Law Commission
Reforming the law

Confiscation of the proceeds of crime after conviction: a final report

HC 828

Law Com No 410

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The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk.

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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, which provides for the proceeds obtained from a confiscation order, 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 His Majesty's Courts and Tribunals Service.

Available amount: An amount lower than the defendant's benefit figure that the defendant is ordered to repay towards their 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 place 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 from 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 their choosing, unless an enforcement receiver (defined below) is appointed. A confiscation order is not an additional financial penalty. See section 6 of POCA 2002.

Contingent order: An enforcement order made by the Crown Court, upon imposing a confiscation order, that takes effect on a "contingent" basis when there are reasonable grounds to believe that the defendant will fail to satisfy the order, or their share of asset will not be realised. A contingent order is activated should the defendant fail to satisfy the order during the time to pay period. Contingent orders are part of our recommended confiscation regime.

Criminal Asset Recovery Board ("CARB"): A body to be established whose function should be to develop a national asset management strategy. The establishment of CARB is part of our recommended confiscation regime.

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.

Early Resolution of Confiscation ("EROC"): A process intended to take place before a confiscation hearing is listed to facilitate the early resolution of confiscation proceedings. It comprises two stages: an EROC meeting, at which parties should seek to settle the confiscation order; and 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. The EROC process is part of our recommended confiscation regime and is currently not in POCA 2022.

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" their 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 His Majesty's 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.

Money Mule: Money muling is a type of money laundering. A money mule is a person who, for a commission, receives money from a third party (usually into their bank account) and transfers it to another person or takes it out in cash and gives it to someone else.

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.

Provisional discharge: The discharge of a confiscation order where there are no reasonable enforcement measures available or the only outstanding amount to be paid comprises only interests. A discharged confiscation order is no longer in force. The discharge is "provisional" because it can be revoked when some conditions are met. The provisional discharge is part of our recommended confiscation regime. For discharge (not termed "provisional") under the current confiscation regime, see sections 24, 25 and 25A of POCA 2002.

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 proposed in the Consultation Paper 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 Rule 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

FCA: Financial Conduct Authority

FCC: Firearms Consultative Committee

G8: G8 Intergovernmental Political Forum

HMCTS: His Majesty's Courts and Tribunals Service

HMRC: His 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

OPC: Office of the Parliamentary Counsel

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

BACKGROUND TO THE PROJECT

1.1 In 2018, the Law Commission agreed with the Home Office to review the law on confiscation after conviction contained within Part 2 of the Proceeds of Crime Act 2002 ("POCA 2002").

Aims of the project

1.2 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.

1.3 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;

(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 the 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.

History of the project

1.4 Work commenced on the project in November 2018. In preparing the consultation paper[1] we consulted extensively with both individuals and organisations with an interest in confiscation. In Appendix 3 of the consultation paper, we set out details of judges, lawyers, law enforcement agencies and officials, prosecution agencies and academics who contributed.

1.5 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. Through our pre-consultation engagement, we gleaned from practitioners, academics, the judiciary and law enforcement that their preference would be to amend the existing regime rather than repeal and replace the law in its entirety. The provisional proposals we made in our consultation paper therefore reflected this approach, as do the recommendations in this report.

1.6 On 17 September 2020 we published our consultation paper. Revealing the complexity of the confiscation regime, the consultation paper ran to over 700 pages. We also published a 41-page summary of the consultation paper. The paper generated considerable interest and stimulated debate on the efficiency and efficacy of the confiscation regime.

1.7 The consultation, which ran between September and December 2020, is discussed below. This consultation involved public events both on the consultation paper in general and on specific parts of the consultation paper. We also met with individuals and organisations from across the criminal justice system to hear first-hand their views about our provisional proposals.

1.8 We draw upon the valuable information and comments that were provided during consultation throughout this report.

TAKING THE PROCEEDS OF CRIME AFTER CONVICTION

1.9 Before we provide a general overview of our recommendations and the structure of the report, we begin with a brief explanation of the current regime for taking the proceeds of crime after conviction[2] and summarise overarching concerns that led to the inception of this project.

The current confiscation regime

1.10 A "confiscation order" is an order made personally against a defendant to pay a sum of money *equivalent to* some or all of their benefit from crime, depending on the assets available to the defendant (an *in personam* order). The defendant is not obliged to realise any particular asset to satisfy the order (which would constitute an *in rem* order), as long as the sum of money is paid.

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1 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249.

2 For a history of post-conviction confiscation law see CP 249, Chapter 2.

1.11 In Chapter 3 of our consultation paper, we set out a general overview of the post-conviction confiscation regime. The regime can be broken down into 10 component parts.

(1) After conviction, the confiscation process begins if the prosecutor asks the Crown Court to consider making a confiscation order, or the court believes that it is appropriate to do so.[3]

(2) Usually, the defendant is sentenced before confiscation takes place.[4] Confiscation can be postponed for up to two years from the date of conviction and for a longer period if there are exceptional circumstances.[5] Where a court postpones confiscation proceedings, financial penalties and forfeiture orders may not be imposed when passing sentence.[6]

(3) From as early as the start of a criminal investigation, the court may make a restraint order against any specified person to preserve the value of assets for the confiscation hearing and prevent their dissipation.[7]

(4) In preparing for the confiscation hearing, information may be provided to the court by the prosecution,[8] the defence,[9] and by third parties who assert that they have an interest in particular assets.[10]

(5) Having determined the scope of the confiscation enquiry, the court will go on to calculate the defendant's benefit from relevant criminal conduct. POCA 2002 provides that "a person benefits from conduct if they obtain[11] property as a result or in connection with it".[12]

(6) The court must also then determine whether the defendant has a "criminal lifestyle". A defendant will have a "criminal lifestyle" if one of three "triggers" set

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

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

5 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.

6 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, [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.

7 Proceeds of Crime Act 2002, ss 40 and 41.

8 Proceeds of Crime Act 2002, s 16.

9 Proceeds of Crime Act 2002, ss 17 and 18.

10 Proceeds of Crime Act 2002, s 18A.

11 See CP 249, 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.

12 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.

out under section 75 of POCA 2002 is satisfied. The explanatory notes to POCA 2002 provide that the criminal lifestyle provisions are designed to "identify offenders who may be regarded as normally living off crime".[13]

(a) If the defendant *does* have a criminal lifestyle, the criminal conduct which is relevant to the confiscation enquiry will be their "general criminal conduct".[14] 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".[15] To assist the court in determining benefit from general criminal conduct, the court is generally required to apply four statutory assumptions.[16]

(b) If the defendant *does not* have a criminal lifestyle, the confiscation enquiry will be limited to what is known as their "particular criminal conduct".[17] 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 passing sentence.[18]

(7) Having determined the value of the defendant's benefit from crime, the court must then determine how much of that benefit the defendant is able to repay (known as the "recoverable amount").

(8) The court must make a confiscation order for the recoverable amount "if, and only to the extent that, it would not be disproportionate to do so".[19]

(9) Having made the confiscation order, the court must determine:

(a) whether the defendant requires time to pay the confiscation order. 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.[20] The maximum time to pay the court may allow initially is three months from the making of the confiscation order.[21] The defendant may apply for an extension of time to pay. The maximum overall time that may be allowed to pay the confiscation order is six months.[22]

13 Proceeds of Crime Act 2002, explanatory notes para 135.
14 Proceeds of Crime Act 2002, s 6(4)(b).
15 Proceeds of Crime Act 2002, s 76(2).
16 Proceeds of Crime Act 2002, s 10. See CP 249, Chapter 13 for more detailed analysis.
17 Proceeds of Crime Act 2002, s 6(4)(c); see, for example, *R v Panayi* [2019] EWCA Crim 413, [2019] 4 WLR 85.
18 Proceeds of Crime Act 2002, s 76(3).
19 Proceeds of Crime Act 2002, s 6(5). See CP 249, Chapter 5 for a more detailed analysis.
20 Proceeds of Crime Act 2002, s 11(2).
21 Proceeds of Crime Act 2002, s 11(3).
22 Proceeds of Crime Act 2002, s 11(5).

(b) the length of the term of imprisonment the defendant could be required to serve if the defendant fails to pay the confiscation order.[23] 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

(c) whether to make a "compliance order".[24] A compliance order is any order that the court believes is appropriate for the purpose of ensuring that a confiscation order is effective. The court must consider whether to make an order restricting the defendant's foreign travel.[25]

(10) If the defendant fails to pay:

(a) a magistrates' court may activate the warrant committing the defendant to prison for non-payment of their confiscation order.[26]

(b) interest accrues from the date for payment on any part of a confiscation order which remains outstanding at that time.[27] The interest rate is the same as the rate set pursuant to the Judgments Act 1838,[28] currently 8% a year.

(c) the prosecutor may apply to the Crown Court for the appointment of an enforcement receiver who may be empowered to sell assets belonging to the defendant.[29]

(d) 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

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23 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.

24 See Chapter 14 for a more detailed analysis.

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

26 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.

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

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

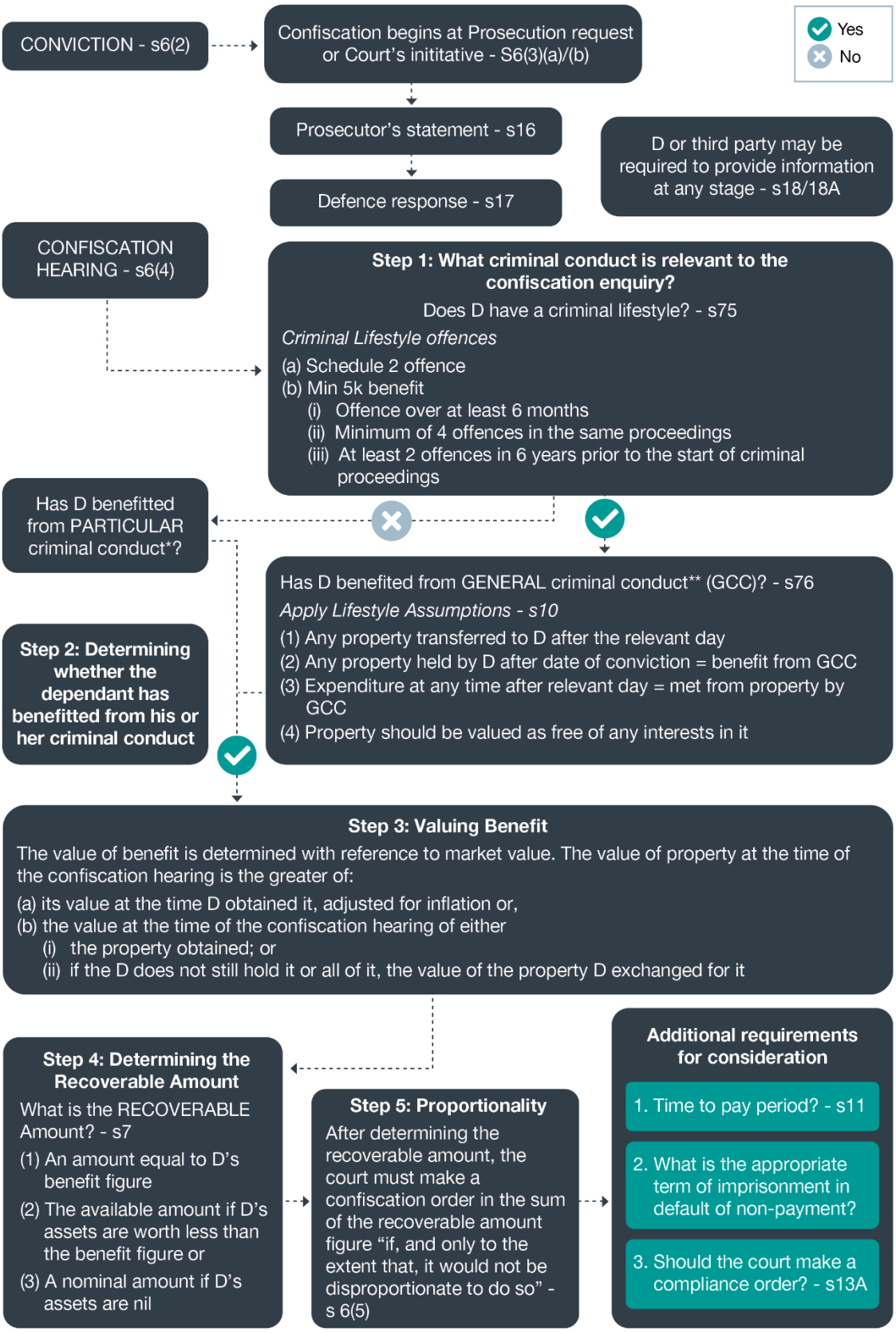
29 Proceeds of Crime Act 2002, ss 50 and 51.

order.[30] Similarly, the magistrates' court may order that seized personal property be sold and the proceeds used to satisfy a confiscation order.[31]

1.12 The flow chart opposite, taken from page 58 of the consultation paper, summarises the process.

[30] Proceeds of Crime Act 2002, s 67.

[31] 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).



* 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.

Perceived problems with the regime

1.13 As of 31 March 2021 the value of outstanding confiscation orders was £2,353,455,000.[32] His Majesty's Courts and Tribunals Service ("HMCTS") considers that just £143 million of that debt (6.1%) is recoverable.[33] A confiscation debt running into the billions of pounds of which only a small proportion is collectable has led to a perception that the confiscation regime is ineffective. Such a perception has been long-standing. In 2013 the National Audit Office estimated the value of confiscation orders successfully enforced as a proportion of estimated total criminal proceeds in 2012 – 2013 as 26p per £100.[34]

1.14 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. As we discuss in the consultation paper at para 1.26, there was a concern after the Act was introduced that it was not being adequately used, leading to targets being set for the volume and value of orders pursued. While explicit targets for financial investigators in asset recovery have now been dispensed with, this has led to an inflation in the value of historical confiscation debt.[35] This "legacy" debt, whilst headline grabbing, does not reveal the true picture.

1.15 Further reasons for the debt appearing particularly high are discussed later in his Report and include:

(1) the treating of jointly obtained benefit as being obtained in full of by each participant in the criminal enterprise;[36]

(2) the treatment of temporary gains as outright gains, such as in the case of money mules;[37]

(3) the addition of interest to confiscation orders at a very high rate (8%); and

(4) the lack of discretion in relation to the application of the criminal lifestyle assumptions.[38]

1.16 In summary, the large outstanding confiscation debt is not a consequence of defendants retaining large amounts of their criminal proceeds. It is an artificial number which reflects the considerable problems with the operation of the regime, both in terms of the calculation of the orders and in terms of their enforcement.

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32 HM Courts and Tribunals Service, "HM Courts and Tribunal Service Trust Statement 2020-21" (2020-21) HC 695 p 36.

33 HM Courts and Tribunals Service, "HM Courts and Tribunal Service Trust Statement 2020-21" (2020-21) HC 695 p 9.

34 Confiscation Orders (2013) HC 738.

35 See Chapter 21 – What happens when a confiscation order is paid? for discussion of the Asset Recovery Incentivisation Scheme.

36 Chapter 8 – Defining and Apportioning Benefit.

37 Chapter 8 – Defining and Apportioning Benefit.

38 Chapter 10 – Applying the Criminal Lifestyle Assumptions.

1.17 The Supreme Court also made observations about the challenges faced by the authorities in attempting to extract criminal assets under the POCA 2002 regime. In *R v Ahmad*[39] the Supreme Court said:[40]

> 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….
>
> 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.

1.18 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,[41] has described the proliferation of appellate judgments over a ten-year period:

> In 2009 the Case List contained 177 Cases. The 2020 Case list contains over 5050 reported 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.

1.19 There have been comments from 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".[42]

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

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

41 HHJ Hopmeier, *A Guide to Restraint and Confiscation Orders under POCA 2002* (2022).

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

1.20 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. One stakeholder remarked during consultation that the current system is "complicated and confusing".

1.21 Another stakeholder, an academic, noted that:

> confiscation proceedings are lengthy and complex. As such, legal representatives are not always able to provide the resources and specialist representation needed.
>
> This problem is exacerbated in cases funded by legal aid.

1.22 The Prison Reform Trust commented:

> The Proceeds of Crime Act 2002 (POCA) is widely regarded as a draconian piece of legislation and is in urgent need of reform. … We welcome the review of this legislation as it impacts on the lives of so many, not only defendants but also their families.

THE CONSULTATION PAPER

1.23 The consultation paper had 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 address those problems and reform the regime in ways which serve to simplify, clarify and modernise the law.

1.24 The paper was written to mirror the progress of a confiscation matter through the court process. Our 104 consultation questions made provisional proposals for reform and asked consultees for their views.

1.25 Due to the length of the consultation paper, we also published a summary version, within which we posed 32 summary consultation questions.

1.26 The consultation paper covered the following stages of the confiscation process:

(1) objectives of the Act;

(2) preparing for the confiscation hearing;

(3) calculation of benefit;

(4) recoverable amount;

(5) enforcement;

(6) other orders of the court;

(7) reconsideration; and

(8) preserving the value of assets.

1.27 We used the consultation 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.

CONSULTATION

1.28 We then undertook a public consultation during which we held a combination of webinars, roundtable discussions, small meetings and a symposium to test our proposals and to determine the extent of support for them.

1.29 The consultation period ran for three months (17 September 2020 – 18 December 2020) and attracted 99 responses via our formal online consultation tool, over 30 contributions via email and extensive engagement during the various events we held.

1.30 Our engagement during consultation was very wide. We consulted with criminal barristers' chambers, solicitors, professional bodies,[43] current and retired members of the judiciary,[44] prosecution agencies,[45] law enforcement agencies, financial investigators,[46] academics, defendants, the Prison Service, court staff,[47] auction houses and receivers. A full list of consultees can be found at Appendix 2.

1.31 We arranged webinars and roundtable discussions thematically, such that each event centred on a different aspect of the paper and policy. This enabled us to extract more specific and useful responses to our proposals.

1.32 We generally received very positive feedback on the consultation paper and were encouraged by the level of support for the proposals. We make recommendations consistent with most of the provisional proposals. There were, expectedly, also some proposals which received less support from consultees. In these instances, we undertook further consultation and research in the light of which we reconsidered our policies.

STRUCTURE OF REPORT AND RECOMMENDATIONS

1.33 In this section we summarise the content of our report and our recommendations. Like the consultation paper, this report is divided into parts, reflecting the way in which a confiscation matter would move through the court system. Each of the parts can be read separately to enable readers to select and focus on areas of particular interest. The following paragraphs provide a summary of each part and chapter.

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43 Bar Council of England and Wales; Criminal Law Solicitors' Association; Fraud Lawyers' Association, the Law Society, the Proceeds of Crime Lawyers' Association.

44 At all levels. We have liaised with the Lord Chief Justice's office, which has been liaising with the President of the Queen's Bench Division and the President of the Family Division. We met with Lord Hughes and Lord Justice Davis; and held a judicial round table, which was attended by a High Court judge, a Queen's Bench Master, circuit judges, a tribunal judge, a district judge and lay magistrates.

45 Including the CPS; Association of Chief Trading Standards Officers; Environment Agency; FCA; HMRC; Insolvency Service; NHS Counter Fraud Service Wales; Private Prosecutors' Association; SFO; West Yorkshire Trading Standards.

46 Including the City of London Police; Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland; Eastern Region Special Operations Unit, Regional Economic Crime Unit; National Crime Agency and National Economic Crime Centre; North East ACE and Confiscation Teams; West Midlands ROCU.

47 HM Courts and Tribunals Service; Justices' Legal Advisers' and Court Officers' Society.

1.34 Throughout the report, we make several recommendations which invite the Criminal Procedure Rule Committee ("CPRC") to consider implementation of reforms to aspects of the confiscation procedure. In these instances, we defer to the Committee to consider the most appropriate vehicle for these reforms (that is, in the rules or by referral to the Lord Chief Justice for inclusion in a practice direction). To avoid repetition to this effect, where these recommendations arise in the report, we have simply recommended that the CPRC consider implementation of the reform.

Part 1 – Objective of the Act (Chapter 2)

1.35 Chapter 2 provides an overview of the objectives often associated with the confiscation regime. It recommends that the objective of Part 2 of POCA 2002 should be placed on a statutory footing. The objective should be "to deprive a defendant of their benefit from criminal conduct, within the limits of their means" and bodies exercising powers under Part 2 of POCA 2002 should pursue this objective. We observe that punishment, compensation, deterrence and disruption may be consequences of the regime but should not be stated aims.

1.36 We also discuss the requirement of proportionality in the making of confiscation orders and how it relates to third-party interests. In that respect, we analyse the compatibility of our policy regarding third-party interests with the human rights legal framework, in particular with article 8 of the European Convention of Human Rights (focusing on the right to respect for one's home) and article 1 of Protocol 1 (right to property).

Part 2 – Preparing for the Confiscation Hearing (Chapters 3 – 7)

1.37 This Part contains a set of recommendations which aim to promote early consideration of confiscation issues and active case management. The overarching purpose of these recommendations is to streamline confiscation proceedings by facilitating the exchange of information between the defendant and the prosecution, as well as encouraging them to reach an agreement.

Chapter 3: Timetabling

1.38 Chapter 3 discusses the problems with the current "postponement" provisions and the sequence of events in relation to sentencing and the making of a confiscation order.

1.39 By way of overview, we recommend that:

(1) A defendant must be sentenced before confiscation proceedings are resolved, unless the court directs otherwise.

(2) The prohibition on financial, forfeiture and deprivation orders being imposed prior to the making of a confiscation order be removed. 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.

(3) 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. The purpose of this recommendation is to align the variation period with that applicable in substantive criminal proceedings.

(4) Confiscation legislation should no longer refer to "postponement". Instead, "drift" in confiscation proceedings should be managed through a statutory requirement that confiscation proceedings are started within a prescribed time, as well as active case management following the commencement of confiscation proceedings.

(5) A timetable for confiscation proceedings must be raised as a matter before the court by the completion of the sentence hearing. Errors or amendments may be addressed (respectively) by applying the slip rule within 56 days of sentencing or through amendment of the timetable.

Chapter 4: Exchange of Information

1.40 Chapter 4 contains recommendations aiming to facilitate the exchange of information between the defendant and the prosecution, as well as with the court, to contribute to a more efficient management of confiscation proceedings.

1.41 First, we recommend that the Criminal Procedure Rules ("Crim PR") should provide timetables for the provision of information and service of statements. The court should have the discretion to amend these timetables on application of the parties.

1.42 Second, we recommend different timetables depending on whether a confiscation case is categorised as "complex" or "non-complex".

1.43 Third, we recommend that the court should give the defendant appropriate warning as to the consequences of non-compliance with the obligation to provide information in the confiscation proceedings.

1.44 Finally, we recommend that the prosecutor's statement of information (section 16, POCA 2002) should comprise certain information, to assist the court in understanding the prosecutor's position and arguments. We also recommend that the content of the defence response to the prosecutor's statement of information should reflect the content prescribed for the prosecution.

Chapter 5: Early Resolution of Confiscation (EROC)

1.45 In Chapter 5, we recommend the introduction of an EROC process to take place after the exchange of information and before the confiscation hearing to facilitate the early resolution of confiscation proceedings. Such a process is intended to formalise the existing practice of agreeing confiscation orders through a collaborative process involving all the relevant parties, including third parties.

1.46 We recommend that the timetabling for the preparation of a confiscation hearing should include the EROC process, unless the court is satisfied that it will serve no useful purpose to do so. Therefore, the EROC process is not mandatory and need not take place when there is no prospect of reaching an agreement.

1.47 The EROC process should comprise two stages:

(1) An EROC meeting, at which the parties should seek to settle the confiscation order and, if the confiscation order cannot be settled, the issues for the confiscation hearing should be identified.

(2) An EROC hearing, at which the judge should consider approving any agreement, or in the event of disagreement, at which case management would take place.

1.48 To facilitate the reaching of an early agreement, we recommend that agreements reached outside the EROC structure should be subject to a process which is comparable to the EROC hearing. This means that defendants would remain free to present a consent order at any stage outside the formalised EROC process. A judge should consider whether the agreement should be approved.

Chapter 6: Incentivising the Payment of Orders

1.49 Chapter 6 discusses the tools that can be used to incentivise the payment of confiscation orders and the sanctions for non-compliance.

1.50 In agreement with the views expressed during consultation, we do not recommend that a reduction in the amount of a confiscation order or a discount on the substantive criminal sentence imposed on the defendant should be used as incentives to agree and satisfy a confiscation order. These compliance tools would be in contrast with the primary objective of the confiscation regime and would conflate confiscation and the punitive aspect of sentencing.

1.51 For these reasons, we do not make recommendations to reward cooperation, because the EROC process is by itself a suitable instrument to incentivise the reaching of an agreement, leading to more realistic and enforceable orders. In addition, the speedy resolution of confiscation proceedings and the prospect of lower legal costs will also act as incentives.

Chapter 7: Forum

1.52 Chapter 7 observes that confiscation proceedings are usually highly complex and require significant judicial expertise. Therefore, it makes recommendations to ensure that confiscation proceedings are heard in the appropriate forum and by judges with sufficient experience.

1.53 First, we recommend that the Crown Court retains jurisdiction for confiscation proceedings. Crown Court judges have the required specialised expertise and experience to deal with confiscation cases. Judicial continuity is also desirable, since a judge who has sentenced the defendant will have already a good understanding of the relevant facts of the case.

1.54 Second, we make a recommendation to ensure that appropriate training is offered to judges hearing confiscation cases.

1.55 Third, we recognise that complex confiscation cases may require a higher degree of judicial expertise and therefore make three recommendations in this respect:

(1) The prosecution should make a non-binding indication on the Plea and Trial Preparation Hearing Form and at the Plea and Trial Preparation Hearing (PTPH) as to whether they envisage any complexities if the case progresses to confiscation. This is intended to facilitate the allocation of an appropriately experienced judge to conduct both the trial and the confiscation proceedings.

(2) In connection with the above, the Criminal Practice Direction on allocation should be updated so that where complex confiscation proceedings are identified at the PTPH stage, this is considered during allocation.

(3) That additional training in confiscation may be offered to Crown Court judges. This system will assist the Resident Judge in allocating complex confiscation cases by identifying a pool of judges with a higher level of training.

Part 3 – Benefit (Chapters 8 – 11)

1.56 Parts 3 and 4 deal with the "substantive" parts of confiscation orders, namely the determination of the defendant's benefit from crime and the recoverable amount. We make recommendations aiming to improve the way the benefit and the recoverable amount are determined by the court, including recommendations regarding issues such as: the apportionment of benefit in case of multiple defendants; criminal lifestyle cases and related assumptions; and hidden assets and tainted gifts. The overall purpose of this set of recommendations is to ensure a more accurate and realistic calculation of the figures that form the basis of a confiscation order.

Chapter 8: Defining and Apportioning Benefit

1.57 Chapter 8 deals with the determination of the defendant's benefit from crime. POCA 2002 provides that "a person benefits from conduct if they obtain property as a result or in connection with it".[48] Property has been "obtained" if the defendant "holds or obtains an interest in it".[49] We recommend replacing this test with one which asks whether the defendant has "gained" property as a result of the conduct.

1.58 We then recommend the introduction of a second stage of the calculation, which requires the court to make an order that the defendant's benefit is equivalent to the amount determined to have been "gained" unless the defendant proves or the court is otherwise satisfied that it would be unjust to do so because the defendant intended to have only a limited power to dispose of or to control the gain. This would allow the court to temper a rigid calculation of the defendant's gain which might lead to unjust outcomes.

1.59 We recommend that the definition of "gain" should include:

(1) keeping what one has;

(2) getting what one does not have; and

(3) gains that are temporary or permanent.

1.60 We also make recommendations concerning the apportionment of benefit. We recognise that multiple co-defendants might have not benefitted equally from the proceeds of crime. Our recommendations are intended to reflect more accurately the shares for the apportionment of benefit. We therefore recommend that:

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48 Proceeds of Crime Act 2002, s 76(4).
49 Proceeds of Crime Act 2002, s 84(2).

(1) The determination as to whether the defendant intended to have only a limited power to dispose of or to control the gain – extends to issues of apportionment of the gain between the defendant and others.

(2) In the event that the court cannot make a determination about defined shares for the apportionment of benefit, the court must make an order that each defendant is liable for an equal share of the whole of the benefit unless it would be in the interests of justice to impose equal liability for the whole of the benefit.

1.61 We finally recommend that any issue relevant to the defendant's intention with regard to the gain should be raised by defendants in their response to the prosecutor's statement.

Chapter 9: Benefit in Criminal Lifestyle Cases

1.62 The current POCA regime (section 75) provides that, if a defendant is found to have a "criminal lifestyle", the benefit from crime will also be calculated to include benefit from "general criminal conduct". In Chapter 9, we make recommendations in relation to the "criminal lifestyle" requirement.

1.63 The criminal lifestyle assumption can be triggered by the types of offences committed by the defendant. The relevant offences are specified in Schedule 2 to POCA 2002, and include, for example, trafficking and money laundering. We recommend adding two offences to Schedule 2, namely: keeping a brothel;[50] and environmental offences related to unlawful waste disposal.[51]

1.64 The criminal lifestyle assumption may also be applied if another trigger is satisfied: either a) the defendant is convicted of at least four offences in the same proceedings and benefited from each such offence ("multiple counts course"); or b) 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 from which he benefited ("multiple convictions course"). In order to simplify the law, we recommend harmonising the number of offences for both parts of the course of criminal activity trigger. Therefore, we recommend that the number of offences required to satisfy the course of criminal activity trigger is three offences.

1.65 We recommend including convictions for offences from which the defendant has attempted to benefit when considering relevant offences which trigger the criminal activity course.

1.66 Under the current confiscation regime, criminal lifestyle triggers (other than a conviction for Schedule 2 offence) are applied only if the defendant has benefitted by at least £5,000. We recommend that this threshold be increased to £5000, adjusted for inflation. As the value of money changes over time, we recommend that the recommended financial threshold should be reviewed by the Secretary of State every five years to ensure that it is applied equally to defendants and continues to reflect defendants' propensity to live off crimes.

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50 Sexual Offences Act 1956, s 33A.

51 Environmental Protection Act 1990, s 33(1)(a); Environmental Permitting (England & Wales) Regulations 2016, reg 38(1)(a).

Chapter 10: Applying the Criminal Lifestyle Assumptions

1.67 Chapter 10 deals with the application of the criminal lifestyle assumptions. Under the current confiscation regime, if either trigger is satisfied, the criminal lifestyle assumptions listed in sections 10(2) to (5) of POCA 2002 apply.

1.68 We recommend that the prosecution should have a discretion not to rely on the criminal lifestyle assumptions. This decision should be made at the earliest opportunity and the discretion should be exercised according to published guidance. This recommendation is intended to formalise the existing prosecutorial practice not to rely on the assumptions in every case, despite their mandatory application under the current confiscation regime. Such a discretion will allow the pursuit of confiscation in cases where the absence of discretion may result in no confiscation proceedings being brought at all due to a reluctance to undertake the complex and resource intensive financial investigation necessary when applying the criminal lifestyle provisions.

1.69 The current confiscation regime provides that the court should not apply the assumptions if there would be a "serious risk of injustice" in their application (section 10(6)(b) of POCA 2002). The case law has narrowly construed the provision, which is ordinarily applied only to prevent double counting, rather than more generally in the interest of justice. With our recommendations, we seek to restore the function of this provision as a safeguard against unjust applications of the assumptions. We therefore recommend that the "serious risk of injustice" test is clarified to ensure that in determining whether there would be a serious risk of injustice if the assumption were applied, the court should consider any oral or documentary evidence; and if documentary evidence is not put before the court, the reason why documentary evidence was not put before the court. Additionally, we recommend that the "serious risk of injustice" test should not be limited to preventing a risk of double counting, but instead should include consideration of any relevant factors which would cause a serious risk of injustice if an assumption were made.

Chapter 11: Assets Tainted by Criminality

1.70 Since POCA 2002 was introduced, there have been over one hundred appellate decisions regarding the calculation of benefit, which has created uncertainty in the law. We recommend that principles developed in the case law should be incorporated into statutory provisions, in order to make the law clearer and more accessible. This chapter deals with the incorporation of case law related to tainted gifts into either Criminal Procedure Rules or a practice direction.

1.71 We recommend that the CPRC should consider inclusion of relevant cases as guidance for when the following circumstances arise:

(1) In determining whether benefit apparently accruing to a company may be treated as benefit accruing to a company.

(2) The issue of common intention constructive trusts.

(3) The issue of alleged benefit when a business (whether incorporated or otherwise) is alleged to be part-tainted by criminality.

(4) In relation to tobacco importation cases:

(a) a summary of principles relevant to benefit in tobacco importation;

(b) in calculating the benefit obtained from evading duties payable on tobacco; and

(c) the relevant retail price of counterfeit goods.

(5) 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).

1.72 In addition, we recommend that the primary legislation include provisions to the effect that the defendant's benefit is limited where property was:

(1) part-purchased with the proceeds of crime, to the value of that part of the property which was derived from criminal conduct; and

(2) purchased with credit, to that part of the property which would be payable to the defendant following the repayment of the creditor or creditors in connection with that purchase.

Part 4 – Recoverable Amount (Chapter 12)

Chapter 12: Recoverable Amount

1.73 In Chapter 12, we make recommendations concerning the recoverable amount. The recoverable amount represents the amount that the defendant is required to pay towards a confiscation order.

1.74 Under the current law, a defendant from whom assets have been seized is still treated as having obtained the benefit. As a result, defendants are subject to a double deprivation because they need to account to the state for the benefit that has already been seized in the form of the assets. To correct this problem, we recommend that the court should identify any property that was seized by or disgorged to the state or repaid to victims by the defendant, and reduce the total benefit figure by that amount to arrive at the outstanding benefit figure. The recoverable amount will be determined with reference to the defendant's available amount but cannot be more than the outstanding benefit figure.

1.75 We discuss cases where confiscation orders are made in an amount less than the benefit figure. We observe that, although confiscation orders made in amounts that are nominal or significantly lower than the benefit from crime serve a legitimate purpose, they undermine public confidence in the confiscation regime and send the inappropriate message that crime does pay. Therefore, we recommend that, where the confiscation order is made in an amount less than the recoverable amount, the court should satisfy itself that the defendant understands:

(1) What each figure means.

(2) Why the figures are different.

(3) That it will be open to the prosecution to seek to recover more of the outstanding benefit in future, until it is repaid in full.

Moreover, we recommend that the Judicial College consider the inclusion of an example direction in the Crown Court Compendium to assist judges to this end.

1.76 We also make a set of recommendations in relation to "hidden assets". This is a term developed by judges and practitioners to describe any unexplained difference in value between the defendant's benefit and the value of their known assets.

1.77 Under the current confiscation regime, findings about hidden assets are a product of case law. POCA 2002 does not provide any criteria in that respect. This has caused problems in terms of inconsistent application of the case law. Therefore, we believe that principles relating to hidden assets should be codified in order to make the law clearer and more accessible. To this end, we recommend including a provision to the effect that where the value of the defendant's available amount appears to be lower than the value of the benefit the court may treat the difference between the values as assets which have been hidden by or on behalf of the defendant, and which are available to satisfy the confiscation order. We further recommend that factors to assist the court in determining whether there are hidden assets be set out in statute.

1.78 Finally, in this chapter, we make a recommendation concerning tainted gifts. Section 77(5)(a) of POCA 2002 defines a tainted gift as a gift made "after the date" on which the offence was committed. To bring the provision in line with existing case law, we recommend amending this definition to provide that a gift is tainted if it was made by the defendant at any time after "the commission of the offence". This amendment will prevent defendants from arguing that a gift should not be treated as a tainted gift because the transfer occurred on the same date on which the offence was committed.

Part 5 – Enforcement (Chapters 13 – 14)

1.79 In Part 5, we discuss the enforcement of confiscation orders. We make recommendations aiming to strengthen the existing enforcement regime, covering issues such as contingent enforcement orders, the venue of enforcement proceedings, confiscation assistance orders, the application of collection orders to confiscation orders and the power of courts to compel the defendant's attendance during enforcement proceedings.

Chapter 13: Contingent Enforcement Orders

1.80 In this chapter, we make recommendations regarding "contingent orders". We recommend that the Crown Court should have discretion, upon imposing a confiscation order, to make an enforcement order that takes effect either immediately or on a "contingent basis" (subject to a further confirmatory 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 view of any third-party interests, there are reasonable grounds to believe that, 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.

1.81 Once the Crown Court is satisfied that either (1) or (2) applies, it should consider some factors when exercising its discretion to make a contingent order. We

recommend a list of non-exhaustive factors, for example: the use ordinarily made, or intended to be made, of the defendant's property; the needs and financial resources of the current or former spouse or civil partner of the defendant, as well as of any child; and whether the asset in question is tainted by criminality.

1.82 Since confiscation orders are imposed by the Crown Court and enforced by a magistrates' court, there is an inevitable delay in enforcement orders being made which might be exploited by defendants seeking to frustrate enforcement. To prevent this, we recommend that the Crown Court should be able to impose contingently every type of enforcement order that can currently be made in the magistrates' court.

1.83 We also seek to ensure that third-party interests are duly protected after the confiscation hearing itself. To this effect, we recommend that a third party who claims an interest in property may raise such an interest in the Crown Court after the making of the confiscation order. They may also raise an interest in property before either the assets are automatically vested in an enforcement receiver or a contingent order is activated, if the third party was not given a reasonable opportunity to make representations at an earlier stage of the confiscation proceedings, or there was a good reason for not making an application earlier, and there would be a serious risk of injustice to the third party if the court was not to hear the application.

1.84 In circumstances where there are related family law proceedings which are running concurrently to the confiscation proceedings, we recommend that where the intervention of the prosecution authority in the family law proceedings is likely to represent an increase in complexity such that the High Court would be the appropriate venue for concurrent disposition of the proceedings, or it is otherwise in the interests of justice for concurrent disposition of the proceedings to take place,[52] allocation of both proceedings may be to the High Court.

Chapter 14: Enforcement

1.85 Chapter 14 deals with other aspects of enforcement of confiscation orders. We discuss the benefits of adopting a more flexible approach regarding the venue for enforcement proceedings. As noted above, under the current confiscation regime, enforcement proceedings are heard in the magistrates' court. However, we have determined that transferring some elements of enforcement to the Crown Court might incentivise defendants to cooperate and ensure that enforcement decisions are taken by the tribunal with the detailed knowledge of the case (since the Crown Court imposes the confiscation order). Therefore, we recommend that the Crown Court and the magistrates' court should have flexible powers to transfer enforcement proceedings between them to achieve the best enforcement of the confiscation order on the facts of each case.

1.86 In addition, we recommend the introduction of some measures designed to foster compliance with confiscation orders. First, we recommend that the Crown Court and the magistrates' court have the power to make confiscation assistance orders, which appoint an appropriately qualified person to assist defendants in satisfying their confiscation order. Such orders can be made either before or after the default term is

[52] For example, because of a particular need for expeditious resolution of the confiscation or because a history of obstruction of the confiscation proceedings suggests that the defendant is likely to appeal both any order of the Family Court and the confiscation order.

activated (in the latter case, for example, an assistance order might serve the purpose of assisting defendants to realise assets quickly so they can be released from custody earlier). Second, we recommend that the court should have a bespoke power to direct a defendant to provide information and documents as to their financial circumstances.

1.87 Finally, we make recommendations to strengthen the powers available to magistrates' courts in confiscation proceedings. First, we recommend making explicit that collection orders can be applied to confiscation orders. Collection orders give a fines officer powers to manage the arrangements for a defendant to pay a financial order imposed by the court, without necessarily reverting to the court. Therefore, the work of fines officers will save court time in confiscation proceedings. Second, we recommend that magistrates' courts should have the power to compel defendants to attend court at any stage of enforcement proceedings.

Part 6 – Reconsideration (Chapters 15 – 16)

1.88 Part 6 contains recommendations regarding reconsideration of confiscation orders. The need to reconsider confiscation orders arises when there are changes of circumstances which require a confiscation order to be varied. Reconsideration permits some degree of flexibility to accommodate such changes after a confiscation order has been made. We discuss issues such as upwards and downwards variation of the available amount and the benefit figure, as well as provisional discharge of a confiscation order.

Chapter 15: Reconsideration

1.89 This chapter concerns reconsideration of the available amount. We discuss the benefits of setting out statutory restrictions on an application for upwards reconsideration of the available amount (section 22 of POCA 2002). We recommend that an application for upwards reconsideration should only be available where: (1) assets held by the defendant have been identified that should have been but were not identified at the time of the confiscation hearing; or (2) assets that were identified as held by the defendant at the time of the confiscation hearing and were realised pursuant to the confiscation order have generated an amount greater than their original valuation. This recommendation encourages the defendant to engage with the confiscation order through full disclosure and swift compliance.

1.90 Under the current law, the Crown Court has no power to increase the compensation element to be paid out of a confiscation order when the confiscation order is varied upwards (section 22) or downwards (section 23). We recommend that when making an order to vary the available amount, the Crown Court should have the power to adjust the compensation element of the order to reflect the variation. This recommendation will achieve the dual aims of prioritising payment of compensation and preventing the defendant from facing unpayable orders.

1.91 We also recommend that, when an order to vary the available amount upwards is made, the court may set a deadline by which the reconsidered available amount must be paid. Under the current regime, defendants might be given time to pay the available amount pursuant to the original confiscation order but become immediately liable to pay the reconsidered amount (as there is no power to fix a deadline). Our recommendation will remove this disparity.

1.92 In addition, we make two recommendations regarding downwards reconsideration (section 23). First, we recommend that a designated officer of the magistrates' court should also have the power to apply for a section 23 order. The extension of this power to designated officers should prevent the need for defendants to make applications to the Crown Court, reducing also the burden generated by unnecessary enforcement hearings in the magistrates' court.

1.93 Second, we recommend that section 23 should be amended to: (1) provide for the downwards reconsideration of the available amount where the value of an asset (including a tainted gift) identified in the original confiscation order realises a lower amount than its original valuation; and 2) recognise substitute assets, ensuring that defendants are not penalised for how they choose to satisfy the confiscation order. This recommendation mirrors the recommendation made with regard to section 22 (upward variation). Its rationale is to avoid penalising defendants for events that occurred outside their control and that would prevent the satisfaction of the original confiscation order. This could happen when assets have been overvalued, or there are good reasons for not realising certain assets (for example, a family home), or the asset is a tainted gift.

1.94 We also recognise the need to align our policy on reconsideration of the available amount with reconsideration of the benefit figure (section 21). Therefore, we recommend that the calculation of the available amount after upwards reconsideration of the benefit figure pursuant to section 21 should require a new application pursuant to section 22 which will ensure the exclusion of after-acquired assets. This recommendation seeks to ensure that the defendant does not escape liability for the value of assets which they held at the time of the original confiscation order while also ensuring that section 21 does not have the effect of inadvertently allowing law enforcement to bypass the restrictions of section 22 and pursue the defendant's after-acquired assets.

1.95 Finally, we recommend that when a defendant obtains a downwards variation in connection with an asset which was realised for less than the value that was ascribed to it at the time of the confiscation order, the defendant's benefit figure may also be reduced accordingly. This recommendation is in line with our policy of preventing a defendant from being exposed to continuing liability when they have already satisfied the confiscation order.

Chapter 16: Provisional Discharge

1.96 Provisional discharge is part of our recommended framework on reconsideration described at paragraph 1.85.. As with the other recommendations on reconsideration, the aim of our recommendations on provisional discharge is to ensure some degree of flexibility to accommodate future changes in circumstances. The recommendations are intended to avoid unlimited enforcement actions when there is no realistic prospect of recovering the remainder of the order, despite the reasonable efforts of enforcement authorities.

1.97 We make two recommendations regarding the reasons which might justify the provisional discharge of a confiscation order. First, we recommend that provisional discharge of a confiscation order should be available where, in light of any enforcement action taken and any reasonable enforcement measures which may be

taken within a reasonable period from the date of the provisional discharge hearing, the amount recoverable would be no more than minimal (whether in absolute terms, or when compared to the value of the outstanding confiscation order). We recommend that these powers should apply to confiscation orders already made (whether under POCA 2002 or pre-POCA 2002 legislation) as well as to new orders.

1.98 Second, we recommend that where the only part of an order that is outstanding is interest, the court should have the ability to discharge the confiscation order provisionally in the interests of justice.

1.99 We also address the consequences of provisional discharge. We recommend that the consequences of an order for provisional discharge be that the confiscation order is treated as no longer in force. Therefore, no further enforcement action (including accrual of interest and the activation of the default term) can be taken to recover sums under the confiscation order, unless the discharge order is revoked.

1.100 The form of discharge that we recommend is "provisional" because a confiscation order may be revived after having been discharged. We set out two conditions for the revocation of a provisional discharge, namely where (1) the conditions for provisional discharge no longer apply, and reasonable enforcement measures become available; or (2) an order is made pursuant to section 21 to increase the benefit figure or section 22 to increase the available amount.

Part 7 – Preserving the Value of Assets (Chapters 17 – 19)

1.101 In Part 7, we detail our policy and the related recommendations regarding the preservation of the value of assets in confiscation proceedings. Our recommended regime aims to protect the value of assets against dissipation before a confiscation order is made and enforced, with a view to preventing defendants from frustrating the purpose of confiscation proceedings. Part 7 covers not only restraint of assets, but also other measures that may have a positive impact on the preservation of assets, such as training of police officers involved in confiscation proceedings and the implementation of a national asset management strategy. We also deal with the challenges posed by cryptoassets.

Chapter 17: Restraint

1.102 Chapter 17 discusses restraint. A restraint order is intended to prevent realisable property being dissipated before a confiscation order is made or enforced. It works by prohibiting any person from dealing with any realisable property specified in the order.

1.103 We recommend placing on a statutory footing the "risk of dissipation" test currently applied by courts but not explicitly mentioned in Part 2 of POCA 2002. We recommend introducing a non-exhaustive list of factors relevant to the risk of dissipation. These would be: the actions of the person whose assets are to be restrained; the nature of the criminality alleged; the nature of the assets; the value of the alleged benefit from criminality; the stage of proceedings; the person's previous good or bad character.

1.104 Under the current confiscation regime, a restraint order must be discharged if criminal proceedings are not started within reasonable time (section 42(7)). In *R v S*,[53] the Court of Appeal suggested non-exhaustive factors that courts should consider when deciding whether criminal proceedings are commenced within a reasonable time for the purposes of determining whether a restraint order should be discharged. We recommend including these non-exhaustive factors, as well as others, in POCA 2022.

1.105 We also make recommendations regarding the release of restrained funds to allow a defendant to meet certain expenses. First, we deal with "reasonable living expenses" (section 41(3)). We recommend that in determining whether restrained funds should be released to meet reasonable living expenses, the court should be guided by all of the circumstances of the case as known at the time, and by the need to preserve assets for confiscation. In assessing the circumstances of the case, the legislation should include the list of indicative factors suggested by the Court of Appeal in *R v Luckhurst*.[54] Moreover, we recommend that the CPR should provide that an application to release restrained funds for reasonable living expenses should be supported by evidence (including a schedule of income and outgoings).

1.106 Second, we deal with legal expenses. We recommend that the legislation should permit legal expenses connected with criminal proceedings and confiscation to be paid from restrained funds, subject to judicial approval of a cost budget and a table of remuneration, set out in a statutory instrument.

1.107 Finally, we make a recommendation about costs in restraint proceedings. The general rule in restraint proceedings is that the unsuccessful party will be ordered to pay the costs of the successful party. We acknowledge that this inhibits applications for restraint orders, since the "losing" prosecution incurs defence costs regardless of its good faith and the reasonableness of the application. We conclude that it is undesirable to focus singularly on the end result because this has a chilling effect on applications. For this reason, we recommend that a power to award costs should be included in POCA 2002 and the CPRC should consider outlining the procedure for an assessment of costs in the CPR in the following (non-exhaustive) terms:

(1) Costs should be limited to each application.

(2) Costs orders should not be made against the defendant.

(3) If the prosecution brings a successful application, each party should bear their own costs.

(4) If the prosecution brings an unsuccessful application, there is a presumption that costs follow the event (that is, that the prosecuting authority pays the defence costs) unless the prosecution can demonstrate that the application was reasonably brought.

(5) In deciding whether the application was reasonably brought, the fact that the application was previously successful does not necessarily mean it was reasonably brought.

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53 *R v S* [2019] EWCA Crim 1728, [2020] 1 WLR 109.

54 *R v Luckhurst* [2020] EWCA Crim 1579, [2020] 1 WLR 1807.

Chapter 18: Effective Asset Management

1.108 Chapter 18 discusses other steps which may be taken to manage or preserve the value of assets in addition to restraint.

1.109 First, we recommend that the National Police Chiefs' Council reconsider the training needs of all police officers in connection with confiscation, and in particular those who may need to exercise or oversee the powers of search and seizure in connection with confiscation.

1.110 Second, we make a recommendation regarding detention of assets. Under the current regime, detained assets may be sold on application to the magistrates' court (section 67A). However, there is no power to sell assets *before* a confiscation order is made in order to preserve their value (unless both a restraint order and a management receivership order are obtained). We consequently recommend that the Crown Court ought to have the power to appoint a management receiver (who may in turn sell the property) without additionally having to restrain the property subject to further detention.

1.111 Finally, we recommend that the Government consider developing a national asset management strategy and a Criminal Asset Recovery Board ("CARB"). We believe that a national strategy, together with a body charged with developing such a strategy, may have several benefits, including generating policies in relation to the management of assets, setting clear guidelines to determine who the appropriate receiver should be and developing a national procurement process.

Chapter 19: Cryptoassets

1.112 In this chapter, we observe that the value of cryptoassets may fluctuate to such an extent that a valuation of a cryptoasset at the start of a lengthy confiscation hearing may be very different to its valuation at the end of the confiscation hearing. We also consider concerns relating to the restraint, secure storage and exchange of cryptoassets. We recommend that any national asset management strategy developed by CARB should cover issues in connection with the storage and exchange of cryptoassets.

Part 8 – Post Confiscation Order Issues (Chapters 20 – 22)

1.113 In Part 8, we discuss issues arising after a confiscation order is made, covering aspects such as multiple confiscation orders, the interaction between a confiscation order and a compensation order, as well as routes to appeal confiscation orders and other orders made in confiscation proceedings.

Chapter 20: Multiple Confiscation Orders

1.114 Chapter 20 makes recommendations regarding multiple confiscation orders (a situation arising when a defendant is subject to more than one order). Consolidated orders will arise in two contexts: (a) consolidation of a new order with an earlier confiscation order and (b) consolidation of concurrent confiscation proceedings into a single order.

1.115 The policy underpinning the current POCA 2002 provisions on multiple confiscation orders (sections 8 to 10) is to prevent double counting. Despite that, the current

regime does not account for the realities of obtaining and enforcing multiple confiscation orders, especially when different prosecution authorities may seek confiscation orders against the same defendant. Therefore, we recommend a new regime that would simplify the process for defendants and the courts when making and enforcing multiple confiscation orders, while continuing to prevent double counting:

(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, the court should have the power to:

(a) amend the benefit calculation for the earlier confiscation order within six years of the date of conviction (pursuant to section 21 of POCA 2002); and

(b) consolidate any amount outstanding under it into the new confiscation order.

1.116 In line with our general policy on the prioritisation of compensation, we recommend that payments 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 21: What Happens When a Confiscation Order is Paid?

1.117 This chapter discusses what happens when a defendant pays sums towards their confiscation order. We deal with two specific issues.

1.118 First, we discuss the Asset Recovery Incentivisation Scheme (ARIS). ARIS was established in 2006 and provides that operational agencies which investigate, prosecute and enforce confiscation orders receive a proportion of funds recovered at the conclusion of proceedings. ARIS is outside the scope of our review. However, we observe that the criticism levelled at ARIS is that the scheme may distort the objectives of confiscation, by focusing on recovery of money to the state, rather than deprivation from the defendant. The main concern is that ARIS creates a conflict of interests, because it provides law enforcement agencies responsible for confiscation with incentives to pursue financial gain for their organisations. Therefore, we conclude that the potential for conflicts of interest is a matter for the Home Office to consider during its review of ARIS.

1.119 Second, we discuss the interaction between confiscation and compensation. We recognise that reform of the compensation regime falls outside the remit of our review of confiscation. Consequently, we focus on how to prioritise the compensation of victims of crime when both a compensation order and a confiscation order are made. We recommend 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 the confiscation order.

Chapter 22: Appeals

1.120 In Chapter 22 we consider the appeals structure of Part 2 of POCA 2002 and in particular the impact of our recommendations on the existing routes of appeal. We make a series of recommendations which, in some instances, seek to clarify the existing rights and routes of appeal and in other instances, establish new routes of appeal which correspond to new aspects of the confiscation process.

1.121 First, we recommend that all routes of appeal be made explicit within Part 2 of POCA 2002, including signposting other legislation where relevant in order to ensure that practitioners have the relevant information easily accessible.

1.122 Second, we recommend that the Court of Appeal (Criminal Division) ("CACD") be given the power to remit confiscation orders to the Crown Court for redetermination in two additional circumstances: (1) upon any successful prosecution appeal in connection with a confiscation order; (2) upon any defence appeal against conviction which is successful against some counts but not all, and the defendant is to be resentenced. This will ensure that the Court of Appeal is not burdened with additional work where the Crown Court is better placed to hear the proceedings and make the calculation.

1.123 Third, we recommend that contingent enforcement orders be appealable at the point they are made in accordance with the general right of appeal against the confiscation order itself. Exceptions to this general principle arise where the type of contingent order is one which is currently made by the magistrates' court and for which there is no existing right of appeal. In these cases, the rights of appeal in the Crown Court will mirror the existing rights which apply to the orders when made in the magistrates' court. We also recommend that the CACD have the power to remit the contingent enforcement order to the Crown Court for reconsideration of its terms where an appeal against the order has been successful.

1.124 Fourth, we recommend that there ought to be a statutory bar on appeals against contingent enforcement orders once those orders have been activated by way of a further order of the Crown Court. This will prevent a frustration of enforcement due to multiple concurrent appeals.

1.125 Finally, we recommend that enforcement steps ought to be stayed in the following circumstances: (1) when an application for leave to appeal either a confiscation or contingent enforcement order is lodged; (2) where an application to appeal is refused by the single Judge but renewed in-time to the full Court; (3) where leave to appeal to the CACD is granted out of time; (4) where the activation of a contingent enforcement order is challenged in the High Court out of time; and (5) where an appeal is lodged along with an application for an extension of time.

Key themes

1.126 Throughout consultation and policy development, several key themes emerged.

"We do it anyway"

1.127 First, a common theme in consultation responses was, "we do it anyway". This response was used both:

(1) to support reform because the law would reflect current practice; and

(2) to suggest that reform is not needed, because practice has developed either in line with case law or in spite of the law.

1.128 Our terms of reference included simplification and clarification of the law. Therefore, where valuable but informal practices have developed, and where application of the law currently depends on consideration of what is often detailed case law, we provisionally proposed that codification of those practices and case law is appropriate. We remain of the view that the law should be made as accessible and as transparent as possible.

1.129 To this end we have consulted extensively with the CPRC who have provided advice as to which of our recommendations might be suitable for inclusion in the Criminal Procedure Rules. We have also consulted with the Office of the Parliamentary Counsel who have provided advice as to which of our recommendations ought to be in primary legislation.

Simplification

1.130 Consultees were keen that the law be made as clear and simple as possible, for example by supporting the adoption of a single number of offences that trigger a finding of "criminal lifestyle", and by removing the sentencing "traps" that arise through the postponement regime.

Fairness

1.131 Even law enforcement stakeholders recognised that the confiscation regime can be draconian. Accordingly, we have sought to strike a balance by ensuring that the regime deprives a defendant of their proceeds of crime proportionately, including in the following ways.

(1) We have reformulated the calculation of the total benefit so it employs a clear definition of what the defendant has gained, and importantly, what the defendant intended to gain. We have also sought to ensure that the gain is properly apportioned between defendants.

(2) We have sought to enhance enforcement measures (for example through the introduction of contingent enforcement orders) but also to provide support to a defendant in realising their assets before the state intervenes (through confiscation assistance orders).

(3) We recommend that the court continues to be able to order that the amount to be paid under a confiscation order is increased. However, we recommend the exclusion of "after-acquired" assets from such orders, thereby encouraging full and frank disclosure at the time of confiscation, increasing finality and supporting rehabilitation and fairness.

1.132 Amongst consultees, the need to ensure fairness was often tempered by the view that enhanced judicial discretion will lead to judges seeking to "pass the buck" and result in a lack of certainty. We consider that our recommendations strike an appropriate balance between achieving a just outcome and certainty. We have considered

carefully, for example, the degree of discretion which should be afforded to judges in disapplying the lifestyle assumptions. Our recommendations in other areas of the report, for example as to judicial training and identification of an appropriate judge, will also facilitate the making of appropriate determinations.

Legal aid

1.133 A perceived inadequacy of legal aid remuneration for confiscation was a key theme which emerged during the consultation. Our terms of reference do not extend to making recommendations for legal aid rates to be changed. However, in late 2021 the Independent Review of Criminal Legal Aid, chaired by Sir Christopher Bellamy QC (as he then was), reported its findings and called for a significant increase in criminal legal aid funding (a minimum of £135 million in additional funding per annum).[55] For the purposes of the Law Commission's project, we have considered the perceived inadequacy of legal aid in the context of resolving the issue of whether funds should be released from restraint to pay for legal fees.

Victims, third parties and compensation

1.134 Consultees considered that victims and third parties are often left behind in the confiscation process. As with legal aid, consultees felt that the law surrounding compensation orders, and the treatment and status of victims in the criminal justice system, requires review. Such a full-scale review is far beyond our terms of reference and may require a project of its own. Indeed, the Crown Prosecution Service has suggested a project on compensation form part of the Commission's 14th programme of law reform, and a number of criminal justice stakeholders have proposed projects on victims for inclusion in the programme.

1.135 As we explain above, and more fully in Chapter 2, although we provisionally proposed that compensation of victims should be an objective of the regime, we do not make such a recommendation. In our view, compensation of victims (along with deterrence and disruption) should be seen as effects of, rather than objectives of, the legislation. However, we do consider the place of victims and third parties throughout the report. We make recommendations as to:

(1) provision of information by third parties prior to confiscation;[56]

(2) attendance of third parties at the Early Resolution of Confiscation ("EROC") hearing to ensure that confiscation is resolved with their interests in mind;[57]

(3) making third party determinations expeditiously through the contingent order process;[58]

(4) third parties being a factor in assessing complexity, which should help cases involving third parties to be dealt with by appropriately experienced judges;[59]

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55 Sir Christopher Bellamy QC, *Independent Review of Criminal Legal Aid* (29 November 2021), para 1.38.
56 Chapter 4 – The Exchange of Information.
57 Chapter 5 – Early Resolution of Confiscation.
58 Chapter 15 – Reconsideration.
59 Chapter 7 – Forum.

(5) the possibility of joint enforcement proceedings with the family court, or clearly prioritised enforcement proceedings;[60]

(6) making compensation orders earlier;[61]

(7) deducting paid compensation (including voluntary compensation) in calculating the outstanding benefit, which incentivises the defendant to pay it; and[62]

(8) facilitating payment of compensation from confiscated funds.[63]

Prisoners

1.136 During the consultation, we heard about difficulties faced by prisoners in satisfying their confiscation orders. We subsequently met with the Prison Service in a multi-stakeholder meeting in which we discussed these difficulties. It is notable that Rules and guidance for prison staff on how to manage prisoners who have been given a confiscation order were updated on 30 June 2021.[64]

1.137 We take account of some of the difficulties faced by prisoners and defendants in general by permitting the court flexibility in making confiscation orders where the defendant cannot satisfy the burden of proof (for example, because they cannot produce evidence to support their claims because they are in prison). We also recommend the introduction of confiscation assistance orders to facilitate the payment of confiscation orders where it might otherwise be difficult to do so.

Interpreting the data

1.138 Throughout the report we have footnoted the number of consultees who have provided responses to each question. For most questions, we presented our provisional proposal and then asked consultees whether they agreed. Consultees were invited to select "yes", "no" or "other", and to give written comments. We have abbreviated the responses as follows:

(1) (Y) = yes

(2) (N) = no

(3) (O) = other

Website References

1.139 Throughout the report there are several footnotes which contain the links to websites. All of these were last accessed in August 2022.

ACKNOWLEDGEMENTS

1.140 We extend our gratitude to Rudi Fortson KC who acted as an expert consultant on this project.

60 Chapter 7 – Forum.
61 Chapter 3 – Timetabling.
62 Chapter 12 – Recoverable amount.
63 Chapter 21 – What happens when a confiscation order is paid?
64 PSI 16/2010, updated 30 June 2021.

1.141 While preparing this report, we have held a number of meetings with individuals and organisations and we are extremely grateful to them all for giving us their time and expertise so generously.

THE TEAM WHO WORKED ON THIS REPORT

1.142 Commissioners would like to thank the following members of the Law Commission who worked on this report: Tessa Donovan, Alexander Mills, Lucy Corrin, Michael Oliver and David Allan (lawyers); and Elizabeth Hartley and Dr Andrea Preziosi (research assistants).

Part 1: Objective of the Act

There is only one chapter in this part of the report (Chapter 2).

Chapter 2 provides an overview of the objectives often associated with the confiscation regime. It recommends that the principal objective of Part 2 of POCA 2002 should be "to deprive a defendant of their benefit from criminal conduct, within the limits of their means" and bodies exercising powers under Part 2 of POCA 2002 should pursue this objective.

Chapter 2 also includes a discussion of the requirement of proportionality in the making of confiscation orders and how it relates to third-party interests. In relation to proportionality, we conclude that our recommended confiscation regime complies with the European Convention of Human Rights

Chapter 2: Objective of the Act

INTRODUCTION

2.1 In Chapter 5 of the consultation paper,[1] we discussed the considerations that guide a court in the exercise of its powers. In addition, we examined the requirement that the court must make a confiscation order that is "proportionate" to the objectives of the legislation.

2.2 We identified four objectives that have been associated with the confiscation regime throughout its evolution:

(1) taking away the profits or proceeds of crime;

(2) punishment;

(3) deterring and disrupting criminal activity; and

(4) the compensation of victims.[2]

2.3 We then considered how those objectives are prioritised under the current confiscation regime and the priority that should be afforded to those objectives in a reformed regime, when making a determination about proportionality, and in relation to decision making under Part 2 of POCA 2002 more generally.

Clarity and consistency as to the purpose of the regime

2.4 In Chapter 5 of our consultation paper we observed that to ascertain the objectives of the regime one has to consider a myriad of authorities,[3] sources of guidance as to statutory intent[4] and the legislation itself[5] while adding qualifications to references to punishment that have been made.[6]

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1 Confiscation of the Proceeds of Crime after Conviction: A Consultation Paper (2020) Law Commission Consultation Paper No 249, p 86.

2 CP 249, para 5.2.

3 See (amongst others) on deprivation of criminal property as an objective: *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. On deterrence and disruption, see *R v Sekhon* [2002] EWCA Crim 2954, [2003] 1 WLR 1655, on punishment see: *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099; *R v X* [2007] EWCA Crim 2498, (2007) 151 SJLB 1434; *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [2]; *R v Omorogieva* [2015] EWCA Crim 382; *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] *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [55] and *R v Andrewes* [2020] EWCA Crim 1055 at [85].

4 *Hansard* (HC) 21 January 1986, vol 90, col 241; *Hansard* (HL) 4 March 1986, vol 472, col 91; *Hansard* (HL) 27 April 1987, vol 486, cols 1269 and 1287; *Hansard* (HC) 18 January 1988, vol 145, col 736; Criminal Justice: The Way Ahead (2001) Cm 5074; Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), paras 3.6, 3.7 and 3.10; Home Office, Serious and Organised Crime Strategy (2013) Cm 8175, p 34; *Home Office,* Serious and Organised Crime Strategy (2018) Cm 9718, para 65.

5 Proceeds of Crime Act 2002, s 6(6), 13(5), 13(6), 55(5).

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

2.5 We will discuss punishment in more detail from paragraph 2.121 below. It is sufficient to anticipate here that in *R v Bajaj*,[7] the Court of Appeal emphasised that punishment is not an objective of the confiscation regime. It considered that (whether consciously or otherwise) the prosecution had appeared to approach confiscation as a punitive exercise.

> Aspects of the prosecution's evidence and arguments in the confiscation proceedings perhaps revealed an approach to the effect that people like the respondent…should be hit very hard when engaging in conduct, and permitting squalid overcrowding, of this kind. That may sometimes well be true. But that is ordinarily the function of the punishment (as the judge appreciated): it should be no part of the confiscation process itself, which is designed to require criminals to disgorge the proceeds of their criminality. That does not, of course, of itself invalidate the confiscation process in this case: but it may to some extent help explain the seemingly entrenched views held.[8]

Proportionality and confiscation

2.6 Before we move on to examine the objectives of the confiscation regime, it is necessary to discuss the proportionality requirement. Proportionality is relevant in relation to the objective of the confiscation regime for two main reasons. First, as we will explain, the identification of the objective(s) of the confiscation regime is necessary in order to assess whether a confiscation order is proportionate. Second, the discussion of proportionality will allow us to assess the compatibility of our recommended regime with the European Convention of Human Rights ("ECHR"), in particular regarding the proportionality of interferences with third-party interests.

2.7 In the consultation paper we discussed the principle of proportionality and how it applies to the making of confiscation orders.[9] We do not intend to reproduce this analysis here except to note that the Serious Crime Act 2015 amended POCA 2002 to introduce a requirement that the court consider whether a proposed confiscation order is "proportionate".[10] In *Paulet v UK*, delivered before the amendment to POCA 2002, the European Court of Human Rights ("ECtHR") had also already confirmed that courts must determine whether a confiscation order would constitute a proportionate interference with the defendant's right to property.[11]

2.8 As a result of the amendment to POCA 2002, rather than requiring the court to make an order that the defendant pay the whole of their "recoverable amount"[12] in all circumstances, the court was henceforth required to make an order that the defendant

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punishment needed some qualification. See also *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] to this effect.

7 *R v Bajaj* [2020] EWCA Crim 1111, [2020] 8 WLUK 177

8 *R v Bajaj* [2020] EWCA Crim 1111, [2020] 8 WLUK 177 at [29].

9 CP 249, from para 5.4.

10 Serious Crime Act 2015, sch 4, para 19. We set out the detailed history which led to the statutory amendment in CP 249, paras 5.2 to 5.19.

11 *Paulet v UK* App No 6219/08, paras 65 to 69.

12 CP 249, ch 15.

repay the recoverable amount "only if, or to the extent that, it would not be disproportionate to require the defendant" to do so.[13]

2.9 In *R v Andrewes* (which was handed down after completion of our consultation paper)[14] the appellant argued that the confiscation order in the sum of the whole salary obtained for a job secured by making false and dishonest statements on his CV was disproportionate. Mr Andrewes had obtained the post of Chief Executive Officer of a hospice, where he had worked in that capacity for ten years and his performance had been widely praised. The Court of Appeal observed that "the 2002 Act proffers no criteria by reference to which an assessment of disproportionality for the purposes of making a confiscation order, is to be made".[15] It examined the Supreme Court decision in *R v Waya* which had led to the statutory amendment and concluded that the Supreme Court had neither cited nor discussed the approach to proportionality that has been adopted in the civil courts[16] in the context of confiscation.[17] Instead, it observed that proportionality in confiscation cases is determined primarily with reference to the objectives of the legislation.[18]

2.10 The Supreme Court handed down the judgment in *R v Andrewes*[19] in August 2022. The Court conducted the analysis with reference to section 6(5) of POCA 2002 and affirmed the application of the four-step analysis of proportionality that was applied in *Bank Mellat v HM Treasury (No 2)*:[20]

> There is the legitimate aim of stripping a criminal of the fruits of crime, confiscation is a rational means of achieving that aim, and there are no less intrusive means of doing so. It follows that the sole step in issue is the fourth step – often referred to as "proportionality stricto sensu" – which asks whether the measure is a proportionate means of achieving the legitimate aim, here of stripping the criminal of the fruits of crime. The disproportionality proviso to section 6(5) is focused on that crucial issue and is asking precisely the same question. Is the confiscation of the sum in question (the recoverable amount) a proportionate means of stripping the criminal of the fruits of crime?[21]

2.11 The Court further cited the decision in *R v Waya*[22] and focussed on the discussion of disproportionality at paragraph 34 of that judgment, which reads:

> There may be other cases of disproportionality analogous to that of goods or money being entirely restored to the loser. An example is where the defendant, by

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

14 *R v Andrewes* [2020] EWCA Crim 1055, [2020] 8 WLUK 56.

15 *R v Andrewes* [2020] EWCA Crim 1055, [2020] 8 WLUK 56 at [78].

16 *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69; *R v Bank Mellat v HM Treasury* [2013] UKSC 38, [2014] AC 700. At CP 249, paras 5.44 to 5.47, we set out the observations of Rudi Fortson KC to the effect that the three-stage approach to making a value judgment about proportionality adopted in *de Freitas v Permanent Secretary of Ministry for Agriculture, Fisheries, Lands and Housing* has not been applied to confiscation.

17 *R v Andrewes* [2020] EWCA Crim 1055, [2020] 8 WLUK 56 at [84].

18 *R v Andrewes* [2020] EWCA Crim 1055, [2020] 8 WLUK 56 at [81], relying in particular on its earlier decision in *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.

19 *R v Andrewes* [2022] UKSC 24.

20 *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700.

21 *R v Andrewes* [2022] UKSC 24 at [38].

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

deception, induces someone else to trade with him or to employ him in a manner otherwise lawful and gives full value for goods or services obtained.

2.12 This focus, in turn, allowed the court to concentrate on the lawfulness of the employment and distinguish Mr Andrewes' conduct from other types of criminal employment in which any deduction for "services rendered" would be inappropriate.

2.13 The Court ultimately concluded that it would be disproportionate to attribute all of Mr Andrewes' salary to benefit obtained from criminal conduct because Mr Andrewes performed the work lawfully (and successfully). Instead, the court decided that the benefit ought to be calculated by reference to what Mr Andrewes would have earned were the fraud not committed. This means they undertook a calculation whereby the salary Mr Andrewes was earning prior to the fraud was subtracted from the salary awarded to Mr Andrewes in the fraudulently obtained roles. This, the court determined, would provide a realistic value of what Mr Andrewes had actually "benefited" from the fraud and would be proportionate pursuant to section 6(5) of POCA 2002.

2.14 The decision of *R v Andrewes* affirms previous authority in relation to how proportionality ought to be determined and specifically provides guidance on how to calculate a proportionate benefit in a particular category of case (namely, CV fraud where the work performed is otherwise lawful).

Proportionality and Third-Party Interests

2.15 In the consultation paper, we did not undertake extensive analysis of third-party property rights in relation to the proportionality of confiscation orders because this concern did not arise during the pre-consultation period.

2.16 Where third-party rights arose in our analysis, such as in relation to the determination of the defendant's interest in property (pursuant to section 10A of POCA 2002) and in relation to the reconsideration of confiscation orders (pursuant to section 22 of POCA 2002), we considered the impact of the current system and our provisional proposals on third parties, though not through the lens of compatibility with article 8 of the ECHR or article 1 of Protocol 1 (A1P1) to the ECHR.

2.17 However, during consultation the issue of compatibility with article 8 and A1P1 was raised by stakeholders and we have consequently sought to explore more fully the way in which the confiscation regime affects third party property rights, principally in the context of proportionality and the objectives of the regime.

Confiscation and interferences with rights protected by the ECHR: the legal framework

2.18 A1P1 to the ECHR, entitled "protection of property", reads:

> 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.

2.19 Article 8 of the ECHR, entitled "right to respect for private and family life", reads:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.20 The Human Rights Act 1998 reproduces verbatim the two provisions in Schedule 1.

2.21 There might be significant overlap between the scope of A1P1 and the scope of article 8 of the ECHR, since the concept of "home" under the latter provision might fall within the concept of "property" under the former. The ECtHR has consistently held that "home" for the purpose of article 8 is an autonomous concept that does not depend on the classification under domestic law: therefore, "whether or not a particular premises constitutes a 'home' which attracts the protection of Article 8 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place".[23]

2.22 The ECtHR has clarified that the existence of a "home" is not dependent upon the existence of property rights or interests. It follows that a person might have property rights over a building or land for the purpose of A1P1, without having sufficient ties with the property for it to be considered their "home" for the purpose of article 8 of the ECHR.[24] Conversely, a person may have a home in which they hold no property rights. Where, however, a person has property rights in their home, both articles may be engaged. For this reason, the ECtHR has sometimes found a violation of both articles,[25] whereas in other instances it has found a violation of one of the two articles only.[26]

Confiscation and interferences with rights protected by the ECHR: overview of the case law

2.23 The ECtHR has ruled in multiple occasions on the compatibility of confiscation regimes with the rights protected by the Convention.

2.24 First, the ECtHR has analysed the compatibility of confiscation measures with the right to property under A1P1. In *Phillips v UK*,[27] the ECtHR held that a confiscation measure amounts to an interference with the right to peaceful enjoyment of possession (first paragraph of A1P1). However, such an interference falls within the scope of the second paragraph of A1P1, which allows States to control the use of

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23 Among many: *Winterstein and Others v France* App No 27013/07, para 141; *Prokopovich v Russia* App No 58255/00, para 36.
24 *Khamidov v Russia* App No 72118/01, para 128; *Surugiu v Romania* App No 48995/99, para 63.
25 *Sargsyan v Azerbaijan* App No 40167/06 (Grand Chamber decision) paras 259-261.
26 *Ivanova and Cherkezov v Bulgaria* App No 46577/15, paras 62 and 76.
27 *Phillips v UK* App No 41087/97.

property to secure the payment of penalties.[28] In that respect, the ECtHR followed its previous case law, in which it was held that the confiscation regime established by the Drug Trafficking Act 1994 was punitive in nature.[29] For such an interference to be compliant with the second paragraph of A1P1, "there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised".[30]

2.25 Generally, regarding interferences with property rights the ECtHR has ruled that States have a wide discretion in choosing the appropriate instruments to fight crimes, including through the use of confiscation measures.[31]

2.26 Second, the ECtHR has dealt with the confiscation of a home from the perspective of article 8 of the ECHR. The approach followed by the ECtHR to evaluate the lawfulness of the interference with article 8 is substantially similar to the approach followed when A1P1 is engaged. In *Aboufadda v France*,[32] the ECtHR found that the confiscation of the applicants' house was lawful, since such an interference pursued one of the legitimate aims mentioned in paragraph 2 of article 8 (namely, the prevention of disorder and crime). In addition, the ECtHR held that the interference was not disproportionate, since national authorities had taken into account the personal circumstances of the applicants, allowing them to remain in the house until they had the possibility to find other accommodation (and in any event until the conclusion of the confiscation proceedings).[33]

2.27 Interestingly, one of the legitimate aims which establishes the lawfulness of this interference with property is one which we have determined ought not be an objective of the regime (namely, deterrence) which is discussed further below. However, while we have determined that deterrence should not be an explicit objective of the regime, we recognise the deterrent *effects* of the confiscation regime.

