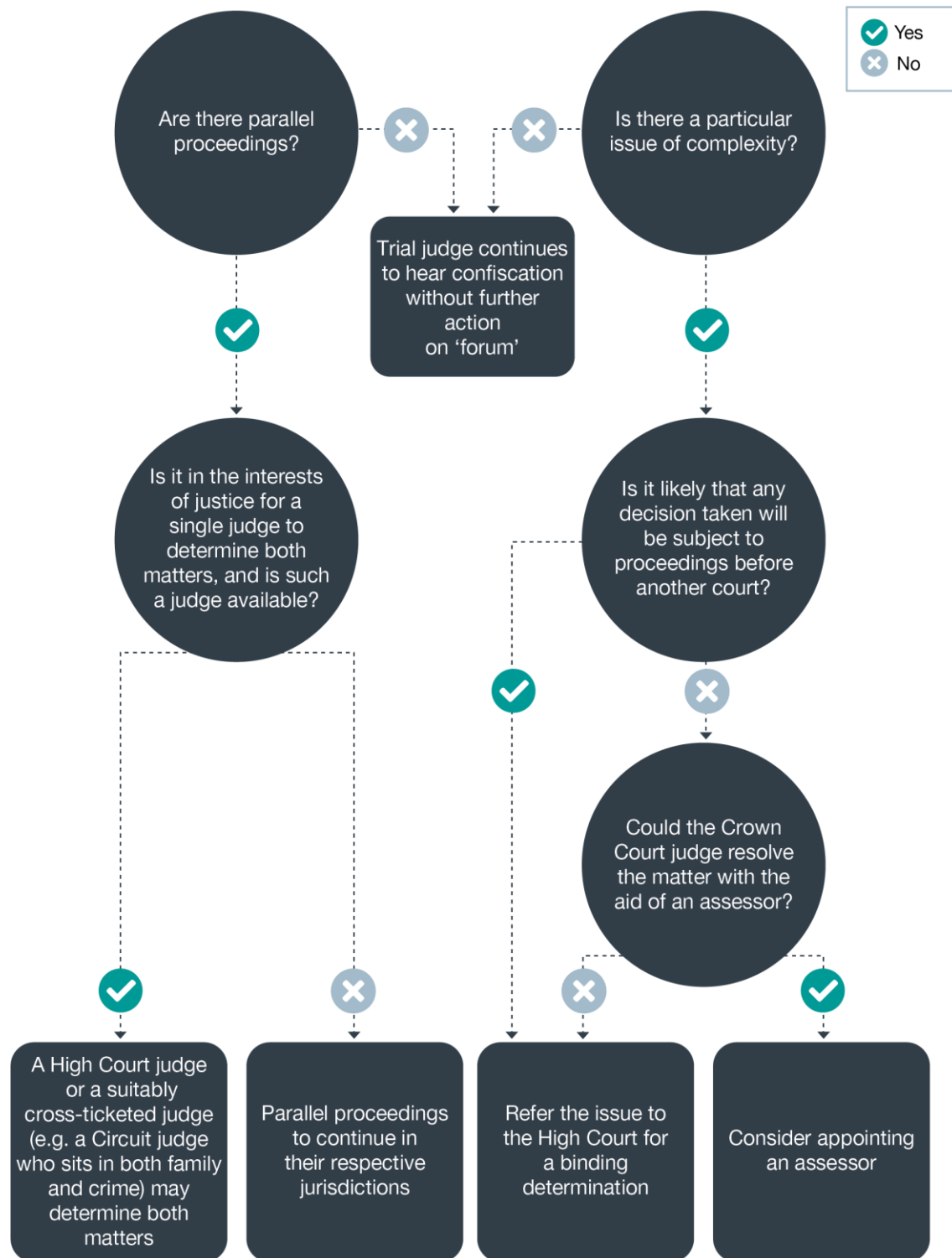
¹²³ Consultees should note that we discuss the problem of parallel financial remedy and enforcement proceedings in respect to the same asset in chapter 22.

AN OVERVIEW OF OUR PROVISIONAL PROPOSALS ON FORUM

AT THE PTPH:



“FORUM” ISSUES AFTER TRIAL:



Part 4: Benefit

INTRODUCTION TO PART 4

In this section of the consultation paper we consider the issue of “benefit”.

In chapter 11 we consider the significance of determination of the defendant’s “benefit” from criminal conduct.

In Chapter 12 we consider the definition and valuation of benefit.

In Chapter 13 we consider extended confiscation for defendants found to have a “criminal lifestyle”. As we discuss in more detail in that chapter, a defendant who satisfies the statutory definition of a “criminal lifestyle” is assumed to have benefited from particular criminal offence(s) for which he or she was convicted and from other offending that was not before the court.¹

In Chapter 14 we consider whether, to make the law clearer and to make court processes more efficient:

- (1) principles that have been developed in the extensive confiscation case law; or
- (2) which are found in various statutes outside of a criminal law context but used in confiscation

ought to be incorporated either in a confiscation statute, in non-statutory guidance or in a Criminal Practice Direction for the assistance of the courts.

¹ Proceeds of Crime Act 2002, ss 10 and 75.

Chapter 11: The significance of “benefit”

INTRODUCTION

- 11.1 Crime is often committed for payment, reward or some other gain. During a Parliamentary debate prior to the enactment of the first confiscation legislation in 1986, the Member of Parliament for Westminster North, John Wheeler, commented on a visit of the Home Affairs Committee to Miami: “we saw the extent of the wealth, particularly in the vessels, the buildings, the property and the assets that the people who managed drugs were making out of this evil crime.”¹
- 11.2 Gain from crime is not limited to cash. A burglar may break into a house to steal property such as jewellery or a laptop, or an accountant may fraudulently divert company funds to his or her personal account electronically.
- 11.3 Under the Proceeds of Crime Act 2002 (“POCA 2002”), this acquisition of wealth, resources or property through the commission of crime and the resulting gain to the offender is referred to as “benefit”.
- 11.4 When introducing the second reading of the Bill that became POCA 2002, John Denham, the Minister for Police, Courts and Drugs described how “far too many defendants pass through the criminal justice system with little or no effort being made to deprive them of the *benefit* that they have derived from their crimes”.² POCA 2002 was therefore intended to “provide for confiscation orders in relation to persons who *benefit* from criminal conduct” (emphasis added).³
- 11.5 In this part of the Consultation Paper we deal with this concept of “benefit”. In this chapter we discuss what the term “benefit” is intended to describe and why it is significant to confiscation. We also outline the structure for this part of the consultation paper.

SIGNIFICANCE OF BENEFIT

- 11.6 The identification and calculation of “benefit” has real significance throughout the confiscation process and beyond.
- 11.7 A member of the public considering the success of the confiscation regime would undoubtedly wish to know two things. Firstly, what did a defendant “gain” from their crime? And secondly, how much of that “gain” was taken away from the defendant?
- 11.8 As to the first question, in making a confiscation order a judge must identify an offender’s “benefit” from crime, and value that benefit.⁴

¹ *Hansard* (HC), 21 January 1986, vol 90, col 257.

² *Hansard* (HC), 30 October 2001, vol 373, col 757.

³ Proceeds of Crime Act 2002, preamble.

⁴ Proceeds of Crime Act 2002, s 80.

11.9 As to the second question, the defendant must repay a sum equivalent to the value of the benefit in full, unless the court is satisfied that the defendant has insufficient assets to do so.⁵ Because the nature and value of a defendant's assets are "essentially within a defendant's personal knowledge"⁶ the defendant bears the burden of showing that his or her assets are insufficient to repay the benefit.

11.10 In seeking to persuade the court that he or she has insufficient assets from which to repay the benefit, the defendant will need to meet the court's inevitable inquiry as to what has happened to the assets that were used to calculate the benefit. If the defendant fails to produce clear and cogent evidence about the location or disposal of an asset the value of which formed part of the benefit, the defendant will be liable to repay the value of the asset on the basis that he or she must still have the asset but has "hidden" it from the authorities.⁷

11.11 It is therefore important that the defendant's benefit is accurately calculated. A defendant cannot hope to produce cogent evidence about the whereabouts of a "benefit" if he or she never benefited in the first place. As Jonathan Fisher QC and Justin Bong Kwan have observed, an incorrectly inflated benefit figure can lead to:

the making of confiscation orders based on assets which do not exist in the hands of a defendant. This generates unrealistic expectations as to the amount of criminal proceeds available to pay a confiscation order and serves to distort the statistics as well as diverting the attention of the law enforcement agencies from enforcing confiscation orders in cases where the assets exist.⁸

11.12 Her Majesty's Courts and Tribunals Service ("HMCTS") Trust Statement for 2018-19 reported that defendants with no identified assets but only "hidden assets" accounted for £493,830,000 of outstanding confiscation order debt.⁹ During our fact-finding, stakeholders suggested that part of the reason that outstanding hidden asset debt was so high was that benefit had been artificially inflated.¹⁰ Police officers and accredited financial investigators spoke repeatedly about a historic culture of "targets" for confiscation cases, leading to high benefit figures being sought.

11.13 The amount of benefit is also significant in terms of the potential consequences to the defendant if he or she fails to repay the amount ordered. If a defendant is ordered to repay a sum that he or she is highly likely never to have had, and therefore is unable to pay, two consequences follow:

⁵ Proceeds of Crime Act 2002, s 7.

⁶ *R v Rees* (19 July 1990) CA (unreported), cited in *R v Barwick* [2001] 1 Cr App R (S) 129.

⁷ *R v Lee* [2013] EWCA Crim 657, [2013] Lloyd's Rep FC 453; *R v Carnall* [2014] EWCA Crim 287; *R v Omorgieva* [2015] EWCA Crim 382.

⁸ J Fisher QC and J Bong Kwan, "Confiscation: deprivatory and not punitive, back to the way we were" [2018] 3 *Criminal Law Review* 192 at 200.

⁹ HMCTS, *Trust Statement 2018-19* (2019) HC 2337 p 8.

¹⁰ For further discussion about hidden assets see Chapter 16.

- (1) Interest accrues on the unpaid amount at the Judgments Act rate of 8% per year.¹¹
- (2) The defendant may be imprisoned for failing to pay his or her confiscation order.¹² The period of imprisonment in the event of non-payment of confiscation orders of more than £1 million is a maximum of 14 years.¹³

11.14 It is therefore important that “benefit” calculations are realistic and carefully made.¹⁴

11.15 In many cases the defendant succeeds in satisfying the court that he or she has insufficient assets to repay the benefit in full. For orders made in 2006-07, the total value of benefit was £866 million and the total value of the confiscation orders ultimately imposed by the court was £146 million.¹⁵ The National Audit Office found, for orders imposed in 2012-13 the total benefit figure was £1.6bn, while the value of the original orders imposed amounted to £319m.¹⁶ In our sample survey of confiscation orders made at Liverpool Crown Court in 2015-16 the total benefit was assessed at £76.6m, while orders were ultimately made for £4.3m. Excluding two very significant benefit findings from the Liverpool data, the figures reduce to £19.8m and £4.1m. Taking all of these sums together suggests an overall trend of roughly £5 of benefit for every £1 forming part of an eventual order made, that is, orders form roughly 20% of benefit.

11.16 In cases where the amount that a defendant is ordered to repay is lower than his or her benefit, the benefit amount remains important, as the amount available to a defendant to satisfy a confiscation order can be reconsidered later:¹⁷

The plain words of the statute...provide for the making of an application for...an increase in the amount recovered under the confiscation order at any time after the original confiscation order was made. By this means drug dealers can be deprived of their assets until they have disgorged an amount *equivalent to all the benefit* which had accrued to them from drug dealing (emphasis added).¹⁸

11.17 A confiscation order is therefore a debt that hangs over a defendant until the benefit is repaid in full. Section 22(4) provides the court may vary the initial order and substitute the amount required to be paid with an amount that it believes is just, but does not exceed the defendant’s benefit. A varied order can take into account assets acquired

¹¹ Judgments Act 1838, s 17(1).

¹² Proceeds of Crime Act 2002, s 35.

¹³ For the cost of detaining a person in prison see Ministry of Justice and HM Prison and Probation Service, *Costs per prison place and prisoner by individual prison 2018-19* <https://www.gov.uk/government/statistics/prison-performance-statistics-2018-to-2019> (last visited 20 July 2020)

¹⁴ For a discussion on this see K Bullock, *Examining attrition in confiscating the Proceeds of Crime* (Home Office Research Report 17, July 2009).

¹⁵ K Bullock, *Examining attrition in confiscating the Proceeds of Crime* (Home Office Research Report 17, July 2009).

¹⁶ Confiscation Orders, report of the National Audit Office (2013-14) HC 738 p 13.

¹⁷ Proceeds of Crime Act 2002, s 22.

¹⁸ *R v Tivnan* [1999] 1 Cr App R (S) 92.

after the original order, even if they were legitimately acquired.¹⁹ There are also no time limits upon such an application.

11.18 Because “the assessment of benefit imposes a lifelong liability upon a defendant to pay it, should his finances permit,”²⁰ therefore:

Benefit determinations (whether contested or agreed) are not to be treated as being “academic” merely because the defendant’s “available amount” is less than the value of his or her benefit from criminal conduct.²¹

“BENEFIT” IN THE CONSULTATION PAPER

11.19 In light of the significance of “benefit” to the determination of a confiscation order, it merits detailed consideration in our consultation paper. As set out in the introduction to this part of the consultation paper, in the next three chapters we outline the current law, identify potential issues with the law and make provisional proposals about various matters relating to benefit.

¹⁹ *R v Padda* [2013] EWCA Crim 2330, [2014] 1 WLR 1920; we discuss reconsideration in more detail in Chapter 25.

²⁰ A Campbell-Teich, “Whither confiscation: May Revisited” [2019] 5 *Archbold Review* 4

²¹ R Fortson QC, “R v Padda: Proceeds of crime – confiscation order” [2014] 6 *Criminal Law Review* 469 at 471.

Chapter 12: Defining and valuing “benefit”

INTRODUCTION

12.1 Under the Proceeds of Crime Act 2002 (“POCA 2002”), the term “benefit” has a distinct legal meaning, which extends beyond an everyday understanding of “gain” from crime. The definition has been subject to extensive criticism. In this chapter we:

- (1) outline how benefit is currently defined under POCA 2002 and how that definition has been interpreted by the courts;
- (2) consider problems with the definition raised by the courts, by academics and by stakeholders during our fact-finding for the project;
- (3) analyse the apparent problems with the definition and examine how the definition may be reformed to address the matters that we have identified; and
- (4) make provisional proposals about how the definition of benefit could be reformed.

THE CURRENT LAW

12.2 The framework for determining “benefit” is underpinned by a number of interrelated concepts. These concepts form the essential building blocks of the process which a judge must follow in order to make a confiscation order. We address the definitions of those key concepts in this section.

- (1) When the court seeks to identify benefit, it must first establish that there has been “criminal conduct”.¹ We therefore begin by considering the definition of criminal conduct under POCA 2002.
- (2) A defendant will have “benefited” from that criminal conduct if² he or she “obtained” either “property” or a “pecuniary advantage” (some form of financial advantage, such as by evading the liability to pay tax).³ We therefore go on to consider the POCA 2002 definitions of:
 - (a) “obtaining”; and
 - (b) “property” or “pecuniary advantage”.
- (3) The property or pecuniary advantage must be obtained “as a result of or in connection with” the criminal conduct.⁴ We therefore also consider the link that

¹ Proceeds of Crime Act 2002, ss 6(4) and 76(1).

² Proceeds of Crime Act 2002, ss 76(4) and (5).

³ *R v Young* [2013] EWCA Crim 302; *R v Morgan* [2013] EWCA Crim 1307, [2014] 1 WLR 3450; *R v Tatham* [2014] EWCA Crim 226, [2014] Criminal Law Review 672; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Doran* [2015] EWCA Crim 384; *R v Parker* [2018] EWCA Crim 1057.

⁴ Proceeds of Crime Act 2002, s 76(4).

is required between the criminal conduct and the property or pecuniary advantage.

- (4) Finally, once a benefit is identified, the court must value that benefit.⁵ We conclude our description of the current law by setting out how benefit is valued under POCA 2002.

Criminal Conduct

- 12.3 Before a judge can identify benefit, “criminal conduct” must be identified. “Criminal conduct” is defined as conduct which constitutes an offence in England and Wales, or which would constitute such an offence if it occurred in England and Wales.⁶ POCA 2002 identifies two types of “criminal conduct”, namely “particular criminal conduct”⁷ and “general criminal conduct”.⁸
- 12.4 Particular criminal conduct is relevant in all confiscation cases. A confiscation enquiry is always concerned with the benefit that a defendant gained from the particular offences for which he or she is before the court. This includes both offences for which the defendant is convicted and any further offences which the defendant asks to be taken into consideration by the court in passing sentence.⁹
- 12.5 General criminal conduct is far broader, comprising all of the defendant’s criminal conduct, whether it occurred before or after the passing of POCA 2002.¹⁰ This is relevant if the court determines that the defendant has what POCA 2002 refers to as a “criminal lifestyle”.¹¹ Because the court is considering not isolated incidents but a more general “criminal lifestyle”, the court will look beyond a defendant’s particular criminal conduct and consider the whole spectrum of his or her criminality. We discuss general criminal conduct and the “criminal lifestyle” regime more generally in Chapter 13.

“Obtaining”

- 12.6 Having established that there was criminal conduct, a person is treated under POCA 2002 as having “benefited” from such conduct if he or she “obtains” property as a result of or in connection with it.¹² Whether a person has “obtained” property has therefore been described by the courts as the “essence” of benefit.¹³
- 12.7 According to section 84(2)(b) POCA 2002, “property is obtained by a person if he obtains an interest in it”. This somewhat circular description was described by the

⁵ Proceeds of Crime Act 2002, ss 79 and 80.

⁶ Proceeds of Crime Act 2002, s 76(1).

⁷ Proceeds of Crime Act 2002, s 76(3).

⁸ Proceeds of Crime Act 2002, s 76(2).

⁹ Proceeds of Crime Act 2002, s 76(3).

¹⁰ Proceeds of Crime Act 2002, s 76(2).

¹¹ Proceeds of Crime Act 2002, s 75.

¹² Proceeds of Crime Act 2002, s 76(4).

¹³ *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182; *CPS v Jennings* [2008] UKHL 29, [2008] 1 AC 1046.

Supreme Court as “puzzling”.¹⁴ In civil law, interests in property can be wide ranging¹⁵ and we will now consider how those interests have been dealt with in the context of confiscation.

The test in *R v May*¹⁶

- 12.8 The starting point for understanding what is meant by “obtaining” property in confiscation cases is a “broad principle” set out by the House of Lords in *R v May*. The House of Lords held that, in confiscation cases, a person “ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control”.¹⁷
- 12.9 To understand the concept of “obtaining”, it is helpful to consider what (if anything) it means to “own” property in civil law. According to Professor William Swadling of the University of Oxford “despite what the layman might think, there is no concept of ownership in English law”. What the law is concerned with is a person’s “title” (a term derived from “entitlement”) to an asset.¹⁸
- 12.10 “Ownership” is, at most, a label which can be used to describe a title that brings with it “an open-ended set of use-privileges and control-powers”.¹⁹ Roughly-speaking, an “owner” can do what he or she likes with the property over which he or she has good title as long as he or she does not interfere with the title held by another owner.
- 12.11 If a person with inferior possessory rights seeks to interfere with another’s superior possessory rights, the latter can bring a claim in court against the former for their wrongful interference with the property. Such an action is known as an action in “conversion”.²⁰
- 12.12 It is the concept of “ownership” as connoting the person with a title which confers such extensive rights to property that is reflected in the “broad principle” set out in *R v May*.²¹

¹⁴ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

¹⁵ For detailed discussion about the extent to which property law requires an enquiry into relative rights see M Bridge, L Gullifer and others, *The Law of Personal Property* (2nd ed 2017) chapter 2 section B (ownership).

¹⁶ *R v May* [2008] UKHL 28, [2008] 1 AC 1028.

¹⁷ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [48(6)]. See paragraph 12.16 below for the Supreme Court’s subsequent explanation of Lord Bingham’s words in *R v Ahmad* [2014] UKSC 36, [2015] 1 AC 299.

¹⁸ W Swadling, “Property, General Principles” in A Burrows (ed) *Oxford Principles of English Private Law* (3rd ed 2013) 4.131.

¹⁹ J Harris, *Property and Justice* (1st ed 1996) p 72; *Benjamin’s Sale of Goods* (10th ed 2017) 5-003.

²⁰ Actions in conversion are not solely available to “owners”. Where any person with inferior possessory rights seeks to interfere with another’s possessory rights, the latter can bring an action in conversion. *Calwodelegh v John* 1479 YN H18 Edw IV f 23a-b pl 5 Ct CP; *Wysse v Andrew* 1531 KB 27/1081 m78; see Baker and Milsom, *Sources of English Legal History: Private Law to 1750* (2nd ed 2019).

²¹ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [48(6)].

12.13 For the purposes of the criminal law, if “ownership” represents a title which confers such extensive rights over property “possession” falling short of “ownership” must represent a title that confers lesser rights.²² For example, under the Theft Act 1968:

- (1) “obtaining” property by deception was defined with reference to ownership or possession.²³
- (2) For the offence of “theft” to be established, the court must be satisfied that the thief has “appropriated” property.²⁴ If a thief steals a watch, he or she has appropriated the watch by assuming the rights of the owner. He or she has all of the powers of use, abuse and disposition in connection with the watch that the owner would have.²⁵ However, his or her powers over the watch would still be subject to the owner’s title.

12.14 Because the test articulated in *R v May* appears to focus on “ownership”²⁶, strict application of the test would mean that a thief would fall outside of the definition of “obtaining” in POCA 2002.²⁷ Accordingly, the Court of Appeal in *R v Allpress* “helpfully interpolated the words”²⁸ “assumes the rights of an owner”²⁹ into the broad principle set out in *R v May*. This effectively replicates the test for “appropriation” of property in the Theft Act 1968. It also reflects the test that is applied in civil law when an action is brought for “conversion” of property, the essence of which is treating another person’s property as your own.³⁰

12.15 The refined, broad principle for determining whether property has been obtained as extrapolated from *R v May* and *R v Allpress* is therefore:

A person ordinarily obtains property if in law he owns it, whether alone or jointly, or assumes the rights of an owner, which will ordinarily connote a power of disposition or control.

12.16 In *R v Ahmad* the Supreme Court sought to explain that, when Lord Bingham spoke of obtaining something “so as to own it” in *R v May*, he was not in fact laying down a test

²² The rights are lesser in that they are enforceable against all the world except the anyone with a better and prior title.

²³ Theft Act 1968, s 15.

²⁴ Theft Act 1968, ss 1(1) and 3(1).

²⁵ *R v Ahmad* [2014] UKSC 36, [2015] 1 AC 299 at [42]. See *Lawrence v Metropolitan Police Commissioner* [1972] AC 626; *R v Morris* [1984] AC 320; *DPP v Gomez* [1993] AC 442, *R v Hinks* [2001] 2 AC 241.

²⁶ See paragraph 12.16 for the Supreme Court’s subsequent explanation of Lord Bingham’s words in *R v Ahmad* [2014] UKSC 36, [2015] 1 AC 299.

²⁷ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [48(6)].

²⁸ *R v Ahmad* [2014] UKSC 36, [2015] 1 AC 299 at [42].

²⁹ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [64].

³⁰ Also *Kuwait Airways Corporation v Iraqi Airways Company* [2002] UKHL 19, [2002] 2 AC 883. The tort of conversion must be compared with the tort of trespass to goods in this regard. Whilst the former requires the tortfeasor to treat the property as his or her own, the latter requires only direct interference with property over which the claimant has possessory rights (see for example *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952; *Rugby Football Union v Viagogo Ltd* [2011] EWHC 764 (QB); [2011] NPC 37 at [10]; *Fitzwilliam Land Co v Cheesman* [2018] EWHC 3139 (QB); *UK Oil and Gas Investments Plc v Persons Unknown* [2018] EWHC 2252 (Ch); [2019] JPL 161).

that focussed solely on ownership. Rather Lord Bingham was doing so to contextualise the position of someone who assumed the rights of an owner in comparison to a mere custodian of property. Such a distinction is familiar to the civil law. On the one hand, a person who wrongfully assumes the rights of an owner may be liable in an action for conversion. On the other hand, a custodian who recognises and respects the rights of an owner will incur no such liability.³¹

12.17 The linking of a power of control or disposition to ownership or assumed ownership means that a person who is a mere custodian of goods will not be treated as having “obtained” those goods. For example, a diner in a restaurant may have custody of the cutlery that he or she uses during the meal, but the diner would not be thought of as having any power to dispose of the cutlery. During the ordinary course of the meal the diner will deal with cutlery in a manner which makes it clear that the cutlery belongs to the restaurant. The diner will have not have assumed any ownership rights.³²

12.18 Similarly, a supermarket till operator who is given money by a customer:

would have physical power to dispose of the money elsewhere; it may be that he or she could put it in their pocket undetected...³³ nobody would ordinarily think of the till operator benefiting from that sum of money or of the money being under the till operator's power of disposition or control in the sense in which the judicial committee [of the House of Lords] used that expression in *May*.³⁴

12.19 If the till operator acted in the ordinary course of employment,³⁵ dealt with the money as directed and was paid for doing so, he or she would have not have acted as the owner or assumed ownership. Accordingly, he or she would not be taken to have obtained the money handed over to him or her at the till.³⁶

12.20 In a criminal context, case law suggests that drugs couriers are similar in many ways to the till operator.³⁷ Drugs couriers only deal with property (in their case with drugs or drug money) as directed by another, in exchange for a fee or reward. What the courier

³¹ However, if that custodian strays beyond the terms of their custodianship, he or she may be liable in an action for trespass to goods, assuming that the claimant has a right to possession (*Ward v Macauley* (1791) 4 TR 489 at 490). For exceptions see *Clerk & Lindsell on Torts* (22nd Ed) 17-136.

³² Similarly, in civil law the diner has not assumed the rights of the owner by taking the property for his or her own private use or disposition, and so there would be no liability in conversion. As long as the diner made reasonable use of the cutlery there would also be no liability in trespass.

³³ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [48].

³⁴ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [48].

³⁵ See in this connection *R v Fulton* [2019] EWCA Crim 163, [2019] Criminal Law Review 633.

³⁶ The analysis at footnote 32 (civil law) applies equally here. The till operator would not have assumed the rights of the owner by taking the property for his or her own private use or disposition, and so there would be no liability in conversion. Furthermore, as long as the till operator did not intentionally act otherwise than as instructed by the employer in connection with money that he or she handles, there would also be no liability in trespass (as to intention see *National Coal Board v JE Evans & Co (Cardiff) Ltd* [1951] 2 KB 861).

³⁷ We discuss whether drug couriers are truly “mere custodians” in the strict sense below.

“obtains” is therefore limited to the payment received for the service of carrying out the transaction.³⁸

- 12.21 If the till operator in our example sought to go beyond his or her role and to use the money to his or her own ends, the till operator would be seeking to exercise the power of control or disposition over the money that would otherwise fall to the owner, and would be taken to have “obtained” the money. The drugs courier who sought to use drugs money to his or her own ends would similarly be taken to have “obtained” property.³⁹

The right to possession

- 12.22 POCA 2002 goes on to define an “interest” in property as including a “right (including a right to possession)”.⁴⁰ The mere fact of possession can give rise to such a right. Professor Swadling has given the example of finding a book on the street. He observes that “though my right of possession may not be as strong as that of the loser of the book, it does not follow that I have no title at all.”⁴¹

- 12.23 Reflecting the notion that title to goods is relative, possessory title is inferior to and subject to defeat by any superior title, including by the rightful “owner” of the property.⁴² Possessory title “nonetheless remains a title to which the law affords protection”.⁴³ The protection it affords is against third parties who have even less of an entitlement to the property.⁴⁴

- 12.24 In *Armory v Delamirie*,⁴⁵ the Claimant found a jewel which was set in a ring whilst sweeping a chimney. He took the ring to a goldsmith for valuation. The goldsmith’s apprentice, under the pretence of weighing it, removed the jewel and returned only the setting. The Claimant brought a claim against the goldsmith for damages for converting the jewel to the goldsmith’s own use. The Claimant succeeded in his action for what is now known as “conversion” because of his earlier possession of the jewel.⁴⁶

³⁸ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [48(6)]; *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 399; *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 469.

³⁹ In civil law, the drug courier who sought to use drugs money for his or her own ends would be liable in conversion. However, had he or she acted as directed and respected the property rights of the principal who had given those directions, he or she would have incurred no liability towards the principal.

⁴⁰ Proceeds of Crime Act 2002, s 84(2)(h).

⁴¹ W Swadling, “Unjust delivery” in A Burrows and A Rodger, *Mapping the Law: Essays in Memory of Peter Birks* (2006) p 281.

⁴² *Manchester Airport Plc v Dutton* [1999] EWCA Civ 844, [2000] 1 QB 133.

⁴³ *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437 at [31].

⁴⁴ A Burrows, “Judicial Remedies” in A Burrows (ed) *Oxford Principles of English Private Law* (3rd ed 2013) p 1296; see also *Kuwait Airways Corporation v Iraqi Airways Company* [2002] UKHL 19, [2002] 2 AC 883; *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [68].

⁴⁵ *Armory v Delamirie* (1772) 1 Str 505, 93 ER 644.

⁴⁶ For a discussion on the history of “trover”, the tort of conversion, see S Green and J Randall, *The Tort of Conversion* (2009) Chapter 2.

12.25 The reasons for protecting possessory rights in goods largely stem from expediency in upholding the rule of law. The “organisational value” of possession is a “legal good”⁴⁷ “essential for a society in which peaceful possession and progressive commerce can both flourish”.⁴⁸

- (1) With some exceptions such as vehicles, there are few requirements to register title to goods. In the absence of a formal record of title, possession can provide a starting point for the resolution of title disputes.
- (2) Without a formal record of title, security of a person’s assets is undermined. If the law is clear that there is a presumption that the person who possesses goods has rights in those goods, it can serve as an indication to those such as the goldsmith in *Armory v Delamirie* that assets cannot be taken with impunity.

12.26 Possessory rights are also protected because they can be, and often are in practice, valuable in their own right. Entire commercial entities operate on the basis that a party may only seek a possessory right, rather than anything superior. For example, those who want to use farm machinery for a season will want to possess and use it, but are unlikely to have much interest in “owning” a depreciating asset. It is the possession which is valuable to the farmer and for which value will have been paid to the lessor.⁴⁹

12.27 Because “the fact of possession...itself gives to the possessor a possessory title”⁵⁰ a thief might have a right protected by conversion.⁵¹ In *Costello v Chief Constable of Derbyshire Constabulary*, the Court of Appeal upheld a claim brought by a person who had been in possession of a stolen vehicle. The vehicle had been seized under the Police and Criminal Evidence Act 1984 (“PACE”) and police had failed to return the vehicle to the person when the conditions for retention under PACE were no longer met.⁵² The rationale for the decision was reflected in the case of *Webb v Chief Constable of Merseyside*:

If goods are in the possession of a person, on the face of it he has the right to that possession. His right to possession may be suspended or temporarily divested if the goods are seized by the police under lawful authority. If the police’s right to retain the goods comes to an end, the right to possession of the person from whom they were seized revives. In the absence of any evidence that anybody else is the true owner, once the police right of retention comes to an end, the person from whom they were compulsorily taken is entitled to possession.⁵³

⁴⁷ P Heck, *Grundriss*, para 3 at [13], as cited in J Gordley, *Foundations of Private Law: Property, Tort and Unjust Enrichment* (2008) at [57], footnote 64.

⁴⁸ S Green and J Randall *The Tort of Conversion* (2009) p 84.

⁴⁹ We touch on hire as a form of bailment at 12.31. As N Palmer observes, “Bailments by way of hire are conventionally contractual and are construed by reference to normal contractual principles of construction (including the implication of terms)” (“Bailment” in A Burrows (ed) *Oxford Principles of English Private Law* (3rd ed 2013) p913 at fn 394). For a modern example see *Waite v Paccar Financial Plc* [2012] EWCA Civ 901, [2012] CTL 222.

⁵⁰ *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437 at [14].

⁵¹ *Webb v Chief Constable of Merseyside* [2000] QB 427, [2000] 2 WLR 546.

⁵² *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437.

⁵³ *Webb v Chief Constable of Merseyside* [2000] QB 427, [2000] 2 WLR 546.

12.28 Similarly, a thief in possession of goods can be a victim of theft.⁵⁴ Section 5(1) of the Theft Act 1968 states that goods “belong” to any person in possession or control of them.

12.29 A thief is therefore brought within the ambit of obtaining property as a result of having an “interest” for the purposes of POCA 2002 on the basis of the “right to possession” test, as well as on the “assumed rights of ownership” test.

12.30 In the same way, a person who looks after goods for another has the right to bring an action before the courts in conversion if property which was in his or her possession is wrongly interfered with.⁵⁵ The person could also be treated as the victim of theft of those goods.⁵⁶ Such a person in civil law is known as a “bailee”. A bailment is a relationship in which possession is transferred from one person (a bailor) to another (a bailee). The bailment could be, for example:

- (1) by way of a deposit for safekeeping (for example leaving luggage for safeguarding with the bailee)⁵⁷;
- (2) by way of loan (for example lending a book to the bailee)⁵⁸;
- (3) paid hire by the bailee (for example a car hired by the bailee)⁵⁹; or
- (4) delivery of the property to permit performance of a service (for example for the bailee to courier the goods).⁶⁰

12.31 On the face of the language in POCA 2002, all such bailees should be treated as having “obtained” property under POCA 2002 because the statutory test of having a right of possession would be satisfied in the strictest sense. Therefore, a bailee could be required to account for the value of any such property in confiscation proceedings. Treating all bailees in the same way as this would appear to take no account of fact-specific relationships between the bailee and the property:

- (1) On the one hand, a person who borrows property for no fee, or who hires property for value gets possession of the goods and can use the goods as if they were theirs, subject to a duty of reasonable care.⁶¹ Furthermore, the bailee can exercise the “normal possessory remedies against third parties who invade

⁵⁴ *R v Smith* [2011] EWCA Crim 66, [2011] 1 Cr App R 30.

⁵⁵ *The Winkfield* P 42 [1900-03] All ER Rep 346.

⁵⁶ Theft Act 1968, s 5(1); *R v Smith* [2011] EWCA Crim 66, [2011] 1 Cr App R 30.

⁵⁷ *Stallard v GW Rly Co* (1862) 2 B & S 419, 121 ER 1129; *Ultzen v Nichols* (1894) 1 QB 92; *Murphy v Hart* (1919) 46 DLR 36; *Alexander v Railway Executive* [1951] 2 KB 882.

⁵⁸ *Coggs v Bernard* (1703) 2 Ld Raym 909, 918, 92 ER 107, 113, *per* Holt CJ; *Kamidian v Holt* [2008] EWHC 1483 (Comm), [2009] Lloyd's Rep IR 242.

⁵⁹ *Waite v Paccar Financial Plc* [2012] EWCA Civ 901 [2012] CTL 222.

⁶⁰ See the six categories of bailment identified by Lord Holt in *Coggs v Bernard* (1703) 2 Ld Raym 909, 92 ER 107; see also M Bridge *Personal Property Law* (4th Ed 2015) p 63.

⁶¹ *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694; *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd* [1979] AC 580.

that possession.”⁶² As we discussed at earlier, possession in these circumstances can be highly valuable to the bailee.

- (2) On the other hand, a bailee who has custody of property for safekeeping or to courier the goods from one place to another in exchange for a reward is not expected to treat the property as his or her own. Rather, the bailee’s role is one of taking reasonable care of the goods on behalf of the bailor⁶³ by guarding against reasonably foreseeable hazards⁶⁴ such as theft, loss or damage.⁶⁵ The possession of the property represents an obligation rather than a valuable reward to the bailee. The bailee’s valuable reward is the fee that he or she receives for acting in that capacity.⁶⁶

12.32 Reflecting this distinction, in *R v Allpress* the Court of Appeal found that it would be “far removed” from what POCA 2002 is intended to achieve⁶⁷ to treat bailees who held property for safekeeping or acted as a courier of property in exchange for a fee or reward as having “obtained” the property which formed the subject of the bailment on the basis that he or she would have a right to bring an action against third parties in respect of the property.

12.33 Distancing itself from strict application of civil law principles, the Court of Appeal emphasised that:

we are concerned with the construction of provisions in criminal statutes designed, as the House of Lords has emphasised, to deprive criminals of the benefit which they have gained from the relevant conduct.⁶⁸

12.34 Therefore, the strict existence of a property right arising from possession is not determinative of whether criminal property was “obtained”, despite the clear wording of POCA 2002.⁶⁹

⁶² N Palmer, “Bailment” in A Burrows (ed) *Oxford Principles of English Private Law* (3rd ed 2013) at 16.45

⁶³ *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd* [1979] AC 580; *Coldman v Hill* [1919] 1 KB 443; *Brook’s Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534.

⁶⁴ *Pitt v Prouleco SA* (1984) 52 ALR 389.

⁶⁵ *Coldman v Hill* [1919] 1 KB 443; *Lilley v Doubleday* (1881) 7 QBD 510; *Edwards v Newland and Co* [1950] 2 KB 534.

⁶⁶ It should be noted that a person might also agree to take possession and care of goods for another for no reward (*Coggs v Bernard* (1703) 2 Ld Raym 909, 92 ER 107 at 912–913, 110; *Phipps v New Claridges Hotel* (1905) 22 TLR 49; *China Pacific SA v Food Corp of India (The Winson)* [1982] AC 939. The bailee remains under a duty to take reasonable care of the goods. In such circumstances it may seem even more unjust to treat the possession of the property as property “obtained” for the purposes of POCA 2002.

⁶⁷ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [76].

⁶⁸ *R v Allpress* above at [47].

⁶⁹ Proceeds of Crime Act 2002, s 84(2)(h).

Property or a pecuniary advantage

12.35 What must be obtained by criminal conduct is either “property” or a “pecuniary advantage”.⁷⁰ Property is defined as “all property wherever situated and includes money, all forms of real or personal property (for example land and goods).⁷¹

12.36 The definition of property also includes “things in action and other intangible or incorporeal property”. A good example of a “thing in action” is the balance in a bank account.⁷² A bank does not hold a particular set of bank notes and coins in a safe as the balance of a particular account. Rather the relationship between bank and customer is one of debtor and creditor.⁷³ When a customer pays money into their account at a branch, they are entitled to request repayment of a sum equal to the value of the sum invested.⁷⁴ This debt or “thing in action” can be enforced by a court applying principles of contract law.⁷⁵

12.37 A proprietary right is not itself a physical object. However, a right over physical property may itself constitute “intangible” or “incorporeal” property. Examples of “intangible” or “incorporeal” property would be a right under a pension scheme or a right to a fishing quota which could be transferred for value.⁷⁶

12.38 A pecuniary advantage is any form of financial advantage. For example, a pecuniary advantage will be obtained if a person evades a liability,⁷⁷ such as a debt⁷⁸ or a tax liability⁷⁹, that would otherwise fall upon them.

Evasion of duty: Tobacco importation

12.39 One particular scenario that has generated considerable case law is the evasion of excise duty on tobacco. A person who has evaded the payment of excise duty through the illegal importation of tobacco is treated as having obtained a pecuniary advantage.⁸⁰ The case law reflects the statutory provisions found in various excise

⁷⁰ Proceeds of Crime Act 2002, ss 76(4) and (5). See *R v Waya* [2010] EWCA Crim 412, [2011] Cr App R (S) 4; *R v Darroux* [2018] EWCA Crim 1009, [2019] QB 33.

⁷¹ Proceeds of Crime Act 2002, s 84(1).

⁷² *R v Sharma* [2006] EWCA Crim 16, [2006] 2 Cr App R (S) 63; *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58.

⁷³ *Foley v Hill* (1848) 2 HLC 28, 9 ER 1002.

⁷⁴ *Joachimson v. Swiss Bank Corporation* [1921] 3 KB 110.

⁷⁵ *Torkington v Magee* [1902] 2 KB 427.

⁷⁶ *Attorney-General of Hong Kong v Nai-Keung* [1987] 1 WLR 1339.

⁷⁷ *R v May* [2008] UKHL 28, [2008] 1 AC 1028.

⁷⁸ *Bale v Rosier* [1977] 1 WLR 263.

⁷⁹ *R v Young* [2013] EWCA Crim 302; *R v Morgan* [2013] EWCA Crim 1307, [2014] WLR 3450; *R v Tatham* [2014] EWCA Crim 226, [2014] Criminal Law Review 672; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Doran* [2015] EWCA Crim 384, [2015] All ER (D) 186; *R v Parker* [2018] EWCA Crim 1057.

⁸⁰ There have been at least 16 confiscation cases before the appellate courts dealing with this issue in the last 10 years. See, amongst others, *R v Mitchell* [2009] EWCA Crim 214, [2009] 2 Cr App R (S) 66; *R v Khan* [2009] EWCA Crim 588, [2009] All ER (D) 136; *R v White* [2010] EWCA Crim 978, [2010] All ER (D) 45; *R v Varsani* [2010] EWCA Crim 1938, [2011] 1 Cr App R (S) 96; *R v Bell* [2011] EWCA Crim 6, *R v Redmond* [2011] EWCA Crim 203, [2011] All ER (D) 256; *R v Kullar* [2011] EWCA Crim 420; *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601; *R v James* [2011] EWCA (Crim) 2991, [2012] 1 WLR 2641; *R v Taylor* [2013] EWCA Crim 1151, [2013] All ER (D) 209; *R v Young* [2013] EWCA Crim 302; *R v Tatham* [2014] EWCA

regulations, including the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. The 2010 regulations impose liability to pay duty upon the person:

- (1) making the delivery of the goods;
- (2) holding the goods intended for delivery; or
- (3) to whom the goods are delivered.⁸¹

12.40 In *R v Parker*, the defendant was convicted of evading duty in connection with three consignments of hand rolling tobacco (“HRT”) weighing a total of 4,295 kg, the duty on which amounted to over £820,000. “The prosecution case was that the [defendant] played a leading role as an organiser and financier of the importations, who would then distribute the tobacco products in the United Kingdom”.⁸² The defendant was stopped by HMRC officers after he had met a lorry containing tobacco. Over £141,000 in cash was seized. His mobile phone contained text messages relating to tobacco importation and when “officers searched the [defendant’s] home [they] found 54,000 illegal cigarettes, and a large number of dealer books and records appearing to relate to the purchase, sale and movement of large quantities of tobacco products.”⁸³ The defendant admitted that he would have sold the tobacco for a profit.

12.41 The Court of Appeal found that the defendant was liable for payment of the duty as a holder of the goods. It found that the defendant:

was actually “holding” the HRT in each case, which he was going to sell for profit, and in any event was the person who was exercising [factual] or [legal] control over the HRT and (for that matter) the cigarettes found at his house because he was going to sell both for a profit.⁸⁴

12.42 The time at which the duty becomes chargeable on tobacco is when the ship carrying it enters the limits of a UK port. For example, when a ship carrying tobacco enters the limits of Felixstowe Docks, excise duty becomes chargeable. If the person who has the liability to pay the duty intends not to declare the tobacco in order to evade the duty, evasion occurs at the moment that the ship enters Felixstowe Docks.⁸⁵

Crim 226, [2014] Criminal Law Review 672; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Doran* [2015] EWCA Crim 384, [2015] All ER (D) 186; *R v Parker* [2018] EWCA Crim 1057.

⁸¹ Identification of the person (or persons) liable to pay the duty may be a complex issue, see *Revenue and Customs Commissioners v Perfect* [2019] EWCA Civ 465, [2020] STC 705.

⁸² *R v Parker* [2018] EWCA Crim 1057 at [10].

⁸³ Above at [8].

⁸⁴ Above at [24].

⁸⁵ For cases on evasion at the point of entering the limits of a port see *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601; *R v Tatham* [2014] EWCA Crim 226, [2014] Criminal Law Review 672. There is the ability to defer the payment of duty for a month in certain circumstances, see GOV.UK, Notice 101: deferring duty, VAT and other charges (<https://www.gov.uk/government/publications/notice-101-deferring-duty-vat-and-other-charges>) (last visited 20 July 2020).

Causation

12.43 Determining whether any property or a pecuniary advantage was obtained “as a result of” or “in connection with” criminal conduct may require the court to scrutinise closely the precise nature of the conduct which is criminalised.

12.44 In the case of *R v McDowell*,⁸⁶ the defendant had been convicted of knowingly being concerned in the supply, delivery, transfer, acquisition or disposal of certain military equipment, contrary to the Trade in Goods (Control) Order 2003. That order allowed the Secretary of State to grant a licence for such trading. The order therefore created a prohibited activity, which could, in certain circumstances, be authorised. Undertaking the prohibited activity without authorisation was the conduct which was criminalised. Because McDowell had engaged in the prohibited activity without authorisation, any receipts (amounts received) from that activity were obtained as a result of, or in connection with, criminal conduct.

12.45 However, in *R v Singh*, an appeal heard alongside *R v McDowell*, the Court of Appeal came to the opposite conclusion. Mr Singh had been convicted of carrying on a scrap metal business without having registered with the relevant local authority, contrary to the Scrap Metal Dealers Act 1964.⁸⁷ Unlike the order in *McDowell*, the law did not prohibit working as a scrap metal dealer, subject to authorisation. Mr Singh was free to work as a scrap metal dealer. What was criminalised was an administrative failure in the form of his failure to register as such. Mr Singh’s profits from working as a scrap metal dealer were therefore not obtained as a result of, or in connection with, criminal conduct.

12.46 Close analysis of the wording of the statute may therefore be necessary to determine whether what is criminalised is the underlying activity or the failure to obtain a licence to carry out that activity. The latter is a regulatory failure in connection with a legal activity and the receipts from that legal activity will not be treated as having been obtained from criminal conduct.

12.47 Further examples of cases in which the Court of Appeal has had to determine the nature of the underlying criminality for the purposes of establishing causation between criminal conduct and the obtaining of property include:

- (1) *R v Palmer*.⁸⁸ The Private Security Industry Act 2001 (“PSIA 2001”),⁸⁹ which prohibited the carrying out of a security business “except under and in accordance with a licence” was found to be similar to the legislation in *R v McDowell*. PSIA 2001 criminalised the underlying activity of running such a business, subject to authorisation. Any receipts from the underlying business were therefore obtained from criminal conduct.
- (2) *Sumal & Sons (Properties) Ltd v Newham LBC*.⁹⁰ Section 95(1) of the Housing Act 2004, which required a person having control or managing a “house in

⁸⁶ [2015] EWCA Crim 173, [2015] 2 Cr App R (S) 14.

⁸⁷ Scrap Metal Dealers Act 1964, s 1(1).

⁸⁸ [2016] EWCA Crim 1049, [2017] 4 WLR 15.

⁸⁹ Private Security Industry Act 2001, s 3(1).

⁹⁰ [2012] EWCA Crim 1840, [2013] 1 WLR 2078.

multiple occupation” to have a licence, was found to be similar to the legislation in *R v Singh*. The underlying activity of controlling or managing a “house in multiple occupation” was not criminalised. What was criminalised was failing to obtain a licence. Any receipts from the underlying activity were therefore not obtained from criminal conduct.⁹¹

12.48 *R v Osei* provides an example of property obtained “in connection with” criminal conduct. The defendant pleaded guilty to the unlawful importation of a class A drug. When stopped at Heathrow airport she had £2,500 in her possession. The defendant claimed that the money had been given to her by those who had arranged for her to import the drugs to show to immigration officers to enable her to pass through immigration.⁹² Whilst the property was not a payment to the defendant, it was nevertheless obtained by her in connection with her criminal conduct.⁹³

12.49 In *R v Ahmad* the Court of Appeal held that the phrase “in connection with” does not extend to the costs of committing a crime: “The robber’s benefit is what he steals... . The costs of undertaking the robbery should not be added on to the benefit”.⁹⁴ A defendant who incurs expense has divested himself or herself of, rather than gained, property.⁹⁵

Valuation of benefit

Valuation rules

The market value of the property

12.50 Having identified what may amount to a benefit, that benefit must be valued. According to section 79(2) POCA 2002, the value of property is its market value.⁹⁶ As the House of Lords observed in *R v Islam*, “the statute has refrained from defining precisely what is meant by the expression “market value”.⁹⁷ However, “the essence of market value is simply that it is the price that would be paid for the goods as between a willing buyer and a willing seller”.⁹⁸

12.51 Baroness Hale considered that it is:

...entirely appropriate to ask “upon what market do we expect the value of this property to be raised?” When we are looking at the benefit which the [wrongdoer]

⁹¹ See also *R v Siaulys* [2013] EWCA Crim 2083.

⁹² *R v Osei* (1988) 10 Cr App R (S) 289.

⁹³ R Fortson QC *Misuse of Drugs and Drug Trafficking Offences* (6th ed 2011) p 13-081.

⁹⁴ *R v Ahmad* [2012] EWCA Crim 391, [2012] 1 WLR 2335 at [53].

⁹⁵ If such costs were included in the benefit figure, that figure would *increase*. The point made by the Court of Appeal in *R v Ahmad* is therefore different to the discussion in Chapter 5 about whether a defendant should be permitted to offset his or her expenses in calculating benefit. If such expenses could be offset the benefit figure would *decrease*.

⁹⁶ Proceeds of Crime Act 2002, s 79(2). For discussion of market value in the context of the sale of goods see *Benjamin’s Sale of Goods* (10th Ed 2017) chapter 17 section 2.

⁹⁷ *R v Islam* [2009] UKHL 30, [2009] 1 AC 1076 at [6].

⁹⁸ Above at [16].

has gained from his conduct, we look at the market in which he expected to dispose of the property in question. That is what it was worth to him.⁹⁹

12.52 In considering the market in which a defendant could be expected to dispose of the property in question:

- (1) The court may come to a valuation using the value of goods in the hidden economy where such goods cannot be sold legally.¹⁰⁰ However, any valuation of such goods should have an evidential basis.¹⁰¹ In *R v Eddishaw* the Court of Appeal found that a judge had “pluck[ed] out of the air a figure of £5 per bottle” as the value of benefit from the sales of counterfeit vodka.¹⁰²
- (2) The valuation may differ depending on the place of the defendant in the supply chain. As in legitimate trading, the wholesale value of goods is lower than the retail value of goods.¹⁰³ For example, in *R v Elsayed*,¹⁰⁴ the wholesale value of 169 grams of cocaine was £6,857. However, the defendant was a retail (or “street”) dealer and the retail (or “street”) value of the cocaine was £108,160.

Value at what point in time?

12.53 Section 80(2) POCA 2002, provides that the value of property is its market value either at the time the person obtained it, adjusted to take account of later changes in the value of money or at the confiscation hearing; whichever is greater.¹⁰⁵ This provision may mean that a defendant is not incentivised either to:

- (1) invest their proceeds of crime in depreciating assets (such as cars and boats) with a view to the ever-decreasing value being used to calculate any benefit for confiscation; or
- (2) devalue property in order to reduce his or her benefit figure. For example, a defendant may purchase an expensive vehicle and use it extensively whilst new and then fail to pay for upkeep of that vehicle or deliberately behave recklessly with it. If the defendant could rely upon the reduction in value of that vehicle he or she would have gained all of the enjoyment of high living from the new vehicle paid for by the proceeds of crime and then be able to benefit from the subsequently devalued state of the vehicle.¹⁰⁶

⁹⁹ *R v Islam* [2009] UKHL 30, [2009] 1 AC 1076 at [25].

¹⁰⁰ *R v Lister* [2014] EWCA Crim 2290; *R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162; *R v Hussain* [2014] EWCA Crim 1181; *R v Elsayed* [2014] EWCA Crim 333, [2014] 1 WLR 3916; *R v Carnall* [2014] EWCA Crim 287; *R v Islam* [2009] UKHL 30, [2009] AC 1076.

¹⁰¹ *R v Mudassar* [2017] EWCA Crim 382.

¹⁰² *R v Eddishaw* [2014] EWCA Crim 2783, [2015] Lloyd's Rep FC 212.

¹⁰³ *R v Spears* [2009] EWCA Crim 2875; *R v Carnall* [2014] EWCA Crim 287.

¹⁰⁴ *R v Elsayed* [2014] EWCA Crim 333, [2014] 1 WLR 3916.

¹⁰⁵ Proceeds of Crime Act 2002, s 80(2).

¹⁰⁶ For some discussion of the suggestion that criminals take rational economic decisions, see J Fisher QC and J Bong Kwan, “Confiscation: deprivatory and not punitive, back to the way we were” [2018] 3 *Criminal Law Review* 192, at 197 and K Bullock, “Criminal benefit, the confiscation order and the post-conviction confiscation regime” vol 62(1) *Crime, Law and Social Change* 45, at 46.

12.54 If the original property is still in the defendant's hands at the time of the confiscation hearing, the exercise of determining what that property is worth at that time should be relatively straightforward.¹⁰⁷

12.55 The position may be less straightforward if the defendant does not retain the original property. A defendant may:

- (1) have invested the property in other assets;
- (2) divested himself or herself of the property altogether; or
- (3) have had the property removed from him or her.

Investment in other assets

12.56 A defendant may, for example, have invested that property in other assets. As the Court of Appeal explained in *R v Pattinson*:

Every school child knows that you cannot have the penny and the sweet. If your mother gives you a penny and you buy a sweet with it, your benefit is a penny's worth and not two penny's worth.¹⁰⁸

12.57 Section 80(3) of POCA 2002 therefore provides that if the defendant does not retain all or any of the originally obtained property but does have other property directly or indirectly representing it, the value of the property at the time of confiscation is the value of the substitute property.¹⁰⁹ "The value of the representing property is an alternative but not an additional or cumulative benefit".¹¹⁰

Example:

If a defendant had obtained from criminal conduct a share portfolio worth £100,000, sold that share portfolio for £90,000 and used the proceeds of sale to acquire a yacht which was worth £80,000 by the time of the confiscation hearing, the combined effect of sections 80(2) and 80(3) of POCA 2002 is that the value of the property obtained would be the higher of the value of the share portfolio (i.e. £100,000) or the value of the yacht in his possession at the time of confiscation hearing (i.e. £80,000). The valuation of the property obtained would therefore be £100,000.

Voluntary divesting of the proceeds of crime

12.58 A defendant may voluntarily spend his or her proceeds of crime. Arguably, by the time of the confiscation the defendant does not retain a benefit. Nevertheless, the

¹⁰⁷ Proceeds of Crime Act 2002, s 80(3)(a).

¹⁰⁸ *R v Pattinson* [2007] EWCA Crim 1536 at [21], [2008] 1 Cr App R (S) 287.

¹⁰⁹ Proceeds of Crime Act 2002, ss 80(3)(b) and 80(3)(c).

¹¹⁰ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [55].

proceeds of crime are still treated as benefit of value to the defendant.¹¹¹ It is therefore likely that benefit calculated for the purposes of confiscation will exceed the value of property which a defendant retains at the time of confiscation.

Involuntary removal of property

12.59 The value of property that is involuntarily removed from the defendant is caught by section 80(2). As Lord Rodger put it in the House of Lords decision in *R v Smith (David Cadman)*:

[it] makes no difference if, after he obtains it, the property is destroyed or damaged in a fire or is seized by customs officers: for confiscation order purposes the relevant value is still the value of the property to the defendant when he obtained it. Subsequent events are to be ignored.¹¹²

12.60 Where property such as cocaine¹¹³ or tobacco products¹¹⁴ has been seized by the authorities, the value of such property forms part of the benefit figure under POCA 2002. As Rudi Fortson QC observed in the *Criminal Law Review*, the value of drugs that are seized can be extremely high.¹¹⁵

12.61 As the Court of Appeal has observed “the fact that the property triggering that benefit was subsequently seized and the conspiracy was unsuccessful does not mean that his crime had “no product”.¹¹⁶ “Seizure [is] an occupational hazard of drug dealing, resulting in a failure to retain, which had nothing to do with the obtaining of property in the first place”.¹¹⁷

Other interests in property

12.62 Prior to determining the value of property, the court must consider whether another person holds an interest in the property. If another person does hold an interest, section 79(3) of POCA 2002 provides that the court must determine the value of the defendant’s interest.¹¹⁸

12.63 As set out earlier in this chapter, title to property is relative. If section 79(3) required the relative possessory interest of the handler of stolen goods to be weighed against a legitimate owner’s superior interest, the value of the handler’s interest would be “nil or

¹¹¹ See the discussion of “benefit and profit” in Chapter 12 – Defining and Valuing Benefit.

¹¹² *R v Smith (David Cadman)* [2001] UKHL 68, [2002] 1 WLR 54 (in the context of the pre-POCA 2002 confiscation regime under the Criminal Justice Act 1988).

¹¹³ *R v Mejia* [2009] EWCA Crim 1940 at [15] (seizure of cocaine impregnated doors); *R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162 (seizure of cocaine at Ramsgate); *R v Brooks* [2016] EWCA Crim 44, [2016] 4 WLR 79 (seizure of cocaine by the Irish Navy).

¹¹⁴ *R v Smith (David Cadman)* [2001] UKHL 68, [2002] 1 WLR 54; *R v Doran* [2015] EWCA Crim 384.

¹¹⁵ R Fortson QC, “*R v Kakkad*: Confiscation Order proceeds of crime” [2015] 8 *Criminal Law Review* 624 at 645. In *R v Mejia* [2009] EWCA Crim 1940 the value of seized drugs was over £500,000. In *R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162 the value was over £1 million. In *R v Moss* [2008] EWCA (Crim) 2454 the value was over £2 million and in *R v Brooks* [2016] EWCA Crim 44, [2016] 4 WLR 79 the value was just under £3 million.

¹¹⁶ *R v Mejia* [2009] EWCA Crim 1940 at [15].

¹¹⁷ *R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162 at [25].

¹¹⁸ *R v Rose* [2008] EWCA Crim 239, [2008] WLR 2113.

next to nothing”.¹¹⁹ The Supreme Court has rejected this interpretation of section 79(3):

It is quite clear that section 79(3) cannot carry this meaning without wholly emasculating POCA 2002; such a construction is contrary to the whole purpose of the Act and would mean that some of the most obvious examples of the proceeds of crime would be almost entirely removed from the calculation of benefit.... what that section means is that *lawfully* co-existing interests in property are to be valued individually [emphasis added].¹²⁰

12.64 The interpretation of section 79(3) is intended to ensure that a defendant cannot take advantage of their own wrongdoing to reduce the valuation of what he or she obtained from crime. It is also intended to further a public policy that a court “should not be called upon to investigate unlawful claims...as between accomplices”.¹²¹

12.65 Nevertheless, it overlooks the fact that a possessory interest *is* a lawfully co-existing interest, even if obtained through unlawful means, as is demonstrated by the case law in which persons alleged to have committed crimes have successfully brought actions in conversion. On the face of section 79(3), such an interest should be evaluated.¹²²

12.66 The need to consider a defendant’s relative interest is further reinforced if the rightful prior possessor cannot be identified. In such circumstances, to all intents and purposes the wrongdoer will have the greatest relative interest in the property. The defendant’s interest could be a highly valuable interest, essentially amounting to the power to do what he or she wishes with the property.

Benefit and profit

12.67 A defendant might have disgorged some of his or her proceeds of crime when committing the offence for which he or she was convicted. For example, a drug dealer may have paid a courier to transfer drugs. The issue of whether a defendant’s “benefit” at the time of imposing a confiscation order should include the value of property already disgorged by that defendant is contentious.

12.68 As we set out in Chapter 2, confiscation legislation was first introduced in 1986, following a review of the law by a committee led by Sir Derek Hodgson that was published in 1984.¹²³ In its report, the Hodgson Committee recommended that a confiscation regime be introduced with the purpose of taking away the net profits of

¹¹⁹ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [68].

¹²⁰ Above at [68].

¹²¹ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [64].

¹²² The sharp distinction between the criminal law seeking to do what is perceived to be “just” and strict application of civil principles is evident in other aspects of the criminal law. See for example, the differing judicial treatment of acquisition of indefeasible title at common law when set against the interpretation of “appropriation” for the purposes of theft (*R v Hinks* [2002] 2 AC 241, [2000] 3 WLR 1590, and associated commentaries: A Bogg and J Stanton-Ife, “Protecting the vulnerable: legality, harm and theft”, [2003] *Legal Studies* (23) no 3 402; S Green, “Theft and conversion - tangibly different?” [2012] *Law Quarterly Review* (128) 564).

¹²³ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984).

offending, thereby restoring the position that existed before an offence had been committed. It was envisioned that the system would work in the following way:

- (1) A defendant who had gained £100,000 from drugs offending, but had spent £10,000 of that money on conducting that drugs offending (for example by purchasing the drugs and paying couriers to move the drugs) would have profited from crime by £90,000.
- (2) A confiscation order should seek to remove the £90,000 from the defendant, thereby leaving them with no profit from his or her crime.

12.69 The confiscation regime, in its purest form, was therefore intended to redress the financial imbalance created by profitable criminality. In so doing, the confiscation regime was intended to send a clear message that “crime should not pay”.¹²⁴ This is reflected in international instruments for tackling serious and organised criminality.¹²⁵

12.70 Subsequently, a power to confiscate was enacted in the Drug Trafficking Act 1986 following the committee’s recommendation. The 1986 Act referred to benefit as “any payment or other reward in connection with drug trafficking.”¹²⁶

12.71 However, the simple restorative principle identified by the Hodgson Committee did not survive either judicial interpretation or the legislative process. From the outset, the courts equated the phrase “payments or other rewards” with gross, rather than net profit.¹²⁷ The difference in outcome can be seen by modifying our example:

- (1) A defendant who had gained £100,000 from drugs offending, but had spent £10,000 of that money on conducting that drugs offending (for example by purchasing the drugs and paying couriers to move the drugs) would have profited from crime by £90,000.
- (2) The confiscation order requires the defendant to repay £100,000.
- (3) The defendant therefore must find an additional £10,000 from other assets that he or she has, for example by selling something that he or she owns that was completely unconnected to the criminality.

¹²⁴ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 79.

¹²⁵ Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988), entered into force 11 November 1990, 1582 UNTS 95 (Vienna Convention) recital; Convention Against Transnational Organised Crime (adopted 15 November 2000), entered into force 29 September 2003, 2225 UNTS 209 (Palermo Convention) art 12; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (adopted 8 November 1990), entered into force 1 September 1993, CETS No 141 recital.

¹²⁶ Drug Trafficking Offences Act 1986, s 1(3).

¹²⁷ *R v Smith* [1989] 1 WLR 765.

12.72 In our example, the position that existed prior to the offending is not restored. Instead, the defendant is £10,000 worse off than he or she would have been prior to the offending.

12.73 Although the purpose of proceeds of crime legislation has been repeatedly described in Parliament with reference to “the profits of crime”,¹²⁸ “gross” rather than “net” profit appears to have been intended,¹²⁹ thereby aligning confiscation with public perception. The Secretary of State for the Home Department, Douglas Hurd, described the aim of confiscation legislation as the removal of

the sense of injury which ordinary people are bound to feel at the idea of traffickers, who may have ruined the lives of children, having the benefit of the profits that they have made from doing so.¹³⁰

12.74 A drug dealer who is rewarded with a holiday or a car by someone higher up the chain is likely to be seen as having enjoyed the full benefit of that holiday or car. As the Court of Appeal observed in *R v Smith*, “it would not, we think, be legitimate to [construe benefit] as meaning value of the holiday or motor car less the business expenses involved in earning the reward”.¹³¹

12.75 Legislative expansion of the confiscation regime through the Criminal Justice Act 1988 cemented a move away from “net profit” by using the broader concept of “obtaining” property rather than payments and rewards.¹³²

12.76 POCA 2002 also refers to “obtaining” a benefit rather than receipt of payments or rewards. As set out earlier in Chapter 12, a person “obtains” property if he or she owns property or assumes the rights of the owner, in the sense of gaining a power of control or disposition over the property. If a person has chosen to spend the proceeds of crime, he or she has clearly exercised a power of control or disposition. The approach of “gross” rather than “net” profit is therefore closely aligned with the notion of “obtaining” property.

12.77 It has been argued in separate articles in the *Criminal Law Review*¹³³ that confiscation orders should do no more than remove a criminal’s profit from their endeavours. Peter Alldridge has argued that:

the “proceeds not profits” doctrine was not well thought out, has given rise to countless difficult appellate decisions and is, at base, fundamentally unjust. People who are convicted of acquisitive crimes should be punished and have to disgorge

¹²⁸ *Hansard* (HC), 21 January 1986, vol 90, col 242; *Hansard* (HC), 30 October 2001 vol 373 col 757.

¹²⁹ *Hansard* (HC), 21 January 1986, vol 90, col 242; *Hansard* (HC), 30 October 2001 vol 373 col 757.

¹³⁰ *Hansard* (HC), 21 January 1986, vol 90, col 242.

¹³¹ *R v Smith* [1989] 1 WLR 765.

¹³² Criminal Justice Act 1988, s 71(4).

¹³³ P Alldridge, “The limits of confiscation” [2011] 11 *Criminal Law Review* 827; J Fisher QC and J Bong Kwan, “Confiscation: deprivatory and not punitive, back to the way we were” [2018] 3 *Criminal Law Review* 192.

any profit they make, but confiscation orders should not go beyond that. On the face of it, *May* and its companion cases cast the net for confiscation orders very wide.¹³⁴

12.78 There are attractions to these arguments, but it important to consider the three overarching reasons¹³⁵ for supporting a “gross” rather than a “net” benefit approach cited by the courts:

- (1) Equating benefit with profit would encourage criminals to transfer, conceal, disguise or dissipate funds to reduce any potential confiscation order,¹³⁶ thereby permitting criminals to “drive a coach and four through any attempt to strip them of the profits of their destructive trade”.¹³⁷
- (2) By encouraging criminals to transfer, conceal, disguise or dissipate funds, the money laundering offences contained within the very same legislation would be reduced to an “absurdity”.¹³⁸ These offences specifically criminalise the transferring, concealing, disguising¹³⁹ and using¹⁴⁰ of the proceeds of crime.
- (3) An “accountancy exercise” is avoided.¹⁴¹ As the Supreme Court stated in *R v Waya*:

To embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime would be to treat his criminal enterprise as if it were a legitimate business and confiscation a form of business taxation. To treat (for example) a bribe paid to an official to look the other way, whether at home or abroad, as reducing the proceeds of crime would be offensive, as well as frequently impossible of accurate determination.¹⁴²

PROBLEMS WITH THE CURRENT LAW

12.79 Our pre-consultation fact-finding identified three particular perceived problems arising from the current definition of benefit:

- (1) a lack of clarity in the law arising from the “open-textured” definition of benefit in POCA 2002;

¹³⁴ P Alldridge, “The limits of confiscation” [2011] 11 *Criminal Law Review* 827 at 842.

¹³⁵ Although four reasons were cited by Bingham LJ in *R v Banks* [1997] 2 Cr App R (S) 110 the fourth related to the specific wording of the Drug Trafficking Act 1994. This wording was not used in POCA 2002 and so the objection was not of overarching applicability.

¹³⁶ *R v Banks* [1997] 2 Cr App R (S) 110.

¹³⁷ *R v Simons* (1994) 98 Cr App R 100.

¹³⁸ *R v Banks* [1997] 2 Cr App R (S) 110.

¹³⁹ Proceeds of Crime Act 2002, s 327.

¹⁴⁰ Proceeds of Crime Act 2002, s 329.

¹⁴¹ *R v Ian Smith* [1989] 1 WLR 765.

¹⁴² *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [26].

- (2) a perception that the definition of benefit in POCA 2002, as interpreted by the courts, produces inconsistent and unrealistic orders, particularly for money launderers;¹⁴³ and
- (3) benefit from a pecuniary advantage through tax evasion has been too broadly interpreted, leading to unjustly inflated orders.

[1] Lack of clarity

12.80 In our pre-consultation discussions, the view that the definition of benefit was unclear was commonly held.

12.81 The confiscation regimes under the Drug Trafficking Offences Act 1986 and the Drug Trafficking Act 1994 defined benefit more narrowly as “any payment or other rewards”¹⁴⁴ received in connection with drug trafficking, rather than property obtained. Writing in the *Criminal Law Review*, Rudi Fortson QC has repeatedly commented that the exercise of identifying what amounts to a benefit under POCA 2002 has been made harder by moving from the older, narrower and more focussed approach to a more “open textured” definition of what might amount to a benefit.¹⁴⁵ He has observed that:

By the date of the Supreme Court’s decision in *R v Waya*¹⁴⁶ no less than 13 judges in that case had considered the value of W’s “benefit”, and yet each tier (Crown Court, Court of Appeal and the Supreme Court) assessed that benefit in a significantly different amount and by a different route.¹⁴⁷

12.82 Issues relating to benefit have been before the Supreme Court no fewer than eight times since POCA 2002 came into force,¹⁴⁸ with the Supreme Court describing POCA 2002 as “badly drafted” on no fewer than 3 occasions.¹⁴⁹ During our fact-finding we met with six of the Supreme Court judges who sat in the case of *R v Waya*,¹⁵⁰ and all agreed that there was a desperate need for reform.

12.83 Reasons cited to us for the lack of clarity included:

¹⁴³ Although we focus on the particular problems associated with money launderers, we also discuss other type of case that raise concern later in the chapter.

¹⁴⁴ Drug Trafficking Offences Act 1986, s 2(1); Drug Trafficking Act 1994, s 4(1)(a).

¹⁴⁵ R Fortson QC, “Case Comment on *R v Neuberg*” [2017] 4 *Criminal Law Review* 331; R Fortson QC, “Case Comment on *R v Fulton*” [2019] 7 *Criminal Law Review* 636.

¹⁴⁶ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

¹⁴⁷ R Fortson QC, “Case Comment on Proceeds of crime: *R v Harvey* [2016] 5 *Criminal Law Review* 356 at 358.

¹⁴⁸ *R v Harvey* [2015] UKSC 73, [2017] AC 105; *R v Ahmad* [2014] UKSC 36, [2015] AC 299; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Waya* [2012] UKSC 51, [2013] 1 AC 294; *R v Islam* [2009] UKHL 30, [2009] 1 AC 1076; *Jennings v CPS* [2008] UKHL 29, [2008] 1 AC 1046; *R v Green* [2008] UKHL 30, [2008] 1 AC 1053; *R v May* [2008] UKHL 28, [2008] 1 AC 1028.

¹⁴⁹ *Perry v SOCA* [2012] UKSC 35, [2013] 1 AC 182; *R v Ahmad* [2014] UKSC 36, [2015] AC 299; *R v Harvey* [2015] UKSC 73, [2017] AC 105.

¹⁵⁰ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

- (1) that civil property law principles were being incorporated into a regime which forms part of the criminal justice process;
- (2) that courts often seek to reach the “right” outcome, which will inevitably turn on the facts of the case; and
- (3) that there is no definitive statement of the purpose of confiscation.

Application of civil principles of property law to confiscation

12.84 Confiscation is ultimately part of the sentencing exercise in criminal proceedings. It is undertaken by criminal practitioners before the criminal courts. However, those practitioners are expected to apply civil principles of property law in determining a defendant’s benefit from crime. Throughout our pre-consultation discussions criminal practitioners were virtually unanimous in their criticism that the application of property law principles strays far beyond the day to day work of the criminal lawyer. This creates a reluctance to undertake confiscation and can lead to the law being misapplied.

12.85 Practitioners were also clear that the application of property law principles can lead to unjust outcomes; we discuss issues relating to such outcomes in connection with money laundering below. The courts have expressly sought to distance themselves from the strict application of property law principles.

12.86 In *R v Harvey* the Supreme Court stated that “the proper application of these provisions requires... a more purposive approach than the mechanical application of the law of property.”¹⁵¹

12.87 In the Appeal Court (High Court of Justiciary) in Scotland, Lady Dorrian observed that:

...the use of words such as “ownership” and concepts relating to the law of property do not sit easily with an exercise which is essentially seeking to assess the benefit of criminal activity... in my view, too great a reliance should not therefore be placed on these concepts.¹⁵²

12.88 As set out above,¹⁵³ under POCA 2000 a person is treated as having “obtained” property if he or she acquires an interest in the property.¹⁵⁴ However, a test of obtaining property based around the broad concept of rights and interests alone may lead to a calculation of benefit that is neither realistic nor appropriate as can be seen from the fact that a test of possession has been deliberately disapplied in the case of drugs couriers.¹⁵⁵

12.89 The courts have therefore mitigated the effects of a test based upon rights alone by “ordinarily” disregarding possessory rights and treating property as “obtained” when a

¹⁵¹ *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [11].

¹⁵² *Mooney v HM Advocate* [2019] HCJAC 49, [2020] JC 1.

¹⁵³ See para 12.7.

¹⁵⁴ Proceeds of Crime Act 2002, s 84(2)(b).

¹⁵⁵ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58.

defendant has assumed such a power of control or disposition over the property as would be assigned to the owner of the property.¹⁵⁶

12.90 “Ordinarily” disregarding possessory rights is contrary to, rather than in accordance with, the strict wording of POCA 2002, which defines property obtained as including any right to possession.¹⁵⁷

12.91 Stating that “ordinarily” possessory rights should be disregarded does not maximise certainty in the law. In *R v Allpress* an example given of when a right to possession may be taken into account is when that right arises as a result of a long lease of an expensive sports car acquired through crime. By virtue of the lease the defendant has obtained what may be valuable rights, namely the power to prevent the “owner” from resuming his or her control over the car while the lease continues to subsist and the power to use the car within the terms of the lease. The Court of Appeal observed that the possessory right in such a case represented by the value of the lease is likely to be considered as a benefit obtained, because of its “substantial value”.¹⁵⁸ This conflates the issue of whether a benefit was obtained and the valuation of that benefit.

12.92 If value is to be taken as the relevant consideration as to whether a possessory right has been “obtained”, “ordinarily” disregarding possessory interests ignores the fact that a possessory right can be of great value even in cases that do not involve lengthy loans of expensive vehicles. Whilst a possessory right is of limited value when weighed against the right of a person with a superior interest, it may be of great value when such a person cannot be found. For example, a thief who is in possession of a stolen Rolex watch will effectively have all of the powers of control or disposition of the owner of that watch, save as against the true owner. If the owner cannot be located to exercise his or her superior right, the thief has effectively stepped into the owner’s shoes. The courts seem to have avoided addressing the issue. In *R v Waya* the Supreme Court addressed an argument based on possessory rights being of “no significant value”¹⁵⁹ but did not seek to address the issue of value itself. In *R v Allpress* the Court of Appeal focussed simply on what was said to be “nil value” of property “held purely for another”.¹⁶⁰

12.93 The approach currently adopted in confiscation cases can lead to misapplication and selective application of property law principles (whether referenced in POCA 2002 or case law), ultimately to achieve what is perceived to be the “right” outcome of the case.

¹⁵⁶ See *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at 48[6], as refined in *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [64].

¹⁵⁷ Proceeds of Crime Act 2002, s84(2)(h).

¹⁵⁸ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 399 at [78]. As discussed at paragraph 12.26 entire commercial entities operate on the basis that possession may be of substantial value.

¹⁵⁹ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [68].

¹⁶⁰ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 399 at [77].

Seeking to achieve the “right” outcome

12.94 According to Supreme Court in *R v Ahmad* “the word ‘obtain’ should be given a broad, normal meaning”.¹⁶¹ It should be interpreted in such a way that any outcome is not “far removed” from what POCA 2002 is intended to achieve,¹⁶² reflecting the facts of each case. The courts have repeatedly made clear that, in establishing what has been obtained, the focus should be on the specific circumstances in question.¹⁶³ As the High Court of Justiciary in Scotland observed:

The extent to which the individual may exert, or have exerted, a power of control or disposition over the assets in question in such a way that they may be described as having obtained a benefit therefrom may be relevant. As may be the distinction [which] may arise between someone who acts only as a courier, for example, and someone who has taken a more central role, accepting that this too will not be determinative. The capacity in which an individual acts is nevertheless important – compare, for example a mere employee with a proprietor or joint trader.¹⁶⁴

The purpose of POCA

12.95 Whether an outcome is “far removed from what POCA 2002 is intended to achieve” depends on that intention. In *R v Ahmad* The Supreme Court was clear that

the overall aim of the statute is to recover assets acquired through criminal activity, both because it is wrong for criminals to retain the proceeds of crime and in order to show that crime does not pay.¹⁶⁵

12.96 This statement articulates two important but different issues. Firstly, confiscation as an exercise in holding the defendant to account for his or her proceeds of crime, and secondly, confiscation as an exercise in deterring the defendant and others from committing offences in the future through a draconian (and potentially punitive) order.

12.97 Rudi Fortson QC, writing in the *Criminal Law Review*, considered that confiscation is “an exercise in financial accountability”.¹⁶⁶ This reflects the comments made by the Secretary of State for the Home Department, Douglas Hurd, when confiscation was first introduced in Parliament, about how confiscation legislation should correct “the sense of injury which ordinary people are bound to feel at the idea of [criminals] having the benefit of the profits that they have made” from crime.¹⁶⁷

12.98 Reparation and punishment are treated by the legislation as two distinct purposes of sentencing.¹⁶⁸ In punishing an offender, sentences can be tailored to the facts of a

¹⁶¹ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [45].

¹⁶² *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [76].

¹⁶³ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [45], citing with approval *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 469 at [12(6)], *R v Allpress* [2009] EWCA Crim 8 [2009] 2 Cr App R (S) 399 at [30]-[33], and *R v Mackle* [2014] UKSC 5, [2014] AC 678 at [64]-[65].

¹⁶⁴ *Mooney v HM Advocate* [2019] HCJAC 49, [2020] JC 1 at [9].

¹⁶⁵ *R v Ahmad* [2014] UKSC 36 [2015] AC 299 at [38].

¹⁶⁶ R Fortson QC, “Case Comment on *R v Fulton*” [2019] 7 *Criminal Law Review* 636 at 638.

¹⁶⁷ *Hansard* (HC), 21 January 1986, vol 90, col 242.

¹⁶⁸ Criminal Justice Act 2003, s 142(1).

case to reflect the degree of a defendant's culpability. A confiscation order should then seek to effect reparation of the money gained as a result of that culpable action. Where a defendant plays an integral role in a conspiracy, for example, the extent of his or her benefit may be greater than that of a minor participant in the conspiracy.

12.99 Despite the courts frequently observing that confiscation orders are not meant to be punitive,¹⁶⁹ many stakeholders that we met considered that the current regime has prioritised punishment and deterrence through confiscation orders which reflect culpability, leading to unfair outcomes. This can be seen through the approach to money launderers, which we discuss in the next part of this chapter.

[2] Inconsistency and lack of realism - the approach to money launderers

12.100 In our pre-consultation discussions, the following views were commonly expressed:

- (1) although the statutory definition of benefit is open-textured, the application of the definition of obtaining benefit as interpreted by the courts produces what might be perceived to be an unjust benefit calculation in certain cases; and
- (2) because the starting point for determining the recoverable amount is the benefit figure, it is likely that any lack of realism at the stage of calculating benefit is, to some extent, carried through into the confiscation order.

A perceived “unjust” approach to the calculation of benefit

12.101 In assessing whether the strict application of the definition of obtaining a benefit produces an apparently unjust benefit figure, we consider four issues:

- (1) whether a person who transfers property from place A to place B in exchange for reward will have a different benefit calculation depending on the method of transfer;
- (2) the extent to which the benefit figure arrived at by virtue of the strict application of the definition of obtaining benefit reflects a “financial accountability” model or “a punishment and deterrence” model of confiscation;
- (3) whether the concept of “proportionality” tempers any benefit figure arrived at through strict application of the definition of obtaining benefit; and
- (4) whether judicial discretion tempers any benefit figure arrived at through strict application of the definition of obtaining benefit.

Benefit and method of transfer

12.102 As set out earlier in this chapter, the courts have established that a person ordinarily obtains property if in law he owns it, whether alone or jointly, or assumes the rights of an owner, which will ordinarily connote a power of disposition or control.¹⁷⁰ A drug courier or a mere custodian in possession of property is not taken to have “obtained”

¹⁶⁹ *R v Jennings* [2008] UKHL 29, [2008] 1 AC 1046 at [13]; *R v Wya* [2012] UKSC 51, [2013] 1 AC 294 at [2]; *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [55]; *R v Boyle Transport (Northern Ireland) Ltd* [2016] 4 WLR 63, [2016] EWCA Crim 19 at [90].

¹⁷⁰ See para 12.8 above.

such property because he or she only possesses the property under the permission and at the direction of another.¹⁷¹ What the courier or mere custodian “obtains” is therefore limited to the payment received for the service in carrying out the transaction.¹⁷²

12.103 In *R v May* the House of Lords remarked that the position of a money launderer may be different to any other mere custodian or courier.¹⁷³ This was explored further by the Court of Appeal in *R v Allpress*,¹⁷⁴ which concluded that money launderers should not be treated differently. In all cases the issue to which the court should address its mind is the extent of the power of control or disposition over the property.

12.104 When funds are held in a bank account, the starting point in law is that the payment of monies into an account gives rise to “a thing in action” in favour of the person who is the named holder of the account.¹⁷⁵ The named holder of the account is therefore treated as having the power of control or disposition over the money and as having obtained a benefit within the meaning of POCA 2002.¹⁷⁶ This is so even if the money is ultimately to be passed on to another. As the Court of Appeal stated in *R v Allpress*, “the £1 million received by the money changer [to transfer overseas] would have been money obtained by him”.¹⁷⁷

12.105 The starting point, that the holder of a bank account has the power of control or disposition can be displaced. In *R v Allpress* the Court of Appeal went on to state that:

We do not exclude the possibility of a case where money is paid into a bank account in the name of D, but which is in reality operated entirely by P for the benefit of P, and where it would be wrong, unusually, to conclude that D obtained monies paid into the account. This is more likely to arise in a domestic than a commercial context. We have in mind, for example, the possibility of a husband or father operating an account in the name of his wife or child, which he treats entirely as his own and in respect of which the wife or child is a mere nominee.¹⁷⁸

12.106 In the absence of clear evidence that the holder of an account is a true nominee, the holder of a bank account is therefore treated as having the freedom of action over the balance of the bank account. By way of example, in *R v Roper* the Court of Appeal found that the defendant, Roper, had the freedom to control or dispose of the funds that were laundered through an account in his name. The defendant pleaded guilty to money laundering on the basis that he had permitted a childhood friend (Lilley) to

¹⁷¹ See para 12.20 above.

¹⁷² *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [48(6)]; *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58; *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 469.

¹⁷³ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [48(6)].

¹⁷⁴ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58.

¹⁷⁵ See para 12.36 above.

¹⁷⁶ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [85]; see also *R v Sharma* [2006] EWCA Crim 16, [2006] 2 Cr App R (S) 63. The position ignores any argument that the property may be held in trust for another.

¹⁷⁷ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [86].

¹⁷⁸ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [86].

have the sole use of a little-used bank account in his name. The Court of Appeal observed that:

This was not an account set up at the outset for the express benefit of Lilley, albeit in the name of Roper. The [defendant] was clearly in as much practical control over the... account as Lilley, even if he chose not to exercise it. In real terms, he had more practical control: Lilley could have no control exercisable as against the bank. The [defendant] certainly had legal ownership of the funds and credits paid into the... account... The act of allowing Lilley to use the account in order to launder the proceeds of crime was itself evidence that the [defendant] had not divested himself of all control of the account. He continued to have the means to prevent Lilley using his account if he had wished to do so.¹⁷⁹

12.107 Roper was therefore found to have “benefited” from the sum passing through the account that he had allowed his friend to use to transfer money.¹⁸⁰

12.108 The outcome should be contrasted with the position that Roper would have been in if his friend had asked him not to facilitate an electronic money transfer, but physically to transport the cash from place A to place B in return for a fee. In such a case, in accordance with the strict application of a test of power of control or disposition, the “benefit” figure would have been only the fee, rather than the amount transported.

12.109 In the case of *R v Casal*, one of the conjoined appeals dealt with by the Court of Appeal in *R v Allpress*,¹⁸¹ the Court of Appeal reduced Casal’s benefit figure, from the £4.5 million in cash that he couriered, to £66,148, representing the fee that he had received. However, if Casal had received that same £4.5 million into his bank account for onward transfer, his benefit would have been £4.5 million plus the fee of £66,148.

12.110 It can therefore be seen that the sum which represents the benefit figure for a cash courier and a money launderer for what is ultimately the same act (transferring property from A to B) is far from consistent.

12.111 There are, of course, some differences between bank accounts and cash. A bank account may attract additional “benefit” including the payment of interest and perhaps other advantages (for example, the rewards provided by banks to customers who pay in a certain level of funds over time such as access to airport lounges and travel insurance). These advantages could potentially form an additional part of the benefit figure for the holder of the account regardless of whether the account is controlled by a different user. However, such additional benefit does not alter the basic position that a money launderer who handles a principal sum for another in exchange for a fee is treated differently depending on whether that sum is handled electronically or physically.

¹⁷⁹ *R v Roper* [2014] EWCA Crim 2476, [2015] Lloyd’s Rep FC 26 at [24].

¹⁸⁰ It is unclear whether a confiscation order was made against Lilley, but arguably he too had a power of control or disposition over the money in light of the observations about dual control of the account.

¹⁸¹ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [86].

Reflection of a punishment and deterrence model of confiscation

12.112 Applying the strict test of obtaining property to money launderers may mean that confiscation goes much further than requiring the defendant to provide redress for what he or she actually gained from wrongdoing into a “punishment and deterrence” form of confiscation order.

12.113 Commenting on the case of *R v Roper*, Gavin Doig, writing in the *Journal of Criminal Law*, noted that Roper’s wrongdoing, as reflected in his money laundering charge, was that he had allowed his account to be used “by other persons”. Nevertheless, because the money went through Roper’s account he was found to have benefited from it. Doig’s central criticism is that:

given the way in which he was indicted, how can it be proportionate at the confiscation stage to impose a confiscation order in the same sum as if the money had been paid in by the Appellant, withdrawn by the Appellant and spent by the Appellant?¹⁸²

12.114 A similar “grossed up”¹⁸³ benefit figure would apply to low level “money mules” more generally. Money mules are people with genuine bank accounts who are lured via adverts and messages (often through social media) into allowing their accounts to be used to transfer money which has a criminal origin, in return for a sum of money. Money “muling” is an increasing problem in England and Wales. Fraud prevention service CIFAS reported its members had identified over 40,000 cases that bore the hallmarks of money muling in 2018.¹⁸⁴ This included a 26% rise in the number of people under 21 years of age suspected to be involved in money muling. Fifty percent of account holders apparently connected with money mules were under 26.¹⁸⁵

12.115 A money mule who suspects that the money is criminal may be convicted of money laundering in the same manner as Roper.¹⁸⁶ As in *R v Roper*, the fact that a money mule has the power of control over the balance of a bank account means that the starting point in any subsequent confiscation exercise is a calculation of benefit with reference to all of the money “muled” through their account. During our pre-consultation discussions, we heard criticism that, in line with *R v Roper*, confiscation orders against “money mules” are perceived to be unjustly inflated by the application of the test of control or disposition.

12.116 The case of *R v Fulton*¹⁸⁷ is also instructive. Fulton was a foreign exchange trader and account manager. As part of a conspiracy to commit fraud, Fulton was involved in payments into and out of a company’s accounts, exchanging money from pounds

¹⁸² G A Doig, “Who obtains a benefit under the Proceeds of Crime Act 2002 and what is its value?” *Journal of Criminal Law* (2015) 79(3) 157 at 159.

¹⁸³ R Fortson QC, “Case Comment on *R v Fulton*” [2019] 7 *Criminal Law Review* 636 at 637.

¹⁸⁴ CIFAS describes itself as “the UK’s leading fraud prevention service, managing the largest database of instances of fraudulent conduct in the country”. It comprises over 400 member organisations, including banks and building societies. See <https://www.cifas.org.uk/> (last visited 20 July 2020).

¹⁸⁵ CIFAS, *Fraudscape 2019* [2019] at 10. <https://www.cifas.org.uk/insight/reports-trends/fraudscape-2019> (last visited 20 July 2020).

¹⁸⁶ Proceeds of Crime Act 2002, ss 327 to 329.

¹⁸⁷ *R v Fulton* [2019] EWCA Crim 163, [2019] *Criminal Law Review* 633.

sterling to euros and vice versa. He was paid a commission on each transaction. Fulton was not the holder of the bank account through which the money passed, nor was he a signatory to it. He personally gained nothing beyond the commission for each transaction. The trial judge found that:

[Fulton had] sole operational control over the transfers for which he was responsible and, importantly, he had access to the banking platform for the purposes of transferring money. That he was not a signatory on the bank account is neither here nor there. He was controlling the funds electronically while carrying out the transactions and was responsible for them coming into the...account.¹⁸⁸

12.117 This finding was endorsed by the Court of Appeal. This meant that Fulton's benefit figure was not the £4,206 that he received by way of commission, but the £17,850,000 that passed through the account. Arguably, a finding that Fulton benefited in a sum that was greater than the commission he actually received by a factor of approximately 4,244 goes far beyond a financial accountability model of confiscation.

12.118 Any argument that Fulton played an instrumental role in the criminality and so the public would expect a "benefit" figure higher than any commission received is essentially an argument based on a punishment and deterrence model of confiscation.

12.119 Seeking to recover more from a person who transfers money electronically for a fee than from a person who transfers money in its physical form for a fee arguably punishes those who transfer money in electronic form as opposed to in physical cash. Peter Alldridge, writing in the *Criminal Law Review*, described the position in which money launderers find themselves in comparison with couriers, as "one of those irrational responses generated by the mystique of electronic banking and the glamour of the word "laundering".¹⁸⁹

12.120 Even if the extent of the benefit to be confiscated was intended to reflect culpable involvement in criminality, it does not do so uniformly. As noted earlier, the amount confiscated in the case of *R v Roper* did not reflect an indictment in which the criminality was facilitating the movement of money for the benefit of others. Furthermore, in *R v Fulton* the Court of Appeal observed that, the nature of money laundering offences often requires a launderer to mix tainted funds with legitimate funds to disguise them. Therefore, "those guilty of committing [money laundering], or conspiring to do so, may be found to have derived greater benefits than those involved directly in cheating [others]".¹⁹⁰

12.121 Summing up the position, the current confiscation regime, as exemplified through the approach to money launderers, is more reflective of a punishment and deterrence approach than one of financial accountability. However, even when considering punishment and deterrence it does not create clear and consistent links between culpability and benefit.

¹⁸⁸ *R v Fulton* above at [54].

¹⁸⁹ P Alldridge "The limits of confiscation" [2011] 11 *Criminal Law Review* 827 at 839.

¹⁹⁰ *R v Fulton* [2019] EWCA Crim 163 at [77].

Proportionality

12.122 As set out in Chapter 5 any confiscation order must be “proportionate”.¹⁹¹ However, the safeguard of proportionality has not alleviated the rigidity in the test for obtaining property. The courts have measured proportionality by weighing any infringement of the right to peaceful enjoyment of property against “the achievement of the statutory aim”¹⁹² of the confiscation regime in POCA 2002, which is the “confiscation of the benefit of criminal conduct”.¹⁹³

12.123 In *R v Johnson* the Court of Appeal held that a confiscation order calculated “in accordance with the provisions” of POCA 2002 will be proportionate to the statutory aim.¹⁹⁴ Rudi Fortson QC observed in the *Criminal Law Review* that the Court of Appeal’s approach limits the scope of proportionality as a safeguard because “a court order of any kind that is designed to achieve a particular result and which is made in accordance with the relevant statute is proportionate”.¹⁹⁵ As the Court of Appeal itself noted in *R v Box*, “in almost all cases an order made in accordance with the provisions of the Act will satisfy the test”.¹⁹⁶

12.124 The power of disposition or control test is therefore unlikely to be applied more flexibly to satisfy a requirement of proportionality. In *R v Fulton* arguments in favour of a less stringent approach to achieve proportionality were rejected. One of Doig’s principal criticisms of the decision of the Court of Appeal in *R v Roper*, where the power of control or disposition test was at the forefront of the court’s considerations, was that proportionality was not considered at all.¹⁹⁷ It will therefore be rare that the concept of “proportionality” tempers any benefit figure arrived at through the strict application of the definition of “obtaining” property.

Judicial discretion

12.125 In addition to the highly limited power afforded by the test of proportionality, POCA 2002 gives the court discretion to apply:

- (1) a “serious risk of injustice” test in deciding whether to make a required assumption in a case where a defendant is found to have what is termed a “criminal lifestyle” (see Chapter 13);¹⁹⁸ and

¹⁹¹ Proceeds of Crime Act 2002, s6(5); *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

¹⁹² *R v Box* [2018] EWCA Crim 542, [2018] 4 WLR 134 at [21].

¹⁹³ Proceeds of Crime Act 2002, preamble. See Chapter 5 for a more detailed analysis of the purpose of the confiscation regime.

¹⁹⁴ *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57 at [35].

¹⁹⁵ R Fortson QC, “Proceeds of crime: *R v Box*” [2018] 7 *Criminal Law Review*, 581.

¹⁹⁶ *R v Box* [2018] EWCA Crim 542, [2018] 4 WLR 134 at [21]; see also *R v Sharma* [2006] EWCA Crim 16, [2006] 2 Cr App R (S) 63, at [25].

¹⁹⁷ G A Doig, “Who obtains a benefit under the Proceeds of Crime Act 2002 and what is its value?” *Journal of Criminal Law* (2015) 79(3) 157.

¹⁹⁸ Proceeds of Crime Act 2002, s 10(6)(b).

- (2) an interests of justice test in deciding the amount in which to make a confiscation order where, for example, a victim has started civil proceedings in respect of their loss, injury or damage.¹⁹⁹

12.126 POCA 2002, however, contains no general discretion to make a confiscation order in terms that the court considers to be “just”.²⁰⁰ Judicial discretion therefore cannot temper any benefit figure arrived at through strict application of the definition of obtaining benefit.

A lack of realism in the final order

12.127 The starting point for the calculation of the amount that a defendant must repay is the benefit figure.²⁰¹ As we discussed in Chapter 11, a lack of realism in the determination of benefit therefore may be carried through to the final confiscation order. This manifests in two ways:

- (1) It may lead to an inappropriate finding of hidden assets, which would artificially inflate a confiscation order.
- (2) Even if a confiscation order is made initially in a sum lower than the benefit figure, the defendant ultimately remains liable to repay the whole of the benefit figure, thereby potentially creating a debt that is highly unlikely ever to be fully recovered.²⁰²

Inappropriate “hidden assets” findings

12.128 A particular concern in the context of money laundering is “hidden assets”. As we described in Chapter 16, if the defendant fails to produce clear and cogent evidence about the location or disposal of an asset the value of which formed part of the benefit, the defendant will be liable to repay the value of the asset on the basis that he or she must still have the asset but has “hidden” it from the authorities.²⁰³

12.129 The case of *R v Sawyer* is instructive in understanding the approach taken to hidden assets by the courts. Ms Sawyer was convicted of stealing £15,902 from a shop at which she worked and she was found to have benefited in that sum. Moving to the amount that could be recovered under the confiscation order, the court accepted the clear evidence that Ms Sawyer had substantial debts and few assets (she had no money in any bank accounts and had scrapped two low value cars some time before confiscation). Nevertheless, the court found that Ms Sawyer had not discharged her burden to produce cogent evidence that the £15,902 was not available to her. The judge concluded that Ms Sawyer’s offending had shown “a degree of foresight and a degree of cunning and an ability, at least to some limited extent, to cover her

¹⁹⁹ Proceeds of Crime Act 2002, s 7(3)(a).

²⁰⁰ R Fortson QC, “Case Comment on *R v Fulton*” [2019] 7 *Criminal Law Review*, 636 at 638.

²⁰¹ Proceeds of Crime Act 2002, s 7(1).

²⁰² As we discuss in Chapter 25, the continuing liability to repay the confiscation order may be an impediment to rehabilitation and legitimate wealth generation.

²⁰³ *R v Lee* [2013] EWCA Crim 657, [2013] Lloyd’s Rep FC 453; *R v Carnall* [2014] EWCA Crim 287; *R v Omorogieva* [2015] EWCA Crim 382.

tracks.”²⁰⁴ This included a period immediately after the offence when Ms Sawyer had “effectively absconded and spent about a week in Bournemouth before she was found by her family and subsequently detained”.²⁰⁵

12.130 A defendant who allows money to pass through their bank account in exchange for a fee is treated as having “obtained” that money. Therefore, his or her benefit figure will reflect the money that passed through his or her account and not just the fee received. A money launderer might be able to satisfy a court that money which passed through his or her hands was passed to others and that therefore he or she does not have sufficient money to pay a confiscation order in the sum of the benefit figure.²⁰⁶ However, by analogy with the decision in *R v Sawyer* (a decision which, on its facts, was understandable), it is equally possible that a court will not be satisfied by what seems to be cogent evidence that the defendant has not retained the money. The Court of Appeal has viewed money launderers as exhibiting the “cunning” and ability to “cover tracks” that was referred to in *R v Sawyer*. In *R v Fulton*, the Court of Appeal commented that:

the benefits obtained through money laundering are necessarily diffuse, it is difficult to isolate and identify specific sums; that is the criminality of the laundering activity, which specifically seeks to mix legitimately – and illegitimately – obtained monies together, thereby putting the latter beyond trace.²⁰⁷

12.131 A money launderer’s benefit figure, inflated through an unrealistic approach to benefit, has the potential to lead to those consequences articulated in Chapter 11, namely the:

Generat[ion of] unrealistic expectations as to the amount of criminal proceeds available to pay a confiscation order; [the] distort[ion of] the statistics as well as [the] diver[sion of] the attention of the law enforcement agencies from enforcing confiscation orders in cases where the assets exist.²⁰⁸

Creating a debt that is likely to be irrecoverable

12.132 If a defendant is successful in satisfying a court that he or she has insufficient assets from which to repay the benefit, a confiscation order may be made in a sum lower than the benefit figure.²⁰⁹ For example, in *R v Morris*, one of the appeals conjoined with *R v Allpress*,²¹⁰ £7,928,682.47 passed through a client account. Morris was found to have available assets of £410,077.20 and a confiscation order was made in that sum.

²⁰⁴ *R v Sawyer* [2014] EWCA Crim 2227 at [12].

²⁰⁵ Above at [5].

²⁰⁶ *R v Warwick* [2013] NICA 13.

²⁰⁷ *R v Fulton* [2019] EWCA Crim 163; [2019] Criminal Law Review 633.

²⁰⁸ J Fisher QC and J Bong Kwan, “Confiscation: deprivatory and not punitive, back to the way we were” [2018] 3 *Criminal Law Review* 192, at 200.

²⁰⁹ Proceeds of Crime Act 2002, ss 7(2) and 9.

²¹⁰ *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58.

12.133 However, “the value of a benefit determination constitutes an unforgiven debt until such time as it is fully satisfied”.²¹¹ It is therefore open to the prosecution to return to court and ask for an increase in the available amount should the defendant be discovered to have more assets available to him or her, until such time as the benefit figure is repaid in full.²¹² In the case of *R v Morris*, the defendant would therefore be liable to repay the original “available amount” more than 18 times over before the confiscation debt would be fully repaid.

12.134 A continuing liability to repay a confiscation order up to an unrealistically high benefit figure is likely to have a real impact upon money mules. Fifty percent of those suspected of acting as money mules are under 26 years of age.²¹³ Those at the start of their working lives are likely to be asset poor and face the prospect of large benefit figures (far beyond the sum that they were paid), which may hang over them for many years into the future and may never be recovered. In this regard, Helena Wood of the Royal United Services Institute commented that the law

deliberately draws as broad a definition of criminal benefit as possible, potentially for its deterrent effect against criminals. However, if you look at how that is drawn, ... that money simply does not exist.²¹⁴

12.135 Money muling may become an increasingly prevalent problem in a digital world, and it might be argued that the creation of a large unforgiven debt serves a deterrent purpose. The Supreme Court observed in *R v Waya* that this was a secondary consideration:

the severity of the regime will have a deterrent effect on at least some would-be criminals. It does not, however, follow that its deterrent qualities represent the essence (or the “grain”) of the legislation. They are, no doubt, an incident of it, but they are not its essence. Its essence, and its frequently declared purpose, is to remove from criminals the pecuniary proceeds of their crime.²¹⁵

12.136 Deterrence is therefore secondary to the removal of the proceeds of crime. As set out earlier, confiscation is an exercise in financial accountability, rather than culpability. Culpability is most appropriately reflected in sentencing and the fact that prosecutions for the substantive money laundering offences carry the prospect of a maximum jail term of 14 years’ imprisonment is clearly intended to have a deterrent effect.

12.137 Furthermore, the deterrent impact of an order reflecting the money passing through the account might be questionable. We heard from stakeholders during our pre-consultation fact-finding that advice to defendants often focusses on the immediately recoverable amount and not on the outstanding unforgiven debt. For example, we heard of advice being given that:

²¹¹ R Fortson QC, “Case Comment on *R v Fulton*” [2019] 7 *Criminal Law Review* 636 at 638.

²¹² Proceeds of Crime Act 2002, s 22.

²¹³ CIFAS, *Fraudscape 2019* [2019] at 10. <https://www.cifas.org.uk/insight/reports-trends/fraudscape-2019> (last visited 20 July 2020).

²¹⁴ Proceeds of Crime, Report of the Home Affairs Committee, (2016-17) HC 25, Q3, para 67.

²¹⁵ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [21].

the “benefit” figure does not matter, because a court’s focus is the recoverable amount. A defendant will only serve their sentence in default if the recoverable amount is not repaid.

12.138 Such focus on the immediately recoverable amount is likely to detract from the deterrent effect of a large overarching debt.

[3] The approach to obtaining a pecuniary advantage through evasion of duty.

12.139 As discussed earlier in this chapter, a person evades the payment of duty on imported goods from the moment that he or she becomes liable to pay it, which is the moment that the ship carrying the goods enters the limits of a UK port. A defendant is treated as having obtained a pecuniary advantage to the extent of that duty payable from that moment.²¹⁶

12.140 Professor Peter Alldridge has repeatedly criticised this approach to benefit as overstating the nature of the pecuniary advantage actually obtained by a defendant at the time that the duty was evaded.²¹⁷ He observes that “liability to pay tax does not go away when it is not paid because of fraud. It remains and can be enforced subsequently with interest, and in some cases penalties”.²¹⁸ What ultimately occurs when a defendant sails past the customs point without paying the duty is a *deferral* of the liability to pay.²¹⁹ This deferral, Peter Alldridge contends, is the extent of the advantage obtained by the defendant.

12.141 Peter Alldridge further argues that any value that could be attributed the deferral of the debt is “negligible”²²⁰, comprising, for example, only the interest that accrued on the money that would otherwise have been used to pay the duty. Therefore, in the opinion of Peter Alldridge any confiscation order is “artificially inflated”²²¹ and should be limited to the value of the deferment of the payment of duty.

12.142 In *R v Smith* the House of Lords addressed the issue that the debt remains outstanding without expressly addressing the point about the value of deferment:

In short, the fact that the tax remains due does not mean that its evasion did not confer a pecuniary advantage, nor indeed that that pecuniary advantage consisted of the whole of the tax withheld, the value of the liability that was evaded. By his crime the appellant evaded payment of £4 million tax. That sum constituted the proceeds of the offence... The fact that he remained in law liable to pay the tax, the fact even, were it so, that the Revenue might later recover it, does not, in our

²¹⁶ *R v Smith (David Cadman)* [2001] UKHL 68, [2002] 1 WLR 54.

²¹⁷ P Alldridge, “Smuggling, Confiscation and Forfeiture” (2002) 65 *Modern Law Review* 781; P Alldridge and A Mumford, “Tax Evasion and the Proceeds of Crime Act 2002” (2005) 25 *Legal Studies* 353 and P Alldridge, “the Limits of Confiscation” [2011] 11 *Criminal Law Review* 827.

²¹⁸ P Alldridge, “the Limits of Confiscation” [2011] 11 *Criminal Law Review* 827 at 840.

²¹⁹ See *R v Taylor* [2013] EWCA Crim 1151, [2013] All ER (D) 209, in which arguments were raised relating to HMRC’s continuing ability to enforce the tax liability.

²²⁰ P Alldridge and A Mumford, “Tax Evasion and the Proceeds of Crime Act 2002” (2005) 25 *Legal Studies* 353.

²²¹ P Alldridge, “Smuggling, Confiscation and Forfeiture” (2002) 65 *Modern Law Review* 781 at 787.

judgment, yield the proposition that the proceeds of his crime were one penny less than the whole of the tax evaded.²²²

ANALYSIS

Reframing the test

12.143 In our examination of the three principal issues raised by stakeholders, we have concluded that making an effective confiscation order appears to be hindered by a lack of clarity in the definition of benefit. This is evidenced by the voluminous case law and extensive criticism of the drafting of POCA 2002 from the judiciary, academics, and other stakeholders.

12.144 Whilst the courts have sought to take an approach to the law which is closely aligned to the principles of property law, such an approach can lead to defendants being found to have obtained a benefit far beyond what the public would understand to be a person's gain from crime. Confiscation orders based on such benefit figures far exceed the amount that defendants could ever repay. The courts have therefore sought to distance themselves from the strict application of property law principles when it is considered appropriate to do so and have sought to apply an approach which reaches what is perceived to be the "right" result.

12.145 Because of the way that the test of proportionality has been applied to confiscation legislation and the limited scope of judicial discretion, such safeguards provide only limited assistance in alleviating any lack of realism in the making of a confiscation order.

12.146 On the basis of this evidence, we provisionally conclude that the test for benefit should be reframed. We now go on to consider how it might be reframed and, in doing so, we consider the approaches adopted in other jurisdictions and in the domestic criminal law.

Approaches in other jurisdictions

12.147 In contrast to the strict interpretation adopted of the obtaining of a benefit under POCA 2002, in other jurisdictions there is often greater scope to fit the determination of benefit to the specific facts of the case. We discuss the approaches in three jurisdictions which have varying degrees of discretion in determining benefit:

- (1) a narrow definition of benefit, with reference to payments and rewards, as adopted for certain types of offending in Hong Kong;
- (2) a wider definition of benefit, guided by a list of factors, as adopted by Australia in its Commonwealth legislation; and
- (3) a broad discretion as to what might amount to a benefit, to be exercised rationally with the court taking into account all of the facts of the case and the purposes of the confiscation regime, as adopted in South Africa.

²²² *R v Dimsey* [2000] 1 Cr App R (S) 497 at 500-501.

A narrower definition of benefit

12.148 The narrower definition of benefit adopted in the pre-POCA drug trafficking confiscation legislation is reflected in the legislation in Hong Kong. The two applicable statutes define the “proceeds of an offence” in cases where the lifestyle assumptions do not apply as:

- (1) any payments or other rewards received by [the defendant] at any time in connection with the commission of that offence;
- (2) any property derived or realised, directly or indirectly, by him from any other payments or other rewards; and
- (3) any pecuniary advantage obtained in connection with commission of that offence.²²³

12.149 The value of the “proceeds of an offence” for the purposes of the order is the aggregate of the values of those three figures.²²⁴

12.150 The test of whether an asset was a “payment or other reward” was particularly suited to drug trafficking, which involves transactions and payments. However, a test of “payment or other reward” does not naturally describe what might be obtained from broader criminality, for example through fraud or theft. This is reflected in the UK Parliament’s deliberate decision to use the definition of “obtaining property” rather than “payment or other reward” in the Criminal Justice Act 1988 (“CJA 1988”) which first extended confiscation to non-drug offending.²²⁵ The CJA 1988 was enacted between the two Acts of Parliament intended to confiscate the proceeds of drug offending (the Drug Trafficking Offences Act 1986 and the Drug Trafficking Act 1994), both of which used the test of payments or other rewards. The use of “obtaining” in the CJA 1988 therefore represented a clear decision to move away from the test of payment or reward for types of criminality other than drug offending.

12.151 The test of “payment or reward” is further narrowed in that it only applies to payments or rewards “received” by the defendant. As can be seen from the case of *HKSAR v Tsang Wai Lun Wayland*,²²⁶ this may require the court to consider carefully the “real” extent of economic benefit to a defendant.

12.152 In that case the Court of Final Appeal of Hong Kong ruled that HK\$32 million passing through the defendant’s account was not the proceeds of crime, because “property ought not to be held to be a particular defendant’s ‘proceeds’ unless the defendant has gained economic benefit from such property”.²²⁷ Therefore, payments to a defendant in connection with the commission of an offence were not to be treated as benefit unless they were payments in the nature of a reward.

²²³ Organized and Serious Crimes Ordinance CAP 455 (HK), s 2(6).

²²⁴ Organized and Serious Crimes Ordinance CAP 455 (HK), s 2(6).

²²⁵ Criminal Justice Act 1988, s 71(4).

²²⁶ *HKSAR v Tsang Wai Lun Wayland* (2014) 17 HKCFAR 319, FACC4-5-6/2013.

²²⁷ *HKSAR v Tsang Wai Lun Wayland* (2014) 17 HKCFAR 319, FACC4-5-6/2013 at [68].

12.153 The court was concerned with whether there was a “genuine power of disposition or control over the funds which briefly transited his bank account”, rather than control over the bank account more generally.²²⁸

12.154 Professor Simon Young describes a hypothetical example given by the Court:

it was suggested that if a professional money launderer was paid a \$100,000 fee to launder \$3 million of drug proceeds, the convicted launderer could only be subject to a confiscation order of \$100,000 even if he was still in possession of the \$3 million.²²⁹

12.155 The approach adopted by the Court of Final Appeal is therefore closely aligned with a “financial accountability” model for the recovery of the proceeds of crime.

12.156 Professor Young goes on to suggest that “as the proceeds of crime, the \$3 million should be subject to confiscation, and it should not matter whose hands they are in.”²³⁰ Whether assets should be subject to forfeiture at all should not be conflated with holding the *defendant* to account for his or her benefit from crime through a confiscation order. Other models of asset forfeiture could be available to a court to facilitate forfeiture of the \$3 million. In England and Wales an application could be brought for *in rem* forfeiture of a sum held in a bank account which has been obtained through unlawful conduct.²³¹

A wider definition of benefit

12.157 Under the Australian Proceeds of Crime Act 2002 the term benefit is not strictly defined with reference to payments or rewards.²³² Rather, in deciding the value of a pecuniary penalty order (the equivalent of a confiscation order), the court is directed to determine the defendant’s benefit having regard to evidence before it on various matters, including:

- (1) The money, or the value of the property other than money that, because of the illegal activity, came into the possession or under the control of the person or another person;
- (2) The value of any other benefit that because of the illegal activity, was provided to the person or another person;
- (3) The value of the person’s property before and after the illegal activity;
- (4) The person’s income and expenditure before, during and after the illegal activity.²³³

²²⁸ *HKSAR v Tsang Wai Lun Wayland* (2014) 17 HKCFAR 319, FACC4-5-6/2013 at [79].

²²⁹ *HKSAR v Tsang Wai Lun Wayland* (2014) 17 HKCFAR 319, FACC4-5-6/2013 at [69(f)].

²³⁰ S Young, “Disproportionality in Asset Recovery: Recent Cases in the UK and Hong Kong” in C King, C Walker and J Gurulé (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (2018) at 483-484.

²³¹ Proceeds of Crime Act 2002, s 303Z14.

²³² Proceeds of Crime Act 2002 (Aus), s 338.

²³³ Proceeds of Crime Act 2002 (Aus), s 122.

12.158 This test is, in part, similar to that used under POCA 2002. Benefit is defined with reference to a power of control or possession, as may be appropriate, and the test could arguably lead to orders that are as large as those under POCA 2002. Benefit assessments made with reference to benefit “provided to another person” would potentially render money mules liable for all of the money passing through their accounts. This would not alleviate the problems identified earlier in this chapter.²³⁴

12.159 The potential for inflated orders for money mules is reinforced by a further provision in the Australian legislation which provides that, where the evidence establishes the “value of the person’s property *during*²³⁵ or after the illegal activity exceeded the value of the person’s property before the illegal activity” then the court is “to treat the value of the benefits derived by the person.... as not less than the amount of the greatest excess.”²³⁶ A student acting as a money mule may have only \$100 in his or her bank account on day 1. On day 2, the money mule receives \$10,000 into the account. On day 3, the money mule transfers \$9,500 out of the account (the \$10,000 minus a \$500 commission). The defendant’s benefit is not the \$500 commission but the \$10,000, because this represents the greatest difference between the money mule’s property before, during or after the offending.

12.160 Furthermore, during our fact-finding, a lack of clarity in POCA 2002 was cited repeatedly as a factor leading to uncertainty in the application of the law, leading to inappropriate orders in some cases. Whilst an indicative list of factors to be considered when calculating benefit may assist with clarity, it may only do so if the law is clear as to the interrelationship between the factors.

12.161 Without the (problematic) steer in the Australian legislation as to the meaning of “greatest excess”, a judge weighing up how to deal with a drugs courier transferring a large sum of cash would be faced with competing arguments based on the factors set out in paragraph 12.157. On the one hand the drugs courier has come into possession of the cash and has gone on to provide that benefit to another person. The value of his or her property before and after the criminality may not have altered significantly (because the courier will have received a fee). Further guidance from superior courts would be required.

A broad discretion as to benefit

12.162 Finally, in South Africa the Court is afforded a broad discretion to fix an appropriate sum representing benefit. The court may make an order “of any amount it considers appropriate” provided it does not “exceed the value of the defendant’s proceeds of the offences”.²³⁷ Those proceeds are defined loosely as the sum of “the property, services, advantages, benefits or regards received, retained or derived” from the relevant criminality.²³⁸ The process has been described in the following terms:

²³⁴ See paras 12.113 to 12.114

²³⁵ Emphasis added.

²³⁶ Proceeds of Crime Act 2002 (Aus), s 123(1).

²³⁷ Prevention of Organised Crime Act 1998 (RSA), s 18.

²³⁸ Prevention of Organised Crime Act 1998 (RSA), s 19.

The discretion of the court at a confiscation inquiry is wide, and largely depends on the facts of each case. The court must exercise its discretion rationally. The court must ensure and also be satisfied that the confiscation order it makes is rationally connected to the purpose sought to be achieved by the confiscation order.²³⁹

12.163 Although the South African approach is tempered by the need rationally to further the purpose of the confiscation order, ultimately it provides little guidance to the parties to a confiscation application. The problems derived from a “list of indicative factors approach” in terms of uncertainty and the need for further judicial or legislative guidance are arguably stronger when the discretion given to the court is so broad. In particular, there is the potential for uncertainty in the statutory definition of “proceeds”, inconsistency of application and the development of local practices (thereby creating a “postcode lottery” in the application of the law). Such an approach opens the door to potentially large numbers of appeals and would not remedy the current criticisms of a lack of clarity in the law.

Alternative approaches using domestic criminal law

12.164 Given that confiscation is imposed in a criminal context, we have considered how concepts similar to “obtaining” are applied in the substantive criminal law.

Gain and appropriation

12.165 “Gain” is a concept which is familiar to criminal practitioners. A person can commit fraud in a number of different ways, including by making false representations, failing to disclose information or by abusing a position that they hold (for example by committing fraud in the workplace). In each case, the offence requires that the person intends to either make “a gain for himself or another or to cause loss or expose another to loss”.²⁴⁰

12.166 A “gain” is defined in the Fraud Act 2006 in the following way:

- (1) “gain” extends only to gain in money or other property (“property” means any property whether real or personal (including things in action and other intangible property));
- (2) “gain” includes any such gain or loss whether temporary or permanent;
- (3) “gain” includes a gain by keeping what one has, as well as a gain by getting what one does not have.²⁴¹

12.167 This definition of “gain” reflects the earlier definition of “gain” from the Theft Act 1968. An intention to “gain” under the Theft Act 1968 is one of the elements to be proved for offences of false accounting, dishonest suppression of documents and blackmail.²⁴²

²³⁹ V Basdeo, “The law and practice of criminal asset forfeiture in South African criminal procedure: a constitutional dilemma” [2014] *Potchefstroom Electronic Law Journal* 30.

²⁴⁰ Fraud Act 2006, ss 2(1)(b), (3)(b) and 4(1)(c).

²⁴¹ Fraud Act 2006, s 5.

²⁴² Theft Act 1968, ss 17, 20 and 21.

12.168 The language of “gain” was used by the House of Lords in *R v May* and *CPS v Jennings* describing the “rationale of the confiscation regime” as to “deprive [the defendant] of what he has gained or its equivalent”.²⁴³ However, the term is used interchangeably with “obtaining”.

12.169 An intention to “gain” as a concept known to the criminal law is arguably narrower than the act of “obtaining” as defined in POCA 2002. This can be seen by analysing the definition of theft in the Theft Act 1968.

12.170 For an offence of theft to be committed, property must be “appropriated”.

[A]ny assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.²⁴⁴

12.171 “Appropriation” is therefore very similar to the definition of “obtaining” in POCA 2002.

12.172 As we observed in our 2002 Consultation Paper *Legislating the Criminal Code, Fraud and Deception*, the definition of appropriation is “very wide”:

It is not necessary to show that the defendant assumed *all* the rights of an owner: the assumption of *any* of those rights will suffice. So the removal of an article from a shelf in a shop, and the changing of the price label, was held to constitute “the assumption of one of the rights of the owner and hence an appropriation”. It is now settled by the House of Lords’ decision in *Gomez* that a “consent to or authorisation by the owner of the taking by the rogue is irrelevant”. The mental state of the owner is also irrelevant, because appropriation is “an objective description of the act done irrespective of the mental state of either the owner or the accused”.²⁴⁵

12.173 When a person appropriates property, for the offence of theft to be established it is immaterial whether the appropriation is made “with a view to gain”.²⁴⁶ An intention to “gain” is therefore treated by the Theft Act as distinct from the act of appropriation, and its scope is narrower. A person might appropriate property without a view to gain. For example, the intention might be immediately to destroy the property.

12.174 In sum, “obtaining” under POCA 2002 and “appropriation” under the Theft Act 1968 have been defined in a comparable way. “Gain” is defined more narrowly than “appropriation” under the Theft Act 1968. Therefore “gain” is a narrower concept than “obtaining” under POCA 2002.

²⁴³ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [9]; *CPS v Jennings* [2008] UKHL 29, [2008] 1 AC 1046 at [13].

²⁴⁴ Theft Act 1968, s 3(1).

²⁴⁵ *Legislating the Criminal Code, Fraud and Deception* (1999) Law Commission Consultation Paper No 155.

²⁴⁶ Theft Act 1968, s 1.

Financial or other advantage

12.175 Under the Bribery Act 2010 an offence is committed if the defendant obtains a “financial or other advantage”²⁴⁷ or “business or advantage in the conduct of business”²⁴⁸. No elaboration is given in the Act. This reflected our final report on bribery, published in 2008, in which we concluded that “‘advantage’ is a term perfectly capable of being understood... in a common sense way without further elaboration”.²⁴⁹

POTENTIAL MODELS FOR “BENEFIT”

12.176 We consider that in reframing benefit the starting point must be establishing what the confiscation regime is intended to achieve. This will inform the “model” of any test of benefit.

12.177 In Chapter 5 we discuss what the purposes of a confiscation regime should be. For the reasons that we have set out in Chapter 5 and against the background of what we have set out in this chapter, we consider that the confiscation regime should hold a defendant to account financially for the proceeds of the offences of which a defendant has been convicted. In essence, such a model should serve the aim of ensuring that the defendant’s benefit from crime has been disgorged, thereby correcting “the sense of injury which ordinary people are bound to feel at the idea of [criminals] having the benefit of the profits that they have made”.²⁵⁰ We will use the term “financial accountability” to describe this approach.

12.178 By removing that benefit, the confiscation regime may have punitive effects,²⁵¹ but should not be punitive per se.²⁵² The confiscation regime is “not intended to be retributive”.²⁵³ Any model for the calculation of benefit should therefore go no further than is necessary to achieve the exercise in financial accountability. In most cases the defendant will have already been sentenced for the offence. The position was summed up by the House of Lords in *CPS v Jennings*: “It is...relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine”.²⁵⁴

12.179 An approach which goes no further than is strictly necessary to remove the defendant’s benefit from crime will likely have less of a deterrent effect than one which goes further. However, as the Supreme Court observed in *R v Waya*, the “deterrent” qualities do not “represent the essence (or the “grain”) of the legislation. They are, no doubt, an incident of it, but they are not its essence. Its essence, and its frequently

²⁴⁷ Bribery Act 2010, ss 1 and 2.

²⁴⁸ Bribery Act 2010, s 6.

²⁴⁹ Reforming Bribery (2008) Law Com No 313 at 3.38.

²⁵⁰ *Hansard* (HC), 21 January 1986, vol 90, col 242.

²⁵¹ If a person has his or has assets taken away, the potential for that person to enjoy and use that asset is also removed. This may be seen as retributive.

²⁵² *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63; *R v Smith (David Cadman)* [2001] UKHL 68, [2002] 1 WLR 54 at [23]. See discussion at paragraphs 5.33 – 5.35 in Chapter 5.

²⁵³ Cabinet Office Performance and Innovation Unit, “*Recovering the Proceeds of Crime*” (June 2000) at 4.11.

²⁵⁴ *CPS v Jennings* [2008] UKHL 29, [2008] 1 AC 1046 at [13].

declared purpose, is to remove from criminals the pecuniary proceeds of their crime.”²⁵⁵

12.180 We therefore consider that a model should be adopted which better reflects financial accountability. We discuss three models, two of which are based more directly around financial accountability and one which is based around refinements to the current, more punitive, approach.

Potential Model 1 – financial accountability as at the date of confiscation

12.181 One potential model would be a model of financial accountability as at the date of confiscation, as originally envisaged by Mr Justice Hodgson’s committee when first proposing that a confiscation regime be introduced.

12.182 Such a model would require the court to identify the benefit to the defendant as it stood at the time of the confiscation order, with the aim of restoring “the *status quo* before the offence”.²⁵⁶ This would be a significant departure from the current position, and would allow a defendant to offset (amongst other things):

- (1) any expenditure made from the proceeds of crime;
- (2) the value of any assets seized by the authorities prior to confiscation.

12.183 Such an approach has the merit of simplicity. However, we consider the public policy rationale behind taking gross revenue and not permitting the offsetting of expenses from property obtained, as set out at paragraph 12.78, to be compelling.

12.184 We also consider the rationale for including seized assets as benefit to be a good one. Ultimately, a drug dealer who holds criminal cash has benefited at the time that he or she holds that cash. It may be more luck than judgment as to whether that cash is subsequently spent on acquiring more drugs, or whether the cash is seized by the police.

12.185 We therefore consider that a confiscation regime which includes expenditure from crime and the value of assets seized prior to confiscation as benefit, as reflected by the current law, is appropriate.²⁵⁷ By doing so, the good public policy rationales for not calculating benefit with reference to net profit would be met. Furthermore, public expectations about what might amount to benefit from crime are likely to be better met. A drug dealer who has gained money from crime would no doubt be seen by the public as having had the benefit of that money, even if that money is then either spent on further criminality or is seized.²⁵⁸ Accordingly, we do not consider that Model 1 would be appropriate.

²⁵⁵ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [21].

²⁵⁶ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 74.

²⁵⁷ A person may have also “gained” from assets which are then restored to the rightful owner. Whether it is appropriate to make a confiscation order to seek recover gain that has already been restored is a different issue.

²⁵⁸ We consider how seized assets should be taken into consideration during the confiscation more generally in Chapter 21.

Potential Model 2 – financial accountability taking into account any “relevant” property

12.186 Having dismissed a model of “financial accountability” as at the time of the confiscation order, we consider a second model, namely one of financial accountability taking into account any “relevant” property. The term “relevant property” is used here as a shorthand for property obtained “as a result of or in connection with” the criminal conduct for which the defendant was convicted. We consider that this second model has two aspects to it:

- (1) The court should focus on what was “gained” by a defendant as a result of, or in connection with, the criminal conduct for which or he she was convicted. This is a more expansive definition of benefit than the test applied in Model 1.
- (2) Having determined what the defendant “gained”, the court should consider the intention of the defendant in relation to that gain.

A move away from the current test of “obtaining”

12.187 The courts have sought to distance themselves from a strict application of property law principles and deliberately sought to couch proceedings as criminal rather than civil in an effort to do what is perceived to be “right” on the facts of individual cases.²⁵⁹

12.188 We discuss at length earlier in the chapter problems associated with the test of “obtaining” benefit. Drawing together those problems, it is apparent that neither the touchstone of “an interest” nor “the power of control or disposition” is adequate on its own to determine whether a person should be taken to have “obtained” property for the purposes of ascertaining benefit from criminal conduct.

12.189 Firstly, “*ordinarily*” disregarding possessory rights neither maximises certainty in the law nor reflects the potentially valuable nature of those possessory rights against anyone who has a lesser relative interest in the property.

12.190 Secondly, the test of “control or disposition” may lead to a just outcome in certain cases, for example by limiting a courier’s benefit to the fee that he or she was paid. However, the outcome is in spite of, rather than in accordance with, the strict wording of POCA 2002, which requires consideration of *any* interest, including a possessory right.²⁶⁰

12.191 Thirdly, the test of control or disposition does not deal with a number of common situations which may require the test to be disapplied. For example, rather than putting criminal money into a trust after obtaining that money, a defendant may have obtained a beneficial interest in a trust, or an increase in the value of their pension fund directly through criminality, such as fraud. The defendant has sought to gain from criminal conduct. It will be an issue of fact as to what rights or powers arise from their beneficial interest in the property, for example proprietary rights exercisable against

²⁵⁹ *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [11]; *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [47]; *Mooney v HM Advocate* [2019] HCJAC 49, [2020] JC 1.

²⁶⁰ Proceeds of Crime Act 2002, s84(2)(h).

third parties who knowingly receive property in breach of trust. However, in practical terms they may not have an immediate or absolute power of disposition or control.

12.192 Similar considerations might apply where a defendant has what is known as a “reversionary interest” in an asset. That is, a defendant does not have current possession, because that lies with a bailee. However, the defendant will have the right to regain possession once the bailment comes to an end.

12.193 Finally, the test of control or disposition can, when taken to its extreme, lead to startling outcomes. In the Scottish case of *Mooney v HM Advocate*, the defendant was convicted of formulating a fraudulent scheme whereby HMRC was induced to pay to claimants the sum of £50,981 not due to them. The rebates were paid directly to the claimants and did not go through the defendant. The claimants then paid a commission to the defendant for obtaining the rebate. Such commissions totalled £15,294.30. The defendant’s benefit was found to be the whole £50,981. The Appeal Court, High Court of Justiciary found that the defendant

had operational control over the creation and submission of the self-assessment returns without which no rebates would have been paid... The appellant controlled the amount of her profit from the crime by maximising the repayments to be made by HMRC. The sum paid directly to her was inextricably bound up with the total sum. By her actions she was in control of the total sum to be disbursed by HMRC. To receive her share of the proceeds, she had to secure payment from HMRC of all the funds. In my view she could be said to have obtained them....²⁶¹

12.194 The court went on to link the decision expressly to the use of the term “obtaining”:

Benefit is linked with “obtaining”, not “receiving”. The former covers both securing and procuring, and to hold the appellant as having obtained the funds in question in the present case does not in my view offend against the normal meaning of the word.²⁶²

12.195 The case of *Mooney* demonstrates that the use of the term “obtained” is apt to lead to outcomes which go far beyond an exercise in financial accountability.

Gain

12.196 As we set out earlier in this chapter, “gain” is a notion of longstanding application in the context of criminal law. A reformed test using this concept would be simpler and more effective than the current test.

12.197 “Gain” is defined in simple terms in the Fraud and Theft Acts as including “keeping what one has, as well as...getting what one does not have”.²⁶³ A test of “gain” also has the advantage over the test of “obtaining” that it does not come with the legacy of being inextricably linked to a large volume of case law that has sought to attach

²⁶¹ *Mooney v HM Advocate* [2019] HCJAC 49, [2020] JC 1 at [9] and [12].

²⁶² *Mooney v HM Advocate* [2019] HCJAC 49, [2020] JC 1 at [13].

²⁶³ 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. For arguments about extending the definition of gain see J Smith, “Commentary on *R v Parkes*” [1973] 1 *Criminal Law Review* 358.

principles of property law to confiscation and which has been littered with caveats and exceptions to seek to achieve the “right” result.

Intention of the defendant

12.198 A test of “gain” as defined in the criminal law does not provide a complete answer. It is wide enough to encompass any short-term gains and so might bring couriers and custodians into its ambit. It therefore does not ameliorate the position of a low-level money mule whose act may be little different to that of a courier.

12.199 Furthermore, it does not resolve the issue of criminal property held by one person on behalf of others. For example, money may be held in a bank account of one defendant prior to distribution to other defendants. During our fact-finding, leading QCs specialising in this area of crime observed that any proposed reformed legislation needs to consider the nature of a defendant’s “spoils” from crime, which may be a share of the whole of the proceeds of crime held in a bank account rather than the whole of the proceeds of crime.²⁶⁴

12.200 What the issue of holding property on behalf of another and the capacity in which a defendant acts have in common is both are connected to the intention of the defendant in relation to the property. A key factor which informed the decision in *HKSAR v Tsang Wai Lun Wayland*²⁶⁵ was the defendant’s intention in holding the money in his account, namely to pass it on to others. We therefore take the view that consideration of a defendant’s intention is an important factor in the calculation of benefit under Model 2.

Re-framing the test in light of issues of “gain” and the defendant’s intention

12.201 During our pre-consultation discussions many judges favoured the introduction of a degree of flexibility in the calculation of benefit. This is reflected by the Supreme Court’s comments in *R v Waya*:

The Crown Court has encountered many difficulties in applying POCA’s strict regime. Many of the complexities and difficulties of confiscation cases, arising from the extremely involved statutory language, would undoubtedly be avoided if a measure of discretion were restored, but whether to restore it, and if so in which form, is a matter for Parliament and not for the courts.²⁶⁶

12.202 Such flexibility has arguably been introduced to some extent in any event through the tests currently applied to “obtaining” and “possession”.

12.203 We consider that the type of broad discretion afforded to judges in South Africa is very wide and provides little guidance as to how that discretion is to be applied. It is therefore apt to lead to uncertainty in the application of the law.

²⁶⁴ In Chapter 14 we discuss our proposed reforms to the calculation of benefit in cases involving multiple defendants. We propose that the starting point for benefit accruing to co-defendants should be apportionment of such benefit between co-defendants and that the court should be permitted to depart from that starting point if in all of the circumstances it would be appropriate to do so.

²⁶⁵ *HKSAR v Tsang Wai Lun Wayland* (2014) 17 HKCFAR 319, FACC4-5-6/2013.

²⁶⁶ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [4].

12.204 The approach in Australia that provides greater guidance as to relevant factors is instructive. The use of indicative factors to guide the court in its determinations is not unknown to the criminal law. For example, when the court is determining admissibility of hearsay evidence, the court must have regard to a series of factors which are set out expressly in section 114(2) of the Criminal Justice Act 2003. However, as we noted in relation to our earlier discussion about the approach in Australia, any indicative factors should provide adequate guidance to all parties involved in a confiscation application.

12.205 The reframed test as part of this second model should promote consideration of a narrow range of factors. We provisionally propose that, in determining a defendant's benefit from criminal conduct, the court must consider:

- (1) what the defendant gained as a result of or in connection with criminal conduct,
- (2) the extent to which the defendant intended to have a power of control or disposition in connection with that gain.

12.206 The approach to the power of control or disposition is more nuanced than the approach currently adopted and would not necessarily lead to all funds passing through the hands of a defendant being treated as his or her benefit. Where the defendant's intent was, for example, to hold that gain for division amongst conspirators or simply to pass it along in exchange for a fee, it would be open to the court to find that his or her benefit was limited to that part of the gain which reflected that intention. Such an intention should be relatively straightforward to ascertain in many cases. For example, a bank statement may show money being transferred onwards or being split between various people.

12.207 This two-stage approach to "gain" is not simply a repackaged test of "payment or reward". As the Hong Kong case of *HKSAR v Tsang Wai Lun Wayland*²⁶⁷ demonstrates, a money launderer's "payment or reward" is arguably likely to be limited to his or her payment rather than all of the money passing through his or her account, regardless of the role that he or she played in any wider conspiracy.

12.208 It was notable during our pre-consultation discussions that the vast majority of consultees were adamant that a professional money launderer's "benefit" is qualitatively different to that of a money mule, and that his or her benefit should reflect the differing quality of their role. Whilst a test of "payment or reward" would have a degree of rigidity in the outcome, the proposed test in relation "gain" allows a degree of flexibility in achieving an outcome which reflects the facts of the case. A professional money launderer who is clearly an equal co-conspirator and who has a clear interest in the money beyond simply moving that money for a fee might potentially (although not necessarily) be treated differently to a money mule.

Offsetting expenses

12.209 The definition of "gain" used in the criminal law states that gain "includes any such gain or loss whether temporary or permanent".²⁶⁸ This reflects the current position with

²⁶⁷ *HKSAR v Tsang Wai Lun Wayland* (2014) 17 HKCFAR 319, FACC4-5-6/2013.

²⁶⁸ Theft Act 1968, s 34(2); Fraud Act 2006, s 5(2)(b).

regards to gross or net benefit. As we suggested in relation to Model 1, we consider that the current position with regards to “gross” and not “net” proceeds of crime has both logic and merit.

12.210 We consider that the two-stage test in Model 2 allows for a more nuanced approach to the offsetting of expenses. A “temporary” gain might arise because (for example) a defendant holds money at the direction of another to pass the property to another. Such a defendant intends only to have a limited power of control or disposition over the money. A defendant may, however, hold money with the intention of spending it on himself or a third party. Such a defendant’s intended power of control or disposition over the money is far wider than the first defendant.

12.211 A third situation of “temporary gain” might be where a defendant is provided with money with the intention of purchasing assets to further criminality. For example, a defendant who is the key conspirator in a drugs offence might purchase substances to bulk out drugs using drug money. As the principal conspirator, the defendant’s intended power of control or disposition over the money is likely to be a wholesale one. However, the court could find that a more minor conspirator, who is transferred money purely for a transaction, did not benefit from the transfer of the money because that minor conspirator did not intend to have any power of control or disposition beyond doing that which they were directed to do.

12.212 The court would therefore be afforded a degree of flexibility to reach a result which reflects the circumstances of individual defendants on the facts of the case. We consider that there is merit in considering Potential Model 2 further.

Potential Model 3 – A reformed “punishment and deterrence” model

12.213 We have already discussed at length in this chapter the fact that the current regime for the calculation of benefit promotes a model of confiscation which is often punitive, and therefore of deterrent effect.²⁶⁹

12.214 The fact that many consultees wished to see money mules and professional money launderers treated differently because of the differing quality of their role may reflect, to some degree, an appetite for a regime which encompasses a degree of punishment and deterrence.

12.215 The criticisms of the current regime, based on property law principles, have often been about the extent to which they create a punishment and deterrence model, and therefore it is logical to consider whether a reformed model based upon the current method of calculating benefit might be appropriate.

12.216 We have considered how such a regime might work. A key issue that would have to be addressed is the current approach to possessory rights, which has been adopted in spite of the clear wording of POCA 2002.

12.217 If possessory rights were disregarded altogether, the courts would have to disregard the rights obtained through theft and from (for example) valuable leases. Given the importance and potential reach of such rights, discounting such possessory interests

²⁶⁹ See paragraphs 12.112 to 12.121.

as “benefit” as a matter of course has the potential to undermine the entire confiscation regime. However, if possessory rights were always included in the definition of a benefit obtained then couriers and custodians of criminal property would be treated as having obtained a benefit from the property that they have held, contrary to the current position and what might be thought of as their actual benefit (their reward).

12.218 To ensure that possessory rights are considered if and when appropriate, it is likely that a similar test to the one proposed in Model 2 would have to be adopted. However, the simple test of “gain” would have to be replaced with an analysis of “obtaining” in accordance with principles of property law. We do not consider that this would simplify the position for criminal practitioners.

12.219 Therefore, we do not consider that Model 3 would be appropriate.

FURTHER EXPLORATION OF “MODEL 2”

12.220 Of the three potential models that we have outlined above, we provisionally propose that Model 2 (financial accountability taking into account relevant property) should be adopted. Under this model, in determining a defendant’s “benefit” the court should:

- (1) determine what the defendant gained as a result of or in connection with criminal conduct; 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.

Financial accountability and seized or repaid benefit

12.221 As we set out above, we consider that there are good reasons for using a test of “gain” which reflects the current “gross” rather than “net” approach to benefit, including where such goods have been seized by or already disgorged to the authorities.²⁷⁰

12.222 Whilst it is right to consider that such an amount is recognised as part of a defendant’s benefit, we do consider that it would be unjust not to recognise the fact that goods have since been seized by the authorities and so have already formed part of the defendant’s being held to account. We therefore consider that the value of assets disgorged through seizure, payment to the state or to victims should be taken into account when making the confiscation order. We set out our proposal in this regard more fully in Chapter 15.

The provisional proposals applied

12.223 We now set out how it is intended that the provisional proposals would apply in connection with examples that we have either already mentioned in this chapter, or which, during our pre-consultation discussions, stakeholders told us caused them concern. Namely:

²⁷⁰ See paras 12.67 to 12.78 and 12.183.

- (1) Couriers.
- (2) Money launderers.
- (3) Evasion of duty on tobacco importation.
- (4) Conspiracy to commit burglary.
- (5) Mortgage advances.
- (6) MITC or “carousel” frauds.

Couriers

12.224 A courier may be considered to have “gained” the property that he or she is expected to courier, because the courier “gets what they do not have”. However, the intended extent of that courier’s power of control or disposition is highly limited. It is intended that the courier acts only under the power or control of another. The courier’s benefit should therefore be limited to any additional fee “gained” for his or her services, over which the courier would be intended to have a more extensive power of control or disposition.

12.225 Only if the courier intended to stray beyond the terms of the bailment and exercise a greater power of control or disposition would he or she be treated as having “benefited” from the principal property.

12.226 The end result is therefore as under the current law, a defendant’s “benefit” is the sum received by way of remuneration.

12.227 A courier may be caught whilst still in possession of the property that he or she was to transfer on to another person. If under our provisional proposal, the intention of the courier to pass on the property was a determinative factor in the calculation of benefit, the property held by the courier would not form part of the confiscation. Civil recovery of the property would have to be pursued.²⁷¹ Whilst this would keep a “bright-line” distinction between the courier’s benefit from crime and other property attributable to crime, we recognise that this would not be an efficient or simple approach particularly given that civil recovery proceedings cannot be brought in the Crown Court (where the confiscation order is made).²⁷²

12.228 Under our provisional proposal, when calculating benefit the court must consider whether it is in the interests of justice to make an order in an amount other than the defendant’s gain in light of his or her intended power of control or disposition in connection with that gain. We consider that where a courier has possession of both the principal property and the fee for dealing with that property, a court is likely to find

²⁷¹ Proceeds of Crime Act 2002, part 5.

²⁷² Proceeds of Crime Act 2002, part 5 permits civil recovery in the High Court and the magistrates’ court. We do not make provisional proposals about whether the Crown Court should have a power to make civil recovery orders because the civil recovery of the proceeds of crime is outside of the ambit of our terms of reference. There is a power for a judge in the Crown Court to exercise the powers of a District Judge (Magistrates’ Courts) under section 66 of the Courts Act 2003. However, this power is exercisable only in relation to “criminal causes and matters”. The provision is also intended to have limited scope, see *Frimpong v Crown Prosecution Service* [2015] EWCA Crim 1933, [2016] 1 Cr App R (S) 59.

that it is in the interests of justice to make an order that the benefit comprises both the fee and the principal property. The principal property can be swiftly and easily recovered without injustice to the courier.

Money launderers

12.229 Like a courier, a low level “money mule” will have “gained” the property which is transferred to them, in this case money in a bank account. Following the judgment in *HKSAR v Tsang Wai Lun Wayland*, the extent to which the money mule intended to exercise a power of control or disposition is limited to an intention that the money be transferred on. It is unlikely that the money mule would intend to have a broader power of control or disposition over that money. Therefore, the court may limit the money mule’s “benefit” to any fee received, over which the courier would be intended to have far more extensive a power of control or disposition.

12.230 A money mule is therefore treated differently to the current law, but is held accountable for the sum that he or she in fact received in exchange for his or her criminal act. A money mule who transfers cash electronically in exchange for a fee is treated in precisely the same way as a courier who transfers cash physically in exchange for a fee.

12.231 Arguably, the approach taken towards money mules is also likely to apply to professional money launderers. Our provisional proposal represents a significant departure from the current approach, whereby money launderers are taken to have obtained the principal property because they have a power of control or disposition over that property. “Benefit” figures in money laundering cases are therefore likely to be significantly lower if our provisional proposal is adopted.

12.232 Our provisional proposal is a less draconian approach to money launderers. However, this is inherent in a financial accountability approach rather than one based on culpability. Of course, the total sum passing through the money launderer’s account can still be used for the purposes of ascertaining culpability in sentencing. A defendant who launders £10 million has facilitated a serious offence and is likely to receive a substantial term of imprisonment.²⁷³

12.233 It should not be forgotten that in these scenarios it is likely that the £10 million was passed on as part of a large-scale organised criminal enterprise. If the law continued to make the defendant who has money passing through their account for a fee fully liable for the benefit figure on the basis of their control of the bank account, the focus would remain on the person who held the account, rather than those who truly benefited from the money, namely the person or persons who put the money through the account. Ultimately, the principal target for confiscation should be the controlling force, or “Mr Big” behind the criminality. We consider that this would be a targeted and proportionate approach to tackling serious and organised crime.

12.234 The test which is provisionally proposed does not close the door entirely on professional money launderers being treated differently to money mules. As we noted above,²⁷⁴ a professional money launderer who is clearly an equal co-conspirator and

²⁷³ Sentencing Council, “*Fraud, Bribery and Money Laundering Offences Definitive Guideline*” (2014).

²⁷⁴ See para 12.208.

who has a clear interest in the money beyond simply moving that money for a fee might potentially (although not necessarily) be treated differently to a money mule.

Evasion of duty on imported tobacco

12.235 A defendant who evades the payment of duty is able to retain a sum of money which they otherwise would not have retained. This amounts to a “gain” as defined in criminal law under the Theft Act 1968 and Fraud Act 2006. The position is no different to the current law, whereby the defendant is treated as having obtained a pecuniary advantage through the evasion of duty.

12.236 As to the amount of “gain” from the evasion of duty, Peter Alldridge is correct in his criticism that technically speaking a defendant who does not pay duty on tobacco importation at the relevant excise point has deferred his or her liability to pay tax until some point in the future and so his or her benefit is really the limited gain from deferment, such as the accrual of interest on money in a bank account that would have otherwise been paid.

12.237 However, we do not consider that it is necessary to propose that the law as to benefit obtained from tax evasion be reframed in any reformed legislation for three reasons.

12.238 Firstly, if a defendant was intent on smuggling tobacco (or any other dutiable product) into the UK without paying the duty owed, it is unlikely that he or she would be intending to pay that duty at a later point. We consider that a reasonable person would conclude that the “gain” to a defendant is that he has evaded the debt (the payment of the duty), rather than deferred payment of the debt. By identifying the duty evaded as benefit rather than merely duty deferred, the courts have simply reflected the defendant’s likely intention to avoid tax.

12.239 Secondly, as was made clear by counsel for the Crown in *R v Edwards*:

where a confiscation order has been made, based upon a benefit calculated by reference to the unpaid duty, the Customs and Excise authorities do not, as a matter of practice, seek recovery of the unpaid duty by way of civil proceedings.²⁷⁵

12.240 Thirdly, leading QCs who specialise in confiscation proceedings told us during our pre-consultation discussions that “in practice there is no difference in result between permanent evasion and temporary deferral”.

12.241 We consider that the “gain” to the defendant in tobacco importation cases will usually be the full value of the duty evaded, rather than just the limited gain from deferment when all of the circumstances of a case are considered. *R v Taylor* provides one example of a typical tobacco importation case. The case involved the importation of 600,000 cigarettes from Belgium. The Court of Appeal observed that “the most important part of this enterprise was to ensure the safe and secret transport of the counterfeit cigarettes to the United Kingdom. The illicit cargo had to be hidden”.²⁷⁶ The importation involved (amongst other things) the use of false names, hiding behind a legitimate business, falsified paperwork and concealment of the cigarettes under other

²⁷⁵ *R v Edwards* [2004] EWCA Crim 2923, [2005] 2 Cr App R (S) 29 at [24].

²⁷⁶ *R v Taylor* [2013] EWCA Crim 1151, [2013] All ER (D) 209 at [4].

goods. In such circumstances, we consider that a court would be quick to conclude that the intention was the wholesale evasion of duty rather than mere deferral of the payment of duty. Accordingly, the benefit would be the duty that was owed rather than the value gained by deferring the payment of the duty.

12.242 If benefit in such cases is generally the duty owed rather than the value gained by deferring the payment of the duty, the issue of who has benefited should also be aligned with this approach. *R v Taylor* is again instructive. Taylor ran a logistics company. A second defendant, Wood, ran a freight forwarding business. They were approached separately by the alleged principal conspirators to facilitate the illegal importation of cigarettes. Each agreed to do so, being fully aware that they would “get an earner”²⁷⁷ from their role in the conspiracy.

12.243 Taylor and Wood arranged for innocent hauliers to bring the consignments of cigarettes, hidden in the tea towels, to the UK. The Court of Appeal found that the defendants were liable to pay the import duty under the regulations then in force because, on the correct interpretation of those regulations, they were people who were “holding the tobacco products at the excise duty point” and because they were also people who “had caused the tobacco products to reach an excise duty point”.²⁷⁸

12.244 Because the defendants had an obligation to pay the duty, their failure to pay allowed them to keep an amount of money which they would have otherwise had to be paid to HM Revenue and Customs. The “pecuniary advantage” to the defendants is a gain.

12.245 Turning to whether the defendants’ intention should mean that the gain should not be treated as their benefit, as discussed above benefit is (and we consider generally should be) calculated with reference to the entirety of the duty evaded rather than with reference to the value gained from deferring the payment of the duty because there is never an intention that anyone pays the duty at all in connection with the importation.

12.246 The non-payment of duty is ultimately to the benefit of principal conspirators. In a legitimate transaction, the vendor will gain a gross profit from the onward sale of goods. The gross profit would then be diminished by fulfilling a contractual obligation to reimburse the importer for any duty paid on the goods during the importation. In the criminal conspiracy, it is the principal conspirators who replace the legitimate vendor. As in the legitimate transaction, the onward sale of the goods generates a gross profit for them. However, there is no deduction in gross profit equivalent to the value of the duty evaded because no duty has been paid and a pecuniary advantage is thereby gained. Effectively, the pecuniary advantage has “passed up the chain” to the principal conspirators.

12.247 Just as a courier gains property subject to the power of control or disposition of another, a low or mid-level participant in a conspiracy who causes goods to travel past the excise point therefore may not be the person who ultimately benefits from the failure to pay the duty. Defendants in the position of Taylor and Wood may argue that they were mid-level participants in the conspiracy, that it was intended that the power

²⁷⁷ *R v Taylor* [2013] EWCA Crim 1151, [2013] All ER (D) 209 at [13].

²⁷⁸ *R v Taylor* [2013] EWCA Crim 1151, [2013] All ER (D) 209 at [32] – [33].

to control all advantages and liabilities of the conspiracy was to pass to the principal conspirators, and that their benefit should be limited to the “earner” that they expected to receive.

12.248 Whether a court adopted such an approach would require careful consideration of the evidence as to roles of the defendants, including whether there were principals above the defendants in the conspiracy. We consider that our proposed model of benefit, which has an express focus on intention in connection with gains, would facilitate a more nuanced approach to the issue in appropriate cases than is currently adopted.

Conspiracy to commit burglary.

12.249 The following example was derived from our pre-consultation discussions and explains how our provisional proposals would apply in a conspiracy case:

- (1) Four defendants entered into a conspiracy to burgle a bank, one of whom was the bank manager. His role was to turn off the alarm to facilitate the burglary and then to leave the premises at the usual time so as not to arouse suspicion. The other three defendants entered the bank some hours later to commit the burglary.
- (2) Having stolen money from the safe, the three burglars counted the money and divided it into 25% shares. The following day, the bank manager was given his 25% share.

12.250 Under our provisional proposal, each of the three burglars “gained” their 25% share of the proceeds, rather than the whole. This represents a departure from the current law, under which each defendant may be treated as having “obtained” the whole sum. Each defendant was engaged in joint offending, committed together, during which the money was taken, pursuant to their joint aim. Each appears to have a power of control or disposition over the whole sum.

12.251 If there was no clear evidence as to apportionment, the court should consider the issue of apportionment in light of all of the circumstances of the case. We discuss apportionment in more detail in Chapter 14. In all of the circumstances, it is clear that the “gain” for each defendant should be limited to 25% of the total money stolen.

12.252 As we discuss in Chapter 14, although this outcome is possible under the current legislation, joint liability for the whole sum is a more commonly adopted approach. We consider that (when taken with our provisional proposal in Chapter 14) our provisional proposal provides for the making of realistic orders by codifying and clarifying the framework for determining benefit in connection with multiple defendants.

Mortgage advances

12.253 The following example is instructive in relation to mortgage advances:²⁷⁹

A defendant wanted to purchase a house for £120,000. He put down a £20,000 deposit from legitimate savings. The defendant applied for a £100,000 mortgage for the remainder of the purchase price. He made a fraudulent statement on that mortgage application as to his income, and secured the mortgage as a result of that fraudulent statement.

12.254 In our example, the defendant's "benefit" is not the £100,000 of mortgage money itself. When a defendant fraudulently obtains a mortgage advance, that mortgage advance "remains in the beneficial ownership of the lender until completion, when it passes direct to the vendor".²⁸⁰ At no stage does a defendant receive the mortgage advance or have any direct power over it.

12.255 When a mortgage is agreed, the defendant gains the benefit of a contract with the bank, and with it a "bundle of rights and liabilities" including the right to have the mortgage money paid towards the purchase of the property.²⁸¹

12.256 If the defendant proceeds with the purchase, what he has obtained from the fraud changes. The defendant no longer has a right under the mortgage contract to have the mortgage money paid towards the purchase. Rather, the defendant now owns a house. But the house is subject to a charge in favour of the mortgage lender. The value of the property to the defendant – what he or she would receive if the house were to be sold – is the value left over after the mortgage has been accounted for. This is known as the defendant's "equity of redemption". Immediately following the purchase, the equity of redemption is £20,000 reflecting the deposit paid by the defendant. However, the equity of redemption is not the proceeds of the mortgage fraud; it reflects money provided by the defendant personally from legitimate sources.

12.257 As the defendant pays off the mortgage, his or her equity of redemption increases. Suppose the value of the property does not change and 50% of the mortgage is paid off by the defendant from legitimate sources. The mortgage now secures only £50,000 and the defendant's equity of redemption is worth £70,000. But the equity of redemption still represents money paid towards the mortgage by the defendant from legitimate sources. Assuming he continues to pay off the mortgage from legitimate sources, the same is true once the defendant has paid the mortgage off in its entirety and owns the house outright.

²⁷⁹ For ease of explanation, we do not deal with the issue of interest accruing on the mortgage advance in our worked example.

²⁸⁰ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294, citing *Target Holdings Ltd v Redfern (a firm)* [1996] AC 421 at 436, reaffirmed in *R v Preddy* [1996] AC 815 at 838, and recently discussed by the Court of Appeal in *Lloyds TSB Bank Plc v Markandan* [2012] EWCA Civ 65, [2012] 2 All ER 884.

²⁸¹ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [53].

12.258 This analysis was endorsed by the Supreme Court in *R v Waya*. However, the court noted that, if the property increases in value, the profit generated by the defendant is attributable to the mortgage fraud and qualifies as proceeds of crime.²⁸²

12.259 The Supreme Court in *R v Waya* did not address a potential additional benefit that accrues to a defendant who obtains a mortgage by fraud. Such a defendant does not usually obtain a mere investment in a property. By obtaining legal title to the property through the provision of the mortgage, he or she obtains the right to use the property as its legal owner (or, perhaps, obtains the use of a better property than he or she would otherwise have been able to afford). This enjoyment of the property has value. Where property is subject to wrongful occupancy, damages may be awarded with reference to “the market rental value of the property occupied or used for the period of wrongful occupation or user”.²⁸³ Arguably, wrongfully obtaining better enjoyment of a property as a result of a fraudulent mortgage application is measurable as a benefit in the same way.

12.260 Under our provisional proposal, a test of the defendant’s “gain” would lead to no different an outcome than under *R v Waya*. Initially, the defendant’s gain would be identified with reference to the bundle of rights and liabilities arising from the contract with the bank. The defendant who still owes all of the outstanding mortgage immediately after purchase has not accrued a “gain” because of obtaining the mortgage advance. All that the defendant has gained is a debt that must be repaid. As the mortgage is repaid and the property increases in value, the financial difference to the defendant can be identified in light of the equity of redemption and any increase in value of the property.

12.261 The potential additional benefit of the enjoyment of property identified at paragraph 12.257 could also be a benefit, and the value of the gain is arguably the market rental value of the property occupied or used for the period of wrongful occupation or “user”.

12.262 As is recognised expressly in *R v Waya*, the position would be different if what was gained was a loan which was paid directly to the defendant. In such a case the defendant would have clearly gained from the money as soon as it was credited to the defendant’s bank account.²⁸⁴ The intention would be that the defendant could do what he or she wished with the money upon it being paid over.²⁸⁵ Because expenses cannot be offset, it would be irrelevant if the defendant then went on to dissipate that loan money (for example on an expensive holiday). The loan would still be treated as benefit.

MTIC or “carousel” fraudsters

12.263 We now consider an example using a more sophisticated form of criminality, known as Missing Trader Intra-Community (MTIC) or “Carousel” fraud. MTIC fraud involves

²⁸² Adjusted to reflect the percentage share of the property over which the mortgage was obtained.

²⁸³ *McGregor on Damages* (20th Ed) 39-046; *London Development Agency v Nidai* [2009] EWHC 1730 (Ch), [2009] 2 P & CR DG23; *Marsden v Colnbrook Trading Co* [1954] CLY 890; *The Mayor and Burgesses of the London Borough of Lewisham v Masterson* (2000) 80 P & CR 117.

²⁸⁴ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [48] and [53].

²⁸⁵ This would be so despite the fact that an equivalent sum of money (plus interest) would be contractually repayable in due course.

exploiting the law and rules surrounding the payment of Value Added Tax (VAT) when goods move between different jurisdictions on a VAT free basis.

12.264 A vendor supplies goods or services to others. The goods or services supplied by a business are known for VAT purposes as “outputs” from the business.

12.265 A vendor will charge his or her customers both for the output and for the VAT that will become due to Her Majesty’s Revenue and Customs (HMRC) on the output. The vendor will then account for the VAT to HMRC. When goods are sold within the UK, the rate of VAT to be paid is usually 20%.

12.266 By way of example:

- (1) A vendor of a tablet PC sells it for £1,200: the £1,000 price of the tablet PC plus £200 in VAT. The vendor is, on the face of it, then liable to pay the £200 in VAT to HMRC.
- (2) Before a vendor can sell a tablet PC, that vendor must first purchase one from a third party, possibly a manufacturer or wholesaler. In accordance with the usual rules on VAT, the third party will charge the vendor (the third party’s customer) for the output (the tablet PC) and the VAT that is due on the output. Therefore, if the third party sells the vendor the tablet for £600, this would comprise £480 for the tablet PC and £120 in VAT.
- (3) The vendor has therefore paid the third party £120 in VAT due for the “input” into his business of the tablet PC and owes HMRC £200 in VAT from the “output” from his business of selling the tablet PC onwards.

12.267 How a trader accounts for VAT was explained by the Court of Appeal in *R v Chahal*:

A trader who has spent money on buying in goods in the course of his business is entitled to reclaim the VAT element as an “input”. When a VAT return is filed, it includes a box for the amounts due to HMRC, and the amounts of VAT on sums spent by the trader on chargeable goods or services (inputs). If the VAT charged on the outputs exceeds the inputs, the trader owes the HMRC the difference. If the VAT inputs exceed the VAT outputs, the trader is entitled to a credit or payment from HMRC.²⁸⁶

12.268 In our example, the VAT charged on outputs (£200) exceeds the VAT paid on inputs (£120). Therefore, the vendor of the tablet PC owes HMRC the difference (£80).

12.269 When goods are traded between EU countries, there is no liability for output VAT in the country where they are sold; in the UK they are treated as “zero” rated.²⁸⁷ The customer is therefore not charged VAT by the vendor in the “usual” way. Therefore, if the third party selling the tablet PC in our example was in France and the vendor in the UK, the vendor would be charged £480 for the tablet. He would not pay the third party the £120 in VAT.

²⁸⁶ *R v Chahal* [2015] EWCA Crim 816, [2016] Crim LR 61 at [4]; Value Added Tax Act 1994, ss 25 and 26.

²⁸⁷ Value Added Tax Act 1994, s 30(8).

12.270 That is not to say that the vendor is not liable to account for the £120 in VAT to anyone. Whilst the VAT is not payable in France where the goods were sold, it is payable in the UK, where the goods were received, because the vendor's acquisition of the goods from another member state is a "taxable acquisition".²⁸⁸ The vendor himself must account for tax on the £120 "output" from France to HMRC.

12.271 While the vendor has become liable for the £120 in tax from the output of the tablet PC from France, in acquiring it he also gained an "input" into his business of the tablet PC, the value of the tax on which was £120.²⁸⁹ Therefore, the "input" and "output" to be declared on a VAT return are the same and "the net effect is neutral so far as chargeable goods or services are concerned".²⁹⁰

12.272 Assuming that the vendor sells on the tablet PC for £1,000 plus £200 VAT as in paragraph 12.266(1), the end result of the vendor's dealings with the tablet PC is that the vendor owes HMRC £200 (output tax of £200 plus acquisition tax of £120 minus input tax of £120).

12.273 In an MTIC fraud:

- (1) Goods are sold by a business ("Business A") in a country outside the UK but inside the EU (or "intra-community") to an importer ("Business B") in the UK. For example, Business A may sell 100,000 mobile phones to Business B on credit for £100 each. There is no VAT on the sale charged because A, being based outside the UK, does not charge VAT.
- (2) For the reasons set out above, the VAT due to be paid by Business B on the imported mobile phones will be a neutral figure, and so Business B will not be required to pay any VAT on the import.
- (3) Business B sells the goods on a customer in the UK ("Business C"), ostensibly charging Business C for the output and for the VAT due on the output in the normal way. As with the sale between Business A and Business B, the sale is on credit. It is often the case that Business B will sell the goods to Business C for less than B paid for the goods. For example, Business B may sell the mobile phones to Business C for £90 + VAT (i.e. £108, assuming the VAT rate to be 20%). On the face of it, B makes a huge loss. However, B does not pay £18 per phone to HMRC as it is supposed to. It keeps the £18 per phone and, after a few months, the company becomes a "missing" link in the VAT chain.
- (4) The goods may pass on to more traders (Businesses D and E) to distance the "missing trader" and later vendors and purchasers by interposing a series of ostensibly legitimate transactions, again with the sales being on credit. Such traders are "buffers", facilitating the fraud. Each buffer company accounts to HMRC. Taking our example further:

²⁸⁸ Value Added Tax Act 1994, ss 1, 10 and 20.

²⁸⁹ Value Added Tax Act 1994, ss 24 and 25.

²⁹⁰ *R v Chahal* [2015] EWCA Crim 816, [2016] Crim LR 61 at [6].

- (a) Business C sells the phones for £91 + VAT to Business D. Business C accounts for the “output” tax to HMRC (the VAT that it charged for the goods, £18.20 per phone) and claims back from HMRC the “input” tax that it paid on the goods (£18 per phone). It therefore owes (and pays) HMRC 20p in VAT per phone.
 - (b) Business D sells the phones for £92 + VAT to Business E. Business D accounts for the “output” tax to HMRC (the VAT that it charged for the goods, £18.40 per phone) and claims back from HMRC the “input” tax that it on the goods (£18.20 per phone). It therefore pays HMRC 20p in VAT per phone.
 - (c) Business E sells the phones for £93 + VAT to Business F. Business E accounts for the “output” tax to HMRC (the VAT that it charged for the goods, £18.60 per phone) and claims back from HMRC the “input” tax that it on the goods (£18.40 per phone). It therefore owes HMRC 20p in VAT per phone.
- (5) Business F is the final UK purchaser, and does not purchase the goods on credit. Business F pays for the goods on a cash basis to enable the purchase and any onward sale to be recognised by HMRC as occurring in the same VAT accounting period. In doing so, a substantial tax rebate will be generated, as described at (6) below.
- (6) The goods are sold by Business F to a purchaser in another EU member state. In accounting for the transaction to HMRC:
- (a) Like the other UK purchasers, Business F is able to reclaim from HMRC the amount of VAT that they paid in the way that a business customer ordinarily could (£18.60 per phone);
 - (b) As with Business A, because exports to registered traders in the EU are “zero rated”, Business F would not have to charge or account for any VAT received on the sale abroad.
 - (c) Business F would therefore be eligible to receive from HMRC the difference between the input tax and output tax, which in this case was £18.60 per phone. For a consignment of 100,000 phones, this amounts to £1,860,000. The HMRC rebate can then be cascaded back along the chain to businesses E, D, C, B and A.
- (7) The purchaser in another EU member state might be Business A and therefore the fraud can begin again. In such instances the fraud is also referred to as a “carousel” fraud.

12.274 Applying our test, assuming that all the UK companies belong to the same criminal ringleader or leaders, their gain is likely to be calculated with reference to the £1.86m credit from HMRC. Although £60,000 was paid by way of VAT during the fraud,²⁹¹ expenditure should not be offset in the calculation of benefit. However, where that

²⁹¹ 20p per phone x 100,000 phones (£20,000) x 3 (because VAT was paid by companies C, D and E).

money has already been accounted for to HMRC, as we set out in Chapter 15, the order will make clear that that sum cannot be recovered twice.

12.275 Where the UK buffer companies are controlled by different defendants the court may have to consider the benefit accruing to each company. Each buffer company has received a large amount of money by way of gross profit from the sale of phones as part of the larger criminal conspiracy of which they are a part, with the intention of passing that money down the chain to their supplier (the person below them in the MTIC fraud). Whilst ordinarily a criminal should not be permitted to offset his or her expenses by relying on an intention to pass the money on to a supplier, buffer companies in MTIC frauds cannot be seen as the equivalent of a usual business and supplier relationship. The supply chain is all just an integral part of the fraud. Credit is provided by each company and then payment is made by the exporter (in our example it is company F, a company which will be owned or controlled by the ringleaders) to a buffer company, which begins a cascade of money down the supply chain.

12.276 Accordingly, we consider that whilst each buffer company has gained a significant amount of money from the sale of the phones, the intention of the buffer company is simply to pass the majority of that money along the chain in furtherance of the criminality, and to have a power of control or disposition only over the £100,000 trading profit (£1 per phone) accruing to the buffer company.

Evaluation

12.277 The proposals are intended to create a clear and simple route to the outcome; ensure that a determination of benefit does not require the drawing of artificial distinctions (for example as to possessory rights); and lead to more realistic benefit figures (such as in relation to money mules). When the law is left unaltered in a way which may provide for large benefit figures (for example by not permitting the offsetting of expenses), we consider that there is a good public policy reason for doing so (for example by not encouraging high living from the proceeds of crime or further investment in crime).

Applying the *Ahmad* Criteria

12.278 In Chapter 5 we set out the criteria for an effective confiscation principle that the Supreme Court outlined in *R v Ahmad*.²⁹² We consider that our proposed approach is consistent with the *Ahmad* criteria.

12.279 The first criterion requires that the confiscation principle is consistent with the aim of recovering assets acquired through criminal activity. We consider that in each of the cases tested in this chapter, the defendant is held to account for the gains that were made from criminal activity.

12.280 The second criterion requires that the confiscation principle makes the recovery process simple, predictable and effective. We consider that the cases tested demonstrate that the principles can be applied relatively consistently and predictably across the different types of cases examined.

²⁹² *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [38].

12.281 The third criterion requires that the confiscation principle is consistent with the right to peaceful enjoyment of property under A1P1 of the European Convention on Human Rights. By focussing not just on what was “gained” but the extent to which the defendant was intended to have a power of control or disposition in connection with that gain, the test for benefit can be applied to the individual circumstances of each case. The case of *R v Waya* was originally decided in accordance with A1P1 and the outcome under our new proposals accords with that decision. In the case of money launderers, the benefit figures are likely to be significantly lower than under the current regime, and therefore more closely aligned to A1P1.

Consultation Question 28.

12.282 We provisionally propose 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; 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.

12.283 Do consultees agree?

Consultation Question 29.

12.284 We provisionally propose that the test of “gain” under our preferred model for the calculation of benefit should reflect the general principles in relation to “gain” already in use in the criminal law, principally that “gain” includes:

- (1) keeping what one has;
- (2) getting what one does not have;
- (3) gains that both are temporary and permanent.

12.285 Do consultees agree?

Chapter 13: Benefit in “Criminal Lifestyle” Cases

INTRODUCTION

- 13.1 Under the Proceeds of Crime Act 2002 (“POCA 2002”), 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”.
- 13.2 Benefit from “general criminal conduct” is determined by applying the lifestyle assumptions. In essence, the court will look back six years before the proceedings that led to the conviction were started and assume that all property obtained or expended 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”.¹
- 13.3 In this chapter, we will:
- (1) consider the rationale behind the “criminal lifestyle” provisions;
 - (2) examine how POCA 2002 identifies a person as having a “criminal lifestyle”;
 - (3) describe the operation of the assumptions which the court will apply when assessing the benefit from crime of someone found to have a “criminal lifestyle”; and
 - (4) consider some options for reform.

THE CURRENT LAW

Development of the law around “criminal lifestyle” and the assumptions.

- 13.4 To understand the current law, it is important to put it into context. The “criminal lifestyle” provisions have their origins in the first confiscation legislation, the Drug Trafficking Offences Act 1986 (“DTOA”). The DTOA provided discretion for a court to make certain assumptions in determining whether a defendant had benefited from drug trafficking and in assessing the value of that benefit.² The rationale behind permitting the court to draw such assumptions was explained by Lord Glenarthur when introducing the Bill that later became the DTOA in the House of Lords:

It may never be possible for the prosecution to establish with certainty how much of a wealthy trafficker's lifestyle was financed by his criminal activities. To insist on it doing so would inevitably mean that many convicted traffickers would be able to

¹ 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.

² Drug Trafficking Offences Act 1986, s 2.

retain most of their illegal gains. Such information is, however, very clearly within the knowledge of the offender, and where he has had some legitimate income it ought not to be too difficult for him to establish that to the satisfaction of the court.³

- 13.5 The majority of the Hodgson Committee, which first proposed that confiscation legislation be introduced, recommended that prosecutors should be required to establish the date at which a first offence took place and any assumptions should apply from that date. However, the DTOA went further, permitting the assumptions to apply to property in the defendant's hands over a period of six years.
- 13.6 Six years represents the limitation period for bringing civil claims for negligence⁴ and many organisations keep relevant documents for such a period. A limitation period of six years therefore assists the court in having all pertinent information before it by reducing the likelihood that documents will have been destroyed prior to confiscation. Whilst a six year application window for the assumptions goes further than was intended by the Hodgson Committee, on the face of it if documents can be obtained spanning the six year period, it should still facilitate a just application of the assumptions.
- 13.7 When the ambit of confiscation orders was extended to other offending through the Criminal Justice Act 1988 ("CJA 1988"), the reach of the assumptions was not similarly expanded. The rationale for not expanding the application of the assumptions reflected the opinion of the majority of members of the Hodgson Committee. They argued that drugs trafficking required
- more stringent investigation... than would be appropriate for other forms of offending: Trafficking in hard drugs inflicts such terrible social harm and is, by its nature, so difficult to detect, that when a wholesaler is caught and convicted, [fitting] measures are justified to ensure that he enters prison stripped of all of his ill-gotten gains.⁵
- 13.8 Following concern about the limited impact of confiscation orders under the CJA 1988,⁶ the Proceeds of Crime Act 1995 amended the CJA 1988 to enable the application of the assumptions to any indictable offence⁷ and certain specified summary offences listed in schedule 4. Schedule 4 offences were a limited subset of acquisitive summary offences for example relating to busking, offences from the VHS era (such as the supply of unclassified video recordings), and the running of unlicensed cinemas. The application of the assumptions to this broader range of criminality was not automatic. The prosecution was required to give notice that it

³ Hansard (HL), 4 March 1985, vol 472, col 92.

⁴ Limitation Act 1980, s 2.

⁵ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 74.

⁶ M Baber, *Proceeds of Crime Bill 1994/1995 [Bill 10]* (House of Commons Research Paper 95/16, 2 February 1995).

⁷ Other than a drug trafficking offence or an offence under the Terrorism Act 2000, ss15 to 18 (Criminal Justice Act 1988, ss 71(9)(c) and 72AA(2)(a)).

sought to rely upon the assumptions, and the court had to consider whether it was appropriate to apply them.⁸

13.9 As will become clear below, the assumptions were carried into POCA 2002, but the approach was revised in a number of respects:

- (1) the assumptions could apply to any criminal conduct;
- (2) the trigger for the application of the assumptions became the identification of a “criminal lifestyle”;
- (3) the discretion previously given to the court and the prosecutor as to whether the assumptions ought to apply in any given case was removed.

13.10 We turn now to consider how the “criminal lifestyle” provisions, and the assumptions associated with them, operate under POCA 2002.

Applying the assumptions under POCA 2002.

13.11 Section 6 of POCA 2002 requires the court to determine whether the defendant has a “criminal lifestyle”⁹ and, if so, the extent to which the lifestyle assumptions apply to the defendant.

13.12 In determining the extent to which the lifestyle assumptions apply to the defendant the court must consider what, if any, property the defendant “obtained” during the relevant period, and the source of that property.¹⁰

13.13 The court must approach the sequencing of this task carefully because of the way that POCA 2002 shifts the burden of proof at different stages of the enquiry.¹¹

Criminal lifestyle

Step 1: Identify the offence or offences concerned.

13.14 A court must begin consideration of “criminal lifestyle” by identifying the “offence (or offences) concerned”.¹² An “offence concerned” is any offence which led to the commencement of confiscation proceedings. This will be either:

- (1) an offence for which the defendant was convicted before the Crown Court; or
- (2) an offence for which the defendant was convicted before a magistrates’ court and which was then sent to the Crown Court for further action (for sentencing and/or confiscation to be dealt with).¹³

⁸ Criminal Justice Act 1988, s 72AA(3).

⁹ Proceeds of Crime Act 2002, s 6(4)(a).

¹⁰ *R v Briggs-Price* [2009] UKHL 19, [2009] 1 AC 1026; *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83.

¹¹ *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83.

¹² Proceeds of Crime Act 2002, s 6(9).

¹³ Proceeds of Crime Act 2002, s 6(2).

Step 2: Determine whether the offence or offences concerned satisfy the “criminal lifestyle” requirements?

13.15 The “offence (or offences) concerned” must satisfy one of three tests for a defendant to be found to have a “criminal lifestyle”. The offence must either:

- (1) be specified in schedule 2 of POCA 2002 (“a schedule 2 offence”);
- (2) constitute conduct forming part of a course of criminal activity (the “course of criminal activity” trigger); or
- (3) have been committed over a period of at least six months (the “prolonged criminality” trigger).¹⁴

13.16 Conduct may form part of a “course of criminal activity” in two ways:

- (1) if the defendant is convicted of at least four offences in the same proceedings; or
- (2) if, in the period of six years prior to the start of the present proceedings, the defendant has been convicted on at least two separate occasions of an offence.¹⁵

13.17 If a defendant is convicted of a schedule 2 offence then the financial value of the benefit received does not matter. However, if the offence is part of a course of criminal activity, or was committed over the course of six months or more, then his or her “relevant benefit” must amount to not less than £5,000.¹⁶

13.18 Each of these tests is considered in detail below.

Lifestyle assumptions

13.19 Having established that the defendant has a “criminal lifestyle”, the court must make the four assumptions in section 10 of POCA 2002:

- (1) *Any property transferred to the defendant* at any time after the relevant day was obtained as a result of his or her general criminal conduct.
- (2) *Any property held by the defendant* at any time after the date of conviction was obtained as a result of his or her general criminal conduct.
- (3) *Any expenditure incurred by the defendant* at any time after the relevant day was met from property obtained as a result of his general criminal conduct.
- (4) For the purpose of valuing *any property obtained* (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it.¹⁷

¹⁴ Proceeds of Crime Act 2002, s 75(2).

¹⁵ Proceeds of Crime Act 2002, s 75(3).

¹⁶ Proceeds of Crime Act 2002, s 75(4).

¹⁷ Proceeds of Crime Act 2002, s 10(2)-(5) (emphasis added).

13.20 The “relevant day” is the first day of the period of six years ending with the day when proceedings for the offence concerned were started against the defendant, or if there are two or more offences and proceedings for them were started on different days, the earliest of those days.¹⁸

13.21 Determining whether any of assumptions (1) to (3) applies involves a two stage process. Firstly, as can be seen from the words in italics above, the court must be satisfied that the defendant either obtained property or incurred expenditure. Secondly, the court must be satisfied that the property obtained (and possibly used to meet expenditure) derived from the defendant’s general criminal conduct.

13.22 Each of the two stages is distinct. The Court of Appeal observed in *R v Whittington* that the “issue as to the proof of the existence of property must not be confused with proof of the source of that property.”¹⁹

Stage 1: Has the defendant obtained property or incurred expenditure?

13.23 The prosecution bears the burden of proof to establish that the defendant has obtained property or incurred expenditure.²⁰ The standard of proof is the civil standard, subject to one narrow exception, as set out in the House of Lords’ decision in *R v Briggs-Price*.²¹

13.24 Ordinarily, possession of property or incurring of expenditure can be easily established, for example through bank statements or records of ownership. However, possession of property or the incurring of expenditure might have to be inferred, for example where a defendant has engaged in previous offending which would generate an income and require expenditure. In *R v Briggs-Price*, the property that a defendant obtained was determined with reference to the defendant’s alleged prior involvement in the distribution of cannabis. The defendant had never been convicted of such criminality.

13.25 A majority of the House of Lords determined that the presumption of innocence applies to confiscation proceedings. Accordingly, where the prosecution seeks to establish that property was obtained or expenditure incurred only by evidence of commission of a specific offence for which the defendant has not been convicted, it must be proved beyond reasonable doubt. The Court of Appeal has repeatedly observed that the exception is a narrow one which will only apply in the fact-specific scenario where the prosecution can only allege that the defendant has obtained property or incurred expenditure from (alleged) offences for which the defendant have not been charged or convicted.²²

¹⁸ Proceeds of Crime Act 2002, s 10(8).

¹⁹ *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83.

²⁰ *R v Whittington* above.

²¹ *R v Briggs-Price* [2009] UKHL 19, [2009] 1 AC 1026.

²² *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83; *R v Sakhizada* [2012] EWCA Crim 1036; *R v Moss* [2015] EWCA Crim 713, [2015] Lloyd’s Rep FC 397. The latter two cases confirm, notwithstanding the decision in *Gale v SOCA* [2011] UKSC 49, [2011] 1 WLR 2760, that *R v Briggs-Price* [2009] UKHL 19, [2009] 1 AC 1026 may still have force.

Stage 2: Was the property obtained as a result of the defendant's general criminal conduct?

- 13.26 Having proved the existence of property, the prosecution can then rely on section 10 to assume a link between the property and criminality.²³ The burden shifts to the defendant to satisfy the court on the balance of probabilities that the property was not derived from general criminal conduct.²⁴
- 13.27 Section 76 of POCA 2002 defines “general criminal conduct” to include any conduct that constitutes an offence in England and Wales or would constitute such an offence if it occurred in the jurisdiction.²⁵ It does not matter whether either the criminal conduct in question or the property constituting the benefit obtained predates the coming into force²⁶ of POCA 2002 on 24 March 2003.²⁷
- 13.28 Section 10(6) as interpreted by case law provides two ways in which the assumptions can be disappplied. Firstly, a defendant can establish that the assumption is incorrect.²⁸ The defendant can lead evidence to rebut the application of any of the assumptions. He or she might seek to prove that funds received were derived from legitimate income, for example.²⁹ The European Court of Human Rights has found that putting the burden on the defendant to show that the assets are legitimate, rather than on the prosecution to show that assets are illegitimate, is compatible with the right to a fair trial under article 6 of the European Convention on Human Rights.³⁰
- 13.29 Secondly, the court must not make an assumption if “there would be a serious risk of injustice if the assumption were made.”³¹ This provision has been construed narrowly, and is essentially concerned with the prevention of double counting.³² The position is summed up in *Millington and Sutherland Williams on the Proceeds of Crime*:

The focus of the court here is not on whether the assumptions themselves are flawed but on whether the effect of making the assumptions would be to create a real risk of the defendant suffering an injustice. This may be so where, for example, the defendant's “criminal lifestyle” consists of buying and selling stolen goods. If he buys one stolen object, then sells it and buys another one with the proceeds and so on the application of the assumptions would hold that the value of the stolen objects,

²³ Proceeds of Crime Act 2002, s 10(1)(a).

²⁴ Proceeds of Crime Act 2002, s 10(6).

²⁵ Proceeds of Crime Act 2002, s 76(1)(2).

²⁶ Proceeds of Crime Act 2002, s 76.

²⁷ SI 2003 No 333, art 2.

²⁸ The Proceeds of Crime Act 2002, s 10(6)(a) does not refer to who bears the burden of proof, it states only that the assumption may be “shown to be incorrect”. However, the courts have interpreted this to mean ‘shown by the defendant’. See (amongst other cases) *R v Briggs* [2018] EWCA Crim 1135; *R v Harvey* [2016] UKSC 73, [2017] AC 105; *R v Briggs-Price* [2009] UKHL 19, [2009] 1 AC 1026; *R v Benjafield* [2001] 3 WLR 75.

²⁹ See for example *R v Panesar* [2008] EWCA Crim 1643; *R v Steed* [2011] EWCA Crim 75, [2011] Lloyd's Rep FC 238.

³⁰ *Phillips v United Kingdom* (41087/98) 11 BHRC 280, [2001] *Criminal Law Review* 817.

³¹ Proceeds of Crime Act 2002, s 10(6)(b).

³² *R v Harvey* [2015] UKSC 73, [2017] AC 105; although the courts appear to have recognised the potential for wider application of the serious risk of injustice test (see *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [25]).

the money the defendant used to buy them, and the money the defendant received from their sale should all count as his benefit ... In these circumstances, the defendant may well have a strong argument that injustice will flow if the assumptions applied in full on these facts.³³

13.30 Having given a brief outline of the current law, we turn now to consider possible improvements to it.

REFORMING THE LAW

The term “criminal lifestyle”

13.31 The phrase “criminal lifestyle”, formed part of the debates around the Proceeds of Crime Act 1995, but first appeared in statute in POCA 2002.³⁴ The explanatory notes accompanying section 75 of POCA 2002 state:

The “criminal lifestyle” regime is based on the principle than an offender who gives reasonable grounds to believe that he is living off crime should be required to account for his assets, and should have them confiscated to the extent he is unable to account for their lawful origin. The “criminal lifestyle” tests, therefore, are designed to identify offenders who may be regarded as normally living off crime.

13.32 This extract reveals an ambiguity in the phrase “criminal lifestyle”. It can be understood both as referring to how a person lives (*expenditure*) and how they make their money (*income*). Appropriately for a conviction-based confiscation regime, the triggers in section 75 for a finding of a “criminal lifestyle” are concerned with *how a person makes their money (income)*. The assumptions relating to both *income and expenditure* are then applied.

13.33 By contrast, a person who has not been convicted may have civil proceedings triggered against them under Part 5 of POCA 2002 as a result of *how they live (expenditure)*. Someone who appears to be able to afford a lifestyle out of proportion with their legitimate income or who has significant assets, the origins of which are unexplained, will then have to account for how they made their money to afford that lifestyle (*income*)³⁵ or face the prospect of forfeiture of those assets because they represent the proceeds of crime.³⁶ In such cases it is a person’s lifestyle, not the offending that generated that lifestyle, that set proceedings in train.

13.34 The use of the phrase “criminal lifestyle” in Part 2 therefore has the potential to cause confusion. If one were to legislate from a blank page, phrases that focus on the conduct rather than the outcomes of the conduct such as “career criminality” or “habitual offending for gain”³⁷ might be preferable. In a recent judgment concerning a convicted drug trafficker, the Court of Appeal quoted a trial judge’s statement which illustrates the tensions between the statutory category and normal language:

³³ Millington and Sutherland-Williams on *The Proceeds of Crime* (5th ed 2018), para 9.58.

³⁴ Proceeds of Crime Act 2002, s 75.

³⁵ Proceeds of Crime Act 2002, ss 362A to 362I.

³⁶ Proceeds of Crime Act 2002, Part 5 chapter 2.

³⁷ This phrase was suggested by one stakeholder during our pre-consultation discussions.

The judge described the appellant as having chosen throughout his adult life either to make his living out of crime or to attempt to do so. The judge said: "he truthfully deserves the description 'career criminal'".³⁸

13.35 The use of the phrase "criminal lifestyle" is particularly unsuited to describe a corporate defendant.

13.36 Ultimately, how POCA 2002 is applied does not turn on the phrase "criminal lifestyle" and there is no evidence that it does in fact cause confusion. Rather, "criminal lifestyle" is a label which is attached to defendants who meet the strict and exhaustive tests in section 75 of POCA 2002.

13.37 Whilst there are other terms which might in principle be preferable to "criminal lifestyle", we do not propose that the term should be changed in the legislation. Rather, we consider that the focus of any alterations to "criminal lifestyle" should be on the tests which are currently found in section 75 of POCA 2002 which trigger the assumptions under section 10 of POCA 2002. We now turn to consider those tests.

When should the assumptions apply?

13.38 In this section we consider whether the current triggers for the application of the "criminal lifestyle" assumptions are clear, appropriate and necessary. We also consider whether any reform is needed to those triggers.

The first test – schedule 2 offences

13.39 A defendant has a "criminal lifestyle" if confiscation proceedings are brought following conviction for any of the offences listed in schedule 2 to POCA 2002. As we noted above, no minimum financial threshold applies in relation to the value of the benefit.³⁹ The fact of conviction is enough.

13.40 schedule 2 includes a diverse selection of offences held together, generally, by the fact that they concern transactions in the criminal economy. They include:

- (1) dealing in illegal goods including drugs and arms, and items made and sold in breach of intellectual property laws.⁴⁰
- (2) Illegal dealings involving people including human trafficking, modern slavery, child sexual offences, offences relating to exploitation of sex workers and the offences of illegal gangmasters.⁴¹
- (3) specific offences often committed as part of a course of conduct, such as blackmail and directing terrorism.⁴²

³⁸ *R v Moss* [2019] EWCA Crim 501, [2019] 1 WLR 6033.

³⁹ Proceeds of Crime Act 2002, s 75(4).

⁴⁰ Proceeds of Crime Act 2002, sch 2(1), (1A) and (5) to (7).

⁴¹ Proceeds of Crime Act 2002, sch 2(3A), (4) and (8).

⁴² Proceeds of Crime Act 2002, sch 2(3), (9) and (9A).

- (4) two of the principal money laundering offences, sections 327 and 328 of POCA 2002.⁴³ We will discuss these offences in more detail later in the chapter.

13.41 “Inchoate” offending, such as aiding, abetting, attempting or conspiring to commit any of the crimes listed in the schedule will also bring the defendant within the schedule.⁴⁴

Analysis

13.42 The explanatory notes for the Proceeds of Crime Act 2002 describe the schedule 2 offences as “areas of criminal conduct associated with professional criminals, organised crime and racketeering and which in some cases are also of major public concern.”⁴⁵

13.43 The nature of the criminal conduct identified in schedule 2 justifies an inference that the defendant is likely to have committed the same or similar offences that either went undetected or did not ultimately form part of the indictment.

13.44 The crimes listed in schedule 2 are, as a general rule, crimes of volume. In *R v Beazley*, the Court of Appeal noted it was “not surprising” that Parliament had included intellectual property offences alongside the very serious offences in schedule 2:

They are typically repeat offences... . A “criminal lifestyle” for the purposes of confiscation under the 2002 Act is not limited to the kinds of gross criminal offences which attract long prison sentences such as drug trafficking... . It is a concept applied by the statute also, and entirely understandably, to those whose business is founded on the commission of offences.⁴⁶

13.45 Despite being crimes of volume, schedule 2 offences are often difficult to detect because they occur in the criminal economy. In schedule 2 offending involving identified victims, such as people trafficking, such victims are likely to have only limited knowledge of the extent of a trafficker’s previous conduct. The vulnerability of such victims, who may have been exploited as a result of attachment or coercion,⁴⁷ can also affect the extent to which meaningful assistance is provided. schedule 2 offences without identifiable victims are also likely to suffer from information shortfalls because such offences often involve transactions in relation to which relevant parties have committed a crime, such as money laundering or drug trafficking.

13.46 It is therefore notoriously difficult to develop robust estimates of the overall scale of the illicit markets in which those convicted of schedule 2 offences operate. In approaching the task of both prosecuting and disgorging the profits of these offences,

⁴³ Proceeds of Crime Act 2002, sch 2(2).

⁴⁴ Proceeds of Crime Act 2002, sch 2(10).

⁴⁵ Explanatory notes to the Proceeds of Crime Act 2002, para 156.

⁴⁶ *R v Beazley* [2013] EWCA Crim 567, [2013] 1 WLR 3331 at [13].

⁴⁷ Crown Prosecution Service, “CPS Policy for Prosecuting Cases of Human Trafficking” (May 2011). https://www.cps.gov.uk/sites/default/files/documents/publications/policy_for_prosecuting_cases_of_human_trafficking.pdf (last visited July 2020).

that lack of information creates difficulties for law enforcement agencies. Two conclusions follow:

- (1) only a fraction of the schedule 2 offences committed are or are ever likely to be prosecuted;
- (2) knowledge about the number of offences committed is likely to be known only by the offender or their co-conspirators.

13.47 “Following the money” offers the greatest likelihood of overcoming these challenges. By looking at a person’s income and expenditure and analysing its source and destination, the nature and extent of criminality can be uncovered. Returning to the observations in Parliament referred to at 13.4 above, the difficulties in the prosecution following the money trail are evident. However, “the knowledge of the money trail is very clearly within the knowledge of the offender”.⁴⁸

13.48 Therefore, the justification for the application of extended confiscation in the form of the section 10 assumptions is strongest for these offences. By permitting extended confiscation in schedule 2 cases, POCA 2002 seeks to ensure that efforts to disgorge the profits of these crimes are effective. Given the potentially lucrative nature of these criminal industries, the reverse burden offers one way for those convicted of these offences to be put to proof regarding the extent of their role in illicit markets and deprived of the benefits obtained.

13.49 If a defendant’s role in an illicit trade was small, the reverse burden might be readily discharged. In the event that a supplier is caught at or about the first instance of his or her involvement in the drugs trade, the statutory assumptions may be disproved through adducing evidence of a history of legitimate sources of income.

13.50 We are persuaded by the rationale for the special treatment of schedule 2 offences, and consider the inclusion of the offences listed in the Schedule to be relatively uncontroversial. We therefore make no proposals to remove offences from schedule 2. However, we would welcome consultees’ views on whether there are offences which do not belong in schedule 2.

Consultation Question 30.

13.51 Are there any offences that consultees consider should be removed from the schedule offences that trigger a finding of a criminal lifestyle (currently schedule 2 of POCA 2002)?

13.52 During our pre-consultation discussions, stakeholders raised some possible omissions from the schedule. These were:

- (1) the money laundering offence under section 329 of POCA 2002;

⁴⁸ Hansard (HL), 4 March 1985, vol 472, col 92.

- (2) keeping a brothel used in prostitution, contrary to section 33A of the Sexual Offences Act 1956;
- (3) fraud, bribery and corruption.

13.53 We consider the arguments for and against adding each of these offences to schedule 2 of POCA 2002 below. We would also welcome views on whether there are other offences which should be included in schedule 2.

Money laundering

13.54 Part 7 of POCA 2002 establishes the UK's anti-money laundering regime. The principal money laundering offences can be found in sections 327 to 329 of POCA 2002. However, as we have seen, only sections 327 and 328 are included in schedule 2 to POCA 2002.

13.55 In considering whether section 329 ought to be included in schedule 2 it is necessary to put sections 327 and 328 into context.

13.56 The conduct prohibited by sections 327 and 328 is connected with the active laundering of criminal property. Section 340 defines criminal property as the proceeds derived from *any* criminal offence.⁴⁹ This is known as an “all-crimes” approach to money laundering.

13.57 Section 327 prohibits the concealing, disguising, converting or transferring of property, or the removal of criminal property from the jurisdiction. On the face of it there is good reason for including section 327 in schedule 2. The activities prohibited in section 327 encapsulate what a person might ordinarily consider to be money laundering. The essence of money laundering is that criminal or “dirty” property is “cleaned” or “laundered” so that it can be used more easily in the legitimate economy. The most effective way to make property appear to be clean is to distance the property from any criminal origins. Reflecting section 327, a person may seek to distance property from a crime by moving it overseas. Alternatively, a person may convert criminal property by moving it through different bank accounts.⁵⁰

13.58 The activities prohibited in section 327 inevitably involve a defendant taking proactive steps to disguise the proceeds of crime. It is therefore difficult for prosecution authorities to identify benefit from crime. As the Court of Appeal observed in *R v Fulton*:

the benefits obtained through money laundering are necessarily diffuse, it is difficult to isolate and identify specific sums; that is the criminality of the laundering activity, which specifically seeks to mix legitimately – and illegitimately – obtained monies together, thereby putting the latter beyond trace.⁵¹

⁴⁹ Proceeds of Crime Act 2002, s 340(2).

⁵⁰ See *R v Rogers* [2014] EWCA Crim1680, [2014] 2 Cr App R 32 for an example of a case which involves the movement of money overseas and the use of bank accounts.

⁵¹ *R v Fulton* [2019] EWCA Crim 163, [2019] Crim LR 633.

- 13.59 Returning to the knowledge disparity between the prosecution and defence referred to above, information about the legitimate or illegitimate nature and extent of funds passing through a money launderer's hands are far more readily within their knowledge. On the face of it, therefore, it would appear to be appropriate to apply the assumptions in a section 327 case.
- 13.60 Section 328 makes it an offence to assist another to acquire, retain, use or control criminal property. As with section 327, on its face section 328 would appear to reflect the types of conduct that a person would ordinarily consider to be money laundering. A person who sets up an apparently legitimate bank account into which the proceeds of crime are to be paid may be facilitating a money laundering arrangement.⁵² Such a person may be a "professional" money launderer. A professional launderer who provides services to others may be adept at disguising the source of criminal property and therefore, on the face of it, the same knowledge disparity issue arises as with section 327. Accordingly, it would appear to be appropriate to apply the assumptions in a section 328 case.
- 13.61 Whilst section 328 makes it an offence to *assist* another to acquire, retain, use or control criminal property, the actual acquisition, retention, use or control of criminal property is prohibited by section 329. Section 329 is not included in schedule 2.
- 13.62 Section 329 offences will most commonly apply to cases of what is known as "self-laundering". Where a defendant commits a crime from which he or she obtains criminal property, he or she will be in possession of criminal property for the purposes of section 329 and therefore guilty of a separate criminal offence of money laundering. It may therefore be the case that a defendant who would otherwise be charged with theft or handling stolen goods could be charged with money laundering, contrary to section 329.⁵³
- 13.63 If a defendant is found in possession of stolen goods, his or her benefit from crime is easily ascertainable. Similarly, if the defendant committed theft, the value of the goods stolen can be calculated relatively easily. Unlike the examples given in connection with sections 327 and 328, the "knowledge" of the defendant is unlikely to be the sole or decisive indicator of benefit from crime. The property itself might be recovered, or the loser of the property may be able to indicate the extent of their loss. There is therefore less need to apply the assumptions and for section 329 to be a "trigger" offence. The omission of section 329 from schedule 2 is justified in the context of clear cases of "self-laundering".
- 13.64 However, section 329 may also apply in cases where the source of the laundered funds is unclear. A defendant may be guilty of money laundering contrary to section 329 not as a result of possession of identified assets but as a result of possession of a large bag of cash. The prosecution may have had no knowledge of the source of the cash, and reliant upon "irresistible inference"⁵⁴ to prove that the cash must have come

⁵² See *R v Fazal* [2009] EWCA Crim 1697, [2010] 1 WLR 694 at [17] where the possibility of charges under either section 327 or 328 for the same conduct was discussed.

⁵³ *Hogan v DPP* [2007] EWHC 978 (Admin), [2007] 1 WLR 2944 and *Wilkinson v DPP* [2006] EWHC 3012 (Admin); [1998] *Crim Law Review* 743.

⁵⁴ *R v Anwoir* [2008] EWCA Crim 1354, [2009] 1 WLR 980.

from crime. An irresistible inference could be proved, for example, if the bag of cash was concealed and the defendant lied to the authorities about it.⁵⁵ Here there is an obvious knowledge differential between the prosecution and the defence about the extent of the defendant's benefit from any crime. The bag may be held on a one-off basis, or might be part of a larger pattern of criminality. Nevertheless, because the defendant would have been charged with possession of criminal property under section 329, the assumptions would not automatically apply by virtue of schedule 2.⁵⁶

13.65 Had the prosecution chosen to charge the defendant under section 327 with concealing criminal property for hiding the bag in question, the assumptions would have applied. A prosecutor would therefore have to engage in tactical charging to bring the case within the assumptions. The Code for Crown Prosecutors requires that prosecutors consider the impact of a charge on confiscation.⁵⁷

13.66 In certain cases, such tactical charging would not be open to the prosecution, for example, if the bag was found in the hallway of a property that was raided by the police. In such a case the only charge open to the prosecution would be possession under section 329. We consider that it is unsatisfactory if a defendant who is in possession of a large amount of cash and who has no adequate explanation for the cash cannot be asked to account for it through the application of the assumptions.

13.67 Where there is a knowledge differential between the defendant and the prosecution such as that just described, there is a valid argument for inclusion of section 329 offending in schedule 2. However, we do not provisionally propose including such a sub-category of offending in schedule 2 for two reasons:

- (1) schedule 2 is currently simple, in that offences are either wholly included or not at all. The partial inclusion of section 329 would make the law more complex.
- (2) Such a partial inclusion of section 329 would be difficult to define. For example:
 - (a) a closed category of section 329 offending which specifies methods of committing the offence could prove too narrow.
 - (b) A category based on the "unexplained origin" of criminal property could prove too broad. The police may know, for example, that the defendant is handling stolen goods. However, the police may not be able to prove where those goods were stolen from.

13.68 Whilst our provisional conclusion is that section 329 should not be included in schedule 2, we would welcome evidence and views from consultees on this issue.

⁵⁵ *R v F* [2008] EWCA Crim 1868, [2008] Lloyd's Rep FC 570.

⁵⁶ The defendant may nevertheless fall within the "criminal lifestyle" provisions because of other triggers.

⁵⁷ Crown Prosecution Service, "Code for Crown Prosecutors" (2018) para 6.1 <https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf> (last visited July 2020).

Consultation Question 31.

- 13.69 Do consultees consider that the money laundering offence under section 329 of POCA 2002 should be either wholly or partially included in any schedule of offences that trigger a finding of a “criminal lifestyle”?
- 13.70 If section 329 of POCA 2002 should be partially included in the schedule of offences that trigger a finding of a “criminal lifestyle”, how should that partial inclusion be defined?
- 13.71 Do consultees know of any cases in which the current law has impeded effective confiscation where the predicate offence was a money laundering offence, contrary to section 329 of POCA 2002?

Keeping a brothel used for prostitution

- 13.72 The offence of “keeping a brothel used for prostitution”⁵⁸ in section 33A of the Sexual Offences Act 1956 was introduced by a (post-POCA 2002) amendment in 2003. Whilst sections 33 (“keeping a brothel”) and 34 (“landlord letting premises for use as a brothel”) are included in schedule 2, section 33A is not. We consider that section 33A is an offence committed for gain in the same way as sections 33 and 34, which has the potential to generate substantial benefit as sections 33 and 34 do, and which, like sections 33 and 34, may be difficult to detect. It is unlikely that those visiting or working in the brothel would be provide full and frank assistance to authorities conducting a financial investigation. Its exclusion from schedule 2 therefore seems anomalous, and may merely have been an oversight given the close proximity between the commencement of POCA 2002 on 24 March 2003 and the introduction of section 33A of the Sexual Offences Act 1956.

Consultation Question 32.

- 13.73 We provisionally propose that the offence of “keeping a brothel used for prostitution”, contrary to section 33A of the Sexual Offences Act 1956, be added to any schedule of offences that trigger a finding of a “criminal lifestyle”.
- 13.74 Do consultees agree?

Fraud, bribery and corruption

- 13.75 During our fact-finding, some stakeholders considered it to be anomalous that “white collar” offences such as fraud and bribery were not listed in schedule 2, whilst

⁵⁸ The addition of the words “used in prostitution” is intended to reflect the fact that the definition of brothel is capable of covering a range of premises used for the purpose of sexual activity not amounting to prostitution, for example saunas and adult clubs to which people resort for consensual sexual activity which takes place without financial reward to a participant (*Rook and Ward on Sexual Offences* (5th Ed, 2016) para 12.35).

laundering the proceeds of any offending (including fraud and bribery) were listed in schedule 2.

13.76 We are not persuaded that this is necessarily anomalous. The argument that because laundering of the proceeds of predicate offences falls within schedule 2 the predicate offences themselves should fall within schedule 2 could be applied to every offence which generates the proceeds of crime. schedule 2 is essentially a list of crimes from which benefit is generated but its value is difficult to determine because the crimes are volume crimes that may be difficult to detect. The question to be asked is therefore whether these financial offences should fall within that list in light of whether they are volume crimes and difficult to detect.

Fraud

13.77 It was suggested during our fact-finding that the inclusion of intellectual property offences such as counterfeiting and infringing copyright in schedule 2, but the exclusion of fraud, was anomalous. All involve fraudulent activity. However, it is arguable that the decision to exclude fraud is not anomalous. As the Court of Appeal observed in *R v Beazley*, intellectual property offences are often volume offences.⁵⁹ Fraud is not necessarily, or at the very least is less likely to be, an offence of volume or the offence on which a business is founded.

13.78 Fraud may well be a one-off offence, involving, for example, submitting inflated requests for overtime payments,⁶⁰ obtaining a mortgage advance by giving false information⁶¹ or using another person to sit a driving test.⁶²

13.79 Where fraud is not a one-off offence a defendant may still fall within the “criminal lifestyle” provisions as a result of other triggers. For example, where the defendant is convicted of multiple instances of fraud or of a prolonged fraud, a “criminal lifestyle” can still be established through the “course of conduct” provisions.

13.80 Furthermore, alternatives to using the lifestyle provisions exist to capture particular instances of fraud. Where fraud is at the foundation of the business, a prosecution can be brought for the criminal offence of carrying on a business for a fraudulent purpose.⁶³ Confiscation could then capture all of the activities of the business as representing the particular criminal conduct in question without having to use the lifestyle provisions.

13.81 The inclusion of fraud in schedule 2 would also have a dramatic impact on the number of cases in which the assumptions would apply. The Crime Survey for England and Wales estimated that there were approximately 3.7 million instances of fraud in the year ending March 2020.⁶⁴ In the first quarter of 2020, 429 cases of fraud were dealt

⁵⁹ *R v Beazley* [2013] EWCA Crim 567, [2013] 1 WLR 3331, at [13].

⁶⁰ *R v Darroux* [2018] EWCA Crim 1009, [2019] QB 33.

⁶¹ *R v White* [2014] EWCA Crim 714, [2014] 2 Cr App R 14.

⁶² *Idrees v DPP* [2011] EWHC 624 (Admin).

⁶³ Fraud Act 2006, s 9; see the Companies Act 2006, s 933 for a comparable offence.

⁶⁴ Office for National Statistics, *Crime in England & Wales; year ending March 2020* (July 2020), <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2020#fraud> (last visited July 2020).

with before the Crown Court and another 1,050 were outstanding.⁶⁵ The application of the lifestyle assumptions to all such cases would cast the net very (and for the reasons already set out unnecessarily) wide, with consequent time and cost implications for the courts.

- 13.82 Our provisional conclusion is therefore that fraud should not be included in schedule 2. However, we would welcome evidence and views from consultees on this issue.

Consultation Question 33.

13.83 We provisionally propose that fraud is not included in in any schedule of offences that trigger a finding of a “criminal lifestyle”.

13.84 Do consultees agree?

13.85 If consultees disagree, do consultees know of any cases in which the current law has impeded effective confiscation where there predicate offence was fraud?

Bribery and corruption.

13.86 Like fraud, bribery and corruption are not inherently serial in nature. The Ministry of Justice Guidance on the Bribery Act 2010 recognises that even well-run corporations may suffer an “isolated incident of bribery on their behalf”.⁶⁶ In determining whether it is preferable to enter into a Deferred Prosecution Agreement rather than undertake an immediate trial against a company for economic crime (including bribery),⁶⁷ prosecutors must consider whether the offending was an “isolated action by rogue individuals, for example by a rogue director”.⁶⁸ Including bribery within schedule 2 would unjustifiably capture all such isolated offending.

13.87 It is also not clear to us that including bribery within schedule 2 would add much to the existing provision intended to reduce crime in the context of serious corporate bribery:

- (1) the post-legislative scrutiny of the Bribery Act 2010 suggested that the offence of failing to prevent bribery, which imposes strict criminal liability upon a corporation when a person associated with it engages in bribery, is itself encouraging good corporate responsibility,⁶⁹

⁶⁵ Ministry of Justice, *Receipts, disposals and outstanding cases for trial in the Crown Court Q1 (Jan-Mar 2020)* (June 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897696/c_rdos_tool.xlsx (last visited July 2020).

⁶⁶ Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (2010), <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> (last visited July 2020).

⁶⁷ Crime and Courts Act 2013, sch 17 para 26.

⁶⁸ Crown Prosecution Service and Serious Fraud Office, *Deferred Prosecution Agreements Code of Practice* (2014) p 6, https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf (last visited July 2020).

⁶⁹ Ministry of Justice, *Bribery Act 2010: Post Legislative Scrutiny Memorandum*, (June 2018) Cm 9631, para 105.

- (2) Deferred Prosecution Agreements, in which a corporation can avoid conviction, have some control over the facts put into the public domain and engage with the authorities over the terms of any remedy, may be entered into when there has been good corporate governance in connection with bribery.⁷⁰ The agreement itself serves as an incentive to engage in good corporate responsibility.

13.88 In cases where there has been a prosecution for bribery, the available evidence suggests that the prosecution has been able to pursue confiscation. For example, in 2016 Sweett Group Plc had a confiscation order made against it in the sum of £850,000 after admitting failing to prevent the making of corrupt payments.⁷¹

13.89 There are few cases in which it may therefore be appropriate to apply the assumptions in the context of bribery. There may be a public policy justification for applying the assumptions to cases in which the defendant does not co-operate and is convicted after a contested prosecution. It is unlikely in those circumstances that the company will be forthcoming with information to assist the court in determining benefit from crime. However, including bribery within schedule 2 in such cases (and in the corporate context in general) could also lead to the imposition of a highly onerous reverse burden. The application of the assumptions to a company would require that company to account for every piece of expenditure, income and asset held during a six year period. Such a burden may be wholly disproportionate to any alleged criminality.

13.90 Our provisional conclusion is therefore that bribery should not be included in schedule 2. However, we would welcome evidence and views from consultees on this issue.

Consultation Question 34.

13.91 We provisionally propose that bribery is not included in in any schedule of offences that trigger a finding of a “criminal lifestyle.”

13.92 Do consultees agree?

13.93 If consultees disagree, do consultees know of any cases in which the current law has impeded effective confiscation where the predicate offence was bribery?

⁷⁰ Above, para 21. Crown Prosecution Service and Serious Fraud Office, *Deferred Prosecution Agreements Code of Practice* (2014) p 6, https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf (last visited July 2020).

⁷¹ Serious Fraud Office, *Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction*, <https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/> (last visited July 2020).

Consultation Question 35.

13.94 Are there any offences that consultees consider should be added to any schedule of offences that trigger a finding of a “criminal lifestyle”? (Such offences are described in the explanatory notes to POCA 2002 as being offences “associated with professional criminals, organised crime and racketeering” or “of major public concern”).)

13.95 If so, do consultees know of any cases in which the omission of those offences from schedule 2 of POCA 2002 has impeded effective confiscation?

The second test – conduct forming part of a course of criminal activity

13.96 Section 75(2)(b) of POCA 2002 provides that a defendant has a “criminal lifestyle” if the offence or any of the offences concerned “constitutes conduct forming part of the course of criminal activity.”

13.97 Section 75(3) sets out two ways that test might be met:

- (1) In the proceedings in which he or she was convicted, the defendant must have been convicted of three or more other offences, and must have benefited from each such offence (“multiple counts course”).
- (2) In the period of six years ending with the day when the proceedings in which he or she was convicted were started (or, if there is more than one such day, the earliest such day), he or she was convicted on at least two separate occasions of an offence constituting conduct from which he or she has benefited.⁷² (“multiple convictions course”).

13.98 Section 75(4) provides that an offence does not satisfy either of these tests unless the defendant obtained “relevant benefit” of at least £5,000. Section 75(5) establishes that relevant benefit is made up of three types of benefit.

- (1) *Benefit from the conduct which constitutes an offence of which the defendant was convicted in the proceedings which led to confiscation.*
- (2) *Benefit from any other conduct which forms part of the course of criminal activity and which constitutes an offence of which the defendant has been convicted.* In a multiple counts course, this would be the benefit from the other counts of which the defendant had been convicted. In a multiple-convictions course, this would be the benefit from the convictions on other occasions.
- (3) *Benefit from conduct which constitutes an offence which has been or will be taken into consideration by the court in sentencing the defendant for an offence mentioned in paragraph (1) or (2).*

13.99 In relation to the third type of benefit, it is necessary to understand what is meant by taking an offence into consideration (“TIC”). A defendant who is charged with a

⁷² Proceeds of Crime Act 2002, s 75(3).

criminal offence may wish to “wipe the slate clean”⁷³ and to admit to committing other offences, by asking for them to be taken into consideration.

13.100 An offender who wishes to do so is not charged with or convicted of the TICs, but the court will take the TICs into account when passing sentence. Although the defendant’s sentence is likely to increase as a result of admitting to the TICs, the sentence “will almost certainly be considerably less severe than it would have been had the TICs been separately prosecuted”.⁷⁴ This is because of the principle of “totality”. The principle was summed up by the Sentencing Council:

All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate ... it is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.⁷⁵

13.101 By having the offences taken into consideration the defendant knows that his or her criminality has been dealt with by the courts. Therefore, the defendant does not have the risk of being subject to future investigation, prosecution and sentencing for that criminality.

13.102 The “course of conduct” triggers were first proposed in the Proceeds of Crime Bill 1995. Introducing the Bill in the House of Commons, Sir John Hannan described how the course of conduct triggers were intended to provide an “indication of a pattern of offending”, thereby facilitating the aim of “catching the lifestyle criminals”.⁷⁶

13.103 The trigger itself has merit. During a debate into the course of conduct triggers in the House of Commons, Barbara Roche MP said that:

it is absolutely right that we are keen to catch those people who have cleverly evaded the law for some considerable time. We know that many serious criminals who are involved in organised crime may not have any previous convictions, and that those who do, have previous convictions that go back some years. They probably do not have many convictions when it comes to the “successful” period of their organised crime.⁷⁷

13.104 However, the course of criminal activity trigger has been described as “absurdly, and unnecessarily complex”.⁷⁸ We therefore consider each element of the trigger:

⁷³ *R v Miles* [2006] EWCA Crim 256, *The Times* 10 April 2006.

⁷⁴ Blackstone’s Criminal Practice (30th ed 2019), D20.55.

⁷⁵ Sentencing Council, *Offences Taken Into Consideration and Totality Definitive Guideline* (2012) p 5, <https://www.sentencingcouncil.org.uk/wp-content/uploads/Offences-Taken-into-Consideration-and-Totality-definitive-guideline-Web.pdf> (last visited July 2020).

⁷⁶ *Hansard* (HC), 3 Feb 1995, vol 253, col 1324.

⁷⁷ *Hansard* (HC), 31 Mar 1995, vol 257, col 1318.

⁷⁸ R Fortson QC *Misuse of Drugs and Drug Trafficking Offences* (6th ed 2011) p 655.

- (1) the number of offences required;
- (2) the nature of the offences;
- (3) whether there must be benefit from each offence.

13.105 The financial threshold for the course of criminal activity also applies to the third trigger, (commission of an offence over at least six months) and we will therefore discuss it separately.⁷⁹

Multiple counts course

13.106 For a defendant to be found to have a “criminal lifestyle” under the multiple counts course, each of three requirements must be met:

- (1) the defendant must be convicted of at least four offences in the same proceedings (“three or more *other* offences”); and
- (2) the defendant must have benefited from each such offence; and
- (3) the total relevant benefit from those offences and any others taken into consideration at sentencing must exceed £5,000.⁸⁰

13.107 The court must scrutinise these requirements carefully. In *R v Hertford UK Ltd*⁸¹ the defendants were convicted of five offences, one of which was contrary to the Town and Country Planning Act 1990 and four of which were contrary to the Consumer Protection from Unfair Trading Regulations 2008 (“CPUTR”). The defendants had, without approval, converted a commercial property into two residential dwellings. An enforcement notice was served on the defendants requiring them to stop using it for residential purposes. Subsequently, the defendants entered into tenancy agreements in respect of the dwellings without disclosing the enforcement notice.

13.108 The Town and Country Planning Act charge was for failing to comply with the enforcement notice. The CPUTR charges were in pairs in respect of each tenancy agreement. For each tenancy the charges were that, by failing to disclose the enforcement notice, the defendants had engaged in a misleading action (one charge) that fell below the standard of a reasonably diligent landlord (a second charge).

13.109 The prosecution alleged the defendants had a “criminal lifestyle” on the basis of the “multiple counts course”, alleging benefit from each of the five offences for which the defendant had been convicted amounting to more than £5,000.

13.110 The judge found, however, that the defendant had only benefited from three offences. In this case the defendants had benefited from securing the tenancies after the failure to disclose the enforcement notice. There was no additional benefit from

⁷⁹ See paragraphs 13.166 to 13.187 below.

⁸⁰ Proceeds of Crime Act 2002, s 75(3)(a); R Fortson QC, *Misuse of Drugs and Drug Trafficking Offences* (6th ed 2011) p 656.

⁸¹ *R v Hertford UK Ltd* [2016] Criminal Law Review 352.

the two charges relating to falling below the standard of the reasonably diligent landlord.

13.111 Where there are charges relating to the same criminality the court should be careful not to trigger the assumptions through double counting. Charges arising from the same criminality may not be uncommon. The judge observed that “there are numerous regulatory offences in various parts of the criminal and quasi-criminal jurisdiction, and it will not be difficult in such cases to find multiple offences to cover a particular criminal activity.”⁸²

13.112 In his commentary on the *R v Hertford UK Ltd*, Rudi Fortson QC builds on an example given by the judge of multiple charges arising from the same criminality outside of the regulatory context:

Suppose D was convicted of two pairs of identical charges in respect of victims A and B. The first and third charges (“fraud by false representation”) *caused a loss to victims A and B* in the sums of £1,500 and £2,000 respectively. The fraud was perpetrated “using a false instrument” in respect of each victim. The actual loss (and total benefit to the fraudster) is £3,500. As the judge remarked....“it would be a complete nonsense to double the £3,500 benefit and make a confiscation order in the sum of £7,000, when the actual benefit obtained was only £3,500.”⁸³

13.113 This demonstrates why close scrutiny of the “multiple counts” course trigger is required. We consider some further examples to be instructive in demonstrating how the trigger may apply:

- (1) A defendant convicted in the same proceedings of four burglaries, each to the value of £1,500, has a “criminal lifestyle”: They have been convicted of at least four offences in the same proceedings, benefited from each of the four offences and the total relevant benefit from all offences is £6,000 (above the £5,000 threshold).
- (2) A defendant convicted of four burglaries, each to the value of £1,000, with two further burglaries to the value of £1,000 each taken into consideration also has a “criminal lifestyle”: Again, the defendant has been convicted of at least four offences in the same proceedings, and benefited from each of the four offences. Although the total benefit from the offences for which the defendant was convicted was £4,000, the total benefit from all offences (including those taken into consideration) was £6,000 and therefore the £5,000 threshold was passed.
- (3) A defendant convicted of three burglaries, each to the value of £1,000, with two further burglaries to the value of £1,000 each taken into consideration does not have a “criminal lifestyle”. POCA 2002 requires four convictions for this lifestyle trigger to apply and because TICs are not counted as convictions, the defendant will not have a “criminal lifestyle” despite having committed five burglaries.

⁸² *R v Hertford UK Ltd* [2016] Criminal Law Review 352 at 354.

⁸³ *R v Hertford UK Ltd* [2016] Criminal Law Review 352 at 356.

Multiple convictions course

13.114 For a defendant to be found to have a “criminal lifestyle” under the multiple convictions course, each of three requirements must be met:

- (1) over a period of six years the defendant must have been convicted of at least one offence on three separate occasions; and
- (2) the defendant must have benefited from each such offence; and
- (3) the total relevant benefit from those offences and any others taken into consideration at sentencing must exceed £5,000.⁸⁴

13.115 During our pre-consultation discussions there was little criticism of the “multiple convictions” course of conduct. Most accepted that convictions on multiple occasions when combined with a relevant financial threshold could properly be used to trigger confiscation. As academic Johan Boucht explains in his book on extended confiscation, the application of lifestyle assumptions to repeat offenders may be appropriate because it is generally considered to be more likely that the individual has acquired his or her wealth through criminal activity.⁸⁵

13.116 However, similar considerations as to the number and nature of the offences, and whether there must be benefit from each, apply to the multiple convictions course as they do to the multiple counts course.

The number of offences for the course of criminal activity trigger

13.117 It was initially proposed that the course of conduct triggers should be:

- (1) for the multiple counts trigger, conviction of at least four qualifying offences in the same proceedings; or
- (2) for the multiple convictions trigger, conviction of a qualifying offence on at least one previous occasion in the past six years.

13.118 The initial proposal was amended to reduce the number of offences required for the multiple counts trigger from four to two. The rationale was that:

we are dealing with an attempt to target the serious professional organised criminal ... the police service and the Crown Prosecution Service have a difficult enough job securing convictions. Organised criminals are not the sort of people who put their hands up in court and say, "Okay, guvnor, it's a fair cop. You've got me bang to rights. I plead guilty and don't be too hard on me because I've got my mum and three kids at home to support." We are dealing not with such people but with people who run criminal operations as a business. They will undoubtedly be trying to ensure that they are not convicted of anything.⁸⁶

⁸⁴ Proceeds of Crime Act 2002, s 75(3)(b).

⁸⁵ J Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (1st ed 2017) p 42.

⁸⁶ *Hansard* (HC), 31 Mar 1995, vol 257, col 1320.

For organised criminals to be convicted at all is a huge mountain for the system to climb. It is illogical that we should say that there must be four mountains.⁸⁷

13.119 Parliament considered that two convictions would be the “minimum requirement”⁸⁸ to show a pattern of offending:

One needs to show a pattern of offending behaviour before, in all fairness, one can apply those assumptions. It is no good saying that someone who has been convicted of one crime was probably responsible for others. We cannot go on gut feelings that someone may have been a criminal; we must rely on the convictions before the court. If someone is convicted of only one offence, it is right to take back from him the value of the goods involved in the theft or crime, but it is not right to apply an assumption and to say, "In addition, chummy, we are going to take everything else you own because you probably got that from theft as well." That would be unfair.⁸⁹

13.120 The counterbalance to the relatively low threshold was said to be judicial and prosecutorial discretion in deciding to apply the course of conduct trigger:

Obviously, we would not want the new powers to be used unfairly or in unviable cases, but hon. Members will note that they are discretionary. I am sure that we can rely on the discretion of the prosecutors and the courts to bring the powers to bear only where it would be proper to do so.

I have no doubt that judges will need a great deal of persuading that it would be right to use the provisions in the Bill every time some Johnny-come-lately appears in court having at long last been convicted of a couple of offences and they are asked to make an order to confiscate every penny in his bank account. I think that the courts could be very cautious in the use of these provisions and would want to be sure that there were good grounds for making the type of orders provided for in the Bill.⁹⁰

13.121 Discretion coupled with a relatively low threshold for the application of the assumptions was therefore said to be desirable:

It must be right...that we give the courts the necessary flexibility and choice. I think that we can rely on the judgment of the courts in every case to use the powers sensibly, but, unless the relevant number of offences is two rather than four, few opportunities will arise for the powers to be used.⁹¹

13.122 When enacted, the Proceeds of Crime Act 1995 inserted the “course of conduct” trigger into the pre-POCA 2002 confiscation regime found in the Criminal Justice Act 1988. In light of the amendments in Parliament the triggers were:

⁸⁷ *Hansard* (HC), 31 Mar 1995, vol 257, col 1320.

⁸⁸ *Hansard* (HC), 31 Mar 1995, vol 257, col 1321.

⁸⁹ *Hansard* (HC), 31 Mar 1995, vol 257, col 1325.

⁹⁰ *Hansard* (HC), 31 Mar 1995, vol 257, col 1320.

⁹¹ *Hansard* (HC), 31 Mar 1995, vol 257, col 1321.

- (1) for the multiple counts trigger, conviction of at least two qualifying offences in the same proceedings; or
- (2) for the multiple convictions trigger, conviction of a qualifying offence on at least one previous occasion in the past six years.

13.123 The prosecution had to give notice that, in its opinion, the case was one which it was appropriate to apply the assumptions.⁹² The court then had a discretion as to whether apply the assumptions.⁹³

13.124 POCA 2002 removed prosecutorial and judicial discretion in applying the assumptions. The thresholds for the course of conduct trigger were raised, seemingly to counterbalance the effect of removing the discretion. Therefore, the course of conduct triggers requires:

- (1) for the multiple counts trigger, conviction of at least four qualifying offences in the same proceedings (“three or more other offences”); or
- (2) for the multiple convictions trigger, conviction of a qualifying offence on at least two previous occasions in the past six years.

13.125 The multiple counts trigger has therefore been “reset” to the level initially proposed in 1995 of a minimum of four offences. It might be correct that the higher the threshold for the trigger, the lower the risk may be in capturing offenders who do not have a “criminal lifestyle”. Raising the threshold to four offences therefore has the potential to reduce the risk of injustice to a defendant without the need for recourse to judicial discretion. However, the arguments underpinning the assumptions and the trigger as set out earlier in this chapter relate to the difficulties in detecting and prosecuting those involved in serious and organised criminality. The issue of the prosecution having to climb four “mountains” in successfully prosecuting those involved in organised criminality before triggering the assumptions remains as pertinent today as it was in 1995.

13.126 We set out below our considerations relating to judicial discretion. As will be seen, we provisionally propose the reintroduction of judicial discretion in connection with the assumptions. We therefore consider that it is appropriate to review the number of qualifying offences required under the multiple counts trigger more appropriately to bring defendants within the ambit of the assumptions.

13.127 In the absence of clear evidence as to the impact of the number of offences required to satisfy the multiple convictions trigger, we welcome consultees’ views about how many offences should be required to establish a course of criminal activity. This might be two offences (as under the Criminal Justice Act 1988), three offences (as currently under the multiple convictions trigger) or four offences (as under the multiple counts trigger). We would be grateful for consultees’ views in the light of:

⁹² Criminal Justice Act 1988, s 72AA(1)(b).

⁹³ Criminal Justice Act 1988, s 72AA(3).

- (1) the need to ensure that serious and organised criminals can be brought within the ambit of the assumption readily,
- (2) the need to ensure that those guilty of more only limited and minor offending (such as a repeat shoplifter) are not brought within the ambit of the trigger unfairly; and
- (3) our proposal to reintroduce an element of judicial discretion (see paragraphs 13.213 – 1.228 below).

13.128 It is of note that the number of qualifying offences under the multiple convictions trigger is one fewer than that under the multiple counts trigger. The multiple convictions trigger only requires three convictions, whereas the multiple counts trigger requires “three or more *other*” offences (a minimum of four convictions).

13.129 The discrepancy between the number of convictions required under the multiple counts and multiple convictions triggers means that whether a defendant is brought within the lifestyle assumptions may depend on when a defendant is investigated for, and prosecuted for, his or her offending. By way of example:

A defendant commits three burglaries on street A. He leaves distinctive footwear prints between the houses. Street A has a CCTV camera and the defendant is identified. The defendant is convicted of the three burglaries in a single trial. A confiscation order is made. Because the defendant is not convicted of at least four offences in the proceedings the multiple counts trigger does not apply. Had the three burglaries occurred on different occasions, leading to separate investigations, trials and convictions, the defendant would have been convicted of at least one offence on three separate occasions and so the multiple convictions trigger would apply.

13.130 This example suggests that in some cases, whether the defendant is brought within the assumptions may depend not on whether the defendant has engaged in repeated criminality for gain, but upon actions beyond his control taken within the criminal justice system.

13.131 We can find no rationale justifying the difference between the two, and therefore provisionally propose that the number of offences required under both limbs of the course of criminal activity trigger should be the same.

Consultation Question 36.

13.132 We provisionally propose that the number of offences required under the course of criminal activity trigger for “criminal lifestyle” be harmonised to remove the discrepancy between cases where there are multiple convictions on the same occasion and convictions on multiple occasions.

13.133 Do consultees agree?

Consultation Question 37.

13.134 Do consultees consider that the number of offences required under the course of criminal activity trigger should be:

- (1) two offences;
- (2) three offences; or
- (3) another number of offences (and if so, how many)?

Identifying the relevant offences

13.135 In determining whether the defendant has been convicted of the relevant number of offences to establish a course of criminal activity the court must only consider convictions. Offences that are TICs can only be taken into account in determining whether the defendant's total benefit from crime is worth more than £5,000.

13.136 As noted earlier in the chapter, a defendant who has committed six burglaries may or may not be treated as having engaged in a course of criminal activity depending on whether the offences were formally charged or whether they were found on a schedule of offences to be taken into consideration (a "TIC schedule"). One police officer told us that she had been encouraged to bring charges, rather than to have offences taken into consideration, because of the impact on confiscation, which raises a number of issues.

13.137 First, as Mr Justice Hodgson observed in his report which laid the foundations for the first confiscation regime:⁹⁴

If the only way that the Crown can make sure that the Court will be able to make a redress order is by charging every single offence alleged to have been committed...this will inevitably lead to...a wholly unnecessary prolongation of trials resulting in a shocking waste of public time and money.⁹⁵

13.138 Secondly, it may not be possible for charges to be brought. Offences may have to be taken into consideration rather than charged because the only positive evidence of a defendant's involvement may be his or her admission on the TIC schedule.

13.139 The assumptions are intended to deal with situations in which it is difficult to hold a criminal to account because of the knowledge disparity between the authorities and the criminal about the criminal's offending and the proceeds of crime. This disparity is said to be particularly great in the case of organised crime. TICs are the embodiment of such a knowledge disparity; the prosecution's knowledge being provided by the defendant. For authorities to be required to prove a crime rather than simply relying

⁹⁴ In the context of sample counts (where all offending is not included in the charge) and taking offences into consideration.

⁹⁵ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 79.

upon a TIC for the assumptions to be triggered arguably undermines the very purpose of the assumptions.

13.140 Thirdly, and most obviously, a defendant who has clearly engaged in repeated criminality from which he or she has benefited may avoid the “criminal lifestyle” assumptions because of the way in which the case is put before the court. Despite having clearly admitted to criminality through the TIC schedule, the court is unable to apply the assumptions because of a lack of formal convictions.

13.141 Defendants who have offences taken into consideration must weigh up the benefits of “wiping the slate clean” with the potential for immediate consequences, such as a longer sentence.

13.142 The potential for financial consequences to follow having an offence taken into consideration is not novel. Defendants currently face financial consequences from having offences taken into consideration. For example, the court may make a compensation order in connection with offences that are taken into consideration.⁹⁶ Defendants must already weigh up the potential financial implications of taking an offence into consideration.

13.143 Whilst TICS are not currently considered when identifying relevant offences for the course of criminal activity trigger, they are considered in determining whether the financial threshold for the course of criminal activity trigger is met. TICs therefore might already trigger the “criminal lifestyle” assumptions.

13.144 The risks of triggering the criminal lifestyle assumptions through having offences taken into consideration under our proposals are higher, and there is potential that defendants may be deterred from having offences taken into consideration if they might trigger the “criminal lifestyle” assumptions.

13.145 Nevertheless, we consider that the advantages to a defendant of having offences taken into consideration remain great. A defendant who does not have an offence taken into consideration will ultimately still runs of confiscation order being made against them in the future in connection with the offending.

13.146 On balance therefore, we therefore provisionally propose that *offences* rather than *convictions* should be the trigger, offences comprising both *convictions* and *offences that are taken into consideration*.

Consultation Question 38.

13.147 We provisionally propose that the course of criminal activity trigger should be that a person has been dealt with by the court for a minimum number of offences, whether those offences comprise convictions or offences taken into consideration.

13.148 Do consultees agree?

⁹⁶ Powers of Criminal Courts (Sentencing) Act 2000, s 130(1)(a).

Benefit from each offence

13.149 POCA 2002 requires that, even where the defendant has been convicted of the relevant number of offences, he or she must have benefited from each offence.⁹⁷ This can throw up some anomalous results. For example, a defendant who is convicted of four domestic burglaries will meet the requirement under the multiple counts trigger; but a defendant who is convicted of three domestic burglaries and who attempted a fourth domestic burglary will not meet the requirement.

13.150 Similar anomalies arise under the multiple convictions trigger. Under the current law the defendant must have benefited from an offence for which he was convicted on each occasion. The test does not encompass attempts to benefit which may be equally indicative of a “criminal lifestyle”. A defendant who is convicted of two burglaries and an attempted burglary will not be treated as having a “criminal lifestyle”.

13.151 The defendant in the latter two cases has clearly committed a series of offences from which he has benefited. He has attempted to continue with that series of offences to allow him to benefit, but has failed in that attempt. The continued pattern of the defendant’s actions is highly suggestive of a person who is leading a “criminal lifestyle” – at least it is identically suggestive as that of the defendant in the first case – yet the absence of benefit from the attempted burglary means that the lifestyle assumptions cannot be triggered by a “course of criminal activity”. This might be despite the defendant having gained thousands of pounds from the three offences and the attempt being in relation to a very expensive property, which raised the prospect of a very lucrative return.

13.152 Under our provisional proposals, TICs would form relevant offences for the course of criminal activity. Under the current POCA 2002 regime where only convictions are relevant, the requirement to have benefited from each offence may lead to even greater anomalies. We have already established that a defendant who is convicted of three domestic burglaries and one attempted burglary does not fall within the multiple counts trigger, because he or she has only benefited from three of the offences. However, such a burglar may also have asked for a further 10 domestic burglaries to be taken into consideration. Under the current law, despite having committed 14 offences, having benefited from 13 and having attempted to benefit from the 14th, the multiple counts trigger would not apply because the defendant had only benefited from three offences of which he or she had been convicted.

Consultation Question 39.

13.153 We provisionally propose that when the court considers each offence relevant to the course of criminal activity trigger, the court should consider both offences from which there was benefit and offences from which there was an attempt to benefit.

13.154 Do consultees agree?

⁹⁷ Proceeds of Crime Act 2002, s 75(3).

Overview of our provisional proposals

13.155 We provisionally propose that:

- (1) Conduct forms part of a course of criminal activity on the basis of multiple offending if:
 - (a) Over a period of six years the defendant has been dealt with by the court for {X} offences, whether because of conviction or because the offences were taken into consideration; or
 - (b) in the proceedings in which the defendant was convicted he was dealt with by the court for {X} offences, whether because of conviction or because the offences were taken into consideration; and
 - (c) the defendant benefited or attempted to benefit from those offences; and
 - (d) the total aggregate benefit from the offences for which the offender was dealt with by the court was at least {the threshold amount}.⁹⁸

The third test – an offence committed over a period of at least six months

13.156 A defendant can also be found to have a “criminal lifestyle” where he or she is convicted of an offence committed over a period of at least six months, from which the defendant has obtained a relevant benefit of at least £5,000.⁹⁹

13.157 In determining whether a defendant has committed an offence “over a period of at least six months” the court must have regard to the whole of the circumstances of the conviction. In a conspiracy case, a defendant will not fall into this lifestyle category if the period of his or her involvement was less than six months even although the total length of the conspiracy was greater than six months.¹⁰⁰

13.158 Moreover, where a defendant is convicted of multiple offences the benefit obtained must be linked to the continuing offence:

If the defendant is convicted of a conspiracy to defraud that lasted longer than six months and a separate count of theft from which he benefitted in the sum of £5,000, the third test will not be met.¹⁰¹

Analysis

13.159 The explanatory notes for section 75 of POCA 2002 offer little additional detail about this specific trigger for the lifestyle assumptions, other than that it was new as part of

⁹⁸ We deal with the issues relating to the financial threshold below at paragraphs 13.168 to 13.192.

⁹⁹ Proceeds of Crime Act 2002, s 75(2)(c) and s 75(4).

¹⁰⁰ *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601; *R v Molloy* [2013] EWCA Crim 682.

¹⁰¹ *Millington and Sutherland-Williams on The Proceeds of Crime* (5th ed 2018) para 9.43. In *R v Moss* [2015] EWCA Crim 713, [2015] Lloyd's Rep FC 397 the defendant pleaded guilty to four offences, two of which were continuing and two of which were not. The offences occurred in the context of the alleged illegal slaughter of unregistered cattle over a period of nearly two years. However, the continuing offences to which the defendant had pleaded guilty were not offences from which the defendant had obtained a benefit of more than £5,000.

the Proceeds of Crime Bill 2001.¹⁰² It must be taken to be an example of the more general description of the lifestyle categories, namely that the fact of a defendant having committed a continuing offence “gives reasonable grounds to believe that he is living off crime” and the defendant should therefore be required to account for the lawful origin of his or her assets.

13.160 To expand on this justification, the reverse burden mechanism is viewed as appropriate because a defendant, having committed a continuing offence for as long as he or she was not caught, or at the very least longer than six months, is likely to have committed other offences.

13.161 It is the fact of the time elapsed rather than anything else about the criminal conduct that is relevant. Relatively minor criminality committed over a prolonged period can form the basis for an inquiry into the defendant’s finances to generate benefit figures that could only be derived from significantly wider offending, significantly more serious crimes or both. This can be seen through two examples.

13.162 Firstly, in *R v Bahbahani*,¹⁰³ the defendant, who owned a property in west London, had converted an outbuilding into residential accommodation without planning permission. He was convicted of two offences of being in breach of an enforcement notice contrary to the Town and Country Planning Act 1990. The offences were committed over more than six months, and the defendant had benefited £26,000 from the offences. He therefore fell within the remit of section 75 and the lifestyle assumptions applied. Applying the assumptions, a confiscation order was made in the sum of £4,310,311. The judge concluded that the defendant “knew next to nothing” about five London properties that he owned and rejected the assertion that the properties had been funded from legitimate sources.

13.163 Secondly, in *R v Steed*,¹⁰⁴ the defendant was convicted of cheating the public revenue and the offences took place over a period of at least six months.¹⁰⁵ His benefit from particular criminal conduct was in the vicinity of £7,000. Applying the assumptions, the judge concluded the defendant’s benefit from general criminal conduct was £863,303. As the Court of Appeal observed:

The Judge then made various findings of criminal activity. He referred to money-laundering, drug-dealing, the possession of goods bearing false trademarks with a view to sale, the evasion of duty and benefit fraud. Relying on those findings the Judge concluded:

it may be that the defendant... would not be convicted on the criminal standard of all the matters to which I have referred. It is a question of viewing an overall picture and the conclusion I come to is that overall picture supports the contention that it is more likely than not that he was involved in criminal conduct over and above the count to which he pleaded guilty.

¹⁰² Explanatory notes to the Proceeds of Crime Act 2002.

¹⁰³ *R v Bahbahani* [2018] EWCA Crim 95, [2018] QB 1099.

¹⁰⁴ *R v Steed* [2011] EWCA Crim 75, [2011] Lloyd’s Rep FC 238.

¹⁰⁵ *R v Steed* [2011] EWCA Crim 75, [2011] Lloyd’s Rep FC 238 at [19].

... Those findings of criminal activity... demonstrated that the appellant was unable to establish on the balance of probabilities the extent to which the sources of his assets and expenditure were legitimate.

13.164 In the cases just cited the assumptions were applied to assets that went far beyond those which could have been obtained from the criminality for which the defendant was convicted and in relation to which no adequate explanation had been provided. Such cases therefore appear to justify the “course of conduct” trigger.

13.165 Unlike the course of criminal activity trigger, the prolonged criminality trigger does not require a clear link to a volume of past or present offending. Rather, a link to other offending is inferred. This is particularly pertinent in conspiracy cases. In the Parliamentary debates surrounding triggers in the context of the Proceeds of Crime Act 1995:

Conspiracy... is technically one crime, but it will have involved a series of criminal acts over a long period. It is important that prosecutors are not prevented from opting to prosecute on a charge of conspiracy simply because it would not necessarily trigger the confiscation provisions – in other words, getting over the hurdle of the two offences being brought before the court.¹⁰⁶

13.166 The prolonged criminality trigger therefore facilitates the effective confiscation of the proceeds of a conspiracy.

13.167 We consider that the trigger provides a way to enable confiscation of the full extent of the proceeds of crime in connection with offending that is serious or complex and which falls outside of other mechanisms for triggering the lifestyle assumptions. The additional financial threshold serves as a safeguard against casting the ambit of the trigger too widely. We therefore do not propose any material alteration to the prolonged criminality trigger.

The financial threshold

13.168 Where the “criminal lifestyle” assumptions are triggered by something other than a conviction for a schedule 2 offence, the defendant must have benefited by at least £5,000.¹⁰⁷

13.169 The decision to impose a threshold value before which the assumptions were applied in certain circumstances was a consequence of amendments during debate over the Proceeds of Crime Bill that became POCA 2002. It was not initially proposed that any threshold should apply in determining “criminal lifestyle”. However, there were concerns that the “criminal lifestyle” tests in non-schedule 2 cases potentially exposed “a defendant convicted of very trivial offences to severe consequences”.¹⁰⁸ For example, a defendant convicted of four shoplifting offences could be found to have a

¹⁰⁶ *Hansard* (HC), 31 Mar 1995, vol 257, col 1322.

¹⁰⁷ Proceeds of Crime Act 2002, s 75(3)(a); R Fortson QC, *Misuse of Drugs and Drug Trafficking Offences* (6th Ed 2011) p 656; See para 13.96 for a discussion of “relevant benefit”.

¹⁰⁸ *Hansard* (HC) 22 July 2002, vol 638, col 45.

“criminal lifestyle” and be treated in the same way as a criminal involved in serious organised crime.

13.170 Accordingly, a financial threshold was introduced to act as a “formal fetter to the authorities’ powers... to make it clear that confiscation orders will not be applied for unfairly”.¹⁰⁹ A threshold of £5,000 was intended to “ensure that an offender who is not convicted of one of the special scheduled offences can be identified as a “criminal lifestyle” offender only if he has benefited significantly from offences.”¹¹⁰

13.171 Although section 75(8) of POCA 2002 empowers the Secretary of State to vary the amount specified, it has not changed since the commencement of the Act.

13.172 During our pre-consultation discussions most agreed that the financial threshold served a useful function, but the current value was criticised for failing to capture “significant benefit” from criminal activity as Parliament intended.

13.173 We consider that the justification for a financial threshold in non-schedule 2 cases is a good one and that evidence of some substantial benefit or “considerable gain” ought to be required to trigger the application of the assumptions. However, it is not clear that £5,000 represents significant or considerable gain.

13.174 The £5,000 figure was first proposed because it was considered that “the Mr Bigs of this world are not interested” in sums below that.¹¹¹ As reflected in Parliamentary discourse during the passage of POCA¹¹² it is quite difficult to quantify what sum would be sufficiently large to generate interest by a “Mr Big”, and it does not appear that there was any data analysis that led to the figure being adopted. The figure adopted was therefore, to a large extent, arbitrary.

13.175 When the figure was proposed, reference was also made to £5,000 representing a “level 1 offence”.¹¹³ The discussion of “level 1” offences throughout the Committee Stage related to a fine threshold imposed for summary offences.¹¹⁴ This threshold was in fact £100. £5,000 represented “level 5” (the maximum on that fine scale). The sum of £5,000 could be taken to be intended to capture what might be termed the “higher end” of summary offending. However, this:

- (1) is speculative as to Parliamentary intention in light of the repeated references to “level 1”¹¹⁵; and

¹⁰⁹ *Hansard* (HC) 22 July 2002, vol 638, col 46.

¹¹⁰ *Hansard* (HC) 22 July 2002, vol 638, col 46.

¹¹¹ *Standing Committee B*, 4 December 2001, Col 434.

¹¹² *Standing Committee B*, 4 December 2001, Cols 446, 452.

¹¹³ *Standing Committee B*, 4 December 2001, Col 434.

¹¹⁴ *Standing Committee B*, 4 December 2001, Cols 428, 447; *Standing Committee B*, 29 November 2001, discussion of Clause 70.

¹¹⁵ In particular, the comments at Col 428: “where do we draw the line? That is a question for the Committee to answer. However, if you decide that offences of level 1 on the standard scale should still be included within the trigger provisions, it could be argued that you are going too far”.

- (2) conflates the punishment that was imposed on the defendant for substantive offending with what his or her benefit from that offending might have been.

13.176 Alternatively, the reference may have been an intended assertion that offences which lead to £5,000 in benefit are likely to be so minor that they will attract only the lowest level of fine. This may be both inaccurate¹¹⁶ and conflate benefit and punishment.

13.177 There is therefore no suitably reasoned starting point from which to recommend an amendment to the financial threshold. With this in mind, we have considered two alternatives.

13.178 One option could be to increase the financial threshold from £5,000 in line with inflation. Accounting for the change in the value of money, £5,000 in 2002 would have amounted to approximately £7,206 in 2020.¹¹⁷ Such an uplift would raise the threshold for triggering a finding of “criminal lifestyle”. However, whether it would raise the threshold to an appropriate level is questionable, given the absence of a reasoned foundation for adopting the £5,000 threshold in the first place.

13.179 An alternative option would be to consider the issue of the minimum wage.¹¹⁸ A defendant who obtains a minimum of £5,000 over six months is taken to have a “criminal lifestyle”. This is less than would be received by virtue of either the national minimum wage or the national living wage over the same period.¹¹⁹

13.180 If the £5,000 threshold is intended to reflect what would be worthwhile criminality for a Mr Big, it is doubtful he or she would wish to be in a worse financial person than a person who receives such a wage.

13.181 The national minimum wage for a person aged 24 over a six-month period is £7,995.¹²⁰ The national minimum wage is intended to provide a “wage floor”. It is not intended to be a “living wage...to provide enough for an employee or their dependants to live on” and “may need to be supplemented by other policy measures, principally in the tax and benefits fields, to produce enough for a family or household to live on”.¹²¹

13.182 The “national living wage” is set at a higher rate intended to more closely meet the needs of living rather than the “floor” of the minimum wage.¹²² When the rate is

¹¹⁶ Sentencing requires consideration of harm and culpability generally (Criminal Justice Act 2003, s 143(1)).

¹¹⁷ HM Treasury, *GDP Deflators at market prices and money GDP June 2020* (June 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896730/GDP_Deflators_Qtrly_National_Accounts_June_2020.xlsx (last accessed July 2020)

¹¹⁸ Although this option was open to Parliament at the time that POCA 2002 was enacted (the minimum wage was introduced by the National Minimum Wage Act 1998) it does not appear to have been considered.

¹¹⁹ Money Advice Service, *National Minimum Wage*, <https://www.moneyadviceservice.org.uk/en/articles/national-minimum-wage#national-minimum-wage-and-national-living-wage-rates-for-2020-21> (last visited July 2020).

¹²⁰ This has been reached by taking the national living wage hourly age for a 24 year old, multiplying it to reflect the average 37.5 hour working week, and applying this rate to a six month period.

¹²¹ The Low Pay Commission, *The Future Path of the Minimum Wage* (2014) Cm 8817 p4.

¹²² The Low Pay Commission, *The National Minimum Wage: Low Pay Commission Report Autumn 2016 Report* (2016) Cm 9272.

applied to a person aged 25 or over for a six-month period, the national living wage is £8,502.

13.183 The fact that a £5,000 gain when spread over six months in accordance with the lifestyle trigger is insufficient to meet both the national living wage and the national minimum wage (a basic measure for subsistence) suggests that £5,000 is an inadequate sum to constitute a “criminal lifestyle”. Even if the £5,000 figure is adjusted for inflation to £7,206 it would still fall below the national minimum wage.

13.184 We consider that a financial threshold at which it may become more worthwhile than not to commit crime should at least reflect the national living wage as a measure on which a person could subsist without reliance upon additional state support. As set out above, this is approximately £8,500.

13.185 International threshold comparators from Australia,¹²³ Norway¹²⁴ and Hong Kong¹²⁵ show that the financial threshold in those jurisdictions is higher than under POCA 2002. The following table is based upon average annual exchange rates produced by HMRC for the year ending March 2020.¹²⁶

Currency	Sum	Exchange rate	UK equivalent
Australian \$	10,000.00	0.5571	£5,571
Norwegian Kroner	100,000.00	0.0918	£9,180
Hong Kong \$	100,000.00	0.0966	£9,660

13.186 A figure of £8,500 appears to be generally aligned with the thresholds applied in other jurisdictions, particularly when adjusted for inflation.

13.187 We considered proposing that any threshold be automatically adjusted for inflation, but concluded that a frequently changing figure might produce uncertainty. We therefore consider that a degree “future-proofing” would be desirable. This could be achieved:

- (1) for the short-term, by applying HM Treasury’s five year inflation forecast to set the threshold.¹²⁷ This would uplift the £8,500 figure to £9,421. For simplicity we consider that adopting a round figure of £9,500 may be preferable.
- (2) for the long-term, by requiring that legislation provides that the Secretary of State must review the threshold every five years.

¹²³ Proceeds of Crime Act 2002, s 338.

¹²⁴ See J Bought *The limits of asset confiscation: on the legitimacy of extended appropriation of criminal proceeds* (1st ed, 2017) p 43, who derives this figure from analysis of the Norwegian case law.

¹²⁵ Organised and Serious Crimes Ordinance Cap 455 (HK), ss 8(4) and 8(6).

¹²⁶ HMRC Guidance, *Spot rates on 31 March 2020*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/877368/Spot-rates-on-31-March-2020.csv/preview (last viewed July 2020).

¹²⁷ HM Treasury, *GDP Deflators at market prices and money GDP June 2020* (June 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896730/GDP_Deflators_Qtrly_National_Accounts_June_2020.xlsx (last accessed July 2020)

13.188 Having set out this analysis and given the lack of reasoned justification behind the £5,000 threshold as currently adopted, we seek consultees views on what the appropriate financial threshold might be.

13.189 During our fact-finding some queried whether such a threshold ought also to apply to schedule 2 offences. As we observed above, the schedule 2 offences are held together, generally, by the fact that they concern transactions in the criminal economy. We therefore consider that the risk of bringing lower level offenders within the ambit of the assumptions is materially lower than with the other triggers. Accordingly, we do not propose the application of a financial threshold to schedule 2 offences.

Consultation Question 40.

13.190 We invite consultees views about whether the financial threshold for triggering the lifestyle assumptions should be raised, and if so whether it should reflect:

- (1) the current £5,000 threshold, adjusted for inflation;
- (2) the national minimum living wage obtained over a period of six months, adjusted for inflation;
- (3) another amount (and if so, how much).

Consultation Question 41.

13.191 We provisionally propose that confiscation legislation should mandate that the financial threshold for triggering the lifestyle assumptions be reviewed by the Secretary of State every five years.

13.192 Do consultees agree?

An additional evidential threshold

13.193 During our fact-finding some stakeholders suggested that the prosecution should have to go beyond the “tick box” exercise of satisfying the triggers and adduce at least some evidence to suggest that the assumptions should apply in each individual case. This was sometimes referred to as a requirement to adduce “prima facie” evidence that the assumptions should apply.

13.194 Extended confiscation could have a potentially significant impact upon a defendant and his or her property and so any application of the assumptions requires a solid foundation.¹²⁸ However, the triggers themselves provide such a foundation. As the preamble to the EU Directive on extended confiscation states:

When determining whether a criminal offence is liable to give rise to economic benefit, Member States may take into account the *modus operandi*, for example if a

¹²⁸ Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union 2014/42/EU, Official Journal L 127/39 recital, para 21.

condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences.¹²⁹

13.195 As this quotation suggests, submissions about why the lifestyle assumptions ought to apply would, in all likelihood, rest on the nature of the offence, the regularity of the offence or the generation of substantial profits. These issues are encompassed by the triggers themselves.

13.196 As we have discussed, the assumptions are intended to capture criminality that might not otherwise be subject to confiscation because of a knowledge differential between the prosecution and defence. To put an additional evidential burden upon the prosecution would arguably run counter to this purpose.

13.197 We note that any injustice potentially caused by the application of the assumptions may be tempered by the ability to disapply the assumptions if the defendant shows that it would be incorrect to apply them or that there would be a serious risk of injustice. Furthermore, we propose below additional prosecutorial and judicial discretion to minimise any risk of injustice.

13.198 We therefore do not propose to introduce a requirement that prosecutors should have to produce “prima facie” evidence that the assumptions should apply beyond that required to satisfy the triggers themselves.

Consultation Question 42.

13.199 If the triggers are satisfied, we do not propose that prosecutors should be required to pass an additional evidential threshold before the assumptions apply.

13.200 Do consultees agree?

Greater discretion – all triggers

13.201 Under the Criminal Justice Act 1988, there was a dual discretion whether to apply the assumptions. The prosecutor was required to give notice that a qualifying offence, in his or her opinion, was one in which it was appropriate for the assumptions to apply. The court could apply the assumptions if it thought fit.¹³⁰ A policy decision was made when the 2002 Act was introduced to remove the prosecutorial discretion. Whilst the court may disapply an assumption where it would lead to a serious risk of injustice,¹³¹ this discretion has been narrowly construed (see 13.213 below).

13.202 An advantage of a mandatory approach to the assumptions is that the triggers are “completely factual and therefore provide legal certainty.”¹³² The mandatory nature of the assumptions was viewed as essential to send “a clear message that there will be

¹²⁹ Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union 2014/42/EU, Official Journal L 127/39 recital, para 21.

¹³⁰ Criminal Justice Act 1988, s 72AA (1)(b) and (3).

¹³¹ Proceeds of Crime Act 2002, s 10(6)(b).

¹³² *Standing Committee B*, 4 December 2001, Col 439.

no profit from crime”.¹³³ By making the application of the assumptions mandatory it was also intended that the perceived judicial approach to confiscation would become more rigorous.¹³⁴ During the debate on the Bill in 2001, Stephen Hesford MP stated that “the judicial culture must change. Often, half the judiciary were not interested in chasing assets, and the other half were ham-fisted in doing so”.¹³⁵

Prosecutorial discretion

13.203 The mandatory nature of the assumptions has been criticised for reducing the role of the prosecutors to essentially a “checklist exercise”.¹³⁶ A clear message that there will be no profit from crime must be tempered with realism. Prosecutions are not pursued at all costs. Rather, prosecutors are required to weigh up whether prosecution is in the public interest, including whether it is a proportionate response.¹³⁷ Whilst it is usually the case that a prosecution will take place, the public interest might be better served by not prosecuting.

13.204 We heard repeatedly during pre-consultation discussions that prosecutors may choose to disregard the mandatory nature of the assumptions¹³⁸ to achieve a result that is both realistic and proportionate. For example, in *R v Kohali*¹³⁹ an agreed confiscation order for a continued breach of an enforcement notice arising from an illegal extension was limited to the defendant’s benefit from particular criminal conduct. The offence in question had been committed over a period lasting well over six months and a benefit far greater than £5,000 was obtained. The prolonged criminality trigger in section 75(2)(c) POCA 2002 was therefore satisfied and benefit should have been calculated with reference to general criminal conduct. Whilst it was mandatory to apply the assumptions, this was a case in which the assumptions would have served no just purpose. The isolated (but lengthy) offence gave no suggestion that the defendant had made more extensive gains from a “criminal lifestyle”.

13.205 We heard during our pre-consultation discussions that there are many cases in which the resources required to explore fully the assumptions would be wholly disproportionate. 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.

13.206 The alternative to acting in spite of the wording of the legislation is to elect not to bring proceedings at all. Section 6 of POCA 2002 gives prosecutors discretion as to

¹³³ *Hansard* (HC), 30 October 2001, vol 373, col 820.

¹³⁴ *Hansard* (HC), 30 October 2001, vol 373, col 793.

¹³⁵ *Hansard* (HC), 30 October 2001, vol 373, col 798.

¹³⁶ J Fisher QC and J Bong Kwan, “Confiscation: deprivatory and not punitive, back to the way we were” [2018] 3 *Criminal Law Review* 192 at 198.

¹³⁷ Crown Prosecution Service, “Code for Crown Prosecutors” (2018) para 6.1 <https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf> (last visited July 2020).

¹³⁸ See the calculation of benefit following the first of the two sets of convictions in *R v Chahal* [2014] EWCA Crim 101, [2014] 2 Cr App R (S) 35.

¹³⁹ *R v Kohali* [2015] EWCA Crim 1757, [2016] 1 Cr App R (S) 30.

whether to bring confiscation proceedings. In deciding whether to institute proceedings prosecutors may therefore consider the extent and impact of an order. CPS guidance on instituting confiscation obliges a prosecutor to consider whether the statute would produce a result where the benefit figure would include “property obtained in the most part legitimately by the defendant, and to which the defendant would have been entitled but for his criminal conduct.”¹⁴⁰ In determining whether a case is a “confiscation” case, consideration may also be given to whether an order would serve any useful purpose where a defendant lacks identifiable assets to satisfy an order.¹⁴¹

13.207 Prosecutors may therefore decide not to pursue confiscation at all to achieve a fair and just outcome. However, such an approach is “all or nothing”. Prosecutors cannot elect to proceed simply on the basis of benefit from particular criminal conduct and to disapply the assumptions. We consider that if a realistic and enforceable order could be made through focussing on particular criminal conduct and the prosecution considers that it is in the public interest only to consider particular criminal conduct, then it should be entitled to do so.

13.208 Prosecutors are trusted to exercise discretion 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 discretion with regards to the application of the assumptions. In the same way that charging decisions are taken transparently, prosecutors should be required to record their decisions as to whether to seek application of the assumptions.

13.209 We therefore provisionally propose that prosecutors should be permitted to exercise discretion as to whether to seek application of the assumptions. We consider that this will facilitate the consideration of the public interest in determining whether extended confiscation is appropriate.

13.210 We discuss how appropriate negotiation might be incentivised in Chapter 9 but for present purposes it may be observed that more flexibility in the statute would also facilitate negotiation in appropriate cases.

Consultation Question 43.

13.211 We provisionally propose that prosecutors should be able to exercise discretion as to whether to seek application of the assumptions.

13.212 Do consultees agree?

¹⁴⁰ Crown Prosecution Service, *Guidance for prosecutors on the discretion to instigate confiscation proceedings* (2009) p 12, https://www.cps.gov.uk/sites/default/files/documents/news/prosecutors_discretion_280509.pdf (last visited July 2020).

¹⁴¹ Crown Prosecution Service, *Proceeds of Crime – Legal Guidance* (2019), <https://www.cps.gov.uk/legal-guidance/proceeds-crime> (last viewed July 2020).

Judicial oversight

13.213 Under the current law the court may act as a check on the power of the prosecution to institute confiscation proceedings through its power to stay proceedings as an abuse of process.¹⁴² In *R v Shabir*,¹⁴³ the Court of Appeal observed that judges should exercise “considerable caution” in staying proceedings, and that stays should be confined to cases of true oppression. In that case the prosecution had sought a confiscation order in a sum exceeding £400,000. The defendant, a pharmacist, had inflated figures in several monthly claims for prescriptions dispensed. He was convicted of six counts. The defendant obtained £464 above that which he would have been legitimately entitled to but for the criminality. However, because the total receipts (nearly £180,000) were tainted by the dishonesty, the prosecution had pursued all the funds. The case, by virtue of the number of counts, was also a “criminal lifestyle” case. The defendant conceded he could not rebut one of the assumptions and a confiscation order was made in the sum of £212,464. The Court ultimately held it was an abuse of process. In so doing it was observed:

it is clearly not sufficient to establish oppression, and thus abuse of process, that the effect of confiscation will be to extract from a defendant a sum greater than his net profit from his crime(s). That is inherent in the statutory scheme.¹⁴⁴

13.214 The ability of the court to act as a check on prosecutorial discretion may be required in certain circumstances. This can be explained in the context of money laundering.

13.215 Firstly, a person facilitating the transfer of money may clearly have committed a one-off offence under section 327 of POCA 2002 (a schedule 2 offence). In such circumstances it may be inappropriate to apply the assumptions.

13.216 Secondly, section 328 (a schedule 2 offence) is wide enough to encompass large corporations such as a bank with potentially unforeseen consequences. In *Squirrell Ltd v National Westminster Bank Plc* Laddie J commented that the purpose of the offence was

not to turn innocent third parties such as [banks] into criminals, but to put pressure on such third parties to provide information to the relevant authorities to enable the latter to obtain information about possible criminal activity and to increase their prospects of being able to freeze the proceeds of crime.¹⁴⁵

13.217 Third, parties who might commit an offence under section 328 have a defence if they facilitate a transaction that they suspected to be criminal if they had first reported the suspicion to the authorities and obtained consent from the National Crime Agency to proceed with the transaction.¹⁴⁶ Nevertheless, section 328

¹⁴² See A Choo, *Abuse of process and judicial stays of criminal proceedings* (2nd ed 2008); See also Crown Prosecution Service, *Abuse of Process – Legal Guidance* (2018), <https://www.cps.gov.uk/legal-guidance/abuse-process> (last viewed May 2020).

¹⁴³ *R v Shabir* [2008] EWCA Crim 1809, [2009] 1 Cr App R (S) 84.

¹⁴⁴ *R v Shabir* [2008] EWCA Crim 1809, [2009] 1 Cr App R (S) 84 at [34].

¹⁴⁵ *Squirrell Ltd v National Westminster Bank Plc* [2005] EWHC 664, [2006] 1 WLR 637 at [16].

¹⁴⁶ Proceeds of Crime Act 2002, s 328(2).

potentially affects not only deliberate or dishonest offenders, but also banks, accountants and legal advisers, etc., who become suspicious as to the legality of the means by which their clients have acquired any of the funds or other property they are asked to deal with or manage.¹⁴⁷

If the assumptions are applied to a large corporation it may impose a reverse burden to account for the legitimacy of thousands of transactions going through its accounts. Again, it may be inappropriate to apply the assumptions.

13.218 Thirdly, a defendant might be charged in such a way as to bring him or her within the assumptions. For example, a money laundering charge could be brought under section 327 of POCA 2002 (a schedule 2 offence) instead of a charge of theft (not a schedule 2 offence).¹⁴⁸ Whilst the Supreme Court has endorsed the approach adopted in cases such as *R (Wilkinson) v DPP*¹⁴⁹ and *R v Rose*¹⁵⁰ of discouraging “inappropriate use of the provisions of POCA 2002 to prosecute conduct which is sufficiently covered by substantive offences”,¹⁵¹ ultimately it is a decision for the prosecutor.¹⁵²

13.219 Similarly, a defendant who conceals money may be charged with an offence of concealment of criminal property pursuant to section 327 POCA 2002 (a schedule 2 offence) or possession of criminal property pursuant to section 329 POCA 2002 (not a schedule 2 offence).

13.220 We take the view that it is appropriate for the court to have the power to consider whether a potentially lengthy enquiry into the application of the assumptions is in the interests of justice in all of the circumstances of the case.

13.221 In *R v Hertford UK Ltd*, the judge noted that “stacking the indictment” to engage the “criminal lifestyle” provisions may, in some cases, amount to an abuse of process. We have dealt with the implications of ARIS in Chapter 4 and as long as such a scheme exists it is likely that the financial incentives on prosecutorial and investigative agencies to pursue lifestyle assumptions will persist. A safety valve of judicial discretion might disincentivise the (inappropriate) overloading of indictments in the first instance. Judicial discretion as to whether to apply the assumptions has the advantage over the power to stay that the option to pursue benefit from particular criminal conduct is clearly left open. Confiscation therefore remains possible even though extended confiscation has been ruled out. The court is not required to resort to the staying of the confiscation proceedings in their entirety and therefore the defendant is not permitted to retain the benefit of his or her proceeds of crime.

13.222 The judicial discretion to disapply an assumption to avoid a serious risk of injustice, found in section 10(6)(b) of POCA 2002 applies to an individual assumption and not the assumptions as a whole. It therefore does not allow “front-end” consideration as to

¹⁴⁷ Blackstone’s Criminal Practice (30th ed 2019) B21.19.

¹⁴⁸ See by way of closely related example *R v Roberts* [2014] EWCA Crim 1475, [2015] Crim LR 458.

¹⁴⁹ *Wilkinson v DPP* [2006] EWHC 3012 (Admin).

¹⁵⁰ *CPS v Rose* [2008] EWCA Crim 239, [2008] 1 WLR 2113 at [20].

¹⁵¹ *R v GH* [2015] UKSC 24, 1 WLR 2126 at [49].

¹⁵² *Wilkinson v DPP* [2006] EWHC 3012 (Admin); *R v Roberts* [2014] EWCA Crim 1475, [2015] Crim LR 458.

whether the assumptions should apply at all. Furthermore, as noted at paragraph 13.29, its scope has largely been limited to preventing multiple counting of the same property as “benefit”, rather than to more general considerations of justice. Therefore, the judicial discretion found in section 10(6)(b) does not directly address the problem of manifest injustice on the face of the application.

13.223 Furthermore, as we discuss in Chapter 5, whilst the concept of “proportionality” may be a safeguard, its application has been narrowly construed and so again it does not necessarily provide a relevant safeguard in connection with the application of the assumptions.

13.224 To combat this, we provisionally propose the introduction of a judicial discretion in connection with the application of the assumptions. In doing so, we are conscious that any changes to the application of the lifestyle assumptions should avoid the creation of unnecessary uncertainty in the application of the law which is likely to lead to unnecessary appeals. We consider that concerns about the inappropriate exercise of discretion can be managed through:

- (1) our provisional proposals on judicial training and ticketing;¹⁵³
- (2) our provisional proposal that the objectives of the confiscation legislation are set out in statute (as to which see Chapter 5), which will assist judges in exercising the discretion.

Consultation Question 44.

13.225 We provisionally propose that:

- (1) if the court decides that the defendant has a “criminal lifestyle”, the court may nevertheless determine that it is contrary to the interests of justice to apply the assumptions, taking into account the statutory purpose of confiscation.
- (2) if the court decides that it is contrary to the interests of justice to apply the assumptions, the court should determine benefit with reference to particular criminal conduct.

13.226 Do consultees agree?

13.227 Do consultees consider that (in addition to considering the statutory purpose of confiscation) there are any particular indicative factors that could assist the court in making this determination?

The application and rebuttal of the assumptions

13.228 We now turn to how the assumptions are applied having determined that a defendant has a “criminal lifestyle”. As described above, the assumptions are the mechanism by

¹⁵³ See Chapter 10.

which the burden is shifted to the defendant to establish that money expended and property received or held does *not* represent his or her benefit from crime.

13.229 In general, the principles are relatively straightforward. It is the defendant's responsibility to lead evidence to establish that the application of an assumption would be wrong.¹⁵⁴

Property transferred to the defendant (section 10(2)) (the "property transferred assumption")

13.230 The first assumption, set out in section 10(2) of POCA 2002, is that "any property transferred to the defendant at any time after the relevant day was obtained by him as a result of his general criminal conduct, and at the earliest time he appears to have held it". It includes, for instance, money flowing into any bank account held by the defendant.

Expenditure assumption (section 10(4))

13.231 The third assumption, set out in section 10(4) of POCA 2002, is that "any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct."

13.232 "The actual question is not what the purpose of the expenditure was, but rather whether the *source of the expenditure* was legitimate or derived from criminal conduct."¹⁵⁵

Property held assumption (section 10(3)).

13.233 A defendant who holds property at any time after the date of conviction is assumed to have obtained that property in connection with his or her general criminal conduct, irrespective of when the property was first acquired. Unlike the other two substantive assumptions, there is in effect no time limitation on the "property held" assumption.

13.234 The judgment of the Court of Appeal *R v Briggs*¹⁵⁶ illustrates the approach of the court in this regard. The prosecution sought to have included in the calculation of benefit the full value of the defendant's equity in a house. The defendant's interest had been acquired in 1999 and the criminality that gave rise to the application of the assumptions had taken place in 2015. Section 10(3) had been applied, and absent evidence to the contrary, the defendant's equitable share, amounting to £104,000, was included as benefit from general criminal conduct.

13.235 On appeal, the defendant had tried to argue that it was disproportionate or that there was a serious risk of injustice in including the property. The Court held that questions of proportionality are relevant to the later inquiry (determination of the available amount) and not to the assessment of benefit.¹⁵⁷ Moreover it was open to the judge on

¹⁵⁴ Proceeds of Crime Act 2002, s 10(6)(a).

¹⁵⁵ R Fortson QC, *Misuse of Drugs and Drugs Trafficking Offences* (6th ed 2011) p 685.

¹⁵⁶ *R v Briggs* [2018] EWCA Crim 1135; *R v Brack* [2007] EWCA Crim 1205, (2007) 104 (19) LSG 26 offers another example of property acquired significantly earlier than the criminal conduct that gave rise to the application of the assumptions.

¹⁵⁷ *R v Briggs* [2018] EWCA Crim 1135 at [16].

the evidence before him to find that there was not a serious risk of injustice¹⁵⁸ nor had the assumption been shown to be incorrect. The period of time having elapsed since the acquisition of the interest in some property, of itself, will not create the serious risk of injustice required.