2.28 An important difference between interferences with A1P1 and interferences with article 8 of the ECHR concerns the level of discretion afforded to States. In fact, the ECtHR has clarified that the level of discretion regarding article 8 is narrower than that enjoyed by States when A1P1 is engaged,[34] due to "the central importance of Article 8 to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community".[35] Therefore, it is possible that the ECtHR might find a violation of article 8 and yet no violation of A1P1.[36]

The case law on confiscation and third-party property rights

2.29 In a few instances, the ECtHR has specifically dealt with third-party interests affected by confiscation proceedings. When third-party interests are at stake, the ECtHR

28 *Phillips v UK* App No 41087/97, paras 50-51.
29 *Welch v UK* App No 17440/90 paras 32-35.
30 *Phillips v UK*, para 51. See also *Balsamo v San Marino* App No 20319/17 and 21414/17, para 81.
31 Among many: *AGOSI v UK* App No 9118/80, para 52; *Gogitidze and others v Georgia* App No 36862/05, para 108.
32 App No 28457/10.
33 As above, paras 38-43.
34 As above, para 44.
35 *Gladysheva v Russia* App No 7097/10, para 93.
36 As happened in *Ivanova and Cherkezov v Bulgaria* App No 46577/15, paras 62 and 76.

assesses the lawfulness of the interference with property rights by following the general approach explained in the previous section.

2.30 In *Andonoski v the former Yugoslav Republic of Macedonia*,[37] the applicant complained that the confiscation of his taxi was disproportionate, since he had not been aware that the individuals he had transported were illegal migrants. In fact, the applicant had not been convicted of any offence.

2.31 In *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v Slovenia*,[38] the applicant company complained that the confiscation of its lorry was disproportionate. The driver of the lorry had been convicted for smuggling drugs, but there was no indication that the company had been involved in the commission of the offence.

2.32 In *Yaşar v Romania*,[39] the applicant had rented his vessel to another person, who had then been found guilty of breaching fishing regulations. The applicant complained that the confiscation of his vessel was disproportionate, since he had not been aware that the vessel had been used for the commission of criminal offences.

2.33 In all the mentioned cases, the vehicles were confiscated because they constituted the means by which criminal offences had been committed. The ECtHR held that the confiscation measures amounted to a "deprivation of property" within the meaning of the second sentence of the first paragraph of A1P1 and thus constituted an interference with property.[40]

2.34 In addition, in all of these cases, the ECtHR found that the interferences were prescribed by law and served the public interest (respectively, preventing illegal migration, smuggling of drugs and illegal fishing).[41]

2.35 In the first two cases, the ECtHR held that the confiscation of the vehicles was disproportionate, because the applicants had not been aware that the vehicles had been used for the commission of criminal offences. In addition, the fact that the confiscation was mandatory prevented the applicants from challenging the confiscation measure. Finally, there was no realistic possibility for the applicants to obtain compensation. The ECtHR concluded that a fair balance had not been struck between the demands of the public interest and the applicants' right to peaceful enjoyment of the possession of their vehicles.[42] As a result, the ECtHR found a violation of A1P1.

2.36 The ECtHR arrived at the opposite conclusion in *Yaşar v Romania.* In fact, the ECtHR observed that the applicant had been provided with sufficient opportunities to challenge the confiscation measure against his vessel, since he had been allowed to submit evidence and to be represented by a lawyer of his own choice during adversarial proceedings. However, national courts had established that, even though

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37 App No 16225/08.
38 App No 42079/12.
39 App No 64863/13.
40 *Andonoski v the former Yugoslav Republic of Macedonia*, para 30; *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v Slovenia*, para 38; *Yaşar v Romania*, para 49.
41 *Andonoski v the former Yugoslav Republic of Macedonia*, para 33; *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v Slovenia*, para 42; *Yaşar v Romania*, para 59.
42 *Andonoski v the former Yugoslav Republic of Macedonia*, paras 34-41; *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v Slovenia*, paras 43-53.

the applicant had not been convicted in the main proceedings, he must have been aware that the vessel had been used to commit criminal offences. The ECtHR concluded that there was no evidence that the national courts had acted arbitrarily, therefore the interference with the applicant's right was not disproportionate.[43] As a result, the ECtHR found no violation of A1P1.

2.37 The ECtHR has adopted the same approach in cases where confiscation measures have been imposed against properties held by family members of the defendant. For example, in *Silickienė v Lithuania*,[44] the ECtHR found that the confiscation of an apartment and of some shares in the possession of a widow of a corrupt public official (acquired with the proceeds of unlawful activities) was proportionate, since the applicant, although not convicted, was suspected of being involved in the criminal activities run by her late husband and in any event was provided with sufficient opportunities to challenge the confiscation measures before the national courts. Similarly, in *Balsamo v San Marino*,[45] the ECtHR ruled that the confiscation of assets possessed by the defendants' daughters was proportionate, because the daughters were able to challenge the confiscation measures before the national courts and failed to rebut the presumption that they had unduly benefited from unlawfully acquired properties. It should be highlighted that in both cases there were strong indications that the family members were involved in criminal activities together with the defendant and, although eventually not convicted, they were also prosecuted at some point.

2.38 To assess whether confiscation measures comply with A1P1 and article 8 of the ECHR, the ECtHR has applied general rules on interferences with rights, examining whether an interference is provided for by law, pursues a legitimate aim and is proportionate.[46]

Legitimate aim

2.39 Given that the confiscation regime is established by the law, it is then necessary to consider whether it pursues the legitimate aim of fighting or preventing crime. As noted above, States are afforded a wide discretion in choosing the appropriate instruments to fight crimes, including through the use of confiscation measures.[47] This confirms that while punishment and deterrence may not be objectives of the regime, the fact that the confiscation regime is punitive and deterrent *in effect* ensures its compliance with the legitimate aims of the ECHR. In fact, the ECtHR has recognised that there is no clear dividing line between objectives of the confiscation regime:

> It cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender. Indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.[48]

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43 *Yaşar v Romania*, paras 60-66.
44 App No 20496/02, paras 60-70.
45 App No 20319/17 and 21414/17, paras 89-95.
46 *Phillips v UK* App No 41087/97; *Gogitidze and Others v. Georgia* App No 36862/05.
47 Among many: *AGOSI v UK* App No 9118/80, para 52; *Gogitidze and others v Georgia* App No 36862/05, para 108.
48 *Welch v UK* App No 17440/90, para 30.

2.40 Notably, while the wide discretion enjoyed by States in choosing the most appropriate measures to fight crime applies also to the decisions to confiscate assets held by third parties, such a discretion is narrower when the right to respect for one's home (article 8 of the ECHR) is at stake. This does not preclude the possibility of confiscating the home of a third party. However, States are obliged to scrutinise more carefully the proportionality of such a measure.

Proportionality

2.41 In the cases mentioned above on confiscation of assets held by third parties, it is evident that a fundamental feature of proportionality is "procedural": the ECtHR is usually satisfied that a confiscation measure is proportionate if the third party is afforded meaningful opportunities to challenge the confiscation of their property before national courts. Put simply, a procedure must exist at national level allowing third parties to challenge confiscation measures affecting assets in which they have an interest.

2.42 Section 10A of POCA 2002 gives the court the power to make a determination as to the defendant's (and any relevant third party's) interest in property for the purposes of determining the defendant's benefit figure and available amount. This determination is appealable by any third party to the Court of Appeal pursuant to section 31(5)(b). We discuss this right of appeal further in Chapter 22.

2.43 In addition to the right of appeal, it is our recommendation (recommendation 58) that third parties should be able to claim an interest in property after the making of the confiscation order and before either the automatic vesting of assets or the activation of a contingent order where certain criteria are satisfied.

2.44 It follows therefore, that the proportionality of confiscation orders as they apply to third parties is subject to appropriate scrutiny by way of the appeal and review mechanisms as they exist and as we recommend.

2.45 We have consequently concluded that our policy regarding the proportionality of the interferences with third-party interests will be compatible with the human rights legal framework, as interpreted by the ECtHR.

Legislative Steer

2.46 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[49] and case law.

2.47 Section 69(1) provides, in broad terms, that the section applies to: restraint orders, search and seizure powers and the appointment of and powers that may be granted to receivers. It does not therefore provide a steer as to the factors to consider when imposing confiscation orders under section 6 of POCA 2002. Whilst the legislative

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[49] The pre-Proceeds of Crime Act "legislative steers" can be found in the Drug Trafficking Offenders Act 1986, s 13(2); Criminal Justice Act 1988, s 82(2); and Drug Trafficking Act 1994, s 31(2).

steer has some utility for applications outside of the confiscation hearing, it does not assist the court when making the confiscation order itself.

2.48 In the consultation paper we concluded that not only is it desirable for the objective(s) of the legislation to be expressly incorporated into statute, but also that there is no fundamental impediment to doing so.[50]

2.49 Having provisionally proposed that it is desirable to place on a statutory footing the objective(s) of the regime, we then considered what these objectives should be. We provisionally proposed that the objectives:

(1) should include:

(a) depriving a defendant of their benefit from criminal conduct, within the limits of their means;[51]

(b) the compensation of victims, where such compensation is to be paid from confiscated funds;[52] and

(c) the deterrence and disruption of criminality.[53]

(2) should not include punishment.[54]

2.50 In this chapter, we recommend an explicit statutory objective. We also recommend (1)(a) and (2). However, for the reasons explained below we do not recommend (1)(b) and (c).

OVERVIEW OF POLICY

2.51 That:

(1) The objective of the regime ought to be placed on a statutory footing.

(2) The objective of the regime should be to deprive a defendant of their benefit from criminal conduct, within the limits of their means.

(3) Punishment should not be a statutory objective of the regime.

PROPOSAL 1 – A STATED OBJECTIVE

The consultation paper

2.52 In the consultation paper, we described how the courts have, on many occasions, identified the objective(s) of the confiscation regime.[55] We acknowledged that because

50 Consultation question 1 and summary consultation question 1(1).
51 Consultation question 2 and summary consultation question 1(2)(a).
52 Consultation question 3.
53 Consultation question 4.
54 Consultation question 5.
55 CP 249, para 5.52.

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.

2.53 However, we note 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.[56]

2.54 We argued that to ascertain the objectives of the regime one must consider a myriad of sometimes conflicting authorities.[57] We concluded that if the appellate courts take diverse views, it is perhaps safe to infer that the precise objective of the regime is not entirely clear.

2.55 We therefore considered that placing the objective(s) 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 objective(s), but would also provide clarity and consistency as to the overall purpose of the regime.

2.56 Furthermore, placing the objective(s) of the regime on a statutory footing would serve to assist the court in determining whether an order imposed is aligned with clearly stated objective(s) of the Act, thus ensuring that any order imposed is proportionate.

Consultation responses

2.57 There was an overwhelmingly positive response from consultees to the question of whether any amended confiscation legislation should include the objectives of the regime.[58]

2.58 One consultee responded that the current system is "complicated and confusing" and that statutory objectives would "result in practitioners being able to focus directly on the requirements [of the legislation]."

2.59 Another consultee agreed that there ought to be statutory objectives but noted that the wording would need to be "clear and unambiguous so [as] not to lead to further appeals".

2.60 A former judge echoed this sentiment and added that "a statement of the statutory objectives set out in the law would be at its lowest helpful and at its highest important".

2.61 Professor Johan Boucht of Oslo University drew a distinction between the objectives of the criminal justice system generally and those of the confiscation regime. While he agreed that statutory objectives ought to be included in Part 2 of POCA 2002, his view was that because confiscation is an aspect of the criminal justice system, if those objectives mirror those of the criminal justice system overall (that is, with a focus on deterrence), they are largely redundant. However, if the stated objectives relate

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56 See paragraphs 2.31-2.35 above.

57 For example, 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* [2002] UKHL 1, [2003] 1 AC 1099 had been cited and followed many times, although Lord Steyn's reference to punishment needed some qualification.

58 Consultation question 1 (52 responses: 43 (Y), 5 (N), 4 (O)) and summary consultation question 1(1) (32 responses: 30 (Y), 1 (N), 1 (O)).

directly to the calculation of accurate and proportionate confiscation orders, this would be an important and useful guide for the courts.

2.62 The Bar Council agreed with the proposal but expressed the view that it is:

> important that the confiscation regime does not cover ground which is already occupied by other aspects of the criminal justice system – it should be no more intrusive than is necessary to fill the gaps that would otherwise exist.

2.63 The City of London Police also supported the proposal:

> Having a clear understanding of the reasoning behind the legislation will allow all those involved within the regime (investigators, prosecutors, defence and courts) to ensure that it is being applied appropriately and proportionately and will assist those at the coal face to decide which cases are considered for confiscation, thereby ensuring that the ones that are considered are the ones that the legislation was intended for. Without that additional steer it is very easy for cases to be taken on a "because we can" basis rather than "because we should."

2.64 A confiscation practitioner who agreed with the proposal reasoned that it would be beneficial to articulate the primary objective of the regime to signpost the principle that the regime is not designed to raise revenue for the government and therefore while the appointment of an enforcement receiver may be costly and cumbersome, if it serves to deprive defendants of their proceeds of crime more efficiently, it ought to be undertaken.

2.65 The Financial Conduct Authority gave an organisational response which supported the proposal for clearly defined objectives in order to ensure that the regime is not susceptible to unclear incorrect interpretation.

2.66 One financial investigator stated that while she felt that the objectives were already clear, she recognised that an explicit provision may assist those who have less familiarity with POCA 2002 in interpreting its purpose.

2.67 During one of our roundtable discussions, a consultee expressed the view that inserting statutory objectives may ultimately be redundant given the limited effect that the existing "legislative steer" has had in relation to section 69 of POCA 2002. However, the same stakeholder acknowledged that explicitly shifting the focus of the legislation away from a measurement of "success" based on the amount of money recovered would be beneficial.

Analysis

2.68 In the consultation paper, we considered whether adding explicit objectives to the regime would improve or detract from the clarity of the legislation.

2.69 We examined the principle that penal statutes should be interpreted strictly and, where there is doubt, they should be interpreted in favour of the accused. We therefore queried whether this rule of interpretation would be disrupted by adding an objective for the purpose of aiding interpretation. However, we concluded that the

body of case law[59] which seeks to interpret the objective of the confiscation regime provides ample evidence for the proposition that the objective ought to be made explicit.

2.70 Our conclusion was further reinforced by the requirement of proportionality which applies explicitly to the final value of a confiscation order,[60] and implicitly throughout POCA 2002. To conduct the proportionality assessment, it is necessary to have objectives against which the issue in question can be measured.

2.71 A common thread of the consultation responses was a view expressed by law enforcement that guidance on how to approach the legislation would be helpful. As noted by consultees, there are times in the confiscation process when law enforcement agencies are required to exercise discretion, such as when determining whether to apply for restraint orders over assets. In these circumstances, consultees noted that they would find it helpful to be able to apply the objective of the legislation as a guide to the exercise of their discretion. For this reason, we have concluded that the statutory objective(s) should be expressed purposively and framed in terms of how powers pursuant to POCA 2002 should be exercised.

Recommendation 1.

2.72 We recommend that any amended confiscation legislation should include the objective of the regime.

PROPOSAL 2 – STATED OBJECTIVE OF THE REGIME

Overview

2.73 We consider that it is largely uncontentious that the 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 their criminal gains.[61] We therefore consider that such an objective ought to be articulated in any confiscation legislation. We provisionally framed this objective with three component parts:

(1) "depriving";

(2) "of…benefit from criminal conduct"; and

(3) "within the limits of their means".

The consultation paper

2.74 In the consultation paper we discussed the component parts in turn.[62]

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59 CP 249, para 5.31.
60 Pursuant to Proceeds of Crime Act 2002, s 6(5).
61 *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.
62 CP 249, paras 5.87 to 5.93.

Depriving

2.75 In the consultation paper we highlighted that an important distinction in framing any objective in connection with holding a defendant to account for their 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).[63]

2.76 We noted that a focus on deprivation rather than recovery would serve to assist with the perceptions of the Asset Recovery Incentivisation Scheme ("ARIS") highlighted in Chapter 1 of the consultation paper. In that chapter we explained that the ARIS scheme allocates 18.75% of confiscated funds to the investigation and prosecution authority undertaking a case. We also described the views of some members of the Bar[64] and the judiciary[65] that ARIS creates the perception of potential conflicts of interest in decision-making.[66] 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".[67]

2.77 We observed that the distinction between deprivation and recovery is of greatest significance in cases where there may be a question as to whether a receiver should be appointed. If, instead of depriving the defendant of their benefit from crime, the aim is to recover funds for the state or victims, then the appointment of a receiver will only be authorised when the amount to be recovered is significantly higher than the cost of the receiver. In cases where this condition is not met, and no receiver is appointed, the defendant may not be deprived of their proceeds of crime. We discuss this further at paragraph 2.106.

2.78 Recovery 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.[68] 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.

The defendant's benefit from criminal conduct

2.79 As we discussed in part 4 of the consultation paper, POCA 2002 refers to what is obtained from criminal conduct as "benefit".[69] In that part of the paper, we discussed that it is important that any definition of benefit should be clear and comprehensive and that therefore any statement of objectives should simply refer to, rather than seek to define, benefit.

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63 CP 249, para 5.87.

64 See, 2 Bedford Row, *Are the police taking the ARIS?*, https://www.2bedfordrow.co.uk/are-the-police-taking-the-aris/.

65 *R v The Knightland Foundation* [2018] EWCA Crim 1860, [2018] 7 WLUK 905; *Wokingham Borough Council v Scott* [2019] EWCA Crim 205, [2020] 4 WLR 2.

66 *R (Kombou) v Wood Green Crown Court* [2020] EWHC 1529 (Admin), [2020] 6 WLUK 153.

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

68 *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* [2015] UKSC 73, [2017] AC 105 at [55].

69 CP 249, from p 221.

Deprivation within a defendant's means

2.80 In Chapter 15 of the consultation paper we discussed in detail why the law should continue to seek to deprive a defendant of their benefit from their criminal conduct within the limits of their means.[70] 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 ordered[71] to pay a sum which it is beyond his means to pay".[72]

2.81 Drawing from the observations of the House of Lords, we determined that reference to the defendant's means would appropriately set the boundaries of the regime and reflect the fact that the regime is not punitive.

Consultation responses

2.82 The vast majority of consultees supported this proposal.[73]

2.83 Professor Johan Boucht of Oslo University agreed that "depriving a defendant of their benefit from criminal conduct, within the limits of their means, should be the main objective of a confiscation regime when confiscation orders are calculated". He referred to this as "gain neutralisation".

2.84 The Crown Prosecution Service also agreed with the proposal and added that there is perhaps an even broader objective that is to "remove the proceeds of crime from society".

2.85 Members of the Organised Crime Task Force (OCTF) of Northern Ireland noted that our proposal focusses on deprivation of benefit rather than recovery. Members of the OCTF were supportive of this focus and added that "this change would place emphasis on depriving the defendant of the asset even if the sum ultimately recovered by the state is low or even non-existent." They made the additional point that it is even "better to have the value of the asset go to enforcement receivers/land sold at an undervalue cost, so long as it is out of the hands of the defendant."

2.86 Ian Smith, a barrister at 33 Chancery Lane, agreed that "setting and achieving such an objective has wide-ranging benefits including concentrating the focus of attention on disgorgement of profit from crime".

2.87 A consultation event held with Garden Court Chambers also elicited a positive response in relation to the proposed objectives. One barrister agreed that the primary objective should be the deprivation of gain from criminal conduct and added that it is sensible to clear up the case law on deprivation and punishment, removing punishment. It was her view that it is right that deprivation is the focus of the confiscation regime.

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70 CP 249, p 357.

71 This statement appears to be intended to reflect s 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.

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

73 Consultation question 2 (55 responses: 41 (Y), 12 (N), 2 (O); 7 did not answer) and summary consultation question 1(2)(a) (31 responses: 27 (Y), 1 (N), 3 (O); 6 did not answer).

2.88 Members of the judiciary saw the advantage in stating the objectives of the regime and that confiscation is, if not draconian, deliberately severe. It was argued that the primary purpose is not punishment, but rather to remove the benefit from crime, which accords with this proposal. A senior member of the judiciary also agreed that the focus ought to be on "depriving" defendants of their criminal proceeds rather than "recovering" the criminal proceeds because the system being proposed is not a tracing system, but a value-based system.

Analysis

2.89 We were persuaded by the overwhelming response from consultees that we should recommend that the stated objective of the regime should be depriving defendants of their benefit from criminal conduct, within the limits of their means.

2.90 This was affirmed in the recent decision in *R v Andrewes* (which was handed down after completion of our consultation paper) in which the Court of Appeal described the aim of POCA 2002 as being "to *deprive* criminals of the proceeds of their criminality".[74]

2.91 Pursuant to our conclusion at paragraph 2.50 above, we have concluded that the statutory objective should be framed in terms of how powers pursuant to POCA 2002 should be exercised by law enforcement, prosecution agencies and the courts to ensure that the objective is pursued.

Recommendation 2.

2.92 We recommend that the stated objective of the regime should be depriving defendants of their benefit from criminal conduct, within the limits of their means.

Recommendation 3.

2.93 We recommend that bodies which exercise powers under Part 2 of POCA 2002, must pursue the stated objective of the regime.

PROPOSAL 3 – COMPENSATION

Overview

2.94 Compensating victims was not initially considered an objective of the confiscation regime. Although one of the statutory aims of sentencing includes the making of reparation by offenders,[75] when the Hodgson Committee recommended the introduction of a confiscation regime it was of the view that victims could seek redress through a separate relevant compensation regime.[76]

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74 *R v Andrewes* [2020] EWCA Crim 1055, [2020] 8 WLUK 56 at [81] (emphasis added).

75 Criminal Justice Act 2003, ss 142(1)(b) and (e).

76 Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 71. The articulation of sentencing aims in the Criminal Justice Act 2003 came nearly 20 years after the Hodgson Committee Report.

2.95 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.[77]

2.96 The Criminal Justice Act 1988 ("CJA 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 recognise that victims should be compensated for their losses, even when a confiscation order was made.

The consultation paper

2.97 In the consultation paper we discussed the ways in which POCA 2002 prioritises compensation over confiscation.[78]

(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.[79]

(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.[80]

(3) Sums collected under a confiscation order are paid first towards compensation and are only credited against the order itself if other priority debts have been satisfied.[81]

2.98 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.

2.99 We provisionally proposed that an objective of the confiscation regime should be ensuring the compensation of victims, where such compensation is to be met from confiscated funds.

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77 *Hansard* (HC) 18 January 1988, vol 145, col 736.
78 CP 249, para 5.103.
79 Proceeds of Crime Act 2002, s 6(6).
80 Proceeds of Crime Act 2002, ss 13(5) and (6).
81 Proceeds of Crime Act 2002, s 55(5).

Consultation responses

2.100 Consultees generally supported the sentiment that the compensation of victims is often not prioritised in practice and that the confiscation regime may be one way of ensuring that more money is recovered which could be paid towards compensation.[82]

2.101 One stakeholder commented that "it is essential that victims of crime are compensated when they have suffered financial loss as this goes to public confidence in the judicial system and democracy."

2.102 A respondent who had personally been subjected to a confiscation order agreed with the proposal but suggested that civil recovery is a more efficient mechanism for victims who seek to recover compensation.

2.103 Another consultee agreed with the proposal to include compensation as an objective of the Act and added that "the Act should prioritise compensation over payment to the state." This point was echoed by the Financial Crime Practice Group, Three Raymond Buildings who reiterated that "the State should not receive a windfall as a result of criminal conduct where there are identified victims."

2.104 A consultee who is a member of a confiscation enforcement team agreed with the proposal and noted that paying compensation from confiscation means the victims are more likely to receive the compensation because the order is actively managed by law enforcement in a way that victims would be unable to accomplish themselves.

2.105 While Professor Boucht commended the Law Commission for recognising victims and their concerns, his view was that compensation of victims should have no bearing on how confiscation orders are quantified which is what the objectives ought to be targeting.

Analysis

2.106 While consultees agreed that victims are often overlooked and deprioritised in favour of state recovery, most did not agree that compensation should be included as a specific objective, because this would:

(1) create inconsistency with the primary objective, which focusses on deprivation;

(2) create inconsistency with other reforms which are intended to make the regime more just;

(3) conflate purpose and effect; and

(4) place undue emphasis on confiscation as a tool for the collection of compensation at the expense of ensuring that the compensation regime itself works efficiently and appropriately.

[82] Consultation question 3 (54 responses: 48 (Y), 4 (N), 2 (O); 8 did not answer); and summary consultation question 1(2)(b)(ii) (36 responses: 29 (Y), 1 (N), 6 (O); 1 did not answer).

Conflict between deprivation and recovery

2.107 Notably, as discussed at paragraph 2.72 above, the confiscation regime is focused on a "deprivation" model which ensures that the proceeds of crime are comprehensively disgorged from defendants. Conversely, compensation is focused on a "recovery" model which aims to recover as much of the victim's loss as possible.

2.108 In most cases, this distinction is unlikely to be problematic, but there may be some instances where this could result in a conflict. For instance, if instead of depriving the defendant of their benefit from crime, the aim is to recover funds for the state or victims, then the appointment of a receiver will only be authorised when the amount to be recovered is significantly higher than the cost of the receiver. In cases where this condition is not met, and no receiver is appointed, the defendant may not be deprived of their proceeds of crime.

Conflict between compensation and other reforms

2.109 In Chapter 15 of this report, we suggest a significant curtailment to the power to make uplift applications. Such applications increase the legal maximum that can be recovered under the confiscation order, and with it the amount that can be recovered for compensatees. Our proposal to curtail the power to make uplift applications is intended to have a positive impact on defendants by encouraging rehabilitation and ending what may amount to a lifelong liability to repay their benefit from crime. However, we recognise that curtailing the power to make uplift applications may have a negative impact on compensatees by lowering the ceiling as to what might be recovered. Making a recommendation which might limit the amount that can be recovered by compensatees whilst including an express objective to prioritise those same compensatees would be paradoxical.

Purpose and effect

2.110 When developing the policy with regard to the statutory objectives generally, we focused on the difference between an objective of the regime and an effect of the regime.

2.111 For example, while punishment is not a purpose of the regime, it is accepted that there are some punitive effects of the regime. This is evident in the way in which benefit is calculated which is explained in detail in Chapter 8. In order to calculate benefit, a gross rather than net determination of criminal proceeds is made. The courts have held that it is not appropriate to allow defendants to offset their criminal expenditure when calculating their proceeds and consequent liability.[83] As a result, their proceeds are invariably calculated at a figure which is higher than their net "profit" from their criminal activity. This is inarguably a punitive element of the regime, but accepted as a necessary consequence of the public policy decision not to undertake an accounting exercise which would enable defendants to deduct the price of the drugs they went on to sell, or the lookout they paid while they burgled a house, when assessing their benefit.[84]

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83 *R v Waya* [2012] UKSC 51, [2013] 1 AC 294] at [26].
84 CP 249, para 12.78.

2.112 The question for the purposes of this analysis, therefore, was whether compensation should be regarded as an objective or an effect of the regime.

2.113 Compensation of victims has factored into the development of several areas of policy in this report, including with regard to reconsideration of the confiscation order (Chapter 15), the way any prior payment of compensation is taken into account when determining a confiscation order (Chapter 12) and the prioritisation of compensation once a confiscation order has been made (Chapter 21).

2.114 All of these measures will improve the amount of compensation available to victims because they create a more efficient, explicit and streamlined process for the calculation of orders and payment of priority orders (of which compensation is one).

2.115 Accordingly, we have determined that compensation is and ought to continue to be an effect of the regime, rather than one of its objectives. There is separate compensation legislation[85] which is designed to ensure that compensation is prioritised and paid to victims. The distinctions between the two regimes and their respective objectives were recently discussed and reinforced by the Court of Appeal in *R v Asplin & Ors*.[86] This case involved a conspiracy to defraud an insurance company in which two of the defendants who worked at the insurance company secretly owned a second company with whom they arranged to contract. They received a substantial salary and bonuses from their work at the insurance company (in addition to the profit they made from the contracts with their second company). The benefit was determined to include the net salaries paid. At paragraph 35 of the judgment, Males LJ notes that:

> it is relevant to note that confiscation and compensation are different. The purpose of confiscation is to deprive criminals of the benefit of their criminal conduct, while the purpose of compensation is to compensate victims for losses or injuries suffered as a result of crime. Confiscation focuses on the benefit which the criminal has obtained from the crime, with a loose causal test ("as a result of or in connection with") tempered, as we have explained, by considerations of proportionality. Compensation, on the other hand, focuses on the losses suffered by the victim with a more conventional test of causation ("compensation for any personal injury, loss or damage resulting from that offence …": section 130(1) of the Powers of Criminal Courts (Sentencing) Act 2000; or see now section 133 of the Sentencing Code). The benefit obtained by the criminal will not necessarily correspond to the losses suffered by the victim.

2.116 In calculating the confiscation and compensation orders, it was determined that the salaries of the defendants ought to be included for the purposes of calculating the defendants' benefit figure, but not as loss for the purposes of calculating compensation:

> In relation to confiscation, the fact that they gave some but not full value means that it is not disproportionate to include their salaries in the calculation of their benefit from the crime. However, when making an order for compensation, at any rate in a

85 Sentencing Code, ch 2; formerly in Powers of Criminal Courts (Sentencing) Act 2000.
86 *R v Asplin & Ors* [2021] EWCA Crim 1313, [2022] EWCA Crim 9.

> case of purely financial loss, it needs to be proved that the offending has caused loss to the victim in a reasonably quantifiable amount…
>
> The fact that the salary does count as part of a defendant's benefit for the purpose of confiscation but does not count as part of the victim's loss for the purpose of compensation may seem superficially odd, but in reality it merely illustrates the differences between these two regimes.[87]

2.117 Part 2 of POCA 2002 is designed to deprive defendants of their criminal proceeds. While ensuring that the correct amount is taken from defendants as efficiently as possible will have the consequence of more money being available to pay compensation orders, this is distinct from the confiscation regime's objective.

Problems with the compensation regime

2.118 One of the issues raised by consultees was that the current compensation regime is not effective and plagued with inefficiencies. The primary motivating factor for the inclusion of an explicit compensation objective in Part 2 of POCA 2002 appeared to be that the confiscation regime is equipped with better enforcement mechanisms than the compensation regime and it would therefore be preferable to be able to pursue compensation through the confiscation regime. Having compensation as an explicit statutory objective would afford prosecutors this power.

2.119 While this is an understandable approach and motivated by good intentions, the confiscation regime cannot be a substitute for a properly functioning compensation regime.

2.120 Ultimately, we recognise that there are significant problems with the current compensation regime which have been emphasised through the strong consultation responses we received to this proposal. While we do not recommend that compensation should be a statutory objective of the confiscation regime, we would support a review of the compensation regime as a separate law reform project.

Conclusion

2.121 In lieu of an explicit objective, we have sought to address the ways in which the confiscation regime could be improved which would have a consequential positive impact on the recovery of compensation (as summarised at paragraphs 2.112 – 2.113 above).

PROPOSAL 4 – PUNISHMENT

Overview

2.122 In the consultation paper,[88] we discussed the view that confiscation is a form of punishment because it is "part of the sentencing process".[89] The statutory aims of sentencing expressly include the punishment of offenders.[90]

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87 *R v Asplin & Ors* [2021] EWCA Crim 1313, paras 70 to 71.
88 CP 249, para 5.122.
89 *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099 at [13]; *R v Benjafield* [2002] UKHL 2, [2003] 1 AC 1099 at [56].
90 Sentencing Code, s 57(2).

2.123 As the ECtHR ruled in the context of drug trafficking in *Welch v United Kingdom*, the confiscation regime established by the Drug Trafficking Offences Act 1986 is punitive due to the following aspects:

(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.[91]

2.124 We discussed in the consultation paper[92] that 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.[93] However, we noted that more recent case law has distanced itself from the earlier approach.[94]

2.125 In the consultation paper, we formed the provisional view that although confiscation may have a draconian impact upon a person and their lifestyle, it is erroneous to consider punishment to be a stated objective of the confiscation regime. The confiscation regime is "not intended to be retributive".[95] As the Supreme Court noted in the case of *R v Waya*, "Lord Steyn's reference to punishment [in *Rezvi*][96] needs some qualification".[97]

2.126 Punishment is achieved by sentencing the defendant for the substantive offence(s) of which they have been convicted. As we discussed in Chapter 12 of the consultation paper,[98] 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).[99]

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91 *Welch v United Kingdom* (1995) 20 EHRR 247, [1995] CLY 2650.

92 CP 249, para 5.124.

93 See Rudi Fortson KC, "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).

94 See Rudi Fortson KC, "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.

95 Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), para 4.11.

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

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

98 CP 249, p 226.

99 R Fortson KC, "Commentary on *R v Fulton*" [2019] 7 *Criminal Law Review* 636, 638.

2.127 In *R v Bajaj*, the Court of Appeal held that punishment "should be no part of the confiscation process itself".[100] Similarly, in *R v Andrewes,* the Court of Appeal held that:

> it is essential to bear in mind the fundamental point that a confiscation order is not designed to be a punishment (although no doubt some defendants may choose not to see it that way) …the punishment is to be contained in the sentence of imprisonment or fine or other penalty imposed by the judge. The confiscation order itself, on the other hand, and consistently with the statutory aim, is restorative, in the sense of requiring the defendant to disgorge, to the extent that he is able, the product of his criminality.[101]

2.128 Whilst depriving the defendant of their proceeds of crime unavoidably has a punitive quality, we formed 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 judicial messages about punishment as an aim of the regime set out in Chapter 5 of the consultation paper, we provisionally proposed that punishment be omitted from the statutory aims.

Consultation responses

2.129 An overwhelming majority of consultees supported the proposal to omit punishment from any statutory objectives of confiscation.[102]

2.130 Several stakeholders[103] explicitly agreed that punishment is achieved through the sentencing process for the substantive criminal offence and is not the aim of the confiscation regime.

2.131 The Prisoners' Advice Service agreed with the proposal and noted that if the defendant is punished for the substantive offence as well as through the confiscation regime, this would amount to duplicate punishment for the same offence which is inherently unfair.

2.132 Professor Johan Boucht from the University of Oslo also agreed with this proposal but noted that without a complementary consideration as to how "benefit" is calculated, the regime may ultimately be punitive regardless of whether "punishment" is listed as an explicit statutory objective.

2.133 Professor Boucht's analysis was echoed by barrister Ian Smith who expressed the view that the regime may be punitive in effect even if punishment is not an explicit objective if benefit is calculated as a gross, rather than net figure.

2.134 A District Judge was supportive of this proposal and noted that:

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100 *R v Bajaj* [2020] EWCA Crim 1111, [2020] 8 WLUK 177 at [29]. See para 2.5 above.
101 *R v Andrewes* [2020] EWCA Crim 1055, [2020] 8 WLUK 56 at [81].
102 Consultation question 5 (49 responses: 38 (Y), 8 (N), 3 (O); 13 did not answer).
103 Garden Court Chambers; Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks' Society); HM Government; Insolvency Service; Financial Crime Practice Group at Three Raymond Buildings; City of London Police; Prisoners' Advice Service; Association of Chief Trading Standards Officers (ACTSO); South East Confiscation Panel, East Kent Bench.

It seems to me important to highlight that the appearance of the defendant at the Crown Court is to give effect to the confiscation regime rather than necessarily any indicator of the gravity of the offending itself.

2.135 Professor Peter Alldridge, an academic at Queen Mary University of London, expressed the view that not only ought "punishment" be excluded from any statutory objectives, but it should be explicit that punishment is not a statutory objective.

2.136 This response was echoed by a criminal barrister of Drystone Chambers and the organisational response of Garden Court Chambers.

Analysis

2.137 For the reasons articulated in the consultation paper, which were reinforced by consultees, we have concluded that it is not appropriate to include punishment as an explicit objective of the confiscation regime. While punishment may be a consequence of the confiscation process, punishment is not and should not be an objective of the process. This would constitute a duplication of the punitive element of the substantive sentencing process and therefore double punishment for the defendant.

2.138 We accept Professor Boucht's comments that a calculation of benefit which centres on gross, rather than net proceeds of crime, is inherently punitive because it is not a true reflection of what the defendant has gained. However, as discussed in detail in Chapter 8, we have concluded that there is a compelling public policy imperative not to engage in an accounting exercise whereby defendants are enabled to offset their criminal expenditure to reduce their liability.

2.139 Consequently, we recommend that punishment should not be a statutory objective of the confiscation regime. Our conclusion is reinforced by the recent Court of Appeal decision in *R v Andrewes* (see paragraph 2.89).

2.140 As we will discuss below, we do not make a formal recommendation that deterrence, disruption and compensation should not be included as objectives of the regime. However, we make such a recommendation in relation to punishment. The fundamental principle as articulated in *Andrewes* is that although confiscation is part of the sentencing process,[104] the objectives of confiscation and sentencing[105] are not directly comparable. A recommendation not to include punishment as an objective would remove any ambiguity as to whether punishment is or should be an objective.[106]

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104 *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).

105 Confiscation is treated as a discrete part of the sentencing process.

106 Earlier apparently authoritative case law references to punishment as an objective need to be dealt with. As we set out above from para 1.81, in *R v Waya* the Supreme Court described Lord Steyn's reference to punishment in *Rezvi* as "needing some qualification".

Recommendation 4.

2.141 We recommend that punishment should not be a statutory objective of the confiscation regime.

PROPOSAL 5 – DETERRENCE AND DISRUPTION

Overview

2.142 The draconian impact of a confiscation order is often aligned with an express aim of sentencing, namely the reduction of crime through deterrence.[107] 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.[108]

2.143 The comments of the Lord Chief Justice reflect one rationale that is cited for introducing proceeds of crime legislation in both the law of England and Wales and internationally,[109] namely to act as a deterrent to criminality.

2.144 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" was described as the most important strand of public policy, and confiscation was viewed as a "sharp new weapon"[110] 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.[111]

2.145 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."[112]

2.146 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... [B]y taking from these criminals the profits they make from crime, the basis

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107 Sentencing Code, s 57; formerly Criminal Justice Act 2003, ss 142(1)(b).
108 *R v Sekhon* [2002] EWCA Crim 2954, [2003] 1 WLR 1655.
109 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.
110 *Hansard* (HC) 21 January 1986, vol 90, col 241.
111 Sir James Hill, MP, *Hansard* (HC) 21 January 1986, vol 90, col 241.
112 *Hansard* (HL) 27 April 1987, vol 486, col 1287.

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."[113]

The consultation paper

2.147 In the consultation paper,[114] we posited that proceeds of crime legislation has a clear role to play in deterring criminality,[115] both of a serious and more "routine" nature. This was recognised in the Home Office 2018 Serious and Organised Crime Strategy.[116]

2.148 We discussed that crime itself may be reduced through disruption of criminal activity and cited the report of the Cabinet Office Performance and Innovation Unit that paved the way for POCA 2002. This report 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.[117]

2.149 Confiscation has therefore been recognised by the Home Office in its two most recent Serious and Organised Crime Strategies[118] and by the courts[119] as a potentially valuable tool to disrupt criminality.

2.150 On this basis, we therefore formed the provisional view that the deterrence and disruption of crime ought to be included among the objectives of confiscation legislation.

Consultation responses

2.151 Although the majority of consultees were in favour of this proposal,[120] those who agreed did not provide detailed reasoning. Those who did not support the proposal did tend to provide reasoning.

2.152 City of London Police noted that deterrence and disruption are key reasons for carrying out confiscation.

2.153 However, Professor Johan Boucht did not agree with this proposal and expressed concerns with the idea of deterrence as a guiding principle:

> Deterrence is problematic as a guiding principle of quantification in confiscation proceedings. A fundamental problem is the inherent boundlessness of deterrence that follows from its forward-looking nature. Reliance on deterrence at the level of quantification therefore entails the risk of imposing ever harsher and more intrusive

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113 Cabinet Office Performance and Innovation Unit, Recovering the Proceeds of Crime (June 2000), paras 3.6 to 3.7.
114 CP 249, para 5.116.
115 *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099 at [14].
116 Home Office, *Serious and Organised Crime Strategy* (2018) Cm 9718, para 65.
117 Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), para 3.10.
118 Home Office, *Serious and Organised Crime Strategy* (2013) Cm 8175, p 34; Home Office, *Serious and Organised Crime Strategy* (2018) Cm 9718, para 65.
119 *R v Rezvi* [2002] UKHL 1, [2003] 1 AC 1099 at [14].
120 Consultation question 4 (50 responses: 37 (Y), 10 (N), 3 (O); 12 did not answer); and summary consultation question 1(2)(b)(i) (32 responses: 25 (Y), 4 (N), 3 (O); 5 did not answer).

confiscation schemes in order to increase the deterrent effect, thus creating an unfair(er) regime.

2.154 Andrew Campbell-Tiech KC also disagreed with the proposal and expressed the concern that the regime will continue to be unduly punitive.

2.155 The UK Anti-Corruption Coalition and Spotlight on Corruption voiced a concern that additional objectives may place an additional burden on prosecutors who need to prove that a confiscation application meets all of the listed objectives, not simply the primary objective.

2.156 McGuire Woods provided an organisational response in which they disagreed with this proposal. They noted that deterrence ought to be achieved through sentencing.

Analysis

2.157 It is impossible to separate the analysis of this proposal from the question whether punishment ought to be an objective (from paragraph 2.120 above) due to the inextricable link between punishment and deterrence.

2.158 It was agreed by consultees that the confiscation regime ought not to have a punitive purpose, even where it may have punitive effects (see paragraph 2.127 above). The substantive criminal process is designed to be punitive and for this reason it is an explicit objective of the sentencing process.[121] However, there is a significant difference between punishment as an objective and punishment as a consequence. The confiscation regime is designed to deprive defendants of their criminal proceeds, not to punish defendants for their criminal offences for a second time.

2.159 Stripping defendants of their criminal proceeds has an inherent deterrent effect and is disruptive because they gain no pecuniary advantage from their conduct. If Part 2 of POCA 2002 is in its purest form a mechanism for depriving the defendant of their benefit from crime, then deterrence as an additional objective (rather than merely an effect) goes beyond that and strays into the punitive.

2.160 The way deterrence is understood to operate is that through the imposition of penalties, the offender and others are discouraged from engaging in the same conduct. The seriousness of the penalty is designed to have a direct link with its deterrent effect. Were deterrence and disruption to be introduced as objectives, the confiscation process might have a punitive outcome, and arguably (because the objectives are express) a more punitive outcome than at present. We concluded that including deterrence as an objective would be a disingenuous way of implicitly including punishment as an objective.

2.161 For these reasons, we have concluded that it is not appropriate for deterrence and disruption to be objectives of the confiscation regime. Like compensation, they are consequences of the process, but ought not be made explicit objectives, as this would risk an overlap with the sentencing of the substantive criminal offence and, therefore, double punishment.

[121] Sentencing Code, s 57(2); formerly Criminal Justice Act 2003, s 142(1)(a).

Part 2: Preparing for the confiscation hearing

This part comprises Chapters 3 to 7 and considers the preliminary stages of the confiscation process:

Timetabling (Chapter 3);

Exchange of Information (Chapter 4);

Early Resolution of Confiscation (Chapter 5);

Incentivising the Payment of Orders (Chapter 6); and

Forum (Chapter 7).

In these chapters we make recommendations about how the law and procedure could be improved to make more efficient use of time and resources for the active management and preparation of a confiscation hearing.

Chapter 3: Timetabling

INTRODUCTION

3.1 Chapter 6 of the consultation paper considered what is currently known as the "postponement" of confiscation proceedings, pursuant to POCA 2002.

3.2 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]

3.3 Consequently, we explored this topic extensively in the consultation paper and made the following provisional proposals for reform of this part of the confiscation process:

(1) Sentencing should take place prior to confiscation proceedings being resolved unless the court directs otherwise.[2]

(2) The prohibition on the imposition of financial, forfeiture and deprivation orders prior to the making of a confiscation order should be removed; where these orders are made, they must be taken into account when determining the confiscation order.[3]

(3) The current 28-day period within which the Crown Court is permitted to vary a financial, forfeiture or deprivation order should be extended to 56 days from the date of the order.[4]

(4) Confiscation legislation should no longer refer to "postponement", which should be replaced with:

(a) a statutory requirement that confiscation proceedings are started within a prescribed time; and

(b) active case management following the commencement of confiscation proceedings.[5]

(5) The maximum statutory period between the date of sentencing and the date on which a confiscation timetable is set should be six months, which can be extended in "exceptional circumstances".[6]

(6) The statutory scheme should provide that:

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1 *R v Guraj* [2016] UKSC 65, [2016] 1 WLR 22 at [36].
2 Consultation question 6; summary consultation question 2(1).
3 Consultation question 7; summary consultation question 2(2); summary consultation question 2(3).
4 Consultation question 8.
5 Consultation question 9.
6 Consultation question 10; summary consultation question 2(4); summary consultation question 2(5).

(a) the court retains jurisdiction to impose a confiscation order even if no timetable is set or dispensed with during the six-month period;

(b) in determining whether to proceed the court must consider unfairness to the defendant;

(c) 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

(d) in reaching a decision, the court must consider the statutory objectives of the regime.[7]

3.4 In this chapter, we conclude that proposals (1) to (4) should become recommendations, as should a modified version of proposal (5). We conclude that we should not make a recommendation along the lines of proposal (6).

OVERVIEW OF POLICY

3.5 That:

(1) The confiscation regime will no longer make reference to "postponement".

(2) A defendant must be sentenced before confiscation proceedings are resolved unless the court directs otherwise.

(3) The court may impose financial, forfeiture and deprivation orders prior to the making of a confiscation order. Where such an order is imposed prior to making the confiscation order, it must be taken into account when determining the confiscation order.

(4) A timetable for confiscation proceedings must be raised as a matter before the court by the completion of the sentence hearing. The timetable may be subject to amendment. A failure to set a timetable may be addressed by applying the "slip rule" within 56 days of sentencing.

(5) After setting a timetable, confiscation proceedings should be subject to active case management.

PROPOSAL 1 – SENTENCING THE DEFENDANT PRIOR TO CONFISCATION

The current law

3.6 In our consultation paper we observed that:

[7] Consultation question 11; summary consultation question 2(6).

> [i]t 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.[8]

However, as the Supreme Court recognised in *R v Guraj*, the usual sequence of events is to impose sentence and deal with confiscation at a later date.[9] Sentencing prior to confiscation requires that confiscation be postponed, and with such postponement comes a series of procedural requirements which must be adhered to.[10] Despite a clear statutory provision to the effect that confiscation orders should not be quashed merely because of a defect in procedure,[11] the procedural requirements have become traps "into which even the most experienced and skilled trial judges may fall"[12] and have led to regular challenges before the courts.[13]

3.7 In *R v Soneji*, the House of Lords described the postponement regime introduced in 1993 as something of an afterthought.[14] 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, [and] the terms of some of the statutory provisions have not, in this respect, altered.[15]

3.8 The first amendment of the original postponement regime came in 1995.[16] Section 14 of POCA 2002 has since 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.

3.9 Despite this, as the Supreme Court observed in 2016,[17] the sequencing of sentencing and confiscation and the status of procedural requirements in POCA 2002 require review.

The consultation paper

3.10 Reflecting what was described in *R v Guraj* as the usual sequence of events, we provisionally proposed that confiscation legislation should provide that a defendant

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8 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, para 6.6.

9 *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8] and [13].

10 Proceeds of Crime Act 2002, ss 14 and 15.

11 Proceeds of Crime Act 2002, s 14(11).

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

13 See (amongst other cases): *R v Soneji* [2005] UKHL 49, [2005] 3 WLR 303; *R v Knights* [2005] UKHL 50, [2006] 1 AC 368; *R v Donohoe* [2006] EWCA Crim 2200, [2007] 1 Cr App R (S) 88; *R v Paivarinta-Taylor* [2010] EWCA Crim 28, [2010] 2 Cr App R (S) 64; *Revenue and Customs Prosecution Office v Iqbal* [2010] EWCA Crim 376, [2010] 1 WLR 1985; *CPS v Neish* [2010] EWCA Crim 1011, [2010] 1 WLR 2395; *R v T* [2010] EWCA Crim 2703, [2010] 9 WLUK 303; *R v Johal* [2013] EWCA Crim 647, [2014] 1 WLR 146;*R v Kakkad* [2015] EWCA Crim 385, [2015] 1 WLR 4162; *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 Sachan* [2018] EWCA Crim 2592, [2019] 4 WLR 67; *R v Hall* [2019] EWCA Crim 662, [2019] 3 WLUK 679.

14 *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340 at [6].

15 *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8].

16 Proceeds of Crime Act 1995.

17 *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [36] to [37].

must be sentenced before confiscation proceedings are resolved unless the court directs otherwise.[18]

Consultation responses

3.11 There was substantial support for this proposal.[19]

3.12 The primary theme of the responses was that this proposal codifies what already occurs in practice. The Bar Council, for instance, commented that this proposal would solve the problems historically associated with the current postponement regime.

3.13 One consultee's response noted that this occurs in practice, largely because it is virtually impossible to conduct a thorough financial review prior to sentencing.

Analysis

3.14 It is already common practice to undertake confiscation proceedings in accordance with this provisional proposal. Given its substantial support by consultees, we recommend the creation of a presumption which reflects in statutory reform the practice that has developed, ensuring that the statutory provisions are transparent and fit for purpose.

3.15 This recommendation also addresses difficulties which arise when this does not occur, namely the defendants remaining in custody without finality as to substantive matters where sentencing has awaited the conclusion of confiscation proceedings.

3.16 Notably, this policy retains judicial discretion to ensure that when it is appropriate to make a confiscation order prior to sentencing, this still can be done. This means that in those cases where it is perfectly clear on the evidence in the substantive matter what the defendant's benefit was, the order can be made as early as possible.

Recommendation 5.

3.17 We recommend that confiscation legislation should provide that a defendant must be sentenced before confiscation proceedings are resolved unless the court directs otherwise.

[18] Consultation question 6.
[19] Consultation question 6 (46 responses: 39 (Y), 7(N); 16 did not answer); summary consultation question 2(1) (34 responses: 29 (Y), 2 (N), 3 (O); 4 did not answer).

PROPOSAL 2 – REMOVING THE PROHIBITION ON IMPOSING FINANCIAL ORDERS PRIOR TO CONFISCATION

The current law

3.18 One of the procedural "traps" that has arisen from the postponement regime is that section 15(2) of POCA 2002 prohibits the imposition of financial, forfeiture and deprivation[20] orders when a defendant is sentenced.[21] The prohibition has an impact:

(1) in court, as judges must exercise a high degree of vigilance to avoid procedural irregularity in sentencing by sidestepping orders that would otherwise be commonplace (for example, by ordering the forfeiture of an item used in an offence or in ordering that compensation be paid); and

(2) on victims, as the inability to impose a compensation order prior to confiscation has the potential to delay recompense.

The consultation paper

3.19 We considered that the current regime is overly complex and creates traps for the unwary.[22] Additionally, there may be circumstances where an order is plainly merited and will have no material impact on the confiscation proceedings.

3.20 In the consultation paper, we provisionally proposed 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 such an order prior to making a confiscation order, the court is required to take the order into account when determining the confiscation order.[23]

3.21 We were of the view that the court should be permitted to impose any order that is appropriate. The discretion afforded to the court will permit uncontested orders to be imposed, of the type we have described. A compensation order 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 by the defendant to pay a compensation order may be indicative of a likely lack of cooperation in satisfying any confiscation order made. This is also discussed in Chapter 14 on enforcement.

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20 Orders under Chapter 4, Part 7 of the Sentencing Code (property lawfully seized from a defendant or which was in their possession or under their control when the offender was apprehended or a summons issued which was used for the purpose of committing or facilitating the commission of an offence).

21 CP 249, paras 6.26 to 6.42.

22 CP 249, paras 6.26 to 6.42.

23 Consultation question 7.

3.22 We did not envisage that the imposition of orders prior to confiscation would occur in every case, but the power to do so would permit a sentencing judge to make orders appropriate to the individual facts of any given case. Removing the prohibition would simplify the process and remove a legislative trap.

3.23 Any order imposed prior to confiscation would be required to be taken into account if relevant to confiscation. The Court of Appeal has recognised[24] that "provided there is no danger of double recovery, compensation orders can legitimately be made prior to the resolution of confiscation proceedings."[25] The view that "double recovery" would be disproportionate mirrors the principles which would apply under our proposed regime.

3.24 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.[26] If, following appeal, a confiscation order is imposed, the court must have regard to any financial orders imposed.[27]

(2) If a confiscation order is not made and new evidence becomes available within six years of the date of conviction, the Crown Court may impose a confiscation order but must have regard to any financial orders previously imposed.[28]

(3) The Crown Court may, within six years of the date of conviction, reconsider a defendant's benefit from crime if new evidence has become available but must have regard to any financial orders imposed at sentence.[29]

3.25 As we set out at paragraph 6.69 of the consultation paper:

> 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.

3.26 The effect of our provisional proposal was intended to be that the court has flexible powers to achieve a just and expeditious outcome. The court may:

(1) sentence the defendant prior to confiscation, imposing a financial, forfeiture or deprivation order at that time (for example, where any determination about the defendant's means is straightforward);

(2) sentence the defendant prior to confiscation but choose to defer the imposition of financial, forfeiture and deprivation orders (for example, because the court requires further detail about the defendant's means which may only come from the type of enquiries that are undertaken pursuant to the confiscation process); or

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24 See for example *R v Sachan* [2018] EWCA Crim 2592, [2019] 4 WLR 67.
25 CP 249, para 6.46.
26 Proceeds of Crime Act 2002, s 31(2).
27 Proceeds of Crime Act 2002, s 32(4).
28 Proceeds of Crime Act 2002, ss 19(1) and (7).
29 Proceeds of Crime Act 2002, s 20.

(3) sentence the defendant after confiscation (for example, when the defendant's confiscation is straightforward and does not require a protracted exchange of information or a protracted final hearing).

Consultation responses

3.27 There was substantial support for this proposal.[30]

3.28 The Bar Council's response considered that the approach of the Court of Appeal in *R v Guraj* was contradictory, in that although the Court of Appeal concluded that the making of financial orders prior to the imposition of a confiscation order was prohibited under POCA 2002, this type of procedural error would not invalidate a later confiscation order. The Bar Council supported a reform which would address this aspect.

3.29 The Serious Fraud Office supported this proposal and commented that it would enable the destruction of drugs once the substantive criminal proceedings were complete rather than having to store them for extended periods while confiscation proceedings are still ongoing.

3.30 One concern expressed with this policy by a member of law enforcement was that often in order to reach an appropriate figure for a compensation order, the confiscation enquiry is needed. The resources deployed for the confiscation enquiry can be used to ensure that compensation is maximised, which would not be possible if a compensation order was made earlier.

3.31 However, it was also noted by Kingsley Napley LLP that allowing financial orders to be made prior to confiscation would enable compliance with these orders which could be taken into account by a judge when making the confiscation order and considering enforcement.

3.32 A response by Wilson's Auctions commented that they often hold assets for extended periods awaiting the resolution of confiscation proceedings. These assets often depreciate over time leading to the need to realise their value which is onerous and requires obtaining the permission of the defendant.

3.33 A concern was expressed by some individual members of law enforcement that this proposal could make the process more complex and could lead to confusion.

Analysis

3.34 The heart of this proposal is the creation of a permissive power for the court to exercise discretion in contexts where it is appropriate to make financial, forfeiture and deprivation orders prior to the resolution of confiscation proceedings. It does not create a requirement for the court to make such orders.

3.35 The overwhelming position expressed in consultees' responses was that a degree of flexibility in this context would be welcomed to enable the swift payment of

[30] Consultation question 7 (52 responses: 42 (Y), 5 (N), 5 (O); 10 did not answer); summary consultation question 2(2) (33 responses: 22 (Y), 4 (N), 7 (O); 4 did not answer); summary consultation question 2(3) (32 responses: 24 (Y), 1 (N), 7 (O), 5 did not answer).

compensation and the early disposition of property which currently must be kept until the making of the confiscation order.

3.36 We envisage that the power is likely to be used routinely for the forfeiture of drugs and in circumstances when the confiscation proceedings are simple and the orders are likely to be of low value but there is likely to be some delay before the confiscation proceedings are concluded. In more complex cases, a decision may be taken not to exercise the discretion to make financial orders at the outset but to wait until the confiscation enquiry is complete to ensure that all relevant financial information is available.

3.37 The primary complexity arises in determining how the financial or forfeiture order of the court is to be taken into account when determining the confiscation order. In Chapter 12, we recommend a new mechanism which affords the court the ability to make appropriate deductions from the overall benefit figure for money or property disgorged either to the state, or by way of compensation prior to the making of the order.

Recommendation 6.

3.38 We recommend 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 has imposed 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.

PROPOSAL 3 – AMENDMENT OF THE CONFISCATION "SLIP RULE" IN SECTION 15(4) POCA 2002 TO 56 DAYS

The current law

3.39 Under the current law if the court sentences the defendant prior to making a confiscation order and refrains from imposing any financial, forfeiture or deprivation order pursuant to section 15(2) of POCA 2002, the court may amend the sentence within 28 days of the end of the period of postponement to impose such an order.[31]

3.40 The limit of 28 days prescribed by POCA 2002 to correct a failure to make one of these orders is potentially a trap for the unwary because it is different to the period of 56 days which is permitted to vary sentence under what is referred to as the "slip rule".

3.41 Despite the slip rule being a commonly known and understood practice, the rectification of errors not properly corrected within the period of the "slip rule"

[31] Proceeds of Crime Act 2002, ss 15(3) and 15(4).

continues to place a significant burden on the Court of Appeal (Criminal Division) ("CACD") and incurs unnecessary costs. In *R v Hoggard* the court observed:

> [Where an error] was not corrected within the 56 day period provided by section 155 of the 2000 Act (now section 385 of the Sentencing Code) it could only be corrected on appeal – which would inevitably involve the use of valuable administrative time, court time and expense.[32]

3.42 Consequently, due to the differential timeframe in confiscation proceedings (in s 15(4) POCA 2002) and the resultant confusion, the difficulties which arise in relation to the application of the slip rule become compounded; and create an additional burden on the CACD.

The consultation paper

3.43 As noted above, in our consultation paper we observed that the 28-day period for amendment currently prescribed by POCA 2002 is confusing to practitioners[33] because usually a period of 56 days is permitted to vary sentence.[34] Until 2008, the Crown Court was only permitted 28 days to vary sentence.[35] 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.[36]

3.44 To simplify the law and remove this sentencing "trap", we provisionally proposed that the current 28-day period within which the Crown Court is permitted to vary a sentence to make a financial, forfeiture or deprivation order following the making of a confiscation order be extended to 56 days from the date on which a confiscation order is imposed. Our provisional view was that this would align the timeframes under POCA 2002 and the Sentencing Code, bringing clarity and consistency to the law; and ensure that any errors can be rectified by the court at first instance rather than using the valuable time and resources of the CACD.

Consultation responses

3.45 This proposal garnered wide support amongst those consultees who submitted a response to this consultation question.[37] In addition to simplifying the slip rule in connection with confiscation, the proposal was also seen as having a pragmatic impact. One comment made in support of this proposal was in relation to the logistical difficulties experienced when attempting to have a matter relisted within 28 days. Extending the period to 56 days would alleviate some of the pressure caused by the 28-day timeframe.

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32 *R v Hoggard* [2013] EWCA Crim 1024, [2014] 1 Cr App R(S) 42 at [16].
33 CP 249, para 6.50.
34 Sentencing Code, s 385; formerly Powers of Criminal Courts (Sentencing) Act 2000, s 155.
35 Criminal Justice and Immigration Act 2008, sch 8(3), para 28(2)(a).
36 Criminal Justice and Immigration Act 2008, sch 8, para 28(2)(a); and the Criminal Justice and Immigration Act 2008 (Commencement No. 2 and Transitional and Savings Provisions) Order 2008, SI 2008 No 1586, art 2(1), sch 1, para 26 (with para 13).
37 Consultation question 8 (41 responses: 39 (Y), 2 (N), 21 did not answer).

Analysis

3.46 This proposal was uncontroversial, removing a "trap" and simplifying an area of the regime which is currently unduly complex and confusing.

Recommendation 7.

3.47 We recommend that the current 28-day period within which the Crown Court is permitted to vary a financial, forfeiture or deprivation order, pursuant to section 15(4) POCA 2002, be extended to 56 days from the date on which a confiscation order is imposed.

PROPOSAL 4 – REMOVING REFERENCES TO "POSTPONEMENT"

The current law

3.48 POCA 2002, like the legislation that preceded it, continues to permit both proceeding with the confiscation case prior to imposing sentence[38] or postponing the confiscation matter and proceeding to sentence.[39]

3.49 The key features of postponement are:

(1) Proceedings may be postponed for a specified period.

(2) A period of postponement may be extended.[40]

(3) The court may postpone for any reason and it may order more than one postponement, but the postponed period (including any extension(s)) must not exceed two years from the date of conviction unless there are exceptional circumstances.[41]

(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.[42]

(5) A period of postponement may be granted without holding a hearing.[43]

(6) Where a court postpones confiscation proceedings and proceeds to sentence, financial, forfeiture and deprivation orders may not be imposed.[44]

38 Proceeds of Crime Act 2002, s 14(1)(a).
39 Proceeds of Crime Act 2002, s 14(1)(b).
40 Proceeds of Crime Act 2002, s 14(2).
41 Proceeds of Crime Act 2002, s 14.
42 Proceeds of Crime Act 2002, s 14(8); and *Revenue and Customs Prosecution Office v Iqbal* [2010] EWCA Crim 376, [2010] 1 WLR 1985.
43 Criminal Procedure Rules, r 33.13(4).
44 Proceeds of Crime Act 2002, s 15(2).

(7) When a period of postponement expires, a court may, within 28 days, vary sentence and impose financial, forfeiture and deprivation orders.[45]

(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.[46]

3.50 The usual sequence of events is to impose sentence (except financial, forfeiture and deprivation orders) and deal with confiscation at a later date.[47]

3.51 Judges should clearly specify whether they are proceeding with confiscation prior to sentence (section 14(1)(a)) or postponing it (section 14(1)(b)).

3.52 The distinction between proceeding and postponing is important because 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. However, the importance of the two-year time limit is somewhat diminished by the case of *CPS (Swansea) v Gilleeney*,[48] in which the Court of Appeal held that where a judge had ordered the prosecution to provide 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.

3.53 Taken to its logical conclusion, the decision in *CPS v Gilleeney* means that:

(1) the two-year time limit on postponed confiscation runs to the setting of the timetable and not the conclusion of confiscation; and

(2) the 28-day period to vary financial, forfeiture and deprivation orders expires 28 days after the setting of the confiscation timetable rather than after the conclusion of the confiscation proceedings. It is highly unlikely that information will have been exchanged within this time, and even more unlikely that confiscation will have been concluded. The whole purpose of the 28-day period (to allow the court to impose financial, forfeiture and deprivation orders in full knowledge of the confiscation decision) is therefore undermined.

3.54 The distinction between postponement and proceeding therefore has:

(1) made the law unnecessarily complicated;

(2) failed to prevent “drift” of confiscation proceedings, because the limitation of time expires on the setting of a timetable; and

(3) created procedural hurdles that can hamper the just disposal of the case.

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45 Proceeds of Crime Act 2002, s 15(3).
46 Proceeds of Crime Act 2002, s 14(11).
47 *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [8] and [13].
48 *CPS (Swansea) v Gilleeney* [2009] EWCA Crim 193, [2009] 2 Cr App R (S) 80.

The consultation paper

3.55 We provisionally proposed that these issues could be addressed through the replacement of the "postponement" regime with:

(1) a statutory requirement to start confiscation proceedings within a prescribed time; and

(2) active case management following the commencement of confiscation proceedings.

3.56 We provisionally proposed that the time at which confiscation begins should be the setting of a confiscation timetable. We considered that this not only reflects the current legal position as articulated in *Gilleeney*,[49] but also would serve a useful purpose. Prosecutors could use the time period up to the setting of the timetable 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. With the benefit of such a financial investigation, the prosecution will be in a position to assist the court with setting a meaningful timetable and that timetable may be somewhat shorter than would otherwise have been the case.

3.57 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 allow the court formally to dispense with the setting of a timetable.

Consultation responses

3.58 The majority of consultees who submitted a response to this consultation question supported this proposal.[50] In general, there was a high degree of concern about drift and delay and those who supported the proposal considered that it would facilitate the prompt resolution of confiscation proceedings. Some comments about this proposal overlapped with comments made in relation to our proposal as to whether the maximum statutory period between the date of sentencing and the date on which a confiscation timetable is set ought to be six months (but able to be extended in "exceptional circumstances").[51] These comments centred on whether it was sensible to separate confiscation proceedings from sentencing at all in light of the need for the expeditious and final disposal of criminal proceedings.

Analysis

3.59 The broad concern which led to the development of this proposal was that confiscation proceedings are prone to drift. The current postponement provisions have been interpreted very broadly, leaving defendants (and often compensatees) waiting for extended periods for the final resolution of the confiscation proceedings. Making this recommendation will ensure that confiscation proceedings are started within a specified time and actively case managed so that they will not be susceptible to drift.

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49 *CPS (Swansea) v Gilleeney* [2009] EWCA Crim 193, [2009] 2 Cr App R (S) 80.
50 Consultation question 9 (46 responses: 31 (Y), 4 (N), 11 (O); 16 did not answer).
51 Confiscation question 10.

The relevant specific period within which proceedings should be started is discussed below.

Recommendation 8.

3.60 We recommend 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.

PROPOSALS 5 AND 6 – STARTING A TIMETABLE WITHIN SIX MONTHS OF SENTENCE, WHICH MAY BE EXTENDED IN EXCEPTIONAL CIRCUMSTANCES

3.61 In our consultation paper we provisionally proposed that confiscation proceedings should be started within six months of the date of sentence, and that the six-month period could be extended in exceptional circumstances.

The current law

3.62 As interpreted by *Gilleeney*,[52] the current period for ordering the service of a prosecutor's statement is two years. However, it is clear that Parliament's original intention was for the two-year period to apply to the conclusion of confiscation proceedings as opposed to the "first step" in those proceedings.[53]

The consultation paper

3.63 We provisionally proposed that the time limit should be measured from the date of sentencing, rather than conviction.[54] Where multiple defendants are tried separately and convicted of related criminality, they are usually sentenced together. The sentencing may therefore be quite some time after conviction. Any time limit for confiscation running from the date of conviction would therefore either have to be lengthy or would almost inevitably have to be extended. Therefore, we provisionally proposed starting the time limit from the date of sentence rather than the date of conviction.[55]

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52 *CPS (Swansea) v Gilleeney* [2009] EWCA Crim 193, [2009] 2 Cr App R (S) 80.

53 In 2001, the Cabinet Office Performance and Innovation Unit report "Recovering the Proceeds of Crime" (para 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.

54 As is currently the case under Proceeds of Crime Act 2002, s 14(5); see CP 249, paras 6.84 to 6.87.

55 CP 249, para 6.85.

3.64 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.[56]

3.65 We considered 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*, we provisionally proposed 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.

3.66 We provisionally concluded 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. We also determined 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 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.

Consultation responses

3.67 There appeared to be some confusion amongst consultees as to whether this proposal would have required the entire confiscation process to be completed within six months as opposed to requiring the setting of a timetable for proceedings within six months. For this reason, some consultees expressed concern that this was an inadequate length of time in which to conduct confiscation proceedings.

3.68 Rather than supporting the proposal to provide a six-month time frame, several consultees supported the proposition that a confiscation timetable ought to be set at sentence.[57] The Environment Agency, for instance, commented that there ought to be explicit encouragement to set a timetable at sentencing. While the Crown Prosecution Service and Insolvency Service did not nominate the sentencing date explicitly, both organisations expressed the view that confiscation proceedings ought to commence as soon as possible.

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56 Confiscation of Proceeds of Crime Act 1989 (NSW), ss 4 and 13.

57 Consultation question 10 (44 responses: 26 (Y), 6 (N), 12 (O); 18 did not answer); summary consultation question 2(4) (34 responses: 25 (Y), 4 (N), 15 (O); 3 did not answer); summary consultation question 2(5) (33 responses: 24 (Y), 4 (N), 5 (O); 4 did not answer); consultation question 11 (43 responses: 26 (Y), 3 (N), 14 (O); 19 did not answer).

3.69 Practitioners from the National Crime Agency also supported a confiscation timetable being set on sentence and the West Midlands Regional Organised Crime Unit commented that it should be standard for the prosecution to request a confiscation timetable on sentencing.

3.70 The Bar Council also agreed that it is appropriate in every case for a confiscation timetable to be set by the date of sentencing at the latest; although the confiscation proceedings might be protracted, this need not delay the setting of a timetable. The Bar Council also noted that the sentencing hearing was the last date all parties would be together, absent a further order.

3.71 One law enforcement officer noted that this proposal may cause further delay. This view was supported by members of the Eastern Region Regional Organised Crime Unit.

Analysis

3.72 The provisional proposal for a six-month period from sentence was intended to afford the parties (and the prosecution in particular) some time to consider their respective positions with regard to confiscation proceedings. Considering the responses from stakeholders who advocated that the timetable be set at the time of sentencing (which included many prosecution agencies to whom the proposal would apply), we have determined that it is not necessary to afford a six-month period (from sentence), within which a timetable must be set for the commencement of confiscation proceedings. Instead, we have responded to consultees' responses and reformulated the policy to require that the confiscation timetable be raised as a matter before the court by the completion of the sentencing hearing.

3.73 Throughout this report we make other recommendations which promote early consideration of confiscation issues and active case management. For example, we recommend that the prosecutor should be required to indicate on the Plea and Trial Preparation Hearing form whether any confiscation proceedings are likely to be complex or non-complex (discussed more comprehensively in Chapters 4 and 5). Restraint continues to be encouraged from the outset of an investigation. Therefore, confiscation is a matter to which regard should be had from early in the case.

3.74 In formulating the appropriate period, we noted that there was a degree of concern expressed by investigative agencies with regard to the imposition of timeframes which fail to take into account the complexity of a case. It is understood to be relatively common for the confiscation investigation to be in its infancy at the time of sentence and there were concerns expressed during consultation that prosecution agencies may not have adequate information to be able to make submissions as to an appropriate timetable at the point of sentence. However, we consider that these concerns are largely met by:

(1) our recommendations and observations on the encouragement of early consideration of confiscation; and

(2) our recommendation for the provision of standard timetables in the Criminal Procedure Rules (see Chapter 4) and the power to amend such timetables after imposition.

3.75 Expediting the setting of a confiscation timetable also addresses consultees' concerns that defendants ought to have finality in relation to their criminal proceedings and liability as soon as possible. It is worthwhile also noting in the context of postponement that during consultation, several consultees expressed concern as to the difficulties experienced by defendants who are in custody awaiting the resolution of confiscation proceedings.

3.76 We heard from consultees who described instances of defendants who would have been subject to preferable custodial arrangements such as moving to a less restrictive prison or release with an electronic tag were it not for their outstanding confiscation matter. During consultation we spoke directly with representatives from HM Prison and Probation Service who confirmed that the way their internal policies operate, defendants with ongoing confiscation proceedings may be disadvantaged when considering less restrictive custodial options:

> Our policy on home detention curfew presumes that people should be released unless you can't manage the risk in the community or there was an offence in the prison and we are awaiting for investigation/proceedings. There is a third limb for those facing confiscation proceedings – it says that you have to postpone the home detention curfew decision if the defendant has a confiscation order and, having consulted the prosecution authority and regional enforcement unit, it is determined there is an unacceptable risk of frustrating the order of the court, or evidence that the defendant has frustrated the proceeds of crime proceedings to avoid a confiscation order being imposed.

3.77 A concern with this approach is that often the decisions as to what constitutes an "unacceptable risk" are being made prior to the confiscation hearing taking place and prior to the order having been made. The "unacceptable risk" is based on limited financial information gathered by the prosecution authority that has not yet been tested in court. The delay of confiscation proceedings may lead to defendants having to remain in high security custodial settings before a decision on the confiscation order has been made.

3.78 For these reasons we recommend that a confiscation timetable must be raised as a matter before the court by the completion of the sentence hearing to ensure prompt consideration by the court.

Recommendation 9.

3.79 We recommend that the prosecution must raise the timetable for confiscation proceedings as a matter before the court by the completion of the sentence hearing.

3.80 We recommend that errors or amendment be addressed (respectively) by applying the slip rule within 56 days of sentencing or through amendment of the timetable.

Chapter 4: The exchange of information

INTRODUCTION

4.1 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.

4.2 In the consultation paper we made the following provisional proposals for a bespoke case management regime for confiscation proceedings.

(1) The Criminal Procedure Rule Committee ("CPRC") should consider providing timetables for the provision of information and service of statements of case in confiscation proceedings.[1]

(2) The CPRC 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.[2]

(3) The CPRC 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.[3]

(4) 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:

(a) The order is an order of the court and it must be complied with.

(b) 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 them.

(c) The defendant will find it hard to discharge that burden without providing the information.

(d) The court can go further and use the failure to provide the information against the defendant when making its decisions in the confiscation hearing.

(e) That ultimately a failure to provide information may result in the defendant facing an order that is far larger than they might have expected, and that they may face imprisonment or forfeiture of specific assets if that order is not paid.

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1 Consultation question 12; summary consultation question 3(1).
2 Consultation question 13; summary consultation question 3(2).
3 Consultation question 14; summary consultation question 3(2).

(5) The CPRC should consider including such a direction in a Criminal Practice Direction on confiscation; and that such a direction should be included in the Crown Court Compendium.[4]

(6) The CPRC 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.[5]

(7) The prosecutor's statement in confiscation proceedings should comprise concise pleadings, statements and exhibits which must be lodged as separate documents.[6]

4.3 We also invited consultees' views on whether the drafting of the prosecutor's statement has contributed to problems in confiscation proceedings; and whether consultees believe that it would be beneficial for a lawyer to have oversight or input into the drafting of the prosecutor's statement.[7]

4.4 In this chapter, we recommend adopting proposal (1) and adopting proposals (2) to (7) in revised form. We also make additional recommendations in connection with timetabling for the provision of and response to third party information and in connection with disclosure.

4 Consultation question 15; summary consultation question 3(4).
5 Consultation question 16.
6 Consultation questions 17; summary consultation question 3(5).
7 Consultation question 18.

OVERVIEW OF POLICY

Exchange of information

4.5 In timetabling confiscation proceedings, the court should first consider whether the case is "complex".

(1) In determining whether the case is complex the court should consider whether it involves:

(a) complex asset structures;

(b) complex income structures;

(c) assets that are or were held through offshore trusts or settlements or otherwise held offshore or overseas;

(d) assets that are or were held through family or unquoted corporate entities;

(e) expert evidence;

(f) a statement from one or more interested parties; or

(g) complex or novel legal arguments.

(2) In complex cases the standardised timetable should be:

(a) 15 business days for service of the defendant's provision of financial information (section 18);

(b) 45 business days for service of the statement of an interested party;

(c) 60 business days from the deadline for service of the defendant's provision of information for the prosecutor's statement of information (section 16); and

(d) 60 business days for service of the defence response to the prosecutor's statement of information (section 17).

(3) In non-complex cases the standardised timetable should be:

(a) 15 business days for service of the defendant's provision of information (section 18);

(b) 30 business days from the deadline for service of the defendant's provision of information for service of the prosecutor's statement of information (section 16); and

(c) 30 business days for service of the defence response to the prosecutor's statement of information (section 17).

(4) The court may disapply or vary the timetable if it is in the interests of justice to do so.