13.236 There is long standing authority for this position, which was the same under previous iterations of confiscation legislation.¹⁵⁹ The rationale has been summarised in the following terms:

Parliament drafted section 10(3) in the belief that, a person who holds property is well placed to explain how he or she came by it and to be able to produce supporting documents or other evidence of its lawful origin.¹⁶⁰

13.237 There is, however, a risk that the application of the assumption in these circumstances leads to unfairness even if it does not create injustice in the sense required by section 10(6) of POCA 2002. Jonathan Fisher QC and Justin Bong Kwan argue:

The statutory framework around the statutory assumptions in section 10 needs to be re-worked. If the acquisition of assets cannot be linked to identifiable criminal conduct, whether the subject of a criminal charge or not, then it should be ignored for the purposes of determining a defendant's benefit. Otherwise, benefit will continue to be determined on a vague and unsubstantiated basis, with the link between the acquisition of assets and criminal conduct broken.¹⁶¹

13.238 This argument, while framed generally by the authors, is particularly pertinent to the application of the "property held" assumption in the circumstances identified above. The approach prescribed by section 10(3)(a) takes the idea of the "criminal lifestyle" to its logical limits. It takes as its starting point property held *now*, but in effect puts a defendant's whole life in scope for the purposes of determining benefit. This includes property acquired prior to the age of criminal responsibility, extending theoretically to a defendant's birth.¹⁶²

13.239 Fisher and Bong Kwan emphasise that the breaking of the link between the crime and the finding of the benefit makes it more likely that confiscation goes beyond the principle of restoring the *status quo ante* and strays into the domain of the punitive. The length of time between the acquisition of the asset in question and the conviction(s) that brought the assumptions into play may tend against assuming it was criminally derived. At the relevant (earlier) point in time the defendant may not yet have commenced a "life of crime". It is also arguable that the rationale for the six year period (seemingly linked to the period for which records are ordinarily retained) applies with similar force to the origins of long-held property.

¹⁵⁸ *R v Briggs* [2018] EWCA Crim 1135 at [22].

¹⁵⁹ *R v Bentham and Clarke* [1997] 1 WLR 557.

¹⁶⁰ R Fortson QC, *Misuse of Drugs and Drugs Trafficking Offences* (6th ed 2011) p 689.

¹⁶¹ J Fisher QC and J Bong Kwan, "Confiscation: deprivatory and not punitive, back to the way we were" [2018] 3 *Criminal Law Review* 192 at 200.

¹⁶² R Fortson QC, *Misuse of Drugs and Drugs Trafficking Offences* (6th ed 2011) p 689.

13.240 A countervailing argument might be that the issue should generally become less relevant in time, as individuals' financial records are more likely to be digitally held and therefore retained for longer periods (albeit not compulsorily). By 2030, for example, it should be easier for a defendant to produce evidence of how a deposit was paid or the documentary evidence for a mortgage advanced in 2014 when compared to someone in Mr Briggs' position.

13.241 As financial-record keeping changes, it may be that the six-year period will be revisited across the assumptions. Until such a time we consider that there should be a parity of expectation as to evidence across the assumptions. In practice it might be reasonable to expect a defendant to evidence how a mortgage has been serviced in the six years prior to the initiation of proceedings (the expenditure assumption), but not to expect records to have been retained for property acquired long before the six year period (the property held assumption).

13.242 To create parity between the assumptions it would arguably be fair to limit the property held assumption to a six year period. However, in effect, this would merely replicate the property transferred assumption. The property held assumption serves a separate and useful purpose in that the prosecution is only obliged to identify property held since the time of conviction. To require the prosecution to identify when property was first held by the defendant would place a potentially onerous burden on it. The prosecution may not know, for example, whether an eight-year-old asset was purchased by the defendant eight years ago, or transferred to the defendant 6 years ago. The property held assumption therefore supplements the property transferred assumption and captures assets about which there may be a lack of evidence available to the prosecution. As set out elsewhere in this chapter, it is precisely this knowledge differential that the assumptions are intended to address.

13.243 In light of the different purposes of the property transferred and the property held assumptions, we do not propose limiting the property held assumption to property held for the six year period prior to the confiscation proceedings. However, we provisionally propose that the law should recognise that it may be more difficult for a defendant to rebut the assumption outside the six year period.

13.244 Historically, it has been the case that a defendant must provide "clear and cogent" evidence to discharge this burden. "Vague and generalised assertions" will rarely provide the court with sufficient evidence to do so.¹⁶³ Where a defendant lacks documentation it will therefore be difficult to rebut the burden. We propose that the position be clarified to ensure that an inflated benefit figure is not reached purely because of a lack of documentation. We provisionally propose that the property held assumption be subject to a clarification to the effect that in determining whether there would be a serious risk of injustice if the assumption were applied, the court should consider:

- (1) any oral or documentary evidence put before the court; and

¹⁶³ *R v Panesar* [2008] EWCA (Crim) 1643; compare *R v O'Shea* [2015] EWCA Crim 1395, [2015] *Criminal Law Review* 995.

- (2) if documentary evidence is not put before the court, the reason why documentary evidence was not put before the court and the validity of that reason.

13.245 A defendant who had purchased an asset more than six years ago and who satisfied the court that he or she was genuinely unable to produce documentary evidence – having put before the court all of the steps that they had taken to obtain such evidence – may be given the benefit of the doubt.

13.246 A defendant, however, who simply contends that they were never in the habit of keeping records is less likely to be given the benefit of the doubt. As the Court of Appeal observed in *R v Jones*, a defendant who chooses

to operate their business dealings in such a way as to deal only in cash and to keep no records of any kind whatsoever they have to take the consequences that may arise: not least for the purposes of the potential application of the Proceeds of Crime Act 2002.¹⁶⁴

Consultation Question 45.

13.247 We provisionally propose that the “serious risk of injustice” test be clarified in its application to the property held assumption, to indicate that in determining whether there would be a serious risk of injustice if the assumption were applied, the court should consider:

- (1) Any oral or documentary evidence put before the court; and
- (2) If documentary evidence is not put before the court, the reason why documentary evidence was not put before the court and the validity of that reason.

13.248 Do consultees agree?

Unencumbered property (section 10(5))

13.249 The final assumption is slightly different. It presumes any property the defendant has been shown to have obtained (either by the application of the assumptions or by other means) to be free of any other interest in it.

13.250 Stakeholders have not raised any concerns with this assumption, and we do not believe any reform is necessary in this regard.

¹⁶⁴ *R v Jones* [2006] EWCA Crim 933 at [20].

Consultation Question 46.

13.251 We do not propose any reforms to the assumption that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he or she obtained it free of any other interests in it.

13.252 Do consultees agree?

13.253 If consultees do not agree, what reforms to this assumption do consultees consider might be appropriate?

Rebutting the assumptions

13.254 Section 10(5) provides that where a defendant can show an assumption is incorrect, it ought not to be applied. For example, if a defendant can establish funds flowing into a bank account were derived from legitimate income, the assumptions should not apply to those transfers.

13.255 We do not propose significant changes to the rebuttal provision in section 10(5). Instead it is envisioned that cases where it would be inappropriate to apply the assumptions *at all* will be excluded from the lifestyle regime by greater discretion.¹⁶⁵ Having decided that the assumptions should apply, the reverse burden mechanism ought to be allowed to play out.

13.256 The court has the residual discretion to avoid any particular injustice using the existing power in section 10(6).

¹⁶⁵ See para 13.222 above.

Chapter 14: Codifying case law on benefit

INTRODUCTION

- 14.1 Since the Proceeds of Crime Act 2002 (“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. In the case of *R v Perrin* Lord Justice Davis introduced the judgment on the issue of benefit as “yet another appeal arising out of the Proceeds of Crime Act 2002.”¹
- 14.2 During our fact-finding 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.
- 14.3 The courts have emphasised that “guidance should ordinarily be sought in the statutory language rather than in the proliferating case law”.² Against that background, in this chapter we consider whether principles developed in the case law, whether directly connected to confiscation or inextricably linked to confiscation, should be incorporated into any reformed statutory provisions to provide clarity and certainty as to the law in respect of “benefit” from criminality.
- 14.4 It may not always be appropriate to seek to codify principles into a criminal law statute. For example, some of the legal principles that we discuss are detailed and may defy simple articulation in a clear and straightforward statutory provision. Furthermore, some of the principles fall outside of a criminal law context and it may not be appropriate for the criminal law to seek to legislate on principles that are well established in civil law.
- 14.5 In those circumstances we consider whether consolidation of certain principles in a Criminal Practice Direction or in non-statutory guidance may be appropriate. Criminal Practice Directions guide participants in proceedings before the criminal courts, and often outline relevant principles. For example, in the context of sentencing, the Criminal Practice Direction sets out relevant principles from case law on the seeking of advance indications of sentence and on the factual basis of a guilty plea.³
- 14.6 In our report on Matrimonial Property, Needs and Agreements, we recommended that the Family Justice Council produce non-statutory guidance for judges and court users on “financial needs”. We observed that:

¹ *R v Perrin* [2014] EWCA Crim 1556 at [1]; see also similar comments in *R v Paivarinta-Taylor* [2010] EWCA Crim 28 [2010] 2 Cr App R (S) 90 at [29]; *R v Soneji* [2003] EWCA Crim 1765, [2004] 1 Cr App R (S) 34 at [3].

² *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [48(4)].

³ Criminal Procedure Rules, Practice Direction VIII, Sentencing C: Indications of Sentence.

Clearly guidance cannot change the law. In answer to the concerns raised by the Family Law Bar Association, it cannot be treated as statute or as law, nor can it bind the courts. But the existence of guidance does not threaten the rule of law in any way. Guidance can disseminate information about the ways in which the courts' discretion is currently exercised; and it can encourage the use of discretion in a particular way and with a particular objective.⁴

14.7 Such guidance has been issued by the Family Justice Council and is in its second edition. In the foreword to the second edition, Sir James Munby described how the guidance "provides a succinct summary of the law as explained and developed in the leading cases. It also includes a number of helpful case studies of common scenarios...the feedback from judges, and practitioners, to the first edition of this Guide was very positive".⁵ Guidance has the advantage of being easy to update.

14.8 Where appropriate, we consider the principles from the case law against the factors set out by the Supreme Court in *R v Ahmad* to assist in the interpretation of POCA 2002:

When faced with an issue of interpretation of the 2002 Act [it is] very important to bear in mind the overall aim of the statute, the need for practicality, and Convention rights.

[1] The overall aim of the statute is to recover assets acquired through criminal activity, both because it is wrong for criminals to retain the proceeds of crime and in order to show that crime does not pay.

[2] Practicality involves ensuring that, so far as is consistent with the wording of the statute and other legal principles, the recovery process, both in terms of any hearing and in terms of physically locating and confiscating the assets in question, is as simple, as predictable, and as effective, as possible.

[3] Defendants are entitled to their Convention rights, in particular to a fair trial under article 6 [of the European Convention on Human Rights] and are only to be deprived of assets in accordance with [article 1 Protocol 1 of the European Convention on Human Rights].⁶

14.9 The principles that have developed in case law which we consider in this chapter are in connection with:

- (1) Joint benefit.
- (2) Assets tainted by criminality.
- (3) Evasion of import duties on tobacco.

⁴ Matrimonial Property, Needs and Agreements Law (2014) Law Com No 343, at [3.86].

⁵ Family Justice Council, *Guidance on "Financial Needs" on Divorce* (2nd ed 2018) p 3. <https://www.judiciary.uk/wp-content/uploads/2018/04/guidance-on-financial-needs-divorce-2nd-edition-april-2018.pdf> (last visited July 2020).

⁶ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [38].

- (4) Treating benefit to a company as benefit of an individual defendant.
- (5) Common intention constructive trusts.

JOINT BENEFIT

Individual liability for benefits that were jointly obtained

14.10 In *R v Ahmad* the Supreme Court addressed the question of “the proper approach for the court to adopt, and the proper orders for the court to make, in confiscation hearings... when a number of people have been involved in the commission of a crime which resulted in property being acquired by them together”.⁷

14.11 According to the Supreme Court in *R v Ahmad* “joint ownership” has a very specific meaning.

Lawful joint owners enjoy “unity of possession”, which means that each co-owner is entitled to possession of the whole of the asset, “unity of interest”, which means that each co-owner is entitled to an equal interest as against the other co-owners, and “unity of time”, which means that each co-owner acquired his interest at the same time.⁸

14.12 It is arguably unrealistic to suggest that co-conspirators would think of themselves as “joint owners” in the legal sense. For example, a conspirator is unlikely be happy for a fellow co-conspirator to appropriate all of the proceeds of a crime for himself or herself on the basis that he or she has a “unity of interest” and is therefore strictly entitled to all of the proceeds.

14.13 The concept of joint ownership has been described as an “esoteric concept...remote from the realities of life”.⁹ As the Supreme Court observed in *R v Ahmad*,

insofar as technical English property law concepts are concerned, it may be more accurate to refer to several conspirators acquiring possession in common of any asset or money, rather than jointly owning the asset or money.¹⁰

14.14 “Owners in common enjoy unity of possession, but do not need to have unity of interest or of time, so they can have different interests, as between each other”.¹¹ Applying the concept of ownership in common to determine the extent of benefit would mean that co-conspirators with different roles and different places on the hierarchy could be treated as having obtained such a proportion of the total benefit as might, for example, reflect the co-conspirator’s position on the hierarchy or any agreement as to distribution of assets between the conspirators.

⁷ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [26].

⁸ Above at [43].

⁹ *Burton v Camden LBC* [2000] 2 AC 399.

¹⁰ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [44].

¹¹ Above [43].

14.15 Although the Supreme Court recognised that “ownership in common” may more accurately reflect benefit in a conspiracy,¹² the Supreme Court expressly rejected adopting a test for apportionment in confiscation cases based on “ownership in common” because legitimate ownership and “obtaining” property through crime under POCA are distinct concepts. The Supreme Court cited the example of two burglars stealing a television:

The burglars do not become the owners of the television, and the argument about them being “joint owners” or “owners in common” proceeds on a wrong premise. Each burglar has usurped the rights of the owner.¹³

14.16 Whilst neither burglar is the “owner” of the property, each has “obtained” the property under POCA.¹⁴ The test simply requires the assumption of the rights of an owner, including the assumption of a power of control or disposition over the asset.¹⁵ Each burglar has sought to exercise such a power over the television and so each is taken to have “obtained” the property.

14.17 The Supreme Court therefore concluded that multiple defendants can be liable for the same criminal gain. In our example of the burglars, because each burglar has sought to assume the rights of the owner over the television, each burglar may be taken to have benefited to the value of the television.¹⁶ Another example may be given in the context of a drugs conspiracy. If a group of four defendants controls a conspiracy to supply drugs and £100,000 is gained from that conspiracy, each defendant has the power to determine what to do with that £100,000. Each defendant has assumed the power of an owner in connection with the £100,000 and therefore has “obtained” the £100,000. Each defendant should therefore be liable for the full £100,000.

14.18 The decision of the Supreme Court reflects a long line of case law which had adopted or endorsed the starting point of individual liability for the whole of a benefit obtained by multiple defendants.¹⁷

14.19 Taking the full £100,000 from each defendant could ultimately lead to the state recovering £400,000 as the profit from crime when the profit was in fact only £100,000. This goes far beyond the aim of the legislation by recovering the proceeds of a crime multiple times, thereby infringing the first *Ahmad* criterion. It also infringes the third criterion of proportionality to require each defendant to facilitate multiple

¹² Above at [44].

¹³ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [44]. The meaning of this statement is clouded by the complexity of the term “owner” in a system of relative title. In this example, each burglar has indeed usurped the rights of the owner, but in doing so has acquired rights in the television that are good against the whole world *other than* the victim of their crime.

¹⁴ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [43].

¹⁵ *R v May* [2008] UKHL 28, [2008] 1 AC 1028; *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58.

¹⁶ *R v May* [2008] UKHL 28, [2008] 1 AC 1028; *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [64].

¹⁷ Proceeds of Crime Act 2002, s 76(4); *R v May* [2008] UKHL 28, [2008] AC 1028; *Jennings v Crown Prosecution Service* [2008] UKHL 29, [2008] AC 1046; *R v Green* [2008] UKHL 30, [2008] 1 AC 1053; *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58; *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 80; *R v Mackle* [2014] UKSC 5, [2014] AC 678.

recovery of the same profit from criminality. According to the Supreme Court, the argument against such over-recovery is “as compelling as it is simple”.¹⁸

14.20 The Supreme Court concluded that a starting point that each defendant should be liable for the whole of the benefit figure should be mitigated in the following way:

14.21 where a finding of joint obtaining is made, whether against a single defendant or more than one, the confiscation order should be made for the whole value of the benefit thus obtained, but should provide that it is not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made *in relation to the same joint benefit*.¹⁹

14.22 Liability for the whole of the benefit figure is effectively what is known as “joint and several” liability.²⁰ Liability is “joint” because the defendants have a joint obligation to pay back the whole of the benefit figure. However, it is also “several” or “separate” because the defendants do not have to fulfil that obligation jointly. In a case with two defendants, a single defendant may pay back the whole of the benefit. The obligation that between the two defendants the benefit figure is repaid has been fulfilled and the second defendant will be left with nothing to pay.

14.23 In 2014 the Joint Committee on Human Rights recommended that the decision in *R v Ahmad* be incorporated into the legislation “to give clear effect” to the decision.²¹ At the time the government declined to incorporate the principle into the legislation, noting that this was a new piece of case law and that the government intended to review how it operated in practice.²²

14.24 It is now five years since the *Ahmad* decision, and the principle continues to be applied and endorsed by the courts.²³ However, the decision was criticised during our pre-consultation discussions and we now turn to address those criticisms.

Pre-consultation discussions

14.25 During our pre-consultation discussions, holding a defendant jointly liable for the whole benefit obtained from an offence was criticised as an unrealistic reflection how criminals approach the division of the gains from their criminality and therefore of an individual defendant’s “benefit”.

14.26 An “Ahmad direction” that the order is not to be enforced to the extent that it has been satisfied by another defendant was also criticised for discouraging co-operation,

¹⁸ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [72].

¹⁹ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [74].

²⁰ R Fortson QC “Case Comment on *R v Ahmad*” [2014] *Criminal Law Review* 756.

²¹ Legislative Scrutiny: (1) Serious Crime Bill, (2) Criminal Justice and Courts Bill (second Report) and (3) Armed Forces (Service Complaints and Financial Assistance) Bill, report of the Joint Committee on Human Rights (2014-2015) HL 49, HC 746 at [1.25].

²² Legislative Scrutiny: (1) Serious Crime Bill, (2) Criminal Justice and Courts Bill (second Report) and (3) Armed Forces (Service Complaints and Financial Assistance) Bill, report of the Joint Committee on Human Rights (2014-2015) HL 49, HC 746 at [1.25].

²³ *R v Sayers* [2014] EWCA Crim 2157; *R v McLoughlin* [2015] EWCA Crim 362.

incentivising money laundering, adding to cost and complexity, creating uncertainty and not serving as an appropriate exercise in financial accountability.

Criticism of joint liability

14.27 The Supreme Court itself recognised in *R v Ahmad* that “ownership in common” is more closely aligned to the reality in criminal cases, that each individual defendant’s benefit from crime is not likely to be the whole, but a proportion. In fact, the Supreme Court in *Ahmad* was very clear that:

Judges in confiscation proceedings should be ready to investigate and make findings as to whether there were separate obtainings. A court should never make a finding that there has been joint obtaining from convenience, or worse from laziness. Where the evidence supports a finding that the asset acquired from a crime was obtained effectively on a several basis, the judge should make it.²⁴

14.28 Whilst *R v Ahmad* recognises that individual benefit in the entire sum may be an appropriate order to make, it does not require that such a conclusion be reached. This reflects earlier case law, such as *R v May* in which the House of Lords left the door open to apportionment in appropriate cases.²⁵

14.29 During our fact-finding stakeholders reported that individual liability for the whole benefit has become the default position adopted by the courts, without any reflection of what might in fact have been obtained by an individual defendant.

14.30 *R v Sivaraman* provides an example of the unreality of a finding that the whole benefit was obtained by an individual defendant. The defendant pleaded guilty to a conspiracy to evade fuel duty. The conspiracy involved purchasing “red” diesel, which is used in agricultural machinery and some off-road vehicles and selling it as DERV (Diesel Engine Road Vehicle fuel) at a service station. Red diesel carries a significantly lower rate of excise duty. The defendant was the employee of the owner of the service station and pleaded guilty on the basis that he had taken a number of deliveries of the red diesel, knowing it to be red diesel and knowing that the higher rate of excise duty that would have been payable on DERV had been avoided. The defendant had been paid £15,000 for his role in the conspiracy. At the confiscation the judge found that the defendant’s benefit was £128,000, representing the total value of duty evaded. The Court of Appeal overturned the benefit decision, stating that:

it is clear that the judge misdirected himself in reaching a decision as to benefit which was contrary to his common sense view of the true benefit gained by the appellant as a matter of fact. This is apparent from his statement that *with reservation as to the particular unfairness*, he felt constrained [by the authorities] to find in the appellant’s case that his benefit must be assessed at £128,520, whereas in the case of the appellant’s employer the judge had no hesitation in finding that the

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

²⁵ *R v May* [2008] UKHL 28, [2008] 1 AC 1028 at [45]; see also *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 80.

same figure represented his benefit “*not only notionally but actually in real life*” (emphasis added).²⁶

Criticisms of an Ahmad direction

14.31 Under an *Ahmad* direction, once benefit is recovered from one defendant it may not be recovered from another defendant. Whilst defendants may co-operate with one-another to apportion the confiscation order between them and pay it, thereby splitting the burden, as Andrew Campbell-Tiech observed in *Archbold Review*:

Ahmad...may cause a defendant to behave as though he were a participant in a particularly nightmarish version of the Prisoner's Dilemma [where a prisoner weighs his or her self-interest over the interest of the group].

Diamond thieves may choose to co-operate with each other. Each pays £500,000 [and brings the matter to an end]. However [one defendant] may well calculate that his self-interest is best served, not by co-operating with [another defendant] and still less with the prosecutor, but by a campaign of delay and disruption. If he can thereby force [the other defendant] to pay the entirety of the order, he escapes scot-free.²⁷

14.32 A defendant whose assets are readily identifiable and realisable is likely to be the first to be targeted by authorities seeking to realise assets. Where a defendant “has identifiable, restrained assets, the temptation must be for the prosecutor to pursue the lowest hanging fruit”.²⁸ In fact, to do so would accord with the CPS Asset Recovery Strategy, which identifies “high priority” cases as including those in which “the debt is collectible”.²⁹ Therefore, a defendant who successfully hides assets, or who puts assets into complex financial or other structures may be rewarded by being permitted to keep all of his or her gains from crime. Making all defendants “jointly and severally liable” arguably acts as an incentive to engage in money laundering.

14.33 A lack of co-operation, and the hiding of assets by a defendant during the confiscation process adds to the time, cost and complexity of any proceedings. As Rudi Fortson QC noted in the *Criminal Law Review*, the *Ahmad* direction as to joint and several liability “is an approach that seems likely to lead to some lively out-of-court discussions between confederates as to who should shoulder the burden of satisfying the total amount payable, and in what proportions”.³⁰

14.34 During our fact-finding, financial investigators involved in enforcing confiscation orders expressed concern that an *Ahmad* direction provides no guidance about who to pursue if co-defendants all have realisable assets, thereby creating uncertainty. For example, two defendants may have benefited jointly in the sum of £20,000. One defendant may have £20,000 in various bank and savings accounts and the other

²⁶ *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 80.

²⁷ A Campbell-Tiech, “Whither confiscation: May revisited” [2019] 5 *Archbold Review* 4,

²⁸ A Campbell-Tiech, “Whither confiscation: May revisited” [2019] 5 *Archbold Review* 4, fn 20.

²⁹ Crown Prosecution Service, *CPS Asset Recovery Strategy* (2014) 7, https://www.cps.gov.uk/sites/default/files/documents/publications/cps_asset_recovery_strategy_2014.pdf (last visited July 2020).

³⁰ R Fortson QC, “Case Comment on *R v Ahmad*” [2014] 10 *Criminal Law Review* 756 at 759.

defendant may have £20,000 in equity in a property. Does the financial investigator seek to enforce all £20,000 against the defendant with the bank account as the most easily realised asset, or does the financial investigator seek to apportion the order fairly and attempt to obtain £10,000 from each defendant?

14.35 Finally, an *Ahmad* direction was criticised during our fact-finding as not reflecting an exercise in financial accountability. Although the jointly obtained benefit might have been repaid in full and so is to an extent an exercise in financial accountability, defendants who have been found to have gained from their criminality may end up repaying nothing because the order has been satisfied by another defendant. Such defendants have not been held financially accountable. Rather they have been rewarded and permitted to keep their personal benefit from crime, potentially because they were less open, honest or co-operative with the prosecution than the defendant who satisfied the order.

Analysis

14.36 As highlighted at {x}, a key criticism has been that the courts appear to be too quick to adopt an approach of joint liability for the whole benefit rather than apportionment. This may be because:

- (1) *Ahmad* has been too narrowly interpreted as *requiring* joint liability for the whole benefit; or
- (2) how an exercise of apportionment should be carried out is unclear; or
- (3) there is a lack of evidence to carry out an apportionment exercise.

A narrow interpretation of *R v Ahmad*

14.37 During our pre-consultation discussions stakeholders reported that joint liability for the whole benefit has become the default position adopted by the courts. However, on many occasions stakeholders from across the criminal justice system (beyond the courts themselves) appeared to assume that joint liability was *required* by *R v Ahmad*, despite a very clear statement in the case to the contrary.

Lack of clarity about how to conduct an exercise of apportionment.

14.38 In *R v Sivaraman* the Court of Appeal stated that determining how defendants intended to apportion the benefit from crime may, to “Circuit Judges and Recorders who do not come from a civil law background... seem rather daunting; but, as Lord Bingham said [in *R v May*], it is essentially a matter of applying concepts which are themselves in most cases relatively straightforward.”³¹ It is therefore important that Crown Court judges are provided with guidance on how to approach any apportionment exercise.

Lack of evidence to carry out an apportionment exercise.

14.39 In terms of the burden of proof, it is for the prosecution to identify a co-defendant’s benefit from crime.³² However, the difficulty identified by the Supreme Court in *R v*

³¹ *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 80 at [13].

³² *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83.

Ahmad is that the prosecution is likely to have little evidence upon which to assist the court as to the nature and extent of an individual co-defendant's interest:

First...the defendants will often, indeed normally, be as misleading and uninformative as they can.

Secondly, again owing to the reticence and dishonesty of the defendants, there will often be considerable, or even complete, uncertainty as to (i) the number, identity and role of the conspirators involved in the crime, and (ii) the quantum of the total proceeds of the crime, or how, when, and pursuant to what understanding or arrangement, the proceeds were, or were to be, distributed between the various conspirators.³³

It would often be impossible to decide what part of the proceeds had been "obtained" by any or all of the defendants. There is obvious cause for concern about having to inquire into the financial dealings between criminals who have together obtained property.³⁴

14.40 The approach of joint liability may therefore provide a degree of certainty.

Provisional proposals for reform

A presumption in favour of equal of liability

14.41 We considered whether one possible approach to reform would be to create a presumption in favour of equal shares between defendants. In Chapter 13 we discussed how the statutory assumptions as to benefit are justified with reference to a knowledge imbalance between the defence and prosecution. Such a knowledge imbalance is evident when it comes to the arrangements as to how proceeds of crime were to be distributed between defendants.³⁵ A presumption in favour of a particular degree of liability could therefore assist the prosecution in satisfying the court as to the extent of a defendant's benefit. Any presumption could be rebutted by the defendant. Such a reversal of the burden of proof would serve a useful purpose in correcting the knowledge imbalance as to the nature and extent of a co-defendant's interests in order to ensure appropriate apportionment of the benefit.

14.42 However, real concerns were expressed that such an approach could unjustly benefit the prime movers behind criminal enterprises. Lower-level participants in a conspiracy may be reluctant to give or adduce evidence which would permit the court to depart from the starting point of equal shares, for fear of the consequences. This could result in lower-level participants in criminality being required to shoulder the burden of a higher confiscation order than would reflect the reality of the criminality. We therefore do not consider that it is appropriate to recommend that it be presumed that defendants had benefited from any particular share of any benefit.

³³ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [38].

³⁴ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [56].

³⁵ *Hansard* (HL), 4 March 1985, vol 472, col 92.

A requirement that the court makes a finding on apportionment

14.43 We provisionally propose that any amended confiscation legislation should be based on a clear articulation of the principle in *R v Ahmad* that “judges in confiscation proceedings should be ready to investigate and make findings as to whether there were separate obtainings”.³⁶ We therefore consider that legislation should make it clear that a court must ascribe a share of the benefit to each defendant. By doing so, many of the criticisms identified earlier in this chapter can be overcome:

- (1) Defendants would not be encouraged to join a race to hide their assets (or “launder” the assets) in the hope that the authorities will focus on a co-defendant.
- (2) The path to a confiscation order should be more straightforward, in that each defendant will be facing the prospect of a lower overall debt burden, in terms of the order to pay off. It is therefore likely that each defendant will be more co-operative than when facing liability for the entire sum, facilitating the efficient making of the order. We consider that by eliminating the need for “lively...discussions as to who should shoulder the burden”,³⁷ the Resolution of Confiscation process proposed in Chapter 8 (which encourages agreement) would be more efficient.
- (3) There would be greater clarity for those involved in enforcing confiscation orders about who to pursue and for what amount in satisfying the order.
- (4) There would be greater financial accountability, in the sense that all defendants would be required to make recompense for their criminal financial gains, unlike the current system where the defendant who is most successful in hiding his or her money may keep everything.

14.44 In Chapter 12 we provisionally proposed that, in calculating “benefit” the court should enquire as to the “gain” that a defendant made from his or her criminality, unless the court is satisfied that it would be unjust to do so, having regard to the defendant’s intention in connection with the gain. We consider a requirement to consider the shares of the parties would complement this test.

14.45 A clear opportunity to address apportionment would also “provide a defendant with a real incentive to explain in detail and truthfully how - and with whom - the index offence was committed, for he could thereby reduce his confiscation order to that which he might actually be able to pay”.³⁸

14.46 There may be cases in which it is impossible for the court to determine what a relevant share would be, for example, because the number of conspirators is unknown.³⁹ Furthermore, defendants in a conspiracy are unlikely to have kept written

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

³⁷ R Fortson QC, “Case Comment on *R v Ahmad*” [2014] 10 *Criminal Law Review* 756 at 759.

³⁸ A Campbell-Tiech, “Whither confiscation: May revisited” (2019) 5 *Archbold Review* 4.

³⁹ See the discussion about multiple trials arising from a single conspiracy, P Dyer and HHJ M Hopmeier “*Ahmad and Fields* - clarification by the Supreme Court or a precursor to more litigation? Recent developments on restraint and confiscation” (2014) 10 *Archbold Review* 6 at 7.

records of any agreements as to interests. It could be thought that any determination as to the nature and extent of any interest may turn on a defendant's willingness to give evidence and the quality of that evidence. During our pre-consultation discussions we heard that defendants who do decide to give evidence at confiscation may not be at their best. "The defendant...has a criminal conviction and is facing the prospect of losing assets".⁴⁰

- 14.47 It is envisaged that the courts would adopt the approach taken now where there are unknown factors. Such an approach involves the court making a reasoned decision on all of the evidence that it has before it, taking into account the views of the parties.⁴¹ As Andrew Campbell-Tiech observed in Archbold Review, weighing up arguments put forward by defendants as to apportionment is no different to the "daily diet of the criminal courts, where judges routinely weigh the assertions, exculpations, accusations and excuses made by defendants in the course of the criminal process."⁴²
- 14.48 Criminal courts are routinely required to undertake such an exercise and are arguably encouraged to do so in confiscation cases involving illegal tobacco importation. As we set out below, the focus in such cases is on the "holder" of the goods who is liable to pay any outstanding duty on tobacco and who therefore "benefits" by evading that duty. The courts have observed that the mere fact that a person is a co-conspirator does not mean that he or she was a "holder" of goods at the time that the duty became payable. For example, the court may have to consider whether the defendant only engaged in the conspiracy after the goods had been imported.⁴³
- 14.49 Apportionment in the context of confiscation has been described by the Court of Appeal as "essentially a matter of applying concepts which are themselves in most cases relatively straightforward."⁴⁴ Even in the absence of express evidence as to apportionment, it may be obvious to a judge on the facts of the case that the defendants intended to split their money in a particular way. Where the conspiracy was between a controlling dominant person and his or her partner, for example, it may be evident that there was never intended to be an equal set of interests in the property.
- 14.50 It is noteworthy that our proposed approach to the assessment of benefit to multiple defendants reflects the Court of Appeal's observations about apportionment in *R v Rooney*:

If... it is established that there was a certain sum by way of benefit which was divided between conspirators, yet there is no evidence on how it was divided, then the court making the confiscation order is entitled to make an equal division as to benefit obtained between all conspirators... however, if the court is satisfied on the

⁴⁰ HHJ M Hopmeier and A Mills, "Post-Conviction Confiscation in England and Wales" in C King, C Walker and J Gurulé (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (2018).

⁴¹ *R v Muddassar* [2017] EWCA Crim 382.

⁴² A Campbell-Tiech, "Whither Confiscation: May revisited" (2019) 5 *Archbold Review* 4.

⁴³ *R v Khan* [2009] EWCA Crim 588, *The Times* 23 April 2009; *R v Tatham* [2014] EWCA Crim 226, [2014] Criminal Law Review 672; *R v Mackle* [2014] UKSC 5, [2014] AC 678.

⁴⁴ *R v Sivaraman* [2008] EWCA Crim 1736, [2009] 1 Cr App R (S) 80 at [13].

evidence that a particular conspirator did not benefit at all or only to a specific amount, then it should find that is the benefit that he has obtained.⁴⁵

14.51 There may of course be cases in which the court concludes that each co-defendant was wholly entitled to the benefit. In such cases, joint and several liability may continue to apply. However, as was articulated in *Ahmad*, legislation should encourage exploration of apportionment rather than the routine application of joint and several liability.

Consultation Question 47.

14.52 In assessing benefit to multiple defendants, we provisionally propose that confiscation legislation should require the court to make findings as to apportionment of that benefit.

14.53 Do consultees agree?

ASSETS TAINTED BY CRIMINALITY

14.54 A series of principles have developed to the effect that where an asset is part-tainted by criminality it does not follow that the total value of the property amounts to criminal benefit. The focus should be on what has in fact been obtained by the defendant as a result of his or her criminality. We now discuss three situations in which such principles have been considered:

- (1) part-contribution to the purchase price of an asset using property that has not come from crime;
- (2) criminal transactions in a legitimate business;
- (3) property purchases partially funded by mortgages obtained through criminality.

Part contribution using property not obtained through criminality

14.55 Firstly, where a defendant has made contributions to the purchase price of an asset using property that has not come from crime, those contributions must be taken into consideration when calculating benefit.⁴⁶ The burden of proof is on the prosecution in establishing the extent of benefit and so in “particular criminal conduct” cases (see Chapter 13) prosecutors are required to direct the court’s attention to any evidence that suggests that there has been a contribution to the purchase of property from a legitimate source. However, in “criminal lifestyle” cases, the burden on the prosecution extends only as far as establishing a defendant’s interest in the property. It is then for the defence to establish that the money used towards the purchase of an asset was legitimate.⁴⁷ For example, in *R v Williams* the benefit figure was reduced by £4,500

⁴⁵ *R v Rooney* [2010] EWCA Crim 2.

⁴⁶ *R v Bello* [2015] EWCA Crim 731.

⁴⁷ *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83.

because the court was satisfied that part of the money used to purchase illegal drugs had been non-criminal money, coming from the defendant's jobseekers' allowance.⁴⁸

Criminal transactions in a legitimate business

14.56 Secondly, where a business is legitimate, the benefit will be the gross profit relating to the tainted transactions within the relevant business, rather than the turnover of the business as a whole.⁴⁹ For example in *R v Sale*, the defendant was the founder, Managing Director and sole shareholder of a legitimate business that undertook electrical engineering and installed and maintained air conditioning units. Sale gave gifts and hospitality worth approximately £7,000 to a member of Network Rail in exchange for the award of contracts to Sale's company. In that case, only part of the legitimate business was tainted by the criminal transaction.

14.57 Tainted transactions might be the criminal transaction that forms the basis of the conviction but might also include other transactions in the business affected by the criminality. For example, in *R v Sale*, profit was made on the contracts. However, additional financial advantages were obtained by the company through "obtaining market share, excluding competitors, and saving on the costs of preparing proper tenders".⁵⁰ Such financial advantages arise as a result of the tainted transactions and should be taken into consideration.

14.58 A further example might be a defendant who runs a convenience store selling tobacco that has been imported illegally. All other sales from the shop are legitimate. However, because the defendant has profited from illegal sales, he can cut prices on other goods. He therefore makes much higher sales volumes and higher overall profits in addition to the profit from the tobacco. In such a case the additional financial rewards arising in connection with the business might be treated as benefit, although such additional benefit might be difficult to prove.

14.59 Where the business as a whole is unlawful, however, its turnover is likely to form the basis of the "benefit" calculation. For example, in *R v Beazley*, the company in question exclusively focussed on selling fake wheel trims for cars. The trims were marketed as "non-genuine replacement parts" and bore the logo of the vehicle manufacturer without any appropriate authorisation. The Court of Appeal concluded that:

a business which is founded entirely on the infringement of other people's property rights, and is a criminal offence, will inevitably attract the consequence of confiscation of the proceeds [and] it will certainly remove their gross takings from [the] business.⁵¹

⁴⁸ *R v Williams* [2011] EWCA Crim 275.

⁴⁹ *R v Beazley* [2013] EWCA Crim 567, [2013] 1 WLR 3331; *R v King* [2014] EWCA Crim 621, [2014] EWCA Crim 621.

⁵⁰ *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663 at [57].

⁵¹ *R v Beazley* [2013] EWCA Crim 567, [2013] 1 WLR 3331 at [17].

14.60 Similarly, in *R v King*,⁵² the defendant sold 58 cars in the capacity as a private vendor when in fact he was operating a car sales business.⁵³ In portraying himself as a private vendor, the defendant avoided having to provide any sort of warranty or guarantee pursuant to consumer protection regulations. The Court of Appeal found that the entire enterprise involving the 58 cars was characterised by the deliberate misrepresentations of the appellant and it was therefore proportionate to confiscate the full turnover in connection with the purchase and sale of the cars.

14.61 In January 2020 the White Collar Crime Centre published its “case for a narrowly tailored corporate confiscation scheme in the UK”. In it, it is suggested that company benefit should be limited to “net”, rather than gross benefit as

the effect of ignoring legitimately incurred expenses is to cause a confiscation order to include monies which do not represent the benefit flowing from criminal activity which the company has committed...the application of a punitive confiscation regime to the corporate entity is inimical to its future success, and therefore, its wider contribution to society. The point is elementary.⁵⁴

14.62 As the White Collar Crime Centre recognises,⁵⁵ the case law set out above is effectively seeking to achieve this end, focussing benefit enquiries on the extent of the criminality in a business.

Mortgages

14.63 Thirdly, in Chapter 12, we discuss the principles that the court applies in determining the nature and extent of a defendant’s benefit from a mortgage obtained by fraud, as articulated by the Supreme Court in *R v Waya*. In essence, a defendant’s benefit is calculated with reference to his or her “equity of redemption” rather than the value of the mortgage advance.

Application of the *Ahmad* criteria

14.64 In evaluating the three principles that the courts consider when assessing the extent to which the criminal “part” of an asset potentially taints the whole of an asset when calculating benefit, the three criteria in *R v Ahmad* for effective confiscation legislation are relevant.⁵⁶

14.65 Each principle might be said to fall short of the first criterion’s objective of recovering the full benefit from crime because “but for” the criminality assets may not have been obtained at all. However, the principles reflect a nuanced approach that seeks to remove a sum which reflects the actual gains made by a defendant. If a defendant gained a house through an illegally obtained mortgage and the defendant failed to

⁵² *R v King* [2014] EWCA Crim 621, [2014] 2 Cr App R (S) 54

⁵³ King had been charged with falsely claiming or creating the impression that a trader is not acting for purposes relating to his trade, business, craft or profession, contrary to regulations 12, 13 and paragraph 22 of schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008.

⁵⁴ V Reid, *Proceed with Caution: The case for a narrowly tailored corporate confiscation scheme in the UK* (2020) p 3, <https://brightlinelaw.co.uk/wp-content/uploads/2020/01/2020.01.15-Confiscation-Company-Defendants.pdf> (last visited July 2020).

⁵⁵ Above, p 51.

⁵⁶ *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [38].

repay that mortgage, the bank would seek to recover the outstanding debt owed to it. A defendant's gains would be limited to any remaining equity after the recovery of that debt.

14.66 The second *Ahmad* criterion requires that confiscation law is practical, in the sense of simplicity and predictability. The principles in connection with the part tainting the whole may require close consideration of the facts of each case to determine what is, and is not, a legitimate contribution, which may prove to be complex and time consuming.⁵⁷ However, on balance we are of the view that the principles are compliant with the *R v Ahmad* test:

- (1) The codifying of the test into statutory provisions does create predictability as to the provisions to be applied. Any complexity may come in the application of the provisions.
- (2) Although complexity should be avoided wherever possible, the *Ahmad* test is to be applied only "so far as is consistent with the wording of the statute and other legal principles". Any complexity in separating legitimate and illegitimate gains is no more than is necessary in order to pay close attention to the actual benefit obtained from crime.

14.67 The third *Ahmad* criterion is one of proportionality of the interference with the right to peaceful enjoyment of property. The three principles in connection with assets tainted by criminality relate directly to the issue of proportionality, with the judgments in *R v Beazley*, *R v King*, *R v Sale* and *R v Waya* acknowledging the proportionality of the outcome in each case.

Provisional proposal

14.68 We therefore consider that the principles in connection with assets tainted by criminality are appropriate principles. During our fact-finding the principles themselves were not thought to cause problems. However, stakeholders felt that it would be desirable for the sake of clarity if such principles could be distilled and codified.

14.69 The principles themselves involve drawing together considerations from case law to guide the court in its application of a statutory provision. Such guiding principles may require more detailed explanation than can be outlined in a short statutory provision. As such, we provisionally propose that they should be codified outside of the confiscation legislation.

14.70 As we discussed at the start of this chapter, non-statutory guidance on the law has been welcomed in the family courts following a recommendation by the Law Commission in 2014. We consider that such guidance would be preferable to a consolidated confiscation Practice Direction, so that explanations can be set out more fully than might be possible in any Criminal Practice Direction and updates can be brought about more readily.

14.71 In the family law context, such guidance is issued by the Family Justice Council, a non-statutory advisory body, comprising members from across the family justice

⁵⁷ See for example *R v Bello* [2015] EWCA Crim 731 at [37].

system. The recommendation for such guidance to be issued by the Family Justice Council was because of the “authority and respect that the body commands”. In criminal law, the closest analogous body is the Criminal Justice Board. However, its role is more related to overarching strategy and policy. In a criminal context, it is likely that a body such as the Criminal Procedure Rules Committee would be best placed to facilitate such guidance.

14.72 During our pre-consultation phase it was suggested that a Criminal Practice Direction may be more appropriate because such a Practice Direction would be seen as carrying more “weight”. Given our observations that the Criminal Procedure Rules Committee is likely to be the most appropriate body to facilitate such guidance we invite consultees to express their views about both non-statutory guidance and a Criminal Practice Direction for confiscation.

Consultation Question 48.

14.73 We provisionally propose that guidance on the principles in connection with assets tainted by criminality should be provided.

14.74 Do consultees agree?

14.75 If yes, should this be provided in the form of:

- (1) non-statutory guidance on confiscation; or
- (2) a Criminal Practice Direction relating to confiscation?

Consultation Question 49.

14.76 We provisionally propose that the following principles of case law in connection with assets that have been obtained in part through criminality be incorporated either in non-statutory guidance or a Criminal Practice Direction:

- (1) The court must consider whether any evidence suggests that the defendant had made contributions to the purchase price using property that has not come from crime.
- (2) When the alleged benefit is in connection with an undertaking, benefit should be calculated with reference to the extent to which criminality taints that undertaking. Only where the entire undertaking is founded on illegality should the court calculate benefit with reference to the entire turnover of the business.
- (3) When a mortgage is obtained over a property, the court should consider the principles from *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 on calculating benefit with reference to the equity of redemption.

14.77 Do consultees agree?

EVASION OF DUTY: TOBACCO IMPORTATION

14.78 The evasion of the payment of excise duty through the illegal importation of tobacco is treated as a pecuniary advantage.⁵⁸ There have been at least 16 reported confiscation cases dealing with the issue of liability for the payment of such a duty in the last 10 years.⁵⁹ The case law reflects the statutory provisions found in various excise regulations, including the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. The 2010 regulations impose liability to pay duty upon the person:

- (1) making the delivery of the goods;
- (2) holding the goods intended for delivery; or
- (3) to whom the goods are delivered.

14.79 The case law was succinctly drawn together by the Court of Appeal in the case of *R v Tatham*.⁶⁰

- (1) The time at which the duty becomes chargeable on tobacco is when the ship carrying it enters the limits of the UK port and, as long as the requisite intention is present, “evasion” occurs from the moment that the excise duty is charged on the goods.
- (2) “Holding” does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for “holding” is that the person is capable of exercising legal and/or factual control over the goods, whether temporarily or permanently, either directly or by acting through an agent.
- (3) There is no need for the person to have any beneficial ownership in the goods in order to be a “holder” (or indeed to have “caused” their importation).
- (4) A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the “holder”.
- (5) The person likely to have benefited is the person or body who had real and immediate responsibility for causing the product to reach an excise duty point, which will ordinarily be the consignor (the person who sends the goods).

⁵⁸ See Chapter 12 at paras 12.39 to 12.42.

⁵⁹ See, amongst others, *R v Mitchell* [2009] EWCA Crim 214, [2009] All ER (D) 64; *R v Khan* [2009] EWCA Crim 588, [2009] All ER (D) 136; *R v White* [2010] EWCA Crim 978, [2010] All ER (D) 45; *R v Varsani* [2010] EWCA Crim 1938, [2010] All ER (D) 32; *R v Bell* [2011] EWCA Crim 6, [2011] All ER (D) 115; *R v Redmond* [2011] EWCA Crim 203, [2011] All ER (D) 256; *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601; *R v Kullar* [2011] EWCA Crim 420; *R v James* [2011] EWCA Crim 2991, [2012] 1 WLR 2641; *R v Taylor* [2013] EWCA Crim 1151, [2013] All ER (D) 209; *R v Young* [2013] EWCA Crim 302; *R v Tatham* [2014] EWCA Crim 226, [2014] Lloyd’s Rep FC 354; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Doran* [2015] EWCA Crim 384, [2015] All ER (D) 186; *R v Parker* [2018] EWCA Crim 1057.

⁶⁰ *R v Tatham* [2014] EWCA Crim 226, [2014] Criminal Law Review 672.

- (6) The consignee (the person to whom the goods will be delivered) will usually be a holder of the goods, but the time at which he becomes such will depend on the mode of shipment.

14.80 The level of duty to evaded is calculated with reference to the Tobacco Products Duty Act 1979.⁶¹ As of 1 July 2019 the duty payable on cigarettes is an amount equal to the higher of:

- (1) 16.5% of the retail price plus £228.29 per thousand cigarettes, or
- (2) £293.95 per thousand cigarettes.

14.81 Case law further states that the excise duty payable on counterfeit cigarettes should be calculated with reference to the recommended retail price of the genuine goods that they sought to imitate.⁶²

14.82 In the case of *R v Young*,⁶³ four appeals were heard together by the Court of Appeal. In all four cases the confiscation orders were quashed because the defendants had neither held the cigarettes at an excise duty point or caused the cigarettes to reach an excise duty point.⁶⁴

14.83 Similarly, in *R v Mackle* (a case from Northern Ireland), the Supreme Court quashed four confiscation orders that were entered into by agreement because there was “no evidence that they held the tobacco products at the excise duty point. Nor [was] there evidence that they caused the tobacco products to reach the excise duty point”.⁶⁵ The Supreme Court emphasised that “judges should be astute to ensure that they are satisfied that agreements on the amount to be recovered by way of confiscation orders are soundly based”.⁶⁶

14.84 In light of the apparent lack of certainty surrounding the law, the large number of appeals brought in connection with tobacco importation duty, and the fact that the relevant principles to be applied in such cases are drawn from a number of sources, we consider that it would be appropriate for the guiding principles in connection with tobacco importation duty to be incorporated either into non-statutory guidance or into a Criminal Practice Direction.

14.85 We consider that codifying the guiding principles on tobacco importation the *Ahmad* criteria would be satisfied. In accordance with the third *Ahmad* criterion, the principles are intended to produce a proportionate outcome by focussing liability on what the legislation terms the “holder” of the goods, as the person who has knowledge of the

⁶¹ Tobacco Products Duty Act 1979, s 2 and sch 1.

⁶² *R v Redmond* [2011] EWCA Crim 203, [2011] All ER (D) 256; *R v Varsani* [2010] EWCA Crim 1938, [2010] All ER (D) 32.

⁶³ *R v Young* [2013] EWCA Crim 302

⁶⁴ *Young* had assisted in unloading contraband cigarettes in return for £150; *Boot* had stored contraband cigarettes in return for £100; *Wheelright* had been involved in distributing contraband cigarettes after they had reached the excise point; *Whitehead* was responsible for lock-up premises used to store the cigarettes after they had reached the excise point.

⁶⁵ *R v Mackle* [2014] UKSC 5, [2014] AC 678 at [32].

⁶⁶ *R v Mackle* above at [47].

goods and the duty to be evaded. The first criterion requires that a defendant's proceeds of crime are removed. We consider that the codification of the case law principles provides a framework within which to do so. By codifying the framework, the second *Ahmad* criterion is satisfied in that the law is clarified, making it simple and predictable. It will also make application of the law more efficient.

Consultation Question 50.

14.86 We provisionally propose that the following principles of case law in connection with the evasion of tobacco import duty be incorporated either into non-statutory guidance or a Criminal Practice Direction:

- (1) The principles relevant to evasion of duty as summarised in *R v Tatham* [2014] EWCA Crim 226, [2014] Crim LR 672.
- (2) In calculating the benefit obtained from evading duties payable on tobacco, the duty evaded should be calculated in accordance with the Tobacco Products Duty Act 1979 section 2 and schedule 1.
- (3) For the purpose of applying the Tobacco Products Duty Act 1979, the retail price of counterfeit goods should be taken to be the recommended retail price of the genuine goods that the counterfeit goods sought to imitate.

14.87 Do consultees agree?

TRANSFERS TO COMPANIES AND TRUSTS

14.88 Criminals may seek to distance themselves from any supposed benefit by acting through a company, transferring assets to others or hiding behind a trust arrangement.

Companies

14.89 A company has separate legal personality.⁶⁷ This means that it is treated as having rights and liabilities that are independent of the rights and liabilities of those who run the company. A criminal may therefore seek to hide behind the company and suggest that the company has benefited from crime, rather than himself or herself.

14.90 In the case of *R v McDowell*, the Court of Appeal observed that “examination of true ownership or control of property is the bread and butter of confiscation proceedings”.⁶⁸ Therefore, in confiscation cases the court may “seek to discover the facts which the existence of the corporate structure would otherwise conceal so as properly to identify the Appellant's true benefit”.⁶⁹ There are three ways in which an offender may seek to use a corporate structure for “concealment”⁷⁰ in confiscation cases. “[T]he companies

⁶⁷ *Salomon v A Salomon and Co Ltd* [1897] AC 22.

⁶⁸ *R v McDowell* [2015] EWCA Crim 173, [2015] 2 Cr App R (S) 14 at [40].

⁶⁹ *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663 at [43].

⁷⁰ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [28].

in such cases are properly treated as alter egos, or agents, of their criminal controllers”:⁷¹

- (1) Where an offender attempts to shelter behind a corporate façade, or veil, to hide their crime and their benefits from it;
- (2) Where an offender commits acts in the name of a company which (with the necessary *mens rea*) constitutes a criminal offence which leads to the offender's conviction;
- (3) Where the transaction or business structures constitute a "device", "cloak" or "sham", ie an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts.⁷²

14.91 The court must look carefully at whether this “concealment principle” applies before treating the company as the alter ego of its criminal controller.⁷³ The court must therefore:

treat with a degree of circumspection, when an issue of lifting or piercing the corporate veil has been raised, tempting invitations to adopt a “robust” or “broad brush” approach and tempting invitations to avoid being distracted by “niceties”. Of course such arguments have their attractions — that is why they are advanced. But such arguments should not be permitted to distract attention away from the proper application of correct legal principles in this field.⁷⁴

14.92 In deciding whether the concealment principle should be applied:⁷⁵

- (1) The test is not simply one of “justice”. So vague an approach would be unprincipled and would give rise to great uncertainty and inconsistency in decision making.
- (2) Regard should be had to the nature and extent of the criminality involved. Whether the business was wholly illegal or tainted by a degree of illegality may not be determinative, but is likely to be relevant.
- (3) The fact that a company which becomes mixed up in criminality is solely owned and solely controlled by the defendant does not *of itself* always necessitate a conclusion that the defendant and the company should be treated as one and the same. It should be remembered that the consequence of treating the company and the defendant as one and the same is that the turnover and assets of the company may be treated as property of the defendant.

⁷¹ *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63; *R v McDowell* [2015] EWCA Crim 173, [2015] 2 Cr App R (S) 14.

⁷² *R v Seager* [2009] EWCA Crim 1303, [2010] 1 WLR 815.

⁷³ See for example *R v Powell* [2016] EWCA Crim 1043, [2016] Crim LR 852, in which the concealment principle did not apply.

⁷⁴ *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63 at [93].

⁷⁵ *R v Boyle Transport (Northern Ireland) Ltd* above.

14.93 The application of the concealment principle involves the court *looking behind* the corporate structure to the reality of the situation. This is not the same as *disregarding* the corporate structure and stripping away its protections. Such disregarding of the corporate structure is what is known as “piercing” or “lifting” the corporate veil and applies when the case falls within a second principle, known as the “evasion principle”.⁷⁶

14.94 The evasion principle applies when:

there is a legal right against the person in control of [a company] which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.⁷⁷

14.95 For example, in the case of *Jones v Lipman*,⁷⁸ Mr Lipman sold a property to the claimants for £5,250 and then, thinking better of the deal, sold it to a company called Alamed Ltd for £3,000. This was intended to make it impossible for the plaintiffs to obtain a judgment for the property to be transferred to them. Mr Lipman owned and controlled Alamed Ltd.

14.96 It is only in the limited category of cases where the evasion principle applies that the concept of “piercing” the corporate veil should be invoked. The court should therefore be careful in its choice of language.⁷⁹

14.97 In order to make the law clear and accessible to those operating in the criminal courts we provisionally propose that consideration should be given by the Criminal Procedure Rules Committee to setting out the relevant principles in a Criminal Practice Direction on confiscation. This would provide guidance to the court which could be more readily amended than a statute to reflect any changes in the law adopted in the civil courts.

Consultation Question 51.

14.98 We provisionally propose that the principles in connection with when benefit apparently accruing to a company may be treated as accruing to a defendant be incorporated, either in non-statutory guidance or a Criminal Practice Direction.

14.99 Do consultees agree?

Trusts

14.100 The court may also be called upon to determine whether property is held outright by a third party or whether the defendant is the beneficiary of a trust arrangement in

⁷⁶ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [28].

⁷⁷ *Prest v Petrodel Resources Ltd* above at [28].

⁷⁸ *Jones v Lipman* [1962] 1 WLR 832.

⁷⁹ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415; *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63 at [63].

connection with a property. For example, although a house may be registered in the name of a defendant's wife, the defendant may in fact have an interest in the property because it was the "common intention" of the defendant and his wife to own the property jointly.

14.101 During our fact-finding, the case law on "common intention" constructive trusts was the most regularly cited example of civil law principles being used in criminal confiscation.⁸⁰ Since the introduction of s10A of POCA 2002, the Crown Court has been able to make what are intended to be binding determinations on third party interests. As we set out in Chapter 25, under our proposals, determination of third party interests at the confiscation stage will become even more commonplace.

14.102 As the Supreme Court observed in *Jones v Kernott*,⁸¹ There are clear stages set out in the case law that should be followed by a court in making a determination as to a common intention constructive trust.

14.103 Firstly, there is a presumption that a party's "real" share of property is the share that the party is strictly entitled to on the face of the law. Therefore, the court should begin by considering what the legal position is as to ownership and presume that parties "real" share of the property is just that. So, if a defendant is the only person whose name appears on the title deeds to a property, on the face of it, the defendant's spouse does not have a right to the property. This is known as "equity (or beneficial ownership) following the law".⁸²

14.104 Secondly, "that presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change".⁸³

14.105 Common intention is to be deduced objectively from the conduct of the parties:

the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party.⁸⁴

14.106 Examples of the sort of evidence which might be relevant to drawing such inferences were given by the House of Lords in *Stack v Dowden*, and approved by the Supreme Court in *Jones v Kernott*:

In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than

⁸⁰ *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432; *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776; *CPS v Piper* [2011] EWHC 3570 (Admin); *R v Alom* [2012] EWCA Crim 736.

⁸¹ *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 at [51].

⁸² *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 at [33], [54] and [109]. *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 at [51] and [68]; *CPS v Piper* [2011] EWHC 3570 (Admin).

⁸³ *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 at [51].

⁸⁴ *Gissing v Gissing* [1971] AC 886 at 906.

financial contributions may be relevant to divining the parties' true intentions. These include:

[1] any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names;

[2] the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys;

[3] the purpose for which the home was acquired;

[4] the nature of the parties' relationship;

[5] whether they had children for whom they both had responsibility to provide a home;

[6] how the purchase was financed, both initially and subsequently;

[7] how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally.

[8] The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection.⁸⁵

14.107 In those cases where it is clear the parties' beneficial ownership was intended to differ from legal ownership, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property".⁸⁶

14.108 We consider that judges ought to be provided with guidance on these issues. However, we understand that the case law referred to has not brought to a close debate about the scope and application of the doctrine of common intention constructive trusts. We recognise that *Jones v Kernott* and *Stack v Dowden* are the closest to a "guide" that can currently be provided, but they are not comprehensive.

⁸⁵ *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

⁸⁶ *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 at [69].

We therefore invite consultees views on how to best guide judges who are facing these issues in confiscation proceedings.

Consultation Question 52.

14.109 We invite consultees' views about how best to guide judges dealing with cases involving issues as to common intention constructive trusts in confiscation proceedings.

Part 5: Recoverable Amount

INTRODUCTION TO PART 5

In this section of the paper, we consider the second stage in determining the confiscation order; the determination of the recoverable amount. This section comprises three chapters; recoverable amount (Chapter 15), hidden assets (Chapter 16) and tainted gifts (Chapter 17).

In Chapter 15 we consider what the recoverable amount is and why the recoverable amount is important. We also look at the potential issues which arise from separating the recoverable amount from the benefit as opposed to equating the two figures. We provisionally propose that where a confiscation order is made in less than the amount of the defendant's benefit, judges should explain the disparity in open court and that it will be open for the prosecution to seek to recover more of the defendant's benefit in future, until it is repaid in full.

In subsequent chapters we examine two specific issues which stem from the calculation of the recoverable amount; hidden assets (Chapter 16) and tainted gifts (Chapter 17) and make proposals for reform.

In relation to hidden assets, we consider whether the prosecution should bear either a legal or evidential burden to satisfy the court that assets have been hidden by a defendant. We conclude that no substantive change should be made to the burden of proof but that POCA 2002 should make clear that the court must impose an order in a sum less than the defendant's benefit 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. We also provisionally propose the creation of a Criminal Practice Direction relating to confiscation for the purpose of clarification and consolidation of relevant principles that will assist the court in applying the legislation. We consider that the creation of a Criminal Practice Direction will also be of assistance in relation to determining the recoverable amount by incorporating important principles to be considered by the judge in reaching their determination.

In respect of tainted gifts, we look at section 9 of POCA 2002 which provides that a defendant's "available amount" includes both "free property" and the value of all "tainted gifts" made by the defendant. We make similar proposals regarding the incorporation of principles into a Criminal Practice Direction. In addition, we provisionally propose that the wording of section 77(5)(a) be amended to provide that a gift is tainted if it was made by the defendant at any time after "the commission of the offence" rather than "the date on which the offence was committed".

Chapter 15: The “recoverable amount” and its place in the confiscation regime

INTRODUCTION

15.1 In Part 5 of this Consultation Paper we considered the issues surrounding the identification and valuation of a defendant’s benefit from crime. However, the calculation of benefit is not the final stage in making a confiscation order. Before a confiscation order can be made the court must take two further steps. The first of those steps is to determine what is known as the “recoverable amount”.

15.2 In this part of the paper we consider:

- (1) what the recoverable amount is and why the recoverable amount is important (this chapter); and
- (2) perceived issues in connection with the recoverable amount identified during our pre-consultation discussions and fact-finding. In particular, we consider:
 - (a) potential issues with separating the recoverable amount from the benefit (this chapter);
 - (b) hidden assets (Chapter 16); and
 - (c) tainted gifts (Chapter 17).

THE CURRENT LAW

15.3 Having determined the value of a defendant’s benefit, the court will go on to decide the “recoverable amount”.¹ Ultimately, the confiscation order will require the defendant to repay that “recoverable amount”.²

15.4 The rationale for an additional stage to the confiscation enquiry and not simply requiring the court to make an order in the amount of the benefit was described by the House of Lords in *R v May* as a “very important” one, namely that “however great the payments a defendant may have received or the property he may have obtained, he cannot be ordered to pay a sum which it is beyond his means to pay”.³

Burden of proof

15.5 The starting point is that the recoverable amount is equal to the benefit that a defendant obtained.⁴ The starting point can be displaced if the defendant satisfies the

¹ Proceeds of Crime Act 2002, s 6(5)(a).

² Proceeds of Crime Act 2002, s 6(5)(b); subject to proportionality of the final order.

³ *R v May* [2008] UKHL 28 at [41], [2008] 1 AC 1028.

⁴ Proceeds of Crime Act 2002, s 7(1).

court that the value of his or her assets is insufficient to repay the benefit in its entirety.⁵

- 15.6 The burden is placed upon 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”.⁶ In *R v Barwick* the Court of Appeal explained the rationale further:

it is likely that an offender may take steps to make the proceeds of crime difficult to trace. Once it is proved that he has received the benefit, it is pragmatic, and entirely fair to the defendant, to place upon him the onus of showing (to the civil standard) that he no longer has the proceeds or that their extent or value has diminished.⁷

- 15.7 The position adopted by the courts in England and Wales was endorsed by the European Court of Human Rights in the case of *Grayson v the United Kingdom*. In rejecting a challenge to the reverse burden of proof as infringing the right to a fair hearing, the court found that:

it was not unreasonable to expect the applicants to explain what had happened to all the money shown by the prosecution to have been in their possession... . Such matters fell within the applicants' particular knowledge and the burden on each of them would not have been difficult to meet if their accounts of their financial affairs had been true.⁸

- 15.8 If the court is satisfied that the defendant's assets are insufficient to meet the benefit, the “recoverable amount” will be reduced from the benefit to either:

- (1) the “available amount”; or
- (2) a “nominal amount” if the available amount is nil.⁹

The available amount

- 15.9 The available amount comprises

- (1) the total of the values (at the time the confiscation order is made) of:
 - (a) all the free property then held by the defendant; and
 - (b) all “tainted gifts”.

⁵ Proceeds of Crime Act 2002, s 7(2).

⁶ *R v Dickens* [1990] 2 QB 102 at [105] per Lord Lane CJ, [1990] 2 WLR 1384.

⁷ *R v Barwick* [2001] 1 Cr App R (S) 129 at [35], [2001] Crim LR 52; see also *R v Comiskey* (1991) 93 Cr App R 227, (1990-91) 93 Cr App R (S) 562.

⁸ *Grayson v United Kingdom* 48 EHRR 30 (App Nos 19955/05 and 15085/06).

⁹ Proceeds of Crime Act 2002, s 7(2).

- (2) minus the total amount payable by the defendant “in pursuance of obligations that have priority”.¹⁰

Free property

15.10 Property is “free property” for the purposes of calculating the available amount unless it falls within section 82(2) or 82(3) of POCA 2002.

15.11 Section 82(2) encompasses property which was made subject to a forfeiture order in earlier proceedings.¹¹ For example, following a conviction for offending connected to drugs, an order may be made for the forfeiture and destruction of property related to the offence.¹² Because such property is already subject to an order of the court, it is not treated as “free” property for the purposes of confiscation.

15.12 Section 82(3) encompasses property which is subject to detention and forfeiture orders under the civil recovery regime in Part 5 of POCA 2002. As with section 82(2), such property is already subject to an order of the court and so is not treated as “free” property for the purposes of confiscation.

15.13 Because “free property” encompasses any property not falling within sections 82(2) or 82(3) of POCA 2002 it therefore encompasses any legitimate property in the hands of the defendant and is not limited to property derived from crime.¹³ Therefore, money gained through a “lottery win or an inheritance”¹⁴ could be “free property”.

15.14 The extension of free property to any type of property including legitimately acquired property reflects the distinction between the confiscation regime in Part 2 of POCA 2002 and the civil recovery regimes under Part 5 of POCA 2002. As we discuss in Part 1 of the consultation paper orders made under Part 5 of POCA 2002 are for forfeiture of specific property which is connected with criminality.¹⁵ However, a confiscation order is made against the defendant to repay a sum of money that represents his or her benefit from crime. Because the order is made against the defendant personally, he or she may satisfy the order from any assets available to him or her, whatever their source. In *R v Waya* the Supreme Court noted that it is

an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation.¹⁶

¹⁰ Proceeds of Crime Act 2002, s 9(1).

¹¹ Proceeds of Crime Act 2002, Explanatory Note 146.

¹² Misuse of Drugs Act 1971, s 27.

¹³ *R v Chastny (No 2)* [1991] 1 WLR 1385, [1992] 1 All ER 193; *R v Currey* (1995) 16 Cr App R (S) 421; *R v May* [2008] UKHL 28 at [41], [2008] 1 AC 1028.

¹⁴ *R v Barwick* [2001] 1 Cr App R (S) 129 at [37], [2001] Crim LR 52.

¹⁵ Proceeds of Crime Act 2002, ss 298, 303O and 303Z14.

¹⁶ *R v Waya* [2012] UKSC 51 at [27].

Tainted Gifts

15.15 Property does not have to be in the hands of the defendant to form part of the “available amount”. A gift given to another may be treated as part of the available amount if it is found to be a “tainted gift”.

15.16 The definition of a “tainted gift” varies depending on whether a defendant was found to have a “criminal lifestyle”¹⁷ earlier in the confiscation proceedings:¹⁸

- (1) Where the court has found that the defendant does not have a “criminal lifestyle”, a gift is “tainted” if it was made by the defendant at any time after the date on which the offence of which the defendant was convicted was committed.¹⁹
- (2) Where the court has found that a defendant does have a “criminal lifestyle”,²⁰ a gift will be tainted if it was made at any time after the “relevant day”.²¹ The relevant day is generally the first day of the period of six years, ending with the day when proceedings for the offence of which the defendant was convicted were started.²²

15.17 A gift includes any property which is transferred to another person at a significant undervalue.²³ For example, “if the defendant sells a car worth £10,000 at the time of the transfer for £2,000”²⁴ it will be treated as a gift for the purposes of the tainted gift provisions.

Obligations that have priority

15.18 According to section 9 of POCA 2002:

- (2) An obligation has priority if it is an obligation of the defendant—
 - (a) to pay an amount due in respect of a fine or other order of a court which was imposed or made on conviction of an offence and at any time before the time the confiscation order is made, or
 - (b) to pay a sum which would be included among the preferential debts if the defendant’s bankruptcy had commenced on the date of the confiscation order or his winding up had been ordered on that date.

¹⁷ Proceeds of Crime Act 2002, s 75.

¹⁸ See Chapter 13.

¹⁹ Or, if his particular criminal conduct consists of two or more offences and they were committed on different dates, the date of the earliest. Proceeds of Crime Act 2002, s 77(5).

²⁰ Or no court has made a decision as to whether the defendant has a “criminal lifestyle”.

²¹ Proceeds of Crime Act 2002, s 77(1).

²² Proceeds of Crime Act 2002, s 77(9). See also s 10(8), as discussed in Chapter 13.

²³ Proceeds of Crime Act 2002, s 78(1).

²⁴ Proceeds of Crime Act 2002, Explanatory Note 144.

15.19 A “preferential debt” for the purposes of section 9(2)(b) has the meaning given to the term by the Insolvency Act 1986²⁵ and includes, for example, taxes and social security contributions which are owed.²⁶

Nominal amount

15.20 Where a defendant has no assets available from which the confiscation order can be satisfied, a nominal order should be made, which will often be in the sum of £1.²⁷

15.21 The reason why an order might be made in a nominal sum is found in section 22 of POCA 2002, which permits an order to be revised upwards at a later date. Section 22 is intended to strike a balance between the making of an order which the defendant can pay and the recovery of a defendant’s benefit from crime.²⁸ It provides that where an order has been made in *any* amount lower than the benefit figure, a prosecutor or a receiver can apply for an upward calculation of the available amount²⁹ “should the [defendant] come into further funds”.³⁰ The available amount can be revised upwards to require payment up to the value of the defendant’s benefit.³¹

15.22 Because section 22 is applicable when the order is made in *any* amount lower than the benefit figure, as long as a confiscation order is made in even a nominal sum, the court retains the ability to revisit the amount which a defendant should be required to pay should he or she come into assets at a later date. In *R v Malhi*, a nominal order of £1 was subsequently uplifted to an available amount of £108,000 to reflect the defendant’s equity in a house which had been purchased after the confiscation order was made.³² Nominal orders therefore serve a pragmatic purpose.

Revising the available amount.

15.23 We discuss the upward revision of the available amount under section 22 of POCA 2002 in more detail in Chapter 25. The available amount may also be revised downwards, under section 23 of POCA 2002:

If the [Crown] court finds that the available amount (as so calculated) is inadequate for the payment of any amount remaining to be paid under the confiscation order it

²⁵ Insolvency Act 1986, s 386.

²⁶ Insolvency Act 1986, Schedule 6.

²⁷ *R v Byatt* [2006] EWCA Crim 904, [2006] 2 Cr App R (S) 116; *R v Siaulys* [2013] EWCA Crim 2083, [2013] 10 WLUK 989; *R v Gunn* [2014] EWCA Crim 1758, [2014] 7 WLUK 472; *R v Ahmad* [2014] UKSC 36, [2015] AC 299 (in the context of a co-defendant’s confiscation order); *R v Ayinde-Azeez* [2015] EWCA Crim 2165, [2015] 12 WLUK 56; *R v Khan* [2016] EWCA Crim 1760, [2016] 10 WLUK 88 (in the context of the co-defendant’s confiscation order); *R v Malhi* [2016] EWCA Crim 2025, [2017] 4 WLR 27; *R v Cole* [2018] EWCA Crim 888, [2018] Lloyd’s Rep FC 321.

²⁸ Whether such a balance actually is struck is discussed in Chapter 25.

²⁹ Proceeds of Crime Act 2002, s 22(1)(b).

³⁰ *R v Ayinde-Azeez* [2015] EWCA Crim 2165, [2015] 12 WLUK 56 at [7]; see also *R v Spears* [2009] EWCA Crim 2875, [2009] 12 WLUK 701 at [7].

³¹ Proceeds of Crime Act 2002, s 22(4)(b).

³² *R v Malhi* [2016] EWCA Crim 2025, [2017] 4 WLR 27.

may vary the order by substituting for the amount required to be paid such smaller amount as the court believes is just.³³

PERCEIVED PROBLEMS WITH SEPARATING BENEFIT AND THE SUM TO BE REPAYED

15.24 During our pre-consultation discussions we heard that separating benefit from the sum to be repaid causes a number of problems arising from the potentially changeable nature of the latter.

15.25 One concern was that, rather than having a single order made in the amount of the benefit, a confiscation order may be subject to numerous variations upwards or downwards depending upon the changing value of a defendant's assets.³⁴ The extent to which orders are varied up or down will depend on what the court considers to be just.³⁵ The potential for multiple court hearings (including appeals resulting from those individual hearings) has inevitable time and cost implications.

15.26 There are examples of court time being taken up with making tenuous applications to vary the available amount in an attempt to evade liability. In *Adams v CPS*, the Court of Appeal upheld the decision of Mrs Justice Nicola Davies to refuse a downward variation of a confiscation order against Mr Adams. He had contended that "he had exhausted all of his assets; that he had received minimal remuneration for some work he had been able to obtain since his release from prison and that he is, effectively, dependent on his wife".³⁶ However, Mrs Justice Nicola Davies found that "there were a number of gaps in the evidence and that unsatisfactory and implausible explanations had been provided".³⁷ Six months after the decision of the Court of Appeal, with the threat of being sent to prison for non-payment of his confiscation order, Mr Adams paid £727,772 in full satisfaction of the order.³⁸

15.27 A further concern was that, by separating out benefit from what a defendant may have to repay in the immediate future, the benefit figure is largely treated as an irrelevance. We were told that this has led to a lack of clear focus on whether a benefit figure is in fact appropriate. As the Court of Appeal observed in *R v Ghulam*:

The benefit figure is important to an offender facing confiscation proceedings...for many offenders, however, the important question in practice is what sum they will be required to pay, bearing in mind that in default of payment they will have to serve a prison sentence consecutive to the sentence for the underlying offending.³⁹

15.28 Whilst orders made in a "nominal amount" therefore serve a legitimate purpose, the rationale behind making such orders may not always be clear to the public. Examples

³³ Proceeds of Crime Act 2002, s 23(3).

³⁴ Proceeds of Crime Act 2002, ss 22 and 23.

³⁵ Proceeds of Crime Act 2002, s 22(3) and 23(3).

³⁶ *Adams v Crown Prosecution Service* [2017] EWCA Civ 185 at [14], [2017] 1 WLR 3732.

³⁷ *Adams v Crown Prosecution Service* [2017] EWCA Civ 185 at [37], [2017] 1 WLR 3732.

³⁸ M Evans, *Terry Adams Pays Back £750,000 from Proceeds of Crime*, <https://www.telegraph.co.uk/news/2017/12/08/terry-adams-pays-back-750000-proceeds-crime/> (last visited 25 May 2020).

³⁹ *R v Ghulam* [2018] EWCA Crim 1691, [2019] 1 WLR 534.

of negative headlines include “Notorious Bristol gang leader who helped make £175,000 must only pay back £1”⁴⁰ and “Nursery’s anger as thieving treasurer ordered to pay back just £1”.⁴¹ A lack of clarity surrounding confiscation orders made in amounts that are nominal, or significantly lower than the benefit from crime, undermines public confidence in the confiscation regime as a mechanism for removing the proceeds of crime. It also fails to meet the aim of deterring criminality by sending a clear message that crime does not pay.

Analysis

15.29 Separating the “benefit” figure from the “recoverable amount” does not happen in many jurisdictions. For example, under the Australian Proceeds of Crime Act 2002, a defendant’s profit from crime is calculated and an order is made in that sum.⁴² The order takes effect as an outstanding debt.⁴³ We have therefore carefully considered whether such an approach is appropriate in this jurisdiction.

Advantages of making the confiscation order in the “benefit” figure

15.30 If such an approach were to be adopted in this jurisdiction, it would have the advantages that:

- (1) an order would be made in a single, definitive sum that reflects the benefit from criminality;
- (2) removing the need for regular variation hearings (uplifts and decreases to the available amount) would save court time and costs;
- (3) There would be clarity that a defendant is liable to repay all of his or her benefit. That is the ultimate position under POCA 2002. However, the position is currently clouded by the fact that order is first made in the recoverable amount, and may then be increased to the amount of the defendant’s benefit;
- (4) the perception generated that a criminal is being “let off” through nominal orders and other orders that are made in sums significantly lower than the benefit from crime would be eliminated (or at least reduced);
- (5) greater focus would be necessarily be placed on the proper calculation of the “benefit” figure itself.

15.31 Whilst such advantages are attractive:

- (1) a move away from the current position could create injustice. A defendant may be liable to serve a term of imprisonment in default; and incur interest on a sum they do not have the means to satisfy; and

⁴⁰ John Hawkins and Daniel Chipperfield, ‘Notorious Bristol gang leader who helped make £175,000 must only pay back £1’ Bristol Live (4 February 2019).

⁴¹ Stef Hall, ‘Nursery’s anger as thieving treasurer ordered to pay back just £1’, *Blackpool Gazette* (5 December 2017).

⁴² Proceeds of Crime Act 2002 (Cth) s 121.

⁴³ Proceeds of Crime Act 2002 (Cth) s 140.

- (2) many of the perceived disadvantages of the current position can be met through modest changes without moving away from the current position.

Objections of principle to making the order in the amount of the benefit

- 15.32 At the outset of this chapter we set out the House of Lords' description of the role played by the recoverable amount calculation as a "very important one" in ensuring that the defendant "cannot be ordered to pay a sum which it is beyond his means to pay".⁴⁴
- 15.33 Limiting a confiscation order to a sum which is within the defendant's means reflects the treatment of confiscation as part of the sentencing process.⁴⁵ Financial orders connected to sentencing, such as fines and compensation orders generally require consideration of a defendant's means.⁴⁶
- 15.34 Financial orders connected to sentence must also be payable within a reasonable time. In *R v York*⁴⁷ the Court of Appeal stated that "while a repayment period of two or three years in an exceptional case would not be open to criticism, in general, excessively long repayment periods should be avoided."⁴⁸ Making a confiscation order that goes far beyond what a defendant may be able to repay within a reasonable time would offend this principle.
- 15.35 In contrast to countries such as Australia, failure to pay a confiscation order under POCA 2002 can lead to imprisonment in default of payment.⁴⁹ During our fact-finding we heard from prosecutors and financial investigators that, in some cases, the threat of such imprisonment can be an effective enforcement tool. This is reflected in the timing of the satisfaction of the confiscation order in the *Adams* case mentioned above.
- 15.36 As will be seen in Chapter 22, we consider that imprisonment in default should still have a place in the enforcement of confiscation orders. The calculation of the final order with reference to the amount actually available to the defendant has the advantage of ensuring that any term of imprisonment for non-payment is proportionate. It would be manifestly unjust to imprison a defendant for failing to pay a sum that they could not realistically ever hope to pay.⁵⁰ Similar considerations also apply to other enforcement tools, such as the accrual of interest on any outstanding sum after the time to pay period has expired.⁵¹

⁴⁴ *R v May* [2008] UKHL 28 at [41], [2008] 1 AC 1028.

⁴⁵ *Phillips v United Kingdom* (2001) 11 BHRC 280, [2001] Crim LR 817; *R v Rezvi* [2001] UKHL 1, [2003] 1 AC 1099; *R v Silcock* [2004] EWCA Crim 408, [2004] 2 Cr App R (S) 61; *R v May* [2005] EWCA Crim 97, [2005] 1 WLR 2902.

⁴⁶ *R v Olliver* (1989) 11 Cr App R (S) 10, (1989) 153 JP 369; *R v York* [2018] EWCA Crim 2754 at [19], [2019] 4 WLR 13.

⁴⁷ *R v York* [2018] EWCA Crim 2754 at [19], [2019] 4 WLR 13.

⁴⁸ As to 2 to 3 years being an appropriate period of time for a compensation order, see *R v Olliver* (1989) 11 Cr App R (S) 10, 15 per Lord Lane CJ.

⁴⁹ See Chapter 18.

⁵⁰ *R v May* [2008] UKHL 28 at [35], [2008] 1 AC 1028.

⁵¹ Proceeds of Crime Act 2002, s 12.

15.37 Although of less significance than the matters we have identified, imposing an order in the benefit figure could increase dramatically the outstanding debt figure. Currently the outstanding debt is calculated against the “available amount” figure,⁵² which is almost routinely lower than the benefit figure. Analysing our data from Liverpool Crown Court, the total benefit from crime for orders made over the period of a year was £76.63 million, compared to a total available amount of £4.35 million. The ratio of benefit to the order made for the available amount was approximately £17 of benefit for every £1 ordered to be paid.⁵³ Taking the Liverpool data, a scheme whereby confiscation orders are routinely imposed in the benefit figure could increase the outstanding debt by up to 17 times.

15.38 We have noted in Chapter 12 the concerns that the overall debt figure has increased. If the benefit figure were used as to the basis for a confiscation order, and therefore for the calculation of the total outstanding confiscation order debt, it is easy to see that the debt figure would be compounded and the problems identified would not be addressed adequately.

Meeting the criticisms of making orders in the available amount

15.39 We consider that criticism of making orders in the available amount can be met through other reforms short of making the confiscation order in the amount of the benefit, namely:

- (1) Ensuring that realistic benefit figures are imposed thus ensuring the disparity between the benefit figure and available amount is reduced in many cases.
- (2) Including the value of seized goods in a defendant’s benefit figure but crediting the value of such goods against the recoverable amount. This proposal would serve to reduce, in some cases, the disparity between benefit and the available amount.
- (3) Promoting greater understanding and transparency by encouraging judges who impose a confiscation order to warn defendants that applications to increase the available amount may be made.

Ensuring realistic benefit figures are imposed

15.40 In Chapters 11 to 14 we have proposed significant changes to the way in which a defendant’s benefit is calculated. Such changes are intended to increase the focus on a realistic (and lower) benefit figure, which should be closer to the amount of a defendant’s assets from which a confiscation order could be satisfied than under the current law.

Crediting the value of certain goods against the recoverable amount

15.41 In Chapter 12 on defining and valuing benefit, we consider the importance of distinguishing between benefit and the realisable amount with respect to temporary gains and seized assets. We indicate that we support the public policy rationale

⁵² HMCTS Trust Statement 2018-19.

⁵³ In 2012-13 the National Audit Office reported a ratio of £12 of benefit for every £1 ordered to be paid (Confiscation Orders, Report of the National Audit Office (2013-14) HC 738).

behind taking gross profit and not permitting the offsetting of expenses from property obtained.

15.42 However, we then consider a scenario in which assets are seized from the possession of a defendant. We proposed that, in this instance that the value of these assets would be held to form part of the defendant's benefit, but would not be recoverable given that the state has the goods in question. The defendant has already been held to account by the state for that part of his or her benefit which was represented by the drugs.

15.43 By way of example, a defendant is arrested and drugs valued at £1 million are seized. The court determines the total benefit as £2 million (including the seized drugs) but the defendant has no realisable assets. The order would be as follows:

- (1) **Benefit:** £2million, of which only £1 million is recoverable (because the £1 million worth of drugs have already been recovered).
- (2) **Available amount:** a nominal order of £1.

15.44 By announcing and recording the order in this way, the position is clear. Thus, if the defendant in our example acquired further assets any application to increase the order pursuant to section 22 (discussed in Chapter 25), would plainly be limited to £1 million as specified on the face of the order.

15.45 The principle would apply equally where a defendant illegally imported cigarettes which were then seized by customs authorities. The value of the goods seized would effectively be credited against the total benefit for which the defendant is to be held to account.

15.46 The proposal seeks to ensure that the benefit figure fully captures the defendant's criminal "gain" but what the defendant is ultimately required to pay does not amount to double recovery of the same value by the state.

Consultation Question 53.

15.47 We provisionally propose that the value of criminal assets seized from a defendant should be considered to be a component of the defendant's total benefit, but the order should reflect that some benefit has already been seized or disgorged to the state or to victims thus preventing double recovery.

15.48 Do consultees agree?

Judicial warning about the scope for applications pursuant to section 22 of POCA 2002

15.49 We consider that an understanding of the significance of the benefit figure and an understanding of nominal orders could be better achieved through clear judicial direction.

15.50 It is noteworthy that when imposing sentence the court is obliged to explain to a defendant, in ordinary language, the effect of the sentence imposed.⁵⁴ This may include, for example, when a defendant will be released from custody and the consequences of non-compliance with a court order. The Crown Court Compendium, which is intended to guide all judges in the Crown Court as to pertinent matters relating to trial and sentence, has examples for judges to use and adapt as necessary to fulfil their statutory duty to explain the effect of a sentence imposed. In respect to determinate custodial sentences and community orders, the following examples are provided:

“You will serve up to half of your sentence in custody and then you will be released.”⁵⁵

“If you fail to complete the unpaid work or to do it properly, or fail to cooperate with supervision/the rehabilitation activity requirement you will be in breach of the order: that means you will be brought back before this court/the Magistrates’ Court and may be given further requirements or resentenced or fined for this offence; and that may well mean custody.”⁵⁶

15.51 Currently the Crown Court Compendium contains a very general “example direction” on confiscation.⁵⁷ The example direction does not, for understandable reasons, give any guidance on explaining why a nominal order has been made, or that the available amount might be uplifted at a later date.

15.52 In appropriate cases, a judicial explanation that an application may be made to increase the available amount pursuant to section 22 POCA 2002 would serve to ensure that the position is clear to defendants and the public at large.

15.53 We are of the view, however, that a statutory obligation, akin to that imposed on the court where sentence is imposed, is not necessary and would be disproportionate to address a discrete issue such as this.

15.54 A requirement to provide an explanation in the terms we have identified could be achieved via an addition to the Criminal Practice Direction or Criminal Procedure Rules. The Criminal Practice Direction currently contains no material pertaining to confiscation whatsoever.

15.55 It is important that defendants and the public understand that where the available amount is less than the benefit figure the latter figure is not rendered nugatory. An addition to the Criminal Practice Direction or Criminal Procedure Rules, and a consequential amendment to the Crown Court Compendium, would not be time consuming and would serve to promote greater transparency and understanding of the process. At Chapter 14 we have proposed that relevant principles from the

⁵⁴ Criminal Justice Act 2003, s 174(3)(a).

⁵⁵ Crown Court Compendium (July 2019 ed) Para 4-19.

⁵⁶ Crown Court Compendium (July 2019 ed) Para 5-4

⁵⁷ Crown Court Compendium (July 2019 ed) Para 7-2.

plethora of case law be incorporated into the Criminal Practice Direction to make the law readily accessible for judges, practitioners and the public.

Consultation Question 54.

15.56 We provisionally propose that:

- (1) the Criminal Procedure Rules Committee considers incorporating into the Criminal Practice Direction a provision to the effect that:

where a confiscation order is made in an amount less than the defendant's benefit, judges should explain why the two figures are different and that it will be open to the prosecution to seek to recover more of the benefit in future, until it is repaid in full.
- (2) consideration be given to including a direction to this effect in the Crown Court Compendium.

15.57 Do consultees agree?

Chapter 16: Hidden Assets

INTRODUCTION

16.1 In this chapter we consider the issue of “hidden assets”. This is not a term that is used in POCA 2002, but is a term that has been developed 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.”¹

THE CURRENT LAW

16.2 As set out in Chapter 15, in calculating the recoverable amount, the starting point is that the defendant has retained all of his or her proceeds of crime. The defendant’s recoverable amount will be his or her benefit, unless he or she can satisfy the court that he or she has insufficient assets to repay that benefit. Ultimately, therefore, it “falls to the defendant to establish a negative, by showing that he does not retain the benefit in question”.²

16.3 A defendant may seek to discharge the burden of proof by producing documentary evidence, giving oral evidence or calling witnesses.

16.4 Defendants often fail to produce any documentation³ or sufficient documentation to satisfy a court.⁴ On some occasions, the lack of documentary evidence may be because the defendant is seeking to avoid scrutiny by the courts. As the Court of Appeal put it in *R v Mehta* in the context of an MTIC fraud:⁵

It is inherently improbable that such a person will undertake such a fraud without ensuring, first, that he makes a substantial amount of money out of it, and second, that he arranges matters so that he keeps it. In order to do that it is inevitably a necessary part of the fraud that the money should be put somewhere where it cannot be traced by the authorities.⁶

¹ J Fisher and J Bong-Kwan “Confiscation: deprivatory and not punitive – back to the way we were” (2018) *Criminal Law Review* 3 192.

² J Fisher and J Bong-Kwan “Confiscation: deprivatory and not punitive – back to the way we were” (2018) *Criminal Law Review* 3 192.

³ *R v Dhall* [2013] EWCA (Crim) 892, [2013] 5 WLUK 215; *R v Omorogieva* [2015] EWCA Crim 382, [2015] 2 WLUK 578.

⁴ *R v Saben* [2013] EWCA (Crim) 575, [2013] 4 WLUK 85; *R v Carnal* [2014] EWCA Crim 287, [2014] 2 WLUK 172.

⁵ For an explanation of “carousel” or MTIC fraud see Chapter 12.

⁶ *R v Mehta* [2009] EWCA Crim 1601, [2009] 7 WLUK 420 at [14].

- 16.5 In *R v Kelly* the Court of Appeal endorsed the confiscation judge's finding that the defendant had operated a "shadowy web of business activities and money movements designed to frustrate the authorities and the exercise in hand".⁷
- 16.6 Linked to a desire to avoid scrutiny at the time of confiscation may be a desire to avoid scrutiny at all (for example by the tax authorities). In this regard (in the context of the lifestyle assumptions under POCA 2002)⁸ the Court of Appeal has stated that:
- if persons such as this appellant in this particular business choose to operate their business dealings in such a way as to deal only in cash and to keep no records of any kind whatsoever they have to take the consequences that may arise: not least for the purposes of the potential application of the Proceeds of Crime Act 2002.⁹
- 16.7 On other occasions documents may not have been kept in good order or at all. For example, in *R v Lee* the Court of Appeal described accounts as "chaotic and of no help" and the underlying till rolls on which the accounts were based had been destroyed.¹⁰ As Jonathan Fisher QC and Justin Bok Kwan have observed in the Criminal Law Review:
- Without the support of proper financial records, a defendant can only offer his word to the court. The credibility of a defendant to prove anything is significantly lowered following a conviction at trial. If a trial judge takes the view that a defendant was evasive and dishonest during trial, the judge is unlikely to afford any value to what he says in relation to financial ability to satisfy an order.¹¹
- 16.8 There have been many cases in which oral evidence given by a defendant in connection with confiscation and hidden assets has been rejected.¹² For example, in *R v Carnall* the Court of Appeal described the defendant as a "consummate liar".¹³ Alternatively, a defendant may give evidence, but simply offer no explanation as to where the funds generated by criminality have gone.¹⁴
- 16.9 A defendant may choose not to give evidence.¹⁵ However, assertions made either by the defendant or advocates in submissions to the court which are unsupported by

⁷ *R v Kelly* [2016] EWCA Crim 1505, [2016] 9 WLUK 339 at [11] and [27].

⁸ As to which see Chapter 13.

⁹ *R v Jones* [2006] EWCA Crim 933, [2006] 4 WLUK 208.

¹⁰ *R v Lee* [2013] EWCA Crim 657 at [11], [2013] Lloyd's Rep FC 453.

¹¹ J Fisher and J Bong-Kwan "Confiscation: deprivatory and not punitive – back to the way we were" (2018) *Criminal Law Review* 3 192, 199.

¹² See, for example, *R v Saben* [2013] EWCA (Crim) 575, [2013] 4 WLUK 85; *R v Bowler-Degan* [2014] EWCA Crim 1190, [2014] 6 WLUK 147; *R v Kaif* [2014] EWCA Crim 2441, [2014] 11 WLUK 265; *R v Omorogieva* [2015] EWCA Crim 382, 2 WLUK 578; *R v Yu* [2015] EWCA Crim 1076, [2015] 2 Cr App R (S) 75.

¹³ *R v Carnall* [2014] EWCA Crim 287, [2014] 2 WLUK 172 at [16].

¹⁴ *R v Druce* [2013] EWCA (Crim) 40, [2013] Lloyd's Rep FC 220; *R v Sawyer* [2014] EWCA Crim 2227, [2014] 10 WLUK 705.

¹⁵ *R v Mirembe* [2013] EWCA (Crim) 1805, [2013] 10 WLUK 221; *R v Deny* [2015] EWCA Crim 69, [2015] 1 WLUK 478.

evidence are “always unlikely to suffice” in discharging the defendant’s burden of proof.¹⁶

- 16.10 The use of “unlikely” in the previous paragraph is reflective of the point made by the Court of Appeal in the case of *R v McIntosh*, namely that:

There is no principle that a court is bound to reject a defendant's case that his current realisable assets are less than the full amount of the benefit, merely because it concludes that the defendant has not revealed their true extent or value, or has not participated in any revelation at all. The court must answer the statutory question [as to the defendant’s recoverable amount] in a just and proportionate way. The court may conclude that a defendant's realisable assets are less than the full value of the benefit on the basis of the facts as a whole. A defendant who is found not to have told the truth or who has declined to give truthful disclosure will inevitably find it difficult to discharge the burden imposed upon him. But it may not be impossible for him to do so. Other sources of evidence, apart from the defendant himself, and a view of the case as a whole, may persuade a court that the assets available to the defendant are less than the full value of the benefit.¹⁷

PERCEIVED PROBLEMS WITH THE CURRENT REGIME

- 16.11 Hidden assets have been described as one of “the many ills that beset the confiscation regime”.¹⁸ During our pre-consultation discussions, financial investigators reported that inappropriate hidden assets findings contribute to the large outstanding confiscation debt. By their nature, the location and form of a hidden asset will be unknown to the authorities, making enforcement difficult (if not impossible).¹⁹
- 16.12 The HMCTS Trust Statement for 2018-19 states that £493,830,000 of the outstanding £2 billion in confiscation debt comprises “assets assessed as hidden with no other assets against which enforcement action can be taken”, approximately a quarter of the outstanding amount.
- 16.13 Financial investigators, police officers and lawyers to whom we spoke during our pre-consultation discussions suggested that such a large outstanding debt for hidden assets is because unrealistic hidden assets findings have been made.

ANALYSIS

A largely historic problem?

- 16.14 Financial investigators and police officers told us that the seeking of unrealistic orders is largely consigned to the past, resulting from the historic setting of confiscation targets for law enforcement agencies. Such targets were based on the volume and value of orders obtained with no regard to the enforceability of such orders or whether

¹⁶ *R v Kelly* [2016] EWCA Crim 1505, [2016] 9 WLUK 339 at [24].

¹⁷ *R v McIntosh* [2011] EWCA Crim 1501 at [15], [2011] 1 Cr App R (S) 60.

¹⁸ A Campbell-Tiech, “Whither confiscation: May revisited” [2019] 5 Archbold Review, p 4-5.

¹⁹ 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.

they were realistic.²⁰ Where such “unrealistic” orders remain unpaid, they continue to accrue interest at 8% per year.²¹ Targets based on the volume and level of orders have now been removed.²²

16.15 Financial investigators reported to us that they rarely pursue a finding of hidden assets unless it is realistic to do so. They often considered that their efforts to create a positive message that confiscation orders are proactively enforced is undermined if a hidden assets finding is sought when there is little prospect of it ever being repaid. The data in relation to confiscation orders made at Liverpool Crown Court from 2015-16 revealed that hidden assets findings were made in just 15 out of 315 cases (4.7%).

16.16 Financial investigators informed us that the preferred approach is now to seek orders for an available amount referable to known assets, even if the order is in a relatively low amount. Having obtained such an order, “uplifts” under section 22 of POCA 2002 are then sought if and when further assets come to light. In this way, orders are made which are more readily enforceable.²³

Burden and standard of proof

16.17 Whilst financial investigators may seek hidden assets findings in fewer cases, ultimately the decision is not one for the financial investigator or the prosecution.²⁴ The burden of proof in demonstrating what has happened to a defendant’s proceeds of crime after they have been obtained falls on the defendant. The court must be satisfied on the balance of probabilities that an asset is no longer available to the defendant before it can be omitted from the available amount.

16.18 The reverse burden of proof means that 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. One practitioner described how a defendant may be “punch drunk” by that time, reluctant to put himself or herself through the process of giving further evidence only to be disbelieved again. Therefore, from the outset, there is an increased likelihood that a “hidden assets” finding will be made.

16.19 Although clear guidance was given by the Court of Appeal in *R v McIntosh* that the court must look at the circumstances as a whole before reaching a “hidden assets” finding, there are cases in which strictly holding the defendant to his or her burden of proof has led to hidden assets findings that may appear on their face to be unrealistic. For example, in *R v Sawyer*,²⁵ the defendant was found to have hidden assets despite

²⁰ For example, the oral evidence of Mick Creedon, Chief Constable of Derbyshire Police and National Lead Officer for Serious and Organised Crime to the House of Commons Committee of Public Accounts, Confiscation orders: progress review (2016-17) HC 124, p 5; Royal United Services Institute, “Enforcing Criminal Confiscation Orders” (2016) p 36.

²¹ As to which see Chapter 18.

²² For example, Confiscation Orders, Report of the House of Commons Committee of Public Accounts (2014) HC 942, Ev 6.

²³ We discuss applications under the Proceeds of Crime Act 2002, s 22 in more detail in Chapter 25.

²⁴ *R v Summers* [2008] EWCA Crim 872, [2008] 2 Cr App R (S) 101; *R v Tanveer* [2013] EWCA (Crim) 360, [2013] 3 WLUK 678.

²⁵ *R v Sawyer* [2014] EWCA Crim 2227, [2014] 10 WLUK 705.

her not having “any or any significant” identifiable assets and clear evidence of substantial debts, because no evidence had been produced about where the money that the defendant had stolen from her employer had gone.

16.20 Writing in the Criminal Law Review, Jonathan Fisher QC and Justin Bok Kwan have commented that:

The conclusion is simple and obvious...the judicial approach to the determination of hidden assets requires statutory intervention, to ensure that the Courts will not decide about the existence of hidden assets unless it is satisfied so that it is sure that these assets exist. A determination based on the civil standard of proof is too easy to satisfy in cases where the best evidence can be given only by the defendant in his own cause.²⁶

Requiring the court to be satisfied so that it is “sure” that the defendant has hidden assets

16.21 “Sure” represents the standard to which the prosecution must usually satisfy the court in criminal cases. It is sometimes referred to as “beyond reasonable doubt”.²⁷

16.22 The following example will be used to analyse the potential complexity in applying the criminal standard to “hidden assets”:

Defendant “A” has benefited in the sum of £100,000.

“A” can show that £30,000 was spent on a motor vehicle.

“A” says that the remaining £70,000 which was withdrawn from his bank account, was subsequently stolen from him by his co-conspirator cousin.

The only evidence on the £70,000 comes from “A” himself.

The authorities cannot find the cousin, whose bank accounts show no deposit of £70,000.

16.23 In our example the defendant currently bears the burden of showing that, on the balance of probabilities, his assets are of a lower value than his £100,000 benefit.

16.24 Currently a defendant would be required to establish that he or she no longer retains control of the £70,000. Merely showing that the money left the account is unlikely to satisfy the court that the theft occurred as alleged or at all or that beneficial ownership of the money does not remain with the defendant. The defendant must therefore adduce evidence, on the balance of probabilities, to show that he or she does not retain an interest in the money.

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 Judicial College, *Crown Court Compendium* (2019) p 5-1.

16.25 Placing the burden of proof on the prosecution to satisfy the court that the defendant does retain an interest in the £70,000 would be dependent on circumstantial evidence founded largely on inference. The prosecution could rely upon:

- (1) The fact that the £70,000 was withdrawn;
- (2) The absence of a credit of £70,000 into the defendant's cousin's bank account;
- (3) The credibility of the defendant's account.

16.26 "Sure" is a high standard to meet and arguably far more cogent evidence that positively suggests that the defendant retains an interest in the money would be required. In the absence of such evidence, the court may find that there is a reasonable doubt that the £70,000 was hidden, because of the possibility that it has been dissipated.

16.27 Requiring the prosecution to satisfy the court so that it is sure that assets are hidden fails to recognise the current rationale for placing the burden of proof on the defendant, namely that "the size of his realisable assets at the time of conviction [is] likely to be peculiarly within the defendant's knowledge".²⁸ The defendant is therefore best placed to explain what has happened to his or her assets since the making of the confiscation order.

16.28 If the prosecution were required to prove beyond reasonable doubt that an asset has been hidden, it is unlikely that a hidden assets finding would ever be made.

16.29 Furthermore, the civil standard of proof (the balance of probabilities, or "more likely than not") is applied throughout confiscation proceedings. Confiscation is already perceived as complex, bringing civil and criminal concepts into the same proceedings with neither the rules of criminal or civil evidence strictly applying.²⁹ To use both the civil and criminal standards of proof may add to this complexity and strengthen these perceptions.

16.30 We do not therefore propose that the prosecution should be required to satisfy the court so that it is sure that assets have been hidden.

Requiring the prosecution to satisfy the court on that the defendant has hidden assets "on the balance of probabilities"

16.31 The complexities of applying different standards at different stages of the confiscation hearing could be avoided if the prosecution was required to prove, on the balance of probabilities, that the defendant has hidden assets.

16.32 It is more likely that the circumstantial evidence outlined above would lead to a hidden assets finding if the standard of proof was the balance of probabilities rather than "sure". However, placing the burden on the prosecution to satisfy the court that the

²⁸ *R v Dickens* [1990] 2 QB 102 at [105], [1990] 2 WLR 1384, per Lord Lane CJ.

²⁹ *R v Silcock & Levin* [2004] EWCA Crim 408, [2004] 1 WLUK 595; *R v Clipston* [2011] EWCA (Crim) 446, [2011] 3 WLUK 192.

defendant has hidden assets on the balance of probabilities would not necessarily lead to different outcomes than under the current law.

- 16.33 In *R v Sawyer*, cited earlier in this chapter, the defendant was found to have hidden assets despite not having “any or any significant” identifiable assets and clear evidence of substantial debts. In that case the defendant had worked as a shop manager. Over five days she stole £15,902 from the store.
- 16.34 Having been alerted that the area manager may have suspicions, the defendant “made a false entry on the computer system purporting to show that she had made a bank deposit that day of £4,500. Furthermore, she took away an important banking book which was never recovered. She had effectively absconded and spent about a week in Bournemouth before she was found by her family and subsequently detained”.³⁰
- 16.35 The money was never recovered. The defendant’s case was that “she did not know where the money had gone. She had had it but had not yet banked it, although she was intending to do so, and it was in her car at a time when she visited a re-cycling site to dispose of other items and she thought she must have accidentally tipped it at that re-cycling site. That explained why it could not be found”.³¹
- 16.36 The judge found that the defendant had hidden the £15,902. The judge was described as having “carefully gone through the evidence of the offending which showed, to some extent, a degree of foresight and a degree of cunning and an ability, at least to some limited extent, to cover her tracks. This included the period when she was out of sight, the period during which the judge appears to have concluded that it would have been open to her to have secreted the money that she had stolen, and in respect of whose fate she had no credible explanation, somewhere where she would later recover it.”³²
- 16.37 Even if (as the Court of Appeal observed) the conclusion is not one which would have necessarily been reached by every judge who could have heard the case, given the careful analysis applied to the facts, it is not clear that the judge would have reached a different conclusion had the burden of proof been on the prosecution. The Court of Appeal noted that the hurdle to be surmounted on appeal is an “extremely taxing one”,³³ namely that no reasonable judge applying his mind to all of the evidence could have come to the same decision.
- 16.38 We do not therefore propose that the prosecution should be required to satisfy the court on the balance of probabilities that assets have been hidden.

A requirement for the prosecution to prove a “prima facie” case

- 16.39 The most limited way to move the burden onto the prosecution would be to place an “evidential burden” on the prosecution. In other words, the prosecution would need to produce some evidence that the defendant has hidden assets. Once the evidential

³⁰ *R v Sawyer* [2014] EWCA Crim 227, [2014] 10 WLUK 705 at [5].

³¹ *R v Sawyer* [2014] EWCA Crim 227, [2014] 10 WLUK 705 at [4].

³² *R v Sawyer* [2014] EWCA Crim 227, [2014] 10 WLUK 705 at [12].

³³ *R v Sawyer* [2014] EWCA Crim 227, [2014] 10 WLUK 705 at [15].

burden was met, the defendant would, as now, bear the burden of persuading the court that there were no hidden assets on the balance of probabilities.

16.40 The Court of Appeal has expressly rejected the assertion that the prosecution must raise what is sometimes referred to as a “prima facie” case. In *R v Barnham* it concluded that:

To hold that the prosecution must, in some way, show a prima facie case that the defendant has hidden assets in our judgment would defeat the object of the legislation. It is designed to enable the court to confiscate a criminal's ill-gotten gains. The expression “hidden assets” is indicative of the fact that the prosecution can have no means of knowing how and where a defendant may have dealt with or disposed of the proceeds of his criminal activities.³⁴

16.41 We consider that an evidential burden would have little meaningful impact. It is likely that such an evidential burden could be easily satisfied by referring to the defendant's benefit and the fact that its whereabouts is unaccounted for at the time of confiscation; the irresistible inference being that assets have been hidden. Furthermore, as the Court of Appeal noted in *R v Barnham*, such a scheme would undermine the purpose of the legislation.

16.42 We therefore do not consider that there is any real merit in introducing a requirement that the prosecution be required to raise a “prima facie case” that a defendant has hidden assets.

Consultation Question 55.

16.43 We do not propose that the prosecution should bear either a legal or evidential burden to satisfy the court that assets have been hidden by a defendant.

16.44 Do consultees agree?

Alternative approaches

16.45 As we have observed, in *R v Barwick* the Court of Appeal held that:

Once it is proved that he has received the benefit, it is pragmatic, and entirely fair to the defendant, to place upon him the onus of showing (to the civil standard) that he no longer has the proceeds or that their extent or value has diminished.³⁵

16.46 We find this reasoning to be compelling and consistent with the purpose of POCA 2002. However, during our pre-consultation fact finding exercise, significant concern was raised about hidden assets findings. A number of stakeholders observed that they harboured suspicions that a large proportion of hidden assets findings involved assets

³⁴ *R v Barnham* [2005] EWCA Crim 1049 at [41], [2005] 1 Cr App R (S) 16.

³⁵ *R v Barwick* [2001] 1 Cr App R (S) 129 at [35], [2001] Crim LR 52; see also *R v Comiskey* (1991) 93 Cr App R 227, (1990-91) 93 Cr App R (S) 562. Although *Barwick* pre-dated POCA 2002, but the requirement upon a defendant to satisfy the court to the civil standard also applies to proceedings under POCA 2002 (Section 6 (7) of POCA 2002 and see *R v Kelly* [2016] EWCA Crim 1505, [2016] 9 WLUK 339).

that do not exist. As one would expect, there is no objective evidence to support this suspicion. The HMCTS Trust Statement for 2018-19 does, however, reveal that £493,830,000 in hidden assets remain outstanding. It would perhaps be naïve to assume that this whole sum was truly hidden or, conversely, that none of the assets in fact exist.

16.47 The outstanding debt, anecdotal evidence from stakeholders and academic commentary led us to conclude that reform may be necessary. Having discounted placing a burden on the Crown, for the reasons we have detailed, we now consider:

- (1) a residual safeguard where a defendant fails to satisfy the court to the civil standard as to his or her available assets; and
- (2) incorporating the existing principles into a Criminal Practice Direction to ensure that they are readily accessible to judges, practitioners and the public at large.

A residual safeguard

16.48 As far as relevant, section 7 of POCA 2002 provides:

- (1) The recoverable amount for the purposes of section 6 of POCA 2002 is an amount equal to the defendant's benefit from the conduct concerned
- (2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is
 - (a) the available amount, or
 - (b) a nominal amount, if the available amount is nil.

16.49 An amendment to section 7 (2), or a new statutory provision, to permit orders in a sum less than the benefit where “the defendant shows *or the court is otherwise satisfied* that the available amount is less than the benefit figure” would help to ensure that inappropriate hidden assets findings are not made.

16.50 Such an approach could be considered consistent with the current position advocated in the case law:

- (1) In *R v Barnham*, the Court of Appeal made clear that although the burden of proof lies with the defendant, the court must keep “well in mind the principle that the risk of serious injustice to the defendant must be avoided and...not just pay lip service to that principle”.³⁶
- (2) In *R v McIntosh*,³⁷ it was held that the court is not bound to reject a defendant's assertion that there are no hidden assets simply because they have been disbelieved or has not given evidence, and that instead the court should consider the evidence in the case as a whole; and

³⁶ *R v Barnham* [2005] EWCA Crim 1049 at [41], [2005] 1 Cr App R (S) 16 at [40].

³⁷ *R v McIntosh* [2011] EWCA Crim 1501 at [15], [2011] 1 Cr App R (S) 60.

- (3) *In R v Hartshorne*,³⁸ the court observed that a defendant is likely to have some of his or her benefit and that this should be taken into account when determining the issue of hidden assets.

16.51 As can be seen, the court must consider all the circumstances of the case and must avoid the risk of serious injustice. In *R v McIntosh* it was observed that “the court must answer the statutory question [in section 7(2)] in a just and proportionate way.”³⁹

16.52 It is clear that the approach advocated in the case law goes beyond a simple analysis of whether the defendant has satisfied his or her burden of proof, and requires the court to consider all of the circumstances and all of the evidence (regardless of which party adduced it). An amendment to section 7(2) to provide a residual safeguard would allow courts to adopt the flexible approach set out in the case law.

Consultation Question 56.

16.53 We provisionally propose that legislation should provide that the court must impose an order in a sum less than the defendant’s benefit 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.

16.54 Do consultees agree?

Incorporating principles into a Criminal Practice Direction

16.55 All of the relevant principles relating to hidden assets are currently derived from case law and it would be of utility to practitioners, judges and the public for those principles to be readily accessible. The problem of an absence of readily accessible set of principles was evident in the case of *R v Brooks*.⁴⁰

16.56 At the confiscation hearing, the judge relied upon an authority pre-dating *R v McIntosh* (which itself had been decided five years earlier). Overturning the judge’s ruling, the Court of Appeal observed that

it was wrong for a judge to make a leap from rejecting a defendant’s account as to his assets to concluding necessarily that the available amount should equate to the amount of benefit...the passage cited from [an earlier authority of the court and relied on by the judge] has been superseded by developments in the case law and the more nuanced approach of *McIntosh* is the correct one.⁴¹

16.57 Incorporating the existing principles into the Criminal Practice Direction would ensure that the relevant principles are readily accessible. We note that a similar approach was taken when a new practice direction was issued in April 2019 to provide

³⁸ *R v Hartshorne* [2010] EWCA Crim 1283, [2010] 5 WLUK 603; see also *R v Comiskey* (1991) 93 Cr App R 227, (1991) 93 Cr App R 227; *R v Cukovic* (1996) 1 Cr App R (S) 131, [1996] CLY 1867; *R v Versluis* [2004] EWCA Crim 3168, [2005] 2 Cr App R (S) 26.

³⁹ *R v McIntosh* [2011] EWCA Crim 1501 at [15], [2011] 1 Cr App R (S) 60.

⁴⁰ *R v Brooks* [2016] EWCA Crim 44, [2016] 4 WLR 79 at [24] - [25].

⁴¹ *R v McIntosh* [2011] EWCA Crim 1501 at [25], [2011] 1 Cr App R (S) 60.

authoritative direction for the magistrates' courts when dealing with applications to adjourn a trial. The myriad of exiting case law was consolidated providing a single point of reference.⁴²

- 16.58 In Chapter 14 we provisionally propose the creation of a Criminal Practice Direction relating to confiscation, for the purpose of clarification and consolidation of relevant principles that will assist the court in applying the legislation.

Inclusion of additional matters in a Criminal Practice Direction

- 16.59 In addition to incorporation of the current law, two points raised during our pre-consultation discussion also arguably merit inclusion in any clarification of principles.
- 16.60 First, the notion that representations made by the prosecution may be of relevance could be included in the Criminal Practice Direction. Financial investigators were clear about the fact that there are cases in which they consider that no hidden assets finding should be sought.
- 16.61 Whilst we do not consider that it is appropriate to place a burden on the prosecution in connection with hidden assets, the court would no doubt be assisted by an indication from the prosecution as to whether it considers that a hidden assets finding should be made in light of the evidence. Prosecution counsel will already be called upon to respond to submissions made by the defence during a confiscation hearing in any event. Any indication in a codified provision that the court may consider prosecution representations goes to the wider point made in *R v McIntosh* that the court should consider all of the surrounding circumstances.
- 16.62 Taking into account prosecution representations may seem an obvious point that should not merit inclusion in any Criminal Practice Direction. However, we consider that in light of the uncertainty that has surrounded the conduct of confiscation hearings, it is of value to do so. Furthermore, directions to consider representations of the parties are currently found in the Criminal Practice Direction,⁴³ and so the proposal is not novel.
- 16.63 Second, we considered the point made during our pre-consultation discussions about defendants potentially not being in an optimal position to give evidence having been through a trial, been disbelieved once and having been convicted. In order to ensure that any finding as to hidden assets made on the basis of the quality of a defendant's evidence is as robust as possible, we consider that there is some merit in including in any codification of principles a recognition that the giving of evidence at such a late stage of the criminal proceedings may be a relevant factor for a judge to consider when determining any issue of hidden assets for a judge to consider when determining any issue of hidden assets.

⁴² Criminal Practice Direction VI Trial: 24c Trial Adjournment in Magistrates' Courts.

⁴³ Criminal Practice Direction VII Sentence: B.11, J.5-J.7, J.11, R.3, R.5, S.2.

Consultation Question 57.

16.64 We provisionally propose that the law in relation to hidden assets is codified and clarified through an articulation of relevant principles in a Criminal Practice Direction.

16.65 Do consultees agree?

Consultation Question 58.

16.66 We provisionally propose that, in relation to hidden assets, a Criminal Practice Direction should contain the following principles:

- (1) Where there is a difference between the amount available to the defendant to repay the confiscation order and the defendant's benefit, the court may find that the defendant has "hidden" assets representing that difference, either in whole or in part.
- (2) In determining whether to make a "hidden assets" finding, the court should consider (amongst any other matters that it considers relevant):
 - (a) The facts of the case taken as a whole, whether derived from
 - (i) evidence given by the defendant; or
 - (ii) sources of evidence other than the defendant
 - (b) Any expenditure incurred by the defendant which is more likely than not to have been met from the defendant's benefit.
 - (c) Representations made by the parties.
 - (d) The potential risk of injustice if a "hidden assets finding" inappropriately increases the "available amount".
- (3) When assessing the evidence, if any, given by the defendant, the court should consider (amongst any other matters that it considers relevant):
 - (a) the merits of any explanation for the absence of positive evidence in connection with the defendant's assets;
 - (b) that the defendant is not obliged to give evidence; and
 - (c) that the quality of any evidence given to the court may be affected by the fact that the defendant is giving evidence in a post-conviction hearing.

16.67 Do consultees agree with the principles suggested in the provisional proposal?

Chapter 17: Tainted Gifts

INTRODUCTION

- 17.1 In this chapter we consider what POCA 2002 refers to as “tainted gifts”.
- 17.2 When the court determines how much a defendant has available to him or her to repay his or her benefit from crime, the court will consider the value of his or her “free property”.¹ As we set out in the last chapter, “free property” is defined in section 82 of POCA 2002 as including any property not subject to a detention or forfeiture order.
- 17.3 By the time of a confiscation hearing, the defendant may have transferred his or her property to another person. That transfer will usually be treated as a gift from the defendant to the other person if:
- (1) the defendant voluntarily transferred property to the other person; and
 - (2) in return, the other person gave the defendant either nothing, or something which is far lower in value than would ordinarily be expected for that transfer.²
- 17.4 After voluntarily transferring the property to the other person by way of a gift, the defendant cannot generally take any steps to recover that gift if the defendant wants to take the gift back.³ Therefore, a gift does not form part of the defendant’s “free property” for the purposes of POCA 2002.
- 17.5 Section 9 of POCA 2002 therefore provides that a defendant’s “available amount” includes both “free property” and the value of all “tainted gifts” made by the defendant.

CURRENT LAW

Definition of “gift”

- 17.6 The question logically prior to whether a gift is tainted is whether it is a gift at all. Lord Justice Davis has observed that POCA 2002 does not give a definition, as such, of “gift”.⁴ Whether a transfer amounts to a gift is “intensely fact specific”.⁵
- 17.7 In *R v Usoro*⁶ payments made by the defendant to the mothers of his two children were not considered to be gifts because

¹ Proceeds of Crime Act 2002, s 9(1).

² *Berry v Warnett (Inspector of Taxes)* [1981] 1 WLR 1, *R v Rastelli* [2008] EWCA Crim 373.

³ *Villers v Beaumont* (1682) 1 Vern 100, 23 ER 342; *Mackintosh v Stuart* (1864) 36 Beav 21, 55 ER 1063; *Slater v Burnley Corpn* (1888) 59 LT 636; *Re L* [2010] EWHC 1531 (Admin).

⁴ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [34].

⁵ *R v Usoro* [2015] EWCA Crim 349; [2016] Crim LR 349 at [22].

⁶ *R v Usoro* [2015] EWCA Crim 349, [2016] Crim LR 349: the Court of Appeal criticised the confiscation judge, whose “focus on whether the payments were tainted gifts deflected his consideration from the prior question of whether they were gifts”.

the payments were made for the maintenance of the appellant's children and were payments of a sort which he could have been required to make whether in fact in Family Court proceedings or via the Child Support Agency. The payments thus wholly or partly discharge his legal duty to or in respect of his children.

17.8 Because the decision is “intensely fact specific”, the question was left open as to whether payments made pursuant to a moral, rather than a legal obligation, constitute a gift.

17.9 Some guidance as to when a transfer should be treated as a gift is provided in section 78 of POCA 2002. Section 78(1) provides that:

If the defendant transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer, he is to be treated as making a gift.⁷

17.10 “Consideration” is a term derived from the law governing the enforceability of agreements and is used to describe the giving of “something of value in the eye of the law”.⁸ For example, the “consideration” provided by the purchaser of a car is the money paid to the vendor.

17.11 Applying section 78 of POCA 2002, the transfer of a car to another person would be treated as a gift and not a sale if the price paid for the car was significantly lower than the amount that the car was worth at the time.

17.12 Whether adequate consideration is provided, or whether the consideration is of a value significantly less than the property “will depend on its own facts and circumstances”.⁹

⁷ See *R v Rastelli* [2008] EWCA Crim 373.

⁸ *Thomas v Thomas* 114 ER 330, (1842) 2 QB 851 at 859; *Haines v Hill* [2007] EWCA Civ 1284, [2008] Ch 412 at [79], as cited in *Chitty on Contracts* (33rd Ed 2019) p 4-002.

⁹ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [58(6)].

17.13 In *R v Hayes* Lord Justice Davis gave the following guidance as to how to approach an enquiry into the adequacy of consideration under section 78:

The court must:

- (1) place a value upon the property transferred, at the time of transfer;
- (2) assess whether consideration has been provided by the recipient of the property. Any consideration which is asserted to have been provided must be attributable to the transfer of property in question.
- (3) assess the value of the consideration provided. The consideration must, therefore, be capable of being ascribed a value in monetary terms.¹⁰

17.14 Where the consideration which is asserted to have been provided by the recipient of the property is not in the form of a direct financial contribution, then it is necessary to examine the evidence rigorously and closely to see if the asserted consideration (whether by way of "services" or otherwise) is capable of being assessed as consideration of value and (if it is) to what extent.

17.15 Each step must always be undertaken objectively and on an evidence based approach. There is no room, in this context, for "plucking a figure out of the air".¹¹

Contributions to family life

17.16 The guidance in *R v Hayes* deals expressly with how the courts should approach consideration that is not a direct financial contribution, such as a contribution to family life.

17.17 In *R v Hayes* the defendant purchased a property three months after getting married. The property was purchased in its entirety using only the defendant's money, but was registered in the joint names of both the defendant and his wife. At the same time a declaration of trust was completed stating that the defendant and his wife held the property in trust for themselves as beneficial joint tenants.

17.18 The defendant was subsequently convicted of conspiracy to defraud.¹² At the confiscation hearing, the prosecution contended that the wife's joint legal and beneficial interest in the property, having made no financial contribution to its purchase constituted a tainted gift on the part of the defendant.

17.19 The defendant's wife asserted that her non-financial contributions to the marriage were valuable consideration equivalent to 50% of the value of the property and that therefore there was no "tainted gift" of the wife's beneficial share of the property. Such contributions included shopping, cooking, cleaning, furnishing and decorating the

¹⁰ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [58].

¹¹ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [58].

¹² As to which see *R v Hayes* [2015] EWCA Crim 1944, [2018] 1 WLR 5060.

home, ordering items prior to the birth of the child and then raising their child. Any costs incurred by the wife in doing so were reimbursed by the defendant.

17.20 The claim that any non-financial contributions to the marriage were worth of 50% of the share of the property was based largely upon the assertion that the marriage was a “partnership of equals”, and the Court of Appeal observed that effectively the “...very fact of marriage was of itself being advanced in this case as being consideration of a value which matched half the value of the property at the time of transfer”.¹³

17.21 The Court of Appeal considered that what it was being asked to do was effectively to put itself into the position of the Family Court when dealing with financial remedy proceedings following a divorce:

The Family Court is concerned to decide as to what is the fair and just division of assets, having regard to the respective contributions (financial and non-financial) of the parties, the respective means of the parties, the respective needs of the parties, the needs of any children and so on. That, most emphatically, is *not* the function of the Crown Court in making its assessment under section 77 and section 78 of the 2002 Act in confiscation proceedings.¹⁴

17.22 When assessing tainted gifts, the primary focus of the court is upon on the value of any consideration rather than the nature of the relationship between the parties. In *R v Hayes* the court noted that whether “family services” not involving any direct financial contributions amounts to valuable consideration for the purposes of section 78 (1) of POCA 2002 is a fact sensitive determination. What “family services” are provided and involve will inevitably vary from case to case.¹⁵ On the facts of the case before it in *R v Hayes*, the Court of Appeal concluded that the contribution to family life did not amount to valuable consideration sufficient to displace the tainted gift provisions.

17.23 Nevertheless, the court left open the possibility that “family services” not involving direct financial contributions could amount to valuable consideration.

17.24 Older cases suggest that raising a family may be considered adequate consideration to displace the suggestion that any transfer of assets is a tainted gift,¹⁶ depending on evidence as to the value provided by raising the children and whether that value was significantly less than the value of the assets transferred.¹⁷

17.25 Prior to *R v Hayes*, Rudi Fortson QC observed that in addition to the determination of the issue of tainted gifts being fact-specific, cases must also be “principle-specific”, and that the principles are “not as clear as they ought to be”.¹⁸ The guidance in *R v Hayes* goes some way to remedying this position.¹⁹

¹³ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [46].

¹⁴ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [47].

¹⁵ *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [56] – [57].

¹⁶ *Gibson v Revenue & Customs Prosecution Office* [2008] EWCA Civ 645, [2009] QB 348.

¹⁷ *R v Usoro* [2015] EWCA Crim 349, [2016] Crim LR 349.

¹⁸ R Fortson QC, “Proceeds of Crime: *R v Usoro*” [2016] 5 *Criminal Law Review* 349.

¹⁹ R Fortson QC, “Proceeds of Crime: *R v Hayes*” [2018] 7 *Criminal Law Review* 586.

17.26 In his commentary to *R v Usoro*, Rudi Fortson QC posed the question “if D gives money to his ex-wife for the day-to-day care of D’s infirm mother who is living with her, has the ex-wife provided ‘consideration’?”²⁰ Applying the principles in *R v Hayes*, the answer would likely be yes, given that the provision of such care is capable of being assessed as being consideration of value.

17.27 We consider that the clarification provided by *R v Hayes* should be placed on a statutory footing. We return to this topic at paragraph 17.106 below where we consider the codification of other common law principles.

The connection between a gift and criminality

17.28 Although the phrase “tainted gift” is used in POCA 2002, it is not necessary to show that property is “tainted” by tracing it directly to identified criminal conduct. The question for the court is whether the property in question falls within one the definitions provided in section 77 of POCA 2002.

17.29 Under section 77, whether a gift is “tainted” depends on whether or not a defendant was found to have a “criminal lifestyle”²¹ earlier in the confiscation proceedings.²² In either case, the only link required between the defendant and criminality is one of the timing of the gift:

- (1) Where the court has found that the defendant does not have a “criminal lifestyle”, a gift is “tainted” if it was made by the defendant at any time after the date on which the offence of which the defendant was convicted was committed.²³
- (2) Where the defendant has a “criminal lifestyle”,²⁴ a gift will be tainted if it was made at any time after the “relevant day”.²⁵ The relevant day is generally the first day of the period of six years ending with the day when proceedings for the offence of which the defendant was convicted were started.²⁶

17.30 Tracing may be relevant, however, if the defendant has a “criminal lifestyle”. In “criminal lifestyle” cases, a further way of a gift being “tainted” is if it

- (1) was obtained by the defendant as a result of or in connection with his general criminal conduct; or

²⁰ R Fortson QC, “Proceeds of Crime: *R v Usoro*” [2016] 5 *Criminal Law Review* 349.

²¹ Proceeds of Crime Act 2002, s 75.

²² See Chapter 13.

²³ Or, if his particular criminal conduct consists of two or more offences and they were committed on different dates, the date of the earliest. Proceeds of Crime Act 2002, s 77(5).

²⁴ Or no court has made a decision as to whether the defendant has a “criminal lifestyle”.

²⁵ Proceeds of Crime Act 2002, s 77(1).

²⁶ Proceeds of Crime Act 2002, s 77(9). See also s 10(8), as discussed in Chapter 13.

- (2) in whole or part, whether directly or indirectly, represented in the defendant's hands, property obtained by him as a result of or in connection with his general criminal conduct.²⁷

17.31 In *R v Johnson*, where the defendant's "tainted gift" was a sum of £20,000, the Court of Appeal explained the nature of the "taint" in the following way:

The defendant would not have been able to make a gift of £20,000 if she had not been benefiting from a "criminal lifestyle" and therefore the Act treats it as if it were the proceeds of crime.²⁸

17.32 Because "tracing" is not necessarily involved, the pre-POCA 2002 confiscation regimes under the Criminal Justice Act 1988 and the Drug Trafficking Act 1994 arguably more aptly referred to "tainted gifts" as gifts "caught by" the legislation.²⁹

Proportion of an asset represented by a tainted gift

17.33 The proportion of an asset represented by a tainted gift is determined by reference to the fraction set out in section 78(2):

$$\frac{(\text{Value of the property at the time of transfer} - \text{consideration provided})}{\text{Value of the property at the time of transfer}}$$

17.34 For example, if a defendant sells an asset to his son for £5,000 and it was in fact worth £20,000, the proportion of the asset represented by the tainted gift would be as follows:

$$\frac{(\text{£20,000} - \text{£5,000}) [\text{£15,000}]}{\text{£20,000}} = \frac{3}{4}$$

Value of the tainted gift

17.35 Valuation of the gift is governed by section 81. It provides that the value of the tainted gift is the greater of either:

- (1) the value of the gift at the time that the gift was given (adjusted to take account of later changes in the value of money); or

²⁷ Proceeds of Crime Act 2002, s 77(3).

²⁸ *R v Johnson* [2016] EWCA Crim 10 at [35], [2016] 4 WLR 57.

²⁹ Criminal Justice Act 1988, s 74(10); Drug Trafficking Act 1994, s 8.

- (2) the value of “property found” at the time of the confiscation order, which represents the gift at the time of the confiscation order.³⁰

17.36 The “property found” might be either:

- (1) the property which formed the basis for the original gift; or
- (2) if the person no longer holds that property, any property in the person’s hands which represents the original gift.³¹

The purpose of the tainted gift provisions

17.37 The fact that the tainted gift provisions cover property given away:

- (1) which is traceable to criminal conduct; and
- (2) from which a confiscation order could have otherwise been satisfied

is indicative of two rationales that are put forward for the tainted gift regime.

17.38 The first rationale is that defendants should not benefit from any attempt to put assets beyond the ambit of the calculation of their available amount by disguising true ownership. In *R v Johnson* Mr Justice Edis commented that “offenders do not commonly risk the commission of offences in order to give away the proceeds. It is far more likely that assets have been disposed of in order to shield them”.³² The tainted gift provisions are intended to provide “effective measures so that the proceeds of crime cannot be hidden or salted away by an accomplice or relative, and can be pursued”.³³

17.39 The second rationale is that (whether an attempt was made to disguise true ownership or otherwise), defendants then should not be permitted to avoid liability to repay his or her benefit from crime by making gifts of assets³⁴ and then having their “available amount” reduced because they cannot recover the gift.³⁵ Again, Mr Justice Edis in *R v Johnson* summed up this point in clear public policy terms:

A defendant should “mak[e] good the losses they have caused by all means at their disposal. If they were always able to defeat confiscation proceedings by relying on gifts of assets which cannot be recovered this would undermine the efficacy of the scheme.”³⁶

17.40 Therefore, as a matter of public policy, the defendant is taken to have the value of any tainted gift available to him or her to pay towards the confiscation order. This is so even though the tainted gift itself remains in the hands of the third party. If the

³⁰ Proceeds of Crime Act 2002, s 81(1).

³¹ Proceeds of Crime Act 2002, s 81(2).

³² *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57.

³³ *Hansard* (HC), 30 October 2001, vol 373, col 846.

³⁴ Whether legitimately or illegitimately acquired.

³⁵ *R v Smith* [2013] EWCA Crim 502, [2014] 1 WLR 898 at [14].

³⁶ *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57 at [26].

defendant does not pay the value of the tainted gift towards the confiscation order, he or she is liable to imprisonment for non-payment.³⁷

Irrecoverable gifts

17.41 As we noted at the start of the chapter, after voluntarily transferring the property to the other person by way of a gift, the defendant cannot generally take any steps to recover that gift if he or she wants to take the gift back.³⁸

17.42 Nevertheless, the value of the tainted gift is included in the available amount. It is not open to the defendant to argue that he or she no longer has the property and that it would be difficult or impossible to recover the gift itself from the third party.³⁹

17.43 Including the value of a gift that cannot be recovered from a third party is partly justified by the *in personam* nature of the confiscation order.⁴⁰ A confiscation order requires that the defendant repay a sum of money, rather than realise particular assets. It is therefore irrelevant whether the actual gift itself can be recovered for the purposes of satisfying the confiscation order. As the Court of Appeal stated in *R v Morrison*:

There are many ways in which a defendant can in principle meet the terms of the order and thereby avoid the default sentence of imprisonment. In principle, he could raise a loan either from a commercial lender or from a friend or member of his family. Furthermore, a person could earn income by doing some work and pay off the required amount from such income. That is a matter for him.⁴¹

17.44 In *R v Johnson* Mr Justice Edis was sceptical about the argument that difficulty in pursuing a third party through the courts for recovery of a gift would be grounds to exclude that gift from the available amount. He considered that “protestations about the difficulty of proceedings which will never happen should carry little weight”.⁴²

17.45 Aside from the public policy rationale of defendants not being able to defeat the purpose of the legislation by giving away their gifts and relying upon irrecoverability, Mr Justice Edis justified his conclusion with reference to two practical considerations:

- (1) Whether or not a gift is recoverable through “legal proceedings against the recipient is a matter which is unlikely to be capable of easy determination in confiscation proceedings and may raise complex issues of civil law.”

³⁷ Proceeds of Crime Act 2002, s 35; Powers of Criminal Courts (Sentencing) Act 2000, s 139(2).

³⁸ *Villers v Beaumont* (1682) 1 Vern 100, 23 ER 342; *Mackintosh v Stuart* (1864) 36 Beav 21, 55 ER 1063; *Slater v Burnley Corp*n (1888) 59 LT 636; *Re L* [2010] EWHC 1531 (Admin).

³⁹ See (amongst others) *R v Dickens* [1990] 2 QB 102; *R v Smith* [1996] 2 Cr App R 1; *R v Tighe* [1996] 1 Cr App R (S) 314; *R v Liverpool Magistrates Court, ex parte Ansen* [1998] 1 All ER 692; *R v Smith* [2013] EWCA Crim 502, [2014] 1 WLR 898; *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57; *R v Box* [2018] EWCA Crim 542, [2018] 4 WLR 134; *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25.

⁴⁰ As to which see Chapter 1.

⁴¹ *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25.

⁴² *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57 at [26].

- (2) Legal proceedings against the recipient to return the value of a tainted gift may only be required in rare cases, because the threat of imprisoning the defendant for non-payment of his or her confiscation order will be sufficient to bring about a return of the value of the gift by the third party.⁴³

Realisation of tainted gifts

17.46 If a confiscation order is made but is not satisfied, the prosecution may apply for the appointment of an enforcement receiver in respect of any realisable property.⁴⁴ That receiver may be permitted to sell the property so that the proceeds may be put towards satisfaction of the confiscation order.⁴⁵

17.47 Realisable property includes “any free property held by the recipient of a tainted gift”.⁴⁶ Therefore, the value of a tainted gift can potentially be recovered from the recipient of the tainted gift through the appointment of a receiver.⁴⁷ A receiver may pursue the gift itself or other legitimately acquired assets.⁴⁸ Whether a receiver is appointed is a matter of discretion for the court.⁴⁹

Tainted gifts and applications for reconsideration of the confiscation order

17.48 Just as the defendant cannot rely on irrecoverability of a gift at the confiscation hearing itself, it is not open to the defendant to seek to reduce the available amount at a later date on the basis that a gift cannot be recovered.

17.49 In *Re L*,⁵⁰ the defendant had given £12,183 to a co-conspirator, with whom he was in a relationship. At confiscation this was treated as a tainted gift. The defendant applied for a “certificate of inadequacy” under the Drug Trafficking Act 1994. This was a procedure similar to that under section 23 of POCA 2002, whereby a defendant can apply to the court for a downward revision of his or her confiscation order on the basis that his or her assets are no longer sufficient to meet any amount that remains to be paid.

17.50 One of the two grounds for the “certificate of inadequacy” was that the money was a gift, and the defendant had no basis upon which he could sue the co-conspirator to recover the money.

17.51 The High Court refused the application for the certificate of inadequacy, drawing on the case of *R v Liverpool Magistrates Court, ex parte Ansen*,⁵¹ in which it was held

⁴³ *R v Johnson* [2016] EWCA Crim 10; [2016] 4 WLR 57 at [26].

⁴⁴ Proceeds of Crime Act 2002, s 50.

⁴⁵ Proceeds of Crime Act 2002, s 51.

⁴⁶ Proceeds of Crime Act 2002, s 83.

⁴⁷ Proceeds of Crime Act 2002, s 50. A receiver may have powers conferred on him or her to (amongst other things) take possession of and realise the property (Proceeds of Crime Act 2002, s 51).

⁴⁸ “Free property” is defined in s 82 of the Proceeds of Crime Act 2002 and is discussed in Chapter 15.

⁴⁹ Proceeds of Crime Act 2002, s 50(2).

⁵⁰ *Re L* [2010] EWHC 1531 (Admin).

⁵¹ *R v Liverpool Magistrates Court, ex parte Ansen* [1998] 1 All ER 692.

that “gifts which an applicant has made may be practically, even legally, irrecoverable”, but their value may nevertheless be included a confiscation order.

PERCEIVED PROBLEMS WITH THE CURRENT LAW

Lack of discretion

17.52 Under the earlier confiscation regime in the Criminal Justice Act 1988 the court had a discretion as to whether to take a gift into account when making a confiscation order.⁵² There is no such discretion when it comes to making a confiscation order under POCA 2002,⁵³ and the courts have clearly stated that the requirement that a confiscation order must be “proportionate”⁵⁴ does not import such a discretion.⁵⁵

17.53 In *R v Morrison*,⁵⁶ the defendant gave money to his partner (who was also the mother of his children) to purchase a property in which she and the children could live. It was accepted that the money was a “tainted gift”. At the confiscation hearing the recorder dealing with the case found that the defendant “would have no right or power to force a sale” and that the partner “was not in a position to sell the house as she would have to repay a substantial part of the deposit to the council and, if she did sell, her children would be homeless”.

17.54 The judge therefore concluded that it would be disproportionate to include the value of the gift in the confiscation order. The Court of Appeal overturned the decision, stating that:

...the exception concerning proportionality in section 6(5)(b) is not to be equated with a general discretion in the court; nor even with a provision requiring or permitting the court to avoid the risk of serious injustice. It does not call for nor does it permit a general balancing exercise, in which various interests are weighed on each side of a balance, including the potential hardship or injustice which may be caused to third parties by the making of an order which includes a tainted gift. The proportionality exception in section 6(5)(b), although important, has a more limited scope.⁵⁷

17.55 The scope of the proportionality enquiry was said to be limited to whether the application of the tainted gift provisions achieves the statutory aim of the Act. That aim was said to be the removal from criminals of their proceeds of crime.

17.56 The tainted gift regime was said to have a fundamental role to play in ensuring that the aim of removing the proceeds of crime from criminals is satisfied. The court stated that without the regime, criminals could defeat confiscation proceedings by making

⁵² Criminal Justice Act 1988, s 74(10)(b).

⁵³ Proceeds of Crime Act 2002, ss 9(2) and 77; *R v Odurah* [2010] EWCA Crim 279.

⁵⁴ Proceeds of Crime Act 2002, s 6(5)(b).

⁵⁵ *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57; *R v Box* [2018] EWCA Crim 542, [2018] 4 WLR 134; *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25.

⁵⁶ *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25.

⁵⁷ *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25 at [67].

gifts of assets which cannot be recovered. The tainted gift regime was therefore described as being “deliberately severe”.⁵⁸

Including sums within the available amount that the defendant does not have the means to pay

17.57 During our pre-consultation discussions, practitioners suggested that findings of tainted gifts have led to orders being made against defendants which require them to account for tainted gifts, even though they have no means from which to do so. Including such figures has the potential to:

- (1) cause injustice to the individual defendant through their imprisonment for non-payment;
- (2) add to the outstanding confiscation debt.

The risk of imprisonment.

17.58 The case of *R v Johnson*⁵⁹ is instructive with regards to the issue of the potential risk of imprisonment arising from the inclusion of tainted gifts in the available amount. In that case, the defendant had been the owner of a property, which she subsequently sold to her daughter for £140,000. The daughter paid £120,000 for the property and the defendant stated in an affidavit that she had “gifted her £20,000 in the conveyance”.

17.59 The daughter subsequently fell into arrears on the mortgage and at the time of the confiscation the mortgagee was expected to take possession of the property. Nevertheless, in light of the defendant’s clear sworn statement that she had “gifted” her daughter £20,000, the judge at the confiscation hearing was obliged to find that the defendant had made a tainted gift and included this in the available amount.

17.60 The judge granted the defendant the maximum period within which to repay the money “in the hope that there is a recovery in house prices and something happens or there is ability to remortgage or some other way”.⁶⁰

17.61 The £20,000 tainted gift represented the entirety of the available amount, with the defendant having no assets and being declared bankrupt. The defendant was, perhaps inevitably, imprisoned for non-payment, although, the value of the tainted gift was paid within 7 days of the defendant’s imprisonment, apparently by the defendant’s family.⁶¹

17.62 In *Re L*⁶² the defendant faced the prospect of imprisonment in default for failing to pay the value of a tainted gift towards his confiscation order. The court accepted that the defendant could not sue the third party for return of the gift. The defendant argued at

⁵⁸ *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25 at [66].

⁵⁹ *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57.

⁶⁰ At the time this was 6 months (prior to amendment of the Proceeds of Crime Act 2002, s 11, by the Serious Crime Act 2015).

⁶¹ *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57 at [21].

⁶² *Re L* [2010] EWHC 1531 (Admin).

the hearing that the issue could be resolved if the prosecution were to appoint an enforcement receiver over the asset. Enforcement receivership applications may only be brought by the prosecutor.⁶³ However, the prosecution indicated that they did not intend taking enforcement proceedings against the third party because such proceedings would not be commercially worthwhile. The defendant therefore was at risk of imprisonment and unable to access a solution which would remedy the situation in which he found himself.

17.63 In comments at the end of the judgment, Mr Justice Hickinbottom heavily implied that the decision about whether a receiver should be appointed ought to be revisited prior to making any application to imprison the defendant for non-payment of the order.

Outstanding confiscation debt

17.64 In *R v Box* the judge approached the issue of tainted gifts by considering whether the gifts in question could or would be repaid. The Court of Appeal overturned the judge's decision on appeal by the prosecution because "that is not the way the statutory tainted gifts scheme works".⁶⁴ The available amount was therefore increased by over £500,000 to include the tainted gifts previously omitted at the confiscation hearing.

17.65 All of the defendant's identified "free property" had already been included in the confiscation order and the judge had identified that the £500,000 neither could nor would be repaid by those to whom the assets were transferred. It is arguable that the increase of half a million pounds in the available amount simply increases the outstanding unpaid confiscation debt.⁶⁵

ANALYSIS

17.66 We consider that the reasons for the tainted gifts regime and for including the value of such tainted gifts in the available amount as set out in this chapter are compelling. It is notable that no stakeholder considered that the regime had no place in the confiscation regime.

Striking a balance

17.67 The courts have already tried to strike a balance between the severity of the regime and the just use of the power to imprison in default. In particular:

- (1) The Crown Court may set a term of imprisonment in default that takes into consideration the irrecoverability of the tainted gift; and
- (2) The magistrates' court is not obliged to commit the defendant to prison for default.

⁶³ Proceeds of Crime Act 2002, s 50(2).

⁶⁴ *R v Box* [2018] EWCA Crim 542, [2018] 4 WLR 134.

⁶⁵ It is notable that the £20,000 tainted gift in *R v Johnson* was repaid by the defendant's family, rather than from any assets said to belong to the defendant.

Setting a term of imprisonment which takes irrecoverability into account.

17.68 As the Court of Appeal observed in *R v Johnson*, a balance can be struck between the public policy of including a tainted gift in the available amount and the fact that the gift cannot or will not be capable of recovery by adjusting the term of imprisonment for non-payment of the order. The Court of Appeal made four key points:

- (1) the statutory scales for setting a suitable period of imprisonment for default in payment of the confiscation order provide for maximum, rather than minimum sentences.⁶⁶
- (2) The court is required to consider all of the circumstances of the case when setting a term of imprisonment to be served in default.⁶⁷
- (3) “The purpose of the term is enforcement not further punishment, and where the court is affirmatively satisfied that enforcement is impossible that may be a reason to make a substantial reduction in the term imposed in default”.⁶⁸
- (4) “A substantial reduction in the term of imprisonment in default will inevitably be a wholly exceptional course because the court will usually have limited confidence that an asset which has been apparently given away cannot be recovered by the offender or that the offender cannot satisfy the order by other means”.⁶⁹

17.69 The propositions that the tainted gift should be included in the available amount, but that the sentence of imprisonment in default should be reduced because the gift either cannot or will not be made available to satisfy the confiscation order, are not mutually incompatible.

17.70 The tainted gift regime reflects a strong public policy need to discourage defendants from seeking to reduce the amount of a confiscation order by putting their assets beyond the reach of the authorities. As we set out at paragraph 17.38, the overarching purpose of the confiscation regime, namely the recovery of a defendant’s proceeds of crime, would be undermined if that defendant could simply give away his or her assets. By continuing to include the tainted gift in the available amount, that public policy is upheld.

17.71 However, the court seeks to achieve fairness. It recognises the default sentence is a contingent sanction, to be activated in the event of non-payment. Where that contingency (non-payment) is bound to arise, it is no longer a contingent sanction but simply a sanction.

17.72 Therefore, when the court includes the tainted gift in the available amount but reduces the sentence of imprisonment in default it sends out a message that whilst the

⁶⁶ Proceeds of Crime Act 2002, s 35.

⁶⁷ *R v Castillo* [2011] EWCA Crim 3173, [2012] 2 Cr App R (S) 36.

⁶⁸ *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57 at [31].

⁶⁹ *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57 at [31].

defendant will not be sent to prison for non-repayment of the tainted gift, he or she will nevertheless remain liable to repay the value of that tainted gift.

Not activating the warrant committing the defendant to prison

17.73 Because the sentence in default is an enforcement tool, in *Re L*,⁷⁰ which we discussed at paragraphs 17.62-17.63 above, Mr Justice Hickinbottom referred to case law which suggested that the magistrates' court should look carefully at whether other enforcement methods might be available before activating the warrant committing the defendant to prison for non-payment.⁷¹

17.74 It was heavily implied that where no effort is made to appoint a receiver over the asset or assets held by the third party, the magistrates' court should be slow to activate the warrant of commitment.

17.75 It is therefore the case that the court should examine all of the circumstances carefully before activating the warrant committing the defendant to prison for non-payment.

Provisional proposal

17.76 We consider that a just application of the principles surrounding imprisonment in default strikes a proper balance between fairness to the defendant and the objectives of the regime. However, that balance is largely to be found set out in case law rather than in the statute itself. For clarity, we provisionally propose that some incorporation of the case law is required. As we observed in Chapter 16, the Criminal Practice Direction has been utilised to incorporate case law principles in other areas of the criminal law.

Consultation Question 59.

17.77 We provisionally propose that the following principle connected to "tainted gifts" and the default sentence for non-payment of the confiscation order is incorporated in a confiscation Criminal Practice Direction:

- (1) Where the value of a tainted gift is included in the defendant's confiscation order, the term of imprisonment imposed on the defendant for defaulting on payment may be adjusted downwards if the court is satisfied that no enforcement measure would be effective in the recovery of the value of that tainted gift.
- (2) In making such a determination the court must consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.

17.78 Do consultees agree?

⁷⁰ *Re L* [2010] EWHC 1531 (Admin).

⁷¹ *R v Harrow Justices ex parte Director of Public Prosecutions* [1991] 1 WLR 395 at 398 [D-H].

Enhancing balance through other reforms

17.79 We consider that incorporation of the current case law, when taken together with other reforms we propose in this Consultation Paper, can further contribute to achieving fairness in the tainted gifts regime.

Contingent orders and enforcement receivership

17.80 In Chapter 21, we discuss what we refer to as “contingent orders”. In short, we provisionally propose that when a confiscation order is made the Crown Court may make a “contingent order”. The order will take effect in the event that the confiscation order is not satisfied by the deadline set by the court. This means that there will be no delay between the deadline set by the court for payment of the order and the taking of steps to enforce the confiscation order. The contingent order might be, for example, that a receiver is appointed over an asset.

17.81 We provisionally propose that one ground for the making of a contingent order should be when 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.

17.82 We provisionally propose that this contingent order power should also apply in relation to tainted gifts. The court will therefore have the opportunity to address specifically the issue of realisability of a tainted gift at the confiscation hearing itself, and to address the appointment of a receiver at an early stage. This should result in early resolution of whether the third party will be required to realise the value of the tainted gift through a receiver, or whether the defendant will be required to do so.

17.83 An early decision on a contingent enforcement receivership order may also inform the court’s decision about the length of any default term imposed on the defendant. If the court decides not to appoint an enforcement receiver and the result of that decision is that the defendant cannot realise the value of the tainted gift, the Court of Appeal’s observations in *R v Johnson* about adjusting the term of imprisonment to reflect that fact may become pertinent.

17.84 The potential need to adjust the term of imprisonment in default is relevant not only if the determination about an enforcement receiver is made at the compliance order stage, but also if a determination of an enforcement receiver is made at a later date.

17.85 We therefore consider that when deciding not to include a tainted gift in a receivership, the court should consider whether the term of imprisonment in default should be revised downwards.

Consultation Question 60.

17.86 We provisionally propose that if a determination is made that a tainted gift should not be included in an enforcement receivership, the court should

- (1) consider whether it is satisfied that the value of the tainted gift cannot be recovered either:
 - (a) by the defendant; or
 - (b) by the realisation of other assets; and if so
- (2) adjust downwards the term of imprisonment for defaulting on payment of the confiscation order.

17.87 We provisionally propose that when making such a determination the court should consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.

17.88 Do consultees agree?

Interest

17.89 In Chapter 22 we discuss how interest is charged on unpaid amounts under a confiscation order, and how such interest is treated as a tool to encourage repayment of the confiscation order.

17.90 Given that the courts are currently encouraged to consider whether it would be appropriate to temper the use of the default sentence as an enforcement tool when there is no prospect of enforcement in relation to a tainted gift, logically interest (as another enforcement tool) should be treated in the same way.

17.91 We therefore provisionally propose that the court should be able to apply similar considerations to the accrual of interest as apply to the setting of a default term in relation to unenforceable tainted gifts.

17.92 In Chapter 22 we discuss our provisional proposal to increase discretion over the charging of interest on a confiscation order. Allowing the court some discretion as to whether interest should accrue on an unenforceable tainted gift would be aligned with this proposal.

Consultation Question 61.

17.93 We provisionally propose that the court may order that interest should not accrue on the value of a tainted gift included in a confiscation order in the event that:

- (1) the value of that tainted gift is not paid towards the confiscation order; and
- (2) the court is satisfied that the value of the tainted gift cannot be recovered either:
 - (a) by the defendant; or
 - (b) by the realisation of other assets.

17.94 We provisionally propose that when making such a determination the court should consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.

17.95 Do consultees agree?

17.96 As with default sentences, a determination about recoverability of the value of the tainted gift may arise after the making of the confiscation order.

Consultation Question 62.

17.97 We provisionally propose that if a determination is made that a tainted gift should not be included in an enforcement receivership, the court should:

- (1) consider whether it is satisfied that the value of the tainted gift cannot be recovered either:
 - (a) by the defendant; or
 - (b) by the realisation of other assets; and if so
- (2) order that interest should not accrue on that tainted gift; and
- (3) that any interest previously accrued on that tainted gift be removed from any outstanding confiscation amount.

17.98 We provisionally propose that when making such a determination the court should consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.

17.99 Do consultees agree?

Tainted gifts and the total outstanding confiscation debt

17.100 According to the HMCTS Trust Statement for 2018-19 the total outstanding confiscation debt is over £2 billion. In Chapter 22 we make a provisional proposal that where there is no realistic prospect of the enforcement of a confiscation order:

- (1) enforcement is put into abeyance; and
- (2) enforcement can be re-opened with leave of the court.

17.101 We do not consider that such a decision should be taken lightly, but rather that it should be taken in light of the aims of the legislation (as to which see Chapter 5).

17.102 We further provisionally propose that the confiscation debt be split into ledgers of enforceable orders and orders which are held in abeyance.⁷²

17.103 We consider that in cases where the court determines that no enforcement measure would be effective in the recovery of the value of a tainted gift, enforcement of that element of the order should be put into abeyance and form part of the confiscation ledger dealing with orders not currently subject to enforcement. This will further clarify the position with regards to the statistics.

17.104 We also consider that this reform, along with the others that are provisionally proposed will facilitate the effective confiscation of the defendant's proceeds of crime, as is reflected in our proposed legislative objectives (as to which see Chapter 5).

Incorporation of other principles into a Criminal Practice Direction

17.105 We further provisionally propose that other principles found in the case law be codified into any revised statute, to ensure that the tainted gift regime is clear.

Non-financial contributions as consideration

17.106 As we discussed at paragraph 17.27 above, we consider that the principle in *R v Hayes* in connection with non-financial contributions merits incorporation into any Criminal Practice Direction. The principle articulated is that:

Where the consideration which is asserted to have been provided by the recipient of the property is not in the form of a direct financial contribution, then it is necessary to examine the evidence rigorously and closely to see if the asserted consideration (whether by way of "services" or otherwise) is capable of being assessed as consideration of value and (if it is) to what extent.

17.107 In Chapter 12 we set out the criteria for effective confiscation principles that the Supreme Court outlined in *R v Ahmad*. We consider that the principle is consistent with the *Ahmad* criteria.

17.108 The first criterion is that the confiscation principle is consistent with the aim of recovering assets acquired through criminal activity. The principle does not undermine

⁷² See Chapter 22.

that aim. Rather it assists the court in reaching a determination about what can be recovered pursuant to the confiscation regime.

17.109 The second criterion requires that the confiscation principle makes the recovery process simple, predictable and effective. As Rudi Fortson QC noted in the Criminal Law Review, the principle is of assistance in guiding the court about whether such consideration may be validly considered when identifying tainted gifts. It therefore creates predictability that was otherwise lacking. Whilst the principle might mean that the outcome is different from case to case, that is because the nature and extent of services provided by way of consideration will vary.

17.110 The third criterion requires that the confiscation principle is consistent with the right to peaceful enjoyment of property under A1P1 of the European Convention on Human Rights. We consider that the principle permits the court to consider carefully whether an asset should truly be treated as a tainted gift and therefore whether its value is treated as recoverable, either from the defendant or the third party to whom that gift was made. In the absence of such careful enquiry, there is real potential for the right to peaceful enjoyment of property to be infringed.

Consultation Question 63.

17.111 We provisionally propose the following principle articulated in *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 be incorporated in an amended confiscation Practice Direction:

Where the consideration which is asserted to have been provided by the recipient of property is other than a direct financial contribution (whether by way of services or otherwise) the court must consider:

- (1) Whether that consideration is capable of being assessed as consideration of value; and if so,
- (2) to what extent.

17.112 Do consultees agree?

Timing of the tainted gift

17.113 At paragraph 17.29 above we discussed the issue of the timing of a tainted gift.

Section 77(5)(a) of POCA 2002 defines a tainted gift as a gift made “after the date” on which the offence was committed.

17.114 In *R v Lehair*⁷³ the defendant robbed a bank. Less than 2 hours later, she deposited £1,100 into her husband’s bank account. At confiscation the money was treated as a tainted gift. On appeal the defendant contended that the transfer to the husband should not have been treated as a tainted gift because the transfer occurred on the date on which the offence was committed.

⁷³ *R v Lehair* [2015] EWCA Crim 1324, [2015] 1 WLR 4811.

17.115 The Court of Appeal found that a literal interpretation of section 77(5)(a) would lead to absurdity or gross anomaly:

It could not have been intended that criminals have a day's grace to dispose of their assets or to require either the prosecution, the enforcement agencies or the court to devise a scheme, outside the Act, to catch relevant assets. ... We have no hesitation in endorsing the argument that there must be a purposive construction of the provision and in doing so, the subsection must read as though the **date** upon which an offence is committed must refer to the actual **time** of commission and after which any tainted gift will fall for the consideration in the court's powers of confiscation.⁷⁴

17.116 We consider that the wording of section 77(5) could benefit from minor amendment to reflect the clarification given by the Court of Appeal that a tainted gift may be made at any time after the commission of the offence, rather than from the following day.

17.117 Such an amendment would accord with the *Ahmad* criteria:

- (1) It is consistent with the aim of recovering assets acquired through criminal activity, in that it expressly closes a loophole that might otherwise have permitted a tainted gift to be excluded from the recoverable amount.
- (2) It makes the recovery process simple, predictable and effective by making the law more precise. Stakeholders will not be required to fall back on case law to interpret the wording of the provision.
- (3) It is consistent with the right to peaceful enjoyment of property under A1P1 of the European Convention on Human Rights, in that the provision continues to encompass property acquired after the commission of the criminal offence, but simply eliminates a "grace" period that exists on the face of the statute in which assets could otherwise be put beyond the reach of the authorities.

Consultation Question 64.

17.118 We provisionally propose that the wording currently found in section 77(5)(a) of POCA 2002 be amended in any revised confiscation legislation to provide that a gift is tainted if it was made by the defendant at any time after "the commission of the offence" rather than "the date on which the offence was committed".

17.119 Do consultees agree?

⁷⁴ *R v Lehair* [2015] EWCA Crim 1324, [2015] 1 WLR 4811 at [18] and [21] (emphasis as per the case report).

Part 6: Enforcement of the confiscation order

INTRODUCTION TO PART 6

As we have discussed elsewhere in this consultation paper,¹ confiscation orders are orders against the defendant personally (*in personam*)² to repay a sum of money equivalent to his or her benefit from crime. The defendant may use any source of funding to meet the order. As Lord Bingham observed in *R v May*:

Although “confiscation” is the name ordinarily given to this process, it is not confiscation in the sense in which schoolchildren and others understand it. [Where] a criminal has benefited financially from crime... he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained.³

A confiscation order therefore requires a defendant to repay the “value” of his or her benefit from crime,⁴ rather than to forfeit particular assets. It is often referred to as a “value-based” order.⁵

Because the focus of the order is the value to be repaid by a defendant, no assets are at stake at the time that a confiscation order is made. A judge will make an assessment of the defendant’s assets in order to reach an overall value for the confiscation order. However, it is ultimately up to the defendant when, how and to what extent he or she realises particular assets to satisfy the confiscation order. A defendant could, for example, take out a loan to satisfy the confiscation order in full.⁶ Or a defendant might choose not to satisfy the order at all. The onus to satisfy the order is placed squarely upon the defendant subject to sanctions that may be imposed by a judge in the event of non-payment.

Throughout our pre-consultation discussions we heard criticism that placing the onus upon the defendant to realise his or her assets has contributed to both delays in, and obstruction of, the satisfaction of confiscation orders.

The value-based regime in Part 2 of the Proceeds of Crime Act 2002 (“POCA 2002”) must be contrasted with the various asset recovery regimes contained within Part 5 of

¹ Chapter 9 – Incentivising the agreement and payment of orders (SOCPA).

² *R v Waya* [2012] UKSC 51, [2013] 1 AC 294; *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57; *R v Moss* [2019] EWCA Crim 501, [2019] 1 WLR 6033; *Glaves v CPS* [2011] EWCA Civ 69, [2011] 4 Costs LR 556; *Re Thorne* [2012] EWHC 1231 (Admin), [the final two cases referred to were dealt with under the pre-POCA confiscation regime under the CJA 1988].

³ *R v May* [2008] UKHL 28, [2008] 1 AC 1028.

⁴ To the extent that the defendant is able to do so (Proceeds of Crime Act 2002, ss 6(5) and 7).

⁵ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [55]; *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [4].

⁶ *R v Dad* [2014] EWCA Crim 2478, [2015] Crim LR 356. Although, if the available amount is less than the benefit figure, satisfying an order via a loan rather than realising an asset could leave a defendant vulnerable to an application to increase the available amount pursuant to s 22 POCA 2002. A topic we discuss in Chapter 25.

POCA 2002. These regimes allow for the forfeiture of specific assets that are, more likely than not, connected to criminality. Because the regimes under Part 5 target specific “things”, they are often referred to as a form of “*in rem*” forfeiture,⁷ a phrase derived from the Latin for “against a thing”.

Assets that are subject to successful applications under Part 5 are either forfeited directly or vested in a trustee for civil recovery, taking the onus of realising assets away from a defendant.⁸

The principal sanction for non-payment of a confiscation order is a term of imprisonment in default. It is imposed by the Crown Court and is coupled with interest which accrues (at the rate of 8%)⁹ on the principal sum upon expiration of the time to pay period.¹⁰

Where an order is not satisfied as directed, the term of imprisonment in default imposed by the Crown Court can be activated by the magistrates’ court before which the confiscation order is being enforced.¹¹

If a defendant is imprisoned in default of payment and subsequently satisfies their order they will be released.¹² The objective is therefore to recover the proceeds of crime rather than to impose an additional punishment.

The evidence suggests that these sanctions do not yield significant results. About £2 billion remains outstanding¹³ and a study found that only two per cent of those imprisoned for non-payment subsequently satisfied their order.¹⁴ The evidence raises the question whether the sanctions available to the court incentivise the defendant to realise their assets.

One method available to the prosecution of taking control over the realisation of assets is the use of an enforcement receiver.¹⁵ Where a defendant fails to satisfy an order, a prosecutor may apply to the Crown Court to appoint an enforcement receiver who may be empowered to take control of, and realise assets belonging to, a defendant. Upon the appointment of an enforcement receiver, the co-operation of a defendant is no longer required.

Receivers are, however, ordinarily appointed in larger value or complex cases as they are highly trained specialists and their costs are taken from the assets realised. The

⁷ *Serious Organised Crime Agency v Gale* [2011] UKSC 49, [2011] 1 WLR 2760; *Director of the Assets Recovery Agency v Green* [2005] EWHC 3168 (Admin), [2006] CLY 331; *National Crime Agency v Simkus* [2016] EWHC 255 (Admin), [2016] 1 WLR 3481.

⁸ The Proceeds of Crime Act 2002, Part 5 is outside of the scope of the terms of reference for this project.

⁹ Judgments Act 1838, s 17.

¹⁰ Proceeds of Crime Act 2002, s 12.

¹¹ Proceeds of Crime Act 2002, s 35(2); Powers of Criminal Courts (Sentencing) Act 2000, s 140; Magistrates’ Courts Act 1980, s 76(2).

¹² Magistrates’ Courts Act 1980, s 79(1).

¹³ HMCTS, *Trust Statement 2018-19* (2018-19) HC 2337 p 8.

¹⁴ Confiscation Orders, National Audit Office (2013-2014) HC 738, para 4.18.

¹⁵ Proceeds of Crime Act 2002, ss 50 and 51.

costs involved mean that enforcement receivers are usually sought only in high value or complex cases. As enforcement receivers are appointed in a small proportion of cases, magistrates enforce most orders utilising powers designed for the collection of fines.

The principal difficulties identified with the current system are:

- (1) The Crown Court conducts an assessment of a defendant's available assets but is then required to trust the defendant to realise them voluntarily.
- (2) Failing voluntary payment, enforcement is then undertaken by magistrates' courts that played no role in the imposition of the order.
- (3) Attempts to remove a defendant's assets, principally by the appointment of an enforcement receiver, are taken too late in the process and in too few cases.
- (4) Defendants may view imprisonment in default as an occupational hazard and may be content to serve a term of imprisonment in the hope that they will retain their assets.¹⁶
- (5) Imprisonment in default is ineffective; once a term in default has been served, there is no real sanction to incentivise payment because imprisonment in default is a one-off sanction.
- (6) The regime is inflexible and does not permit a tailored approach to enforcement dependent on the facts of the case.

OVERVIEW OF THIS PART OF THE CONSULTATION PAPER

In this Part of the paper, we consider the current law on how a confiscation order is made and enforced (Chapter 18), and the problems with the current regime (Chapter 19).

In Chapters 20, 21 and 22 we consider potential reforms, both radical and minor, to address the perceived difficulties with the current enforcement regime. Our terms of reference ask us to consider both alternatives to the current value-based system of confiscation orders as well amendments to the current regime.

In Chapter 20 we consider whether approaches to asset forfeiture adopted overseas could inform radical reform of the confiscation regime, with a view to optimising enforcement. In particular, we consider:

- (7) whether replacement of value-based confiscation with asset-based confiscation would be appropriate to optimise enforcement; and
- (8) whether a confiscation order should continue to be a judgment that requires the defendant to pay a sum of money representing the value of the proceeds of

¹⁶ For some discussion of the suggestion that criminals take rational economic decisions, see J Fisher QC and J Bong Kwan, "Confiscation: deprivatory and not punitive, back to the way we were" [2018] 3 *Criminal Law Review* 192 at 197 and K Bullock "Criminal benefit, the confiscation order and the post-conviction confiscation regime" (2014) 62(1) *Crime, Law and Social Change* pp 45 at 46.

crime, but that to satisfy the order assets belonging to the defendant should vest automatically in the state (whether through a receiver or otherwise) at a particular date.

In Chapter 21 we return our focus to the provisions of POCA 2002 itself and consider whether, rather than automatic vesting of assets in the state, the current “compliance order” provisions in section 13A of POCA 2002 could be enhanced to make the process of divestment of assets simpler and easier in appropriate cases.

In Chapter 22 we consider the current system of sanctions and enforcement powers under POCA 2002 and discuss potential reforms to those sanctions and powers.

Chapter 18: The current regime for enforcing confiscation orders

INTRODUCTION

18.1 In this Chapter we set out the current regime for enforcing confiscation orders. In doing so, we reiterate some relevant background which informs the current approach to enforcement.

THE ROLE OF THE CROWN COURT

18.2 Historically, both the Crown Court and magistrates' courts could impose confiscation orders. The magistrates' power was available only where a defendant had been convicted of certain specified offences¹ and the jurisdiction was subsequently removed by the POCA 2002.²

18.3 The magistrates' power was re-introduced by the Serious Organised Crime and Police Act 2005 which provides that the Secretary of State may issue an order permitting magistrates' courts to impose a confiscation order but only where the order is below £10,000.³ To date, the Secretary of State has not issued such an order.⁴ Accordingly, all confiscation orders are currently imposed in the Crown Court.⁵

18.4 As we set out in the introduction to this part of the consultation paper, the term "confiscation order" is a misnomer. The nature and extent of a defendant's interests in assets is relevant to the Crown Court's determination of the amount of the confiscation order.⁶ However, the order does not confiscate or remove a defendant's assets.

18.5 At the enforcement stage the onus is placed on a defendant to satisfy an order by realising their assets voluntarily and using the proceeds to satisfy the debt. The Crown Court must then consider issues relevant to enforcement of the confiscation order. 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

¹ Criminal Justice Act 1988, s 71 (3) and sch 4.

² Proceeds of Crime Act 2002, sch 12 para 1.

³ Serious Organised Crime and Police Act 2005, s 97.

⁴ *Archbold Magistrates' Courts Criminal Practice* (2020), 32-2.

⁵ Proceeds of Crime Act 2002, s 6.

⁶ Proceeds of Crime Act 2002, ss 9 and 82. The available amount is also calculated with reference to any "tainted gifts" given to others (see Chapter 17 on tainted gifts).

- (3) whether any further order (known as a compliance order) is “appropriate for the purpose of ensuring that the confiscation order is effective”.⁷

Time to pay

The Crown Court must determine whether a defendant should be afforded time to pay. The full amount due under an order becomes payable immediately, unless a defendant can establish that they need time to pay. The maximum period is 3 months from the date of the confiscation order but an extension can be granted if the court is satisfied that, despite having made all reasonable efforts, the defendant is unable to pay the amount. The maximum extended time to pay is six months from the date of the confiscation order.⁸

Period of imprisonment in default

18.6 The default term of imprisonment is the length of time the defendant will serve in custody should they fail to satisfy the order directed, subject to the early release provisions.⁹ When making a confiscation order, the Crown Court must set a term of imprisonment in default. The length of the term imposed is at the court’s discretion subject to a statutory maximum prescribed in section 35(2A) of POCA 2002 which is proportionate to the value of the order.¹⁰ A default term must be imposed even where the order relates to a “tainted gift”.

18.7 When fixing the default term, the Crown Court must not exceed the maximum terms specified in section 35(2A) of POCA 2002, which are calculated by reference to the amount payable under the order as follows:

£10,000 or less	6 months
More than £10,000 but no more than £500,000	5 years
More than £500,000 but no more than £1 million	10 years
More than £1 million	14 years

Compliance order

18.8 Under section 13A of POCA 2002, having made a confiscation order, the court *must* consider whether to make a compliance order. The compliance order can be any

⁷ Proceeds of Crime Act 2002, s 13A.

⁸ Proceeds of Crime Act 2002, s 11; *R v Kearney* [2007] EWHC 460 (Admin).

⁹ Proceeds of Crime Act 2002, s 35(2A) as amended by Serious Crime Act 2015, s 10; the default term is initially fixed at the time the order is made and reduced pro-rata to reflect any payments made towards to outstanding balance.

¹⁰ See *R v Castillo* [2011] EWCA Crim 3173, [2012] 2 Cr App R (S) 36, for the principles to be considered when fixing the term in default. See also *R v Morrissey* [2019] EWCA Crim 244; *R v Mills* [2018] EWCA Crim 944, [2019] 1 WLR 192; *R v Lyons* [2014] EWCA Crim 1306; *R v Patel* [2012] EWCA (Crim) 2736; *R v Samati* [2011] EWCA Crim 1009; *R v Aspinwell* [2010] EWCA Crim 1294, [2011] 1 Cr App R (S) 54; *R v Wilkes* [2009] EWCA Crim 2245; *R v Smith* [2009] EWCA Crim 344; *R v Cox* [2008] EWCA Crim 3007; *R v Pigott* [2009] EWCA Crim 2292, [2010] 2 Cr App R (S) 91; *R v Liscott* [2007] EWCA Crim 170; *R v Howard* [2007] EWCA Crim 1489; *R v Qema* [2006] EWCA Crim 2806.

order that the court “believes is appropriate for the purpose of ensuring that the confiscation order is effective”.¹¹

- 18.9 The court must consider whether any restriction or prohibition on the defendant’s travel outside of the United Kingdom ought to be imposed.¹² This may include the defendant surrendering their passport or a prohibition on applying for a passport or international travel document.¹³
- 18.10 Section 13A was inserted into POCA 2002 by the Serious Crime Act 2015, with the intention for it to serve as the post-confiscation equivalent of section 41(7) of POCA 2002. Section 41(7) permits the court to make such order as it believes is appropriate for the purpose of ensuring that a restraint order is effective.¹⁴ Section 41(7) has been used to facilitate greater control over assets pending the making of a confiscation order, for example by requiring that assets held overseas are brought into the jurisdiction of England and Wales,¹⁵ or that Bitcoin is converted into sterling and paid into a restrained account in the jurisdiction.¹⁶

Further involvement of the Crown Court

- 18.11 Once the Crown Court has made a confiscation order, and, if appropriate, a compliance order, it plays no further part in the enforcement process unless an application is made for the appointment of an enforcement receiver or a compliance order is sought by the prosecutor (if no compliance order was made at the time of the confiscation order).¹⁷
- 18.12 The Crown Court has no discretion to retain enforcement proceedings and enforcement is therefore exclusively a matter for the magistrates’ court which enforces a confiscation order as if it were an outstanding fine.

Enforcement receivers

- 18.13 Where a defendant fails to satisfy an order, the prosecutor may apply to the Crown Court for the appointment of an enforcement receiver who may be empowered to sell assets belonging to a defendant.
- 18.14 The Crown Court can appoint a receiver where the prosecution makes an application and the following conditions are satisfied:
- (1) the court has made a confiscation order;
 - (2) the confiscation order has not been satisfied; and

¹¹ Proceeds of Crime Act 2002, s 13A(2).

¹² Proceeds of Crime Act 2002, s 13A(4).

¹³ See *R v Pritchard* [2017] EWCA Crim 1267, [2018] 1 WLR 1631 at [25].

¹⁴ See Chapter 26.

¹⁵ *DPP v Scarlett* [2000] 1 WLR 515

¹⁶ *R v Teresko* [2018] Crim LR 81. See Chapter 28.

¹⁷ Proceeds of Crime Act 2002, s 13A(3)(b).

(3) the confiscation order is not subject to appeal.¹⁸

18.15 The Crown Court may grant a receiver the following powers:¹⁹

- (1) to take possession of the property;
- (2) to manage or otherwise deal with the property;
- (3) to realise the property, in such manner as the court may specify;
- (4) to start, carry on or defend any legal proceedings in respect of the property.

18.16 Where assets are realised the proceeds are apportioned firstly to cover the receiver's expenses; secondly to payments directed by the Crown Court and thirdly towards the confiscation order.²⁰

18.17 As confiscation orders do not remove a defendant's assets, an asset is not truly at stake until an enforcement receiver is appointed to realise it. At this juncture the position of third parties must be considered. For example, a defendant may be the sole legal owner of a property but the defendant's partner may have a beneficial interest in the property.

Receivership and third party interests

18.18 The confiscation legislation prior to POCA 2002 provided that third party interests were to be resolved in the High Court when an application was made for the appointment of an enforcement receiver.²¹ Since the introduction of POCA 2002, the appointment of receivers is now exclusively a matter for the Crown Court. Addressing the pre-POCA 2002 position, the House of Lords observed:

The question for the High Court, when the proceedings reach this stage, relates not to the amount of money which the defendant must pay - that has already been fixed by the order made in the Crown Court - but to the powers which the receiver is to be authorised to exercise. It is at this stage that third parties are entitled to have their claims heard and determined. This is when, as a matter of both substance and procedure, representations may be made as to their interests, if any, in the property which the receiver wishes to realise...²²

Provisions designed to protect the interests of third parties are conspicuously absent from the rules of procedure that apply at the stage of the hearing in the Crown Court. Third parties are not entitled to participate in the criminal proceedings in that court. But the issue for the Crown Court is not whether any property in which a third party might have an interest is to be confiscated. The order which it makes is an order which is directed against the defendant only, and it is simply an order for the

¹⁸ Proceeds of Crime Act 2002, s 50.

¹⁹ Proceeds of Crime Act 2002, s 51.

²⁰ Proceeds of Crime Act 2002, s 54.

²¹ Drug Trafficking Offences Act 1986 s 11, Drug Trafficking Act 1994 s 29, and Criminal Justice Act 1988 s 80.

²² *Re Norris* [2001] UKHL 34, [2001] 1 WLR 1388, at [4] – [5].

payment of a sum of money. The question of realisation, if the exercise of powers by a receiver is needed in order to make good the order which the defendant is required to satisfy, is reserved for the High Court.

- 18.19 A third party was therefore only able to assert his or her interest as a party to proceedings when an enforcement receiver was being appointed. This was because it was only at that point of proceedings that the asset in question fell to be realised and thus their interest in the asset was truly at stake.
- 18.20 Although the power to appoint a receiver was moved to the Crown Court under POCA 2002, as originally enacted, the position as to when third party rights were at stake remained the same as under the pre-POCA 2002 confiscation regimes.
- 18.21 Parliament recognised that leaving the resolution of third party interests until the appointment of an enforcement receiver led to protracted enforcement proceedings. Accordingly, in 2015 POCA 2002 was amended²³ and the Crown Court was granted power (pursuant to section 10A POCA 2002) to make a binding determination as to the extent of a defendant's interest in an asset likely to be realised to satisfy an order.
- 18.22 The power contained in section 10A is exercisable where it appears that a third party holds an interest in the property and the court has afforded that third party a reasonable opportunity to make representations. Any determination made under section 10A is conclusive where the property in question falls to be realised for the purposes of satisfying the confiscation order. There is, however, a duty in certain circumstances to hear further representations when considering what powers to grant an enforcement receiver. Neither the Court of Appeal nor Supreme Court are bound by any determination made by the Crown Court.²⁴
- 18.23 The Crown Court was also granted power to order an "interested person" to provide to the court such information as is specified in an order (section 18A POCA 2002). The court may draw such inferences as it believes are appropriate if an "interested person" fails, without reasonable excuse, to comply with an order.
- 18.24 The introduction of these powers was designed, in straightforward cases, to expedite the enforcement process and deter litigation at the point of enforcement. The explanatory notes to the Act which introduced the power stated:

In general, it is most appropriate for third party interests to be dealt with substantively at the enforcement stage of a confiscation order given that the existence of such interests only crystallises against specific property at that stage. However, in some cases waiting until enforcement to determine the extent of a third party's interest in the defendant's property can complicate, lengthen and otherwise frustrate the confiscation process. Sections 1 to 4 seek to give effect to the commitment in the Serious and Organised Crime Strategy to strengthen POCA 2002

²³ Serious Crime Act 2015, s 1.

²⁴ Proceeds of Crime Act 2002, s 10 (4); Proceeds of Crime Act 2002, s 51(8)(b).

by “ensuring that criminal assets cannot be hidden with spouses, associates or other third parties”.²⁵

18.25 The power is discretionary. The explanatory notes observe:

It is envisaged that the Crown Court would only make such determinations in relatively straightforward cases, that is where the court considers that it can, without too much difficulty, determine the defendant’s interest in particular property. In deciding whether to make a determination in any particular case, it is expected that judges will exercise this power to determine the defendant’s interest in property only in those cases where their experience (including in respect of matters as regards to property law), the nature of the property, and the likely number and/or complexity of any third-party interests allows them to do so.²⁶

18.26 A determination made by the Crown Court pursuant to section 10A is conclusive in connection with “the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order or any action or proceedings taken for the purposes of any such realisation or transfer.”²⁷ A determination is therefore binding for the purposes of enforcement and cannot be relitigated at that stage. Section 51(8B) of POCA 2002 provides that if the court makes a third-party determination at the confiscation hearing, there can be no challenge to the determination when appointing a receiver over the assets if:

- (1) the third party was given a reasonable opportunity to make representations when the determination was made; and
- (2) it appears to the court that there would be no serious risk of injustice to the person if the court was bound by the determination.

18.27 If a third party determination has not been made then the third party must be given the opportunity to make representations before a receiver is granted power:

- (1) to manage or otherwise deal with property;
- (2) to realise property;
- (3) to order a person holding an interest in realisable property to make payment to the receiver in respect of a beneficial interest held by the defendant or the recipient of a tainted gift.²⁸

18.28 Where a receiver is appointed, a defendant or an affected third party may appeal. Where the court declines to appoint a receiver, the prosecutor may appeal.²⁹

²⁵ Serious Crime Act 2015, explanatory notes para 19.

²⁶ Serious Crime Act 2015, explanatory notes para 21.

²⁷ Proceeds of Crime Act 2002, s 10A(3).

²⁸ Proceeds of Crime Act 2002, s 51(8).

²⁹ Proceeds of Crime Act 2002, s 65.

18.29 A determination of a defendant's interest in property by the Crown Court under section 10A is not, however, binding in family proceedings.

18.30 A third party may appeal where a determination has been made pursuant to section 10A only if:

- (1) the person was not given a reasonable opportunity to make representations when the determination was made; or
- (2) it appears to the Court of Appeal to be arguable that giving effect to the determination would result in a serious risk of injustice to the person.³⁰

18.31 Accordingly, where a third party has been afforded a reasonable opportunity to be heard or there would be no risk of serious injustice there is no right of appeal.

Sanctions for non-payment

18.32 POCA 2002 sets out the mechanism for enforcement and mandates that sums due under a confiscation order are treated, for enforcement purposes, as though they were a fine imposed by the Crown Court.³¹ This method of enforcement replicates the process utilised by the original confiscation regimes of the 1980s.³²

Enforcement of fines

18.33 As confiscation orders are treated for enforcement purposes as if they were a financial penalty imposed by the Crown Court it is necessary to examine how fines imposed by the Crown Court are enforced. Such enforcement is carried out by magistrates' courts.

18.34 When imposing a fine, magistrates' courts may permit an offender time to pay.³³ A term of imprisonment in default of payment should not be imposed at the time of sentence unless it appears that the defendant has sufficient means to pay forthwith or the defendant is unlikely to remain within the UK for sufficient time to enable the fine to be enforced by other means.³⁴

18.35 Where a defendant fails to pay, the court may require them to appear before the court.³⁵ In most cases, the court may not commit an offender to custody unless:

- (1) the court has, since the conviction, inquired into their means, in their presence, on at least one occasion;³⁶
- (2) the court is satisfied that the default is due to the defendant's wilful refusal or culpable neglect; and

³⁰ Proceeds of Crime Act 2002, s 31(5) – (7).

³¹ Proceeds of Crime Act 2002, s 35.

³² Drug Trafficking Offences Act 1986, s 6 and Criminal Justice Act 1988, s 75.

³³ Magistrates' Court Act 1980, s 75.

³⁴ Magistrates' Courts Act 1980, s 82.

³⁵ Magistrates' Courts Act 1980, s 83 and s 86.

³⁶ Magistrates' Courts Act 1980, s 82(3)(b).

(3) all other methods of enforcing payment have been tried or considered.³⁷

18.36 The methods of enforcing payment which must have been tried or considered are:³⁸

- (1) issuing a warrant of control empowering bailiffs to take possession and sell property;
- (2) an application to the High Court or county court for enforcement;
- (3) an order that the defendant be placed under the supervision of a person appointed by the court until payment is made;
- (4) an attachment of earnings order; and
- (5) if the defendant is under the age of 25, an attendance centre order (at which training, education and vocational skills are provided).

18.37 The magistrates' court also has the power to remit the whole or a part of any fine if it considers it just to do so, where there has been a change of circumstances.³⁹

18.38 Even if the court is satisfied that custody is appropriate the warrant may be suspended on any condition the court deems appropriate including payment by instalments.⁴⁰

18.39 As can be seen, custody is a measure of last resort and the objective of the statutory scheme is to ensure payment is made. Further evidence of the purpose of the legislation is derived from the fact that a defendant who has been committed to custody in default of payment will be immediately released where payment of the outstanding balance is made. Where part payment is made a proportionate reduction is made to the term to be served.⁴¹

18.40 Where a term of imprisonment in default is served a defendant's liability to pay a fine is extinguished.⁴² The same is not true in respect of confiscation orders, a point we return to later in this chapter.

18.41 Fines imposed by the Crown Court are treated, for enforcement purposes, as if they had been imposed by a magistrates' court.⁴³ Accordingly, the same enforcement process is utilised with some modifications. For example, a magistrates' court may not remit a fine imposed in the Crown Court without the consent of the Crown Court.⁴⁴

³⁷ Magistrates' Courts Act 1980, s 82(4)(b).

³⁸ Magistrates' Courts Act 1980, s 82(4A).

³⁹ Magistrates' Courts Act 1980, s 85.

⁴⁰ Magistrates' Courts Act 1980, s 77.

⁴¹ Magistrates Courts Act 1980, s 79.

⁴² *R v Jawad* [2013] EWCA Crim 644, [2014] 1 Cr App R (S) 16, at [18].

⁴³ Powers of Criminal Courts (Sentencing) Act 2000, s 140.

⁴⁴ Powers of Criminal Courts (Sentencing) Act 2000, s 140(5).

Differences between the enforcement of fines and confiscation orders

18.42 Although confiscation orders are treated for enforcement purposes as though they were a fine imposed by the Crown Court, there are some differences:

- (1) Magistrates may not permit additional time to pay, remit any amount of the order (or any accrued interest) and are not required to hold a means enquiry before activating a default term of imprisonment.⁴⁵
- (2) If a defendant serves a term of imprisonment or detention in default of payment, liability to satisfy the order is not extinguished and other enforcement methods (excluding a further term of imprisonment on default) may be utilised.⁴⁶
- (3) Interest accrues on confiscation orders but not on other financial penalties.
- (4) The magistrates' court may (providing a receiver has not been appointed) order that sums held in bank accounts or cash which has been seized, be paid to the court in satisfaction of the money owed under a confiscation order.⁴⁷ The magistrates' court has similar powers in respect of seized personal property.⁴⁸ It is noteworthy that the Crown Court does not currently have this power.
- (5) The Crown Court may impose a "compliance order" or appoint an enforcement receiver, as described earlier in this chapter.

Activation of the default term of imprisonment

18.43 In the event of non-payment, the magistrates' court must summons the defendant to court and decide whether to commit the defendant to prison. In other words, the court may activate the default term imposed by the Crown Court.

18.44 Because the mechanism underpinning the imposition of the default term is based on the enforcement of fines, one of its purposes is to ensure that payment is made.

⁴⁵ Proceeds of Crime Act 2002, s 35(3); *CPS v Greenacre* [2007] EWHC 1193 (Admin), [2008] 1 WLR 438; and *Munir v Bolton Magistrates Court* [2010] EWHC 3794 (Admin).

⁴⁶ Proceeds of Crime Act 2002, s 38(5).

⁴⁷ Proceeds of Crime Act 2002, s 67. A similar result can be achieved via the county court which may make a third-party debt order. HMCTS enforcement staff told us that they do not seek such orders as the process is more cumbersome than an order pursuant to s 67. Third party debt orders are governed by Part 72 of the Civil Procedure Rules. The process involves: (i) the imposition of an interim order; (ii) an instruction to the third party (usually a bank) not to make a payment which reduces the account balance below an amount specified in the order (usually the judgment debt and the fixed costs of proceedings); (iii) the order must be served on the third party who may then file objections to a final order being made; (iv) in the intervening period, a debtor can seek a hardship payment; (v) a final hearing is then listed at which a final order can be imposed. By comparison, the procedure under s 67, which is governed by Criminal Procedure Rules r 33.24 simply involves an order being made and a direction being made to the bank to make payment within 7 days. If a bank fails to comply, the court may direct the bank to pay up to £5,000 (s 67(6) POCA 2002). The procedure under s 67 is thus far less cumbersome and more effective. Accordingly, we do not consider third party debt orders in this paper.

⁴⁸ Proceeds of Crime Act 2002, s 67A.

- 18.45 Although the default term is fixed by the Crown Court, it is activated by the magistrates' court (subject to one exception).⁴⁹ When activating a term of imprisonment in default the court must be satisfied that the non-payment is due to the "offender's wilful refusal or culpable neglect".⁵⁰ Furthermore, it must appear to the court that all other methods of enforcing payment of the sum are inappropriate or have been unsuccessful.⁵¹
- 18.46 In *Johnson v Birmingham Magistrates' Court*, Irwin J cautioned against reading the second requirement narrowly in relation to committing a defendant to prison for default:
- The test...must be applied practically, with the specific evidence in mind arising in the particular case. It is a mistake to approach the obligation set out in subsection (4)(b)(ii) in a formulaic fashion.⁵²
- 18.47 It is enough for a court on the appropriate facts to have regard to other methods of enforcement and to consider that they are inappropriate. It is not a requirement, before an order may properly be made, that all other methods should have been tried and failed.⁵³
- 18.48 Where a term of imprisonment in default of payment is imposed, a defendant must serve half the term imposed,⁵⁴ unless the order imposed was for more than £10 million, in which case a defendant must serve the whole of the term.⁵⁵ A default term must be served consecutively to any sentence of imprisonment imposed in respect of the substantive offending.⁵⁶
- 18.49 A defendant remains liable to pay a confiscation order even if a term of imprisonment in default of payment is served.⁵⁷ A term of imprisonment in default cannot, however, be imposed on a subsequent occasion; it is a one-off sanction.⁵⁸

⁴⁹ The one exception is if the Crown Court orders immediate payment together with a default term, it may activate that term if it appears to the court that the defendant has sufficient means to pay forthwith and it appears that the defendant will not remain at a place of abode within the jurisdiction to enable other methods of enforcement.

⁵⁰ *R (Beach) v Folkestone Magistrates' Court* [2018] EWHC 2843 (Admin), [2019] Lloyd's Rep FC 245; *Cooper v Birmingham Magistrates' Court* [2015] EWHC 2341 (Admin); *R (Sanghera) v Birmingham Magistrates' Court* [2017] EWHC 3323 (Admin); *R (Popoola) v Westminster Magistrates' Court* [2015] EWHC 3476 (Admin); *R (Jestin) v Dover Magistrates' Court* [2013] EWHC 1040 (Admin).

⁵¹ Magistrates' Courts Act 1980, ss 82(4)(b)(i)-(ii); *Harrow Justices, ex parte DPP* [1991] 1 WLR 395, [1991] 3 All ER 873; *R (Garette) v City of London Justices* [2003] EWHC 2909 (Admin); *Barnett v DPP* [2009] EWHC 2004 Admin.

⁵² *Johnson v Birmingham Magistrates' Court* [2017] EWHC 596 (Admin), (2012) 176 JP 298 at [38].

⁵³ *Johnson v Birmingham Magistrates' Court* above, at [39].

⁵⁴ Serious Crime Act 2015, s 258.

⁵⁵ Criminal Justice Act 2003 s 258(2B), as amended by the Serious Crime Act 2015, s 10(3).

⁵⁶ Proceeds of Crime Act 2002, s 38(2).

⁵⁷ Proceeds of Crime Act 2002, s 38(5).

⁵⁸ As above.

18.50 A prosecutor can apply to increase the term of imprisonment in default if the effect of adding interest increases the maximum period in default of payment for which a defendant would be liable.⁵⁹

Interest

18.51 Aside from the threat of a term of imprisonment in default of payment, the main incentive or sanction deployed to encourage payment is the imposition of interest. The accrual of interest was introduced by section 15 of the Criminal Justice (International Co-operation) Act 1990 in relation to drugs offences and section 9 of the Proceeds of Crime Act 1995 to other forms of crime.

18.52 It is of note that the original intention in introducing the accrual of “interest” was to meet as fully as possible the requirements of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) by ensuring “that the maximum possible amount of the proceeds of drug trafficking — and any income derived from them — is confiscated”.⁶⁰ Part 2 of the 1990 Act, which introduced the interest provision, was in fact headed “the Vienna Convention”.

18.53 The accrual of interest as a principal sanction for enforcement was therefore not intended initially as a sanction for non-co-operation. Rather, it was intended to facilitate the fullest possible disgorgement of the proceeds of crime.

18.54 When the time for payment set by the court making the confiscation order expires, a defendant will become liable to pay interest on the sum outstanding. Interest accrues on all orders at the same rate applicable to civil judgments, which is currently fixed at 8% pursuant to section 17 of the Judgments Act 1838. Any interest accrued forms part of the amount payable for confiscation.⁶¹

18.55 The court has no discretion as to whether, and if so in respect of what period, the defendant is liable to pay interest.⁶² The explanatory notes to the 2002 Act state:

Section 12 makes it clear that the defendant must pay interest on a confiscation order that is not paid in full by the time allowed. It leaves no room for doubt that the payment is mandatory in all cases.⁶³

18.56 Interest will begin to accrue upon the expiry of the time to pay period irrespective of whether an appeal has been lodged.

⁵⁹ Proceeds of Crime Act 2002, s 39(5).

⁶⁰ *Hansard* (HC) 27 February 1990, vol 168, col 152. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 19 December 1988) 28 ILM 493 (1989), art 5(6)(c).

⁶¹ Except to the extent that accrued interest is not included in the starting point for the purposes of the calculation of the reduction in days of imprisonment when giving proportionate credit for the part-payment of the order in accordance with the Magistrates Act 1980, s 79.

⁶² *Hansford v Southampton Magistrates* [2008] EWHC 67 (Admin), [2008] 4 All ER 432.

⁶³ Para 31.

WHO ENFORCES CONFISCATION ORDERS?

18.57 There are a number of important stakeholders who play a significant role in the enforcement of confiscation orders in the criminal courts. Enforcement is split between Her Majesty's Courts and Tribunals Service (HMCTS) and the Crown Prosecution Service (CPS). In broad terms, the CPS enforces more complex cases and those in which a restraint order is in place (approximately 37.5 percent of the case load).⁶⁴ HMCTS enforce the remaining orders.

18.58 The CPS describe the respective roles of HMCTS and the CPS in their POCA 2002 guidance as follows:

HMCTS is ultimately responsible for collecting the debt owed by a defendant on a confiscation order. However, the CPS assumes responsibility for cases that require prosecution input in order to enforce effectively. The criteria for determining the lead enforcement agency is set out in the Service Level Agreement between the CPS and HMCTS. When there is nothing more we can do to enforce the debt, we shall remit the case back to HMCTS.⁶⁵

18.59 A network of operational agencies and teams collaborate to investigate, identify and facilitate the realisation of assets. Overarching this framework are ten Regional Organised Crime Units (ROCU) that exist across England and Wales.⁶⁶ The ROCUs consist of a number of regional police forces that collaborate to bring together specialist policing capabilities to focus on Serious and Organised Crime.

18.60 The ROCUs have a number of "core capabilities" which include teams with specific roles in relation to asset recovery. In simple terms, a ROCU oversees the provision of Regional Asset Recovery Teams ("RARTs") and Asset Confiscation Enforcement ("ACE") Teams.

18.61 RARTs are intended to further the government's Serious and Organised Crime Strategy and are tasked with proactive financial investigation, asset denial and asset recovery amongst other matters.⁶⁷

18.62 The RARTs facilitate criminal financing investigations, both discrete stand-alone investigations or supporting other ROCU led investigations. Financial investigators

⁶⁴ Agencies other than HMCTS enforce 37.5% of orders by value. Those agencies include: the Crown Prosecution Service, Serious Fraud Office, Department for Work and Pensions and local authorities. HMCTS, *Trust Statement 2018-19* (2019) HC 2337, p 3.

⁶⁵ Crown Prosecution Service, *Proceeds of Crime – Legal Guidance*, https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Proceeds%20of%20Crime.pdf (last visited August 2020) p 38.

⁶⁶ East Midlands ("EMSOU") West Midlands ("WMROCU") Eastern ("ERSOU"), North East ("NERSOU"), North West ("NWROCU" or "Titan"), South East ("SEROUCU"), London, South West ("SWOCU or Zephyr"), South Wales ("TARIAN"), Yorkshire and Humber ("YHROCU or ODYSSEY").

⁶⁷ HM Inspectorate of Constabularies, *Regional Organised Crime Units, a review of capabilities and effectiveness*, (November 2015).

and detectives work in partnership with specialist lawyers from the Crown Prosecution Service who are either co-located with, or accessible to, the RART.⁶⁸

18.63 In addition, ACE Teams are co-located within and alongside the RARTs. The role of the ACE Teams is to assist in the enforcement of confiscation orders by identifying assets and working with defendants to realise assets. The ACE Teams also work closely with the CPS, and in particular with the CPS Proceeds of Crime ARIS Unit, which specialises in looking for additional assets after the making of a confiscation order. The ACE team network is funded by a share of the “top slice” monies from the Asset Recovery Incentivisation Scheme (“ARIS”).⁶⁹ The teams are considered to be effective in delivering results, directly contributing to the recovery of £31m in 2016/17.

18.64 Having considered the law underpinning the current enforcement regime and the operational agencies responsible for enforcement, in the next Chapter we consider the problems and issues that have arisen.

⁶⁸ HM Inspectorate of Constabularies, *Regional Organised Crime Units, a review of capabilities and effectiveness* (November 2015) p 44.

⁶⁹ The Asset Recovery Incentivisation Scheme provides that the proceeds obtained from a confiscation order are, once collected, distributed by the Home Office in accordance with an agreed protocol with HM Treasury, see Chapter 4.

Chapter 19: Problems with the Current Enforcement Regime

INTRODUCTION

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

CRITICISM OF THE CURRENT ENFORCEMENT REGIME ARISING FROM OFFICIAL SCRUTINY

19.2 In 2013 the National Audit Office (“NAO”) reported that

The use of confiscation orders to deny criminals the proceeds of their crimes is not proving to be value for money...only about 26p in every £100 of criminal proceeds was actually confiscated in 2012-13.

19.3 The NAO found that:

- (1) no clear enforcement strategy existed;¹
- (2) no explicit strategy was in place for the use of receivers;² and
- (3) the two main sanctions (imprisonment in default and interest) were considered by stakeholders to be ineffective.³ The report identified that in 2012 only 2 per cent of offenders paid in full once a default sentence was imposed.⁴

19.4 The NAO report contended that

[t]he fundamental problem is a lack of strategic direction and agreement on what level of confiscation would constitute success. This is compounded by poor information, lack of knowledge, outdated IT systems, data errors and ineffective sanctions. There is a sharp need for a coherent and joined-up cross-government strategy. At the moment this activity cannot be seen as value for money nor as a credible deterrent to crime.⁵

¹ Confiscation Orders, Report of the National Audit Office (2013-2014) HC 738, para 4.5.

² Above, para 4.12.

³ Above, para 4.17.

⁴ Above, summary para 11.

⁵ Amyas Morse, head of the National Audit Office, press release accompanying Confiscation Orders, National Audit Office (2013-2014) HC 738.

- 19.5 In March 2014, the House of Commons' Public Accounts Committee reported on the Government's administration of confiscation orders. The Committee concluded that the various bodies had failed to put in place an effective system, that not enough orders were being imposed and that not enough was being done to enforce those orders that had been imposed. The Committee made six recommendations: more use and awareness of orders; better enforcement; more effective sanctions; better performance and cost information; clearer direction; and more effective incentives. The Home Office accepted the recommendations and committed to implement them by the end of 2015.
- 19.6 The Crown Prosecution Service adopted a national strategy for proceeds of crime, and regional asset confiscation enforcement ("ACE") teams have helped recover £22 million since their creation in November 2014. As a result, the amount of money collected through confiscation orders rose by £42 million (32%) from £133 million in 2012–13 to £175m in 2015–16.⁶
- 19.7 The enforcement rate for orders over £1 million increased to 22% at September 2015 (compared to 18% at September 2013) and the Crown Prosecution Service reported a 12% increase in enforcement rates for its priority cases (generally orders greater than £500,000).⁷
- 19.8 The Home Office acknowledged that more needed to be done, particularly in enforcing high value orders. Reforms to POCA 2002 followed in the Serious Crime Act 2015. These reforms, discussed in Chapter 3, reduced the time permitted for payment to a maximum of six months, provided for longer default sentences for non-payment, introduced compliance orders, gave power to the Crown Court to make binding determinations as to third party interests in property and to direct third parties to provide information.⁸
- 19.9 In 2016 the National Audit Office published a progress review. It found that:⁹

Since 2014 the criminal justice bodies have improved how they administer confiscation orders, with greater focus on enforcement and better joint working across bodies. This has led to a £22 million (16%) increase in confiscated income in 2 years and the highest amount collected to date. Other changes, such as stronger sanctions, that could potentially improve performance, have also been introduced.

But the Committee of Public Accounts expected the confiscation order system as a whole to have been transformed by the end of 2015, and this has not happened. The criminal justice bodies have not met five of the Committee's six recommendations, despite agreeing to do so by the end of 2015. ... As a result, many of the fundamental weaknesses in the system, identified two years ago, remain. The number of orders imposed has fallen by 7% and remains a tiny fraction

⁶ Confiscation orders: progress review, Report of the House of Commons Public Accounts Committee (2016-17) HC 124, para 8. In 2018 – 2019 the amount collected through confiscation orders was £166m; Home Office, *Asset Recovery Statistical Bulletin* (September 2019).

⁷ Above, para 10.

⁸ Serious Crime Act 2015, explanatory notes, p 4-7.

⁹ Confiscation Orders: progress review, National Audit Office (2015-16) HC 886, para 21.

of total crimes. There are also fewer financial investigators and fewer restraint orders used, both crucial to successful enforcement.

This is a disappointing result. All of the criminal justice bodies involved will need to show more determination and urgency to implement the Committee's recommendations, and address the deeper systemic problems surrounding the management of confiscation orders. Only by doing this will the full potential of confiscation orders be realised, and value for money be achieved for the significant resources invested in the system.

19.10 That same year (2016), the Public Accounts Committee concluded that

The Home Office needs to do more to explain why so much of the accumulated debt is unlikely to be collected, highlight what is collected against recent confiscation orders and set out how it is tackling uncollected debt to show that crime does not pay.¹⁰

19.11 The gross value of confiscation order debt as at 31 March 2018 was £1,961,278.000.¹¹ As at 31 March 2019, the outstanding debt now exceeds 2 billion pounds.¹² HMCTS estimates that only £161 million of the current outstanding sum is recoverable.¹³

19.12 This large sum indicates that, despite progress undoubtedly having been made since 2012, the present enforcement regime could be improved. A number of factors were identified in the cited reports which contribute to the large outstanding debt. Some relate to the making of the confiscation order. For example:

- (1) The National Audit Office observed that historically, targets set by government incentivised financial investigators to inflate the estimated value of assets held by defendants. This may have resulted in the making of unrealistic orders.¹⁴
- (2) When a defendant decides not to co-operate with the procedure for disclosing financial information regarding their assets, there is no evidence before the court to rebut the prosecution case as to benefit. This can lead to an unrealistic order which the defendant cannot satisfy.¹⁵

19.13 Other factors relate more directly to enforcement:

- (1) Criminal gains are often disposed of quickly or transferred out of reach, and many criminals are determined to keep as much as they can. The value of

¹⁰ Confiscation orders: progress review, Report of the House of Commons Public Accounts Committee (2016-17) HC 124.

¹¹ HMCTS, *Trust Statement 2017-18* (2017-18) section 2.

¹² The precise figure is £2,065,303.00. See HMCTS, *Trust Statement 2018-19* (2018-19) HC 2337, p 13.

¹³ HMCTS, *Trust Statement 2018-19* (2018-19) HC 2337, p 13.

¹⁴ Confiscation Orders: progress review, National Audit Office (2015-16) HC 886, p 27, para 2.18.

¹⁵ Confiscation Orders: progress review, National Audit Office (2015-16) HC 886, p 27, para 2.18.

hidden assets¹⁶ with no other assets against which enforcement could be taken was estimated recently at £493,830,000.¹⁷ HMCTS noted:

In higher value orders, it is very often the case that a significant portion of the order value relates to assets which are either hidden or held overseas, making enforcement very difficult.¹⁸

- (2) Where assets can be identified, the process of realising an asset's value can be lengthy, for example, the sale of a house. Debt can remain uncollected for a substantial period.¹⁹
- (3) The accrual of interest on the unpaid debt itself adds to the outstanding debt total. Recent data reveals that £748,882,000 in interest alone was outstanding.²⁰
- (4) There is no general provision to write off confiscation debt, even when those responsible for enforcement believe that there is no prospect of recovery. There are some limited powers available to discharge orders, such as if the remaining amount due is below £50 or the offender has died and there is no prospect of recovering the debt from the deceased's estate.²¹ Accordingly, many orders, which are highly unlikely to be collected, continue to accrue interest. This can distort the progress that has been made in the imposition of more realistic orders and greater success in collection.

19.14 It is evident that there is a continued perception amongst those who have formally reviewed the confiscation process that the enforcement regime is functioning at a far from optimal level.

CRITICISMS OF THE CURRENT SANCTIONS REGIME

Perceived problems with the default term

19.15 The default term is "penal by character"²² but the policy rationale is simply "to secure satisfaction of the confiscation order and so to deprive the criminal of the fruits of their crime".²³

19.16 Imprisonment will in some cases prompt payment. A high-profile example is that of convicted money launderer Terry Adams who pleaded poverty but was sent to prison for 12 months in default of payment of costs. Three hours later, the Judicial Office issued a public announcement stating that Mr Adams had paid the outstanding sum of

¹⁶ "Hidden assets" are discussed in Chapter 16.

¹⁷ HMCTS, *Trust Statement 2018-19* (2018-19) HC 2337, p 13.

¹⁸ Above, p 12.

¹⁹ Above, p 13.

²⁰ Above, p 13.

²¹ Proceeds of Crime Act 2002, ss 25 and 25A.

²² *R v Ellis (Gary)* [1992] 2 Cr App R 9 (S) 403, [1996] Crim LR 444, cited in *R v Mills* [2018] EWCA Crim 944, [2019] 1 WLR 192 at [33].

²³ *R v Castillo* [2011] EWCA Crim 3173, [2012] 2 Cr App R (S) 36 at [13]. *R v Price* [2009] EWCA Crim 2918, [2010] 2 Cr App R (S) 44 at [11].

£46,258.²⁴ In 2017, he paid £730,000 to satisfy the outstanding amount on a confiscation order made against him, against shortly after a magistrates' court issued a warrant of committal to activate a default sentence against him.²⁵

19.17 However, the default term achieves this objective in only a small proportion of cases and is estimated to cost £18.4 million annually.²⁶ During our pre-consultation discussions, we encountered perceptions of problems with the default term as an enforcement mechanism. The perceived problems arose:

- (1) prior to a magistrates' court considering activating the warrant committing the defendant to prison;
- (2) once the default sentence had been activated; and
- (3) after service of the default.

19.18 HMCTS enforcement staff at the National Compliance and Enforcement Service in the North East told us that the production of fraudulent medical certificates was commonplace where defendants sought to avoid attending court in circumstances where imprisonment in default might have been imposed.

19.19 Even when defendants were brought to court, in 2012 only two per cent of offenders paid in full once a default sentence was imposed.²⁷ This demonstrates that defendants were either unwilling or unable to pay.

19.20 HMP Wandsworth receives prisoners from City of Westminster Magistrates' Court including those imprisoned for failing to pay confiscation orders. Although HMP Wandsworth does not keep data on the number of defendants who satisfied an order after a default term of imprisonment had been imposed, we were told by the Offender Management Unit that such payments were rare and in the last four years they had been made in approximately four cases.

19.21 The Public Accounts Committee's examination of confiscation concluded that default sentences are limited in their success, finding "many criminals, particularly those with high value orders are willing to serve a prison sentence rather than pay up".²⁸ The finding of ineffectiveness of default terms in higher value cases was further supported by evidence collected in 2010 that low value confiscation orders under the sum of

²⁴ See, BBC News, *Crime Boss Terry Adams pays £50,000 to avoid jail* (February 2019) <https://www.bbc.co.uk/news/uk-england-london-47145280> (last visited April 2020).

²⁵ Evening Standard, *Crime Lord Terry Adams pays £730,000 to avoid prison – after claiming he was too poor* (December 2017) <https://www.standard.co.uk/news/crime/crime-lord-terry-adams-pays-730000-to-avoid-prison-a3714086.html> (last visited September 2020); and see *Re Adams* [2017] EWCA Crim Civ 185, [2017] 1 WLR 3732.

²⁶ Confiscation Orders, Report of the National Audit Office (2013-2014) HC 738, p 41.

²⁷ Above, summary para 11.

²⁸ Confiscation orders, Report of the House of Commons Public Accounts Committee (2013-14) HC 942, p 5.

£50,000 have a high rate of successful enforcement, while a significant number of high value orders go unpaid.²⁹

- 19.22 Once a default term has been served, there is little incentive to satisfy a confiscation order. During our pre-consultation discussions, HMCTS staff raised concerns about the effectiveness of the default sentence in the longer term because, following service of the default, there was no leverage to make defendants pay.

Is the imposition of interest an effective sanction?

- 19.23 During our pre-consultation discussions practitioners reported that in very low-level cases the prospect of accumulated interest might encourage prompt repayment, but that often it has a counter-productive effect. First, the accrual of interest at a rate of 8% was cited as a factor which contributed to a sense of hopelessness for defendants often struggling to find employment post-conviction. Secondly, defendants with large orders with substantial interest accruing, can see no way of settling confiscation and simply give up on payment of their order.

- 19.24 As we noted in the last chapter, although magistrates cannot extend the time by which a confiscation order must be satisfied, they may enforce the sum due by directing payment via instalments using their ordinary fine enforcement powers. Magistrates we spoke to observed that such instalments are often dwarfed by the accruing interest which compounds the issues we have described.³⁰

- 19.25 The case of *Re G* provides a recent example of the problem. Interest was accruing at the rate of about £150 a day and the sum due under the confiscation order had risen from £849,300 to £1,352,911.10.³¹ The defendant had been ordered to pay £20 a month towards the debt from her social security benefits. The Court observed that:

the order, whilst accruing interest exponentially... has a sort of mere abstract or symbolic quantity to it only, subject only to the drop in the ocean that is paid by the applicant of £20 a month, as I have described.

- 19.26 In one case in the North East region, an outstanding order was accumulating £1,500 per day in interest, while the defendant was paying in instalments of £10 per week. Some stakeholders working for the HMCTS National Compliance and Enforcement Service in the North East were of the view that there should be greater discretion allowing interest to be paused or re-adjusted after service of the default sentence.

Placing the onus on the defendant to satisfy a confiscation order

- 19.27 The enforcement mechanisms described above are intended to facilitate the realisation of assets after a defendant has failed to do so. A system which places the onus on the defendant to realise his or her assets:

(1) is open to abuse by defendants who do not wish to co-operate;

²⁹ As of December 2018, 37% of orders between £1 million and £10 million were satisfied and 23% of orders of over £10 million were satisfied (HMCTS data provided to the Law Commission).

³⁰ This view was expressed to us by magistrates in the North East and East Kent.

³¹ *Re G* [2019] EWHC 1737 (Admin).

- (2) may place a heavy burden on defendants who do wish to co-operate but who (for whatever reason) cannot.

19.28 Case law and anecdotal evidence both support the assertion that a system which relies upon a defendant's co-operation is open to abuse. In the case of *Re Stannard*,³² enforcement proceedings were still ongoing 12 years after the making of a confiscation order. Although this case was dealt with under the pre-POCA 2002 confiscation regime found in the Criminal Justice Act 1988, the order was an *in personam* order:

Contrary to what [I am assured] is the motivation behind this application, namely, to clear the outstanding balance and purge his contempt, I have formed the clear impression...that Mr Stannard is wholly unrepentant. In reality he is still doing his level best to avoid making any further payment, to go behind decisions unfavourable to him that have already been made by the Court and which he has not appealed, to re-run arguments he has already lost, and to put the CPS and the Enforcement Receiver to as much further trouble and expense as possible, presumably in the hope that they will give up and go away.³³

19.29 This is not an isolated occurrence. The introduction of compliance orders, shortened "time to pay" periods and the ability to make binding third party determinations at confiscation hearings (inserted into POCA 2002 by the Serious Crime Act 2015) were intended to address concerns articulated in the Government's 2013 Serious and Organised Crime Strategy that "Criminals are exploiting POCA 2002 proceedings to delay the asset recovery".³⁴

19.30 During pre-consultation stakeholder discussions, we were told that the system relies too heavily on the co-operation of defendants. The HMCTS National Compliance and Enforcement Service in the North East told us that defendants sometimes go to great efforts to frustrate the enforcement process when they are responsible for disposing of assets, or are trying to avoid imposition of the default term of imprisonment. One of the ways of doing so described to us was by using forged receipts showing the apparent sale of an asset at a lower price than valuation. In one case, a fraudulent receipt was used to suggest that a car valued at £11,000 had been sold for £2,000. The defendant produced the receipt at court and made an application to vary the confiscation order downwards under section 23 of POCA 2002 on the basis that the asset had been sold for less than the value ascribed to it at the confiscation hearing. However, the fraud was identified by the ACE team.

19.31 In contrast, staff who work on the front line of enforcement told us that the ongoing nature of enforcement places a significant burden on defendants who do wish to co-operate. It was considered important for enforcement to have an end date. As one member of staff put it, "there has got to be a time where there is a light at the end of the tunnel".

³² *Re Stannard* [2015] EWHC 1199 (Admin), [2015] Lloyd's Rep FC 420.

³³ *Re Stannard*, above at [80].

³⁴ GOV.UK, *HM Government Serious and Organised Crime Strategy* (2013) Cm 8715, p 35.

CRITICISMS OF THE MECHANISMS USED FOR ENFORCEMENT

The use (or non-use) of receivers

19.32 The appointment of a receiver is one alternative to leaving an asset in the hands of a defendant. Receivers are highly trained specialists and whilst their costs may be necessarily and appropriately incurred and proportionate in all of the circumstances, those costs may nevertheless amount to large sums of money. During our pre-consultation discussions there was a perception amongst some stakeholders, including HMCTS employees, that there was a reluctance to appoint a receiver because of concerns about whether it is economically viable to do so. In 2016, Helena Wood of the Royal United Services Institute (RUSI) observed:³⁵

Due perhaps to the high costs associated with them, enforcement receivers are applied for sparingly and only in cases where the receiver's costs are covered by the assets in view.

19.33 Enforcement receivers' costs are ordinarily, and perfectly legitimately, recovered from assets that are realised. In 2005, the Supreme Court observed:

If it becomes necessary to have a receiver, why should the Crown be left paying his costs, disbursements and fees? On the contrary, in most such cases, at least where there is a sufficiency of assets, the only proper order is that the burden of meeting those costs, disbursements and fees should be thrown on the defendant rather than on the Crown.³⁶

19.34 By subtracting the funds to be paid to the receiver from the money recovered from the defendant's assets, the amount of money available to put towards the confiscation order may be diminished. The appointment of a receiver may therefore only be viewed by prosecuting authorities to be cost effective in higher value or complex cases involving third party interests or assets that could prove difficult to realise.

19.35 Judgments of the court have detailed the level of costs that can be incurred. Examples include costs of £93,000 from approximately £150,000 of cash assets in the receiver's possession³⁷ and costs of £772,547.³⁸ The latter figure involved the costs of a management receiver in a case where the Supreme Court held that the order in question should never have been made. Accordingly, the Crown Prosecution Service were liable to pay the receiver's costs as opposed to those costs being taken from the realised assets.

19.36 Commenting on the effect of the Supreme Court's decision, the authors of *Millington and Sutherland Williams on the Proceeds of Crime* suggested that exposure to a

³⁵ H Wood, "Enforcing Criminal Confiscation Orders from Policy to Practice", RUSI Occasional Paper, (February 2016).

³⁶ *Re HN* [2005] EWHC 2982.

³⁷ *R v Kazmi* [2005] EWCA Crim 2707.

³⁸ *Crown Prosecution Service v Eastenders Group* [2014] UKSC 26, [2015] AC 1.

liability for costs may have resulted in prosecutorial reluctance to seek the appointment of an enforcement receiver:³⁹

It is observed that this case became something of a watershed, in that prosecutors have subsequently been reluctant to appoint receivers for fear of the cost, diminishing considerably the effect of the legislation.

19.37 We met with several receivers and were told that the rate of instructions had plummeted over recent years.

19.38 Evidently the co-operation of the defendant is required in the vast majority of cases because receivers are used sparingly.

19.39 Even in cases where a receiver is ultimately appointed, before an asset can be realised:

- (1) confiscation proceedings must be resolved;⁴⁰
- (2) a defendant may be permitted up to six months to satisfy the order;⁴¹
- (3) if a defendant fails to satisfy the order an application must be made by the prosecutor to appoint a receiver;⁴²
- (4) a receiver cannot be appointed whilst an appeal against a confiscation order is pending;⁴³
- (5) upon an application to appoint a receiver, a third-party has a right to be heard (if a section 10A determination has not been made) and may assert an interest even if they have given evidence during the trial at the Crown Court and have been disbelieved;⁴⁴
- (6) there is a right of appeal against the appointment of a receiver.

19.40 The resolution of these steps invariably takes time and proceedings can become protracted. Stakeholders told us that it is not uncommon for third parties to raise a claim to an interest in property for the first time at the point of enforcement. Indeed, we were told by stakeholders that it is a regular occurrence that when attempts are made to realise assets, third parties claim an interest in the property. Specifically, we were told that matrimonial proceedings are regularly initiated by the spouse of the defendant at the enforcement stage. The government's 2013 Serious and Organised

³⁹ *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2017) para 11:39.

⁴⁰ Proceeds of Crime Act 2002, s 50(1).

⁴¹ Proceeds of Crime Act 2002, s 11.

⁴² Proceeds of Crime Act 2002, s 50(2).

⁴³ Proceeds of Crime Act 2002, s 50(1)(c).

⁴⁴ *Re Norris* [2001] UKHL 34, [2001] WLR 1388 at [16] and [23] – [26].

Crime Strategy referred to third party claims being used to delay the asset recovery process.⁴⁵

- 19.41 Therefore, cases in which attempts are made to take asset realisation out of the hands of a defendant by appointing an enforcement receiver may be far from straightforward or expeditious.

Use of alternative powers

- 19.42 The use of alternative powers to facilitate the realisation of assets may involve costly proceedings across multiple jurisdictions. For example, a charging order is an available means of enforcement over real property. A charging order is limited as it merely provides security for the debt owed: for example, if an offender owns a property, a charging order can be sought to register the debt against the property. However, a charging order is subject to prior mortgages and charges and is not an order for possession and sale of the property. When the property is sold, if there is sufficient equity, outstanding debts charged against the property will be paid from the proceeds of the sale.

- 19.43 If a charging order is made, an application can be made for an order for sale. The court has a discretion whether to order sale of the property. The county court may order a sale of a property where the value of the charge does not exceed £350,000. An order for sale involving a charge over £350,000 must proceed in the High Court.

Examples of protracted enforcement proceedings

- 19.44 The following examples demonstrate how protracted the enforcement process using existing mechanisms can become.
- 19.45 First, in a recent case, the Crown sought to realise a property in Spain owned solely in the name of the defendant against whom a confiscation order had been made. The confiscation order was made in November 2011 in the sum of £800,567. In 2016, attempts were made to realise the property in Spain but another person asserted that, although he did not have a registered legal interest in the property, he held a beneficial interest in it. In May 2018, following a trial in the High Court, the claim was rejected some six and a half years after the confiscation order had been imposed.⁴⁶
- 19.46 Secondly, a stakeholder involved in enforcing confiscation orders provided an example of a case which illustrates the difficulties that can arise when proceedings become protracted. This is perhaps a stark example but serves to illustrate the degree of delay that can be encountered:
- (1) October 2007: Confiscation order made for £65,000.
 - (2) October 2008: An appeal against the order was dismissed.
 - (3) November 2008: A claim was made that a property said to belong to the defendant was in fact held on trust for the defendant's son.

⁴⁵ GOV.UK, *HM Government Serious and Organised Crime Strategy* (2013) Cm 8715, p 35.

⁴⁶ *The Crown Prosecution Service (CPS) v Jarvis* [2018] EWHC 4024 (Admin).

- (4) November 2008: The offender failed to attend a hearing before the enforcement court but provided a medical certificate.
- (5) November 2008: A suggestion was made that the mortgage provider should foreclose which would be more cost effective than appointing a receiver.
- (6) May 2010: A charging order was obtained over the property. The defendant lodged an appeal.
- (7) January 2012: An adjudicator at the Land Registry found that the property was owned by the defendant. The charging order remained in place.
- (8) January 2014: A deduction from benefits order⁴⁷ was made.
- (9) December 2014: HMCTS requested assistance from the ACE team.
- (10) February 2015: The ACE team requested the appointment of a receiver.
- (11) September 2015: The mortgage company confirmed to enforcement authorities that the property would not be repossessed as an arrangement had been made regarding arrears.⁴⁸
- (12) December 2015: The defendant informed the enforcement court that the property had been repossessed, which was not true.
- (13) February 2016: The prosecution indicated that there was insufficient information available to appoint a receiver.
- (14) November 2016: A decision regarding the appointment of a receiver remained under consideration by the prosecution.
- (15) May 2017: A receiver was appointed. The defendant did not object.
- (16) June 2017: The defendant appealed against the decision to appoint a receiver.
- (17) July 2018: The appeal was refused.
- (18) September 2018: The receiver obtained possession of the property. However, the outstanding mortgage by this time had risen due to the accrual of interest.
- (19) Only £719 was ultimately paid in satisfaction of the confiscation order.

The impact of protracted proceedings on victims

19.47 As we discuss in Chapter 24, there is a significant interrelationship between confiscation and compensation orders. A compensation order under the Powers of Criminal Courts (Sentencing) Act 2000⁴⁹ can be imposed in addition to a confiscation order, or a direction can be given that compensation be paid from sums collected

⁴⁷ An order where sums are taken directly from a person's state benefits.

⁴⁸ The arrangement was not honoured.

⁴⁹ Powers of Criminal Courts (Sentencing) Act 2000, s 130.

under a confiscation order if the defendant has insufficient means to satisfy both a compensation and confiscation order.⁵⁰

19.48 Protracted enforcement proceedings have an impact on victims, who often anticipate that they will receive a lump sum following the imposition of a compensation order to be paid from confiscated funds.

19.49 In our pre-consultation discussions we spoke to a victim who had been expecting to receive such compensation. He detailed no fewer than 41 occasions on which he had been to court (including for the substantive criminal proceedings, confiscation hearing and enforcement hearings at the magistrates' court). At the time that we spoke, the victim had recovered just over £16,000 in compensation out of more than £130,000 owed to him. He told us:

...to be honest the current system isn't working and has been a real let down to me and my family, not to mention my company... I am totally lost for words with how this individual is able to get around this system.

The use of fine enforcement powers to enforce confiscation orders

19.50 Because enforcement receivers are appointed in a relatively small proportion of cases, most cases are enforced against the defendant personally in the magistrates' court.

19.51 This has caused difficulties because the fines enforcement regime used in the magistrates' courts was not drafted with confiscation in mind. The Supreme Court has observed that the process involves a "complex statutory scheme" and "convoluted statutes."⁵¹

19.52 Reference must be made to multiple statutes to ascertain the final position. This is because the various interlinked statutory provisions cross refer to one another. The court must refer to POCA 2002 (which treats sums due under a confiscation order as if they were a fine imposed by the Crown Court), the Powers of Criminal Courts (Sentencing) Act 2000 (which deals with fines imposed in the Crown Court), and the Magistrates' Courts Act 1980 (which contains the enforcement provisions). In this regard the Supreme Court has observed:

Many of the difficulties which have beset the present case arise out of the fact that the enforcement of confiscation orders is thus achieved by applying to them statutory provisions which were not designed for them. In particular, the process of referrals just described has the effect that a confiscation order is treated for enforcement as if it was a fine imposed by the magistrates.⁵²

19.53 Perhaps not surprisingly there have been difficulties with interpretation of the law. A considerable body of case law has arisen detailing how the statutory provisions operate in relation to the enforcement of confiscation orders. A summary of some of

⁵⁰ Proceeds of Crime Act 2002, s 13 (5) and (6).

⁵¹ *R (Gibson) v Secretary of State for Justice* [2018] UKSC 2, [2018] 1 WLR 629 at [3] and [8].

⁵² Above, at [12].

the case law provides a flavour of the difficulties posed by using legislation drafted for a different purpose:

- (1) If not paid by the due date, confiscation orders attract interest but fines do not. The Supreme Court had to consider how credit should be given against a term of imprisonment in default where part payment had been made: the issue was whether credit should be given for part payment against the total sum outstanding (including interest) or whether any reduction in the term of imprisonment should be calculated by reference to the principal sum due under the confiscation order. The court decided that it was the latter position and observed:

A scheme under which the period of imprisonment served in default of payment in full of the amount specified in the confiscation order is based on the entire amount outstanding, including interest, may or may not be what the framers of the confiscation legislation might have wished for or intended if the point had been considered. However, because the means adopted took the form of statutory reference (and re-reference) to provisions which were drafted for a different purpose and without confiscation in mind, they have not achieved that effect. If it is desired that they should do so, express legislation will be needed.⁵³

- (2) The Divisional Court has held that a magistrates' court does not have the power, under the Magistrates' Courts Act 1980, to allow further time to pay a confiscation order, as they may do for fines. If the power was available it would alter the date upon which interest began to accrue and would be tantamount to a partial remittal of the confiscation order which the statute does not permit.⁵⁴
- (3) Prior to activating a default term, a magistrates' court is not required to conduct a means enquiry as the Crown Court will have already done so as part of the exercise in making the confiscation order. The magistrates' court must, however, consider if the default in payment is owing to the offender's wilful refusal or culpable neglect.⁵⁵
- (4) A magistrates' court deals solely with enforcement and may not interfere with findings made by the Crown Court.⁵⁶ This is because a magistrates' court may not act in an appellate capacity over the Crown Court. Accordingly, any application to reduce the amount payable must be made to the Crown Court.⁵⁷
- (5) The magistrates' court does retain a discretion to stay enforcement as an abuse of process on the grounds of delay.⁵⁸

⁵³ *R (Gibson) v Secretary of State for Justice* [2018] UKSC 2, [2018] 1 WLR 629 at [23].

⁵⁴ *CPS v Greenacre* [2007] EWHC 1193 (Admin), [2008] 1 WLR 438.

⁵⁵ *Munir v Bolton Magistrates' Court* [2010] EWHC 3794 (Admin) at [4].

⁵⁶ *Hunter v Chief Constable of West Midlands* [1982] AC 529; *R v Harrow Justices Ex p DPP* [1991] 1 WLR 395.

⁵⁷ Proceeds of Crime Act 2002, s 23.

⁵⁸ *O'Connell v Westminster Magistrates' Court* [2017] EWHC 3120 (Admin), [2018] Lloyd's Rep FC 130.

- (6) Where a term of imprisonment in default of payment has been imposed, it was held that the magistrates' court has no power to issue a warrant of arrest where a defendant fails to attend a further enforcement hearing. The power to issue a warrant of arrest is contingent on there being a power to impose imprisonment in default, and that sanction can only be deployed on one occasion.⁵⁹

19.54 As can be seen, enforcement is beset by many difficulties. Many of these difficulties were evident in the recent case of *Olabinjo v Westminster Magistrates Court*.⁶⁰ The chronology of events was as follows:

- (1) The defendant was convicted in December 2013 and was sentenced to a term of 6 years' imprisonment.
- (2) In April 2015, a confiscation order was imposed. The defendant's benefit was assessed in the sum of £401,940.00 which represented the amount he had improperly obtained from a not-for-profit company.
- (3) The available amount was assessed in the sum of £14,238.50. The schedule of assets attached to the confiscation order identified this sum as the defendant's beneficial interest in a property (the family home). The defendant was given 6 months to pay the sum which was to be paid by way of compensation.⁶¹
- (4) The defendant applied for leave to appeal against the confiscation order 18 months out of time. The ground of appeal was that the order could not be satisfied without the family home being sold thus the order was disproportionate.
- (5) The application was refused by the single judge and was renewed. The renewed application was refused in October 2017.
- (6) On 6 November 2018, the defendant was committed to prison in default of payment. He challenged that decision on the basis that the procedure before the magistrates' court had been flawed. The defendant's challenge was refused, by which time he had served the term of imprisonment in default.

19.55 The case puts into stark focus many of the key problems we have identified with the current enforcement regime:

- (1) There were no fewer than 20 enforcement hearings listed before the magistrates' court.⁶²

⁵⁹ *R (Necip) v City of London Magistrates' Court* [2009] EWHC 755 (Admin), [2010] 1 WLR 1827. But see *R (Lawson) v Westminster Magistrates' Court* [2013] EWHC 2434 (Admin), [2014] 1 WLR 2085 where it was held that a warrant could be issued where a summons had been issued by virtue of schedule 5 of the Courts Act 2003.

⁶⁰ *Olabinjo v Westminster Magistrates Court* [2020] EWHC 1093 (Admin).

⁶¹ Proceeds of Crime Act 2002, ss 13 (5) and (6).

⁶² *Olabinjo v Westminster Magistrates Court* [2020] EWHC 1093 (Admin) at [11].

(2) Despite a property being identified, an enforcement receiver was not appointed thus the defendant was entrusted to satisfy the order.⁶³

(3) The court noted:

Analysis of the chronology of the hearings demonstrates that the [defendant] misled the court more than once. In June 2016 he said that he was awaiting the result of his appeal against conviction in respect of which there had been a hearing in May 2016. There had been no such hearing.⁶⁴

(4) After serving the default sentence, the confiscation order had still not been satisfied and the victim had not been compensated. As the order was for £10 million or less, the defendant was released unconditionally and was not on licence; no sanction therefore existed to enforce payment. Accordingly, in March 2019, almost four years after the order had been imposed and compensation ordered, the Crown Prosecution Service indicated that they proposed to seek the appointment of an enforcement receiver.⁶⁵

19.56 In the next chapter, we go on to consider how the current system for enforcement might be reformed to tackle the difficulties we have identified.

⁶³ Above, at [31] and [47].

⁶⁴ Above, at [39].

⁶⁵ Above, at [48].

Chapter 20: Reforming the confiscation enforcement regime

INTRODUCTION

20.1 In the preceding chapter we identified difficulties with the current enforcement process. Those difficulties, together with matters raised by stakeholders, can be summarised as follows:

- (1) Placing the onus on a defendant to repay an order from assets of their choosing causes delay and hampers effective enforcement.
- (2) Enforcement receivers are not routinely instructed despite properties belonging to defendants being identified. There was a perception that, although effective, the appointment of a receiver is expensive and the prosecution may be dissuaded from seeking the appointment of a receiver on the grounds of cost. This can result in assets not being realised.
- (3) Defendants routinely obfuscate and attempt to delay enforcement by providing inaccurate information or by launching challenges.
- (4) Imprisonment in default is a one-off sanction and, once imposed, post-default sanctions are ineffective in incentivising payment.
- (5) The accrual of interest, in many cases, does not incentivise payment and contributes to the growing outstanding debt.
- (6) Victims often anticipate receipt of a lump sum following the imposition of a compensation order, but it will often not be paid which undermines victims' faith in the criminal justice system.

20.2 Over the next three chapters we consider potential reforms, both radical and minor, to address the perceived difficulties with the current enforcement regime. Our terms of reference ask us to consider both alternatives to the current value-based system of confiscation orders¹ as well as amendments to the current regime.

20.3 In this chapter we consider whether approaches to asset forfeiture adopted overseas could inform radical reform of the confiscation regime, with a view to optimising enforcement. In particular, we consider:

- (1) Whether replacement of value-based confiscation with asset-based confiscation would be appropriate to optimise enforcement; and
- (2) Whether a confiscation order should continue to be a judgment that requires the defendant to pay a sum of money representing the value of their proceeds of

¹ It should be noted that Part 5 of POCA 2002 dealing with civil asset-based forfeiture is outside our terms of reference.

crime, but that to satisfy the order assets belonging to the defendant should vest in the state (whether through a receiver or otherwise) at a particular date.

20.4 In Chapter 21 we return our focus to the provisions of POCA 2002 itself and consider whether, rather than automatic vesting of assets in the state, the current “compliance order” provisions in section 13A of POCA 2002 could be enhanced to make the process of divestment of assets simpler and easier in appropriate cases.

20.5 In Chapter 22 we consider the current system of sanctions and enforcement powers under POCA 2002 and discuss potential reforms to those sanctions and powers.

APPROACHES ADOPTED IN OTHER JURISDICTIONS

The United States of America²

20.6 A comparable post-conviction “*in personam*” asset forfeiture regime exists in the United States of America. In federal criminal cases, if a person is convicted of an offence for which forfeiture is authorised,³ the court may impose a forfeiture judgment as part of the sentence.⁴

20.7 One of the forms such a judgment may take is a “money judgment”⁵ requiring that the defendant personally pay a sum of money equivalent to his or her benefit from the offence giving rise to the conviction, or to the value of the property used to commit that offence.⁶ As in England and Wales, forfeiture of specific assets in such cases largely depends upon the authorities taking further action after the order has been made.⁷

20.8 In addition to the money judgment, a federal court in the USA may order the defendant to forfeit specific assets that were derived from or were used to commit the offence.⁸ Where such directly forfeitable property is recovered, the court will credit the

² Our thanks to Stefan D. Cassella, former federal prosecutor, now associated with Asset Forfeiture Law, LLC for his contribution to this section.

³ The United States has no generally applicable asset forfeiture provision. Instead, there are different forfeiture provisions for different federal crimes, and for some federal crimes there is no provision for forfeiture at all.

⁴ *United States v Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (a criminal forfeiture order is a judgment *in personam* against the defendant; this distinguishes the forfeiture judgment in a criminal case from the *in rem* judgment in a civil forfeiture case); *United States v Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007) (criminal forfeiture operates *in personam* against a defendant; it is part of their punishment following conviction). For the procedure for imposing a criminal forfeiture judgment see Rule 32.2(b), Federal Rules of Criminal Procedure.

⁵ *United States v Hampton*, 732 F.3d 687, 691 (6th Cir. 2013); *United States v Ginsburg* **773 F.2d 798, 801-02 (7th Cir. 1985)**.

⁶ *United States v Hall*, 434 F.3d 42, 59 (1st Cir. 2006); *United States v Casey*, 444 F.3d 1071, 1076 & n.4 (9th Cir. 2006); *United States v Vampire Nation*, 451 F.3d 189, 202 (3rd Cir. 2006). For a summary of subsequent case law see S D Cassella, *Asset Forfeiture Law in the United States* (2nd ed 2013) pp 696 to 697 and generally at 19-4.

⁷ *United States v Hall*, 434 F.3d 42, 59 (1st Cir. 2006).

⁸ Rule 32.2(b).

value of the property against the money judgment that the defendant is ordered to pay.⁹

20.9 “Directly forfeitable property” is property that has a clear connection with a defendant’s criminality. Although the precise connection differs between statutes,¹⁰ essentially the asset must either:

- (1) constitute, or be derived from, the proceeds of the defendant’s criminality; or
- (2) have been used, or have been intended for use, “in any manner or part, to commit, or to facilitate the commission of,” the criminal offence.¹¹

20.10 If the directly forfeitable property cannot be recovered, or if it is insufficient to satisfy the money judgment, the court may order that the money judgment be satisfied by the forfeiture of untainted property belonging the defendant. This is known as “substitute assets.”¹² Such property is liable for forfeiture if, as a result of any act or omission of the defendant, the directly forfeitable property:

- (1) cannot be located with due diligence;
- (2) has been transferred, sold to, or deposited with, a third party;
- (3) has been placed beyond the jurisdiction of the court;
- (4) has been substantially diminished in value; or
- (5) has been commingled with other property which cannot be divided without difficulty.¹³

20.11 The requirement to demonstrate that property that can be directly forfeited is unavailable as a result of any act or omission of the defendant has been interpreted “liberally”.¹⁴ A sworn affidavit that “we have searched for the \$750,000...received from Libya but we have not been able to locate it”¹⁵ has been found to be sufficient for the substitute assets provisions to take effect.

⁹ *United States v Clark*, 2016 WL 361560, *6 (S.D. Fla. Jan. 27, 2016) (finding defendant liable for three money judgments, but in each case allowing credit for the value of specific assets forfeited).

¹⁰ See, for example, 18 USC §982(a)(1), (7) and (8); 18 USC §1963(a)(2).

¹¹ 21 USC § 853(a)(1) and (2). Because criminal forfeiture orders are *in personam* in nature, the directly forfeitable property is liable to forfeiture only if it is the property of the defendant. If the property used to commit the offence belonged to a third party, or if the proceeds of the offence were later transferred to a bona fide purchaser for value, the third party may contest the forfeiture in a post-conviction proceeding. The recovery of third party property used to commit an offence can only occur in the USA in a parallel *in rem* forfeiture proceeding.

¹² S D Cassella, *Asset Forfeiture Law in the United States* (2nd ed. 2013), p 690.

¹³ 21 U.S.C. 853(p).

¹⁴ *United States v Alamoudi*, 452 F.3d 310, 315 (4th Cir. 2006).

¹⁵ *United States v Alamoudi*, above. See also *United States v Garza*, 407 Fed. Appx. 322, 324-25 (10th Cir. 2011). For a summary see S D Cassella, *Asset Forfeiture Law in the United States* (2nd ed 2013), p 764.

20.12 A clear explanation of the relationship between the types of criminal forfeiture was given by Stefan Cassella in his book, *Asset Forfeiture Law in the United States*:

Suppose a court or jury has determined that the defendant obtained \$500,000 in a fraud scheme...the court must order a preliminary order for forfeiture directing the defendant to forfeit \$500,000.

- (1) If the money is still in the defendant's possession, or if it is traceable to an identifiable asset, the court will identify the money or the asset as directly forfeitable property.
- (2) If the money has been dissipated or has not yet been located... but it is readily apparent that the defendant has another asset, such as a boat, house or airplane... the court must include the boat, house or airplane... as a substitute asset.
- (3) If the government has not yet located any substitute assets, the court may leave the order of forfeiture in the form of a money judgment for \$500,000. The government may then conduct a post-conviction investigation to see if the defendant has anything – or later obtains anything [...] that may be forfeited as a substitute asset to satisfy the money judgment.¹⁶

20.13 Regardless of the form of the order, a post-conviction asset forfeiture order in the USA therefore:

- (1) requires the identification of the directly forfeitable property or a finding as to the amount of money that a defendant will be required to forfeit;
- (2) exposes the defendant to an ultimate liability to repay that sum of money;
- (3) remains in force over the defendant personally until it is satisfied in full.¹⁷

20.14 There are similarities in the overarching approaches adopted in the USA and in England and Wales:

- (1) The requirement to calculate "benefit"¹⁸ is akin to the requirement in the USA to make a finding as to the amount of money that a defendant has obtained from crime.
- (2) A defendant remains ultimately liable to repay their benefit in full, even from assets obtained after a confiscation order has been made.¹⁹

¹⁶ S D Cassella, *Asset Forfeiture Law in the United States* (2nd ed 2013), p 762-63 (formatting added). See also S D Cassella, "Asset Forfeiture Law in the United States," ch 18 in *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Colin King, Clive Walker and Jimmy Gurule (eds.) (UK, Palgrave Macmillan 2018).

¹⁷ *United States v Navarette*, 667 F.3d 886, 887-88 (7th Cir. 2012); *United States v Casey*, 444 F.3d 1071, 1074 (9th Cir. 2006). S D Cassella, *Asset Forfeiture Law in the United States* (2nd ed 2013), p 699.

¹⁸ Proceeds of Crime Act 2002, s 6(4)(b),(c).

¹⁹ Proceeds of Crime Act 2002, s 22.

- (3) A confiscation order remains in force over the defendant personally until it is satisfied in full.²⁰

20.15 In the USA, a defendant's personal liability can be met readily through the forfeiture of assets to, and realisation of assets by, the government. By virtue of statutory criminal forfeiture provisions, "all right, title, and interest" in criminal proceeds "vests in the United States upon the commission of the act giving rise to forfeiture."²¹

20.16 As noted in the Department of Justice *Asset Forfeiture Policy Manual*, "since the forfeiture process vests title to the property in the United States, a forfeiture sale is a sale by the Government of property it owns".²² There is therefore no need to obtain future court orders or obtain consent from the defendant to deal with the property.

20.17 Unlike under the system in England and Wales there is no reliance placed upon a defendant in realising assets. An order made over assets themselves therefore has the potential to make enforcement of orders far more efficient than in cases in England and Wales, such as *Stannard*²³ which we discussed in Chapter 19 (*Problems with the current regime*).

The "hybrid" approach in New Zealand

20.18 In 2009, New Zealand enacted the Criminal Proceeds (Recovery) Act to streamline its approach to asset recovery. The Act replaced the Proceeds of Crime Act 1991 and largely removed the distinction between conviction-based and civil recovery of criminal property. The Act provides for three forms of order, each with a parallel restraint provision. The available orders are:

- (1) Instruments forfeiture orders.
- (2) Assets forfeiture orders.
- (3) Profit forfeiture orders.

20.19 The profit forfeiture order offers the closest analogy to a confiscation order, although it is a non-conviction based order. The High Court of New Zealand must make a profit forfeiture order if it is more likely than not that the respondent has "unlawfully benefited" from "significant criminal activity" and the respondent has an interest in property.²⁴

20.20 The court making the profit forfeiture order must specify:

- (1) the value of the unlawful benefit;

²⁰ Proceeds of Crime Act 2002, s 87.

²¹ 21 USC §853(c). For case law see United States Department of Justice, *Asset Forfeiture Policy Manual* (2016), p 101, fn8.

²² United States Department of Justice, *Asset Forfeiture Policy Manual* (2016), p 101.

²³ *R v Stannard* [2015] EWHC 1199 (Admin).

²⁴ Criminal Proceeds (Recovery) Act 2009 (NZ), s 55(1).

- (2) the maximum recoverable amount (which is the value of the unlawful benefit minus any sums already forfeited to the state); and
- (3) the property that is to be disposed of, being property in which the respondent has, or is treated as having, an interest.

20.21 The property to be forfeited is property in which the defendant has an interest, without reference to whether the property represents the proceeds or means of offending.

20.22 If the defendant has insufficient assets to meet the maximum recoverable amount, the outstanding sum remains a debt owed by the defendant.²⁵

20.23 The New Zealand approach therefore includes fewer of the complexities in making orders over assets that exist in the regime adopted by the USA.

20.24 In New Zealand, the Official Assignee (from the Insolvency and Trustee Service) is immediately empowered to take charge of assets. Its powers to dispose of property do not take effect, however, until after a “specified period”. That period is either:

- (1) where no appeal is brought, the date six months after the time for bringing an appeal expires; or,
- (2) where an appeal is brought, the date six months after the appeal has been withdrawn or finally determined.²⁶

USING OVERSEAS APPROACHES TO INFORM RADICAL REFORM IN THIS JURISDICTION

20.25 Having set out two approaches used overseas, we now consider whether those approaches could increase the effectiveness of the enforcement of a confiscation order. We consider:

- (1) whether replacement of value-based confiscation with an asset-based regime to take the identified proceeds of crime would be an appropriate way to optimise enforcement; and
- (2) whether a confiscation order should continue to be a judgment that requires the defendant to pay a sum of money representing the value of their proceeds of crime, but that in order to satisfy the order assets belonging to the defendant may be vested automatically in the state (whether through a receiver or otherwise) at a particular date.

Is a move away from a “value-based” order appropriate?

20.26 During our pre-consultation discussions, a number of stakeholders questioned whether there was any necessity for a value-based order against the defendant

²⁵ Criminal Proceeds (Recovery) Act 2009 (NZ), s 55(4).

²⁶ Criminal Proceeds Recovery Act 2009 (NZ) s 56(1).

because civil proceedings for the recovery of the proceeds of crime²⁷ would clearly identify and remove identified assets that represented the proceeds of crime, and they could also be used to remove the instrumentalities of crime. Making orders against identified assets could result in realistic orders which could be enforced efficiently.

20.27 Three leading QCs who specialise in POCA work also told us that one alternative to the current value-based system would be a system based on taking identified assets which represented the proceeds and instrumentalities of an offence (essentially a system of asset-based forfeiture).

20.28 Under Part 5 of POCA, property which can be forfeited includes “recoverable property”.²⁸ “Recoverable property” is defined as “property obtained through unlawful conduct”,²⁹ whether that means the original property or property into which the original property has been traced.³⁰ “Unlawful conduct” is in turn defined as including conduct which is “unlawful under the criminal law” in England and Wales.³¹ Therefore, where a defendant has been convicted before the criminal courts, it should be relatively straightforward for the principles applied in civil recovery to be extended to the Crown Court following a conviction.

20.29 Civil proceedings for the recovery of the proceeds of crime may be pursued in the High Court following a defendant’s acquittal in the Crown Court.³² The extension of civil powers of asset recovery to the Crown Court could mean that, even if a defendant was acquitted because the jury was not sure of his or her guilt, a judge could find on the balance of probabilities that an asset had come from crime.³³

20.30 The identification and forfeiture of the specific assets which are the proceeds of a crime³⁴ or the instrumentalities of crime has the merit of relative simplicity in terms of enforcement. The approach to confiscation in the USA and to profit orders in New Zealand focusses on such assets to an extent. However, the focus is not entirely asset based. The court calculates the *value* of a defendant’s gains from crime and then identifies assets against which the order can be enforced, for example through vesting such assets in the Official Assignee.

20.31 The approach is reflected in a number of international conventions, which require parties to adopt value-based confiscation measures that go further than a focus on the assets into which the proceeds of a crime can be traced. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of

²⁷ In the general sense used in Part 5 of POCA (covering both civil recovery in the High Court and the forfeiture of cash, listed assets and money held in bank and building society accounts in the magistrates’ court).

²⁸ Proceeds of Crime Act 2002, ss 266, 298, 303O, 303Z14.

²⁹ Proceeds of Crime Act 2002, s 304.

³⁰ Proceeds of Crime Act 2002, s 305.

³¹ Conduct is “unlawful” if it is unlawful in the part of the UK in which it occurs. It may also extend to conduct that took place outside of the UK; Proceeds of Crime Act 2002 s 241.

³² See comments by Lord Phillips JSC in *Gale v SOCA* [2011] UKSC 49, [2011] 1 WLR 2760 at [44].

³³ Whilst we raise this issue, we do not make any recommendations about it because it pertains to Part 5 of POCA 2002. Our terms of reference relate only to Part 2 of POCA 2002.

³⁴ Or which are derived from the proceeds of crime.

Crime and on the Financing of Terrorism (the “2005 Warsaw Convention”) was ratified by the UK in 2015. It requires each party to:

adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds *or property the value of which corresponds to such proceeds* and laundered property.³⁵

20.32 Similarly, the United Nations Convention Against Corruption, which was ratified by the UK in 2006, states that:

Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of proceeds of crime derived from offences established in accordance with this Convention, *or property the value of which corresponds to that of such proceeds*.³⁶

20.33 The rationale behind holding a defendant accountable not only for assets with a specific link to crime but also for the value of his or her profits from crime more generally, as articulated in the case of *United States v Ginsburg* in connection with deterrence, is compelling:

A racketeer who dissipates the profits or proceeds of his racketeering activity on wine, women, and song has profited from organized crime to the same extent as if he had put the money in his bank account. Every dollar that the racketeer derives from illicit activities and then spends on such items as food, entertainment, college tuition, and charity, is a dollar that should not have been available for him to spend for those purposes. In order to truly separate the racketeer from his dishonest gains, therefore, the statute requires him to forfeit to the United States the total amount of the proceeds of his racketeering activity, regardless of whether the specific dollars received from that activity are still in his possession. To require less would seriously undermine the intended deterrent effect of... forfeiture; a racketeer would have no incentive to discontinue his racketeering activity if he could freely use the proceeds of that activity to enrich his life up until the moment of his eventual conviction, at which time he would only be required to forfeit whatever was left over.³⁷

20.34 The public interest in holding a defendant financially accountable for his or her benefit from crime is also a salient factor. When introducing the second reading of the Bill that became the Criminal Justice Act 1988, the Secretary of State for the Home Department, Douglas Hurd described how confiscation is intended to:

remove the sense of injury which ordinary people are bound to feel at the idea of traffickers, who may have ruined the lives of children, having the benefit of the profits that they have made from doing so.³⁸

³⁵ The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism, Art 3(1) (emphasis added).

³⁶ United Nations Convention Against Corruption, Art 31(1)(a) (emphasis added).

³⁷ *United States v Ginsburg* 773 F.2d 798, 802 (7th Cir. 1985).

³⁸ *Hansard* (HC) 21 January 1986 Vol 90 Col 242.

20.35 A system which focussed purely on the particular assets without addressing the value of a defendant's profits from crime more generally would not really address these issues.

20.36 The systems in the USA and New Zealand therefore have a focus on assets that might be realised, but ultimately the confiscation exercise is value-based. A money judgment will be outstanding against the defendant for any sum not recovered through the realisation of specific assets. We therefore consider that any reformed system should continue to focus on "value" when making the order.

Vesting assets in a trustee for confiscation

20.37 Having determined that the court should focus on value when making the order, the question then becomes how the order should be enforced.

20.38 In New Zealand and the USA, identified assets will vest in state authorities and will ultimately be forfeited to the state in satisfaction of the court order. Any outstanding debt is then a money judgment against the defendant personally.

20.39 We considered carefully whether it would be appropriate to propose a system similar to the USA and New Zealand, whereby assets identified during the confiscation process vest in a "trustee for confiscation", thus removing the defendant from the equation and facilitating effective enforcement.

20.40 As we discussed in Chapter 18, under the present system in England and Wales, where a defendant fails to satisfy an order, the prosecutor may apply to the Crown Court for the appointment of an enforcement receiver. The appointment may be made if a confiscation order is not satisfied and the confiscation order is not subject to appeal.³⁹

20.41 We consider receivership more generally in Chapter 27. In that Chapter, we discuss why it may be appropriate to use a diverse range of individuals or organisations to act as "trustees for confiscation" to facilitate the management and realisation of assets. Such an approach would allow decisions to be taken on case by case basis as to whether the private sector or the Official Receiver (or other public entity) should be assigned to manage and realise an asset. Relevant factors may include:

- (1) the value of the asset;
- (2) the location of the asset;
- (3) the nature and extent of any management required;
- (4) whether particular expertise is required to manage and or realise the asset; and
- (5) the likely costs involved.

20.42 In essence, a "trustee for confiscation" could be any person who is suitably qualified to secure the detention, custody or preservation of any property vested in them and to

³⁹ Proceeds of Crime Act 2002, s 50.

realise the value of property vested in them, so far as practicable, in the manner best calculated to maximise the amount payable to the enforcement authority.⁴⁰

20.43 As noted in *Millington and Sutherland Williams on the Proceeds of Crime* in the context of trustees for civil recovery used under Part 5 of POCA:

Much will depend on the complexity and issues involved in realising the asset in question. If, for example, assets are held outside of the jurisdiction, a trustee in the form of an insolvency practitioner is likely to be appointed, because of the jurisdictional issues involved. If, on the other hand, the realisation is a straightforward matter over a modest number of assets, the relevant authority is likely to nominate a member of its own staff, not least because it is more cost effective to do so.⁴¹

20.44 The vesting of assets earlier in the process could expedite enforcement. We consider whether such vesting could take place:

- (1) automatically on the making of a confiscation order;
- (2) on a contingent basis following expiry of time to pay;
- (3) through a "criminal bankruptcy" order.

Automatic vesting of assets on the making of the confiscation order

20.45 If assets were automatically to vest in a trustee for confiscation on the making of a confiscation order:

- (1) Third party interests in the property would have to be determined.
- (2) Enquiries into undue hardship to the defendant or third parties would have to be undertaken.
- (3) A trustee to realise assets would have to be identified and procured.

Determination of a third party's interests

20.46 Under the current confiscation regime, the Crown Court has the power to determine the extent of a defendant's interest in property when imposing a confiscation order, pursuant to section 10A of POCA 2002. However, the confiscation order is a debt which a defendant may satisfy from assets of his or her choosing. Therefore, as is emphasised in the explanatory notes to the Serious Crime Act 2015 (which introduced the section 10A power):

in general, it is most appropriate for third party interests to be dealt with substantively at the enforcement stage of a confiscation order given that the existence of such interests only crystallises against specific property at that stage.⁴²

⁴⁰ See by analogy, Proceeds of Crime Act 2002, s 267.

⁴¹ *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed) para 14.42.

⁴² Serious Crime Act 2015, explanatory notes, para 19.

20.47 To determine such matters in every case would clearly be time-consuming. It would also be potentially unnecessary if a defendant who had been given a time to pay period would have realised the asset or its equivalent value in any event.

Consideration of “undue hardship”

20.48 Similar considerations apply to the issue of “undue hardship” caused to third parties through the realisation of an asset. Article 1 of protocol 1 of the European Convention on Human Rights (A1P1) provides for a general protection prohibiting the state from interfering with property rights but then qualifies that right in the following terms:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

20.49 The Supreme Court, in the context of POCA 2002 and A1P1, has observed:⁴³

It is clear law, and was common ground between the parties, that this imports, via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in, inter alia, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation.

20.50 The ECHR approach to all qualified rights, including A1P1, is to apply a three-pronged test to constitutional compliance:

- (1) Is the measure lawful (that is, provided for by domestic law)?
- (2) Is it directed towards a legitimate aim (necessity)?
- (3) Is the measure proportionate to that aim?

20.51 Vesting assets in a trustee for confiscation may impinge upon A1P1 and article 8 rights (the right to respect for a private and family life). The means deployed by the state to remove the proceeds of crime under POCA 2002 must be proportionate to that aim.

20.52 Currently such issues are relevant at the enforcement stage. In *R v Ahmed*, a case determined before section 10A was brought into force, the Court of Appeal observed:

Different considerations, will... arise if the debt is not met and the prosecution determine to take enforcement action, for example by obtaining an order for a receiver. As the House of Lords explained in *Re Norris*,⁴⁴ this is the stage of the

⁴³ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [12].

⁴⁴ *R v Ahmed* [2001] UKHL 34, [2001] 1WLR 1388.

procedure in which third party's rights can not only be taken into account but resolved. If the court is asked at that stage to make an order for the sale of the matrimonial homes, article 8 rights are clearly engaged. It would be at that stage that the court will have to consider whether or not it would be proportionate to make an order selling the home in the circumstances of the particular case. That is a decision which can only be made on the facts at the time. The court would undoubtedly be concerned to ensure that proper weight is given to the public policy objective behind the making of confiscation orders, which is to ensure that criminals do not profit from their crime. And the court will have a range of enforcement options available with which to take account of the rights of third parties such as other members of the Ahmed family.⁴⁵

20.53 In *Morrison* the court considered whether section 10A had altered the position and observed:

In our judgement, section 10A is not, even on its face, a general provision permitting the court to act in a way to avoid hardship or injustice to a third party.... all that provision does is to raise the issue of the extent to which the defendant has an interest in the relevant property at the time of the making of the confiscation order. To that extent it is true such issues are brought forward from the time of potential enforcement action. Fundamentally, however, what this does not lead to is what [counsel for the defendant] needs to establish, which is that section 6(5)(b) enables the Crown Court to carry out a general balancing exercise as between the statutory aim of the 2002 Act and other interests, for example the potential hardship or injustice to third parties. If that is to be taken into account at all, in our view, it remains the case (in accordance with the decision in *Ahmed*) that that must await the stage of potential enforcement action.⁴⁶

20.54 Vesting assets when a confiscation order is imposed would mean an asset is truly at stake at the time an order is imposed. Accordingly, the court would be required to consider the effect of realising an asset far earlier in the process.

20.55 Proper consideration of the proportionality⁴⁷ of the interference with the rights of a third party may involve close scrutiny of the facts, as is exemplified by considering areas of law other than confiscation in England and Wales in addition to the approach under part 2 of POCA 2002.

[\[1\] The Insolvency Act 1986](#)

20.56 The Insolvency Act 1986 provides that a bankrupt's estate: "shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee."⁴⁸ A bankrupt's estate includes "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy."⁴⁹

⁴⁵ *R v Ahmed* [2004] EWCA Crim 2599, [2005] 1 WLR 122 at [12].

⁴⁶ *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25 at [82] – [84].

⁴⁷ In Chapter 5 we discuss the concept of proportionality and its application to POCA 2002.

⁴⁸ Insolvency Act 1986, s 306.

⁴⁹ Insolvency Act 1986, s 283.

20.57 In simple terms a bankrupt's interest in property is transferred to the trustee. Property required to earn an income (such as tools, books and vehicles) and items required to maintain a reasonable standard of living (such as clothing, bedding and furniture) are excluded.

20.58 Insolvency legislation in the UK has a number of measures dealing with the position where the asset is a bankrupt's (or their spouse's/civil partner's) sole or principal residence. For example:

- (1) An application for possession or sale of the property must be dismissed if the value of the bankrupt's interest is below a prescribed amount.⁵⁰
- (2) Three years from the date of bankruptcy any interest in a dwelling house no longer forms part of the bankrupt's estate unless the trustee has realised the interest or has sought an order⁵¹ in respect of the interest.⁵²
- (3) Occupation rights can prevent a sale but after one year it is assumed that, absent exceptional circumstances, the creditors' interests outweigh all other considerations.⁵³

20.59 It is apparent therefore that in insolvency proceedings additional protections are afforded to the principal residence of a bankrupt and his or her family. However, it is noteworthy that after a year there is an assumption that the creditors' interests should prevail.

20.60 Exceptional circumstances are required to avoid the presumption that creditors' interests outweigh all others. In considering the sale of the family home and the competing interests between creditors and the bankrupt's family, the Court of Appeal has observed:

What then are exceptional circumstances? As the cases show, it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest [in the family home] will not produce enough to buy a comparable home in the same neighbourhood, or indeed elsewhere. And, if she has to move elsewhere, there may be problems with schooling and so forth. Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar.⁵⁴

20.61 More recent authority has confirmed:⁵⁵

The principles which can be derived from the authorities may be summarised as follows. First, the presence of exceptional circumstances is a necessary condition to

⁵⁰ Insolvency Act 1986, s 313A.

⁵¹ Including an order for sale, a charging order or a possession order.

⁵² Insolvency Act 1986, s 283A.

⁵³ Insolvency Act 1986, ss 336 and 337.

⁵⁴ *Re Citro* [1991] Ch 142.

⁵⁵ *Dean v Stout* [2004] EWHC 3315 (Ch).

displace the presumption that the interests of the creditors outweigh all other considerations, but the presence of exceptional circumstances does not debar the court from making an order for sale.

Second, typically the exceptional circumstances in the modern cases relate to the personal circumstances of one of the joint owners, such as a medical or mental condition.

Third, the categories of exceptional circumstances are not to be categorised or defined and the court makes a value judgment after looking at all the circumstances.

Fourth, the circumstances must be exceptional and this expression was intended to apply the same test as the pre-Insolvency Act 1986 decisions on bankruptcy (see in *Re Citro [1991] Ch.142...*).

Sixthly, for the purposes of weighing the interests of the creditors, the creditors have an interest in the order for sale being made, even if the whole of the net proceeds will go towards the expenses of the bankruptcy, and the fact that they will be swallowed up in paying those expenses is not an exceptional circumstance justifying the displacement of the presumption that the interests of the creditors outweigh all other considerations.

20.62 As can be seen, the sale of a debtor's principal residence can be avoided only in exceptional circumstances. It is perhaps arguable that a debt owed to the state in lieu of sums acquired through criminality ought to attract less protection.

[2] A Scottish perspective

20.63 In Scotland, section 98 of POCA 2002 makes provision about the disposal of a family home to satisfy a confiscation order.

20.64 Section 98 applies where a confiscation order has been made and the prosecutor has not satisfied the court that the defendant's interest in the family home has been acquired as a benefit from his criminal conduct.

20.65 Before disposing of any right or interest in the defendant's family home, the administrator must obtain consent to do so⁵⁶ or apply to the court for authority to carry out the disposal.⁵⁷

20.66 The court must have regard to all the circumstances of the case including:

- (1) the needs and financial resources of the spouse or former spouse of the person concerned;
- (2) the needs and financial resources of any child of the family;

⁵⁶ Consent must be obtained from the spouse or a former spouse who occupies the property, regardless of whether the person against whom the order was made (the relevant person) also resides at the property or, if the relevant person resides at the property with a child of the family, the consent of the relevant person is required (section 98 (5)).

⁵⁷ Proceeds of Crime Act 2002, s 98(2).

- (3) the length of the period during which the family home has been used as a residence by a spouse, former spouse or child of the family.⁵⁸

20.67 The court may refuse to grant the application or may postpone the granting of the application for such period (not exceeding 12 months) as it may consider reasonable in the circumstances or may grant the application subject to such conditions as it may prescribe.⁵⁹

20.68 It was not until 2017 that the first opposed section 98 application came before the court.⁶⁰ The Outer House of the Court of Session observed:

There is no directly equivalent provision in England that would allow the delay of the sale of a family home. The English courts do have discretion in relation to the realisation of property, but the court's powers must be exercised with a view to the satisfaction of the confiscation order.

20.69 Additional protection is afforded to the family home where it cannot be ascertained that it was acquired with criminal funds. The legislation does not, however, prevent the family home being realised if consent is obtained or the court so orders having had regard to the matters we have identified at paragraph 4.64 above.

[3] The approach taken in this jurisdiction to the realisation of and distribution of assets

20.70 Confiscation orders are perhaps in a different category to personal insolvency proceedings because there is an even stronger public interest in ensuring that defendants are stripped of a sum equivalent to the proceeds of their criminality. The Supreme Court has observed:

POCA is concerned with the confiscation of the proceeds of crime. Its legislative purpose, like that of earlier enactments in this field, is to ensure that criminals (and especially professional criminals engaged in serious organised crime) do not profit from their crimes, and it sends a strong deterrent message to that effect.⁶¹

20.71 The courts in this jurisdiction have taken a robust approach. In deciding whether the spouse of a defendant was entitled to an order in ancillary relief (divorce) proceedings pursuant to the Matrimonial Causes Act 1973 where the assets were tainted by criminality, the Court of Appeal made the following observation:

Where assets are tainted and subject to confiscation they should ordinarily, as a matter of justice and public policy, not be distributed. This is not to say that the court is deprived of jurisdiction under the 1973 Act nor to say that no circumstances could exist in which an order would be justified; an example of a seriously disabled child living in specially adapted accommodation was mooted in argument. It is to say that, in most cases, and certainly in this one, the fact that the assets are tainted is the decisive factor in any balance. The error of the judge lay in thinking that the requirement to conduct a balancing exercise meant that in every case, all factors are

⁵⁸ Proceeds of Crime Act 2002, s 98(3).

⁵⁹ As above.

⁶⁰ *Cleghorn v Duncan* [2017] CSOH 114, 2017 SLT 1189.

⁶¹ *R v Wya* [2012] UKSC 51, [2013] 1 AC 294 at [2].

relevant. In cases such as this the knowledge of the wife, throughout her married life, that the lifestyle and the assets she enjoyed were derived from drug trafficking is dispositive.⁶²

20.72 The High Court has, however, refused an application to realise a matrimonial home in satisfaction of a confiscation order on the basis that the wife was entirely innocent and did not know of the husband's planned criminal activity.⁶³

20.73 It is clear that resolution of issues pertaining to undue hardship in every case would be time-consuming. It would also be potentially unnecessary if a defendant who had been given a time to pay period would have realised the asset or its equivalent value in any event.

Unnecessary time and expense in identifying and using a trustee to realise assets

20.74 The HMCTS Trust Statement identified that, in connection with confiscation orders imposed during 2018-19 of a value below £25,000, 70% of the debt was collected. Whilst this amounts to just over 5% of the total value of all confiscation orders imposed that year, it nevertheless represents £9.1 million.⁶⁴ This demonstrates that quite a number of relatively low value assets were realised in satisfaction of confiscation orders within the year of the confiscation order being imposed. To require a trustee to be appointed by the court in connection with all such assets would be both costly and unnecessary.

Conclusion on automatic vesting

20.75 In addition to potential interference with article 1 Protocol 1 rights and rights of third parties, the rights of a defendant to peaceful enjoyment of possessions must also be considered. Under the current regime a balance is struck because a defendant may opt to meet the confiscation order from a different asset, or by way of borrowing. Automatic vesting would remove this opportunity.

20.76 As we have observed above, automatic vesting of assets would require the state to expend funds in managing, preserving and realising assets. These expenses may be unnecessarily incurred if a defendant were to satisfy the order voluntarily.

20.77 We have therefore concluded that automatic vesting in every case would not only be wasteful of finite public resources it could also be a disproportionate measure.

20.78 We do, however, recognise that in some circumstances the court ought to have discretion to direct that assets should vest immediately. We return to this topic in Chapter 21.

⁶² *CPS v Richards* [2006] EWCA Civ 849, [2006] FLR 1220.

⁶³ *Re: O* [2006] EWHC 3543 (Admin).

⁶⁴ HMCTS, *Trust Statement 2018-19* (2018-19) HC 2337 p 8.

“Contingent orders” which take effect after expiry of a time to pay period in every case

20.79 Having dismissed “automatic vesting” of assets in every case as being unnecessary and potentially draconian, we next consider whether a “contingent” order should be made in every case.

20.80 Like automatic vesting, the court would determine whether an asset should vest in a trustee for confiscation at the time of making the confiscation order. However, unlike automatic vesting, a “time to pay” period could be granted. Any order to vest assets would not take effect at the time of confiscation but would be “contingent” upon a defendant failing to satisfy his or her order during the “time to pay” period.

20.81 The imposition of a contingent order would reduce the risk of unnecessary time and expense being taken up with the actual vesting of assets automatically at the time of confiscation, when the defendant would have satisfied their confiscation order in any event. A contingent order would also reduce the related risk of the vesting of assets being a disproportionate interference with A1P1 rights by depriving the defendant of the choice as to which assets to realise to satisfy his or her order.

20.82 Nevertheless, whilst contingent orders imposed in every case may reduce time and cost being taken up with unnecessary vesting in comparison with automatic vesting, court time and costs may still be wasted. For example, it is unnecessary to consider contingent vesting if the court is satisfied that the defendant will satisfy his or her confiscation order in any event.

20.83 We therefore form the provisional conclusion that “contingent orders” may have merit, but should only be made in appropriate cases. We consider the possible use of contingent orders in the next chapter before asking consultation questions about such orders.

Criminal bankruptcy orders

20.84 In this jurisdiction, criminal bankruptcy orders were available until 1988. A criminal bankruptcy order enabled a defendant’s assets to be vested in a trustee.⁶⁵ The Crown Court was able to impose an order upon conviction where:

- (1) as a result of the offence, loss or damage (not attributable to personal injury) had been suffered by a person(s) whose identity was known to the court;
- (2) the amount, or aggregate amount, of the loss or damage exceeded £15,000; and
- (3) a compensation order had not been imposed.⁶⁶

⁶⁵ Powers of Criminal Courts Act 1973, ss 39-41 and sch 2, which were repealed by the Criminal Justice Act 1988, s 101.

⁶⁶ Powers of Criminal Courts Act 1973, s 39.

20.85 Notably, criminal bankruptcy orders did not provide a mechanism for the confiscation of proceeds of crime more generally, but rather enabled restitution to victims of crime via an expedited form of bankruptcy proceedings.⁶⁷

20.86 Where an order was made, the Director of Public Prosecutions acted as Official Petitioner in Bankruptcy⁶⁸ and only presented a petition where it was in the public interest to do so.⁶⁹ A petition was presented to the High Court⁷⁰ and matters that had to be established before the appointment of a receiver were treated as proved by the criminal bankruptcy order.⁷¹ Thereafter normal bankruptcy proceedings followed with the onus placed on the bankrupt to explain the acquisition of his or her assets.