(5) Having set the timetable, the court must be satisfied that the defendant understands the consequences of not complying with the timetable.

The prosecutor's statement of information

(6) The prosecutor's statement should comprise the following, the content of which should be prescribed by the Criminal Procedure Rules:

(a) a prosecution skeleton argument;

(b) a table which clearly identifies key assertions "at a glance" (a "Scott Schedule");

(c) the financial investigator's statement;

(d) any witness statements or evidence relied upon by the financial investigator or prosecutor to support the conclusions reached; and

(e) a declaration that unused material has been reviewed and that either:

(i) there is no such material;

(ii) none that requires disclosure; or

(iii) material has been disclosed.

Disclosure

(7) Further to 6(e) and following receipt of the defence response to the prosecutor's statement of information, the prosecution must review disclosure and update the defence about the outcome of that review.

PROPOSAL 1 – INTRODUCING CONFISCATION TIMETABLES INTO THE CRIMINAL PROCEDURE RULES

The current law

4.6 The legislation and Criminal Procedure Rules ("CrimPRs") afford a large degree of discretion to the court in fixing the appropriate timetable for confiscation (in essence, there are no standard timetables provided). 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 and can lead to wildly different timetables being set in each case. This broad discretion means that there is a dearth of guidance in relation to what a "reasonable" timetable may be including:

(1) a formal case management guidance governing confiscation proceedings;

(2) suggested timetables for the service of material;

(3) prescribed forms to record information other than confiscation orders themselves;

(4) mandatory case management hearings; or

(5) Criminal Practice Directions applicable to confiscation proceedings.

4.7 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.[8]

4.8 It was against this backdrop that we proposed that the CPRC prescribe a consistent approach to confiscation proceedings.

The consultation paper

4.9 The Court of Appeal and the Supreme Court have both observed that confiscation timetables "slip"[9] and "are particularly susceptible to drift".[10] In our consultation paper we identified that, in addition to drift caused when evidence takes longer to obtain than was anticipated, drift may occur for less justifiable reasons, including the following:[11]

(1) The primary focus of participants in the criminal justice process is on the prosecution and sentencing of the defendant for their criminality, and confiscation is widely perceived as a complicated annex to that process. This means that the parties do not turn their attention to the complicated process of obtaining the relevant financial records and other evidence until the substantive proceedings are complete.[12]

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8 *R v Lowe* [2009] EWCA Crim 194, [2009] 2 Cr App R (S) 81 at [21].
9 *R v Lowe* [2009] EWCA Crim 194, [2009] 2 Cr App R (S) 81 at [21].
10 *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [37].
11 Confiscation of the Proceeds of Crime after Conviction: A Consultation Paper (2020) Law Commission Consultation Paper No 249, para 7.27.
12 See *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [37].

(2) There is a perception that confiscation proceedings will often settle and that therefore there is no real need to comply with directions that would assist the court in preparing for a contested hearing.[13]

(3) Defendants may be disengaged because:

(a) "it is often in their interests to delay".[14] The longer a confiscation takes to resolve the longer a defendant is likely to retain the benefit of their assets and the more opportunity the defendant has to put those assets beyond the reach of the courts.

(b) defendants who face confiscation proceedings have already been convicted and face punishment including a potential loss of liberty. They are likely to be reluctant to co-operate with proceedings in which they may also be required to give up assets.

(c) the defendant's role as a stakeholder in the confiscation process is often under-emphasised. Defendants bear the burden of rebutting the statutory assumptions (see Chapters 9 and 10). They also carry the burden of showing that the available amount (see Chapter 12) is less than the value of the benefit obtained (if that is the case).[15]

4.10 Unlike in substantive criminal proceedings, the Criminal Procedure Rules do not prescribe any timetables for the service of material. We provisionally proposed that the rules should make such provision for standard timetables to:[16]

(1) provide the court and parties with a clear indication that confiscation proceedings should not be permitted to drift and should be subject to robust time limits; and

(2) assist in removing the perception that confiscation is merely an annex to the principal criminal proceedings in which effective case management may be less important.

Consultation responses

4.11 Consultees overwhelmingly supported this proposal.[17] It was welcomed by several stakeholders on the basis that confiscation proceedings often lack rigorous case management and are therefore susceptible to drift. A retired member of the Court of Appeal noted that a revised Criminal Procedure Rule in this regard would greatly assist.

4.12 The primary reservation expressed in relation to this proposal was that if the prescribed timetable is not appropriate for a particular case, the court must have discretion to alter it.

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13 See Chapter 5 – Early Resolution of Confiscation.
14 *R v Guraj* [2016] UKSC 65, [2017] 1 WLR 22 at [37].
15 R Fortson KC, M*isuse of Drugs and Drug Trafficking Offences* (6th ed 2012) p 13-050.
16 CP 249, paras 7.70 to 7.76
17 Consultation question 12 (42 responses: 36 (Y), 6 (N); 20 did not answer); summary consultation question 3(1) (33 responses: 22 (Y), 2 (N), 9 (O); 4 did not answer).

4.13 It was noted by consultees that ensuring judicial discretion was incorporated into any prescribed timetable was critical to ensure, for instance, that defendants in custody have sufficient time to access their records and instruct their legal representative.

Analysis

4.14 This proposal was relatively uncontroversial in that most stakeholders recognised that confiscation proceedings are susceptible to drift and there ought to be mechanisms in place to prevent and manage this. Timetabling and case management are not novel in criminal cases. The Criminal Procedure Rules already provide for the timetabling of preparation for criminal proceedings,[18] ranging from the date by which initial details of the prosecution case must be served to dates by which applications to adduce hearsay evidence must be served and responded to.[19] In addition, legislation prescribes timetables, including the time for service of a defence statement which sets out the nature of a person's defence.[20]

4.15 The support for this proposal was often qualified by a concern that a judge ought to be able to exercise discretion to amend a standard timetable if the circumstances of a case demand it. The absence of timetables for confiscation proceedings in the Criminal Procedure Rules means that currently judges have a very broad discretion. However, the discretion is largely left unchecked and as a result timetables are highly variable. While it is accepted that judicial discretion is needed for cases that either require significantly more time than the timetable provides or can be resolved very swiftly and do not require a timetable, this ought to be limited. Consequently, the recommendation retains some judicial discretion but within the context of standardised timetables, so that the default position is for confiscation proceedings to be resolved without delay.

4.16 This recommendation would ensure that a standard timetable is set before or by the conclusion of sentence, and the matter is appropriately case managed.

Recommendation 10.

4.17 We recommend that the Criminal Procedure Rule Committee should provide standard timetables for the provision of information and service of statements of case in confiscation proceedings. The court should have discretion to amend these timetables on application of one or more of the parties based on the facts of the case.

PROPOSALS 2 AND 3 – STANDARD TIMETABLES FOR "COMPLEX" CONFISCATION CASES AND "NON-COMPLEX" CONFISCATION CASES

4.18 In our consultation paper we provisionally proposed that the CPRC should consider timetables for the service of statements regarding confiscation which use periods of:

18 Criminal Procedure Rules, r 8.2.
19 Criminal Procedure Rules, part 20.
20 Criminal Procedure and Investigations Act 1996, s 12; Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011.

(1) 28 days in “non-complex” cases; and

(2) 56 days in “complex” cases.

The current law

4.19 Currently under Part 2 of POCA 2002, the parties have a duty to assist the court in furthering the just resolution of a criminal case. 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.

4.20 Confiscation is treated as an extension of the sentencing process,[21] and appropriate information should therefore be made available to the court to resolve confiscation fairly, efficiently and expeditiously, pursuant to the overriding objective. POCA 2002 provides for the provision of information to the court in sections 16 to 18A. These sections can be briefly summarised as follows.

(1) The provision of information by the defendant under section 18 of POCA 2002 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. Additionally, pursuant to section 10A of POCA 2002, at the confiscation hearing the Crown Court may 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 may direct a third party to provide information to assist in determining the extent of that third party’s interest in property pursuant to section 18A.

(2) The prosecution statement of information under section 16 is usually drafted by a financial investigator who has investigatory powers at their disposal. 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, the amount of benefit it is asserted a defendant has obtained, and whether any third party holds an interest in a relevant asset.

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.

[21] See the discussion in the CP 249, para 7.4.

(3) The purpose of the defendant's response to the prosecutor's statement of information under section 17 is "to identify the areas in dispute for a confiscation hearing". If the 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. A defendant may be ordered to indicate which matters within the section 16 statement are accepted and to identify matters which are not accepted in a section 17 statement.

(4) The prosecution is at liberty to serve an additional statement of information at any time, and may also be ordered to do so.

4.21 There are no standard timetables for the provision of such statements.

The consultation paper

Tailored and flexible timetables

4.22 We acknowledged in the consultation paper that the broad discretion afforded by having no standardised confiscation timetables is perhaps reflective of 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.[22] However, we did not consider such an argument to negate the advantages in having standardised timetables. We concluded that:

(1) the complexity of proceedings could be reflected in standardised but differential timetables;

(2) those timetables could be departed from in the interests of justice; and

(3) a standardised starting point for timetabling serves to promote consistency in approach across courts, even if the interests of justice require that it be departed from on the facts of a particular case.

4.23 We considered that the starting point for timetabling therefore ought to be an assessment of complexity of the confiscation proceedings, with complexity being determined using factors similar to those considered by the Family Court in allocating financial work to the specialist 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 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;

[22] CP 249, para 7.39.

(6) expert accountancy evidence; and

(7) complex or novel legal arguments.[23]

The starting point for timetabling

4.24 A judicial "Guide to Restraint and Confiscation" written by HHJ Hopmeier suggests that "28 days" is ordinarily sufficient for the exchange of information,[24] and we originally took this as our starting point for each stage of a proposed timetable for cases that do not involve complex issues. We recognised that this 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.[25] However, we considered 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.

4.25 We considered that 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.

4.26 We discussed the assertion 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.

4.27 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 proposed were designed to promote consistency in approach.

4.28 Our consultation paper was written with reference to "days". The Criminal Procedure Rules 2020 have largely converted references to "days" into references to "business days".[26] Accordingly, we have endeavoured to clarify our references to timescales to reflect the change.

Consultation responses

4.29 Whilst the proposition of having prescribed timetables for the service of statements was generally supported, the proposed timeframes themselves were met with mixed responses.[27]

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23 Certificate of Financial Complexity in the Financial Remedies Unit of the Central Family Court.

24 HHJ Hopmeier, *A Guide to Restraint and Confiscation Orders under POCA 2002* (2022), pp 27 to 28.

25 Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005 (SI 2005 No 902); Form PTPH NG2.

26 Criminal Procedure Rules Secretariat, "A Guide to the Criminal Procedure Rules 2020".

27 Consultation question 13 (40 responses: 24 (Y), 16 (N); 22 did not answer); consultation question 14 (40 responses: 22 (Y), 18 (N); 22 did not answer); summary consultation question 3(2) (32 responses: 17 (Y), 6

4.30 Although 28 days (20 business days) was seen as sufficient time to respond to an order that the defendant provide details of their assets, some operational stakeholders considered that such a period was inadequate for preparation of the prosecutor's statement.[28]

4.31 Furthermore, even a 56-day period (40 business days) might be inadequate as a result of:

(1) the defendant being in custody;[29]

(2) the need for expert reports;[30] and

(3) the need to conduct overseas enquiries.[31]

4.32 While we did not explicitly ask consultees for their views on the factors which may be considered when determining whether a case could be considered "complex", Rudi Fortson KC noted that:

> It is questionable whether the value of an asset should be a factor, although determining the existence and/or extent (and thus the value) of a third party interest in property can be a complex issue (but this is usually within the competence and experience of the Crown Court: see *R v Hilton* (Respondent) (Northern Ireland) [2020] UKSC 29; *Bevan* [2020] EWCA Crim 1345, and *Forte* [2020] EWCA Crim 1455).

Analysis

4.33 Given the disconnect between the views expressed by stakeholders on the proposed timescales and the informal guidance[32] given to the judiciary, we consulted further with the judiciary to determine whether our proposals were in line with the [discretionary] timetables currently being set.

4.34 Liverpool Crown Court has been consistently in the top three rankings of Crown Courts with respect to the volume of confiscation hearings, the duration of hearings and the number of sitting days spent on confiscation. One Judge at Liverpool Crown Court told us that in their experience:

> In a non-complex case we would routinely set the following timetable: defendant section 18 statement within 14 days; prosecution section 16 statement 4-6 weeks thereafter; defendant section 17 statement 14 days after that. In complex cases there is no routine timetable. Each one would be bespoke to the type of case.

(N), 9 (O); 5 did not answer); summary consultation question 3(3) (33 responses: 25 (Y), 1 (N), 7 (O); 4 did not answer).

28 Association of Chief Trading Standards Officers; Environment Agency; Financial Conduct Authority; an individual from HMRC; individual members of the Metropolitan Police Service; a member of the National Crime Agency; City of London Police.

29 Crown Prosecution Service.

30 Garden Court Chambers; personal response from a forensic accountant.

31 Practitioner from the National Crime Agency.

32 HHJ Hopmeier, *A Guide to Restraint and Confiscation Orders under POCA 2002* (2022) pp 27 to 28.

4.35 We note that the approach adopted in Liverpool is largely aligned with the timetable proposed by the "Guide to Restraint and Confiscation" by HHJ Hopmeier.

4.36 In light of the consultation responses and our further inquiries, we carefully reconsidered the provisionally proposed timetables to ensure that they provide a realistic and workable framework through which the confiscation proceedings can be properly case managed, without having to resort to the exercise of discretion in every case and without the proceedings becoming disproportionately protracted.

4.37 We recommend the following timetables for non-complex and complex cases and provide detailed reasoning below.

Non-complex cases

4.38 We recommend the following timetable:

(1) 3 working weeks[33] for service of the defendant's provision of information under section 18 (15 working days);

(2) 6 working weeks for service of the prosecutor's statement of information under section 16 (30 working days); and

(3) 6 working weeks for service of the defence response to the prosecutor's statement of information under section 17 (30 working days)

4.39 This amounts to a total timetable of 75 working days (15 working weeks). Whilst 30 working days does not appear to be much of an extension to the 28-day period initially proposed, because the recommendation is framed in terms of working days rather than days, in effect it adds a full two working weeks (10 working days) to our provisionally proposed timetable and reflects the upper-end of the bracket used in Liverpool.

Complex cases

4.40 We recommend the following timetable:

(1) 3 working weeks for service of the defendant's provision of information under section 18 (15 working days);

(2) 9 working weeks for service of the statement of an interested party under section 18A (45 working days);

(3) 12 working weeks for the prosecutor's statement of information under section 16 (60 working days); and

(4) 12 working weeks for service of the defence response to the prosecutor's statement of information under section 17 (60 working days).

[33] Monday to Friday.

4.41 This amounts to a total timetable of 135 working days (27 working weeks). In accordance with our original proposals, the periods for service of the sections 16 and 17 statements are twice as long as in non-complex cases.

4.42 Our revised timetables ensure that there are equal lengths of time for the prosecution and defence to prepare their cases following service of the defendant's provision of information under section 18.

4.43 Notably, the timeframe for initial service of the defence provision of information does not change depending on the nature of the matter (complex or non-complex) because this information should already be available to the defendant and therefore should not take a significant length of time to prepare. However, it is acknowledged that the preparation of the prosecutor's section 16 statement and the defence's section 17 response require further action by the parties, the extent of which will vary depending on the complexity of the case. For this reason, the timeframes given for preparing these statements are longer.

4.44 Where there is a statement required from one or more interested party, this may elevate the matter to a "complex case" which means that the "complex case" timetable will apply. We assessed that it would be necessary for the interested party to have adequate time to obtain legal advice and produce a statement. This would need to be balanced with the need for both the prosecution and defence to review the material prior to producing their own statements. We have consequently concluded that it is appropriate to prescribe that any statement from an interested party must be served within 45 business days from the date the defendant's provision of information is served (under section 18).

4.45 Notably, this means that the period for the interested party's statement and the prosecutor's statement will overlap, but the prosecutor will still have 15 working days to consider the interested party's statement before the prosecutor's statement is due. As the interested party's statement will involve a single discrete issue (that is, a claimed interest in particular assets), we have determined that three weeks is sufficient for the prosecution to consider its contents before the prosecution statement is due.

4.46 Importantly, as per the original proposal, these revised timetables are subject to a judicial discretion to modify them based on the circumstances of a particular case. If for example, there are multiple interested parties who provide statements. It may also be that a defendant is in custody and therefore requires more time than the timetable allows, or a financial investigator is unable to engage an expert in the time allowed. In these instances, a judge can modify the timetable and set a more appropriate one. Similarly, if the matter is very straightforward and a shorter timetable would be appropriate, a judge may exercise their discretion to amend it accordingly.

4.47 With regard to the factors to be considered by the court when determining whether to classify a confiscation case as complex, Rudi Fortson KC's consultation response (see paragraph 4.32 above) is compelling. The value of any particular asset is clearly not necessarily determinative of the complexity of the case. For instance, the defendant may have a single asset (a house solely in their name) worth a lot of money but nothing else, allowing a very straightforward confiscation hearing and confiscation order determination. Conversely, the defendant may have several assets, each not

worth very much, which are held jointly with their partner, rendering the case considerably more complex.

4.48 Consequently, we do not recommend that the value of family assets, trust and/or corporate entities should be included in the list of factors for the court to consider when classifying the case as complex.

Recommendation 11.

4.49 We recommend that the Criminal Procedure Rule Committee should consider prescribing different timetables for "complex" and "non-complex" cases.

4.50 In non-complex cases, we recommend that those timetables should be:

(1) 15 working days for service of the defendant's provision of information under section 18 of POCA 2002;

(2) 30 working days for service of the prosecutor's statement of information under section 16 of POCA 2002; and

(3) 30 working days for service of the defence response to the prosecutor's statement of information under section 17 of POCA 2002.

4.51 In complex cases, we recommend that those timetables should be:

(1) 15 working days for service of the defendant's provision of information under section 18 of POCA 2002;

(2) 45 working days for service of any interested party's statement under section 18A of POCA 2002;

(3) 60 working days for service of the prosecutor's statement of information under section 16 of POCA 2002; and

(4) 60 working days for service of the defence response to the prosecutor's statement of information under section 17 of POCA 2002.

4.52 We recommend that these revised timetables be subject to a judicial discretion to disapply them based on the circumstances of a particular case.

4.53 We further recommend that to determine whether a case is complex or non-complex, the court should consider whether the case involves:

(1) complex asset structures;

(2) complex income structures;

(3) assets that are or were held through offshore trusts or settlements or otherwise held offshore or overseas;

(4) assets that are or were held through family or unquoted corporate entities;

(5) expert evidence;

(6) a statement from one or more interested parties; or

(7) complex or novel legal arguments.

PROPOSALS 4 AND 5 – WARNING THE DEFENDANT ABOUT NON-COMPLIANCE

The current law

4.54 If a defendant is ordered to provide information to the court about their assets and the defendant fails to comply without a reasonable excuse, the court may draw any inference that appears appropriate.[34] 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.[35]

4.55 Similarly, a defendant who fails to respond to an allegation contained in a prosecutor's statement may be treated by the court as having accepted the allegation.[36] 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 they can understand.[37]

4.56 During our pre-consultation discussions we asked practitioners how often they have been aware of sanctions (such as contempt of court or adverse inferences being drawn) 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".

The consultation paper

4.57 Accordingly, in our consultation paper we provisionally proposed that judges be required to give a direction in every case when service of documents is ordered pursuant to a confiscation enquiry to the following effect.

(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 them.

(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 they might have expected, and that they may face imprisonment or forfeiture of specific assets if that order is not paid.

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34 Proceeds of Crime Act 2002, s 18(4); *R v Bhanji* [2011] EWCA Crim 1198, [2011] Lloyd's Rep FC 420.
35 Proceeds of Crime Act 2002, s 18(5).
36 Proceeds of Crime Act 2002, s 17(3); *R v Layode* (Unreported, 12 March 1993).
37 *R v Leeming* [2008] EWCA Crim 2753, [2008] 11 WLUK 36; Criminal Procedure Rules, r 33.13(7)(b).

4.58 We also provisionally proposed that such a direction ought to be included in a Criminal Practice Direction on confiscation[38] and that such a direction should be included in the Crown Court Compendium.[39]

Consultation responses

4.59 These proposals received a generally positive response from operational stakeholders. Practitioners and other individual members of the legal and law enforcement community also supported these proposals.[40]

4.60 A number of consultees referred to the problem of non-compliance by the defence with the timetables set, or late compliance – sometimes so late that it necessitated the prosecution seeking an adjournment in order to respond to the defence statement properly. The City of London Police suggested that a record should be made, and an adverse inference drawn by the court, if a party consistently made last-minute submissions without good cause.

4.61 One criticism of this proposal from stakeholders was that it is unnecessary because defendants already receive this advice from their legal representatives. One Crown Court Judge expressed the view that such directions should be optional, but not mandatory.

Analysis

4.62 Based on the generally positive response to these proposals, we continue to be of the view that it is important to ensure that the defendant is aware of the points we listed in our provisionally proposed direction. However, in order to ensure an appropriate level of flexibility to suit the facts of each case, we recommend that the Court should satisfy itself that the defendant is aware of those points, which will in some cases necessitate an explicit direction.

4.63 This requirement could be included within the Criminal Procedure Rules and resemble the drafting of rule 25.9(f). This rule sets out a requirement that:

> The court must satisfy itself that there has been explained to the defendant, in terms the defendant can understand (with help, if necessary)—
>
> (i) the right to give evidence in person, and
>
> (ii) that if the defendant does not give evidence in person, or refuses to answer a question while giving evidence, the court may draw such inferences as seem proper.

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38 See Part 9 of the Criminal Procedure Rules 2020 for examples of directions already provided as to what the court must explain to defendants in the context of allocation and sending for trial.

39 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 example directions for judges to use and adapt as necessary in relation to various aspects of the criminal justice process.

40 Consultation question 15(1) (44 consultation responses: 32 (Y), 3 (N), 9 (O); 18 did not answer); consultation question 15(2) (44 consultation responses: 34 (Y), 3 (N), 7 (O); 18 did not answer); summary consultation question 3(4) (31 responses: 22 (Y), 9 (O); 6 did not answer).

4.64 While the rule imposes a requirement on the court, it is not prescriptive as to the way in which the court must fulfil this requirement. It allows for the court to draw on a broad range of material when determining whether the requirement has been met.

4.65 This recommendation strikes a balance between ensuring that the defendant's ability to understand and participate in proceedings is prioritised and the need for the judge to have some discretion over the management of the proceedings.

Recommendation 12.

4.66 We recommend that the Criminal Procedure Rule Committee should implement a requirement that the court must satisfy itself that the defendant understands the following matters in order that the defendant is able to participate effectively in confiscation proceedings.

(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 them.

(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 they might have expected, and that they may face imprisonment or forfeiture of specific assets if that order is not paid.

PROPOSALS 6, 7 AND 8 – FORM AND DRAFTING OF CONFISCATION STATEMENTS

The current law

4.67 Prosecutors' 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.[41] However, we were told that very often these portions of the statement are muddled together, making the identification of the prosecutor's case difficult.

4.68 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 information leads to difficulties in identifying the salient issues and hampers the court's ability to case-manage proceedings. We were given examples in which the section 16

[41] Pursuant to Criminal Procedure Rules, r 33.13(5) and POCA 2002, s 16.

statement lacked clarity and was needlessly lengthy. It is important that in confiscation proceedings all parties and the court are able to understand clearly the nature of each party's case, and to separate evidence from assertion.

4.69 The importance of clarity and concision has been emphasised repeatedly by the courts[42] and in procedural guidance that has been issued to both criminal[43] and civil practitioners. We considered 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.

The consultation paper

4.70 To identify the disputed issues in confiscation proceedings, we provisionally proposed that the Criminal Procedure Rules should prescribe the content and form of statements in confiscation proceedings.

4.71 In particular, we envisaged the service of prosecution statements as 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.

4.72 The purpose of the provisional proposals was to ensure that evidence, submissions and the factual basis upon which a case is put are readily discernible.

4.73 We also asked consultees whether they considered that it would be beneficial for a lawyer to have input into or oversight of the drafting of a prosecutor's statement, rather than to leave the drafting to a financial investigator, whose expertise is in investigation rather than in presentation of a case to the courts.

Consultation responses

Prescribing the content and form of statements exchanged in confiscation proceedings

4.74 This proposal, to prescribe the content and form of statements exchanged in confiscation proceedings to ensure that they assist the court in identifying issues in dispute, was largely supported by operational and legal stakeholders.[44]

4.75 One recurring concern was that prosecutors' statements are often lengthy and unfocussed and that ensuring there is a standardised structure would assist in making the process more efficient through clear identification of the issues.

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42 *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].

43 Criminal Practice Direction XII part D; Criminal Procedure Rules r 39.3(2).

44 Consultation question 16 (39 responses: 34 (Y), 5 (N); 23 did not answer).

4.76 Several consultees suggested that there are templates being used by various organisations which have been developed internally.

Provision of separate pleadings, statements and exhibits

4.77 This proposal was also largely supported by legal and operational stakeholders.[45]

4.78 A barrister at 5 St Andrew's Hill supported this proposal on the basis that it would be the best way to prevent statements which contain imprecise, inaccurate and irrelevant content. The Environment Agency similarly agreed with the proposal subject to clear guidance as to what should be included in the financial investigator's statement.

4.79 The Bar Council commented that the division between pleadings and evidence should be clearer because it is often hard to determine whether evidence should be challenged through the financial investigator or through a witness from whom the evidence has been called.

4.80 The criticisms of this proposal largely centred on concerns that this would create additional work, documents and confusion. The City of London Police shared these concerns; their proposed solution was to retain a single bundle of documents with marked appendices.

Should there be a prescribed degree of prosecutorial involvement in the prosecutor's statement?

4.81 This consultation paper invited views rather than a simple "yes" or "no" response.

4.82 There was not perceived to be a problem in agencies where there was already integrated working between lawyers and financial investigators. The Environment Agency submitted that they had not experienced problems with the prosecutor's statement. In their cases, once drafted by the financial investigator, the prosecutor's statement was reviewed by the prosecutor and any suggested revisions agreed. The Financial Conduct Authority said it operated a similar system whereby the prosecutor's statement was reviewed by the prosecutor and counsel before service.

4.83 A lack of collaborative working was seen as producing the opposite outcome. One Trading Standards officer cited the lack of cooperation between the investigating officer and prosecutor as the primary issue and that often Counsel did not see the prosecutor's statement until the day of the hearing. A barrister at 5 St Andrew's Hill chambers described a tendency to introduce irrelevant facts and incorrect statements of legal principles in prosecutor's statements and that the lack of legal input meant such mistakes were not corrected. Matrix Legal and Forensic Services Ltd, expressed the view that frequently the drafting of section 16 statements was deficient and they have difficulties obtaining additional information.

4.84 The Bar Council looked at expertise more generally, commenting that financial investigators were generally well versed in what was required, but there are some cases in which a lawyer's oversight could assist.

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[45] Consultation question 17 (37 responses: 28 (Y), 9 (N); 25 did not answer); summary consultation question 3(5) (32 responses: 21 (Y), 5 (N), 6 (O); 5 did not answer).

Analysis

4.85 These three provisional proposals were intended to facilitate the clear and intelligible presentation of information in confiscation cases with input from the appropriate professionals at the appropriate time. Consultees generally supported that approach. However, consultees did not want processes introduced which made matters more complex. Two key points were apparent:

(1) rather than produce separate documents, a single "bundle" is preferable; and

(2) reflecting a theme throughout the consultation, adoption of terminology used in criminal law proceedings is preferable to that used in civil proceedings.

4.86 We therefore recommend that the prosecution "statement of information" comprises a single bundle made up of:

(1) a prosecution skeleton argument;

(2) a table which clearly identifies key assertions "at a glance" (a "Scott Schedule"[46]);

(3) the financial investigator's statement;

(4) any witness statements or evidence relied upon by the financial investigator or prosecutor to support the conclusions that were reached.

4.87 We envisage the prosecution skeleton argument being a brief document containing an overview of the position adopted by the prosecution (for example as to the application of the assumptions). In more complex cases, it might include references to more complex legal argument. Pursuant to the views of consultees, adoption of criminal law terminology means that the use of "skeleton argument" as opposed to "position statement" or "pleadings" is preferable.[47]

4.88 To facilitate accessibility and to provide the defendant with a framework within which to respond to the prosecution, this should be supplemented by a table, or "Scott Schedule", which sets out the key assertions on each row, and provides a space for the defendant to summarise their position.

4.89 The "financial investigator's statement" that follows will be similar to the current prosecutor's statement, setting out their calculations and the rationale for them.

4.90 Finally, the witness statements and evidence that informed the financial investigator's rationale should be set out.

4.91 By separating out the financial investigator's statement and the evidence in support of that statement from the skeleton argument, the law and the evidence is kept separate. We consider that this meets current concerns of a "prosecutor's statement" being

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46 A Scott Schedule is designed to identify precisely the questions that the judge has to decide.

47 Whilst still analogous, it is perhaps the least analogous of the three terms used here.

neither produced by a prosecutor[48] nor being a "statement" in the traditional sense of providing evidence to the court.

4.92 The content of that financial investigator's statement could be prescribed by the Criminal Procedure Rules. Such content as is currently prescribed by rule 33.13(5) would need to be revised to remove references to content which relates to legal argument (for example whether the defendant has a criminal lifestyle or whether the court needs to make a binding determination about third party interests) and to focus on factual matters. Matters of legal argument might be prescribed by the Criminal Procedure Rules as relevant content for the skeleton argument.

4.93 We consider that separating out the documents as described within a single bundle will enable the court and the parties to become familiar with the papers quickly and the case to proceed more efficiently. The recommendations also ensure that the expertise of professionals is deployed appropriately. The financial investigator can focus on gathering, analysing and presenting evidence whilst the lawyer focusses on ensuring that issues are clear and legally correct for the court.

4.94 Whilst ensuring that the documents and assertions are set out clearly may take a little more time, ultimately, the task largely involves separating out existing documents and articulating what ought to be thought through in any event, namely the legal arguments and factual assertions to be raised in the context of the case.

DISCLOSURE

Background

4.95 Section 3(1) of the Criminal Procedure and Investigations Act 1996 ("CPIA 1996") requires the prosecution to:

> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
>
> (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

4.96 Further to this requirement of initial disclosure is a "continuing duty" of disclosure, pursuant to section 7A:

> (1) This section applies at all times—
>
> (a) after the prosecutor has complied with section 3 or purported to comply with it, and
>
> (b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.

[48] But by a financial investigator who is also a witness in the proceedings.

(2) The prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material which—

(a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and

(b) has not been disclosed to the accused.

(3) If at any time there is any such material as is mentioned in subsection (2) the prosecutor must disclose it to the accused as soon as is reasonably practicable (or within the period mentioned in subsection (5)(a), where that applies).

4.97 The Code of Practice issued under section 23(1) of the CPIA 1996 articulates that the requirements in the CPIA 1996 include an obligation to provide a schedule of any "unused" prosecution material[49] and a requirement continually to review the unused material and disclose it if it becomes relevant at any stage of proceedings.[50]

4.98 These provisions apply to the substantive criminal proceedings as well as to the confiscation proceedings, though this is not made explicit within Part 2 of POCA 2002.

4.99 In *R v Onuigbo*, the Court of Appeal (Criminal Division) addressed the issue of disclosure in confiscation proceedings and noted that:

> Assuming that the material is, in this sense, available for use, the prosecutor's function is the same as it would be in preparation for trial. We consider that the CPS legal guidance to Crown Prosecutors upon chapter 21 of the Disclosure Manual correctly identifies the prosecutor's disclosure obligation as follows:
>
> > "21.2 Where a financial investigation is supporting a criminal investigation or is being conducted alongside a prosecution case, the financial investigator must ensure that revelation of all material is made to the prosecutor on the relevant forms in accordance with the existing procedure set out within CPIA 1996. In normal circumstances this will be via the disclosure officer.
> >
> > 21.2 The underlying principles of the common law, the Guidelines and ECHR mean that prosecution material created or obtained following conviction should be dealt with in the same manner. This will include the continuing duty to review the unused material, particularly, if appropriate, following the receipt of any response to a confiscation statement."
>
> It is the prosecutor's responsibility to examine the material for the purpose of ascertaining whether it may have the effect of undermining the case for the prosecutor or assisting the case for the appellant.[51]

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49 The Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, 6.2.
50 The Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, para 8.2.
51 *R v Onuigbo* [2014] EWCA Crim 65, [2014] 1 WLUK 844, [58].

Consultation

4.100 In the context of prosecution statements, we received three comments from practitioners as to the issue of disclosure. Kennedy Talbot KC expressed the view that the best way to guarantee adequate case management was through the use of prescribed distinct stages (for pleading, disclosure and evidence) modelled on the civil process. He argued that there ought to be an explicit provision that confirms that the prosecution has a continuing duty to review unused material and disclose what is relevant as was stated by the Court of Appeal (Criminal Division) in *R v Onuigbo*,[52] and is referred to in the Crown Prosecution Service Disclosure Manual.

4.101 The matter of prosecution disclosure was also raised by Dennis Clarke of Clarke Kiernan Solicitors LLP who expressed concern as to the lack of an explicit requirement for the prosecution to disclose unused material during confiscation proceedings.

4.102 These comments were reiterated by a further practitioner who noted the absence of statutory disclosure provisions.

Analysis

4.103 The issue of disclosure was not raised with us during the pre-consultation stage of the project and so it was not a matter on which we made provisional proposals. Consequently, it was not extensively commented upon by consultees. Nevertheless, we recognise that:

(1) the courts have recently re-emphasised the need for a confiscation determination to be made in light of all relevant information;[53]

(2) the Crown Prosecution Service already recognises that there is an ongoing duty to review and to disclose unused material in confiscation cases;[54] and

(3) that ongoing duty to review and to disclose unused material in confiscation cases has been recognised by the Court of Appeal.[55]

4.104 Given the few occasions on which the issue of disclosure was raised and the lack of extensive consultation on the matter we do not consider it appropriate to make wide-ranging recommendations about disclosure. Nevertheless, the ongoing duty of the prosecution to review and to disclose unused material in confiscation is already recognised as part of established practice. We consider that the existing practice could be codified to ensure that the requirement is clear.

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52 *R v Onuigbo* [2014] EWCA Crim 65, [2014] 1 WLUK 844.

53 *Barnet LBC v Kamyab* [2021] EWCA Crim 543, [2021] 4 WLUK 63; *R v Bajaj* [2020] EWCA Crim 1111, [2020] 8 WLUK 177; *R v Parveaz* [2017] EWCA Crim 873, [2017] 5 WLUK 473.

54 CPS Disclosure Manual, Chapter 21 (Disclosure of Unused Material Created in the Course of Financial Investigations).

55 *R v Onuigbo* [2014] EWCA Crim 65, [2014] 1 WLUK 844.

Recommendation 13.

4.105 We recommend that the Criminal Procedure Rule Committee consider requiring that the prosecution "statement of information" comprises a single bundle made up of:

(1) a prosecution skeleton argument;

(2) a table which clearly identifies key assertions "at a glance" – (a "Scott Schedule");

(3) the financial investigator's statement; and

(4) any witness statements or evidence relied upon by the financial investigator or prosecutor to support the conclusions that were reached.

Recommendation 14.

4.106 We recommend that the Criminal Procedure Rule Committee should consider amending Criminal Procedure rule 33.13 as to the content of the prosecution statement of information to:

(1) separate out issues of law, which are relevant to the prosecution skeleton argument, and issues of evidence, which are relevant to the financial investigator's statement;

(2) prescribe the outline content of the prosecution skeleton argument and financial investigator's statement;

(3) include a declaration that unused material (if any) has been reviewed and that:

(a) there is no such material;

(b) there is no material that requires disclosure; or

(c) material has been disclosed; and

(4) We also recommend that the Criminal Procedure Rule Committee should consider requiring that following receipt of the defence response to the statement of information under section 17 of POCA 2002, the prosecution must review disclosure and update the defence about the outcome of that new review.

Recommendation 15.

4.107 We recommend that the Criminal Procedure Rule Committee should consider amending the Criminal Procedure Rules as to the content of the defence response to the prosecutor's statement of information to reflect the need to respond to the skeleton argument and the "Scott Schedule".

Chapter 5: Early Resolution of Confiscation

INTRODUCTION

5.1 In the last chapter we discussed the framework for the exchange of information leading up to the confiscation hearing. In this chapter we discuss the provisional proposals to introduce a new process, intended 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 referred to this as the Early Resolution of Confiscation ("EROC").

5.2 In the consultation paper, we provisionally proposed the following:[1]

(1) A new stage of the confiscation process be introduced, known as the Early Resolution of Confiscation.

(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, case management would take place.

5.3 In this chapter, we recommend adopting proposals (1) and (2) and make additional recommendations to facilitate the EROC process.

5.4 In the consultation paper, we also asked whether an additional formalised process of "early offers to settle" should be introduced to resolve confiscation proceedings. Having considered carefully the consultation responses, we make no recommendation to introduce such a process. However, we do recommend that where a consent order[2] is agreed outside of an EROC meeting, it should be subject to the same judicial scrutiny as an order would be had it been agreed at an EROC meeting.

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1 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, paras 8.47 and 8.55; consultation questions 19 and 20; summary consultation question 4.

2 A consent order is a legal document that confirms the agreement of the person consenting to a financial order.

OVERVIEW OF POLICY

5.5 That:

(1) The final stage of timetabling for the preparation of a confiscation hearing should be to set a date for an EROC meeting and an EROC hearing, unless the court is satisfied that it will serve no useful purpose to do so.

(2) The form and location of the EROC meeting should not be prescribed, but instead may be flexible as required in the interests of justice in each case taking into account the nature, number and location of the parties and the evidence which must be considered.

(3) The EROC meeting should be attended by the parties, the financial investigator and wherever practicable, the Instructed Advocate. Third parties who have an interest in property which might be subject to the confiscation order and expert witnesses may attend.

(4) The procedure should be prescribed in whichever vehicle the Criminal Procedure Rule Committee considers most appropriate (either in rules or by some other means).

(5) At a subsequent EROC hearing the judge will scrutinise any agreement reached and make the order by consent if the judge is satisfied that:

(a) the proposed order represents a just disposal of the confiscation; and

(b) the defendant and any third parties who have an interest in property affected by the order are entering into the agreement freely and that they understand the content and effect of the order that they are agreeing to.

(6) Any agreement should be recorded clearly in the relevant court forms (currently 5050 and 5050A). Relevant detail should include but not be limited to:

(a) the assets that were taken into account;

(b) the value ascribed to those assets;

(c) any agreement about the extent of the defendant's interest in property;

(d) the location of the assets; and

(e) an agreement that the proposed order was being consented to freely and with clear knowledge about its effects.

(7) In the event of partial agreement or no agreement, the EROC hearing should be used for the case-management of the final confiscation hearing, and

involve completion of a Confiscation Hearing Management Form, with the court and parties considering a non-exhaustive list of issues.

(8) Recommendations (5) and (6) should also be followed where parties reach a provisional agreement on confiscation outside an EROC meeting.

(9) Legal aid funding should be available for both the Early Resolution of Confiscation (EROC) meeting and EROC hearing, just as it is available in family proceedings.

PROPOSAL 1 – INTRODUCE EARLY RESOLUTION OF CONFISCATION (EROC)

The current law

5.6 There are currently no provisions in POCA 2002 to direct that parties attempt to reach an agreement on a confiscation order. 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 court will determine the defendant's benefit figure and the sum they will be immediately liable to pay, pursuant to the confiscation order, as discussed in Chapter 7.

5.7 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.

The consultation paper

5.8 In the consultation paper we described how, despite the absence of any legislative provisions on agreement, confiscation orders are regularly agreed between the parties.[3] We proposed EROC to formalise what is becoming an established but informal practice for courts actively to encourage counsel to agree confiscation orders out of court before seeking judicial approval of them.[4]

5.9 By formalising the process, we considered that EROC would support the following aims.[5]

[3] CP 249, para 8.4. Cases on agreed orders include *R v Kaur* [2019] EWCA Crim 695, [2019] 4 WLUK 358; *R v Yaqoob* [2018] EWCA Crim 1728, [2018] 7 WLUK 108; *R v Ghulam* [2018] EWCA Crim 1691, [2019] 1 WLR 534; *R v Hockey* [2018] EWCA Crim 1419, [2018] 6 WLUK 446; *R v Morfitt* [2017] EWCA Crim 669, [2017] 5 WLUK 581; *R v Yaseen* [2016] EWCA Crim 2139, [2016] 12 WLUK 196; *R v Kelly* [2016] EWCA Crim 1505, [2016] 9 WLUK 339; *R v Souleiman* [2016] EWCA Crim 124, [2016] 1 WLUK 241; *R v Fell* [2015] EWCA Crim 667, [2015] 3 WLUK 258; *R v Onuigbo* [2014] EWCA Crim 65, [2015] 1 WLUK 844; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Ayankoya* [2011] EWCA Crim 1488, [2011] 5 WLUK 673; *R v Kennedy (John)* [2011] EWCA Crim 1377; *R v Hirani* [2008] EWCA Crim 1463, [2008] 6 WLUK 232.

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

[5] CP 249, paras 8.11 to 8.15.

(1) Agreements can be reached in a timely manner, which is beneficial to the parties, to the courts and to victims who may be awaiting compensation from confiscated funds.[6]

(2) The process of reaching agreements can be regulated, ensuring that all relevant parties are present and able to participate in a meaningful way, including the defendant and financial investigators.

(3) The confiscation order ultimately made is more likely to be realistic and enforceable if the defendant has some say in the order that is made than if the order is simply imposed by the court.

(4) The judiciary will be provided with a framework for the scrutiny and endorsement of a provisionally agreed order.

5.10 As we noted in the consultation paper,[7] and as recognised by the courts, an agreed order may contain an element of "compromise"[8] or at least have "pragmatic advantages" for the defendant.[9] However, agreements will not be without judicial scrutiny, which is intended to ensure that the agreement has:

(1) a sound legal and factual basis. The court retains the power to ensure that the agreement holds the defendant to account, in accordance with the objectives of the regime.

(2) the consent of the defendant. If the process is perceived to be fair and values the contribution of a defendant as an active stakeholder in proceedings, commitment to the result is more likely.[10]

5.11 It is notable that the Hodgson Committee, which first proposed that a confiscation regime be adopted in 1984, considered that "not infrequently the prosecution and defence will be able openly to compromise on an agreed figure… we can see no objection to this".[11]

Consultation responses

5.12 A large majority of consultees supported the proposal to introduce EROC, subject to appropriate procedures and formalities being in place in advance of, during and after the EROC process.[12]

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6 By reaching the agreement in a timely manner, the overriding objective of the Criminal Procedure Rules can be facilitated. By Rule 1.1(1) cases must be dealt with "justly". According to rule 1.1(2) dealing with a case "justly" includes "dealing with the prosecution and defence fairly…respecting the interests of victims…[and] dealing with the case efficiently and expeditiously".

7 CP 249, para 8.16.

8 *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v Morfitt* [2017] EWCA Crim 66, [2017] 5 WLUK 581; *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 (Admin), [2011] 7 WUK 36; *R v Hirani* [2008] EWCA Crim 1463, [2008] 6 WLUK 232.

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

10 See *R v Farquhar* [2008] EWCA Crim 806, [2008] 3 WLUK 200 at [13] in the context of voluntary repayment of the proceeds of crime.

11 Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 75.

12 Consultation question 19(1) (59 responses: 34 (Y), 2 (N), 13 (O); 13 did not answer) and summary consultation question 4 (35 responses: 24 (Y), 2 (N), 9 (O); 2 did not answer).

5.13 Consultees who were in favour of EROC considered that it would result in court time being better used and confiscation proceedings being resolved expeditiously.

(1) Two solicitors' firms – Kingsley Napley LLP and BCL Solicitors LLP – considered that EROC could resolve confiscation proceedings more quickly, and result in a streamlined process.

(2) Consultees (including several financial investigators) were also keen that agreements would no longer be reached immediately prior to a final confiscation hearing, when court time had already been spent, and more allocated, to prepare for and conduct the confiscation proceedings.

5.14 Consultees also considered that it would result in the just disposal of agreed confiscation cases.

(1) Consultees saw that time savings in conducting the confiscation hearing could facilitate proper judicial scrutiny of the proposed agreed order.

(2) Consultees considered that EROC would formalise a process of reaching informal agreements which are not currently subject to transparent processes and procedures.

(3) Consultees also considered that EROC could improve the defendant's engagement in the confiscation process.

5.15 The criticisms raised by consultees who were not in favour of the proposal mirror several of the points above. Several consultees were concerned that EROC would *not* be a transparent process and would amount to a continuation of the "horse trading" which currently occurs at the door of court (often excluding the financial investigator).[13] These concerns were identified as significant detriments of the current system, of which EROC was considered by some consultees merely to be a continuation.

5.16 In addition, rather than expediting the disposal of the case, some consultees questioned whether EROC would be used by defendants as another way to *delay* confiscation proceedings. They queried whether this would add a layer of complication to already lengthy confiscation proceedings where defendants would still not feel compelled to reach an agreement until the last moment.

5.17 Other consultees were also concerned that EROC would not be suitable in high-value or complex cases. For example, Andrew Campbell-Tiech KC supported the proposal, but not in cases where criminal lifestyle assumptions are being applied. One consultee suggested that one EROC hearing may not be enough to resolve complex cases.

5.18 Several practitioner consultees commented that EROC would require proper funding in order to be effective.

[13] As described by one member of Devon and Cornwall Police.

Analysis

5.19 This proposal, which is intended to formalise the existing practice of agreeing confiscation orders, was well supported by consultees. We therefore consider that such a process should be recommended.

5.20 Part of the rationale for formalising the EROC process is to provide the transparency that is currently lacking in relation to agreed orders. While some consultees were doubtful that this would occur, it is our view that the practices that we recommend should be introduced in connection with the new EROC process will ensure improved transparency. We discuss these practices below.

5.21 As now, whilst there is considerable merit in trying to resolve matters expeditiously and justly through a transparent agreement, it will not be suitable to attempt to reach agreement in every case. Nor will agreement be reached in every case. Therefore, we recommend that whilst EROC should be considered in every case when the judge is setting the confiscation timetable, we do not recommend that it is mandatory. To this extent, we recommend that there ought to be a presumption that EROC will take place unless EROC would serve no useful purpose.

Recommendation 16.

5.22 We recommend that an Early Resolution of Confiscation process ought to be implemented to formalise the existing practice of agreeing confiscation orders.

Recommendation 17.

5.23 We recommend that the timetable for the preparation of a confiscation hearing should include the Early Resolution of Confiscation (EROC) process, unless the court is satisfied that it will serve no useful purpose to do so.

PROPOSAL 2 – THE EROC PROCESS

The consultation paper

5.24 In the consultation paper we proposed a two-stage process for EROC, comprising an EROC meeting and an EROC hearing.

5.25 We referred to two family law procedures – Financial Dispute Resolution (FDR) appointments and Issues Resolution Hearings (IRH) – as examples of the use of meetings in advance of hearings to facilitate negotiation and narrow the issues.[14]

5.26 We discussed how the EROC process should be accompanied by mechanisms to facilitate transparency and good practice. In this regard, we drew a comparison with the deferred prosecution agreement (DPA) process and its use of judicial oversight

[14] CP 249, paras 8.23 to 8.31.

and approval of any final agreement.[15] We also said that a code of practice similar to that produced for DPAs would be likely to be necessary for the EROC process.[16]

5.27 In the event that the case is not resolved through the EROC meeting and hearing, then we proposed that the EROC hearing should be used for case management. We envisaged that this would include completion of a Confiscation Hearing Management Form ("CHMF").[17] This form would assist the court and parties dealing with the case efficiently by, for example: identifying remaining disputed issues; recording agreed matters; identifying third party interests and steps required to facilitate third party representations; identifying any concurrent proceedings; and acting as a further opportunity to identify complex factors which may necessitate the use of a specialist judge.[18]

Consultation responses

5.28 We asked consultees whether they agreed with the two-stage process of an EROC meeting and an EROC hearing.[19] We also received comments about other aspects of the EROC process which we discussed in the consultation paper.

The two-stage approach

5.29 Consultees were generally supportive of a two-stage approach, noting that it would formalise the current informal practice of negotiation and a mention or case management hearing.[20] Two operational consultees suggested that the EROC meeting should take place immediately before the hearing.[21]

5.30 Responding negatively, one trading standards officer considered that this was an unnecessary complication of the current system whereby the equivalent of an EROC hearing naturally took place at the first case management hearing.

Transparency

5.31 Consultees considered that EROC could improve the transparency, openness and fairness of the process for agreeing confiscation order. Several consultees[22] expressed support for a code of practice, as described in the consultation paper,[23] to ensure that the agreed order is properly arrived at. In this regard, consultees considered that an evidence-based approach should be taken to reaching agreements (as to which, see below).

5.32 Consultees were supportive of a requirement that the judge scrutinises any agreement that is reached and checks that a defendant is clear about what is being agreed, although one judge expressed misgivings about the degree of judicial control which would in fact be exercised. The Scottish Government stressed that there ought to be

15 CP 249, paras 8.33 to 8.34.
16 CP 249, paras 8.35 to 8.37.
17 CP 249, paras 8.42 to 8.44.
18 CP 249, para 8.43.
19 Consultation question 19(2) (50 responses: 36 (Y), 2 (N), 12 (O); 12 did not answer).
20 Personal response from a member of law enforcement; Gary Pons (5SAH); North East ACE Team; Bar Council.
21 West Midlands Regional Organised Crime Unit; one practitioner from the NCA/NECC.
22 Including the Insolvency Service and Helena Wood of the Royal United Services Institute.
23 CP 249, para 8.37.

no suggestion that the defendant was not being fully deprived of their benefit from crime as a result of the agreement.

Evidence-based approach

5.33 It was suggested that EROC practice should require an evidence-based approach to agreements.

5.34 All consultees who specified when they thought EROC should take place agreed that it should at least be after service of the prosecutor's statement.

5.35 Consultees including the Crown Prosecution Service ("CPS") and the National Compliance and Enforcement Service (NCES) were particularly supportive of agreements being properly recorded, with orders specifying the process by which figures were agreed and a list of the assets taken into consideration. The NCES noted that they face enforcement problems when informal agreements are not properly recorded. Similar concerns were repeated to us by practitioners working in asset recovery. We heard evidence during consultation that in some instances the defendant does not know what has been agreed, which also contributes to difficult enforcement.

5.36 We spoke to consultees about the benefits of uploading agreed orders to the Crown Court Digital Case System (DCS). The DCS is a digital platform which facilitates the sharing of information in connection with a criminal case. Parties can access, prepare and present information on a case by sharing information with court staff, the judge and the prosecution or defence, and collaborating on documents and the bundle.[24]

5.37 At the time the consultation paper was published and during the subsequent period of consultation, confiscation material was not routinely stored on the DCS despite consultees generally being in favour of uploading it for ease of access. Notably, this omission has now been rectified and as of September 2021, material related to the making of a confiscation order has been added as a category of material on the DCS. However, this material does not extend to agreed orders.

The EROC meeting

5.38 Consultees commented on which parties ought to be engaged in the EROC meeting and how this process might benefit them.

(1) The defendant – consultees recognised that EROC could better engage the defendant in the process by which an order is made, increasing the degree to which they regard it as fair and thereby increasing the likelihood of compliance. However, Dr Craig Fletcher was concerned that EROC must not cause undue pressure on the defendant to agree an order in terms which do not represent their benefit (for example, by threats of much higher orders if they resist, or by involving their families in proceedings). Another consultee noted that there is an imbalance of expertise between the defence and the prosecution, the latter having the assistance of a financial investigator.

[24] HM Courts and Tribunals Service, *Crown Court Digital Case System Guidance* (updated November 2020), https://www.gov.uk/guidance/crown-court-digital-case-system-guidance.

(2) Instructed counsel – the Bar Council commented on how, currently, informal negotiations were more effective when instructed counsel were present at the mention before the final hearing. Other consultees agreed and indicated that adequate funding would be necessary to secure the involvement of the instructed advocate rather than "stand in counsel".

(3) The financial investigator ("FI") – several consultees from law enforcement, including individual FIs and the Environment Agency, confirmed the experience we described in the consultation paper of FIs and investigating bodies feeling excluded from the agreement process.[25] In contrast, the Criminal Law Solicitors' Association described the FI as often effectively conducting litigation on behalf of the prosecution.

(4) Third parties – consultees, including the CPS, highlighted the need for EROC to account for third party interests. This may include members of the defendant's family or business partners who may have an interest in the defendant's assets. A member of the Association of Business Recovery Professions (referred to as "R3" in the Consultation Paper) suggested that this may include those entitled to be paid compensation out of confiscated funds, however we have concluded this would not be appropriate and provide reasoning below.

5.39 Consultees, including the Serious Fraud Office, considered that there should be flexibility about where and how an EROC meeting takes place.

The EROC hearing

5.40 Consultees were supportive of the EROC hearing as described in the consultation paper. One consultee expressed concern that a single EROC hearing may not be sufficient in every case, including particularly complex cases.[26] The Insolvency Service queried whether the final approval of the agreement could be done on the papers without the need for a hearing.

Analysis

5.41 We consider that the two-stage process which was provisionally proposed in the consultation paper, when combined with a clear procedural framework, has the potential to build greater efficiency and transparency into resolving confiscation.

5.42 As set out in relation to recommendation 18, where EROC is not dispensed with in the interests of justice, we recommend that EROC is timetabled to take place after the exchange of information to ensure that all relevant information is available to the parties.

5.43 We recommend that the procedure for EROC be included in the Criminal Procedure Rules (discussed further below and at Recommendation 22).

5.44 The detail of the procedure could be drawn from examples including the family procedure rules on settlement; the process for "early appropriate guilty pleas" in New South Wales; pre-hearing engagement which takes place before a Pre-Trial Preparation Hearing ("PTPH") in substantive criminal proceedings; and other

[25] CP 249, para 8.7.
[26] Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland.

procedures already existing in the Criminal Procedure Rules. Any procedure should encourage the meeting and hearing to be meaningful.

5.45 In order to support the transparency and proper conduct of EROC, there should be a code of practice to regulate the conduct of the EROC meeting and hearing. This may draw on the DPA Code of Practice.[27]

5.46 However, we are mindful of the need to simplify and streamline processes and so we consider that any series of procedural safeguards could and should be included in any confiscation practice direction.

5.47 Regarding the parties who ought to attend the EROC meeting and hearing, in addition to the prosecution, defendant and instructed advocate we recommend, in accordance with consultee views:

(1) the financial investigator; and

(2) any third parties who would have standing in contested proceedings, particularly those who hold an interest in any of the property deemed to belong to the defendant.

Recommendation 18.

5.48 We recommend that in addition to the prosecution, defendant and instructed advocate, the following parties ought to attend the EROC meeting and hearing:

(1) the financial investigator; and

(2) any third parties who would have standing in contested proceedings, particularly those who hold an interest in any of the property deemed to belong to the defendant.

5.49 In line with our approach to compensation within the confiscation regime, we do not recommend that compensatees should be invited to the meeting or hearing. We do not consider that the position of compensatees in confiscation should depart radically from their position in the substantive criminal proceedings. Therefore, their interests should be represented by the prosecution.

The EROC meeting

5.50 We recommend that the format of the meeting should remain flexible. There should be an option to conduct it remotely or at court, and the judge may specify the format when setting the confiscation timetable.

[27] Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice (Crime and Courts Act 2013)* (February 2014), https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf.

5.51 We recommend that the judge should not be directly involved in the EROC meeting. The involvement of the judge could prejudice judicial continuity if the judge has to withdraw themselves from involvement in the confiscation hearing, having been involved in earlier failed negotiations. It may also negate some of the efficiency gains of the EROC meeting taking place outside of court time, if it is reliant on the allocation of a judge. Moreover, judges already have the power and duty to manage cases actively, and in appropriate cases may exercise these powers in relation to EROC (for example, if the parties do not appear to have taken the process seriously when they appear for the EROC hearing). These powers and duties are to be reemphasised in the confiscation context;[28] this will extend to the judicial oversight of the EROC process.

The EROC hearing

5.52 We recommend that the judge's main role at the EROC hearing will be to scrutinise the order, if one has been agreed by the parties. Approval may be withheld where, for example, the judge does not find that the agreed order is a wholly accurate reflection of the defendant's proceeds from crime, or where the defendant does not understand what they are agreeing to. In a similar way to the process in DPAs, the judge will give reasons for approving an agreed order. In the absence of agreement between the parties, the EROC hearing will take the form of a case management hearing as the parties proceed to a contested hearing. This will involve the completion of a Confiscation Hearing Management Form.

5.53 We consider that there ought to be flexibility regarding the continuation or conclusion of EROC proceedings, especially in cases involving third parties (or where third-party issues come to light during the EROC process). This may necessitate a second meeting and/or hearing. Equally, the process needs to be sufficiently flexible to accommodate joint proceedings in cases where multiple defendants' orders are being considered together, which might necessitate a series of sequential or concurrent EROC meetings.

5.54 We consider that one of the key improvements EROC may bring is to encourage better recording of confiscation orders. This will provide greater clarity about which assets have been taken into account and will assist with enforcement. This responds to consultees' concerns that agreed orders can be difficult to enforce, because of a lack of clarity about which assets were included, and the basis of the findings.

5.55 We consider that where an agreement is reached, the result should be recorded in the 5050 and 5050A forms. The 5050 form is drawn up by the Court and contains a record of the confiscation order. It includes the amount of benefit; the date of the order; the default sentence for non-payment; details of any other defendants with whom joint benefit is found to be held; and details of the time to pay period.[29] The 5050A form contains a schedule of available or realisable assets. It is filled in by the financial investigator and consented to by the defendant. It contains a description of each

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28 Consultation question 9; see ch 3.

29 Crown Prosecution Service, *Legal Guidance, Proceeds of Crime* (December 2019), https://www.cps.gov.uk/legal-guidance/proceeds-crime, ch 3, "The Confiscation Order".

asset, its current location, any notes (such as whether it is under restraint or a charging order), its value assessed by the FI and the value assigned by the Court.[30]

5.56 We consequently recommend that His Majesty's Courts and Tribunals Service ("HMCTS") update these forms to support a more robust recording of agreed orders, including precisely which assets were included.

5.57 The agreed order should also record how the figures of benefit, maximum confiscatable benefit and available amount were arrived at. Improving the format and content of these forms should help to meet concerns from consultees that the assets included in, and reasoning behind, agreed orders are not clear at the enforcement stage.

5.58 The agreed order should be uploaded to the Crown Court Digital Case System.

Recommendation 19.

5.59 We recommend that the EROC process comprise two stages:

(1) An EROC meeting, at which the parties should seek to settle the confiscation order, and in the event that the confiscation order cannot be settled, the issues for the confiscation hearing should be identified.

(2) An EROC hearing, at which the judge should consider approving any agreement, or in the event of disagreement, at which case management would take place.

Recommendation 20.

5.60 We recommend that the Criminal Procedure Rule Committee should consider prescribing the conduct of the EROC process.

Recommendation 21.

5.61 We recommend that HMCTS update the 5050 and 5050A forms to account for the EROC process.

[30] HM Courts and Tribunals Service, *Form 5050A: Make a schedule of available or realisable assets* (December 2008), https://www.gov.uk/government/publications/make-a-schedule-of-available-or-realisable-assets-form-5050a.

Recommendation 22.

5.62 We recommend that the new category for confiscation material on the Crown Court Digital Case System should include agreed orders.

EARLY OFFERS TO SETTLE

The current law

5.63 Confiscation proceedings are quasi-civil in nature. Early and genuine offers to settle are a long-established part of civil proceedings.[31]

5.64 "Part 36 offers" are early offers to settle made pursuant to Part 36 of the Civil Procedure Rules in which an offer is made by a party in a genuine attempt to settle a dispute. These offers have specific cost consequences for the party who fails to accept the offer and later loses the case.

5.65 In confiscation, early offers to settle 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.

The consultation paper

5.66 In the consultation paper we highlighted the potential cost and time savings which accompany formal offers to settle.[32] We asked stakeholders whether any criminal procedure rules or practice directions on confiscation should incorporate "early offers to settle" by allowing a defendant to supplement their response to a prosecutor's statement with a written offer to resolve the matter of confiscation.[33]

Consultation responses

5.67 The majority of consultees who answered this question considered that there was some merit in introducing early offers to settle into the confiscation process. However, even amongst the majority who were in favour there were concerns about the operational impact that it might have.

(1) As we highlighted in the consultation paper, consultees were concerned about adverse costs consequences for the prosecution if the offer to settle were not accepted and they later lose the hearing, which might lead to a continuation of the risk-averse approach to confiscation.[34] Such an approach might have an impact on the justice of any final agreed confiscation order.[35]

(2) The Financial Conduct Authority was concerned about the importation of more civil procedures into a criminal law context. This might increase complexity.

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31 Civil Procedure Rules, part 36; *Calderbank v Calderbank* [1975] 3 All ER 333.
32 CP 249, paras 8.49 to 8.54.
33 Consultation question 20 (44 responses: 30 (Y), 14 (N); 18 did not answer).
34 CP 249, 8.53.
35 Serious Fraud Office; Environment Agency; City of London Police.

(3) Garden Court Chambers noted that third party rights may be a complicating factor and would need to be accounted for appropriately.

(4) Tactical offers to settle might be made at the last minute to delay proceedings whilst the merits of the offer were considered, which might add to the delays and obstruction in confiscation that has affected the regime to date.[36]

5.68 Consultees, including the CPS, considered that transparency and fairness were key to the successful early resolution of confiscation. Whilst some consultees considered that this could be achieved in part through a requirement that formal early offers to settle be made in writing,[37] the clear preference amongst consultees both in favour of and against the introduction of formal early offers to settle was for early resolution to be achieved through the EROC procedure.

Analysis

5.69 The EROC process itself includes many of the safeguards which would be required to deal with the issues outlined above. Rather than being inherently tactical and adversarial, the EROC process is intended to facilitate the reaching of agreements through a collaborative process involving all the relevant parties, including third parties. The cost consequences that might flow from rejection of an early offer to settle do not apply (that is, a failure to accept an offer ought not have cost implications based on the outcome of the later confiscation hearing). The EROC process will be set out clearly, in whichever vehicle the Criminal Procedure Rule Committee considers most appropriate. The judge will determine whether any proposed order is freely entered into and whether it is fair, just and proportionate to make the order in all of the circumstances of the case.

5.70 Accordingly, we do not recommend formalising the process of making offers to settle confiscation proceedings in a similar manner to that used in civil proceedings.

5.71 Parties remain free to present a consent order at any stage and should be encouraged to keep that option open. It is clearly in the interests of justice if a fair and proportionate agreement can be reached and, as with orders reached through EROC, a judge should consider carefully whether the agreement should be approved.

5.72 At paragraph 8.6 of the consultation paper we highlight that the absence of a formal mechanism for agreement well in advance of a confiscation hearing was criticised because it results in last minute agreements.

5.73 We noted in the consultation paper that during pre-consultation, 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 that agreements are often reached between lawyers “at the door of the court”.

5.74 For these reasons, we see merit in including a process for agreeing consent orders in any confiscation practice direction, to mirror the EROC process, with judicial oversight. In addition to formalising the process for reaching agreed orders, it may also serve the

[36] HM Government.
[37] Serious Fraud Office; Bar Council.

case management function of reminding the parties that they can agree consent orders at any stage.

5.75 We note that the Supreme Court has emphasised the need for judges to be "astute to ensure that they are satisfied that agreements on the amount to be recovered by way of confiscation orders are soundly based".[38]

Recommendation 23.

5.76 We recommend that any confiscation practice direction requires that agreements reached outside the EROC process should be subject to a process which is comparable to the EROC hearing.

38 *R v Mackle* [2014] UKSC 5, [2014] AC 678 at [47].

Chapter 6: Incentivising payment of confiscation orders

INTRODUCTION

6.1 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.[1] 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] or the defendant may be found to be in contempt of court.[3]

(2) If a defendant fails to respond to an allegation in a prosecutor's statement of information, the defendant is deemed to have accepted the matter.[4]

(3) When imposing an order, the court must consider the imposition of a compliance order (an order that the court believes is appropriate for the purpose of ensuring that the confiscation order is effective).[5]

(4) Interest accrues at the rate of 8% per year on the principal sum if an order is not satisfied as directed.[6]

(5) A defendant may be imprisoned if an order is not satisfied as directed.[7]

6.2 Other areas of the criminal justice system reward compliance rather than simply penalising non-compliance, for example through:

(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 (agreements pursuant to the Serious Organised Crime and Police Act 2005, or "SOCPA" agreements);[8]

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1 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, para 9.6.
2 Proceeds of Crime Act 2002, s 18(4).
3 Proceeds of Crime Act 2002, s 18(5).
4 Proceeds of Crime Act 2002, s 17(3).
5 Proceeds of Crime Act 2002, s 13A.
6 Proceeds of Crime Act 2002, s 12. We discuss the accrual of interest in greater detail in CP 249, ch 22.
7 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 the outstanding balance.
8 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.

(3) reductions in sentence for providing information to the state;

(4) Deferred Prosecution Agreements (DPAs) where a corporate defendant may avoid prosecution if certain requirements are met; and

(5) Contractual Disclosure Facilities Agreements in tax-related cases specific to His Majesty's Revenue and Customs.[9]

6.3 In the consultation paper we considered whether there would be value in introducing specific rewards for compliance with the confiscation process. These included:

(1) reducing the amount of a confiscation order;[10] or

(2) a discount on the substantive sentence imposed on the defendant.[11]

6.4 We ultimately concluded against such positive incentives. Having considered the consultation responses, we do not recommend specific rewards for compliance.

INCENTIVISING COOPERATION WITH THE CONFISCATION PROCESS

Reducing the amount of a confiscation order

6.5 During the pre-consultation period, 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).[12]

Current law

6.6 In the consultation paper we set out how the potential to reduce confiscation orders or to avoid them altogether is currently approached by the Crown Prosecution Service ("CPS"). In its guidance on SOCPA agreements the CPS states that:

> 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.[13]

6.7 Accordingly, the CPS concludes that:

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9 CP 249, paras 9.19 to 9.40.
10 Consultation question 21.
11 Consultation question 22.
12 CP 249, paras 9.49 to 9.61.
13 Crown Prosecution Service, *Queen's Evidence – Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005*, https://www.cps.gov.uk/legal-guidance/queens-evidence-immunities-undertakings-and-agreements-under-serious-organised-crime, paras 34 to 36.

> It will rarely, if ever, be appropriate as part of an assisting offender agreement…to agree that the prosecutor will not ask the court to proceed to consider confiscation under section 6 of POCA.[14]

6.8 Similarly, it concludes that it would be inappropriate 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" assumptions.[15]

The consultation paper

6.9 In the consultation paper we observed that a scheme which permits the level of the confiscation order to be reduced by way of incentive would:

(1) undermine our provisionally proposed primary objective of the confiscation regime, because the defendant would not be deprived of their proceeds of crime; and

(2) be to the detriment of 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.

6.10 We considered that there is no contradiction between the conclusion that a defendant should not be permitted to retain their 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. EROC[16] 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 their benefit from crime. The proposed agreement regime does not discount a proportion of the defendant's criminal gains "as of right" for reaching an agreement.[17]

Discount on the sentence imposed

6.11 In the consultation paper, we considered whether a defendant who cooperates with the confiscation process ought to be eligible for a reduction in their substantive sentence.[18]

6.12 Although it may not seem palatable for a convicted defendant to receive a reduction in sentence for merely paying back the proceeds of their criminality, we considered that a reduction in the substantive sentence could potentially be justified because:

(1) The rationale in favour of the reduction – that court time and resources related to the confiscation proceedings and the enforcement of the resulting order are saved if agreement is reached and money is recovered by the state – does not

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14 Crown Prosecution Service, *Queen's Evidence –Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005*, https://www.cps.gov.uk/legal-guidance/queens-evidence-immunities-undertakings-and-agreements-under-serious-organised-crime, para 106.

15 CP 249, para 9.55.

16 See Chapter 5 – Early Resolution of Confiscation.

17 CP 249, para 9.61.

18 CP 249, paras 9.63 to 9.70.

appear to be readily distinguishable from the rationale used for a reduction in sentence where a defendant pleads guilty.

(2) Voluntary repayment is potentially indicative of remorse and could be considered to be evidence of a defendant making reparation for their offending, thereby informing the court's decision as to mitigation, which must be considered at sentencing in any event.

6.13 However, we determined that the benefits were insufficient to justify a reduction in the substantive sentence. We considered that 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) revisiting 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 after the reduction 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; and

(7) any such scheme would add a further layer of complexity to the sentencing process.

6.14 We consequently provisionally concluded that a reduction in the substantive sentence for prompt payment of a confiscation order could not be justified.[19]

Consultation responses

Reducing the amount of a confiscation order

6.15 Consultees strongly agreed that it would be wrong in principle to allow a defendant to retain a portion of the proceeds of their criminality as an incentive to agree and satisfy a confiscation order.[20]

6.16 The Bar Council remarked that if the status quo was not maintained, the primary aim of the confiscation regime would be undermined, as would public confidence in the criminal justice system generally.

6.17 Dr Craig Fletcher was not sure that such incentives were necessary. He commented that his research suggested most defendants would agree their confiscation orders if they reflected their true profits from criminality. This was a point strongly echoed by Professor Johan Boucht of Oslo University, who added that his research indicated that

19 CP 249, para 9.87.
20 Consultation question 21 (45 responses: 40 (Y), 5 (N); 17 did not answer).

the perceived fairness of an order was a strong factor in determining to what extent a defendant complied with it.

6.18 A member of law enforcement noted that there ought not to be bartering, offers or incentivisation with regard to confiscation.

6.19 One of the officers responding within the National Crime Agency ("NCA") said a reduction in the order would be wrong in principle but that offering a reduced available amount would be an option to secure an early agreement.

6.20 HM Government commented that if the stated purpose of the regime is to deprive criminals of their benefit then it would not be consistent with that to create incentives whereby a defendant might retain some of the benefit.

6.21 Garden Court Chambers submitted that provided an emphasis was placed on realistic settlement offers, then a scheme that explicitly permitted the retention of criminal property was not appropriate.

Discount on the sentence imposed on the defendant for cooperation with the confiscation process

6.22 Consultees also strongly agreed that it would be undesirable to permit a reduction to a substantive sentence imposed as an incentive to agree and satisfy a confiscation order.[21]

6.23 The Bar Council noted that it was already possible for defendants to make voluntary reparation to victims before sentencing and for that to be taken into account by the court. Their view was therefore that it would be unnecessary to make additional provision for this.

6.24 Dr Craig Fletcher suggested that if defendants were able to obtain a discount on sentence for cooperation with the order, this could lead to a situation where wealthy (and likely more criminally significant) defendants could buy their way out of custody.

6.25 Both the CPS and Garden Court Chambers expressed a concern that if a defendant is offered a reduction in their substantive sentence for cooperation with the confiscation proceedings, this inappropriately implies that confiscation is linked to punishment.

6.26 One member of the Metropolitan Police Service could see the benefit of a defendant receiving a reduced sentence if a victim was repaid at an early stage. This perspective was echoed by the NCA who commented that if the defendant is active in attempting to pay back their criminal proceeds, this ought to be taken into account.

Analysis

Reducing the amount of a confiscation order

6.27 It was clear from consultees' responses that incentivising payment of the confiscation order by reducing the amount of the order (thereby, enabling defendants to retain a portion of their criminal proceeds) is not perceived to be appropriate.

[21] Consultation question 22 (48 responses: 40 (Y), 8 (N); 14 did not answer).

6.28 The objective of the regime is to deprive defendants of the proceeds of their criminal activity. The confiscation regime, if working effectively, ought to be a pure calculation of what criminal proceeds were gained and what the defendant has that is recoverable towards that gain. That a defendant would be able to negotiate their way out of punishment for their substantive offence by paying back their criminal proceeds was generally seen as perverse.

6.29 While the current confiscation regime is marred by inefficiencies caused, in part, by inflated benefit figures and unrealistic orders that will never be paid, the new confiscation regime, recommended in this report, aims to remove the need for incentivisation. It does so through improved mechanisms for accurately calculating the value of confiscation orders, processes to encourage early agreement of confiscation orders, effective enforcement tools and an appropriate steer towards rehabilitation.

6.30 We have therefore concluded that it would not be appropriate to incentivise co-operation with the confiscation process by permitting a reduction in the amount that could be recovered pursuant to the confiscation order.

Discount on the sentence imposed on the defendant for cooperation with the confiscation process

6.31 The primary reasoning in favour of a scheme whereby cooperation could be rewarded with a discount on substantive sentence is that it may lead to victims being compensated earlier in the process. However, as noted by the Bar Council, any early voluntary repayment can already be taken into account on sentence, rendering this argument less persuasive.

6.32 A compelling concern is that discounting the substantive sentence as a reward for cooperation with confiscation proceedings inappropriately conflates confiscation with the punitive aspect of sentencing. We have therefore concluded that the substantive sentence should not become a bargaining chip in confiscation proceedings.

Conclusion

6.33 We have concluded that neither reductions in the amount of a confiscation order nor discounts on sentence should be used to incentivise compliance with the confiscation process or payment of confiscation orders.

6.34 We reiterate the conclusion that we reached in the consultation paper that, even in the absence of specific recommendations to reward cooperation, the system of agreements pursuant to the Early Resolution of Confiscation process (described in Chapter 5 of this report) in and of itself would provide an incentive to reach agreement. 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 their proceeds of crime than if an unrealistic and unenforceable order is made after a contested hearing.

6.35 If the process is perceived to be fair and one which values the contribution of a defendant as a stakeholder in the proceedings, this may encourage the defendant to play a larger role in the process than they currently do which may, in turn, lead to better compliance with the final order. 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 prospect 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.[22]

6.36 We aim to encourage defendants to comply with the system through improvements to its fairness and efficiency which is distinct from offering additional benefits to the defendant in exchange for their compliance.

[22] CP 249, para 9.90.

Chapter 7: Forum

INTRODUCTION TO THE CHAPTER

7.1 This chapter concerns proposals relating to the optimal forum for confiscation proceedings.

7.2 In determining confiscation cases, Crown Court judges are often asked to address issues that fall far outside of the day-to-day business of the criminal courts. Judges are asked to determine issues relating to family law, matrimonial property and other more general commercial equitable and property interests. Both the Supreme Court and the Court of Appeal have described POCA 2002 as being a technical and complex piece of legislation.[1] This has led to three particular concerns.[2]

(1) Confiscation too frequently is not dealt with adequately or at all in cases where due consideration should have been given to confiscation.[3]

(2) The law is frequently misapplied, as evidenced by the significant number of appeals arising from confiscation cases.[4]

(3) When claims arise regarding matters connected to confiscation, the same issues may be considered multiple times in different jurisdictions.[5]

7.3 A recent judgment (delivered on 25 June 2021) has highlighted again the problems which may arise when Crown Court judges are faced with complex confiscation proceedings which raise matters outside their usual experience. In *Parker v Financial Conduct Authority*, an incorrect determination by a Crown Court judge that the appellant (a victim of fraud) did not have an equitable interest in a property he invested in under a fraudulent scheme, and instead that it was held by the defendant and his wife, resulted in the property being sold and the proceeds distributed to other victims before the appellant could challenge the determination.[6] The Court of Appeal

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1 *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [30]; *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [4]; *R v Spencer (Raymond)* [2008] EWCA Crim 2870; *SFO v Lexi Holdings Plc* [2008] EWCA Crim 1443, [2009] 1 Cr App R 23

2 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, paras 10.18 to 10.21.