20.87 The jurisdiction was described by the court as:

[enabling] a speedy procedure, controlled by the Director of Public Prosecutions acting as Official Petitioner in Bankruptcy, to be put in motion through which steps can be taken to enable property, obtained by the convicted person by his criminal act, to be traced and recovered, without the necessity for the individuals who have suffered loss or damage to take slower and more expensive civil proceedings under the Bankruptcy Act 1914.⁷²

20.88 The Hodgson Report in 1984, which recommended the first confiscation regime and is discussed in Chapter 3, found that the orders had not worked well.⁷³ *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime* notes:

Studies of criminal bankruptcy orders in the late 1970s showed that the orders were infrequently made because of cost and resource restrictions. The orders made were difficult to enforce, there was often considerable discrepancy between the amount of the criminal bankruptcy order and the known available assets of the defendant with little co-operation from the defendant. No provision was made for pre-trial restraint powers and so the criminal defendants had often dissipated or hidden their assets before the criminal bankruptcy order was made.⁷⁴

20.89 Criminal bankruptcy orders were abolished in 1988 and replaced with a power to make confiscation orders.⁷⁵

20.90 We consider that any decision as to vesting should be taken by the Crown Court to reflect modern practice and to ensure that enforcement is undertaken expeditiously without proceedings across multiple courts.

⁶⁷ Powers of Criminal Courts Act 1973, s 39.

⁶⁸ Powers of Criminal Courts Act 1973, s 41.

⁶⁹ Powers of Criminal Courts Act 1973, sch 2 para 14.

⁷⁰ Powers of Criminal Courts Act 1973, sch 2 para 5(1).

⁷¹ Powers of Criminal Courts Act 1973, sch 2 para 6.

⁷² *Anderson V DPP* (1978) 67 Cr App R 185.

⁷³ *Sentences of Imprisonment- a review of maximum penalties* para 31, page 137 (Cited in Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 119.

⁷⁴ *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime*, Volume 2, (2004) para I.006.

⁷⁵ Criminal Justice Act 1988, s 101.

Chapter 21: “Contingent orders”

INTRODUCTION

- 21.1 In the previous chapter we concluded that a “contingent vesting order”, used in appropriate circumstances, could facilitate enforcement of confiscation orders if a defendant failed to pay his or her confiscation order by the expiry of a time to pay period.
- 21.2 In this chapter we consider how such a vesting order would operate in practice. We also explore whether other types of contingent enforcement orders could be utilised to improve enforcement.

THE NATURE OF A “CONTINGENT ORDER”

- 21.3 A contingent order regime would not require significant alteration to the current mechanisms used in confiscation proceedings:
- (1) A contingent order would be, in essence, a species of “compliance order” made under section 13A of POCA 2002. Under section 13A of POCA 2002, having made a confiscation order, the court *must* consider whether to make a compliance order. The compliance order can be any order that the court “believes is appropriate for the purpose of ensuring that the confiscation order is effective”.¹
 - (2) A contingent vesting order would also be similar to an enforcement receivership order, in that a person would be appointed to realise assets in which the defendant has an interest.
- 21.4 However, the contingent order regime would not be a mere replication of the existing powers. The principal differences are that:
- (1) A contingent order would operate as an incentive to pay during the time to pay period, because it would take effect should the defendant fail to satisfy the order during that period.
 - (2) Issues relating to the appointment of a person to realise assets in which the defendant has an interest would be resolved earlier in the process than under the current regime, thereby expediting the enforcement of the confiscation order.
- 21.5 The key issues to address in assessing the viability of such a regime are:
- (1) When a contingent order should be imposed.

¹ Proceeds of Crime Act 2002, s 13A(2).

- (2) How a contingent order should be “activated” upon default and what impact a pending application for leave to appeal would have on any contingent order imposed.
- (3) How third parties raising an interest in an asset after a contingent order has been made should be dealt with.
- (4) The interaction between the enforcement of confiscation orders and financial remedy proceedings following the dissolution of a marriage or civil partnership.
- (5) What types of contingent orders should be available.

21.6 We consider each of these issues in turn. Following our discussion of the nature and operation of any contingent order regime we ask a series of consultation questions.

WHEN SHOULD A CONTINGENT ORDER BE IMPOSED?

21.7 As we identified in the last chapter, it might ultimately be unnecessary and waste time and costs if, in every case, the court must resolve any disputes about whether a contingent order should be made (including any issues as to third party interests). Furthermore, affected parties would have the right to appeal against a decision made in connection with a contingent order.

21.8 Accordingly, we consider that a requirement to make a contingent order in every case has the potential to pose a disproportionate burden on the Crown Court, the Court of Appeal and on the parties, particularly because such an order is in any event intended to be “contingent” and may ultimately prove to be unnecessary. The question then arises as to when it is appropriate to make a contingent order.

21.9 We consider that there are two situations in which a contingent order would be appropriate, namely where there are reasonable grounds to believe that:

- (1) a defendant will fail to satisfy his or her confiscation order through wilful refusal or culpable neglect; or
- (2) without a contingent order, the defendant’s share of the asset will not be made available for realisation by the expiry of the time to pay period.

Reasonable grounds to believe that the defendant will fail to satisfy his or her confiscation order through wilful refusal or culpable neglect

21.10 It may be apparent at the time of a confiscation hearing that a defendant is highly unlikely to satisfy his or her confiscation order during the time to pay period. A defendant who is obstructive throughout the trial and confiscation hearing, who fails to respond to orders for disclosure of assets and who is found to have hidden his or her assets to put them beyond the reach of the court is unlikely to co-operate in the satisfaction of his or her confiscation order.

21.11 As we detailed in Chapter 18, before imprisoning a defendant for failure to satisfy a confiscation order, the court must be satisfied that the failure to pay was the result of the defendant's wilful refusal or culpable neglect.²

21.12 The test of wilful refusal or culpable neglect is well understood by criminal practitioners and judges. Suitably modified, it could be of utility in assessing whether a contingent order is appropriate.

Consideration of future conduct

21.13 In considering whether there has been wilful refusal or culpable neglect under the current regime, magistrates consider a defendant's conduct *since* the confiscation order was imposed. When considering the imposition of a contingent order, the court will be required to make an assessment as to a defendant's likely *future* conduct. We note, however, that criminal courts are well versed in making judgments as to a defendant's likely future conduct and do so:

- (1) in determining whether a defendant should be remanded in custody or admitted to bail;
- (2) when considering the imposition of a restraint order.

21.14 The exceptions to the right to bail are complex; broadly a court must, in considering whether withholding bail is appropriate, consider whether there are substantial grounds to believe that a defendant will commit further offences, interfere with witnesses or obstruct justice or fail to surrender.³ In exercising its judgment, the court must consider a number of factors including the nature and seriousness of the offence, the character and antecedents of the defendant and the strength of the evidence. Applying the statutory criteria in the Bail Act 1976, the court must make an assessment of the likely future behaviour of a defendant.

21.15 When considering whether to restrain a defendant's assets, the court must determine whether, without a restraint order, there is a real risk that assets will be dissipated. The Court of Appeal has observed:

[A restraint order] should only be made if there is a reasonable apprehension that, without it, realisable property will be dissipated... if there is no such risk or the risk is merely fanciful, the order ought not be made...⁴

21.16 Determining whether a defendant is likely to satisfy a confiscation order at the time it is imposed involves a similar judgment about a defendant's future conduct.

21.17 We therefore see nothing wrong in principle with a contingent order being imposed based on a qualitative assessment of the circumstances of the case.

21.18 In Chapter 6 we provisionally propose that the court should have a power to impose a compensation order (and other financial and forfeiture orders) before a confiscation

² And that all other methods of enforcement are impractical; Magistrates' Courts Act 1980, s 82(4)(b).

³ Bail Act 1976, s 4, sch 1.

⁴ *Re AJ & DJ* (Unreported, December 9, 1992, CA).

order is imposed. In making a judgment about whether a defendant is likely to satisfy his or her confiscation order voluntarily for the purposes of imposing a contingent order, the court will be able to check if such a financial order made at the time of sentencing has been paid by the time of the confiscation hearing. The fact that an order has not been paid will provide an indication, in some cases, of the likelihood of a defendant satisfying a confiscation order voluntarily.

The appropriate standard of proof

21.19 Under section 82 of the Magistrates' Courts Act 1980, a court must be satisfied to the criminal standard (beyond reasonable doubt) that a defendant's failure to satisfy an order is due to wilful refusal or culpable neglect.

21.20 The criminal standard is appropriate because the finding of wilful refusal or culpable neglect is a pre-cursor to the immediate activation of a term of imprisonment and the defendant's liberty is at stake. The imposition of a contingent order differs in that liberty is not at stake and assets will only be removed from the defendant in the event that he or she fails to realise the assets himself or herself. We therefore do not consider that it should be necessary for the court to be satisfied to the criminal standard before imposing a contingent order.

21.21 We have considered carefully whether to align the test for obtaining a contingent order with the test that would be used in restraint proceedings should they be brought at the same time as an application for a contingent order.

21.22 The test used in restraint proceedings after proceedings have commenced is "reasonable cause to believe" that an alleged offender has benefitted from criminal conduct.⁵

21.23 At the stage of a criminal investigation, the standard of proof is the lower standard of "reasonable grounds to suspect."⁶ The explanatory notes to the Serious Crime Act 2015 explained the difference in the test to be applied:

The phrase "reasonable cause to believe" in this context is taken to mean that the court thinks that, on the available evidence, it is more likely than not that the defendant has benefitted from criminal conduct. This contrasts with the test for the arrest of a person, namely that there is "reasonable grounds for suspecting" that the person is guilty of an offence that had been or is being committed (see section 24 of the Police and Criminal Evidence Act 1984). The term "suspicion" denotes a degree of satisfaction, not amounting to belief, but at least extending beyond speculation. A test based on suspicion can therefore be more easily satisfied than one based on belief.⁷

21.24 We consider that the higher bar of "belief" as opposed to "suspicion" is an appropriate bar to set given:

⁵ Proceeds of Crime Act 2002, s 40(3).

⁶ Proceeds of Crime Act 2002, s 40(2), as amended by Serious Crime Act 2015, s 11(1).

⁷ Serious Crime Act 2015, explanatory notes para 67.

- (1) the state of a judge's knowledge at the time when a decision is to be taken about a contingent order;
- (2) the potential time, cost and property rights implications of a contingent order; and
- (3) criminal proceeds will be extant when an order falls to be imposed so the test should be aligned with that of restraint.

21.25 In light of the comments in the explanatory notes, it is clear that the test essentially replicates the civil standard of proof (more likely than not) that is used throughout confiscation proceedings.

Reasonable grounds in connection with third party interests

21.26 In Chapter 26 we set out the problems identified by stakeholders in connection with determination of third party interests. In particular, we have noted the potential delays that may be caused if third party interests are not determined until the enforcement stage.

21.27 We therefore consider that a contingent order should also be possible if there are reasonable grounds to believe that:

- (1) it is more likely than not that realisation of a specific asset will be necessary in satisfaction of the confiscation order; and
- (2) third party interests in that specific asset will require resolution before the asset can be realised to satisfy the confiscation order.

21.28 In such circumstances, we consider that the court should make a declaration in connection with third party interests, under the equivalent of section 10A, if it has not done so already. In Chapter 26 we proposed allowing the court to make such a determination at *any stage* of the proceedings.

21.29 A declaration of interests may be a necessary pre-requisite before it can be known whether a third party interest is likely to inhibit realisation of a particular asset. It may be that once an equitable share is settled the parties will be more likely to come to an agreement about realisation. If not, a contingent order may be necessary to facilitate the realisation and sale of the asset, through the appointment of a trustee. Therefore, having resolved the nature and extent of third party interests, we consider that the court should consider whether:

In light of any third party interests, whether established through a declaration or otherwise, are there 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?

21.30 We welcome consultees' views on whether our proposed approach is too restrictive and whether a contingent order should be available to the court in a wider range of circumstances than those that we have described.

Discretion to impose a contingent order

21.31 Even where any test for imposing a contingent order is satisfied, we consider that the court should have a discretion as to whether to impose such an order. For example, there is little point in making a vesting order:

- (1) over a defendant's "hidden assets" if they cannot be found;
- (2) if the asset in question is of minimal value and the expense of vesting the asset would exceed its value.

21.32 We now consider other factors that a court might take into account when exercising its discretion.

21.33 In Chapter 5 we set out our proposed "legislative steer" for any reformed confiscation proceedings. We consider that the court's primary consideration ought to be to act in accordance with that steer and to realise assets for confiscation. However, any order made must be proportionate to that aim. Therefore, the court must consider the impact of making the contingent order.

21.34 In New Zealand, the High Court may exclude property from a profit forfeiture order if "having regard to all of the circumstances" the court considers that "undue hardship is reasonably likely to be caused to the respondent."⁸ The Act provides a non-exhaustive list of factors⁹ to which the court may have regard, including:

- (1) the use ordinarily made, or intended to be made, of the property;
- (2) the nature and extent of the respondent's interest in the property; and
- (3) the circumstances of the significant criminal activity to which the profit forfeiture order relates.

21.35 As we have discussed, in considering realisation of the family home, a Scottish court must have regard to all the circumstances of the case including:

- (1) the needs and financial resources of the spouse or former spouse of the person concerned;
- (2) the needs and financial resources of any child of the family;
- (3) the length of the period during which the family home has been used as a residence by a spouse, former spouse or child of the family.

21.36 In Chapter 20 we have also identified that, in this jurisdiction, in determining whether property jointly held by a defendant and a third party should be realised or distributed, the court has had particular regard to:

- (1) whether the asset in question is tainted by criminality; and

⁸ Criminal Proceeds Recovery Act 2009 (NZ) s 56(1).

⁹ Criminal Proceeds Recovery Act 2009 (NZ) s 56(2).

- (2) the extent of the third party's knowledge of the same.

21.37 We consider that codifying the factors detailed above would provide the court with guidance in using its discretion to ensure that proportionate determinations are made about divesting a defendant of property through a contingent order.

21.38 We consider that any codification of these factors should be in the form of a non-exhaustive list, to ensure that the court's discretion can be exercised appropriately on the facts of each case.

21.39 We address how specific claims by spouses or civil partners could be dealt with later in this chapter.

21.40 Having detailed when it may be appropriate to impose a contingent order we now consider issues arising in connection with the activation of a contingent order.

WHEN SHOULD A CONTINGENT ORDER TAKE EFFECT?

Potential difficulties with the activation of a contingent order

21.41 Two practical issues with contingent orders require consideration:

- (1) when a contingent order should take effect if a court is satisfied that a defendant can satisfy an order forthwith and accordingly is not given time to pay the order; and
- (2) whether at the end of a time to pay period, the contingent order should take effect automatically or whether a further order of the court should be required.

Orders that are payable forthwith

21.42 The logical consequence of requiring a confiscation order to be paid immediately is that any failure to pay would result in an immediate default. Any contingent order made to support the enforcement of the confiscation order would therefore take effect.¹⁰

21.43 To allow a contingent order to take effect immediately could lead to injustice because the possibility exists that the confiscation order itself or any contingent order made pursuant to that confiscation order may still be liable to be quashed on an appeal at that point in time.

Contingent orders taking effect automatically

21.44 If a contingent order took effect automatically, the order might take effect:

- (1) unnecessarily. For example, the defendant may not have sold their property by the expiry of the time to pay period, but there may be undisputed evidence that a sale is imminent. In such circumstances, the activation of a contingent order

¹⁰ It is arguable that a "contingent" order imposed in these circumstances could hardly be called "contingent" given its immediate effect.

thereby requiring the state to acquire and manage the asset would not be justified.

- (2) despite an appeal being outstanding, leading to the same possibility of injustice as identified in relation to orders payable forthwith.

Appeals

21.45 Both of the practical issues touch on the fact that a defendant may seek to appeal his or her confiscation order and any contingent order that is made pursuant to that order. Given that the ability to appeal a confiscation order (and any contingent order) raises potential difficulties, we briefly discuss the appellate process under the current confiscation regime.

21.46 In order to challenge a confiscation order, an application for leave to appeal must be made 28 days from its imposition.¹¹ An application for leave to appeal can, however, be made after the 28 day period has elapsed but must be accompanied by an application for an extension of time in which to apply.

21.47 Where leave to appeal is refused, an applicant must renew their application no later than 14 days from service of the notice of refusal. An applicant may, however, apply to renew their application out of time (ie after the 14 day time limit has expired) but must apply for an extension of time in which to do so.

21.48 As can be seen, the appeal process has multiple stages and an applicant can apply for leave to appeal substantially out of time. By way of example, recent confiscation cases have involved an application for leave to appeal over eight years out of time¹² and an application to renew an application for leave two years out of time.¹³

21.49 If an out of time application were to prevent the appointment of an enforcement receiver, such applications could be used as a device to thwart enforcement. For example, if the prosecution sought to appoint an enforcement receiver, a defendant could prevent appointment by lodging an out of time application for leave to appeal or apply out of time to renew an existing application that had been made in time.

21.50 Parliament recognised this difficulty and section 87A of POCA 2002 provides that in determining whether there is no further possibility of an appeal, “any power to extend the time for giving notice of application for leave to appeal, or for applying for leave to appeal, must be ignored.”

Proposed solution: a first enforcement hearing before the Crown Court at least one month after an order is imposed

21.51 In the next chapter, as part of our proposals for reforms to current enforcement powers, we provisionally propose that, in general, any first enforcement hearing be listed in the Crown Court. We consider that such a hearing could ameliorate the difficulties identified in this chapter.

¹¹ Criminal Appeal Act 1968, s 18(2) and Criminal Procedure Rules r 39.2(1).

¹² *R v Cole* [2018] EWCA Crim 888, [2018] Lloyd’s Rep FC 321.

¹³ *R v Yaxley-Lennon* [2018] EWCA Crim 244, [2018] 4 WLR 83.

21.52 We provisionally propose that where a contingent order is made the Crown Court must:

- (1) Where time to pay is granted, list an enforcement hearing before the Crown Court at the expiry of the time to pay period. At the enforcement hearing the Crown Court would consider:
 - (a) activating any contingent order imposed if a confiscation order has not been satisfied, and/or consider activation of any term of imprisonment in default of payment; and
 - (b) fixing a further enforcement hearing if an application for leave to appeal had been lodged.
- (2) Where a court directs that payment must be made within 28 days of the making of the confiscation order and imposes a contingent order, list an enforcement hearing no earlier than one month from the date of the order. At the enforcement hearing the court would consider the same matters as detailed above.

21.53 Requiring the Crown Court to list an enforcement hearing, in the timeframes we have suggested, after a contingent order has been imposed, would ensure that the court could determine whether an appeal had been lodged and, if necessary, consider postponing the imposition of any enforcement order that had been imposed.

21.54 The period between the imposition of the order and the enforcement hearing would also allow a defendant time to satisfy the order and would serve to ensure that any decision to vest asset(s) would truly be a measure of last resort.

21.55 An enforcement hearing before the court which imposed the order has additional benefits including:

- (1) The judge may be satisfied that a defendant is taking all reasonable steps to realise the asset in question and that further time should be afforded before an asset is vested in a trustee for realisation.
- (2) A defendant will be aware that he or she will be appearing before the court that imposed the order and will be provided with a fixed return date. It will be made plain precisely what the consequences of non-compliance will be and the continuity of tribunal may serve to incentivise the defendant to co-operate.
- (3) The costs involved in managing and realising an asset incurred by a trustee are only borne where it is plain that a defendant cannot or will not comply with the order.

21.56 We recognise that our proposals may incentivise unscrupulous defendants to lodge unmeritorious appeals to delay enforcement orders taking effect. This is perhaps an inevitable consequence of starting the enforcement process far earlier.

21.57 Whilst our provisional proposals will not eradicate such delaying tactics, they will serve to ensure that they are deployed and addressed far sooner, thus facilitating more expeditious enforcement.

21.58 We note that legal representatives are only permitted to settle applications for leave to appeal that they consider to be properly arguable and that the Court of Appeal possesses powers to deter unmeritorious applications by imposing costs¹⁴ and, in appropriate cases, directing that time spent in custody will not count towards a defendant's sentence (a loss of time order).¹⁵

21.59 The Registrar of Criminal Appeals also has the power to refer unmeritorious applications to the full court to be dismissed summarily if satisfied that the application is frivolous or vexatious.¹⁶

Contingent orders and third party interests

21.60 We provisionally proposed earlier in this chapter that whether the court should impose a contingent order ought to be a matter of discretion.

The timing of determination of third party interests

21.61 In Chapter 26 we provisionally proposed that the power of the Crown Court to make binding determinations about interests in property under section 10A of POCA 2002 should be extended to permit such determinations to be made as and when the court considers it appropriate to do so. We consider that this will assist in speeding up any determination of third party interests for the purposes of determining whether to impose a contingent vesting order.

21.62 However, third parties can emerge late, which can delay the enforcement process. In the case of *CPS v Jarvis*, the prosecution sought to realise a property in Spain registered solely in the name of the defendant against whom a confiscation order had been made. The order was made in November 2011 in the sum of £800,567. In 2016, attempts were made to realise the property in Spain but another person asserted that, although he did not have a registered legal interest in the property, he held a beneficial interest in it. In May 2018, following a trial in the High Court, the claim was rejected some six and a half years after the confiscation order had been imposed.¹⁷

21.63 Under the current law, in respect of section 10A determinations, a balance is achieved under section 51(8B) of POCA 2002. This provides that if the court makes a third party determination at the confiscation hearing, there can be no challenge to the determination when appointing a receiver over the assets if:

- (1) the third party was given a reasonable opportunity to make representations when the determination was made; and

¹⁴ Prosecution of Offences Act 1985, s 18.

¹⁵ Criminal Appeal Act 1968, s 29.

¹⁶ Criminal Appeal Act 1968, s 20.

¹⁷ *CPS v Jarvis* [2018] EWHC 4024 (Admin).

- (2) it appears to the court that there would be no serious risk of injustice to the person if the court was bound by the determination.

21.64 Where a third party applies for determination of a third party interest prior to the enforcement hearing at which activation of a contingent order is considered, we consider that such a provision would be apt to regulate applications. This approach applies in New Zealand, which also has a safeguard to prevent tactical applications for third party determinations, akin to section 51(8B) POCA 2002. Section 62(4) of the Criminal Proceeds (Recovery) Act 2009 only permits a court to grant relief from forfeiture to a person who was served with the application for forfeiture or appeared at the application for forfeiture if there are “special reasons” to do so:

“Special reasons” include, without limitation, that the Court is satisfied –

- (a) that the applicant had a good reason for failing to attend the hearing of the application for the civil forfeiture order; or
- (b) that evidence proposed to be adduced by the applicant in connection with the application under subsection (2) was not reasonably available to the applicant at the time of the hearing of the application for the civil forfeiture order.¹⁸

21.65 We therefore provisionally propose that third party applications in connection with property that may be subject to a contingent vesting order be permitted up until the time of the enforcement hearing at which the activation of the contingent vesting order is considered. However, we consider that such applications should be subject to a restriction equivalent to that in section 51(8B) of POCA 2002.

21.66 If an asset was realised before a legitimate interest was raised, there would be nothing to prevent an aggrieved party pursuing an appropriate remedy via civil proceedings.

AUTOMATIC VESTING WHEN A CONFISCATION ORDER IS IMPOSED

21.67 Whilst we envisage that in the vast majority of cases the court will impose a contingent order, there may be cases in which this is not considered to be appropriate and assets should vest forthwith.

21.68 By way of example, in Chapter 6, we propose that the court should have discretion to impose financial and forfeiture orders prior to the resolution of confiscation proceedings. Where such an order is imposed and is not satisfied, the court may well be justified in concluding that a contingent order would serve no useful purpose because there is ample evidence that the defendant will not co-operate. Furthermore, where the order imposed is substantial the court may conclude that identified assets should vest forthwith.

21.69 Accordingly, where the test we have detailed above is satisfied, we consider that the court should have discretion to impose a contingent order or that assets will vest

¹⁸ Criminal Proceeds (Recovery) Act 2009 (NZ), s 83(3).

immediately. Assets vest immediately in bankruptcy proceedings and the presence of criminality may provide greater justification for the interference with property rights.

- 21.70 The cost to the public purse would make it undesirable in every case, but consistent with our general approach to ensuring that the court is able to tailor its approach to the facts of the case before it, we consider this to be a viable option as an alternative to the contingent order regime we have discussed in this chapter.
- 21.71 Such an order would require the Crown Court to determine and resolve third party interests in assets before an order was made or at any stage prior to the assets being realised where the test we have detailed above is met.
- 21.72 For the reasons we have detailed in this chapter, we consider that assets so vested ought not to be realised until the time limit in which to seek leave to appeal has expired or, where an application has been lodged in time, any appeal has been determined. Where an order that assets should vest immediately is made, we consider that it will be necessary for the Crown Court to be notified in writing whether an application for leave to appeal has been lodged. Where an application has been lodged, an enforcement hearing should then be listed to determine the next steps with regards to enforcement.
- 21.73 As we have described, this regime may incentivise unmeritorious applications for leave to appeal to hinder enforcement. As we have noted, our provisional proposals will not eradicate such delaying tactics, they will serve to ensure that they are deployed and addressed far sooner, thus facilitating more expeditious enforcement.
- 21.74 Where an application for leave to appeal is lodged in time, the state will be required to incur any costs involved in managing the asset in question and therefore such an order should be used sparingly.

CONCURRENT CONFISCATION PROCEEDINGS AND PROCEEDINGS UNDER THE MATRIMONIAL CAUSES ACT 1973 OR THE CIVIL PARTNERSHIP ACT 2004

- 21.75 As we set out in Chapter 10, in the making of a confiscation order there may be tension between the removal of assets to satisfy a confiscation order pursuant to the criminal law, and the distribution of assets pursuant to an order of the family court following the breakdown of a marriage or civil partnership.
- 21.76 When an asset is vested in the state, the vesting removes the defendant's interest in the property and thus precludes the making of a property adjustment order by the family court. This mirrors the position in insolvency proceedings when a bankrupt's estate vests in a trustee in bankruptcy. The position is summarised in *Muir Hunter on Personal Insolvency*¹⁹ as follows:

A property adjustment order under section 24 of the 1973 Act, or paragraph 7 of schedule 5 to the 2004 Act, cannot be made against a bankrupt's trustee, because he is not a party to the bankrupt's marriage²⁰ or civil partnership. Nor can such an order be made against a bankrupt in respect of property which has vested in his

¹⁹ *Muir Hunter on Personal Insolvency*, Volume 1 (1987) para 3-643.

²⁰ *Re Holliday (A Bankrupt)* [1981] Ch 405, at 419B–D.

trustee, even though the trustee may have consented to the order, because the ambit of section 24 of the 1973 Act, and of paragraph 7 of schedule 5 to the 2004 Act, is confined to property to which the bankrupt is entitled, either in possession or reversion, and the bankrupt is no longer entitled to that property in possession or reversion.²¹

21.77 Vesting a defendant's assets in a trustee for confiscation could prevent a defendant's partner from making what could be a legitimate claim for a property adjustment order upon the dissolution of a marriage or civil partnership. A mechanism to avoid injustice being caused to a potentially innocent third party is therefore required.

21.78 The Crown Court is able to determine the extent of a defendant's interest in property pursuant to section 10A of POCA 2002 but is not able to transfer property to a defendant's spouse or civil partner. Such orders are, and should remain, the province of the family court. Stakeholders told us that it is not uncommon for financial remedy proceedings to be initiated when attempts are made to realise an asset.

21.79 As we discuss in Chapter 10, there are no statutory provisions to assist the court in balancing these considerations. This is perhaps not surprising given that each case will be highly fact specific. The authorities make clear that confiscation pursuant to POCA 2002 does not take priority over matrimonial proceedings. Each statute confers a discretion which must be exercised according to the facts of the case. The Court of Appeal has observed:

...it does not seem to me to be axiomatic that it is more in the public interest to enforce an order under section 31 [Drug Trafficking Act] 1994 than to make a property adjustment order under section 24 [Matrimonial Causes Act] 1973. If the former has the effect of forcing a spouse to sell her home and become dependent on the state for housing and financial support in order to meet a confiscation order in relation to property which was not acquired by the profits of crimes; if the wife has made a substantial financial or other contribution to the acquisition of that property; if the crime involved is one of which she was ignorant and by which she is untainted, it seems to me that the public policy argument may well go the other way. Each case must depend on its facts.²²

21.80 In determining where the appropriate balance lies the court has made it plain that the court should be careful to ensure that the applicant is genuinely innocent and the injustice real. The court must consider whether the property was purchased with the proceeds of crime or is tainted or whether the property was preserved by the offender's criminal conduct.

21.81 The Court of Appeal has held that tainted assets should not ordinarily be distributed but that the court may order distribution. In this regard the court has observed:

Where assets are tainted and subject to confiscation they should ordinarily, as a matter of justice and public policy, not be distributed. This is not to say that the court is deprived of jurisdiction under the 1973 Act nor to say that no circumstances could

²¹ *Hellyer v Hellyer* [1996] 2 FLR 579; *McGladdery v McGladdery* [1999] 2 FLR 1102; *Ram v Ram (No.2)* [2004] EWCA Civ 1684, [2005] BPIR 628.

²² *HM Customs and Excise v MCA* [2002] EWCA Civ 1039, [2003] Fam 55 at [44].

exist in which an order would be justified; an example of a seriously disabled child living in specially adapted accommodation was mooted in argument. It is to say that, in most cases, and certainly in this one, the fact that the assets are tainted is the decisive factor in any balance.²³

21.82 Historically, it was usual for a single judge of the High Court to determine both matters at the same hearing. The two public policy objectives of depriving offenders of the fruits of their crime and making proper provision for dependants after a divorce could therefore be considered in the round.

21.83 This was possible because, prior to the enactment of POCA 2002, the appointment of an enforcement receiver was the preserve of the High Court and the power to make the financial orders identified in the Matrimonial Causes Act 1973 is conferred upon “the court”, defined as the High Court or Family Court.²⁴ Essentially, the jurisdiction of the Family Court is exercisable by a wide number of judges and is not venue specific.²⁵

21.84 The Court of Appeal held²⁶ that this procedural device was entirely appropriate:

Procedurally, the course adopted in this case whereby both applications under MCA 1973 and DTA 1994 were listed together before a Family Division judge of the High Court was, I am sure, correct and should in my judgment be the procedure whenever a conflict or potential conflict arises between the two jurisdictions. The judges of the High Court are used to dealing with difficult ancillary relief claims, and many have direct experience in crime, either as trial judges or from sitting in the Court of Appeal Criminal Division.

21.85 The High Court provided guidance to ensure that financial remedy proceedings were transferred to the High Court to be heard together with related confiscation enforcement proceedings.²⁷

21.86 POCA 2002 removed the jurisdiction of the High Court in relation to the enforcement of confiscation orders; the Crown Court now has exclusive jurisdiction. Accordingly, the consolidation of linked financial remedy and enforcement proceedings before the High Court is no longer possible. The Court of Appeal has observed:²⁸

I have no doubt that the procedure adopted pre-POCA 2002 whereby, in relation to restraint and enforcement proceedings, if ancillary relief proceedings were pending, the matter was dealt with by a single High Court Judge with appropriate expertise, was a thoroughly sensible, convenient, and cost-saving procedure. However, it is equally clear to me that, the sole jurisdiction to deal with all matters of restraint, confiscation, and enforcement now resides in the Crown Court (save that the High

²³ *CPS v Richards* [2006] EWCA Civ 849, [2006] FLR 1220 at [26].

²⁴ Matrimonial Causes Act 1973, ss 23 and 52.

²⁵ Matrimonial and Family Proceedings Act 1984, ss 31B and 31C.

²⁶ *HM Customs and Excise v MCA* [2002] EWCA Civ 1039, [2003] Fam 55 at [100].

²⁷ *W v H (HM Customs & Excise Intervening)* [2004] EWHC 526 (Fam).

²⁸ *Webber v Webber (CPS intervening)* [2006] EWHC 2893 (Fam), [2007] 1 WLR 1052.

Court is the venue for applications made by the enforcement authority for recovery orders pursuant to section 243 POCA 2002).

- 21.87 As the Crown Court has no power to resolve matrimonial proceedings, the two matters, which may involve the same property (for example the matrimonial home), are now resolved separately.
- 21.88 The court has been invited to bridge the gap between the jurisdictions after the introduction of POCA 2002; a High Court judge was invited to exercise his power to sit as a Crown Court judge where the applicant mother had applied for periodic payments from her husband but there was a Crown Court restraint order in place.²⁹ It has been held that such an approach would not now be appropriate.³⁰
- 21.89 In Chapter 10 we provisionally propose that during the substantive confiscation hearing, where the Crown Court considers that it is in the interests of justice to do so, it may refer an issue in confiscation proceedings to the High Court for a binding determination.
- 21.90 In the context of enforcement, when the Family Court may be precluded from making an order that would ordinarily be within its power by virtue of the activation of a contingent order, it is plainly preferable that one court is able to consider these matters in the round. We note that a similar system was utilised successfully prior to the introduction of POCA 2002.
- 21.91 We therefore provisionally propose that where an application for a financial remedy has been made, the Crown Court should have discretion to transfer the matter to the High Court to determine if a contingent vesting order should be made or activated alongside the financial remedy proceedings.
- 21.92 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.
- 21.93 This proposal would sit alongside our proposal in Chapter 10 that the Crown Court should have power in appropriate cases to refer complex matters to the High Court for a binding determination.

WHAT TYPES OF CONTINGENT ORDERS SHOULD BE AVAILABLE?

- 21.94 Throughout this chapter we have focussed on contingent vesting orders. However, other types of contingent order may also assist the Crown Court in incentivising and facilitating enforcement of the confiscation order.
- 21.95 It is important to reiterate at this stage that although confiscation orders are exclusively imposed in the Crown Court, they are largely enforced in the magistrates' courts using the powers ascribed to them for enforcing the payment of fines. Aside

²⁹ *T v B* [2008] EWHC 3000 (Fam), [2009] 1 FLR 1231.

³⁰ *Re Stanford International Bank Ltd (In Receivership)* [2010] EWCA Civ 137, [2011] Ch 33.

from committing a defendant to custody in default of payment, magistrates' powers include the power to impose:

- (1) A warrant of control.³¹ This is an order permitting certain persons to take control of goods and sell them and, in certain circumstances, to enter property and to use reasonable force to do so.³²
- (2) An order for supervision pending payment.³³
- (3) A duty to make an attachment of earnings or deduction from benefits order to enforce a financial order made against a defendant if they are in employment or in receipt of certain benefits, and it is not impracticable or inappropriate to do so.³⁴

21.96 Magistrates' courts also have powers to enforce confiscation orders that do not exist in relation to fines and other financial orders. These powers apply to:

- (1) seized money or money held in bank accounts;
- (2) seized personal property.

21.97 A magistrates' court may order the payment of cash or money held in a bank account directly towards the satisfaction of a confiscation order.³⁵ If a confiscation order has been made, and provided a receiver has not been appointed, the magistrates' court may order the money to be paid towards the confiscation order. There is no need to wait until the expiry of the time to pay the confiscation order.

21.98 A magistrates' court may order that certain personal property be sold and the proceeds distributed in prescribed ways including in order to satisfy a confiscation order.³⁶ This power applies to:

- (1) seized property;
- (2) property produced in response to a production order issued under Part 8 of the Act.

21.99 Such an order may only be made after the time to pay the confiscation order has expired, and provided an enforcement receiver has not been appointed.³⁷

21.100 The defendant can be made subject to such enforcement powers upon default in payment following the expiry of time to pay upon an order of the magistrates' court.

³¹ Magistrates' Courts Act 1980, s 76.

³² Tribunals, Courts and Enforcement Act 2007, Part 3.

³³ Magistrates' Courts Act 1980, s 88.

³⁴ Courts Act 2003, s 97 and sch 5.

³⁵ Proceeds of Crime Act 2002, s 67.

³⁶ Proceeds of Crime Act 2002, s 67A.

³⁷ Proceeds of Crime Act 2002, s 67A(2).

The powers are broad and are exercised by a court that played no part in imposing the order.

21.101 Because orders are imposed by the Crown Court and enforced by a magistrates' court, there is inevitable delay in enforcement orders being made. The inherent delay and lack of continuity of tribunal serves to hamper effective enforcement.

21.102 We consider that at the time a confiscation order is imposed, the Crown Court should have the power to make a contingent enforcement order which:

- (1) takes effect only where a defendant fails to satisfy a confiscation order as directed; and
- (2) subjects the defendant to such orders as can be imposed by the magistrates when such default occurs in any event.

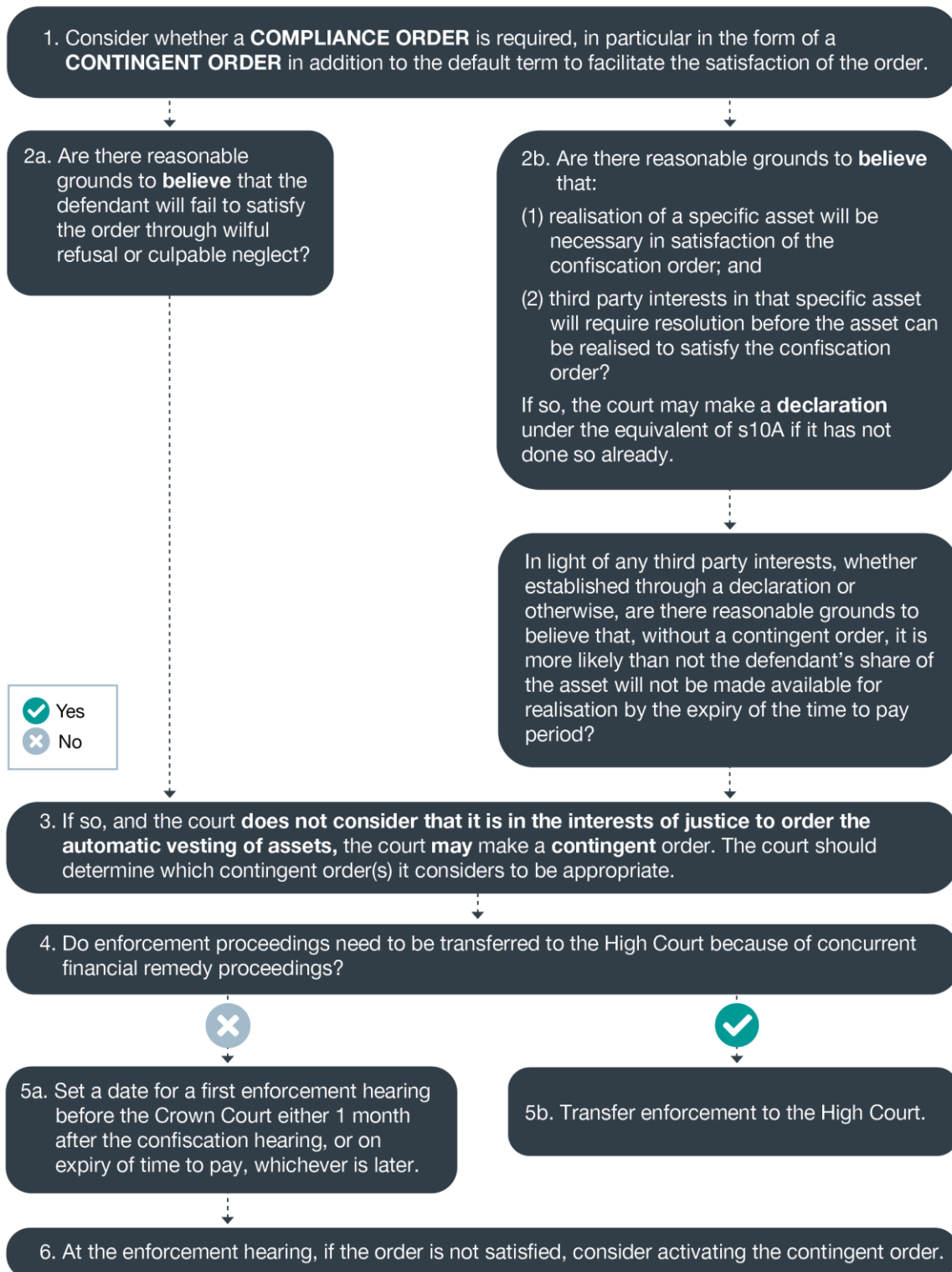
21.103 We therefore provisionally propose that when imposing a contingent order, a court could direct that if the confiscation order is not satisfied as directed:

- (1) an asset, such as a property, will vest in a trustee for confiscation;
- (2) funds held in a bank account will be forfeited;
- (3) seized property will be sold; or
- (4) a warrant of control will take effect.

21.104 The court imposing the order would, however, be able to tailor enforcement to the facts of the case before it to ensure effective and proactive enforcement action is taken in the event of default.

AN OVERVIEW OF THE PROPOSED CONTINGENT ORDER PROCESS

21.105 The following flow chart summarises the proposed contingent order process:



PROVISIONAL PROPOSALS

Consultation Question 65.

21.106 We provisionally propose that the Crown Court should have the discretion, upon imposing a confiscation order, to make an enforcement order that takes effect either (i) immediately; or (ii) on a “contingent” basis (subject to a further confirmatory court hearing) 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 that the defendant’s share of the asset will not be made available for realisation by the expiry of the time to pay period.

21.107 Do consultees agree?

Consultation Question 66.

21.108 We provisionally propose that when imposing a contingent enforcement order, the Crown Court should be able to order that if the order is not satisfied as directed:

- (1) an asset, such as a property, will vest in a trustee for confiscation;
- (2) funds held in a bank account will be forfeited;
- (3) seized property will be sold; or
- (4) a warrant of control will take effect.

21.109 Do consultees agree?

Consultation Question 67.

21.110 We provisionally propose a non-exhaustive list of statutory factors for the court to consider when exercising its discretion to make a contingent order, including:

- (1) the use ordinarily made, or intended to be made, of the property;
- (2) the nature and extent of the defendant's interest in the property;
- (3) the needs and financial resources of the spouse, civil partner, former spouse or former civil partner of the defendant;
- (4) the needs and financial resources of any child of the family;
- (5) (if applicable) the length of the period during which the family home has been used as a residence by a spouse, civil partner, former spouse, former civil partner or child of the family;
- (6) whether the asset in question is tainted by criminality; and
- (7) the extent of an interested party's knowledge of the same.

21.111 Do consultees agree?

Consultation Question 68.

21.112 We provisionally propose that, in addition to any ability to claim an interest in property during the confiscation hearing itself, a third party who claims an interest in property may be permitted to raise such an interest in the Crown Court after the making of the confiscation order and before either the automatic vesting of assets or the activation of a contingent order if:

- (1) the third party was not given a reasonable opportunity to make representations at an earlier stage of the confiscation proceedings; or
- (2) the third party had a good reason for not making the application earlier in the confiscation proceedings; and
- (3) it appears to the court that there would be a serious risk of injustice to the third party if the court was not to hear the application.

21.113 Do consultees agree?

Consultation Question 69.

21.113 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.

21.114 Do consultees agree?

Chapter 22: Provisional proposals for an optimal enforcement regime

INTRODUCTION

22.1 In Chapter 19 we discussed the problems associated with the current enforcement regime, which include:

- (1) Approximately £2 billion is outstanding under unpaid confiscation orders.
- (2) Placing the onus on a defendant to realise his or her assets can result in protracted enforcement proceedings.
- (3) Identified assets are not routinely realised because enforcement receivers are appointed only in a small proportion of cases.
- (4) Cogent and reliable information is not always available to the enforcing court.
- (5) Imprisonment in default is considered ineffective in extracting payment and, after a defendant has served a term of imprisonment in default, appropriate sanctions are no longer available.
- (6) Interest accrues on outstanding orders that are deemed to be unenforceable and, in many cases, accruing interest outstrips, by a considerable margin, instalments being paid.
- (7) The mechanisms to write off orders that are deemed to be unenforceable are too restrictive.

22.2 In Chapter 20 we considered how some overseas forfeiture regimes remove the need to secure a defendant's co-operation to realise assets, and why the introduction of contingent vesting orders in this jurisdiction could be useful in addressing items (2) and (3) above.

22.3 In Chapter 21 we set out our provisional view of how such contingent orders could work. As a species of compliance order, a contingent order would permit the court to impose enforcement directions, not limited to the vesting of assets, that come into effect only in the event that a defendant fails to satisfy a confiscation order as directed. Enforcement decisions would be taken proactively rather than reactively.

22.4 In this chapter we discuss additional reforms to the current enforcement process which will address the other difficulties we have described.

AN OVERVIEW OF OUR PROVISIONAL PROPOSALS

22.5 In broad terms, we envisage an enforcement regime whereby:

- (1) The Crown Court has discretion to retain enforcement proceedings but may remit enforcement to a magistrates' court. The most suitable venue for enforcement would therefore be determined on a case by case basis rather than the uniform approach currently deployed.
- (2) A defendant who has served a term of imprisonment in default (of which they will serve half unless the confiscation order imposed exceeds £10 million), will no longer be released unconditionally but will remain on licence and may be returned to custody in the event of further default.
- (3) Defendants may be compelled by the court to provide financial information and accompanying evidence. Information could be required in advance of an enforcement hearing and may require the production of material such as bank statements, rent or mortgage statements and proof of income such as wage slips.

The information provided would be housed on the courts' digital system and would provide an audit trail which could provide the basis for applications for uplifts to an order, or support an application for enforcement to be held in abeyance. A failure to comply without reasonable excuse would fall to be dealt with by the court which would have a range of sanctions available including the imposition of a curfew, a period of unpaid work or imprisonment.

- (4) Where the supervising enforcement court is satisfied there are sufficient grounds to do so, the court may pause or reduce interest to incentivise continued compliance. The ability to suspend or reduce the amount of interest payable means that the decision of the Supreme Court in *Gibson*¹ should be reversed. In *Gibson* the court held that, where part payment is made, credit should be given against the amount originally ordered rather than that sum and any accrued interest.
- (5) If the Crown Court is satisfied that a defendant is unable to satisfy an order, and all methods of enforcement have been exhausted, it could direct that further enforcement be stayed pending further order of the court. If a magistrates' court is supervising enforcement, they would have power to commit the case to the Crown Court to consider staying future enforcement.
- (6) We consider that a confiscation order should also have the same effect as a judgment debt imposed by a civil court. Accordingly, an unpaid confiscation order should be placed in the Register of Judgments in all cases.

VENUE FOR ENFORCEMENT

22.6 In the last chapter we provisionally proposed that if a contingent order is imposed by the Crown Court, any first enforcement hearing should be also listed before the Crown Court so that it may consider if any contingent order should be brought into effect.

22.7 Currently all confiscation orders are imposed in the Crown Court but are enforced in a magistrates' court. Inevitably, a Crown Court judge who imposes a confiscation order

¹ *R (Gibson) v Secretary of State for Justice* [2018] UKSC 2, [2018] 1 Cr App R (S) 51.

will be aware of the facts of the underlying offending and a defendant's financial circumstances. Conversely, an enforcing magistrate, who plays no part in the original proceedings, does not have these advantages.

- 22.8 Our proposals in respect of contingent enforcement orders are designed to provide the court that imposes a confiscation order with the requisite tools to tailor enforcement to the individual facts of the case before it. What contingent orders (if any) are made will be driven by the identified assets and the judge's view of the most appropriate way to enforce the order in the event of default. Enforcement decisions will be taken by the tribunal vested with detailed knowledge of the case and enforcement will be proactive as opposed to reactive.
- 22.9 As we discussed in that chapter, by listing the enforcement hearing before the Crown Court, a defendant will be aware that he or she will be appearing before the court that imposed the order on a fixed return date. The continuity of tribunal may serve to incentivise some defendants to co-operate.
- 22.10 Whether the contingent order is activated will be informed by whether an application for leave to appeal has been lodged. There will inevitably be cases in which an application for leave to appeal is lodged, in time, against the imposition of a contingent enforcement order or the confiscation order itself. In such cases, the realisation of assets under compulsion of a court order may not be appropriate for the reasons we gave in Chapter 21. We have therefore considered what should happen in terms of enforcement in cases within this category.
- 22.11 Under the current regime although an enforcement receiver cannot be appointed whilst an appeal is pending, a defendant is still liable to satisfy the order. The Court of Appeal has observed:²

No authority has been cited for the proposition that the time to pay a confiscation order runs from the date of the determination of an appeal against it, and in our judgment the proposition is unsound in law. In principle the fact that an appeal is pending does not operate so as to suspend the operation of any sentence or order. That is why a defendant sentenced to imprisonment has to seek bail if he wishes to be released from custody while an appeal is pending and why a disqualified driver has to seek an order suspending the disqualification if he wishes to drive in the period before his appeal is determined. The clearest demonstration of this principle is to be found in the Divisional Court decision of *Greater Manchester Probation Committee v Bent*.³ There it was held that, when a community service order was made, it was in force immediately and, despite the lodging of an appeal against it, a failure to attend under the order would amount to a breach unless there was a reasonable excuse. Saville LJ said:

The general principle is that once a sentence of any kind has been passed, then it is in force and enforceable in the absence of specific provisions to the contrary. Of course, as a matter of practice, in the case of fines, it may well be

² *R v May (Confiscation Order: Time to pay)* [2005] EWCA Crim 367

³ *Greater Manchester Probation Committee v Bent* [1996] 160 JP Rep 297.

that the fine is not in fact enforced, but that is for practical reasons and not as a result of any principle of law.⁴

22.12 As can be seen, although an order may be subject to appeal, a defendant is still liable to satisfy the order unless there is a court order to the contrary.

22.13 With this principle in mind, cases in which an application for leave to appeal has been lodged need not be held in abeyance. On a return date for a contingent order where an appeal has been lodged, the Crown Court may wish to use the court time productively by considering what, if any, enforcement mechanisms might be appropriately used at that stage. The hearing would be entirely wasted if the Crown Court had no power to take any action and instead was required to remit the case to the magistrates' court for any enforcement decisions to be made.

22.14 Furthermore, there will be cases in which no contingent order is imposed. The potential benefits to enforcement in the Crown Court that apply to cases in which a contingent order was made apply equally to cases where no such order was made:

- (1) The Crown Court judge who imposed the confiscation order will be aware of the facts of the underlying offending and a defendant's financial circumstances. Therefore, enforcement decisions will be taken by the tribunal vested with detailed knowledge of the case and enforcement will be proactive as opposed to being reactive.
- (2) Appearing again before the court which imposed the confiscation order, in full knowledge that the court adjourned to that date to review progress of enforcement of the order, may serve to incentivise some defendants to co-operate.

22.15 Therefore, we consider that there is merit in permitting the Crown Court to be given the power to enforce any confiscation order if it considers that it is appropriate to do so and to have discretion to remit enforcement to the magistrates' court.

22.16 We consider that the magistrates' courts can and should continue to play their vital role in enforcing confiscation orders. During our pre-consultation fact finding exercise, we met with vastly experienced magistrates and staff involved in enforcement. 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.

22.17 A flexible approach to the appropriate venue for enforcement is by no means unique and is commonplace in other areas of the criminal justice system. For example, where the Crown Court imposes a suspended term of imprisonment or a community order, it may retain breach proceedings or direct that a magistrates' court should deal with any

⁴ *Greater Manchester Probation Committee v Bent* [1996] 160 JP Rep 297, 301D.

breach.⁵ Upon breach, a magistrates' court can deal with the breach, in certain circumstances, or commit the case back to the Crown Court.⁶

22.18 Our proposals in respect of contingent orders are intended to provide similar flexibility in enforcement, by permitting the Crown Court to tailor enforcement to the individual facts of the case before it. What contingent orders (if any) are made will be driven by the identified assets and the judge's view of the most appropriate way to enforce the order in the event of default.

22.19 We therefore provisionally propose that the courts ought to have discretion as to the appropriate venue for enforcement. In some cases, the Crown Court may wish to retain enforcement hearings and in other cases remittal to a magistrates' court may be appropriate. For example:

- (1) If, at the first enforcement hearing in connection with a contingent order an appeal has been lodged, whilst the Crown Court may still consider enforcement issues at that hearing, it may see no merit in retaining enforcement beyond that hearing. A magistrates' court could properly enforce the confiscation order and monitor the progress of any appeal. If an appeal was unsuccessful the magistrates' court could transfer enforcement back to the Crown Court to consider, for example, vesting assets if it was not possessed of the power to do so itself.
- (2) In cases where the value of a confiscation order is comprised solely of hidden assets, it may be a more appropriate use of resources to direct that enforcement should be undertaken before the magistrates. This is because (i) there will be no assets to consider vesting and (ii) magistrates' courts have vast experience of enforcing financial penalties and activating terms of imprisonment in default where appropriate.

22.20 In the first example, we cited the potential for a magistrates' court to transfer enforcement back to the Crown Court. During our pre-consultation discussions, stakeholders suggested that at enforcement hearings representations are often made that steps will be taken at the Crown Court, such as an application to appoint a receiver or an application to reduce the amount that the defendant is required to pay because of inadequacy of his or her assets. Permitting a magistrates' court flexibility to transfer enforcement back to the Crown Court could reduce delays in enforcement by removing the onus from the parties to file new applications with the Crown Court.

22.21 We were told that this is particularly pertinent in cases where representations are made that an application is likely to be made to vary downwards the available amount. Whatever the reason for the delay, we were told that there is then often a significant delay in such an application being made to the Crown Court. Stakeholders considered that in some cases, the raising of a potential application to vary downwards the available amount is a tactic to delay enforcement of the confiscation order.

⁵ Criminal Justice Act 2003, sch 8 para 7(1)(b), and sch 12 para 6(1)(b).

⁶ Criminal Justice Act 2003, sch 8 para 9(6), and sch 12 para 8(6).

Consultation Question 70.

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

22.23 Do consultees agree?

IMPRISONMENT IN DEFAULT

22.24 Imprisonment in default of payment is a measure of last resort designed to extract payment from a defendant. This is evident because:

- (1) a term of imprisonment in default may be imposed only where the court is satisfied that there has been wilful refusal or culpable neglect in satisfying the order and all other methods of enforcement have been tried or considered;⁷ and
- (2) a defendant can secure his or her immediate release by satisfying the order in full or a proportionate reduction to the term by means of part payment.⁸

22.25 Imprisonment in default has been considered an ineffective sanction. It is costly and a study by the National Audit Office found that only 2% of defendants imprisoned for non-payment subsequently satisfied their order and secured their release.⁹

22.26 Our wider proposals are intended to ensure that identified assets are removed swiftly and without the need for a defendant's co-operation. Accordingly, imprisonment in default ought to be necessary in a smaller proportion of cases.

22.27 Some defendants will, however, be successful in putting their wealth out of reach of the court and an appropriate sanction is required to incentivise payment. The Court of Appeal has observed that "criminals may often have few assets, and/or may conceal what they have".¹⁰

22.28 As we observed in Chapter 19, convicted money launderer Terry Adams pleaded poverty but was sent to prison for 12 months in default of payment. Three hours later, the Judicial Office issued a public announcement stating that Mr Adams had paid the outstanding sum of £46,258 in costs, on top of the £730,000 he paid two years earlier to satisfy the confiscation order made against him when an earlier period of imprisonment in default of payment was activated.¹¹

⁷ Magistrates' Courts Act 1980 s 82(4). The relevant standard of proof is the criminal standard; *R v South Tyneside Justices ex parte Martin*, Independent 20 September 1995.

⁸ Magistrates' Courts Act 1980, s 79, and Prison Service Instruction 003/2015, paragraphs 16.1.6 and 16.7.

⁹ Confiscation Orders, Report of the National Audit Office (2013-2014) HC 738, key facts p 4.

¹⁰ *R v Jawad* [2013] EWCA Crim 644, [2014] 1 Cr App R (S) 16 at [17].

¹¹ See, BBC News, "Crime Boss Terry Adams pays £50,000 to avoid jail" (February 2019) <https://www.bbc.co.uk/news/uk-england-london-47145280> (last visited April 2020).

22.29 The aim of the confiscation regime is to remove a defendant's benefit from crime, but it is well recognised that it also serves to deter and disrupt criminality.¹² Absent satisfaction of an order, the court must retain power to send a strong deterrent message.

22.30 We therefore consider that imprisonment in default should be retained, strengthened and supplemented by additional powers, in particular the conditional release of defaulters.

Conditional release of defaulters whose confiscation order was for £10 million or less

22.31 Imprisonment in default is a one-off sanction: once a defendant has served a term of imprisonment in default a further term cannot be imposed.¹³

22.32 HMCTS enforcement staff told us that once a term of imprisonment in default has been activated, they considered that they had no "leverage" and post-default sanctions "lacked teeth."

22.33 A defendant committed to custody in default of payment is entitled to unconditional release after serving half of the default term except if the default is in respect of a confiscation order of more than £10 million in which case a defendant must serve the whole term.¹⁴

22.34 The unconditional release of a defendant renders the second half of the default term of no consequence: a defendant is not on licence and cannot be returned to custody to serve the balance of the term.

22.35 The position of a prisoner committed to custody in default of payment is in marked contrast to a defendant sentenced to a determinate term of imprisonment or detention in a young offender institution of less than seven years, who will automatically be released on licence at the half way point of the sentence (unless additional days have been added for breach of prison rules whilst serving the sentence).¹⁵

22.36 The balance of the sentence in such cases is served in the community on licence. Breach of the terms of the licence (which may be by the commission of a further offence or by failure to comply with a specific condition in the licence) may lead to the Secretary of State revoking the licence and recalling the offender to custody to serve part or the remainder of the unexpired sentence.¹⁶

22.37 Prisoners sentenced to a term of imprisonment or detention in a young offender institution of more than one day and less than 24 months are released on licence for the second half of their sentence and must be subject to 12 months statutory

¹² See for example Home Office, Serious and Organised Crime Strategy 2018, Cm 9718.

¹³ Proceeds of Crime Act 2002, s 38(5). Pursuant to Proceeds of Crime Act 2002 s 39(5), a prosecutor can apply to increase the term of imprisonment in default if the effect of adding interest increases the maximum period in default of payment for which a defendant would be liable.

¹⁴ Criminal Justice Act 2003, ss 258 (2) and (2B).

¹⁵ Criminal Justice Act 2003 s 244, The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 SI 2020 No 158.

¹⁶ Criminal Justice Act 2003, s 254.

supervision (post sentence supervision).¹⁷ By way of example, a defendant sentenced to a custodial sentence of two months would serve one month in custody, one month on licence, and 11 months subject to post-sentence supervision.

22.38 The following conditions can be imposed:¹⁸

- (1) a requirement to be of good behaviour and not to behave in a way which undermines the purpose of the supervision period;
- (2) a requirement not to commit any offence;
- (3) a requirement to keep in touch with the supervisor in accordance with instructions given by the supervisor;
- (4) a requirement to receive visits from the supervisor in accordance with instructions given by the supervisor;
- (5) a requirement to reside permanently at an address approved by the supervisor and to obtain the prior permission of the supervisor for any stay of one or more nights at a different address;
- (6) a requirement not to undertake work, or a particular type of work, unless it is approved by the supervisor and to notify the supervisor in advance of any proposal to undertake work or a particular type of work;
- (7) a requirement not to travel outside the British Islands, except with the prior permission of the supervisor or in order to comply with a legal obligation (whether or not arising under the law of any part of the British Islands);
- (8) a requirement to participate in activities in accordance with any instructions given by the supervisor;
- (9) a drug testing requirement;
- (10) a drug appointment requirement.

22.39 A defendant can be recalled to custody to serve the balance of their sentence if they fail to comply.

22.40 A defendant who fails to comply with the requirements of post-sentence supervision must appear before a court which may impose a fine, commit the defendant to prison for up to 14 days or impose a supervision default order including a curfew or an unpaid work requirement.¹⁹

¹⁷ Criminal Justice Act 2003, s 256AA.

¹⁸ Criminal Justice Act 2003 s 256AB.

¹⁹ Criminal Justice Act 2003 s 256AC.

22.41 If a supervision default order is breached the court may commit a defendant to custody for up to 14 days, fine them, or impose a curfew or unpaid work requirement.²⁰

22.42 Defendants released after serving a term of imprisonment in default of payment of a confiscation order are not subject to a period of licence or post-sentence supervision.²¹

Should a defendant released from serving a term of imprisonment in default be subject to a period of licence?

22.43 Although confiscation orders are enforced using powers designed to enforce financial penalties such as fines and compensation orders, there is a key difference. Serving a term of imprisonment in default expunges liability to pay a fine (and other financial orders) whereas a defendant's liability to satisfy a confiscation order is not so expunged.²²

22.44 Release on licence of a defendant imprisoned for non-payment of a fine would serve no useful purpose. A defendant is not liable to satisfy the debt so there is, in effect, nothing to enforce. In stark distinction, a period of licence in respect of a defendant released following the implementation of a default term in respect of a confiscation order, would serve to ensure that an appropriate sanction for non-compliance remained.

22.45 We consider that enforcement via a return to custody, after service of a default term, should be available where the confiscation order imposed was £10 million or less.

22.46 Where a confiscation order of over £10 million is imposed a defendant must serve the whole default term, which may be up to 14 years. We considered whether changes were necessary to ensure a period of licence was available in these circumstances.

22.47 We concluded that an additional sanction, post-release, would do little to incentivise payment where a substantial term of imprisonment had failed to do so. However, as we detail below, defendants in this category would be compelled to provide information as to their financial circumstances and would be liable to sanctions in the event of non-compliance.

What would the conditions of the licence be?

22.48 We do not endeavour to set out precise conditions of any licence for the purposes of this consultation paper. Nevertheless, we set out some considerations about licence conditions which might inform the views of consultees about whether such licences are appropriate.

22.49 We consider that the defendant should be subject to conditions which facilitate the enforcement of the confiscation order. This might involve:

²⁰ Criminal Justice Act 2003, s 256AC, sch 19A.

²¹ Prison Service Instruction 003/2015 para 16.1.7.

²² Proceeds of Crime Act 2002 s 38(5); *R v Jawad* [2013] EWCA Crim 644, [2014] 1 Cr App R (S) 16 at [18].

- (1) making all reasonable efforts to realise identified assets (including assets which the Crown Court decided not to make subject to a contingent vesting order);
- (2) attendance at enforcement hearings; and
- (3) the provision of information to the courts for enforcement hearings, as required (we make a provisional proposal about the provision of information below).

22.50 We do not consider that the defendant should be subject to a general licence condition of “co-operation” with enforcement of the confiscation order, because this could potentially lead to arguments that a defendant is required to consent to every possible enforcement action that could be taken. For example, a defendant may perceive that he or she has a legitimate objection to the appointment of a trustee or receiver to realise the defendant’s property. The right to peaceful enjoyment of property may be undermined if a defendant were not entitled to raise such objections before the courts.

22.51 Furthermore, whether a defendant had “reasonably” objected to the appointment of a receiver is a matter that in many cases cannot be determined until after the court has adjudicated on the receivership. If the court did not find in the defendant’s favour on the receivership, it is more likely (although not inevitable) that the court will find that the defendant’s objection was unreasonable. Such uncertainty about whether a defendant will be returned to prison for raising an objection could have a chilling effect on the defendant raising what they considered to be a reasonable argument.

Determining whether the defendant should be returned to custody

22.52 It is noteworthy that prior to the introduction of post-sentence supervision, prisoners sentenced to fixed term sentences of less than 12 months were also released unconditionally after serving half of their sentence.²³ Our proposal will align the release of confiscation defaulters with other forms of custodial sentences.

22.53 Prisoners released on licence are recalled to custody via an administrative process. The Secretary of State revokes the licence and the defendant is returned to custody. The court plays no part in the process.²⁴ Prior to changes made by the Criminal Justice Act 2003, where a defendant committed further offences during the currency of his or her licence, the court could order that he or she be returned to custody for a period up to the remainder of the term of the sentence.²⁵

22.54 Administrative recall of defendants could be considered appropriate where a defendant’s compliance is monitored by the Probation Service. Where a defendant fails to attend appointments as directed without good cause, is arrested for new offences or there is evidence that a defendant poses a risk to the public, a probation officer is best placed to exercise his or her judgment to recall a defendant.²⁶

²³ Offender Rehabilitation Act 2014, explanatory notes to section 1.

²⁴ Criminal Justice Act 2003, s 254.

²⁵ Criminal Justice Act 1991, s 40 and Powers of Criminal Courts (Sentencing) Act 2000 s 116.

²⁶ An overview of the process is available here: In Brief, *Recall to Prison*, <https://www.inbrief.co.uk/prison-law/recall-to-prison/> (Last visited September 2020).

22.55 The position is different where the licence relates solely to a term of imprisonment in default imposed for non-payment of a confiscation order. A defendant will not require supervision by a probation officer.

22.56 We therefore consider that a similar power to that which was available prior to the amendments made by the Criminal Justice Act 2003 (described above) should be vested in the courts. Following release from a default term, if payments are not made as directed, the enforcing court should have the power to order a return to custody for a period up to the remaining term of the period in default.

Consultation Question 71.

22.57 We provisionally propose that:

- (1) defendants subject to confiscation orders of £10 million or less should no longer be released unconditionally after serving half a term of imprisonment in default; and
- (2) during the second half of the term of imprisonment the defendant should be released subject to licence conditions that facilitate the enforcement of the confiscation order.

22.58 Do consultees agree?

Sanctions short of imprisonment in default

22.59 We considered carefully whether measures short of imprisonment in default, such as: (i) unpaid work; (ii) a period of electronically monitored curfew; or (iii) disqualification from driving would be appropriate.

22.60 The purpose of a sanction, although punitive in nature, is not to punish a defendant but to incentivise payment. Given the ineffectiveness of imprisonment in default to date in incentivising payment, we consider sanctions short of custody would be unlikely to fare better.

22.61 A defendant who opts to defy an order they have been deemed by the court to have the means to satisfy, and who does not satisfy the order despite being subject to a period of imprisonment, is unlikely to comply merely because they are disqualified from driving or made subject to a curfew or period of unpaid work.

Consultation Question 72.

22.62 We provisionally propose that new sanctions short of imprisonment in default, such as disqualifying a defaulter from driving or imposing a curfew or period of unpaid work should not be introduced.

22.63 Do consultees agree?

PROVISION OF FINANCIAL INFORMATION BY DEFENDANTS

The current position

- 22.64 Defendants currently appearing before an enforcing magistrates' court must detail what steps they have taken to satisfy an order (for example by realising their assets) and provide details of their income, assets and expenditure.
- 22.65 We observed enforcement hearings at several magistrates' courts. It was apparent that the court was largely reliant on information provided by the defendant before them.
- 22.66 Defendants are required to complete a means form detailing their income and expenditure. In many cases we observed, the information provided was not supported by any independent corroborating evidence.
- 22.67 Defendants may well be less than candid if they are intent on retaining their asset(s). By way of analogy, where a convicted defendant instructs a new legal team to lodge an application for leave to appeal, the Court of Appeal has repeatedly stated that any newly instructed lawyer(s) must check the veracity of the instructions given by the defendant by making enquiries of the lawyers who acted at trial.²⁷ The purpose of such enquiries was explained as follows:

Of late it has become the habit for a number of cases to be brought on appeal to this court on the basis of incompetent representation by trial solicitors or trial counsel. As in this case, many such cases proceed without any enquiry being made of solicitors and counsel who acted at trial. That means that the lawyer who brings such an application acts on what is, *ex hypothesi*, the allegations of a convicted criminal - and in this case a convicted paedophile. For a lawyer to put forward such allegations based purely on such a statement, and without enquiry, is in our view impermissible.²⁸

- 22.68 The same principle would seem to apply with equal force to enforcement proceedings. Stakeholders repeatedly told us that defendants deploy many tactics to avoid satisfying a confiscation order. The Court of Appeal is alive to this point, noting that:

In particular, especially where large sums are involved, many criminals may prefer serving time in prison in default to surrendering by way of payment of compensation the sums which they have obtained from the loser by their crime.²⁹

- 22.69 In *Re Stannard*,³⁰ enforcement proceedings were still ongoing 12 years after the making of a confiscation order. The court noted:

Contrary to what [I am assured] is the motivation behind this application, namely, to clear the outstanding balance and purge his contempt, I have formed the clear impression... that Mr Stannard is wholly unrepentant. In reality he is still doing his

²⁷ *R v McCook* [2014] EWCA Crim 734, [2016] 2 Cr App R 301 and *R v Lee* [2014] EWCA Crim 2928.

²⁸ *R v OA* [2014] EWCA Crim 567, [2014] 2 Cr App R 7.

²⁹ *R v Jawad* [2013] EWCA Crim 644, [2014] 1 Cr App R (S) 16 at [19].

³⁰ *Re Stannard* [2015] EWHC 1199 (Admin), [2015] Lloyd's Rep FC 420.

level best to avoid making any further payment, to go behind decisions unfavourable to him that have already been made by the court and which he has not appealed, to re-run arguments he has already lost, and to put the CPS and the enforcement receiver to as much further trouble and expense as possible, presumably in the hope that they will give up and go away.³¹

22.70 We consider that an enforcing court should be provided with supporting evidence to support a convicted defendant's assertions. We have therefore considered measures to ensure enforcing courts have reliable information to aid enforcement.

22.71 A magistrates' court may, prior to sentence, make a "financial circumstances order" requiring a defendant to provide a statement of his or her assets and other financial circumstances as the court may require. A failure to do so (or where a false or misleading statement is made) renders an individual liable to summary conviction punishable by way of a financial penalty.³²

22.72 When enforcing a confiscation order, pursuant to section 84 of the Magistrates' Courts Act 1980, the magistrates' court may require a defendant to furnish a statement detailing his or her assets and other financial circumstances within a period specified in the order.³³ Failure to comply is punishable on summary conviction by way of financial penalty.³⁴ If material facts are knowingly withheld, or a defendant knowingly provides a false or misleading statement, the penalty is up to four months' imprisonment.³⁵

22.73 It is noteworthy that a custodial sanction is available only where a defendant furnishes false or misleading information or knowingly withholds relevant matters. A defendant who simply fails to furnish a statement at all may only be made subject to a financial penalty. The offence is therefore non-imprisonable and community penalties cannot be imposed.³⁶

22.74 Section 84 of the Magistrates' Courts Act 1980 was not designed with the enforcement of confiscation orders in mind. This resulted in a challenge by a defendant who had been brought before the court for a means inquiry.³⁷ The court observed:

As to the means inquiry, it is said that the district judge purported to direct such an inquiry pursuant to section 84 of the 1980 Act. In fact there is no note or other record in the papers before the court evidencing that proposition. We will, however, assume for present purposes that it is correct. Miss Freeman contends that section 84, which provides the court with a power to order a person to provide a statement of means

³¹ *Re Stannard* [2015] EWHC 1199 (Admin), [2015] Lloyd's Rep FC 420 at [80].

³² Criminal Justice Act 2003, s 162. The magistrates may order that the defendant be searched and any money found be put towards the outstanding order (Magistrates' Courts Act 1980 s 80).

³³ Magistrates' Courts Act 1980, s 84 (1).

³⁴ Magistrates' Courts Act 1980, s 84 (2).

³⁵ Magistrates' Courts Act 1980, s 84 (3).

³⁶ Criminal Justice Act 2003, s 150A. The power to impose a community penalty in respect of a persistent offender previously fined (Criminal Justice Act 2003, s 151) is not yet in force.

³⁷ *R (Lawson) v Westminster Magistrates' Court* [2013] EWHC 2434 (Admin), [2014] WLR 2085.

either before or on inquiring into a person's means under section 82, does not provide a free-standing power so to act, but is contingent on the court exercising its powers under section 82. Since the court could not have been acting under section 82 (which, for my part, I accept), the jurisdiction conferred by section 84 could not be invoked.

Whilst, for my part, I might be prepared to accept that such a proposition was arguable as a matter of construction, it would mean that there would be no teeth provided to the court to endeavour to get to the bottom of the means available to a serial confiscation defaulter such as the claimant.

22.75 The court noted that, in any event, there was an alternative route to a means enquiry pursuant to the Attachment of Earnings Act 1971 (as amended by the Collection of Fines (Final Scheme) Order 2006) that a defendant could be required to provide a signed statement detailing his or her financial circumstances.³⁸

22.76 Form MC100 is used by the magistrates' court to inform its approach to enforcement of a confiscation order and where a financial circumstances order is imposed in substantive criminal proceedings.³⁹ In enforcement proceedings, a failure to provide information as ordered, in addition to being a criminal offence, would also serve to inform the court's decision as to whether there had been wilful refusal or culpable neglect and whether implementation of a default term was justified. Compliance could assist the court in determining what, if any, other methods of enforcement are available other than activating the default term.⁴⁰

22.77 Form MC100 is rudimentary. It comprises one page completed by a defendant and does not require additional evidence to support a defendant's assertions. By comparison, in civil proceedings, a judgment debtor may be compelled to attend court to answer questions on oath and to produce any documents or information that the court directs.⁴¹ A failure to comply is punishable as a contempt of court and therefore can be punished by an order for committal to custody.

22.78 An application for a judgment debtor to attend court for questioning is made on form N316.⁴² The form details that the judgment debtor will be required "to produce all relevant documents" including: pay slips, bank statements, building society books, share certificates, rent book, mortgage statement, hire purchase and similar agreements, court orders, any other outstanding bills, electricity, gas, water and council tax bills for the past year.

³⁸ *R (Lawson) v Westminster Magistrates' Court*, above at [40] – [43].

³⁹ HM Courts and Tribunals Service, *MC100 statement of assets and other financial circumstances, make sure you can pay your fine* (2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/688361/mc100-eng.pdf (last visited July 2020).

⁴⁰ It should be noted that there is no obligation for a magistrates' court to conduct a means enquiry prior to activation of the default term of imprisonment for non-payment of a confiscation order *R (Anscome) v Hastings and Rother Justices* (1998) 162 JP 340.

⁴¹ Civil Procedure Rules r 71 and associated practice direction.

⁴² HM Courts and Tribunals Service, *Form N316 application for order that debtor attend court for questioning* (June 2016), <https://www.gov.uk/government/publications/form-n316-application-for-order-that-debtor-attend-court-for-questioning> (last visited July 2020).

22.79 As we stated at paragraph 6.64, we observed enforcement hearings at several magistrates' courts and noted that only form MC100 was provided to the enforcing court.

Potential reform

22.80 We consider that a bespoke power to compel the provision of information in confiscation enforcement proceedings (on a prescribed form⁴³) should be enacted to:

- (1) Ensure the production of documentary evidence to support a defendant's assertions;
- (2) Ensure the production prior to an enforcement hearing to allow the information to be investigated and scrutinised.
- (3) Make a failure to comply with such requirements punishable by a range of sanctions including a period of curfew, unpaid work or imprisonment.

22.81 The provision of information in this manner would provide a clear audit trail of a defendant's financial circumstances. Prosecuting authorities would be able to investigate the veracity of a defendant's assertions prior to an enforcement hearing allowing any error or misrepresentation to be drawn to the attention of the enforcing court.

22.82 Making the simple failure to comply with a request for information punishable by imprisonment would permit the court to impose community penalties if a custodial sentence were not deemed appropriate. As we noted at paragraph 6.72, this is not currently the position. A simple failure to provide a statement is punishable by way of a financial penalty. This is unsatisfactory, particularly if a defendant has hidden substantial assets that ought to be realised to satisfy the outstanding order.

22.83 As we have described, there are key differences in the enforcement of confiscation orders and other financial penalties which the magistrates' court enforces. We consider that this should be reflected in the sanctions available for non-compliance designed to thwart enforcement of a confiscation order.

An enhanced financial circumstances order

22.84 We consider that such reform could be easily achieved through an "enhanced financial circumstances order" in connection with confiscation enforcement, applicable to enforcement in both the Crown Court and Magistrates' Court.

22.85 Failure to comply with the order at all, or to make a false or misleading statement when purportedly complying could have the following consequences:

- (1) it may be indicative of wilful refusal or culpable neglect, thereby suggesting that the default sentence should be activated;

⁴³ Appendix B, figure 4 of the Law Commission's final report on the Enforcement of Family Financial Orders details the type of information and documentation that ought to be included.

- (2) if the default sentence has been activated and the defendant is on licence, it may indicate a refusal to facilitate enforcement of the confiscation order, leading to recall;
- (3) Further or alternatively it may be punishable as a criminal offence, as is currently the case under a financial circumstances order pursuant to section 162 of the Criminal Justice Act 2003 and in the case of failure to comply with an order pursuant to section 84 of the Magistrates' Courts Act 1980.

22.86 The provision of cogent evidence as to a defendant's means would enable the court to make an informed decision about future enforcement action and whether there is a realistic prospect of successfully enforcing an order. If satisfied that a defendant simply does not have the means to satisfy an order, we consider that the court ought to be able to direct that enforcement be held in abeyance (a topic we return to below).

Consultation Question 73.

22.87 We provisionally propose that:

- (1) the court should have a bespoke power to direct a defendant to provide information and documents as to his or her financial circumstances; and
- (2) a failure to provide such information should be punishable by a range of sanctions including community penalties and imprisonment.

22.88 Do consultees agree?

Retention of material

22.89 Once information is obtained the issue arises as to what use is to be made of it. In Chapter 7 we discuss criticisms of current data storage arrangements. As we note in that chapter, although an electronic database (the Crown Court Digital Case System, commonly referred to as the CCDS) is available, material relating to confiscation is not uploaded to it. Stakeholders repeatedly remarked on this anomaly and the difficulties it presents in practice.

22.90 Magistrates' courts also have an online system ("Court Store") into which evidence can be uploaded. Stakeholders informed us that during enforcement proceedings in the magistrates' court, evidence and statements used in confiscation proceedings before the Crown Court were provided, where available, by the prosecution and uploaded to Court Store.

22.91 It is essential that all relevant material is available to the court. Technological and resource issues aside, we found no legitimate reason (other than cost) why material relating to confiscation could not be uploaded to the CCDS. Sensitive material such as witness statements and transcripts of interviews involving victims of sexual abuse, images of injuries and the personal details of parties involved in case are all uploaded onto the CCDCS on a daily basis. Financial information may well be sensitive, but is uploaded in fraud cases.

22.92 It appears to us that the information should be uploaded to the CCDCS and transferred to Court Store when enforcement proceedings are remitted to the magistrates' court.

22.93 We note that a "Common Platform" is being devised whereby the criminal justice service will operate from a unified IT system. It is hoped that the implementation of such a system will remedy many of the issues as to sharing of information we have identified.

INTEREST

The current position

22.94 The perceived problems regarding interest were discussed in Chapter 19. The substantive issue identified was that the court has no discretion as to the accrual or rate of interest and, because the current rate of interest is 8% (substantially above the base rate), very often the instalments paid by a defendant do not cover the accruing interest let alone the principal sum.

22.95 Stakeholders repeatedly told us about cases whereby the instalments did not meet the interest that was accruing. We note that HMCTS data reveals that £748,882,000 in interest alone was outstanding.⁴⁴ As we observed in Chapter 19, a stark example can be found in a recent case involving criminal proceedings which ended in 2005.⁴⁵ In 2015, the prosecutor consented to discharge of the receivership order and the restraint order. The magistrates accepted that, in view of the passage of time, it would be an abuse of process for the applicant to be penalised by imprisonment for failure to have discharged the sum due under the confiscation order. The applicant had been ordered to pay £20 a month from her benefits (paid for her and her seriously impaired son) but interest was accruing at the rate of £150 per day. The confiscation order had risen from £849,300 to £1,352,911.10. The court observed:

So the order, whilst accruing interest exponentially, as I have explained, has a sort of mere abstract or symbolic quantity to it only, subject only to the drop in the ocean that is paid by the applicant of £20 a month, as I have described.⁴⁶

22.97 The principal purpose of interest is to compensate the receiving party for being deprived of monies owed to them; interest is not therefore punitive by design.

22.98 Confiscation orders are imposed on the basis that a defendant has the means to satisfy an order and thus any default could be said to be of a defendant's own making. This is perhaps reflected in the fact that the court has no discretion as to whether, and if so in respect of what period, the defendant is liable to pay interest.⁴⁷ The explanatory notes to POCA 2002 state:

⁴⁴ HMCTS, *Trust Statement 2018-19* (2018-19) HC 2337 p 8.

⁴⁵ *Re G* [2019] EWHC 1737 (Admin).

⁴⁶ *Re G*, above, at [3].

⁴⁷ *Hansford v Southampton Magistrates* [2008] EWHC 67 (Admin), [2008] 4 All ER 432.

Section 12 makes it clear that the defendant must pay interest on a confiscation order that is not paid in full by the time allowed. It leaves no room for doubt that the payment is mandatory in all cases.

22.99 POCA 2002 does, however, recognise that orders, in some cases, may require downward adjustment. The Crown Court may recalculate the available amount and reduce it, if the court is satisfied the available amount is inadequate for the payment of the sum outstanding under the confiscation order.⁴⁸ This power cannot be used by a defendant to re-open findings made at the confiscation hearing.⁴⁹

22.100 The lack of discretion as to the application of interest could lead to unjust results. Interest accrues on the principal sum upon expiration of the time to pay period.⁵⁰ The maximum overall time that may be allowed to pay the confiscation order is six months.⁵¹ 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.

22.101 Unlike the confiscation regime, civil courts largely have broad discretion as to whether to award interest at all and, if an award is made, the applicable rate.⁵² The position is usefully summarised in *Clerk and Lindsell on Torts*:⁵³

By the Senior Courts Act 1981 section 35A, and the County Courts Act 1984 section 69, a court may include in any sum for which judgment is given simple interest on all or any part of the damages for which judgment is given or for which payment is made before judgment; and, in the case of a judgment for damages for personal injuries or death exceeding £200, such interest shall be included unless the court is satisfied that there are special reasons to the contrary. The courts have the discretion to fix the period for which interest is payable, within the limits of the date when the cause of action arose and the date of judgment or, in the case of a sum paid before judgment, the date of that payment. The rate of interest is also at the discretion of the courts.

Potential reform

22.102 We do not consider that permitting the criminal courts to vary the rate of interest charged on a confiscation order is desirable. Arguments about what the appropriate rates would be and in various circumstances could lead to new complexity and uncertainty in the application of the law, and create new avenues of appeal.

⁴⁸ Proceeds of Crime Act 2002, s 23.

⁴⁹ *R v Younis* [2008] EWCA Crim 2950, [2009] 2 Cr App R (S) 34, but see *Re Adams* [2017] EWCA Civ 185, [2017] 1 WLR 3732.

⁵⁰ Proceeds of Crime Act 2002, s 12.

⁵¹ Proceeds of Crime Act 2002, s 11(5).

⁵² For example, see County Courts Act 1984, s 69 and Senior Courts Act 1981, s 35A.

⁵³ (22nd edition 2017), para 28-66.

22.103 However, to ameliorate the problems about which we have heard repeatedly from stakeholders, we consider that the court should have discretion to pause interest accruing on a confiscation order where:

- (1) it is in the interests of justice to do so; and
- (2) the court is satisfied that the defendant is (or has been) taking all reasonable steps to satisfy the order.

22.104 We envisage that in the vast majority of cases interest would accrue, but a residual power to pause interest would serve to ensure that enforcement can be tailored to the individual facts of the case before the court.

Consultation Question 74.

22.105 We provisionally propose that the court should have discretion to pause interest on a confiscation order in the interests of justice, where it is satisfied that a defendant has taken all reasonable steps to satisfy an order.

22.106 Do consultees agree?

Interest and the calculation of the default term

22.107 In *R (Gibson) v Secretary of State for Justice*, the Supreme Court had to consider how credit should be given against a term of imprisonment in default where part payment had been made. The issue was whether credit was given for part payment against the total sum outstanding (including interest) or whether any reduction was calculated by reference to the principal sum due under the confiscation order. The court decided that it was the latter position and observed:

A scheme under which the period of imprisonment served in default of payment in full of the amount specified in the confiscation order is based on the entire amount outstanding, including interest, may or may not be what the framers of the confiscation legislation might have wished for or intended if the point had been considered. However, because the means adopted took the form of statutory reference (and re-reference) to provisions which were drafted for a different purpose and without confiscation in mind, they have not achieved that effect. If it is desired that they should do so, express legislation will be needed.⁵⁴

22.108 If an enforcing court has a power to pause interest, we provisionally propose that credit for part payment ought to be calculated by reference to the total outstanding sum inclusive of interest. This is because interest will only accrue where the court deems it appropriate.

22.109 It follows from the provisional proposal that the decision in *Gibson* would have to be reversed through clear legislative provisions. It is notable that the Supreme Court's decision in *Gibson* was not a rejection of the principle that the default term could be

⁵⁴ *R (Gibson) v Secretary of State for Justice* [2018] UKSC 2, [2018] 1 WLR 629 at [23].

calculated on the basis of the total outstanding amount inclusive of interest. Rather, it was a decision based on statutory interpretation.

Consultation Question 75.

22.110 We provisionally propose that if the court has discretion to pause interest, any credit against a term of imprisonment in default for part payment should be calculated by reference to the total outstanding sum, inclusive of interest.

22.111 Do consultees agree?

CONFISCATION ORDER TO BE REGISTERED AS A CIVIL DEBT

The current position

22.112 County Court and High Court judgments are recorded on a Register of Judgments.⁵⁵ Financial institutions (amongst others) use this information to determine applications for credit. If a judgment is satisfied within one month, the judgment can be removed from the Register. If judgment is satisfied after one month, the judgment is marked as “satisfied” in the Register but the entry remains for six years.

22.113 Sums adjudged to be paid by a conviction or order of a magistrates' court may also be included on the Register.⁵⁶ The enforcing officer must send the matter for registration where there has been default.⁵⁷

22.114 This is seldom done in relation to confiscation orders. Guidance issued by the Justices' Clerks' Society in 2012 stated that, although “[t]his is a step that a fines officer can take under paragraph 38 (1) (b) of the Courts Act 2003.... this would not be appropriate for the enforcement of a confiscation order.”⁵⁸

22.115 The rationale behind the advice was not explicitly stated in the guidance. We were however, informed that the reasoning was:

- (1) The collection order process, which is pre-requisite to registration, states that “a decision should be made as to the enforcement process most likely to elicit payment of the financial imposition by the offender concerned.” Confiscation debts are large and registration is unlikely to extract payment.
- (2) Owing to the accrual of interest, the amount of the debt is not static and invariably rises.

22.116 We see force in these points but consider that a confiscation order should be registered upon expiry of the time to pay period. We see no reason in principle why a

⁵⁵ Courts Act 2003, s 98.

⁵⁶ Courts Act 2003, s 98(1)(e).

⁵⁷ Register of Judgments, Orders and Fines Regulations 2005, reg 8(1)(c).

⁵⁸ Justices' Clerks' Society, *Confiscation Orders and Collection Orders* (News Sheet No 15/2012).

defendant who owes sums of money pursuant to a confiscation order should be in different position than a judgment debtor in civil proceedings.

22.117 Furthermore, the adverse effect on a debtor's credit rating may serve to incentivise some defendants to satisfy their order expeditiously.

Consultation Question 76.

22.118 We provisionally propose that where a confiscation order is not satisfied as directed, the fact should be recorded in the Register of Judgments as a matter of course.

22.119 Do consultees agree?

ORDERS TO BE HELD IN ABEYANCE

The current position

22.120 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.

22.121 Aside from an application pursuant to section 23 of POCA 2002, which we discussed above, there are other limited circumstances in which an outstanding balance may be written off:

- (1) Where a confiscation order has been made, and the amount outstanding is less than £1,000, there is power to recalculate the available amount and, if the court finds it is inadequate to meet the outstanding amount, the court may discharge the confiscation order.⁵⁹
- (2) Where the amount outstanding on a confiscation order is £50 or less, and the designated officer of the magistrates' court so applies, the court may discharge the confiscation order.⁶⁰
- (3) Where the defendant dies, and it is not reasonable to make any further attempt to recover anything from the estate of the deceased defendant, the court may discharge the confiscation order.⁶¹

22.122 The gross value of confiscation order debt as at 31 March 2019 was £2,065,303,000 (over £2 billion).⁶² At present the data available is skewed by the enormous legacy

⁵⁹ Proceeds of Crime Act 2002, s 24.

⁶⁰ Proceeds of Crime Act 2002, s 25.

⁶¹ Proceeds of Crime Act 2002, s 25A (added by the Serious Crime Act 2015).

⁶² HMCTS, *Trust Statement 2018-19* (2018-19) HC 2337 p 8.

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.⁶³

22.123 In its 2016 report on enforcing confiscation orders, the Royal United Services Institute observed:

The framing of the criminal-confiscation provisions in the POCA relies heavily on the defendant being physically present to liquidate their assets and thereby meet the value of the order. It is often the case, however, that an individual does not remain in the jurisdiction following the serving of their sentence and no assets can be identified against which to take action. This may be due to the defendant absconding, dying or being deported before the payment of the confiscation order.

As of December 2013, £86 million was owed by defendants who had been deported. Although the enforcement authorities will continue, in theory, to pursue the assets of deported offenders to meet the confiscation order, they are invariably unable to invoke the persuasive tools, such as the default sentence, in order to trigger payment and cannot call individuals to the enforcement courts. Research in the course of this study suggests that it is often the case that individuals are deported by the Home Office without prior notification being given to HMCTS and without due consideration of the impact of this action on the unenforced order. It should be noted that government-sanctioned deportation is not grounds for writing off the order.

According to the HMCTS annual Trust Statement 2014–15, around £9 million of the outstanding debt is definitively known to be overseas and currently deemed unenforceable. The real amount of assets overseas is likely to be much higher, but is included in the “hidden assets” figures, or is currently subject to ongoing enforcement efforts.⁶⁴

22.124 The difficulties described have been compounded by the passage of the time. The HMCTS Trust Statement for 2018-2019⁶⁵ reveals that outstanding sums have increased where defendants have been deported, are deceased, cannot be located or have secreted assets abroad making enforcement particularly difficult:

	2018-19 £000	2017-18 £000
Interest (historically challenging to enforce)	748,882	657,595
Assets assessed as hidden with no other assets against which enforcement action can be taken.	493,830	432,800
Offenders deceased, deported or cannot be located	151,183	167,982
Orders subject to appeal and cannot be enforced	11,895	16,129
Assets overseas	9,646	10,596
Sub-total	1,415,436	1,285,102

⁶³ As above.

⁶⁴ Royal United Services Institute, *Enforcing Criminal Confiscation Orders* (2016), p 12-13.

⁶⁵ At page 8.

	2018-19 £000	2017-18 £000
Remaining confiscation order balance	649,867	676,176
Total outstanding debt	2,065,303	1,961,278

Potential reform

22.125 We consider that resources should be targeted where there is a real likelihood of successfully enforcing an order.

Writing-off orders

22.126 One approach to dealing with orders where there is no realistic prospect of enforcement would be to “write-off” the order. As we described earlier in the chapter, POCA 2002 is highly restrictive and only permits confiscation orders to be written off in the limited circumstances we described earlier. This restrictive approach reflects the statutory aim of the regime to ensure that criminals are stripped of the proceeds of their criminality and crime is disrupted and deterred.

22.127 We recognise that writing-off orders may offend the principal aim of the regime and therefore we do not consider that writing-off is an appropriate mechanism for dealing with orders against which no further enforcement action can be taken.

Holding orders in abeyance

22.128 In criminal cases, a mechanism exists to permit indictments, or counts on an indictment, to “lie on file”. Guidance produced by the CPS describes the process as follows:

There is no verdict, so the proceedings are not formally terminated. There can be no further proceedings against the defendant on those matters, without the leave of the Crown Court or the Court of Appeal. The consent of the judge is required to leave an indictment or counts to lie on the file. In practice, the judge usually consents, provided that the defence agrees. The procedure is particularly useful when:

- (1) the defendant has pleaded guilty or has been convicted of other counts in the same indictment; or
- (2) the defendant has pleaded guilty or has been convicted of counts on another indictment; and
- (3) convictions for the remaining offences would have no significant impact on the sentence; and it is no longer in the public interest to proceed on the remaining matters.⁶⁶

22.129 We consider that a modified form of this process would be of utility in respect to enforcement of confiscation orders where there is no reasonable prospect of enforcing

⁶⁶ Crown Prosecution Service, *Termination of proceedings (including discontinuance)* (November 2019) <https://www.cps.gov.uk/legal-guidance/termination-proceedings-including-discontinuance> (last visited July 2020).

the order. Such an approach would ensure that enforcement officers and the court can devote their resources to cases where there is a real prospect of success. Oversight over orders held in abeyance would be retained and where new assets or income are disclosed, enforcement proceedings could be commenced with leave of the court. Once assets that are readily available are realised, a proportionate approach would be adopted in respect of sums that are, in all probability, unlikely to be realised.

22.130 We therefore provisionally propose that the Crown Court (which imposes all confiscation orders) may, of its own motion or following an application by the prosecution or defendant, direct that further enforcement action be held in abeyance until further order of the court.

22.131 In order to prevent repeated unwarranted defence applications, we propose a statutory limit on defence applications. A similar approach is taken in respect of applications to remove a disqualification from driving.⁶⁷ After a disqualification is imposed or an application for removal is refused, prescribed periods must elapse before an application can be made. The court must also consider:

- (1) the character of the person disqualified and his conduct subsequent to the order;
- (2) the nature of the offence; and
- (3) any other circumstances of the case.

22.132 We consider that similar statutory limitations and material factors to consider should be deployed to ensure the efficacy of any system which permits defence applications to put confiscation orders into abeyance.

22.133 As confiscation orders are exclusively imposed in the Crown Court, we consider that such applications should be determined by the Crown Court.

22.134 Earlier in the chapter we considered that, where a magistrates' court is enforcing a confiscation order, it should be permitted to refer enforcement to the Crown Court. One such circumstance in which we consider that it may be appropriate for the magistrates' court to do so would be to consider if enforcement should be placed in abeyance.

22.135 As we observed above, HMCTS currently impairs the amounts owing under confiscation orders for accounting purposes and it reported that, of the approximately £2 billion outstanding, only £161 million is recoverable. Our proposal will ensure that there is judicial oversight of impairment thus ensuring the process is transparent.

22.136 Earlier in this chapter we provisionally propose that the Crown Court should have the power to make an enhanced "financial circumstances order". We consider that, pursuant to this power, where enforcement is held in abeyance, the court should be entitled to:

⁶⁷ Road Traffic Offenders Act 1988, s 42.

- (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.

22.137 We consider that this approach will ensure that, in an appropriate case, the court and enforcement officers can retain oversight of enforcement. Enforcement officers and the court can therefore devote their resources to cases where there is a real prospect of success but will retain oversight of orders in which enforcement is held in abeyance. Where the court does not fix a further review and new assets or income are disclosed or discovered, enforcement proceedings may be commenced with leave of the court.

Application to POCA 2002 and pre-POCA 2002 confiscation orders

22.138 We consider that the power to place enforcement in abeyance should apply to orders whenever imposed. Accordingly, historic orders, which HMCTS consider to be uncollectable, could be robustly examined and, after judicial oversight, a direction could be made that enforcement be held in abeyance. We consider that judicial oversight is an important safeguard and will ensure that there is a proper evidential basis for placing enforcement in abeyance.

22.139 As we have noted, uncollectable orders could then be placed in a separate ledger and reliable and accurate data as to whether confiscation orders imposed under the new model were being successfully enforced would be available.

22.140 Orders held in abeyance would be capable of being enforced where a defendant comes into assets or it was found that the court had been misled. 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 Chapter 25. In that chapter we propose that the indicative factors should be used to determine whether the defendant's confiscation order should be subject to an "uplift" in the amount to be paid. A confiscation order uplift and the re-opening of enforcement action relating to a confiscation order that was held in abeyance, both expose the defendant to a new (or at least a renewed) liability to repay his or her benefit from crime. Both therefore have clear similarities and similar considerations arise as to whether it is in the interests of justice to re-open the order.

Consultation Question 77.

22.141 We provisionally propose that the court should be able to direct that enforcement be placed in abeyance where it is satisfied that an order cannot be enforced.

22.142 Do consultees agree?

Consultation Question 78.

22.143 We provisionally propose that where enforcement is placed in abeyance, the court should have discretion to list the matter for review and direct a defendant to provide an update as to his or her financial circumstances at periodic intervals as determined by the court.

22.144 Do consultees agree?

Consultation Question 79.

22.145 We provisionally propose that:

- (1) Legislation should set out indicative factors for the court to consider when determining whether to re-open enforcement of a confiscation order that has been placed in abeyance.
- (2) Those indicative factors should mirror those proposed in connection with uplift applications (see consultation question 85).

22.146 Do consultees agree?

Private sector involvement as an alternative to putting an order into abeyance

22.147 It is perhaps an unpalatable proposition that criminals who are deported or secrete assets abroad rendering enforcement difficult should enjoy the benefit of an order being placed in abeyance. Consideration may have to be given to alternative enforcement methods. One issue that has been raised is that of increased private sector involvement, including the sale of the confiscation debt to the private sector.

22.148 We note the Home Office's Asset Recovery Action Plan 2019 describes the need to "explore innovative partnership approaches that span the public and private sectors to increase the amount of criminal assets that are seized and frozen".⁶⁸ It promises to support the pursuit and enforcement of realistically recoverable assets, saying:

The Home Office will work with the Ministry of Justice and HMCTS to examine how a public-private partnership approach could bolster existing enforcement partners' expertise with the support of specialist firms to identify, pursue and recover proceeds of crime in unenforced confiscation order cases.⁶⁹

22.149 Barristers Kennedy Talbot QC and James Mather have recently proposed the establishment of a private sector funding model, which is intended to capitalise on the

⁶⁸ Home Office, Asset Recovery Action Plan (July 2019) para 10.

⁶⁹ Above, para 79a.

growing public-private sector working relationship and which, if adopted, would represent a new method of litigation funding to pursue criminal assets.⁷⁰

22.150 We see nothing wrong in principle with such an approach. In Chapter 27 we discuss issues relating to asset management and realisation. Whilst we touch on issues of public-private sector co-operation, our provisional proposals do not extend to the detail of such working. This is largely a political question and one that ought to be subject to separate review by government.

⁷⁰ K Talbot QC and J Mather: *Stolen Asset Recovery Fund (SARF): Outline Proposal* (2020).

Part 7: Other orders of the court

INTRODUCTION TO PART 7

In this section we consider 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 comprises two chapters; concurrent confiscation orders (chapter 23) and compensation (chapter 24).

In chapter 23 we consider how POCA 2002 operates in relation to defendants who are subject to multiple confiscation orders and the problems that arise as a result of concurrent orders. We consider the current law in sections 8, 9 and 10 of POCA 2002, the provisions which govern how a confiscation order is to be determined when a defendant has been made subject to more than one confiscation order. We also analyse how the current law operates when multiple orders are in place and reconsideration is proposed. We consider the impact on multiple orders when an application to increase the available amount is made.

We provisionally propose that where there are multiple confiscation orders sought against the same defendant, the court should have additional powers of amendment and consolidation in order to do justice. Further, that payments from money obtained pursuant to a consolidated confiscation order should first prioritise compensation of victims before satisfying outstanding orders in their chronological order.

In chapter 24, we consider the issue of compensation in more detail. We look at compensation orders only in so far as such orders inter-relate with confiscation orders in accordance with our terms of reference. We outline the legislation which governs compensation and confiscation orders. We consider the extent to which the law prioritises compensation and some of the difficulties with the present system before setting out our provisional proposals for reform. We conclude that the legislative steer for Part 2 of POCA should include the principle of compensation as an important secondary consideration. We provisionally propose amending the powers of the court so as to ensure a better and more efficient system for the compensation of victims in confiscation proceedings.

Chapter 23: Multiple confiscation orders

INTRODUCTION

23.1 In this chapter we consider concerns that were expressed at the pre-consultation stage about how well the Proceeds of Crime Act 2002 (“POCA 2002”) operates in relation to defendants who become subject to more than one confiscation order.

THE CURRENT LAW

23.2 Sections 8, 9 and 10 of POCA 2002 contain provisions governing how a confiscation order is to be determined when a defendant has been made subject to more than one such order.

23.3 Section 8 deals with the calculation of the defendant’s “benefit”. The calculation of that benefit when there has been a previous confiscation order will depend on whether the previous order involved benefit from “general” or “particular” criminal conduct.¹ We set out the different considerations which will apply below.

23.4 Section 9 sets out how the defendant’s “available amount” is to be calculated. As we discuss below, the “available amount” at the time of a first confiscation order will affect the calculation of benefit in a second confiscation order.²

23.5 Section 10 deals with the lifestyle “assumptions” that apply to the calculation of benefit from general criminal conduct.³ We discuss below how the application of the assumptions is modified when making a second confiscation order.⁴

Multiple confiscation orders based on particular criminal conduct

Determining benefit

23.6 Where more than one confiscation order has been made against a defendant, and all the confiscation orders concerned are based on particular criminal conduct, the determination of the benefit of the defendant from their particular criminal conduct for the purposes of each is straightforward. Each order will be based on the particular benefit obtained from the offences with which those proceedings are concerned.⁵

¹ Proceeds of Crime Act 2002, s 8(3)(c). We deal with “general” and “particular” criminal conduct in greater detail in Chapter 12.

² Proceeds of Crime Act 2002, s 8(5).

³ As to which, see Chapter 13.

⁴ Proceeds of Crime Act 2002, s 10(9).

⁵ This proposition is implicit in s 8 of the Proceeds of Crime Act 2002.

Determining the available amount

- 23.7 Where there is more than one confiscation order against a defendant, assets making up the available amount are only taken into account once.⁶
- 23.8 The available amount, for the purpose of any confiscation order, is the aggregate of all free property held by a defendant, plus the value of all tainted gifts, minus the value of all obligations of the defendant that have priority.
- 23.9 Obligations that have priority include obligations which are:
- to pay an amount due in respect of a fine *or other order of a court* which was imposed or made on conviction of an offence and at any time before the confiscation order is made.⁷
- 23.10 It seems that this wording would include an amount ordered to be paid under a previous confiscation order, although the Act is not explicit. Therefore, when calculating the available amount for the purposes of the later confiscation order, the court should deduct an amount equal to the value of an earlier confiscation order, to the extent that it has not already been paid by the defendant and therefore remains an obligation upon him.
- 23.11 To explain how multiple confiscation orders made on the basis of particular criminal conduct “fit” together when calculating the available amount, the following example is useful:

- (1) In 2015, Defendant A is convicted of stealing £10,000 from his or her employer in one transaction (so this is a case based on particular criminal conduct). In the absence of any additional benefit, such as interest accruing to A on the £10,000, A’s benefit is £10,000.
- (2) A only has available assets worth £5,000 and a first confiscation order is made in the sum of £5,000.
- (3) A pays £1,000 towards the confiscation order but does not pay the rest. A still has an obligation to pay the outstanding £4,000.
- (4) In 2020, A is convicted of a single fraud lasting less than 6 months, (so again, the court will look at A’s particular criminal conduct). A’s benefit from the fraud is determined to be £8,000.
- (5) For the value of A’s “available amount” in 2020, see scenarios 1 and 2 (below).

⁶ Proceeds of Crime Act 2002, s 9.

⁷ Proceeds of Crime Act 2002, s 9(2)(a) (emphasis added).

23.12 The sum in which any second confiscation order will be made in the example will depend upon the extent of A's available assets at the time of the second confiscation order. We outline two scenarios which demonstrate the potential outcomes:⁸

Scenario 1: A only has sufficient assets to repay all or part of the first confiscation order.

- (1) In 2020, A's assets are worth £4,000.
- (2) Because A still has an obligation to pay £4,000 under the 2015 confiscation order, this is an obligation that has priority. Therefore, £4,000 is deducted from the figure for A's available assets for the purposes of the 2020 confiscation order.
- (3) A's current assets of £4,000, minus £4,000, comes to £0. Therefore, A's available amount for the purposes of the second confiscation order is £0. Because the defendant has no assets which are "available", the 2020 confiscation order will be in a nominal amount, usually £1.⁹
- (4) If A comes into further assets having paid the £4,000 in satisfaction of the outstanding 2015 confiscation order, an application may be made to increase the available amount for the 2020 confiscation order to include those assets.¹⁰

Scenario 2: A has more than sufficient assets to repay all of the first confiscation order

- (1) In 2020, A's assets are worth £10,000.
- (2) In determining A's available assets for the purposes of the 2020 confiscation order, the court will still need to deduct the amount of the obligation owed by A that has priority, that is, A's obligation to pay the outstanding portion of the 2015 confiscation order. That is £4,000.
- (3) Therefore, A's assets for the purposes of the second confiscation order will be taken to be £10,000 of assets in 2020, minus £4,000 representing the outstanding amount of the confiscation order from 2015.
- (4) A's "available amount" for the purposes of the 2020 confiscation proceedings is therefore £6,000, and the confiscation order in 2020 would be made in that sum.
- (5) That still leaves A with £4,000, but A has an obligation to pay the £4,000 outstanding from the earlier confiscation order.

⁸ In our scenarios, for ease of explanation we have omitted issues of accrued interest on the first confiscation order.

⁹ Proceeds of Crime Act 2002, s 7(2)(b). We discuss why confiscation orders may be made in a nominal amount in Chapter 15 on the "recoverable amount".

¹⁰ Proceeds of Crime Act 2002, s 22.

Multiple confiscation orders based on “general criminal conduct”

23.13 Where a defendant has a “criminal lifestyle”, the court must decide whether the defendant has benefited from his or her general criminal conduct.¹¹

23.14 “General criminal conduct” is broadly defined as “all his criminal conduct”, and it is immaterial:

whether conduct occurred before or after the passing of [POCA 2002] and whether property constituting a benefit from conduct was obtained before or after the passing of [POCA 2002].¹²

23.15 In seeking to determine a defendant’s benefit from criminal conduct, the court will be assisted by applying the lifestyle assumptions under section 10 of POCA 2002.¹³ The lifestyle assumptions apply to proceeds of crime obtained by the defendant at any time after what POCA 2002 terms “the relevant day”.

23.16 When making a first confiscation order, that “relevant day” is “the first day of the period of six years ending with the day when proceedings for the offence concerned were started against the defendant”.¹⁴

23.17 If the defendant is then subject to a second confiscation order, the relevant day changes to the day on which the first confiscation order was made.¹⁵ The determination of benefit in the second confiscation order therefore picks up from the point at which the determination of benefit from the first confiscation order ceased. This effectively provides for the keeping of what might be termed a “running total” of the benefit from all of the defendant’s criminal conduct.

23.18 In keeping that “running total”:

- (1) Section 8(4) provides that the defendant’s benefit found at the time of the last confiscation order must be taken to be their benefit from general criminal conduct as at that time. As the Court of Appeal observed in *R v Chahal*:

it could be invidious – as well as impracticable – for a subsequent judge of co-ordinate jurisdiction to seek to assess the merits of a prior judicial determination of benefit from general conduct.¹⁶

- (2) Section 8(5) provides that the court must deduct the amount “ordered to be paid under each confiscation order previously made against the defendant” (the recoverable amount).¹⁷

¹¹ Proceeds of Crime Act 2002, s 6(4)(b).

¹² Proceeds of Crime Act 2002, s 76(2).

¹³ As to which see Chapter 13.

¹⁴ Proceeds of Crime Act 2002, s 10(8)(a).

¹⁵ Proceeds of Crime Act 2002, s 10(9).

¹⁶ *R v Chahal* [2014] EWCA Crim 101, [2014] 2 Cr App R (S) 35 at [42].

¹⁷ Proceeds of Crime Act 2002, s 6(5).

23.19 The following example demonstrates how a “running total” is calculated applying these statutory provisions:

Proceedings 1

- (1) Defendant B was convicted of criminal offences and a confiscation order was made against B in March 2018. B’s benefit from general criminal conduct was £100,000. B had assets worth £20,000 and so was ordered to pay £20,000, which B paid.

Proceedings 2

- (2) B is convicted again in November 2018 for offences that occurred in 2017. A confiscation order is made against B in December 2018.
- (3) B’s general criminal conduct until March 2018 was calculated in proceedings 1. The court found that there was no benefit from general criminal conduct after March 2018 because the offences in proceedings 2 occurred before that date. The starting point for the calculation of benefit from general criminal conduct is therefore £100,000 as calculated in proceedings 1.
- (4) Pursuant to section 8(5), the court is required to reduce the £100,000 figure by the amount ordered to be paid in proceedings 1 (£20,000). B’s benefit is therefore calculated to be £80,000.
- (5) B has no assets left. The recoverable amount (ordered to be paid) is a nominal figure (£1).

Proceedings 3

- (6) B is convicted for a third time in January 2020 for offending that occurred between January 2019 and December 2019. A third confiscation order is made. The starting point for the calculation of B’s benefit is the £80,000 benefit figure from general criminal conduct calculated in proceedings 2. B has obtained an additional benefit from general criminal conduct of £200,000. The £200,000 must be added to the £80,000.
- (7) Pursuant to section 8(5) the court is required to reduce the £280,000 by the amount ordered to be paid in proceedings 2 (£1). B’s benefit is therefore calculated to be £279,999.
- (8) B has come into more assets since proceedings 2 and a recoverable amount of £50,000 is set.

23.20 Whilst the “running total” may not be immediately apparent, it becomes so when the confiscation orders are presented in a tabular format:

Table of B's confiscation order debt:

	Benefit from date of last calculation to current date	Benefit which has not yet been ordered to be repaid¹⁸	Recoverable amount (amount ordered to be paid)
At point of making order 1	£100,000	£100,000	£20,000
At point of making order 2	£0	£80,000 (£100,000 + £0 – £20,000)	£1
At point of making order 3	£200,000	£279,999 (£80,000 + 200,000 – £1)	£50,000
Total Following the making of order 3	£300,000	£229,999 (£279,999 – 50,000)	£70,001

23.21 Following the making of order 3, the defendant's benefit from general criminal conduct (all of his or her criminal conduct) stands at £300,000. The defendant has been ordered to repay £70,001 of that benefit. The £229,999 outstanding may be recovered should the defendant come into more assets at a later date.¹⁹

PERCEIVED PROBLEMS WITH THE CURRENT REGIME

23.22 The aim of section 8 is to prevent double counting²⁰ by providing a mechanism through which to obtain a clear overview of the defendant's overall confiscation debt (as in the table above). However, during our pre-consultation discussions, stakeholders from prosecution bodies and law enforcement agencies reported that such clarity was impeded by:

- (1) The fact that the obtaining of confiscation orders can be a more granular process than is envisaged by section 8; and
- (2) the complexity of the statutory provisions.

The granular process of obtaining confiscation orders

23.23 Section 8, which works to build up a cumulative picture of liability, assists a prosecution authority which is seeking to obtain and enforce multiple confiscation orders against the same defendant. However, stakeholders and case law suggests that section 8 does not reflect the fact that:

- (1) different branches of a prosecution authority or different prosecution authorities may seek confiscation orders; and

¹⁸ Pursuant to the Proceeds of Crime Act 2002, s 22 (we discuss applications for reconsideration under s 22 in Chapter 25).

¹⁹ Pursuant to the Proceeds of Crime Act 2002, s 22 (we discuss applications for reconsideration under s 22 in Chapter 25).

²⁰ Proceeds of Crime Act 2002, explanatory notes, para 26.

(2) confiscation orders may be sought to achieve different ends.

23.24 In *R v Chahal*²¹ two defendants committed a fraud in 2004. They were charged in 2006 and so the “relevant day” for the purpose of calculating their confiscation orders was in 2000. In August 2010, they were made subject to confiscation orders based on their general criminal conduct. The benefit figure for each defendant was set at £140,265.

23.25 In addition to the fraud referred to above, both defendants had committed a second, completely separate fraud, which took place in 2005. This fraud involved losses to the victims and benefit to the defendants of millions of pounds. Because of the period over which the fraud was committed and the level of benefit obtained, the confiscation proceedings for the second fraud were, like the confiscation proceedings for the first fraud, based on general criminal conduct.

23.26 Despite the evidence that the defendants had obtained a benefit far in excess of £140,265 each during the period covered by the finding as to benefit in the first confiscation hearing, the Court of Appeal held that, in the second confiscation proceedings, the scope of any enquiry by the court was limited to any benefit accruing after the date of the first confiscation order, pursuant to section 10(9) of POCA 2002.

23.27 The Court of Appeal found that:

the respondents will most probably not have had to disgorge anything like the true proceeds of their serious criminality. But that outcome is not attributable to a deficiency in the statutory provisions: it is attributable to the (unwise) decision of the prosecution to elect to apply to proceed in the [first] confiscation proceedings and then, having done so, to proceed to a conclusion of those confiscation proceedings and to agree the confiscation orders in the terms made: all prior to the conclusion of the [second] proceedings. Quite why that choice was made without, for instance, any attempt to seek to defer (for good reason) such matters until the outcome of the [second] proceedings was never really explained to us. Mr Munday suggested that it may have been by reason of one prosecutorial arm not being alert to what another prosecutorial arm was doing. Maybe that is so. Maybe the potential implications of section 8 had not been appreciated. But it still remains something of a puzzle.

23.28 It is clear from the decision that a proper application of section 8 requires strategic thinking on the part of a prosecution authority or multiple prosecution authorities. In some cases, such as *Chahal*, this may mean exploring the possibility of a single joint application for a confiscation order.

23.29 In other cases, confiscation orders may have to be sought strategically to ensure that victims are compensated. In the following example, defendant C has two confiscation orders made against them.

²¹ *R v Chahal* [2014] EWCA Crim 101, [2014] 2 Cr App R (S) 35.

- (1) In the first confiscation hearing C's benefit from general criminal conduct is found to be £100,000. C has £100,000 in assets and is ordered to pay £100,000.
- (2) C's second confiscation order is made against C a month later. No benefit accrued to C after the date of the first confiscation order. The starting point for C's benefit from general criminal conduct would be £100,000, reflecting the finding from the first confiscation order.
- (3) However, applying section 8(5), the court must make a deduction for the amount ordered to be paid pursuant to the first confiscation order. C's benefit is therefore £0 (after deduction of the £100,000 ordered to be paid in connection with the first confiscation order).

23.30

23.31 Looking at the overarching picture, C's total benefit from general criminal conduct was £100,000 and C has been required to pay £100,000 in relation to the first confiscation order. Therefore, the overall outcome appears to be satisfactory.

23.32 However, the second confiscation case may involve clear evidence of benefit and victims who need to be compensated for their losses from crime. Because of the "available amount" in connection with the first confiscation order, those victims cannot be compensated through the second confiscation order, and the first confiscation order cannot be amended to permit the payment of compensation from it. Victims would be left to seek recourse through the civil courts.

23.33 Where a confiscation order is sought with the aim of compensating victims, to ensure such victims are compensated the prosecution authority may find itself in a race to be the first to confiscation judgment.

[Uplift applications](#)

23.34 Such a race to judgment may also arise in the context of uplift applications. As we discuss in Chapter 15, a confiscation order may be made in a sum less than the defendant's benefit, to reflect the defendant's means. Under section 22 of POCA 2002 a defendant is potentially liable for "uplifts" of the amount that he or she has to repay until the whole of the benefit has been repaid.

23.35 In the following example, defendant D has two confiscation orders made against them.

- (1) Defendant D has a first confiscation order made. D's benefit from criminal conduct was £100,000. D has no assets and so a nominal order is made (£1).
- (2) D has a second confiscation order made. D's benefit from general criminal conduct arising after the date of the first confiscation order is £50,000. D's total benefit from general criminal conduct is £150,000.
- (3) £1 must be deducted to reflect the amount ordered to be paid under the first confiscation order, so D's benefit from general criminal conduct is £149,999.

(4) D still has no assets. Another nominal order is made (£1).

Table of D's confiscation order debt:

	Benefit from date of last calculation to current date	Benefit which has not yet been ordered to be repaid	Recoverable amount (amount ordered to be paid)
At point of making order 1	£100,000	£100,000	£1
At point of making order 2	£50,000	£149,999 (£50,000 + £100,000 – £1)	£1
Total following the making of order 2	£150,000	£149,998 (£149,999 – £1)	£2

23.36 In our example, the “running total” appears to be clear: £150,000 of benefit, of which £2 has been ordered to be paid, and of which £149,998 could be ordered to be paid in future if the defendant comes into the means to pay.

23.37 However, the defendant has two separate findings of “benefit” against them. In the first confiscation order, that finding was £100,000. In the second confiscation order that finding was £149,999, comprising £99,999 benefit from the first confiscation order that has not yet been ordered to be repaid.

23.38 Because section 22 permits an uplift of the available amount to the benefit figure, in theory the defendant could be liable to have her confiscation orders uplifted and be required to pay £249,999 when her benefit was £150,000.

23.39 A confiscation order must be proportionate,²² and as the Supreme Court observed in *R v Ahmad* “it would not serve the legitimate aim of the legislation and would be disproportionate for the state to take the same proceeds twice over”.²³

23.40 It is therefore highly likely that a court faced with a second uplift application would limit “just” recovery to the defendant’s total overall benefit, rather than that determined by the court.

23.41 In such circumstances:

- (1) There may, again, be a “race” to be the first confiscation order to be uplifted so as to achieve the maximum return on that confiscation order. This may leave victims who it was intended would be compensated through the second confiscation order uncompensated.
- (2) Because it would be disproportionate to recover that portion of the benefit figure which takes the defendant beyond the total aggregate benefit from general criminal conduct, enforcement action cannot, and will not ever be taken in

²² Proceeds of Crime Act 2002 s 6(5).

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

relation to it. It nevertheless remains a part of the benefit that is recorded against the defendant in perpetuity.

23.42 Aside from the issue of when an uplift to a confiscation order might be “just”, reconsideration in cases of multiple confiscation orders raises a more fundamental problem of priority.

23.43 Section 9 defines “priority” obligations as “an obligation to pay an amount due in respect of a fine *or other order of a court* which was imposed or made on conviction of an offence and at any time before the confiscation order is made.”²⁴ It therefore appears to include a confiscation order.

23.44 At the date of an uplift application, section 9 must be applied “as if references to the date of the confiscation order were to the date of the new calculation”.²⁵ Taken to its logical conclusion this means that the potential for the available amount to be uplifted would be diminished by the total amount outstanding in respect of any other confiscation order as at the date of the uplift application. For example:

- (1) Defendant E has confiscation order 1 made against them. E’s benefit from general criminal conduct is £10,000, but E has no assets. E’s confiscation order is made in a nominal amount (£1). There are victims seeking compensation in the case.
- (2) E’s has a second confiscation order made against them. E’s additional benefit from general criminal conduct since the making of the first confiscation order is £5,000. E’s benefit is £14,999 (£10,000 + £5,000 - £1)
- (3) E has come into an inheritance of £10,000 and so a confiscation order is made for the full amount of E’s benefit, £14,999. E does not pay the order.
- (4) E has a third confiscation order made against them. E’s additional benefit from general criminal conduct since the making of the second confiscation order is £5,000. E’s benefit is £5,000 (£14,999 + £5,000 - £14,999).
- (5) E still has their inheritance and so a confiscation order is made for £5,000. E does not pay this order either.
- (6) The prosecution applies for an uplift to the first confiscation order to compensate the victims out of E’s £10,000 inheritance.
- (7) Because E has more than £10,000 outstanding on their two other confiscation orders at the date of the uplift application, there is no spare money to be included in any uplift.

23.45 Furthermore, amongst the orders themselves, there is no clear priority afforded to any particular confiscation order when considering an “uplift”. In the absence of any clear

²⁴ Proceeds of Crime Act 2002, s 9(2)(a) (emphasis added).

²⁵ Proceeds of Crime Act 2002, s 9(3).

priority, courts may be required to weigh up the merits of uplifting each confiscation order. For example, a confiscation order may have been made second, but may involve victims who are waiting to be compensated.

Complexity of the statutory provisions

23.46 Section 8 of POCA 2002 has been described as “a particularly convoluted provision”,²⁶ and in *R v Barnett*, a case dealing with the assessment of benefit in connection with an “earlier confiscation order” the Court of Appeal described how “the statutory material concerning confiscation is somewhat labyrinthine and the process of following the appropriate paths is difficult”.²⁷

ANALYSIS

23.47 In light of the perceived problems identified above, any proposed reform to multiple orders involving general criminal conduct must therefore address the following issues:

- (1) The complexity of the statutory provisions.
- (2) Preventing a “race to judgment”.
- (3) The impact of multiple orders on applications for uplifts.
- (4) How orders should be prioritised.

23.48 Two particular methods of reform were suggested to us to address such issues.

Keeping multiple confiscation orders entirely separate

23.49 One proposal for reform in this area suggested to us was to keep two or more confiscation orders completely separate. It was suggested that this could be achieved by preventing a court making a later confiscation order based on general criminal conduct including any sum representing general criminal conduct determined by a court when making an earlier confiscation order.

23.50 Separating confiscation orders entirely would have the effect of ensuring that a defendant is only exposed to one liability for the same benefit.

23.51 However, keeping the orders entirely separate does nothing to discourage a “race to judgment” for an uplift. Furthermore, each order would remain a “priority order” for such purposes. Therefore, we do not consider that keeping orders entirely separate is appropriate.

Introducing a power to amend and consolidate confiscation orders.

23.52 An alternative to the present scheme might be to give a court dealing with a confiscation order the power to amend any earlier confiscation order and to consolidate any amount outstanding under it into the new confiscation order.

²⁶ Rudi Fortson QC, *Misuse of Drugs and Drug Trafficking Offences* (6th ed) p 13-136.

²⁷ *R v Barnett* [2011] EWCA Crim 2936 at [65].

23.53 Consolidation of confiscation orders would have the advantage that a defendant would only be subject to a single confiscation order. This would:

- (1) create simplicity for the defendants and the courts when making and enforcing confiscation orders;
- (2) reflect the existing purpose of the convoluted provisions of section 8, namely to reflect the defendant's "running total" of confiscation liabilities;
- (3) fit within the existing framework of powers to review confiscation determinations; and
- (4) allow the court to take into account information not previously available.

23.54 The court may already reconsider the value of benefit at the date of a confiscation order by virtue of section 21 of POCA 2002 if there is evidence available to the prosecutor that was not available at the time of the order. Having undertaken such a reconsideration, the court may then set a new recoverable amount in light of the defendant's available assets at the date of the new hearing.

23.55 An amendment and consolidation provision could be considered an extension of section 21. Arguably, had such an application been made in *R v Chahal*, the benefit which the Court of Appeal lamented would not be recovered under the second order might have been recovered under the first order.

23.56 Having reconsidered the benefit in light of any new information, the court could then consider any benefit accruing after the date of the confiscation order, as is currently permitted under section 10(9) of POCA 2002.

23.57 A single available amount could then be determined, from which the defendant could repay his or her single confiscation order.

23.58 In connection with uplift applications, amalgamating all confiscation orders against a defendant would resolve the issues of:

- (1) a "race to judgment" in uplift applications, because all applications will be combined; and
- (2) outstanding benefit that will never be enforced simply continuing to exist as a potential debt hanging over the defendant, because any uplift will only be to the aggregate benefit from criminal conduct.

23.59 Questions may still arise as to priority in allocation of funds paid from a confiscation order. We consider that the issue of priority of payment of confiscated funds could be resolved relatively easily by virtue of a clear provision to the effect that:

- (1) Where there are victims, repayment of those victims should be prioritised; and
- (2) Where there are no victims, priority should be afforded to paying off each confiscation order in the order in which it was obtained;

The problem of different law enforcement agencies bringing proceedings

- 23.60 Consolidation of confiscation orders is not without its problems. Confiscation orders may have been obtained by different prosecution authorities (a Local Authority or the SFO instead of the CPS for example), and which authority should enforce any consolidated confiscation order may then be in issue. Who enforces the confiscation order will have financial implications as to the costs involved in bringing enforcement action.
- 23.61 A second financial implication again demonstrates the potential problems raised by the Asset Recovery Incentivisation Scheme.²⁸ Because a particular law enforcement agency may benefit from the scheme, there is little incentive for an authority which already has a confiscation order in place to see their confiscation order amalgamated with another. Where a first confiscation order has the potential to lead to a high return to a prosecution authority, there would appear to be no real attraction to that prosecution authority in merging the order with a second order sought by a different prosecution authority.
- 23.62 A similar problem might inhibit law enforcement agencies in working together to obtain a joint confiscation order as part of the same proceedings from the outset.
- 23.63 Such problems should not be insurmountable. As we set out in Chapter 4 the issue of how funds are distributed to law enforcement agencies from confiscated funds is a matter that is ultimately beyond the scope of this paper and can be addressed as part of broader governmental policy considerations. Furthermore, as we discuss in the enforcement section of this paper, law enforcement agencies have used memorandums of understanding to define how they work together. In Chapter 27 we discuss the need for an inter-agency body (which we refer to as the Criminal Asset Recovery Board). Such issues could potentially fall within its ambit.

²⁸ See Chapter 4.

Consultation Question 80.

23.64 We provisionally propose that:

- (1) Where there are multiple confiscation orders sought against the same defendant, the court should have the power to consolidate the applications for confiscation.
- (2) Where a defendant already has a confiscation order made against him or her, the court should have the power to amend any earlier confiscation order and to consolidate any amount outstanding under it into the new confiscation order.
- (3) 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.

23.65 Do consultees agree?

Chapter 24: The interrelationship between compensation and confiscation orders

INTRODUCTION

- 24.1 Confiscation orders are not the only means by which the proceeds of crime can be taken from an offender. When a criminal offence such as fraud is committed, there will be at least one victim who has sustained financial loss as a result of the offending. The court must consider whether a compensation order should be made to help to return the victim to the position he or she was in prior to the commission of the offence.¹
- 24.2 Compensation orders are not punitive² and perform a different function to confiscation orders,³ which serve a number of interconnected and sometimes conflicting objectives.⁴ Yet in cases where victims have sustained financial loss and the state is seeking to confiscate the proceeds of a crime, the effective interrelationship between these two orders is crucial.
- 24.3 Our Terms of Reference (see Chapter 1) are limited to confiscation orders under Part 2 of POCA 2002. We are considering compensation orders in so far as such orders inter-relate with confiscation orders. It is not within our terms of reference to consider law and policy in relation to the compensation of victims more generally.
- 24.4 In this chapter, we will explore the statutory regimes governing both compensation and confiscation orders. We will consider the extent to which the law prioritises compensation and the interrelationship between the two types of orders. We will go on to examine the difficulties with the present system, and make provisional proposals for reform.

THE CURRENT LAW

Compensation and confiscation orders: general matters

- 24.5 Compensation and confiscation orders serve different purposes and are governed by separate statutory regimes.
- 24.6 Confiscation orders are governed by POCA 2002 and the regime is designed to give effect to the principle that criminals should not profit from crime. As we discuss in Chapter 5, the purpose of confiscation is to recover the financial benefit obtained from criminal conduct, deter the commission of further offences and reduce the profits

¹ Powers of Criminal Courts (Sentencing) Act 2000, s 130(2A).

² *R v Dorton* (1987) 9 Cr App R (S) 514, (1988) 152 JP 197.

³ *R v Muia* [2012] EWCA Crim 332,

⁴ In Chapter 5 we discuss the aims and objectives of the confiscation regime and provisionally propose placing them on a statutory footing to ensure clarity and consistency of approach.

available to fund further criminal enterprises.⁵ Confiscation is not therefore intended to be an additional punishment or fine.⁶

24.7 Sums recovered under a confiscation order are retained by the state unless a direction is made that compensation is to be paid from sums recovered under a confiscation order.⁷ Directions of this type are made where a defendant has insufficient means to satisfy both a compensation and confiscation order.

24.8 The power to award compensation to victims in criminal cases has long been available to the court.⁸ A court can order an offender to pay a sum of money to the victim of his or her offending regardless of whether his or her assets are related to the offence they committed. Over forty years ago, the court described the principles underpinning compensation orders as follows:⁹

Compensation orders were not introduced into our law to enable the convicted to buy themselves out of the penalties for crime. Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable the compensation to be paid. One has to bear in mind that there is always the possibility of a victim taking civil proceedings, if he be so advised.

24.9 The present power to impose a compensation order derives from section 130 of the Powers of Criminal Courts (Sentencing) Act 2002 which is designed as a quick and simple method of ordering a defendant to repay the victims.¹⁰ Where it has power to do so, a sentencing court must consider making a compensation order and give reasons if it does not do so.¹¹ Sums recovered are paid to the person(s) identified in the order.

24.10 The courts have reiterated that compensation orders should only be imposed in simple and straightforward cases. More complex matters should be determined by the civil courts.¹²

Is a compensation order mandatory and when must it be paid?

24.11 The court has a discretion to impose a compensation order and must have regard to a defendant's means before doing so.¹³ Ordinarily, a compensation order should be payable within a reasonable period, usually no more than 3 years from its imposition.¹⁴

⁵ POCA 2002, explanatory notes, para 4; and *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [2].

⁶ *Jennings v Crown Prosecution Service* [2008] UKHL 29, [2008] 1 AC 1046 at [13].

⁷ Proceeds of Crime Act 2002, ss 13(5) and (6).

⁸ See, for example, the Forfeiture Act 1870 and Powers of Criminal Courts Act 1973, s 35 as amended by the Criminal Justice Act 1988.

⁹ *R v Inwood* (1974) 60 Cr App R 70 at [73].

¹⁰ *R v Jawad* [2013] EWCA Crim 644, [2013] 1 WLR 3861 at [12].

¹¹ Powers of Criminal Courts (Sentencing) Act 2000, ss 130 (2A) and (3).

¹² See, for example, *R v Sheehan* [2009] EWCA Crim 1260.

¹³ Powers of Criminal Courts (Sentencing) Act 2000, s 130(11).

¹⁴ Banks on Sentence (13th ed 2018) at 17.59; and *Stapylton* [2012] EWCA Crim 728, [2013] 1 Cr App R (S) 12.

As an order is subject to a defendant's means, a compensation order will not always be made and may not represent the full amount of loss or damage. By way of example, in *R v Kluver*¹⁵ a defendant stole £26,000. An order for £23,000 was imposed payable at £120 per month. On appeal it was noted that it would have taken 16 years to pay and the order was quashed. A compensation order for £2,880, payable at a rate of £120 per month over two years, was substituted.¹⁶

24.12 The confiscation regime has been described as draconian¹⁷ and courts have little discretion. The court must, in broad terms, identify the benefit obtained by the defendant, determine the value of that benefit and the recoverable amount.¹⁸ If the court decides that a defendant has benefited from his general or particular criminal conduct, it *must* make an order requiring him to pay the recoverable amount subject to a test of whether to do so would be disproportionate.¹⁹

24.13 The duty to make a confiscation order becomes merely a power to do so if the court believes that any victim of the conduct has started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained.²⁰

The full amount due under a confiscation order becomes payable immediately, unless an offender can show that they need time to pay. The maximum initial time to pay is three months from the date of the order. An extension can be granted only if the court is satisfied that, despite having made all reasonable efforts, the defendant is unable to pay the amount. The maximum extended time to pay is six months from the date of the order.²¹

Compensation is a discretionary order: the court must consider a defendant's means and ability to pay over a reasonable period (usually up to three years). Conversely, the confiscation regime, where engaged, is largely mandatory: unless civil proceedings are pending, the court is under a duty to proceed. Payment must be made within six months following which interest is added to the order.²² The court may postpone confiscation proceedings for up to two years from the date of conviction (and for longer if there are exceptional circumstances) and proceed to sentence.²³ This is the normal process that occurs in the majority of cases.²⁴ Where a court postpones confiscation proceedings and

¹⁵ *R v Kluver* [2010] EWCA Crim 3237.

¹⁶ See also *R v Malik (Kamran)* [2019] EWCA Crim 1079 at [18], "we are driven to the conclusion that the judge failed to do as subsection 130(11) (of the PCCSA 2000) requires him to do as regards the making of a compensation order".

¹⁷ *R v Dickens* (1990) 12 Cr App R (S) 191; *R v Comisky* (1991) 93 Cr App R 227; *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601; *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52, [2014] 1 WLR 2228 at [33].

¹⁸ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [7].

¹⁹ The current law is summarised in Chapter 2. Proportionality is discussed in Chapter 5. Benefit and the criminal lifestyle assumptions are discussed in Chapters 11-14 and the recoverable amount is discussed in Chapters 14-16.

²⁰ Proceeds of Crime Act, s 6 (5) – (6A).

²¹ Proceeds of Crime Act 2002, s 11.

²² Proceeds of Crime Act 2002, s 12.

²³ Proceeds of Crime Act 2002, s 14.

²⁴ *R v Guraj* [2016] UKSC 6, [2017] 1 WLR 22 at [8] and [13].

proceeds to sentence, financial penalties (including a compensation order)²⁵ may not be imposed.²⁶ When a postponement period expires a court may, within 28 days, vary sentence and impose a compensation order (and other financial and forfeiture orders).²⁷

24.14 Where a confiscation order has been imposed it must be taken into account by a sentencing court before a specified financial order (such as a fine, forfeiture or deprivation order) is imposed.²⁸ A compensation order is treated as a “priority” order and therefore a confiscation order is not to be taken into account in determining compensation.²⁹

Other court orders

Slavery and trafficking reparation orders

24.15 Under section 8 of the Modern Slavery Act 2015, a sentencing court may impose a slavery and trafficking reparation order. The explanatory notes to the 2015 Act detail the purpose of the order:

This section enables the court, where a person is convicted of a slavery or trafficking offence, to order the defendant to provide reparation to the victim.... the number of compensation orders made in the last ten years in human trafficking and slavery cases is low. A specific reparation order for victims of slavery and trafficking will therefore enable courts to order a person convicted of a modern slavery offence to pay reparation to their victim or victims, in respect of the exploitation and degradation they have suffered. A reparation order will only be made where the court is satisfied that the defendant has the means to pay.

24.16 A slavery and trafficking reparation order (“STRO”) may be imposed when a defendant has been convicted of certain offences pursuant to the Modern Slavery Act 2015 and a confiscation order has been made.³⁰ An order requires the person against whom it is made to pay compensation to the victim of a relevant offence for any harm resulting from that offence.³¹ Unlike a compensation order, a slavery and trafficking reparation order may only be made when a confiscation order is also imposed and thus it is not included in section 15(2) of POCA 2002, which lists types of order that cannot be imposed prior to confiscation proceedings being resolved.

24.17 A compensation order under the Powers of Criminal Courts (Sentencing) Act 2000 and an STRO may not be made in the same proceedings.³²

²⁵ Proceeds of Crime Act 2002, s 15(2)(c).

²⁶ Proceeds of Crime Act 2002, s 15(2).

²⁷ Proceeds of Crime Act 2002 s 15(3).

²⁸ Proceeds of Crime Act s 13(2) and (3).

²⁹ Proceeds of Crime Act 2002, s 13(3)(a) and (3A).

³⁰ Modern Slavery Act 2015, s 8.

³¹ Modern Slavery Act 2015, s 9.

³² Modern Slavery Act 2015, s 10.

24.18 If a defendant has insufficient means to satisfy both an STRO and a confiscation order, the court must direct that a specified sum recovered under the confiscation order be paid to the victim.³³

Restitution and forfeiture orders

24.19 Restitution orders³⁴ are available where goods have been stolen and a defendant has been convicted of an offence with reference to the theft. The court can order that the stolen goods are restored to the victim(s). In practice this means that money in a bank account or some other asset such as a car can be ordered to be returned to the victim. If the goods have been disposed of, a court may order that the proceeds of sale be paid to the victim. Alternatively, the court may order that the value of the goods be paid to the victim from other money or property seized from the offender when he or she was arrested. The courts have held that where there is a dispute as to the title of goods, such matters should be left to the civil courts.³⁵

24.20 Unlike compensation orders, a restitution order may be sought by the victim.³⁶ An application must be made in writing. However, the evidence is confined to that which was before the trial court.³⁷ As the victim makes the application, he or she is entitled to address the court.³⁸ In contrast to compensation orders, the court is not limited by the offender's means; no account is required to be taken of the offender's financial health. It has been held that complex matters of restitution should not be determined summarily by a criminal court.³⁹ Failure to comply with a restitution order may lead to proceedings for contempt of court and result in a prison sentence. This is the only means by which the order can be enforced.

24.21 The principal power that a court may use to order the forfeiture of property connected with the commission of an offence is contained in section 143 of the Powers of Criminal Courts (Sentencing) Act 2000. There are also specific powers in relation to the forfeiture of drugs,⁴⁰ firearms⁴¹ and the seizure of offensive weapons⁴² which will not be covered in this paper. Likewise, powers of forfeiture in terrorism cases are also beyond the scope of this paper.⁴³

24.22 Where a person is convicted of an offence, the court by or before which they are convicted may make a forfeiture order in respect of property either a) used for the

³³ Proceeds of Crime Act 2002, s 13 (5) and (6).

³⁴ Powers of Criminal Courts (Sentencing) Act 2000, ss 148 to 149.

³⁵ *R v Ferguson* [1970] 1 WLR 1246, and *Re Norris* [2001] UKHL 34, [2001] 1 WLR 1388.

³⁶ Powers of Criminal Courts (Sentencing) Act 2000, s 148 (2)(b).

³⁷ Powers of Criminal Courts (Sentencing) Act 2000, s 148 (5).

³⁸ Criminal Procedure Rules, r 28.7(4).

³⁹ *R v Church (Peter Leslie)* (1971) 55 Cr App R 65; and Powers of Criminal Courts (Sentencing) Act 2000, ss 148(5) and (6).

⁴⁰ Misuse of Drugs Act 1971, s 27.

⁴¹ See Part II of sch 6 to the Firearms Act 1968.

⁴² Prevention of Crime Act 1953, s 1(2); see also Crossbows Act 1987, s 6(3); and Knives Act 1997, s 1.

⁴³ Terrorism Act 2000, ss 23 to 23B.

purpose of committing, or facilitating the commission of, any offence, or b) intended by them to be used for that purpose, provided:

- (1) that the property has been lawfully seized from them, or the property was in their possession or under their control at the time when they were apprehended for the offence or when a summons in respect of it was issued; and⁴⁴
- (2) in considering whether to make an order, the court shall have regard to the value of the property and the likely financial and other effects on the offender of the making of the order (taken together with any other order that the court contemplates making).⁴⁵

PROBLEMS WITH THE CURRENT LAW

Victim involvement

24.23 While we highlight this as an issue which was raised during our pre-consultation discussions, we note that it is not within our Terms of Reference to consider changes to the policy relating to the compensation of victims more generally. As victims are not currently separately represented in criminal cases, any consideration of this issue would only be appropriate in a focused study which is outside the scope of our review.

24.24 Victims have no right to address the court directly or to be represented separately. Prosecution counsel can provide evidence of the impact on the victim of the offence for which the offender falls to be sentenced in accordance with relevant guidance.⁴⁶ The court is commonly provided with a written statement (a Victim Personal Statement or “VPS”) from the victim of the offence which explains the impact upon the victim and is considered by the judge prior to sentence.

24.25 Some commentators have called for victims who have suffered financial loss to be separately represented. Ian Smith and David Shepherd have highlighted the particular problems that victims of fraud face in the criminal courts. Without a direct voice, they are reliant on compensation being pursued for them by police and prosecutors:

Victims of fraud frequently are unaware that the criminal courts can order the convicted wrongdoers to award them compensation or restitution. Even police officers and prosecutors can be unfamiliar with these court powers...although criminal courts are obliged to consider making compensation orders, on current interpretation of the law, victims have no right to address a court (either themselves or through a lawyer) and no right to seek a judicial review of a court’s refusal to make a compensation order. We think that this is a bad state of affairs and overdue for challenge and change.⁴⁷

⁴⁴ Powers of Criminal Courts (Sentencing) Act 2000, s 143(1).

⁴⁵ Powers of Criminal Courts (Sentencing) Act 2000, s 143(5).

⁴⁶ Criminal Practice Direction VII, paras F.1 – F.3; and see *R v Perkins* [2013] EWCA Crim 323, [2013] Crim LR 533.

⁴⁷ I Smith and D Shepherd, *Commercial Fraud: A Legal Guide to Justice for Victims* (2017) p 180-181.

- 24.26 Although victims who have suffered financial loss are not entitled to an advocate to represent their interests in the criminal justice system of England and Wales, such schemes have existed for victims and their families in cases of violent crime.
- 24.27 A pilot scheme operated between 2006 and 2008 for “Victims’ Advocates” in offences of murder or manslaughter to allow families to present a statement to the court either through a CPS prosecutor or an independent advocate.
- 24.28 On 1 October 2007, the Attorney General announced the national CPS Victim Focus Scheme. This permitted CPS prosecutors to meet with bereaved families in homicide cases to explain the charging decision, court process and procedures and the opportunity to make a statement that would be presented to the court. On 12 December 2012, the Victim Focus Scheme was extended to include cases involving deaths dealt with in the magistrates’ court: causing death by careless or inconsiderate driving; causing death by driving whilst unlicensed, disqualified or uninsured; and aggravated vehicle taking where death is caused; and to qualifying appeal cases to the Court of Appeal.
- 24.29 The current scheme for victims is outlined in the Ministry of Justice’s Code of Practice for Victims of Crime⁴⁸ published in 2015, which sets out the state support and services available to victims of crime.
- 24.30 The Criminal Injuries Compensation Authority deals with compensation claims from people who have been physically or mentally injured as a result of a violent crime in England, Scotland or Wales.⁴⁹

Compensation ordered only in clear cases

- 24.31 There are a number of provisions in the Powers of Criminal Courts (Sentencing) Act 2000 which indicate Parliament’s intention to encourage the use of compensation orders. For example, a court is required to give reasons why it is not making a compensation order⁵⁰ and compensation is given priority over a fine.⁵¹ The courts have generally held that the power to award compensation should only be exercised in clear or straightforward cases.⁵² While it can be argued that the criminal courts lack the resources or expertise to deal with such matters, the criminal courts are dealing with complex confiscation proceedings. If compensation is not addressed, it can disadvantage those who are victims of more complex or serious cases where precise

⁴⁸ Ministry of Justice, *Code of Practice for Victims of Crime* (October 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF (last visited August 2020).

⁴⁹ More information about the CICA can be found at their website: <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority/about>.

⁵⁰ Powers of Criminal Courts (Sentencing) Act, s 130(3).

⁵¹ Powers of Criminal Courts (Sentencing) Act, s 130(12).

⁵² For cases endorsing the general approach see *R v Donovan* (1981) 3 Cr App R (S) 192; *Hyde v Emery* (1984) 6 Cr App R (S) 206; *R v Briscoe* (1994) 15 Cr App R (S) 699; *R v White* [1996] 2 Cr App R (S) 58 and *R v Stapylton* [2012] EWCA Crim 728, [2013] 1 Cr App R (S) 12 (68); compare with *R v James* [2003] EWCA Crim 811, [2003] 2 Cr App R (S) 97 (574) and *R v Pola* [2009] EWCA Crim 655, [2010] 1 Cr App R (S) 6 (32).

losses are difficult to calculate or may be open to argument. As Ian Smith and David Shepherd have argued:

In essence, the criminal courts have, historically, been encouraged to deal only with “simple, straightforward” cases. This is particularly disadvantageous for victims of fraud, given that establishing a loss and its amount will often not be simple and straightforward.⁵³

24.32 This creates a potential for injustice. The criminal courts may offer the only realistic prospect for a victim to receive compensation from the offender. If the Crown Court declines to deal with compensation, victims may be left with no realistic avenue for redress. There is a risk of inconsistency in the approach of the courts if some judges decline to deal with compensation perceiving any assessment to be complex, whereas others may find it appropriate to address the issue. In *Donovan*⁵⁴ the offender had hired a car and failed to return it. He pleaded guilty to an offence of taking a conveyance without authority. A compensation order was made on the basis of the hire company’s loss of use. The compensation order was quashed on appeal on the basis that calculating the amount of damages in the civil courts in a loss of use case would be open to argument. In *James*⁵⁵ the court considered compensation in a case where the offender had pleaded guilty to multiple charges of false accounting. The total losses were in issue but it was agreed between the parties that there had been a minimum loss of £8,000. The Court of Appeal held that it was appropriate to make an order in that sum, taking into account the fact that the victim would be unlikely to recover the losses in the civil courts.

24.33 In *Pola*⁵⁶ the Court of Appeal upheld a compensation order imposed following a successful prosecution for a breach of the Health and Safety at Work Act 1974 which resulted in personal injury to the victim. The Court of Appeal rejected the argument that it should not have been imposed on the grounds of medical complexity. Rather it was right to do so; the order was compliant with policy and practice, based on sufficient evidence of the gravity of the injury and it was a relevant factor that there was “no more convenient or practicable alternative route” for the victim to pursue. There appears to be greater recognition of the issues faced by victims by courts. However, there is a strong argument in favour of amending POCA 2002 to clarify the purpose of the legislation and to provide clear objectives, including compensating victims.⁵⁷

Delay

24.34 The bar on imposing financial orders during a period of postponement means that compensation orders will be delayed in every case in which confiscation proceedings are postponed. If confiscation proceedings are protracted, compensation may be severely delayed. By way of example, in *R v Davenport*⁵⁸ the defendant was convicted

⁵³ I Smith and D Shepherd, *Commercial Fraud: A Legal Guide to Justice for Victims* (2017).

⁵⁴ *R v Donovan* (1981) 3 Cr App R (S) 192, [1981] Crim LR 723.

⁵⁵ *R v James* [2003] EWCA 811, [2003] 2 Cr App R (S) 97 (574).

⁵⁶ *R v Pola* [2009] EWCA Crim 655, [2010] 1 Cr App R (S) 6 (32).

⁵⁷ See Chapter 5.

⁵⁸ *R v Davenport* [2015] EWCA Crim 1731, [2016] 1 Cr App R (S) 41.

on 19 May 2011 and confiscation and compensation orders were not imposed until 17 July 2014.

24.35 In determining a case involving the court's power to impose a compensation order where confiscation proceedings had initially been postponed (under a regime prior to POCA 2002) the court observed:

[Compensation orders] should be made as soon as possible, for the benefit of the victim. And in so far as the 1988 [Criminal Justice] Act contemplates the order being made at the time of sentencing, that is not to raise any expectation in the mind of the offender that if it is not so made, then he can expect to keep his ill-gotten gains.⁵⁹

24.36 There is a strong public interest in victims being compensated as soon as possible and it is unsatisfactory that victims are required to wait for extended periods of time for compensation orders to be imposed.

24.37 Additionally, owing to deficiencies in the enforcement of orders, the fact that a compensation order is made for a certain sum is by no means a guarantee that the victim will receive the amount awarded. In *Olabinjo v Westminster Magistrates' Court*, the defendant was convicted in 2013 and a confiscation order was imposed in April 2015. The court directed that sums collected under the order be paid as compensation to the victim. An asset which was identified at the confiscation hearing was not realised and, as at March 2019, the victim had not been compensated.⁶⁰

24.38 The problems with enforcement are discussed in further detail above.

The complexities involved in imposing compensation and confiscation orders in the same proceedings

24.39 In many cases sentencing courts must consider awarding compensation to victims as well as stripping defendants of their proceeds of crime by way of confiscation. Where there are insufficient funds available to meet compensation and confiscation orders imposed in the same proceedings, the court *must* direct the sum of the compensation order be paid from sums recovered under the confiscation order.⁶¹ The intention of the legislation is to prioritise compensation of victims over amounts owed to the government.⁶²

24.40 Where a defendant has sufficient means to satisfy compensation and confiscation orders, both orders may be imposed.⁶³ However, courts should not make both orders where full restitution has been made to the victims prior to the hearing. Care should be taken to avoid double counting: ordering repayment of the same sum by way of compensation and confiscation could lead to the imposition of a disproportionate order. If an assertion is made by a defendant that restitution will take place after the hearing, the assertion should be closely scrutinised. If the court is unsure that

⁵⁹ *R v Hussain* [2006] EWCA Crim 2152, at [18].

⁶⁰ [2020] EWHC 1093 (Admin).

⁶¹ Proceeds of Crime Act 2002, s 13(5) and (6).

⁶² Explanatory notes to Serious Crime Act 2015, para 44.

⁶³ See for example *R v Mitchell* [2001] 2 Cr App R (S) 29 (141) (decided under the CJA 1988).

payment will be made under a compensation order, a confiscation order which includes the amount of compensation will not usually be disproportionate.⁶⁴

- 24.41 The current regime could be considered overly complex. The difficulties the present regime can create were exemplified in *R (Faithful) v Ipswich Crown Court*.⁶⁵ The defendant had been convicted of stealing £15,000 from her employer, F. A confiscation order was imposed but the judge incorrectly believed that he had to take the confiscation order into account when subsequently considering compensation. The result of the judge's order was that the sums recovered (under the confiscation order imposed) would be paid to the state rather than to F. F's application for judicial review was refused and it was observed that it was open to F to pursue civil proceedings against the defendant in respect of the sum stolen.
- 24.42 The considerations detailed above arise, in part, because the making of a compensation order is not the equivalent of payment or restoration to the victim. Compensation orders are enforced in the magistrates' court and the ultimate sanction for non-payment is a term of imprisonment in default. However, it has been observed that liability to pay a compensation order ceases when a term of imprisonment in default of payment is imposed. Conversely, the obligation to pay a confiscation order remains where a term of imprisonment is served in default of payment. The court has noted that some criminals may opt to serve a term of imprisonment in default rather than pay a compensation order.⁶⁶ It is unsatisfactory that the enforcement regimes differ.
- 24.43 Under the present regime a victim is potentially placed in a worse position where a defendant has the means to pay a compensation and confiscation order in full. This is because a defendant may simply opt to serve a term of imprisonment in default and thus extinguish his liability to pay a compensation order.⁶⁷ However, if a direction is made that compensation is paid from sums recovered under a confiscation order, the defendant's liability to pay is not extinguished by serving a term of imprisonment in default of payment.⁶⁸
- 24.44 The courts have remarked that it is unsatisfactory that the power contained in subsections 13(5) and (6) of POCA 2002 (to direct that compensation be paid from sums recovered under a confiscation order) is only available where the defendant has insufficient means to satisfy both orders.⁶⁹
- 24.45 As at April 2019, £89,040,000 in compensation remained outstanding.⁷⁰ Sums collected under confiscation orders and paid as compensation were between 15 and 20% of the total amount collected pursuant to confiscation orders:⁷¹

⁶⁴ *R v Davenport* [2015] EWCA Crim 1731, [2016] 1 Cr App R (S) 41 at [75].

⁶⁵ *R (Faithful) v Ipswich Crown Court* [2007] EWHC 2763 (Admin), [2008] 1 WLR 1636.

⁶⁶ *R v Jawad* [2013] EWCA Crim 644, [2013] 1 WLR 3861 at [16] – [19].

⁶⁷ Magistrates' Courts Act 1980, s 79.

⁶⁸ Proceeds of Crime Act 2002, s 38(5), *R v Jawad* [2013] EWCA Crim 644, [2013] 1 WLR 3861 at [18].

⁶⁹ *R v Jawad*, above, at [13] and *R v Davenport* [2015] EWCA Crim 1731, [2016] 1 Cr App R (S) 41, at [70].

⁷⁰ HMCTS, *Trust Statement 2018-19* (2019), p 29.

⁷¹ Home Office, *Asset Recovery Statistical Bulletin 2013/14 – 2018/19* (2019), p 7,10.

2014: £139 million recovered; £28 million paid as compensation.

2015: £156 million recovered; £24 million paid as compensation.

2016: £207 million recovered, £38 million paid as compensation.

2017: £162 million recovered; £36 million paid as compensation.

2018: £144 million recovered; £30 million paid as compensation.

2019: £166 million recovered; £36 million paid as compensation.

24.46 However, there is currently no central database which collects data on all compensation paid to victims. Furthermore, the number of victims being paid cannot be ascertained from the Joint Asset Recovery Database (JARD) as several victims can be covered under one compensation order.⁷²

24.47 The impact of having disparate mechanisms for the award and collection of compensation leads to a paucity of data which impedes scrutiny of the effectiveness of the present regime.

24.48 At a pre-consultation meeting with stakeholders, it was observed that where a direction is made that compensation is to be paid from sums collected under a confiscation order, this fact is not always readily apparent.

The existence of other types of compensatory orders: slavery and trafficking reparation orders, restitution orders and forfeiture orders

24.49 Under the present regime, courts must consider sections 13, 14 and 15 of POCA 2002 and sections 8-10 of the Modern Slavery Act 2015 to ascertain the extent of their powers. The complexity of the present regime is demonstrated by considering the various permutations:

- (1) If a court makes a confiscation order prior to sentence (which is not the usual sequence of events)⁷³ it must take the order into account before it imposes a fine on the defendant or before it makes one of the orders mentioned in section 13 (3)(a)-(d) POCA 2002. These orders include forfeiture orders, deprivation orders and orders involving payment (with the exception of priority orders). “Priority orders” are listed in section 13(3A) POCA 2002 and can relate to compensation, a statutory surcharge, unlawful profit, and/or a slavery and trafficking reparation order.
- (2) Confiscation proceedings are likely to be postponed and the court may proceed to sentence (sections 14(2), 15(1) of POCA 2002). However, when sentencing, the court “must not” impose one of the orders mentioned in subsections 15(2)(a)–(d) of POCA 2002: a fine, compensation, surcharge, unlawful profit order or an order listed in subsection 13(3) of POCA 2002. This subsection includes an order involving “payment”, but not a restitution order for the return of stolen goods. The court cannot impose a slavery and trafficking reparation order (assuming the defendant has been convicted of an offence pursuant to

⁷² Above, p 10.

⁷³ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8] and [13].

sections 1, 2 or 4 of the Modern Slavery Act 2015) as the power to do so only arises when a confiscation order has been imposed.⁷⁴

- (3) If sentenced during a “postponement period” (defined by section 15(7) of POCA 2002), the court may, at the end of that period (and within 28 days thereafter (section 15(4) of POCA 2002), vary the sentence imposed (section 15(3) of POCA 2002) by imposing one of the orders mentioned in section 15(3)(a)–(d) of POCA 2002). These are the same orders mentioned in section 15(2)(a)–(d) of POCA 2002. If the court makes a confiscation order and one or more priority orders, and the judge believes that the offender will not have sufficient means to pay them all in full, the court must direct that a portion of the amount payable under the priority order(s) is to be paid out of any sums recovered under the confiscation order. POCA 2002 prescribes a maximum limit of 28 days to vary. This seems to be because until 2008, the Crown Court was only permitted 28 days in which to vary any sentence or other order made (the “slip rule”). It appears that the power to amend sentence in POCA was based on the previous regime and POCA 2002 was not amended to reflect the changes to the “slip rule” made by subsequent legislation. Retaining the limit of 28 days in POCA 2002 has created a trap for the unwary as it does not reflect current sentencing law which permits variation up to 56 days from the making of the order or the imposition of a sentence.⁷⁵
- (4) The court may make a slavery and trafficking reparation order against a defendant even if he or she has been sentenced for the offence prior to the imposition of a confiscation order (section 8(4) of the Modern Slavery Act 2015). However, the court cannot impose both a compensation and a slavery and trafficking reparation order (section 10(1) of the Modern Slavery Act 2015). Furthermore, the amount of the order must not exceed the amount the defendant is required to pay under the confiscation order made in relation to that offence (section 9 (4) of the Modern Slavery Act 2015).
- (5) The power to impose a slavery and trafficking reparation order is contingent on a confiscation order being imposed. Where a defendant has been sentenced prior to confiscation proceedings, the court is empowered by section 8(4) to impose an order but there is no statutory time limit within which this must occur.

24.50 The addition of another form of compensatory order, available in respect of a limited number of offences, adds a further layer of complexity to the statutory regimes which govern the imposition of compensation and confiscation orders.

⁷⁴ Modern Slavery Act 2015, s 8(1)(a) and (b).

⁷⁵ Powers of Criminal Courts (Sentencing) Act 2000, s 155. See Chapter 6 where we propose that this anomaly is remedied.

24.51 It appears that the power to impose slavery and trafficking reparation orders has not been utilised since it became available on 31 July 2015.⁷⁶ In answer to a written question,⁷⁷ Baroness Williams of Trafford confirmed:

To the end of the calendar year 2017, the latest period of data that is available shows that no slavery, trafficking and reparation orders have been made. We are currently using the review of the Modern Slavery Act to assess the effectiveness of these powers.

24.52 An independent review of the Modern Slavery Act published its final report in May 2019 and confirmed that no orders had been made up to the end of 2017. However, the review had received anecdotal evidence that at least two orders had been imposed.⁷⁸ The report noted that stakeholders were confused about the differences between reparation and compensation orders.⁷⁹

24.53 The failure to impose a single order up to the end of 2017 is perhaps indicative of the complexity of the present provisions.

Restitution orders and forfeiture orders

24.54 Financial and forfeiture orders may not be imposed whilst confiscation proceedings are pending.⁸⁰ The rationale of the prohibition appears to be that all financial matters ought to be considered and resolved at the same time. However, despite restitution involving payment or the return of goods, there appears to be no bar on the imposition of a restitution order prior to the resolution of confiscation proceedings. The courts have remarked on this anomaly.⁸¹

24.55 The Powers of Criminal Courts (Sentencing) Act 2000 does not provide a mechanism for the enforcement of restitution orders. It has been suggested that enforcement is via contempt of court proceedings.⁸² Therefore, there are differences in the enforcement of compensation orders, restitution orders and compensation collected under a confiscation order. A victim may apply for a restitution order but has no standing to apply for a compensation order or a slavery and trafficking reparation order. It is unsatisfactory that a cohesive system is not in place. It appears that the existing statutory powers were simply incorporated into the confiscation regime without thorough consideration as to how the systems should operate in tandem.

⁷⁶ Modern Slavery Act 2015 (Commencement No. 1, Saving and Transitional Provisions) Regulations 2015, reg 2.

⁷⁷ Parliament.UK, Slavery and Trafficking Reparation Orders: *Written question – HL11276*, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2018-11-05/HL11276/> (last visited March 2020).

⁷⁸ Home Office, *Independent Review of the Modern Slavery Act 2015: Final Report* (2019), para 3.1.2.

⁷⁹ Above, para 3.1.3.

⁸⁰ Proceeds of Crime Act 2002, s 15(2).

⁸¹ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [11].

⁸² Crown Prosecution Service, *CPS Guidance*, “Sentencing-Ancillary Orders” <https://www.cps.gov.uk/legal-guidance/sentencing-ancillary-orders> (last visited March 2020).

Confusion over priority

24.56 The confiscation legislation and authorities indicate that the rights of victims are of paramount concern and it is in the public interest that victims are compensated quickly and without the need for litigation. However, during our pre-consultation discussions it was clear that there is greater scope for modifications which ensure that victims are routinely compensated and that orders are consistently and robustly enforced.

The “legislative steer”

24.57 As we highlight in Chapter 26, the power to make a restraint order must be exercised with a view to preserving realisable property for any confiscation order that may be made against the defendant according to a fundamental provision of POCA 2002 known as the “legislative steer”.⁸³ The legislative steer does not include reference to compensation or restitution orders let alone assign an order of priority. This leaves victims of crime who have suffered financial loss in a more precarious position than the state as the legislative steer prioritises confiscation proceedings.

24.58 In *Serious Fraud Office v Lexi holdings PLC (In Administration)*,⁸⁴ the Court of Appeal held that the court did not have jurisdiction to vary a restraint order to release funds to pay a bona fide but unsecured creditor unless this did not conflict with the stated objective in the legislative steer to preserve realisable property for any confiscation order. During our pre-consultation discussions with stakeholders, Ian Smith, a barrister who specialises in representing victims of fraud summarised the problem as follows:

At the moment, victims of economic crime fall between two stools. The criminal system would prefer that they bring their claims in the civil courts. The civil system is available but unaffordable. This gap means that huge numbers of victims of economic crime do not receive compensation that could be awarded to them. It also means that in some cases the state collects assets which would have been better utilised by those victims and certainly which in a fair system ought to go to victims rather than the state.

The Asset Recovery Incentivisation Scheme (ARIS)

24.59 In Chapter 4 we discuss ARIS and perceived issues associated with it. As the state stands to benefit from confiscation, including investigating and prosecuting authorities through the ARIS scheme, there is a perception that victims’ needs may not be prioritised. In *Fraud and punishment, enhancing deterrence through more effective sanctions*, published by the Centre for Counter Fraud Studies at the University of Portsmouth, a Detective Sergeant was quoted as saying:

I had this conversation with a sergeant, in a neighbouring force, and this is going back four years go. He went... “we’ll only do the ones where we don’t have an identified victim, because we get to keep the money, if you’ve got a victim and the victim is going to get the money, then, we’re not interested.” Now, I don’t know if that

⁸³ Proceeds of Crime Act 2002, s 69(2).

⁸⁴ *Serious Fraud Office v Lexi holdings PLC (In Administration)* [2008] EWCA Crim 1443, [2009] QB 376.

was their force policy or that was just him, bravado or whatever, but it quite took me aback... because surely we're there to look after victims.⁸⁵

24.60 Similarly, in his PhD thesis, *Complicit Silence – organisations and their response to occupational fraud*, David Shepard quotes an interview with a former police officer who at the time was a security manager in a private company:

They [*County A Police*] are only interested in cases with no victims so they can get their share of the recoveries...⁸⁶

24.61 Such perceptions are not apt to lead to confidence that victims are prioritised in the confiscation regime.

Encouragement of the voluntary repayment of victims

24.62 Under section 6(6) of POCA 2002, the otherwise mandatory duty to impose a confiscation order becomes merely a power to do so where a victim does, or intends to, pursue civil proceedings against the defendant in respect of their loss.⁸⁷ If, notwithstanding the fact that civil proceedings are pending, the court proceeds with confiscation, it is afforded a discretion as to the recoverable amount of the confiscation order. In broad terms, the court may impose an amount that is just.⁸⁸ The purpose of this provision is to provide courts with a mechanism to ensure that the sums that victims may recover are not taken by the state pursuant to a confiscation order prior to the conclusion of civil proceedings.⁸⁹

24.63 The Court of Appeal has observed:

The section 6(6) concession does not appear to apply where a defendant has voluntarily repaid a victim for loss and damage before the victim has started or expressed an intention to start civil proceedings against him. On this view therefore, the defendant would be better off not to seek to make good the consequences of his offences until the victim has started civil proceedings or given some clear indication of his intention to do so. This would mean that a defendant who made voluntary reparation would be worse off than the defendant who waited for the victim to start civil proceedings. As a number of earlier cases, such as *R v Mahmood and Shahin*,⁹⁰ *R v Farquhar*⁹¹ and *R v Morgan*⁹² demonstrate, this would plainly be contrary to the public interest that a victim of an acquisitive crime should receive

⁸⁵ M Button, D Lewis and others *Fraud and punishment, enhancing deterrence through more effective sanctions* (July 2012) p 36

⁸⁶ D Shepard “*complicit Silence – organisations and their response to occupational fraud*” (May 2016) p 136.

⁸⁷ Proceeds of Crime Act 2002, s 6(6).

⁸⁸ Proceeds of Crime Act 2002, s 7(3).

⁸⁹ *R v Nield* [2007] EWCA Crim 993 at [20].

⁹⁰ *R v Mahmood* [2005] EWCA Crim 2168, [2006] 1 Cr App R (S) 96.

⁹¹ *R v Farquhar* [2008] EWCA Crim 806, [2008] 2 Cr App R (S) 104.

⁹² *R v Morgan* [2008] EWCA Crim 1323, [2008] 4 All ER 890.

reparation for it as soon as possible, and if possible, without the burden of initiating proceedings.⁹³

24.64 It should be noted that since the decision cited above, the Supreme Court⁹⁴ and Parliament⁹⁵ have incorporated a test of proportionality into the confiscation regime.⁹⁶ Prior to the introduction of that test,⁹⁷ the CPS had issued guidance on exercising its discretion not to pursue confiscation proceedings where the defendant had voluntarily paid full compensation to the victim or victims, or was ready, willing and able immediately to repay all of the victims to the full amount of their losses.⁹⁸

Sentencing traps

24.65 As originally enacted, the confiscation regimes prior to POCA 2002, under the Drug Trafficking Offences Act 1986 and Criminal Justice Act 1988, made no provision for the postponement of determinations in confiscation proceedings. Accordingly, sentence awaited the resolution of confiscation proceedings and the statutory provisions were drafted on the basis that sentencing would occur after a confiscation order had been imposed. Sentencing courts were required to take account of any confiscation order in imposing sentence. This sequence led to delays in imposing sentence which offended a key principle of the criminal law that sentence ought to follow conviction either immediately or shortly thereafter.⁹⁹

24.66 To remedy the position, legislation was enacted in 1993 to incorporate into both regimes a power for the court to postpone confiscation proceedings and to sentence first.¹⁰⁰ It has been observed that POCA 2002 has been modelled on the previous regimes and does not make plain that the natural order of events is to postpone confiscation proceedings and proceed to sentence.¹⁰¹

24.67 The combination of sections 13(3) and 15(2) of POCA 2002 create a blanket prohibition on the imposition of a fine, compensation, forfeiture, deprivation, surcharge or unlawful profit order where confiscation proceedings have been postponed. Section 15(2) is mandatory and no discretion is afforded to a sentencing judge. However, no legitimate purpose appears to be served, for example, by requiring large quantities of

⁹³ *R v Nelson* [2009] EWCA Crim 1573, [2010] QB 678.

⁹⁴ *R v Waya* [2012] UKSC 51, [2013] 1 AC 294

⁹⁵ Serious Crime Act 2015, sch 4 para 19

⁹⁶ Proportionality is discussed in Chapter 5.

⁹⁷ *R v Axworthy* [2012] EWCA Crim 2289; *R v Jawad* [2013] EWCA Crim 644, [2013] 1 WLR 3861; *R v McGarry* [2014] EWCA Crim 1103; *R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162.

⁹⁸ Crown Prosecution Service, *Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings*, https://www.cps.gov.uk/sites/default/files/documents/news/prosecutors_discretion_280509.pdf (last visited August 2020).

⁹⁹ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8].

¹⁰⁰ Criminal Justice Act 1993, s 8 would have permitted the court to postpone confiscation proceedings under the DTOA 1986 and proceed to sentence first. The legislation was superseded by the DTA 1994 before the provision was brought into force. The Drug Trafficking Act 1994 itself contained a postponement provision: s 3. The CJA 1993 s 28 inserted a postponement provision into the CJA 1988 (s 72A), which came into force on 3 February 1995 (SI 1995 No 43).

¹⁰¹ *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8] and [13]. See Chapter 6 where we propose that the legislation is amended to remedy this problem.

drugs to be stored for many years pending the resolution of confiscation proceedings. The court has observed that the legislation creates a trap into which even the most experienced and skilled trial judges may fall.¹⁰²

Reopening compensation

24.68 Currently section 22 of POCA 2002 applies¹⁰³ when a court has made a confiscation order in the available amount because the defendant's assets were less than his or her benefit. A prosecutor or receiver can apply to the Crown Court to make a new calculation of the available amount which is, in simple terms, the amount payable under a confiscation order.¹⁰⁴ The court may increase the amount payable where it considers it just to do so and any uplift does not exceed the amount found to be the defendant's benefit from the conduct concerned.

24.69 The purpose of this provision is to ensure that where additional assets are discovered at a later stage, the available amount can be uplifted to reflect this. In *R v Tivnan*¹⁰⁵ Rose LJ observed that the policy behind the provision was to ensure that:

By this means drug dealers can be deprived of their assets until they have disgorged an amount equivalent to all of the benefit which had accrued to them from drug dealing.

24.70 During our fact-finding process, we heard from stakeholders that the power contained in section 22 of POCA 2002, allowing the court to revisit and recalculate the available amount at a later date, does not make any provision for revisiting compensation orders to permit an uplift to compensation. Likewise, the power to adjust a confiscation order downwards does not permit an application in respect of the compensation element of an order. While the two orders have different objectives, they must correlate in order for the regime to operate efficiently. Therefore, the inability to adjust one when the other is amended is undesirable.¹⁰⁶

Distribution of money collected pursuant to a confiscation order

24.71 Funds recovered under a confiscation order are retained by the state unless a direction is made that compensation is to be paid from the sums received under the confiscation order. Funds recovered by way of a compensation order are paid to victims and priority is always afforded to victims.¹⁰⁷

24.72 In Chapter 4 we discuss the Home Office Asset Recovery Incentivisation Scheme (ARIS). This scheme ensures that sums recovered under confiscation orders are shared between the agencies involved once liquidators, receivers and compensation have been paid, and payments are made in accordance with any international treaties, conventions and asset sharing agreements. The Home Office retains 50 per cent, law

¹⁰² *R v Guraj*, above, at [11].

¹⁰³ See Chapter 25.

¹⁰⁴ Proceeds of Crime Act 2002, s 22(1)(c).

¹⁰⁵ *R v Tivnan* [1999] 1 Cr App R (S) 92, [1988] Crim LR 591.

¹⁰⁶ In Chapter 25 we discuss reconsideration of confiscation orders.

¹⁰⁷ Home Office, *Asset recovery statistical bulletin 2013/14 – 2018/19* (2019), p 10,

enforcement agencies and prosecutors receive 18.75 per cent and HMCTS receives 12.5 per cent. Those funds have been expended as follows:¹⁰⁸

	Asset recovery work	Crime reduction projects	Community projects	Miscellaneous	Total
2013	£44.5m	£2.1m	£1.4m	n/a	£47.9m
2014	£71.8m	£4.3m	£1.8m	£2.0m	£79.8m
2015	£70.4m	£6.3m	£1.9m	£4.5m	£83.0m
2016	£72.9m	£3.0m	£1.5m	£5.5m	£83.0m
2017	£56.0m	£2.0m	£1.5m	£0.1m	£59.6m

24.73 During our pre-consultation discussions, it was suggested by some stakeholders that sums collected pursuant to confiscation orders could, and perhaps should, be used to compensate victims rather than be retained by the state and distributed according to the ARIS model.

POTENTIAL REFORMS

24.74 Some of the matters discussed in this chapter raise issues that go beyond our terms of reference, and we do not make provisional proposals in relation to them. As we set out earlier, the issue of the representation of victims in the criminal justice process raises broad policy and practical considerations that may merit separate consideration.

24.75 Further, the issue of whether slavery and trafficking reparation orders should be available to the court at the point of sentence and not just following the making of a confiscation order is an issue that is more appropriately addressed through a wider consultation on post-conviction orders.

24.76 Our proposed reforms focus on affording better priority to victims of crime in receiving reparation when a compensation order is made from confiscated funds. Our package of proposals is intended to ensure:

- (1) compensation from confiscated funds is given due prominence in the confiscation regime;
- (2) compensation is ordered earlier in the process;
- (3) the Crown Court is empowered to vest an offender's assets in a "trustee in confiscation" to be realised to satisfy any outstanding compensation due;
- (4) confiscation enforcement tools will be available in all cases where compensation is ordered to be paid and a confiscation order is made.

¹⁰⁸ Above, p 9.

24.77 We considered carefully whether to recommend the establishment of a central compensation fund from confiscated funds and we set out below the reasons why we do not make such a recommendation.

24.78 Finally, we make a recommendation about varying compensation orders made from confiscated funds after they are made, to rectify a potential lacuna in the law.

Giving due prominence to compensation from confiscated funds

24.79 To ensure that victims are appropriately prioritised in the confiscation process, in Chapter 5 we make a provisional proposal that an express statement of statutory purpose of the confiscation regime should include the compensation of victims, where such compensation is to be paid from confiscated funds.

Ensuring compensation orders are imposed at an earlier stage

24.80 Earlier in this chapter we observed that the statutory bar on the imposition of financial orders until confiscation proceedings have been resolved inevitably leads to victims experiencing delay in receiving compensation. Accordingly, in Chapter 6 we provisionally propose that the bar should be removed.

24.81 There is plainly merit in all financial and forfeiture orders being dealt with at the same time to enable the sentencing court to consider matters in the round. However, we are of the view that the importance of victim(s) being compensated as early as possible must take priority over the expediency of dealing with all financial matters at the same time.

The risk of double recovery

24.82 As we discuss in Chapter 6 on postponement, directing the payment of financial orders, including compensation orders, prior to finalising confiscation proceedings exposes a defendant to the risk of being ordered to pay the same sum twice over. To avoid this, a sentencing court must be obliged to take into account any compensation order imposed when determining sums due under a confiscation order. As we noted earlier in relation to Postponement, POCA 2002 already caters for what could be considered to be analogous situations where a confiscation order is imposed after a compensation order has been imposed.¹⁰⁹ In Chapter 6, we provisionally propose that confiscation legislation should enshrine this obligation to facilitate our proposal and prevent unfairness.

24.83 In *Sachan*¹¹⁰ a compensation order was imposed in error before confiscation proceedings had been resolved. The Court of Appeal found that the compensation order was not a nullity. The Crown undertook that it would not seek to enforce both the confiscation order and the compensation order which would have exposed the offender to double liability for the same sum. The appellant's appeal was therefore dismissed. It is evident that, provided there is no danger of double recovery, compensation orders can legitimately be ordered prior to the resolution of confiscation proceedings.

¹⁰⁹ Proceeds of Crime Act 2002, ss 19(7), 20(11) and (12) and 32(4) and (7).

¹¹⁰ *R v Sachan* [2018] EWCA Crim 2592, [2019] 4 WLR 67.

Crown Court oversight - Improving enforcement and consistency

24.84 Our proposals are intended to facilitate the payment of compensation far earlier in the process than under the current regime. Compensation orders could be made at the discretion of the sentencing judge, before confiscation has been resolved and therefore the Crown Court will still be seized of the matter and can ensure that payment has been made.

24.85 Enforcement is discussed in detail in Part 6 of this consultation paper. However, it is important to note that once the Crown Court has imposed a confiscation order, in the vast majority of cases, it plays no part in enforcement because enforcement is largely undertaken in the magistrates' court.

24.86 Under our proposed enforcement model set out in Chapter 22 the Crown Court will, when a confiscation order is made, determine whether any proactive enforcement steps should be taken. Such steps could include the contingent vesting of the defendant's assets in a trustee for confiscation (with the contingency to be activated in the event of non-payment of the confiscation order within the time set by the court).

24.87 We provisionally propose in Chapter 21 that a court may impose such an order if, for example, there are reasonable grounds to believe that the defendant will, through wilful refusal or culpable neglect, fail to satisfy a confiscation order.

24.88 In making this determination the court will be able to check if any compensation order made at the time of sentencing (which could be considerably earlier than the making of the confiscation order) has been paid. The fact that a compensation order has not been paid will provide an indication, in some cases, of the likelihood of an offender making reparation on a voluntary basis. This information will assist the court in determining whether a defendant will realise their assets voluntarily to satisfy any confiscation order imposed.

24.89 When assets are vested in a trustee in confiscation they will be sold and sums due as compensation would, under our proposed new legislative steer discussed above, take priority. This process will serve to ensure that victims are compensated in a higher proportion of cases and, unlike the historic criminal bankruptcy regime,¹¹¹ allows the Crown Court to determine all matters with an option to refer to the High Court for enforcement if necessary.¹¹²

Universal availability of confiscation enforcement tools where compensation is ordered and a confiscation order is made

24.90 As we set out earlier in this chapter, 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.

24.91 We consider that where confiscation and compensation orders are made in the same proceedings, all outstanding compensation should be recovered in the same manner

¹¹¹ Criminal Bankruptcy Orders are discussed in Chapter 20.

¹¹² This proposal relates specifically to cases where a financial remedy is sought in family law proceedings at the same time as proceedings are brought to enforce the confiscation order, see Chapter 22.

to create a simpler and more efficient system and to rectify a perceived lacuna in the process.¹¹³

24.92 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.

24.93 We consider that such a reform would also ensure that reforms to enforcement of confiscation are of the widest benefit to victims.

24.94 The new regime should enhance the prospect of compensation ordered by the criminal courts being satisfied. However, it would still be open to victims to pursue a civil claim should they choose to do so. Accordingly, the existing discretion afforded to the court by virtue of section 6(6) of POCA (duty to impose a confiscation order becomes merely a power where civil proceedings are pending) would remain.

Consultation Question 81.

24.95 We provisionally propose that, 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.

24.96 Do consultees agree?

A compensation fund

24.97 The notion of using sums collected under confiscation orders for the benefit of victims was mooted as long ago as 1978 in Sir Derek Hodgson's report¹¹⁴ which led to the enactment of the first confiscation regime. The report noted that the obstacles to such a scheme were finance and administration. The then Chairman of the Criminal Injuries Compensation Board (as it was then known) candidly told the committee that he believed the difficulties would be insuperable and the Board could not cope with the volume of work which it would generate without substantial restructuring.¹¹⁵ Sir Derek suggested a pilot scheme should test the feasibility of a Victim Compensation Fund funded by the proceeds of confiscation orders.¹¹⁶

24.98 The administration and cost of such a scheme, as noted in 1978, would be considerable. By way of background, the Criminal Injuries Compensation Scheme was set up in 1964 to compensate victims of violent crime. In 2018-19 the Criminal Injuries Compensation Authority (as it is now known) resolved over 35,000 claims and

¹¹³ *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].

¹¹⁴ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 63.

¹¹⁵ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 64.

¹¹⁶ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) recommendation A7.

provided £130,000,000 in compensation.¹¹⁷ The Authority operates as a measure of last resort and compensates blameless victims of violent crime, or people whose loved ones have died as a result of a violent crime. The Authority's guidance states:

The Scheme is intended to be one of last resort. Where the opportunity exists for you to pursue compensation elsewhere you should do so. We will expect you to take all reasonable steps to obtain any social security benefits, insurance payments, damages or compensation to which you may be entitled as a result of your injuries.

24.99 Despite being a measure of last resort, the Criminal Injuries Compensation Authority received 31,008 new applications in 2018-19, a decrease on 2017-18 in which 32,280 applications were received.¹¹⁸

24.100 It is noteworthy that there is no similar scheme for victims of economic crime. A scheme to compensate victims of economic crime, like the CICA, would have to act as a measure of last resort to be viable.

24.101 To demonstrate the potential number of applicants under any scheme it is instructive to note that £79,000,000 in compensation was outstanding as at April 2017. This figure represents cases where a defendant has been successfully prosecuted and the court has been satisfied that the defendant has the means to pay compensation. In many cases an offender is never identified or no charges are brought due to a lack of evidence. In some cases, an offender may be charged and acquitted. By way of illustration of the vast numbers of potential victims, Action Fraud (the UK's national fraud reporting system) receives approximately 42,000 calls per month. During the financial year 2017/2018 there were a total 294,984 reports of which 181,496 were assessed solely by the automated system.¹¹⁹

24.102 If a centralised compensation scheme was made available to all victims of economic crime it is likely there would be insufficient revenue generated to meet existing and continued demand. The administration of applications, which would likely dwarf those received by the CICA, would be vast and would require a government agency to process applications. Accordingly, any Victims' Compensation Scheme would have to be limited in scope to make it viable.

24.103 The idea of a centralised compensation fund is appealing but any such scheme would be extremely costly to administer. It would be unsatisfactory for the large administration costs of such a scheme to swallow up vast sums of money that could be and are used to fund community projects and the agencies which are involved in the recovery and realisation of criminal assets for the benefit of identified victims of crime. Furthermore, there is a risk that there would be insufficient funds generated to compensate victims adequately.

24.104 We believe that our new regime will ensure that victims receive compensation more regularly than under the current system. Additionally, the new regime will involve

¹¹⁷ Criminal Injuries Compensation Authority, *Annual Report and Accounts 2018-2019* (2019) p 6.

¹¹⁸ Above, p 12.

¹¹⁹ Written answer given by Rt Hon Ben Wallace MP, Secretary of State, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-07-24/168181/> (last visited September 2020).

additional costs in realising assets to ensure victims are compensated. For these reasons we do not recommend the establishment of a centralised compensation fund derived from confiscated funds.

Consultation Question 82.

24.105 We do not propose that a central compensation scheme, funded from sums collected pursuant to confiscation orders, be created. Do consultees agree?

Amendments to orders

24.106 In Chapter 25 we discuss the powers of the Crown Court to vary upwards and downwards the amount that a defendant can be required to pay pursuant to a confiscation order, depending on his or her means.

24.107 Under section 22 of POCA 2002 the prosecutor or a receiver can apply to the court to reconsider the amount payable under a confiscation order.¹²⁰ The court may increase the amount payable where it considers it just to do so and any uplift does not exceed the amount found as the defendant's benefit from the conduct concerned. The legislation does not permit an uplift to compensation. 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.

24.108 Provision is made for variations to slavery and trafficking reparation orders where a confiscation order is amended.¹²¹ There is no apparent justification for the absence of a similar power in respect of compensation orders. It is another peculiarity of the system that slavery and trafficking reparation orders and compensation orders are not dealt with in a consistent manner.

24.109 The power to adjust a confiscation order downwards¹²² does not permit an application in respect of the compensation element of an order.

24.110 Presently an application to discharge a compensation order is made to the enforcing magistrates' court who, if the order was imposed by the Crown Court, must obtain the consent of the Crown Court before discharging or reducing the order.¹²³ The same process applies to slavery and trafficking reparation orders.¹²⁴

24.111 We consider that it is unsatisfactory that confiscation and slavery and trafficking reparation orders can be amended but a compensation order cannot. The legislation ought to be amended to remove this anomaly.

¹²⁰ Proceeds of Crime Act 2002, s 22.

¹²¹ Modern Slavery Act 2015, ss 10(4) and (5).

¹²² Proceeds of Crime Act 2002, s 23.

¹²³ Powers of Criminal Courts (Sentencing) Act 2000, s 133.

¹²⁴ Modern Slavery Act 2015, s 10(3).

Consultation Question 83.

24.112 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 to reflect the variation.

24.113 Do consultees agree?

Part 8: Reconsideration

INTRODUCTION TO PART 8

In this section we explore the law in relation to the reconsideration of the amount an offender must pay under a confiscation order, in simple terms, applications to increase the available amount. In the single chapter (Chapter 25) in this section, we focus on section 22 of POCA 2002 which permits a judge to increase the available amount to a figure “that is just”, provided it does not exceed the benefit figure.

We provisionally propose that the court should be invited to weigh a number of factors in reaching their decision. We propose that these factors should include the legislative priorities of financial accountability for the proceeds of crime; deterrence from criminality by encouraging the pursuit of a legitimate lifestyle; disruption of criminality, undue hardship and the diligence of the prosecution.

Chapter 25: Reconsideration

INTRODUCTION

25.1 In the Supreme Court decision in the confiscation case of *Re Peacock*, Lord Brown began the judgment by outlining the following scenario:

Suppose that a convicted drug trafficker is found to have benefited from his trafficking to the extent of £1m but, having at the time realisable property worth only £100,000, a confiscation order is initially made against him just for this lesser sum. Suppose then that the defendant, entirely legitimately, later acquires property to the value of upwards of a further £900,000. Is he at that stage liable to a further court order increasing to the full extent of his criminal gain the amount recoverable under the confiscation order by reference to these after-acquired assets?¹

25.2 The scenario raises conflicting matters of public policy. Ensuring that criminals are stripped of an amount equivalent to the full proceeds of their crimes must be weighed against the need to reform and rehabilitate offenders and the right to peaceful enjoyment of property. Such conflicting considerations are evident in the case law and were evident during our pre-consultation discussions.

25.3 In this chapter we explore the law in relation to the reconsideration of the amount an offender must pay under a confiscation order, perceptions of unfairness with the current regime and make provisional proposals for reform.

CURRENT LAW

25.4 The law provides for reconsideration of confiscation orders in five situations:

- (1) Where there was originally no confiscation enquiry (pursuant to section 6) and therefore no order was imposed, but further evidence has become available, pursuant to section 19 of POCA 2002.
- (2) Where the judge concluded that there was no benefit (from general or particular criminal conduct) and no order was imposed, but further evidence has become available, pursuant to section 20 of POCA 2002.
- (3) Where a confiscation order was imposed but further evidence has come to light concerning benefit, pursuant to section 21 of POCA 2002.
- (4) Where a confiscation order has been imposed and there is an application to reconsider the available amount, pursuant to section 22 of POCA 2002.
- (5) Where a confiscation order was imposed and the available amount at a later date is lower than the available amount at the time that the confiscation order was made, pursuant to section 23 of POCA 2002.

¹ *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164.

- 25.5 An application in categories 1-3 above must be based on new evidence that was not available to the prosecutor at the relevant time and the application must be made within six years of the offender's conviction.²
- 25.6 During our pre-consultation discussions, the concerns raised by stakeholders centred exclusively around category 4. Lawyers, financial investigators and judges all reported a marked increase in applications to reconsider the available amount.³ It is therefore the focus of this chapter and the other provisions relating to reconsideration are not discussed further. Applications to increase the available amount are commonly referred to as "uplift applications" and that is the terminology we adopt throughout this chapter.

Uplift applications

- 25.7 Section 22 provides that the prosecution or a receiver may ask the court to make a new calculation of the available amount.⁴ If the amount found under the new calculation exceeds the available amount that was previously calculated by the court, the court may vary the order by substituting for the amount required to be paid such amount as
- (1) it believes is just, but
 - (2) does not exceed the amount of the defendant's benefit.⁵
- 25.8 In *Re Peacock* the Supreme Court was divided as to whether it was legitimate to permit an increase to the available amount in respect of "after-acquired assets". The majority held that it was lawful.⁶ The introduction of POCA 2002 removed any doubt as to the legislative intent and the scope of the power: "after-acquired assets" can be taken into account.⁷
- 25.9 In determining what might amount to a "just" increase, the court must have regard to other financial orders that have been imposed on the defendant by the court, such as a fine or compensation order.⁸ Having considered such financial orders, the court's residual discretion remains broad. The courts have established the following principles:

² Proceeds of Crime Act 2002, s 19(1) and (2), s 20(1) and (2) and s 21(1) and (2).

³ In March 2020 the Northern Proceeds of Crime Lawyers' Association hosted a panel discussion on "the rise of section 22 applications".

⁴ Proceeds of Crime Act 2002, s 22(2).

⁵ Proceeds of Crime Act 2002, s 22(4).

⁶ *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164. The House of Lords had previously left the question open (see *Re Maye* [2008] UKHL 9, [2008] 1 WLR 315 (Northern Ireland)).

⁷ Proceeds of Crime Act 2002, s 22 (3) requires the court to determine the value of the defendant's property (in accordance with section 9) at the time of the new calculation, thus after-acquired assets are plainly caught. See also [29] of *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164.

⁸ Proceeds of Crime Act 2002, s 22(3).

- (1) The court must take into account the legislative policy in favour of maximising the recovery of the proceeds of crime, even from legitimately acquired assets.⁹
- (2) An assessment of an amount which is "just" extends beyond what is just to a defendant. The word "just" means just in all the circumstances, bearing in mind that the purpose of such orders is the advancement of the public interest in confiscating the proceeds of crime.¹⁰
- (3) The court can take all relevant circumstances into account when deciding whether to make an order under section 22.¹¹ Relevant factors include, but are not limited to, the amount outstanding, the additional amount which might now be available for a further payment, the length of time since the original confiscation order was made, the impact on the defendant of any further payment contemplated and indeed any other consideration which might properly be thought to affect the justice of the case.¹²
- (4) Parliament opted to afford the court a discretion as to whether an order pursuant to section 22 should be made. This discretion operates a residual safeguard in respect of rehabilitation and fairness.¹³ The fact that a life of crime "has been abandoned"¹⁴ and "the available amounts may have been acquired by hard work in a legitimate enterprise does not preclude an order, although the court may take those matters into account."¹⁵
- (5) Judges determining applications under section 22 should assess carefully in each case the competing considerations in order to decide what course is truly just. In cases not involving a "windfall" gain the consideration should be particularly anxious.¹⁶

PERCEPTIONS OF THE CURRENT REGIME

Positive perceptions of the current regime

25.10 Some stakeholders, particularly police financial investigators, considered that the current regime is positive in that it:

- (1) Fulfils POCA 2002's key objective of requiring a defendant to repay a sum equivalent to his or her benefit from criminality.
- (2) Does not encourage the short-term hiding of assets. If assets cannot be realised pursuant to a confiscation order after a particular date, a defendant

⁹ *R v Padda* [2013] EWCA 2230, [2014] 1 WLR 1920 at [49].

¹⁰ *R v Mundy* [2018] EWCA Crim 105, [2018] 4 WLR 130.

¹¹ *R v Padda* [2013] EWCA 2230, [2014] 1 WLR 1920 at [49].

¹² *R v Padda*, above, at [45].

¹³ *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164 at [29].

¹⁴ *R v Bates* [2006] EWCA Crim 1015, [2007] 1 Cr App R (S) 2.

¹⁵ *R v Mundy* [2018] EWCA Crim 105, [2018] 4 WLR 130 at [29].

¹⁶ *R v John* [2014] EWCA Crim 1240, [2014] 2 Cr App R (S) 73.

may well seek to put his or her assets beyond the reach of the authorities until after that date.

- (3) Keeps the “pressure” on a defendant to satisfy his or her confiscation order.
- (4) Ensures fairness by giving the court discretion to make such uplifts as it considers “just”.

(1) Fulfilling POCA’s objectives

25.11 The role of uplift applications in fulfilling POCA 2002’s objectives was clearly summed up by the Court of Appeal in *R v Tivnan* (in the context of pre-POCA 2002 confiscation legislation relating to drug trafficking):

the confiscation legislation is...as has been repeatedly said previously by the courts, draconian. It is intended to strip those who deal in drugs of any possible profit from so doing, by depriving them of their realisable assets, whether or not these are the proceeds of drug trafficking, up to the amount by which they have benefited from drug dealing [...]

By [the means of an application for an uplift in the available amount] drug dealers can be deprived of their assets until they have disgorged an amount equivalent to all the benefit which has accrued to them from drug dealing.¹⁷

25.12 A good example of the strength of the uplift provisions is the case of *R v O’Flaherty*,¹⁸ in which the defendant was subject to two confiscation orders following separate convictions. In the first order, which made in 2010, the defendant’s benefit was £30,050 and his available amount was £5,135. In the second order, made in 2013, the defendant’s benefit was £27,556 and his available amount was £871. In 2016, the police identified a property which was registered in the defendant’s name. The Crown Court increased the available amount in respect of each confiscation order to take account of the defendant’s equity in that property. In respect of the 2010 confiscation order, the available amount was increased by more than £25,000. In respect of the 2013 confiscation order, the available amount was increased by more than £19,000. The increases meant that sufficient funds were now available to repay, in the case of the first confiscation order all, and in the case of the second confiscation order most, of the defendant’s proceeds of crime.

(2) Not encouraging the short-term hiding of assets

25.13 In Chapter 16 we note that a defendant might seek to hide assets at the time of confiscation to prevent those assets from being taken into consideration when the court is making a confiscation order. The absence of any ability for the court to revisit the available amount would have a number of related consequences:

¹⁷ *R v Tivnan* [1996] 1 Cr App R (S) 92, in the context of an application under the Criminal Justice (International Co-operation) Act 1990, s 16; *R v Griffin* [2009] EWCA Crim 569, [2009] 2 Cr App R (S) 89.

¹⁸ *R v O’Flaherty* [2018] EWCA Crim 2828.

- (1) a defendant might be further encouraged to hide assets for the duration of the confiscation proceedings thereby reducing the “available amount” at the time of the confiscation hearing;
- (2) if the available amount identified at the time of the confiscation hearing had been paid, the value of assets hidden until after confiscation could then only be recovered if separate civil proceedings were brought under Part 5 of POCA 2002. This would add to the time and cost in recovery;
- (3) assets that can be recovered under Part 5 must be related to criminal activity and could not comprise legitimate assets which could, however, be used to repay the defendant’s benefit;¹⁹
- (4) the benefit may therefore never be repaid despite the defendant having assets from which to do so and which are plain sight after the making of the confiscation order. This would undermine the key objective of POCA 2002 of ensuring that criminals disgorge (and are seen to be disgorging) their profits from crime.

(3) Keeping the “pressure” on a defendant to satisfy his or her confiscation order

25.14 Because the legislation is intended to lead to disgorgement of the whole of a defendant’s benefit from crime, there is no limitation of time on applications for “uplifts” of the “available amount”.²⁰ There is also no limit on the number of applications that can be made. Therefore, a defendant may be pursued until a confiscation order has been paid in full. It is arguable that the open-ended nature of enforcement is an incentive for a defendant to seek to satisfy their confiscation order in full as soon as possible.

(4) Permitting discretion to achieve a “just” result.

25.15 As we set out at earlier in this chapter, the courts have a broad discretion to achieve what is considered to be a “just” result in each case. In *R v Mundy*²¹ an application was made in May 2017 to increase the available amount (by about £30,000) of an order imposed in December 2008 (for approximately £172,000). In March 2009 the defendant had paid the original available amount (approximately £9,000) and had been released from custody in December 2010. The application was premised on an increase in value in the defendant’s property; money deposited in several bank accounts (including sums that the defendant stated were intended to pay his child’s university fees); and several modest vehicles, one of which the offender stated he used for work. It was accepted that the assets had been legitimately acquired. The judge refused the application, ruling that an uplift would not be just in light of “the circumstances in which [the defendant] acquired the various vehicles and also the circumstances and the use to which the savings which were gathered were to be put”. That decision was upheld in the Court of Appeal, which observed that the sums involved had been relatively modest.

¹⁹ Proceeds of Crime Act 2002, ss 298(2), 304, 303O, 303Z14.

²⁰ *R v Tivnan* [1996] 1 Cr App R (S) 92.

²¹ *R v Mundy* [2018] EWCA Crim 105, [2018] 4 WLR 130.

25.16 In *R v S*²² the defendant had operated as a Covert Human Intelligence Source from 2007 to 2014, during which time he had provided valuable assistance to the police. The Court of Appeal found that there was no reason in principle why the provision of assistance to the police could not be taken into account by a court in determining what a “just” uplift to a confiscation order should be pursuant to section 22.

Negative perceptions of the current regime

25.17 There were two negative perceptions of the current regime which were related to confiscation as part of the sentencing process.²³ In particular, it was perceived that the current regime for uplifts is incompatible with rehabilitation and the timescales for payment of fines and compensation orders.

25.18 Furthermore, the discretion which was seen as a positive factor in achieving a just result was also perceived to lead to the prospect of inconsistent results.

Incompatibility with rehabilitation

25.19 “Reform and rehabilitation” is an express purpose of sentencing.²⁴ However, during our pre-consultation discussions, stakeholders including defence practitioners repeatedly raised a perception that uplift applications fail to fulfil this purpose. The argument was summed up by Lord Wilson in *Re Peacock*:

It is unfair and counter-productive to increase the amount of a confiscation order by reference to [assets acquired after the making of the confiscation order]. This, it is said, would militate against his reform and rehabilitation and be likely to discourage him (once he has satisfied any initial confiscation order and been released from any sentence of imprisonment) from engaging in lawful and openly profitable employment. And, of course, the longer after conviction it is sought to confiscate after-acquired assets, the more unfair it may appear.²⁵

25.20 In *R v Padda*, the defendant had a confiscation order imposed on him in 2006. His benefit was found to be £156,226.74 and his available amount was found to be £9,520. In 2013 (over six years after the making of the confiscation order), that available amount was increased to £74,652.02. The whole of the increase came from the defendant’s legitimate earnings. Following his release from prison in 2009, the defendant began work, earning a monthly salary. Through his employment he learnt about credit hire and built up a range of contacts in the car hire business. In 2010 he set up his own business and in 2011 formed a limited company through which to conduct the business. In upholding the uplift, the Court of Appeal found that:

Of course, it is commendable that he has worked hard in an honest business and done well at it, and it shows the ability that he has, which I am sure will stand him in

²² *R v S* [2019] EWCA Crim 569, [2019] Crim LR 883.

²³ *Phillips v United Kingdom* App No 41087/98 (2001) 11 BHRC 280, [2001] Crim LR 817; *R v Rezvi* [2001] UKHL 1, [2003] 1 AC 1099; *R v Silcock* [2004] EWCA Crim 408, [2004] 2 Cr App R (S) 61; *R v May* [2005] EWCA Crim 97, [2005] 1 WLR 2902. A confiscation order is a sentence for the purposes of the Criminal Appeal Act 1968; s 50 of the Criminal Appeal Act 1968 was amended by s 456 Proceeds of Crime Act 2002, sch 11 para 4 (3).

²⁴ Criminal Justice Act 2003.

²⁵ *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164 at [26].

good stead in the future. But the fact that the court is now asked to look at earnings he has achieved through his own good work and business sense is not an answer to the application that the prosecution makes [for an uplift in the confiscation order].²⁶

25.21 In *Re Peacock* a similarly hard-line approach was taken. In 1997 the defendant was found to have benefited from drug-trafficking to the sum of £273,717.50. He was found to have assets available to him of just £823, and a confiscation order was made in that sum. Following his release from prison in 2000, the defendant went into the property business with his father and acquired very substantial further assets. In 2007 (some 10 years after the making of the confiscation order), an uplift was granted to the effect that the defendant now held realisable assets sufficient to repay the remainder of his benefit from drug trafficking. Accordingly, the confiscation order was uplifted to the full £273,717.50. Upholding the uplift in the Supreme Court, Lord Brown stated that:

As for the main argument, based on fairness and rehabilitation, naturally I recognise Parliament could have chosen a different policy with regard to after-acquired assets. But it seems to me perfectly understandable that in fact Parliament decided...to leave it open to the courts as a matter of discretion to mulct a defendant of his criminal gains on an ongoing basis irrespective of precisely how and when he came by any increased wealth.²⁷

Incompatibility with the treatment of fines and compensation orders

25.22 Financial orders connected to sentence must also be payable within a reasonable time. In *R v York* the Court of Appeal stated that “while a repayment period of two or three years in an exceptional case would not be open to criticism, in general, excessively long repayment periods should be avoided.”²⁸ In contrast, there is no limit on time placed on a confiscation order, which is also part of the sentencing process.²⁹

Discretion leading to inconsistent outcomes

25.23 As the Court of Appeal stated in *R v S*, the Crown Court’s discretion is broad one. The court “may” vary the order to make a new calculation of the available amount in such amount as the court “believes is just.”³⁰

25.24 In *R v Mundy*³¹ the conclusion of the Crown Court that it was not just to uplift a confiscation order to include legitimately obtained money led to criticism by the prosecution that the judge had not weighed competing factors appropriately. In *R v Padda*, the opposite conclusion of the Crown Court led to similar criticisms from the defence. Despite opposite conclusions being reached in each case, the Court of Appeal endorsed the Crown Court judge’s exercise of discretion on both occasions.

²⁶ *R v Padda* [2013] EWCA 2230, [2014] 1 WLR 1920.

²⁷ *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164 at [29].

²⁸ *R v York* [2018] EWCA Crim 2754, [2019] 4 WLR 13; As to 2 to 3 years being an appropriate period of time for a compensation order, see *R v Oliver* (1989) 11 Cr App R (S) 10, 15 per Lord Lane CJ.

²⁹ A further issue raised in connection with compensation and section 22 was that whilst an uplift to a confiscation order is available, there is no mechanism to review and increase a compensation order. We deal with this issue in chapter 24 on compensation.

³⁰ Proceeds of Crime Act 2002, s 22(4).

³¹ *R v Mundy* [2018] EWCA Crim 105, [2018] 4 WLR 130.

Financial investigators and lawyers to whom we spoke during our pre-consultation discussions reported that such a broad discretion which can lead to opposite outcomes does not promote certainty in how uplift applications should be approached or made.

ANALYSIS

25.25 Assets acquired after a confiscation order has been made may fall into two categories. Such assets may be “substituted assets”, obtained in the place of another asset. As Lord Walker explained in *Re Peacock*, substituted assets could arise, for example by “making changes in a portfolio of investments, or by remortgaging a house in order to pay the deposit on a second house, or by receiving cash on the surrender or maturity of a life policy”.³²

25.26 The concerns expressed during our pre-consultation discussions were not with such assets, but with “after-acquired property” in the sense of “property accruing to a person (whether as earnings or by gift, inheritance or some other windfall) without a corresponding diminution in that person’s existing assets”.³³

25.27 The extent to which a defendant might be pursued for such assets has been described by the House of Lords as an “important and difficult” question.³⁴

The passage of time and rehabilitation

Time limits

25.28 There is no limit on time on the number of applications that can be made pursuant to section 22 of POCA 2002. However, time limits apply to applications in connection with the recovery of assets elsewhere in POCA 2002.

25.29 Part 5 of POCA 2002 (which is outside the terms of reference of this project) created a new statutory scheme for the recovery in civil proceedings of property obtained through unlawful conduct. Unlike confiscation proceedings under Part 2, the powers are exercisable regardless of any criminal proceedings.

25.30 In criminal cases in England and Wales there is generally no limit of time on bringing a prosecution unless an offence is “summary only”.³⁵ By contrast, most civil causes of action are subject to limitation periods.³⁶ By way of illustration, a claim for negligence must usually be brought within six years.³⁷ The law is complex and subject to exceptions and caveats which are beyond the scope of this paper. The principles of limitation are to ensure that:

- (1) claimants have a fair and sufficient opportunity to pursue their remedy;

³² *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164 at [29].

³³ *Re Peacock (Secretary of State for the Home Department)*, above, at [35].

³⁴ *Re Maye* [2008] UKHL 9 at [24], WLR 315 at [24].

³⁵ Magistrates’ Courts Act 1980, s 127, which provides for a six month time limit.

³⁶ Limitation Act 1980.

³⁷ Limitation Act 1980, s 2; see caveats in s 11 to 14B.

- (2) defendants are entitled to be protected against stale claims; and
- (3) uncertainty in the law is to be avoided wherever possible.³⁸

25.31 POCA 2002 inserted into the Limitation Act 1980 a new provision (section 27A) which provides a special limitation regime for civil recovery proceedings under Part 5 of POCA 2002. Section 27A created a limitation period of 12 years (subsequently raised to 20 years)³⁹ which runs from the date on which the cause of action accrues. In cases of fraud, concealment or mistake the period of limitation does not begin to run until the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.⁴⁰

25.32 The absence of a time limit within which to make an application under Section 22 of POCA 2002 is also in stark contrast to applications for recalculation of a confiscation order pursuant to sections 19-21 of POCA 2002, which require any application to be made within six years of an offender's conviction. There are therefore limitation periods for some applications under POCA 2002.

25.33 Successful applications for civil recovery, or pursuant to Section 19, 20 or 21 will be likely to expose an offender to a greater total liability than was previously the case and thus a time limit is necessary. Conversely, an offender faced with an application pursuant to Section 22 is not at risk of their benefit figure being increased and will have always been aware that their liability is, in theory, for the amount of their benefit. An offender is therefore not in jeopardy of increased liability.⁴¹

The fixing of the amount of benefit is a signpost that the defendant will, without any express period of limitation, remain liable to have the amount which he is required to pay reassessed and increased, should hidden assets be discovered or after-acquired property come to light... it is not as though an entirely new confiscation order is made where there has been an increase under section 16 [now section 22] in the amount which might be realised. What appears to happen is that the new [available amount] figure is substituted in the original confiscation order...⁴²

25.34 The right to the conclusion of proceedings within a reasonable time, enshrined in article 6(1) of the European Convention on Human Rights applies to uplift applications.⁴³ However, lengthy periods of time between the confiscation order and the making of an uplift have been regularly upheld. In *R v O'Flaherty*,⁴⁴ the increase to the available amount was some six years after the making of the 2010 confiscation

³⁸ *The High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah* [2016] EWHC 1465 (Ch), [2016] WTLR 1763 at [102]; McGee, *Limitation Periods* (8th ed 2018) 1.047. See also *A'Court v Cross* 130 ER 540, (1825) 3 Bing 329.

³⁹ Policing and Crime Act 2009, s 62(1)(a).

⁴⁰ Limitation Act 1980, s 32.

⁴¹ In *re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164 at [26] - [28]. *Peacock* dealt with the position under the regime prior to POCA 2002 but the observations of the court appear to apply equally to POCA 2002.

⁴² *Re Sagar (Confiscation Order: Delay)* [2005] EWCA Civ 174, [2005] 1 WLR 2693 at [38] - [39].

⁴³ *Re Sagar (Confiscation Order: Delay)*, above.

⁴⁴ *R v O'Flaherty* [2018] EWCA Crim 2828.

order. A similar six year period had elapsed in *R v Padda*.⁴⁵ In *Re Peacock* the Supreme Court upheld an uplift made ten years after the making of a confiscation order.⁴⁶

Rehabilitation of offenders

25.35 The ability to order continued enforcement of a confiscation order many years after any criminality is arguably incompatible with the principles connected with the rehabilitation of offenders.

25.36 The law on rehabilitation of offenders is contained primarily in the Rehabilitation of Offenders Act 1974. The purpose of the Act is summed up by the Ministry of Justice guidance to the Act:

The Rehabilitation of Offenders Act 1974 (“1974 Act”) primarily exists to support the rehabilitation into employment of reformed offenders who have stayed on the right side of the law.

Under the 1974 Act, following a specified period of time which varies according to the disposal administered or sentence passed, cautions and convictions (except those resulting in prison sentences of over four years and all public protection sentences) may become spent. As a result, the offender is regarded as rehabilitated.

For most purposes the 1974 Act treats a rehabilitated person as if he or she had never committed, or been charged with charged [sic] or prosecuted for or convicted of or sentenced for the offence and, as such, they are not required to declare their spent caution(s) or conviction(s), for example, when applying for most jobs or insurance, some educational courses and housing applications.⁴⁷

25.37 Periods after which convictions are deemed to be “spent” are set out in section 5 of the Rehabilitation of Offenders Act 1974:

Sentence	End of rehabilitation period for adult offenders	End of rehabilitation period for offenders under 18 at date of conviction
A custodial sentence of more than 30 months and up to, or consisting of, 48 months	The end of the period of 7 years beginning with the day on which the sentence (including any licence period) is completed	The end of the period of 42 months beginning with the day on which the sentence (including any licence period) is completed

⁴⁵ *R v Padda* [2013] EWCA 2230, [2014] 1 WLR 1920.

⁴⁶ *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164.

⁴⁷ Ministry of Justice, *New Guidance on the Rehabilitation of Offenders Act 1974* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299916/rehabilitation-of-offenders-guidance.pdf (last visited September 2020).

Sentence	<i>End of rehabilitation period for adult offenders</i>	<i>End of rehabilitation period for offenders under 18 at date of conviction</i>
A custodial sentence of more than 6 months and up to, or consisting of, 30 months	The end of the period of 48 months beginning with the day on which the sentence (including any licence period) is completed	The end of the period of 24 months beginning with the day on which the sentence (including any licence period) is completed
A custodial sentence of 6 months or less	The end of the period of 24 months beginning with the day on which the sentence (including any licence period) is completed	The end of the period of 18 months beginning with the day on which the sentence (including any licence period) is completed
Removal from Her Majesty's service	The end of the period of 12 months beginning with the date of the conviction in respect of which the sentence is imposed	The end of the period of 6 months beginning with the date of the conviction in respect of which the sentence is imposed
A sentence of service detention	The end of the period of 12 months beginning with the day on which the sentence is completed	The end of the period of 6 months beginning with the day on which the sentence is completed
A fine	The end of the period of 12 months beginning with the date of the conviction in respect of which the sentence is imposed	The end of the period of 6 months beginning with the date of the conviction in respect of which the sentence is imposed
A compensation order	The date on which the payment is made in full	The date on which the payment is made in full
A community or youth rehabilitation order	The end of the period of 12 months beginning with the day provided for by or under the order as the last day on which the order is to have effect	The end of the period of 6 months beginning with the day provided for by or under the order as the last day on which the order is to have effect
A relevant order	The day provided for by or under the order as the last day on which the order is to have effect	The day provided for by or under the order as the last day on which the order is to have effect]

25.38 If a person fails to pay “a fine or other sum adjudged to be paid by or imposed on a conviction” he or she is nevertheless considered to be rehabilitated at the end of the

rehabilitation period.⁴⁸ However, failure to pay the amount adjudged payable pursuant to a confiscation order will not permit a defendant to be treated as rehabilitated. This is effectively an enforcement tool, in that a defendant cannot be treated as rehabilitated whilst the “available amount” remains unpaid.⁴⁹

25.39 A person who has served their sentence and paid their confiscation order as ordered by the Crown Court (assuming it is a sentence of less than four years’ imprisonment) will be considered a rehabilitated person as a matter of law after the passage of the rehabilitation period. That person may have also shown all of the signs of rehabilitation as a matter of fact, such as establishing a legitimate career (as in *R v Padda* and *R v Peacock*). The ability to make an uplift application in relation to such a person therefore creates a paradox. Section 22 is seen by law enforcement agencies as a mechanism to keep pressure on “criminals” despite the law now recognising these same people as rehabilitated persons. As one financial investigator put it, section 22 enables them to “keep the boot on the neck of criminals” indefinitely.

PROVISIONAL PROPOSALS

25.40 In order to balance removal of the proceeds of crime and rehabilitation we first consider a number of ways in which applications for uplifts of the available amount could be restricted. In particular we consider:

- (1) time limits derived from the Rehabilitation of Offenders Act 1974;
- (2) a single time limit;
- (3) excluding after-acquired assets.

25.41 We then go on to consider whether (4) providing the court with indicative factors for the exercise of its discretion or (5) permitting payment of any uplift by instalments would assist in striking the appropriate balance.

Restricting applications for uplifts to the available amount

Time limits derived from the Rehabilitation of Offenders Act 1974

25.42 A limitation of time would go some way to redressing the balance towards rehabilitation. Adopting the time periods in the Rehabilitation of Offenders Act 1974 is superficially attractive. The periods prescribed in the 1974 Act provide a helpful starting point. However, they do not provide a complete answer. Many cases in which uplifts were considered, including *R v Padda*, *R v S*, *R v Mundy* and *R v Robinson* would effectively have no limitation period because the substantive sentence imposed in those cases was longer than 48 months. The problems identified earlier in this chapter with regards to rehabilitation would therefore not be addressed.

25.43 The rehabilitation period when the sentence is a fine is 12 months after the date on which conviction is imposed. Given that confiscation orders may take some time to deal with after imposing conviction, any uplift period may be very short. Taking this

⁴⁸ Rehabilitation of Offenders Act 1974, s 1(2)(a).

⁴⁹ Rehabilitation of Offenders Act 1974, s 1(2B) inserted by the Proceeds of Crime Act 2002, s 456 and sch 11, see Proceeds of Crime Act 2002, explanatory notes para 651.

point to its logical conclusion, linking limitation to the rehabilitation periods may encourage delay in confiscation applications to avoid uplift proceedings. It may also encourage a tactical approach to sentencing to avoid such applications. Therefore, we do not propose a limitation of time based on the periods laid down by the Rehabilitation of Offenders Act 1974.

A single time limit

25.44 An alternative approach would be to adopt a single limitation period for all offences. This would have the merit of simplicity and certainty in that every offender would be treated in the same way.

25.45 We do not consider that, if such an approach were to be adopted, the 20 year limitation period in civil proceedings under POCA 2002 would be appropriate. The aim of rehabilitation would be undermined if such a significant proportion of a person's life was spent living with the potential to have a confiscation order revisited regardless of the circumstances.

25.46 Another possibility would be the six year limitation period adopted in sections 19 to 21, which would have the advantage of consistency. Sections 19 to 21 deal with situations in which further evidence comes to light after the initial consideration of confiscation that was not available at the earlier time. Such information may well have been hidden from the authorities. In such cases, there is ample justification for permitting the court to revisit the issue of the making of the confiscation order.⁵⁰

25.47 Arguably, there should be no limitation of time upon revisiting a confiscation order in any circumstance where a defendant has sought to hide information from the authorities to thwart the purpose of a confiscation enquiry. However, the six year limitation period is a pragmatic one. In each of sections 19 to 21 the court will reconsider a defendant's "benefit". In examining benefit, the court must have the ability to consider the defendant's conduct and assets from a point in the past. As we observe in Chapter 13 on the criminal lifestyle assumptions, six years represents the limitation period for bringing civil claims for negligence⁵¹ and many organisations keep relevant documents for such a period. A limitation period of six years therefore assists the court in having all pertinent information before it by reducing the likelihood that documents will have been destroyed prior to confiscation.

25.48 A six year limitation period in connection with uplift applications is arguably unnecessary because reconsideration of the available amount does not require the court to look backwards to a point in the past. Rather, it involves analysis of the defendant's current assets. Issues as to the length of document retention are therefore less pertinent.

25.49 A "one size fits all" six year limitation period is also not reflective of when a defendant is deemed to have been rehabilitated under the Rehabilitation of Offenders Act 1974.

⁵⁰ On the contrary, a court may be justified in refusing to revisit the confiscation decision if information could have been reasonably obtained at the time of the confiscation order, but was not – see R Fortson QC, *Misuse of Drugs and Drug Trafficking Offences* (6th ed 2012) p 13-243.

⁵¹ Limitation Act 1980, s 2.

25.50 It is notable that a six year limitation period is unlikely to address the issue of rehabilitation in any event. In *Re Peacock and R v Padda* the uplifts occurred just over six years after the making of the confiscation order, with gains being made within the six year period. In *O'Flaherty* the uplift to one of the defendant's two confiscation orders occurred three years after it was made.

25.51 Furthermore, a six year limitation period is generally incompatible with the period within which the courts anticipate that any fine and compensation order imposed should be payable, which is ordinarily no longer than two to three years.⁵²

25.52 A limitation period may also encourage the hiding of assets until the expiry of that period. There is therefore no easy answer to regulating uplift applications on the basis of a single limitation of time, and we do not provisionally propose introducing such a time limit on applications.

Conditional limitation period

25.53 There is clearly a good public policy rationale behind not imposing a time limit where a defendant has hidden his or her assets. However, it is arguable that there should be a time limit where the prosecution could have discovered the existence of a defendant's assets and brought an application for an uplift with the exercise of reasonable diligence.

25.54 Such a time limit would have advantages in that:

- (1) On its face, where assets are hidden, there can be little argument that the prosecution should have discovered them, and so the time limit would not apply. Therefore, a defendant would not benefit from hiding his or her assets.
- (2) The prosecution is encouraged to exercise all reasonable diligence and expedition in seeking to enforce the confiscation order.

25.55 However, on closer analysis such a time limit is not straightforward. A defendant who hides his or her assets may seek to argue that assets which were alleged to be "hidden" were in fact hiding in plain sight and therefore discoverable with reasonable diligence, for example through a credit check or through making enquiries with authorities in an overseas jurisdiction connected to the defendant.

25.56 It is arguable that such a time limit places a continuing onus on the prosecution authorities to keep a defendant's asset position under review until the defendant's benefit is repaid in full in every case. This is potentially costly and time consuming and has the potential to distract from a focus on cases in which assets are known to be available and which can be recovered.

25.57 In Chapter 22, we provisionally propose that

- (1) when a defendant no longer has assets available to him or her which can be realised to satisfy a confiscation order, that order may be put into abeyance, and no further enforcement action may be taken without leave of the court. We

⁵² *R v York* [2018] EWCA Crim 2754, [2019] 4 WLR 13; *R v Oliver* (1989) 11 Cr App R (S) 10 at p 15, per Lord Lane CJ.

make that proposal in order to provide a degree of certainty to all parties and to ensure that the focus of the courts and authorities is on orders where there are assets that can be realised;

- (2) When an order is in abeyance, the defendant should be required to periodically provide information to the courts and the authorities about his or her assets.

25.58 We consider that these provisional proposals would be confused by a requirement that shifts the onus onto the prosecution to continue to exercise all due diligence in looking for assets from which the benefit figure could be repaid.

25.59 Furthermore, a “hard-edged” requirement that the prosecution should act with all due diligence may preclude an uplift being sought in cases where the court might otherwise consider the uplift to be just. For example, although the prosecution may not have acted with all due diligence, there may be victims who would be left uncompensated if an uplift application was refused.

25.60 We therefore do not provisionally propose the creation of a conditional limitation period.

Exclusion of after-acquired assets

25.61 An alternative approach would be to exclude after-acquired assets from any uplift application and limit the application to assets which were not considered at the time that the original confiscation order was made because the defendant failed to disclose them.

25.62 Such an approach has a number of attractions:

- (1) Finality in the making of the confiscation order is promoted.
- (2) Such finality encourages rehabilitation because a defendant can invest in a business, trade or occupation and benefit from it without having to consider whether income and investments will be diverted to pay the confiscation order.
- (3) Co-operation in the making of the confiscation order is encouraged if disclosing assets at the time of confiscation will preclude an uplift application in connection with that asset.

25.63 However, such an approach is also potentially subject to criticism, in that it does not fully reflect the purpose of POCA 2002, which is to deprive a defendant of the benefit of his or her criminal conduct. In *Re Peacock*, on the making of the confiscation order the defendant was ordered to disgorge just £823 of a £273,000 confiscation order (0.3% of the defendant’s benefit from crime). The subsequent uplift, albeit 10 years after the confiscation order, required the defendant to account for the remaining 99.7% of the order.

25.64 A blanket limitation on after-acquired assets also raises evidential issues. If an asset comes to light after the making of a confiscation order, it is easy to see that arguments might be raised about the date of acquisition of the asset. Therefore, we do not provisionally propose excluding after-acquired assets from uplift applications.

Provision of Indicative factors

25.65 Having rejected restrictions as a preferred approach to regulating uplift applications, we now consider whether giving the courts greater guidance would be appropriate.

25.66 In exercising its discretion to achieve a “just” outcome in each case, the courts have identified a number of indicative factors which could influence the court’s exercise of its discretion, including:

- (1) the legislative policy in favour of maximising the recovery of the proceeds of crime, even from legitimately acquired assets;⁵³
- (2) the abandonment of a previous life of crime;
- (3) the defendant’s conduct after the offending;
- (4) the passage of time;
- (5) exceptional hardship that may be suffered;⁵⁴ and
- (6) assistance provided to the authorities.⁵⁵

25.67 In *R v Bates* the Court of Appeal declined to lay down definitive guidance because “there may be all sorts of circumstances to which a judge can properly have regard, or other matters which he rejects as being of little or no significance. Everything will depend on the circumstances of the case”.⁵⁶

25.68 In the absence of clear guidance, the court has fallen back on what is perceived to be Parliament’s objective in enacting the confiscation regime in POCA 2002, and arguments have often centred around the extent to which maximising the recovery of assets should be furthered. As can be seen in Chapter 5, we consider that depriving a defendant of his or her benefit from criminal conduct should be a legislative priority. Deterrence is also a legislative priority and we consider that deterrence can be achieved in a number of different ways. The bluntest way is to send out a message that a defendant will be pursued indefinitely in relation to a confiscation order. A subtler way is to send out a dual message that recognises:

- (1) that a defendant could be pursued indefinitely for his or her proceeds of crime; and
- (2) that deterrence can also be achieved by encouraging the pursuit of a legitimate lifestyle.

25.69 We consider that a greater balance in the legislative priorities could be achieved through a provision setting out indicative factors. We consider that such a provision

⁵³ *R v Padda* [2013] EWCA Crim 2330, [2014] 1 WLR 1920.

⁵⁴ Points 1 to 4 are taken from *R v Bates* [2006] EWCA Crim 1015, [2007] 1 Cr App R (S) 2.

⁵⁵ *R v S* [2019] EWCA Crim 569, [2019] Crim LR 883.

⁵⁶ *R v Bates* [2006] EWCA Crim 1015, [2007] 1 Cr App R (S) 2 at [13]. See also *R v Padda* [2013] EWCA Crim 2330, [2014] 1 WLR 1920 at [49].

should provide that, in considering what is “just”, the court should weigh factors including the legislative priorities set out in Chapter 5:

- (1) depriving a defendant of his or her benefit from criminal conduct;
- (2) any need to compensate victims from confiscated funds;
- (3) deterrence from criminality by encouraging the pursuit of a legitimate lifestyle;
- (4) disruption of criminality, whether through assistance provided to the authorities or otherwise.

25.70 We consider that hard-edged rules or guidance about how to weigh up those factors would hinder the discretion of the court to achieve what it considers to be a “just” result on the facts of the case. However, we consider that the explicit recognition of the relevance of rehabilitation to the exercise of judicial discretion is desirable, for the reasons we explained above.

Undue hardship

25.71 One of the factors considered in *R v Bates* was that of “exceptional hardship”. In Chapter 21 on contingent orders we discuss the issue of a test of “undue hardship”. As we observed in that chapter, in New Zealand, the High Court may exclude property from a profit forfeiture order if “having regard to all of the circumstances” the court considers that “undue hardship is reasonably likely to be caused to the respondent.”⁵⁷ The Act provides a non-exhaustive list of factors to which the court may have regard, including:

- (1) the use ordinarily made, or intended to be made, of the property;
- (2) the nature and extent of the respondent’s interest in the property; and
- (3) the circumstances of the significant criminal activity to which the profit forfeiture order relates.

25.72 In Scotland, section 98 of POCA 2002 makes provision about the disposal of a family home to satisfy a confiscation order. Section 98 applies where a confiscation order has been made and the prosecutor has not satisfied the court that the person’s interest in his family home has been acquired as a benefit from his criminal conduct.

25.73 Before disposing of any right or interest in the person’s family home the administrator must obtain consent to do so from the person who holds the right or interest, or apply to the court for authority to carry out the disposal. The court must have regard to all the circumstance of the case including:

- (1) the needs and financial resources of the spouse or former spouse of the person concerned;
- (2) the needs and financial resources of any child of the family; and

⁵⁷ Criminal Proceeds Recovery Act 2009 (NZ), s 56(1).

- (3) the length of the period during which the family home has been used as a residence by a spouse, former spouse or child of the family.

25.74 We consider that similar factors in connection with hardship should also be considered by the court in deciding whether to grant an uplift to a confiscation order.

Diligence by the prosecution

25.75 Earlier in the chapter we set out why we considered that there should not be a hard-edged limitation period based on the diligence of the prosecution in identifying assets seeking an application for an uplift. Nevertheless, such diligence may be a factor that is relevant to determining whether it is just to order an uplift. For example, where a prosecution authority knew of the defendant's assets for years and yet took no action, and the defendant has since moved away from crime and into a legitimate career, the court may consider that justice favours not granting the uplift.

25.76 We therefore provisionally propose that the diligence of the prosecution in making an uplift application should be a factor to be considered by the court in deciding whether to grant an uplift to a confiscation order.

Payment by instalments

25.77 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. There is no mechanism to permit this under section 22.

25.78 Payment by instalments could soften any issue of rehabilitation or hardship by not requiring repayment in a lump sum. 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.

25.79 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. A power to make attachment of earnings orders is already in existence under schedule 5 of the Courts Act 2003 and such a power could facilitate payment in instalments.

CONSULTATION QUESTIONS

Prescribed restrictions on uplift applications

25.80 Whilst we do not consider that there should be restrictions on uplift applications 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; or
- (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 welcome consultees' views about whether prescribed restrictions on uplift applications would be appropriate, and if so, what such restrictions should be.

Consultation Question 84.

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

25.82 If so, what should such restrictions be?

A statutory list of indicative factors

Consultation Question 85.

25.83 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, including:

- (1) the legislative priorities of
 - (a) depriving a defendant of his or her benefit from criminal conduct;
 - (b) any need to compensate victims from confiscated funds;
 - (c) deterrence from criminality by encouraging the pursuit of a legitimate lifestyle;
 - (d) disruption of criminality, whether through assistance provided to the authorities or otherwise.
- (2) Undue hardship that would be caused through the granting of the uplift.
- (3) Diligence of the prosecution in applying for an uplift.

25.84 In weighing up undue hardship, we provisionally propose that the court should consider factors including:

- (1) The use ordinarily made, or intended to be made, of the property; and
- (2) The nature and extent of the defendant's interest in the property.

25.85 Do consultees agree?

Consultation Question 86.

25.86 We provisionally propose that, when an uplift is determined, the court may order that an uplifted available amount be paid either:

- (1) by a specified deadline;
- (2) in instalments.

25.87 Do consultees agree?

Other reconsideration provisions

25.88 As we discussed at the outset of the chapter, reconsideration may be sought in a variety of circumstances. However, we have only addressed uplift applications because they were the exclusive focus of concerns raised by stakeholders. We invite consultees to submit their views about problems with any of the other reconsideration provisions in Part 2 of POCA 2002

Consultation Question 87.

25.89 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

INTRODUCTION TO PART 9

A confiscation order is intended, ultimately, to require a defendant to account for his or her benefit from crime. If, by the time of confiscation, the defendant has little to no assets from which to repay that benefit, the ability to hold the defendant to account is diminished. A priority of the courts and of law enforcement agencies must be to ensure that as much of the proceeds of crime as possible (or the equivalent value) is available when a confiscation order is ultimately made.¹

There may be many reasons why assets from which a confiscation order might be paid might otherwise be dissipated. A defendant might move assets in an attempt to hide them from the police.² Alternatively, the defendant or the recipient of a gift which was bought with the proceeds of crime, might dispose of an asset as part of everyday living.³ Defendants may also re-invest funds into further criminal enterprises.⁴ Alternatively, money may be gambled away or invested in property.⁵ The defendant's assets might also have diminished in value. Those assets might include perishable goods and vehicles, for example.

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.⁶ 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:

- In Chapter 26 we consider restraint orders, which are used to prevent a person from disposing of or diminishing the value of assets.
- In Chapter 27 we consider other steps that can be taken to prevent the diminution of the value of assets, whether or not subject to a restraint order, sometimes

¹ Proceeds of Crime Act 2002, s 69.

² See *R v Mehta* [2009] EWCA Crim 1601 at [14]; *R v Patel* [2014] EWCA Crim 995; compare *R (Mills) v Sussex Police* [2014] EWHC 2523 (Admin), [2015] 1 WLR 2199 where it was alleged that there was positive misrepresentation that property was not included in a restraint order because of deliberate concealment from the police. The court rejected the argument about positive misrepresentation, limiting its findings to material non-disclosure.

³ *R v AW* [2010] EWCA Crim 3123; *R v Shepherd* [2012] EWCA Crim 1716; *Re Ali* [2012] EWHC 2302 (Admin), [2013] 1 FLR 1061; *Ready Rentals Ltd v Ahmed* [2016] EWHC 1996 (Ch), [2017] Lloyd's Rep FC 30.

⁴ *R v Green* [2008] UKHL 30, [2008] 1 AC 1053.

⁵ *R v Morgan* [2008] EWCA Crim 1323, [2009] 1 Cr App R (S) 60 at [31(a)]; see also *R v Lee* [2012] EWCA Crim 954; *R v Panesar* [2008] EWCA Crim 1643.

⁶ United Nations Office on Drugs and Crime, *Effective management and disposal of seized and confiscated assets* (2017) p 8.

referred to as “asset management” measures.⁷ These measures include seizing and detaining assets and the appointment of a receiver.

Finally, in Chapter 28 we consider whether specific reforms of the confiscation regime are required to deal with cryptoassets, given that such assets have only emerged as a type of property since POCA 2002 was enacted.

⁷ United Nations Office on Drugs and Crime, *Effective management and disposal of seized and confiscated assets* (2017).

Chapter 26: Restraint Orders

INTRODUCTION

- 26.1 A restraint order operates to preserve assets at any stage after a criminal investigation has commenced.¹ If there are reasonable grounds to suspect that an alleged offender has benefited from his criminal conduct, a prosecutor can apply for an order to prevent a suspect² from dissipating his or her assets so that any subsequent confiscation order stands a much better chance of being satisfied.
- 26.2 In *Jennings v CPS*³ Lord Justice Laws observed that:
- At the restraint order stage the court makes no final decision as to the defendant's "benefit" or "realisable property". It is concerned only... to make a protective order so that in the particular case the satisfaction or fulfilment of any confiscation order made or to be made will be efficacious.
- 26.3 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. On average, criminal cases that were heard before the Crown Court in the first six months of 2018 were concluded 253 days after the offence was committed.⁴
- 26.4 Further, the confiscation process itself can be lengthy. If a court makes an order for disclosure pursuant to section 18 of the Proceeds of Crime Act 2002, the offender has an obligation to disclose details of his or her assets to the court. The investigation of an offender's finances by a specialist financial investigator may also be required. Delays may be encountered in complex cases, for example where assets are proving difficult to trace. Section 14 of the Proceeds of Crime Act 2002 ("POCA 2002") permits postponement of the confiscation hearing for up to 2 years after the date of conviction, and even beyond 2 years after the date of conviction in exceptional circumstances to allow for such eventualities.
- 26.5 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

¹ Proceeds of Crime Act 2002, ss 40(2) and 88(2).

² Or a person in receipt of a tainted gift, see Proceeds of Crime Act 2002, s 83. A restraint order is an order to any specified person, prohibiting them (in some way) from dealing with any property under their control and in which a defendant or recipient of a tainted gift has an interest; Proceeds of Crime Act 2002, s 41(1).

³ *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182.

⁴ See Ministry of Justice, *Criminal Courts Timeliness*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/743862/timeliness-transparency-april-june-2018.csv (last visited December 2018).

opportunity to spend their criminal gains is also likely to undermine any potential deterrent effect that a confiscation order could have.⁵

- 26.6 A restraint order also constitutes a considerable interference with affected parties and their powers over property. Because restraint orders are protective, they may be granted over a suspect's assets prior to guilt being determined. The suspect may ultimately be not guilty. Similarly, property in the hands of third parties may be alleged to be tainted by criminality, but it may transpire that the property was legitimately funded.⁶ As the Court of Appeal observed in *Director of the Serious Fraud Office v A*:

A restraint order is a far-reaching order. Although it takes away no property or assets from the person under investigation, and is by definition temporary in application, it prevents him from using the frozen property in any way until the criminal investigation and any ensuing prosecution is over. That may restrict him considerably in what he can do by way of business or private activity. If it turns out that the person is not shown to be guilty of crime, he may in the meantime have lost a good deal because of restrictions put upon him by the order...The restriction of a restraint order may sometimes last for a long time.⁷

- 26.7 Any restraint regime must therefore be proportionate⁸ in order to protect those subject to an application from unwarranted deprivation of assets.⁹
- 26.8 Following Mr Justice Hodgson's recommendations in 1984,¹⁰ confiscation legislation has from the outset¹¹ provided for restraint orders. The restraint order provisions are now found in sections 40 to 47 of POCA 2002.
- 26.9 In this chapter, we examine the current law on restraint and the issues that arise in practice. We will go on to consider the preliminary views of those working within the confiscation regime on the effectiveness of the current process. We then analyse how the restraint might be made both more effective and proportionate. We conclude this chapter by outlining our provisional proposals on restraint and seeking consultees' views on them.

⁵ See Chapter 5.

⁶ See Chapter 17.

⁷ *Director of the Serious Fraud Office v A* [2007] EWCA Crim 1927, [2008] Lloyds Rep FC 30.

⁸ For a full discussion of "proportionality" and how the term has been applied in confiscation, see Chapter 5.

⁹ See article 1, protocol No 1 of the European Convention on Human Rights. For a state interference to be deemed compatible with article 1 of protocol No 1, the interference must fulfil certain criteria: it must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (*Beyeler v. Italy* [GC], §§ 108-114). See *Raimondo v Italy* (1994) 18 EHRR 327, *AP v CPS* [2007] EWCA Crim 3128, [2008] 1 Cr App R 39; *Re S (Release of Assets for Legal Representation)* [2004] EWCA Crim 2374.

¹⁰ Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 154.

¹¹ Drug Trafficking Offences Act 1986, s 8; Criminal Justice Act 1988, s 77; Drug Trafficking Act 1994, s 26. For a summary of the evolution of the restraint order regime, see *Jennings v CPS* [2008] UKHL 29, [2008] 1 AC 1046 at [9].

THE CURRENT LAW

26.10 POCA 2002, like the legislation that preceded it,¹² permits the granting of a restraint order at any time after the commencement of a criminal investigation.

26.11 There are several pre-requisites before restraint can occur depending on the stage that the investigation or proceedings have reached. In the next section we examine the position at the pre- and post-charge stages.

26.12 A restraint order may be granted if one of the conditions in section 40 of POCA 2002 is met. A restraint order may be obtained at any one of a number of stages during the course of a criminal case. The two situations that are arguably of greatest pertinence in everyday application are that either:

- (1) *a criminal investigation* has been started in England and Wales with regard to an offence,¹³ or
- (2) *proceedings for an offence* have been started in England and Wales and not concluded.¹⁴

Restraint at the stage of pre-charge criminal investigation

Threshold for restraint

26.13 Prior to the Serious Crime Act 2015, the threshold for restraint at the pre-charge investigation stage of a case was whether there was “reasonable cause to believe” that a defendant had benefited from criminal conduct.¹⁵ The Joint Committee on Human Rights, in its pre-legislative scrutiny of the Serious Crime Act observed that:

The operational experience of the CPS is that...at the early stage of the investigation it is very hard to prove reasonable belief because there is often insufficient evidence at that stage. Delaying the obtaining of a restraint order until sufficient evidence is available to meet the reasonable cause to believe test can give suspects the opportunity to dissipate or hide their assets and so protect them from seizure.¹⁶

26.14 In 2013 the Government’s Serious and Organised Crime Strategy included a recognition that such criminality could be tackled more effectively by “enabling assets to be frozen more quickly and earlier in investigations”.¹⁷ The Serious Crime Act 2015

¹² Drug Trafficking Offences Act 1986, s 8; Criminal Justice Act 1988, s 77; Drug Trafficking Act 1994, s 26.

¹³ Proceeds of Crime Act 2002, s 40(2)(a).

¹⁴ Proceeds of Crime Act 2002, s 40(3)(a). Proceedings are started when a summons is issued or a defendant is charged (see Proceeds of Crime Act 2002, s 85).

¹⁵ Serious Crime Act 2015, s 11, amending the Proceeds of Crime Act 2002, s 40(2)(b).

¹⁶ Joint Committee on Human Rights, *Legislative Scrutiny: (1) Serious Crime Bill, (2) Criminal Justice and Courts Bill (Second Report), (3) Armed Forces (Service Complaints and Financial Assistance) Bill* (2014-15) HL Paper 49 HC 746, para 1.12.

¹⁷ Home Office, *Serious and Organised Crime Strategy* (Oct 2013) para 4.49.

sought to give effect to this strategy by lowering the threshold to one of “reasonable grounds to suspect” that an alleged offender has benefited from criminal conduct.¹⁸

- 26.15 A test of reasonable grounds to suspect also aligned the test for restraint with the test for arrest,¹⁹ meaning that a restraint order could be more readily obtained for service at the time of arrest. Serving the restraint order at the same time that a suspect discovers he is under investigation deprives him or her of the opportunity to dispose of assets in the intervening period that would otherwise arise between the arrest and the grant of the restraint order.²⁰

Reporting Requirement

- 26.16 The lower threshold for restraint was tempered by an accompanying statutory requirement for the progress of the investigation to be monitored by the court with a view to discharging the order if proceedings are not instituted within a reasonable time.²¹ Although the court previously had the power to discharge an order should proceedings not be started within a reasonable time,²² there was no formal framework for continued oversight of progress by the court.²³
- 26.17 The applicant for a restraint order at the investigation stage must be required to report to the court on the progress of the investigation at such times and in such manner as the order may specify.²⁴ Although reporting requirements are couched in mandatory terms, the court may disapply the requirement in the circumstances of an individual case.²⁵ For example, the court may dispense with a reporting requirement if “the law enforcement agency has informed the court that the suspect is to be arrested and charged within a short period”.²⁶ The court must give reasons for disapplying the reporting requirement,²⁷ and may at any time (on application or of its own motion) vary the order so as to include a reporting requirement.²⁸

Restraint after “proceedings have started”.

- 26.18 A restraint order may also be granted if “proceedings for an offence have been started in England and Wales and not concluded”.²⁹ Generally, proceedings are deemed to have started upon a person being charged or upon a summons being issued.³⁰ If a

¹⁸ Proceeds of Crime Act 2002, s 40(2)(b).

¹⁹ Police and Criminal Evidence Act 1984, s 24.

²⁰ Serious Crime Act 2015, explanatory note 67.

²¹ Serious Crime Act 2015, s 11(2) which inserted s 41(7A) to (7C) into the Proceeds of Crime Act 2002.

²² Proceeds of Crime Act 2002, s 42(7).

²³ Serious Crime Act 2015, explanatory note 67.

²⁴ Proceeds of Crime Act 2002, s 41(7B)(a); inserted by Serious Crime Act 2015, s 11(2).

²⁵ Proceeds of Crime Act 2002, s 41(7C); inserted by Serious Crime Act 2015, s 11(2).

²⁶ Serious Crime Act 2015, explanatory note 68.

²⁷ Proceeds of Crime Act 2002, s 41(7C)(a); inserted by Serious Crime Act 2015, s 11(2).

²⁸ Proceeds of Crime Act 2002, s 41(7C)(b); inserted by Serious Crime Act 2015, s 11(2).

²⁹ Proceeds of Crime Act 2002, s 40(3)(a).

³⁰ Proceeds of Crime Act 2002, s 85(1).

confiscation order is made, proceedings will only be treated as concluded once the order is satisfied, discharged or quashed without further possibility of appeal.³¹

- 26.19 Unlike pre-charge restraint, the threshold that a person has benefited from criminal conduct at the post-charge stage remains one of “reasonable cause to believe”.³² A defendant will only be charged when there is sufficient evidence to do so,³³ which necessarily requires adequate investigation into criminal conduct to have been carried out. Essentially, the court is asked to determine whether “on the available evidence it is more likely than not that the defendant has benefited from criminal conduct”.³⁴

The “risk of dissipation” test.

- 26.20 Even if a prosecution authority is able to satisfy the statutory test for the granting of restraint pre-charge or after proceedings have been commenced, the courts have introduced an additional test that must be satisfied before a restraint order can be granted. The additional test was summed up by Lord Justice Moses in the case of *R v B*:

There can be no justification for such a restraint unless the prosecution establish that there is a real risk that assets will be dissipated which might otherwise meet a confiscation order.³⁵

- 26.21 The rationale for this test begins with a person’s right to property. “It is beyond dispute”³⁶ that a restraint order interferes with the right to peaceful enjoyment of property, enshrined in article 1 of the first protocol to the European Convention on Human Rights. Therefore, a restraint order must only interfere with the right to peaceful enjoyment of property to the extent that such interference is necessary.³⁷
- 26.22 The extent to which interference with a property right through restraint is necessary has been inferred by the courts³⁸ through consideration of what has become known as the “*legislative steer*”³⁹ in confiscation legislation. Currently found in section 69(2)(a) of *POCA 2002*, it provides that the powers to make a restraint order must be exercised with a view to the value of property being made available to satisfy any confiscation order. A property right should therefore only be interfered with to the extent that it is necessary to do so in order to preserve the value of assets for confiscation.⁴⁰ The courts have reasoned that if there is no real risk to the value of assets, then any

³¹ Proceeds of Crime Act 2002, s 85(5).

³² Proceeds of Crime Act 2002, s 40(3)(b).

³³ See for example the Crown Prosecution Service, *Code for Crown Prosecutors* (2018), paras 4.6 to 4.8.

³⁴ Serious Crime Act 2015, explanatory note 67.

³⁵ *R v B* [2008] EWCA Crim 1374 at [9], citing *Jennings v CPS* [2005] EWCA Civ 746, [2008] 1 AC 1046.

³⁶ *R v B*, above, at [9].

³⁷ For further discussion about the right to peaceful enjoyment of property and confiscation see Chapter 5 on “proportionality”.

³⁸ *R v B* [2008] EWCA Crim 1374 at [9]; *Jennings v CPS* [2008] UKHL 29, [2008] 1 AC 1046 at [9].

³⁹ *Re Peters* [1988] QB 871, [1988] 3 WLR 182; *Re S* [2010] EWHC 917 (Admin).

⁴⁰ *Jennings v CPS* [2008] UKHL 29, [2008] 1 AC 1046, citing *Re Peters* [1988] QB 871, [1988] 3 WLR 182.

interference with property rights through a restraint order is unnecessary and unjustifiably disproportionate.⁴¹

26.23 The magnitude of risk to the value of assets has been expressed as a “real risk of dissipation.”⁴²

How might a risk of dissipation be established?

26.24 As noted by the Financial Action Task Force (“FATF”) in its 2018 Mutual Evaluation Report of the UK’s anti-money laundering and counter-terrorist financing measures:

The CPS will consider a range of factors, which may include previous convictions, any evidence of preparations to move or dissipate assets, the accused’s capacity and capability to move or dissipate assets (e.g. access to foreign bank accounts or corporate structures) and any actual dissipation.⁴³

26.25 Certain categories of cases may, on their face, suggest a risk of dissipation. Lord Justice Glidewell in *Re AJ and DJ* observed that “almost every case” involving drug trafficking would give rise to a reasonable apprehension that, without a restraint order, realisable assets were likely to be dissipated.⁴⁴ Furthermore, where charges involve dishonesty “there will usually be reason to fear that assets will be dissipated”.⁴⁵

26.26 In cases involving high levels of financial gain “the risk of dissipation will generally speak for itself”.⁴⁶

Issues with the risk of dissipation test

26.27 In the circumstances outlined above, the risk of dissipation will be relatively simple to establish. Nevertheless, there are many cases in which risk of dissipation cannot be easily established. This is particularly so in cases where an application for restraint is not made at the outset of an investigation. As was noted in the FATF 2018 Mutual Evaluation Report:

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.⁴⁷

26.28 In cases when a risk of dissipation cannot readily be established, the investigatory authorities must rely on tools to monitor accounts and assets and react when there is

⁴¹ *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182 at [28], [40] – [41].

⁴² *R v B* [2008] EWCA Crim 1374 at [13], [17].

⁴³ Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures, United Kingdom mutual evaluation report* (December 2018) para 191.

⁴⁴ *Re AJ* (unreported, 9 December 1992).

⁴⁵ *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182 at [61].

⁴⁶ *Jennings v CPS*, above, at [55].

⁴⁷ Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures, United Kingdom mutual evaluation report* (December 2018) para 191.

actual dissipation. One example of such “shutting the stable door after the horse has bolted” is given in the FATF Mutual Evaluation Report:

In 2015, HMRC investigated a value added tax (VAT) fraud case in which the accused received GBP 5 million in wrongful payments. The money was concealed in assets owned by the accused’s family. Prior to arresting the accused, HMRC and CPS considered restraint but concluded that there was insufficient evidence of a real risk of dissipation. To ensure that dissipation did not occur, HMRC secured an account monitoring order for the accused’s accounts prior to his arrest. Shortly after arrest, HMRC became aware from the account monitoring order that the accused was withdrawing lump sums of cash. HMRC immediately worked with CPS to gather the evidence necessary to prepare an application for restraint. A restraint order was obtained within a week of receiving this evidence. By this time, the accused had withdrawn a total of £45,000.⁴⁸

Full and frank disclosure

26.29 The duty of “candour” or “full and frank disclosure” is imposed upon a party which makes an application to a court without giving notice to other parties (“*ex parte*”). The duty of full and frank disclosure and its relationship with restraint applications was summed up by the Court of Appeal in the case of *Re Stanford International Bank*:

[It] consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA 2002 in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable...

In effect a prosecutor seeking an *ex parte* order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge...⁴⁹

26.30 In restraint cases, as in all cases involving without notice applications, the duty is a “high obligation on the applicant to put everything before the judge, whether it may help or hinder his cause”.⁵⁰

26.31 The fact that the prosecution is acting in the public interest is no bar to the application of the duty of candour. In the case of *Jennings v CPS*, the Court of Appeal stated that:

precisely because the applicant is the Crown, the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by

⁴⁸ Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures, United Kingdom mutual evaluation report* (December 2018) box 13.

⁴⁹ *Re Stanford International Bank Ltd* [2010] EWCA Civ 137 at [159] and [187], [2011] 1 Ch 33.

⁵⁰ *Director of the Serious Fraud Office v A* [2007] EWCA Crim 1927, [2008] Lloyd’s Rep FC 30.

the state, and so should particularly insist on strict compliance with its rules and standards, not least the duty of disclosure.⁵¹

26.32 Failure to comply with the duty of candour may lead to the discharge of a restraint order.⁵² However, restraint applications are brought in the public interest and so the court should consider whether “the ultimate sanction of discharge”⁵³ is justified. This will depend upon the nature and extent of the breach; “minor failings...in the absence of bad faith on the part of the prosecutor [are] unlikely to result in the restraint order being discharged”.⁵⁴

Ancillary Orders

26.33 Section 41(7) of POCA 2002 provides that the Crown Court “may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective”.

26.34 Under the pre-POCA 2002 confiscation legislation, the High Court had the power to make a disclosure order ancillary to restraint⁵⁵ by analogy with its inherent powers to order disclosure of information in connection with civil freezing orders.⁵⁶ Disclosure orders continue to be made ancillary to restraint by the Crown Court under POCA 2002.⁵⁷ Rule 33.51(4) of the Criminal Procedure Rules deals with ancillary orders and makes express reference to “an order for disclosure”.

26.35 To respect the privilege against self-incrimination, generally information disclosed should be used only for the purposes of the restraint proceedings and any confiscation proceedings that may follow (including enforcement of the confiscation proceedings). A prosecutor should not use the information provided in criminal proceedings against the person who provided the information,⁵⁸ unless the criminal proceedings directly relate to the information in question (for example if the defendant were charged with perjury or contempt of court in connection with the information).⁵⁹

26.36 Although as a general rule evidence provided pursuant to a disclosure order should not be disclosed to a co-defendant,⁶⁰ prosecutors must consider their obligations in connection with substantive criminal investigations. The prosecution must continually keep under review whether any material might reasonably be considered capable of

⁵¹ *Jennings v CPS* [2005] EWCA Civ 746 at [56], [2006] 1 WLR 182.

⁵² *Director of the Serious Fraud Office v A* [2007] EWCA Crim 1927, [2008] Lloyds Rep FC 30; *Re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] 1 Ch 33 at [159].

⁵³ *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182 at [64].

⁵⁴ Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) 7.16; see *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182; and *Malabu Oil and Gas Ltd v DPP* [2016] Lloyd's Rep FC 108.

⁵⁵ *Re O (Restraint Order: Disclosure of Assets)* [1991] 2 QB 520, [1991] 2 WLR 475.

⁵⁶ *AJ Bekhor and Co Ltd v Bilton* [1981] QB 923, [1981] 2 WLR 601; Senior Courts Act 1981, s 37.

⁵⁷ *CPS v Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [30]; *Director of the SFO v O'Brien* [2014] UKSC 23, [2014] AC 1246; *R v JS* [2009] EWCA Crim 2972.

⁵⁸ *Re O (Restraint Order: Disclosure of Assets)* [1991] 2 QB 520, [1991] 2 WLR 475.

⁵⁹ *Re C (Restraint Order: Disclosure)* 4 September 2000, as cited in *R v JS* [2009] EWCA Crim 2972.

⁶⁰ *Re C (Restraint Order: Disclosure)*, above.

undermining the prosecution case or assisting the case for the co-defendant.⁶¹ Where material disclosed to the prosecution pursuant to a disclosure order satisfies this test “the court must retain ultimate control over the use to which the disclosed information is put and...an application for direction must be made to determine how if at all, the disclosed information might be revealed to the co-accused”.⁶²

26.37 The Criminal Procedure Rules anticipate that information may be sought from defendants not just in written form but by way of oral examination. Rule 33.51(4) provides that an application must give full details of:

- (1) the identity of any person whom the applicant wants the court to examine about the extent or whereabouts of realisable property;
- (2) a list of the main questions that the applicant wants to ask any such person; and,
- (3) a list of any documents to which the applicant wants to refer such a person.

26.38 Aside from disclosure of information, another common ancillary order is for the “repatriation” of assets held overseas to the jurisdiction. In *Mirchandi v Somaia*, for example, an order was made that £64,254.84 held in a Dubai bank account be “repatriated so as to be available in the event the court decides they should form part of the realisable funds”.⁶³

26.39 In *DPP v Scarlett*, the High Court ruled that:

If a power to order full disclosure of assets on affidavit is inherent in a restraint order, the order should also include power to order the return of those assets within the jurisdiction. Both powers are essential to the purpose of the restraint order and to the realisation of those assets which is the purpose of the express statutory power given by Parliament.⁶⁴

26.40 Such an order will require that funds are repatriated within a specified period, often a period of 21 days⁶⁵ and that the funds are paid into a designated bank account.

26.41 A repatriation order does not overreach the territorial jurisdiction of the courts of England and Wales because it is a personal order requiring a specified person to take action. It is not an order made against the property which is located overseas.⁶⁶

26.42 Section 41(7D) of POCA 2002 provides that, in considering whether to make an ancillary order, the court must “in particular, consider whether any restriction or

⁶¹ Criminal Procedure and Investigations Act 1996, s 7A.

⁶² Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) 3.37.

⁶³ *Mirchandi v Somaia* [2017] EWHC 1038 (QB) in the context of the pre-POCA 2002 confiscation regime under the Criminal Justice Act 1988.

⁶⁴ *DPP v Scarlett* [2000] 1 WLR 515.

⁶⁵ See sample restraint order in Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018), Appendix 9; *R v Mills* [2018] EWCA Crim 944.

⁶⁶ *Derby and Co Ltd v Weldon (No 6)* [1991] WLR 1139; *DPP v Scarlett* [2000] 1 WLR 515.

prohibition on the defendant's travel outside the United Kingdom ought to be imposed for the purpose mentioned in that subsection”.

- 26.43 The power to make such travel restrictions has long been available to the High Court⁶⁷ and may include the defendant surrendering his or her passport or a prohibition on applying for a passport or international travel document.⁶⁸ The court “must strike a [careful] balance between the need to ensure that the confiscation order in question is effective, and the impact to the individual defendant if a travel restriction is made.”⁶⁹ Each case should be assessed on its merits.

PERCEIVED PROBLEMS WITH THE RESTRAINT REGIME

- 26.44 As part of our pre-consultation discussions we sought the views of stakeholders from across the criminal justice system.
- 26.45 Little concern was expressed about the use of a test of suspicion or belief in restraint applications and we do not propose any reforms in this regard.
- 26.46 One stakeholder suggested that the duty of candour should have no place in confiscation. We can see the merit in the concern that the duty of candour may not sit easily with the fact that that applications for restraint are often brought at an early stage of proceedings and with some urgency. However, the concern was not more widely expressed. Furthermore, we consider that the rationales for the application of the duty of candour in restraint proceedings to be compelling. We therefore do not provisionally propose specific reforms in connection with the duty of candour. However, the reforms that we propose below in connection with the risk of dissipation and costs may give stakeholders a clearer framework for the application of the duty in restraint proceedings.
- 26.47 The primary concern with the test for restraint was with the risk of dissipation test. Some prosecutors reported that the test makes it difficult to obtain restraint orders. This reflects evidence given to Parliamentary committees in 2014 by the Director of Public Prosecutions and the Head of the Crown Prosecution Service Organised Crime Division.⁷⁰
- 26.48 However, we received some comments that the risk of dissipation test is not a barrier to restraint. This view is apparently supported by the FATF 2018 Mutual Evaluation Report, which states that “the UK authorities explained that they are accustomed to

⁶⁷ For a discussion on the history and nature of writs *ne exeat regno* see *Fenton v Callis* [1969] 1 QB 200.

⁶⁸ See *R v Pritchard* [2017] EWCA Crim 1267, [2018] 1 WLR 1631 at [25] in the context of comparable “compliance orders”, which may be made in connection with the confiscation order itself (dealt with in Chapter 22).

⁶⁹ *R v Pritchard* [2017] EWCA Crim 1267 at [26], [2018] 1 WLR 1631.

⁷⁰ Confiscation Orders, Report of the House of Commons Committee of Public Accounts (2013-14) HC 942, minutes of oral evidence, qs 44 and 94 (Alison Saunders). Joint Committee on the Draft Modern Slavery Bill (2013-14) HL Paper 166 HC 1019, p 94.

working with [the risk of dissipation test] and did not view [it] as a hurdle to effective restraint”.⁷¹

26.49 The FATF went on to articulate that prosecutors take a pragmatic position when they cannot establish a risk of dissipation at the outset of a case. In such instances, investigatory tools can be used to identify when actual dissipation subsequently occurs. An application for restraint can then be made. Whilst this position might be pragmatic, it does not address the concern articulated by one consultee at our symposium on confiscation reform, namely that “it is almost as if you have to let some assets go to establish the risk”.⁷² By doing so, the primary intended effect of a restraint order (to preserve assets) will have been (at least to some extent) negated. This suggests, rather than points away from, the risk of dissipation test being problematic.

26.50 We therefore consider whether reforms to the risk of dissipation test could assist in facilitating effective and appropriate restraint.

ANALYSIS

The importance of the risk of dissipation test

26.51 In light of the potential difficulties with the risk of dissipation test, the Joint Committee on the Draft Modern Slavery Bill recommended that the requirement to demonstrate a risk of dissipation be “explicitly removed”.⁷³ In rejecting this recommendation in 2014, the Government effectively adopted the reasoning of the courts from *R v B*.⁷⁴ The test was seen to be

an important safeguard to ensure that restraint orders are only made in cases where they are necessary and appropriate. Given the rationale for restraint orders, it is difficult to see why it would be necessary to seek such an order in a case where there is not considered to be any risk of dissipation.⁷⁵

26.52 We therefore provisionally propose that the risk of dissipation test should be retained. We next consider whether the common law test could be refined to improve the assessment of the existence and extent of any risk. We begin with a more detailed analysis of the factors that might indicate a greater risk of dissipation.

Refining the risk of dissipation test

26.53 Having provisionally concluded that some form of the risk of dissipation test merits retention, we now consider whether it can be refined to facilitate more effective and appropriate restraint.

26.54 As we observed above, a risk of dissipation of a suspect’s assets could be indicated by:

⁷¹ Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures, United Kingdom mutual evaluation report* (December 2018) para 191.

⁷² See the example given in the FATF Mutual Evaluation Report, cited at paragraph 2.27 above.

⁷³ Joint Committee on the Draft Modern Slavery Bill (2013-14) HL Paper 166 HC 1019, para 208.

⁷⁴ *R v B* [2008] EWCA Crim 1374, [2009] Cr App R 14.

⁷⁵ *Hansard* (HL) 2 July 2014, vol 754, col 1751.

- (1) The type of offending;
- (2) Specific risk factors.

Types of offending

26.55 Case law has suggested that certain types of offending may, on their face, indicate a risk of dissipation, for example drug trafficking cases.⁷⁶ At present, no clear guidance is given in POCA 2002 itself as to types of offending that may give rise to a risk of dissipation. The only guidance is in relation to types of cases that are connected to a “criminal lifestyle”. Such offences include those listed in schedule 2 to the Act. These include:

- (1) Dealing in illegal goods including drugs and arms, and items made and sold in breach of intellectual property laws.⁷⁷
- (2) Illegal dealings involving people including human trafficking, modern slavery, child sexual offences, offences relating to exploitation of sex workers and the offences of illegal gangmasters.⁷⁸
- (3) Specific offences often committed as part of a course of conduct, such as blackmail and directing terrorism.⁷⁹
- (4) Two of the principal money laundering offences, sections 327 and 328 of POCA 2002.⁸⁰ We will discuss these offences in more detail later in the chapter.

26.56 These offences generally fall within the definition of serious and organised crimes provided in the government’s Serious and Organised Crime Strategy.⁸¹ The proceeds of such offences are seen as a means to permit defendants to lead a “criminal lifestyle”⁸² and to facilitate further offending. As articulated in the context of the Australian Proceeds of Crime Act 2002,⁸³ such offences are “generally serial in nature and often use the proceeds of one offence to commit the next”.⁸⁴ Such serial offences that require continued financing arguably indicate a risk of dissipation.

26.57 Examples of cases in which assets were purchased to further the serious and organised criminality include *R v Smith*, in which money from cannabis trafficking was

⁷⁶ *Re AJ* (unreported, 9 December 1992).

⁷⁷ Proceeds of Crime Act 2002, sch 2, para 1, 1A, para 5 and paras 6, 7.

⁷⁸ Proceeds of Crime Act 2002, sch 2, paras 3A, 4, 8.

⁷⁹ Proceeds of Crime Act 2002, sch 2, paras, 3,9, 9A.

⁸⁰ Proceeds of Crime Act 2002, sch 2, para 2.

⁸¹ Home Office, *Serious and Organised Crime Strategy* (November 2018) Cm 9718, para 16.

⁸² Proceeds of Crime Act 2002, s 75.

⁸³ Proceeds of Crime Act 2002 (Cth) Australia, s 338.

⁸⁴ Parliament of the Commonwealth of Australia House of Representatives, *Proceeds of Crime Bill 2002, Explanatory Memorandum*.

reinvested in further consignments of cannabis⁸⁵ and *R v Moss*,⁸⁶ in which the judge inferred that drugs were purchased with funds from previous criminal activity.

26.58 In *R v Stubbs*, goods were purchased from the proceeds of prostitution to further the running of a brothel.⁸⁷ In *R v Carter*, the conspiracy in question involved the use of illegal immigrants for work, who were provided with false documents. The proceeds of the work were used to pay the workers, thereby permitting the conspiracy to continue.⁸⁸

26.59 *R v Simm* involved intellectual property infringement through the importing and sale of approximately 400,000 counterfeit DVDs from Malaysia on different occasions.⁸⁹ In that case, there were significant expenses incurred, including the wholesale purchase price of the DVDs and travel expenses. The “substantial” expenses had to be met during the currency of the conspiracy.⁹⁰

26.60 As noted earlier, aside from cases involving schedule 2 offences, in the case of *Jennings v The Crown Prosecution Service* it was observed that where charges involve dishonesty “there will usually be reason to fear that assets will be dissipated”.⁹¹

Specific risk factors

26.61 While the type of offending may provide a means of identifying the risk of dissipation, the presence of other specific factors may also assist. We will consider some of the factors that we have identified in the next section:

- (1) whether a suspect has engaged in a course of criminal activity;
- (2) where there is a single instance of alleged offending, whether it was prolonged;
- (3) whether the financial benefit from the alleged offending is likely to be substantial;
- (4) whether the suspect has the capability to move assets;
- (5) whether there is evidence of dissipation by a suspect or preparatory steps taken towards dissipation;
- (6) the stage of criminal proceedings;

⁸⁵ *R v Smith* [1989] 1 WLR 765, [1998] 2 All ER 948.

⁸⁶ *R v Moss* [2008] EWCA Crim 2454.

⁸⁷ *R v Stubbs* [2019] EWCA Crim 945 (in Chapter 13 we provisionally propose the inclusion of Sexual Offences Act 2003, s 33A, in schedule 2).

⁸⁸ *R v Carter* [2006] EWCA Crim 416.

⁸⁹ Although the charge ultimately brought was conspiracy to defraud, rather than a specific intellectual property offence.

⁹⁰ *R v Simm* [2006] EWCA (Crim) 2256.

⁹¹ *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182 at [61].

- (7) The suspect's past "bad character".

Course of criminal activity

26.62 Even if a suspect has not committed an offence listed in schedule 2 of POCA 2002, if a suspect has engaged in a "course of criminal activity", that pattern of criminality is seen as permitting a defendant to lead a "criminal lifestyle".⁹² For example, a suspect may have:

- (1) been convicted in the same proceedings of at least four offences, and have benefited from each of them; or
- (2) in the six years prior to proceedings starting against him, been convicted on at least two separate occasions of an offence constituting conduct from which he has benefited.⁹³

26.63 As with the schedule 2 offending, restraint may be necessary to prevent a real risk of dissipation to further a "criminal lifestyle" and/or to further future criminality.

26.64 If restraint is sought prior to conviction, the prosecution cannot satisfy a court definitively that the defendant meets the test for engagement in a "course of criminal activity". Nevertheless, the prosecution may be able to adduce evidence of a suspicion that the defendant has engaged in a course of criminal activity. For example, the prosecution may have evidence to suggest that the defendant has committed at least four offences and has benefited from each of them.

A prolonged single instance of offending

26.65 The final way in which POCA 2002 deems a person to have a "criminal lifestyle" is if a person has committed the offences over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.

26.66 The risk of dissipating funds for further criminality is arguably lower in such cases because no repeat offending is inherent in the nature of the person's conduct. Therefore, there may be no further criminality to fund. However, if a person is alleged to have engaged in sustained criminality it is also arguable that they have an incentive to dissipate funds for sustaining that, or similar, criminality. If maintaining a lifestyle or making personal financial gains is dependent upon criminality, a person is unlikely simply to stop such criminality voluntarily.

26.67 Maintenance of a lifestyle funded by criminality can often be seen in cases involving abuse of a position of financial trust.⁹⁴ Where a defendant has made gains to provide a lifestyle through prolonged fraudulent activity, the temptation on the part of the defendant to put such gains beyond the reach of authorities is easy to see.

26.68 The making of personal financial gains through continued criminality is exemplified in cases relating to ongoing business arrangements that are connected with criminality. In *R v Del Basso* the Court of Appeal observed that the risk of confiscation is often run

⁹² Proceeds of Crime Act 2002, s 75(2)(b).

⁹³ Proceeds of Crime Act 2002, s 75(3).

⁹⁴ For example *R v Reynolds* [2012] EWCA Crim 3042, *R v Pandit* [2017] EWCA Crim 1087.

in such cases because the defendants “have treated the illegality of the operation as a routine business risk with financial implications in the form of potential fines or, at worst, injunctive proceedings”.⁹⁵ In *Del Basso* the defendants had engaged in repeated criminality and had taken active steps to avoid financial liabilities by incorporating a company behind which they could operate. It is easy to see how such defendants could be tempted to put their assets beyond the reach of the authorities had the risk from confiscation proceedings been “fully appreciated”.⁹⁶

26.69 Continued criminality for financial gain that is committed over a prolonged period is also reflected in cases involving a conspiracy. Although a conspiracy is a single charge, it will have “involved a series of criminal acts over a long period.”⁹⁷ Although some conspiracies last for less than six months,⁹⁸ many will have lasted for longer. It is arguable that the longer the involvement in such a conspiracy lasts the more likely it is that the defendant’s lifestyle will be derived from criminality, and would need to be maintained by engaging in continued criminality.

26.70 We therefore consider that alleged prolonged single instances of criminality may provide an indication of the magnitude of the risk of dissipation.

Large financial gains

26.71 In *Jennings v CPS*⁹⁹ the Court of Appeal stated that in cases involving high levels of financial gain “the risk of dissipation will generally speak for itself”.¹⁰⁰

26.72 We have analysed our data from Liverpool Crown Court to seek to identify the financial tipping point at which that risk of dissipation may “speak for itself”. We analysed the amount by which a convicted defendant was found to have benefited from crime against findings that a defendant had hidden that benefit from law enforcement agencies by the time of the confiscation hearing. Such a defendant can be said to have “dissipated” their benefit in the sense of having put it beyond the reach of the authorities.

26.73 When analysed with reference to the financial thresholds used to report Joint Asset Recovery Database (JARD) data, just 3 out of 15 cases involving hidden assets had a benefit figure of less than £50,000. This suggests that a tipping point at which the risk of dissipation may speak for itself is in cases where the criminal benefit is greater than £50,000. Of the 12 cases where the benefit was greater than £50,000 and assets were hidden, assets totaling £1,062,466.98 were found to have been put beyond the reach of the courts. The sample size is small. However, as we set out in appendix 1, this data is representative of the national trends in confiscation.

⁹⁵ *R v Del Basso* [2010] EWCA Crim 1119, [2011] 1 Cr App R (S) 41 at [46].

⁹⁶ *R v Del Basso* [2010] EWCA Crim 1119, [2011] 1 Cr App R (S) 41 at [46].

⁹⁷ *Hansard* (HC), 31 Mar 1995 vol 257, col 1322.

⁹⁸ *R v Molloy* [2013] EWCA Crim 682; *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601; *R v Odamo* [2013] EWCA (Crim) 1275, [2014] 1 Cr App R (S) 44.

⁹⁹ *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182.

¹⁰⁰ *Jennings v CPS*, above at [55].