3 Across England and Wales, 10 court centres accounted for a third of total confiscation hearings and 40% of the entire time spent on confiscation (data provided by HMCTS on confiscation hearings). See also the anecdotal evidence provided during the pre-consultation phase of the project as outlined at CP 249, para 10.24.

4 Confiscation Orders, Report of the National Audit Office (2013-14) HC 738 para 3.15. See problems that arose, for example in *R v Bukhari* [2008] EWCA Crim 2915, [2009] 2 Cr App R (S) 18; *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83; *R v Moss* [2015] EWCA Crim 713.

5 On the interrelationship between family law financial remedy proceedings and criminal confiscation, see *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [47]; *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039 (Fam), [2003] 1 FLR 164; *Webber v Webber* [2006] EWHC 2893 Fam at [49], [2007] 1 WLR 1052; *Crown Prosecution Service v Richards* [2006] EWCA Civ 849 (Fam), [2006] 2 FLR 1220; *Stodgell v Stodgell* [2009] EWCA Civ 243, [2009] 2 FLR 244. See also: David Corker, "Stand by your man? The clash of criminal law and family law concerning inter-spousal transfers of assets" (2018) *Corker Binning blog*; D Chidgey, "For better or for worse: financial remedies and the proceeds of crime" [2014] *Family Law Review* 984.

6 *Parker v Financial Conduct Authority* [2021] EWCA Crim 956, [2021] 6 WLUK 355.

described the appellant as "badly let down by the criminal justice system" and noted that the case raises "concerns about the fairness of the requirement that issues concerning the beneficial entitlement to property in the context of confiscation proceedings under POCA should always be determined in the Crown Court".[7] The Court commented on the importance of such determinations being made by a judge with "relevant expertise", either through transfer to the business and property courts or assignment of a specialist judge to sit in the Crown Court. The Court continued:

> This observation is not intended as a criticism of the experienced judge who heard this matter, but as a reflection of the considerable disadvantages that judges of the criminal court will face when confronted with issues of this nature, without having (or being expected to have) expertise in the law of trusts, and without necessarily having the assistance of specialist counsel.[8]

7.4 In Chapter 10 of the consultation paper, we made a series of provisional proposals intended to address the problems highlighted above.

(1) We provisionally proposed that the Crown Court should retain jurisdiction for determining confiscation cases.[9]

(2) We provisionally proposed 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.[10]

(3) We made three provisional proposals in relation to complex confiscation cases.[11]

(a) 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.

(b) 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.

(c) The Lord Chief Justice should consider the institution of "ticketing" of suitable judges to deal with complex confiscation cases.

(4) We provisionally proposed 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.[12]

(5) We provisionally proposed 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. In considering the interests of

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7 *Parker v Financial Conduct Authority* [2021] EWCA Crim 956, [2021] 6 WLUK 355, at [8] and [9].
8 *Parker v Financial Conduct Authority* [2021] EWCA Crim 956, [2021] 6 WLUK 355, at [10].
9 Consultation question 23.
10 Consultation question 24.
11 Consultation question 25.
12 Consultation question 26.

justice, we provisionally proposed that the court should consider, among other relevant factors: the value of the asset or interest that is subject to the dispute; the complexity of the issue; and the conduct of the parties.[13]

7.5 In this chapter, we conclude that proposals (1) to (3) should become recommendations (with modifications to (3)). We conclude that we should not make recommendations along the lines of proposals (4) and (5).

OVERVIEW OF POLICY

7.6 That:

(1) Confiscation hearings must take place in the Crown Court.

(2) At the Plea and Trial Preparation Hearing ("PTPH") the prosecution should give an indication of whether any potential confiscation proceedings are likely to be complex.

(3) If the case is likely to be complex, the case should be referred to the Resident Judge for allocation to an appropriate judge who should deal with both trial and any potential confiscation proceedings. Ultimately, this is a decision for the court.

(4) The appropriate judge might be a judge who has been designated as a "complex confiscation judge". However, this is a matter of discretion, not necessity, particularly in light of (5).

(5) All judges who sit in the Crown Court should be provided with enhanced confiscation training.

(6) The issue of whether confiscation proceedings are likely to be complex can be revisited prior to those proceedings if it becomes necessary to do so.

PROPOSAL 1 – JURISDICTION OF THE CROWN COURT

The current law

7.7 Under the POCA 2002, the Crown Court has primary jurisdiction for confiscation proceedings. Confiscation proceedings can come before the Crown Court where the defendant is convicted in the Crown Court[14] and, where the defendant is convicted in the magistrates' court, on committal for sentencing or confiscation.[15] The Crown Court also has jurisdiction for applications for restraint orders,[16] the appointment of

13 Consultation question 27.
14 Proceeds of Crime Act 2002, s 6(2).
15 Proceeds of Crime Act 2002, s 70.
16 Proceeds of Crime Act 2002, s 41.

management and enforcement receivers,[17] and for reconsideration of confiscation orders.[18]

The consultation paper

7.8 In the consultation paper we considered that the Crown Court remains the most appropriate venue for the determination of confiscation. We concluded that it was not appropriate for confiscation to be allocated to a separate confiscation court, the High Court, or the magistrates' court.

7.9 Regarding a separate confiscation court, we considered that establishing such a court would likely be costly and time-consuming. It would comprise a limited number of judges and is therefore likely to create a backlog of cases waiting for confiscation. Transferring confiscation proceedings to a separate confiscation court after the trial would also require a new judge to assimilate all relevant evidence from what may have been a long and complex criminal trial, the details of which may be relevant to the confiscation.[19]

7.10 We rejected transferring confiscation to the High Court for similar reasons, as well as because of the potential shortage of judges to deal with the volume of confiscation work.[20]

7.11 Regarding confiscation in the magistrates' court,[21] we noted that defendants currently have an automatic right of appeal from the magistrates' court to the Crown Court.[22] In 2019, 7,913 such appeals were dealt with across England and Wales.[23] A further 2,104 appeals were outstanding. Given the tendency for defendants to seek to appeal from Crown Court confiscation findings,[24] it is highly likely that defendants would seek to exercise their automatic right of appeal from confiscation proceedings in the magistrates' courts. Delaying confiscation proceedings by engaging in prolonged litigation is a problem that has already been identified by both the courts and Parliament. We concluded that the advantage of having the same judge deal with confiscation and the substantive trial may not be possible in the magistrates' court because the same bench that dealt with the trial might not be able to deal with confiscation. Furthermore, confiscation is seen as having the potential to be highly complex, even when dealt with before the Circuit Bench.

Consultation responses

7.12 We asked consultees whether they agreed with the provisional proposal that the Crown Court should retain jurisdiction for determining confiscation cases.[25] The

17 Proceeds of Crime Act 2002, ss 48 and 50.
18 Proceeds of Crime Act 2002, ss 19 to 26.
19 CP 249, paras 10.58 to 10.63.
20 CP 249, paras 10.64 to 10.67.
21 CP 249, paras 10.68 to 10.71.
22 The upcoming Law Commission project to review and consider reform of the criminal appeals framework will examine these routes of appeal in greater depth, https://www.lawcom.gov.uk/law-commission-to-undertake-review-of-the-appeals-system/.
23 Ministry of Justice, *Crown Court statistics (Quarterly) April to June 2020* (tables). In 2020, there were 4,913 appeals against decisions from the magistrates' court: Ministry of Justice, *Crown Court statistics (Quarterly) September to December 2020* (tables).
24 Between the 2020 and 2021 edition of HHJ Hopmeier, *A Guide to Restraint and Confiscation Orders under POCA* 2002 the number of cases had risen from 507 to over 530.
25 Consultation question 23 (46 responses: 39 (Y), 4 (N), 3 (O); 16 did not answer).

overwhelming majority of consultees considered that the Crown Court is the appropriate forum for determining confiscation cases.

7.13 The Bar Council's submission reflected the general position of consultees that "whilst there are undoubtedly some confiscation cases that pose substantial challenges for the criminal justice system, the majority are relatively simple once the underlying facts are understood".

7.14 It was suggested by some consultees that there ought to be a tiered approach to confiscation, reflecting the differing complexities identified by the Bar Council. However, there was disagreement as to those tiers. Some considered that simple cases could be dealt with by the magistrates' court[26] and more complex cases by the Crown Court. Others considered that simple cases should be dealt with by the Crown Court and more complex cases by a more specialised forum (whether the High Court or a specialist confiscation court).[27] The disagreement reflected the arguments set out in the consultation paper and rehearsed above.

Analysis

7.15 As the Bar Council set out in its response, the fundamental issue lying at the core of responses was ensuring that whoever determines the confiscation proceedings has adequate understanding of the relevant law and the facts to make the necessary determinations. Ultimately, consultees considered that Crown Court judges whose primary practice and judicial experience relates to the criminal law can deal with most confiscation cases. As the Bar Council noted and as we set out in the consultation paper,[28] judicial continuity is desirable because a trial or sentencing judge will have a good understanding of the relevant facts of the case. Such continuity can be achieved most readily by keeping the case in the Crown Court.

7.16 If magistrates have dealt with a case, both the need for understanding of the facts and for continuity might suggest that confiscation in simple cases should be dealt with before the magistrates' court. However, the difficulties raised in the consultation paper and set out above were not substantively addressed in the consultation responses and so the concerns outlined remain.

7.17 Consultees took the view that considerations in complex cases might require more specialised judicial knowledge. However, the consultation paper raised a number of ways in which specialist knowledge could acquired.do The mere fact that some cases are complex does not in itself require that the confiscation hearing in its entirety be moved to another forum.

7.18 The Crown Court remains the optimal forum to conduct confiscation proceedings. Although several challenges are identified, including in the context of particularly complex cases, we do not see a convincing case made for whole or partial transfer of jurisdiction for confiscation proceedings to any of the alternative forums suggested.

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26 Personal response from a member of Sussex Police; South East Confiscation Panel (East Kent Bench); personal response from a trading standards officer; several practitioners at the National Crime Agency and National Economic Crime Unit; Association of Chief Trading Standards Officers.

27 Personal response from a solicitor; David Winch, forensic accountant; personal response from a member of the Metropolitan Police; Gary Pons (5 St Andrew's Hill); R3.

28 CP 249, paras 10.60 and 10.61, 10.98 and 10.99.

7.19 Moreover, we make several other recommendations in this chapter aimed at improving the situation in all confiscation cases in the Crown Court, and especially in complex ones.

Recommendation 24.

7.20 We recommend that the Crown Court retains jurisdiction for confiscation proceedings.

PROPOSAL 2 – NON-COMPLEX CONFISCATION CASES

The consultation paper

7.21 As was clear in the responses to the consultation question on the appropriate forum, some confiscation cases are more complex than others. In the consultation paper, we drew a distinction between "non-complex" and "complex" confiscation cases with reference to the criteria which are used by the financial remedy unit at the Central Family Court to identify complex cases.[29] We suggested that the presence of similar factors or arguments should be indicative of complex confiscation cases. In addition to the factors identified in that list, we identified that added complexity may also arise in confiscation cases with concurrent proceedings in another area of law (such as before the family courts).[30]

7.22 We considered that any case not involving complex factors can properly be dealt with by any judge of the Crown Court.[31] However, we also noted that there was little judicial appetite for confiscation and that the number of appellate decisions each year is high.[32]

7.23 Currently, the Judicial College offers confiscation training, but we were told that it is possible for judges to "sidestep" it. When training is offered, it is for approximately 2 hours.[33] We noted the observations made by the National Audit Office in both 2013 and 2016 about the need for enhanced judicial training for confiscation.[34]

7.24 We concluded that more extensive training on confiscation would emphasise that confiscation is a mainstream part of the criminal justice process. We also concluded that it would equip judges to make greater and more accurate use of confiscation in day-to-day court business.[35] A similar need for training was highlighted by Sir James Munby in 2018 in connection with family proceedings in which financial remedies are in issue. As President of the Family Division, he considered that substantive justice

29 The factors set out pursuant to a Certificate of Financial Complexity in the Financial Remedies Unit of the Central Family Court include whether a case raises issues of complex asset structures; complex income structures; assets that are or were held through the medium of offshore trusts or settlements or otherwise held offshore or overseas; assets that are or were held through the medium of family or unquoted corporate entities; the value of family assets, trust and/or corporate entities; expert accountancy evidence; and complex or novel legal arguments.

30 CP 249, paras 10.111 to 10.112.

31 Complex cases are considered more fully below, from para 7.31.

32 CP 249, paras 10.84 and 10.86.

33 CP 249, para 10.83.

34 CP 249, paras 10.81 and 10.82.

35 CP 249, para 10.87.

could be better achieved in financial remedy proceedings through "an improved programme of judicial training".[36]

Consultation responses

7.25 We provisionally proposed 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.[37] The overwhelming majority of consultees supported this proposal, with the Crown Prosecution Service ("CPS") describing improved judicial training as "very important".

7.26 Some consultees elaborated on the negative consequences of inadequate training, including errors, unrealistic orders, difficulty enforcing the order and unfairness to the defendant.[38] It was also suggested by some consultees that enhanced training may improve judicial attitudes towards confiscation, which were described as another obstacle to successful proceedings.[39]

7.27 A number of consultees gave examples of topics which they considered require particular focus for training, including on the determination of property and third-party rights,[40] relevant areas of civil law,[41] the role of fairness and the intended purpose of the legislation,[42] and determination of the available amount.[43]

7.28 During a meeting with members of the judiciary there was generally consensus that robust judicial training was very important and that it would support efforts to keep confiscation matters in the Crown Court.[44]

7.29 Some consultees' comments reflected what we discuss in the consultation paper, namely that judicial training in and of itself is not sufficient to resolve all the existing problems of the regime.[45] Consultees emphasised that this proposal should be considered alongside other reforms.[46] Nevertheless, training was considered important, and it was considered that now is an opportune moment to reform confiscation training against the background of our recommendations for reform. As the Bar Council put it:

> Given the likely changes to the law that would result from the acceptance of other proposals within the consultation, it would be an ideal time to ensure that the

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36 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.

37 Consultation question 24 (50 responses: 46 (Y), 2 (N), 2 (O); 12 did not answer).

38 Personal response; South East Confiscation Panel, East Kent Bench; Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks' Society).

39 Gary Pons (5 St Andrew's Hill); personal response from a member of Kent Police; personal response from a trading standards officer.

40 Personal response from a member of Kent Police.

41 Rudi Fortson KC.

42 Practitioners from the National Crime Agency and National Economic Crime Centre.

43 Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland.

44 Judges' roundtable meeting, 8 December 2020.

45 CP 249, para 10.104.

46 Association of Chief Trading Standards Officers; Financial Crime Practice Group at Three Raymond Buildings; personal response from a solicitor; practitioners from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland; Spotlight on Corruption; Transparency International UK; UK Anti-Corruption Coalition.

judiciary were given comprehensive training to ensure a smooth transition and effective implementation.

Analysis

7.30 In support of our recommendation above (that the Crown Court retain jurisdiction for confiscation proceedings) we recommend enhanced judicial training for Crown Court judges. This will assist the smooth conduct of confiscation proceedings, reduce appeals and, in conjunction with our other recommendations, contribute to more realistic, accurate and fairer confiscation orders.

Recommendation 25.

7.31 We recommend that the Lord Chancellor should consult with the Lord Chief Justice to institute enhanced confiscation training for judges eligible to sit in the Crown Court.

PROPOSAL 3A TO 3C – COMPLEX CONFISCATION CASES

The consultation paper

7.32 As set out at paragraph 7.14 above, we considered that it is desirable that the judge who hears a trial also hears the confiscation proceedings. We considered that this is particularly important in complex cases and in our consultation paper we made provisional proposals to facilitate a timely identification of a suitable judge to deal with complex confiscation cases. To this end, we made three related provisional proposals.

(1) The consideration of whether a specialist judge may be necessary for confiscation should take place at the stage of the Plea and Trial Preparation Hearing (PTPH).[47]

(2) If complexities are identified, the Crown Court judge should consult with the Resident Judge about allocation of work to an appropriately experienced judge.

(3) An "appropriately experienced judge" should be one who (in addition to our proposed general enhanced confiscation training) has been authorised or "ticketed" to conduct complex confiscation cases.[48] We identified that in addition to full-time judges who may be interested in a confiscation ticket, there are many part-time fee paid judges of the Crown Court ("Recorders") who have a background in civil or family law who are likely to have an interest in applying their day-to-day expertise in a criminal context.

47 CP 249, paras 10.109 to 10.115.

48 In other areas of the criminal law, judges must be "ticketed" (for example to conduct murder cases, attempted murder cases, and serious sexual offences cases). See CP 249, paras 10.101 to 10.108.

Proposal 3A – Identifying complexity at the Plea and Trial Preparation Hearing

Consultation responses

7.33 We asked consultees whether they agreed with our provisional proposal for complexity in confiscation to be identified at the PTPH.[49]

7.34 A very clear majority of consultees favoured this proposal. Again, the Bar Council's response was reflective of the general position that:

> There is no reason why the PTPH form should not include a question for the prosecution in relation to the potential complexity of confiscation proceedings, which can then be taken into account when allocating a trial or sentencing judge.

7.35 Several consultees made comments about the principle and practicality of this proposal.

(1) With regard to principle, some consultees did not think it was appropriate or fair to require the defendant to comment on confiscation (a matter which is a consequence of conviction) before they had been convicted.[50]

(2) With regards to practicality, some consultees were concerned about whether prosecutors would be able to make an indication of the likelihood of pursuing confiscation at the PTPH. They indicated that the investigatory work is not necessarily complete by then and often issues raised and resolved at trial have a bearing on that decision.[51]

Analysis

7.36 This proposal was intended to encourage the early identification of factors which might make a confiscation case particularly complex. Complexity will then have a bearing on which judge is best placed to hear the case and is also relevant to the timetabling proposals in Chapter 3. Even those consultees cited earlier who raised concerns about practicalities had no objection to the prompt identification of complex matters.

7.37 We acknowledge the force of three particular issues in connection with the defendant providing evidence about confiscation at the PTPH.

(1) It may violate the presumption of innocence to require the defence to comment on the complexity of confiscation proceedings pre-trial when such proceedings only arise as a consequence of conviction. Although in many cases the defence will already be aware of the likelihood of future confiscation proceedings from pre-trial restraint proceedings, we accept that to require a defendant to "skip ahead" and consider events after conviction might raise a perception that the defendant's guilt is being pre-judged.

(2) It might amount to a request for disclosure "by the back door". There are already regimes for making disclosure orders in connection with confiscation

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49 Consultation question 25(1) (47 responses: 35 (Y), 5 (N), 7 (O); 15 did not answer).

50 John McNally, Drystone Chambers; Garden Court Chambers; personal response from a member of the Metropolitan Police.

51 Environment Agency and the Criminal Law Solicitors' Association

prior to conviction.[52] However, such orders should only be made after careful and specific consideration rather than as a matter of routine in every case. There is also a limitation on how such evidence can be used in light of the privilege against self-incrimination.[53]

(3) Failure by the defence to raise complex issues early may also lead to a perception that the defendant has been obstructive, potentially casting them in a negative light during the confiscation proceedings. In 2021 alone there have been two unsuccessful applications for leave to appeal against confiscation orders brought on the basis of allegedly negative remarks made by the judge, in relation to the defendant, prior to confiscation.[54]

7.38 We therefore considered whether it was appropriate to require only the prosecution to give an indication of potential complexity of confiscation, particularly in light of the issues of practicality set out earlier. As we set out in the consultation paper, we did not consider a requirement to provide an indication at PTPH to be an onerous one, for the following three reasons.[55]

(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 their 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 indication of whether the prosecution will ultimately pursue confiscation.

7.39 We also observed that "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".[56]

7.40 We consider that it is appropriate to require the prosecution to answer a question at the PTPH about whether they envisage any complexities if the case progresses to confiscation. An affirmative answer is not a binding indication that confiscation proceedings will be pursued by the prosecution. It is also not the latest time at which complex issues can be identified and have a bearing on proceedings. However, where possible, it will contribute to bringing complexities in future confiscation proceedings

52 Proceeds of Crime Act 2002, s 41(7)
53 *Re O* [1991] 2 QB 520, [1991] 1 All ER 330.
54 *R v Hussain* [2021] EWCA Crim 108, [2021] 1 WLUK 409; *R v Neophyto* [2021] EWCA Crim 169, [2021] 2 WLUK 245.
55 CP 249, para 10.110.
56 CP 249, para 10.113.

forward in the minds of the prosecution at the start of proceedings. In turn, this should help to facilitate the allocation of an appropriately experienced judge to conduct both the trial and confiscation.

7.41 While we do not anticipate this being an onerous obligation for the prosecution, it is the intention that it will create a procedural expectation for the prosecution to have considered the confiscation proceedings at the time of the PTPH such that any failure to do so could result in a wasted costs order[57] in favour of the defendant because it may give rise to unnecessary (and costly) delays later. If a defendant does not know until after the substantive proceedings have concluded that confiscation proceedings are envisaged, there will be delays in obtaining the evidence they need to justify their income and expenditure. They will also have to engage legal representation for a potentially much longer period.

7.42 We note that the Criminal Practice Direction XIII (Listing) already requires the prosecution to identify complexities in the substantive case for the purposes of allocation.[58] To require the prosecutor to provide evidence in relation to confiscation simply takes this requirement a step further. Perhaps further aligned with our conclusion is the fact that whilst the prosecution must provide such information to the court, the defence "may also" do so. [59]

Recommendation 26.

7.43 We recommend that the prosecution should be required to make a non-binding indication on the Plea and Trial Preparation Hearing Form and at the Plea and Trial Preparation Hearing as to whether they envisage any complexities if the case progresses to confiscation.

Proposal 3B – Allocating the appropriate judge

Consultation responses

7.44 There was very strong support amongst consultees for the proposal to amend the Criminal Practice Direction on allocation to provide a mechanism for an appropriately experienced judge to be allocated to determine complex confiscation cases.[60] There was a general consensus among consultees that certain cases require particular expertise.

7.45 One solicitor raised a particular example to us in a practitioners' roundtable discussion,[61] describing cases which raise matrimonial finance issues. She suggested they might appropriately be dealt with by a "dual ticketed circuit judge" trained in both family and crime, in particular a circuit judge who also sits on the financial remedy court and therefore has specialist financial knowledge.

57 Criminal Procedure Rules, r 46.8.
58 Criminal Practice Direction XIII Listing, C.3.
59 Criminal Practice Direction XIII Listing, C.3.
60 Consultation question 25(2) (46 responses: 36 (Y), 4 (N), 6 (O); 16 did not answer).
61 Practitioners' roundtable meeting, 27 October 2020.

7.46 The option of encouraging greater use of High Court judges to sit on confiscation cases in the Crown Court was highlighted to us multiple times during the consultation, including by members of the judiciary. There was generally positive support for the (currently possible) practice of High Court judges sitting in the Crown Court for cases of particular complexity. This view was similarly expressed at the judges' roundtable as well as by a number of participants at the symposium.[62] We were told that this solution importantly preserved the existing routes of appeal from the Crown Court and avoided the administrative and bureaucratic cost of transferring and returning the case between different forums.

7.47 In answering this question consultees again emphasised that training for all judges should be a priority. Practically, consultees raised concerns regarding listing practices, delay and added complexity if cases are moving around regularly.

Analysis

7.48 This proposal was intended to create specific provision in the Criminal Practice Direction on judicial allocation to encourage consideration of the needs and complexity of confiscation proceedings.

7.49 The Criminal Practice Direction Division XIII (Listing) currently provides that "the Resident Judge must arrange with the listing officers a satisfactory means of ensuring that all cases listed at their court are listed before judges, Recorders or qualifying judge advocates of suitable seniority and experience".[63] We consider that the practice direction could be amended to ensure that case listing includes listing not only for the substantive trial but also for confiscation.

7.50 This proposal was intended to provide a basis for complex cases to be allocated to appropriately experienced judges. In particular, we envisaged that this proposal might facilitate the use of:

(1) High Court judges sitting in the Crown Court (where confiscation proceedings are anticipated to raise issues particularly within the expertise of High Court judges);

(2) complex confiscation judges (see below);

(3) dual ticketed circuit judges, for example judges who specialise in family and crime (such a judge may be appropriate in cases with a matrimonial finance element or with concurrent family law proceedings); and

(4) circuit judges and Recorders who sit only in crime and who are not complex confiscation judges.

7.51 We recognise that ultimately judge allocation is a matter for the Lord Chief Justice and Heads of Division. However, per our recommendation above, we do see the value in identifying early in proceedings where a case is likely to involve complex confiscation

62 Confiscation symposium, 30 November 2020.
63 Criminal Practice Direction XIII Listing, C.2.

proceedings so that consideration can be given to whether the case would benefit from a judge with a greater level of expertise.

7.52 To that end, we recommend that the Criminal Practice Direction on allocation is updated so that where complex confiscation proceedings are identified at the PTPH stage, this is taken into account during the allocation process.

Recommendation 27.

7.53 We recommend that the Criminal Practice Direction on allocation is amended such that where complex confiscation proceedings are identified at the PTPH stage, this is taken into account during the allocation process.

Proposal 3C – Ticketing confiscation judges

Consultation responses

7.54 There was very good support amongst consultees for a system of identifying particular judges to deal with complex confiscation cases, although it was again emphasised by some consultees that further training for all judges is required in order to bring about a culture change in dealing with confiscation.[64]

7.55 Three particular concerns were expressed with our provisional proposal on ticketing.[65]

(1) There would be an insufficient number of ticketed judges to deal with confiscation cases.

(2) Consequently, this would lead to greater delay.

(3) It would disrupt continuity of judge from the trial to confiscation.[66]

7.56 We received a positive informal response from a crime Recorder who supported the idea of a register of judges who "(a) are keen to do the work; and (b) had [undertaken] special training for it".[67]

Analysis

7.57 As originally envisaged, this proposal was for "ticketed" confiscation judges to be identified. A "ticketed" judge, as in other areas where this label is used, would denote a judge who had received an enhanced degree of training and was particularly able and willing to take on cases of a particular kind. However, contrary to the usual use of this term, it was never intended to mandate *all* confiscation proceedings to be undertaken by ticketed judges.[68]

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64 John McNally (Drystone Chambers); Bar Council.

65 Consultation question 25(3) (46 responses: 35 (Y), 2 (N), 9 (O); 16 did not answer) and summary consultation question 5(1) (35 responses: 27 (Y), 7 (N), 1 (O); 2 did not answer).

66 Webinar 1, 'Preparation for a confiscation hearing and forum', co-hosted with IALS (8 October 2020).

67 Personal response from a crime Recorder.

68 CP 249, para 10.112.

7.58 Although we received overall support for this proposal, we consider that it is appropriate to move away from the language of "ticketing" to make it clearer that the judges who have undertaken some additional training will not be the only ones eligible to undertake confiscation proceedings. Rather, the system is intended to facilitate the role of the Resident Judge in allocation of complex confiscation proceedings by identifying a pool of possible judges who might be drawn upon if necessary.

7.59 Another option would be for an appropriately specialist High Court judge to sit in the Crown Court to hear a complex confiscation case (facilitated by the recommendation above).

7.60 We note that the sum of these proposals accords with the recent comments made by the Court of Appeal in *Parker v FCA* and reflects the aim of ensuring that judges with "relevant expertise" are available to deal with "more complex cases" of confiscation.[69]

7.61 Therefore, we have concluded that all judges ought to be offered additional training in confiscation with some enhanced training made available for those judges who would seek to take on more complex confiscation cases and that whether this training has been undertaken should be considered when making allocation decisions.

Recommendation 28.

7.62 We recommend that Crown Court judges ought to be offered additional training in confiscation (including enhanced training) and whether this has been undertaken should be considered when making allocation decisions.

PROPOSALS 4 AND 5 – PERMITTING THE JUDGE TO DRAW ON THE ASSISTANCE OF OTHERS

7.63 In the consultation paper, we considered various options for assisting the judge to determine complex confiscation cases. This included permitting the judge to sit with others in the Crown Court, or as a "confiscation chamber" of the First Tier Tribunal.[70] Ultimately, we rejected both of these options.

7.64 We also considered ways of permitting the judge to draw on the assistance of others. We looked at two options: making use of an assessor and referring discrete matters to the High Court.

Proposal 4 – Assessors

Current law

7.65 Under section 70(1) of the Senior Courts Act 1981 and Civil Procedure 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.

69 *Parker v Financial Conduct Authority* [2021] EWCA Crim 956, [2021] 6 WLUK 355 at [9].
70 CP 249, paras 10.117 to 10.125.

7.66 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 practises 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.

7.67 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.[71]

7.68 The assessor in question could be a judge with relevant expertise. For example, in the case of *Mastercigars Direct Ltd v Withers LLP*,[72] 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.

7.69 Under Civil Procedure Rule 35.10(2), a party may object to an assessor, either personally or in respect of that person's qualification.

7.70 Assessors are distinct from “experts” who may be engaged by the parties in criminal proceedings to give opinion evidence on a particular subject.[73] The expert evidence, unless agreed by the parties, is tested in court like all other evidence presented during the proceedings.

Consultation responses

7.71 Consultees were divided on this question.[74] The Bar Council’s response frankly acknowledged that opinion had been divided as to its response on this question, but ultimately decided against the proposal. Some were attracted to the idea of using an assessor to provide both assistance to the court on particularly complex areas of law and reassurance to the parties.[75] Even amongst those who considered assessors a potentially valuable addition, few consultees had unreserved support for the proposal. Particular concerns were raised about three issues.

(1) Several consultees questioned whether the use of an assessor was necessary or desirable in light of the ability of the parties to call, and the court to hear, expert evidence from persons who have established expertise in their field.[76] It was felt that an assessor might be used to admit what essentially amounts to expert evidence “through the back door” or lead to unnecessary complication.[77]

(2) Several consultees questioned whether the assessor would ultimately usurp the role of the judge, and asked whether the problem would be better dealt with

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71 Criminal Procedure Rules, r 35.15(3).
72 *Mastercigars Direct Ltd v Withers LLP* [2007] EWHC 2733 (Admin); [2009] 1 WLR 881.
73 Criminal Procedure Rules, Part 19.
74 Consultation question 26 (45 responses: 31(Y), 8 (N), 6 (O); 17 did not answer) and summary consultation question 5(2) (34 responses: 15 (Y), 19 (N); 2 did not answer).
75 For example, Gary Pons (5 St Andrew’s Hill).
76 John McNally (Drystone Chambers).
77 FCA; Insolvency Service.

through ensuring that the judge has appropriate expertise. As one consultee said:

> It would be completely wrong to use "expert assessors" because the task they would be asked to undertake is to make effectively a judicial determination on the evidence of property rights.[78]

(3) Some consultees were concerned about the delay and opportunity for frustrating proceedings where the appointment and use of an expert assessor is subject to challenge.

Analysis

7.72 This proposal was intended to provide the court with access to appropriate specialist advice on matters that fell outside the usual remit of judges dealing with complex confiscation cases.

7.73 The concept was derived from the civil context in which assessors, pursuant to Civil Procedure Rule 35.5, offer advice to the court on a subject in which they are an expert. The assessor is engaged by the court rather than either of the parties. This process is distinct from expert evidence in criminal proceedings, pursuant to Part 19 of the Criminal Procedure Rules, in which an expert is engaged by one or more of the parties to offer an opinion on a subject (in which they are expert) which is admitted as evidence in proceedings. The evidence may be given live in court by the witness and may be tested in cross examination.

7.74 However, in light of our other recommendations, and the weight of concerns raised by consultees, we are not convinced that the use of assessors would be suitable. Assessors appear to have been used successfully in the civil context. Nonetheless, we are reluctant to add new layers of complexity and challenge to the determination of confiscation proceedings without promise of significant benefits. It is likely that assessors would be used infrequently and their use could cause delay.

7.75 One of the aims of this review is to make confiscation proceedings, and the law surrounding them, simpler and more efficient. Creating an obscure and under-used provision which is at odds with the familiar practice of criminal courts and practitioners does not meet these aims or match the spirit of simplification and pragmatism driving our reforms. Parties in confiscation proceedings will remain able to instruct experts in the normal way.

7.76 For these reasons, we do not recommend the use of assessors to assist judges in confiscation proceedings.

Proposal 5 – Referral to the High Court

The consultation paper

7.77 As highlighted at the start of this chapter, the Crown Court has exclusive jurisdiction over confiscation proceedings (pre-enforcement). However, as we observed in the consultation paper, "there may be some circumstances in which complex issues can

[78] Penelope Small (33 Chancery Lane).

only be resolved appropriately through recourse to another court".[79] In such a case we considered that it may be better for a single, binding determination, usually on third party interests, to be made in the High Court and for the decision to be binding upon the Crown Court.

7.78 We provisionally proposed 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.[80] We envisaged that introducing this measure would have the benefit of enabling High Court Judges to apply their expertise in a way that binds the parties and prevents the issue being re-litigated before the Crown Court and the High Court, as is currently possible.[81] By doing so, the routes of appeal would also be narrowed to one division of the Court of Appeal (the Court of Appeal (Civil Division)).

Consultation responses

7.79 This provisional proposal was met with a mixed response.[82] Many consultees expressed support in principle for the proposal but had practical concerns.

7.80 The CPS agreed with the proposal, although they questioned, alongside other consultees, whether using a ticketed judge may remove the need for a referral to the High Court. We observe that this is similarly addressed by High Court judges sitting in the Crown Court.

7.81 The Financial Conduct Authority queried the compatibility of this proposal with the intention that POCA establish a "one-stop-shop" for confiscation at the Crown Court, which our proposals about enhanced training and ticketing were intended to reinforce.

7.82 There was general agreement among those who commented that such referrals should be limited to very occasional use. The Bar Council said:

> It is a power that should be used sparingly, but in a very small minority of cases there would be a clear advantage to determining an issue in this way. For example, when victims have launched civil proceedings against the defendant and similar issues of property and trust law arise in both the criminal and civil jurisdictions.

7.83 Concerns about delay and cost were raised by a number of stakeholders, with Andrew Campbell-Tiech KC describing the ability to refer a discrete issue to the High Court as creating a route of "interlocutory appeal by another name".

7.84 Reflecting the concerns about cost and delay, one Crown Court judge said the following:

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79 CP 249, para 10.135.
80 CP 249, para 10.140.
81 Proceeds of Crime Act 2002, s 59(5).
82 Consultation question 27 (47 responses: 39 (Y), 2 (N), 6 (O); 15 did not answer) and summary consultation question 5(3) (34 responses: 18 (Y), 16 (N); 2 did not answer).

> Referral to the High Court sounds like a great way for Circuit Judges to pass the buck. In some cases, it would clearly be very valuable; but it could result in great cost and great delay.[83]

7.85 His Majesty's Courts and Tribunals Service and the NCES also considered that there would be an administrative burden, with new processes required to facilitate the transfer of cases. The issue of legal aid transfers and availability if the case was transferred from a criminal to a civil court was also raised as a matter which would require resolution by the Legal Aid Agency.

Analysis

7.86 This proposal was intended to provide for an exceptional procedure whereby an issue in confiscation proceedings could be determined by the High Court. It was intended to deter defendants or third parties from frustrating normal confiscation proceedings by going to the High Court to seek a binding determination on an issue after the Crown Court has decided against them.[84] Making the determination in the High Court from the outset could avoid this delay and the cost of concurrent proceedings. It would prevent appeals on the same issue before different divisions of the Court of Appeal because the decision is made only once. We considered this to be particularly important in light of the high number of appeals brought in confiscation cases.

7.87 We consider that the issues of delay, disruption to legal aid funding and the disruption of normal routes of appeal militate against the adoption of this provisional proposal, especially when set against the recommendations to improve judicial training, to identify complex cases and allocate those cases to specialist judges (including High Court judges and dual ticketed circuit judges sitting in the Crown Court).

7.88 The issue of making what might be seen as preliminary determinations in the context of the confiscation proceedings as a whole was considered recently by the Court of Appeal in the case of *Barnet LBC v Kamyab*.[85] The Court of Appeal concluded that the judge in the Crown Court had fallen into error when making a preliminary determination. The Court of Appeal could not immediately vary the order as it did not have the benefit of the evidence or submissions that would have been made had there been a full confiscation hearing rather than a mere preliminary determination. Therefore, a full hearing was required into the substantive case.[86]

7.89 The Court of Appeal has previously emphasised "the dangers of proceedings by way of a preliminary issue in a confiscation matter".[87] This may arise where the court is either not in possession of all relevant information that would have been raised at the full substantive hearing, or where the court has to call large amounts of the substantive evidence that would be raised at such a hearing. In *R v Bajaj*, the Court of Appeal described the judge who heard a large amount of evidence on a "preliminary" confiscation matter as having become embroiled in a "most unfortunate"

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83 HHJ Rupert Lowe. There was broad agreement at the judges' roundtable that better training would be preferable than referrals to the High Court. Such referrals were described as "cumbersome" and there was concern that they would cause additional delay and prevarication.

84 CP 249, paras 1.136 to 1.141.

85 *Barnet LBC v Kamyab* [2021] EWCA Crim 543, [2021] 4 WLUK 63.

86 For reasons set out in ch 22 on appeals, that hearing had to take place in the Court of Appeal rather than in the Crown Court.

87 *R v Parveaz* [2017] EWCA Crim 873, [2017] 5 WLUK 473 at [29].

determination, which turned into a "procedurally sorry" state of affairs.[88] The courts have long made it clear that confiscation should be a series of logical steps, and to make adjudications prior to receiving full evidence on one of those steps may lead the court into error and to an unjust outcome.[89]

7.90 All of this led the Court of Appeal in *Kamyab* to say:

> It can now be seen that [the judge] should have decided the case at the end, giving a ruling on all matters. This is the only sensible course in this technically difficult field where both sides have a right to appeal. We consider that it is the job of the Crown Court in significant confiscation proceedings such as this to deal with them in the way we have described. We hope that this point, now made by three different constitutions of this court, will become much more widely appreciated.[90]

7.91 Part of the problem with preliminary issues identified in *Kamyab* arose from the wording of the legislation. This provided that on the prosecution appeal there was no power to remit the case to the Crown Court to hear the full evidence and so the full substantive confiscation hearing had to be listed before the Court of Appeal. The Court of Appeal called upon the Law Commission to consider a solution to this issue.[91] However, even if the problem of powers on appeal is resolved, we remain cautious of parcelling up confiscation proceedings and deciding elements in silo without the benefit of full evidence.

7.92 For these reasons, and those identified by consultees, we do not recommend that discrete issues in confiscation proceedings should be decided on reference to the High Court.

88 *R v Bajaj* [2020] EWCA Crim 1111, [2020] 8 WLUK 177 at [24].

89 *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83, at [9] and [20]; *R v Moss* [2015] EWCA Crim 713, [2015] 4 WLUK 540, describing the need for a "rigorous step-by-step approach to the process of identifying and determining the necessary issues in confiscation proceedings" at [41].

90 *Barnet LBC v Kamyab* [2021] EWCA Crim 543, [2021] 4 WLUK 63 at [62].

91 See Chapter 22 - Appeals - for full discussion of this issue.

Part 3: Benefit

Part 3 comprises the following chapters and deals with the first of the substantive parts of confiscation orders, namely the determination of the defendant's benefit:

Defining and Apportioning Benefit (Chapter 8);

Benefit in Criminal Lifestyle Cases (Chapter 9);

Applying the Criminal Lifestyle Assumptions (Chapter 10); and

Assets tainted by Criminality (Chapter 11).

In these chapters we make recommendations which aim to simplify the way the benefit is calculated by the court and assist the court in determining the correct apportionment of benefit in case of multiple defendants. We also consider the application of the criminal lifestyle provisions and related assumptions.

The overall purpose of this set of recommendations is to ensure a more accurate and realistic calculation of the figures that form the basis of a confiscation order.

Chapter 8: Defining and apportioning benefit

INTRODUCTION

8.1 In Chapter 12 of the consultation paper, we proposed that in determining a defendant's "benefit":

(1) the court should make an order that the defendant's benefit is equivalent to what the defendant "gained" as a result of or in connection with the criminal conduct for which they were convicted; unless

(2) 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, in which case, the court may reduce the benefit to an amount which reflects that limited power.

(3) We described these two elements as the first and second limbs of our provisionally proposed test of benefit.

8.2 In relation to the first limb, we proposed defining "gain" as including:

(1) keeping what one has;

(2) getting what one does not have; and

(3) gains that are both temporary and permanent.

8.3 In Chapter 14 of the consultation paper, we proposed that in assessing benefit to multiple defendants, the court should be required to make findings as to apportionment of that benefit.

8.4 In this chapter we discuss each of the above proposals and make a series of final recommendations. We move away from the language of "limbs" and instead describe a two-stage calculation of "total" benefit. We refer to total benefit for consistency here because this is the term we adopt for the purposes of calculating the recoverable amount in Chapter 12 – Recoverable Amount.

OVERVIEW OF POLICY

8.5 That:

(1) The defendant's total benefit should be determined by what they have "gained" as a result of or in connection with the criminal conduct.

(2) The definition of "gain" should include:

(a) keeping what one has;

(b) getting what one does not have; and

(c) gains that both are temporary and permanent.

(3) The defendant's total benefit may be reduced to reflect their intention to have only a limited power of control or disposition in connection with their gain.

(4) The determination of gain extends to the assessment of how the gain is apportioned between the defendant and others.

(5) The defendant must raise any assertions about the extent to which they intended to have a power of control or disposition over their gain when they file a response to the prosecution statement of information.

(6) If the court is unable to attribute particular shares to each defendant, the court should first consider whether it is appropriate to apportion the total benefit equally between the defendants. Only if the court is unable to attribute particular shares to each defendant and equal apportionment cannot be justified should the court make each defendant liable for the total benefit.

(7) Any findings as to apportionment should be clearly recorded on the face of the confiscation order.

PROPOSAL 1: DETERMINING THE DEFENDANT'S TOTAL BENEFIT BY WHAT THEY "GAINED" AS A RESULT OF OR IN CONNECTION WITH THE CRIMINAL CONDUCT

The current law

8.6 Under the current law, the starting point for the determination of a defendant's confiscation order is their "benefit" from criminal conduct. Scrutiny of multiple definitions is required before one can understand what is meant by "benefit".

(1) Under section 76(4) of POCA 2002, a person "benefits" from criminal conduct if they "obtain" property as a result of or in connection with that criminal conduct.

(2) Pursuant to section 84(2)(b), whether a person "obtains" property depends on whether they obtain "an interest" in it.

(3) Under section 84(2)(h), "an interest" includes any right in property, including a right to possession.

The consultation paper

The difficulty of possessory rights

8.7 The current law is unsatisfactory because anyone who picks up an item of property from the street has a possessory right. More importantly for confiscation, a drugs courier, who temporarily holds drugs or cash for a drug dealer, has a possessory right in the drugs and therefore, using the statutory provisions above, should be treated as having benefited from the value of the drugs and any cash that they were entrusted to carry.

8.8 The courts have recognised that the outcome just described would be wholly unfair on the drugs courier. Therefore, they have sought to temper the impact of the law, effectively by ignoring it.[1] The courts have instead asked whether the defendant has a "power of control or disposition" over the property and have held that a drugs courier does not have such a power in relation to the drugs or money that they carry and so their benefit should be limited to the fee they were paid.

8.9 The case law suggests that the bare possessory rights of the courier should "ordinarily" be disregarded (the implication being that objectively valuable possessory rights should be treated as having been "obtained").[2] As we recognised in the consultation paper, this:

(1) fails to create certainty in the law; and

(2) conflates the issue of whether benefit is obtained with the valuation of that benefit.[3]

8.10 As we observed in the consultation paper, the fact that the test applied by the courts ignores the express wording of the legislation is not satisfactory, both because it is intellectually disingenuous and because it largely ignores the fact that a possessory right can be extremely valuable to the individual who holds it against the world at large.[4]

The difficulty of the power of control or disposition test

8.11 The court's focus is now "ordinarily" on whether the defendant had a power of control or disposition over the property. As we set out in the consultation paper, the test is not apt to cover scenarios where:[5]

(1) property is held in a trust (eg the value of a pension fund has increased as a result of crime) as there may be no power of control or disposition;

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1 *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58.
2 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, paras 12.89 to 12.93.
3 CP 249, para 12.91.
4 CP 249, para 12.26.
5 CP 249, paras 12.191 to 12.195.

(2) the defendant may have solely a reversionary interest in property only when the current bailment ends; or

(3) the defendant has what might be described (at best) as tenuous control. This is demonstrated through the "extreme and startling"[6] outcome in *Mooney v HM Advocate*, where the defendant induced HM Revenue and Customs ("HMRC") to pay the claimants rebates that were 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 the rebate. The court considered that the defendant "controlled the amount of her profit from crime by maximising the repayments to be made by HMRC… by her actions she was in control of the total sum disbursed by HMRC".[7]

8.12 As we set out in the consultation paper, the test of control or disposition has led to inconsistent outcomes. Where a defendant holds money in cash on behalf of another, the courts have concluded that there is no power of control or disposition over that money and so that money has not been "obtained" by the defendant. However, where a defendant holds money in a bank account on behalf of another, there is such a power because the holder of the bank account can direct the bank as to what to do with the balance. Accordingly, the money is "obtained" by the defendant. In both cases the defendant obtained a principal sum and was paid a commission, yet in only one case is the principal sum treated as benefit.[8]

The use of civil law principles

8.13 It is perhaps unsurprising that the Supreme Court has made it clear that "the word 'obtain' should be given a broad and normal meaning"[9] and that "the proper application of these provisions requires a more purposive approach than the mechanical application of the law of property".[10] The Court of Appeal has also stated that obtaining should be interpreted in such a way that any outcome is not "far removed" from what the confiscation legislation is intended to achieve.[11]

8.14 It is apparent that to achieve a just outcome, the courts have sought to distance themselves from what appears to be a logical way of analysing whether someone has obtained something, because the benefit test stops at the point of "obtaining". The courts ask whether at any point property has come into the defendant's possession or whether the defendant has obtained any right in that property if it has not yet come into their possession. There is currently no safety valve that can temper the determination of whether the obtained property amounts to a benefit.

8.15 Through the courts seeking to distance themselves from a strict application of the wording of the legislation, the wording itself has been ignored. This has created uncertainty. Moreover, the test used does not cover all eventualities.

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6 CP 249, para 12.193.
7 *Mooney v HM Advocate* [2019] HCJAC 49, [2020] JC 1 at [13].
8 CP 249, see the lengthy discussion of benefit and method of transfer from paras 12.102 to 12.121.
9 *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [45].
10 *R v Harvey* [2015] UKSC 73, [2017] AC 105 at [11].
11 *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R (S) 58 at [76].

Consultation responses

8.16 As discussed above at 8.1, in the consultation paper we referred to the two stages of our proposed new benefit test as the two "limbs":

(1) the court should make an order that the defendant's benefit is equivalent to what the defendant "gained" as a result of or in connection with the criminal conduct for which they were convicted; unless

(2) 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, in which case, the court may reduce the benefit to an amount which reflects that limited power.

Consultees were asked about both limbs of the test, and a clear majority of consultees supported the provisional proposal.[12]

8.17 Positive comments about the first "limb" included those from prosecutorial agencies including the Serious Fraud Office, who said that "an approach based on gain offers the possibility for a fairer and realistic approach to benefit over the current approach." Similarly, the Financial Conduct Authority ("FCA") agreed saying, "determining what a person has gained is a straight-forward test which can properly be applied to capture benefit from crime." The Insolvency Service was also supportive; in their view, "this will make the law clearer, removing some artificial distinctions, resulting in a fairer outcome."

8.18 In contrast, the Crown Prosecution Service ("CPS") considered that the move from obtaining to gaining would be a move towards the concept of "profit", questioning whether this is right in public policy terms. We do not agree that the proposal was a move towards a profit model; we explain why a profit model is undesirable below.

8.19 Others who were against a test of "gain" considered that the test of "gain" changed very little substantively[13] because it did not in fact move towards a concept of profit. A "profit" model was supported by, for example, Professor Johan Boucht, Dr Craig Fletcher and Garden Court Chambers.[14]

Analysis

8.20 As set out above, the courts have had to distance themselves from the strict wording of the broad test of "obtaining" under POCA 2002 in order to reach what is perceived to be the "just" outcome in a case. Our provisional proposal to introduce a two-stage test for benefit was intended to capture both that broad test (what, if anything, has been "gained") and to permit a just outcome to be reached.

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12 Consultation question 28 (44 responses: 29 (Y), 5 (N), 10 (O); 18 did not answer) and summary consultation question 6 (31 responses: 21 (Y), 6 (N), 4 (O); 6 did not answer). Of the 11 responses which were not in favour, three agreed with the first limb (a test of "gain") but disagreed with the second limb. The Financial Conduct Authority also agreed with the first limb of the test, but not the second.

13 This issue was also raised at our symposium at the close of the consultation process.

14 A "profit" model was also supported by the majority of commentators at our Commentators' roundtable meeting (20 October 2020). Similar submissions were also made via email by Ian Smith (33 Chancery Lane).

Evaluation

8.21 Returning to the broad wording of the statute as originally intended is arguably easier said than done. It requires either:

(1) undoing case law that has developed over a 20-year period; or

(2) embracing what the case law appeared to be trying to achieve – focussing on the facts.

8.22 During our pre-consultation engagement with stakeholders, senior confiscation practitioners Kennedy Talbot KC and Martin Evans KC commented on the problems of the existing law:

> These problems are caused by the insertion of civil property law into a statute designed to make criminals repay the value of their benefits from crime. The two do not fit together.

8.23 The need to avoid applying (and misapplying) civil law principles was recently repeated by Edis LJ in *Collins v DPP*,[15] who effectively described the continued use of the phrase "joint and several" liability in connection with multiple defendants being liable to repay the whole of the benefit from a crime as being both unhelpful and inaccurate.

8.24 The courts have been very clear that in determining a person's benefit, a straightforward approach should be taken that avoids the complexities of property law principles, which are not best suited to what is essentially a factual question. Instead, the court should ask, what did the defendant get from committing their offence that they did not have before? Until now, the courts have had to approach that question against the background of a legal framework that is imbued with property law principles and the case law has had to interpret away the strict application of those principles. By doing so, case law has developed a framework that exists almost independently of the legislation, insofar as it effectively ignores what the legislation says when it appears just to do so.

8.25 It would be possible to amend the law to indicate that the case law should be departed from and the statute applied as it was originally written. However, as the foregoing demonstrates, to do so would add rather than remove complexity in the wording of the legislation, which has previously been described as poorly drafted. If any amendment uses the wording of the case law to signify a departure from the old law, inevitably that case law appears to retain some relevance, which is unsatisfactory if the intention is to mark a clean break with the case law. Furthermore, it may appear difficult to mark a clean break with nearly 20 years of case law if the old statutory provisions that the case law interpreted largely remain intact and subject to "tweaks". Those old provisions continue to refer to particular rights and interests and keeping those provisions does not address the concerns about importing property law principles into the criminal courts.

8.26 The test of gain is not, in and of itself, intended to increase fairness. It is intended to fulfil a core function of law reform, namely, to simplify and clarify the law. In this case it

[15] *Collins v DPP* [2021] EWHC 634 (Admin), [2021] 3 WLUK 320.

seeks to achieve this core function of law reform by moving away from property law principles to change the relevant question from, "did the defendant obtain some form of right or interest in property?" to "what did the defendant get (even temporarily) that they did not have prior to the crime?" If the defendant stole a watch, the answer is "a watch", an answer that can be reached without having to grapple with interests or assumed rights and powers. Similarly, the answer to, "what did the defendant, who had £100,000 paid through their account, have (even temporarily) that they did not have prior to the crime?", is a "thing in action" worth £100,000. As we set out in the consultation paper:

> 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 principles of property law to confiscation and which has been littered with caveats and exceptions to seek to achieve the "right" result.[16]

8.27 Whilst the test is not in and of itself intended to improve fairness, it is our view that because the law to be applied is intended to become clearer, more accessible and more readily applicable by criminal courts, this will also improve fairness.

8.28 Given what the reform is intended to achieve, the difficulty and undesirability in achieving that reform using property law principles and the formal responses from consultees, we recommend that the (total) benefit test centre on what the defendant has "gained" from their criminal conduct.

PROPOSAL 2: THE DEFINITION OF GAIN

Current law

8.29 "Gain" is defined in simple terms in the Fraud Act 2006 and Theft Act 1968 as including "keeping what one has, as well as… getting what one does not have".[17]

Consultation paper

8.30 We provisionally proposed that gain be defined in similar terms to the current law, thereby ensuring that the law is kept simple, accessible and consistent in the criminal context. We asked consultees if they agreed with that principle, and specifically whether the definition of "gain" should include:

(1) keeping what one has;

(2) getting what one does not have; and

(3) gains that both are temporary and permanent.

Consultation responses

8.31 A strong majority of consultees agreed with the provisional proposal.[18]

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16 CP 249, para 12.197.

17 Fraud Act 2006, s 5(3); Theft Act 1968, s 34.

18 Consultation question 29 (43 responses: 32 (Y), 6 (N), 5 (O); 19 did not answer). As to responses from operational stakeholders, one operational stakeholder was against our proposed definition of gain (the CPS). Responses in favour of our proposed definition of gain were received from Environment Agency; Financial Conduct Authority; Insolvency Service; City of London Police; Association of Chief Trading

8.32 The Insolvency Service described the proposed test as providing "a clearer legal basis and just way to identify the 'ill gotten' gains of defendants". The Financial Crime Practice Group at Three Raymond Buildings described how "the use of principles which are already familiar to criminal lawyers will add to the overall clarity of the proposed new confiscation regime".

8.33 As with the definition of benefit itself, the CPS did not favour the proposed test of "gain" on the basis that the focus of the benefit calculation would change from "what is obtained (gross) to what is retained (profit) by way of a change of terminology".

8.34 Interestingly, a criticism raised by Garden Court Chambers was to precisely the opposite effect: that the test fails to focus on what is retained and is instead too broad, thereby not addressing the problems that have arisen from the test of "obtaining".[19]

Analysis

8.35 We consider that the definition of gain as recommended meets the criticism of the CPS and it is our position that a shift to gain would not mark the adoption of a profit model of confiscation. We made this clear in the consultation paper. We set out why a profit model would be inappropriate:[20]

> It is important to consider the three overarching reasons 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, thereby permitting criminals to "drive a coach and four through any attempt to strip them of the profits of their destructive trade".
>
> (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". These offences specifically criminalise the transferring, concealing, disguising and using of the proceeds of crime.
>
> (3) An "accountancy exercise" is avoided. As the Supreme Court stated in *R v Waya*:[21]
>
> > 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

Standards Officers; practitioners from the National Crime Agency and National Economic Crime Centre; Serious Fraud Office; HM Revenue & Customs. The Criminal Law Solicitors' Association was also in favour.

19 A similar response was received from John McNally of Drystone Chambers. The issue was also raised at our second practitioners' roundtable meeting (03 November 2020) and webinar 2, "Benefit" (15 October 2020).

20 CP 249, para 12.78.

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

the proceeds of crime would be offensive, as well as frequently impossible of accurate determination.

8.36 We also described the rationale for not adopting a profit-based model as "compelling"[22] and set out expressly that:

> The definition of "gain" used in the criminal law states that gain "includes any such gain or loss whether temporary or permanent". This reflects the current position with regards to gross or net benefit…we consider that the current position with regards to "gross" and not "net" proceeds of crime has both logic and merit.[23]

8.37 In light of the positive responses from consultees, we recommend that the broad definition of gain be adopted.

PROPOSAL 3: REDUCING THE DEFENDANT'S TOTAL BENEFIT TO REFLECT THE DEFENDANT'S INTENDED POWER OF CONTROL OR DISPOSITION

8.38 As set out above, in the consultation paper we referred to the two stages of our proposed new benefit test as the two "limbs":

(1) the court should make an order that the defendant's benefit is equivalent to what the defendant "gained" as a result of or in connection with the criminal conduct for which they were convicted; unless

(2) 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, in which case, the court may reduce the benefit to an amount which reflects that limited power. Consultees were asked about both limbs of the test, and a clear majority of consultees supported the provisional proposal.[24]

8.39 As discussed above, consultees were asked about both "limbs" of this test, and a clear majority of consultees supported the provisional proposal.[25]

8.40 The principal criticism of the second stage ("intention limb") of the proposed reformed test of benefit was that it may create undue complexity,[26] with the court having to determine the intention of an individual defendant.

8.41 In the consultation paper we did not address the issue of the burden and standard of proof in relation to the defendant's intention and focussed instead on the principle of having a second stage ("limb") to the calculation. Stakeholders were of the view that

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22 CP 249, para 12.183.

23 CP 249, para 12.209.

24 Consultation question 28 (44 responses: 29 (Y), 5 (N), 10 (O); 18 did not answer) and summary consultation question 6 (31 responses: 21 (Y), 6 (N), 4 (O); 6 did not answer). Of the 11 responses which were not in favour, three agreed with the first limb (a test of "gain") but disagreed with the second limb. The Financial Conduct Authority also agreed with the first limb of the test, but not the second.

25 Consultation question 28 (44 responses: 29 (Y), 5 (N), 10 (O); 18 did not answer) and summary consultation question 6 (31 responses: 21 (Y), 6 (N), 4 (O); 6 did not answer). Of the 11 responses which were not in favour, three agreed with the first limb (a test of "gain") but disagreed with the second limb. The Financial Conduct Authority also agreed with the first limb of the test, but not the second.

26 In addition to formal consultation responses, the issue of complexity was raised at our policy-makers round-table event.

the burden of proof for establishing the defendant's intention should be on the defendant.

8.42 The Financial Crime Practice Group at Three Raymond Buildings specifically addressed this issue in its response:

> We note that there is a risk that the introduction of the need for courts to assess not only how much a defendant has gained but what the defendant's intention was likely to have been in relation to the disposition of the assets in question risks slowing down the confiscation process by adding an additional factor for the court to consider. However, we suspect that it is likely that in most cases the judge will have formulated an idea of the defendant's intention during the course of the criminal trial and any subsequent confiscation hearing. It is also an improvement on and is unlikely to add to the complexity of existing confiscation proceedings and will have the benefit of making the regime fairer for a large number of defendants who currently face having unrealistically high benefit figures hanging over them for the foreseeable future.

8.43 A further criticism raised by the FCA, and in some personal responses, was that the second stage of the calculation does not in fact achieve the regime's objectives (or at least not consistently) where the defendant has money in their possession at the time of the confiscation order being made, despite an intention to distribute the money to others.

8.44 Crystallising the time of a defendant's intention was also seen as a potentially difficult issue for the court to determine because the extent of the defendant's intended power or control the defendant over the property in question is subjective to the defendant and may change over time.[27]

8.45 Two solutions to this potential complexity were proposed:

(1) replacing the second stage of the calculation with a general judicial discretion to make a confiscation order in a sum which appears to the court to be "just";[28] and

(2) having a single test which provides a clear list of statutory factors as to what would amount to a "gain".[29]

8.46 The introduction of further judicial discretion was addressed by the Three Raymond Buildings Financial Crime Practice Group, which considered that our proposal struck the correct balance: "any wider or more open-ended discretion would risk injecting far less clarity into the proposals and would certainly result in less streamlined and more complex confiscation hearings". The danger of general discretion leading to orders not being made either appropriately or at all was raised at our symposium launching the consultation paper.

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27 In addition to formal consultation responses, the issue of timing of determining any intention was raised at our first practitioners' roundtable meeting (27 October 2020).

28 For example, responses from Gary Pons and Andrew Campbell-Tiech KC. Similar responses were received at our second practitioners' roundtable meeting (03 November 2020).

29 Financial Conduct Authority. Kingsley Napley LLP also suggested a clear statutory test.

Analysis

8.47 We now address the reservations and suggested alternatives put forward by consultees.

Complexity

8.48 Adding another stage to the confiscation enquiry may slow down confiscation in some cases. For example, at present a money mule is unable to argue that their benefit should be reduced because of a factor relating to control or disposition because the law presumes they have such power and there is no process to displace this presumption. The second stage ("limb") of our benefit calculation would afford money mules this opportunity which could lead to lengthier confiscation proceedings. However, in many other cases such an enquiry in relation to control or disposition must already be undertaken. For example, a judge must be satisfied that a defendant is a mere courier or custodian of goods before a conclusion can be reached about the extent of the defendant's power of control or disposition.

8.49 As the Financial Crime Practice Group at Three Raymond Buildings noted in its response, complexity is likely to be reduced if the trial judge also hears the confiscation proceedings (as we recommend[30] should be considered), because a judge is likely to have formed a view of the defendant's role in the criminality. Furthermore, as in the case of the money mule, this consultee noted that the proceedings will be fairer to the defendant.

Burden of proof

8.50 We consider that the extent to which the defendant intended to have[31] a power of control or disposition in relation to property is something which is uniquely within the knowledge of the defendant. Therefore, it should be for the defendant to satisfy the court that the benefit should be reduced from the total amount gained. Furthermore, as observed above, the court may be satisfied from the evidence adduced at trial and without more about the role played by the defendant. Therefore, we recommend that the defendant must prove, or the court must be otherwise satisfied as to the intended extent of the defendant's power of control or disposition.

Meeting the objectives

8.51 In the consultation paper we framed the primary objective of the confiscation regime as "depriving defendants of their benefit from criminal conduct, within the limits of their means".

8.52 As framed, we acknowledge the criticism raised by the FCA and some personal responses that the second stage of the benefit test does not in fact achieve the regime's objectives (or at least do so consistently) in circumstances where the defendant has money in their possession at the time of the confiscation order being made, despite an intention to distribute the money to others.

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30 Recommendation 28.

31 Not what they in fact had, which would mark a return to the old case law.

8.53 In the consultation paper[32] we set out the decision by the Court of Final Appeal in Hong Kong in the case of *HKSAR v Tsang Wai Lun Wayland,* in which the court was concerned with whether there was a "genuine power of disposition or control over the funds which briefly transited [the defendant]'s bank account",[33] in a way which resembles the second stage of our recommended calculation. The court went on to give a hypothetical example, as described by Professor Simon Young:

> 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.[34]

8.54 If our provisional proposal had omitted the words "it would be unjust to do so", our provisional proposal would require the court to amend the benefit figure if the defendant proved or the court was otherwise satisfied that that defendant intended to have only a limited power to dispose of or to control the property that had been gained. The hypothetical example given in the *Wayland* case would reflect the approach that the court would be obliged to adopt.

8.55 As we set out in the consultation paper,[35] far from being contrary to the primary objective of the regime, this would be a purist reflection of that objective. In response to Professor Young's suggestion that "as the proceeds of crime, the $3 million should be subject to confiscation, and it should not matter whose hands they are in"[36] we observed that:

> Whether assets should be subject to forfeiture at all should not be conflated with holding the defendant to account for their 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.[37]

8.56 We went on to recognise that:

> Whilst this would keep a "bright-line" distinction between the [defendant'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).[38]

8.57 Accordingly, the second stage of the total benefit calculation contains an interests of justice test. In the consultation paper we concluded 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 that it is in the interests of justice to make an

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32 CP 249, paras 12.151 to 12.156.
33 *HKSAR v Tsang Wai Lun Wayland* (2014) 17 HKCFAR 319, FACC4-5-6/2013 at [79].
34 *HKSAR v Tsang Wai Lun Wayland* (2014) 17 HKCFAR 319, FACC4-5-6/2013 at [69(f)].
35 CP 249, para 1.156.
36 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.
37 POCA 2002, s 303Z14.
38 CP 249, para 12.227.

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.[39] This safeguard addresses the concerns expressed by the FCA by ensuring that the courier is not able to retain criminal proceeds.

8.58 However, we recognise that where a defendant continues to retain the proceeds of crime despite establishing via the second stage of the benefit calculation that they do not have what was described in *Wayland* as a genuine power of disposition or control, it may be concluded that the primary objective as we had originally framed it is not truly met – the defendant is deprived of a sum of money that goes beyond their personal benefit from crime despite the sum itself constituting criminal proceeds.

8.59 For this reason, we have not adopted the test in *Wayland* verbatim and have instead framed our second stage as an "intended" limited power of control or disposition, because the intention may have existed but may never have been fulfilled (that is, the defendant may have intended to disperse the criminal proceeds but never did). In such a case, the court has the discretion to calculate the order based on what would be in the interests of justice in the context of the defendant's intention.

First suggested alternative: Providing a clear list of statutory factors as to what would amount to a "gain"

8.60 In the consultation paper we described the approach in Australia, which provides statutory factors to consider when determining benefit. Those factors are broad and relate to the first part of our proposed test. We considered that the use of such factors would not be appropriate for the first part of our proposed test because a list of factors does not provide clarity to the decision maker about how those factors interrelate and what priority or weight should be attributed to them. Accordingly, legal certainty is undermined.[40] We did not receive any responses from consultees which addressed these concerns.

8.61 It might be arguable that there would be scope to adopt indicative factors as to what amounts to a gain, rather than a second stage of the test. Such circumstances might include, for example:

(1) whether the defendant obtained property pursuant to an arrangement to hold or to transfer that property to another in exchange for a financial or other advantage;

(2) whether the property was obtained pursuant to criminality involving multiple defendants; and

(3) the role that the defendant played in the criminality.[41]

8.62 Ultimately, these factors reflect the intended extent of the defendant's power of control or disposition as we provisionally proposed in the second stage of the calculation. Rather than create a list of statutory factors which may or may not cover each

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39 CP 249, para 12.228.

40 CP 249, paras 12.160 to 12.161 and 12.204.

41 These factors were identified as potentially relevant to a very similar potential version of the second limb which we considered during the pre-consultation phase of the project.

individual situation, we consider that the second stage as provisionally proposed, which covers the common thread from each such factor, would be preferable.

Second suggested alternative: Replacing the second stage of the benefit calculation with a general judicial discretion to make a confiscation order in a sum which appears to the court to be "just"

8.63 In the consultation paper we described the approach in South Africa, under which the court is afforded a broad discretion to fix an appropriate sum representing benefit.[42] 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".[43] Those proceeds are defined loosely as the sum of "the property, services, advantages, benefits or regards received, retained or derived" from the relevant criminality.[44]

8.64 We considered that such a broad approach provides little guidance to the parties and does not promote clarity in the law. Therefore, we consider that the test in the second stage of the calculation remains preferable, as provisionally proposed.

Recommendation 29.

8.65 We recommend that the defendant's benefit should be calculated according to the following rules:

(1) a defendant's total benefit is equivalent to what the defendant "gained" as a result of or in connection with the criminal conduct for which they were convicted; unless

(2) the defendant proves or the court is otherwise satisfied that it would be unjust to make an order that the defendant's benefit is equivalent to the gain, because the defendant has intended to have only a limited power to dispose of or to control the gain, the court may reduce the total benefit figure to an amount which reflects the limited power to dispose of or to control the gain.

Recommendation 30.

8.66 We recommend that "gain" is defined as:

(a) keeping what one has;

(b) getting what one does not have; and

(c) gains that both are temporary and permanent.

42 CP 249, para 12.162.
43 Prevention of Organised Crime Act 1998 (RSA), s 18.
44 Prevention of Organised Crime Act 1998 (RSA), s 19.

PROPOSAL 4: REQUIRING THE COURT TO CONSIDER APPORTIONING BENEFIT

Current law

8.67 In our consultation paper we described the Supreme Court's decision in *R v Ahmad*, which concluded (against the background of a long line of case law)[45] that multiple defendants can be liable for the same criminal gain where all such defendants have "usurped the rights of an owner".[46] The Supreme Court gave the example of two burglars stealing a television. In this example, 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.[47]

8.68 Whilst *R v Ahmad* recognises that it may be appropriate to make an order that the defendant's benefit was the entire sum, it does not require that such a conclusion be reached. In fact, the Supreme Court stated 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.[48]

8.69 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.[49]

Consultation paper

8.70 In our consultation paper we observed that judges and prosecutors often ignore the Supreme Court's instruction to consider carefully what an individual obtained. During our pre-consultation discussions, 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.[50] Therefore, we provisionally proposed that legislation should require the court to make findings as to apportionment of benefit.

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45 *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.

46 *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [44.

47 *R v May* [2008] UKHL 28, [2008] 1 AC 1028; *R v Allpress* [2009] EWCA Crim 8 at [64], [2009] 2 Cr App R (S) 58. We noted in the consultation paper that "the meaning of this statement is clouded by the complexity of the term 'owner' in a system of relative title. In the example of the burglars, each has usurped the right 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" (CP 249, p 335 fn 13).

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

49 *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.

50 CP 249, para 14.29.

Consultation responses

8.71 There was a very high degree of support for this proposal amongst consultees.[51] One Crown Court judge bluntly described how the topic had become "an ongoing embarrassment", with some prosecutors becoming so fixated on "equal liability" that they were unable to see the absurdity of its application to the facts of an individual case.

8.72 As in other areas of the paper, it was suggested that some financial investigators already adopt the practice of considering apportionment in every case.[52]

8.73 Opposition to the proposal was largely on the basis that defendants would seek to be obstructive and to mislead the court as to the role that they played in order to reduce their liability. It was suggested that by making apportionment a "live" issue, additional time will be taken up in determining confiscation.[53] Furthermore, defendants may be reluctant to reveal their role and the roles of others, particularly in front of conspirators with a greater role.

Burden of proof

8.74 The issue of the burden of proof was raised by a number of consultees. As set out above, opposition to the proposal was largely on the basis that defendants would seek to be obstructive and to mislead the court as to the role that they played in order to reduce their liability. Those in favour of the proposal largely considered that the burden of proof as to apportionment should be on the defendant,[54] with the prosecution's role being to assist the court. The Environment Agency suggested that defendants should be required to raise any assertions about apportionment in their response to the prosecutor's statement.

Discretion and alternative outcomes

8.75 A number of operational stakeholders considered that there should be a discretion to consider apportionment rather than a requirement.[55]

8.76 In the event that the court did not apportion, the Insolvency Service and Fraud Lawyers Association considered that, in the absence of evidence on the point, equal division would be best, unless it would lead to unfairness. Similarly, Professor Johan Boucht and an individual police officer in the Metropolitan Police considered that, in the absence of any evidence of division between conspirators, then the fairest approach would be equal division. The Environment Agency considered that the finding of joint benefit should be a "a fall-back position".

Effect on enforcement

8.77 The Justices' Legal Advisers' and Court Officers' Society ("JLACOS") and His Majesty's Courts and Tribunals Service ("HMCTS") said the enforcement of orders

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51 Consultation question 47 (43 responses 38 (Y), 5 (N); 19 did not answer) and summary consultation question 11 (32 responses: 25 (Y), 5 (N), 2 (O); 5 did not answer).

52 North East ACE Team.

53 A barrister from 33 Chancery Lane Chambers.

54 City of London Police; Serious Fraud Office; an individual working for the NCA. Kingsley Napley LLP considered that the burden of proof to prove each defendant's gain should fall on the prosecution.

55 Bar Council; Environment Agency; Financial Conduct Authority. Similar responses were received from individuals, including a barrister at 12CP chambers.

made on a joint and several liability basis was problematic and so welcomed the proposal. The CPS accepted that it would make enforcement cleaner, although it considered that enforcement would become more complicated.

8.78 As we noted in the consultation paper, if each defendant is wholly liable for the benefit, readily realisable assets in the hands of any such defendant can be identified and targeted to satisfy the order. The Eastern Regional Organised Crime Unit provided a response which reflected the proposition set out in the consultation paper that where a defendant "has identifiable, restrained assets, the temptation must be for the prosecutor to pursue the lowest hanging fruit".[56] They considered that the provisional proposal was especially important where a defendant who wasn't the main player had the most assets. At present they pursued those assets. They recognised that whilst this was good for the enforcement figures, it did not sit comfortably with their staff.

Clear findings

8.79 A number of consultees who enforce confiscation orders, including the South East Confiscation Panel, East Kent Bench and an individual within the Metropolitan Police, considered that findings as to apportionment should be clearly recorded. This point was also made by a member of the judiciary.

Analysis

8.80 There was strong support from consultees for our provisional proposal on apportionment, which reflected the Supreme Court's view that judges in confiscation proceedings should "be ready to investigate and make findings as to whether there were separate obtainings".[57]

8.81 Whilst it might take time to undertake such an investigation, reflecting *Ahmad*, a decision to make each defendant "equally liable" for the whole of the benefit is a decision that should be taken having considered the evidence, rather than simply to expedite confiscation.[58] In this context, by "equal liability" we mean that each defendant is liable for the whole amount, but any payment made by any of them reduces the liability for all of them.

8.82 Whilst equal liability for the whole benefit may have the merit of simplicity when it comes to enforcement, as the JLACOS and HMCTS accepted, that is not necessarily the case. We noted in our consultation paper that:

> 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 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

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56 Andrew Campbell-Tiech, "Whither confiscation: May revisited" (2019) 5 *Archbold Review* p 4-5, fn 20.
57 *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [51].
58 *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [51].

asset, or does the financial investigator seek to apportion the order fairly and attempt to obtain £10,000 from each defendant?[59]

8.83 Furthermore, the practical effect of the current system was that defendants delayed satisfying a confiscation order in the hope a co-defendant would pay first. We reflected this point in our consultation paper, citing the following passage from an article by Andrew Campbell-Tiech KC 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 their 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.[60]

8.84 We observed that 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 their gains from crime. Making all defendants "jointly and severally liable" arguably acts as an incentive to engage in money laundering.[61]

8.85 We have taken note of the issues raised by consultees when developing our recommendation. As consultees highlighted:

(1) the proportion of criminal assets obtained by each defendant is likely to be uniquely within their knowledge and it will be difficult for the prosecution to obtain such information and satisfy any burden of proof in connection with apportionment; and

(2) a defendant might be reluctant to reveal their role and that of others, particularly in front of major conspirators.

8.86 We consider that the second stage of our recommended test for the calculation of benefit provides a useful mechanism through which to determine the apportionment whilst meeting these issues. That stage of the calculation requires that the court make an order in the amount of the defendant's gain "unless the defendant proves or the court is otherwise satisfied that the defendant intended to have a limited power of control or disposition in connection with the gain".

8.87 The test in this second stage of the benefit calculation does not place the onus on the prosecutor. Rather, it requires the court to consider all available evidence. Whilst the defendant might adduce evidence as to their role, even in the absence of such evidence the court might determine the issue of apportionment based on the evidence that it has heard.

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59 CP 249, para 14.34.
60 Andrew Campbell-Tiech, "Whither confiscation: May revisited" (2019) 5 *Archbold Review*, pp 4 to 5.
61 CP 249, para 14.32.

8.88 We also consider that the court should have discretion as to whether to apportion. If the court considers that equal liability for the whole of the benefit is appropriate, or the court cannot make a reasoned determination as to apportionment, then it should have flexibility to make appropriate findings as to benefit.

8.89 In the event that the court cannot make a determination about apportionment, we consider that the court should default to an equal apportionment of shares of the benefit.[62] However, if it is determined that equal apportionment cannot be justified, each defendant must be equally liable for the whole of the benefit. Any recommendation as to equal liability should be framed as such, rather than as "joint and several" liability in light of Edis LJ's remarks in *Collins v DPP*,[63] set out at paragraph 8.22 above.