26.74 We also considered those cases in which no hidden asset findings were made to see whether a benefit figure greater than £50,000 would suggest a risk of dissipation more generally. Our analysis of the Liverpool data supports the general proposition that the higher the benefit figure, the lower the rate of satisfaction of the confiscation order in full. With regards to the national picture we would anticipate a similar situation to hold true. The national data is couched in terms of the recoverable amount. The Liverpool data shows that where the recoverable amount is less than £50,000, the rate of completion is at its greatest. To give an example, the completion rate for orders where the recoverable amount was between £10,000 and £50,000 was 93%. This dropped by 29 percentage points to 64% for orders of between £50,000 and £100,000.¹⁰¹ (The benefit figure is always equal to or greater than – and in most cases significantly greater than – the recoverable amount.)

26.75 There may be many reasons why orders with a benefit figure of below £50,000 are more regularly satisfied in full than those over £50,000. A criminal may be prepared to accept a certain degree of lost profit as an “occupational hazard”.¹⁰² Furthermore, orders of less than £50,000 may be readily satisfied, for example through realisation of money in bank accounts and the sale of vehicles. Taking our data from confiscation orders made in Liverpool, 88% of cases where cash held by the defendant or the police was identified as a realisable asset involved a benefit figure of less than £50,000. In 89% of cases where a vehicle was identified as a realisable asset there was a benefit figure of less than £50,000.

26.76 Taken together, the evidence in connection with both hidden and non-hidden assets cases suggests that a benefit figure of £50,000 is a reasonable threshold at which it can be said that the risk of dissipation increases.

Capability to move assets

26.77 As noted above, the CPS considers the capability of a person to move assets in evaluating the risk of dissipation. This may include the ability to move funds overseas and access to corporate structures.

26.78 In 2018-19, the overall confiscation debt included £9,646,000 of identified unrealised assets located overseas. Our Liverpool data showed that in the course of a year only a small proportion of identified assets (4%) were located overseas, with buildings or land amounting to 89% of that 4%. Whilst there may be little risk of dissipation of identified buildings or land, it must be recognised that assets overseas may also be unidentified or “hidden” assets. As the HMCTS Trust Statement records, “In higher value orders, it is very often the case that a significant proportion of the order value relates to assets which are either hidden or held overseas, making enforcement very difficult”.¹⁰³ The more difficult it is to enforce confiscation orders against assets held overseas, the greater the incentive becomes to seek to move assets overseas.

¹⁰¹ The national statistics are also reflected by completion rates on orders from Leeds Crown Court (see Appendix 1, p 7).

¹⁰² *R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162; for an opinion that criminals do not approach confiscation on a rational economic basis see J Fisher, J Bong Kwan “Confiscation: deprivatory and not punitive – back to the way we were” (2018) *Criminal Law Review* 3 at p 200.

¹⁰³ HMCTS, *Trust Statement 2018-19* (2019) HC 2337 p 8.

Therefore, if a person has clear capabilities to move assets overseas the greater the risk of dissipation becomes.

26.79 Access to corporate or trust structures may also increase the risk of dissipation. For example, the ability to hide behind the anonymity provided by a company or trust has been recognised by the FATF as facilitating hiding and movement of criminal money.¹⁰⁴ Furthermore, company structures can be used in an attempt to shield money from forfeiture, by claiming the money belongs to a company and not to a defendant.¹⁰⁵

Actual dissipation or preparatory steps taken towards dissipation

26.80 Where there has been actual dissipation of assets or clear preparatory steps have been taken towards dissipation of assets, for example by asking a financial institution to move funds in the near future, the risk of dissipation speaks for itself.

The stage of the criminal proceedings

26.81 In bail cases, the risk that a person would fail to surrender to custody is likely to be heightened when that person has been convicted and is facing an inevitable custodial sentence.¹⁰⁶ Similarly, the risk that a defendant will dissipate their assets arguably becomes greater as criminal proceedings progress and the risk of a confiscation order increases. In fact, the argument about the increased risk of dissipation of assets is arguably stronger than the argument about increased risk of a failure to surrender to custody for two reasons.

26.82 First, despite some commentary to the contrary,¹⁰⁷ throughout our pre-consultation discussions we were told repeatedly by financial investigators and prosecutors that criminals are rational economic beings, who balance risk and reward in committing offences. Prison was referred to by stakeholders as an “occupational hazard” for criminals and was seen as having little impact on the balance of risk and reward. Confiscation proceedings were seen as having a far greater impact and were said to be of far greater concern to defendants, who saw such proceedings as tipping the balance of risk and reward against them. As one MP put it, confiscation “will put a chill on the...criminal. It is no good him working for nothing”.¹⁰⁸ During our scoping exercise a District Judge involved in enforcing confiscation orders told us that criminals wish to frustrate enforcement because “you want to keep something”. Therefore, the likelihood of a confiscation order leading to dissipation of assets is arguably greater than the likelihood of a prison sentence leading to a failure to surrender to custody.

26.83 Second, it is far easier to seek to distance assets from the courts than it is to put a person beyond the reach of the courts. Therefore, the risk is heightened in comparison to the risk of failure to surrender to custody.

¹⁰⁴ FATF – Egmont Group, *Concealment of Beneficial Ownership* (July 2018).

¹⁰⁵ See, for example *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63.

¹⁰⁶ *R (Rojas) v Snaresbrook Crown Court* [2011] EWHC 3569 (Admin) at [23] per Holman J.

¹⁰⁷ J Fisher, J Bong Kwan “Confiscation: deprivatory and not punitive – back to the way we were” (2018) *Criminal Law Review* 3 at p 200.

¹⁰⁸ *Hansard* (HC) 21 January 1986, vol 90, col 241.

26.84 The risk of a confiscation order being made against a defendant becomes a reality once an application to proceed to confiscation is made and a confiscation timetable is set.

Bad character

26.85 Whilst the current alleged criminality may be an important factor in determining a risk of dissipation, so too might be a defendant's previous "bad character"¹⁰⁹ in the sense of previous misconduct.¹¹⁰ For example, a defendant may have previously been:

- (1) convicted of offences such as money laundering, in which they have been found to have taken steps to put assets beyond the reach of the authorities; or
- (2) convicted of offences of dishonesty; or
- (3) found to have been untruthful and therefore less worthy of belief in connection with the dissipation of assets.¹¹¹

Compliance with court orders and directions

26.86 During criminal proceedings all parties must comply with what is known as the "overriding objective".¹¹² Found in rule 1 of the Criminal Procedure Rules, the overriding objective in criminal proceedings is to deal with cases justly.¹¹³ This includes (amongst other things) dealing with the case efficiently and expeditiously and ensuring that appropriate information is before the court.¹¹⁴

26.87 If a defendant has failed throughout the criminal trial to comply with disclosure orders or the requirement to file a defence statement it may indicate that he or she is unlikely to comply with the terms of the restraint order, which is a further order of the court. Although we have received no direct evidence on this point, we consider that the potential for this factor to indicate a risk of dissipation is evident.

26.88 Whilst it is unlikely that such information would be available to the court if the restraint order is applied for at the outset of a criminal investigation, it may be relevant if the restraint order is applied for at a later stage or in during an investigation into an offender who had previously been before the courts.

How should these factors inform the court's decision about risk in individual cases?

26.89 Having identified some of the factors that may give rise to a risk of dissipation, we now consider how the risk of dissipation should be used by the court.

26.90 We considered carefully whether there should be mandatory or automatic restraint of assets in particular categories of case. In Australia, for example, it is mandatory to make a restraining order in cases where there are reasonable grounds to suspect that

¹⁰⁹ Criminal Justice Act 2003, s 98.

¹¹⁰ Criminal Justice Act 2003, s 112.

¹¹¹ *R v Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169.

¹¹² Criminal Procedure Rules, r 1.2

¹¹³ Criminal Procedure Rules, r 1.1(1).

¹¹⁴ Criminal Procedure Rules, r 1.1(2).

a person has committed a “serious offence”.¹¹⁵ The list of such offences closely reflects schedule 2 of POCA 2002. Even in cases of such seriousness we do not propose that restraint should become mandatory. Any interference with property rights must be proportionate on the facts of the case.

26.91 We therefore went on to consider whether it could be proportionate for the starting point to be weighted towards a finding that there is a risk of dissipation in certain types of cases. In such cases, we considered whether there should be a presumption of a risk of dissipation. This would, effectively, reverse the burden in proving a risk of dissipation.

26.92 In 2014 an amendment was proposed to the Serious Crime Bill to introduce a presumption of a risk of dissipation in all cases.¹¹⁶ The amendment was rejected on the grounds that it would be a disproportionate interference with the right to peaceful enjoyment of property.¹¹⁷

26.93 The courts have also expressed the view that whilst “the power to impose restraint...orders is an important weapon in the battle against crime”,¹¹⁸ it must be exercised appropriately. Failure to do so has the potential to cause harm rather than prevent it. It should remain the case that an application for a restraint order is therefore “emphatically not a routine matter of form” and there should be no “expectation that it will routinely be granted”.¹¹⁹

26.94 We therefore do not propose an approach which presumes that there is a risk of dissipation because of the presence of a particular factor connected to the case or to the defendant. Instead, we provisionally propose that a statutory list of factors that should be weighed up in determining whether there is a risk of dissipation. We consider that, by providing such a list of factors:

- (1) The making of a restraint order is facilitated in appropriate cases by providing prosecutors and the courts with clear guidance that multiple factors may be relevant, rather than a decision being governed by whether there has been any dissipation to date. In turn this should avoid those situations described earlier where investigators and prosecutors have had to “let some assets go to establish the risk”.
- (2) Because prosecutors and the courts 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. We deal with costs in more detail below. This should encourage greater (and responsible) use of restraint powers.

¹¹⁵ Proceeds of Crime Act 2002 (Cth) Australia, s 18.

¹¹⁶ *Serious Crime Bill, Marshallled list of amendments to be moved in Committee, Amendment 12, 1 July 2014*, <https://publications.parliament.uk/pa/bills/lbill/2014-2015/0001/amend/ml001-i.htm> (last visited 25 May 2020).

¹¹⁷ *Hansard* (HL) 2 July 2014, vol 754, col 1752.

¹¹⁸ *Barnes v The Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [123].

¹¹⁹ *Re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] 1 Ch 33, cited with approval by the Supreme Court in *Barnes v The Eastenders Group*, above, at [120].

- (3) The court is assisted in performing its function of examining each application “carefully and with a critical eye”¹²⁰ before interfering with a person’s right to the peaceful enjoyment of property. This should encourage appropriate and proportionate application of restraint powers. It also aligns the approach adopted with consideration of deprivation of liberty, another fundamental right. For example, in bail proceedings the fact that a person has been convicted and faces the inevitable prospect of losing their liberty does not of itself mean that bail should be refused. The court must examine the facts and consider whether the inevitability of conviction would mean that there are substantial grounds for believing that the defendant would fail to surrender to custody.¹²¹
- (4) By articulating factors to which the court and prosecutors should have regard, we consider that a better steer might be provided to parties in considering whether a prosecutor has complied with his or her duty of candour (see above) in connection with the risk of dissipation.

Provisional proposal

26.95 We provisionally propose that the court should consider the following factors, and any other factors 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) the extent of compliance with court orders and directions.
- (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.

¹²⁰ *Barnes v The Eastenders Group*, above, at [123].

¹²¹ *R (Rojas) v Snaresbrook Crown Court* [2011] EWHC 3569 (Admin) at [24] per Holman J.

(9) Whether a surety or security could be provided.

26.96 In the Criminal Justice Act 2003 a series of indicative factors are provided to the court for weighing up the interests of justice in connection with the admission of hearsay.¹²² Those factors are not exhaustive and the court may have regard to any other factors that it considers to be relevant. The court is not obliged to engage in an extensive investigation of each factor, but must exercise its judgment in light of the factors.¹²³ It is proposed that a similar approach should apply in connection with the proposed indicative factors for restraint.

26.97 Whether a person has already dissipated their assets is just one factor that the court should take into consideration when determining whether there is a risk of dissipation. This should allow the court to take a more nuanced approach than has been adopted in some cases at present, where the prosecution authorities have had to wait until some dissipation has occurred before restraint can be pursued. For example, the person's trial could be nearing its conclusion, conviction is now looking highly likely and the person has strong connections overseas. This may mean the lack of dissipation to date is now less important.

26.98 As to the nature of the alleged criminality, we provisionally propose that, in accordance with observations in the case law,¹²⁴ the court should be invited to consider whether a defendant is alleged to have acted dishonestly in weighing up the magnitude of the risk of dissipation.

26.99 If the court has reasonable grounds to suspect that the defendant's alleged criminality falls within the test for "criminal lifestyle", then this may indicate a risk of dissipation. As set out earlier in this paper, the schedule 2 offences can facilitate the living of a "criminal lifestyle", and funds from those offences may be used as part of a cycle to fund further acts of criminality. These offences generally fall within the definition of serious and organised crimes provided in the Government's Serious and Organised Crime Strategy.¹²⁵

26.100 Similarly, alleged "criminal lifestyle" offending established through a course of conduct gives rise to the risks that money would be dissipated to continue the funding of a "criminal lifestyle" and/or to further future criminality. Single instances of prolonged criminality with a minimum financial benefit are currently seen as supporting the proposition that a person is living a "criminal lifestyle". As noted earlier, there is a risk that if a "criminal lifestyle" has been generated in this way, it will be necessary for the criminal to continue that criminality to maintain that lifestyle.

26.101 Whilst we identified earlier in this chapter that £50,000 of benefit appears to be the "tipping point" at which dissipation becomes more likely, we do not provisionally propose that a financial threshold is placed on any alleged benefit for the purposes of indicating a risk of dissipation in any statutory provision. Rather, the value of any alleged benefit is a factor that can be taken into account when critically evaluating the

¹²² Criminal Justice Act 2002, s 114(2).

¹²³ *R v Taylor* [2006] EWCA Crim 260, [2006] 2 Cr App R 14 (222).

¹²⁴ *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182 at [61].

¹²⁵ Home Office, *Serious and Organised Crime Strategy* (November 2018) Cm 9718, para 16.

risk of dissipation. For example, a defendant's alleged benefit may be £48,000, but the defendant may be charged with extensive fraudulent activity and have been entirely un-cooperative during a previous recent criminal trial. In order for the court to reach a reasoned determination on the risk of dissipation all such factors should be taken into account.

26.102 We identified earlier that a person's bad character may be indicative of a risk of dissipation. Equally, a person may benefit from being of "good character". In criminal proceedings, a jury will be told that a person who is of previous good character is less likely to lie and to commit an offence.¹²⁶ Such a starting point may be of assistance in guiding the court in restraint proceedings when weighing up the risk of dissipation in a finely balanced case.

26.103 With regards to the stage of proceedings, for all of the reasons previously set out, we concluded that the risk of dissipation is both different to, and higher than, the risk of failure to surrender to custody and that the likelihood of a confiscation order being made against the defendant may be one factor to which the court may properly have regard.

26.104 We provisionally propose that the court should be able to consider whether unrestrained sources of assets would be available to a defendant if a restraint order were made.

26.105 Where a defendant has only a small proportion of his or her assets restrained, any risk of dissipation is diminished because the defendant has access to other funds.

Provision of a surety or a security

26.106 Our provisional proposal for the court to consider the provision of a surety or a security requires further explanation. The provision of a surety requires a third party to give an undertaking that they will pay a sum of money into court in the event that the defendant fails to surrender to custody.¹²⁷ Pursuant to section 8(2) of the Bail Act 1976 in considering the suitability for that purpose of a proposed surety, regard may be had (amongst other things) to—

- (a) the surety's financial resources;
- (b) his character and any previous convictions of his; and
- (c) his proximity (whether in point of kinship, place of residence or otherwise) to the person for whom he is to be surety.

26.107 It is proposed that provision of a surety would mean that a defendant could avoid a restraint order either in whole or in part, depending on the value of that surety compared to the value of the alleged benefit from crime that would otherwise be restrained. At the same time, if assets were dissipated, the value of those assets would still be preserved for confiscation through the surety.

¹²⁶ *R v Vye* [1993] 1 WLR 471; *R v Aziz* [1996] AC 41; *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367.

¹²⁷ Bail Act 1976, s 3(4).

26.108 Alternatively, the court may consider provision of security. Unlike a surety, which is a future guarantee to surrender funds by a third party, a security is actually surrendered to the court by the defendant himself or herself.¹²⁸ The result of this proposal, if adopted, would not be that a defendant would be simply substituting restraint of assets for payment of those same assets into court. A third party can provide the security to the defendant. “The arrangements the defendant might make with those who helped him to put up the requisite security [are not] a matter for the court”¹²⁹. Further or alternatively, it is not the case that the entirety of a defendant’s assets will be restrained. Because the purpose of a restraint order is to preserve assets for confiscation, assets should only be restrained up to the benefit figure.¹³⁰ Therefore, a defendant may wish to release certain assets from restraint by paying other sums available to him or her into court.

26.109 We consider that the court should be able to permit the provision of a surety or a security to the equivalent value of a restrained asset to assist with the alleviation of concerns about the risk of dissipation.

¹²⁸ Bail Act 1976, s 3(5).

¹²⁹ *R (Stevens) v Truro Magistrates’ Court* [2001] EWHC Admin 558, [2002] 1 WLR 144 at [30].

¹³⁰ *Re K* [2005] EWCA Crim 619, [2006] BCC 362.

Consultation Question 88.

26.110 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; and
 - (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; or
 - (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.

26.111 Do consultees agree?

Consultation Question 89.

26.112 Are there any other factors not identified in Consultation Question 5 that consultees consider should be taken into account by a judge when determining a risk of dissipation?

PROCEDURE FOR WITHOUT NOTICE RESTRAINT APPLICATIONS

26.113 Pursuant to Criminal Procedure Rules, rule 33.34, applications in restraint proceedings should be dealt with without a hearing, unless the Crown Court orders otherwise. When such matters are to be dealt with before the Crown Court, its own

caseload pressures in dealing with ordinary matters of criminal law must be taken into account. An authority seeking a restraint order is therefore required to:

give as much advance notice to the listing office as it reasonably can, together with a properly considered estimate of the time likely to be required for pre-reading and for the hearing of the application. If other trials are not to be interrupted, the listing office will need proper time to make the necessary arrangements under the supervision of the resident judge...¹³¹

26.114 Because such applications require proper scrutiny:

it is not acceptable that such an application should be forced into a busy list, with very limited time for the judge to deal with it, except in the comparatively rare case of a true emergency application where there is literally no opportunity for the prosecution to give the court sufficient notice for any other arrangement to be made.¹³²

26.115 During our pre-consultation discussions, financial investigators repeatedly highlighted difficulties in accessing courts for restraint applications, whether because of geographical location or because of the workload before the court.

26.116 The Criminal Procedure Rules¹³³ contain rules governing hearings that do not require all parties to be present in the courtroom:

- (1) Rule 3.5 permits the court to give any direction to actively manage a case unless it would be inconsistent with legislation. Rule 3.5(2)(d) provides that this includes the power to "...conduct a hearing by live link, telephone or other such electronic means".¹³⁴
- (2) Rule 3.2(2)(h) states that active management of the case includes making use of technology.
- (3) Rules 3.2(4) and 3.2(5) specify the circumstances in which it is appropriate for live links or telephone facilities to be employed.¹³⁵

26.117 The Criminal Practice Directions 2015 detail the nature of the power which can be exercised in relation to the use of live link and telephone facilities.¹³⁶ Notably it is largely at the court's discretion whether the use of these facilities is appropriate in any given case. Direction 3N.8 also specifies that:

¹³¹ *Barnes v The Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [119].

¹³² *Barnes v The Eastenders Group* above, at [120].

¹³³ 2015 as amended up to April 2020 (prior to further temporary amendments made in April 2020).

¹³⁴ Criminal Procedure Rules 2015, r 3.5.

¹³⁵ Criminal Procedure Rules 2015, r 3.2(5) no longer appears as a result of temporary amendments made in April 2020.

¹³⁶ Criminal Practice Directions 2015, Div I para 3N.

there is no legal obstacle to the judge, magistrate or magistrates conducting it from elsewhere, with other participants assembled in a courtroom from which the member or members of the court are physically absent.¹³⁷

26.118 The Coronavirus Act 2020 temporarily modified the law by extending the availability of live link technology to a wider category of cases thus enabling the court to function during the pandemic.¹³⁸ We discuss the impact of the pandemic in the foreword. In the current circumstances, and generally, we consider that remote hearings could be a useful tool to ensure that without notice restraint applications are dealt with efficiently and fairly.

26.119 We provisionally propose that Criminal Procedure Rules, rule 33.34 should continue to apply. However, the starting point should be that:

- (1) applications (whether dealt with “on paper” or by way of hearing) should be dealt with by a nationally accessible “duty” confiscation judge rather than at a specific court centre.
- (2) where the duty confiscation judge considers that a hearing is necessary, the application should be dealt with at a virtual hearing rather than before a specific court centre.¹³⁹

26.120 We propose that such a judge would be a Crown Court judge or recorder with an appropriate qualification or “ticket” to determine confiscation matters, who would be able to sit in any court centre without using a courtroom.

26.121 National access to the virtual confiscation judge using accessible audio-visual technology would allow the application to be dealt with efficiently.

26.122 We consider that the starting point would apply, for example, when an application for restraint is to be made without notice on a stand-alone basis (for example, at the investigation stage when no concurrent application is made to the court for any other investigatory orders in connection with the criminal offence itself). If the application is made during a trial, or there is to be an *inter partes* contested hearing, then the interests of justice would require a hearing at the Crown Court. We consult on this proposal in Chapter 10.

26.123 We are mindful that the COVID-19 pandemic has led to a rapid and widespread introduction of video hearings, and the degree to which that has been a success will be undoubtedly be a matter for reflection for some time.

26.124 Nevertheless, we remain confident that our modest proposal with regards to remote hearings is appropriate. The proposal is narrow in its scope. It is not intended to replace face to face hearings, but to provide a mechanism through which a judge dealing with an application on the papers can obtain more evidence to enable an urgent without notice application to be dealt with efficiently and effectively.

¹³⁷ Criminal Practice Directions 2015, para 3N.8.

¹³⁸ Coronavirus Act 2020, ss 53 and 54; and sch 23 and 24.

¹³⁹ See Chapter 10.

Consultation Question 90.

26.125 We provisionally propose that:

- (1) Applications for without notice restraint orders should be made to a duty judge, accessible nationally.
- (2) The application should be dealt with by the judge on the papers where possible.
- (3) If the judge requires further information, that judge should be permitted to hold a hearing remotely.
- (4) Should the judge decide that there is a need for an inter partes hearing, the hearing should be listed at a court centre local to the parties.

26.126 Do consultees agree?

VARIATION OR DISCHARGE OF RESTRAINT ORDERS

26.127 Applications can be made to vary or discharge restraint orders with two days' notice.¹⁴⁰ During our pre-consultation discussions there was no suggestion that this test caused concern or difficulty and we do not propose to change what is seen as an important safeguard for those people who are affected by a restraint order.

Failing to start criminal proceedings within a reasonable time.

26.128 As we discussed earlier in the chapter, section 42(7) of POCA 2002 requires the court to discharge a restraint order if criminal proceedings against the person who is under investigation are not started within a reasonable time. In *R v S* the Court of Appeal suggested that:

the following, in no particular order, at least will usually be likely to be relevant (there may of course, we stress, be others in any given case) where section 42(7) is under consideration:

- (1) The length of time that has elapsed since the Restraint Order was made.
- (2) The reasons and explanations advanced for such lapse of time.
- (3) The length (and depth) of the investigation before the Restraint Order was made.
- (4) The nature and extent of the Restraint Order made.
- (5) The nature and complexity of the investigation and of the potential proceedings.

¹⁴⁰ Criminal Procedure Rules, r 33.53(4).

(6) The degree of assistance or of obstruction to the investigation.

It is the obligation of the judge to evaluate all the relevant circumstances of the particular case in reaching his or her judgment as to whether or not proceedings have been started within a reasonable time. If they are adjudged not to have been started within a reasonable time then the Restraint Order *must* be discharged; and accordingly the consequences flowing from such discharge are then irrelevant.¹⁴¹

26.129 Throughout this paper we have made recommendations about the incorporation of guidance provided by the court into statute to ensure that the law is simple, clear and accessible. The guidance provided by the Court of Appeal in *R v S* provides a very clear and helpful list of non-exhaustive factors for judges and practitioners to take into consideration when analysing whether proceedings have been started within a reasonable time. Accordingly, we provisionally propose that these indicative factors are set out in any revised confiscation legislation.

26.130 As with the indicative factors we propose in connection with a risk of dissipation, we provisionally propose that the factors are not exhaustive and the court may have regard to any other factors that it considers to be relevant. The court should not be obliged to engage in an extensive investigation of each factor, but must exercise its judgment in light of the factors.¹⁴²

¹⁴¹ *R v S* [2019] EWCA Crim 1728, [2020] 1 WLR 109 at [39] to [40] (emphasis in original).

¹⁴² *R v Taylor* [2006] 2 Cr App R 14 (222), [2006] EWCA Crim 260.

Consultation Question 91.

26.131 We provisionally propose that in considering whether criminal proceedings against a person who is under investigation are commenced within a reasonable time for the purposes of determining whether a restraint order should be discharged, the court must have regard to the following factors (and to any others that it considers relevant in all of the circumstances of the case):

- (1) The length of time that has elapsed since the Restraint Order was made.
- (2) The reasons and explanations advanced for such lapse of time.
- (3) The length (and depth) of the investigation before the restraint order was made.
- (4) The nature and extent of the restraint order made.
- (5) The nature and complexity of the investigation and of the potential proceedings.
- (6) The degree of assistance or of obstruction to the investigation.

26.132 Do consultees agree?

Variations to meet expenses

26.133 On an application to vary a restraint order, a judge may release funds from restraint to meet:

- (1) reasonable living expenses;
- (2) reasonable legal expenses; and/or
- (3) reasonable expenses for the carrying on of any trade, business, profession or occupation.¹⁴³

Variation to permit reasonable living expenses

26.134 We provisionally propose that no substantive variation be made to the general principle that a defendant should be permitted to draw reasonable living expenses from restrained funds.

26.135 How reasonable living expenses are calculated was raised as a problem during our pre-consultation discussions. The starting position for reasonable living expenses is summed up in *Millington and Sutherland Williams on the Proceeds of Crime*:

Most restraint orders will make provision for the release of funds (beginning at around £300 per week)... . At the time the prosecutor applies for a restraint order, the information he has as to the personal circumstances of the defendant may well

¹⁴³ Proceeds of Crime Act 2002, s41(3)

be limited. He may not, for example, know the defendant's marital status, or whether he has any dependant children to care for. It is also unlikely that the prosecutor will know the extent of the defendant's legitimate financial commitments, such as mortgage repayments, public utility bills and the like.¹⁴⁴

26.136 During our scoping exercise, we repeatedly heard anecdotal evidence that what is intended to be a pragmatic starting point for the assessment of reasonable expenses is treated as a minimum entitlement, without any scrutiny as to the amount. If the prosecution stated that £300 a week should be considered as a starting point, more often than not £300 would be the sum treated as permitted living expenses.

26.137 Because the sum has been treated as a minimum right, in any subsequent application to vary the order, any bills to be met have been treated as additional to the initial figure that had been proposed by the prosecutor. In our example, a person who was permitted to withdraw £300 of living expenses who stated that he or she required £100 to meet bills every week would, more often than not, be awarded living expenses of £400 per week. This approach does not reflect the required balance between permitting a defendant and their dependants to continue to lead a reasonable lifestyle¹⁴⁵ and the statutory mandate to preserve assets for confiscation,¹⁴⁶ leading to an unjustified diminution in the assets available to satisfy a confiscation order.

26.138 No guidance is provided in either POCA 2002 or the Criminal Procedure Rules about how reasonable living expenses are to be calculated. Section 41 of POCA 2002 and rule 33.52(1) simply state that a variation for such expenses can be made. It is therefore perhaps understandable that the approach adopted has not always been in accordance with the need to preserve funds for confiscation.

26.139 We provisionally propose that when an application is made for a restraint order, the order may provide for the release of a sum that the court deems to be appropriate for meeting reasonable living expenses. In coming to its conclusion about what might be appropriate, we provisionally propose that the court be guided by all of the circumstances of the case, as known at the time. This reflects the fact that more funds may be needed to support a family of four than would be needed to support a single person, for example. This would go some way to ensuring that any sum permitted to be released from restraint was appropriate and proportionate to both the needs of the person whose assets are restrained and his or her dependents and the need to preserve assets for confiscation.

26.140 Further, we provisionally propose that a new Criminal Procedure Rule requiring that any application to release funds for reasonable legal expenses must be supported by a schedule of income and outgoings and include copies of evidence to support assertions made within that schedule. The schedule of income and outgoings should be on a standard form within the Criminal Procedure Rules, which would be

¹⁴⁴ Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) para 5.28.

¹⁴⁵ *Re Peters* [1988] QB 871, [1988] 3 WLR 182.

¹⁴⁶ Proceeds of Crime Act 2002, s 69.

accessible and clear. This would permit the court to pay close scrutiny to the proportionality of any award of living expenses.

Consultation Question 92.

26.141 We provisionally propose that:

- (1) any amended legislation provides that:
 - (a) when an application is made for a restraint order, the order may provide for the release of a sum that the court deems to be appropriate for meeting reasonable living expenses.
 - (b) in coming to its conclusion about what might be appropriate, the court be guided by all of the circumstances of the case, as known at the time and by the need to preserve assets for confiscation.
- (2) the Criminal Procedure rules be amended to include:
 - (a) a rule to the effect that any application to release funds for reasonable living expenses must be supported by a schedule of income and outgoings and include copies of evidence to support assertions made within that schedule.
 - (b) a standard form for a schedule of income and outgoings.

26.142 Do consultees agree?

Variation to permit reasonable legal expenses

26.143 Whilst POCA 2002 permits restraint orders to be varied to withdraw reasonable legal expenses, such a variation may not be granted to the defendant or the recipient of a tainted gift to challenge any matter related to the criminal offence or offences that he or she is suspected of having committed.¹⁴⁷ This includes funding to challenge proceedings under Part 2 of POCA 2002.¹⁴⁸ 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".¹⁴⁹ It cited examples of three cases in which it contrasted prosecution and defence legal costs:

In case 1 the prosecutor's legal costs have been approximately £100,000 to date compared with defence fees of £826,000...in case 2, the defence barrister's fees are estimated to be some £250,000, whilst the prosecuting barrister is likely to be paid

¹⁴⁷ Proceeds of Crime Act 2002, s 41(4).

¹⁴⁸ *In Re S (Restraint Order: Release of Assets)* [2004] EWCA Crim 2374, [2005] 1 WLR 1338.

¹⁴⁹ Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000) p 72.

only £50,000; and in case 3 the prosecutor's legal costs were £275,000 compared with defence costs of £811,000.¹⁵⁰

26.144 The PIU concluded that the payment of private legal fees was a cause of a "considerable drain on the assets recovered under confiscation orders"¹⁵¹ and the prohibition on legal expenses was intended to "prevent the purposeful dissipation of the assets in legal fees".¹⁵²

26.145 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.¹⁵³ Any property freezing order obtained in connection with civil recovery proceedings therefore freezes property alleged to have been obtained through *illegitimate* means.¹⁵⁴ Nevertheless, a defendant is permitted to draw from such funds for their defence.¹⁵⁵
- (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.

26.146 When POCA 2002 was originally enacted, the position with regards to civil and criminal asset recovery litigation funding was the same. Funds connected with civil recovery could not be used to meet legal expenses¹⁵⁶ to reduce the "inevitability of dissipation".¹⁵⁷ However, this position was altered by the Serious Organised Crime and Police Act 2005. The rationale was explained clearly in the Explanatory Memorandum to the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005.¹⁵⁸

At the time, the Government's preferred method to ensure representation in these cases was through the civil legal aid scheme. However, operational experience

¹⁵⁰ Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000) para 8.37.

¹⁵¹ Above, para 8.47.

¹⁵² Explanatory Memorandum to the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005, SI 2005 No 3382, para 7.2.

¹⁵³ Proceeds of Crime Act 2002, s 243(1) and 304(1).

¹⁵⁴ Proceeds of Crime Act 2002, s 245A(5).

¹⁵⁵ Proceeds of Crime Act 2002 s 245C(5).

¹⁵⁶ Proceeds of Crime Act 2002 s 252(4).

¹⁵⁷ Explanatory Memorandum to the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005, SI 2005 No 3382, para 7.2.

¹⁵⁸ Explanatory Memorandum to the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005, SI 2005 No 3382.

shows that the current provisions of the scheme are ill-suited to this type of case, partly due to the scope of the scheme, but in particular due to the financial eligibility limits, and the rules surrounding these limits.

Furthermore, it is almost inevitable that respondents in these cases have complex financial affairs. The statutory requirement for the Legal Services Commission (which administers legal aid) to investigate an applicant's means has given defendants the opportunity to delay the legal aid process, and thus to hold up and frustrate the intention of POCA 2002.¹⁵⁹

26.147 The legal aid position in connection with criminal restraint orders is slightly different. Whilst specific assets are targeted by civil recovery proceedings, a restraint order is more likely to be made in connection with all of a person's known assets, particularly in cases where the lifestyle assumptions apply. This materially lowers the difficulty in assessing eligibility for legal aid. If a restraint order is granted prior to charge, a suspect will be means-tested for civil legal aid. In assessing means, the Legal Aid Agency has regard to the fact that assets are under restraint and that, therefore, the suspect's means to meet legal expenses are curtailed to the extent of the order. Furthermore, no account is taken of the fact that a defendant may be in receipt of a sum per week by way of reasonable living expenses in means-testing income.¹⁶⁰ After charge a person is eligible for means-tested criminal legal aid for both the confiscation and substantive criminal matters. The approach taken by the Legal Aid Agency to assessment of means is identical.¹⁶¹ There is therefore no inherent injustice in the rationales behind permitting private costs to be met from frozen funds in civil recovery proceedings and prohibiting the same in confiscation proceedings.

26.148 With regards to the disparity between the position of defendants and third parties, the starting point for both defendants and third parties other than recipients of tainted gifts is identical, namely consideration of funding streams. A third party may have sources of funding other than drawing on a restrained asset in which they have an interest.¹⁶² If they do not, they may be eligible for means-tested civil legal aid. Only as a last resort should such a third party be permitted to draw on restrained funds. Similarly, a defendant may have unrestrained sources of funding. If not, he or she will be eligible for either criminal or civil legal aid (depending on the stage of proceedings). Therefore, there is parity in the approach applied.

26.149 However, that parity between defendants and third parties does not necessarily extend to the reality that if funds are released from restraint a third party may have access to a pool of practitioners broader than those willing to work for standard criminal legal aid rates. During our pre-consultation discussions it was suggested that the current legal expense exception is unsatisfactory because it limits the defendant in their choice of practitioner in both the criminal case and the confiscation proceedings

¹⁵⁹ Explanatory Memorandum to the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005, SI 2005 No 3382, paras 7.3 and 7.4.

¹⁶⁰ Legal Aid Agency, *Means Assessment Guidance* (April 2019) part 6.7.

¹⁶¹ Legal Aid Agency, *Criminal Legal Aid Manual, applying for legal aid in criminal cases in the magistrates' court and Crown Court*, part 11.2.

¹⁶² *Serious Organised Crime Agency v Azam* [2011] EWHC 1551 (Admin); *Director of the Asset Recovery Agency v Patrick Fleming and Others* [2007] NIQB 16.

to those willing to work for legal aid rates, and that standard criminal legal aid rates are not always sufficient to reflect the complexity of the work involved.

26.150 The Law Commission makes no observation about the adequacy of criminal legal aid funding. It is a matter for individual lawyers to determine whether they are willing to treat legal aid funding as adequate remuneration in a particular case.¹⁶³ However, having different funding regimes in civil recovery and criminal restraint creates 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.

26.151 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. Despite being aware of the apparent justification for the prohibition, press publicity has been negative. Writing in the *Evening Standard*, Martin Bentham noted that the prohibition was "supposed" to ensure that assets are preserved but in fact meant that "super-rich criminals" were given legal aid.¹⁶⁴

26.152 Section 46 of the Crime and Courts Act 2013 was intended to alleviate some of the burden on the public purse. Section 46 amended section 41 of POCA 2002¹⁶⁵ to require restraint orders to be subject to a "legal aid exception", to facilitate the repayment of legal aid by a defendant to the Legal Aid Authority once a confiscation order is satisfied.¹⁶⁶ The restraint order will remain in force until the legal aid bill is repaid.

26.153 Section 46 goes some way to improving the position with regards to public finances. However, as the Ministry of Justice recognised in analysis that preceded section 46, the "legal aid exception" will only apply in "some" cases where "defendants will still have assets that are subject to a restraint order following the satisfaction of their confiscation order".¹⁶⁷ This is reflected in the fact that over £2 billion is outstanding in unpaid confiscation orders.¹⁶⁸

26.154 We provisionally propose that the legal aid exception to restraint orders should be broadened to permit the payment of lawyers in confiscation proceedings and related criminal proceedings. We consider that this would:

¹⁶³ Bar Standards Board, *The Bar Standards Board Handbook*, Part 2 r C30.8.

¹⁶⁴ M Bentham "Special investigation: scandal of super-rich criminals given legal aid to fight fraud trial" *Evening Standard* (26 November 2012), <https://www.standard.co.uk/news/crime/special-investigation-scandal-of-super-rich-criminals-given-legal-aid-to-fight-fraud-trial-8352182.html> (last viewed October 2019)

¹⁶⁵ Proceeds of Crime Act 2002, s 41(2A) and 41(2B).

¹⁶⁶ Proceeds of Crime Act 2002, s 41(5A) and SI 2015 No 868 Reg 2.

¹⁶⁷ SI 2015 No 868, Explanatory Note, para 7.3.

¹⁶⁸ HMCTS, *Trust Statement 2018-19* (2019), p 8.

- (1) Permit defendants to have the same access to a range of legal practitioners as would be available to defendants in civil proceedings to recover the proceeds of crime and to third parties in confiscation proceedings.
- (2) Save the state from having to supply legal aid to defendants who have sufficient means to pay legal fees. This in turn would redress any public perception about the use of legal aid where it may seem to be unnecessary.

26.155 We accept that permitting payment of lawyers in confiscation proceedings may mean that funds are diverted from the satisfaction of the confiscation order itself and that this could be seen as undermining the purpose of confiscation. Three points arise in this regard:

- (1) There is a difference between what the PIU described as “reckless dissipation of restrained assets” and the controlled use of those assets through oversight by the courts. The submission and approval of a costs budget by the judge would protect against unreasonable dissipation. In civil recovery proceedings legal expenses are governed by a dedicated statutory instrument¹⁶⁹ and practice direction,¹⁷⁰ which would require some replication in criminal restraint proceedings.
- (2) Any legal fees exception should not be permitted to authorise the release of restrained assets below the amount which would be needed to compensate alleged victims.
- (3) A defendant who uses funds to pay for lawyers is still not free to use that money to finance a “criminal lifestyle” directly. He or she must use the money in furtherance of the resolution of the criminal proceedings and confiscation rather than to purchase a car (for example). Ultimately, the money is not placed into the hands of the alleged criminal.

26.156 The statutory instrument applicable to funding in civil recovery proceedings sets out a table of remuneration for legal representatives:

Rates of remuneration for legal representatives are specified, with different rates for different categories of fee earner, higher rates for cases which raise “substantial novel or complex issues of law or fact” and increases for firms whose offices are in London.¹⁷¹

26.157 Such a table has the merits of providing a degree of clarity and certainty. It would also ensure a degree of proportionality by regulating the level of fees. The Law Commission does not intend to go further than provisionally proposing that such a statutory instrument be considered. In the event such a table of remuneration is considered appropriate, any rates of payment to be applied would be a matter for separate consideration by stakeholders.

¹⁶⁹ The Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005, SI 2005 No 3382.

¹⁷⁰ Practice Direction – Civil Recovery Proceedings.

¹⁷¹ SI 2005 No 3882, explanatory memorandum, para 7.11.

26.158 We have considered whether increased availability of private funding might expose prosecutors to an increased risk of having to pay greater costs in the event that a case goes in favour of a defendant. We address the costs implications and make recommendations in that regard later in this chapter.

26.159 We have also considered whether a provision to permit legal expenses should be linked to a provision similar to section 46 of the Crime and Courts Act 2013, deferring payment of fees to lawyers until a confiscation order has been paid. However, the permission to release restrained assets for legal expenses may arise at a very early stage in proceedings, for example, at the outset of an investigation or during a lengthy criminal trial that precedes the confiscation. If costs were incurred at an early stage and a lawyer could not expect payment until confiscation proceedings were concluded, lawyers might be reluctant to act. Such a provision may therefore be counterproductive in seeking to broaden access to legal representation.

Consultation Question 93.

26.160 We provisionally propose that:

- (1) The current test for release of funds for legal expenses is varied to permit the payment of legal expenses connected with criminal proceedings and confiscation.
- (2) Legal expenses should be subject to:
 - (a) Approval of a costs budget by the judge dealing with the case.
 - (b) The terms of a table of remuneration, set out in a statutory instrument.

26.161 Do consultees agree?

COSTS IN RESTRAINT PROCEEDINGS

26.162 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.¹⁷² The reason for adopting the civil costs regime under POCA 2002 appears to have been because, prior to POCA 2002 coming into force, applications for restraint orders were dealt with by the High Court. Accordingly, rules akin to civil procedure rules were imported to the Crown Court.¹⁷³

26.163 In deciding what order (if any) to make about costs, the court must have regard to all of the circumstances, including (amongst other things):

- (1) the conduct of all the parties;
- (2) the amount or value of any money or property involved;

¹⁷² Criminal Procedure Rules, r 33.47(3)(a), Criminal Practice Direction X: Costs, Part 7.1.1.

¹⁷³ SI 2003 No 421, explanatory note.

- (3) the importance of the matter to all the parties;
- (4) the particular complexity of the matter or the difficulty or novelty of the questions raised; and
- (5) the skill, effort, specialised knowledge and responsibility involved.¹⁷⁴

26.164 This does not mean that a prosecution authority that reasonably applied for a restraint order will be immune from a costs order. As Mr Justice Schiemann observed in the case of *re W*:

If he is acquitted [the accused person's] assets are unfrozen. The question essentially is: should the innocent individual pay the costs of taking part in proceedings initiated by the Commissioners of Customs and Excise or should the public at large? In my judgment it should be the public at large. Prosecutions are launched, and if someone is acquitted by the verdict of the jury, then one can see in retrospect that he should not have been troubled in the matter. There is no blame to be attached to the Customs and Excise, but it seems to me that in principle the public should pay.¹⁷⁵

26.165 Therefore, in every case in which a restraint order is discharged the general rule means that there is a real risk of costs being awarded against a prosecution authority,¹⁷⁶ even though a restraint order may have been obtained reasonably and appropriately.

26.166 Furthermore, although a costs order must be proportionate, the Costs Practice Direction recognises that restraint proceedings inevitably involve some complexity and therefore there is a risk that proportionate costs may be relatively high.¹⁷⁷ The risk of a substantial costs order has been cited as a factor that impacts upon the decision whether to apply for a restraint order.¹⁷⁸

26.167 This position must be contrasted with the position in civil asset forfeiture cases before the magistrates' court. Unlike in restraint proceedings, the rules governing detention and forfeiture of cash were not imported from the High Court. Because such proceedings are dealt with as if they were proceedings "by way of complaint"¹⁷⁹ the cost regime to be applied is that under section 64 of the Magistrates' Courts Act 1980. This gives the court discretion to award such costs as it thinks just and reasonable.

¹⁷⁴ Criminal Procedure Rules, r 33.48(5) and Criminal Practice Direction (Costs in Criminal Proceedings) 2015, Parts 7.1.3 and 7.2.4 to 7.2.5.

¹⁷⁵ *In re W* (*The Times*, 13 October 1994), approved by Simon Brown LJ in *Hughes v Customs and Excise Commissioners* [2002] EWCA Civ 734, [2003] 1 WLR 177.

¹⁷⁶ *In the matter of Olden v Crown Prosecution Service* [2010] EWCA Civ 961.

¹⁷⁷ Criminal Practice Direction (Costs in Criminal Proceedings) 2015, para 7.2.6.

¹⁷⁸ Confiscation Orders, Report of the House of Commons Committee of Public Accounts (2013-2014) HC 942 p 9.

¹⁷⁹ SI 2002 No 2998, r 11(2).

The discretion applies not just to the amount to be paid but also to the party who is to pay costs.¹⁸⁰

26.168 In the case of *R (Perinpanathan) v City of Westminster Magistrates' Court*,¹⁸¹ the Court of Appeal (Civil Division) found that no costs should be awarded against an unsuccessful applicant for forfeiture of assets allegedly connected to criminality, as long as the application was brought "honestly, reasonably, properly and on grounds that are sound".¹⁸² The rationale for adopting this position was that:

There is a need to make and stand by honest, reasonable and apparently sound decisions in the public interest without fear of exposure to undue financial prejudice, in one case if the decision is successfully challenged, in the other if the application fails. There is a real public interest that the police seek an order for forfeiture if they consider that on the evidence it is more probable than not that the money was intended for an unlawful purpose. It would be quite contrary to the public interest if, due to fear of financial consequences, it was decided not to seek its forfeiture, but simply return the money. The public duty requires the police to make an application in such circumstances.¹⁸³

26.169 Two highly contrasting costs principles therefore apply to asset recovery proceedings. On the face of it, the application of the *Perinpanathan* principle to restraint applications is attractive in encouraging greater use of restraint orders. However, it would lead to a fundamental shift away from the long-established position in restraint cases that liability for costs should rest with "the public at large".¹⁸⁴

26.170 The costs principles are different again in criminal cases. The Crown Court has the power to make what is known as a "defendant's costs order" in the event that a defendant is acquitted or a case is not proceeded with.¹⁸⁵ As with civil proceedings, subject to clearly defined boundaries,¹⁸⁶ costs ordinarily follow the event even if the case was properly brought. In accordance with the Practice Direction (Costs in Criminal Proceedings):

A defendant's costs order should normally be made unless there are positive reasons for not doing so, for example, where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him was stronger than it was.¹⁸⁷

¹⁸⁰ *City of Bradford v Booth* (2000) 164 JP 485.

¹⁸¹ *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] EWCA Civ 40, [2010] 1 WLR 1508.

¹⁸² *R (Perinpanathan) v City of Westminster Magistrates' Court*, above at [33].

¹⁸³ *R (Perinpanathan) v City of Westminster Magistrates' Court*, above at [45]; endorsing the comments of Goldring LJ in the Divisional Court; *R (Perinpanathan) v City of Westminster Magistrates' Court* [2009] EWHC 762 (Admin).

¹⁸⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 7.

¹⁸⁵ Prosecution of Offences Act 1985, s 16.

¹⁸⁶ Prosecution of Offences Act 1985, s 16A.

¹⁸⁷ Criminal Practice Direction (Costs in Criminal Proceedings) 2015, para 2.2.1

26.171 There are two key differences between the costs regime currently applicable to restraint proceedings and the costs regime applicable to ordinary criminal proceedings:

- (1) Costs in ordinary criminal proceedings are drawn from what are known as “Central Funds”. The “Central Funds” from which criminal costs are paid is derived from the Ministry of Justice budget and not from the budgets of individual prosecution authorities.¹⁸⁸
- (2) Costs in ordinary criminal proceedings are capped at criminal legal aid rates.¹⁸⁹ This provision serves a pragmatic purpose in preserving public funds.¹⁹⁰

26.172 During our pre-consultation discussions we heard that the use of the civil costs regime is a risk factor that inhibits applications for restraint orders. This costs risk was expressly referred to by the former Director of Public Prosecutions, Alison Saunders, in addressing why there had been a drop in the number of restraint order applications between 2010-11 and 2012-13.¹⁹¹

26.173 Costs incurred must be met by the prosecution in the event that they are the “losing” party, regardless of the good faith or the reasonableness of the application. The implications of our proposals regarding the release of legal expenses is that any costs that may be incurred are likely to be higher. This has the potential to expose a prosecution authority to a greater financial risk and so might be counterproductive in encouraging the use of restraint powers.

Analysis

26.174 We consider that none of the alternative approaches to costs is entirely satisfactory in resolving the competing tensions:

- (1) For costs to “follow the event”, regardless of the reasonableness of action by a prosecution authority, fails to reflect the public policy issues involved in an application for restraint. As articulated in *Perinpanathan*, there are strong public policy justifications for encouraging the use of restraint to preserve assets for confiscation and compensation without fear of costs being imposed in all circumstances where the case is “lost”.
- (2) An innocent party should be able to reclaim costs for the reasons articulated in *In Re W*.¹⁹²

¹⁸⁸ Ministry of Justice, *The Award of Costs from Central Funds in Criminal Cases*, Consultation Paper (November 2008) CP28/08.

¹⁸⁹ Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 7; Ministry of Justice, *Calculation of amounts payable in respect of legal costs under defendant’s costs orders*, 24 March 2016; Regulation 4A of the Costs in Criminal Cases (General) Regulations 1986 (SI 1986 No 1335), reg 4A.

¹⁹⁰ Ministry of Justice, *The Award of Costs from Central Funds in Criminal Cases*, Consultation Paper (November 2008) CP28/08.

¹⁹¹ Confiscation Orders, Report of the House of Commons Committee of Public Accounts (2013-14) HC 942, written evidence from the Crown Prosecution Service, Home Office and the National Crime Agency.

¹⁹² *In re W* (The Times, 13 October 1994).

- (3) Adopting the approach in ordinary criminal cases where costs follow the event and are awarded from central funds arguably does not appropriately allocate financial liability for wholly unjustified applications for restraint.

A starting point of the assessment of reasonableness

26.175 To encourage the responsible use of restraint powers, we consider that the starting point in any costs enquiry should be a *Perinpanathan* assessment of the reasonableness of a prosecution authority's actions. Applications for restraint have potentially serious implications for a defendant's peaceful enjoyment of property. We therefore consider that in determining whether the prosecution acted reasonably the court should consider the extent to which the prosecution applied its mind to the "indicative factors" in connection with a risk of dissipation. In addition, the court should consider:

- (1) The stage of an investigation or prosecution. At an early stage it is likely that less information will be available to prosecutors.
- (2) The urgency of proceedings. The more urgent the application the less likely it is that each indicative factor may have been considered in detail.
- (3) Whether all reasonable lines of enquiry have been followed, particularly in light of (1) and (2).
- (4) Whether there has been full and frank disclosure of matters known to the prosecution that may assist the defence or undermine the prosecution.

26.176 Taking account of reasonableness of conduct is not in fact a radical departure from the civil costs regime. Section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 limits costs awarded against a person in receipt of legal aid¹⁹³ to a reasonable sum. In calculating what is reasonable the court should take into account "[the person's] conduct in connection with the dispute to which the proceedings relate".¹⁹⁴

26.177 Cases heard on the Small Claims Track¹⁹⁵ and Fast Track¹⁹⁶ are subject to fixed recoverable costs.¹⁹⁷

¹⁹³ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 26(2).

¹⁹⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 26(1)(b).

¹⁹⁵ Civil Procedure Rules, r 26.6(1) - (3) provides that the Small Claims Track is appropriate for claims below £10,000, and personal injury claims and claims by tenants for repairs that do not exceed £1,000.

¹⁹⁶ Civil Procedure Rules r 26.6(4) and (5) provide that the Fast Track is the appropriate track for claims not suitable for the Small Claims Track and, for proceedings issued on or after 6th April 2009, which have a value of not more than £25,000. Trials normally last for no longer than one day and there expert evidence is limited.

¹⁹⁷ Civil Procedure Rules r 27.14(2), r 45.38.

26.178 The prescribed fixed costs may be dispensed with where the court is satisfied that a party has behaved unreasonably.¹⁹⁸ This is a fact-sensitive question, although the comments of higher courts may assist.¹⁹⁹

Unreasonable conduct

26.179 We consider that in the event that the prosecution acted unreasonably, there should be no cap on costs, as under the current law.²⁰⁰ To do otherwise would have the potential to lead to unjust outcomes. In *Chief Constable of Sussex Police v Taylor*, for example, costs were awarded in the sum of £25,081.60 after the magistrates' court implicitly²⁰¹ found that the conduct of the applicant authority was unreasonable in cash forfeiture proceedings because "the [police] complainant chose to advance an unsustainable argument".²⁰²

26.180 In that case it was initially contended that, amongst other things, the defendant was in possession of money derived from crime or intended for use in crime as a result of alleged involvement in blackmail. However, the defendant had been acquitted of blackmail prior to the cash forfeiture proceedings and ultimately the argument was not referred to by the time of the applicant authority's closing speech. The £25,000 costs figure included £15,000 for representation by a QC at the magistrates' court. The reason for the QC's attendance was because he had represented the defendant during his blackmail trial. Whilst £15,000 appears to be high, it was deemed to have been appropriate to award it in all of the circumstances. If a cap on costs had been in place, it may have limited recovery of a sum that was, in the view of the High Court, reasonably incurred in all of the circumstances.

¹⁹⁸ Civil Procedure Rules, r 27.14(2)(g), r 45.39(7).

¹⁹⁹ eg *Dammermann v Lanyon Bowdler LLP* [2017] EWCA Civ 269 at [30] – [31].

²⁰⁰ See *Crown Prosecution Service v Grimes* [2003] EWCA Civ 1814, [2004] 1 FLR 910.

²⁰¹ *Chief Constable of Sussex Police v Taylor* [2013] EWHC 1616 at [20], [2013] 5 Costs LO 692.

²⁰² *Chief Constable of Sussex Police v Taylor*, above.

Consultation Question 94.

26.181 We provisionally propose that, in an application for costs in connection with restraint proceedings:

- (1) The court should decide whether the application for restraint was reasonably brought.
- (2) In doing so, the court should consider the extent to which the prosecution applied its mind to the “indicative factors” in connection with a risk of dissipation. In addition, the court should consider a series of indicative factors, including:
 - (a) The stage of an investigation or prosecution. At an early stage it is likely that less information will be available to prosecutors.
 - (b) The urgency of proceedings. The more urgent the application the less likely it is that each indicative factor may have been considered in detail.
 - (c) Whether all reasonable lines of enquiry have been followed, particularly in light of (a) and (b).
 - (d) Whether there has been full and frank disclosure of matters known to the prosecution that may assist the defence or undermine the prosecution.
- (3) If the court concludes that the application was not reasonably brought, costs should follow the event.

26.182 Do consultees agree?

Reasonable conduct

26.183 In the event that the prosecution acted reasonably, we consider that there are four potential options:

- (1) No costs are awarded.
- (2) Costs are awarded, but capped at legal aid rates.
- (3) Costs are awarded, but are subject to a pre-determined discount.
- (4) Costs are awarded, but are capped at an amount that the court considers reasonable in all of the circumstances.

26.184 During our pre-consultation discussions, option (1) was not the preferred option of any stakeholder, including prosecution authorities.

26.185 Option (4) provides the greatest flexibility but may not alleviate any costs risk because what may be considered reasonable may be a very high proportion of the

final costs. Exposure to costs at the discretion of the court would not encourage the use of restraint and would not address the issues we identified earlier in this chapter.

26.186 Options (2) to (3) attempt to provide certainty. All parties have certainty in three ways: firstly, certainty in the knowledge that reasonableness would be taken into account in any award of costs; secondly, certainty as to how the court should take reasonableness into account; and thirdly, certainty that a party successfully challenging the restraint will be awarded costs, albeit tempered to some extent by a limitation on what can be claimed.

26.187 Option (3) permits innocent parties to reclaim costs at a level that is potentially higher than legal aid rates, subject to an appropriate deduction for reasonableness. However, option (3) still has the potential to expose prosecution authorities to large costs orders. A set percentage discount on a costs order measured in the thousands of pounds is still a substantial order. In itself this would do little to alleviate the current “risk aversion” to restraint caused by costs orders, or to encourage the legitimate public function involved in bringing restraint proceedings.

26.188 Option (2) was proposed as an amendment to the Serious Crime Bill in 2014.²⁰³ At the time the proposed amendment was described by the Parliamentary Under-Secretary of State to the Home Office, Lord Taylor of Holbeach, as “interesting”²⁰⁴ but ultimately it was not considered to be a matter for legislation. The government stated that, whilst it agreed in principle²⁰⁵ with the proposal, it was a matter for the Criminal Procedure Rules²⁰⁶ and that it intended to consult with the Criminal Procedure Rules Committee (CPRC).²⁰⁷ Option (2) would align the position on costs in restraint proceedings with criminal proceedings more generally.²⁰⁸ The capping of costs in substantive criminal proceedings has been criticised by practitioners and has been referred to as a tax on the innocent.²⁰⁹ Conservative MP Nigel Evans, who voted for the amendment, stated that “it was completely wrong” after he incurred costs of £130,000, which he did not recover, upon his acquittal of a number of sexual offences.²¹⁰ It nevertheless remains the test used in criminal proceedings.

26.189 Our proposed test of reasonableness provides balance between the competing aims of encouraging restraint applications and the impact upon an individual in having their assets restrained. If the prosecution is found to have acted unreasonably they would

²⁰³ *Hansard* (HL) 2 July 2014, vol 754, col 1745 and 1748; Serious Crime Bill, Amendment 12, <https://publications.parliament.uk/pa/bills/lbill/2014-2015/0001/amend/ml001-i.htm> (Marshaled amendments to be moved in Committee) (last visited September 2020).

²⁰⁴ *Hansard* (HL) 2 July 2014, vol 754, col 1752

²⁰⁵ *Hansard* (HL) 14 October 2014, vol 756, col 130.

²⁰⁶ *Hansard* (HL) 2 July 2014, vol 754 Col 1752.

²⁰⁷ *Hansard* (HL) 14 October 2014 ,vol 756 col 130.

²⁰⁸ Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 7; Ministry of Justice, *Calculation of amounts payable in respect of legal costs under defendant’s costs orders* 24 March 2016; Costs in Criminal Cases (General) Regulations 1986 (SI 1986 No 1335), reg 4A.

²⁰⁹ The secret barrister, *Mr Gove must now hammer the final nail into Grayling’s legacy – and abolish the Innocence Tax*, <https://thesecretbarrister.com/tag/innocence-tax/> (last visited August 2020).

²¹⁰ A Hill and O Bowcott, *“It’s completely wrong”: falsely accused Tory MP attacks legal aid cuts*, <https://www.theguardian.com/law/2018/dec/27/its-completely-wrong-falsely-accused-tory-mp-attacks-legal-aid-cuts> (last visited August 2020).

not be afforded costs protection. Such a scheme would replicate the system deployed in civil claims on the Small Claims and Fast Track that we discussed earlier. We note that the operation of costs' capping in substantive criminal proceedings does not have a similar safety valve.

26.190 Restricting the amount of costs that are recoverable would reflect the fact that restraint applications take place before a criminal court as part of the criminal justice process. It would also align the position on costs in restraint proceedings with the costs in the main confiscation proceedings, which are treated as part of the criminal proceedings.²¹¹ The limitation of costs recovery to legal aid rates in the context of criminal proceedings has been found to be compatible with the right to a fair trial guaranteed by article 6 of the European Convention on Human Rights²¹² and would serve the legitimate purpose of encouraging the making of reasonable applications for restraint.

26.191 Option (2) would also serve the purpose of simplifying the law by requiring the application of what would essentially be a single costs regime for confiscation and its related criminal proceedings. We therefore provisionally propose that option (2) be considered by the CPRC.

26.192 In February 2018, the CPRC considered the amendment of the Criminal Procedure Rules with regard to limitation of costs in restraint proceedings. It requested a paper “on evidence of the difficulties to which this proposal was addressed and, if appropriate, reviewing other possible responses, for example some means of ensuring that awards of costs against public authorities should not be in disproportionate amounts”.²¹³

²¹¹ Criminal Practice Direction X: Costs, Part 7.1.1.

²¹² *R (Henderson) v Secretary of State for Justice* [2015] EWHC 130 (Admin), [2015] 1 Cr App R 29.

²¹³ Criminal Procedure Rules Committee draft minutes, 2 February 2018.

Consultation Question 95.

26.193 We provisionally propose that a rule be adopted to the effect that, if the court considers an unsuccessful or discharged application for restraint was reasonably brought, costs should be capped at legal aid rates.

26.194 Do consultees agree?

26.195 If consultees do not agree, should:

- (1) No costs be awarded.
- (2) Costs be awarded subject to a pre-determined discount to reflect the reasonableness of the application; if so, we would welcome consultees' views as to what discount might be appropriate.
- (3) Reasonable costs be awarded in all of the circumstances of the case, not capped at legal aid rates.
- (4) Costs be awarded in some other formula? If so, we would welcome consultees' view as to what formula might be appropriate.

Meeting costs of reasonably brought restraint applications from central funds

26.196 When a defendant's costs order is made in criminal proceedings, costs are met from central funds. Risk-aversion for prosecution authorities could be met to some extent by applying the criminal costs regime in full and permitting costs in all confiscation proceedings to be met from central funds rather than directly from the budgets of prosecution authorities themselves.

26.197 Whilst there may be some attraction in aligning the two regimes, our provisional proposal affords prosecuting authorities a degree of costs protection where applications are reasonably brought. Ultimately which department should bear the costs of such matters is a political question rather than a question for the Law Commission.

WHETHER TO MAKE DETERMINATIONS ABOUT THIRD PARTY INTERESTS AT OR AFTER RESTRAINT

26.198 A restraint order is an order to preserve rather than to realise assets. Therefore, at the restraint stage the court usually extends its consideration only to whether the prosecution has a good arguable²¹⁴ case that the defendant has an interest in property. The court "will not normally be willing to become embroiled in an argument as to ownership of property".²¹⁵

²¹⁴ *S v Revenue and Customs Prosecutions Office* [2005] EWCA Crim 2919.

²¹⁵ Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) 16.26; *Re Norris* [2001] UKHL 34, [2001] 1 WLR 1388; *Re Piggot* [2010] EWCA Civ 285, [2010] STC 1190.

26.199 Nevertheless, restraint orders operate to prohibit “any person” dealing with realisable property.²¹⁶ “The restraint order provisions are therefore “wide enough to restrain third parties”.²¹⁷ Because third parties are affected by restraint orders, the court must hear applications to vary or discharge a restraint order brought by “any person affected by the order”.²¹⁸ POCA 2002 is explicit that although the court should exercise its restraint powers to preserve assets for confiscation, its powers must also be exercised “with a view to allowing a person other than the defendant or the recipient of a tainted gift to retain or recover the value of any interest held by him”.²¹⁹

26.200 A court may therefore be required to consider the nature and extent of third party interests at the restraint stage. Of course, “the third party will need to consider his position carefully – if the defendant is ultimately acquitted, he will potentially waste costs in litigating his interest at the restraint stage.”²²⁰

26.201 A third party may seek to assert an interest at the confiscation hearing itself.²²¹ The third party can be represented²²² and the determination is:

conclusive in relation to any question as to the extent of the defendant’s interest in the property that arises in connection with—

- (a) the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order, or
- (b) any action or proceedings taken for the purposes of any such realisation or transfer.²²³

26.202 Therefore, for example, when a determination is made at the confiscation hearing it is treated as conclusive at a later hearing to appoint an enforcement receiver. Representations cannot be made that are inconsistent with the determination, unless the third party can show that they were not given a reasonable opportunity to make representations, or it appears to the court that there would be a serious risk of injustice if the court was bound by the determination.²²⁴

26.203 Although the Crown Court may consider third party interests at the restraint stage, there is no equivalent provision for a “binding” determination to be made at the restraint stage.

²¹⁶ Proceeds of Crime Act 2002, s 41(1).

²¹⁷ Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018).

²¹⁸ Proceeds of Crime Act 2002, s 42(3)(b).

²¹⁹ Proceeds of Crime Act 2002, s 69(3)(a).

²²⁰ Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) 16.27.

²²¹ Proceeds of Crime Act 2002, s 10A(1).

²²² Proceeds of Crime Act 2002, s 10A(2).

²²³ Proceeds of Crime Act 2002, s 10A(3).

²²⁴ Proceeds of Crime Act 2002, s 51(8).

26.204 During our pre-consultation discussions, prosecution authorities suggested that the confiscation process could be facilitated by allowing the court to make binding determinations of third party interests as early as the restraint stage. By doing so, it was contended that the confiscation process could be expedited by identifying and resolving issues in a timely manner.

26.205 The power of the Crown Court to make binding determinations on third party interests at the confiscation hearing was introduced because waiting until enforcement “to determine the extent of a third party’s interest in the defendant’s property can complicate, lengthen and otherwise frustrate the confiscation process”.²²⁵

26.206 By moving the possibility of making such determinations to even earlier in the confiscation process, third party rights may be determined definitively and expeditiously for the purposes of confiscation near the outset of an investigation. This is advantageous to:

- (1) the third party, whose right to peaceful enjoyment of property is in issue and who may otherwise incur continued legal costs over a prolonged period; and
- (2) all parties in preparing for confiscation, who will know whether such assets may be considered in making submissions about both benefit and any realisable amount at confiscation.

26.207 The power to make binding determinations on third party interests at the confiscation hearing was introduced into the Crown Court by the Serious Crime Act 2015.²²⁶ In debating the Bill which was to become the Serious Crime Act 2015, an amendment was proposed in Parliament which would have had the effect of “bringing the process forward”, requiring genuine third party interests to be claimed and determined at the restraint stage rather than waiting until either enforcement or the confiscation hearing.

26.208 The government did not consider that it would be appropriate to bring determination of all third-party interests forward to the restraint stage because “not all restraint orders lead to confiscation orders....it would be a wasteful use of limited judicial and prosecutorial resources to require the court to make a determination as to third party interests in restrained property.”²²⁷

26.209 Provisionally, we agree with the arguments advanced by the government, and reiterated during our pre-consultation discussions by members of the Bar, that it would not be appropriate to require all third party interests to be determined at the restraint stage. Nevertheless, we consider that the court should have an appropriate power to do so where it is in the interests of justice for such a determination to be made at the restraint stage. Where, for example, a third party seeks the variation of a restraint order to remove an asset in which it is alleged that the defendant does not have an interest, we consider that such a determination should generally be binding on the rest of the confiscation proceedings.

²²⁵ Serious Crime Act 2015, explanatory notes.

²²⁶ Serious Crime Act 2015, s 1.

²²⁷ *Hansard* (HL) 2 July 2014 vol 754, col 1726.

26.210 We consider that by rendering third party determinations made in connection with restraint proceedings binding on the rest of the confiscation proceedings, the altered confiscation regime that we provisionally propose would be facilitated. For example, we provisionally propose that the court should have the power to make a “contingent vesting order”, at the time of making the confiscation order. This would vest assets in a trustee for confiscation in the event that the defendant fails to satisfy his or her confiscation order by the deadline set by the court.²²⁸ In doing so, it is likely that findings will have to be made about third party interests. By permitting such findings to be made definitively at the restraint stage, the process of making a contingent order would be expedited.

26.211 We therefore provisionally propose that the ability of the court to make a conclusive determination on third party interests be extended not just to restraint but to any stage of the confiscation process. This would permit the court to make determinations as and when it may be appropriate to do so.

26.212 We consider that the current safeguard which permits third parties to make representations at any stage if they can show that they were not given a reasonable opportunity to make representations, or it appears to the court that there would be a serious risk of injustice if the court was bound by the determination, ought to apply to any determination made at the restraint stage.²²⁹

Consultation Question 96.

26.213 We provisionally propose that:

- (1) where it is in the interests of justice to do so, the Crown Court may make a binding determination of interests in property at any stage of proceedings (including at the restraint stage);
- (2) such a determination should be conclusive in relation to the confiscation proceedings, unless the court is satisfied that a party did not have a reasonable opportunity to make representations at the hearing when the determination was made, or it appears to the court that there would be a serious risk of injustice if the court was bound by the determination.

²²⁸ See Chapter 21.

²²⁹ Proceeds of Crime Act 2002, s 51(8).

Chapter 27: Effective Asset Management

INTRODUCTION

- 27.1 In the last chapter, we considered the restraint regime. In this chapter 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.
- 27.2 Consideration may need to be given to obtaining a restraint order at the very beginning of the investigative process. For instance, upon the arrest of a defendant, the police may identify assets that could be used to satisfy a later confiscation order, which may be at risk of being dissipated.
- 27.3 However, if a restraint order is obtained, it does not necessarily follow that the assets will not be dissipated. The existence of a restraint order is intended to reduce the risk of dissipation of assets or the diminution of their value.¹ The force of the order is then reinforced by the sanctions for breach of the order, namely a maximum of 2 years’ imprisonment for contempt of court,² or when there are “serious aggravating features”,³ the prospect of facing criminal charges for perverting the course of justice.⁴ Perverting the course of justice carries a maximum sentence of life imprisonment.
- 27.4 The Court of Appeal has stressed that, in determining the appropriate sentence for breaching a restraint order it “cannot emphasise enough” that disobedience of restraint orders is “marked with very severe penalties” to send out a strong message of deterrence.⁵ However, the existence of a restraint order and the prospects of such sanctions if the order is breached may be insufficient to eliminate the risk that a person will seek to put their assets beyond the reach of the justice system. In *R v Adewunmi*⁶ the defendant deliberately and repeatedly breached the restraint order, moving funds from the United States to Cyprus using innocent parties and through a company incorporated in the British Virgin Islands. In substituting a sentence of 12 months’ imprisonment, the Court of Appeal observed that Mr Adewunmi:

clearly enjoyed a lavish lifestyle as a result of the proceeds of fraud and seems to have calculated that it was worthwhile spending extra time in prison if he could retain some of his ill-gotten gains.⁷

¹ Proceeds of Crime Act 2002, s 69.

² Contempt of Court Act 1981, s 14; *Director of the Serious Fraud Office v O'Brien* [2012] EWCA Crim 67, [2012] 1 WLR 3170.

³ *R v Kenny* [2013] EWCA Crim 1, [2013] QB 896 at [36].

⁴ *R v Norman* [2013] EWCA Crim 1397.

⁵ *R v Samra* [2014] EWCA Crim 2748 at [23].

⁶ *R v Adewunmi* [2008] EWCA Crim 71, [2008] 2 Cr App R (S) 52.

⁷ *R v Adewunmi* [2008] EWCA Crim 71, [2008] 2 Cr App R (S) 52 at [12].

- 27.5 This case, along with others in which contempt proceedings were brought,⁸ suggests that restraint alone, even backed by the very real threat of imprisonment for non-compliance, may be insufficient to ensure that assets are not dissipated.
- 27.6 In this chapter, we consider whether methods other than restraint that are used to manage or preserve the value of assets are effective. Such methods include seizure, detention and realisation by investigatory authorities and management receivership.

ASSET MANAGEMENT MEASURES

The international drive for effective asset management

- 27.7 The need for effective interim management of assets pending confiscation has long been recognised at an international level, for example by the G8 inter-governmental political forum (“the G8”), the United Nations (“the UN”) and the Financial Action Task Force (“the FATF”).
- 27.8 In 2003 the G8 group of nations⁹ identified “basic principles of good practice” on tracing, freezing and confiscation of assets which recognised the need to facilitate the preservation of the maximum value of property.¹⁰ The G8 supplemented its 2003 principles in 2005 with guidance on best practices for the administration of assets seized with a view to their later confiscation.
- 27.9 Although the G8 guidance states that it is not intended to replace or amend the obligations that states may have under UN and Council of Europe Conventions, or the commitments that states had made pursuant to the recommendations of the FATF, the guidance is aligned with these obligations and commitments.
- 27.10 Article 31(3) of the UN Convention Against Corruption requires that:
- Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property.
- 27.11 At the European level, the preamble to Directive 2014/42 EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union states that “property frozen with a view to possible subsequent confiscation should be managed adequately in order not to lose its economic value”.¹¹

- 27.12 The FATF describes itself as

an inter-governmental body established in 1989 by the ministers of its member jurisdictions. The mandate of the FATF is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related

⁸ *R v Roddy* [2010] EWCA Crim 671, [2010] 2 Cr App R (S) 107; *R v Kirby* [2010] EWCA Crim 877; *R v Shepherd* [2012] EWCA Crim 1716; *R v Kenny* [2013] EWCA Crim 1, [2013] QB 896; *R v Norman* [2013] EWCA Crim 1397.

⁹ Comprising the UK, Canada, France, Germany, Italy, Japan, Russia and the USA.

¹⁰ G8, *Best Practice Principles on Tracing, Freezing and Confiscation of Assets* (2003).

¹¹ Directive 2014/42 EU preamble, para 32.

threats to the integrity of the international financial system. In collaboration with other international stakeholders, the FATF also works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse.¹²

27.13 The FATF has published 40 recommendations to combat money laundering and nine special recommendations on countering terrorist financing. The recommendations are intended to be a “a comprehensive and consistent framework of measures which countries should implement...through measures adapted to their particular circumstances”.¹³

27.14 With regards to asset management, the FATF recommends that:

Countries should establish mechanisms that will enable their competent authorities to effectively manage and, when necessary, dispose of, property that is frozen or seized, or has been confiscated.¹⁴

Powers of investigatory authorities in this jurisdiction

Seizure, detention and realisation of property at risk of dissipation

27.15 Prior to its amendment in 2015, POCA 2002 did not allow the police to seize assets at risk of dissipation, unless a restraint order was in place and the assets were seized to prevent their removal from England and Wales.¹⁵ However, on 1 June 2015,¹⁶ a new set of provisions were brought into force. These provisions allow for the seizure, detention and realisation of assets to complement the restraint regime and to preserve assets or their value for confiscation.¹⁷

27.16 The provisions were introduced into POCA 2002 by the Policing and Crime Act 2009.¹⁸ These followed the proposals in the 2007 Home Office Asset Recovery Action Plan consultation document to give police “pre-emptive” seizure powers to ensure effective enforcement of confiscation orders.¹⁹

Seizure of property at risk of dissipation

27.17 Under section 47C of POCA 2002 an “appropriate officer” may exercise the power to seize property if that officer has reasonable grounds for suspecting that:

- (1) the property may otherwise be made unavailable for satisfying any confiscation order that has been or may be made against the defendant, or

¹² FATF, *International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation – the FATF Recommendations* (2019) p 6.

¹³ FATF, above, p 6.

¹⁴ FATF, above, Interpretive note to recommendations 4 and 38 (confiscation and provisional measures) p 34.

¹⁵ Proceeds of Crime Act 2002, s 45.

¹⁶ SI 2015 No 983.

¹⁷ Proceeds of Crime Act 2002, ss 47A to 47S.

¹⁸ Policing and Crime Act 2009, s 55.

¹⁹ Home Office, *Asset Recovery Action Plan: A Consultation Document* (May 2007).

- (2) the value of the property may otherwise be diminished as a result of conduct by the defendant or any other person.²⁰

27.18 This test reflects a broad understanding of the potential for dissipation and has a much wider scope than section 45 of POCA 2002 (now repealed), which permitted seizure of property only to prevent its removal from England and Wales if a restraint order was in force.

27.19 An “appropriate officer” for these purposes is either an officer of HM Revenue and Customs, an immigration officer, a constable, an officer of the Serious Fraud Office or an accredited financial investigator.²¹

27.20 A confiscation order may be satisfied from any property that a defendant has available to him or her. Therefore, the range of assets that could be seized under section 47C is potentially very broad. However, the statute prohibits the seizure of what is described as “exempt property”. “Exempt property” comprises property that represents necessities for everyday life, including:

- (1) such tools, books, vehicles and other items of equipment as are necessary to the defendant for use personally in the defendant's employment, business or vocation;
- (2) such clothing, bedding, furniture, household equipment, provisions or other things as are necessary for satisfying the basic domestic needs of the defendant and the defendant's family.²²

27.21 The power to seize assets is exercisable from the outset of an investigation if that investigation is in relation to an indictable offence and if a person has been arrested, even if a restraint order is not in force.²³

27.22 The power of seizure is not unfettered, in that it is subject to “appropriate approval”, namely approval of a justice of the peace or (if that is not practicable) the approval of a senior officer.²⁴ Any search of premises, people or vehicles for property which may be seized is subject to restrictions set out in POCA 2002²⁵ and in a Code of Practice²⁶ pursuant to POCA 2002.²⁷

Detention of property at risk of dissipation

27.23 A restraint order may include a provision authorising the detention of any property to which the restraint order applies, which has already been seized under section 47C,

²⁰ Proceeds of Crime Act 2002, s 47C (1).

²¹ Proceeds of Crime Act 2002, s 47A.

²² Proceeds of Crime Act 2002, s 47C(4).

²³ Proceeds of Crime Act 2002, s 47B(2); see also s 47B(4).

²⁴ Proceeds of Crime Act 2002, s 47G(2).

²⁵ Proceeds of Crime Act 2002, s 47D to 47F.

²⁶ Home Office, *Code of Practice, Search Seizure and Detention of Property (England and Wales)* (2018), issued under the Proceeds of Crime Act 2002, s 47S.

²⁷ Proceeds of Crime Act 2002, s 74S.

or which may be seized under section 47C at a later date.²⁸ When such a provision has been included in the restraint order, further detention of the property is straightforward.

27.24 When a restraint order does not include a provision authorising detention of the property, or when there is no restraint order at all:

- (1) the property may be detained for a period of 48 hours, excluding weekends, Christmas Day, Good Friday and bank holidays;²⁹
- (2) if an application for a restraint order with such a provision for detention is made within the 48 hour period to the court, the “clock is effectively stopped”³⁰ and the property may be detained until the application is determined or otherwise disposed of.
- (3) If no application for a restraint order is made within the 48 hour period (which is a real possibility in light of the short timeframe) an application must be made to a magistrates’ court to extend the period of detention. That period will lapse on the making of a relevant restraint order.³¹ Pursuant to section 47M of POCA 2002, the magistrates’ court may grant such an application if it is satisfied that,
 - (a) at the very least, a criminal investigation has begun in England and Wales regarding an offence, a person has been arrested and there are reasonable grounds to suspect that the person has benefited from a criminal offence;
 - (b) the property is realisable property other than exempt property; and
 - (c) there are reasonable grounds for suspecting that—
 - (i) the property may otherwise be made unavailable for satisfying any confiscation order that has been or may be made against the defendant, or
 - (ii) the value of the property may otherwise be diminished as a result of conduct by the defendant or any other person.

27.25 No maximum period for detention is specified. However, if a person who has had his or her assets seized after arrest, does not have criminal proceedings started against him or her within a reasonable time, the magistrates’ court must discharge the order for detention.³² In any event, a senior officer should review whether the conditions for

²⁸ Proceeds of Crime Act 2002, s 41A(4)(a).

²⁹ Proceeds of Crime Act 2002, s 47J, s 47H(7)

³⁰ Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) p 47.

³¹ Proceeds of Crime Act 2002, s 47N(4).

³² Proceeds of Crime Act 2002, s 47N(3).

detention are met every three months.³³ Ultimately such detention is intended to be with the obtaining of a restraint order in mind.

Realisation of property detained as representing a risk of dissipation.

27.26 When a confiscation order has been made and no receiver has been appointed, the magistrates' court may order that an "appropriate officer" realise the property.³⁴ The court may order that any reasonable costs incurred in the storage and realisation of such assets be recovered from the amount realised.³⁵

27.27 Any person affected by the order may appeal against such orders (or appeal the refusal to make such orders) to the Crown Court.³⁶

27.28 The primary focus of the regime is the detention of assets that might otherwise be dissipated or have their value diminished through the acts of the owner or another person pending confiscation. The focus is not on the preservation of the value of assets *per se*. The focus on detention to prevent interference is evident from the Code of Practice, which states that:

The logistics of securing property...may involve the placing of property in sealed bags or containers and restricting access. In all cases, the property should be properly secured, insured and stored so as to retain its value so far as is possible.³⁷

27.29 Although this passage discusses the need to retain value, it is in the context of storage. To this end, the Code of Practice goes on to state that:

An appropriate officer should consider the proportionality of detention. This includes the calculation of the likely costs of storage and insurance as against the value of the property (particularly depreciating assets) in order to assess whether it is reasonable to continue to detain the property.³⁸

27.30 The point at which it becomes disproportionate to detain the asset may depend on the asset itself. Assets such as perishable foodstuffs are likely to deteriorate and depreciate quickly. Other assets, such as boats, may take longer to depreciate. However, mooring or similar fees may cause continued detention to be unviable economically. If it is no longer proportionate to detain the asset, it must be released from detention or consent from the owner of the asset must be sought for its sale.³⁹

³³ Home Office, *Code of Practice issued under section 47S of the Proceeds of Crime Act 2002, Search Seizure and Detention of Property (England and Wales)*(2018), para 135.

³⁴ Proceeds of Crime act 2002, s 67A.

³⁵ Proceeds of Crime Act 2002, s 67B.

³⁶ Proceeds of Crime Act 2002, s 67C.

³⁷ Home Office, *Code of Practice issued under section 47S of the Proceeds of Crime Act 2002, Search Seizure and Detention of Property (England and Wales)* (2018), para 133.

³⁸ Home Office, above, para 135.

³⁹ Home Office, above, para 135.

- 27.31 By the time that a decision is made that it is no longer proportionate to detain a depreciating asset, it may no longer have sufficient value to make its sale either possible or worthwhile from the perspective of securing funds for confiscation.
- 27.32 If the asset retains its value, the person from whom the asset was seized may or may not co-operate and consent to sale. If a person has in mind the long-term objective of reclaiming the value of an asset after an acquittal (rather than the asset itself), they may make an economically rational decision to seek the maximum possible return on their property. It is equally possible that the person would not consent to sale. The assets were initially subject to detention because of a risk of dissipation, which implies that the owner of the asset may not wish to co-operate with authorities by providing consent for action to be taken.
- 27.33 In the absence of consent, the magistrates' court has no power to order disposal of the asset by the "appropriate officer" until a confiscation order has been made. The asset must either be returned to the owner or an application must be made for the appointment of a management receiver.

Management Receivership

- 27.34 If the court has made a restraint order, it may appoint a management receiver in respect of any realisable property.⁴⁰ That receiver may, amongst other things, take possession of the property and manage or otherwise deal with that property.⁴¹ "Managing or otherwise dealing with property" includes "selling the property or any part of it or interest in it".⁴²
- 27.35 In December 2018, through its mutual evaluation reporting mechanism, the FATF rated the United Kingdom as being technically compliant with its recommendation that "countries should establish mechanisms that will enable their competent authorities to effectively manage and, when necessary, dispose of, property that is frozen or seized, or has been confiscated",⁴³ relying (amongst other things) upon the ability to appoint a management receiver.
- 27.36 Ordinarily, an application to manage or otherwise deal with property must be made on notice to persons holding an interest in property.⁴⁴ However, in the case of perishable or otherwise depreciating assets, there is no such requirement to give notice.⁴⁵

The cost of receivership

- 27.37 Costs are inevitably incurred during a management receivership. The Criminal Procedure Rules seek to control those costs by restricting the power of the Crown Court to order remuneration to such a sum:

⁴⁰ Proceeds of Crime Act 2002, s 48.

⁴¹ Proceeds of Crime Act 2002, s 49(2).

⁴² Proceeds of Crime Act 2002, s 49(10)(a).

⁴³ Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures, United Kingdom mutual evaluation report* (December 2018) p 179.

⁴⁴ Proceeds of Crime Act 2002, s 49(8).

⁴⁵ Proceeds of Crime Act 2002, s 49(8A), inserted by the Serious Crime Act 2007, s 82.

as is reasonable and proportionate in all of the circumstances and which takes into account –

- (a) the time properly given by him and his staff to the receivership;
- (b) the complexity of the receivership;
- (c) any responsibility of an exceptional kind or degree which falls on the receiver in consequence of the receivership;
- (d) the effectiveness with which the receiver appears to be carrying out, or to have carried out, his duties; and
- (e) the value and nature of the subject matter of the receivership.⁴⁶

PERCEIVED PROBLEMS WITH THE CURRENT REGIME FOR ASSET MANAGEMENT

Use of powers by investigatory authorities

27.38 During our pre-consultation discussions, we heard from police officers and financial investigators that the powers available to investigatory authorities under POCA 2002 are not well known, well understood or routinely used. This has the potential to undermine the preservation of the value of assets pending a confiscation order.

Managing specific types of asset held by the authorities

27.39 Even when powers of seizure are used during a criminal investigation, there are certain types of asset held by investigatory authorities which raise potential management issues, including depreciating and perishable assets and assets in respect of which management is disproportionate.

Depreciating and perishable assets

27.40 Section 47C of POCA 2002 gives law enforcement agencies the power to seize assets where there are reasonable grounds to suspect a risk of dissipation. However, in the absence of the consent of the owner, there is no power for law enforcement agencies to sell such depreciating assets until a confiscation order has been made.⁴⁷ In the absence of consent to sell, the law enforcement official must consider whether it is cost-effective to continue to detain the asset, or whether that asset should be released from detention.

27.41 If the law enforcement official wishes to sell the property prior to a confiscation order being made, an application must be made for the appointment of a management receiver to deal with such assets. This requires a restraint order to be in force.⁴⁸ In most cases a restraint application will be able to be determined relatively quickly given the similarity of the tests for restraint and for detention.⁴⁹ However, the detention provisions have no maximum time period, and, as set out earlier, section 47M of

⁴⁶ Criminal Procedure Rules, r 33.61(3).

⁴⁷ Proceeds of Crime Act 2002, s 67A.

⁴⁸ Proceeds of Crime Act 2002, s 48(1).

⁴⁹ Proceeds of Crime Act 2002, s 47B(2) and s 40(2)(b).

POCA 2002 specifically envisages that there may be circumstances in which a restraint application may not be made for some time. The Code of Practice in relation to search, seizure and detention of assets requires that detention must be formally reviewed after a period of three months⁵⁰ and ultimately detention could be for much longer. During such a period all value of a diminishing or perishable asset could be lost.

27.42 The provisions that enabled asset detention by law enforcement agencies were intended to preserve the value of assets. However, the current requirement that depreciating or perishable goods in the hands of law enforcement agencies are subject to restraint and management receivership orders, or sale by consent, does not afford sufficient protection of the value of such assets which may rapidly depreciate before such an order is made.

Assets in respect of which management is disproportionate

27.43 The costs of managing an asset subject to further detention may outweigh the value of the asset itself. This means that the only benefit to be obtained is the removal of the asset from the owner. A management receiver may have the power to sell an asset if it is disproportionate to keep it, pursuant to his or her power to deal with the property.⁵¹ However, in relation to depreciating assets, law enforcement agencies have no similar power. Instead, law enforcement agencies are required to “seek a consent order for its sale or to take steps to release it”.⁵²

Management Receivership

27.44 We have heard from stakeholders across the criminal justice system, and from receivers themselves, that the number of management receivership applications each year is low. A range of reasons have been put forward for this, all of which are interrelated:

- (1) cost;
- (2) the impact of cost;
- (3) risk aversion.

Cost

27.45 Despite the controls on costs imposed by the Criminal Procedure Rules, there was a perception amongst some stakeholders with whom we met in the pre-consultation discussion phase of our work that there was a reluctance to appoint a receiver because the costs involved are seen as high. There is, of course, a difference between the incurring of an unnecessarily high sum in costs and a sum that is large but proportionate in all of the circumstances. Management receivers with specialist expertise will charge rates that reflect that expertise. Receiverships that involve the

⁵⁰ Home Office, *Code of Practice issued under section 47S of the Proceeds of Crime Act 2002, Search Seizure and Detention of Property (England and Wales)* (2018), s 47S, para 135.

⁵¹ Proceeds of Crime Act 2002, s 49.

⁵² Home Office, *Code of Practice issued under section 47S of the Proceeds of Crime Act 2002, Search Seizure and Detention of Property (England and Wales)* (2018), para 135.

ongoing management of a business will inevitably lead to the fees being incurred at a level that reflects the nature and the extent of the commitment needed by the receiver. When used appropriately, even if there are extensive costs incurred, the receiver can not only prevent diminution of the value of a business but may, in fact, increase its value. It is suggested in *Millington and Sutherland Williams on the Proceeds of Crime*:

The defendant will have benefited from a professional manager administering his assets and business. In many cases, following his acquittal, the defendant will get back assets that are far better managed and maintained than at the time the receiver took office.⁵³

The impact of the cost of receivership

27.46 A management receiver's remuneration and expenses are paid from the assets over which he or she is appointed.⁵⁴ The costs incurred (even if entirely reasonably incurred) therefore impact upon the amount that could ultimately be recovered to satisfy a confiscation order. Whilst it might be argued that it is irrelevant if costs are incurred because ultimately a person is deprived of control of an asset that may have come from crime, costs do have consequences for:

- (1) those eligible for compensation, who may not receive the full compensation due where both a confiscation and compensation order have been made;
- (2) a defendant, whose "benefit" from crime may not have been as fully repaid as might otherwise have been the case, resulting in an ongoing debt;
- (3) the prosecution authority, whose return from ARIS funding is likely to be affected.⁵⁵

27.47 Cost is therefore a factor that has the potential to influence the decision to appoint a management receiver. Additionally, when the prosecution authority risks bearing the burden of such costs, this may also lead to a risk-averse approach by prosecution authorities as to whether a receiver is appointed.

Risk aversion

27.48 In *Barnes v Eastenders Group*⁵⁶ the Supreme Court considered who should bear the burden of costs in cases where a determination is made that property should not have been included in a receivership order. It concluded that:

- (1) the ordinary rule that costs of a receivership come from assets realised should be disapplied. To require a person to bear the costs of managing their assets when they should never have been subject to management in the first place would violate that person's right to peaceful enjoyment of property under A1P1.

⁵³ Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) p 86.

⁵⁴ Proceeds of Crime Act 2002, s 49(2)(d); Criminal Procedure Rules, r 33.61(5).

⁵⁵ As to which see Chapter 4.

⁵⁶ *Barnes v Eastenders Group* [2014] UKSC 26, [2015] AC 1.

- (2) However, to refuse the receiver, his or her remuneration would “replace one injustice with another”:⁵⁷

A receiver who accepts appointment by a court is entitled to know that the terms of his appointment will not be changed retrospectively. Moreover it is an ordinary part of receivership law that a receiver has a lien [or a right] for his proper remuneration and expenses over the receivership property.⁵⁸ To take away that right without compensating him would violate the receiver’s rights [to peaceful enjoyment of property].⁵⁹

- (3) In such circumstances, based on the law relating to “unjust enrichment”,⁶⁰ the receiver had a claim against the CPS as the prosecution authority that sought his appointment. By way of enrichment,

the CPS plainly perceived that there would be benefit to the public in the companies’ assets being removed from their control and placed in the hands of an independent receiver while its criminal investigation was proceeding.⁶¹

27.49 This enrichment was unjust because, once it was determined that property should not have been included in a receivership order, the promise to the receiver that he or she would have a right (or “lien”) to recover their costs from that property was unenforceable.

27.50 Section 49(9) of POCA 2002 permits the court making a management receivership order to impose conditions and exceptions. Pursuant to this power, the Supreme Court suggested a form of words or “Piggott condition”⁶² that could be used in future cases that crystallises the position with regards to potential liability of the prosecution authority for costs:

- (1) Subject to the condition set out in (2) below, the receiver shall, in relation to any property to which the above receivership order is expressed to apply, have powers to realise so much of it as is necessary to meet his or her remuneration and expenses and to recover them out of the proceeds of its realisation.
- (2) The condition referred to in (1) above is that, in the event that it is hereafter determined, whether on appeal or by way of application for variation or discharge of this order, that any property to which the above receivership order is expressed to apply is not arguably held by the defendant and so should not have been made subject to the above receivership order, the powers in (1) above shall not extend to such property and, to the extent that in consequence the said powers do not enable the receiver to recover his remuneration and

⁵⁷ *Barnes v Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [96].

⁵⁸ See *Sinclair v Glatt* [2009] EWCA Civ 176, [2009] 1 WLR 1845.

⁵⁹ *Barnes v Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [96].

⁶⁰ Goff and Jones, *The Law of Unjust Enrichment* (9th ed 2016) p 8.

⁶¹ *Barnes v Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [101].

⁶² Derived from argument in a case involving management receivership: *Re Piggott* [2010] EWCA Civ 285, [2010] STC 1190 at [54].

expenses in full or in part, the applicant for this order do pay him in respect of them.

27.51 Participants in our fact-finding exercise reported a perception that prosecutors have taken a “risk-averse” approach to the appointment of management receivers as a result of the decision in *Barnes v Eastenders Group*.

ANALYSIS AND PROPOSED REFORMS

27.52 We consider that the reforms of the restraint regime proposed in the previous chapter should encourage the greater use of restraint powers. Such reforms are intended to ensure that the value of assets is better preserved pending confiscation.

27.53 However, as demonstrated by the case of *R v Adewunmi*⁶³ and other cases,⁶⁴ the existence of a restraint order, even if reformed in accordance with our proposals, may be insufficient to ensure that the value of assets is preserved effectively pending confiscation. In some cases, additional steps such as the seizure, sale or management of assets are necessary. We therefore go on to consider potential reforms which may help to facilitate such steps in light of the perceived problems that we have identified.

Effective use of investigatory powers

27.54 Section 47S of POCA 2002 provides for the Secretary of State to make a code of practice in connection with the power to search for and seize assets in confiscation cases to preserve their value. Such a code first came into operation on 1 June 2015.⁶⁵ Despite the existence of the code, in 2016 the House of Commons Home Affairs Committee reported that

Poor collection performance could be improved through better training at an investigation level. Often investigators did not know that they could and should seize or restrain criminal assets, or what process to follow if they suspected financial gain from a crime being investigated.

Criminals are becoming more sophisticated at concealing the proceeds of their crimes. Ensuring the efficient recovery of these proceeds should be one of the first issues an investigator tackles.... waiting for a conviction is far too late. As part of their training police officers should be equipped to deal with these challenges.⁶⁶

27.55 The Committee recommended that

Upon entry into the service, all police officers receive at least one full day of financial investigative training, accredited by the National Crime Agency (NCA), so that all officers are equipped to secure recovery at a much earlier stage and have a good

⁶³ *R v Adewunmi* [2008] EWCA Crim 71, [2008] 2 Cr App R (S) 52.

⁶⁴ See, for example, *R v Roddy* [2010] EWCA Crim 671, [2010] 2 Cr App R (S) 107; *R v Kirby* [2010] EWCA Crim 877; *R v Shepherd* [2012] EWCA Crim 1716; *R v Kenny* [2013] EWCA Crim 1, [2013] QB 896; *R v Norman* [2013] EWCA Crim 1397.

⁶⁵ SI 2015 No 730, art 2. Section 47S came into force on 22 November 2014 (SI 2014 No 3101, art 3).

⁶⁶ Proceeds of Crime, Report of the House of Commons Home Affairs Committee (2016-17) HC 25, para 14.

understanding of the impact of charges, offences and pleas on asset recovery. Secondly, all detective officers should receive advanced financial investigation training on at least an annual basis so that appropriate evidence is gathered about financial gain, as well as criminal conduct in every investigation into a serious crime offering financial gain.⁶⁷

27.56 During our pre-consultation discussions, we spoke to a group of trainee detectives who stated that they did receive such training. However, other than in initial training and during detective training the majority reported that they had received no training on POCA 2002. This raises the real possibility that a large proportion of frontline officers who are between initial and detective training and who do not work alongside specialist financial investigators (“FIs”) may not have day to day familiarity with the powers of search and seizure under POCA 2002. Amongst the questions asked of the trainee detectives was “do you have any thoughts on how the recovery of the proceeds of crime could be improved”, to which responses included:

- (1) “More and regular training – especially for police departments who have little experience otherwise it is not considered early enough”.
- (2) “More awareness as to the process and how to apply for POCA 2002”.
- (3) “More training for officers. It could be used more often if officers knew more about it”.

27.57 In 2018 a Home Office research report was published entitled “Exploring the Role of the Financial Investigator”. It reported that:

there was a [perceived] lack of understanding of financial investigation among key partners: non-FI [financial investigator] colleagues in their organisations as well as external partners in the criminal justice system (such as judges, barristers and representatives of the Crown Prosecution Service) and other organisations. The FIs perceived this lack of understanding to have a detrimental effect on the success and efficiency of their investigations. The FIs thought that offering training input to key partners and better integrating FIs with the investigative teams they assisted would help to build a better understanding of financial investigation.⁶⁸

27.58 Its recommendation was that guidance should be issued

as to appropriate use of financial investigation during criminal investigations to those with oversight of FIs, including their senior managers and partners from the criminal justice system (such as judges, barristers and representatives of the CPS), who were reported to sometimes be unwilling to sanction the use of particular powers or charges.⁶⁹

27.59 In Chapter 10 we provisionally propose that enhanced training of judges and the “ticketing” of judges in relation to confiscation be considered. This should go some

⁶⁷ Proceeds of Crime, Report of the House of Commons Home Affairs Committee (2016-17) HC 25, para 15.

⁶⁸ E Gale and J Kelly, Home Office Research Report 104, “Exploring the Role of the Financial Investigator”.

⁶⁹ E Gale and J Kelly, Home Office Research Report 104, “Exploring the Role of the Financial Investigator”.

way to addressing the concerns that have been raised. We also consider that the National Police Chiefs' Council ought to reconsider the training needs of all police officers in addressing the concerns raised, including "front-line" officers who conduct searches of property.

27.60 In Chapter 14 on codification of principles on benefit, we provisionally proposed that non-statutory guidance be produced for use by stakeholders in the criminal justice system. We provisionally propose that such non-statutory guidance ought also to discuss the role played by specific confiscation search and seizure powers, and refer stakeholders to the statutory code issued by the Secretary of state in this regard.

Consultation Question 97.

27.61 We provisionally propose that the National Police Chiefs' Council reconsider the training needs of all police officers in connection with confiscation, and in particular those front-line police officers who may need to exercise the powers of search and seizure in connection with confiscation.

27.62 Do consultees agree?

Consultation Question 98.

27.63 We provisionally propose that the non-statutory guidance provisionally proposed in Chapter 14 ought to deal with any specific 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.

27.64 Do consultees agree?

Disposal of assets which are in detained by law enforcement agencies

27.65 Applications for the sale of goods after the making of a confiscation order may be made in the magistrates' court.⁷⁰ However, as we set out earlier in the chapter, no comparable power exists prior to confiscation. This means that when assets are detained pursuant to section 47M of POCA 2002, a restraint order and a management receivership order must be obtained to effect the sale of any property, in the absence of the consent of the owner.

27.66 The test for the further detention of assets seized as being at risk of dissipation under section 47M of POCA 2002 is comparable to that for a restraint order. The court must be satisfied that there are reasonable grounds to suspect that a person has benefited from conduct constituting an offence.⁷¹ Arguably, the test is stricter than the test for a restraint order in that before the property was seized the person must have been

⁷⁰ Proceeds of Crime Act 2002, s 67A.

⁷¹ Proceeds of Crime Act 2002 s 47M, s 47B(2)(d)

arrested for the offence.⁷² Such an order for detention is subject to appeal to the Crown Court.⁷³

27.67 If a section 47M order is not subject to appeal and therefore statutory conditions comparable to those for obtaining a restraint order have been found to be satisfied by a court, we see no reason why a Crown Court judge should not be permitted to consider appointing a management receiver over the property, subject to the normal appeal routes that are open against any receivership order. We consider that this balances the need for proper consideration of a person's A1P1 rights in relation to the property against the need to preserve the value of the property for confiscation through active asset management measures.

Consultation Question 99.

27.68 We provisionally propose that the power to appoint a management receiver should be extended to cover assets which are seized and then subject to an order that they may be detained (currently found in section 47M of POCA 2002).

27.69 Do consultees agree?

Reforming receivership

27.70 The G8 guidance on best practice in asset management requires that "states should adopt mechanisms for the administration of seized assets which are as efficient and cost effective as possible".⁷⁴ There are a number of ways through which this could be achieved. This might involve any or a combination of the following:

- (1) Transferring all receiverships to a single organisation that is already in existence, either in the public or private sector;
- (2) Allowing different organisations to manage assets in accordance with their own expertise;
- (3) Creating an oversight and procurement mechanism for the management of assets;
- (4) Setting up a new office to take over the management of assets.

Transferring all receiverships to a single organisation, weighed against allowing different organisations to manage assets in accordance with their own expertise.

27.71 There are number of organisations which could potentially manage assets, for instance:

- (1) the Official Receiver;

⁷² Proceeds of Crime Act 2002, s 47B(2)(b).

⁷³ Proceeds of Crime Act 2002, ss 47O.

⁷⁴ G8, *Best Practices for the Administration of Seized Assets* (2005), p 2.

- (2) management receivers;
- (3) auction houses;
- (4) law enforcement agencies.

27.72 In countries such as Australia and New Zealand, assets are managed by the Official Trustee⁷⁵ or Assignee⁷⁶ in Bankruptcy, whose experience in managing assets in general is seen as transferrable to the management of criminal assets. These are public positions. In contrast, in England and Wales, private sector “management receivers” are used.

27.73 In this jurisdiction, there are likely to be cases where the Official Receiver might be well placed to act with comparable expertise to that which can be found in the private sector. In these cases, the cost of managing the asset may be reduced. However, we do not provisionally propose the automatic use of the Official Receiver. As set out earlier in this chapter, costs involved in receivership may simply be reflective of the value added by the use of a professional in the private sector with particular expertise, and there may be cases where such expertise is vital to the successful preservation of the value of assets. For example, where the only asset to be sold is a property, consideration might be given to the use of estate agents or auction houses. This reflects the approach adopted in countries such as France and Canada.⁷⁷ During our pre-consultation discussions it became apparent that extensive use is made of auction houses by law enforcement agencies in England and Wales for asset realisation. Whether the Official Receiver could, or should, be used will depend upon the nature of the case and any potential burden that case would place upon the Insolvency Service.

27.74 Similarly, law enforcement officials may be able to take simple steps in relation to asset management. Under the current law if cash was seized using civil powers under POCA 2002, where the cash is to be detained for more than 48 hours, it must, at the first opportunity, be paid into an interest-bearing account and held there. The interest which accrues on the cash is then to be added to its value upon its forfeiture or release.⁷⁸

27.75 Therefore, we do not consider that a “one-size fits all” approach to asset management, cherry-picking from a range of existing bodies, is appropriate.

27.76 Instead, any appropriate “trustee for confiscation” could be appointed. Under Part 5 of POCA, when civil recovery orders are made, a trustee for civil recovery is appointed. That trustee must be a “suitably qualified person” to carry out his or her relevant functions. Those functions are primarily:

- (1) to secure the detention, custody or preservation of any property vested in him by the recovery order,

⁷⁵ Proceeds of Crime Act 2002 (Cth) Australia, s 276.

⁷⁶ Criminal Proceeds (Recovery) Act 2009, s 80.

⁷⁷ UNODC, *Effective management and disposal of seized and confiscated assets* (2017) pp 55 and 56.

⁷⁸ Proceeds of Crime Act 2002, s 296(1).

- (2) in the case of property other than money, to realise the value of the property for the benefit of the enforcement authority.

27.77 As noted in *Millington and Sutherland Williams on the Proceeds of Crime* in the context of trustees for civil recovery used under Part 5 of POCA:

Much will depend on the complexity and issues involved in realising the asset in question. If, for example, assets are held outside of the jurisdiction, a trustee in the form of an insolvency practitioner is likely to be appointed, because of the jurisdictional issues involved. If, on the other hand, the realisation is a straightforward matter over a modest number of assets, the relevant authority is likely to nominate a member of its own staff, not least because it is more cost effective to do so.⁷⁹

Creating an oversight mechanism for the management of assets

27.78 At present, 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;
- (4) the enforcement approach by that agent (for example, whether a minimum value must be obtained for an asset).

27.79 Having a single, central organisation maximises the prospect of uniformity in 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.

27.80 Unless there is a coherent national asset management strategy, whether defendants are permitted to retain, for example, depreciating assets, will depend upon regional policy and interpretation.

27.81 Whilst the CPS pursues the majority of confiscation proceedings, such proceedings are now brought by a wide range of bodies, from local authorities to private prosecutors. During our fact finding we have heard of different practices, for example, as between the CPS and the SFO with regards to how enforcement is approached in complex cases. A single, central organisation could provide national oversight and regulation of confiscation enforcement, regardless of who brings the prosecution.

27.82 Such central management bodies are not unfamiliar overseas. Countries such as Belgium (through the Central Office for Seizure and Confiscation) and the Netherlands

⁷⁹ Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018) para 14.42.

(through the Criminal Assets Deprivation Bureau), have offices whose “primary role... is to coordinate the activities of the different players, primarily through the management of information about assets subject to seizure and confiscation orders.”⁸⁰

A new office for the management of assets.

27.83 In some countries the asset management office itself will take on management of an asset.⁸¹ We considered carefully whether to propose the establishment of a new Criminal Asset Recovery Bureau, whose role would be take over the management of assets. However, we considered that the development of a new Criminal Asset Recovery Bureau would require moving staff from current organisations and positions into a new framework. This could potentially have significant cost and operational implications for both the new organisation and the organisations from which the staff were drawn. The primary rationales for an oversight board, namely the generation of national policy and economies of scale could be achieved without the need to incur such organisational upheaval or expense.

A broader Criminal Asset Recovery Bureau

27.84 A new bureau may be more cost efficient than the model just outlined if its focus was not solely on asset management but also on enforcement of confiscation orders more broadly. When POCA 2002 was first enacted, an Assets Recovery Agency was established⁸² which both brought and enforced confiscation orders. However, as the House of Commons Public Accounts Committee reported in 2007, “by the end of 2006 the Agency had recovered a total of £23 million and had cost £65 million to run”.⁸³ It was abolished by section 74 of the Serious Crime Act 2007 and its functions absorbed into the Serious Organised Crime Agency. Many of its cases had taken time to work through the court system and during our pre-consultation discussions a number of stakeholders who either worked for or with the Agency considered that it had been abolished prematurely. They also suggested that there may be some merit in considering reintroducing such an agency.

27.85 There is an argument that if a single body takes responsibility for enforcement, it can take ownership of, and more importantly responsibility for, the enforcement of each case from the point of the making of the confiscation order (or potentially earlier if asset management is required) until payment is satisfied. This creates a clear line of accountability and has the potential to reduce the opportunities for error or duplication of work.

27.86 However, it also poses a number of problems, in particular in the form of significant disruption to the current model of enforcement. In order to understand how a broad new Criminal Asset Recovery Bureau might disrupt the current enforcement model,

⁸⁰ UNODC, *Effective management and disposal of seized and confiscated assets* (2017) p 8.

⁸¹ See for example, Canada (the Seized Property Management Directorate), France (the Agency for the Recovery and Management of Seized and Confiscated Assets) and Ireland (the Asset Management Office of the Criminal Assets Bureau).

⁸² Proceeds of Crime Act 2002, s 1.

⁸³ Assets Recovery Agency, Report of the House of Commons Committee of Public Accounts (2006-07) HC 391, p 9.

some consideration of that model is necessary. In Chapter 18 we set out how the current confiscation enforcement model involves different organisations.

- 27.87 HMCTS is ultimately responsible for collecting the debt owed by a defendant on a confiscation order. HMCTS therefore takes day-to-day responsibility for the enforcement of confiscation orders. Where prosecution input is required for effective enforcement of an order, the CPS will become involved, pursuant to a Service Level Agreement between the CPS and HMCTS.⁸⁴
- 27.88 The Asset Confiscation Enforcement (ACE) teams and the Regional Asset Recovery Teams (RARTs) also have a role to play in confiscation enforcement. The nature of the ACE Teams and the RARTs must be considered in the context of the ten Regional Organised Crime Units (ROCU) that exist across England and Wales.⁸⁵
- 27.89 The ROCUs are regional collaborations of police forces that bring together specialist policing capabilities to tackle the threat from Serious and Organised Crime. Each ROCU provides what are referred to as “core” capabilities to its constituent forces. These include intelligence collection and analysis capabilities, asset recovery, fraud, cyber-crime and prisons intelligence. Two of the core capabilities relate directly to asset recovery, namely the provision of RARTs and ACE Teams.
- 27.90 RARTs are intended to further the government’s Serious and Organised Crime Strategy by supporting the disruption of organised crime through four principal tasks, namely:
- (1) proactive fraud and financial investigation including specialist money laundering support to the investigation of predicate offences by regions;
 - (2) development of financial intelligence;
 - (3) support to partnership disruption activity; and
 - (4) asset denial and asset recovery.⁸⁶
- 27.91 The RARTs’ functions therefore include facilitating criminal financing investigations, whether on discrete stand-alone investigations or in support of other ROCU functions (for example by supporting the work of Regional Fraud Teams). The investigations could be in relation to substantive offending or for the purposes of a confiscation hearing. Financial investigators and detectives work together with specialist lawyers from the CPS to secure successful prosecutions. Such lawyers are either co-located with, or accessible to, the RART.⁸⁷

⁸⁴ Service Level Agreement between the CPS and HMCTS for the Enforcement of Confiscation Orders, version 3, 2012.

⁸⁵ East Midlands (“EMSOU”) West Midlands (“WMROCU”) Eastern (“ERSOU”), North East (“NERSOU”), North West (“NWROCU” or “Titan”), South East (“SEROCU”), London, South West (“SWOCU or Zephyr”), South Wales (“TARIAN”), Yorkshire and Humber (“YHROCU or ODYSSEY”).

⁸⁶ HM Inspectorate of Constabularies, *Regional Organised Crime Units, a review of capabilities and effectiveness*, November 2015.

⁸⁷ HM Inspectorate of Constabularies, above, p 44.

27.92 Whilst ACE Teams are treated as a separate ROCU capability, they reflect part of the RARTs' role in connection with asset recovery. ACE Teams are therefore co-located within and alongside the RARTs. The specific role of the ACE Teams is to provide pro-active assistance in the enforcement of confiscation orders. During our scoping exercise we have spoken with ACE Team leaders from across the country. Such teams play an active role in identifying assets that could be realised in satisfaction of confiscation orders, and in assisting defendants with realisation (for example, by visiting defendants in prison and discussing how best to realise specific assets). The ACE Teams work closely with the CPS, and in particular with the CPS Proceeds of Crime ARIS Unit, which specialises in looking for additional assets after the making of a confiscation order.

27.93 We considered carefully whether to recommend that all of these enforcement bodies be brought under one umbrella, namely a Criminal Asset Recovery Bureau. However, this has the potential to significantly disrupt the way in which organised crime is tackled:

- (1) The RARTs and the ACE Teams form part of the wider capabilities of the ROCUs in tackling serious criminality. By separating out the asset recovery law aspects of the bodies referred to, we would run the risk of undermining the existing integrated serious and organised crime strategy;
- (2) Furthermore, divorcing asset enforcement lawyers from other parts of a prosecution authority may undermine an integrated approach to prosecution. The risk of confiscation being seen as a "bolt-on" to the Criminal Justice System has been identified as part of our scoping exercise, and steps have been taken by the CPS to address this. For example, in October 2018 the Code for Crown Prosecutors was amended so that "for the first time, prosecutors must take into account the degree to which a suspect benefitted financially from an alleged offence when deciding whether to charge them".⁸⁸ If CPS lawyers are no longer involved in enforcement of confiscation there is a real possibility of reinforcing the message that confiscation is an afterthought and not an integral part of the process of prosecution.
- (3) Divorcing prosecution and asset forfeiture enforcement also runs a risk that case knowledge will become "splintered". During our pre-consultation discussions practitioners emphasised how effective asset forfeiture applications often depended upon the quality and depth of knowledge that an applicant had in connection with the substantive case. Whether a person has an ability to hide assets overseas, for example, may have become clear from evidence given during a trial.

27.94 Weighing the options against one another, we consider that development of a national strategy on asset management under an oversight board is the better model of facilitating effective management of assets. We now look at what such a board and its strategies might look like in more detail.

⁸⁸ CPS, *Code for Crown Prosecutors* (October 2018) para 6.1.

CRIMINAL ASSET RECOVERY BOARD

27.95 In this section, we will explore the merits of creating a Criminal Asset Recovery Board (“CARB”) with responsibility for developing a national strategy for asset management and realisation.

27.96 Boards have been used with varying degrees of influence and oversight to review and consult on legislative matters.

27.97 The Home Office PACE Strategy Board was established in December 2007 as an independent monitoring group, appointed to oversee and advise on two public consultations commissioned by the Home Office in relation to the Police and Criminal Evidence Act 1984. A version of the PACE strategy board continues to exist today. Board members included police, civil servants and other relevant parties. The Board's Terms of Reference were:

[To] monitor the review process and advise on its strategic development. The Board will monitor and help direct the programme of work arising from the Review programme and oversee and support the evidence based development of policy.

27.98 The Firearms Consultative Committee (“FCC”) was established in 1988 in accordance with the Firearms Amendment Act 1988. Its remit included keeping the working of the Act under review and making specific recommendations on amendments. The Act included no statutory criteria for membership of the FCC; the Home Secretary was given a broad power to make appointments. The FCC's members included those who had knowledge and experience of either the possession, use or keeping of, or transactions in firearms, weapon technology or the administration or enforcement of the provisions of the Firearms Act. They ranged from the Royal Society for the Prevention of Cruelty to Animals, to the National Rifle Association and the British Shooting Sports Council. The life of the FCC was extended numerous times but it was ultimately disbanded in 2004. The House of Commons Home Affairs Committee acknowledged its achievements:

We believe that the Firearms Consultative Committee has operated effectively to its remit of reviewing the operation of the Firearms Act, and has provided a valuable forum for contact and discussion between representatives of shooting organisations, the police and other interested parties. We regret that successive Governments have not found it possible to implement some of the Committee's more detailed recommendations for the operation of firearms legislation, and we hope that this Government will, in reviewing the Firearms Acts, keep the full range of those recommendations in mind.⁸⁹

⁸⁹ Firearms Control volume 1, Report of the House of Commons Home Affairs Committee (1999 – 2000) HC 95-I.

What should CARB achieve?

27.99 The FATF has published a “Best Practices Paper” on confiscation and asset recovery frameworks.⁹⁰ It suggests that (amongst other things) an ideal asset management framework would have the following characteristics:

- (1) A framework for managing or overseeing the management of frozen, seized and confiscated property. This should include a designated authority or designated authorities which are responsible for managing (or overseeing management of) such property.
- (2) Sufficient resources in place to handle all aspects of asset management.
- (3) Appropriate planning processes prior to taking freezing or seizing action.
- (4) Measures in place to:
 - (a) properly care for and preserve as far as practicable such property;
 - (b) deal with the individual’s and third party rights;
 - (c) dispose of confiscated property;
 - (d) keep appropriate records; and
 - (e) take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.
- (5) Those responsible for managing (or overseeing the management of) property should have the capacity to provide immediate support and advice to law enforcement agencies in relation to freezing and seizure. They should also be able to handle all practical issues in relation to freezing and seizure of property.
- (6) Those responsible for managing the property should have sufficient expertise to manage any type of property.

27.100 CARB should seek to achieve these objectives by generating national policies and economies of scale in relation to who should manage assets and how assets should be managed. By streamlining the allocation of assets and having overarching standards for their maintenance, investigative and prosecution bodies will no longer have to spend time seeking out private asset managers and negotiating rates. Instead, there will be clear guidelines to determine who the appropriate receiver should be (whether private or public) in any given case. Currently the CPS has a panel of receivers upon whom they draw. We consider that such a panel ought to exist under any new national overarching policy framework applicable to all prosecution agencies and covering all relevant asset management partners.

27.101 A national procurement process, facilitated by CARB, is also likely to lead to a more consistent rate of return on the sale of assets. During our fact-finding exercise we

⁹⁰ FATF, *Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery* (2012).

heard that individual police forces procure the services of auction houses but the negotiated contractual terms are often inconsistent, varying both in relation to the existence of a commission, and its amount. The return on assets sold will therefore vary from area to area, and with it the potential amount to be recovered pursuant to a confiscation order. CARB will ensure consistency with regard to the procurement of services from private providers.

27.102 With regards to determining whether an asset should be managed, and if so by who, the G8 *Best Practices for the Administration of Seized Assets* stresses the importance of pre-seizure planning:

Pre-seizure planning is essential to anticipate resource expenditures and make informed decisions about what property is being targeted for seizure, how and when it will be seized, and most importantly whether or not the property should be seized in the first place.⁹¹

27.103 Whether assets are left with an owner or subject to management by a third party may depend upon conducting a cost-benefit analysis. In routine cases, this may be a straightforward conclusion (for example, when cash is seized). However, in other cases, the assessment may be more complex. The UNODC suggests that the pre-seizure planning stage should require that:

- (1) an accurate current value of an asset is obtained;
- (2) analysis of the condition of the asset is conducted (for example, a “drive-by” of property might be conducted to evaluate the state of repair, the occupants and any observable challenges, such as security concerns);
- (3) an analysis of transport, security, storage, maintenance and management costs is conducted; and
- (4) the identity of the most appropriate person or body to manage the asset is identified.⁹²

27.104 In the USA, detailed pre-seizure asset management guidance can be found in the Department of Justice Asset Forfeiture Policy Manual.⁹³ A primary function of CARB would be to formulate a similar nationally applicable asset management framework. This would promote transparency, consistency and accountability in the approach to be adopted, provide support and guidance to those involved in taking decisions on a day-to-day basis, and facilitate the requirements for advice and support in the FATF optimal framework.

⁹¹ G8, *Best Practice Principles on Tracing, Freezing and Confiscation of Assets* (2003).

⁹² UNODC, *Effective management and disposal of seized and confiscated assets* (2017) p 8.

⁹³ US Department of Justice Criminal Division, *Money Laundering and Asset Recovery Section Asset Forfeiture Recovery Manual* (2019) p 24.

PROVISIONAL PROPOSALS

CARB as the forum for development of a national Asset Management Strategy

27.105 Based on the above analysis, it is our provisional view that a national asset management strategy is desirable and that a Criminal Asset Recovery Board is the appropriate and proportionate way to deliver such a strategy. We have argued that a Board structure comprised of relevant stakeholders would be a more efficient approach than to construct an entirely new asset management body.

27.106 It is provisionally proposed that CARB should comprise stakeholders from across confiscation enforcement. It would therefore include representatives of the principal agencies that undertake confiscation, as well as law enforcement representatives (including heads of ACE Teams) and HMCTS.

27.107 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.

27.108 Such public-private sector working is currently being actively explored in other areas of asset recovery. For example:

- (1) the Home Office Asset Recovery Action Plan 2019 describes the need to “explore innovative partnership approaches that span the public and private sectors to increase the amount of criminal assets that are seized and frozen”.⁹⁴
- (2) Barristers Kennedy Talbot QC and James Mather have recently proposed the establishment of a Stolen Asset Recovery Fund, which is intended to capitalise on the growing public-private sector working relationship and which, if adopted, would represent a new method of litigation funding to pursue criminal assets.⁹⁵

27.109 It is our proposal that CARB would, as a collective entity, develop a national asset management strategy consisting of policy guidelines to be applied when determining how assets are to be managed and realised. These policy guidelines would be applicable in relation to property which has been seized during an investigation as evidence, assets subject to a restraint order and ultimately assets which are the subject of a confiscation order. CARB would also function as an advisory body in relation to the application of this policy.

CARB within the economic crime governance structure.

27.110 However, ultimately any recommendation about the organisational structure and position of CARB within the criminal justice framework is an operational decision which is beyond the scope of this paper. However, we briefly refer to the current economic crime governance structure to demonstrate that CARB could fit into existing frameworks.

⁹⁴ Home Office, Asset Recovery Action Plan (July 2019) para 10.

⁹⁵ K Talbot QC and J Mather: *Stolen Asset Recovery Fund (SARF): Outline Proposal*.

27.111 One potential option is the expansion of an existing inter-disciplinary group, known as the Senior Operational Practitioners' Group. The Group's composition and role was summed up in the 2019 Home Office Asset Recovery Action Plan:

The multi-agency Senior Operational Practitioners' Group (SOPG), is co-chaired by senior operational leaders from the Crown Prosecution Service and the National Police Chiefs' Council, as the two agencies responsible for the bulk of asset recovery investigations and prosecutions. The SOPG is focussed on asset recovery operational performance and co-ordination, examining individual agencies' performance, identifying areas for improvement and suggesting ways to remove barriers. The arrangements have already fostered closer working arrangements between agencies who work on asset recovery...⁹⁶

The SOPG is a valuable forum for bringing together the community of senior operational leaders who collectively ensure collective, strategic oversight of operational delivery. They continue to play a key role in ensuring barriers to operational performance and co-ordination are addressed.⁹⁷

27.112 Alternatively, CARB could form part of the government's approach to tackling economic crime by having a place within the economic crime governance structure. At the top of the structure is the Economic Crime Strategic Board, which was announced in December 2017⁹⁸ and first met in January 2019.⁹⁹ It is intended that the ECSB will meet twice a year. The ECSB is jointly chaired by the Home Secretary and the Chancellor of the Exchequer, and comprises representatives of government, the police and stakeholders in the private sector, including Chief Executives of banking institutions, senior representatives of UK Finance and others.¹⁰⁰

27.113 The mission of the ESCB includes (amongst other things) to:

- (1) enhance ways of working to deliver a genuine public private partnership, which is intelligence-led and has shared strategic objectives;
- (2) develop and deploy the assets and capabilities available across all sectors in a co-ordinated and joined up way to disrupt the illicit financial flows which allow criminals to access the profit from the proceeds of crime.¹⁰¹

27.114 This mission is supported on a day-to-day basis by an Economic Crime Delivery Board, jointly chaired by the Permanent Secretaries of the Home Office and Treasury. The Delivery Board ("ECDB") is intended to "provide senior oversight and ownership of work on economic crime reform...it will take a strategic overview of our collective

⁹⁶ Home Office, *Asset Recovery Action Plan* (July 2019) para 38.

⁹⁷ Home Office, *Asset Recovery Action Plan* (July 2019) para 39.

⁹⁸ A Rudd, Secretary of State for the Home Department, Economic crime and anti-corruption: Written statement, HCWS329.

⁹⁹ HM Treasury, Home Office, The Rt Honourable Phillip Hammond MP; the Rt Honourable Sajid Javid MP, *New Taskforce to tackle economic crime*, <https://www.gov.uk/government/news/new-taskforce-to-tackle-economic-crime> (last visited 14 January 2019).

¹⁰⁰ HM Treasury, Home Office, *Economic Crime Strategic Board Terms of Reference*.

¹⁰¹ HM Treasury, Home Office, *Economic Crime Strategic Board Terms of Reference*.

understanding of the scale and nature of the threat, assess national economic crime capabilities to tackle it and ensure resources are allocated to deliver our strategic priorities.”¹⁰²

27.115 It is intended that the work on economic crime reform supported by the ECSB will be enhanced by the strategic input of technical level working groups, including technical working groups on asset recovery. CARB could be one such group. As we discussed earlier, we set this out merely as one example of how CARB might fit into existing organisational structures and make no provisional proposals about where CARB could fit into such structures. Ultimately that decision is an operational one.

Consultation Question 100.

27.116 We consider that a national asset management strategy is desirable, to determine who and how assets should be managed.

27.117 Do consultees agree?

Consultation Question 101.

27.118 We provisionally propose that to develop any national asset management strategy:

- (1) a new Criminal Asset Recovery Board be established;
- (2) the new board should comprise stakeholders from the public and private sector.

27.119 Do consultees agree?

RECORDING CONFISCATION DATA

27.120 Effective asset management is likely to require “detailed records of the nature, condition, location, value, ownership, stage in the confiscation process and other significant features of restrained and realized property”.¹⁰³ Through accurate and effective record keeping progress of satisfaction of a confiscation order can be monitored and action can be taken to deal with the asset in an appropriate way if, for example, costs of continued management outweigh the benefit.

27.121 The Joint Asset Recovery Database (JARD) is the “main central database where information on confiscation orders is maintained”.¹⁰⁴ Although JARD is managed by

¹⁰² HM Treasury, Home Office, *Economic Crime Strategic Board Terms of Reference*.

¹⁰³ UNODC, *Effective management and disposal of seized and confiscated assets* (2017) p 61. See also G8, *Best Practices for the Administration of Seized Assets* (2005) p 3.

¹⁰⁴ Proceeds of Crime: Government’s response to the Committee’s Fifth Report of Session (2016-17) HC 805, p 13.

the National Crime Agency, information is entered into JARD by relevant law enforcement officials from across the criminal justice system.¹⁰⁵

27.122 During our pre-consultation discussions we spoke to stakeholders including police financial investigators and HMCTS staff who enforce confiscation orders.

27.123 Stakeholders were clear that the quality of information entered onto JARD is highly variable, and practices as to the entering of information differ between different regions. Law enforcement agencies and prosecution authorities may have difficulty in knowing what assets require management or enforcement, thereby inhibiting effective management and realisation of assets.

27.124 When such information cannot be found on JARD, law enforcement agencies may have to fall back on the material from the confiscation hearing itself. However, we received extensive representations about the lack of a central repository for confiscation data. This data is often needed years after the making of an order, for example when a defendant seeks to vary the amount that they are required to pay or when a second confiscation order is made and account needs to be taken of assets included in the first order. At present, whether such data is kept and how long such data are kept for is a matter for each enforcement authority and the court service.

27.125 We understand that potential reforms with regards to data collection and storage for confiscation are currently under investigation or action, although we have not been provided with details as to the nature or timeline of such reforms. Given that such reform is either being or is likely to be undertaken by others we do not make any proposals. However, we do consider that such reforms are integral to facilitate an effective confiscation regime.

¹⁰⁵ See S Jenner [in association with HM Courts Service, Association of Chief Police Officers, HM Revenue and Customs, National Crime Squad, Crown Prosecution Service, Revenue and Customs Prosecutions Office, Assets Recovery Agency and HM Prison Service]. *National Best Practice Guide to Confiscation Order Enforcement* (2005) pp 8 – 12.

Chapter 28: Confiscation and cryptoassets

INTRODUCTION

- 28.1 In this chapter 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.
- 28.2 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.
- 28.3 While this chapter does not make significant policy proposals,¹ it 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).

THE NATURE OF CRYPTOASSETS

What are cryptoassets?

- 28.4 Cryptoassets are a type of digital asset. They encompass what are known as cryptocurrencies. Cryptocurrencies are secured digital representations of value or contractual rights that can be transferred, stored or traded electronically.²
- 28.5 If a person wants to transfer money to a traditional bank account, the holder of the account must provide that person with his or her bank account number and sort code. However, the person to whom the bank account details were given to make the transfer need not have been given (and should not have been given) the password or PIN number for the account. Such details are only needed by the account holder.
- 28.6 This distinction between “public” and “private” information necessary to the operation of a bank account is also used in connection with cryptocurrencies. The holder of a cryptocurrency “wallet” will have “a public key, which functions like an address to which bitcoins can be sent as a means of payment, and a private key, which protects access to those bitcoins, functioning rather like a PIN or password”.³
- 28.7 Therefore, rather than holding cryptocurrencies themselves, the “holder” of a cryptocurrency has exclusive access to these combined keys, giving him or her the power to control the cryptocurrency, “whether that be for spending, saving, or moving round between accounts”.⁴

¹ Although we invite consultees views in relation to prosecutorial liability at Consultation question 102.

² J Madir (ed), *Fintech: Law and Regulation* (2019) p 75.

³ D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (1st ed 2019) p 15.

⁴ D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (1st ed 2019) p 16.

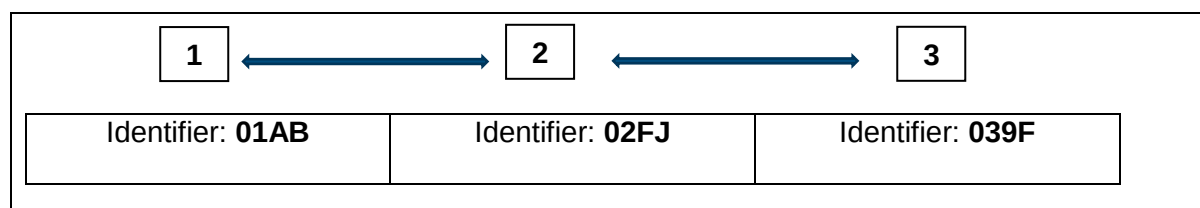
Recording and validating cryptoasset transactions

28.8 Electronic ledgers are used to record every transaction made with cryptoassets and users have access to a record of transactions.⁵ The electronic ledger is therefore “distributed” rather than centralised in a central authority (such as a bank), and is referred to as Distributed Ledger Technology (DLT).⁶

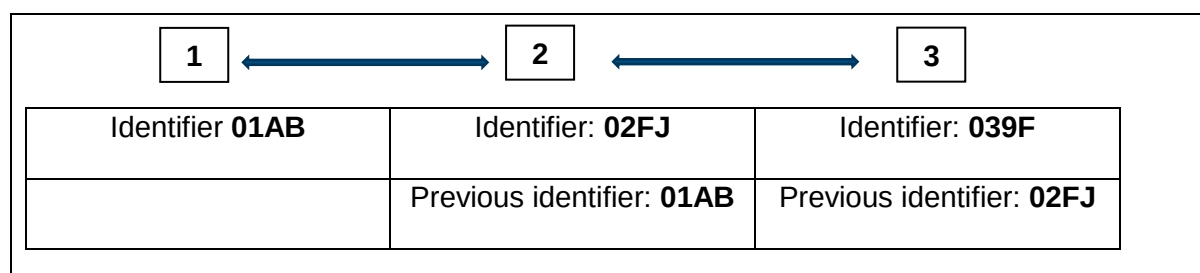
28.9 There are various forms a DLT can take and different ways they can operate. Blockchain, for instance, is one of many different types of DLT and was created to underpin the cryptocurrency Bitcoin. The following paragraphs provide a simple summary of the way blockchain works, as one of the more established DLTs. It is critical to note that while Blockchain is a well-known form of DLT, it is but one example. There are other DLTs that operate differently to Blockchain. We have chosen to focus on Blockchain because it is well known and because it is named by external publications which we refer to later in this chapter.

Blockchain

28.10 Each “block” contains the information that a person would expect to see on a standard bank ledger for each of the many transactions. This information includes details of the sender, receiver and the amount of bitcoin. Each “block” also has a unique identifier which is generated when the information is entered.



28.11 In order to ensure accuracy of the ledgers, cryptography⁷ or encryption is used to ensure that external parties cannot “break into” the system and manipulate the transaction history. The cryptography involves the duplication of the identifier from one block in the ledger to the next:



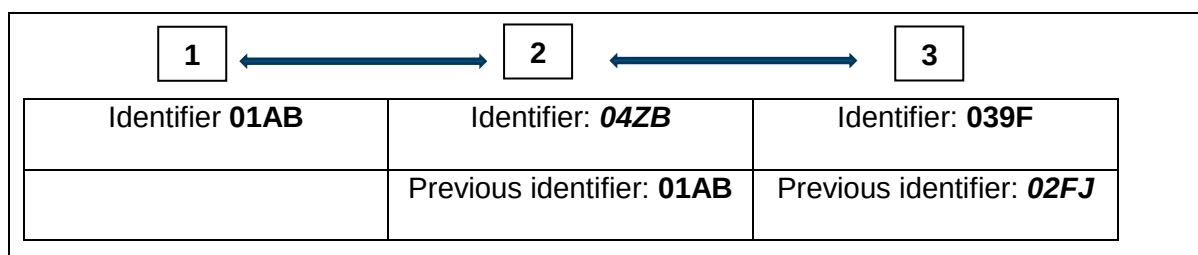
⁵ Some “permissioned” systems may be set up so as to restrict access to certain participants.

⁶ D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (1st ed 2019) p 2.

⁷ Electronic Execution of Documents (2019) Law Commission Paper No 386, glossary, p vi.

28.12 If block 2 were tampered with:

- (1) the identifier for block 2 would change to reflect the fact that the data in block 2 had changed; and
- (2) because the identifier for block 2 had changed, block 3 would contain incorrect data, and so would each subsequent block. This is significant because if the transactions are improperly recorded, the accuracy of the quantity and consequent value of the cryptocurrency is compromised.