Recommendation 31.

8.90 We recommend that the court must consider the apportionment of the gain between the defendant and others when determining whether the defendant intended to have only a limited power to dispose of or to control the gain.

Recommendation 32.

8.91 We recommend that in the event that the court is not able to apportion benefit based on defined shares, the court must make an order that each defendant is liable for an equal share of the whole of the benefit unless the court is satisfied that it would be in the interests of justice to impose equal liability for the whole of the benefit.

8.92 We note the suggestion by the Environment Agency that defendants should be required to raise any assertions about apportionment in their response to the prosecutor's statement. We consider that this is a sensible suggestion, and recommend that any issue in connection with the apportionment of the defendant's gain or the extent to which the defendant intended to control or dispose of their gain should be set out in the defence response. However, we do not intend that a failure to do so would preclude the matter from being raised later or considered by the court. Placing a requirement on the defendant simply ensures that the court has any relevant information at as early a stage as possible in the confiscation proceedings.

62 See *R v Nawaz* [2020] EWCA Crim 1715, [2020] 12 WLUK 366 per Green LJ.
63 *Collins v DPP* [2021] EWHC 634 (Admin), [2021] 3 WLUK 320.

Recommendation 33.

8.93 We recommend that the Criminal Procedure Rule Committee should in whatever way it considers most appropriate (either in rules or by some other means) provide that the defendant should be required to raise any assertions relevant to determining whether the defendant intended to have only a limited power to dispose of or to control the gain in their response to the prosecutor's statement.

Recommendation 34.

8.94 We recommend that form [5050], on which confiscation orders are recorded, allows for the recording of any finding as to apportionment.

Chapter 9: Benefit in criminal lifestyle cases

INTRODUCTION

9.1 A defendant has a "criminal lifestyle" if their substantive criminal conduct falls within one of the categories defined in section 75(2) of POCA 2002. These categories are:

(1) it is specified in Schedule 2;

(2) it constitutes conduct forming part of a course of criminal activity;

(3) it is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.

9.2 "Schedule 2" refers to Schedule 2 to POCA 2002 which contains a list of substantive criminal offences to which the criminal lifestyle provisions will automatically apply.

9.3 Under section 75 of POCA 2002, if the defendant is found to have a "criminal lifestyle", their benefit from crime will also be calculated to include benefit from "general criminal conduct".

9.4 The calculation of benefit obtained from "general criminal conduct" entails the application of a series of assumptions to the period of six years before the proceedings that led to the conviction were started. Under these assumptions, all property obtained or expended by the defendant since that date is assumed to constitute benefit from crime unless the defendant can show otherwise.

9.5 There are two key questions to the calculation of benefit in criminal lifestyle cases.

(1) Does the defendant have a "criminal lifestyle" within the meaning of POCA 2002?

(2) If so, how do the four criminal lifestyle assumptions apply to the defendant during the period of six years before the proceedings that led to the conviction were started?

9.6 This chapter concerns our recommendations in relation to the first question, determining whether the defendant has a criminal lifestyle. We will make five recommendations. The second question is addressed in the next chapter, where we make three recommendations.

OVERVIEW OF POLICY

9.7 That:

(1) No offences are removed from Schedule 2 to POCA 2002.

(2) The following offences are added to Schedule 2 to POCA 2002:

(a) Keeping a brothel used for prostitution contrary to section 33A of the Sexual Offences Act 1956; and

(b) The illegal dumping of waste contrary to section 33(1)(a) of the Environmental Protection Act 1990 and regulation 38(1)(a) of the Environmental Permitting (England & Wales) Regulations 2016.

(3) The number of offences required under the course of criminal activity trigger be three offences for

(a) cases where there are multiple convictions on the same occasion; and

(b) multiple convictions on multiple occasions.

(4) The offences should include offences taken into consideration.

(5) 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.

(6) The financial threshold for triggering the criminal lifestyle assumptions pursuant to section 75(4), POCA 2002 should be raised to £5,000 (+ inflation).

(7) The legislation mandates that the financial threshold for triggering the criminal lifestyle assumptions is reviewed by the Secretary of State every five years with a view to amending the figure to reflect inflation.

"CRIMINAL LIFESTYLE" WITHIN THE MEANING OF POCA 2002

9.8 In the consultation paper, we explored the rationale for the criminal lifestyle provisions.[1] We cited the explanatory notes accompanying section 75 of POCA 2002, which say:

> 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

[1] Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, paras 13.31 to 13.37.

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.

9.9 We commented on the ambiguity of the phrase "criminal lifestyle" (which can be interpreted as including both expenditure and income). We noted that terms such as "career criminality" or "habitual offending for gain" may more accurately reflect the focus of section 75 on how the defendant makes money through crime, in the context of *post-conviction* confiscation. This can be compared to Part 5 of POCA, which targets those who (although they have not been convicted) appear to be able to afford a lifestyle out of proportion with their legitimate income.[2]

DETERMINING THAT A DEFENDANT HAS A "CRIMINAL LIFESTYLE"

The current law

9.10 Section 6(4)(a) of POCA 2002 requires the court to determine whether the defendant has a "criminal lifestyle".

9.11 The first step is to identify the "offence (or offences) concerned".[3] An "offence concerned" means any offence which led to the commencement of the confiscation proceedings.[4] This can be either an offence for which the defendant was convicted before the Crown Court, or for which the defendant was convicted before the magistrates' court and sent to the Crown Court for sentencing.

9.12 The second step is to determine whether the offence (or offences) concerned satisfy one of three tests which decide whether the defendant has a "criminal lifestyle" for the purposes of POCA 2002. According to section 75:

(1) the offence must be specified in Schedule 2 to POCA 2002;

(2) the offence must constitute conduct forming part of a course of criminal activity because:

(a) the defendant is convicted of at least four offences in the same proceedings; or

(b) 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; or

(3) the offence must have been committed over a period of at least six months.

9.13 The third step (which does not apply if the offence is specified in Schedule 2) is to determine whether the financial value of the benefit received for the offence concerned exceeds the financial threshold. The financial threshold is currently £5,000.[5]

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2 CP 249, paras 13.32 to 13.34.
3 Proceeds of Crime Act 2002, s 6(9).
4 Proceeds of Crime Act 2002, s 6(2).
5 Proceeds of Crime Act 2002, s 75(4).

The consultation paper

9.14 In relation to the question of how a defendant is identified as having a criminal lifestyle, we asked five questions and made seven provisional proposals.

9.15 First, in relation to Schedule 2:

(1) We asked consultees whether there are any offences which should be removed from Schedule 2 to POCA 2002.[6]

(2) We asked consultees whether the offence of money laundering under section 329 of POCA 2002 should be wholly or partially included in Schedule 2 to POCA 2002.[7]

(3) We provisionally proposed that the offence of "keeping a brothel used for prostitution" contrary to section 33A of the Sexual Offences Act 1956 be added to Schedule 2 to POCA 2002.[8]

(4) We provisionally proposed that fraud should not be added to Schedule 2 to POCA 2002.[9]

(5) We provisionally proposed that bribery should not be added to Schedule 2 to POCA 2002.[10]

(6) We asked consultees whether there are any offences which should be added to Schedule 2 to POCA 2002.[11]

9.16 Second, in relation to the course of criminal activity trigger:

(1) We provisionally proposed 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.[12]

(2) We asked consultees what number of offences should be required under the course of criminal activity trigger (two offences; three offences; or another number of offences).[13]

(3) We provisionally proposed 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.[14]

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6 Consultation question 30.
7 Consultation question 31.
8 Consultation question 32.
9 Consultation question 33.
10 Consultation question 34.
11 Consultation question 35.
12 Consultation question 36.
13 Consultation question 37.
14 Consultation question 38.

(4) We provisionally proposed 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.[15]

9.17 Third, in relation to the financial threshold for triggering the criminal lifestyle assumptions:

(1) We invited consultees' views about whether the financial threshold for triggering the criminal lifestyle assumptions should be raised and if so, to what amount.[16]

(2) We provisionally proposed that confiscation legislation should mandate that the financial threshold for triggering the lifestyle assumptions be reviewed by the Secretary of State every five years.[17]

PROPOSAL 1 – REMOVING OFFENCES FROM SCHEDULE 2

9.18 A defendant has a "criminal lifestyle" if confiscation proceedings are brought following a conviction for any of the offences listed in Schedule 2 to POCA 2002. The fact of the conviction triggers the application of the assumptions, without more.

9.19 In summary, Schedule 2 contains offences in relation to drug trafficking; money laundering; terrorism; slavery; people trafficking; arms trafficking; counterfeiting; intellectual property; prostitution; child sexual exploitation and abuse; and blackmail.

The consultation paper

9.20 In the consultation paper, we discussed the different rationales behind the inclusion of offences in Schedule 2.[18] The explanatory notes 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".[19]

9.21 We also commented that "the crimes listed in Schedule 2 are, as a general rule, crimes of volume".[20] In particular, the intellectual property offences are included because they are "typically repeat offences" committed by a defendant "whose business is founded on the commission of offences".[21]

9.22 We noted that "despite being crimes of volume, Schedule 2 offences are often difficult to detect because they occur in the criminal economy". We gave the examples of people trafficking (where victims are unlikely to know the extent of the defendant's criminal conduct) and money laundering (which may suffer from an "information shortfall" from the absence of easily identifiable victims).[22]

9.23 We considered that, in prosecuting and extracting the profits from offences listed in Schedule 2, two key difficulties exist for law enforcement agencies. First, "only a

15 Consultation question 39.
16 Consultation question 40.
17 Consultation question 41.
18 CP 249, paras 13.42 to 13.50.
19 Explanatory notes to the Proceeds of Crime Act 2002, para 156.
20 CP 249, para 13.44.
21 *R v Beazley* [2013] EWCA Crim 567, [2013] 1 WLR 3331 at [13].
22 CP 249, para 13.45.

fraction of the Schedule 2 offences committed are or are ever likely to be prosecuted". Second, "the number of offences committed is likely to be known only by the offender or their co-conspirators".[23] A key investigatory tool in that regard is to follow the money trail. "By looking at a person's income and expenditure and analysing its source and destination, the nature and extent of criminality can be uncovered". By applying the criminal lifestyle assumptions in such cases and requiring the defendant to account for what they gained and what they spent, the nature and extent of the defendant's criminality can be uncovered and the information gap can be (at least in theory) overcome.[24]

9.24 We concluded that we were "persuaded by the rationale[s] for the special treatment of Schedule 2 offences and consider the inclusion of the offences listed in the Schedule to be relatively uncontroversial."[25] Therefore, we did not provisionally propose that any offences should be removed from Schedule 2. Nonetheless, we asked consultees whether they considered that any offences should be removed from Schedule 2.[26]

Consultation responses

9.25 The majority of consultees who responded did not think any of the offences currently included in Schedule 2 should be removed. Among the remaining consultees, we received a variety of responses.

9.26 Dr Craig Fletcher said that the criminal lifestyle assumptions should not exist at all, that they lead to irrecoverable and grossly inflated confiscation orders and incite "a sense of resistance amongst defendants". Professor Johan Boucht called for caution in any system which applies criminal lifestyle assumptions after the commission of only one offence. He called for greater judicial discretion and the addition of a financial threshold to offences in the Schedule.

9.27 Two consultees, including Andrew Campbell-Tiech KC, also objected to triggering the lifestyle assumptions by the type of offence committed. They objected to the existence and operation of Schedule 2 in its entirety.

9.28 In relation to specific offences currently included in the Schedule, two consultees suggested that the intellectual property offences should be removed, noting that they sit "uneasily amidst drug trafficking and terrorism".[27] One consultee said that blackmail offences should be removed.[28] Garden Court Chambers called for the money laundering offences to be removed, arguing that professional money launderers (as opposed to a person who allows money to pass through their account on one occasion in exchange for a small fee) are caught by the other triggers.[29]

9.29 The offences which drew the most support for their removal were the drug offences under the Misuse of Drugs Act 1971 ("MDA 1971"). The Prisoners' Advice Service suggested that possession with intent to supply be removed from the Schedule. This

23 CP 249, para 13.46.
24 CP 249, paras 13.47 to 13.50.
25 CP 249, para 13.50.
26 Consultation question 30 (42 responses: 30 (no offences removed), 12 (varied answers, described in analysis above); 20 did not answer).
27 Andrew Campbell-Tiech KC and David Winch (forensic accountant).
28 David Winch (forensic accountant).
29 Garden Court Chambers.

was supported by Rudi Fortson KC, who called for the removal of three MDA 1971 offences.[30] He argued that:

> Those offences need not (realistically) involve a criminal lifestyle at all. Thus, the person who supplies (socially) a single ecstasy tablet to a friend (section 4), or who permits a person to smoke cannabis in their flat (section 8), has committed a criminal lifestyle offence. Of course, one would hope that prosecutors would exercise their discretion not to initiate confiscation proceedings in such cases.

9.30 A further consultee (and member of law enforcement) who suggested that there should be no change to the Schedule, nevertheless observed that possession with intent to supply cases can result in vastly different benefit depending on whether or not the defendant is a "low level" drug supplier. She said that discretion is not always exercised appropriately:

> Some FIs [financial investigators] will look at these cases and not pursue to confiscation because they deem them to be low level drug suppliers and seek only to pursue forfeiture of any cash seized etc, whilst other FIs will look at these cases, see it is a lifestyle offence and pursue confiscation.[31]

Analysis

9.31 We received only three responses which were in favour of dramatic reform to Schedule 2. Largely, consultees did not support change. In considering whether change is appropriate, two issues of context are important.

(1) Our policy decision on bolstering the discretion to disapply the criminal lifestyle assumptions will provide an improved safeguard against the inappropriate application of the assumptions.[32]

(2) In line with our efforts to simplify POCA 2002 and given that one function of Schedule 2 is to simplify the process by which a person is deemed to have a criminal lifestyle, we support keeping the Schedule as simple as possible. Either an offence is included or excluded; we are not in favour of partial or qualified inclusion in this context.

9.32 During policy development we closely considered the problem presented by low-level drug offending (so-called "social supply" or "street offending"). We acknowledged the argument in favour of excluding this sort of offending from Schedule 2 and the inappropriate automatic application of the criminal lifestyle assumptions.

9.33 We considered whether a financial threshold should apply to offences in Schedule 2, to exclude low-level offending (such as low-level social supply of drugs). We noted that low-level offending largely should not be dealt with through confiscation orders: other mechanisms exist, in particular deprivation orders, to remove the source and profit of this offending from low-level offenders.

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30 Misuse of Drugs Act 1971, s 4(2) and (3) (unlawful production or supply of controlled drugs); s 5(3) (possession of controlled drug with intent to supply); and s 8 (permitting certain activities in relation to controlled drugs).

31 Personal response from a member of Kent Police.

32 See para 10.140.

9.34 However, we are not in favour of applying a financial threshold to Schedule 2. This would undermine the simplicity and certainty benefits of Schedule 2. It may also be inconsistent with one rationale for the Schedule, which focuses not on the value of offending, but that offending takes place as part of a pattern of difficult to detect behaviour.

9.35 We are also not in favour of removing the MDA 1971 offences from the Schedule altogether. There was no suggestion that non-social supply or high-level offending was inappropriately captured by Schedule 2. To remove these offences completely would be unsatisfactory and inconsistent with the background of the criminal lifestyle assumptions as a whole, which grew out of drug trafficking legislation. The inclusion of the MDA 1971 offences still serves to target some of the "right people" (ie serious and organised drug offenders). Furthermore, the courts have emphasised the importance of ensuring that the court carefully considers each stage of confiscation – the true extent of a person's criminality may only become evident when the money trail has been followed.

9.36 Therefore, we do not recommend removing the MDA 1971 offences from the Schedule or applying a financial threshold to Schedule 2. We consider that by improving prosecutorial and judicial discretion, the assumptions will not be automatically applied to defendants whose offending is not indicative of a criminal lifestyle.

9.37 In relation to the other offences which consultees suggested should be removed, we do not recommend that any of them should be removed.

(1) We acknowledge that the inclusion of intellectual property offences may seem incongruous by comparison to other offences included in the Schedule. However, we note that no consistent rationale can be identified for the inclusion of all the offences. We infer that intellectual property offences are included because they are often committed in volume, over a long period, and may be difficult to detect. While they may not be perceived to cause the same sort of serious harm or attract the same level of "major public concern" as other offences in the Schedule, we do not consider that we have received sufficient support or reasoning to justify recommending their removal. Intellectual property offences are, in macroeconomic terms, very harmful, in particular due to the offenders' increasing ability (with technological advances) to offend repeatedly at very low cost. As above, we anticipate that wholly inappropriate cases will be avoided by better use of discretion.

(2) We do not recommend removing blackmail. We only received one response calling for its removal without supporting reasons.

(3) We do not recommend removing the money laundering offences (sections 327 and 329 of POCA 2002). We address the inclusion of money laundering offences in greater detail below, when considering whether to add the offence in section 329 of POCA 2002 to Schedule 2.

PROPOSAL 2 – ADDING OFFENCES TO SCHEDULE 2

The consultation paper

9.38 In the consultation paper, we considered adding several offences to Schedule 2, on the basis that the omission of these offences had been raised with us by stakeholders during pre-consultation discussions.[33] The offences we considered adding were:

(1) money laundering contrary to section 329 of POCA 2002;

(2) keeping a brothel used in prostitution, contrary to section 33A of the Sexual Offences Act 1956;

(3) fraud; and

(4) bribery.

Money laundering contrary to section 329 of POCA 2002

The consultation paper

9.39 In relation to money laundering, we noted that the principal money laundering offences are established by sections 327, 328 and 329 of POCA 2002, but only sections 327 and 328 are currently included in the Schedule.[34] We described the context for the inclusion of these two offences: they concern the "active laundering of criminal property".[35] Section 327 entails "what a person might ordinarily consider to be money laundering", whereby a person seeks to distance property from crime "so that it can be used more easily in the legitimate economy".[36] We explained the inclusion of section 327 in the Schedule on the basis that "information about the legitimate or illegitimate nature and extent of funds passing through a money launderer's hands [is] far more readily within their knowledge".[37] Section 328 makes it an offence to assist another with the activity contrary to section 327, i.e. assisting another to acquire, retain, use or control criminal property.

9.40 Rather than being an active money laundering offence, section 329 prohibits the actual acquisition, retention, use or control of criminal property. Most commonly, as we described in the consultation paper, section 329 is used to target "self-laundering", where a defendant commits a crime and retains possession of the resulting criminal property.[38] We argued that the "knowledge disparity" which justifies the inclusion of sections 327 and 328 does not always apply to section 329. It is often much easier to ascertain the defendant's benefit from crime in a section 329 offence because the source of the criminal property is clear and forms the basis of the charge.

33 CP 249, para 13.52.
34 CP 249, para 13.54.
35 CP 249, para 13.56.
36 CP 249, para 13.57.
37 CP 249, para 13.59.
38 CP 249, para 13.62.

9.41 In cases where it is not easy to ascertain the source of the criminal property, we noted that the inclusion of section 327 and not section 329 in the Schedule may result in tactical charging to engage the application of the criminal lifestyle assumptions.[39]

9.42 However, we ultimately concluded against adding section 329. We were not in favour of attempting to add section 329 to the Schedule on a partial basis, to target the "right cases", as this may over-complicate Schedule 2 and undermine its simplicity and certainty.[40]

9.43 Nonetheless, we asked consultees for their views on adding section 329 to Schedule 2; how any partial inclusion could be defined; and whether they knew of cases where the current law has impeded effective confiscation because section 329 was not included in the Schedule.

Consultation responses

9.44 Consultees were divided in response to this question, almost evenly answering in favour and against adding section 329 to Schedule 2.[41]

9.45 Among those in favour of adding section 329, consultees described the current omission as "incongruous" and "illogical".[42] As with other types of offences included in Schedule 2, both the Insolvency Service and the Financial Crime Practice Group at Three Raymond Buildings considered that this offence is often charged where the source of the laundered funds is unclear and the prosecution rely upon an inference to determine its source. The offence is, in their view, one for which there is a disparity in the knowledge between the defendant and the prosecution. Both concluded that partial inclusion of the section 329 offence would be difficult to define and that it should be wholly included. They cited prosecutorial and judicial safeguards as operating to remove any potential unfairness.

9.46 Against the addition of section 329, consultees agreed that the commission of a single offence under section 329 does not necessarily warrant the application of the criminal lifestyle assumptions. One practitioner from the National Crime Agency ("NCA") said:

> The section 329 offence being included [in Schedule 2] will mean that it will become the normal to seek this as a charge over offences in the Theft Act [1968]. It's a lesser offence for a single simple crime. It cannot be assumed that a section 329 offence suggests a criminal lifestyle. If there is more to a case than the section 329 offence then an appropriate charge under either section 327 or section 328 can be made or another trigger may show a criminal lifestyle.

9.47 The Crown Prosecution Service ("CPS") agreed, saying that "possession of [one's] own proceeds does not imply a [criminal] lifestyle". One member of His Majesty's Revenue and Customs , responding in a personal capacity, said that by adding

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39 CP 249, paras 13.64 to 13.66.

40 CP 249, para 13.67.

41 Consultation question 31 (46 responses; 22 (add), 17 (do not add), 7 (other); 16 did not answer) and summary consultation question 7(1)(c) (33 responses; 13 (add), 17 (do not add), 3 (other); 4 did not answer).

42 Penelope Small (33 Chancery Lane) and a personal response from a member of Devon and Cornwall Police.

section 329 it would potentially catch "virtually every defendant who commits an acquisitive crime".

9.48 Garden Court Chambers reiterated their position that all three money laundering offences should not be included in the Schedule. While they opposed the inclusion of section 329, they also argued that the inclusion of only sections 327 and 328 "could lead to absurd results". They were concerned that "the application of the assumptions should not depend upon arbitrary charging decisions".

9.49 Three responses related to charging and plea decisions, in particular the readiness of defendants to offer pleas under section 329 in place of charges under section 327, reportedly to avoid the application of the lifestyle assumptions.[43]

Analysis

9.50 We do not recommend that section 329 of POCA 2002 should be added to Schedule 2. As we noted in the consultation paper, and summarised above, section 329 is materially different from the offences under sections 327 and 328. The knowledge disparity which justifies the inclusion of sections 327 and 328 does not apply to offences under section 329. In the absence of this rationale, we are persuaded that appropriate instances of offending under section 329 which ought to attract the application of the criminal lifestyle assumptions will be caught through the other triggers.

9.51 We are not convinced that the fact that the defendant might be charged with a different offence to trigger the criminal lifestyle provisions, or might offer a plea to a particular offence to avoid the provisions, is reason in itself for including section 329 in the Schedule.

Keeping a brothel used for prostitution contrary to section 33A of the Sexual Offences Act 1956

The consultation paper

9.52 Section 33A of the Sexual Offences Act 1956 ("SOA 1956") makes it an offence to keep a brothel used for prostitution. It exists alongside the offence of keeping a brothel (section 33 of the SOA 1956)[44] and the offence of a landlord letting premises for use as a brothel (section 34 of the SOA 1956). Sections 33 and 34 of the SOA 1956 are included in Schedule 2; section 33A is not.

9.53 In the consultation paper, we considered that section 33A is "an offence committed for gain in the same way as sections 33 and 34", that it "has the potential to generate substantial benefit" and that it "may be difficult to detect". We described its omission as "anomalous" and suggested that it "may merely have been an oversight given the close proximity between the commencement of POCA 2002 on 24 March 2003 and

43 Insolvency Service; City of London Police; personal response from a member of the Metropolitan Police.

44 The addition of the words "used for prostitution" in section 33A 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: see *Rook and Ward on Sexual Offences* (5th ed, 2016) para 12.35.

the introduction of section 33A of the [SOA 1956]" through an amendment contained in the Sexual Offences Act 2003.[45]

9.54 We therefore provisionally proposed that section 33A of the SOA 1956 should be added to Schedule 2 to POCA 2002.

Consultation responses

9.55 There was strong support from consultees for this provisional proposal.[46]

9.56 Three stakeholders agreed with our assessment in the consultation paper that the inclusion of section 33 and omission of section 33A was "anomalous" and an "oversight".[47]

9.57 Although Professor Johan Boucht considered that if section 33 is included, then logically section 33A should also be included, he objected generally to the inclusion of either, saying, "assisting in the management of a brothel is not necessarily an offence that is liable to produce the kind of wealth intended [to be] targeted by the scheme".[48]

9.58 On the other hand, City of London Police responded that:

> The potential criminal benefit from offences of this kind can be huge as well as damaging to those involved in providing the services that result in that benefit and the local communities near to these locations. By including the offence as a Schedule 2 offence it will allow law enforcement to strip assets from offenders, add further deterrent to those involved and provide additional reassurance to local communities.

9.59 The omission of section 33A was described as "important" by the CPS. Two organisations also cited cases involving section 33A offending where application of the lifestyle assumptions was considered appropriate.[49] In one instance different offending was charged to bring the case within the lifestyle assumptions.

Analysis

9.60 This proposal met with strong support from consultees. It appears that the omission of section 33A is anomalous, and the most likely reason is the close timing of the passing of the Sexual Offences Act 2003 and POCA 2002. When the Sexual Offences Act 2003 was enacted, Schedule 2 was updated to ensure that those offences which were previously included in Schedule 2 by virtue of being offences under the Sexual Offences Act 1956 continued to be included in Schedule 2. The predecessor to section 33 was included in Schedule 2 and so section 33 was included in the updated Schedule. However, section 33A was a new offence created by the Sexual Offences Act 2003 and was omitted during the transposition exercise.

9.61 In fact, section 33A is a more serious offence than section 33: it is triable either way (whereas section 33 is a summary only offence) and has a maximum penalty of seven

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45 CP 249, para 13.72.

46 Consultation question 32 (39 responses: 29 (add), 3 (do not add), 7 (O); 23 did not answer) and summary consultation question 7(2) (35 responses: 26 (add), 2 (do not add), 7 (other); 2 did not answer).

47 Garden Court Chambers; Kingsley Napley LLP; Professor Johan Boucht.

48 This view was also articulated at Webinar 4, "Benefit in criminal lifestyle cases" (22 October 2020).

49 City of London Police; Eastern Region Special Operations Unit.

years' imprisonment where tried on indictment (whereas section 33 has a maximum penalty of six months' imprisonment). While both offences capture a broad range of behaviour, we remain of the view that their inclusion is justified. There is the potential to generate substantial benefit, likelihood of being committed undetected and association with career criminality. Cases where this does not apply can be appropriately dealt with through discretion.

9.62 We therefore recommend that the offence of keeping a brothel used for prostitution contrary to 33A of the SOA 1956 should be added to Schedule 2 to POCA 2002.

Fraud and bribery

The consultation paper

9.63 In the consultation paper we rejected the argument that it was anomalous for several white-collar financial offences to be omitted – including fraud and bribery – when laundering the proceeds of this offending would trigger the criminal lifestyle assumptions under Schedule 2.[50] We considered that the same argument could be made for any predicate offence which generates benefit from crime. Rather, the focus should be whether offences are "volume crimes and difficult to detect".[51] We therefore independently considered whether fraud and bribery should be added to Schedule 2.

9.64 In relation to fraud, we commented that while fraud may be "an offence of volume or the offence on which a business is founded", it may also be a "one-off offence".[52] The former type of offending can still be captured through the course of criminal activity triggers.

9.65 We noted that not only does fraud cover a very broad range of behaviour, it is highly prevalent and may therefore have a "dramatic impact on the number of cases in which the assumptions would apply".[53] The rate of offending has reportedly increased since the figures cited in the consultation paper: the Crime Survey England and Wales reported 4.5 million fraud offences in the 12 months to December 2020.[54] Similarly, we cited high numbers of cases at the Crown Court.[55]

9.66 We therefore provisionally proposed that fraud should not be included in Schedule 2 to POCA 2002.

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50 CP 249, para 13.75.
51 CP 249, para 13.76.
52 CP 249, paras 13.77 and 13.78.
53 CP 249, para 13.81.
54 Office for National Statistics, *Crime in England & Wales: year ending December 2020* (13 May 2021), https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingdecember2020#fraud. In CP 249, we cited data from the CSEW for the year ending March 2020, estimating 3.7 million instances of fraud, para 13.81.
55 CP 249, para 13.81. Updated figures: 935 receipts, 756 disposals and 2,107 outstanding cases; Ministry of Justice, *Receipts, disposals and outstanding cases for trial in the Crown Court Q4 (Oct-Dec)* (25 March 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972716/cc_rdos_tool.xlsx.

Consultation responses

9.67 Consultees largely agreed that fraud should not be added to Schedule 2, although there was some support for making the addition.[56]

9.68 Among those against the addition, consultees tended to note the very broad range of behaviour captured by fraud, highlighting that in many cases it would be inappropriate to apply the criminal lifestyle assumptions.

9.69 The Criminal Law Solicitors' Association distinguished between one-off "opportunistic" fraud, and that committed by "a more sophisticated professional criminal". They said it may be "unjust" to catch the former in the lifestyle assumptions. A similar distinction was drawn in the response from the Financial Crime Practice Group at Three Raymond Buildings:

> Fraud can cover a very wide range of offending – from a career benefit fraudster who truly lives what can be described as a criminal lifestyle, to the one-off offender who tries their luck by omitting key information from a mortgage application.

9.70 The Insolvency Service also argued that the "knowledge disparity" justification did not necessarily apply to fraud, saying:

> Fraud is not an offence where the disparity of knowledge between the prosecution and defendant is always present and victims are too frightened [or] vulnerable to come forward.

9.71 Consultees were generally agreed that serial fraudsters would be caught by the other triggers, although they were divided on whether this militated in favour or against of the offence being added to Schedule 2.[57]

9.72 The Fraud Lawyers Association was not in favour of making the addition, although they expressed this view alongside a general observation that the criminal lifestyle provisions should be abolished.

9.73 Three organisations argued that fraud in general should not be added, but that offences in connection to fraudulent business should be (contrary to section 9 of the Fraud Act 2006 and section 993 of the Companies Act 2006).[58] This potential addition is addressed in Appendix 3, when considering the suggestions made in response to our open question on adding any other offences to Schedule 2.

9.74 The Bar Council did not express a fixed view on what they regarded as "essentially a question of policy". However, they noted that the "Schedule contains some apparent illogicalities" and fraud may have factors indicating "what a layman would consider to be a criminal lifestyle".

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56 Consultation question 33 (45 responses: 13 (add), 27 (do not add), 5 (other); 17 did not answer) and summary consultation question 7(1)(a) (33 responses: 13 (add), 16 (do not add), 4 (other); 4 did not answer).

57 Financial Crime Practice Group at Three Raymond Buildings; personal response from a trading standards officer; personal response.

58 Insolvency Service; Association of Chief Trading Standards Officers; East Sussex Trading Standards.

9.75 In favour of the addition, consultees cited the connection of fraud to organised crime[59] and the widespread prevalence of fraud.[60]

9.76 The NCA and National Economic Crime Centre ("NECC") submitted an official response which argued forcefully in favour of adding fraud to Schedule 2. They argued that fraudsters will usually commit "thousands" of offences and a conviction "will only relate to a small portion of their activity". The NCA and NECC also argued that fraud is difficult, if not impossible, to investigate fully but where it is, "large sums of cash and assets" are located, suggesting that it merits the application of the lifestyle assumptions.

9.77 One financial investigator argued that if fraud is added to Schedule 2, FIs will use their discretion to ensure that the courts aren't flooded by extra work through the application of the criminal lifestyle assumptions in inappropriate cases.

Analysis

9.78 We are convinced that it is not appropriate to add fraud offences to Schedule 2 to POCA 2002. While we are alive to concerns, in particular as expressed by the NCA and NECC, that fraud is highly prevalent, we note that their argument for adding fraud to the Schedule rests partly on the high number of offences often committed by a career fraudster. In such a case, the course of criminal activity trigger would be easily satisfied, and the criminal lifestyle assumptions applied.

9.79 As we noted in the consultation paper, and as reiterated to us by consultees, fraud covers a very broad range of behaviour. In many cases, one offence of fraud will not be indicative of a criminal lifestyle.

9.80 We therefore do not recommend fraud is added to Schedule 2 to POCA 2002. We also do not recommend that other permutations of fraud offences (conspiracy to defraud, conspiracy to cheat, or fraudulent trading contrary to section 9 of the Fraud Act 2006 or section 993 of the Companies Act 2006) should be added to the Schedule; these are considered in more detail in Appendix 3.

Bribery

The consultation paper

9.81 In the consultation paper, we gave three reasons for our provisional proposal not to include bribery in Schedule 2 to POCA 2002.

9.82 First, we argued that, "like fraud, bribery and corruption are not inherently serial in nature". We cited Ministry of Justice ("MOJ") guidance on the Bribery Act 2010, which recognises that "isolated" incidents of bribery may occur even in well-run organisations. We concluded that "including bribery within Schedule 2 would unjustifiably capture all such isolated offending".[61]

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59 Personal response from a member of Sussex Police; Professor Mike Levi.
60 National Crime Agency and National Economic Crime Centre; North East ACE Team; personal response.
61 CP 249, para 13.86.

9.83 Second, we noted that in the prosecutions for bribery to date, "the available evidence suggests that the prosecution has been able to pursue confiscation" after conviction, suggesting that adding bribery to Schedule 2 was not necessary.[62]

9.84 Third, we reasoned that there are "few cases in which it may therefore be appropriate to apply the assumptions in the context of bribery". Furthermore, inappropriately applying the assumptions "could also lead to the imposition of a highly onerous reverse burden" against a company, which "may be wholly disproportionate to any alleged criminality".[63]

Consultation responses

9.85 Consultees largely agreed that bribery should not be added to Schedule 2, although there was some support for making the addition.[64]

9.86 Against the inclusion of bribery in Schedule 2, consultees pointed to the other triggers being sufficient to capture instances of bribery which are indicative of a criminal lifestyle.[65] Although they did not give additional comments, the CPS and Serious Fraud Office ("SFO", which has a particular role investigating bribery) were not in favour of making the addition.

9.87 Professor Johan Boucht agreed that given the "potentially far-reaching consequences of triggering the assumptions", we should exercise "considerable caution" when adding offences to Schedule 2.

9.88 The South East Confiscation Panel (East Kent Bench) argued against including bribery:

> The range of activities to which it relates is broad and includes (by way of example) the giving and receipt of limited value corporate hospitality which was regarded as acceptable prior to this legislation. Activities such as this, previously undertaken in the normal course of business, should not now constitute a "criminal lifestyle".

9.89 Two consultees who were otherwise in favour of adding fraud to the Schedule expressed more reluctance with regards to bribery, one consultee saying that "bribery perhaps is more of a one-off occurrence (and rarely charged)".[66]

9.90 In favour of the inclusion of bribery in Schedule 2, we received the same response from three anti-corruption organisations (Transparency International UK, Spotlight on Corruption and the UK Anti-Corruption Coalition), saying:

> The consultation document focuses its argument on not including bribery entirely on the corporate offence in the Bribery Act. This does not take into account where the Bribery Act might be used to prosecute domestic corruption by individuals or against public officials from other countries who may seek bribes on a regular basis [as] part

62 CP 249, para 13.88.
63 CP 249, para 13.89.
64 Consultation question 34 (36 responses: 10 (add), 26 (do not add), 4 (other); 26 did not answer) and summary consultation question 7(1)(b) (35 responses: 10 (add), 18 (do not add), 7 (other); 2 did not answer).
65 Andrew Campbell-Tiech KC.
66 West Midlands ROCU Financial Investigations Team; Professor Mike Levi.

of a pattern of kleptocracy. Kleptocratic behaviour would seem to be particularly suitable for the criminal lifestyle test.

We note that under Question 44 below, the consultation [paper] proposes that the court should be allowed to determine that even where an assumption of a criminal lifestyle is allowed, it not be made. This, alongside the fact that a court may determine the assumption does not apply in the first place, allows for important checks against use of criminal lifestyle assumptions where they may not be appropriate in fraud and bribery cases. We therefore strongly urge the Law Commission to reconsider its proposals on not including fraud and bribery as the basis for criminal lifestyle assumptions.

9.91 A personal response in favour of adding bribery to Schedule 2 referred to the Transparency International Corruption Perceptions Index ("TI CPI") and argued on that basis that "it is more important than ever that bribery is included as a lifestyle offence".

9.92 The TI CPI is "an index which ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople".[67] However, contrary to this consultee's suggestion, the perception of corruption in the UK has not changed significantly since 2012, and the UK currently ranks 11th out of 180 countries on the index, with a score of 77 out of 100.[68]

9.93 A personal response from a member of the Metropolitan Police also argued that "the overall impact [of bribery] on society" pointed in favour of including it on the Schedule.

9.94 One practitioner from the NCA submitted that:

> Bribery is a clandestine type of crime and victims are unlikely to be identified. Therefore, when an offender is convicted, it is highly likely that the conviction will relate to a small proportion of the offender's activity. Again, bribery (and other corrupt acts) are part of a pattern of behaviour (a lifestyle) [and] one in which the rewards outweigh the risks to an offender.

Analysis

9.95 Unlike fraud, prosecutions for bribery are relatively rare. Although only including data up to 2017 (and which was suggestive of an upward trend), post-legislative scrutiny from the House of Lords Select Committee on the Bribery Act 2010 reported seven prosecutions under section 1 and nine prosecutions under section 2 in 2017.[69] It was also noted in the Law Commission's corporate criminal liability options paper that

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67 Transparency International, *Corruption Perceptions Index 2020* (28 January 2021), https://images.transparencycdn.org/images/CPI2020_Report_EN_0802-WEB-1_2021-02-08-103053.pdf, p 6.

68 The TI CPI gives a score out of 100, 0 being very corrupt and 100 being very clean. In 2012, the UK had a score of 74 and ranked 17th out of 176. Although there has been some fluctuation in the intervening period (rising to a score of 82 in 2017, ranked 8th out of 180), the UK is not listed as having undergone "statistically significant" change between 2012 and 2020: Transparency International, *Corruption Perceptions Index 2020*, full data set and table of significant changes available to download from https://www.transparency.org/en/cpi/2020/index/gbr.

69 The Bribery Act 2010: post-legislative scrutiny, Report of the Select Committee on the Bribery Act 2010 (2017-2019) HL 303, pp 16 and 17, tables 1 and 2.

"nine of the twelve DPAs secured by the SFO include section 7 Bribery Act 2010 [failure to prevent] offences".[70]

9.96 We are aware of the view that bribery is "clandestine" and may be difficult to detect. This is explicitly recognised in the Government's recent Economic Crime Plan:

> While they are not victimless crimes, economic crimes such as money laundering, corruption and bribery and sanctions contravention are typically clandestine, making detection and measurement challenging.[71]

9.97 While to some extent, both of these factors suggest that inclusion in Schedule 2 may be appropriate, we remain of the view that bribery should not be added. Like fraud, bribery offences may be committed in a very broad range of ways and we are reluctant to catch low-level or one-off offending inappropriately. We have previously rejected adding a financial threshold to Schedule 2, as an unnecessary complicating factor. We are in favour of keeping Schedule 2 simple, and we are mindful of those who ask us to exercise caution when adding offences to the Schedule, given the onerous reverse burden which the application of the assumptions entails.

9.98 Like fraud, there are instances of bribery which ought to lead to the application of the criminal lifestyle assumptions. However, we have not seen evidence to suggest that the absence of bribery from Schedule 2 is currently impeding effective confiscation in the prosecutions which do occur. Importantly, the SFO, which has specialist responsibility for investigating and prosecuting bribery, was not in favour of the addition.

Any other offences

Consultation responses

9.99 In the consultation paper, we invited consultees' views on whether there are any other offences which should be added to Schedule 2.[72]

9.100 Including the suggestions in relation to fraud above, there were 10 types of offences suggested:

(1) Offences related to illegal waste dumping contrary to section 33(1)(a) of the Environmental Protection Act 1990 and section 38(1)(a) of the Environmental Permitting (England & Wales) Regulations 2016.[73]

(2) Offences and regulations related to the licensing of houses of multiple occupancy contrary to the Housing Act 2004, in particular sections 72 and 95 and regulations made pursuant to section 234.[74]

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70 Corporate criminal liability: An options paper (2022) Law Commission Options Paper, p 75.
71 HM Treasury and Home Office, *Economic Crime Plan, 2019 to 2022* (12 July 2019), https://www.gov.uk/government/publications/economic-crime-plan-2019-to-2022, para 1.14.
72 Consultation question 35 (21 responses).
73 Environment Agency.
74 Association of Chief Trading Standards Officers.

(3) Offences related to the provision of false information and the prejudicing of investigations under the Money Laundering, Terrorist Finance and Transfer of Funds (Information on the Payer) Regulations 2017, regulations 86 to 88.[75]

(4) Offences related to the contravention of financial sanctions under the Sanctions and Anti-Money Laundering Act 2018 and related legislation.[76]

(5) The offence of participating in a fraudulent business contrary to section 9 of the Fraud Act 2006 and the offence of fraudulent trading contrary to section 993 of the Companies Act 2006.[77]

(6) Offences relating to the illegal importation of dogs, contrary to articles 4, 16 and 17 of the Rabies (Importation of Dogs, Cats and Other Mammals) Order 1974 (pursuant to the Diseases of Animals Act 1950); sections 73 and 75 of the Animal Health Act 1981; regulation 39 of the Trading in Animals and Related Products (England) Regulations 2011 as amended; and article 16 of the Non-commercial Movement of Pets Order 2011.[78]

(7) The offence of robbery contrary to section 8 of the Theft Act 1968.[79]

(8) The offence of cultivation of cannabis contrary to section 6 of the Misuse of Drugs Act 1971.[80]

(9) The offence of conspiracy contrary to the Criminal Law Act 1977.[81]

(10) Offences of illegal importation of cigarettes, tobacco and alcohol contrary to section 170 of the Customs and Excise Management Act 1979.[82]

9.101 It is notable that several consultees objected to the inclusion of any new offences. Garden Court Chambers said:

> The list of offences within Schedule 2 should be kept to the minimum to avoid applying too broad brush an approach and capturing low level "one-off" defendants.

9.102 Rudi Fortson KC also warned against reliance on the justification of offences being "of major public concern", as this may risk "politicising" Schedule 2 to respond to certain activities. He advocated in favour of an approach which was "more objectively grounded in principle".

9.103 Andrew Campbell-Tiech KC reiterated his view that "the whole concept of [trigger offences] is problematic, in theory and in practice". If criminal lifestyle cases were to be retained at all, he preferred a system which allowed the judge to determine whether the defendant was "a career criminal and thus in possession of a criminal

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75 Personal response from a member of the Metropolitan Police.
76 Personal response from a member of the NCA.
77 Insolvency Service.
78 Association of Chief Trading Standards Officers.
79 Personal response from a member of the North East RECU ACE Team.
80 Personal response from a member of the Metropolitan Police; David Winch (forensic accountant).
81 Financial Conduct Authority.
82 HM Revenue and Customs; Association of Chief Trading Standards Officers; two personal responses from trading standards officers.

lifestyle", by which he meant "proof thereof being that the defendant lives wholly or primarily on the proceeds of criminal activity."

Analysis – overview

9.104 We have considered each offence in detail, conducting research into the prevalence of offending and suitability of adding it to Schedule 2. A summary of this analysis can be found at Appendix 3.

9.105 Ultimately, however, we are inclined only to recommend the addition of the offences related to the illegal dumping of waste contrary to section 33(1)(a) of the Environmental Protection Act 1990 and section 38(1)(a) of the Environmental Permitting (England & Wales) Regulations 2016.

9.106 Conducting this research and analysis revealed further difficulties with the inconsistent rationale behind the inclusion of offences in Schedule 2, and to an extent this has contributed to our cautious approach. We have continued to assess the appropriateness of adding offences on the basis of whether they involve a particular knowledge disparity between the prosecution and defence, are offences of volume, are linked to serious and organised crime, or are difficult to detect and investigate in their full extent. We have also remained mindful of keeping the Schedule simple and making any changes in the context of our other recommendations.

9.107 In response to concerns raised by consultees about the appropriateness of "public policy" considerations being relevant to the inclusion of particular offences, we have not given significant weight to whether offences are "of major public concern" when reviewing the proposed additions (despite that wording appearing in the explanatory notes to Schedule 2).

The offence of illegal dumping of waste contrary to Section 33(1)(a) of the Environmental Protection Act 1990 and regulation 38(1)(a) of the Environmental Permitting (England & Wales) Regulations 2016

Consultation responses

9.108 The Environment Agency said in their official response:

> Waste crime is often perpetrated by organised crime groups and environmental offending should be high up on the list of major public concerns.

9.109 The project team met with representatives from the Environment Agency during the consultation period.[83] They explained in more detail their reasons for arguing in favour of these offences – in particular the offence of failing to have the requisite environmental permit under regulation 38(1)(a) – being added to the Schedule. They described the illegal waste industry in organised crime as comparable to drug trafficking, and potentially more lucrative owing to the lower penalties. They explained that whilst in some cases the indictment contains either a sufficient number of offences or offences committed over a sufficiently long period of time sufficient to trigger a criminal lifestyle finding, in other cases they will be prevented from using the assumptions because no triggers are met.

[83] Meeting with the Environment Agency (14 October 2020).

The nature of illegal dumping/waste disposal offences

9.110 Regulation 38(1)(a) of the Environmental Permitting (England & Wales) Regulations 2016 ("the 2016 Regulations"), makes it an offence to contravene regulation 12(1) of the 2016 Regulations. Regulation 12(1) makes it a requirement to have an environmental permit in order to conduct certain regulated activities, including operating a waste facility.

9.111 Section 33(1)(a) of the Environmental Protection Act 1990 ("EPA 1990") makes it an offence to deposit certain waste without an authorising permit.

9.112 Our research focused on the prevalence of cases brought under the EPA 1990 and the 2016 Regulations which involve confiscation, and the value of confiscation orders then made.

9.113 We found five recent appeal decisions concerning confiscation orders in the context of the EPA 1990 and relevant regulatory offences: *Ryder*[84] (confiscation order of £260,000); *Baison*[85] (confiscation order of £694,481); *Morgan*[86] (confiscation order of £156,500); *Hillard*[87] (confiscation order of £384,100); and *Bruce*[88] (confiscation order of £2,102,208.66). All five cases involve large sums and tend to support the Environment Agency's suggestion that this offending can involve large-scale operations and generate significant profit. This level of offending is more indicative of a criminal lifestyle case than low-level offending.

9.114 A further case, *Sweeney v Westminster Magistrates' Court,* concerning a challenge to a search conducted by the Environment Agency, lends credence to the connection between illegal waste and organised crime. This case involved Sweeney and others operating companies in an opaque way, making it difficult to discover who was actually in charge and where money had flowed.[89] The search was conducted as part of an investigation into illegal waste dumping and money laundering.

Analysis

9.115 We have concluded that illegal waste dumping offences contrary to section 33(1)(a) of the EPA 1990 and regulation 38(1)(a) of the Environmental Permitting (England & Wales) Regulations 2016 should be added to Schedule 2 to POCA 2002. As described by the Environment Agency, and confirmed through our research, these offences are connected to large scale operations and linked to serious and organised crime. Large confiscation orders have been made in such cases.

9.116 The sole consultee to call for the addition of these offences, the Environment Agency, is uniquely well-placed to identify this need, as it has responsibility for investigating and prosecuting these offences.

9.117 Bolstering the views of the Environmental Agency is the work of the Financial Action Task Force ("FATF"). In 2021 the FATF held a seminar to accompany the publication

84 *R v Ryder* [2020] EWCA Crim 1110, [2020] 8 WLUK 176.
85 *R v Baison* [2019] EWCA Crim 1050, [2019] 6 WLUK 376.
86 *R v Morgan* [2013] EWCA Crim 1307, [2014] 1 WLR 3450.
87 *R v Hillard* [2021] EWCA Crim 1680.
88 *R v Bruce* [2021] EWCA Crim 1896.
89 *Sweeney v Westminster Magistrates' Court* [2014] EWHC 2068 (Admin), [2014] 6 WLUK 723.

of their report "Money Laundering from Environmental Crime". The report details the range of environmental offences which are connected with large-scale money laundering operations. It also argues for the need for global cooperation to disrupt these organised crime networks:

> Environmental crime covers a wide range of activities, from illegal extraction and trade of forestry and minerals to illegal land clearance and waste trafficking. Actors involved in these crimes vary from large organized crime groups to multinational companies and individuals…The 'low risk, high reward' nature of environmental crime makes for a lucrative and safe source of revenue for criminals. This is partly due to a regulatory and legal environment that is not always consistent globally and does not fully address the financial aspects and money laundering … risks of these crimes. …
>
> [This study] brings together expertise from across the FATF's Global Network to identify good practices that governments and the private sector can take to disrupt the profitability of environmental crimes.[90]

9.118 The FATF report also notes that "environmental crime is estimated to be among the most profitable proceeds-generating crimes in the world, generating around USD 110 to 281 billion in criminal gains each year".[91]

9.119 We therefore recommend that section 33(1)(a) of the EPA 1990 and regulation 38(1)(a) of the Environmental Permitting (England & Wales) Regulations 2016 should be added to Schedule 2 to POCA 2002.

Recommendation 35.

9.120 We recommend that the following offences are added to Schedule 2 to POCA 2002:

(1) The offence of keeping a brothel used for prostitution contrary to section 33A of the Sexual Offences Act 1956; and

(2) Offences related to the illegal dumping of waste contrary to section 33(1)(a) of the Environmental Protection Act 1990 and regulation 38(1)(a) of the Environmental Permitting (England & Wales) Regulations 2016.

COURSE OF CRIMINAL ACTIVITY TRIGGER

The current law

9.121 If a relevant offence is not contained in Schedule 2 to POCA 2002, the criminal lifestyle assumptions may still be applied to the defendant. This occurs where another "trigger" is satisfied, and the financial threshold is met. As highlighted above, there are two other triggers.

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90 Financial Action Task Force, *Money Laundering from Environmental Crime* (July 2021), p 3.
91 Financial Action Task Force, *Money Laundering from Environmental Crime* (July 2021), para 1.1.

(1) The "course of criminal activity" trigger requires that the offence constitute conduct forming part of a course of criminal activity because:

(a) the defendant is convicted of at least four offences in the same proceedings and benefited from each such offence ("multiple counts course"); or

(b) 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 from which he benefited ("multiple convictions course").[92]

(2) The "prolonged criminality" trigger requires that the offence must have been committed over a period of at least six months.[93]

9.122 Under the course of criminal activity trigger ("CCAT"), the defendant must obtain "relevant benefit" from an offence for it to satisfy the test. The financial threshold for relevant benefit is currently £5,000. The benefit from offences taken into consideration ("TICs") goes to calculating whether the financial threshold is met.[94] However, each offence taken into consideration does *not* constitute a relevant offence for determining whether the defendant has reached the required number of offences to satisfy the course of criminal activity trigger.[95]

Our proposals

9.123 We did not make any provisional proposals in relation to the prolonged criminality trigger.

9.124 With regard to the course of criminal activity trigger:

(1) We provisionally proposed 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.[96]

(2) We asked consultees what number of offences should be required under the course of criminal activity trigger (two offences; three offences; or another number of offences).[97]

(3) We provisionally proposed 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.[98]

(4) We provisionally proposed that when the court considers each offence relevant to the course of criminal activity trigger, the court should consider both offences

92 Proceeds of Crime Act 2002, ss 75(2)(b) and (3).
93 Proceeds of Crime Act 2002, s 75(2)(c).
94 Proceeds of Crime Act 2002, ss 75(5).
95 Proceeds of Crime Act 2002 s 75 (3).
96 Consultation question 36.
97 Consultation question 37.
98 Consultation question 38.

from which there was benefit and offences from which there was an attempt to benefit.[99]

9.125 After consultation and policy development, we now make two recommendations in relation to the course of criminal activity trigger.

(1) We recommend that the number of offences required under the course of criminal activity trigger for "criminal lifestyle" be three offences for both cases where there are multiple convictions on the same occasion and convictions on multiple occasions.

(2) We recommend 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.

9.126 We do not recommend that offences taken into consideration should be used to determine whether the defendant has offended on a sufficient number of occasions for the criminal lifestyle provisions to be triggered.

PROPOSAL 3 – NUMBER OF OFFENCES REQUIRED FOR COURSE OF CRIMINAL ACTIVITY TRIGGER

The consultation paper

9.127 We commented on the disparity between the number of relevant offences for the multiple counts and multiple convictions courses, the former requiring at least four qualifying offences in the same proceedings, and the latter requiring a conviction of a qualifying offence on at least two previous occasions (a total of at least three convictions).[100] We noted one of the impacts of the discrepancy was that:

> whether a defendant is brought within the lifestyle assumptions may depend on when a defendant is investigated for, and prosecuted for, [their] offending.
>
> […] 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 [their] control taken within the criminal justice system.[101]

9.128 Having set out the background to the development of the disparity in the number of offences,[102] we concluded that we could "find no rationale justifying the difference between the two". We therefore provisionally proposed that the number of offences should be the same under both limbs of the course of criminal activity trigger.[103] We also asked consultees whether the number of offences should be two, three or another number.

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99 Consultation question 39.
100 CP 249, paras 13.124 and 13.128 to 13.131.
101 CP 249, paras 13.129 to 13.130.
102 CP 249, paras 13.117 to 13.125.
103 CP 249, para 13.131.

Consultation responses

Harmonisation

9.129 We asked consultees whether they agreed with our provisional proposal to harmonise the number of offences required under the course of criminal activity trigger, so that it was the same whether or not the defendant satisfied the trigger under the multiple counts or multiple convictions limb.[104]

9.130 There was strong support for harmonisation. Consultees agreed that the current discrepancy is "illogical",[105] "does not really make much sense",[106] and lacked a supporting rationale.[107] One consultee noted that simplifying the provisions may help save time spent in court arguing over their application.[108]

9.131 Among those not in favour of harmonisation, Professor Johan Boucht rejected the suggestion that the discrepancy lacked a rationale. He argued that:

> Whereas the multiple-convictions ground may legitimately be referred to as indicating a pattern of offending, the reasons to believe that a defendant who is convicted of multiple-offences on a single occasion is a career criminal are, arguably, weaker (although there may be exceptions). As the Law Commission points out, it is not necessarily difficult to find multiple offences to cover a particular criminal activity. Therefore, it may very well be that in spite of multiple [counts] the defendant has either begun a criminal career through these offences, or they simply represent single-time offences. In both cases, applying the lifestyle rules would seem disproportionate.

How many offences?

9.132 We also asked consultees about the number of offences which should be required.[109]

9.133 Consultees were divided in their responses. The strongest consensus fell in favour of three offences (41% of consultees who answered). Those in favour of three offences gave a range of reasons. There appeared to be a general sentiment that there was some significance to the defendant repeating something three times to merit the conclusion that he had a criminal lifestyle.[110] Another consultee expressed the view that two offences was too few to fairly indicate a "lifestyle".[111]

9.134 The second most favoured number was two offences, followed by four offences. The Criminal Law Solicitors' Association was in favour of four offences and noted that this

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104 Consultation question 36 (42 responses: 37 (Y), 3 (N), 2 (O); 20 did not respond).
105 South East Confiscation Panel, East Kent Bench.
106 One practitioner from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland.
107 Bar Council.
108 Personal response from a member of law enforcement.
109 Consultation question 37 (40 responses: 13 (2 offences), 21 (3 offences), 1 (4 offences), 1 (discretion), 4 (other); 22 did not answer) and summary consultation question 8(1) (31 responses: 2 (2 offences), 8 (3 offences), 2 (4 offences), 2 (5 offences), 1 (1 offence), 4 (no change), 6 (discretion), 6 (other); 6 did not answer)).
110 Personal response from a trading standards officer; personal response from a member of Sussex Police.
111 Personal response from a member of the Metropolitan Police.

would "help avoid catching the 'non career' criminal", thereby "reducing the prospect of injustice".

9.135 A total of seven consultees were in favour of a more discretionary, fact-specific approach which was not determined by the number of offences.[112] The numerical approach was repeatedly described as a "blunt instrument".

9.136 John McNally of Drystone Chambers said,

> This should not be an exercise of nominalism, dependent upon the vagaries of drafting or a "mere number". […] The powers of the courts should be reserved to be deployed (proportionately) in appropriate proceedings for which number is no measure.

9.137 The remaining consultees made other suggestions, ranging between one to five offences, keeping the current position and abolishing the lifestyle provisions altogether.

Analysis

9.138 The proposal to harmonise the number of offences for each part of the course of criminal activity trigger supports our efforts to simplify confiscation legislation. Consultees confirmed our view that the application of the criminal lifestyle assumptions is one of the most complex and confusing parts of POCA 2002. We therefore favour harmonising the number of offences required as one step towards simplification.

9.139 We acknowledge two concerns raised by consultees. First, that the numerical element to determining whether the criminal lifestyle assumptions apply is arbitrary and may not be indicative of whether the defendant actually has a criminal lifestyle. Second, that there may have been good reason for a differentiated approach in the multiple counts and multiple convictions routes to satisfying the course of criminal activity trigger.

9.140 In relation to the first concern, we recognise that there is a balance to be struck between keeping the law clear and simple and ensuring that the law is applied justly and fairly to reflect the facts of each case. Whilst using a numerical threshold may be somewhat arbitrary, consultees generally regarded the identification of a pattern of offending which generates significant benefit as one suitable way to decide when the assumptions ought to apply. Under our reforms, the number of offences provides only a starting point and should be looked at holistically alongside the other safeguards we recommend, namely a raised financial threshold for the application of the assumptions and enhanced discretion to disapply the assumptions.

9.141 We consider that any suggestion that the prosecution could unfairly "stack" the indictment to achieve the application of the criminal lifestyle assumptions could be

[112] John McNally and Barnaby Hone (Drystone Chambers); personal response; BCL Solicitors LLP; personal responses from two judges; Helena Wood (RUSI); Ian Foxley (University of York).

challenged as an abuse of process or mitigated by our recommendations on judicial discretion and does not, in itself, require departure from a numerical approach.[113]

9.142 In relation to the second concern, there may be good reason for the differentiated approach between the multiple counts and multiple convictions routes to satisfy the trigger. There is merit to the argument that a "spree" of offending on one occasion (multiple counts) may be less indicative of a criminal lifestyle than a series of discrete offences across a given period (multiple convictions), so that the former justifies a higher number. However, there will also be cases where the multiple counts trigger is met by an established pattern of offending occurring on more than one occasion, but which is prosecuted together.

9.143 We are ultimately persuaded by the merits of harmonising the number of offences, in the interests of simplicity and ease of practical application. To mitigate the concern above, we decide in the next chapter that any guidance issued to support the exercise of prosecutorial discretion should refer to the multiple counts trigger, and highlight that prosecutors should consider whether it is appropriate to apply the criminal lifestyle assumptions in cases where the multiple counts trigger is satisfied by a "spree" of offending on one occasion, which is not otherwise indicative of a criminal lifestyle.[114]

9.144 Regarding the number of offences required under the harmonised provisions, we recommend that three offences are required for each of the multiple counts and multiple convictions routes.

9.145 Although there was no majority support, this figure attracted the most support. A "three strikes" rule appeared to align with consultees' general feeling that three offences was not an accident and could indicate a pattern. This approach is also used in sentencing law.[115]

9.146 This decision was finely balanced, and we are alive to the arguments that requiring four offences would leave less doubt about whether the defendant had a criminal lifestyle. However, we were unable to obtain data on the number of offences which leads to the application of the criminal lifestyle offences, to determine whether setting the number at four would rule out too many cases with only three offences but which were indicative of a criminal lifestyle.

Recommendation 36.

9.147 We recommend that section 75(3) POCA 2002 be amended such that the number of offences required to satisfy the course of criminal activity trigger be three offences.

113 See concerns raised in *R v Hertford UK Ltd* [2016] Criminal Law Review 352.
114 See para 10.149.
115 See, for example, the "three strikes" mandatory minimum sentences in domestic burglary cases.

PROPOSAL 4 – IDENTIFYING RELEVANT OFFENCES (1): OFFENCES TAKEN INTO CONSIDERATION

The consultation paper

9.148 In the consultation paper, we noted the difference between how convictions and offences taken into consideration are treated for the purposes of reaching the requisite number and for satisfying the financial threshold.[116] We noted that this may impact charging decisions, as police and prosecutors are mindful of the consequences for confiscation.

9.149 Offences taken into consideration ("TICs") are offences of which the defendant has not been convicted but which they admit and ask the court to take into consideration when sentencing. TICs give the court, prosecutors and the police a "fuller and more accurate picture" of the defendant's offending. TICs may result in a longer sentence than if the defendant was only sentenced for the charge(s) of which they were convicted. The defendant cannot subsequently be prosecuted for these offences and can therefore "clear the slate". Victims have an opportunity to claim compensation from any offence admitted, the police gain "valuable intelligence", resources are "used efficiently" and "the public's confidence in the criminal justice system is improved".[117]

9.150 In the consultation paper, we considered that the rationale behind the criminal lifestyle assumptions and the system of offences taken into consideration is similar: it may not be possible to account for every individual offence or source of criminal benefit through the full criminal or confiscation process. We said that:

> 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 [defendant] about the [defendant'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 upon a TIC for the assumptions to be triggered arguably undermines the very purpose of the assumptions.[118]

9.151 We said that "the way in which the case is put before the court" may therefore impact the application of the assumptions, whether or not the defendant has "clearly engaged in repeated criminality from which they have benefited".[119] We noted that financial consequences flowing from TICs are "not novel", as TICs are already included in compensation orders. We also reiterated that criminal benefit obtained from TICs counts towards the financial threshold.[120]

9.152 We noted one key disadvantage of TICs being included in the number of offences for triggering the lifestyle assumptions:

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116 CP 249, para 13.136.
117 Crown Prosecution Service, *Offences to be taken into Consideration (TICs)* (2020), available at https://www.cps.gov.uk/legal-guidance/offences-be-taken-consideration-tics.
118 CP 249, para 13.139.
119 CP 249, para 13.140.
120 CP 249, paras 13.142 to 13.143.

> 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.

9.153 However, we ultimately concluded that "the advantages to a defendant of having offences taken into consideration remain great" and "on balance", we provisionally proposed that offences, comprising *both* convictions and offences taken into consideration, should be counted to reach the numerical threshold.[121]

Consultation responses

9.154 We asked consultees whether they agreed with our provisional proposal for offences taken into consideration to be counted when assessing the number of offences to trigger the course of criminal activity trigger.[122] There was good support for this proposal, although strong reasons were also given from organisational consultees who opposed it.

9.155 In favour of the proposal, consultees commented that this measure would remove the discrepancy between charged offences and those taken into consideration, and "remove any confusion for all involved in the confiscation".[123] Two consultees also considered that this would result in a truer reflection of the defendant's criminality.[124]

9.156 Even among consultees in support of the proposal, caution was expressed about the risk of reducing defendants' willingness to declare and accept TICs.[125] The City of London Police agreed that "this may deter persons from admitting TICs, which is an important part of victim justice".

9.157 Among those who disagreed with the proposal, several practitioner organisations argued forcefully against it.[126]

9.158 The Bar Council said:

> In our experience, there is a marked difference in the approach taken by defendants to offences for which they have been charged and TICs. Defendants facing a number of proposed TIC offences are more likely to accept the commission of these offences than those of which they are charged, even in the absence of reliable evidence and sometimes without any acknowledged memory of the events underpinning the TIC schedule.
>
> At present there must be a possibility that defendants facing a number of burglaries, several of which are listed on a TIC schedule, will accept burglaries which they do not recall and may not have committed. That risk – even taken in the face of advice – presently does not expose defendants to sanctions which are likely to be much

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121 CP 249, paras 13.145 to 13.146.

122 Consultation question 38 (43 responses: 32 (Y), 7 (N), 4 (O); 19 did not answer) and summary consultation question 8(3) (29 responses: 18 (Y), 3 (N), 8 (O); 8 did not answer).

123 City of London Police.

124 NHS Counter Fraud Service Wales; personal response from a member of West Mercia Police.

125 Personal response from a trading standards officer; Financial Conduct Authority; personal response from a member of Kent Police; HM Government; CPS; North East ACE and Confiscation Teams.

126 Garden Court Chambers; R3; Bar Council; Criminal Law Solicitors' Association; Fraud Lawyers Association.

more serious than the sentence(s) that they would have received for the indicted offence(s). Accordingly, the TIC schedule is a convenient, pragmatic way of delivering a robust form of justice for police, public and defendants.

However, were its consequences to become more significant because the offences on the TIC schedule could be taken into account to trigger the criminal lifestyle provisions of the confiscation regime, the risks are twofold: (i) an increase in defendants refusing to accept TICs; or (ii) the bringing within the lifestyle provisions of those who may for reasons of pragmatism when it comes to weighing up likely sentences accept offences which they may not in fact have committed.

Accordingly, we consider that the potentially severe consequences of the lifestyle provisions justify requiring the formality of a criminal conviction to trigger their effects.

9.159 The Insolvency Service agreed, saying:

> We consider that the inclusion of TICs as part of the criminal activity trigger would undermine the TIC regime as defendants would be less willing to dispose of offences in this way. Defendants often admit offences where there is insufficient evidence to prosecute them in order to take the opportunity to "wipe the slate clean". The inclusion of TICs will lead to a general caution being exercised by defendants and their advisers which [will] lead to a downturn in the detection of offences.

9.160 The Criminal Law Solicitors' Association described the potential consequences for the TIC regime as "catastrophic". The Fraud Lawyers Association added that they "do not think that the standard of evidence required for an offence to be taken into consideration is sufficient for these types of offences to trigger the draconian 'criminal lifestyle' [assumptions]". This was because "defendants will frequently ask for offences to be taken into consideration when there is no or limited evidence in relation to an offence". They gave the example of a defendant who is addicted to controlled substances and may not remember particular offences but asks for them to be taken into consideration in case evidence comes to light later.

Analysis

9.161 The intention of this proposal was to achieve a more consistent approach between the treatment of offences taken into consideration as regards the satisfaction of the number of offences, and the calculation of the relevant benefit to meet the financial threshold. It was based on the shared rationales behind offences taken into consideration and the criminal lifestyle assumptions. It was also borne out of concerns raised by stakeholders in pre-consultation discussions that the exclusion of offences taken into consideration inappropriately influenced charging and plea decisions. These aims drew broad support from consultees.

9.162 Despite these aims and the support which they received, consultees (including those who supported the proposal) repeatedly noted the impact which this proposal may have on the TIC regime. In particular, several key practitioner groups argued forcefully against the proposal because it may seriously hinder and undermine the operation of the TIC regime, which has its own important aims.

9.163 Two of our overarching considerations throughout this review have been to situate confiscation as a more "mainstream" part of the criminal justice process, and also to support criminal justice processes which are familiar to participants and practitioners, to improve that integration. It would run counter to these aims if one of our recommendations were to have a detrimental impact on another element of the criminal justice process.

9.164 We are persuaded by the strong arguments against including offences taken into consideration in the number of offences which is required to satisfy the course of criminal activity trigger.

PROPOSAL 5 – IDENTIFYING RELEVANT OFFENCES (2): ATTEMPTED OFFENCES

The consultation paper

9.165 In the consultation paper we noted that the requirement that the defendant must have benefited from each offence can lead to "anomalous results". In particular, this may seem stark where one attempted offence prevents the defendant from reaching the threshold which they would have otherwise met if they had benefitted from that offence.[127]

9.166 The current test therefore "does not encompass attempts to benefit which may be equally indicative of a 'criminal lifestyle'".[128] We noted that this may fail to capture a "continued pattern of the defendant's actions" which is "identically suggestive" of a criminal lifestyle as a defendant who repeatedly benefits from their offending.[129]

9.167 We therefore provisionally proposed 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.

Consultation responses

9.168 We asked consultees whether they agreed with our provisional proposal to include attempts to benefit in the number of offences required to meet the numerical threshold of the course of criminal activity trigger.[130] There was strong support for this proposal.

9.169 The main argument in favour was that it is the frequency and nature of offending which is relevant to determining whether a person has a criminal lifestyle, rather than the "success" of that offending.[131] One personal respondent expressed the view that a defendant should not be rewarded for being thwarted in their attempt to benefit.

9.170 Elaborating on this view, the Insolvency Service said:

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127 CP 249, para 13.149.

128 CP 249, para 13.150.

129 CP 249, para 13.151.

130 Consultation question 39 (43 responses: 34 (Y), 8 (N), 1 (O); 19 did not answer) and summary consultation question 8(4) (30 responses: 19 (Y), 8 (N), 3 (O); 7 did not answer).

131 City of London Police; Association of Chief Trading Standards Officers; personal response; Rudi Fortson KC; personal response from a trading standards officer; personal response from a member of Sussex Police; NHS Counter Fraud Service Wales; personal response from a member of the North East RECU; personal response from a member of Thames Valley Police; personal response from a member of West Mercia Police; FI Team at the West Midlands RECU; Eastern RECU.

> We agree that inchoate offences should be included and consider the present exclusion to be an anomaly. It seems illogical that they should be excluded as the conduct does establish a pattern of behaviour and a profile of whether an individual is a repeat or professional offender. We do not think that success or failure of the final outcome should be the determining factor as to whether the defendant has a criminal lifestyle.

9.171 One practitioner from the NCA also noted that for the offences in Schedule 2, an attempted offence also triggers the lifestyle assumptions, so it would be "odd" if an attempt at a non-Schedule 2 offence were treated differently.

9.172 The Financial Conduct Authority ("FCA"), which was in favour of making this change, noted that "this is another instance where the sensible exercise of the proposed prosecutorial discretion will be essential to the fair and proper operation of these provisions." Another consultee emphasised the importance of safeguards if this change is to be made.[132]

9.173 The SFO clarified that the financial threshold will also need to be satisfied:

> This should not detract from the need for an aggregate benefit value over the offences, and where a defendant has attempted to benefit (but has not succeeded), then the other offences where he has benefited will necessarily need to be for larger sums to ensure that they meet… the threshold.

9.174 Against this proposal, consultees argued that the focus should remain on offences which were committed to completion,[133] in particular because these are the only offences from which the defendant can have benefitted.[134]

9.175 The Bar Council was not in favour, saying:

> The focus of the lifestyle provisions is on income that has in fact been derived illegitimately. Accordingly, it is illogical and potentially unfair to trigger these provisions in circumstances in which this has not taken place. We consider that it is important to remember that while the criminal lifestyle provisions have their place, the focus of the criminal justice system as a whole ought to be on investigating and prosecuting offending to conviction (and beyond), and so the use of the lifestyle provisions ought to be seen as exceptional rather than a primary tool of resort.

9.176 The FCA said that this proposal was inconsistent with the objective of recovering benefit from criminal conduct.[135]

9.177 One personal respondent argued that the logic of including attempts runs counter to the requirement for a financial threshold (as the defendant will not have benefitted from the attempt).[136]

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132 Professor Johan Boucht.
133 Criminal Law Solicitors' Association; personal response from a member of the Metropolitan Police.
134 Prisoners' Advice Service; personal response; personal response from a trading standards officer.
135 This view was shared by a personal response from a member of Kent Police and the Fraud Lawyers' Association.
136 David Winch (forensic accountant).

9.178 The law firm Kingsley Napley LLP added that this will add "an unnecessary layer of complexity" and discouraged the adoption of this proposal. Other consultees shared the view that it was already difficult enough to establish whether the financial threshold was met, and consideration of attempted benefit would make it even more complicated.[137]

Analysis

9.179 Unlike the proposal to include offences taken into consideration in the number of offences required to satisfy the course of criminal activity trigger, this proposal relates to *convictions* for attempted offending from which the defendant intended to benefit but did not actually do so.

9.180 This proposal received strong support, primarily on the basis that attempts to benefit demonstrate the defendant's intention to have a criminal lifestyle even if they haven't been able to achieve it from that particular offence. The attempt is an equally valid part of the pattern of offending.

9.181 We acknowledge the concerns of some consultees that this proposal detracts from the requirement that the defendant has benefitted from their offending in order to attract the criminal lifestyle provisions. However, as the SFO noted, the financial threshold would remain. While this proposal would remove the requirement to have benefitted from *each* offence which counted towards satisfaction of the number of offences, the defendant's benefit from the relevant offences would still have to exceed the financial threshold.

9.182 A defendant who made three attempts to benefit and obtained nothing would not be subject to the criminal lifestyle assumptions because the financial threshold would not be met. In instances where there are two attempts and one successful offence which accrued benefit, provided the financial threshold is also satisfied, we believe this is sufficient to establish a pattern of criminality.

9.183 Given this, we recommend that convictions for attempts to benefit should count towards satisfaction of the number of offences which may satisfy the course of criminal activity trigger.

Recommendation 37.

9.184 We recommend that where a defendant has convictions for offences from which they have attempted to benefit, these should be included as relevant offences for the purpose of satisfying the course of criminal activity trigger in section 75(3) POCA 2002.

[137] Kingsley Napley LLP; personal response from a member of Kent Police; personal response; personal response from a member of Devon and Cornwall Police.

PROPOSAL 6 – FINANCIAL THRESHOLD

The consultation paper

9.185 In the consultation paper, we discussed the current requirement that (for criminal lifestyle triggers other than a conviction for a Schedule 2 offence) the defendant must have benefitted by at least £5,000.[138] We explained the rationale of the financial threshold, to prevent the inclusion of low-level offending which was not indicative of a criminal lifestyle.[139] The threshold was described as ensuring that only a defendant who has "benefitted significantly from offences" would be subject to the criminal lifestyle provisions.[140]

9.186 Although section 75(8) of POCA 2002 empowers the Secretary of State to vary the amount specified, it has not been changed since the commencement of the Act. During our pre-consultation discussions, the view emerged that the financial threshold serves an important function, but that it may no longer represent "significant benefit" as intended.[141]

9.187 We described the Parliamentary discussions which led to the adoption of the £5,000 threshold. Although we cited various (speculative) rationales for the figure,[142] we concluded that it was "to a large extent, arbitrary.[143]

9.188 We considered two options for reform: first, to increase the current threshold in line with inflation (to approximately £7,206, as calculated at the time of publication); and, second, to set a threshold by reference to the national living wage (as a marker for "what would be worthwhile criminality") (to approximately £8,500 at the time of publication).[144] We also drew comparison with several foreign jurisdictions, and concluded that "a figure of £8,500 appears to be generally aligned with the thresholds applied in other jurisdictions, particularly when adjusted for inflation".[145]

9.189 We considered whether any threshold should be automatically adjusted for inflation but concluded that "a frequently changing figure might produce uncertainty". We therefore considered whether "future-proofing" the figure would be helpful, by increasing the figure to account for projected five-yearly inflation, and by mandating a five-yearly review by the Secretary of State.[146]

9.190 Ultimately, "given the lack of reasoned justification behind the £5,000 threshold as currently adopted", we sought consultees' views on the threshold and how it should be reviewed.

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138 Proceeds of Crime Act 2002, s 75(3)(a); CP 249, para 13.168.
139 CP 249, para 13.169.
140 *Hansard* (HC) 22 July 2002, vol 638, col 46; CP 249, para 13.170.
141 CP 249, paras 13.171 to 13.173.
142 CP 249, paras 13.175 to 13.176.
143 CP 249, para 13.174.
144 CP 249, paras 13.178 to 13.184.
145 CP 249, paras 13.185 to 13.186.
146 CP 249, para 13.187.