28.13 By requiring one block to contain the identifier of the previous block, it becomes virtually impossible to manipulate blocks mid-chain. However, such alteration may be possible by using computing power to manipulate each block along the chain.

28.14 Blockchain therefore requires a clear element of “human input” into the creation of a block on the chain by requiring “proof of work” before a block can be added. This considerably increases the amount of time it would take to manipulate each block. The “proof of work” is the solving of a complex equation. When the equation is solved, the user is rewarded with some bitcoin and the new block is added. This process of solving equations and adding blocks is referred to as “mining”.⁸

28.15 Who can view, modify and validate the information on the ledger will depend on whether the DLT is “permissioned” or “permissionless”. Permissioned DLTs are not freely accessible and will often require definite identification of the participants.⁹ They also often have mechanisms which conceal transaction information from anyone who is not an authorised participant in the network. Where the DLT is “permissionless” the ledger can be viewed and modified by anyone with the relevant software. Notably, in the case of blockchain, the modification of the ledger requires the solution of the aforementioned equations.

28.16 There are a multitude of different cryptocurrencies which have different capabilities and varying levels of security and stability. Cryptocurrencies originally derived their value from how willing people were to use them as currency in lieu of traditional currency. Therefore, the increase in demand for a cryptocurrency led to an increase in its value. Increasingly, however, cryptocurrencies are being used as investment products, with people retaining stores of bitcoin, as they would shares.

28.17 One of the attractive features of cryptocurrencies is that they can obviate the need for a centralised bank because all transactions are recorded across the ledger and are

⁸ D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (1st ed 2019) p 5.

⁹ J Madir (ed), *Fintech: Law and Regulation* (2019) p 127.

usually accessible to all participants in the network, depending on the particular system being used. However, this means that there is no third party to indemnify a person if transfers are effected accidentally or incorrectly. Similarly, if cryptocurrencies are stolen, there is no mechanism to ensure reimbursement or recovery.¹⁰

Cryptoassets as property

28.18 Before considering cryptoassets in the context of confiscation orders, it is first necessary to consider the ongoing issue of whether cryptoassets should be treated as property.

28.19 In November of 2019 the UK Jurisdiction Taskforce (UKJT) of the LawTech Delivery Panel published a paper entitled “Legal statement on cryptoassets and smart contracts”¹¹ which sought to answer this very question.

28.20 The UKJT carefully considered existing case law.¹² Ultimately it determined that while there is no definitive UK case law which defines cryptoassets as property, cryptoassets appear to comply with the “indicia of property”, articulated by Lord Wilberforce in *National Provincial Bank v Ainsworth*:

before a right or an interest could be admitted into the category of property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. Certainty, exclusivity, control and assignability have also been identified in case law as characteristic of property rights.¹³

28.21 It concluded that:

- (1) The private key which gives access to the cryptoasset affords exclusive control over that asset and thus constitutes “ownership”.
- (2) The way in which cryptoassets are stored and the use of secure ledgers means that cryptoassets are “definable”. The value and quantum of assets are recorded, as are all transfers.

¹⁰ D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (1st ed 2019) p 16.

¹¹ The LawTech Delivery Panel, UK Jurisdiction Taskforce, *Legal Statement on Cryptoassets and Smart Contracts* (2019), https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf (last visited April 2020).

¹² *OBG Ltd v Allan* [2008] 1 AC 1, [2007] UKHL 21; *Colonial Bank v Whinney* (1885) 30 Ch D 261 (CA), at [285]; *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156, [2012] EWHC 10 (Ch); *Attorney General of Hong Kong v Nai-Keung* [1987] 1 WLR 1339, [1988] Crim LR 125; *Your Response v Datateam Business Media* [2014] EWCA Civ 281, [2015] QB 41.

¹³ *National Provincial Bank v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472.

- (3) The value of a cryptoasset is “assignable” to another person, as a traditional¹⁴ currency would be, and systems of cryptography such as blockchain are designed to facilitate the secure transfer of value.¹⁵
- (4) Cryptoassets have the same level of “permanence” as other forms of currency in the sense that they are able to be counted and stored until such time as they are spent, redeemed, cancelled or repaid.
- (5) The nature of cryptoassets is that they can fluctuate in value and can be transferred and redeemed extremely rapidly. However, cryptoassets are “sufficiently permanent or stable to be treated as property, at least for a commercial cryptoasset system with a significant number of participants, an established history of transactions, and a generally stable set of rules”.¹⁶

28.22 The conclusion of the UKJT that cryptoassets meet “Lord Wilberforce’s classic definition of property in *National Provincial Bank v Ainsworth*” was supported by Mr Justice Bryan in *AA v Persons Unknown*.¹⁷

CRYPTOASSETS AND CONFISCATION

28.23 Part 2 of POCA 2002 requires that property be identified and valued to facilitate the calculation of “benefit” from criminal conduct. Part 2 of POCA 2002 may also require that the value of particular property is preserved or realised to satisfy any confiscation order that is made. Whether cryptoassets should be treated as property, and how best to maximise the value of those cryptoassets are therefore key issues that must be addressed.

Is a cryptoasset “property” for the purposes of confiscation?

28.24 Section 84 of POCA 2002 states that:

- (1) property is all property wherever situated and includes
 - (a) money;
 - (b) all forms of real or personal property; and
 - (c) things in action and other intangible or incorporeal property.

28.25 During our pre-consultation discussions, the definition of property was perceived as being wide enough to encompass cryptoassets without amendment. The position of stakeholders is reinforced by the UKJT’s conclusion that cryptoassets fall within the

¹⁴ A currency as traditionally understood is sometimes referred to as “fiat” currency.

¹⁵ This conclusion is further supported by the Money Laundering and Terrorist Financing (Amendment) Regulations 2019, which acknowledge that cryptoassets are a means of trading value. Reg 4 adds “cryptoasset exchange providers” to the list of those who must conduct due diligence on clients to reduce the risk of money laundering.

¹⁶ The LawTech Delivery Panel, UK Jurisdiction Taskforce, *Legal Statement on Cryptoassets and Smart Contracts* (2019), https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf (last visited April 2020).

¹⁷ *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35.

general definition of property, as supported by the judgment in *AA v Persons Unknown*¹⁸ and in the recent New Zealand High Court decision in *Ruscoe and Moore v Cytopia Limited*.¹⁹

28.26 The perception that that definition is sufficiently broad to encompass cryptoassets is also consistent with the approach adopted in Australia. Section 338 of Australia's Proceeds of Crime Act 2002 defines "property" in comparable terms to section 84 of POCA 2002. Bitcoin has been restrained pursuant to section 338.²⁰

28.27 Therefore, we do not consider that any amendment to POCA 2002 is necessary to bring cryptoassets within the ambit of the confiscation enquiry.

Valuation of a cryptoasset

28.28 "Cryptocurrencies are characterised by extreme high and persistent volatility that exceeds the volatility of other assets like equities and gold".²¹ The Bank of England has noted that

[f]rom 2014 to the beginning of 2018, oil prices didn't change by more than 10% in one day unlike the value of Bitcoin which changed significantly – rising by 65% in one day and falling by 25% on another.²²

28.29 In addition to general external factors that may affect volatility (apparently including social media influence),²³ in permissionless markets the values of cryptocurrencies are vulnerable to manipulation. Permissionless markets are unregulated, so there are no safeguards in place to protect the integrity or transparency of trades. As a result, rates of trade are able to be falsified to give the appearance of frequency and popularity.²⁴ In this way, permissionless cryptoasset markets differ significantly from other markets, such as the stock exchange, which are heavily regulated. It is important to note that permissioned markets are often better regulated and more transparent.

28.30 The vulnerability of cryptoassets to fluctuation in value and the consequent risks inherent in relying on cryptoassets for commercial transactions are discussed in the

¹⁸ *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35; See A Caines, *Cryptoassets' relationship with the Proceeds of Crime Act 2002* (2020), <https://brightlinelaw.co.uk/cryptoassets-relationship-with-the-proceeds-of-crime-act-2002/> (last visited April 2020).

¹⁹ *Ruscoe and Moore v Cytopia Limited* [2020] NZHC 728, at [102]-[124].

²⁰ Australian Federal Police, *Annual Report* (2018-2019) <https://www.afp.gov.au/annual-report-2018-19> (last visited 10 March 2020). See also *New South Wales Crime Commission v Ward* [2019] NSWSC 140.

²¹ T Walther, T Klein and E Bouri, "Exogenous drivers of Bitcoin and Cryptocurrency volatility – A mixed data sampling approach to forecasting", *Journal of International Financial Markets, Institutions & Money*, (2019) vol 63, 101133.

²² Bank of England, *What are cryptoassets (cryptocurrencies)?*, <https://www.bankofengland.co.uk/knowledgebank/what-are-cryptocurrencies> (last visited April 2020).

²³ F Mai, Z Shan, Q Bai, X Wang and RHL Chiang, "How Does Social Media Impact Bitcoin Value? A Test of the Silent Majority Hypothesis", *Journal of Management Information Systems* (2018) vol 35, no 1, pp 19-52.

²⁴ Financial Conduct Authority, *Guidance on Cryptoassets* (2019) p 2.32 – 2.34, <https://www.fca.org.uk/publication/consultation/cp19-03.pdf>, (last visited April 2020).

recent decision of the Supreme Court of Singapore in *B2C2 Ltd v Quoine Pte Ltd*.²⁵ In this case B2C2 Ltd was trading on an electronic trading platform operated by Quoine Pte Ltd. This claim was based on the fact that on 19 April 2017 an automated programming safeguard was activated and led to a number of transactions occurring at a default price which was very low. Upon seeing the transactions, Quoine assumed that these occurred in error and they were unilaterally cancelled. The facts and decision are largely irrelevant for the purposes of this analysis as they relate to the principles of contract law. What is relevant for the purposes of this discussion is the difficulty in valuing cryptoassets which are the subject of court proceedings because of their fluctuations in value. This matter was ultimately decided in favour of B2C2 Ltd but the judge stopped short of making an order for specific performance because:

...the compelling factor against ordering specific performance is that it would serve to require Quoine to transfer BTC to B2C2 which it would have to obtain at today's price which is substantially higher than the price in 2017 when the trades were executed.²⁶

28.31 The Judge's decision to deviate from an order of specific performance because of the fluctuating value of these currencies and the potential for unfairness demonstrates the difficulties faced by courts in relation to these emerging technologies. It is an issue that the courts also grapple with in the context of POCA 2002.

28.32 During our pre-consultation discussions, some prosecutors expressed the view that a valuation of a cryptoasset at the start of a lengthy confiscation hearing may be different to its valuation at the end of the confiscation hearing.²⁷ This may impact on both:

- (1) The calculation of "benefit"; and
- (2) The determination of the current value of the defendant's assets, which informs the decision about the amount that the defendant will have to repay.

28.33 With regards to benefit, whilst other types of assets may be subject to less volatility than cryptoassets,²⁸ the issue of volatility in the valuation of assets is not unique to cryptoassets. For example, the value of shares may fluctuate. There is already scope in POCA 2002 to deal with the changing value of assets when calculating the defendant's benefit. Section 80 of POCA 2002 directs that, for the purpose of deciding the value of property obtained by a person, as a result of or in connection with his criminal conduct:

- (1) The value of the property at the material time is the greater of the following—

²⁵ *B2C2 Ltd v Quoine Pte Ltd* [2020] SGCA(I) 02. See also the earlier judgment of the Singapore International Commercial Court: [2019] SHGC(I) 03.

²⁶ *B2C2 Ltd v Quoine Pte Ltd* [2020] SGCA(I) 02 at [256].

²⁷ Although POCA 2002 does state expressly that valuation should be in pounds sterling, the courts have used pounds sterling for valuation purposes (see for example, *Byer* [2006] EWCA Crim 1070).

²⁸ T Walther, T Klein and E Bouri, "Exogenous drivers of Bitcoin and Cryptocurrency volatility – A mixed data sampling approach to forecasting", *Journal of International Financial Markets, Institutions & Money*, (2019) vol 63, 101133.

- (a) the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money;
- (b) the value (at the material time) of the property found under subsection (3).

28.34 Notably, section 80(2)(a) refers to changes in the value of money as a factor that needs to be taken into account. This reference acknowledges the ongoing variance in the value of currencies and the impact of inflation.

28.35 With regards to the determination of the defendant's "available amount", concern was again expressed by prosecutors that within a short period after the making of the confiscation order, the court may well have to entertain an application to vary the available amount upwards²⁹ or downwards³⁰ to reflect the value at which any cryptoasset is realised.

28.36 Whilst the volatility of a cryptoasset may well lead to an application to vary the available amount, the provisions for the variation of the confiscation order exist primarily to deal with such changes in value after the making of the confiscation order.

28.37 We ultimately consider that POCA 2002, as currently framed, has adequate provisions relating to both the calculation of "benefit" and the "available amount" to deal with the volatile nature of the value of cryptoassets. The court must keep in mind the issue of value until the point of making the confiscation order and may revisit the issue after the order is made. The provisions have the merit of flexibility and do not require that the cryptoasset itself is realised at a defined point in time.

Preserving the value of a cryptoasset

28.38 In Chapter 26 we consider the court's power to restrain a person from dealing with his or her assets. Section 69 of POCA 2002 requires that the power "must be exercised...with a view to securing that there is no diminution in the value of realisable property". Cryptoassets present two challenges in this regard:

- (1) the electronic nature of cryptoassets makes them easier to dissipate than other types of asset;
- (2) the value of cryptoassets may fluctuate to such an extent that it will be difficult to know whether the exercise of the court's power will in fact diminish the value of realisable property.

28.39 In 2016 the CPS provided written evidence³¹ in response to the Home Affairs Committee Report on the Proceeds of Crime.³² In this evidence the CPS warned that "the use of virtual currencies is increasingly a feature of serious and organised crime".

²⁹ Proceeds of Crime Act 2002, s 22.

³⁰ Proceeds of Crime Act 2002, s 23.

³¹ Crown Prosecution Service, *Written Evidence submitted by the Crown Prosecution Service* (2016) <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Home%20Affairs/Proceeds%20of%20crime/written/29664.html> (last visited April 2020).

³² House of Commons, Home Affairs Committee, Report on the Proceeds of Crime, Fifth Report of Session (2016-17) HC 25.

It then went on to state that “a power for law enforcement to seize, hold and sell virtual currency is required if we are to keep abreast of changes in the manner sophisticated criminals operate.”

28.40 POCA 2002 already contains a number of provisions that could be used to this end, including:

- (1) section 41(7) of POCA 2002 which enables a court to make ancillary orders in conjunction with a restraint order in order to ensure the restraint order is effective;
- (2) sections 47A to 47S of POCA 2002 which confer powers in relation to the search and seizure of property in confiscation matters, post-conviction; and
- (3) section 67 of POCA 2002 which relates to money seized.

The power to make ancillary orders

28.41 Section 41(7) of POCA 2002 provides that, when the court makes a restraint order, it may also make *any* order the court believes is appropriate to ensure the effectiveness of the restraint order.

28.42 In *R v Teresko*³³ the police found a cryptocurrency wallet (a software programme which stores public and private keys) when searching premises. A restraint order was made. The court also made an ancillary order permitting the police to convert the bitcoin into sterling to preserve its value. The application was made on the basis of the volatility of bitcoins and their vulnerability to attack, even when held in a dedicated police bitcoin wallet. Such an approach mirrors the approach taken in Australia, where it has been reported that bitcoin has been restrained and deposited into the Commonwealth’s Confiscated Assets Account.³⁴

28.43 The restraint and confiscation of bitcoin was ordered by the Crown Court more recently in the case of *West*.³⁵

Protection of the prosecution

28.44 During our pre-consultation discussions the issue was raised as to whether, in circumstances where there has been a successful application for conversion of a cryptoasset into sterling and its payment into an interest-bearing account, the prosecution ought to be indemnified in relation to any claim against it for compensation in the event of an acquittal where value of that cryptoasset subsequently rises. Given that cryptoassets are often subject to significant fluctuations in value, the potential cost liability to the prosecution authority could be considerable.

³³ *R v Teresko (Sergejs)* [2017] 10 WLUK 225, [2018] Crim LR 81.

³⁴ Australian Federal Police, *Annual Report* (2018-2019) <https://www.afp.gov.au/annual-report-2018-19> (last visited 10 March 2020).

³⁵ *R v West* (unreported) 23 August 2019; M Busby, “Bitcoin worth £900,000 seized from hacker to compensate victims” (23 August 2019) *The Guardian*, <https://www.theguardian.com/technology/2019/aug/23/bitcoin-seized-hacker-grant-west-uk-compensate-victims> (last visited April 2020).

28.45 In Chapter 26 we discuss risk-aversion in obtaining restraint orders. In the absence of any indemnification there is a real possibility that a risk-averse approach may be taken to the realisation of cryptoassets.

28.46 We do not consider that it is appropriate to propose a blanket indemnity in circumstances where a cryptoasset is realised and that asset then increases in value. In Chapter 26 we propose a costs regime for restraint orders based around reasonableness of prosecution action, and we consider that any decision about compensation arising from the conversion of the cryptoassets ought to be subject to a test of reasonableness in the same way.

28.47 We note that in the case of *Lithgow v United Kingdom*³⁶ the European Court of Human Rights considered the issue of share valuation and appropriation by the state. The Aircraft and Ship Building Industries Act 1977 (“the 1977 Act”) was found to be compatible with the right to the peaceful enjoyment of property under A1P1 of the European Convention on Human Rights. The 1977 Act sought to nationalise companies which were previously owned by a number of shareholders. The Act provided for compensation to be paid to shareholders based on the value of the shares at the date of valuation, not at the date of vesting in the state. In the intervening period some shares increased in value which disadvantaged some shareholders. One issue for determination was whether the 1977 Act was incompatible with A1P1 because of fluctuations in the value of the shares between the date of valuation and the vesting of the assets.

28.48 It was ultimately held by the majority that the 1977 Act was not incompatible with A1P1. The decision centred on the fact that while the terms of the compensation scheme should be fixed in advance and applied uniformly across companies (whether their share value increased or decreased), ultimately the period between the date of valuation and the date of vesting was the result of the parliamentary process and constituted “reasonable measures of a general economic nature”.³⁷

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

Consultation Question 102.

28.50 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 as a result? If so, in what circumstances?

³⁶ *Lithgow v United Kingdom* (1986) 8 EHRR 329, [1986] CLY 1415.

³⁷ *Lithgow v United Kingdom* (1986) 8 EHRR 329, [1986] CLY 1415.

Search and seizure powers and extraterritoriality

- 28.51 The exercise of the power under section 41(7), along with the exercise of search and seizure powers under POCA 2002 in connection with virtual currencies, may raise issues of extraterritoriality. We use the term extraterritoriality in this context to refer to the enforcement of laws beyond the United Kingdom's territory.³⁸
- 28.52 In *R v Teresko*,³⁹ which we discussed above, the court granted an application to seize the contents of a cryptocurrency wallet under sections 47A to 47S of POCA 2002. The Crown Court then granted an order pursuant to section 41(7) of POCA 2002 permitting the police to convert bitcoin seized from the cryptocurrency wallet into sterling.
- 28.53 Jonathan Hall QC has raised the question of whether the application of these powers in the context of cryptocurrency engages issues of extraterritoriality, writing:
- If UK law enforcement agencies were to cause a bitcoin to be transferred from one public key to another public key, that would in due course cause foreign servers to process information as they validate the transfer across the blockchain. Applying a traditional territorial model, UK law enforcement agencies could therefore be said to have changed data held on servers located on foreign soil (although it is unlikely that one could identify which foreign soil). The precise application of territorial jurisdiction to cyberspace, if such a concept can even be admitted to exist, is highly contentious and beyond the scope of this commentary. However, on the basis that the territorial model does apply, it could be said that this would be contrary to general principles of international law, and therefore unlikely to have been intended by Parliament.⁴⁰
- 28.54 There are three interrelated questions to which the use of enforcement powers in connection with virtual currencies gives rise. First, as a preliminary matter, it may be questioned whether enforcement action exercised by law enforcement agencies in this jurisdiction in respect of virtual currencies really ought to be classified as involving an extraterritorial exercise of power.
- 28.55 On one view, it is overly formalistic to construe the exercise of enforcement powers in this jurisdiction as extraterritorial simply because an incidental effect is the alteration of data located abroad. A finding of extraterritoriality would rest on the premise that the location of data is a determinative factor in whether the power is exercised extraterritorially. Looking at the matter in the round, we consider it arguable either way whether such acts involve an extraterritorial exercise of power.
- 28.56 The second question is whether the presumption against a statute operating extraterritorially would actually prevent enforcement action being permissible under POCA 2002. This question applies particularly in respect to virtual currencies in circumstances where the action has been classified as extraterritorial. There is a presumption that, unless the contrary intention appears, a power conferred by a statute does not apply extraterritorially to people or matters outside the territory to

³⁸ FA Mann, "The Doctrine of Jurisdiction in International Law" (1964) 111 *Recueil des Cours* 1, 154.

³⁹ *R v Teresko* [2018] Crim LR 81, [2018] Crim LR 81.

⁴⁰ J Hall QC "Restraint Orders: *R v Teresko*" [2018] *Criminal Law Review* 81, 83.

which it extends.⁴¹ Whether this presumption is rebutted, and therefore whether a provision does have extraterritorial application, is a question of statutory construction,⁴² having regard to the wording of the provision in question, the statutory purpose and the relevant context.⁴³

28.57 It is of significance that section 84(1) of POCA 2002 defines property as “all property wherever situated”. It is acknowledged that restraint orders create a worldwide *in personam* jurisdiction.⁴⁴ Accordingly, the statutory powers discussed likely have an element of extraterritorial application.

28.58 In the light of recent case law,⁴⁵ it has been argued that the courts have signalled a greater willingness to interpret enforcement powers as having extraterritorial effect.⁴⁶ There are a number of matters that would likely support the contention that Parliament did intend the enforcement powers in POCA 2002 to apply to virtual currencies, including to give effect to the statutory regime and to ensure that the powers are effective. We therefore consider that the presumption against extraterritoriality would likely be rebutted in this context by the wording of POCA 2002 and its statutory purpose.

28.59 The third and final question is whether the exercise of enforcement powers in connection with virtual currencies would breach international law. As well as a presumption against extraterritoriality, there is a related presumption that Parliament would not have chosen to confer powers on law enforcement agencies that are inconsistent with the comity of nations and established rules of international law.⁴⁷

28.60 The starting point in international law is that no state may exercise its enforcement jurisdiction in the territory of another state without that State’s permission.⁴⁸ Academic literature highlights the difficulty of applying traditional concepts of territoriality and jurisdiction to electronic data and matters in cyberspace.⁴⁹ It has been argued that without the right deriving from an international treaty or consent, accessing data in a foreign jurisdiction *could* be considered a breach of territorial sovereignty.⁵⁰ However,

⁴¹ D Bailey and L Norbury (eds), *Bennion on Statutory Interpretation* (7th ed 2019), s 4.8.

⁴² *Masri v Consolidated Contractors International (UK) Ltd* [2009] UKHL 43, [2010] 1 AC 90 at [10]; *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1 at [212].

⁴³ *R (KBR) v Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin), [2019] QB 675 at [29].

⁴⁴ *Serious Organised Crime Agency v Perry* [2012] UKSC 35, [2013] 1 AC 182 at [36].

⁴⁵ *R (on the application of KBR Inc) v Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin), [2019] QB 675; *R (on the application of Jimenez) v First Tier Tribunal (Tax Chamber)* [2019] EWCA Civ 51, [2019] 1 WLR 2956.

⁴⁶ Alex Davidson, “Extraterritoriality and statutory interpretation: the increasing reach of investigatory powers” (2020) 1 PL 1, 1.

⁴⁷ D Bailey and L Norbury (eds.), *Bennion on Statutory Interpretation* (7th ed: 2019), s 4.6. *Maxwell on the Interpretation of Statutes* (12th ed, 1969) p 183.

⁴⁸ *SS “Lotus” (France v Turkey)*, 1927 PCIJ, Series A No 10. See James Crawford, *Brownlie’s Principles of Public International Law* (2019, 9th ed) p 462.

⁴⁹ Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed 2015) p 81; Jennifer Daskal, “The Un-Territoriality of Data” (2015) 125 Yale LJ 326, 329; Alex Davidson, “Extraterritoriality and statutory interpretation: the increasing reach of investigatory powers” (2020) 1 PL 1, 5.

⁵⁰ Anna-Maria Osula, “Transborder access and Territorial Sovereignty” (2015) 31 CLS Rev 719 at 727.

the answer remains unclear and a definitive answer will likely require international consensus.⁵¹

- 28.61 The courts have approached the matter by utilising the touchstone of whether “eyebrows might be raised” at the notion that Parliament has conferred the extraterritorial jurisdiction in issue.⁵² It may also be argued that, in some contexts involving transborder search or access to data, there may be no affront to sovereignty by reason of the “de minimis” principle. Where, for example, production powers are used against domestic parties, concerning an exclusively domestic investigation, but the data happens to be abroad, the exercise of the power may not be of concern to the latter country, and therefore may not be problematic under international law.
- 28.62 The issues raised relating to extraterritoriality raise broader matters of policy and practice than can be covered in a consultation paper focussing on Part 2 of POCA 2002. We therefore do not make any provisional proposals or reach conclusions with regard to the exercise of powers in connection with seizure of cryptoassets and extraterritoriality.

Cryptoassets as hidden assets

- 28.63 We have discussed the difficulties with valuing cryptoassets and preserving their value. However, a key difficulty with attempting to assess virtual assets for the purposes of a confiscation order is locating the assets. In Chapter 15 we discuss the concept of “hidden assets” at length and the challenges courts face with accurately valuing the defendant’s benefit and subsequently enforcing the orders.
- 28.64 While it is difficult to trace currency, bank accounts and tangible property, it is exceptionally difficult to trace cryptoassets, particularly if they are stored in private wallets on permissionless networks, which are virtually impossible to break into or monitor. It is this aspect of cryptoassets which makes them potentially attractive for defendants to conceal their assets and avoid the enforcement of confiscation orders. For instance, defendants can use technology to conceal their identities in online transactions. They can also transfer the currency through multiple online “wallets” to make the funds difficult to track and can transfer the currency onto prepaid cards which can be stored offline or with a third party.
- 28.65 In their article in Family Law, Cady Pearce, Mary Young and Liam Hurren of Kingsley Napley describe the difficulties with tracing cryptoassets:

Someone who holds Bitcoin holds a private key, which is not linked to their name in any way, and the publicly available information on any trades simply records the public key: another sequence of letters and numbers with no personal identifying features. Bitcoin is, by its very nature, anonymous even if all the trades are publicly available

⁵¹ See Cybercrime Convention Committee Criminal Justice Access to Electronic Evidence in the Cloud: Recommendations for consideration by the T-CY (September 2016) at [143].

⁵² *Masri v Consolidated Contractors International (UK) Ltd* [2009] UKHL 43, [2010] 1 AC 90 at [24]; *R (KBR) v Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin), [2019] QB 675 at [72]; *R (on the application of Jimenez) v First Tier Tribunal (Tax Chamber)* [2019] EWCA Civ 51, [2019] 1 WLR 2956 at [49]. See also *Serious Organised Crime Agency v Perry* [2012] UKSC 35, [2013] 1 AC 182 at [157].

...there are other ways in which Bitcoin could be bought which may not leave any record or trail to follow. An example of this would be a scenario where a spouse buys cryptoassets using a specialist ATM.⁵³

28.66 Permissioned networks are significantly easier to trace than permissionless networks. The security and stability afforded by permissioned networks often come at the cost of total anonymity which permissionless networks such as Blockchain may be able to offer.

28.67 James Marsden QC, in an article written for the Journal of International Banking and Financial Law in 2019 describes the limited scope for tracing cryptoassets on a permissionless network:

In my experience of numerous claims in this jurisdiction and jurisdictions such as Singapore the only safe and reliable way of tracing cryptocurrency movements is when the user goes “off-grid” by using or converting cryptocurrency to acquire a tangible or incorporeal assets or “fiat” (conventional) currency.⁵⁴

28.68 Ultimately this is emerging technology which will continue to pose challenges for law enforcement and the courts. In Chapter 16, we have made provisional proposals which are designed to future-proof the law as it applies to Hidden Assets. These proposals will also apply to cryptoassets.

28.69 We note that the problems of identifying cryptoassets held by a particular individual may, to some extent, be ameliorated by the Money Laundering and Terrorist Financing (Amendment) Regulations 2019⁵⁵, which bring cryptoasset exchange providers⁵⁶ and custodian wallet providers⁵⁷ into what is known as the “regulated sector”.⁵⁸ Cryptoasset exchange providers and custodian wallet providers must therefore conduct due diligence enquiries on clients and transactions to prevent

⁵³ C Pearce, M Young and L Hurren, “When your client thinks their partner owns cryptoassets: how to find out and what to do next” [2020] Fam Law 622.

⁵⁴ J Ramsden QC, “Identifying and tracing the origins and flows of cryptocurrency” (2019) 3 JIBFL 173.

⁵⁵ SI 2019 No 1511, amending the Proceeds of Crime Act 2002, schedule 9 and the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 SI 2017/692.

⁵⁶ Defined as “a firm or sole practitioner who by way of business provides one or more of the following services, including where the firm or sole practitioner does so as creator or issuer of any of the cryptoassets involved, when providing such services (a) exchanging, or arranging or making arrangements with a view to the exchange of, cryptoassets for money or money for cryptoassets; (b) exchanging, or arranging or making arrangements with a view to the exchange of, one cryptoasset for another, or (c) operating a machine which utilises automated processes to exchange cryptoassets for money or money for cryptoassets (SI 2019 No 1511, reg 4(7), inserting reg 14A into SI 2017 No 692 and reg 15, amending sch 9 of POCA 2002).

⁵⁷ Defined as “a firm or sole practitioner who by way of business provides services to safeguard, or to safeguard and administer (a) cryptoassets on behalf of its customers, or (b) private cryptographic keys on behalf of its customers in order to hold, store and transfer cryptoassets (SI 2019/1511, reg 4(7), inserting reg 14A into SI 2017/692 and reg 15, amending sch 9 of POCA 2002).

⁵⁸ Proceeds of Crime Act 2002, sch 9.

money laundering.⁵⁹ Such enquiries include enquiries as to a customer's identity, including enquiries as to beneficial ownership.⁶⁰

28.70 While tracing cryptoassets poses significant difficulty for investigative bodies, developing strategies for this is beyond the scope of this review. We therefore highlight the use of cryptoassets as a means to conceal assets because it is increasingly used by organised crime networks and was raised as a concern by financial investigators during our pre-consultation discussions. We do not, however, seek to consult on how better to trace cryptoassets. Instead, we rely on our policy position in Chapter 16 in relation to how the courts should address the prospect of hidden assets (including hidden cryptoassets) generally.

Consultees' views on cryptoassets and confiscation

28.71 Having identified what we consider to be relevant issues to cryptoassets and confiscations, we invite consultees to submit any concerns that they have about the interrelationship between cryptoassets and the confiscation regime.

Consultation Question 103.

28.72 Do consultees have any concerns about the interrelationship between cryptoassets and the confiscation regime?

Consultation Question 104.

28.73 Do consultees consider that there are any matters connected to Part 2 of the Proceeds of Crime Act 2002 that are not covered in this consultation paper that require reform?

28.74 If so,

- (1) what are they; and
- (2) how should they be reformed?

⁵⁹ SI 2017 No 692, reg 8 refers to "relevant persons" who must conduct due diligence. This is subject to reg 38.

⁶⁰ SI 2017 No 692, reg 28. There is some prohibition on anonymous accounts within the regulations (SI 2017 No 692 reg 29(6), 29(7A); 38(1)(d)).

Appendix 1: Analysis of confiscation data from Liverpool Crown Court

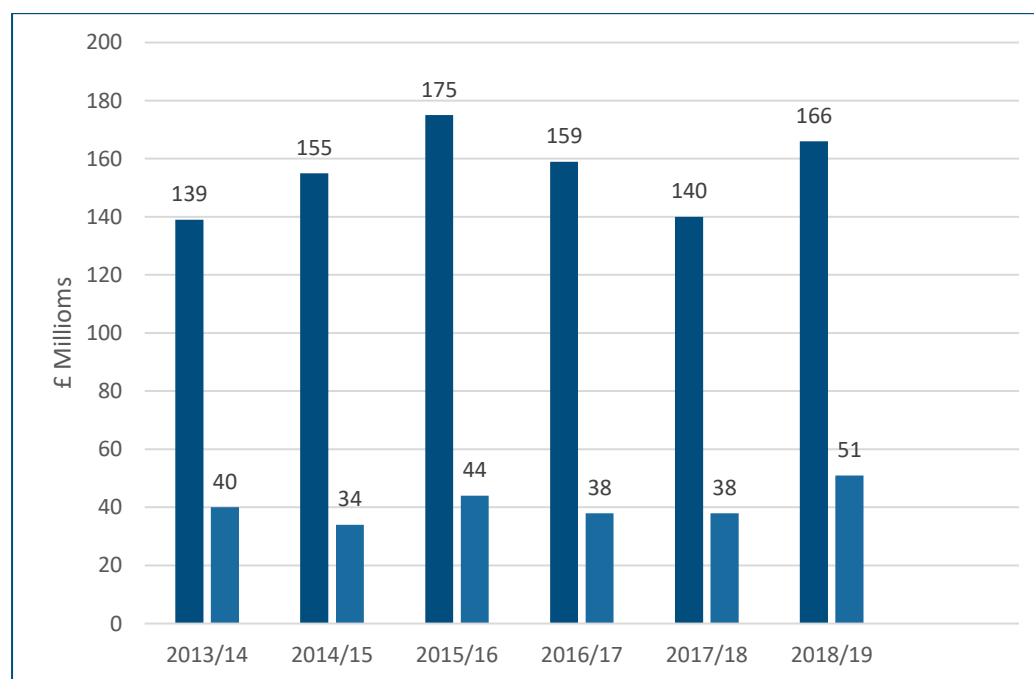
INTRODUCTION

28.75 In this annex we describe our analysis of confiscation data from Liverpool Crown Court, which has informed some of our preliminary conclusions and proposals. While we were able to obtain data from this particular court, there is limited data of this nature widely available.

Background

28.76 For the six-year period between 2013 and 2019, the average annual sums collected from confiscation orders and cash forfeiture were £156m and £41m respectively.¹ Criminal confiscation refers to the seizure of the proceeds of crime following a criminal conviction whereas cash forfeiture does not require a conviction and instead relies upon civil proceedings. See figure 1 below.

Figure 1: Amount of money collected from cash forfeiture and confiscation orders, 2013/14 – 2018/19, (£million)



28.77 Over the last three periods shown money collected from confiscation orders as a proportion of total sums collected has steadily declined from 81% to 77%.

28.78 The Law Commission project seeks to improve the efficacy of the regime recovering the proceeds of crime from convicted offenders. As part of that process evidence is

¹ Home Office, *Asset recovery statistical bulletin 2013/14 – 2018/19* (September 2019).

required to inform policy recommendations. However, a single reference point from which to locate all relevant statistics does not exist.

28.79 The Home Office leads the government’s asset recovery policy pursuant to the Proceeds of Crime Act 2002 (“POCA 2002”). The Joint Asset Recovery Database (“JARD”) provides asset recovery intelligence. Enforcement data on JARD lacks granular detail on how the law was applied to produce the outcome which required enforcement in the first place. During the project’s pre-consultation discussion phase, stakeholders described how data about an initial confiscation hearing is often unavailable when a confiscation order is later enforced. This problem was thought to be particularly acute in connection with older orders.

28.80 The Law Commission therefore conducted an evidence-gathering exercise. This annex

- (1) describes the data-collection exercise;
- (2) presents the findings of that exercise; and
- (3) sets out a wider sense-check for sample reliability.

THE LAW COMMISSION’S DATA COLLECTION

28.81 We used a version of cluster sampling based on data from Liverpool Crown Court.

28.82 As figure 2 shows, during the 35-month period ending February 2018, Liverpool Crown Court consistently featured within the top three rankings of Crown Courts with respect to:

- (1) the volume of Part 2, POCA 2002 hearings;
- (2) the duration of hearings; and
- (3) the number of sitting days.

Figure 2: Crown Court POCA 2002 hearings and the sitting days, January 2015 – February 2018²

Crown Court	No. of Hearings	Duration of Hearings [mins] ³	Sitting Days
Liverpool	1,056	15,443	60
Nottingham	655	n/a	n/a
Birmingham	599	24,041	93
Southwark	n/a	29,396	114

Source: Data provided by HMCTS, November 2018

² Restricted to the top three ranking Crown Courts in each category. “N/a” means the Crown Court did not fall within one of the top three rankings.

³ Based on average data, we identified the average case hearing time and the number of hearings per sitting day as about 30 mins and 10 hearings respectively.

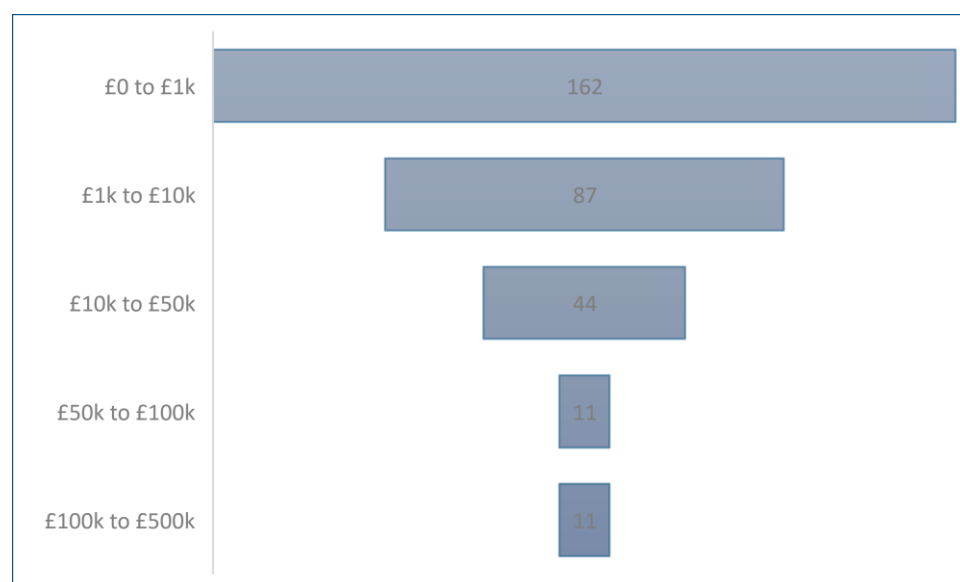
28.83 Our interest is in collecting data across a range of variables and extrapolating findings from our sample to confiscation orders in general. In some cases, a proportion of the population (post-2015 confiscation orders) is known to have particular characteristics. For example, data reveals the proportion of “unable to pay-nominal” (“UTP⁴-nominal”) orders as a percentage of all confiscation orders.

28.84 In other cases, the proportion of the population is less certain, for example, the proportion of orders requiring a time extension in order to complete payment. However, even for those variables about which we are less certain we have benefitted from stakeholder insights and anecdotal evidence.⁵

LIVERPOOL CROWN COURT DATA

28.85 Between 3 September 2015 and 29 August 2016 Liverpool Crown Court (“CC”) issued 315 confiscation orders.⁶ The vast majority (75%) of orders issued were valued at less than £10k and a minority (8%) were valued above £50k.⁷ See figure 3 below.

Figure 3: Breakdown of confiscation orders by original order amount



28.86 The total value⁸ of all confiscation orders issued was £4.35 million. Completed payments accounted for about £2.36 million⁹ (54%) of this amount. About 85% of all orders¹⁰ had an original order amount of less than £25,000 and a total value of

⁴ UTP is used throughout the HMCTS data to refer to orders which a defendant is “unable to pay”.

⁵ On this basis we identified a minimum sample size.

⁶ Including “unable to pay-nominal” orders.

⁷ This number excludes nominal orders of which there were 50.

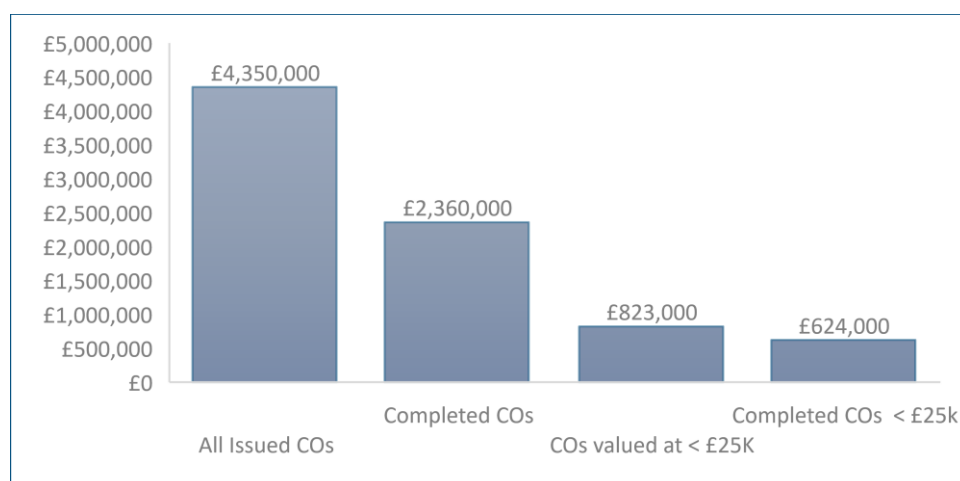
⁸ The value of the final confiscation order.

⁹ Refers to confiscation orders with zero balance outstanding but these may still have cumulative interest payments. There were 146 confiscation orders completed.

¹⁰ This figure excludes “unable to pay-nominal” orders, see para 1.40.

£823,000. Just under 55%¹¹ of orders (with an original order amount less than £25,000) were completed in full. See figure 4 below.

Figure 4: Liverpool Crown Court: confiscation orders “CO”s - number and value



28.87 The chart above indicates that a higher proportion of lower value confiscation orders are collected (76%) but such orders account for a lower proportion of total payments (35%) than do higher value confiscation orders.

28.88 The Crown Court data was broken down into two tables, which provided data as follows:

- (1) Table 1: 1 row per order. This table facilitated data analysis in connection with “benefit”, original order amount and balance outstanding.
- (2) Table 2: 1 row per asset. This table facilitated data analysis in connection with assets, their value/realisation, location/jurisdiction and compliance/default.

28.89 Figure 5 below provides headline details from the two distinct tables.

Figure 5: Assets and benefits, 2015-2016, (in £ million)

	In £ million
Total benefit assessed	£76.63
Original confiscation order amount	£4.35
Current confiscation order amount	£4.24
Total payments	£3.76 ¹²
Total asset value applied for	£9.64
Asset value assessed	£9.52

¹¹ 125 of 226 confiscation orders.

¹² The “total payments” may be higher than the asset value realised because assets whose value are taken into consideration at the time of confiscation need not be realised for confiscation. The defendant may satisfy his or her confiscation order from any source.

	In £ million
Asset value realised	£1.29
Total payments / total benefit assessed	5%
Asset value realised / asset value assessed	13%

28.90 The following provides detailed coverage under the following headings:

- (1) criminal lifestyle assumptions cases;
- (2) asset breakdown of confiscation orders;
- (3) third party interests;
- (4) timely make payments;
- (5) default sentences;
- (6) cumulative Interest; and
- (7) ability to pay.

Criminal lifestyle assumption cases

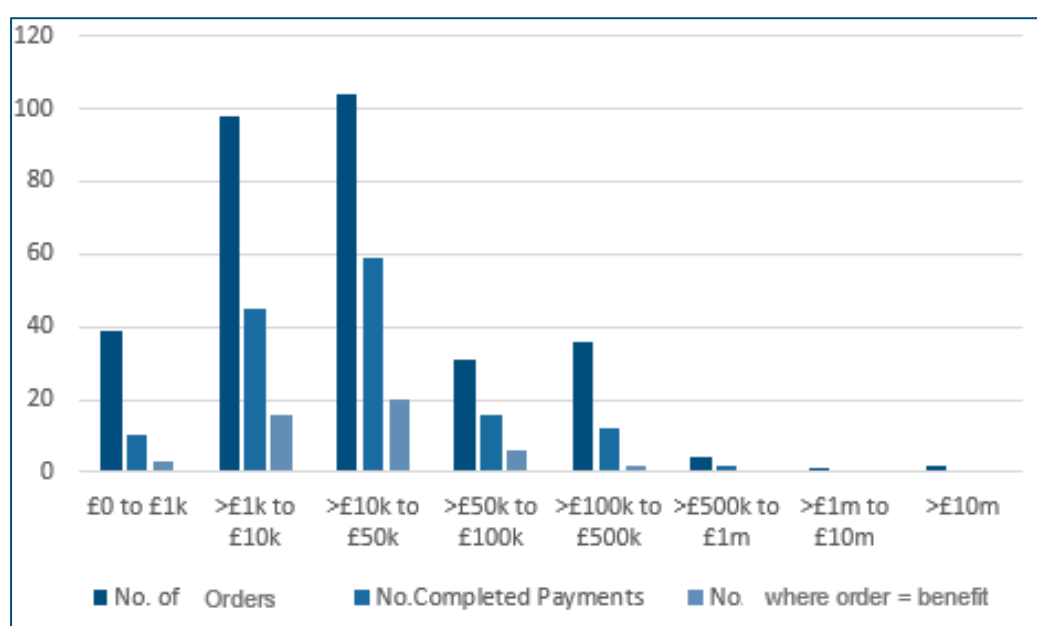
28.91 One can infer that the criminal lifestyle assumptions were applied in cases where the total benefit is considerably higher than the final confiscation order.¹³

Benefit amount

28.92 When the focus transfers to total benefit to identify occasions where completed payments occurred at the total benefit value, a contrasting picture emerges. The highest total benefit value (£29.48m) is much greater than the highest final confiscation order value (£417k):

¹³ We use the point at which [final confiscation order = total benefit] as the threshold enabling insight on divergence.

Figure 6: Number of orders with completed payments by value category



28.93 The higher the benefit amount the less likely benefit amount=final confiscation order and the greater the divergence between the two variables. For confiscation orders with a benefit amount greater than £100k; of the 43 orders, only 12 (27%) had a final confiscation order more than 10% of the benefit amount. The likelihood of completing payments diminished as the benefit amount increased. Confiscation orders with a benefit amount up to the £50k range had the greatest number of occasions where benefit amount = final confiscation order, and the greatest proportion of completed payments.

28.94 The above findings are consistent with the national profile on the proportion of completions by value category (see figure 22).

ASSET BREAKDOWN

28.95 Confiscation orders accounted for just under 690¹⁴ different assets. On average each confiscation order had 2 assets which may or may not have been of the same asset type. Nine asset types (including instances where no assets were identified) were included in the figures as follows:¹⁵

- (1) Vehicles and transport (in addition to cars, this includes plant and machinery; a hackney cab; jet skis).
- (2) Buildings and land (includes shared house ownership).
- (3) Cash held (includes bank accounts/pension funds as well as physical cash).

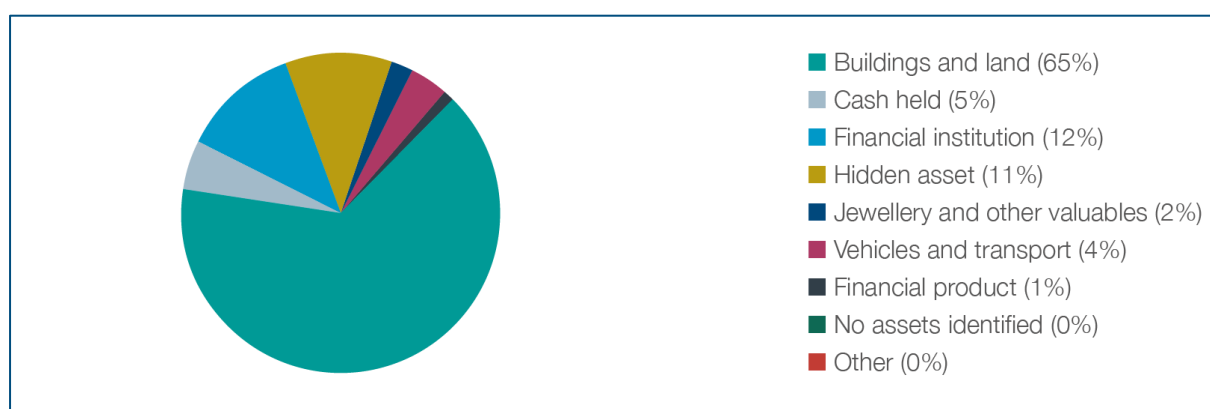
¹⁴ Precisely 687 assets were indicated.

¹⁵ Cash held under both the "Cash held" and "Financial product" category risks being under-estimated under "Cash held" and over-estimated under "Financial institution".

- (4) Financial institution (primarily bank accounts but also the occasional reference to cash).
- (5) Financial product (primarily pension funds and shares).
- (6) Jewellery and other valuables (mainly watches).
- (7) Hidden assets (eg proceeds from house / car sales).
- (8) Other (includes mobile phones – usually iPhones).
- (9) No assets identified (nominal order applied).

28.96 Buildings and land account for the greatest share (65%) of total assessed asset value (£9.52 million). Holdings in bank accounts/pension funds¹⁶ and Hidden assets account for the next largest share of 12% and 11% respectively. Hidden assets have an asset value of just over £1.1 million with 4 (out of 15) orders recording an asset value of more than £50k. See figure 7 below.

Figure 7: Asset type as a proportion of total assets



28.97 Notwithstanding the above evidence on asset valuation, Buildings and land recorded one of the lowest shares of realised assets (7%), only Vehicles and transport was marginally lower (6%). Hidden assets failed to realise any value. Financial holdings, whether as cash, bank accounts or pension funds had the most significant asset realisation. See figures 8 and 9 below.

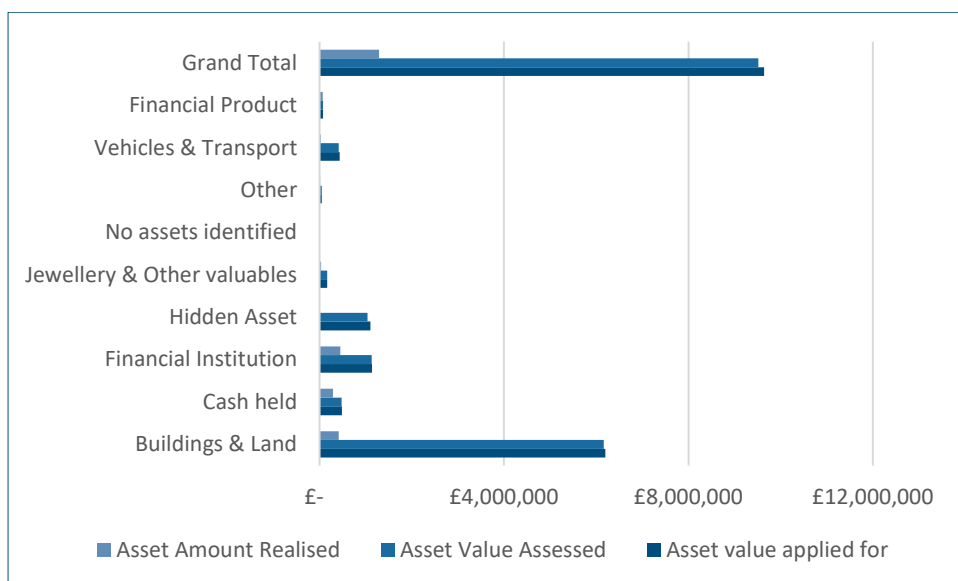
Figure 8: Confiscation orders by asset type, 09/2015 to 08/2016 (in £ million)

Asset type	Asset value applied	Asset value assessed	Amount realised
Buildings and land	£ 6.20	£6.17	£ 0.42
Cash held	£ 0.48	£0.48	£ 0.29
Financial institution	£ 1.14	£1.13	£ 0.45
Hidden asset	£ 1.10	£1.04	£ -
Jewellery and other valuables	£ 0.17	£0.17	£0.03

¹⁶ Represented by the “financial products” and “financial institutions” categories.

Asset type	Asset value applied	Asset value assessed	Amount realised
No assets identified ¹⁷	£ 0.0	£ 0.0	£ -
Other	£ 0.05	£ 0.50	£0.01
Vehicles and transport	£ 0.43	£ 0.42	£ 0.02
Financial product	£0.08	£ 0.08	£ 0.06
Grand total¹⁸	£9.64	£9.52	£1.29

Figure 9: Assets by type and value



28.98 Most assets were held in England. A very small number (7) were held outside England primarily in Ireland (3). There was one instance each of assets held in Spain, Malta and Bulgaria and one unknown location overseas. Assets ranged from Buildings and land, Cash held and Financial products (a financial product (pension fund)). See figure 10 below.

Figure 10: Asset value and jurisdiction

Asset jurisdiction	Asset type	Asset value
Ireland	n/a	n/a
Ireland	Cash held	£ 12,000
Malta	Financial product	£ 28,500
Bulgaria	Buildings and land	£ 19,500
Ireland	Buildings and land	£100,000
Spain	Buildings and land	£ 201,690
Total	All assets	£361,690

¹⁷ "No assets identified" is the asset value applied (£30.00) / Asset value assessed (£14.00).

¹⁸ Figures have been rounded up/down meaning the sum may not accurately reflect the parts.

28.99 Assets held overseas accounted for just 4% of the value of all assets and (28%) of realised assets. Buildings and land alone accounted for 89% of overseas assets.

28.100 Assets were held by the:

- (1) police;
- (2) defendant; and
- (3) a third party (who may or may not be connected to the defendant).

28.101 The data was not sufficiently granular to enable comment around third party interests. There was one example of a cash asset (£85k) in the hands of a daughter. However, insights are available on both defendant and police involvement as set out in figure 11 below.

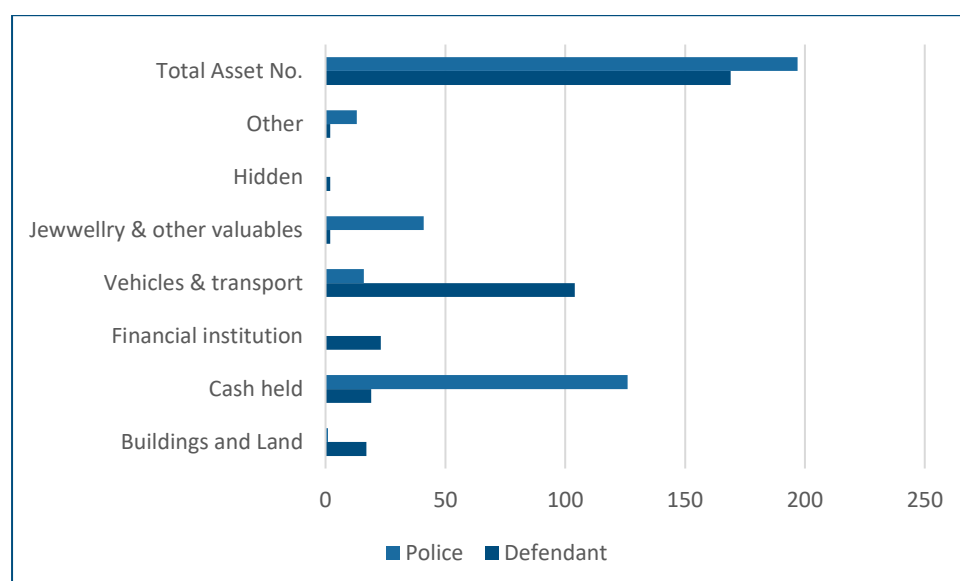
Figure 11: Number (proportion of total) assets held by defendant and police

Asset type	Defendant	Police
Buildings and land	17(19%)	1 (1%)
Cash held	19 (10%)	126 (66%)
Financial institution	23 (19%)	0 (0%)
Vehicles and transport	104 (65%)	16 (10%)
Jewellery and other valuables	2 (4%)	41 (87%)
Hidden	2 (11%)	0 (0%)
Other	2 (7%)	13 (46%)
Total asset no.	169	197

28.102 The instances where buildings and land were held by defendants was lower than what one might have expected but this may have to do with the way the data was recorded. An asset was linked specifically to the defendant only where it was identified as such, for example through “defendant” or “deft”. Otherwise it was recorded simply by factual description as to location. In the case of police location this also included reference to the constabulary.

28.103 Whereas cash was the most significant asset type held by the police, Vehicles and transport was the asset type most often held by defendants. For the most part this did not refer to high value cars but tended to be the average family car and in the rare case plant machinery. See figure 12 below.

Figure 12: Number/asset type held by defendants/police



28.104 The proportion of confiscation orders paid within the original order time was as follows in figure 13.

Figure 13: Proportion of confiscation orders paid by defendant/police

Asset type	Proportion paid (defendant)	Proportion paid (police)
Buildings and land	88%	0%
Cash held	42%	83%
Financial institution	83%	0%
Vehicles and transport	81%	50%
Jewellery and other valuables	50%	39%
Hidden	50%	0%
Other	50%	23%

28.105 The proportion paid appears to be higher on average when the asset was held by the defendant as opposed to being held by the police.

28.106 There were only three instances of staggered payment dates.

Third party interests

28.107 Interests connected to third parties were most apparent in the asset types of Buildings and land and Jewellery and other valuables. The number of Buildings and land cases shown is potentially an under-estimate as this figure (9) refers only to cases which explicitly state a percentage interest and/or were the “matrimonial home”. A broader interpretation to cover instances where “equity in X” was indicated sees the number rise to 44 representing almost 50% of the asset category and 6% of total assets. See figure 14 below.

Figure 14: Number of assets with a third party interest and as a proportion of asset group

Asset type	Orders with third party interest [A]	As a proportion of asset group	As a proportion of total assets	Asset realised
Buildings and land	9	10%	1%	2
Cash held	0	0%	0%	n/a
Financial institution	1	1%	0%	1
Hidden asset	1	6%	0%	0
Jewellery and other valuables	6	13%	1%	1
No assets identified	0	0%	0%	n/a
Other	0	0%	0%	n/a
Vehicles and transport	0	0%	0%	n/a
Financial product	0	0%	0%	n/a

28.108 In terms of the realisation of assets, Buildings and land had the highest return (2), with one example each of partial and full asset value realised. Financial institutions had the greatest proportion with full asset value applied for being realised. The asset value realised following a default sentence was just under £18.4k with only one example of payment whilst serving a default sentence (£61.10 – jewellery).

Compliance orders

28.109 Of the 315 orders registered, there was only 1 indication of a compliance order being issued.

Time to pay

28.110 The original payment period end date differs according to the asset type. Many confiscation orders require immediate payment, some are given 3 months and a few have extensions in original payment dates. In general, less liquid assets such as buildings and land had a minimum of 3 months to pay whilst cash held had greater time variability, ranging from days to 6 months. See figure 15 below.

Figure 15: Number of orders given 3 months/extended periods to pay

Asset Type	No. given 3 mths to pay	No. given 6 mths to pay ¹⁹	No. given extension	No. satisfied during original date	No. satisfied during extended period	No unsatisfied although date extended
Buildings and land	35	2	11	25	8	3
Cash held	36	3	7	115	6	1
Financial institution	23	0	1	27	1	0
Hidden asset	5	0	1	3	1	0

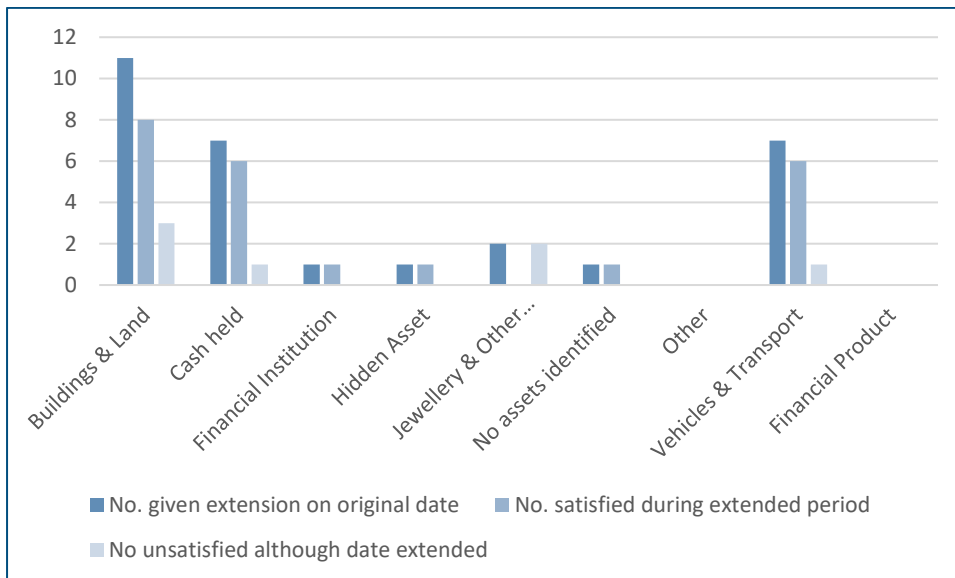
¹⁹ Cases with a non-zero value are an anomaly suggesting incorrect administration of the legislation, which provides for a maximum of 3 months to pay in the first instance.

Asset Type	No. given 3 mths to pay	No. given 6 mths to pay ¹⁹	No. given extension	No. satisfied during original date	No. satisfied during extended period	No unsatisfied although date extended
Jewellery and other valuables	6	0	2	4	0	2
No assets identified	0	0	1	2	1	0
Other	3	0	0	4	n/a	n/a
Vehicles and transport	33	3	7	29	6	1

28.111 Whilst Buildings and land and Cash held have similar occurrences during the three-month window of time, this differs significantly when measured as a proportion of the total asset type. In the case of Buildings and land this was 39%; Cash held assets accounted for 19% and Vehicles and transport 23%.

28.112 Time extension on the original payment periods is capped at three months. It provides the opportunity for increased receipts and the avoidance of penalties. Buildings and land had the greatest number of extensions of time to pay (11). The next joint closest number was Cash held (7) and Vehicles and transport (7). Buildings and land also had the greatest number satisfied during the extended time period (8). See figure 16 below.

Figure 16: Confiscation orders with extended time to pay by asset types



Interest accrued

28.113 Accrued interest across all 315 of the original order amounts was £4.35m, accounting for about 5% of the total original order amount. By contrast accrued interest as a proportion of the outstanding balance was 37%. See figure 17 below.

Figure 17: Accrued interest/proportion of original order amount

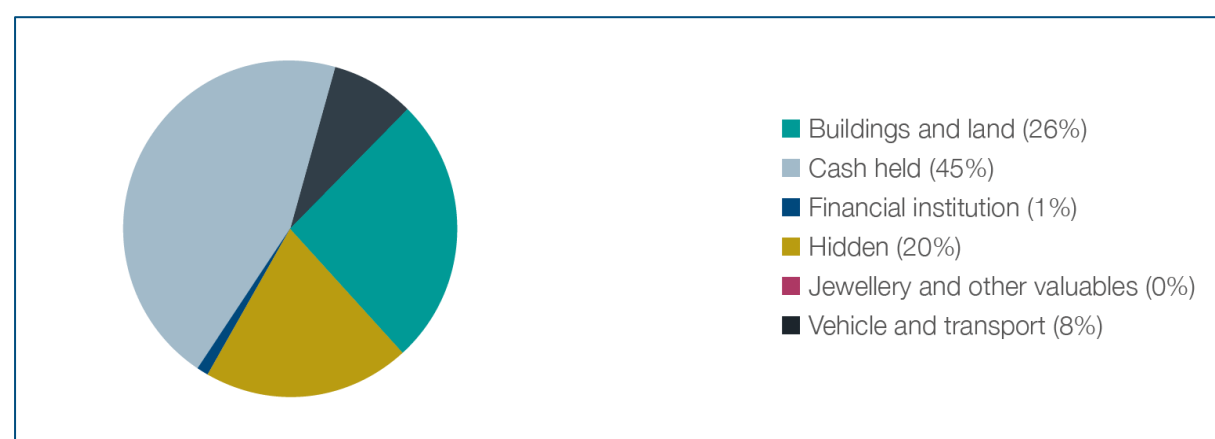
Accrued interest	£197k
Original order amount	£4,350k
Outstanding balance	£528k
Interest / Original order amount	5%
Interest / Outstanding balance	37%

28.114 Of the 315²⁰ confiscation orders issued by Liverpool Crown Court, 232 orders were satisfied in full, including 71 which had outstanding interest payments.

Default sentences

28.115 During the twelve months, 15 default sentences were activated with a total unrealised value of just under £134k. Only one of the cases involved Hidden assets, which had the greatest single unrealised value of £60k, whilst there were 5 instances of unrealised orders in Vehicles and transport (with a total value of just under £11.2k). See figure 18 below.

Figure 18: Unrealised asset type as a proportion of total unrealised assets



Unable to Pay (UTP)

28.116 Nominal orders are a subset of confiscation orders referred to as Unable to Pay (UTP). A UTP-Nominal order is generally set at a “nominal” value of £1.00 where there are no assets at the time of the making of the order. The nominal value allows for a future uplift should assets subsequently become available.

28.117 There were 50 instances of a nominal order, where 49 were set at £1 and one was initially set at £1,300 and then reduced to £1. The total order value was £1,349 whereas the total benefit amount assessed was just under £2.75 million.²¹ No nominal order was the subject of a successful re-consideration.

²⁰ Of which 50 are “unable to pay – nominal orders”, see para 1.41.

²¹ Exactly £2,746,766.69.

28.118 The proportion total orders that are nominal is just under 16%. Liverpool CC data is consistent with the national picture where the proportion was 14% (see below).

28.119 Other UTP categories are as follows:

- (1) UTP – Interest outstanding from LEA (law enforcement agency): Examples where a substantive order was made, the principal paid and the interest outstanding has been designated UTP. In an LEA case they were assets seized and then realised by the police so any delay (leading to the imposition of interest) is not the fault of the offender.
- (2) UTP – due to variation, things will have sold for less than anticipated so the interest owing on the original amount (since varied) will not be enforced.
- (3) UTP – Hidden asset; and
- (4) UTP – Subject deported.

28.120 In contrast to nominal orders, for which no payments were made in all 50 cases, both “UTP – Interest outstanding” and “UTP – due to variation” have no outstanding balance beyond the cumulative interest. See figure 19 below.

Figure 19: UTP/Cumulative interest

UTP Category	Proportion of UTP cases	Cumulative interest
UTP - Subject deported	<1%	£20.69
UTP - Nominal order	<1%	£0.22
UTP - Interest outstanding from LEA	7%	£3,211.71
UTP - Interest due to variation	45%	£21,562.41
UTP - Hidden assets	48%	£22,811.18

THE LIVERPOOL DATA AND THE NATIONAL PROFILE OF CONFISCATION ORDERS

National profile

28.121 The national picture of confiscation orders is indicated in figure 20. Total outstanding debt consists primarily of accrued interest and hidden assets. Between them they contribute to more than 50% of outstanding debt. See figure 21.

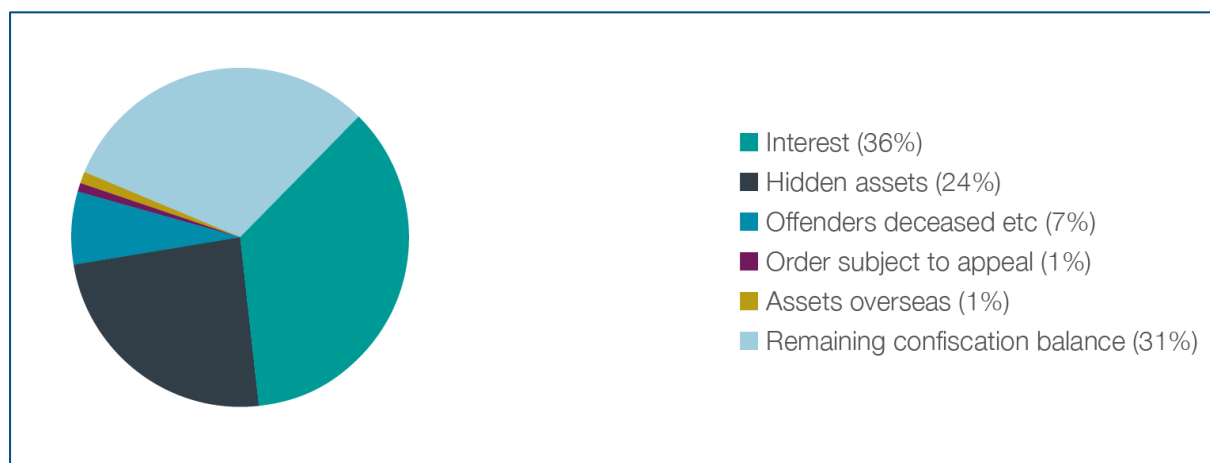
Figure 20: Confiscation Orders: Interest, Assets & Debt, 2018-19 to 2016-17 [in £'000]

	2018-19	2017-18	2016-17
Interest [historically challenging to enforce]	748,882	657,595	568,067
Assets assessed as hidden with no other assets against which enforcement action can be taken	493,830	432,800	359,078
Offenders deceased, deported or cannot be located	151,183	167,982	169,122
Orders subject to appeal and cannot be enforced	11,895	16,129	12,661

	2018-19	2017-18	2016-17
Assets overseas	9,646	10,596	7,766
Sub-Total	1,415,436	1,285,102	1,116,694
Remaining confiscation order balance	649,867	676,176	698,124
Total outstanding debt	2,065,303	1,961,278	1,814,818

Source: Various HMCTS Trust Statements, 2017-18 and 2018-19

Figure 21: Confiscation Orders – interest, assets and debt



28.122 Whilst overseas assets had the greatest proportional change, such assets account for a very small proportion of outstanding debt and therefore have minimal impact. Conversely as interest and hidden assets have a significantly greater absolute value, even small increases had a discernible impact on the debt burden.

28.123 Joint Asset Recovery Database (“JARD”) data on orders made from 2004 onwards, including any pre-2004 orders outstanding when the system went live, provides some insight into the value range of orders most likely to be completed or to have an outstanding balance. In general order amounts less than £10k had the highest completion rates between 98-94%. As the range increased the percentage completed fell; see figure 22 below.

Figure 22: Breakdown of confiscation orders by value,²² 2004 to 2018

	Imposed	Completed	Outstanding	Percentage completed
£0 to £1k	21,769	21,264	505	98%
>£1k to £10k	21,939	20,637	1,302	94%
>£10k to £50k	13,650	12,091	1,559	89%
>£50k to £100k	3,937	3,183	754	81%
>£100k to £500k	4,200	2,957	1,243	70%

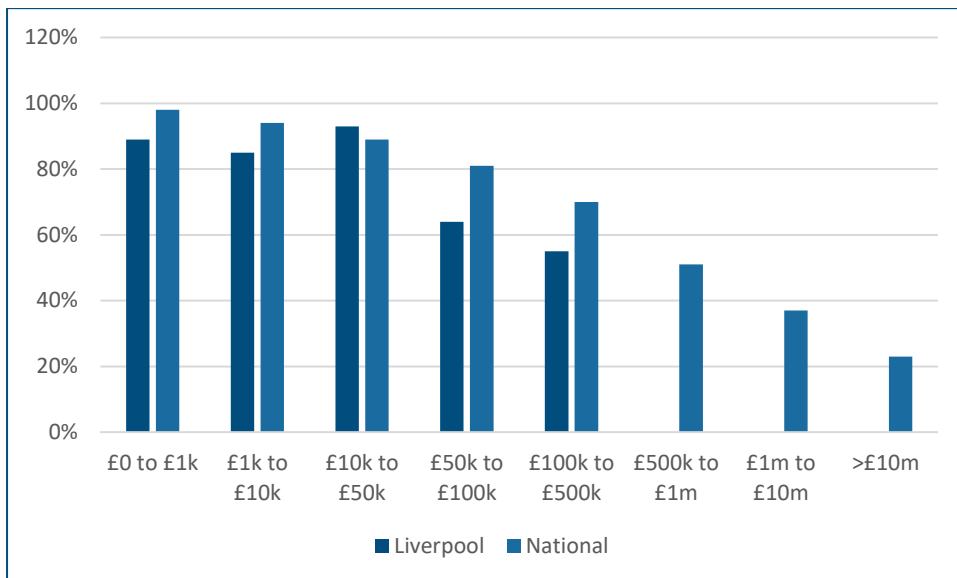
²² The figure excludes nominal orders. Reference to “value” in JARD data obtained from HMCTS – assumed to be equivalent to original order amount.

	Imposed	Completed	Outstanding	Percentage completed
>£500k to £1m	565	290	275	51%
>£1m to £10m	403	149	254	37%
>£10m	26	6	20	23%

Liverpool data compared with national confiscation data

28.124 There is compelling evidence that Liverpool Crown Court data displays similar trends to the national picture. For example, figure 23 below shows the proportion of confiscation orders completed across different value ranges in the case of all national confiscation orders and Liverpool Crown Court data.

Figure 23: Proportion of Completed Confiscation Orders, Liverpool v National



28.125 For confiscation orders with original order amounts less than £50k, divergence between national and sample statistics is less than 10 percentage points ranging from -4% to 9%. One explanation for greater divergence in evidence beyond £50k is the limited sample size of just 22 confiscation orders which increases the ability of a few large orders to bias results.

28.126 A consistency check using the £25,000 threshold value adopted in the HMCTS Trust Statement²³ produced a similar trend between Liverpool CC and the national picture. For both the sample and the national a higher proportion of lower value confiscation orders were completed (70% at the national level and 76% with respect to Liverpool CC).

²³ HMCTS, *Trust Statement 2018-19* (July 2019) HC 2337.

28.127 Further similarity between national and Liverpool data arises in relation to the proportion of total orders that are nominal: 16% nationally and 14% with respect to Liverpool.

28.128 On the basis of the above there is a high level of certainty that the characteristics observed in the sample are representative of the characteristics of the total population.

28.129 Sample data identifies Buildings/Land as the most influential asset type accounting for the greatest estimated asset value (65% of total asset value), the greatest proportion of overseas assets (89%) and the highest proportion of unrealised assets (70%). The asset is the most illiquid and this impacts directly on payment period end dates.

28.130 Inferences that may be extrapolated from the sample to the national are as follows:

- (1) Overseas assets: Largely consist of Buildings and land and account for a relatively small proportion of total asset value, less than 4%. On the national scale, overseas assets were also of comparatively low value in relation to other national statistics, albeit significantly lower than our sample proportions;
- (2) Criminal lifestyle assumptions applied: Confiscation orders with a benefit figure greater than £50k are most likely to have had the statutory criminal lifestyle assumptions applied. Sample data identifies 85% of confiscation orders with an original order amount of less than £50k. On this basis the number of applications is likely to be low.
- (3) Third party interests: Unsurprisingly Buildings and land had the greatest identifiable instance of third party interests [9]. But this is likely to be an underestimate potentially being as high as 50% of the asset type category. Given the significant asset valuation of this category, the impact could be significant;
- (4) Time to pay: In the 30 cases given time extensions, 23 confiscation orders were satisfied, 8 of which were in relation to the asset type Buildings and land, i.e. 35% of the total satisfied during the extended payment period - more than one-third.
- (5) Hidden assets: Only 4 of the 15 orders had an asset value greater than £50k [of which 3 were over £100k]. This is somewhat at odds with the national picture of significant hidden assets. Small sample size may have contributed as only a few large orders are required to inflate the value.

Additional comparison with data from the North Eastern Circuit

28.131 When data for the relevant period is compared with that across the North Eastern Circuit Crown Courts and nationwide, it is possible to draw more robust conclusions on patterns and trends that apply across confiscation orders.

Figure 24: Number of confiscation orders by region [excluding nominal orders]

	National*	North Eastern	Liverpool
Population size	66,489	800	263

28.132 The following analysis of confiscation orders is based on 11 North Eastern Circuit Crown Courts and 2 magistrates' courts. Similarly to the Liverpool Crown Court data, it covers the 12-month period from September 2015 to August 2016 inclusive. A total of 966 confiscation orders were issued, See figure 25 below.

Figure 25: Number of confiscation orders recorded as issued by Crown Courts on the North Eastern Circuit

Crown Court	No. of Confiscation Orders
Leeds Crown Court	283
Sheffield Crown Court	161
Bradford Crown Court	150
Teesside Crown Court	138
Newcastle upon Tyne Crown Court	122
York Crown Court	45
Kingston upon Hull Crown Court	23
Great Grimsby Crown Court	21
Durham Crown Court	19
Canterbury Crown Court*	1
Nottingham Crown Court*	1
Sheffield Magistrates' Court**	1
Teesside (Middlesbrough) Magistrates' Court**	1
TOTAL	966

* It is unclear why certain data from these courts, which are not on the North-Eastern Circuit, are included on the national data for the North-Eastern Circuit.

** It is also unclear why certain orders are attributed to magistrates' courts, which cannot issue confiscation orders.

28.133 Of the 11 Crown Courts, the five largest account for just under 90 percent of confiscation orders issued. By way of context over a similar time frame Liverpool CC issued 315 orders – at least twice as much as four of the Crown Courts issued on an individual basis.

28.134 The following analysis covers:

- (1) breakdown of confiscation orders by final confiscation order value;
- (2) trends in the total benefit amount;
- (3) breakdown of confiscation orders by Unable to Pays (UTPs);

- (4) balance outstanding following extensions in time to pay; and
- (5) summary.

Breakdown of the Confiscation Orders by Final Confiscation Order Amount

28.135 Of the total number of confiscation orders issued by North-East Circuit Crown Courts (966), 166 were UTP-nominal orders. The total value of all confiscation orders issued [800] was £31.35 million, compared to £4.35 million in Liverpool Crown Court. The average value of each confiscation order was therefore about £39,200 (for Liverpool, £16,500).

28.136 Figure 26 below shows the number of confiscation orders, excluding nominal orders, based on numbers imposed, completed and balance outstanding. Similar to the national picture, orders less than £50k have significantly higher rates of completion.

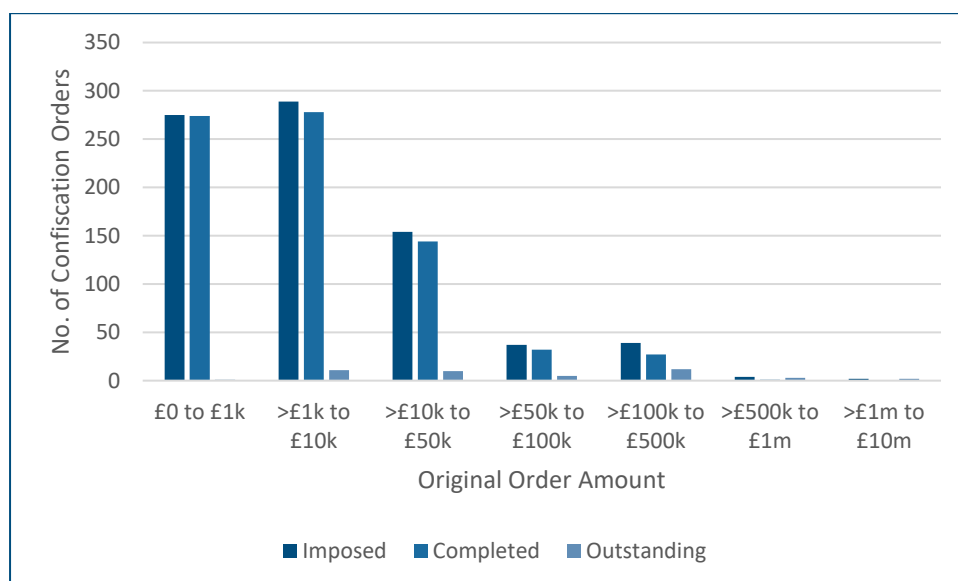
Figure 26: Final confiscation orders by value [excluding nominal orders]

	Imposed	Completed	Outstanding	% Completed
£0 to £1k	275	274	1	100%
>£1k to £10k	289	278	11	96%
>£10k to £50k	154	144	10	94%
>£50k to £100k	37	32	5	86%
>£100k to £500k	39	27	12	69%
>£500k to £1m	4	1	3	25%
>£1m to £10m	2	0	2	0%
TOTAL	800	756	44	

28.137 Confiscation orders with a final value of less than or equal to £10,000 accounted for 69% of total orders (excluding nominal orders).²⁴ A declining trend is evident as the final confiscation order increases – the proportion completed decreases. See figure 27 below.

²⁴ The comparable statistic for Liverpool CC was 75%.

Figure 27: Confiscation orders imposed, completed and outstanding²⁵



28.138 The total value of all completed orders was £25.31 million. Confiscation orders with an original order amount of less than £25,000 had a total completion value of £12.34 million.

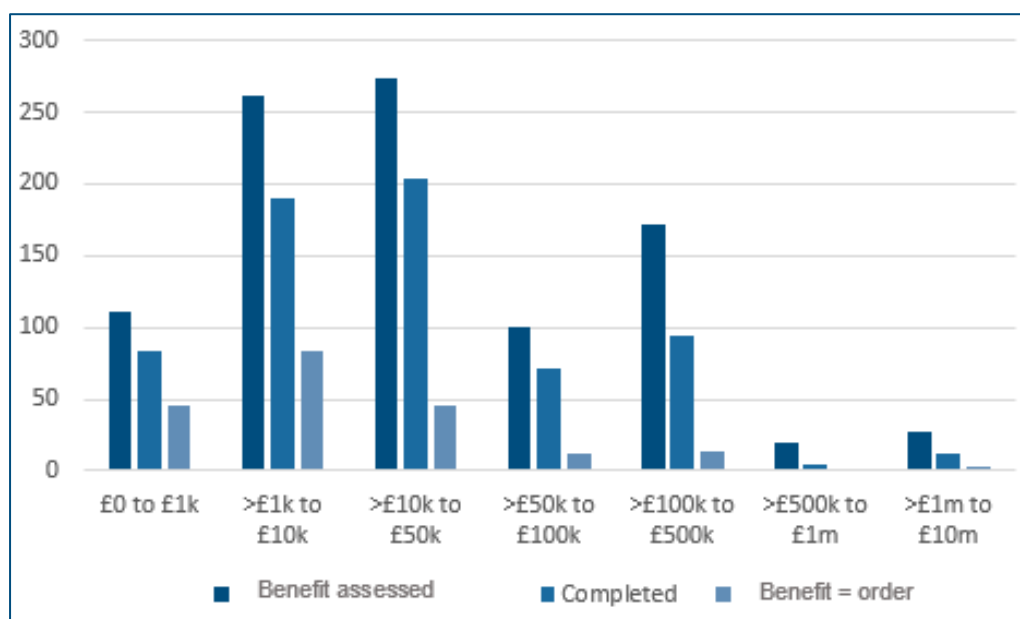
Trends in the total benefit amount

28.139 The highest total benefit amount was £8.2 million compared to the highest final confiscation order value of £6.84 million. The North-East Circuit Crown Courts have a much narrower total benefit amount/final confiscation order range than was the case with Liverpool CC.²⁶ However, the trends observed in Liverpool CC data are similar but just of a higher magnitude. Figure 28 shows the number of confiscation orders within each value range.

²⁵ Data on the number of imposed / completed / outstanding orders beyond £500k are too low to register sufficiently on a chart. The numbers are as follows: £500k to £1million imposed [4] - completed [1] - outstanding [3] / £1 million to £10 million imposed [2] – completed [0] – outstanding [2].

²⁶ Liverpool Crown Court: Confiscation order with highest total benefit valued at £29.28 million and high final confiscation order of £417k.

Figure 28. Number of confiscation orders by total benefit amount



28.140 As was the case with confiscation orders issued in Liverpool Crown Court, the higher the total benefit the lower the proportional completion rate and the less likely the total benefit was equal to the final confiscation order. Confiscation orders with a total benefit value of £0 to £50k had the greatest proportion of instances where total benefit = final confiscation order.

Breakdown of confiscation orders by Unable to Pays (UTPs)

28.141 Of the 166 UTP cases, nominal orders accounted for some 17% of all issued confiscation orders, See figure 29 below. This compares favourably with the national picture of 16% (and 14% in the case of Liverpool CC).

Figure 29: UTPs by category

	Number	% of total No. of COs
UTP - nominal orders	166	17%
UTP - Interest outstanding from LEA	134	14%
UTP - Interest only due to variation	58	6%
UTP - Hidden Asset	17	2%
UTP - Subject deported	1	0%

28.142 All 17 UTP-Hidden assets confiscation orders were incomplete, i.e. had outstanding balances, with a total final confiscation order of £14.97 million and a combined outstanding balance of £14.56 million.

Extension on Time to Pay and Accrued Interest

28.143 Existing legislation allows for the write-off of outstanding balances less than or equal to £50 at the end of the original payment period. Figure 30 below sets out the

number/proportion of orders with total outstanding balances²⁷ less than the £50 threshold in the extended period.

Figure 30: Number of confiscation orders with a total balance outstanding at the end of the original payment period

	No. with Bal. outstanding	No. with Bal. outstanding of <£50	% with Bal. Outstanding <£50
less than 1 month	8	6	75%
> 1 month to 2 months	7	1	14%
> 2 months to 3 months	28	5	18%
> 3 months	<u>8</u>	<u>3</u>	<u>38%</u>

28.144 Accrued interest across all 966 of the confiscation orders was £4.32 million accounting for about 14% of the total original order amount. By contrast accrued interest as a proportion of the outstanding balance was 26%. See figure 31 below.

Figure 31: Accrued interest/proportion of final confiscation order amount

Accrued interest	£4.32 million
Final confiscation order amount	£31.35 million
Outstanding balance	£16.71 million
Interest / Original order amount	14%
Interest / Outstanding balance	26%

28.145 The proportion of accrued interest as a percentage of the outstanding balance is significantly lower than the national picture which accounted for some 32%.

Summary

28.146 Headline statistics across all three regions are comparable. Although it is to be expected that Liverpool Crown Court displays lower lows/higher highs as a result of having a significantly smaller population size. This was evident in comparative total benefit and final confiscation order values where the highest total benefit/final confiscation order values were £417k/£29.48m for Liverpool Crown Court and £6.84m/£8.42m for North Eastern Circuit Crown Courts.

28.147 If one was to isolate the largest North Eastern Circuit Crown Court – Leeds Crown Court [283 confiscation orders] – and examine the breakdown of orders based on the final confiscation orders, a much wider differential is likely to show. To illustrate that point, see figure 32 below.

²⁷ Total outstanding balance = balance outstanding from final confiscation order plus interest accrued.

Figure 32: Confiscation Orders issued by Leeds Crown Court by final confiscation order amount²⁸

	Imposed	Completed	Outstanding	% Completed
£0 to £1k	101	99	2	98%
>£1k to £10k	79	79	0	100%
>£10k to £50k	37	35	2	95%
>£50k to £100k	10	7	3	70%
>£100k to £500k	9	8	1	89%
>£500k to £1m	1	1	0	100%
TOTAL	237	229	8	

28.148 When comparing completion size of confiscation orders across the three regions the following holds true: Up to £50k both Liverpool and the North-East are consistent with the national picture (the North-East more so than Liverpool). Thereafter, beyond £50k Liverpool diverges from the national trend but the North-East maintains a similar magnitude up until £500k and then also diverges significantly. See figure 33 below.

Figure 33: Percentage of completed final confiscation orders by region

	National*	North-East	Liverpool
£0 to £1k	98%	100%	91%
>£1k to £10k	94%	96%	85%
>£10k to £50k	89%	94%	93%
>£50k to £100k	81%	86%	64%
>£100k to £500k	70%	69%	55%
>£500k to £1m	51%	25%	N/A
>£1m to £10m	37%	0%	N/A
>£10m	23%	N/A	N/A
Population size	66,489	800	263

28.149 With the exception of accrued interest trends, the following headline indicators conform to national trends/indicators:

- (1) Final confiscation order breakdown.
- (2) UTP-nominal orders as a percentage of total orders.
- (3) Total benefit trends of the three groups.

²⁸ This figure excludes UTP- Nominal Orders.

28.150 On this basis one can be reasonably confident in making broad comments about the population based on the similarity of the sample.

Appendix 2: Table of principal statutory provisions in Part 2 of POCA 2002

Part 2 of POCA 2002 was drafted to enact a comprehensive code for confiscating the proceeds of crime following conviction. The provisions most likely to be encountered during confiscation proceedings in England and Wales are:

Section 6	Making a confiscation order
Section 7	Recoverable amount
Section 8	Defendant's benefit
Section 9	Definition of "available amount"
Section 10	The four statutory assumptions to be applied when a defendant has benefited from "general criminal conduct"
Section 10A	Determination of defendant's interest in property
Section 11	Time for payment of a confiscation order.
Section 12	Interest on unpaid sums
Section 13	Effect of order on court's other powers
Section 13A	Making a compliance order
Sections 14, 15	Postponement provisions
Section 16	Statement of Information (provided by the prosecution)
Section 17	Defendant's Response to the Statement of Information
Section 18	Provision of information by the defendant
Section 18A	Provision of information re extent of D's interest in property
Section 22	Reconsideration of "available amount" [prosecution]
Section 23	Inadequacy of "available amount" [defence]
Section 35	Enforcement as fines
Sections 40, 41	Restraint orders
Sections 48,49	Management receivers
Sections 50,51	Enforcement receivers
Section 75	Meaning of "criminal lifestyle"
Section 76	Definition of "criminal conduct"
Section 76(2)	Definition of "general criminal conduct"
Section 76(3)	Definition of "particular criminal conduct"
Section 76(4)-(6)	Definition of "benefit" [and note section 8]
Sections 77, 78, 81	Tainted gifts
Sections 79, 80	Valuation of property (and benefit obtained)
Section 82	Definition of "free property"
Section 83	Definition of 'realisable property'

Appendix 3: Contributing Stakeholders

INDIVIDUALS

Name	Organisation
Lord Brian Kerr	The Supreme Court
Lady Brenda Hale	The Supreme Court
Lord Patrick Hodge	The Supreme Court
Lord Anthony Hughes	The Supreme Court
Lord Brian Kerr	The Supreme Court
Professor Peter Aldridge	Queen Mary University London
Mr Simon Arscott	Devon and Cornwall Police
Ms Julie Bailey	Cumbria Police
Ms Emma Barker	Kent and Essex Police Serious Crime Directorate
Ms Wendy Barr	Crown Office and Procurator Fiscal Service
Ms Julia Bateman	Kingsley Napley LLP
Mr Mick Beattie	National Police Chiefs Council
Ms Foizia Begum	Home Office
Martin Bentham	Evening Standard
Mr Stuart Biggs	Three Raymond Buildings
Mr John Binns	Solicitor, Money Laundering Reporting Officer
Mr Andrew Bird	5 St Andrews Hill
Mr Richard Blackman	Landwood Group
Mr John Blair-Gould	14 Bedford Row
Mr Andrew Bodnar	Matrix
Margaret Bonsall JP	East Kent Bench (Folkstone)
Professor Johan Boucht	University of Oslo
Mr Mark Boyle	Solicitors Regulation Authority
Ms Sheena Cassidy-Hope	Mishcon de Reya LLP
Mr Sat Chander	Her Majesty's Courts and Tribunals Service
Mr David Chapman	Insolvency Service
Mr Michael Cheek	Serious Fraud Office
Ms Abigail Coghill Smith	33 Chancery Lane
Mr Christopher Convey	33 Chancery Lane
Mr Nigel Crowther	West Yorkshire Police
Mr Neil Curtis	Home Office

Name	Organisation
Ms Karen Dunston	National Crime Agency
Mr Justice Edis	
Ms Lucy Edwards	Blake Morgan
Mr Adrian Eissa QC	25 Bedford Row
Martin Evans QC	33 Chancery Lane
Mr Paul Farrell	Financial Investigator
Mr Simon Farrell QC	3 Raymond Buildings
Mr Doug Ferns	Metropolitan Police
Ms Nicola Finnerty	Kingsley Napley LLP
Dr Craig Phillip Fletcher	Manchester Metropolitan University
Mr Rudi Fortson QC	25 Bedford Row
Mr Jonathan Foster	Crown Prosecution Service
Mr Neil Frame	Surrey Police Headquarters
Mr Muthupandi Ganesan	Scarmans
Ms Julia Gerrard	Ministry of Justice
Ms Frances Gibb	The Times
Mr Manuel Gonzalez	Oxford University
Mr Jonathan Hall QC	6KBW
Ms Sarah Hall	Blackfords LLP
Ms Debbie Harris	Her Majesty's Courts and Tribunals Service
Professor Jackie Harvey	Northumbria University
Mr Adam Haselhurst	Environment Agency
Ms Susan Hawley	Spotlight on Corruption
Ms Christina Hayward-Kourabas	Tuckers Solicitors
Ms Lynne Henderson	Crown Prosecution Service
Mr Tristram Hicks	Tristram Hicks Associates Ltd
Mr Tony Holden	Metropolitan Police
Sir Anthony Hooper	Matrix Chambers
HHJ Michael Hopmeier	Crown Court
Ms Lorraine Howell	Her Majesty's Courts and Tribunals Service
Mr James Jeffreys	R3 - Association of Business Recovery Professionals
Mr Tom Keatinge	Royal United Services Institute
Dr Colin King	Sussex University
Ms Eileen Kirkwood	Crown Office & Procurator Fiscal Service (Scotland)
Mr Daniel Krist	Trading Standards

Name	Organisation
Ms Hannah Lamming	Peters & Peters Solicitors LLP
Mr Aidan Larkin	Wilsons Auction House
Professor Michael Levi	Cardiff University
Ms Alison Levitt QC	2 Hare Court
Ms Samantha Ling	Warwickshire and West Mercia Police
Mr Martin Lynagh	Her Majesty's Revenue and Customs
Ms Helen Lynch	Carter Moore Solicitors
Chris Mackenny JP	East Kent Bench
Mr Soumya Majumdar	Crown Prosecution Service
Ms Sophie Marlow	Judicial Office
Ms Wendy Martin	National Trading Standards
Mr Paul McGladrigan	Her Majesty's Courts and Tribunals Service
Mr Ken Menz	Her Majesty's Treasury
Ms Alison Moore	UK Central Authority
Ms Eleanor Murphy	Home Office (Government Legal Department)
Ms Deborah Naughton	Her Majesty's Courts and Tribunals Service
Srikantharajah Nereshraag	Serious Fraud Office
Mr Michael Newbold	Foundry Chambers
Mr Alan Nicholson	Organised Crime Unit
Ms Helen Nisbet	Crown Office & Prosecutor Fiscal Service (Scotland)
Mr Frank Pasfield	Trading Standards
Mr Paul Phillips	South West Regional Organised Crime Unit
HHJ Christopher Prince	Durham Crown Court
Mr John Rushton	National Crime Agency
Ms Helen Rutherford	Legal Aid Agency
Mr Derek Sammy	Insolvency Service
Mr Martin Sharpe	Public Defender Service
Mr Ian Sheel	Her Majesty's Courts and Tribunals Service
Mr Charles Shuttleworth	Insolvency Service
Mr Alam Siaf	Department for Work and Pensions
HHJ Paul Sloan QC	
Ms Penny Small	33 Chancery Lane
Mr Ian Smith	33 Chancery Lane
Mr Jonathan Solly	Criminal Procedure Rules Committee
Ms Caroline Sumner	R3 - Association of Business Recovery Professionals

Name	Organisation
Mr Kennedy Talbot QC	33 Chancery Lane
Ms Emma Turner	North East Regional Asset Recovery team
Ms Lisa Valentine	
Mr Tom Wainwright	Garden Court Chambers
Ms Yasmin Waljee	Hogan Lovells
Professor Clive Walker	Leeds University
Professor David Wall	Centre for Criminal Justice Studies, Leeds University
Mr Christopher Walters	(formerly) Her Majesty's Courts and Tribunals Service
Ms Helena Wood	Royal United Services Institute
Mr Leigh Wright	Tuckers Solicitors

ORGANISATIONS, AGENCIES AND FORUMS

Organisations/Agencies/Forums
Association of Chief Trading Standards Officers
Birmingham Trading Standards
Cambridge International Economic Crime Symposium
Department for Business, Energy and Industrial Strategy
Environment Agency
Financial Investigators Working Group
Her Majesty's Circuit Judges
Insolvency Service
National Crime Agency
Serious Fraud Office
The Bar Council
The Fraud Lawyers Association
The Law Society
Whitehall Prosecutors Group
ACE (Asset Confiscation Enforcement) Team Leaders
Government Legal Service Prosecutors Conference
Wiltshire Police Initial Crime Investigators Development Programme

Chapter 29: Consultation Questions

Consultation Question 1.

- 29.1 We provisionally propose that any amended confiscation legislation should include the objectives of the regime.
- 29.2 Do consultees agree?

Paragraph 5.83

Consultation Question 2.

- 29.3 We provisionally propose that the principal objective of the regime should be “depriving defendants of their benefit from criminal conduct, within the limits of their means.”
- 29.4 Do consultees agree?

Paragraph 5.97

Consultation Question 3.

- 29.5 We provisionally propose that an objective of the regime should be ensuring the compensation of victims, where such compensation is to be met from confiscated funds.
- 29.6 Do consultees agree?

Paragraph 5.109

Consultation Question 4.

29.7 We provisionally propose that the statutory objectives of the confiscation regime should include:

- (1) deterrence; and
- (2) disruption of crime.

29.8 Do consultees agree?

Paragraph 5.120

Consultation Question 5.

29.9 We provisionally propose that punishment is omitted from any statutory objectives of any amended confiscation legislation.

29.10 Do consultees agree?

Paragraph 5.131

Consultation Question 6.

29.11 We provisionally propose that confiscation legislation should provide that a defendant must be sentenced before confiscation proceedings are resolved unless the court directs otherwise.

29.12 Do consultees agree?

Paragraph 6.59

Consultation Question 7.

29.13 We provisionally propose that:

- (1) The absolute prohibition on financial, forfeiture and deprivation orders being imposed prior to the making of a confiscation order be removed; and
- (2) Where a court imposes a financial, forfeiture or deprivation order prior to making a confiscation order, the court must take such an order into account when determining the confiscation order.

29.14 Do consultees agree?

Paragraph 6.67

Consultation Question 8.

29.15 We provisionally propose that the current 28 day period within which the Crown Court is permitted to vary a financial or forfeiture order be extended to 56 days from the date on which a confiscation order is imposed.

29.16 Do consultees agree?

Paragraph 6.75

Consultation Question 9.

29.17 We provisionally propose that confiscation legislation should no longer refer to “postponement”. Instead, “drift” in confiscation proceedings should be managed through:

- (1) a statutory requirement that confiscation proceedings are started within a prescribed time; and
- (2) active case management following the commencement of confiscation proceedings, pursuant to the Criminal Procedure Rules (as to which see Chapter 7).

29.18 Do consultees agree?

Paragraph 6.95

Consultation Question 10.

29.19 We provisionally propose that

- (1) the maximum statutory period between the date of sentencing and the date on which a confiscation timetable is set or on which a confiscation timetable is formally dispensed with should be six months; and
- (2) the period may be extended by the Crown Court in exceptional circumstances even if an application has not been made expiry of the six month period.

29.20 Do consultees agree?

Paragraph 6.97

Consultation Question 11.

29.21 We provisionally propose that the statutory scheme should provide that:

- (1) the court retains jurisdiction to impose a confiscation order even if no timetable is set or dispensed with during the six month period;
- (2) in determining whether to proceed after the permitted period has expired, the court must consider whether any unfairness would be caused to the defendant;
- (3) if there is unfairness, the court must consider whether measures short of declining to impose a confiscation order would be capable of remedying any unfairness; and
- (4) in reaching a decision, the court must consider the statutory objectives of the regime (which we discuss at Chapter 5).

29.22 Do consultees agree?

Paragraph 6.99

Consultation Question 12.

29.23 We provisionally propose that the Criminal Procedure Rules Committee should consider providing timetables for the provision of information and service of statements of case in confiscation proceedings.

29.24 Do consultees agree?

Paragraph 7.77

Consultation Question 13.

29.25 We provisionally propose that the Criminal Procedure Rules Committee should consider a timetable for a case where no complex factors have been identified which uses periods of 28 days for the service of statements regarding confiscation.

29.26 Do consultees agree?

29.27 If not, what periods would consultees consider to be appropriate for the service of statements regarding non-complex confiscation cases?

Paragraph 7.79

Consultation Question 14.

29.28 We provisionally propose that the Criminal Procedure Rules Committee should consider a timetable for a case where complex factors have been identified which uses periods of 56 days for the service of statements regarding confiscation.

29.29 Do consultees agree?

29.30 If not, what periods would consultees consider to be appropriate for the service of statements regarding complex confiscation cases?

Paragraph 7.82

Consultation Question 15.

29.31 We provisionally propose that judges should be required to give a direction in every case when service of documents is ordered pursuant to a confiscation enquiry to the effect that:

- (1) The order is an order of the court and it must be complied with.
- (2) It is in the defendant's best interests to comply with the requirement because the burden of proof relating to the assumptions and the available amount rests on him or her.
- (3) The defendant will find it hard to discharge that burden without providing the information.
- (4) The court can go further and use the failure to provide the information against the defendant when making its decisions in the confiscation hearing.
- (5) That ultimately a failure to provide information may result in the defendant facing an order that is far larger than he or she might have expected, and that he or she may face imprisonment or forfeiture of specific assets if that order is not paid.

29.32 We provisionally propose that:

- (1) the Criminal Procedure Rules Committee should consider including such a direction in a Criminal Practice Direction on confiscation; and
- (2) that such a direction should be included in the Crown Court Compendium.

29.33 Do consultees agree?

Paragraph 7.88

Consultation Question 16.

29.34 We provisionally propose that the Criminal Procedure Rules Committee should consider prescribing the content and form of statements exchanged in confiscation proceedings to ensure that they assist the court in identifying issues in dispute.

29.35 Do consultees agree?

Paragraph 7.95

Consultation Question 17.

29.36 We provisionally propose that a prosecutor's statement in confiscation proceedings should comprise concise pleadings, statements and exhibits which must be lodged as separate documents.

29.37 Do consultees agree?

Paragraph 7.97

Consultation Question 18.

29.38 We invite consultees' views on:

- (1) Whether the drafting of the prosecutor's statement has contributed to problems in confiscation proceedings.
- (2) Whether consultees believe that it would be beneficial for a lawyer to have oversight or input into the drafting of the prosecutor's statement, and if so whether it would be beneficial to have a lawyer's oversight or input in:
 - (a) all cases;
 - (b) higher-value cases;
 - (c) cases of particular complexity; and/or
 - (d) some other category of cases; and if so which other category?

Paragraph 7.101

Consultation Question 19.

29.39 We provisionally propose that:

- (1) A new stage of the confiscation process be introduced, known as the Early Resolution of Confiscation (EROC).
- (2) The EROC process should comprise two stages:
 - (a) 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.
 - (b) an EROC hearing, at which the judge should consider approving any agreement, or in the event of disagreement, at which case management would take place.

29.40 Do consultees agree?

Paragraph 8.47

Consultation Question 20.

29.41 Do consultees consider that any criminal procedure rules and/or practice direction on confiscation should include a provision for “early offers to settle” to allow a defendant to supplement their response to a prosecutor’s statement with a written offer to resolve the matter of confiscation?

Paragraph 8.55

Consultation Question 21.

29.42 Do consultees agree that it would be wrong in principle to allow a defendant to retain a portion of the proceeds of his or her criminality as an incentive to agree and satisfy a confiscation order?

Paragraph 9.62

Consultation Question 22.

29.43 Do consultees agree that a scheme permitting a reduction to the substantive sentence imposed where a confiscation order is agreed and satisfied as directed is not desirable?

Paragraph 9.88

Consultation Question 23.

29.44 We provisionally propose that the Crown Court should retain jurisdiction for determining confiscation cases.

29.45 Do consultees agree?

Paragraph 10.72

Consultation Question 24.

29.46 Do consultees consider that the Lord Chancellor should consult with the Lord Chief Justice to institute enhanced POCA 2002 training for judges eligible to sit in the Crown Court?

Paragraph 10.89

Consultation Question 25.

29.47 We provisionally propose that:

- (1) Potential complexities in the confiscation hearing should be identified through questions at the Plea and Trial Preparation Hearing, or when the complexity comes to light.
- (2) A clear practice direction be issued that where there is added complexity in the confiscation hearing, the Crown Court judge should consult with the Resident Judge about allocation of the case to an appropriately experienced judge.
- (3) The Lord Chief Justice considers the institution of “ticketing” of suitable judges to deal with complex confiscation cases.

29.48 Do consultees agree?

Paragraph 10.115

Consultation Question 26.

29.49 We provisionally propose that when seeking to resolve a complex issue in confiscation proceedings the court should be permitted to use an assessor, subject to objections by the parties.

29.50 Do consultees agree?

Paragraph 10.133

Consultation Question 27.

29.51 We therefore provisionally propose that, where the Crown Court considers that it is in the interests of justice to do so, it may refer an issue in confiscation proceedings to the High Court for a binding determination.

29.52 We provisionally propose that, in considering the interests of justice, the court should consider, amongst any other factors that it considers to be relevant:

- (1) the value of the asset or interest that is subject to the dispute;
- (2) the complexity of the issue; and
- (3) the conduct of the parties.

29.53 Do consultees agree?

Paragraph 10.142

Consultation Question 28.

29.54 We provisionally propose 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; 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.

29.55 Do consultees agree?

Paragraph 12.282

Consultation Question 29.

29.56 We provisionally propose that the test of “gain” under our preferred model for the calculation of benefit should reflect the general principles in relation to “gain” already in use in the criminal law, principally that “gain” includes:

- (1) keeping what one has;
- (2) getting what one does not have;
- (3) gains that both are temporary and permanent.

29.57 Do consultees agree?

Paragraph 12.284

Consultation Question 30.

29.58 Are there any offences that consultees consider should be removed from the schedule offences that trigger a finding of a criminal lifestyle (currently schedule 2 of POCA 2002)?

Paragraph 13.51

Consultation Question 31.

29.59 Do consultees consider that the money laundering offence under section 329 of POCA 2002 should be either wholly or partially included in any schedule of offences that trigger a finding of a “criminal lifestyle”?

29.60 If section 329 of POCA 2002 should be partially included in the schedule of offences that trigger a finding of a “criminal lifestyle”, how should that partial inclusion be defined?

29.61 Do consultees know of any cases in which the current law has impeded effective confiscation where the predicate offence was a money laundering offence, contrary to section 329 of POCA 2002?

Paragraph 13.69

Consultation Question 32.

29.62 We provisionally propose that the offence of “keeping a brothel used for prostitution”, contrary to section 33A of the Sexual Offences Act 1956, be added to any schedule of offences that trigger a finding of a “criminal lifestyle”.

29.63 Do consultees agree?

Paragraph 13.73

Consultation Question 33.

29.64 We provisionally propose that fraud is not included in in any schedule of offences that trigger a finding of a “criminal lifestyle”.

29.65 Do consultees agree?

29.66 If consultees disagree, do consultees know of any cases in which the current law has impeded effective confiscation where there predicate offence was fraud?

Paragraph 13.83

Consultation Question 34.

29.67 We provisionally propose that bribery is not included in in any schedule of offences that trigger a finding of a “criminal lifestyle”.

29.68 Do consultees agree?

29.69 If consultees disagree, do consultees know of any cases in which the current law has impeded effective confiscation where the predicate offence was bribery?

Paragraph 13.91

Consultation Question 35.

29.70 Are there any offences that consultees consider should be added to any schedule of offences that trigger a finding of a “criminal lifestyle”? (Such offences are described in the explanatory notes to POCA 2002 as being offences “associated with professional criminals, organised crime and racketeering” or “of major public concern”.)

29.71 If so, do consultees know of any cases in which the omission of those offences from schedule 2 of POCA 2002 has impeded effective confiscation?

Paragraph 13.94

Consultation Question 36.

29.72 We provisionally propose that the number of offences required under the course of criminal activity trigger for “criminal lifestyle” be harmonised to remove the discrepancy between cases where there are multiple convictions on the same occasion and convictions on multiple occasions.

29.73 Do consultees agree?

Paragraph 13.132

Consultation Question 37.

29.74 Do consultees consider that the number of offences required under the course of criminal activity trigger should be:

- (1) two offences;
- (2) three offences; or
- (3) another number of offences (and if so, how many)?

Paragraph 13.134

Consultation Question 38.

29.75 We provisionally propose that the course of criminal activity trigger should be that a person has been dealt with by the court for a minimum number of offences, whether those offences comprise convictions or offences taken into consideration.

29.76 Do consultees agree?

Paragraph 13.147

Consultation Question 39.

29.77 We provisionally propose that when the court considers each offence relevant to the course of criminal activity trigger, the court should consider both offences from which there was benefit and offences from which there was an attempt to benefit.

29.78 Do consultees agree?

Paragraph 13.153

Consultation Question 40.

29.79 We invite consultees views about whether the financial threshold for triggering the lifestyle assumptions should be raised, and if so whether it should reflect:

- (1) the current £5,000 threshold, adjusted for inflation;
- (2) the national minimum living wage obtained over a period of six months, adjusted for inflation;
- (3) another amount (and if so, how much).

Paragraph 13.190

Consultation Question 41.

29.80 We provisionally propose that confiscation legislation should mandate that the financial threshold for triggering the lifestyle assumptions be reviewed by the Secretary of State every five years.

29.81 Do consultees agree?

Paragraph 13.191

Consultation Question 42.

29.82 If the triggers are satisfied, we do not propose that prosecutors should be required to pass an additional evidential threshold before the assumptions apply.

29.83 Do consultees agree?

Paragraph 13.199

Consultation Question 43.

29.84 We provisionally propose that prosecutors should be able to exercise discretion as to whether to seek application of the assumptions.

29.85 Do consultees agree?

Paragraph 13.211

Consultation Question 44.

29.86 We provisionally propose that:

- (1) if the court decides that the defendant has a “criminal lifestyle”, the court may nevertheless determine that it is contrary to the interests of justice to apply the assumptions, taking into account the statutory purpose of confiscation.
- (2) if the court decides that it is contrary to the interests of justice to apply the assumptions, the court should determine benefit with reference to particular criminal conduct.

29.87 Do consultees agree?

29.88 Do consultees consider that (in addition to considering the statutory purpose of confiscation) there are any particular indicative factors that could assist the court in making this determination?

Paragraph 13.225

Consultation Question 45.

29.89 We provisionally propose that the “serious risk of injustice” test be clarified in its application to the property held assumption, to indicate that in determining whether there would be a serious risk of injustice if the assumption were applied, the court should consider:

- (1) Any oral or documentary evidence put before the court; and
- (2) If documentary evidence is not put before the court, the reason why documentary evidence was not put before the court and the validity of that reason.

29.90 Do consultees agree?

Paragraph 13.247

Consultation Question 46.

29.91 We do not propose any reforms to the assumption that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he or she obtained it free of any other interests in it.

29.92 Do consultees agree?

29.93 If consultees do not agree, what reforms to this assumption do consultees consider might be appropriate?

Paragraph 13.251

Consultation Question 47.

29.94 In assessing benefit to multiple defendants, we provisionally propose that confiscation legislation should require the court to make findings as to apportionment of that benefit.

29.95 Do consultees agree?

Paragraph 14.52

Consultation Question 48.

29.96 We provisionally propose that guidance on the principles in connection with assets tainted by criminality should be provided.

29.97 Do consultees agree?

29.98 If yes, should this be provided in the form of:

- (1) non-statutory guidance on confiscation; or
- (2) a Criminal Practice Direction relating to confiscation?

Paragraph 14.73

Consultation Question 49.

29.99 We provisionally propose that the following principles of case law in connection with assets that have been obtained in part through criminality be incorporated either in non-statutory guidance or a Criminal Practice Direction:

- (1) The court must consider whether any evidence suggests that the defendant had made contributions to the purchase price using property that has not come from crime.
- (2) When the alleged benefit is in connection with an undertaking, benefit should be calculated with reference to the extent to which criminality taints that undertaking. Only where the entire undertaking is founded on illegality should the court calculate benefit with reference to the entire turnover of the business.
- (3) When a mortgage is obtained over a property, the court should consider the principles from *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 on calculating benefit with reference to the equity of redemption.

29.100 Do consultees agree?

Paragraph 14.76

Consultation Question 50.

29.101 We provisionally propose that the following principles of case law in connection with the evasion of tobacco import duty be incorporated either into non-statutory guidance or a Criminal Practice Direction:

- (1) The principles relevant to evasion of duty as summarised in *R v Tatham* [2014] EWCA Crim 226, [2014] Crim LR 672.
- (2) In calculating the benefit obtained from evading duties payable on tobacco, the duty evaded should be calculated in accordance with the Tobacco Products Duty Act 1979 section 2 and schedule 1.
- (3) For the purpose of applying the Tobacco Products Duty Act 1979, the retail price of counterfeit goods should be taken to be the recommended retail price of the genuine goods that the counterfeit goods sought to imitate.

29.102 Do consultees agree?

Paragraph 14.86

Consultation Question 51.

29.103 We provisionally propose that the principles in connection with when benefit apparently accruing to a company may be treated as accruing to a defendant be incorporated, either in non-statutory guidance or a Criminal Practice Direction.

29.104 Do consultees agree?

Paragraph 14.98

Consultation Question 52.

29.105 We invite consultees' views about how best to guide judges dealing with cases involving issues as to common intention constructive trusts in confiscation proceedings.

Paragraph 14.109

Consultation Question 53.

29.106 We provisionally propose that the value of criminal assets seized from a defendant should be considered to be a component of the defendant's total benefit, but the order should reflect that some benefit has already been seized or disgorged to the state or to victims thus preventing double recovery.

29.107 Do consultees agree?

Paragraph 15.47

Consultation Question 54.

29.108 We provisionally propose that:

- (1) the Criminal Procedure Rules Committee considers incorporating into the Criminal Practice Direction a provision to the effect that:

where a confiscation order is made in an amount less than the defendant's benefit, judges should explain why the two figures are different and that it will be open to the prosecution to seek to recover more of the benefit in future, until it is repaid in full.
- (2) consideration be given to including a direction to this effect in the Crown Court Compendium.

29.109 Do consultees agree?

Paragraph 15.56

Consultation Question 55.

29.110 We do not propose that the prosecution should bear either a legal or evidential burden to satisfy the court that assets have been hidden by a defendant.

29.111 Do consultees agree?

Paragraph 16.43

Consultation Question 56.

29.112 We provisionally propose that legislation should provide that the court must impose an order in a sum less than the defendant's benefit 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.

29.113 Do consultees agree?

Paragraph 16.53

Consultation Question 57.

29.114 We provisionally propose that the law in relation to hidden assets is codified and clarified through an articulation of relevant principles in a Criminal Practice Direction.

29.115 Do consultees agree?

Paragraph 16.64

Consultation Question 58.

29.116 We provisionally propose that, in relation to hidden assets, a Criminal Practice Direction should contain the following principles:

- (1) Where there is a difference between the amount available to the defendant to repay the confiscation order and the defendant's benefit, the court may find that the defendant has "hidden" assets representing that difference, either in whole or in part.
- (2) In determining whether to make a "hidden assets" finding, the court should consider (amongst any other matters that it considers relevant):
 - (a) The facts of the case taken as a whole, whether derived from
 - (i) evidence given by the defendant; or
 - (ii) sources of evidence other than the defendant
 - (b) Any expenditure incurred by the defendant which is more likely than not to have been met from the defendant's benefit.
 - (c) Representations made by the parties.
 - (d) The potential risk of injustice if a "hidden assets finding" inappropriately increases the "available amount".
- (3) (3) When assessing the evidence, if any, given by the defendant, the court should consider (amongst any other matters that it considers relevant):
 - (a) the merits of any explanation for the absence of positive evidence in connection with the defendant's assets;
 - (b) that the defendant is not obliged to give evidence; and
 - (c) that the quality of any evidence given to the court may be affected by the fact that the defendant is giving evidence in a post-conviction hearing.

29.117 Do consultees agree with the principles suggested in the provisional proposal?

Paragraph 16.66

Consultation Question 59.

29.118 We provisionally propose that the following principle connected to “tainted gifts” and the default sentence for non-payment of the confiscation order is incorporated in a confiscation Criminal Practice Direction:

- (1) Where the value of a tainted gift is included in the defendant’s confiscation order, the term of imprisonment imposed on the defendant for defaulting on payment may be adjusted downwards if the court is satisfied that no enforcement measure would be effective in the recovery of the value of that tainted gift.
- (2) In making such a determination the court must consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.

29.119 Do consultees agree?

Paragraph 17.77

Consultation Question 60.

29.120 We provisionally propose that if a determination is made that a tainted gift should not be included in an enforcement receivership, the court should

- (1) consider whether it is satisfied that the value of the tainted gift cannot be recovered either:
 - (a) by the defendant; or
 - (b) by the realisation of other assets; and if so
- (2) adjust downwards the term of imprisonment for defaulting on payment of the confiscation order.

29.121 We provisionally propose that when making such a determination the court should consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.

29.122 Do consultees agree?

Paragraph 17.86

Consultation Question 61.

29.123 We provisionally propose that the court may order that interest should not accrue on the value of a tainted gift included in a confiscation order in the event that:

- (1) the value of that tainted gift is not paid towards the confiscation order; and
- (2) the court is satisfied that the value of the tainted gift cannot be recovered either:
 - (a) by the defendant; or
 - (b) by the realisation of other assets.

29.124 We provisionally propose that when making such a determination the court should consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.

29.125 Do consultees agree?

Paragraph 17.93

Consultation Question 62.

29.126 We provisionally propose that if a determination is made that a tainted gift should not be included in an enforcement receivership, the court should:

- (1) consider whether it is satisfied that the value of the tainted gift cannot be recovered either:
 - (a) by the defendant; or
 - (b) by the realisation of other assets; and if so
- (2) order that interest should not accrue on that tainted gift; and
- (3) that any interest previously accrued on that tainted gift be removed from any outstanding confiscation amount.

29.127 We provisionally propose that when making such a determination the court should consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.

29.128 Do consultees agree?

Paragraph 17.97

Consultation Question 63.

29.129 We provisionally propose the following principle articulated in *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 be incorporated in an amended confiscation Practice Direction:

Where the consideration which is asserted to have been provided by the recipient of property is other than a direct financial contribution (whether by way of services or otherwise) the court must consider:

- (1) Whether that consideration is capable of being assessed as consideration of value; and if so,
- (2) to what extent.

29.130 Do consultees agree?

Paragraph 17.111

Consultation Question 64.

29.131 We provisionally propose that the wording currently found in section 77(5)(a) of POCA 2002 be amended in any revised confiscation legislation to provide that a gift is tainted if it was made by the defendant at any time after “the commission of the offence” rather than “the date on which the offence was committed”.

29.132 Do consultees agree?

Paragraph 17.118

Consultation Question 65.

29.133 We provisionally propose that the Crown Court should have the discretion, upon imposing a confiscation order, to make an enforcement order that takes effect either (i) immediately; or (ii) on a “contingent” basis (subject to a further confirmatory court hearing) 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 that the defendant’s share of the asset will not be made available for realisation by the expiry of the time to pay period.

29.134 Do consultees agree?

Paragraph 21.106

Consultation Question 66.

29.135 We provisionally propose that when imposing a contingent enforcement order, the Crown Court should be able to order that if the order is not satisfied as directed:

- (1) an asset, such as a property, will vest in a trustee for confiscation;
- (2) funds held in a bank account will be forfeited;
- (3) seized property will be sold; or
- (4) a warrant of control will take effect.

29.136 Do consultees agree?

Paragraph 21.108

Consultation Question 67.

29.137 We provisionally propose a non-exhaustive list of statutory factors for the court to consider when exercising its discretion to make a contingent order, including:

- (1) the use ordinarily made, or intended to be made, of the property;
- (2) the nature and extent of the defendant's interest in the property;
- (3) the needs and financial resources of the spouse, civil partner, former spouse or former civil partner of the defendant;
- (4) the needs and financial resources of any child of the family;
- (5) (if applicable) the length of the period during which the family home has been used as a residence by a spouse, civil partner, former spouse, former civil partner or child of the family;
- (6) whether the asset in question is tainted by criminality; and
- (7) the extent of an interested party's knowledge of the same.

29.138 Do consultees agree?

Paragraph 21.110

Consultation Question 68.

29.139 We provisionally propose that, in addition to any ability to claim an interest in property during the confiscation hearing itself, a third party who claims an interest in property may be permitted to raise such an interest in the Crown Court after the making of the confiscation order and before either the automatic vesting of assets or the activation of a contingent order if:

- (1) the third party was not given a reasonable opportunity to make representations at an earlier stage of the confiscation proceedings; or
- (2) the third party had a good reason for not making the application earlier in the confiscation proceedings; and
- (3) it appears to the court that there would be a serious risk of injustice to the third party if the court was not to hear the application.

29.140 Do consultees agree?

Paragraph 21.112

Consultation Question 69.

29.141 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.

29.142 Do consultees agree?

Paragraph 21.113

Consultation Question 70.

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

29.144 Do consultees agree?

Paragraph 22.22

Consultation Question 71.

29.145 We provisionally propose that:

- (1) defendants subject to confiscation orders of £10 million or less should no longer be released unconditionally after serving half a term of imprisonment in default; and
- (2) during the second half of the term of imprisonment the defendant should be released subject to licence conditions that facilitate the enforcement of the confiscation order.

29.146 Do consultees agree?

Paragraph 22.57

Consultation Question 72.

29.147 We provisionally propose that new sanctions short of imprisonment in default, such as disqualifying a defaulter from driving or imposing a curfew or period of unpaid work should not be introduced.

29.148 Do consultees agree?

Paragraph 22.62

Consultation Question 73.

29.149 We provisionally propose that:

- (1) the court should have a bespoke power to direct a defendant to provide information and documents as to his or her financial circumstances; and
- (2) a failure to provide such information should be punishable by a range of sanctions including community penalties and imprisonment.

29.150 Do consultees agree?

Paragraph 22.87

Consultation Question 74.

29.151 We provisionally propose that the court should have discretion to pause interest on a confiscation order in the interests of justice, where it is satisfied that a defendant has taken all reasonable steps to satisfy an order.

29.152 Do consultees agree?

Paragraph 22.106

Consultation Question 75.

29.153 We provisionally propose that if the court has discretion to pause interest, any credit against a term of imprisonment in default for part payment should be calculated by reference to the total outstanding sum, inclusive of interest.

29.154 Do consultees agree?

Paragraph 22.111

Consultation Question 76.

29.155 We provisionally propose that where a confiscation order is not satisfied as directed, the fact should be recorded in the Register of Judgments as a matter of course.

29.156 Do consultees agree?

Paragraph 22.119

Consultation Question 77.

29.157 We provisionally propose that the court should be able to direct that enforcement be placed in abeyance where it is satisfied that an order cannot be enforced.

29.158 Do consultees agree?

Paragraph 22.142

Consultation Question 78.

29.159 We provisionally propose that where enforcement is placed in abeyance, the court should have discretion to list the matter for review and direct a defendant to provide an update as to his or her financial circumstances at periodic intervals as determined by the court.

29.160 Do consultees agree?

Paragraph 22.144

Consultation Question 79.

29.161 We provisionally propose that:

- (1) Legislation should set out indicative factors for the court to consider when determining whether to re-open enforcement of a confiscation order that has been placed in abeyance.
- (2) Those indicative factors should mirror those proposed in connection with uplift applications (see consultation question 85).

29.162 Do consultees agree?

Paragraph 22.146

Consultation Question 80.

29.163 We provisionally propose that:

- (1) Where there are multiple confiscation orders sought against the same defendant, the court should have the power to consolidate the applications for confiscation.
- (2) Where a defendant already has a confiscation order made against him or her, the court should have the power to amend any earlier confiscation order and to consolidate any amount outstanding under it into the new confiscation order.
- (3) 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.

29.164 Do consultees agree?

Paragraph 23.63

Consultation Question 81.

29.165 We provisionally propose that, 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.

29.166 Do consultees agree?

Paragraph 24.97

Consultation Question 82.

29.167 We do not propose that a central compensation scheme, funded from sums collected pursuant to confiscation orders, be created. Do consultees agree?

Paragraph 24.107

Consultation Question 83.

29.168 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 to reflect the variation.

29.169 Do consultees agree?

Paragraph 24.114

Consultation Question 84.

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

29.171 If so, what should such restrictions be?

Paragraph 25.81

Consultation Question 85.

29.172 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, including:

- (1) the legislative priorities of
 - (a) depriving a defendant of his or her benefit from criminal conduct;
 - (b) any need to compensate victims from confiscated funds;
 - (c) deterrence from criminality by encouraging the pursuit of a legitimate lifestyle;
 - (d) disruption of criminality, whether through assistance provided to the authorities or otherwise.
- (2) Undue hardship that would be caused through the granting of the uplift.
- (3) Diligence of the prosecution in applying for an uplift.

29.173 In weighing up undue hardship, we provisionally propose that the court should consider factors including:

- (1) The use ordinarily made, or intended to be made, of the property; and
- (2) The nature and extent of the defendant’s interest in the property.

29.174 Do consultees agree?

Paragraph 25.83

Consultation Question 86.

29.175 We provisionally propose that, when an uplift is determined, the court may order that an uplifted available amount be paid either:

- (1) by a specified deadline;
- (2) in instalments.

29.176 Do consultees agree?

Paragraph 25.86

Consultation Question 87.

29.177 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.

Paragraph 25.89

Consultation Question 88.

29.178 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; and
 - (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; or
 - (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.

29.179 Do consultees agree?

Paragraph 26.110

Consultation Question 89.

29.180 Are there any other factors not identified in Consultation Question 5 that consultees consider should be taken into account by a judge when determining a risk of dissipation?

Paragraph 26.112

Consultation Question 90.

29.181 We provisionally propose that:

- (1) Applications for without notice restraint orders should be made to a duty judge, accessible nationally.
- (2) The application should be dealt with by the judge on the papers where possible.
- (3) If the judge requires further information, that judge should be permitted to hold a hearing remotely.
- (4) Should the judge decide that there is a need for an inter partes hearing, the hearing should be listed at a court centre local to the parties.

29.182 Do consultees agree?

Paragraph 26.125

Consultation Question 91.

29.183 We provisionally propose that in considering whether criminal proceedings against a person who is under investigation are commenced within a reasonable time for the purposes of determining whether a restraint order should be discharged, the court must have regard to the following factors (and to any others that it considers relevant in all of the circumstances of the case):

- (1) The length of time that has elapsed since the Restraint Order was made.
- (2) The reasons and explanations advanced for such lapse of time.
- (3) The length (and depth) of the investigation before the restraint order was made.
- (4) The nature and extent of the restraint order made.
- (5) The nature and complexity of the investigation and of the potential proceedings.
- (6) The degree of assistance or of obstruction to the investigation.

29.184 Do consultees agree?

Paragraph 26.131

Consultation Question 92.

29.185 We provisionally propose that:

- (1) any amended legislation provides that:
 - (a) when an application is made for a restraint order, the order may provide for the release of a sum that the court deems to be appropriate for meeting reasonable living expenses.
 - (b) in coming to its conclusion about what might be appropriate, the court be guided by all of the circumstances of the case, as known at the time and by the need to preserve assets for confiscation.
- (2) the Criminal Procedure rules be amended to include:
 - (a) a rule to the effect that any application to release funds for reasonable living expenses must be supported by a schedule of income and outgoings and include copies of evidence to support assertions made within that schedule.
 - (b) a standard form for a schedule of income and outgoings.

29.186 Do consultees agree?

Paragraph 26.141

Consultation Question 93.

29.187 We provisionally propose that:

- (1) The current test for release of funds for legal expenses is varied to permit the payment of legal expenses connected with criminal proceedings and confiscation.
- (2) Legal expenses should be subject to:
 - (a) Approval of a costs budget by the judge dealing with the case.
 - (b) The terms of a table of remuneration, set out in a statutory instrument.

29.188 Do consultees agree?

Paragraph 26.160

Consultation Question 94.

29.189 We provisionally propose that, in an application for costs in connection with restraint proceedings:

- (1) The court should decide whether the application for restraint was reasonably brought.
- (2) In doing so, the court should consider the extent to which the prosecution applied its mind to the “indicative factors” in connection with a risk of dissipation. In addition, the court should consider a series of indicative factors, including:
 - (a) The stage of an investigation or prosecution. At an early stage it is likely that less information will be available to prosecutors.
 - (b) The urgency of proceedings. The more urgent the application the less likely it is that each indicative factor may have been considered in detail.
 - (c) Whether all reasonable lines of enquiry have been followed, particularly in light of (a) and (b).
 - (d) Whether there has been full and frank disclosure of matters known to the prosecution that may assist the defence or undermine the prosecution.
- (3) If the court concludes that the application was not reasonably brought, costs should follow the event.

29.190 Do consultees agree?

Paragraph 26.181

Consultation Question 95.

29.191 We provisionally propose that a rule be adopted to the effect that, if the court considers an unsuccessful or discharged application for restraint was reasonably brought, costs should be capped at legal aid rates.

29.192 Do consultees agree?

29.193 If consultees do not agree, should:

- (1) No costs be awarded.
- (2) Costs be awarded subject to a pre-determined discount to reflect the reasonableness of the application; if so, we would welcome consultees' views as to what discount might be appropriate.
- (3) Reasonable costs be awarded in all of the circumstances of the case, not capped at legal aid rates.
- (4) Costs be awarded in some other formula? If so, we would welcome consultees' view as to what formula might be appropriate.

Paragraph 26.193

Consultation Question 96.

29.194 We provisionally propose that:

- (1) where it is in the interests of justice to do so, the Crown Court may make a binding determination of interests in property at any stage of proceedings (including at the restraint stage);
- (2) such a determination should be conclusive in relation to the confiscation proceedings, unless the court is satisfied that a party did not have a reasonable opportunity to make representations at the hearing when the determination was made, or it appears to the court that there would be a serious risk of injustice if the court was bound by the determination.

Paragraph 26.213

Consultation Question 97.

29.195 We provisionally propose that the National Police Chiefs' Council reconsider the training needs of all police officers in connection with confiscation, and in particular those front-line police officers who may need to exercise the powers of search and seizure in connection with confiscation.

29.196 Do consultees agree?

Paragraph 27.61

Consultation Question 98.

29.197 We provisionally propose that the non-statutory guidance provisionally proposed in Chapter 14 ought to deal with any specific 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.

29.198 Do consultees agree?

Paragraph 27.63

Consultation Question 99.

29.199 We provisionally propose that the power to appoint a management receiver should be extended to cover assets which are seized and then subject to an order that they may be detained (currently found in section 47M of POCA 2002).

29.200 Do consultees agree?

Paragraph 27.68

Consultation Question 100.

29.201 We consider that a national asset management strategy is desirable, to determine who and how assets should be managed.

29.202 Do consultees agree?

Paragraph 27.116

Consultation Question 101.

29.203 We provisionally propose that to develop any national asset management strategy:

- (1) a new Criminal Asset Recovery Board be established;
- (2) the new board should comprise stakeholders from the public and private sector.

29.204 Do consultees agree?

Paragraph 27.118

Consultation Question 102.

29.205 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 as a result? If so, in what circumstances?

Paragraph 28.50

Consultation Question 103.

29.206 Do consultees have any concerns about the interrelationship between cryptoassets and the confiscation regime?

Paragraph 28.72

Consultation Question 104.

29.207 Do consultees consider that there are any matters connected to Part 2 of the Proceeds of Crime Act 2002 that are not covered in this consultation paper that require reform?

29.208 If so,

- (1) what are they; and
- (2) how should they be reformed?

Paragraph 28.73