Consultation responses

Setting the financial threshold

9.191 We asked consultees whether they considered that the financial threshold should remain at £5,000; be raised to account for inflation; be raised in line with the national living wage; or be raised to another amount.[147]

9.192 There was little consensus among consultees as to the appropriate threshold.

(1) The most popular option was adjusting the current £5,000 threshold for inflation (26% of consultees who answered).

(2) The second most popular option was not changing the £5,000 threshold at all (21% of consultees who answered).

(3) The third most popular option was raising it to £10,000 (16% of consultees who answered).

(4) There was some support for a threshold calculated by reference to the national living wage, although there were divergent views about how many months' wage the figure should represent.

(5) Some consultees preferred a much higher threshold, ranging from £20,000 to in excess of £50,000).

9.193 Among the consultees who considered that the current threshold should not change, their primary reason was that £5,000 remained a fair marker of a criminal lifestyle.[148] One consultee commented that £5,000 is "a lot of money for the majority of people";[149] another agreed, saying it is "still a significant sum".[150] Two consultees commented that in their experience (of drugs supply cases and trading standards cases respectively) the £5,000 threshold was adequate.[151]

9.194 Contrary to this view, the majority of consultees favoured raising the current threshold. They commented that that the threshold was "outdated"[152] and noted that it has not been reviewed since the Act's commencement. As a result of the threshold being too low, one consultee considered that "the criminal lifestyle provisions are applied in far too many cases".[153]

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147 Consultation question 40 (43 responses: 19 (£5000 + inflation), 6 (living wage), 5 (£10,000), 7 (other calculation), 2 (no change, £5000), 1 (£7,500), 1 (£17,000), 1 (£30,000), 1 (>£50,000); 19 did not answer)) and summary consultation question 8(2) (30 responses: 13 (no change, £5,000), 7 (£10,000), 2 (£8,000), 2 (£20,000), 1 (£25,000), 2 (£50,000), 3 (other calculation); 7 did not answer). It must be noted that these questions were phrased differently regarding the £5,000 figure: CQ40 asked whether consultees agreed with £5,000 adjusted for inflation whereas SCQ8(2) asked whether consultees thought the current £5,000 should be raised.

148 NHS Counter Fraud Service Wales; personal response from a member of the Metropolitan Police.

149 Personal response from a member of the North East RECU.

150 Ian Foxley (University of York).

151 Personal response from a member of the Metropolitan Police; Association of Chief Trading Standards Officers.

152 Personal response from a member of the Thames Valley Police.

153 Gary Pons (5 St Andrew's Hill).

9.195 In favour of £5,000 adjusted for inflation, consultees considered that this would still represent "a significant amount",[154] and one consultee noted that confiscation for a value below this "does not become financially viable to pursue due to costs".[155] Another consultee noted that other parts of POCA 2002 require inflation to be taken into consideration, so this would not be a novel approach.[156]

9.196 The Government response said:

> We would not object to a review of the threshold for triggering the lifestyle assumptions and we welcome evidence-based views from consultees as to why the trigger should be amended. We are wary of over complicating the calculation of benefit. Adjusting figures for inflation—moving away from clear, simple numbers like £5,000—will not achieve our objective of simplifying the regime.

9.197 In favour of a £10,000 threshold, this was described as "simple and straightforward to understand and apply".[157] One consultee objected to the more precise calculation in the consultation paper and argued that we should round up to £10,000 for clarity.[158]

9.198 The Financial Crime Practice Group at Three Raymond Buildings supported a threshold calculated by reference to the national living wage over a six month period, but said that it should be reduced to reflect the tax which someone lawfully earning that amount would pay. Garden Court Chambers argued for a threshold which was the annual national living wage (approximately £17,500), in order "not to catch low-level repeat offenders".

9.199 Against a figure calculated by reference to the national living wage, one consultee described this as "needlessly complicated".[159]

9.200 Among consultees who wanted a much higher threshold, one referred to the £50,000 threshold which applies for Unexplained Wealth Orders.[160] A higher threshold was seen as a way to remove inappropriate cases from the reach of the criminal lifestyle provisions.[161]

9.201 Others continued to express the view that the financial threshold was "arbitrary" and "not likely to shed much light (if any light) on the question of whether or not a defendant has a criminal lifestyle".[162]

9.202 The Bar Council did not express a view on the threshold itself, but said that, "from the practical perspective of managing the flow of cases through the courts, and with a

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154 Insolvency Service.
155 One respondent from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland.
156 Personal response from a member of the NCA. One such section of POCA 2002 is section 80(2)(a) which requires that a calculation of the value of property be determined by "the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money".
157 David Winch (forensic accountant).
158 Personal response from a member of Surrey Police.
159 Personal response from a practitioner at the NCA/NECC; this view was also expressed by HMRC.
160 Personal response from a member of the Metropolitan Police.
161 Andrew Campbell-Tiech KC.
162 Rudi Fortson KC.

view to ensuring that public funds are focused where they are likely to do most good, we can see a strong argument for increasing the threshold by a considerable amount."

9.203 We received two responses which related to disordered gambling and the financial threshold.[163] The Commission on Crime and Problem Gambling called for a discretion which could take account of how "the amounts stolen in gambling-disorder driven offences can escalate quickly and typically remain hidden for significant time". They argued that the gains of this offending "rarely result in what could be regarded as a criminal lifestyle" and called for a "discretion to qualify the level of benefit where offences are related to a diagnosed gambling disorder".

Reviewing the financial threshold

9.204 We also asked consultees whether they agreed with our provisional proposal that the legislation should mandate that the financial threshold for triggering the lifestyle assumptions be reviewed by the Secretary of State every five years.[164]

9.205 There was good support for this proposal. The Bar Council described this as a "sensible proposal", which "will enable the necessary political calculations to be made in light of the regime as it operates in practice".

9.206 Several consultees called for both a five-yearly review and increases in line with inflation.[165] The City of London Police said that this would provide for "reasonable adjustment for inflation" as well as "allowing for reasonable amendments in line with changing trends in criminal offending".

9.207 Although not expressing a fixed view either way, Rudi Fortson KC questioned "on what basis the Secretary of State would make an adjustment of the financial threshold":

> Given that it does [not] seem that there was any data analysis that led to the figure of £5,000 being adopted, one wonders what approach would be taken (consistently) when reviewing the threshold.

9.208 A trading standards officer also noted the potential detriments of a "frequently-changing threshold":

> It will create litigation and a need to legislate for when each figure should be applied, as well as any implementation/transition period, and for circumstances when the start and end of the offending period spans either side of a revised figure.

9.209 Consultees also supported the need for the threshold to be reviewed in response to the previous proposal, although there were different views on how regularly this should happen. Some consultees supported a five-yearly review,[166] while others were in favour of more frequent updating in line with inflation (on an annual[167] or biannual[168]

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163 Gamvisory; Commission on Crime and Problem Gambling (Howard League for Penal Reform).
164 Consultation question 41 (41 responses: 30 (Y), 6 (N), 5 (O); 21 did not answer).
165 Association of Business Recovery Professionals (R3).
166 Criminal Law Solicitors' Association; HMRC.
167 Association of Chief Trading Standards Officers; Andrew Campbell-Tiech KC; South East Confiscation Panel, East Kent Bench.
168 John McNally (Drystone Chambers).

basis). In opposition, some consultees considered that regular updating would cause confusion and undue complexity.[169] Others commented more generally, calling for "routine" review,[170] "from time to time",[171] although not necessarily in line with inflation.

9.210 Those against the proposal called it "needless bureaucracy",[172] and said it "would create too much uncertainty, especially if changed in relation to offences that occur over a period of time".[173]

Analysis

Setting the financial threshold

9.211 The criminal lifestyle provisions are intended to target defendants whose convicted offending is highly suspected not to represent the full picture of their benefit-generating criminality, so much so that they face a reverse burden of proof regarding their income and outgoings. Their finances (dating back six years) are subject to scrutiny and anything for which they cannot account is assumed to constitute benefit from crime.

9.212 The financial threshold is a safeguard on the application of these provisions. A high percentage of consultees supported raising the threshold, albeit there was a divergence of views regarding precisely how the threshold should be raised. We remain of the view that there is no clear rationale for the current figure; we have not identified one since publishing the consultation paper and we were not presented with one by consultees.

9.213 In considering how to approach this problem, we looked at other financial thresholds in POCA 2002 and elsewhere. Part 5 of POCA 2002 contains two financial thresholds. The financial threshold for the seizure, detention and forfeiture of cash is £1,000.[174] The rationale for this threshold was "to target and combat lower level criminality that blights local communities".[175] Given that the criminal lifestyle provisions are not intended to catch the type of low level criminality for which the £1,000 threshold is intended, we consider that such a low threshold is inappropriate to trigger a finding of a criminal lifestyle.

9.214 Part 5 of POCA 2002 also governs civil recovery in the High Court, for which the financial threshold is £10,000.[176] The purpose of a £10,000 threshold was to ensure "that civil recovery will not be used in minor or trivial cases".[177] Whilst this is a closer rationale to the financial threshold for criminal lifestyle cases in Part 2, the proceedings are qualitatively different. A respondent may be liable to forfeit property in civil recovery proceedings without ever being convicted before a criminal court to the

169 Association of Chief Trading Standards Officers; personal response from a member of Surrey Police; personal response from a member of the Metropolitan Police; personal response from a trading standards officer.
170 Kingsley Napley LLP.
171 Financial Conduct Authority.
172 One practitioner from the NCA/NECC.
173 One respondent from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland.
174 Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006, SI 2006/1699, reg 2.
175 Explanatory Memorandum to SI 2006/1699, para 7.3.
176 Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003 SI 2003/175, reg 2.
177 Proceeds of Crime Bill Explanatory Notes (Bill 31-EN), para 383.

high standard of proof required in criminal proceedings. Whilst the criminal lifestyle provisions require the court to look beyond the offences for which the defendant has been convicted, they do require at least one criminal conviction to trigger such an enquiry.

9.215 Looking to other examples in the criminal law, we note that unexplained wealth orders ("UWOs") have a financial threshold of £50,000.[178] UWOs can be obtained where a person is alleged to have been involved in "serious criminality" or is a "politically exposed person". As with civil recovery orders, on its face the serious criminality requirement bears some analogy with the type of criminal that the assumptions are intended to catch. Again, as with civil recovery, the respondent faces a court order without ever being convicted before a criminal court to the high standard of proof required in those proceedings. If anything, the UWO is more intrusive. The respondent will be ordered to account, in detail, for their sources of income. As was outlined in the case of *NCA v Hussain*,[179] the threshold for obtaining an UWO is very low[180] and may lead to personal and reputational damage.[181] The interference with the rights to privacy and enjoyment of property must be proportionate, and therefore the high financial threshold that must be met is arguably appropriate in light of the low threshold for the substantive test for obtaining the order.

9.216 Between these benchmarks of £1,000 and £5,000 (which are too low) and £50,000 (which is too high), there are several options:

(1) to adjust the £5,000 threshold for inflation to the present day (£7,650);[182]

(2) to adjust the £5,000 threshold for inflation to the present day *and* future-proof it by five years (£8,000);[183]

(3) to calculate the threshold by reference to the national living wage for six months and future-proof it by five years (£9,100);[184] and

(4) to increase the threshold to £10,000.

9.217 Option (1) had the strongest support from consultees and is the least radical change. Because it is based on the current figure, there is a compelling argument for its simplicity. This option also relies on the assumption that the threshold will be reviewed and updated (for inflation) every five years which means that there is an in-built future-proofing mechanism. This is not uncontroversial. The power to review and update the

178 POCA 2002, s 362B(2)(b).

179 *NCA v Hussain* [2020] EWHC 432 (Admin), [2020] 1 WLR 2145.

180 Namely that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property (s 362B(3) POCA 2002).

181 The presumptive starting point for applications is therefore that they should be dealt with in private (*NCA v Hussain* [2020] EWHC 432 (Admin), [2020] 1 WLR 2145 at [88]).

182 This figure represents the uprated value of £5,000 by 2002 prices to 2021 (£7,623.06, rounded up "to avoid giving the impression of certainty to the last penny").

183 This figure was provided by Vindelyn Smith-Hillman, economist for the Law Commission of England and Wales. It represents the uprated value of £5,000 by 2002 prices to 2021 (£7,623.06) uprated again to 2025 (the latest year for an HM Treasury forecast) (£7978.71, rounded up "to avoid giving the impression of certainty to the last penny").

184 This has been calculated applying the national living wage for persons aged over 23 (£8.91/hour), for a 37.5-hour week and six-month period (£8,687.25). This figure was then uprated for inflation forecast to 2025 (£9,092.55) and rounded up.

current threshold has not been exercised in the almost 20 years since POCA 2002 was enacted.

9.218 Option (2) combines both the threshold with the strongest support of consultees (£5,000 adjusted for inflation) and a degree of future-proofing. It is also based on the assumption that the threshold will be reviewed every five years, and future-proofed again. Arguably, this approach also creates a higher threshold for defendants who offend soon after the legislation is amended, compared to those who offend immediately before a review. The difficulties with a regular review are considered in greater detail below.

9.219 Option (3) may have a more rational basis, being calculated by reference to the national living wage. However, as soon as we begin calculating the threshold by reference to external standards – to make it more "realistic" – the limits of the comparison are exposed. For example, one consultee said that the threshold should reflect tax which the defendant would be liable to pay if the amount were earned legitimately. Other consultees disagreed over the length of time by reference to which the figure should be calculated, giving suggestions including three months and one year. While the six-month figure bears some analogy to the prolonged activity trigger (the relevant offence must be committed over at least a six-month period), this is a minimum period and the same minimum time frame does not apply to the course of criminal activity trigger. If the defendant committed four relevant offences over a two-year period, it may be logical for the financial threshold to cover the same time period, to ascertain whether they could have substituted their criminal lifestyle offending with a national living wage job. A defendant living in London may argue for a higher financial threshold because the national living wage is higher in London.

9.220 Therefore, while reference to the national living wage is superficially attractive and may correspond better to notions of a "lifestyle" than an arbitrary threshold, it is also rife with difficulties. For these reasons, we reject option (3).

9.221 Option (4) has the benefit of simplicity. It is a "clean" threshold (a feature for which the Government has expressed a preference). It is a significant increase from the current threshold. It is comparable to the threshold in civil recovery, which has a similar rationale. However, this comparison may also suggest that the threshold is too high, as the civil recovery enquiry does not require a conviction before it is undertaken. A figure of £10,000 is relatively arbitrary, not being calculated by reference to another metric. It is higher than the figures for options (1) to (3) and, to this extent, it may incorporate a further degree of futureproofing, if the exercise of a power to review and update is unlikely. It may also initially avoid the need for a five-year review. As elaborated on below, there are real difficulties which a review power may raise, including for offending which takes place across the period before and after the figure is updated.

9.222 However, the weight of consultees' views were in support of increasing the current threshold for inflation. Moreover, it may be disingenuous to recommend a power for a five yearly review and simultaneously to doubt that this power will be used, by going further than five years of futureproofing.

9.223 For these reasons, we recommend that the financial threshold should be raised to £5,000, adjusted to account for inflation on the day in which the provision is enacted.

This is the simplest way to ensure the threshold is clear, fair and does not represent a significant departure from Parliament's original intention. Furthermore, it is not necessary to future-proof the figure itself because the review mechanism ensures this threshold will be regularly reviewed and, if appropriate, revised to account for inflation.

Reviewing the financial threshold

9.224 This proposal is a corollary to our recommendation to raise the financial threshold. That recommendation became a necessity because the figure in POCA 2002 has not been updated in the almost 20 years since its enactment, despite the existence of a power to increase it.[185] It is important that the financial threshold is applied equally to defendants as the value of money changes and continues to reflect what may be understood as an amount which indicates a defendant is "living off crime".

9.225 This proposal was well supported by consultees, who recognised the need for the financial threshold to stay up to date. We note that the Government did not object to the proposal.

9.226 However, consultees also raised some questions which would need to be resolved if a periodic review and updating of the financial threshold is to be workable. In particular, they asked what would happen if the relevant offending which triggers the assumptions spans a period where two financial thresholds apply. This may occur under either the prolonged offending trigger, or the course of criminal activity trigger.

9.227 They also asked on what basis the review would be conducted (for example, if it would always be to increase the figure in line with inflation until the next review or could take account of other considerations). We have also considered whether the review could be used to reduce the financial threshold, whether this would be a mandatory or discretionary review, and what sort of power would be required to change the threshold.

9.228 We recommend that if a defendant has relevant offences which span multiple financial thresholds, the defendant should have the benefit of whichever threshold is higher. We recommend that this review should be mandatory in order to account for the changing value of money, however the reasons for changing the threshold to either increase or decrease it remain within the discretion of the Secretary of State as per the current power pursuant to section 75(8), POCA 2002.

Recommendation 38.

9.229 We recommend that the financial threshold for triggering the criminal lifestyle assumptions pursuant to section 75(4) POCA 2002 is increased to £5,000 adjusted to account for inflation on the day in which the provision is enacted.

[185] Proceeds of Crime Act 2002, s 75(8).

Recommendation 39.

9.230 We recommend that the legislation mandates that the financial threshold for triggering the criminal lifestyle assumptions pursuant to section 75(4) POCA 2002 is reviewed by the Secretary of State every five years in order to account for inflation.

Chapter 10: Applying the criminal lifestyle assumptions

INTRODUCTION

10.1 In the previous chapter, we made recommendations to reform POCA 2002 in relation to determining whether the defendant has a "criminal lifestyle".

10.2 In this chapter, we make recommendations in relation to what may happen once the defendant has been determined to have a criminal lifestyle; namely, when and how to apply the criminal lifestyle assumptions.

OVERVIEW OF POLICY

10.3 That:

(1) The prosecution are not required to satisfy an additional evidential burden before the criminal lifestyle assumptions apply.

(2) The prosecution may exercise discretion not to apply the criminal lifestyle assumptions.

(3) The court have a power to disapply the assumptions if it would be in the interests of justice to do so.

(4) The serious risk of injustice test is clarified (in its application to all of the assumptions) to ensure that in determining whether there would be a serious risk of injustice if the assumption were applied, the court should consider:

(a) any oral or documentary evidence put before the court; and

(b) if documentary evidence is not put before the court, whether there is a valid reason why not.

(5) In determining whether there is a serious risk of injustice the court should not be limited to determining whether there would be a risk of double counting, but instead should be able to determine whether any relevant factor or factors would result in a serious risk of injustice if an assumption were made.

(6) There be no changes to the fourth assumption, that any property obtained or assumed to have been obtained by the defendant is assumed to be free of any other interest in it.

THE CURRENT LAW

10.4 If the defendant is found to have a criminal lifestyle by satisfying one of the triggers in the previous chapter, then the criminal lifestyle assumptions will apply. This entails the application of four assumptions to the period of six years from the "relevant day".[1]

10.5 The four assumptions are established by section 10 of POCA 2002. Unless they are rebutted, it will be assumed that:

(1) any property transferred to the defendant at any time after the relevant day was obtained as a result of their general criminal conduct;

(2) any property held by the defendant at any time after the date of conviction was obtained as a result of their 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 their general criminal conduct; and

(4) for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, they obtained it free of any other interests in it.

10.6 Assumptions (1) to (3) entail a two-stage process.

(1) First, the prosecution must prove (on the balance of probabilities) that property was obtained by the defendant, or that the defendant incurred expenditure.

(2) Second, the court must be satisfied that the property transferred to, held by, or used to meet expenditure derived from the defendant's general criminal conduct. This is where the assumption bites: the prosecution can rely on section 10 to assume a link between the property and the criminality. To rebut the assumption, the defendant must prove (on the balance of probabilities) that the property was not derived from general criminal conduct.

10.7 These are separate questions; proof of the existence of property is not proof of the source of that property.[2]

10.8 The assumptions must not be applied if "there would be a serious risk of injustice if the assumption were made".[3]

THE CONSULTATION PAPER

10.9 In the consultation paper, we made five provisional proposals in relation to the application of the criminal lifestyle assumptions:

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1 The "relevant day" is the first day of the period of six years ending with the day when the proceedings for the offence concerned were started against the defendant, or the earliest day proceedings were started if there are two or more offences and proceedings for them were started on different days: POCA 2002, s 10(8).

2 *R v Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App R (S) 83.

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

(1) We provisionally proposed not to introduce an additional evidential threshold before the assumptions apply.[4]

(2) We provisionally proposed that prosecutors should be able to exercise discretion as to whether to seek application of the assumptions.[5]

(3) We provisionally proposed that 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. If the court decides that it is contrary to the interests of justice to apply the assumptions, the court should determine benefit by reference to particular criminal conduct.[6]

(4) We provisionally proposed 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 any oral or documentary evidence put before it and if documentary evidence is not put before the court, the reason why it was not and the validity of that reason.[7]

(5) We did 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, they obtained it free of any other interests in it. We asked consultees whether any reforms to this assumption might be appropriate.[8]

PROPOSAL 1 – ADDITIONAL EVIDENTIAL THRESHOLD

The consultation paper

10.10 During pre-consultation discussions some stakeholders suggested that the prosecution should have to adduce some evidence that the defendant has a criminal lifestyle and that the assumptions should apply, in addition to satisfying one of the triggers.[9] In the consultation paper we rejected this suggestion for several reasons.

(1) We argued that the triggers themselves already provide a solid foundation on which to justify the application of the assumptions. For example, the court must already consider if an offence is committed in the context of organised crime or is generating regular profits.[10]

(2) We considered that requiring the prosecution to satisfy an additional evidential burden would run contrary to one of the aims of the criminal lifestyle provisions,

4 Consultation question 42.
5 Consultation question 43.
6 Consultation question 44. We also asked whether there are any particular indicative factors which consultees considered could assist the court in making this determination.
7 Consultation question 45.
8 Consultation question 46.
9 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, para 13.193.
10 CP 249, para 13.194.

which is to mitigate the knowledge disparity between the prosecution and defence about the extent of the defendant's benefit from criminality.[11]

(3) We noted that "any injustice potentially caused by the application of the assumptions" was overcome by the opportunities for them to be disapplied (either by the defendant adducing evidence to rebut them or if there would be a serious risk of injustice).

(4) We considered that our other provisional proposals to introduce a greater degree of prosecutorial and judicial discretion would further minimise any risk of injustice.[12]

Consultation responses

10.11 We asked consultees whether they agreed with our provisional proposal that, once the triggers are satisfied, prosecutors should not be required to pass an additional evidential threshold before the assumptions apply.[13] This proposal received very strong support, with only one consultee disagreeing.

10.12 Consultees agreed that to require the prosecution to satisfy an evidential burden would fail to reflect the "knowledge differential" between the prosecution and the defence, especially with regard to undetected criminality.[14]

10.13 One consultee argued that the triggers themselves should be "rigorous enough for any further evidential threshold to be unnecessary".[15] The Bar Council also agreed, noting that the application of the assumptions once the triggers are satisfied was important for certainty:

> Any reform should be to the triggers themselves. The process of identifying whether someone is likely to fall within the lifestyle provisions should be made as straightforward as possible, in order to assist (among other things) with the giving of advice to defendants who might be caught by these provisions.

10.14 The Financial Conduct Authority ("FCA") considered that "this is done in practice anyway":

> In our cases it is rare that the assumptions will be relied on as a blanket practice without careful consideration being applied as to whether the assumptions could properly be rebutted, for example by the existence of some evidence.

10.15 Consultees also noted that the potential for injustice can be avoided by the disapplication of the assumptions through rebuttal evidence, the serious risk of injustice test, and prosecutorial and judicial discretion.[16]

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11 CP 249, para 13.196.
12 CP 249, para 13.197.
13 Consultation question 42 (42 responses: 38 (Y), 1 (N), 3 (O); 20 did not answer).
14 Financial Crime Practice Group at Three Raymond Buildings; Insolvency Service.
15 One respondent from the NCA/NECC.
16 Rudi Fortson KC; Insolvency Service; Financial Crime Practice Group at Three Raymond Buildings; Bar Council.

10.16 The Prisoners' Advice Service opposed the proposal saying that the "'ability to disapply the assumptions' or 'prosecutorial and judicial discretions' are not … strong enough safeguards to ensure fairness."

Analysis

10.17 This proposal maintains the current position, whereby the prosecution does not have to satisfy an additional evidential burden to secure the application of the criminal lifestyle assumptions, once one of the triggers has been satisfied.

10.18 Consultees were strongly in support of this proposal. In particular, we note the comments of the FCA (which reflect those we heard from other members of law enforcement during the consultation period) that in practice the prosecution does consider the strength of the evidence that the defendant has a criminal lifestyle before seeking the application of the assumptions, both generally and in relation to particular assets.

10.19 As already noted, this proposal must be considered in light of our other recommendations. This includes the rationalisation and updating of the triggers, as well as our recommendations below which provide greater scope for the assumptions to be disapplied.

10.20 We therefore do not recommend that the prosecution be required to satisfy an additional evidential burden before the assumptions are applied, once the triggers have been satisfied.

PROPOSAL 2 – PROSECUTORIAL DISCRETION

The current law

10.21 Under the current law, prosecutors have no statutory discretion to elect not to apply the assumptions if the triggers are satisfied. However, they do have discretion to determine whether or not to bring confiscation proceedings at all.[17]

The consultation paper

10.22 In the consultation paper, we noted that a greater degree of discretion to apply the assumptions used to apply under the criminal lifestyle provisions as contained in the Criminal Justice Act 1988 (CJA 1988). There, the prosecutor had to give notice of their opinion that a qualifying offence was one to which it was appropriate the assumptions apply, and the court had a discretion to apply the assumptions if it thought it was fit to do so.[18]

10.23 Prosecutorial discretion was removed by POCA 2002, one of the stated advantages being that a mandatory approach provided greater certainty and sent a clearer message about not allowing defendants to benefit from crime.[19] Judicial discretion was also curtailed: under the current law, the court may only disapply an assumption where its application would lead to a serious risk of injustice. This discretion has been narrowly construed (see further, below). It was hoped that the narrowing of judicial

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17 Proceeds of Crime Act 2002, s 6.

18 CP 249, para 13.201; citing CJA 1988, s 72AA(1)(b) and (3).

19 CP 249, para 13.202; citing *Standing Committee B,* 4 December 2001, col 439; and *Hansard* (HC), 30 October 2001, vol 373, col 820.

discretion would bring about a change in judicial culture, towards a more rigorous approach.[20]

10.24 Despite the legislative removal of prosecutorial discretion, we repeatedly heard during pre-consultation discussions that in practice prosecutors exercise judgement about whether to apply the assumptions "to achieve a result that is both realistic and proportionate".[21] This may be part of the prosecutorial decision-making process, which requires consideration of whether it would be in the public interest to prosecute.[22] We also heard that the high cost of pursuing the application of the criminal lifestyle assumptions in every case was a relevant factor.

10.25 We concluded that "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."[23] The legislation is uncompromising; the only way not to apply the assumptions is not to bring confiscation proceedings at all.[24]

10.26 We argued that, as prosecutors are trusted to exercise discretion in determining whether to bring a criminal charge, they should have discretion over the application of the assumptions. They should be required to take and record these decisions transparently.[25]

Consultation responses

10.27 We asked consultees whether they agreed with our provisional proposal that prosecutors should have discretion as to whether to seek application of the assumptions. This proposal received strong support.[26]

In favour of prosecutorial discretion

10.28 Consultees favoured the re-introduction of formalised discretion to ensure that the criminal lifestyle assumptions are not applied in cases for which it would be "inappropriate"[27] and "disproportionate"[28] to do so. The Private Prosecutors' Association said:

> It is foreseeable that there will be circumstances when it is disproportionate to implement the assumptions, for example where a defendant is bankrupt or has very few available assets. A prosecutor's resources may be limited, and the discretion will allow prosecutors to consider whether it is in the public interest to apply the assumptions, basing their decision on whether it is reasonable and proportionate to do so.

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20 CP 249, para 13.202; citing *Hansard* (HC), 30 October 2001, vol 373, cols 793 and 798.
21 CP 249, para 13.204.
22 CP 249, para 13.203.
23 CP 249, para 13.205.
24 CP 249, para 13.206.
25 CP 249, para 13.208.
26 Consultation question 43 (46 responses: 39 (Y), 5 (N), 2 (O); 16 did not answer) and summary consultation question 9 (33 responses: 22 (Y), 5 (N), 6 (O); 4 did not answer). Note: SCQ9 asked: Do consultees agree that the question of whether the "lifestyle assumptions" should apply should be subject to the exercise of appropriate prosecutorial and judicial discretion?
27 Gary Pons (5 St Andrew's Hill).
28 Insolvency Service.

10.29 The Insolvency Service agreed, noting that "in some cases, the resources required to fully explore the assumptions are disproportionate, particularly where there is a consensus between the parties that the offence is isolated." They considered that discretion would "ensure a consistent approach across regulators and prosecutors".

10.30 Similarly, the Serious Fraud Office ("SFO") described the "lack of prosecutorial discretion in the application of the assumptions" as creating "an undue burden on SFO resources in having to fully investigate matters […] just so that we can satisfy the court that there is a serious risk of injustice in the assumptions being applied". They observed that in the absence of discretion, the SFO were forced to "shoe-horn this issue through in an attempt to reach a just outcome".

10.31 The Government agreed:

> We recognise that in cases where the prosecution wishes to disapply the assumptions they are required to meet a high threshold—by satisfying the court that there would be a serious risk of injustice to do so—where prosecutorial discretion may suffice.

10.32 One consultee from law enforcement described having "wasted significant time in the past on cases" reviewing material for the application of the assumptions "knowing that the judge will probably not accept them".[29] Another individual from Thames Valley Police said that in some cases:

> the benefit obtained in the particular conduct is so high compared to the available assets, the time and work involved in looking at a lifestyle confiscation is often without merit and leads to a large amount of disparity in the orders.

10.33 One consultee described the current absence of discretion as "disastrous".[30] Another agreed with the view expressed in the consultation paper, that this would prevent an "all or nothing approach" to seeking confiscation at all.[31]

10.34 Another key reason for supporting the proposal was that this is already current practice. Several consultees from law enforcement said that they do not apply the assumptions in every case where the triggers are satisfied.[32] Kingsley Napley LLP said that, in their experience, "many prosecutors have demonstrated a willingness to disregard the assumptions where it would clearly not be in the interests of justice for them to apply." BCL Solicitors LLP agreed, saying that currently:

> In certain circumstances prosecutors seek to avoid the provisions where they are of the view that they would be inappropriate. This state of affairs suggests that the legislation is overly restrictive. Prosecutorial discretion with judicial oversight would likely bring a greater degree of justice to confiscation proceedings generally.

10.35 Some consultees also considered that formal discretion could "encourage settlement and compromise", especially when negotiating agreed orders.[33] Regularised discretion

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29 Personal response from a member of HMRC.
30 Andrew Campbell-Tiech KC.
31 Professor Johan Boucht.
32 Personal response from a member of law enforcement; personal response; Bar Council; David Winch (forensic accountant); Kingsley Napley LLP.
33 Financial Crime Practice Group at Three Raymond Buildings; Eastern RECU.

in the application of the assumptions would also "allow for more transparent decision making".[34]

Framing the discretion

10.36 The Crown Prosecution Service ("CPS") argued that this should be framed as a "discretion to disapply the assumptions". They also advocated a discretion to reapply the assumptions when making an application for reconsideration.

10.37 The SFO called for discretion to operate as a mechanism which allows prosecutors "to disapply specific assumptions or only use the assumptions in a very targeted way". Their reasoning was that "there may be circumstances where targeted use of the assumptions is of considerable assistance, but where their more general application will be more of a hindrance." The SFO sought a discretion which could apply the assumptions to "a few suspicious or unexplained payments or transfers" rather than a defendant's entire financial history. They continued:

> If the application of the assumptions was an all or nothing approach, it would put the prosecutor in the difficult position of either letting these few payments go, or facing the burden of having to deal with the application of the assumptions in their totality in circumstances where that would clearly be inappropriate.

10.38 The Prisoners' Advice Service called instead for "a duty to consider whether it would be fair to apply the assumptions".

Exercising and regulating the discretion

10.39 The Insolvency Service said that prosecutors are already experienced making discretionary decisions which "balance a wide range of public interest factors".[35] They continued that "prosecutors are therefore ideally placed to exercise the proposed discretion as to whether any or all of the assumptions are dis-applied in confiscation cases."

10.40 Two consultees commented that this proposal would require a greater degree of direct prosecutor involvement in the running of confiscation proceedings than presently occurs.[36] Currently, in their view, the financial investigator is the "driving force" behind proceedings and decision making in relation to them.[37]

10.41 The Criminal Law Solicitors' Association supported the proposal but expressed concerns about the need for clear and transparent guidance on how the CPS would exercise this discretion.[38] At one of our consultation events, participants also said that exercise of any discretion could be subject to judicial scrutiny, to improve the consistency and appropriateness of its use.[39]

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34 Financial Crime Practice Group at Three Raymond Buildings.
35 This view was shared by one personal response from a member of law enforcement.
36 City of London Police; Criminal Law Solicitors' Association.
37 Criminal Law Solicitors' Association.
38 This view was supported at our Practitioners' first roundtable meeting (27 October 2020).
39 Webinar 3, "Benefit in criminal lifestyle cases" (22 October 2020).

10.42 One respondent from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland was concerned that the exercise of this discretion would be subject to judicial review.

Against prosecutorial discretion

10.43 The FCA did not support the proposal:

> We prefer the current approach that the assumptions are triggered automatically. First and foremost, it sends a strong message to criminals; secondly, there are already sufficient safeguards built into the process (eg abuse arguments, incorrect/ unjust to apply and disproportionality etc). As soon as discretion is created there will be an unnecessary increase in litigation on this point; the current system ensures that all cases are dealt with consistently. There was therefore a good reason to move from discretion under predecessor legislation (eg under the CJA [1988]) to the mandatory nature of the assumptions under POCA.

10.44 Two consultees from the National Crime Agency ("NCA") disagreed with the proposal on the grounds that prosecutorial discretion runs counter to the logical and sequential application of POCA 2002.[40] Another response from an individual in law enforcement said that "this could lead to the total disregard of the assumptions" and in turn "lower than appropriate orders".

10.45 A personal response said that discretion "should only be allowed if it is strictly monitored". Another individual said that the system should remain as it is, where the financial investigator must already explain why the assumptions are not being applied.[41]

10.46 Although they responded "other", one solicitor cautioned against prosecutors making this decision because of a potential conflict of interests:

> The current position where we have both ARIS as well as Home Office targets may tend to suggest that prosecutors cannot in fact be left to make these decisions as their organisation may have priorities that override proper decision making. We also come across cases where it is quite clear that the defendant is being prosecuted rather than the case being prosecuted. It would follow that a great deal of expense can then be incurred to pursue as high a benefit figure as possible and with a great deal of energy expended to try to find tainted gifts and allegations of hidden assets.

Gambling cases

10.47 Two consultees reiterated their concern about the application of the criminal lifestyle assumptions to defendants who engage in problem gambling.[42] The Commission on Crime and Problem Gambling called for a "discretion to qualify the level of benefit where offences are related to a diagnosed gambling disorder".

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40 See para 7.84 to 7.87 (forum).

41 Personal response from a member of South Wales Police; this view was supported by Ethu Crorie (12CP Barristers).

42 Gamvisory; Commission on Crime and Problem Gambling (Howard League for Penal Reform).

Analysis

10.48 One of the aims of this review is to simplify and clarify the law relating to post-conviction confiscation. This includes identifying areas where law and practice do not align and considering whether there is a good case for harmonisation.

10.49 We consider that there are strong reasons in favour of formal prosecutorial discretion to disapply the criminal lifestyle assumptions. We have heard that prosecutors and financial investigators do not always apply the assumptions, despite the mandatory application of the legislative scheme. It is not satisfactory that prosecutors must circumvent the application of the law to achieve the right result. The objective of confiscation – to deprive the defendant of their proceeds of crime – is better served by a system which facilitates confiscation of benefit from particular criminal conduct in cases where the absence of discretion would result in no confiscation being pursued. It is also important that decisions about the application of the law are made openly.

10.50 Guidance will be needed to inform the exercise of this discretion, so that decisions are made on the basis of relevant information and considerations, are transparent, and can be scrutinised. Guidance will also assist in making decisions fairer and more consistent. This guidance should make reference to the multiple counts trigger, and highlight that prosecutors should consider whether it is appropriate to apply the criminal lifestyle assumptions in cases where the multiple counts trigger is satisfied by a "spree" of offending on one occasion, which is not otherwise indicative of a criminal lifestyle.[43]

10.51 The CPS is well placed to make these decisions and already applies its discretion routinely in charging decisions. Scrutinising each case may require greater CPS input at the point of decision-making. However, consultees repeatedly said that a greater degree of discretion would save resources because the criminal lifestyle provisions would not be applied in inappropriate cases.

10.52 We acknowledge the concerns, in particular from the Bar Council, that whether the assumptions apply should be as straightforward and simple as possible. While some consultees considered that a greater degree of discretion would support negotiation for agreed orders, doubt about whether the assumptions will apply has the potential to limit those negotiations.

10.53 We consider that the discretion should be exercised as early as possible, on the basis of sufficient information, in a way which:

(1) maximises the efficient use of resources (in the financial investigation, the preparation of the defence case and the use of court time); and

(2) supports negotiation and arrival at agreed orders, including through the EROC process.

10.54 This discretion should permit the prosecution to disapply the application of the criminal lifestyle assumptions as a whole, and instead pursue confiscation of benefit from particular criminal conduct.

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43 See Chapter 9 – Benefit in ciminal lifestyle cases.

10.55 We note the reasons from the SFO in favour of a targeted use of prosecutorial discretion, to apply the criminal lifestyle assumptions to particular transactions or time periods. However, we believe that this would create too much complexity, uncertainty and inconsistency. Where there are particular assets which the prosecution suspects represent criminal proceeds, but where the defendant does not appear to have a criminal lifestyle, there are two options:

(1) apply the lifestyle assumptions as a whole and conduct a full enquiry into general criminal conduct (which may or may not reveal the defendant to have a criminal lifestyle, but that decision will be after that issue has been subjected to full scrutiny, as the courts have suggested is appropriate in confiscation cases where criminal lifestyle is suspected);[44] or

(2) do not apply the lifestyle assumptions at all and consider alternative means to target those assets (such as through civil recovery in Part 5 of POCA 2002).

10.56 It is important to remember that in these cases the defendant will still face confiscation for their benefit obtained from particular criminal conduct.

10.57 We therefore recommend that the prosecution should have a discretion not to rely on the criminal lifestyle assumptions. This decision should be made as early as possible and be subject to published guidance.

Recommendation 40.

10.58 We recommend that the prosecution should have a discretion not to rely on the criminal lifestyle assumptions. This decision should be made at the earliest opportunity and the discretion should be exercised according to published guidance.

Recommendation 41.

10.59 We recommend that the Director of Public Prosecutions consider publishing guidance to assist prosecutors when deciding whether to rely on the criminal lifestyle assumptions.

PROPOSAL 3 – JUDICIAL DISCRETION

The current law

10.60 Under the current law, the court may check the power of the prosecution to institute confiscation proceedings through its power to stay proceedings as an abuse of process.

[44] *R v Moss* [2015] EWCA Crim 713; [2015] 4 WLUK 540 at [41].

The consultation paper

10.61 In the consultation paper, we discussed the use of the court's power to stay proceedings as an abuse of process in confiscation cases, in particular in relation to money laundering,[45] and "stacking the indictment" to trigger the application of the assumptions.[46]

10.62 We took the view that, in addition to the court's power to stay proceedings for abuse of process:

> 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.[47]

10.63 We gave four reasons for this conclusion. First, that "a safety valve of judicial discretion might disincentivise the (inappropriate) overloading of indictments in the first instance". Second, the advantage of judicial discretion over the power to stay proceedings is 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 their proceeds of crime.[48]

10.64 Third, we commented that the discretion to disapply an assumption to avoid a serious risk of injustice[49] applies to individual assumptions rather than to the assumptions as a whole: "It therefore does not allow "front-end" consideration as to whether the assumptions should apply at all" and "does not directly address the problem of manifest injustice on the face of the application".[50]

10.65 Fourth, the concept of "proportionality" in confiscation has been "narrowly construed" and therefore "does not necessarily provide a relevant safeguard in connection with the application of the assumptions".[51]

10.66 We therefore provisionally proposed to introduce judicial discretion in connection with the application of the assumptions. In proposing this, we noted concerns about any changes to the application of the criminal lifestyle assumptions creating "unnecessary uncertainty in the application of the law which is likely to lead to unnecessary appeals". We argued that inappropriate exercise of discretion could, however, be dealt with through our proposals on judicial training and allocation, and on legislative objectives, which will assist judges in exercising the discretion.[52]

10.67 The terms of the provisional proposal on judicial discretion were that:

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45 CP 249, paras 13.213 to 13.219.
46 CP 249, para 13.221.
47 CP 249, para 13.220.
48 CP 249, para 13.221.
49 Proceeds of Crime Act 2002, s 10(6)(b).
50 CP 249, para 13.222.
51 CP 249, para 13.223; on proportionality, see CP 249, ch 5.
52 CP 249, para 13.224.

(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; and

(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.

Consultation responses

10.68 We asked consultees whether they agreed with our provisional proposal to permit the court to disapply the criminal lifestyle assumptions if the court determines that it would be contrary to the interests of justice to apply them. This proposal received good support, albeit that consultees had reservations and further questions about the discretion.[53]

10.69 We also asked consultees whether there were any particular indicative factors that could assist the court in making this determination, in addition to considering the statutory purpose of confiscation.[54]

Against judicial discretion

10.70 The main concern consultees expressed about allowing judges to exercise discretion over the application of the assumptions was that it would permit judges who are reluctant to deal with confiscation cases to avoid dealing with certain aspects or to dispose of the case more quickly.[55] One individual from law enforcement anticipated that this proposal would lead to the number of assumptions cases dropping, "possibly significantly", because, "if a court has a discretion to apply or not apply something, in my experience they will usually choose the latter." The same consultee from law enforcement also commented that the "mandatory nature of existing legislation" addresses "judicial reluctance".

10.71 The Financial Crime Practice Group at Three Raymond Buildings described judicial discretion as "over-complicating" things and undermining the "hard edged certainty" in the application of the assumptions. This uncertainty would make it difficult for the prosecution to determine whether to deploy resources into a criminal lifestyle investigation. They also asked:

> When would the determination be made; at the beginning of confiscation proceedings when the confiscation evidence will necessarily be far less clear? Or some time afterwards, when considerable time and money will have been spent investigating and responding?

Ultimately, the Financial Crime Practice Group at Three Raymond Buildings said that "potential unfairness to the defendant can be addressed by other means". They gave

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53 Consultation question 44 (43 responses: 27 (Y), 9 (O), 7 (N); 19 did not answer) and summary consultation question 9 (33 responses: 22 (Y), 5 (N), 6 (O); 4 did not answer). Note: SCQ9 asked: Do consultees agree that the question of whether the "lifestyle assumptions" should apply should be subject to the exercise of appropriate prosecutorial and judicial discretion?

54 Consultation question 44(3) (16 responses: 6 (suggested indicative factors), 3 (made other comments), 7 (had no other indicative factors to suggest); 46 did not answer).

55 Association of Chief Trading Standards Officers; personal responses from two trading standards officers.

the examples of "disapplication of assumptions in relation to individual transactions" and "proportionality when making the order".

Other concerns

10.72 Some consultees were concerned about the impact of this proposal on consistency and certainty in the application of the assumptions. One individual from law enforcement noted that this may lead to "unfairness" owing to "the possibility of different courts or judges having differing opinions about what is in the interests of justice".

10.73 The Scottish Government had a similar view:

> Where safeguards are already built into any final proposals for revised legislation to deal with proportionality and risk of injustice it would appear unnecessary to then add a further discretionary power to judges to disapply the assumptions. Such an approach may lead to lack of consistency in approach and lack of clarity or tests and standard to be applied.

10.74 Additionally, consultees were concerned about how this proposal may "create a new avenue of appeal against a decision to exercise discretion to apply assumptions".[56] One High Court judge agreed, saying that although she agreed with the proposal, we "need to be a bit careful of giving too much discretion to first instance judges as it could take some questionable decisions outside the scope of appeal."

10.75 Another individual caveated his response by saying that any disapplication should be "subject to the agreement of the victim".[57]

10.76 The Prisoners' Advice Service reiterated their view that there should be "a duty to determine whether it is in the interest of justice to make the assumptions."

In favour of judicial discretion

10.77 Those in favour of judicial discretion noted that it could allow for flexibility in cases where the application of the assumptions was disproportionate, both because a case did not fit the idea of a "criminal lifestyle" and because the resources required to conduct a criminal lifestyle investigation may be too great.

10.78 The Insolvency Service said:

> We agree that the court should have the power to make determinations as to whether a potentially lengthy enquiry into the application of the assumptions, is in the interests of justice of the case by reference to the statutory purpose of the legislation.

10.79 Professor Johan Boucht was particularly supportive:

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56 One respondent from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland.

57 Personal response.

> Judicial discretion would be an important counterbalance to the extraordinarily wide powers of confiscation that s. 10 POCA 2002 gives. This is particularly important, as the prosecutorial discretion is limited to an "all or nothing" assessment.

10.80 Helena Wood, from the Royal United Services Institute, agreed:

> [Many] of the issues the system faces today are the result of blunt triggers which prevent the facts of individual cases being considering on their own facts. Introducing judicial discretion may go a long way to ensuring more proportionate use of the powers.

10.81 Another reason for supporting judicial discretion was that it might improve fairness to the defendant. Kingsley Napley LLP said:

> We believe that the nature of the assumptions contained in Section 10 POCA, in addition to the burden on the defendant to prove that they are incorrect if the court decides he has benefited from general criminal conduct, reflect a highly unjust and draconian piece of legislation.
>
> These assumptions are difficult to rebut unless the defendant's account is specific and backed up with concrete evidence, which is rarely the case in relation to property held by or transferred to him just under six years ago. Whilst even the most "sophisticated" criminals are often caught out by this requirement, it tends to discriminate further against those who are simply guilty of poor record-keeping.

10.82 Although, as noted in response to the question on prosecutorial discretion, Kingsley Napley LLP had experienced prosecutors' "willingness to disregard the assumptions where it would clearly not be in the interests of justice for them to apply", they considered that judicial discretion would be "an additional safeguard where it would be inherently unfair for the assumptions to apply."

How might the discretion apply?

10.83 Professor Johan Boucht also asked whether the proposed discretion would apply to all of the assumptions, or could be applied to only some of them, advocating the latter approach. He said:

> In the case of multiple convictions, committed during a period of six years, the reasons for applying all of the assumptions is generally the strongest. Where, on the other hand, the defendant has only been convicted of a single trigger offence, it may be fairer to limit confiscation to property held by the defendant at the date of conviction, ie the first assumption, and thus not to apply any of the other assumptions.

10.84 One individual consultee agreed, commenting that discretion would be particularly important in relation to the "property held" assumption when applied following the "prolonged offending" trigger (a single offence committed over a period greater than six months". In his view, in this situation, "to ask for justification of wealth beyond that directly attributable to the only offence committed" was disproportionate.

10.85 Consultees who supported the discretion also supported part (2) of the proposal, that the consequence of the assumptions being disapplied was that benefit should be calculated by reference to particular criminal conduct.[58]

When should the discretion apply?

10.86 The CPS supported the proposal but said that "the timing and extent of the court decision should be limited". In particular, they noted that "resource is dedicated to pursuing a criminal lifestyle case" and "factors impacting such a decision could only emerge during the confiscation process".

10.87 Commenting on when the discretion should be exercised, one member of the Metropolitan Police Service said they considered it should take place at sentencing. In their view, this would "save all parties time" and "focus the parties' minds on more appropriate matters".

Indicative factors

10.88 The Bar Council also agreed with the proposal but said that "for this to be an effective safety valve, the factors to be considered would need to be wider than merely the legislative steer itself". They listed five factors; namely the:

(1) extent of the likely investigation, including its duration;

(2) present prospect of recovery of significant sums;

(3) means and ability of the defendant to contest the confiscation proceedings;

(4) defendant's rights under Article 1, Protocol 1 to the European Convention on Human Rights; and

(5) potential impact on third parties.

10.89 One practitioner from the NCA said that the following should be taken into account:

> Where benefit is so great, or where the particular conduct includes an extensive money laundering conviction, it is likely the assumptions would either create a needless layer of investigation or essentially repeat the criminal investigation.

10.90 Other factors were suggested by consultees and are listed below.

(1) Is the defendant a "career criminal" who received substantial gains from their criminality?[59]

(2) Whether the amount obtained by the defendant over the course of a year exceeds what the defendant would have obtained from the national living wage.[60]

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58 One respondent from the NCA; Insolvency Service.
59 John McNally (Drystone Chambers).
60 Garden Court Chambers.

(3) Factual considerations as to whether the defendant in fact has a criminal lifestyle, including a defendant's criminal history and their employment history.[61]

(4) The likelihood of a case being subject to reconsideration.[62]

(5) Whether the relevant offences have been committed against public service bodies, such as His Majesty's Revenue and Customs and Department for Work and Pensions, or vulnerable individuals.[63]

(6) The impact on innocent third parties.[64]

10.91 Organisations Gamvisory and the Commission on Crime and Problem Gambling (at the Howard League for Penal Reform) made the same representations regarding the use of discretion to account for cases where a defendant has generated benefit from offences related to a diagnosed gambling disorder.

Analysis

10.92 Judicial discretion in the confiscation regime is a controversial subject about which views are divided. Since the removal of judicial discretion in POCA 2002, the confiscation regime has been mandatory and applies as part of "a sequential process".[65] The courts have described the need for a "rigorous, step-by-step approach".[66]

10.93 Recent jurisprudence has confirmed this: confiscation proceedings are not amenable to preliminary determinations,[67] because they cannot be made on the basis of full evidence and argument. Errors are very difficult to correct without that information.[68]

10.94 In the consultation paper, we did not elaborate on precisely when and how a judicial discretion would be exercised, albeit that we proposed a broad discretion on the basis of the "interests of justice". During policy development, we considered how we could implement this proposal while mitigating the concerns raised by consultees and the considerations above. The options we considered are set out below.

10.95 However, we have ultimately decided against judicial discretion. We believe that the combination of prosecutorial discretion and our recommendations on the "serious risk of injustice" test provide strong and workable safeguards to prevent the inappropriate application of the criminal lifestyle assumptions.

Broad judicial discretion

10.96 Our provisional proposal was for a broad judicial discretion: the judge could disapply the criminal lifestyle assumptions where it was in the interests of justice to do so. This

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61 Gary Pons (5 St Andrews Hill).
62 Personal response from an individual at HMRC.
63 Personal response from an individual at HMRC.
64 Prisoners' Advice Service.
65 *R v Whittington* [2009] EWCA Crim 1641; [2010] 1 Cr App R (S) 83 at [9].
66 *R v Moss* [2015] EWCA Crim 713; [2015] 4 WLUK 540 at [41].
67 *R v Parveaz* [2017] EWCA Crim 873; [2017] 5 WLUK 473 at [29]; *R v Bajaj* [2020] EWCA Crim 1111; [2020] 8 WLUK 177 at [22-24].
68 *Barnet LBC v Kamyab* [2021] EWCA Crim 543, [2021] 4 WLUK 63 at [62].

proposal was intended to cater for inflexibility in the application of the assumptions which leads to injustice, and which is not avoided by other safeguards.

10.97 Above, we rejected a requirement for the prosecution to adduce additional evidence before the criminal lifestyle assumptions apply (see paragraph 10.19 above). We do not intend to introduce this requirement "by the back door". Requiring the defence to show that the application of the assumptions is not in the interests of justice imposes a corresponding (albeit lower) burden on the prosecution to show that it is. This somewhat resembles a "no case to answer" submission for the application of the assumptions. It may inadvertently require the prosecution to demonstrate that the defendant has unexplained funds linked to criminality, undermining the purpose of the reverse burden of proof in the criminal lifestyle regime. While the prosecution bears some burden – to demonstrate the existence of funds – this would be a significant change and contrary to our previous decision.

10.98 This decision also could not be made without the benefit of all the evidence, without falling foul of the dangers of preliminary determinations in confiscation proceedings. However, a late stage discretion does not provide a high degree of certainty and may result in wasted resources on lengthy and complex investigations and hearings.

10.99 There is also already a mechanism for disapplying the criminal lifestyle assumptions at the end of the confiscation process, through the "serious risk of injustice" test.

10.100 Given these considerations, we considered how a judicial discretion could be framed to apply as early as possible in the confiscation process, on the basis of the information accessible at that point.

Exercising judicial discretion as early as possible

10.101 We considered whether a judicial discretion to disapply the criminal lifestyle assumptions could apply early in the confiscation process, when setting the timetable for confiscation. This approach would have the benefits of limiting from the outset the scope of the enquiry, to ensure that cases are dealt with expeditiously and finite resources used efficiently. This would also provide certainty to all parties and facilitate negotiation (there may be little incentive to seek resolution, including through EROC, if the benefit enquiry may be curtailed by a judge at a later date).

10.102 However, there are disadvantages to exercising a discretion at this early stage. The financial investigation may be incomplete or not yet begun, and therefore the court may not have all of the information required to make a decision. If information emerges in the course of subsequent proceedings which demonstrates that the earlier disapplication was wrong, this cannot be remedied without an abuse of process. We have already cited the strong reasons against making preliminary determinations.

Conclusion on judicial discretion

10.103 For the reasons above, we are not in favour of a broad judicial discretion which may be exercised early in proceedings and without the benefit of all of the evidence. Instead, we believe that our other recommendations, and the existing law on abuse of process, are sufficient safeguards. We therefore do not intend to recommend the introduction of a new judicial discretion to disapply the criminal lifestyle assumptions early in proceedings.

10.104 First, we have recommended the introduction of prosecutorial discretion to disapply the assumptions. This addresses the concerns we heard surrounding the disproportionate burden which applying the criminal lifestyle assumptions may sometimes impose on prosecutorial authorities, the defendant and the court. The nature, extent, duration and difficulty of the financial investigation and the consequent proceedings may be factors which the prosecution decides militate against applying the assumptions (for example, if the defendant is a large corporation).

10.105 Second, we recommend below that the serious risk of injustice test should be bolstered, to enable the court to exercise its discretion to disapply the criminal lifestyle assumptions (in whole or in part) *after* it has heard all of the evidence. This is distinct from the prosecutorial discretion which would operate at the commencement of proceedings.

10.106 Third, we believe that the existing law on abuse of process addressed concerns we heard about procedure being manipulated to seek the application of the assumptions, in particular through charging decisions. While the possibility of confiscation proceedings is a legitimate factor which may be considered when making a charging decision,[69] this is not without limits.[70] Manipulation of procedure by prosecution authorities is a recognised ground on which criminal proceedings can be stayed as an "abuse of process".[71] The framing of the indictment in a particular way in order to invoke the lifestyle assumptions may amount to such a manipulation,[72] particularly when financial incentives may have informed that decision.[73] While judicial discretion may act as a further disincentive to this behaviour, we do not believe it is a necessary addition.

10.107 Staying proceedings for abuse of process is a severe measure. We considered whether, if the application of the criminal lifestyle assumptions were precluded as an abuse of process, the prosecution may still pursue confiscation for benefit from particular criminal conduct. In *Attorney General's Reference (No 2 of 2001)* it was held (in the context of delay in proceedings) that the court may look for a lesser sanction than a complete stay of proceedings and should consider all the options.[74] However, that decision went on to acknowledge that where the legitimacy or moral integrity of the jurisdiction is at issue, there may nonetheless need to be a stay, for example in cases of bad faith or executive manipulation.[75] In our scenario, where the charges were manipulated to achieve the application of the criminal lifestyle assumptions, this extends to the charges from which benefit from particular criminal conduct would be calculated.

10.108 We acknowledge that staying proceedings for abuse of process may therefore be a blunter instrument than the judicial discretion we envisaged in our provisional

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69 *R (Kombou) v Crown Court at Wood Green* [2020] EWHC 1529 (Admin), [2020] 6 WLUK 153, at [85].

70 CPS Code for Crown Prosecutors (2018), para 6.1; *R v Hertford UK Ltd* [2015] 12 WLUK 356, [2016] Criminal Law Review 352, 354.

71 *Canterbury and St Augustine Justices, ex parte Klisiak* [1982] QB 398; *Sheffield Justices, ex parte DPP* [1993] Crim LR 136; *R (Wardle) v Leeds Crown Court* [2001] UKHL 12, [2002] 1 AC 754.

72 *R v Hertford UK Ltd* [2015] 12 WLUK 356, [2016] Criminal Law Review 352, 354.

73 *R v Knightland Foundation* [2018] EWCA Crim 1860, [2018] 7 WLUK 905; *Wokingham Borough Council v Scott* [2019] EWCA Crim 205, [2020] 4 WLR 2; *R (Kombou) v Crown Court at Wood Green* [2020] EWHC 1529 (Admin); see CP 249, paras 4.18 to 4.30.

74 *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, at [24].

75 *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, at [25].

proposal. However, this mechanism ought to deter manipulative prosecutorial decisions and it is therefore appropriate that in some cases confiscation proceedings may be halted in their entirety, including those in relation to particular criminal conduct.

PROPOSAL 4 – THE SERIOUS RISK OF INJUSTICE TEST

The current law

10.109 There are currently two ways in which the defendant may seek to disapply the criminal lifestyle assumptions: by adducing evidence to demonstrate that the application of an assumption would be wrong; and by demonstrating that the application of an assumption would lead to a serious risk of injustice.

10.110 Section 10(6)(b) of POCA 2002 states that the court must not apply one of the assumptions if "there would be a serious risk of injustice if the assumption were made". Case law has narrowly construed this provision, and it is now largely concerned with preventing double counting (such as directing the same funds towards both a compensation order and a confiscation order),[76] rather than more general considerations of justice.

10.111 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, 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.[77]

The consultation paper

10.112 In the consultation paper, we noted that the serious risk of injustice test has been narrowly construed.[78]

10.113 We also noted that the test may be particularly difficult to apply in relation to the "property held" assumption.[79] The property held assumption applies as follows:

> A defendant who holds property at any time after the date of conviction is assumed to have obtained that property in connection with their general criminal conduct, irrespective of when the property was first acquired.

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76 *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]).

77 *Millington and Sutherland-Williams on The Proceeds of Crime* (5th ed 2018), para 9.58.

78 CP 249, para 13.222.

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

10.114 We commented that "unlike the other two substantive assumptions [property transferred and expenditure], there is in effect no time limitation on the 'property held' assumption."[80] To illustrate this, we cited the case of *R v Briggs*,[81] in which the defendant challenged the inclusion of the equity value of his home (acquired in 1999) in his benefit figure, through the application of the assumptions in 2015. The Court said that it had been open to the judge to find on the evidence that there was a serious risk of injustice, albeit that the period of time elapsed since acquiring the property does not, of itself, create a serious risk of injustice.[82]

10.115 We noted that the property held assumption "in effect puts a defendant's whole life in scope for the purposes of determining benefit".[83] Whilst it is possible that a defendant may have acquired criminal property at any point in their life, the longer it is between acquisition of the asset in question and the conviction(s) that brought the assumptions into play, the less likely it is that those assets are criminal in origin.[84] However, the longer it has been since property was acquired, the more difficult it will be for the defendant to prove its legitimate origin. The six-year period which applies to the other assumptions mirrors the period during which records are ordinarily retained.[85]

10.116 We did not, however, propose that the property held assumption should be limited to a six-year period, on the basis that this would "merely replicate the property transferred assumption" and deprive the property held assumption of its "separate and useful purpose in that the prosecution is only obliged to *identify* property held since the time of conviction."[86] We considered that it would be too onerous a burden to require the prosecution to identify when all property was first held by the defendant. This could undermine the rationale of the assumption, which is to redress the knowledge differential between the prosecution and defendant with regards to the defendant's financial history.[87]

10.117 Therefore, we suggested that "the law should recognise that it may be more difficult for a defendant to rebut the assumption outside the six-year period."[88] We noted that without documentation it will be difficult for the defendant to produce "clear and cogent" evidence that the assumption is wrong.[89]

10.118 We provisionally proposed that the property held assumption should 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

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80 CP 249, para 13.233.
81 *R v Briggs* [2018] EWCA Crim 1135, [2018] 4 WLUK 354.
82 *R v Briggs* [2018] EWCA Crim 1135, [2018] 4 WLUK 354 at [22]; CP 249, paras 13.234 to 13.235.
83 CP 249, para 13.238.
84 CP 249, para 13.239.
85 CP 249, para 13.239.
86 CP 249, para 13.242 (emphasis added).
87 CP 249, para 13.242.
88 CP 249, para 13.243.
89 CP 249, para 13.244; citing *R v Panesar* [2008] EWCA Crim 1643, [2008] 7 WLUK 525.

(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.

Consultation responses

10.119 We asked consultees whether they agreed with our provisional proposal to clarify how the defendant could seek to demonstrate a serious risk of injustice in relation to applying the property held assumption, in the terms above. This proposal received strong support.[90]

Against clarifying the test

10.120 Two consultees opposed the proposal, one giving the reason that this was "otiose" as "surely the Court is bound to consider these matters in deciding the serious risk of injustice test in any event."[91]

In favour of clarifying the test

10.121 The main reason for supporting the proposal was that it may be very difficult for the defendant to obtain evidence relating to property held. Gary Pons, a barrister from 5 St Andrew's Hill, said that "in particular the court should be required to consider th[e] time that has elapsed in relation to particular issues and the effect this has on obtaining the documents."

10.122 Professor Johan Boucht agreed, saying:

> If documentary evidence is not put before the court, the reason why such evidence was not put before the court and the validity of that reason should be considered. The difficulties for the defendant to produce evidence in order to rebut the presumptions should not be underestimated. For many individuals, documentation of transactions that took place 5-6 years prior can be very difficult to obtain, particularly if they were of a shadowy albeit not necessarily an unlawful nature.

10.123 One respondent from the NCA said that "confiscation is not a punishment in itself for committing a crime" and therefore if the defendant can demonstrate that they have made "every effort to obtain evidence that the property held by them […] was gained by legitimate [means]", then this should be "assessed appropriately by the court".

10.124 The Insolvency Service said:

> We agree that the law should recognise that it may be more difficult for a defendant to rebut the "property held" assumption outside the six-year period, particularly if a considerable period of time has elapsed. It is agreed that an inflated benefit figure should not be reached purely because of a lack of documentation and that the test of the "serious risk of injustice" should be clarified. However, the court's enquiry into the lack of documentation should be rigorous and avoid allowing vague or ambiguous explanations to be advanced by defendants.

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90 Consultation question 45 (42 responses: 34 (Y), 6 (O), 2 (N); 20 did not answer).
91 Financial Crime Practice Group at Three Raymond Buildings.

10.125 Two consultees who gave qualified support said that the proposal would need to be supplemented by guidance on the meaning of "serious risk", rather than just "risk". Without guidance, this would be "determined by litigation".[92] One individual added that the test would need to be "subject to the agreement of the victim".[93]

10.126 The Bar Council agreed with the proposal, saying that although "in practice the test has generally been operated in this way, this is a helpful clarification". Two practising barristers said that the proposal was not necessary,[94] as it reflected current law.[95]

Additional suggestions

10.127 Garden Court Chambers agreed with the proposal, but said that the clarified test "should apply to all assumptions, otherwise arbitrary distinctions may arise":

> For example, a defendant may own a property which they rent out. The equity in the property is caught by the "property held" assumption and the rent received is caught by the "property transferred" assumption. In both cases the defendant has to demonstrate that the original house purchase was legitimate and the same test should apply to each item of proposed benefit.
>
> The "property transferred" assumption is in reality no more time-limited than the "property held" assumption. Monies received during the six-year period from rental, dividends, sales and more all require that the defendant prove that the underlying purchase of property, stocks or goods was carried out using legitimate funds whether or not that purchase took place in the six year period.

10.128 The FCA suggested an alternative, "to keep to the 6-year rule but then require documentary evidence outside this period."

10.129 Professor Johan Boucht drew a parallel with Part 5 of POCA 2002, where "in order to reach a conclusion […] that the assets originate from unlawful conduct, some information as to what that conduct is [said] to have been is required." He noted that the reason for there being "no tracing requirement" under the criminal lifestyle provisions was "probably that the rules operate under a reversed burden of proof and that a burden to trace the property in considered incompatible with this", as well as the requirement for convictions to trigger the investigation. However, he questioned whether a similar requirement could be used in criminal lifestyle cases (ie "that assets in order to be liable for confiscation should be linked to certain identifiable criminal conduct, albeit of a general nature") to "considerably increase the safeguard level of the scheme".

Analysis

10.130 Section 10(6)(b) requires the court not to make an assumption if "there would be a serious risk of injustice if the assumption were made." On its face, this is a broad power which permits a fully reasoned determination, at the final confiscation hearing and with the benefit of all the information, that the application of one or more

92 Personal response from a trading standards officer; Association of Chief Trading Standards Officers.
93 Personal response.
94 John McNally (Drystone Chambers).
95 Andrew Campbell-Tiech KC (Drystone Chambers).

assumptions would cause “a serious risk of injustice”. However, as we note above and in the consultation paper, this test has been narrowly construed.

10.131 First, we intend to clarify the basis on which the court may determine that there is a serious risk of injustice. In essence, we consider that it should be made clear that in determining whether there would be a serious risk of injustice if the assumption were applied, the court should consider any oral or documentary evidence put before the court; and 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.

10.132 Second, we intend to restore the serious risk of injustice test to a position which more closely resembles its original wording and to reflect consultees’ call for a final and effective safeguard in the application of the criminal lifestyle assumptions.

Clarifying the test

10.133 There was strong support among consultees for recognising the evidential difficulties faced by a defendant to whom the property held assumption is applied. As we note above, this assumption is effectively not limited in time, and may therefore require the defendant to prove the origin of property dating back well beyond six years. This goes beyond the usual length of time one is expected to keep records. We also heard during consultation that this is especially difficult for defendants who have “chaotic lives” and are not well-practised in obtaining and keeping documentary records of their transactions.

10.134 We acknowledge the comments from some consultees that the court should already consider both oral and documentary evidence, and any reasons for the absence of the latter. However, we remain of the view that articulating this specifically will bring this consideration forward in the minds of both those advising defendants and the courts.

10.135 We are also sensitive to the points raised by Garden Court Chambers, that the assumptions often overlap and cannot always be neatly separated. We do not wish to create “arbitrary distinctions” between the assumptions and therefore we support the suggestion to extend the clarification of the serious risk of injustice test to all of the assumptions, as a general rule of evidence in their application. By clarifying the serious risk of injustice test in relation to all of the assumptions, we consider that it would be “reset” to meet the original and broader natural interpretation of the phrase.

Resetting the serious risk of injustice test

10.136 The criminal lifestyle assumptions are one of the most far-reaching and demanding elements of the POCA 2002 post-conviction confiscation regime. They require the defendant to account for the last six years of financial activity, to prove that it does not represent benefit from crime. In reviewing options for reform, we have sought to achieve a balance between upholding the good reasons for this regime and ensuring that it is applied fairly and consistently.

10.137 We have recommended the addition of prosecutorial discretion, to operate at the beginning of the confiscation process and to disapply the criminal lifestyle assumptions before an extensive investigation is undertaken.

10.138 We have not recommended the addition of a similar judicial discretion. This is because we could not identify when and how such a new discretion could be exercised, at a time when the court has the necessary information to make such a determination accurately and in a manner which does not result in unnecessarily wasted resources. Moreover, in light of our other recommendations, we did not consider that such a judicial discretion was necessary. Our proposed test – to disapply the assumptions because it was "in the interests of justice to do so" – was not too far removed from the original form of the "serious risk of injustice" test.

10.139 The serious risk of injustice test already operates at the end of the confiscation process, when the court has all of the relevant information. It is already accepted that prosecutors risk having one or more of the assumptions disapplied after they have made extensive investigations.

10.140 Although we did not recommend a new judicial discretion, consultees were largely in favour of this proposal. We believe that restoring the serious risk of injustice test to its original intended scope (that is, broadening the considerations which the court may take into account beyond the risk of double counting) will address the concerns expressed by consultees.

(1) The first main concern was that a new judicial discretion would enable judges to avoid difficult and lengthy confiscation proceedings. This concern does not apply to a bolstered serious risk of injustice test, because the determination typically takes place at the final confiscation hearing, once the judge has heard all the evidence and argument.

(2) The second main concern was that a new judicial discretion would undermine the certainty of the regime. We acknowledge that, owing to the test operating later in proceedings, the serious risk of injustice test adds a degree of uncertainty to proceedings. The test operates to the defendant's advantage, and therefore a greater degree of uncertainty may be tolerated in favour of fairness. Moreover, the prosecution will be aware of the risk of the test from the outset, and ought to seek to operate within its limits.

(3) Improving the serious risk of injustice test does not respond to consultees who supported early use of judicial discretion on the basis that it may save resources, because the determination takes place with the benefit of all the information. However, we believe our recommendation on prosecutorial discretion meets this consideration.

10.141 A bolstered test responds to consultees who supported judicial discretion on the basis that it could provide a greater degree of flexibility to accommodate cases in which, for a range of reasons, it may not be appropriate to apply one or more of the assumptions. We recommend that the reasons a court may take into consideration should not be limited to double counting, but rather concern "injustice" more broadly, as the court is well-placed to judge.

10.142 We therefore recommend that the serious risk of injustice test is clarified (in its application to all of the assumptions) to ensure that in determining whether there would be a serious risk of injustice if the assumption(s) were applied, the court should consider any oral or documentary evidence put before the court; and 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. We also recommend that in determining whether there is a serious risk of injustice the court should not be limited to determining whether there would be a risk of double counting, but instead should be able to determine whether any relevant factor or factors would result in a serious risk of injustice if an assumption were made.

Recommendation 42.

10.143 We recommend that the serious risk of injustice test in section 10(6)(b) POCA 2002 is clarified (in its application to all of the assumptions) to ensure that when 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.

Recommendation 43.

10.144 We recommend that in determining whether there is a serious risk of injustice, the court should not be limited to determining whether there would be a risk of double counting the defendant's benefit, but instead should determine whether any relevant factor or factors would result in a serious risk of injustice if an assumption were made.

PROPOSAL 5 – PROPERTY FREE OF OTHER INTERESTS

The consultation paper

10.145 In the consultation paper, we noted that "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.[96]

10.146 We said that stakeholders did not raise any concerns with this assumption in the pre-consultation period, and therefore "we do not believe any reform is necessary".[97]

Consultation responses

10.147 We asked consultees whether they agreed with our decision not to propose any reforms to the assumption that, for the purpose of valuing any property obtained (or

96 CP 249, para 13.249.
97 CP 249, para 13.250.

assumed to have been obtained) by the defendant, they obtained it free of any other interests in it. This proposal received strong support.[98]

In favour of reform

10.148 Three consultees considered that reform was necessary. One personal respondent said that the "assumption that property obtained by the defendant is free of any other interests risks depriving third parties of legitimate interest."

10.149 John McNally from Drystone Chambers described this assumption as a "blunt tool" and said that "as a matter of justice", the "assessment of competing interests" in property, or their value, "should be within a judge's discretion".

10.150 The Prisoners' Advice Service said that "a matrimonial home should not be considered to be free of the partner's beneficial interest".

No reform needed

10.151 A large majority of consultees agreed that no reform was needed. The Bar Council said:

> It will usually be relatively clear whether a defendant has obtained a property in circumstances where other parties do or may have an interest in it, and the regime (at present and as proposed) contains provisions that provide for such situations.

10.152 One personal respondent agreed, saying that in his experience this has not caused difficulties. The court is already equipped to address the question of other interests in property, by making "an informal decision or a formal determination under section 10A".[99]

10.153 One respondent from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland agreed, saying that "this is within the knowledge of the defendant and therefore the burden should remain with him".

10.154 Andrew Campbell-Tiech KC also agreed, but added that:

> There should be a judicial power to ameliorate (reduce) a confiscation order that may lead to the forced sale of the family home and/or other severe consequences to a defendant's dependents – regardless of whether [the spouse] can prove an equitable interest. In short, article 8 [of the European Convention on Human Rights] interests of third parties should be capable of being taken into account – [this is] another example of the need for an overarching judicial discretion.

Analysis

10.155 We are not inclined to recommend reform to the fourth assumption, concerning whether a defendant's property is assumed to be free of other interests.

10.156 As discussed in Chapter 1 of this report, the European Court of Human Rights has applied general rules on interferences with rights, examining whether an interference

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98 Consultation question 46 (41 responses: 38 (Y), 3 (N); 21 did not answer).

99 David Winch (forensic accountant).

is provided for by law, pursues a legitimate aim and is proportionate. Proportionality is largely determined by the third party's ability to make representations as to their interest in the property and challenge any findings to this effect.

10.157 We consider that the regime already appropriately caters to the determination of third-party interests and provides appropriate avenues of appeal. We also believe that our other recommendations – which encourage consideration to be given to confiscation earlier,[100] require greater awareness of third party interests from the outset, and promote the use of appropriately trained judges to deal with complex third party issues[101] – should facilitate earlier and fairer resolution of third party interests, including where they are engaged by the criminal lifestyle assumptions.

[100] See Chapter 3 - Timetabling.
[101] See Chapter 7 - Forum, on identification of complex issues at the pre-trial preparation hearing and judicial allocation in complex cases.

Chapter 11: Assets tainted by criminality

INTRODUCTION

11.1 Since POCA 2002 was introduced there have been over one hundred appellate decisions connected to the calculation of benefit.[1] The appellate courts have made clear their exasperation with the large numbers of confiscation cases before them.[2] During our pre-consultation discussions, the ever-expanding body of case law was cited as creating uncertainty in the law, leading to inappropriate or improperly made orders, particularly when criminal judges are required to crossover into consideration of cases from the civil courts. Accordingly, in the consultation paper we considered whether principles developed in the case law should be incorporated into any reformed statutory provisions to provide clarity and certainty as to the law in respect of "benefit" from criminality.

11.2 We observed that:

> 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.[3]

11.3 Accordingly, we considered whether inclusion of certain principles in a Criminal Practice Direction or in non-statutory guidance might be appropriate. We made other proposals to codify the case law in other sections of the paper, including as to tainted gifts, hidden assets and as to apportionment between co-defendants. In this chapter, we deal with case law in the context of all assets tainted by criminality.

THE CONSULTATION PAPER

11.4 In respect of those matters which we are covering in this chapter, we provisionally proposed the following.

(1) There should be guidance on the principles in connection with assets tainted by criminality.[4]

(2) Such guidance should be in the form of either non-statutory guidance on confiscation or a criminal practice direction relating to confiscation.[5]

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1 See further Chapter 14 of the consultation paper: Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, para 14.1.

2 *R v Perrin* [2014] EWCA Crim 1556, [2014] 7 WLUK 458 at [1]; *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].

3 CP 249, para 14.4.

4 Consultation question 48 and summary consultation question 10(1).

5 Consultation question 48.

(3) The following principles found in case law should be incorporated into the guidance.

(a) The court must consider whether any evidence suggests that the defendant has made contributions to the purchase price of an asset using property that has not come from crime.[6]

(b) When a mortgage is obtained over a property, the court should consider the principles from *R v Waya*[7] on calculating benefit with reference to the equity of redemption.

(c) 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.[8]

(4) The following issues relating to tobacco importation cases should also be incorporated into such guidance.

(a) The principles relevant to evasion of duty as summarised in *R v Tatham*.[9]

(b) In calculating the benefit obtained from evading duties payable on tobacco, the duty evaded should be calculated in accordance with section 2 of and Schedule 2 to the Tobacco Products Duty Act 1979.

(c) 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.

(5) Principles in connection with when benefit apparently accruing to a company may be treated as accruing to the defendant should be incorporated into such guidance.[10]

11.5 We also asked consultees for their views about how best to guide judges dealing with cases involving issues as to common intention constructive trusts in confiscation proceedings.[11]

6 *R v Bello* [2015] EWCA Crim 731.
7 *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.
8 Consultation question 49 and summary consultation question 10(2).
9 *R v Tatham* [2014] EWCA Crim 226, [2014] Crim LR 672.
10 Consultation question 50 and summary consultation question 10(3).
11 Consultation question 52.

OVERVIEW OF POLICY

11.6 That the following principles ought to be included in primary legislation:

(1) The court must consider whether any evidence suggests that the defendant has made contributions to the purchase price of an asset using property that has not come from crime.[12]

(2) When a mortgage is obtained over a property, the court should consider the principles from *R v Waya*[13] on calculating benefit with reference to the equity of redemption.

11.7 That the Criminal Procedure Rule Committee ("CPRC") consider incorporating the following principles into rules or by some other means:

(1) 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.[14]

(2) The following issues relating to tobacco importation cases:

(a) The principles relevant to evasion of duty as summarised in *R v Tatham*.[15]

(b) In calculating the benefit obtained from evading duties payable on tobacco, the duty evaded should be calculated in accordance with section 2 of and Schedule 2 to the Tobacco Products Duty Act 1979.

(c) 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.

(3) Principles in connection with when benefit apparently accruing to a company may be treated as accruing to the defendant.[16]

11.8 That guidance as to the key cases in connection with common intention constructive trusts be provided by the CPRC in whatever form it considers appropriate.

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12 *R v Bello* [2015] EWCA Crim 731.
13 *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.
14 Consultation question 49 and summary consultation question 10(2).
15 *R v Tatham* [2014] EWCA Crim 226, [2014] Crim LR 672.
16 Consultation question 50 and summary consultation question 10(3).

CONSULTATION RESPONSES

Restating principles from case law in guidance

11.9 An overwhelming majority of consultees were in favour of providing guidance to assist stakeholders in approaching the issue of assets tainted by criminality,[17] with a very strong majority of consultees in favour of including the particular principles that we identified.[18]

11.10 Similarly, there were very strong majorities in favour of including the principles that were identified in connection with:

(1) tobacco importation cases;[19]

(2) when benefit apparently accruing to a company may be treated as accruing to an individual defendant;[20] and

(3) the principle articulated in *R v Hayes* in connection with consideration and tainted gifts.[21]

11.11 As to common intention constructive trusts, where we asked an open question about how best to guide judges dealing with cases involving such issues, some stakeholders suggested distilling key principles into written form.[22] Others suggested simply incorporating references to key case law. There was disagreement as to whether such principles should be incorporated into a confiscation Criminal Practice Direction or into non-statutory guidance.[23] Others considered that input from experts might be required,[24] or specialist judges might be needed.[25]

The location of codified principles

11.12 Consultees were evenly divided on the issue of whether the relevant principles should be included in non-statutory guidance on confiscation or a Criminal Practice Direction relating to confiscation.[26]

11.13 Those in favour of non-statutory guidance considered that it could provide a degree of flexibility to deal with changes in the law that would not be provided if the material was included in a Criminal Practice Direction.

11.14 Concerns were raised that non-statutory guidance would amount to nothing more than a simplified confiscation textbook, of which there are plenty available on the market.

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17 Consultation question 48(1) (41 responses: 37 (Y), 4 (N); 21 did not answer) and summary consultation question 10(1) (27 responses: 21 (Y), 1 (N), 5 (O); 10 did not answer).

18 Consultation question 49 (42 responses: 30 (Y), 5 (N), 8 (O); 20 did not answer).

19 Consultation question 50 (36 responses: 25 (Y), 4 (N), 7 (O); 26 did not answer) and summary consultation question 10(2) (29 responses: 23 (Y), 1 (N), 5 (O); 8 did not answer).

20 Consultation question 51 (37 responses: 35 (Y), 2 (N); 25 did not answer) and summary consultation question 10(3) (30 responses: 25 (Y), 5 (O); 7 did not answer).

21 Consultation question 63 (39 responses: 32 (Y), 1(N), 6 (O); 23 did not answer).

22 Bar Council; South East Confiscation Panel, East Kent Bench; Serious Fraud Office; Financial Crime Practical Group at Three Raymond Buildings.

23 Bar Council; Garden Court Chambers.

24 Personal response from an individual at HMRC; personal response; personal response from a solicitor from Blake Morgan LLP.

25 Environment Agency; an individual barrister from 5 St Andrew's Hill Chambers.

26 Consultation question 48(2) (34 responses: 17 (Y), 17 (N); 28 did not answer).

Queries were also raised about who should write the guidance, with Garden Court Chambers suggesting that a body similar to the Sentencing Council be set up. Consultees also queried whether such guidance would be kept up to date.

ANALYSIS

11.15 In each of the areas for which we asked consultees directly about the merits of distilling principles in a written format, the response was overwhelmingly in favour. There is clearly a strong appetite for ensuring that the principles that apply in confiscation be readily accessible. However, the response to our open question about how to deal with the issue of common intention constructive trusts, shows that this approach is not a panacea. It must be considered alongside our other proposals for ensuring that appropriate expertise is deployed in dealing with confiscation, including the use of suitably experienced judges in complicated cases and increasing the level of training given to all judges in dealing with confiscation.

11.16 We considered carefully, in consultation with Parliamentary Counsel, whether any of the principles identified should be in primary legislation given their general importance. The following two principles fall into this category, and we therefore recommend that they are included in confiscation legislation:

(1) The defendant's benefit will be limited where property was:

(a) part-purchased with the proceeds of crime, to the value of that part of the property which was derived from criminal conduct;[27] and

(b) purchased subject to credit, to that part of the property which would be payable to the defendant following the repayment of the creditor or creditors in connection with that purchase.[28]

11.17 As to the Criminal Procedure Rules ("Crim PRs") and Practice Directions "(Crim PDs"), it is noted that the Crim PDs already make reference to case law. The references to cases come in the form of articulation of relevant principles from the cases,[29] (including direct quotations from such cases) or simply lists of relevant cases.[30] Crim PD VIII Sentencing C (Indications of Sentence) gives detailed guidance of the content of the Court of Appeal's judgment in *R v Goodyear*.[31] Crim PD IV Appeal 39 C (Appeal: notices containing grounds of appeal) sets out detailed guidance about the decision in *R v James*,[32] and the considerations and criteria which will be applied by the Court of Appeal in determining whether an appellant should be permitted to rely upon grounds of appeal not identified in the appeal notice.

11.18 References to relevant statutory provisions which assist the court in making its determinations are also present,[33] including, for example, a full description of the

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27 *R v Bello* [2015] EWCA Crim 731.
28 *R v Waya* [2012] UKSC 51, [2013] 1 AC 294.
29 Criminal Practice Direction (CPD): CPD I 3D.5, 3F.12 to 15, and 3L.5 to 6; CPD V 18D.16, 18E.67, and 19A.4; CPD VI 26A, B, C and G; CPD VII; CPD IX 39C.4.s
30 CPD I 3D.4; CPD V 18E.67; CPD VI 24C.31.
31 *R v Goodyear* [2005] 1 WLR 2532, [2005] 2 Cr App R 20.
32 *R v James* [2018] EWCA Crim 285, [2018] 1 WLR 2749.
33 CPD I 3F.6.

nature and effect of the statutory provisions in connection with spent convictions and their relationship with applications to adduce bad character and sentencing.[34]

11.19 We therefore recommend that the CPRC should in whatever way it considers most appropriate (either in rules or by some other means) consider including guidance to the following effect:

(1) In determining whether benefit apparently accruing to a company may be treated as benefit accruing to a company, cases of relevance include *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 and *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19, [2016] 4 WLR 63.

(2) Cases of relevance to the issue of common intention constructive trusts include *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 and *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

(3) Cases on the issue of alleged benefit when a business (whether incorporated or otherwise) is alleged to be part-tainted by criminality include: *R v Beazley* [2013] EWCA Crim 567, [2013] 1 WLR*, R v King* EWCA Crim 621, [2014] EWCA Crim 621 and *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663*.*

(4) In relation to tobacco importation cases:

(a) a summary of principles relevant to benefit in tobacco importation cases can be found in *R v Tatham* [2014] EWCA Crim 226, [2014] Criminal Law Review 672;

(b) in calculating the benefit obtained from evading duties payable on tobacco, the duty evaded should be calculated in accordance with section 2 and Schedule 1 to the Tobacco Products Duty Act 1979; and

(c) cases on the relevant retail price of counterfeit goods include *R v Redmond* [2011] EWCA Crim 203, [2011] All ER (D) 256 and *R v Varsani* [2010] EWCA Crim 1938, [2010] All ER (D) 32.

[34] CPD V 21A.

Recommendation 44.

11.20 We recommend that the primary legislation include provisions to the effect that the defendant's total benefit is limited where property was:

(1) part-purchased with the proceeds of crime, to the value of that part of the property which was derived from criminal conduct; and

(2) purchased subject to credit, to that part of the property which would be payable to the defendant following the repayment of the creditor or creditors in connection with that purchase.

Recommendation 45.

11.21 We recommend that the Criminal Procedure Rule Committee should in whatever way it considers most appropriate (either in rules or by some other means) consider inclusion of the relevant cases as guidance in the following matters:

(1) In determining whether benefit apparently accruing to a company may be treated as benefit accruing to a company.

(2) Whether there are common intention constructive trusts.

(3) The issue of alleged benefit when a business (whether incorporated or otherwise) is alleged to be part-tainted by criminality.

(4) In relation to tobacco importation cases:

(a) a summary of principles relevant to benefit in tobacco importation;

(b) in calculating the benefit obtained from evading duties payable on tobacco; and

(c) the relevant retail price of counterfeit goods.

(5) 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).

Part 4: Recoverable Amount

This part only comprises Chapter 12 (Recoverable Amount).

In Chapter 12, we make recommendations concerning the recoverable amount which is the figure that represents the amount that the defendant is required to pay towards a confiscation order.

We make recommendations in relation to the calculation of the “recoverable amount” where the defendant has already had some assets seized by the state. To this end we develop the terminology of “total benefit” and “outstanding benefit”. We also make recommendations which promote transparency and public confidence in cases where confiscation orders are made in an amount less than the total benefit figure.

Furthermore, we consider “hidden assets”. This is a term developed by judges and practitioners to describe any unexplained difference in value between the defendant’s benefit and the value of their known assets.

Chapter 12: Recoverable amount

INTRODUCTION

12.1 The recoverable amount represents the amount that the defendant is required to pay towards a confiscation order. Under the current law, the recoverable amount is either:

(1) an amount equivalent to the defendant's benefit figure, where the defendant's assets—including any hidden assets and/or tainted gifts—are worth at least the amount of the benefit figure;

(2) the available amount, where the defendant's assets are worth less than the benefit figure; or

(3) a nominal amount, where the available amount is nil.

12.2 In this chapter we analyse the provisional proposals that were made in our consultation paper in connection with:

(1) the maximum amount that can be recovered if the defendant has already disgorged some of the benefit to victims or to the state, or some of the benefit has been seized by the state;

(2) providing reasons for making a confiscation order in an amount other than the total benefit;

(3) the burden of proof in relation to the recoverable amount;

(4) considerations that might help inform a court's determination as to whether the defendant has hidden assets;

(5) inclusion of the guidance provided in *R v Hayes*[1] in the Criminal Procedure Rules or in a confiscation practice direction; and

(6) the time from which a gift becomes a "tainted gift".

[1] *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060.

OVERVIEW OF POLICY

12.3 That, having determined the defendant's total benefit:

(1) The court should identify any property that was seized by or disgorged to the state by the defendant pursuant to the case and reduce the total benefit figure by that amount to arrive at the outstanding benefit.

(2) The court should then consider the defendant's recoverable amount. That amount should equal the gain unless, having regard to all the circumstances of the case, the defendant proves or the court is otherwise satisfied that the available amount is less than the outstanding benefit.

(3) In determining (2), where the value of the defendant's identified assets is lower than the outstanding benefit, the court may treat some or all of the difference as having been hidden by or on behalf of the defendant, and treat that difference as part of the available amount.

(4) In determining (3), the court must consider whether any difference between the value of identified benefit and the value of identified available assets is due to:

(a) expenditure incurred by the defendant which has been made from the defendant's benefit; and

(b) downward changes in the value of assets.

12.4 We recommend that the Criminal Procedure Rule Committee ("CPRC") should in whatever way it considers most appropriate (either in rules or by some other means) consider including the guidance in *R v Hayes*[2] namely, that where 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 should examine:

(1) whether that consideration is capable of being assessed as consideration of value; and

(2) if so, to what extent.

12.5 We recommend that a gift should be regarded as 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".

[2] *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060.

PROPOSAL 1 – CALCULATING HOW MUCH SHOULD BE PAID WITH REFERENCE TO SEIZED OR DISGORGED ASSETS

The current law

12.6 In our consultation paper we observed that where assets are seized from a defendant, those assets will form part of their benefit. The rationale for this is a good one:

> Ultimately a drug dealer who holds cash has benefited at the time they hold 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 […].[3]

12.7 We recommend in Chapter 2 of this report that the statutory objective of confiscation should be to deprive a defendant of their benefit from crime. Under the current law, a defendant who has had their assets seized is not treated as having repaid their benefit. Therefore, the defendant must account to the state a second time for that benefit.[4] We considered that requiring double deprivation went beyond the statutory objective and so we provisionally proposed 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.[5]

Consultation responses

12.8 A large majority of consultees were in favour of this proposal.[6]

12.9 The Bar Council said that this would make confiscation orders more transparent, in that it would be clear on the face of the order that seized assets had already been disgorged by the defendant. It would also be likely to encourage precision in the calculation of the value of such assets.

12.10 The City of London Police said this would reduce the incidence of disproportionate and unrealistic benefit figures in confiscation orders.

12.11 A number of consultees queried how assets which the state cannot realise (for example drugs or counterfeit goods) would be treated under the proposal.[7]

12.12 One consultee considered that such assets should not form part of the benefit in the first place.

Analysis

12.13 As set out above, we consider that the rationale for including the value of assets that are seized or otherwise disgorged to the state or to victims in the defendant's total

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3 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, paras 12.184 to 12.185.
4 CP 249, para 15.42.
5 Consultation question 53.
6 Consultation question 53 (41 responses: 37 (Y), 4 (N); 21 did not answer).
7 HM Government; Association of Chief Trading Standards Officers; Wilsons Auctions.

benefit is a good one, provided that such assets are offset against the defendant's total benefit (as we had provisionally proposed and as agreed by consultees).

12.14 The 2021 Court of Appeal case, *R v Seed*[8] provides a useful examination of the way in which the "available amount" is calculated when assets have already been disgorged to the state. In this case the defendant was one of six men who had stolen jewellery and other items worth around £13.7 million from a safety deposit box company. The police seized a significant amount of the jewellery and were able to return much of it to its owners. The remainder, however, (despite being in the custody of the police) was deemed to constitute part of both the defendant's benefit and his "available amount" for the purposes of the confiscation application. The remaining jewellery was sold and its value recovered pursuant to confiscation orders.

12.15 While in this case, the value of the assets could be realised and credited against the defendants' confiscation orders, in contrast, if the "assets" had not been jewellery but had been drugs, for example, the defendants would have been liable for the value of the seized drugs as part of both their benefit and "available amount" despite no longer having possession of the drugs or any way to realise their value.[9] *R v Seed* provides a valuable example of why assets which form part of the defendant's benefit but have been disgorged to the state ought to be considered differently when assessing the "available amount", and thus the recoverable amount.

12.16 We have therefore created a mechanism which removes the liability to repay what has already been disgorged, which has its own clear label. We recommend that an additional "stage" of the confiscation calculation is introduced.

(1) The defendant's **total benefit** is calculated.

(2) The value of any seized or disgorged property is deducted from the defendant's total benefit to leave their **outstanding benefit ("OB")**.

(3) The defendant must then be ordered to repay the recoverable amount, which would be the lesser of the OB or the available amount (the amount of free property available to the defendant if less than the OB).

12.17 This model is not the equivalent of a profit model of confiscation. It does not allow expenditure incurred during the course of criminal activity to be offset against the revenues of that activity (for example, the cost of a "getaway" vehicle cannot be deducted from the yield of a bank robbery). Rather, the model acknowledges that what has been taken from the defendant by the state or disgorged to victims should not be paid twice. It is therefore about depriving the defendant of their benefit from crime rather than maximising the amount the state is able to recover from the defendant in cash or assets.

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8 *R v Seed* [2021] EWCA Crim 1198, [2021] 1 WLR 6033.

9 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, paras 12.59 – 12.61; *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).

12.18 Despite introducing this additional stage, the benefit figure is still relevant because it is used to identify the defendant's total gain from crime and is unaltered by any seizure or disgorgement. It is also the starting point for establishing the OB.

12.19 By deducting the value of the seized or disgorged property from the total benefit to arrive at the outstanding benefit, rather than from the available amount, the difficulty that the value of illegal goods cannot form part of the available amount (because they cannot be sold legally) is avoided. The statutory objective of confiscation is to deprive the defendant of their benefit from criminal conduct. The purpose of this recommendation is to ensure that the maximum amount in which a confiscation order is made represents the benefit that is not recovered from the defendant by the time of the making of the order. In other words, benefit should be thought of as a ledger (total benefit vs outstanding benefit) and this proposal is intended to balance that ledger.

Scenario

(1) The defendant is caught with drugs worth £100,000. The evidence shows that the defendant's total benefit from the conduct for which he has been convicted is £110,000.

(2) The drugs are seized and forfeited to the state.

(3) The state has therefore deprived the defendant of £100,000 of his benefit by the time of the confiscation proceedings.

(4) £100,000 should therefore be deducted from the total benefit to determine the outstanding benefit . In this case, the outstanding benefit is the value of the remaining property worth £10,000 (£110,000 - £100,000).

(5) Having determined what the outstanding benefit is (£10,000), the court will look at what assets the defendant has (the available amount) from which the £10,000 can be repaid and will make a confiscation order in the value of those assets, up to £10,000.

Recommendation 46.

12.20 We recommend that if a person is deemed to have benefited from criminal conduct their total benefit is the value of the property obtained.

Recommendation 47.

12.21 We recommend that, having calculated the defendant's total benefit, the court should identify any property that was seized by or disgorged to the state or repaid to victims by the defendant pursuant to the case and reduce the total benefit figure by that amount to arrive at the outstanding benefit.

PROPOSAL 2 – EXPLAINING WHY A CONFISCATION ORDER MIGHT BE IN AN AMOUNT LOWER THAN THE BENEFIT FIGURE

Current law

12.22 In our consultation paper we observed that although making orders in an amount less than the benefit figure serves a legitimate purpose:

> The rationale behind making such orders may not always be clear to the public. Examples of negative headlines include "'Notorious Bristol gang leader who helped make £175,000 must only pay back £1"[10] and "Nursery's anger as thieving treasurer ordered to pay back just £1".[11] 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.[12]

12.23 We observed that the Crown Court Compendium[13] has example directions for judges to use and adapt as necessary. The example direction does not explain why a nominal order has been made or that the available amount might be uplifted at a later date.[14]

Consultation paper

12.24 In the consultation paper we provisionally proposed that:

(1) the CPRC 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; and

(2) consideration be given to including a direction to this effect in the Crown Court Compendium.[15]

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10 John Hawkins and Daniel Chipperfield, "Notorious Bristol gang leader who helped make £175,000 must only pay back £1", Bristol Live (4 February 2019).

11 Stef Hall, "Nursery's anger as thieving treasurer ordered to pay back just £1", Blackpool Gazette (5 December 2017).

12 CP 249, para 15.28.

13 The Crown Court Compendium is intended to guide all judges in the Crown Court as to pertinent matters relating to trial and sentence.

14 CP 249, paras 15.50 to 15.51.

15 Consultation question 54, summary consultation question 12.

Consultation responses

12.25 A very clear majority of consultees were in favour of this proposal.[16]

12.26 There was some disagreement about the extent to which such directions are given anyway. The Bar Council said that it was less likely to make a difference to legally represented defendants, who were already advised to this effect.[17] However, Dr Craig Fletcher said a consistent theme of his research was defendants not being fully advised of the potential to reconsider their confiscation orders. Therefore, it was vital judges fully explained it. HM Government supported this proposal to improve transparency.

12.27 Whilst a clear direction was seen as improving transparency, consultees doubted that it would prevent negative headlines surrounding confiscation orders.[18]

12.28 Against the provisional proposal, the Crown Prosecution Service suggested that warning defendants of the implications of a confiscation order being made in a sum less than the benefit figure, namely the risk of reconsideration, may encourage defendants to hide their assets.

12.29 In relation to recording the outcome of proceedings, the Financial Conduct Authority said it might be better to expand the obligation on the court already contained in section 7(5) of POCA 2002 to include in the confiscation order a statement of its findings as to the matters relevant for determining that the available amount is below the benefit figure.

12.30 Views differed amongst consultees as to whether the need for such a direction should be set out in the Crown Court compendium or a practice direction. In addition, the National Crime Agency said these matters should also be made clear on the face of the record of the confiscation order (the 5050 form) a copy of which should be provided to the defendant and which could become a "confiscation certificate".

Analysis

12.31 In Chapter 4 we discussed our provisional proposal to provide a direction to defendants about the effects of failure to comply with requirements for the exchange of information in advance of the confiscation hearing. That proposal was couched in similar terms and we echo those conclusions here. As in relation to that recommendation, we consider that a brief criminal procedure rule, similar to CrimPR 25.9(f), would set out what matters the court must be satisfied that the defendant understands. In particular, that:

(1) the component parts of the order have been clearly explained; and

(2) the effect of making the order in a sum lower than the benefit figure has been explained.

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16 Consultation question 54 (44 responses: 34 (Y), 2 (N), 8 (O); 18 did not answer) and summary consultation question 12 (33 responses: 27 (Y), 1 (N), 5 (O); 4 did not answer).

17 A similar response was received from the CPS. An individual Crown Court judge, the Criminal Law Solicitors' Association and the North East ACE Team said judges do this in any event.

18 Bar Council; Kingsley Napley LLP.

12.32 A brief sample direction in the Crown Court compendium may assist the judge to this end. To continue the clarity, the form 5050 on which confiscation orders are recorded should give a brief pro-forma explanation of the consequences of the order being made in an amount lower than the benefit figure.

12.33 These recommendations will ensure that the defendant and general public are clear about the defendant's ongoing liability for the full outstanding benefit figure and that there is transparency with regard to the confiscation order itself.

Recommendation 48.

12.34 We recommend that the Criminal Procedure Rule Committee considers incorporating (whether in rules or as it sees fit) a provision to the effect that where:

(1) a defendant's outstanding benefit is lower than their total benefit; and/or

(2) a confiscation order is made in an amount less than the recoverable amount

the court should satisfy itself that the defendant understands:

(a) what each figure means;

(b) why the figures are different; and

(c) that it will be open to the prosecution to seek to recover more of the outstanding benefit in future, until it is repaid in full.

Recommendation 49.

12.35 We recommend that the Judicial College consider including an example direction in the Crown Court Compendium to assist the judge in satisfying themselves that all of the matters set out by the Criminal Procedure Rule Committee in respect of the confiscation order have been understood by the defendant.

Recommendation 50.

12.36 We recommend that His Majesty's Courts and Tribunals Service consider including in the form 5050 on which confiscation orders are recorded a brief explanation of the consequences of the order being made in an amount lower than the outstanding benefit figure.

PROPOSALS 3 AND 4 – THE BURDEN OF PROOF IN RELATION TO HIDDEN ASSETS

Current law

12.37 In our summary consultation paper, we summed up the law on hidden assets:

> "Hidden assets" 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 their 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."[19] […]
>
> Hidden assets have been described as one of "the many ills that beset the confiscation regime".[20]
>
> By their nature, the location and form of a hidden asset will be unknown to the authorities, making enforcement difficult (if not impossible).[21]
>
> Hidden assets findings arise from the burden of proof being on the defendant to show what has become of their benefit. The reverse burden of proof means that a defendant will be required to produce financial records, which may not have been kept or may not be in good order. Further, a defendant who is at the end of what may have been lengthy criminal proceedings, during which they may have already been disbelieved on oath, is required to give yet more evidence before the court.[22]

12.38 As of 31 March 2022 the total value of confiscation debt estimated to be recoverable is £146 million compared to a gross debt of £2,438 million. This equates to approximately 6% of the amount still owed.[23]

Consultation paper

12.39 In the consultation paper we considered carefully whether the burden of proof in connection with hidden assets should be on the prosecution, rather than the defence and provisionally concluded that it should not.[24]

12.40 Instead, we considered that a more nuanced approach should be taken to evaluating the evidence provided by the defendant, which reflects the case law on hidden assets. Under this approach, we provisionally proposed that the law should provide a residual safeguard by requiring that the court makes an order in a sum less than the benefit figure where, having regard to all the circumstances of the case, the defendant proves *or the court is otherwise satisfied* that the available amount is less than the defendant's benefit. This provisional proposal would require a court to go beyond a simple analysis of whether the defendant has satisfied their burden of proof, and

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

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

21 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,

22 Confiscation of the proceeds of crime after conviction: Summary of our consultation paper (2020) Law Commission, p 19.

23 *Trust Statement 2021-2022 of His Majesty's Courts and Tribunals Service* (2021-2022) HC 449, p 12.

24 CP 249, paras 16.17 to 16.44.

instead the court must consider all of the circumstances and all of the evidence (no matter which party adduced it).

12.41 We consulted on both:

(1) not introducing a legal or evidential burden on the prosecution; and

(2) requiring the court to consider not just evidence adduced by the defence but all other circumstances of the case before making a hidden assets finding.

Consultation responses

No legal or evidential burden on the prosecution to satisfy the court that assets have been hidden by the defendant

12.42 A very strong majority of consultees agreed that the prosecution should not bear a legal or evidential burden to satisfy the court that assets have been hidden by a defendant.[25] HM Government summed this up by saying that it would defeat the purpose of the regime to put the burden of proving something that is in the unique knowledge of the defendant on the prosecution.

12.43 Of those who did consider that there should be an evidential burden on the prosecution, the primary concern was that hidden assets findings are inappropriately made, because of the issues identified above which arise from having a strict burden of proof on the defendant.

Requiring the court to consider not just evidence adduced by the defence but all other circumstances of the case before making a hidden assets finding

12.44 An overwhelming majority of consultees supported this proposal.[26] Although some consultees considered that this reflects what should happen in current practice,[27] a requirement for the judge to consider all of the evidence, whether adduced by the defendant or otherwise, was welcomed as a way to ensure that the law is applied fairly.

12.45 Consultees considered that any articulation of the burden of proof ought to be in primary legislation.[28]

Analysis

12.46 Having considered consultees' responses, which were largely in favour of there not being a burden of proof on the prosecution in connection with hidden assets, we do not recommend that such a burden be introduced. As noted above and in the consultation paper:[29]

> "The size of his realisable assets at the time of conviction [is] likely to be peculiarly within the defendant's knowledge".[30] The defendant is therefore best placed to

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25 Consultation question 55 (45 responses: 37 (Y), 8 (N); 17 did not answer).
26 Consultation question 56 (43 responses: 41 (Y), 2 (N); 19 did not answer) and summary consultation question 13(1) (32 responses: 26 (Y), 3 (N), 3 (O); 5 did not answer).
27 Bar Council; Andrew Campbell-Tiech KC.
28 South East Confiscation Panel, East Kent Bench; Bar Council.
29 CP 249, para 16.27.
30 *R v Dickens* [1990] 2 QB 102, [1990] 2 WLR 1384, per Lord Lane CJ at [105].

explain what has happened to their assets since the making of the confiscation order.

12.47 The key concerns related to judicial decision-making only on the basis of evidence added by the defendant, rather than considering the evidence in the case as a whole. Accordingly, it is perhaps unsurprising that there was overwhelming support for our provisional proposal to require the court to consider all of the surrounding circumstances.

Recommendation 51.

12.48 We recommend that the court must make a confiscation order in a sum less than the outstanding benefit where, having regard to all the circumstances of the case, the defendant proves or the court is otherwise satisfied that the available amount is less than the outstanding benefit.

PROPOSAL 5 – REFLECTING PRINCIPLES RELATED TO HIDDEN ASSETS IN THE CRIMINAL PROCEDURE RULES OR A CRIMINAL PRACTICE DIRECTION

Current law and consultation paper

12.49 In Chapter 11 we discuss areas of confiscation case law that have developed that we consider could be codified, reflected in the Criminal Procedure Rules or a practice direction. The purpose of this is to ensure that the law is both clear and accessible.

12.50 With that in mind, and with regards to hidden assets, we identified that a hidden assets finding is a creature of case law[31] and that therefore the principles relating to when it might be appropriate to make a hidden assets finding are not readily accessible. In the consultation paper we cited the problems that this has caused in terms of incorrect and inappropriate application of the case law.[32] Therefore, we provisionally proposed that principles relating to hidden assets be incorporated into a criminal practice direction.

Consultation responses

12.51 An overwhelming majority of consultees considered that law on hidden assets should be incorporated into a criminal practice direction to make the law clear and accessible.[33] However, some questioned whether a Practice Direction was the right instrument to use, since this is arguably a matter of substantive law that should be included in primary legislation rather than in an instrument primarily intended to deal with procedure.[34]

12.52 In the summary consultation paper, we asked consultees about the general principle of whether there should be a series of non-exhaustive factors that are set out in a criminal practice direction which should be taken into account when considering

31 CP 249, paras 16.1 and 16.55.
32 See for example *R v Brooks* [2016] EWCA Crim 44, [2016] 4 WLR 79.
33 Consultation question 57 (40 responses: 36 (Y), 4 (N); 22 did not answer).
34 Including Bar Council; Financial Conduct Authority; Rudi Fortson KC.

making a hidden assets finding.[35] We identified specific factors in this regard in the main consultation paper[36] and we address these in relation to proposal 6.

Analysis

12.53 Although not articulated in relation to hidden assets, as with consultees' views on the risk of dissipation test in connection with restraint,[37] we consider that it is incongruous to include any guidance on hidden assets without a clear statutory provision that hidden assets findings are permissible within the statute itself. Accordingly, we recommend that hidden assets provisions are included within the primary legislation to supplement the provisions relating to calculation of the available amount.

12.54 We therefore recommend that there be an express statutory provision to the effect that hidden assets findings can be made. We also recommend the articulation of some non-exhaustive factors that should be taken into account when deciding whether to make such a finding. We consider that where possible it is preferable for such factors to be in primary legislation rather than a criminal practice direction, to ensure that the law is as self-contained and clear as is practicable. We address what those factors should be in the next section.

Recommendation 52.

12.55 We recommend that POCA 2002 be amended to include a provision to the effect that where the value of the defendant's available amount appears to be lower than the value of the outstanding benefit the court may treat the difference between the values as assets which have been hidden by or on behalf of the defendant, and which are available to satisfy the confiscation order.

Recommendation 53.

12.56 We recommend that factors to assist the court in determining whether there are hidden assets be set out in POCA 2002.

PROPOSAL 6 – THE FACTORS TO BE TAKEN INTO ACCOUNT IN RELATION TO HIDDEN ASSETS

The consultation paper

12.57 In the consultation paper we proposed that:

(1) In determining whether to make a hidden assets finding the court should consider (amongst any other matters that it considers relevant):

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35 Summary consultation question 13(2) (32 responses: 26 (Y), 3 (N), 3 (O); 5 did not answer).
36 Consultation question 58.
37 See Chapter 17 - Restraint.

(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; and

(d) the potential risk of injustice if a "hidden assets finding" inappropriately increases the "available amount".

(2) 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.

Consultation responses

12.58 A significant majority of consultees were in favour of the factors that we had identified.[38] Whilst some of those in favour positively endorsed the inclusion of specific factors, others were less explicitly supportive, stating that it would cause no harm to do so.[39]

12.59 Consultees questioned:

(1) whether we should specify that representations made by the parties should be taken into account. It was suggested that this was stating the obvious[40] and that it could introduce a burden on the prosecution "by the back door".[41]

(2) the value of specifying that the defendant is not obliged to give evidence and that the quality of such evidence might be affected by the fact that evidence is being given in a post-conviction environment.[42] Further, it was felt that despite there not being a formal adverse inference which can be drawn in the event that a defendant fails to give oral evidence, the fact that a defendant can be obliged to provide information through a disclosure order impacts on the notion that the defendant is not obliged to give evidence.[43]

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38 Consultation question 58 (44 responses: 31 (Y), 2 (N), 11 (O); 18 did not answer).
39 Financial Conduct Authority; Financial Crime Practice Group at Three Raymond Buildings.
40 Financial Crime Practice Group at Three Raymond Buildings.
41 Serious Fraud Office.
42 Financial Crime Practice Group at Three Raymond Buildings.
43 An individual within the National Crime Agency.

12.60 The Prisoners' Advice Service suggested that difficulties faced by prisoners in gathering evidence should also be taken into account. They noted that prisoners do not have access to the internet, mobile phones, laptops or other electronic devices, or to their bank statements, business accounts, personal invoices or receipts. In addition, paperwork sent to prison often gets lost and prisoners' property often goes astray when they are transferred to other prisons. Furthermore, prisoners can only get access to phones at certain times and there is often a queue. Even when calls can be made, prisoners can only phone pre-approved numbers and the process for approving new numbers was said to be slow.

Analysis

12.61 Some of the factors that we identified as relevant to a hidden assets determination were intended to deal with the same concern as identified and addressed through the recommendation which permits the court to take into account all of the circumstances of the case before reaching a hidden assets finding, rather than simply considering evidence adduced by the defendant. For example, we provisionally proposed that the court take into account the facts of the case taken as a whole, whether derived from evidence given by the defendant, sources of evidence other than the defendant or representations made by the parties. Because these factors are already dealt with through the above recommendation, we do not consider that they need to be further repeated as indicative factors.

12.62 Similarly, we identified factors about the weight to be attributed to the defendant's evidence. Again, this was most pertinent when the court was considering only the evidence adduced by a defendant. Instead, the court is now required to consider all of the circumstances of the case. There is therefore less need for such guidance. Furthermore, how credible a witness appears to be is likely to be case specific and judges are likely to take into account the sorts of factors identified without them being articulated expressly.

12.63 We also identified factors which may mean that the defendant's available amount might be less than the outstanding benefit. This includes any personal expenditure incurred by the defendant (not related to the criminal activity) which has been met from the defendant's benefit. Similarly, changes in the value of assets may also be relevant and should also be taken into consideration. We consider that such factors could be set out helpfully in statute.

12.64 We note that we have omitted the words "more likely than not to have been met" in the final recommendation because we have determined that it is unnecessary to articulate the standard of proof when the civil standard already applies to confiscation proceedings in their entirety.

Recommendation 54.

12.65 We recommend that legislation should set out that, in considering whether to make a hidden assets finding, the court must consider whether any difference between the outstanding benefit and the defendant's apparent available amount is due to:

(1) Personal expenditure incurred by the defendant (unrelated to the criminal conduct) which has been met from the defendant's benefit; or

(2) changes in the value of assets.

HOW THESE RECOMMENDATIONS FIT TOGETHER

12.66 The issue of hidden assets should be taken together with the recommended refinements to the test for identifying the recoverable amount.

(1) The court must impose an order in a sum less than the outstanding benefit where, having regard to all the circumstances of the case, the defendant proves or the court is otherwise satisfied that the available amount is less than the outstanding benefit.

(2) In determining (1), where the value of the defendant's identified assets is lower than the OB, the court may treat the difference as having been hidden by or on behalf of the defendant, and treat that difference as part of the available amount.

(3) In determining (2), the court must consider whether any difference between the OB and the defendant's identified assets is due to:

(a) expenditure incurred by the defendant which has been met from the defendant's benefit; or

(b) falls in the value of assets.

PROPOSAL 7 – TAINTED GIFTS: INCORPORATING *R V HAYES* INTO A PRACTICE DIRECTION

12.67 We made a number of provisional proposals in connection with tainted gifts, most of which are dealt with elsewhere in this report.[44] In this chapter we discuss the incorporation of the principle in *R v Hayes*[45] into a confiscation Practice Direction[46] and the question of amending the definition of a "tainted gift" in section 77(5)(a) of POCA 2002.[47]

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44 Consultation questions 59 to 62 are addressed in Chapter 16 – Provisional discharge.
45 *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060.
46 Consultation question 63.
47 Consultation question 64.

Current law

12.68 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.

12.69 The value of the tainted gift is then deemed to form part of a defendant's available assets for the purposes of the confiscation order and the defendant is consequently liable to repay the value of that gift.

12.70 At paragraph 10.39 of the Consultation Paper[48] we summarised the facts of *R v Hayes:*[49]

> 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 to what extent the "family services" provided by the appellant's wife constituted valuable consideration when determining the issue of a tainted gift.
>
> 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.
>
> 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

48 CP 249.

49 *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060

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."[50]

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.

Consultation paper

12.71 In the consultation paper we provisionally proposed that the following principle articulated in *R v Hayes*[51] 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.[52]

Consultees' responses

12.72 There was a strong majority in favour of including the principle articulated in *R v Hayes* in connection with consideration and tainted gifts.[53]

12.73 However, as we discuss in Chapter 11 of this report, "Codifying the Case Law", when consultees were asked about the appropriate vehicle for reform, there was disagreement as to whether principles derived from case law should be incorporated into a confiscation Criminal Practice Direction or into non-statutory guidance.[54] Some considered that input from experts might be required,[55] or specialist judges might be needed.

Analysis

12.74 We note in Chapter 11 of this report that in each of the areas for which we asked consultees directly about the merits of distilling principles in a written format, the response was overwhelmingly in favour. There is clearly a strong appetite for ensuing that the principles that apply in confiscation be readily accessible.

12.75 We therefore recommend that the CPRC should consider a provision to the following effect:

> (1) 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

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50 *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060 at [47].
51 *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060.
52 Consultation question 63.
53 Consultation question 63 (39 responses: 32 (Y), 1(N), 6 (O); 23 did not answer).
54 Bar Council; Garden Court Chambers.
55 Personal response from an individual at HMRC; personal response; personal response from a solicitor from Blake Morgan LLP.

of services or otherwise) the court should consider the guidance given in *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060, namely:

(a) whether that consideration is capable of being assessed as consideration of value; and

(b) if so, to what extent.

Recommendation 55.

12.76 We recommend that the Criminal Procedure Rule Committee should in whatever way it considers most appropriate (either in rules or by some other means) consider a provision to the following effect:

(1) 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 should consider the guidance given in *R v Hayes* [2018] EWCA Crim 682, [2018] 1 WLR 5060, namely:

(a) whether that consideration is capable of being assessed as consideration of value; and

(b) if so, to what extent.

PROPOSAL 8 – TAINTED GIFTS: AMENDING SECTION 77(5)(A) OF POCA 2002

Current law

12.77 Section 77(5)(a) of POCA 2002 defines a tainted gift as a gift made "after the date" on which the offence was committed.

12.78 In *R v Lehair*,[56] the defendant robbed a bank. Less than two 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 defendant's husband should not have been treated as a tainted gift because the transfer occurred on the date on which the offence was committed.

12.79 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

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

which any tainted gift will fall for the consideration in the court's powers of confiscation.[57]

Consultation paper

12.80 In the consultation paper, we suggested 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".[58]

Consultees' responses

12.81 Consultees were overwhelmingly in favour of making this amendment,[59] which was described by one individual respondent as "obvious and necessary". A number of consultees said that the amendment would also be more consistent with the criminal lifestyle assumption provisions.

12.82 Of the two respondents who disagreed, one thought that the current wording of "the date on which the offence was committed" was less open to interpretation than "after the offence was committed". The other considered that in her experience, gifts had been dealt with by *R v Lehair* and so no amendment of the law was needed.

Analysis

12.83 This proposal received a very high degree of support. Although one consultee considered that the current law has not posed problems, that appears to be in spite of, rather than because of, the wording of the legislation, with the principle in *R v Lehair* being applied.

12.84 We consequently recommend that the definition of a tainted gift currently found in section 77(5)(a) of POCA 2002 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".

Recommendation 56.

12.85 We recommend that the definition of a tainted gift 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".

57 *R v Lehair* [2015] EWCA Crim 1324, [2015] 1 WLR 4811 at [18] and [21].
58 CP 249, para 17.116.
59 Consultation question 64 (42 responses: 40 (Y), 2 (N); 20 did not answer).

Part 5: Enforcement of the Confiscation Order

This Part comprises two chapters and centres on the enforcement of confiscation orders:

Contingent Orders (Chapter 13); and

Enforcement (Chapter 14).

In these chapters we consider the current enforcement regime for confiscation orders make a series of recommendations which aim to strengthen the existing mechanisms.

In Chapter 13 we discuss the fact that confiscation orders are made by the Crown Court but enforced by the magistrates' court which leads to an inevitable delay in enforcement orders being made. We consequently make recommendations which afford the Crown Court the power to make enforcement orders earlier in confiscation proceedings.

In Chapter 14 we make recommendations a series of recommendations aimed to improve and strengthen the enforcement of confiscation orders. These relate to the appropriate venue for enforcement proceedings, confiscation assistance orders, the application of collection orders to confiscation orders and the power of courts to compel the defendant's attendance during enforcement proceedings.

Chapter 13: Contingent orders

INTRODUCTION

13.1 In the consultation paper, we considered potential additional enforcement options for confiscation orders.[1] One option we explored was the prospect of "contingent vesting orders" which would improve enforcement in a manner consistent with the existing enforcement 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".[2]

(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.

13.2 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; and

(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.

13.3 The key issues we identified when assessing the viability of such a regime were:

(1) when a contingent order should be imposed;

(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 imposed should be dealt with;

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1 Confiscation of the Proceeds of Crime after Conviction: A Consultation Paper (2020) Law Commission Consultation Paper No 249, p 451.

2 Proceeds of Crime Act 2002, s 13A(2).

(4) the interaction between the enforcement of confiscation orders and financial remedy proceedings following the dissolution of a marriage or civil partnership; and

(5) the types of contingent orders that should be available.

13.4 We considered each of these issues in turn and ultimately made the following provisional proposals for reform.

(1) 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:

(a) there are reasonable grounds to believe that the defendant will fail to satisfy the order through wilful refusal or culpable neglect; or

(b) 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 the defendant's share of the asset will not be made available for realisation by the expiry of the time to pay period.[3]

(2) First, in determining whether such an order is appropriate (before later determining whether to, in fact, make the order) the court should consider a number of non-exhaustive factors.

(3) When imposing a contingent order, the Crown Court should be able to order that if the confiscation order is not satisfied as directed:

(a) an asset, such as a property, will vest in a trustee for confiscation;

(b) funds held in a bank account will be forfeited;

(c) seized property will be sold;

(d) a warrant of control will take effect;

(e) an attachment of earnings order or deduction from benefits order will be made; or

(f) a collection order will be made.[4]

(4) Once the court has determined that such an order would be appropriate, there ought to be a non-exhaustive list of statutory factors for the court to consider when exercising its discretion to actually make a contingent order, including:

(a) the use ordinarily made, or intended to be made, of the property;

(b) the nature and extent of the defendant's interest in the property;

[3] Consultation question 65 and summary consultation question 15.
[4] Consultation question 66.

(c) the needs and financial resources of the spouse, civil partner, former spouse or former civil partner of the defendant;

(d) the needs and financial resources of any child of the family;

(e) (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;

(f) whether the asset in question is tainted by criminality; and

(g) the extent of an interested party's knowledge of the same.[5]

(5) 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 should 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:

(a) the third party was not given a reasonable opportunity to make representations at an earlier stage of the confiscation proceedings; or

(b) the third party had a good reason for not making the application earlier in the confiscation proceedings and 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.[6]

(6) 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.[7]

13.5 In this chapter, we recommend in line with (1) to (6).

13.6 We discuss appeals against contingent orders comprehensively in Chapter 22 – Appeals.

5 Consultation question 67.
6 Consultation question 68.
7 Consultation question 69. This applies to both contingent orders and enforcement more generally.

OVERVIEW OF POLICY

13.7 That:

(1) 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. A contingent order may be made if:

(a) there are reasonable grounds to believe that the defendant will fail to satisfy the order through wilful refusal or culpable neglect;

(b) 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, the defendant's share of the asset will not be made available for realisation by the expiry of the time to pay period.

(2) In determining whether a contingent order is appropriate the court should consider a number of non-exhaustive factors.

(3) When imposing a contingent order, the Crown Court should be able to impose an enforcement order over property including but not limited to the following:

(a) an asset, such as a property, will vest in a receiver;

(b) funds held in a bank account will be forfeited;

(c) seized property will be sold;

(d) a warrant of control will take effect;

(e) an attachment of earnings order or deduction from benefits order will be made; or

(f) a collection order will be made.

(4) When the Crown Court has imposed a contingent order, the first enforcement hearing should also be listed in the Crown Court to determine whether the contingent order should be activated.

(5) 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 raise such an interest in the Crown Court after the making of the confiscation order and before either assets are automatically vested in a receiver or a contingent order is activated, if:

(a) the third party was not given a reasonable opportunity to make representations at an earlier stage of the confiscation proceedings or the third party had a good reason for not making the application earlier in the confiscation proceedings; and

(b) 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.

(6) Where the intervention of the prosecution authority is likely to represent an increase in complexity such that the High Court would be the appropriate venue for concurrent disposition of the proceedings, or it is otherwise in the interests of justice for concurrent disposition of the proceedings to take place,[8] allocation may be to the High Court. Otherwise, proceedings should continue before an appropriate judge in the Financial Remedies Court.

PROPOSAL 1 – DISCRETION TO MAKE A CONTINGENT ORDER

The consultation paper

13.8 In the consultation paper,[9] our view was 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 their 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.

Wilful refusal or culpable neglect

13.9 It may be apparent at the time of a confiscation hearing that a defendant is highly unlikely to satisfy their 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 assets to put them beyond the reach of the court is unlikely to co-operate in the satisfaction of the confiscation order.

13.10 Under the current regime, in considering whether there has been wilful refusal or culpable neglect, 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) in sentencing; and

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8 For example, because of a particular need for expeditious resolution of the confiscation proceedings or because a history of obstruction of the confiscation proceedings suggests that the defendant is likely to appeal both any order of the Family Court and the confiscation order.

9 CP 249, para 21.9.

(3) when considering the imposition of a restraint order.

13.11 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.

13.12 Before activating the default term of imprisonment, the 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.[10] The criminal standard is appropriate because the defendant's liberty is at stake.

13.13 The imposition of a contingent order differs in that it will only relate to property and not activation of the default term. Liberty is not at stake and assets will only be removed from the defendant in the event that they fail to realise the assets themselves. We therefore did not consider that it should be necessary for the court to be satisfied to the criminal standard before imposing a contingent order.[11]

13.14 The test used in restraint proceedings after proceedings have commenced is "reasonable cause to believe" that an alleged offender has benefitted from criminal conduct.[12]

13.15 We considered that the higher threshold of "belief" as opposed to "suspicion" is an appropriate bar to set when assessing whether the defendant will fail to satisfy their confiscation order due to wilful refusal or culpable neglect.

Reasonable grounds in connection with third-party interests

13.16 In Chapter 26 of the consultation paper we set out the problems identified by stakeholders in connection with the determination of third-party interests.[13] In particular, we noted the potential delays that may be caused if third-party interests are not determined until the enforcement stage.

13.17 We therefore considered that making a contingent order should also be possible if there are reasonable grounds to believe that:

(1) 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.

13.18 In such circumstances, we considered that the court should make a declaration in connection with third-party interests, under the equivalent of section 10A of POCA 2002, if it has not done so already.

13.19 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

10 Under section 82 of the Magistrates' Courts Act 1980.
11 CP 249, para 21.20.
12 Proceeds of Crime Act 2002, s 40(3).
13 CP 249, paras 21.26 to 21.30.

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 determined that the court should consider whether:

> In light of any third-party interests, whether established through a declaration or otherwise, there [are] reasonable grounds to believe that, without a contingent order, it is more likely than not the defendant's share of the asset will not be made available for realisation by the expiry of the time to pay period.[14]

Consultation responses

13.20 This proposal was very well-received by consultees.[15]

13.21 The Bar Council commented that unlike the sanction of imprisonment, this type of order would also have the benefit of making it more likely that the proceeds of crime would in fact be recovered. However, they also observed that this proposal may open the way for satellite litigation in relation to enforcement orders.

13.22 One consultee agreed with this proposal but added that care should be taken to ensure that the rights of third parties are not harmed.

13.23 The City of London Police supported this proposal, noting that contingent orders would be a species of compliance order which would aid enforcement but ought not to be automatic because there are cases in which there is a good reason why an asset has not been realised within the "time to pay".

13.24 The Insolvency Service also supported this proposal but noted that consideration ought to be given to the impact this will have on the resources of prosecution agencies.

13.25 Rudi Fortson KC warned that a considerable amount of Crown Court time may be expended dealing with the issues that arise out of this proposal, including whether the power to make a contingent order should be exercised.

13.26 Kingsley Napley LLP did not support this proposal and queried what would constitute "reasonable grounds" and "culpable neglect". They envisaged that this lack of clarity will generate significant additional case law. They did not support the potential for some orders to be enforceable "forthwith" and suggested that they are unable to envisage a scenario where a contingent order would not suffice.

13.27 One consultee proposed an alternative approach: automatic vesting of assets should occur at the time the order is made to ensure that the order is satisfied as soon as possible and not reliant on the defendant's actions. In order to ensure that third-party interests are not overlooked, there could be a period in which the assets are held by the trustee or receiver and not able to be realised. If there is a concern in relation to the cost of receivers, there could be a threshold asset value above which automatic vesting applies.

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14 CP 249, para 21.29.

15 Consultation question 65 (43 responses: 36 (Y), 1 (N), 6 (O); 19 did not answer); and summary consultation question 15 (34 responses: 30 (Y), 1 (N), 3 (O); 3 did not answer).

13.28 The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks' Society) provided a very comprehensive response to this proposal in which they urged the Law Commission to consider whether a finding of wilful refusal or culpable neglect is necessary given that the default term has already been imposed in the Crown Court on the understanding that this will be the penalty if the order is not paid.

13.29 The Royal United Services Institute submitted a response in support of the proposal but noted that:

> This legal change should be accompanied by the establishment of a government, Crown or law enforcement unit which has experience of asset management and realisation to avoid considerable proportions of the realised assets being put towards the cost of expensive receivers.

Analysis

Wilful refusal and culpable neglect

13.30 During consultation, some stakeholders expressed concern with the language of "wilful refusal" and "culpable neglect" because of its relationship to warrants of commitment and the conflicting case law on this enforcement mechanism. Section 82(4) of the Magistrates' Courts Act 1980 ("MCA 1980") governs the circumstances in which the magistrates' court can activate the default term of sentence and commit the defendant to custody.

13.31 In the consultation paper we proposed to apply this mechanism in the context of contingent orders. This familiar criterion provides a way for courts to assess whether it is appropriate to activate a contingent order against a defendant's assets.

13.32 However, as noted by consultees, there has been some conflicting case law interpreting "wilful refusal" and "culpable neglect" and its relevance and application pursuant to section 82(4) of the MCA 1980.

13.33 It has been argued that the wilful refusal and culpable neglect test in section 82(4) is only engaged where the court is required to inquire into the defendant's means.[16] It is further argued that the court is not required to conduct a means inquiry when considering an application for committal in respect of non-payment of a confiscation order.[17]

13.34 However, the recent High Court decision of *Collins v Director of Public Prosecutions*[18] affirms the position of earlier case law,[19] and helpfully clarifies the issue. In this judgment it was decided that a warrant of commitment for default in the payment of a confiscation order should not be issued unless the court:

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16 Millington, Sutherland and Williams, *The Proceeds of Crime* (5th ed 2018), para 11.96.

17 Millington, Sutherland and Williams, *The Proceeds of Crime* (5th ed 2018), para 11.96, citing *R v Hastings and Rother Magistrates Court Ex p Anscombe* [1998] 2 WLUK 91, [1998] Crim LR 812.

18 *Collins v Director of Public Prosecutions* [2021] EWHC 634 (Admin), [2021] 3 WLUK 320.

19 *Munir v Bolton Magistrates' Court* [2010] EWHC 3794 (Admin), [2010] 12 WLUK 614; *Cooper v Birmingham Magistrates' Court* [2015] EWHC 2341 (Admin), [2015] 6 WLUK 334; *R (Sanghera) v Birmingham Magistrates' Court* [2017] EWHC 3323 (Admin), [2017] 12 WLUK 185 at [10]; *Olabinjo v Westminster Magistrates Court* [2020] EWHC 1093 (Admin), [2020] 5 WLUK 21.

(1) is satisfied that the default is due to the offender's wilful refusal or culpable neglect; and

(2) has considered or tried all other methods of enforcing payment of the sum and it appears to the court that they are inappropriate or unsuccessful.

13.35 In light of this case law reinforcing the application of the "wilful refusal or culpable neglect" test as an appropriate benchmark for determining whether to activate a default sentence, we have concluded that it is appropriate to adopt the same approach to the activation of contingent orders. This is a familiar test in confiscation proceedings and it is preferable to use consistent concepts and language.

Automatic vesting

13.36 With regard to the notion of contingent orders more generally, we received responses from a small number of consultees who preferred the notion of automatic vesting of assets at the point of the confiscation order to ensure that they cannot be dissipated or their value diminished during the time to pay period.

13.37 This proposal was considered at length in the consultation paper,[20] and ultimately abandoned in favour of the proposal for contingent orders which affords the court more discretion. The primary problem with a system of automatic vesting is that it could place an overwhelming burden on law enforcement and prosecution agencies with regard to the holding of assets or require these agencies to rely on costly private receivers, even in cases where assets might have been realised by the defendant.

13.38 While we accept that creating a system of contingent orders adds an additional stage to the process, the efficiencies promoted by a system which creates a mechanism for the expeditious vesting of assets after the expiry of the time to pay period are likely to outweigh any potential for delay resulting from this additional step.

13.39 The matter of the potential for resultant appeals is discussed below, but even accounting for the prospect of new appeals resulting from the activation of contingent orders, this enforcement mechanism will render the process more efficient because the contingent orders will act as an incentive for defendants to pay their orders within the time to pay period so as not to risk having their assets vested.

Conclusion

13.40 We ultimately conclude that in order to achieve a fair outcome for defendants, while making the enforcement process more efficient, it is appropriate to recommend contingent orders along the lines provisionally proposed in the consultation paper.

13.41 This means that the courts must decide whether an initial threshold is satisfied when considering whether an enforcement order is appropriate. This threshold is whether:

(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

[20] CP 249, paras 21.67 to 21.74.

order, the defendant's share of the asset will not be made available for realisation by the expiry of the time to pay period.

13.42 The second ground will require the court to consider any third party interests in the property. While third-party interests are not intrinsic to the assessment that, 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, they will inform it.

13.43 Once this threshold has been met, the court must then consider a series of non-exhaustive factors which determine whether it will exercise the power to make an enforcement order and whether the order will be immediate or on a contingent basis. These factors are considered below (see below).

13.44 This two-stage process ensures that the court carefully considers whether it is appropriate for the enforcement order to be made, taking into account any submissions made by the defendant and any third-party interests.

13.45 Once this two-stage process has been undertaken, the enforcement order will either be activated immediately, or the contingent enforcement order will ordinarily be activated at the end of the time to pay period. Activation of the order is discussed below.

13.46 The words "more likely than not" have been omitted from part (2) of the final recommendation because we have determined that it is unnecessary to specify the standard of proof to be applied given that the standard for confiscation proceedings is "on the balance of probabilities" which itself means it is "more likely than not".

Recommendation 57.

13.47 We recommend 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 hearing to activate the order) 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, the defendant's share of the asset will not be made available for realisation by the expiry of the time to pay period.

PROPOSAL 2 – FACTORS TO BE CONSIDERED WHEN EXERCISING DISCRETION

The consultation paper

13.48 In the consultation paper we noted that even when the test for imposing a contingent order is satisfied, there may be little point in making a vesting order:[21]

(1) over a defendant's "hidden assets" if they cannot be found; or

(2) if the asset in question is of minimal value and the expense of vesting the asset would exceed its value.

13.49 Accordingly, we concluded that the court should have a discretion as to whether to impose such an order.[22] In the consultation paper we considered the way in which discretion is exercised by courts in other jurisdictions in the context of asset forfeiture in confiscation proceedings, noting the models in New Zealand and Scotland.[23] We 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

(2) the extent of the third party's knowledge of the same.[24]

13.50 We ultimately concluded that codifying the following factors 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:

(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 whether the asset in question is tainted by criminality.[25]

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21 CP 249, para 21.31.
22 CP 249, para 21.31.
23 CP 249, paras 21.34 to 21.35.
24 CP 249, p 433.
25 Consultation question 67.

Consultation responses

13.51 The factors identified received a high level of support from consultees.[26]

13.52 The City of London Police supported this proposal and noted that they are particularly supportive of the effort to prevent the delay of confiscation proceedings due to parallel applications made in the family court.

13.53 An individual practitioner within the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland responded that they agreed with the proposal and further noted that it will be apparent in some cases that the defendant will not realise their assets or make efforts to pay the order.

13.54 The Magistrates' Association also supported the proposal and noted that the list of factors is comprehensive.

Analysis

13.55 As discussed at paragraph 13.41 above, the consideration of these non-exhaustive factors occurs at the second stage of the process of determining whether to make an immediate or contingent enforcement order at the time the confiscation order is made. In order to determine whether an enforcement order may be appropriate, the court must first establish whether the first stage threshold is met. This threshold is whether:

(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, the defendant's share of the asset will not be made available for realisation by the expiry of the time to pay period.

13.56 Once this threshold has been met, the factors assist in determining whether the court ought to exercise its discretion to make an order and the type of order that should be made (immediate or contingent).

13.57 We therefore recommend the inclusion of a non-exhaustive list of statutory factors.

[26] Consultation question 67 (41 responses: 36 (Y), 1(N), 4 (O); 21 did not answer).

Recommendation 58.

13.58 We recommend 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 defendant's 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.

PROPOSAL 3 – TYPES OF CONTINGENT ORDER

The consultation paper

13.59 In Chapter 21 of the consultation paper,[27] we primarily focussed on contingent vesting orders. However, we also noted that there may be other types of contingent order which may assist the Crown Court in incentivising and facilitating enforcement of the confiscation order.

13.60 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 from committing a defendant to custody in default of payment, magistrates' powers include the power to impose:

(1) a warrant of control.[28] 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;[29]

(2) an order for supervision pending payment;[30]

(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

27 CP 249, p 451.
28 Magistrates' Courts Act 1980, s 76.
29 Tribunals, Courts and Enforcement Act 2007, Part 3.
30 Magistrates' Courts Act 1980, s 88.

in receipt of certain benefits, and it is not impracticable or inappropriate to do so;[31]

(4) a collection order.[32] This is an order permitting the appointment of a Fines Officer who supervises the payment of the financial order (in this instance, the confiscation order).

13.61 To enforce confiscation orders, magistrates' courts also have powers 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; and

(2) seized personal property.

13.62 A magistrates' court may order the payment of cash or money held in a bank account directly towards the satisfaction of a confiscation order.[33] 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.

13.63 A magistrates' court may order that certain personal property be sold and the proceeds distributed in prescribed ways including to satisfy a confiscation order.[34] This power applies to:

(1) seized property; and

(2) property produced in response to a production order issued under Part 8 of POCA 2002.

13.64 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.[35]

13.65 As 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 forum may serve to hamper effective enforcement.

13.66 We therefore concluded in the consultation paper 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 short of imprisonment in default as can be imposed by the magistrates when such default occurs.[36] Imprisonment in

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31 Courts Act 2003, s 97 and sch 5.
32 Courts Act 2003, s 97 and sch 5, para 12(1).
33 Proceeds of Crime Act 2002, s 67.
34 Proceeds of Crime Act 2002, s 67A.
35 Proceeds of Crime Act 2002, s 67A(2).
36 CP 249, para 21.102.

default can only be activated when a further threshold is met, which is discussed in detail in Chapter 14 of this report.

Consultation responses

13.67 Of the consultees who responded to this question, the response was overwhelmingly positive (albeit few consultees gave additional supporting comments).[37]

13.68 The Bar Council agreed with the proposal in relation to the types of orders which may be made to facilitate enforcement of the primary confiscation order but added that this ought not be an exhaustive list.

13.69 The Financial Conduct Authority supported this proposal and noted that it will make enforcement faster.

13.70 The Environment Agency supported this proposal but queried whether contingent orders would complement the existing restraint regime.

13.71 The Serious Fraud Office ("SFO") agreed that this proposal would potentially support the enforcement of confiscation orders but argued that the consent of the prosecutor ought to be required when making a contingent enforcement order. The SFO was concerned that it would be the prosecutor who becomes responsible for the seizure, control and administration of the assets.

Analysis

13.72 Consultees were largely supportive of this proposal, though expressed some concerns as to who would be responsible for assets once they have been vested given the costs of storage and realisation.

13.73 The use of the term "trustee for confiscation" was intended to connote a type of enforcement receiver, but some law enforcement and prosecution agencies were apprehensive that they may be expected to perform this function. This proposal was not intended to establish a new role for law enforcement or prosecution agencies as enforcement receivers. It was not envisaged that these organisations would perform this function. For this reason, we have changed the terminology from "trustee for confiscation" to "receiver" to ensure the role is properly understood.

13.74 This mechanism is designed to enhance the existing enforcement receivership regime because it allows an order for the appointment of an enforcement receiver to be made significantly earlier in the process (at the point at which the confiscation order is made), rather than at the point at which it becomes clear that enforcement is not effective.

13.75 We also recommend that the remit of the receiver be overseen by the Criminal Asset Recovery Board ("CARB"), discussed in Chapter 18. The streamlining of enforcement receiver processes is one of the operations we recommend would be subject to guidance from the newly established CARB, which would ensure that there is consistency in the management of assets and the minimisation of costs.

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[37] Consultation question 66 (42 responses: 34 (Y), 8 (O); 20 did not answer).

13.76 With regard to the types of contingent order proposed, we considered alternative terminology to distinguish between these, such as “contingent receivership order”, “contingent warrant of control order”. However, based on consultees’ desire for simplicity and consistency, we ultimately concluded that it would be preferable for the court to have the discretion to impose a “contingent enforcement order” generally and then have a further discretion to decide the terms of the order, which may include directing that:

(1) an asset, such as a property, will vest in a receiver;

(2) funds held in a bank account will be forfeited;

(3) seized property will be sold;

(4) a warrant of control will take effect;

(5) an attachment of earnings order or deduction from benefits order will be made; or

(6) a collection order will be made.

13.77 Our intention is that these are non-exhaustive options the court may consider. We wish to retain flexibility in the event that new types of enforcement orders become available to the court.

Recommendation 59.

13.78 We recommend that the Crown Court should be able to impose, on a contingent basis, every type of enforcement order that can currently be made in the magistrates’ court. The contingent enforcement order would take effect if the confiscation order is not satisfied as directed. Such orders could include:

(1) vesting an asset, such as a property in a receiver;

(2) forfeiting funds held in a bank account;

(3) selling seized property;

(4) effecting a warrant of control;

(5) making an attachment of earnings order or deduction from benefits order; or

(6) making a collection order.

PROPOSAL 4 – ACTIVATION OF A CONTINGENT ORDER

The consultation paper

13.79 In the consultation paper, we considered two practical issues with contingent orders:

(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

13.80 We noted in the consultation paper that the logical consequence of requiring a confiscation order to be paid immediately is that any failure to pay would result in an immediate default.[38] Any contingent order made to support the enforcement of the confiscation order would therefore take effect immediately.[39]

13.81 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.

Contingent orders taking effect automatically

13.82 We also noted in the consultation paper that 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 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.[40]

Analysis

13.83 As part of our proposals for reform of current enforcement powers, we provisionally proposed that, in general, any first enforcement hearing be listed in the Crown Court. We considered that such a hearing could ameliorate the difficulties identified above.[41]

13.84 We provisionally proposed that where a contingent order is made, the Crown Court must:

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38 CP 249, para 21.42.

39 It is arguable that a "contingent" order imposed in these circumstances could hardly be called "contingent" given its immediate effect.

40 CP 249, para 21.44.

41 CP 249, para 21.51.

(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.

13.85 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.

13.86 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 assets would truly be a measure of last resort.

13.87 An enforcement hearing before the court which imposed the order has additional benefits:

(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 receiver;

(2) a defendant will be aware that they 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 prospect of returning to Crown Court may serve to incentivise the defendant to co-operate; and

(3) the costs involved in managing and realising an asset incurred by a receiver are only borne where it is plain that a defendant cannot or will not comply with the order.

13.88 We anticipate that these recommendations will facilitate more expeditious enforcement.

Recommendation 60.

13.89 We recommend that where a contingent enforcement order has been made, the Crown Court must list an enforcement hearing in the Crown Court to determine whether the contingent order ought to be "activated".

PROPOSAL 5 – CONTINGENT ORDERS AND THIRD PARTIES

The consultation paper

13.90 In Chapter 26 of the consultation paper,[42] 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.[43] We considered that this would assist in speeding up any determination of third-party interests for the purposes of determining whether to impose a contingent vesting order. However, third-party claims can emerge late, which can delay the enforcement process. In the case of *CPS v Jarvis*, a third-party claim was rejected some six and a half years after the confiscation order had been imposed.[44]

13.91 Under the current law, in respect of section 10A determinations of the extent of the defendant's interest in property, 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

(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.

13.92 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 determined that such a provision would be apt to regulate applications.[45] This approach is used in New Zealand, which also has a safeguard to prevent tactical applications for third-party determinations, akin to section 51(8B) of POCA 2002.[46]

13.93 We therefore provisionally proposed 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 proposed that such applications should be subject to a restriction equivalent to that in section 51(8B) of POCA 2002.[47] If an asset was

42 CP 249, p 561.
43 Chapter 17 - Restraint.
44 *CPS v Jarvis* [2018] EWHC 4024 (Admin), [2018] 5 WLUK 58.
45 CP 249, para 21.64.
46 Criminal Proceeds (Recovery) Act 2009 (NZ), s 62(4).
47 CP 249, paras 21.65 to 21.66.

realised before a legitimate interest was raised, there would be nothing to prevent an aggrieved party pursuing an appropriate remedy via civil proceedings.

Consultation responses

13.94 This proposal received substantial support from the consultees who responded to this consultation question.[48]

13.95 The City of London Police supported the proposal and noted that the court should also be required to be satisfied that reasonable opportunity was not given or there was good reason why an application was not made sooner.

13.96 The Insolvency Service agreed with this proposal and added that third parties ought to be given an opportunity, as proposed, because it is in the interest of fairness. They noted that the legitimacy of the claimed interest could be tested through the application.

13.97 Practitioners from the National Crime Agency ("NCA") and National Economic Crime Centre supported the proposal and agreed that third-party interests must be dealt with before enforcement can be effected. However, they noted that any post-confiscation order claims must be rigorously examined by the court.

13.98 The South East Confiscation Panel, East Kent Bench stated that they did not feel that this proposal would be necessary if the existing provisions of the legislation were applied accurately or effectively.

13.99 The Criminal Law Solicitors' Association supported the proposal but noted that the funding of third-party applications ought to be reviewed because it is very rare to receive legal aid funding and there are often conflicts of interest which necessitate separate representation from the defendant.

13.100 A senior member of the judiciary suggested that confiscation action ought to take precedence over any potential family court proceedings because otherwise there may be a perverse incentive to transfer property.

Analysis

13.101 This proposal was uncontroversial amongst consultees and as a result we recommend it.

13.102 Noting the response from the Criminal Law Solicitors' Association, it is worth acknowledging that provision is made for civil legal aid in the context of section 10A determinations, so any third parties who may have an interest in property which becomes the subject of a contingent order may be eligible for means-tested funding.[49]

13.103 Consultees supported the view that while it is essential to ensure that third parties are given the opportunity to raise their interest, this must not become a technique used to delay enforcement proceedings. It was consequently agreed that the proposed conditions which must be met before the application will be considered strike an

[48] Consultation question 68 (42 responses: 33 (Y), 1 (N), 8 (O); 20 did not answer).
[49] CP 249, para 26.148.

appropriate balance between safeguarding third-party rights and ensuring efficient enforcement of confiscation orders.

Recommendation 61.

13.104 We recommend 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 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 the third party had a good reason for not making the application earlier in the confiscation proceedings; and

(2) 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.

PROPOSAL 6 – CONCURRENT CONFISCATION ENFORCEMENT AND FINANCIAL REMEDY PROCEEDINGS

The consultation paper

13.105 As we set out in Chapter 10 of the consultation paper,[50] 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.

13.106 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* as follows:[51]

> A property adjustment order under section 24 of the Matrimonial Causes Act 1973, or paragraph 7 of Schedule 5 to the Civil Partnership Act 2004, cannot be made against a bankrupt's trustee, because he is not a party to the bankrupt's marriage[52] or civil partnership. Nor can such an order be made against a bankrupt in respect of property which has vested in his 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

50 CP 249, p 189.
51 *Muir Hunter on Personal Insolvency,* Volume 1 (1987) para 3-643.
52 *Re Holliday (A Bankrupt)* [1981] Ch 405, [1981] 2 WLR 996 at 419B–D.

bankrupt is entitled, either in possession or reversion, and the bankrupt is no longer entitled to that property in possession or reversion.[53]

13.107 Vesting a defendant's assets in a receiver 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.

13.108 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.

13.109 As we discuss in Chapter 10 of the consultation paper,[54] 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. Lord Justice Schiemann in the Court of Appeal observed in *HM Customs and Excise v MCA*:

> It does not seem to me to be axiomatic that it is more in the public interest to enforce an order under section 31 [of the Drug Trafficking Act] 1994 than to make a property adjustment order under section 24 [of the 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.[55]

13.110 In determining where the appropriate balance lies the Court of Appeal 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.

13.111 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 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,

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53 *Hellyer v Hellyer* [1996] 2 FLR 579, [1996] 7 WLUK 333; *McGladdery v McGladdery* [1999] 2 FLR 1102, [1999] 7 WLUK 448; *Ram v Ram (No.2)* [2004] EWCA Civ 1684, [2004] 11 WLUK 429.

54 CP 249, p 189.

55 *HM Customs and Excise v MCA* [2002] EWCA Civ 1039, [2003] Fam 55 at [44].

> in most cases, and certainly in this one, the fact that the assets are tainted is the decisive factor in any balance.[56]

13.112 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.

13.113 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.[57] Essentially, the jurisdiction of the Family Court is exercisable by a wide number of judges and is not venue-specific.[58]

13.114 The Court of Appeal held that this procedural device was entirely appropriate:

> Procedurally, the course adopted in this case whereby both applications under Matrimonial Causes Act 1973 ("MCA 1973") and Drug Trafficking Act 1994 ("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.[59]

13.115 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.[60]

13.116 POCA 2002 removed the jurisdiction of the High Court in relation to the appointment of receivers for the purpose of enforcing confiscation orders; the Crown Court now has exclusive jurisdiction for the appointment of receivers and accordingly, the consolidation of linked financial remedy and enforcement proceedings before the High Court is no longer possible.

13.117 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.

13.118 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

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56 *CPS v Richards* [2006] EWCA Civ 849, [2006] FLR 1220 at [26].
57 Matrimonial Causes Act 1973, ss 23 and 52.
58 Matrimonial and Family Proceedings Act 1984, ss 31B and 31C.
59 *HM Customs and Excise v MCA* [2002] EWCA Civ 1039, [2003] Fam 55 at [100].
60 *W v H (HM Customs & Excise Intervening)* [2004] EWHC 526 (Fam), [2004] 3 WLUK 413.

from her husband but there was a Crown Court restraint order in place.[61] It has been held that such an approach would not now be appropriate.[62]

13.119 In Chapter 10 of the consultation paper, we provisionally proposed 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.[63]

13.120 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 operated successfully prior to the introduction of POCA 2002.

13.121 We therefore provisionally proposed 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.[64]

13.122 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.

13.123 This proposal was designed to complement our provisional proposal in Chapter 10 of the Consultation Paper that the Crown Court should have the power in appropriate cases to refer complex matters to the High Court for a binding determination.[65]

Consultation responses

13.124 The proposal for concurrent confiscation enforcement and financial remedy proceedings was overwhelmingly supported by consultees.[66]

13.125 The Bar Council supported this proposal but noted the tension between these two areas of the law.

13.126 The Association of Chief Trading Standards Officers (ACTSO) and a number of individual trading standards officers agreed with the proposal but noted the cost implications of the proceedings for prosecutors who may be local authorities and consequently not have the same funding available as organisations such as the Crown Prosecution Service.

13.127 The City of London Police supported this proposal, noting the benefit of this as a discretionary power available to the judge.

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61 *T v B* [2008] EWHC 3000 (Fam), [2009] 1 FLR 1231.
62 *Re Stanford International Bank Ltd (In Receivership)* [2010] EWCA Civ 137, [2011] Ch 33.
63 CP 249, para 10.140.
64 CP 249, para 10.142.
65 Consultation question 27.
66 Consultation question 69 (41 responses: 38 (Y), 3 (O); 21 did not answer); summary consultation question 20 (32 responses: 26 (Y), 4 (N), 2 (O); 5 did not answer).

13.128 Practitioners from the NCA and National Economic Crime Centre also supported this proposal but noted that wherever possible confiscation should remain in the Crown Court with trained judges. Although, they also noted that it makes sense to consider all of the related matters together, earlier in the process.

13.129 In one of our consultation round-table events, a member of the judiciary expressed the view that better judicial training for Crown Court judges (including for civil judges) would be preferable to referrals to the High Court. Another member of the judiciary added that avoiding referrals to the High Court would be preferable because it may cause some Crown Court judges to feel that they are being side-lined.

13.130 At the same roundtable another member of the judiciary was concerned that referrals to the High Court increase the potential for further delay and confusion if the issues to be determined are not precisely and accurately framed in the reference.

13.131 A senior member of the judiciary commented during consultation that, where there are parallel family court proceedings, it may be necessary to try the matters together or, at the very least, have joint management hearings to arrange the order of proceedings and potentially allow for cross-disclosure of material.

13.132 One consultee commented that legal aid funding ought to be available for both sets of proceedings.

13.133 The Office of the Lord Chief Justice observed that as this affects only a very small number of cases, it could be dealt with by appropriately allocating judges.

Analysis

13.134 As we have discussed above, in our consultation paper we provisionally proposed that there be a power for concurrent confiscation enforcement and financial remedy proceedings to be dealt with together[67] to ensure that determinations are made efficiently by a court which is in possession of all relevant facts. We now explore two ways in which we might achieve that outcome:

(1) referral to the High Court; or

(2) a prioritised determination system.

13.135 We consider that referral to the High Court would be preferable only for the most complex cases. Prioritised determinations would be appropriate for the majority of cases where there are concurrent confiscation enforcement and financial remedy proceedings, with the financial remedy proceedings dealt with first before the Financial Remedies Court ("FRC") (within the Family Court) followed by confiscation enforcement proceedings in the criminal courts.

13.136 Here, we set out what form such proceedings would take. Our intention is to ensure that confiscation proceedings are dealt with in a way which minimises:

[67] For example, for a determination to be made as to whether an enforcement receiver should be appointed to realise the matrimonial home or whether seized property or funds in a bank account be transferred pursuant to the confiscation order.

(a) any increased workload for the High Court to a level which is proportionate to the just disposition of concurrent financial remedy and confiscation enforcement proceedings;

(b) delay;

(c) obstruction by defendants who wish to thwart enforcement of their confiscation orders; and

(d) conflict between different jurisdictions.

13.137 In *W v H (HM Customs & Excise Intervening)*, Mr Justice Munby (as he then was) observed that:

> Some of these cases involve only modest assets and, but for the involvement of the Crown, would be disposed of quickly and cheaply by a District Judge…. It is particularly important that costs in such cases should be kept under control and that everything should be done to simplify the procedure.[68]

13.138 Our recommendations seek to ensure that confiscation orders are enforced proactively, either through taking steps after time for payment of the confiscation order has expired or through the introduction of new contingent enforcement orders which are imposed upon the making of a confiscation order and which come into effect after expiry of time to pay. The recommendations may lead to the making of more enforcement receivership orders and more orders requiring the transfer of other assets, such as funds held in bank accounts. As was implicit in the case of *W v H*, it would not be appropriate for all such matters to require resolution before the High Court.

13.139 In *Webber v Webber and CPS*, Sir Mark Potter stated that:

> 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, His Honour Judge Kramer KC 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 the light of the findings of the High Court judge hearing the ancillary relief application.[69]

13.140 This position has clear logic. The Crown Court should not order that an enforcement receiver be appointed to sell a property, and a magistrates' court should not order that a bank account's funds be transferred out, if that property or those funds might be subject to a determination in the FRC that makes it inappropriate to do so. Furthermore, a defendant should not be sent to prison for failing to pay a confiscation order if an order or pending order of the FRC means that the defendant has neither wilfully refused to satisfy the confiscation order nor has acted with culpable neglect in so doing. We therefore consider that where there is likely to be a call for the same funds to be drawn upon pursuant to an order of the FRC and a confiscation order, the financial remedy proceedings should be concluded first.

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68 *W v H (HM Customs & Excise Intervening)* [2004] EWHC 526 (Fam/Admin) at [2].

69 *Webber v Webber and CPS* [2006] EWHC 2893 (Fam); [2007] 1 WLR 1052.

Bringing confiscation to the attention of the Financial Remedies Court ("FRC")

13.141 We note the reference in *W v H* to the District Judge who has initial conduct of the case. Financial Remedy proceedings are likely to begin before a District Judge (in what is now the FRC).

13.142 Under our original provisional proposal, the Crown Court would have to draw the attention of the FRC to the concurrent nature of the proceedings. We recognise that this would have two distinct disadvantages. First, it might place an unnecessary burden on the judiciary and/or court staff. Second, we also note that enforcement of confiscation orders might be in either the magistrates' court or the Crown Court. If enforcement were in the magistrates' court, enforcement would first have to be transferred to the Crown Court. Again, this is cumbersome.

13.143 A preferable position would be that the prosecution authority should apply to be an intervener in the financial remedy proceedings.[70] The prosecution should be aware of such proceedings because each party has a duty under the Criminal Procedure Rules to alert the court to any related family proceedings or anticipated family proceedings as soon as reasonably practicable after becoming aware of them. Therefore, the defendant and any third relevant third party[71] should alert the court to any financial remedy proceedings to which they are a party which might affect confiscation. It is not envisaged that the prosecution authority will apply to become an intervener in all cases, but only in those cases where the assets at stake are effectively "in competition" in both the financial remedy and confiscation proceedings.

13.144 On receipt of an application from a prosecution authority, we envisage that the case may be referred to the Designated Family Judge for consideration (or reconsideration) of allocation. The application to be an intervener should address the issue of allocation.

13.145 Where the intervention of the prosecution authority is likely to represent an increase in complexity such that the High Court would be the appropriate venue for concurrent disposition of the proceedings, or it is otherwise in the interests of justice for concurrent disposition of the proceedings to take place,[72] allocation may be to the High Court. Otherwise, proceedings should continue before an appropriate judge in the FRC. We note that such judges have expertise in precisely the sorts of matters that arise in most confiscation cases.

Concurrent proceedings in the High Court

13.146 In *HM Customs & Excise v A*, the Court of Appeal held that:

> Procedurally, the course adopted…whereby both applications under MCA 1973 and [the pre-POCA confiscation legislation] were listed together before a *Family Division judge of the High Court* was, I am sure, correct and should in my judgment be the

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70 Our primary position would be that this should be without payment of a fee in light of the public function that is being performed and to prevent the prosecutorial risk aversion to which we referred throughout the consultation paper.

71 A party who might be subject to a binding determination of the Crown Court about interests in property pursuant to section 10A of the Proceeds of Crime Act 2002.

72 For example, because of a particular need for expeditious resolution of the confiscation proceedings or because a history of obstruction of the confiscation proceedings suggests that the defendant is likely to appeal both any order of the Family Court and the confiscation order.

procedure whenever a conflict or potential conflict arises between the two jurisdictions.[73]

13.147 In *W v H (HM Customs & Excise Intervening)*, Mr Justice Munby (as he then was) gave guidance about how such proceedings should be dealt with, including:

(1) directions to be given by the District Judge in the Family Court prior to the case being transferred to the Family Division of the High Court; and

(2) steps to be taken on transfer of the case to the High Court.

Steps taken on transfer

13.148 If the decision is taken to transfer the case to the High Court, steps should be taken for allocation to an appropriate High Court judge and for active case management in accordance with the directions in *W v H*.

The hearing before the High Court

13.149 In accordance with the pre-POCA position, we envisage that the hearing would be before a judge of the Family Division who is also a nominated judge of the Administrative Court.

13.150 In accordance with the approach taken in the existing case law, neither the confiscation order, nor the order of the Judge of the Family Division would take priority, but all relevant factors should be taken into consideration, including whether assets are "tainted" by criminality[74] and the guilty knowledge of the applicant.[75]

13.151 Having made the determination about what might appropriately be included in the outcome of the financial remedy, the judge may then make the appropriate order for enforcement. This will require reinstating the powers of the Administrative Court to make confiscation enforcement orders as appropriate in connection with the remainder of the assets.

13.152 The starting point in the Family Division of the High Court is that proceedings are in private,[76] whereas administrative court proceedings are generally in public.[77] To balance the need for privacy with the need for transparency (particularly given that the criminal proceedings and the making of the confiscation order are in public), we envisage that the decisions above would be taken in private, unless the court otherwise directs. Having made the determination, a public version of the judgment should be made available, suitably edited to include only those matters relevant to confiscation enforcement.

13.153 Having made that determination, enforcement of the confiscation order should be remitted to the criminal court which last had conduct of enforcement (which might be

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73 *HM Customs & Excise v A* [2002] EWCA Civ 1039, [2003] Fam 55 at [100] (emphasis added).
74 *CPS v Richards & Richards* [2006] EWCA Civ 849, [2006] 2 FLR 1220; *Gohil v Gohil* [2015] UKSC 61, [2015] 3 WLR 1085.
75 *HM Customs & Excise v A* [2002] EWCA Civ 1039, [2003] Fam 55.
76 Family Procedure Rules, rule 27.10.
77 Civil Procedure Rules, part 39.

the magistrates' court or the Crown Court). If no criminal court has yet had conduct of enforcement, the enforcement should be remitted to the magistrates' court.

Appeals

13.154 As under the pre-POCA regime, a single appeal could be made to the Court of Appeal (Civil Division) against any of the aspects of the order made by the High Court judge.

Proceedings in the FRC followed by proceedings in the criminal courts

13.155 Where the case is not transferred to the High Court, the issue of competing confiscation and matrimonial finance claims are dealt with by whichever judge is dealing with the financial remedy proceedings within the FRC, with the criminal courts taking enforcement steps based on the outcome of those proceedings. The intervention of the prosecution agency might affect the allocation decision within the FRC. The directions that might be made on receipt of the application may be drawn from those set out in *W v H*. The proceedings should be prioritised wherever possible, because of the potential for the FRC proceedings to delay confiscation.

13.156 Once the decision is reached by the FRC, the enforcement of the confiscation order could continue in light of that decision. Appeals arising from the FRC proceedings and the confiscation proceedings would be separate.

The impact of waiting for determination of the financial remedy proceedings on the confiscation proceedings

13.157 Financial remedy proceedings may impact on the enforcement of confiscation orders in a number of ways.

(1) Binding determinations of third-party interests under POCA 2002 might be informed by the outcome of the FRC proceedings.

(2) The Crown Court may be delayed in determining whether it is appropriate to impose a contingent enforcement order, to be activated in the event of a default in payment.[78]

(3) The Crown Court[79] or the magistrates' court may be delayed in taking steps to enforce a confiscation order in relation to which the defendant is already in default.

13.158 The first of these issues was not addressed directly by our proposal. However, if the prosecution wishes to intervene in FRC proceedings because they may have a material impact on confiscation, then we see no reason why it should not be permitted to do so. In such circumstances, as Sir Mark Potter, P pointed out in *Webber v Webber and CPS,* by resolving the financial remedy proceedings first, the Crown Court can decide how much of a property can properly be included as an available asset in the confiscation order. Ultimately, a judge in the Crown Court may take the view that confiscation proceedings need not be adjourned because the outcome of the family court proceedings would make no difference to the making of a confiscation order. If the defendant's share of a property is worth less than anticipated or cannot be

78 We recommend this as a new power of the Crown Court (see Chapter 14 - Enforcement).
79 We recommend extending enforcement powers to the Crown Court (see Chapter 14 - Enforcement).

realised at all, then the confiscation order to be paid can be adjusted downwards pursuant to the statutory variation powers currently found in section 23 of POCA 2002.

13.159 The second and third issues are an inevitable part of having the same assets being subject to competing claims in different courts. We envisage that any enforcement measure that might be affected by the FRC proceedings should not be implemented until the conclusion of those proceedings. This would include any contingent enforcement order. The Crown Court would still be able to set a time to pay and state a period of default imprisonment which might be activated in the event of a default. That is not to say that other enforcement steps unaffected by the financial remedy proceedings could not be taken. For example, if the sole issue in the financial remedy proceedings relates to a house, money in a bank account held in the sole name of the defendant might be subject to enforcement.

Conclusion

13.160 We recognise that there would be merits in referring all concurrent financial remedy and confiscation enforcement proceedings to a dual authorised High Court Judge. Prioritised proceedings mean that:

(1) there will be split decision making with a judge (or lay bench) in the criminal courts having to be apprised of what happened in the FRC, and with the potential for delay in enforcement action being taken in connection with the confiscation order; and

(2) there is the potential for delay in connection with appeals. Delays in confiscation through the bringing of unmeritorious appeals have been a common feature of the confiscation regime to date. Rights of appeal would lie in connection with both the decision of the FRC and the enforcing criminal court. This is likely to result in appeals arising both before an enforcement decision can be taken (whist an appeal is pending in connection with the FRC decision) and before the enforcement can take effect (whilst an appeal is pending against the decision to take particular enforcement steps). Such appeals would also be to two different divisions of the Court of Appeal.

13.161 Whilst this might militate in favour of all such proceedings being before the High Court, we recognise that there is real potential to open “floodgates” by recommending that all concurrent applications are dealt with by the High Court. We also note that the Lord Chief Justice is of the view that “this affects only a very small number of cases”.

13.162 We therefore recommend a permissive regime under which the High Court would have the power to make concurrent determinations, but that power would only need to be used in a limited category of cases.

Recommendation

13.163 We recommend that where the intervention of the prosecution authority is likely to represent an increase in complexity such that the High Court may be a more appropriate venue for concurrent disposition of the proceedings, or it is otherwise in

the interests of justice for concurrent disposition of the proceedings to take place,[80] allocation to the High Court may be considered. Otherwise, proceedings will continue before an appropriate judge in the FRC.

Recommendation 62.

13.164 We recommend that confiscation proceedings be referred to the High Court where:

(1) the intervention of the prosecution authority in financial remedy proceedings is likely to represent an increase in complexity such that the High Court may be a more appropriate venue for concurrent disposition of confiscation and financial remedy proceedings; or

(2) it is otherwise in the interests of justice for concurrent disposition of the proceedings to take place.

[80] For example, because of a particular need for expeditious resolution of the confiscation proceedings or because a history of obstruction of the confiscation proceedings suggests that the defendant is likely to appeal both any order of the Family Court and the confiscation order.

Chapter 14: Enforcement

INTRODUCTION

14.1 In the consultation paper, we dedicated Part 6 to the enforcement of confiscation orders. We explored the current enforcement regime, its problems, and options for reform.[1] We made provisional proposals for a new regime of contingent enforcement orders which we covered in the previous chapter of this report.

14.2 In Chapter 22 of the consultation paper, "Provisional proposals for an optimal enforcement regime", we listed seven main problems with the enforcement of confiscation orders which we had identified during pre-consultation engagement with stakeholders.

(1) Approximately £2 billion was outstanding under unpaid confiscation orders.

(2) Placing the onus on a defendant to realise their assets can result in protracted enforcement proceedings.

(3) Identified assets are often not realised because enforcement receivers are appointed in only 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 instalments being paid by a considerable margin.

(7) The mechanisms to write off orders that are deemed to be unenforceable are too restrictive.[2]

14.3 In response to these problems, we made 10 provisional proposals. Half of these have been incorporated into recommendations elsewhere in the report, as our proposals for an optimal confiscation regime have been streamlined and harmonised.[3]

14.4 In addition to the provisional proposals we made in the consultation paper with a view to improving the enforcement regime, at Consultation Question 104 we asked consultees whether there were any areas of reform we had neglected to address. This question elicited a response from the National Compliance and Enforcement Service within His Majesty's Courts and Tribunals Service ("HMCTS") which centred on the

1 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, chs 18 to 20.
2 CP 249, para 22.1.
3 Consultation questions 74, 75 and 77 to 79 have been incorporated into our recommendations on provisional discharge, at Chapter 16.

use of the magistrates' courts' fines-based powers for the purposes of enforcing confiscation orders. Based on this response, further consultation we have undertaken with these stakeholders, and additional research, we make further recommendations which seek to complement our other recommended enforcement mechanisms.

OVERVIEW OF POLICY

14.5 That:

(1) The Crown Court and the magistrates' court should have flexible powers to transfer enforcement proceedings between them to achieve the best enforcement of the confiscation order on the facts of each case.[4]

(2) Several enforcement powers of the magistrates' court be extended to the Crown Court to facilitate enforcement action being undertaken by the Crown Court.

(3) There be confiscation assistance orders to help defendants to pay their confiscation order.

(4) New sanctions short of imprisonment in default should not be introduced.

(5) There be a new power for the court to order defendants to provide financial information.

(6) Where a confiscation order is not satisfied as directed, the fact should not be recorded in the Register of Judgments as a matter of course.[5]

(7) It be made explicit that collection orders can be applied to confiscation orders.

(8) The requirement upon a fines officer to hold a means inquiry when seeking to enforce a collection order in the civil courts be removed.

(9) Magistrates' courts and Crown Courts have the power to compel the attendance of defendants at enforcement hearings beyond those specified in section 83(1) of the Magistrates' Courts Act 1980, and particularly after the default term has been served.

4 Consultation question 70.
5 Consultation question 76.

PROPOSAL 1 – FLEXIBLE TRANSFER OF ENFORCEMENT PROCEEDINGS

Current law

14.6 Currently, enforcement of confiscation orders takes place exclusively in the magistrates' court.

Consultation paper

14.7 In the consultation paper, we discussed some of the benefits of having a more flexible approach to the venue for enforcement proceedings. In particular, we noted that bringing elements of enforcement into the Crown Court may "incentivise some defendants to co-operate" and ensure that enforcement decisions are "taken by the tribunal vested with detailed knowledge of the case" (as the Crown Court imposed the confiscation order).[6]

14.8 However, we also noted that enforcement in the Crown Court will not always be necessary, concluding 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.[7]

14.9 We described the "vital role" which magistrates' courts play in enforcing confiscation orders, and said that it is "plainly desirable" that they continue to use their vast experience and skill to "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."[8]

14.10 We cited other examples of flexible venues for enforcement in the criminal justice system (such as proceedings for breach of a suspended sentence or community order).[9] Similarly, our proposal for flexible transfer was intended to enable the Crown Court to "tailor enforcement to the individual facts of the case".[10] In particular, where enforcement in a magistrates' court gives rise to matters which need to be dealt with at the Crown Court, if the magistrates' court can transfer the proceedings itself, this "could reduce delays in enforcement by removing the onus from the parties to file new applications with the Crown Court."[11]

14.11 We therefore provisionally proposed that the Crown Court and a magistrates' court should have flexible powers to transfer enforcement proceedings between them to achieve the best enforcement of the confiscation order on the facts of each case.

Consultation responses

14.12 This proposal received very strong support.[12]

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6 CP 249, para 22.14. In the previous chapter, we also recommended that where a contingent order is imposed, the first enforcement hearing takes place in the Crown Court.
7 CP 249, para 22.15.
8 CP 249, para 22.16.
9 CP 249, para 22.17.
10 CP 249, para 22.18.
11 CP 249, para 22.20.
12 Consultation question 70 (44 responses: 41 (Y), 1 (N), 2 (O); 18 did not answer) and summary consultation question 19 (32 responses: 27 (Y), 1 (N), 4 (O); 5 did not answer).

14.13 Consultees agreed that it is appropriate for the Crown Court to retain enforcement of confiscation in some cases, and that our proposal would facilitate such action.[13] The provisional proposal was also seen as supporting:

(1) our recommendations with regard to forum, which promote judicial continuity in confiscation generally by enhancing judicial continuity from making to enforcing the confiscation order;[14] and

(2) the efficient resolution of cases.[15] In particular, cases being adjourned while applications are made to the Crown Court was recognised by the Justices' Legal Advisers' and Court Officers' Service ("JLACOS") as a source of delay.

14.14 There was good support for how magistrates' courts currently deal with enforcement.[16] There was some concern that the vast experience of magistrates' courts at enforcing confiscation orders not be lost to an already over-burdened Crown Court.[17]

14.15 The Bar Council also noted that continuity of counsel may be equally as important as continuity of judge, but this was largely dependent on funding. The Criminal Law Solicitors' Association commented that a defendant's representation order ought to be transferable with the proceedings, so that the defendant does not have to apply afresh each time. Funding implications were also highlighted by the Government.

14.16 The Insolvency Service and Garden Court Chambers both asked what criteria would be used to determine which was the appropriate enforcement forum.

14.17 The Crown Prosecution Service supported the proposal but suggested that there should be a presumption that the Crown Court will retain enforcement that could be rebutted in cases which are straightforward. The Association of Chief Trading Standards Officers ("ACTSO") said that proceedings should only be transferred to District Judges with specialised training in post-conviction confiscation.

14.18 The Financial Conduct Authority ("FCA") said that the proposal should be facilitated by a digital case system that allows easy storage and transfer of information.

14.19 Several consultees made alternative proposals, such as a dedicated organisation for monitoring payments in satisfaction of confiscation orders or a dedicated confiscation court.[18]

Analysis

14.20 The magistrates' courts currently hold primary responsibility for the enforcement of confiscation orders and have a wealth of experience doing so. We intend to support magistrates' courts in fulfilling this responsibility.

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13 Bar Council; personal response; South East Confiscation Panel, East Kent Bench.
14 Personal response; although, as noted by one individual at a roundtable event, this is not always necessary, such as where the defendant pleads guilty.
15 Fraud Lawyers' Association.
16 Magistrates' Association.
17 South East Confiscation Panel, East Kent Bench. A similar view was expressed by the City of London Police.
18 Personal responses.

14.21 However, in some cases it may be necessary, or more efficient, to retain enforcement proceedings in, or transfer them to, the Crown Court. This will usually be because of particular powers needed for effective enforcement, that the Crown Court has which magistrates' courts do not.

14.22 In light of consultees' support for a framework to guide transfers, we have considered different permutations of enforcement that might arise.

The first enforcement hearing

14.23 We recommend that the first enforcement hearing should take place in the Crown Court where:

(1) a contingent order has been made with the confiscation order. If the Crown Court has made a contingent enforcement order, it is essentially because the prospects of enforcement without it are poor. The Crown Court will have been clear about what it was expecting by way of compliance with the order and is probably best placed to examine whether its expectations were met. Furthermore, a defendant will be aware that they are coming before a judge who has full knowledge of the background to the contingent order. This might encourage compliance.

(2) the case is identified as "complex", unless at the time of making the order the court decides this is not necessary. Such cases are likely to involve: assets held by third parties (whether through beneficial ownership arrangements or through companies, or in the form of tainted gifts that are difficult to recover); assets held overseas; or assets which are shared as part of domestic living arrangements. Enhanced enforcement measures such as receivership are likely to be needed in such cases, which can only be imposed in the Crown Court. A first enforcement hearing in the Crown Court will mean that such steps can be appropriately considered. However, it should only be a starting point. Where the defendant is likely to comply with the confiscation order, enforcement could be remitted to the magistrates' court.

14.24 At any appropriate point thereafter, and with a view to whether enforcement may need to return to the Crown Court in the future, enforcement may be remitted to a magistrates' court.

14.25 In cases which are not identified as "complex" or where no contingent order was made, the first enforcement hearing should take place in a magistrates' court, unless at the time of making the confiscation order the Crown Court decides to retain enforcement.

Recommendation 63.

14.26 We recommend that the first enforcement hearing should take place in the Crown Court where:

(1) a contingent order has been made with the confiscation order; or

(2) the case has been identified as "complex", unless at the time of making the order the court decides this is not necessary.

Criteria for transferring cases

14.27 The main criterion for transferring a case from a magistrates' court to the Crown Court is to facilitate an application which would otherwise need to be filed by the parties before the Crown Court (in particular, an application for reconsideration under sections 22 or 23,[19] for an enforcement receiver or an application for provisional discharge of the confiscation order).[20] In essence, this is a transfer to facilitate the exercise of the powers of the Crown Court. The Crown Court may then take over and actively manage enforcement and any pending applications, more efficiently than would be the case if the proceedings relied entirely on the initiation of the parties.

14.28 Mirroring this, the main criterion for transferring a case from the Crown Court to a magistrates' court is to facilitate the use of magistrates' courts' powers to enforce the order.

14.29 Beyond this, we do not wish to be overly restrictive, as our aim is to facilitate flexible enforcement responsive to the needs of each case. The power may be expressed in terms which emphasises that transfer is for the purposes of the just and efficient enforcement of a confiscation order.

Recommendation 64.

14.30 We recommend that the Crown Court and a magistrates' court should have flexible powers to transfer enforcement proceedings between them to achieve the best enforcement of the confiscation order on the facts of each case.

Enforcement of confiscation orders by the Crown Court

14.31 To facilitate enforcement in the Crown Court (where appropriate), it is necessary to extend to the Crown Court some of the fines-based powers of magistrates' courts. There will be no utility in the Crown Court retaining the case for the purposes of enforcement if it has fewer mechanisms available to manage the enforcement than there are in a magistrates' court.

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19 See Chapter 15 – Reconsideration.
20 See Chapter 16 – Provisional discharge.

14.32 Consequently, we recommend that the following enforcement powers be extended to the Crown Court as either contingent enforcement powers or standard enforcement powers:[21]

(1) Warrants of control.[22] These are orders 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.[23]

(2) Attachment of earnings orders and deduction from benefits orders.[24] These orders are used to enforce a financial order made against a defendant who is either in employment or in receipt of certain benefits, and it is not impracticable or inappropriate to do so.

(3) Orders in relation to money seized from the defendant under section 67 of POCA 2002. A magistrates' court may order the payment of cash or money held in a bank account directly towards the satisfaction of a confiscation order.

(4) Orders in relation to property seized from the defendant under section 67A of POCA 2002. 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. This power applies to:

(a) seized property; and

(b) property produced in response to a production order issued under Part 8 of POCA 2002.

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.[25]

(5) Collection orders which enable the appointment of a fines officer to supervise payment of the order.[26]

(6) Warrants of commitment to enable activation of the default sentence of imprisonment.[27]

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21 Note that we make recommendations on compelling the provision of financial information and compelling the attendance of the defendant later in this chapter which we recommend would also apply to the Crown Court for the purposes of enforcement of the order.

22 Magistrates' Courts Act 1980, s 76.

23 Tribunals, Courts and Enforcement Act 2007, Part 3.

24 Courts Act 2003, s 97 and sch 5, Part 3.

25 Proceeds of Crime Act 2002, s 67A(2).

26 Courts Act 2003, sch 5, Part 4, s 12(1).

27 Magistrates' Court Act 1980, s 76(1).

Recommendation 65.

14.33 We recommend that the following enforcement powers of magistrates' courts be extended to the Crown Court to facilitate enforcement action being undertaken by the Crown Court (where appropriate):

(1) warrants of control;

(2) attachment of earnings orders and deduction from benefits orders;

(3) orders in relation to money seized from the defendant pursuant to section 67 of POCA 2002;

(4) orders in relation to property seized from the defendant pursuant to section 67A of POCA 2002;

(5) collection orders; and

(6) warrants of commitment.

PROPOSAL 2 – RELEASE ON LICENCE

Current law

14.34 When a confiscation order is made against the defendant, a term of imprisonment in default is set. The defendant may serve this period of imprisonment if it is activated by a magistrates' court on the basis that the defendant has demonstrated "wilful refusal" to pay the confiscation order or "culpable neglect" in failing to pay it.[28] The defendant can secure release from imprisonment by satisfying the order.[29]

14.35 The default term can only be imposed once.[30] A defendant committed to custody is entitled to unconditional release after serving half of the term (except in respect of a confiscation order for more than £10 million).[31]

14.36 Unlike the effect of serving a default term of imprisonment in default of payment for other financial penalties, serving the default term does not expunge the liability to satisfy the confiscation order.[32]

Consultation paper

14.37 We observed that "imprisonment in default is a measure of last resort designed to extract payment from a defendant", albeit that it is considered a "costly" and "ineffective sanction".[33] We cited data from the National Audit Office which found that

28 Magistrates' Courts Act 1980, s 82(4).
29 Magistrates' Courts Act 1980, s 79; and Prison Service Instruction 003/2015, paras 16.1.6 and 16.7.
30 Proceeds of Crime Act 2002, s 38(5).
31 Criminal Justice Act 2003, ss 258 (2) and (2B).
32 Proceeds of Crime Act 2002, s 38(5); *R v Jawad* [2013] EWCA Crim 644, [2014] 1 Cr App R (S) 16 at [18].
33 CP 249, paras 22.24 to 22.25.

"only 2% of defendants imprisoned for non-payment subsequently satisfied their order and secured their release".[34]

14.38 However, we noted the need for "an appropriate sanction to incentivise payment" (especially where defendants may conceal their assets) and cited one example of an effective use of the default term being triggered to achieve that outcome.[35]

14.39 We considered that "imprisonment in default should be retained" but "strengthened and supplemented by additional powers", in particular "the conditional release of defaulters".[36]

14.40 In the consultation paper we said that:

> 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.[37]

14.41 We observed that this is in "marked contrast" with a prisoner sentenced for an offence, who is released on licence at the halfway point, and serves the remainder of the sentence on licence.[38] We listed the various conditions which can be imposed on an offender on licence, and noted that "a defendant can be recalled to custody to serve the balance of their sentence if they fail to comply."[39]

14.42 Given that serving the default term does not expunge the confiscation liability, we considered that releasing a confiscation defendant on licence would "serve to ensure that an appropriate sanction for non-compliance remained."[40] We highlighted conditions which might appropriately apply during this licence period, including "making all reasonable efforts to realise identified assets", to attend confiscation hearings, and to provide financial information for enforcement hearings.[41] Moreover, we envisaged that the defendant could be recalled to custody for failure to comply.[42]

14.43 We therefore provisionally proposed that 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 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.

Consultation responses

14.44 This was a highly controversial proposal. It received a mixed response from consultees.[43]

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34 CP 249, para 22.25; citing Confiscation Orders, Report of the National Audit Office (2013-2014) HC 738, key facts p 4.
35 CP 249, paras 22.27 to 22.28.
36 CP 249, para 22.30.
37 CP 249, para 22.34.
38 CP 249, paras 22.35 to 22.36.
39 CP 249, paras 22.39 to 22.39.
40 CP 249, para 22.44.
41 CP 249, para 22.49.
42 CP 249, paras 22.52 to 22.55.
43 Consultation question 71 (47 responses: 29 (Y), 9 (N), 9 (O); 15 did not answer) and summary consultation question 16 (33 responses: 27 (Y), 2 (N), 4 (O); 4 did not answer).

In favour of release on licence

14.45 Consultees who supported this proposal considered that it would bolster the default term of imprisonment as an enforcement tool.[44] The South East Confiscation Panel, East Kent Bench said that the proposal would remove "a major loophole in effective enforcement of confiscation orders". The Magistrates' Association made comments, echoed by practitioners in the National Crime Agency ("NCA") and National Economic Crime Centre, that this would provide a continuing incentive to satisfy the confiscation order.

14.46 Two main questions were raised by consultees in favour of the proposal: (1) what licence conditions would be applied; and (2) who would be responsible for overseeing the licence conditions.[45] In particular, members of law enforcement said that monitoring compliance with licence conditions would amount to a substantially increased workload.

14.47 The Eastern Regional Economic Crime Unit ("RECU") queried how licence conditions would assist the defendant in paying the order, rather than impede their ability to earn an income.

14.48 One Crown Court Judge qualified his support on the basis that the exercise of this power must be fair and realistic. BCL Solicitors LLP agreed; the exercise of this power must be fair, and the defendant should be afforded an opportunity to challenge particular conditions and when they are said to be breached.

14.49 One Justice of the Peace considered that the threat of being recalled to prison would encourage a defendant to settle the order.

Against release on licence

14.50 Several consultees argued forcefully against this proposal. The Prison Reform Trust raised three concerns. First:

> If a defendant is recalled to prison for a licence breach relating to non-payment of a confiscation order, they could effectively serve three prison sentences stemming from one original criminal matter. In an overstretched, overcrowded and under resourced prison system, this is not only impractical, but inhumane.

14.51 Second, the Prison Reform Trust noted that recall rates have increased significantly in recent years, demonstrating that released prisoners are not reintegrating into the community successfully or receiving adequate support. Therefore, "the threat of recall is not in itself effective in preventing further behaviour of concern." Finally, the Prison Reform Trust noted that short term sentences of imprisonment should not be introduced because they are especially damaging to rehabilitation.

14.52 Other consultees agreed; this proposal was described as "unduly harsh",[46] especially where the defendant does not pay because they lack the means.[47] Andrew Campbell-

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44 City of London Police.
45 CPS; BCL Solicitors LLP; Fraud Lawyers' Association; personal responses from members of law enforcement.
46 Association of Chief Trading Standards Officers.
47 Personal response.

Tiech KC said that the proposal perpetuates the myth that defendants would rather stay in custody than pay their order, when the primary reason for non-payment is because a defendant is unable to pay. A further sentence of imprisonment will not remedy this. The Financial Crime Practice Group at Three Raymond Buildings said this proposal resembles a "debtor's prison".

14.53 Consultees also suggested that the proposal may complicate matters with a defendant's substantive sentence, and there may be overlapping periods of licence with different conditions.[48]

14.54 Consultees raised similar arguments as those in favour of the proposal, questioning whether licence conditions and recall would have any effect on compliance, and asking who would be responsible for monitoring the implementation of this proposal.[49] In particular, the Financial Crime Practice Group at Three Raymond Buildings challenged the condition of "making all reasonable efforts to realise identified assets", saying that it was "very difficult to quantify or measure in terms of compliance". They questioned whether probation officers were equipped to apply this vague test.

14.55 Consultees also opposed the proposal during consultation events. Three points were raised by attendees at our fairness roundtable.[50]

(1) There is not adequate evidence of the deterrent effect of the default sentence to warrant extending this power.

(2) Custodial penalties are very costly to the state and this proposal may be counterproductive if the defendant is unable to realise assets and satisfy their order while in custody.

(3) Licence conditions can inhibit a person's ability to engage with certain types of community support, which hinders rehabilitation. This is particularly detrimental for women.

Other comments

14.56 Consultees who did not express a fixed view tended to understand the need for further enforcement measures but doubted the efficacy and fairness of release on licence.[51]

14.57 The Bar Council acknowledged the potential benefits of release on licence but expressed concern about the "likely effectiveness of any recall to prison" as well as of "general licence conditions". They doubted whether these would "have a significant impact on the satisfaction of orders".

14.58 Rudi Fortson KC similarly questioned the effectiveness of the proposal. He preferred an approach which concentrated efforts on intelligence gathering and financial monitoring, to uncover assets for realisation.

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48 Personal response; this view was also expressed at a consultation roundtable meeting.
49 Financial Crime Practice Group at Three Raymond Buildings; Insolvency Service; Criminal Law Solicitors' Association.
50 Fairness roundtable meeting (17 November 2020).
51 Garden Court Chambers.

14.59 The North East ACE and Confiscation Team noted that the default sentence is a last resort option which simply enables the defendant to set up a payment plan rather than paying the full confiscation order (through an attachment of earnings order). They preferred other enforcement mechanisms.

14.60 Kingsley Napley LLP considered that the proposal was too vague and poses an unnecessarily dangerous risk to a defendant's liberty.

14.61 During the consultation period, we spoke with representatives from HM Prison and Probation Service and the Ministry of Justice. They expressed the view that they try very hard to avoid the "revolving door" of release and recall and would therefore be reluctant to support any policy which could increase this. They were also disinclined to endorse a proposal which may increase the overall prison population, which is nearing capacity. Moreover, there would be significant resource implications if HM Prison and Probation Service was required to monitor those on licence.

Analysis

14.62 Activating the default term of imprisonment is the most draconian enforcement mechanism available in respect of confiscation orders: the defendant can go to prison, for a maximum of 14 years, for non-payment of a confiscation order.[52] The default term is rightly seen as the "last resort" of enforcement mechanisms; by the time it is activated there is little else which could compel a defendant to pay. There is a high threshold before it can be activated: the defendant must have demonstrated wilful refusal to satisfy the order or culpable neglect in failing to satisfy it.

14.63 It is understandable that many consultees supported a proposal which was intended to re-invigorate the default term and extend this "last resort" to cover the full term (with half served in prison and half served on licence). This concept is familiar to criminal practitioners: most defendants serving terms of imprisonment for substantive offences are released at the halfway point and serve the remainder on licence. However, we accept that the default term of imprisonment for non-payment is not wholly analogous to a sentence for a substantive offence. It is not a punishment, but an enforcement mechanism. Its purpose is to compel payment, rather than achieve the diverse aims of sentencing.

14.64 Any decision to restrict a defendant's liberty must be taken extremely seriously. In order to be proportionate, there must be a good likelihood that the restriction will further the aims of the confiscation regime. Consultees were sceptical that licence and recall would be effective at compelling payment, given that the original activation of the default term is already a blunt (and largely ineffective) tool.

14.65 Therefore, we returned to the rationale underlying this proposal to develop an alternative approach which is intended to achieve the same ends. The purpose of the proposal was to encourage a defendant whose warrant of commitment to prison had been activated to:

(1) make all reasonable efforts to realise identified assets (including assets which the Crown Court decided not to make subject to a contingent vesting order);

[52] Proceeds of Crime Act 2002, s 35(2A).

(2) attend enforcement hearings; and

(3) provide information to the courts for enforcement hearings, as required.

14.66 We consider that a three-part approach could achieve these ends:

(1) introducing a confiscation assistance order;

(2) introducing warrants/summonses for enforcement hearings post-activation of the default term of imprisonment;

(3) (as we had provisionally proposed) requiring the defendant to complete a new bespoke form for provision of financial information, with failure to provide complete and accurate information subject to contempt sanctions.[53]

Confiscation assistance orders

14.67 We recommend the introduction of confiscation assistance orders, which would be orders for a designated person to be appointed to assist the defendant in satisfying the confiscation order. They are intended to facilitate compliance. They are also intended to reflect the understanding that the default term should not be activated before the conclusion is reached that other enforcement options would not be effective.[54]

14.68 Before activating the default term, a court should therefore consider (for example):

(1) the defendant realising assets themselves;

(2) an enforcement receivership order;

(3) forfeiture of funds held in a bank account;

(4) the sale of seized property; or

(5) a warrant of control.

14.69 During our pre-consultation engagement with stakeholders, we heard that some defendants contact HMCTS looking for advice on how to satisfy their order. We also heard from some financial investigators that their practice is to visit defendants in prison to assist them in satisfying their orders. This is not a formal or routine practice.

14.70 In family law, a family assistance order can be made where a person is appointed (with their consent) "to assist and advise any person named in the order".[55]

14.71 A similarly termed order may be helpful in confiscation cases to explain to a defendant what options there are for realising assets and assist him or her towards the

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53 Consultation question 73.

54 *R v Harrow Justices, ex p DPP* [1991] 1 WLR 395, [1991] 3 WLUK 420; *Garotte v City of London Magistrates' Court* [2003] EWHC 2909 (QB), [2002] 12 WLUK 464; *Lloyd v Bow Street Magistrates' Court* [2003] EWHC 2294 (Admin), [2003] 10 WLUK 182; *Barnett v DPP* [2009] EWHC 2004 (Admin), [2009] 7 WLUK 212.

55 Children Act 1989, s 16. The person appointed is usually an officer of the Children and Family Court Advisory and Support Service ("CAFCASS") or a local authority.

mechanisms for doing so. This would not be binding advice, and the defendant would not be obliged to follow it. However, failure to engage with the person appointed may reflect negatively on the defendant in relation to other decisions (such as the decision to activate the default term). Appointment would be with the consent of the person appointed, so it would be up to the enforcement teams to decide how to allocate resources to use this tool. By placing this function on a statutory footing, it may become more routine. It also underscores that the default term is a last resort, and "front loads" assistance with satisfying the order.

14.72 Confiscation assistance orders could be made by the Crown Court or the magistrates' court either before or after the default term is activated. There may be good reason for providing assistance after the default term is activated, including:

(1) to assist the defendant in prison to realise their assets quickly so they may be released;

(2) to allow continued enforcement after the default term is served; and

(3) to assist decision-making for provisional discharge, in the knowledge that every reasonable enforcement measure has been explored.

Warrants or summonses post activation of the default term of imprisonment

14.73 Failure to attend may have serious consequences for a defendant, including activation of a warrant of commitment. In *R (Necip) v City of London Magistrates' Court*, it was determined that, in light of the wording of the Magistrates' Courts Act 1980, once the defendant had served their default term, a warrant of arrest could not be issued for non-attendance at the magistrates' court.[56] We heard from HMCTS that when exercising enforcement powers in relation to collection orders, effort must be made to secure the attendance of the defendant in those circumstances.[57]

14.74 Without making a judgment as to whether it is appropriate to use the enforcement powers allowed pursuant to a collection order to compel the defendant's attendance at a confiscation enforcement hearing, it is clear that this is at least one step that can theoretically be taken to assist in enforcing the order after the defendant has served their term of imprisonment in default.

Provision of financial information

14.75 We recommend below that a new bespoke form for provision of financial information should be created, which the defendant must complete. Failure to provide complete and accurate information would be subject to contempt sanctions.

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56 *R (Necip) v City of London Magistrates' Court* [2009] EWHC 755 (Admin), [2010] 1 WLR 1827.

57 Courts Act 2003, sch 5, para 12; a designated fines officer can then refer the case to the magistrates' court ("MC") under sch 5, para 42(1), and the court can issue a summons under the Fines Collection Regulations 2006, reg 4. The MC may then issue a warrant for the defendant's arrest under Magistrates' Courts Act 1980, s 83(2). In *R (Lawson) v Westminster Magistrates' Ct* [2013] EWHC 2434 (Admin), [2014] 1 WLR 2085, the court also found that the MC then had the power to require the defendant to provide evidence of their means under Courts Act 2003, sch 5, paras 42 and 50.

Conclusion on release on license

14.76 The package of measures outlined would meet the ends which were intended to be achieved by the provisional proposal to release a defendant on licence, in a manner which is less draconian and which may be more effective in ensuring that the confiscation order is satisfied.

Recommendation 66.

14.77 We recommend that the Crown Court and the magistrates' courts have the power to make confiscation assistance orders, which appoint an appropriately qualified person to assist a defendant in satisfying their confiscation order.

PROPOSAL 3 – OTHER SANCTIONS

Consultation paper

14.78 We considered options for sanctions short of imprisonment in default, including unpaid work, a period of electronically monitored curfew, and disqualification from driving.[58] However, we ultimately rejected them. We noted that the purpose of an enforcement sanction is "not to punish the defendant but to incentivise payment". Therefore, if imprisonment in default is ineffective, "sanctions short of custody would be unlikely to fare better".[59]

14.79 This is distinct from other circumstances where sanctions such as driving disqualification may be a useful way to incentivise payment of a financial order. The Law Commission report, *Enforcement of Family Financial Orders,*[60] explores the use of driving disqualification and passport confiscation as ways to enforce family financial orders. The report recommends the use of these orders as a way to incentivise debtors to pay without resorting to a judgment summons and a term of imprisonment. It examines the complex process for obtaining a judgment summons and the difficulties debtors have in paying their orders while in custody. Ultimately the *Enforcement of Family Financial Orders* report concludes that sanctions short of custody would be helpful and appropriate in these circumstances.

14.80 Conversely, confiscation orders have a term of imprisonment in default set at the time the order is made. This means that the defendant is aware that custody is a potential consequence at the time the order is made. As we discussed in the consultation paper, if this impending imprisonment is unable to incentivise payment, it is highly unlikely that any other sanctions will.[61]

14.81 In the consultation paper, we also considered the usefulness of these types of sanctions when the term of imprisonment in default has already been served. By this point in the enforcement process the defendant has been willing to serve a sentence

58 CP 249, para 22.59.
59 CP 249, para 22.60.
60 Enforcement of Family Financial Orders (2016) Law Commission Report No 370, ch 12.
61 CP 249, para 22.60.

of imprisonment to avoid paying the order. It is therefore unlikely that any other sanctions will incentivise compliance.

14.82 We therefore provisionally proposed not to introduce new sanctions short of imprisonment in default, such as disqualifying a defaulter from driving or imposing a curfew or period of unpaid work.

Consultation responses

14.83 Consultees agreed that sanctions short of imprisonment should not be introduced.[62] They recognised that if imprisonment in default is not successful in compelling payment, lesser sanctions are also unlikely to be. In particular, the Bar Council said that lesser sanctions could be punitive rather than coercive. One personal respondent agreed, saying that removing a defendant's driving licence could be counterproductive, by preventing them from working.

14.84 The FCA supported the proposal and envisaged that there would be difficulties monitoring community sanctions.

14.85 In favour of other sanctions being introduced, the South East Confiscation Panel, East Kent Bench said that sanctions short of imprisonment may be more cost-effective than custody and could be important once the defendant has served the default term.

14.86 The Government and one personal respondent suggested company directorship disqualification as an alternative sanction.

14.87 Two personal respondents said that sanctions could alert credit reference agencies to outstanding confiscation orders, to incentivise payment.

Analysis

14.88 Consultees tended to agree with our assessment in the consultation paper that sanctions short of imprisonment are unlikely to be effective if activating the default term is not effective. We remain of this view.

14.89 We are conscious of the concerns from consultees that these additional sanctions may be punitive rather than coercive, would require additional monitoring, and may hamper rehabilitation by limiting access to credit and impeding legitimate employment. However, we note that the *Enforcement of Family Financial Orders* report emphasises the coercive (as opposed to penal) nature of these types of orders in the context of family financial orders.

14.90 Our recommendation of confiscation assistance orders above focuses on facilitating the payment of confiscation orders by creating conditions which enable the defendant to satisfy their liability. We consider that the combination of confiscation assistance orders, contingent orders, and our other recommendations on enforcement are sufficient, without additional sanctions short of imprisonment.

14.91 We therefore do not make a recommendation for sanctions short of imprisonment in default.

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62 Consultation question 72 (43 responses: 34 (Y), 7 (N), 2 (O); 19 did not answer).

PROPOSAL 4 – PROVISION OF FINANCIAL INFORMATION

Current law

14.92 At present, a defendant appearing before a magistrates' court for enforcement proceedings must detail what steps they have taken to satisfy an order and provide details of their income, assets and expenditure by completing a means form. There are several powers to compel the provision of financial information.

(1) Prior to sentence for any substantive criminal offence, a magistrates' court may make a "financial circumstances order" requiring a defendant to provide a statement of their assets and financial circumstances.[63]

(2) When enforcing a confiscation order, a magistrates' court may require a defendant to give a statement detailing their assets and other financial circumstances within a specified period.[64] Failure to comply is punishable on summary conviction by financial penalty. The penalty is four months' imprisonment if material facts are knowingly withheld or a defendant knowingly provides a false or misleading statement.

(3) A means enquiry may also be conducted pursuant to the Attachment of Earnings Act 1971.

(4) In most cases, the magistrates' court uses the MC100 form to obtain financial information for enforcement (where a financial circumstances order is imposed in the substantive criminal proceedings).

Consultation paper

14.93 We described how the enforcing court is "largely reliant on information provided by the defendant before them" in order to make enforcement decisions, and that the defendant "may well be less than candid if they are intent on retaining their assets" or fail to provide supporting evidence to corroborate the information they provide.[65] We noted the importance of reliable information to aid enforcement.[66]

14.94 Although the powers above already exist to compel the provision of financial information, we noted that they were not designed with confiscation in mind,[67] and that the MC100 form is "rudimentary", requiring no additional evidence to support a defendant's assertions.[68]

14.95 We therefore considered that a "bespoke power to compel the provision of information in confiscation enforcement proceedings (on a prescribed form) should be enacted". We said that this power could:

(1) ensure the production of documentary evidence to support a defendant's assertions;

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63 Criminal Justice Act 2003, s 162.
64 Magistrates' Courts Act 1980, s 84.
65 CP 249, paras 22.65 to 22.67.
66 CP 249, para 22.70.
67 CP 249, para 22.74.
68 CP 249, para 22.77.

(2) ensure that production prior to an enforcement hearing to allow the information to be investigated and scrutinised; and

(3) make a failure to comply with such requirements punishable by a range of sanctions including a period of curfew, unpaid work or imprisonment.[69]

14.96 In particular, we argued that "provision of information in this manner would provide a clear audit trail of a defendant's financial circumstances" and enable prosecution authorities to "investigate the veracity of a defendant's assertions".[70] We considered that punishing failure to comply with a financial penalty was "unsatisfactory", particularly if the defendant is suspected of having substantial hidden assets. We therefore proposed that the failure to comply would be punishable by imprisonment or a community penalty.[71] Such failure may also be indicative of wilful refusal or culpable neglect, indicating that the default sentence should be activated.[72]

14.97 The provision of accurate information would ultimately enable the court "to make an informed decision about future enforcement action".[73] This is to the benefit of all parties, including the defendant: if the court is satisfied that the defendant does not have the means to satisfy an order, the court may consider an order for provisional discharge.[74]

14.98 We therefore provisionally proposed that the court should have a bespoke power to direct a defendant to provide information and documents as to their financial circumstances; and a failure to provide such information should be punishable by a range of sanctions including community penalties and imprisonment.

Consultation responses

14.99 Most consultees supported this proposal, although there was greater support for the creation of a bespoke power to compel the provision of information than for the penalties proposed for non-compliance.[75]

A bespoke power to compel the provision of information

14.100 Among consultees who agreed with this proposal, few made additional supportive comments in relation to the first part.[76] The Financial Crime Practice Group at Three Raymond Buildings said that more information is needed to understand the practicalities of the power. The ACTSO said that the power should be to order production of information within a specified timeframe.

14.101 Similarly, among consultees who opposed the proposal, their objections focused on the nature of the penalties. For example, the Prison Reform Trust was not, in principle, against a power to direct the defendant to produce supporting documentation.

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69 CP 249, para 22.80.
70 CP 249, para 22.81.
71 CP 249, para 22.82.
72 CP 249, para 22.85.
73 CP 249, para 22.86.
74 See Chapter 16 – Provisional discharge.
75 Consultation question 73 (47 responses: 29 (Y), 6 (N), 12 (O); 15 did not answer) and summary consultation question 17(1) (32 responses: 25 (Y), 2 (N), 5 (O); 5 did not answer).
76 Those in favour included the CPS; SFO; Environment Agency; City of London Police; Magistrates' Association and others.

However, they noted that it is unrealistic and impractical to expect a defendant who has just served (or is serving) a prison sentence to have immediate access to their financial documents.

14.102 The Bar Council commented generally that the current system of obtaining information for enforcement is inadequate, but that our proposal may also pose a risk of unfairness and requires safeguards. In particular, they noted that unrepresented defendants may have difficulty collating and submitting extensive material. Garden Court Chambers agreed with this.

14.103 Rudi Fortson KC noted that previous attempts to introduce measures which require defendants to provide financial information had not been very effective.

Penalties for non-compliance

14.104 Among consultees in favour of the first part of the proposal, two consultees (the Government and an individual) suggested that a more appropriate penalty would be to draw an adverse inference against the defendant (ie to assume that they have the means to satisfy their order). The Eastern RECU commented that new custodial sanctions will create an additional burden for HM Prison and Probation Service.

14.105 Another individual consultee argued that the existing sanctions for contempt of court were sufficient. The Financial Crime Practice Group at Three Raymond Buildings agreed: the court already has the power to require information disclosure in a compliance order, sanctioned through committal for contempt of court.

14.106 Consultees from the NCA and National Economic Crime Centre said that sanctions should extend to providing false information, not merely failing to provide information.

14.107 The JLACOS cautioned against adding new layers and sanctions to the enforcement process, which was already complex.

14.108 Other consultees argued strongly against custodial sanctions for failure to provide information.[77] The Criminal Law Solicitors' Association said that this was "unjust" and added a criminal sanction to what was effectively a civil process. One individual described this as a "life sentence" for defendants and contended that it could severely inhibit rehabilitation.

Analysis

14.109 In order to facilitate the enforcement process, it is essential that the court is furnished with accurate and current information. We make recommendations designed to enhance the ability of the court to require the defendant to provide further information. The MC100 form is a general magistrates' court means form. For the purposes of confiscation enforcement, we consider that a bespoke form is required to elicit more precisely the information required for the court to make its decisions. The MC100 form also does not require supporting information. We consider that a defendant should, as far as they are able to do so, be required to substantiate the assertions they make

[77] Including the Prison Reform Trust.

with regards to their financial situation through supporting evidence and documentation.

14.110 We are responsive to the concerns of consultees that criminal sanctions, including imprisonment and community penalties, may not be appropriate. As consultees noted, a sanctions regime for non-compliance with similar orders already exists, through contempt of court.[78] In serious cases, such as continued failure to provide information or provision of false or misleading information, the court may consider a finding of contempt to be appropriate. The financial penalties which currently exist in relation to other financial information orders should also be applicable.

14.111 Our reformed system provides mechanisms for the defendant's non-compliance with enforcement orders to be taken into consideration in a way which is somewhat similar to the "adverse inferences" called for by some consultees.

(1) Before the default term is activated, prior non-compliance will be a relevant factor in determining whether the defendant has demonstrated wilful refusal to comply with the order or culpable neglect in failing to comply with it.

(2) After the default term has been activated, non-compliance may be relevant to other decisions, especially the decision to make an order for provisional discharge.

14.112 By linking failure to comply with these other enforcement tools, the defendant is both disincentivised from non-compliance (because they may face imprisonment in default) and incentivised to comply (because it may increase the likelihood of provisional discharge, which includes the pausing of interest). The new bespoke form should contain a warning to the defendant of the consequences of failing to provide any, or accurate, information.

Recommendation 67.

14.113 We recommend that the court should have a bespoke power to direct a defendant to provide information and documents as to their financial circumstances.

14.114 A new confiscation enforcement financial information form should be introduced to facilitate the provision of such information, which should warn the defendant of the consequences of failing to provide any, or accurate, information.

[78] The Law Commission is currently undertaking a project to review the law on contempt of court. Further information can be found at https://www.lawcom.gov.uk/project/contempt-of-court-2/.

PROPOSAL 5 – REGISTER OF JUDGMENTS

Current law

14.115 The Register of Judgments, Orders and Fines is a central record of money judgments, orders and fines from the County Court, High Court, and magistrates' court and contains several other administrative and family orders. The Register contains information about unsatisfied and satisfied records, the name, address and date of birth of the defendant, the court and case number, amount owed and (if applicable) date of satisfaction. It is accessible by anyone at a cost of between £6 and £10.[79]

14.116 Confiscation orders may currently be entered onto the Register.

(1) Section 35 of POCA 2002 applies to the effect that confiscation orders are enforced as though they were fines (and therefore subject to enforcement under section 132 of the Sentencing Code). The combination of these provisions brings confiscation orders within the scope of section 98(1)(e) of the Courts Act 2003, which creates the Register and specifies which sums may be recorded in it.[80]

(2) Entry of a confiscation order onto the Register is also possible through the enforcement process which fines officers may pursue through the High Court and County Court.[81]

Consultation paper

14.117 We noted that the Register of Judgments is available to financial institutions and the information on it can be used to determine applications for credit.[82] Although the power to register confiscation orders already exists, it is "seldom done". We cited guidance from the Justices' Clerks' Society in 2012 which said that this step "would not be appropriate for the enforcement of a confiscation order".[83]

14.118 We considered that the reasoning for this was likely that "confiscation debts are large and registration is unlikely to extract payment", as well as "owing to the accrual of interest, the amount of the debt is not static and invariably rises".[84] Nevertheless, we considered that confiscation orders should be registered upon expiry of the time to pay period: "We see no reason in principle why a defendant who owes sums of money pursuant to a confiscation order should be in a different position from a judgment debtor in civil proceedings."[85] We added that "the adverse effect on a debtor's credit rating may serve to incentivise some defendants to satisfy their order expeditiously".[86]

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79 Registry Trust Ltd is the company which operates the Register on behalf of the Ministry of Justice, https://rojof.org.uk/home.shtml; TrustOnline is operated by Registry Trust to provide access to the Register, https://www.trustonline.org.uk/.

80 See also, Register of Judgments, Orders and Fines Regulations 2005, sub-para 8(1)(c).

81 Magistrates' Court Act 1980, s 87; Courts Act 2003, sch 5, para 38.

82 CP 249, para 22.112.

83 CP 249, para 22.114; citing Justices' Clerks' Society, *Confiscation Orders and Collection Orders* (News Sheet No 15/2012).

84 CP 249, para 22.115.

85 CP 249, para 22.116.

86 CP 249, para 22.117.

14.119 We therefore provisionally proposed 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.

Consultation responses

14.120 This proposal received a good response, although several consultees raised serious concerns.[87]

14.121 In favour of the proposal, consultees noted that it would provide an additional incentive for the defendant to satisfy the order.[88] The main reason for this is that an entry on the Register of Judgments may adversely impact the defendant's ability to access credit.[89]

14.122 Consultees raised various practical concerns. Practitioners from the NCA and NECC asked who would maintain the records. The Eastern RECU suggested that this proposal would put an additional burden on HMCTS, which would have to monitor and update the Register. The Bar Council neither supported nor opposed the proposal but noted that there would need to be engagement from the Crown Court to ensure the record is accurately updated.

14.123 Against the proposal, one individual described it as oppressive, and another agreed, saying that the destruction of a defendant's credit rating can impede rehabilitation. Another individual said that the conflict of this proposal with finality and rehabilitation meant that, if adopted, this proposal should be limited to the most serious cases. The Criminal Law Solicitors' Association also opposed the proposal, describing it as unfairly punitive, especially where the reasons a defendant cannot pay off the order are outside their control. They also questioned the compatibility of the proposal with the restrictions on accessing information about the defendant's criminal record.

14.124 Garden Court Chambers agreed with the concerns about rehabilitation and added that there is no evidence to suggest that adversely affecting a defendant's credit rating would provide any more incentive to satisfy the order than the default sentence.

14.125 The Financial Practice Group at Three Raymond Buildings agreed with our reasoning in the consultation paper, that there is little evidence that registration would compel payment and the proposal may present difficulties because the amount of debt is not static.

14.126 The National Compliance and Enforcement Service gave extensive comments. They noted that they already have the power to seek registration but:

> It is not used for practical reasons because it requires regular manual cross-referencing, which NCES is not resourced for, and if the debt is not removed from the Register promptly it can have a negative effect on the defendant's credit rating, for which they can seek compensation from us.

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87 Consultation question 76 (44 responses: 34 (Y), 5 (N), 5 (O); 18 did not answer).
88 Association of Chief Trading Standards Officers.
89 Three personal consultees.

14.127 The NCES said that any extension would be "difficult" to manage and "add further complexity". They also asked questions about how the proposal would interact with interest, which figure (the benefit figure or available amount) would be recorded, and how long the order would remain on the Register. They added that there would be particular implications if the proposal applied to those under 18.

14.128 At a consultation webinar, further questions were raised by practitioners,[90] including whether registering the confiscation order would make it liable to be extinguished by the Limitation Act 1980, or if the defendant was declared bankrupt.

Analysis

14.129 Three quarters of consultees were in favour of this proposal. In particular, it was seen as a way to apply additional pressure on the defendant to induce payment. Despite this, we are persuaded by the significant difficulties raised by other consultees which render this proposal undesirable, if not unviable.

14.130 First, if confiscation orders were to be recorded on the Register of Judgments, they would need to be kept up to date to prevent an undue impact on the defendant. It was not clear who should have responsibility for this, but the comments from NCES demonstrate that it is a burdensome task. This is because the amount of outstanding confiscation debt changes, with interest, partial payment and reconsideration. Under our proposals, a confiscation order may also be contingently discharged. If the Register was not kept up to date, this could result in decisions which prejudice the defendant (such as a refusal of credit) being made on the basis of incorrect information.

14.131 Second, it may be contrary to the regime which manages access to a defendant's criminal record. The system for obtaining information about a defendant's criminal record is highly regulated. Access is currently limited by what the intended use of the information is.[91] For example, the Disclosure and Barring Service operates a system whereby employers can apply for access to criminal records for specified purposes. Including a confiscation order on the Register of Judgments as a matter of course has potential to circumvent these restrictions.

14.132 Even if we do not recommend the registration of confiscation orders, it remains possible. However, we do not think it should happen as a matter of course. The NCES has highlighted that it is rarely appropriate and causes significant difficulties when it is used. We agree, and therefore, owing to the NCES' primary responsibilities for enforcement and registration, it is unlikely to become more prevalent.

14.133 We therefore do not recommend that where a confiscation order is not satisfied as directed, the fact should be mandatorily recorded in the Register of Judgments in every case.

ADDITIONAL PROPOSALS – FINES-BASED POWERS OF THE MAGISTRATES' COURT

14.134 During consultation, we received a response from the NCES of HMCTS which expressed concerns with the ways in which the fines-based powers of the magistrates'

90 Webinar 6, Other court orders (12 November 2020).
91 The Police Act 1997 (Criminal Records) Regulations 2002.

court can be employed to enforce confiscation orders. They noted the complexities which arise when certain powers are available for the enforcement of fines but not confiscation orders; and the problem of retroactivity where certain powers are available for the enforcement of new orders but not old orders.

14.135 The NCES response particularly focused on collection orders, the powers of fines officers and the power of the court to compel the attendance of defendants which we have subsequently explored. We now make three recommendations with regard to these policy areas below.

Current law

Collection orders

14.136 Collection orders are a relatively new enforcement tool of a magistrates' court. They were introduced by the Courts Act 2003[92] and create the role of a "fines officer" who may take certain enforcement steps without the involvement of the magistrates themselves.[93]

14.137 Collection orders give an administrative officer powers to manage the arrangements for a defendant to pay a financial order imposed by the court, without necessarily reverting to the court. The function of collection orders is to a considerable extent to allow such an officer to impose, manage and vary the terms of any attachment of earnings order, or deduction from benefits order where such orders are appropriate, or to vary the time allowed for payment of outstanding sums due under an order.

14.138 The Courts Act 2003 provides that, when enforcing a sum due to it, a magistrates' court must make a collection order "unless it appears to the court that it is impractical or inappropriate to make the order".[94] While this is framed as a duty, it functions as a discretion.

14.139 Once a collection order is in force, the powers of a fines officer comprise the power to do the following:[95]

(1) Vary the terms of an existing attachment of earnings order or make such an order on the application of the defendant.[96]

(2) Make an attachment of earnings order.[97]

(3) Make an application for a deduction from benefits.[98]

(4) Make a request for information about the defendant's finances (their assets, other financial circumstances or both). This power is available for the purpose of determining whether, or how, the fines officer should vary the payment terms of the collection order. This means that, in a confiscation order case, this power may only be available where an attachment of earnings order or deduction of

92 Courts Act 2003, s 97, sch 5, para 12.
93 Courts Act 2003, sch 5, para 13(2).
94 Courts Act 2003, s 97, sch 5, para 12
95 Courts Act 2003, sch 4, para 38.
96 Courts Act 2003, sch 5, para 22.
97 Courts Act 2003, sch 5, paras 26, 38.
98 Courts Act 2003, sch 5, paras 26, 38.

benefits order is in place, as otherwise there would appear to be no power for the fines officer to vary the payment terms of a confiscation order.[99] Indeed section 35(3) of the Magistrates' Courts Act 1980 (MCA 1980) is explicit that the power to dispense with immediate payment of the order (in section 75 of the MCA 1980) does not apply to confiscation orders.

(5) Refer the case to the magistrates' court.[100]

(6) Issue a warrant of control.[101]

(7) Make a transfer of fine order. This can be made by the fines officer where a collection order is in force in the same way it can be made by a magistrates' court generally.[102]

(8) Take enforcement action in the county court or High Court.[103] The powers of the fines officer in this regard are identical to the powers of the designated officer of the magistrates' court, except that a fines officer may not apply for civil enforcement in the county court or High Court without first making an inquiry into the defendant's means.[104]

(9) Apply to the magistrates' court for a summons to compel the defendant to attend.[105] If this summons is not complied with, the magistrates' court may issue a warrant for the defendant's arrest. These are the only circumstances in which a magistrates' court may issue a warrant for a defendant to attend court after the default term has been served.[106]

(10) Apply to the magistrates' court to:

(a) Register the confiscation order as a debt on the Register of Judgments, Orders and Fines: Once such an order has been made, if the defendant satisfies the confiscation order within one month, the registration will be removed. Any registration must be made within five years of the date of conviction and must be removed from the register five years from the date of conviction.

(b) Make a clamping order: this means that vehicle in the defendant's name can be clamped pending full payment of the sum outstanding by the defendant. The magistrates' court may order sale of the vehicle.

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99 The payment terms include any term requiring the defendant to pay the sum due within a specified period, the terms of any attachment of earnings order or deduction from benefits order and the terms of what will happen should any attachment of earnings order or benefits deduction order fail: Courts Act 2003, sch 5, paras 13, 14.

100 Courts Act 2003, sch 5, paras 37, 42.

101 Courts Act 2003, sch 5, para 38.

102 Magistrates' Courts Act 1980, ss 89 and 90.

103 Magistrates' Courts Act 1980, ss 87(1A) and (3A).

104 Magistrates' Courts Act 1980, s 87(1A), (3A).

105 Courts Act 2003, sch 5, para 42. Fines Collection Regulations 2006 (SI 2006 No 51), reg 4.

106 Magistrates' Courts Act 1980, s 83(2), *R (Lawson) v Westminster Magistrates' Court* [2013] EWHC 2434 (Admin), [2014] 1 WLR 2085; Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, para 19.53.

14.140 The High Court in *R (Lawson) v Westminster Magistrates' Court*[107] appeared to confirm that collection orders might be used for confiscation orders. However, it is perhaps significant that the claimant's application in that case did not challenge the making of the collection order until the time to do so had expired, and it is not entirely clear from the judgment (which was against the claimant) whether the High Court allowed the grounds of appeal to be amended to include the question of whether a collection order was permissible in a confiscation case, and then rejected the argument on the merits, or whether the court had rejected the proposed amendment to the grounds of appeal, and therefore only given cursory consideration to the merits. The relevant part of the judgment reads: "For my part, I would not permit such a late application which, in any event does not appear to have any intrinsic merit."[108]

14.141 It was also noted in *Lawson* that collection orders are not mentioned at all in the 221 pages of the National Best Practice Guide to Confiscation Order Enforcement (2010).[109]

14.142 However, despite the lack of detailed judicial consideration, *Lawson* is now taken as authority for the proposition that collection orders may be made in order to enforce confiscation orders. It also provides a useful example of the payment terms of a confiscation order being set out in a collection order and sent to the defendant.

Means inquiry

14.143 As discussed at paragraph 14.138(8) above, fines officers may not apply for civil enforcement in the county court or High Court without first making an inquiry into the defendant's means.[110]

Attendance of Defendants

14.144 Currently, a fines officer has the power to issue a summons for the purpose of ensuring that the defendant attends a magistrates' court when there is a collection order in place.[111] If this summons is not complied with, the magistrates' court may issue a warrant for the defendant's arrest. These are the only circumstances in which a magistrates' court may issue a warrant for a defendant to attend court after the default term has been served. This means that at present, unless there is a collection order in force, there is no other mechanism to compel the defendant to attend the magistrates' court to effect further enforcement measures after the default term has been served.[112]

Analysis

14.145 While these were issues which were raised singularly by the NCES, we find their concerns compelling given their central role in the enforcement of confiscation orders in the magistrates' court. It is not surprising that other consultees may not have

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107 *R (Lawson) v Westminster Magistrates' Court* [2013] EWHC 2434 (Admin), [2014] 1 WLR 2085.
108 *R (Lawson) v Westminster Magistrates' Court* [2013] EWHC 2434 (Admin), [2014] 1 WLR 2085 at [8].
109 *R (Lawson) v Westminster Magistrates' Court* [2013] EWHC 2434 (Admin), [2014] 1 WLR 2085 at [14].
110 Magistrates' Courts Act 1980, s 87.
111 Courts Act 2003, sch 5, sub-para 42(3). Fines Collection Regulations 2006 (SI 2006 No 51), reg 4.
112 Magistrates' Courts Act 1980, s 83(2), *R (Lawson) v Westminster Magistrates' Court* [2013] EWHC 2434 (Admin), [2014] 1 WLR 2085; Confiscation of the proceeds of crime after conviction: a consultation paper (2020) Law Commission Consultation Paper No 249, para 19.53.

identified these issues because no other organisations have the intimate operational knowledge and experience that the NCES do.

Collection orders

14.146 While it is not explicit in the legislation, the court in *Lawson* has established the principle that collection orders can be applied to confiscation orders.

14.147 This means that these orders could be made in relation to confiscation orders at an early stage and enable a fines officer to manage the enforcement of the order outside of court in a more cost-efficient manner. We have been told by the NCES that currently these orders are not widely used and when they are, it is primarily as a tool to assist enforcement once the default sentence has been served. We understand that this is because collection orders provide a power to compel the defendant to attend court that is not otherwise available to the magistrates' court at this stage in proceedings.

14.148 We discuss our proposal on the power to compel attendance below, but in short, we recommend that this power ought to be extended such that defendants can be summoned to attend at any stage of enforcement proceedings.

14.149 In addition to the power to compel attendance of the defendant, fines officers have the power to make or vary attachment of earnings and deduction of benefits orders.[113] These powers replicate the powers afforded to the magistrates' court generally.[114]

14.150 Notably, fines officers also have the power to vary the payment terms of a fine which is subject to a collection order. As highlighted at paragraph 14.138(4) above, this is not a power which can be applied to confiscation orders as it would constitute a power to dispense with immediate payment pursuant to section 75 of the MCA 1980 (and would be effectively overturning the decision of the Crown Court to impose a specific time to pay period). We do not recommend allowing the magistrates' court to dispense with immediate payment of the confiscation order.[115]

14.151 However, we recognise that the primary benefit of collection orders is the power they give fines officers to manage confiscation orders outside the formal court process. The NCES noted in their consultation response that the work of fines officers saves court time, is more cost-effective and efficient:

> If these powers are made more applicable to the collection and enforcement of confiscation orders it would assist the enforcement of confiscation orders in the magistrates' court and save valuable court time.

14.152 We find this persuasive especially in light of the enormous burden on magistrates' courts given the backlog of cases.

14.153 We consequently recommend that collection orders be made explicitly applicable to confiscation orders, save for the power for fines officers to vary the payment terms of

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113 Courts Act 2003, sch 5, Part 6, para 22.
114 Magistrates' Courts Act 1980, s 121(5A).
115 See Proceeds of Crime Act 2002, s 35.

a confiscation order. The power to make these orders ought also to be available to Crown Courts where they retain the order for the purposes of enforcement.

Recommendation 68.

14.154 We recommend that it is made explicit that collection orders can be applied to confiscation orders pursuant to section 97 of and Schedule 5, paragraph 12 to the Courts Act 2003, save for the power for fines officers to vary the payment terms of a confiscation order.

14.155 We also recommend that the power to make these orders ought also to be available to Crown Courts where they retain the order for the purposes of enforcement.

Means inquiry

14.156 In their consultation response, the NCES also raised the powers of fines officers, particularly the obligation to conduct a means inquiry when applying for civil enforcement of the order in the county court or High Court.

14.157 They noted that:

> In order to improve the operation of the collection and enforcement of confiscation order, the Law Commission may wish to consider making proposals to amend section 35 of POCA 2002 to make the fines based powers of the magistrates' courts including the collection order regime in Schedule 5 to the Courts Act 2003 more applicable to the collection and enforcement of confiscation orders to assist NCES and the magistrates' court. Collection orders are already available to the enforcement of confiscation orders but are used rarely because they can add a further step before a confiscation order can be enforced. For example, if there is a collection order in force a fines officer has to conduct an inquiry into means before enforcing a confiscation order in the High Court or county court (section 87(3A) of the Magistrates' Courts Act 1980) but a designated officer does not because of section 35(3)(c) of POCA 2002.

14.158 We have discussed the application of collection orders above and have concluded that collection orders represent a useful enforcement mechanism and should be available for the enforcement of confiscation orders. However, we accept the NCES' concern that the efficiency of collection orders could be improved if the powers of fines officers were less restrained.

14.159 Above we recommend that the magistrates' court have the power to direct a defendant to provide information and documents as to their financial circumstances. This means that the court should have a clear picture of the defendant's financial circumstances at the point at which a collection order pertaining to a confiscation order is made.

14.160 If this is the case, then it is unnecessary also to require a fines officer to conduct a means inquiry prior to applying to enforce the order in the High Court or county court.

14.161 We consequently recommend that when a fines officer applies for a civil enforcement order in the county court or High Court to enforce a collection order which has been made in relation to a confiscation order, there should be no requirement to conduct a means enquiry.

Recommendation 69.

14.162 We recommend that when a fines officer applies for a civil enforcement order in the county court or High Court to enforce a collection order which has been made in relation to a confiscation order, there should be no requirement to conduct a means enquiry under section 87(3A) of the Magistrates' Court Act 1980.

Attendance of Defendants

14.163 Currently a magistrates' court has the power to issue a summons and a subsequent warrant only when contemplating activating the term of imprisonment in default.[116]

14.164 Aside from this power, the court has no general power to compel the attendance of the defendant for the purposes of enforcing the confiscation order.

14.165 As discussed at paragraph above, a fines officer has the power to issue a summons for the purpose of ensuring that the defendant attends a magistrates' court when there is a collection order in place.[117] If this summons is not complied with, the magistrates' court may issue a warrant for the defendant's arrest. This is the only circumstance in which a magistrates' court may issue a warrant for a defendant to attend court after the default term has been served.

14.166 Put simply, a collection order is crucial if further enforcement is to be effective after the term of imprisonment in default has been served. If there is no collection order in place at this stage, the magistrates' court is rendered effectively powerless to enforce the confiscation order.

14.167 While collection orders may be a useful way to enforce confiscation orders in some circumstances, it is our view that enforcement would be aided by streamlining the powers of the courts *pursuant to a collection order* and the *general enforcement* powers of the court. We recommend that the court ought to have the power to compel the attendance of a defendant at any time during the enforcement of the confiscation order. This recommendation would broaden the scope of section 83 of the MCA 1980 such that it no longer applies only to when the court is considering activating the term of imprisonment in default.

14.168 Enabling the court to compel the attendance of the defendant at any stage of the enforcement process (including after the term of imprisonment in default has been served) obliges the defendant to engage and cooperate with the enforcement process. We anticipate that broadening this power will also encourage the court to

116 Magistrates' Courts Act 1980, s 83.
117 Courts Act 2003, sch 5, para 42(3); Fines Collection Regulations 2006 (SI 2006 No 51), reg 4.

consider other methods of enforcement before activating the default term because the defendant will be able to be compelled to participate in the process prior to its activation. The term of imprisonment in default will become an enforcement tool of last resort.

14.169 Importantly, an extension of the power in section 83 of the MCA 1980 would also mean that the court is no longer reliant on the presence of a collection order to engage with the defendant after they have served their term of imprisonment in default.

Recommendation 70.

14.170 We recommend that the power of the magistrates' court to issue a summons (and a warrant in the event of non-compliance) pursuant to section 83 of the Magistrates' Courts Act 1980 be extended so that defendants can be compelled to attend court at any stage of enforcement proceedings, including once the sentence in default has been served and that this power ought also to be available to the Crown Court.

14.171 This recommendation complements our recommendation to compel defendants to provide information about their financial circumstances because it provides another mechanism to ensure the cooperation of the defendant throughout the enforcement process. Defendants will have an incentive to comply with the order promptly to avoid being summoned to court and having to compile their financial information for each appearance.

Part 6: Reconsideration

Part 6 comprises two chapters and discusses circumstances changes of circumstances which require a confiscation order to be varied:

Reconsideration (Chapter 15); and

Provisional Discharge (Chapter 16).

This part considers issues such as upwards and downwards variation of the available amount and the benefit figure, as well as provisional discharge of a confiscation order.

Chapter 15 concerns reconsideration of the available amount. We discuss the benefits of setting out statutory restrictions on an application for upwards reconsideration of the available amount (section 22 of POCA 2002) and make recommendations to this effect. We also consider the intersection between confiscation orders and compensation orders and make recommendations which aim to prioritise the payment of compensation orders.

In Chapter 15 we also consider the reconsideration of the available amount through downwards variation (section 23 of POCA 2002) and reconsideration of the benefit figure (section 21 of POCA 2002) and make recommendations which aim to promote consistency through Part 2 of POCA 2002.

In Chapter 16 we make a series of recommendations intended to avoid unlimited enforcement action when there is no realistic prospect of recovering the remainder of the order, despite the reasonable efforts of enforcement authorities.

Chapter 15: Reconsideration

INTRODUCTION

15.1 This chapter concerns reconsideration of the available amount (the amount the defendant must pay under the confiscation order). In the consultation paper we focused on the powers in section 22 of POCA 2002, to make an application for the available amount to be increased. In this chapter, we recommend restricting applications to increase the available amount to exclude property which the defendant acquired after the confiscation order was made.

15.2 In the consultation paper we also asked consultees whether there were other aspects of reconsideration which merited our consideration.[1]

15.3 This chapter also incorporates our recommendation on permitting adjustment of the compensation element of a confiscation order when an order is made to vary the confiscation order.[2]

The current law

15.4 The current law provides for reconsideration of confiscation orders in eight 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 by increasing it, pursuant to section 22 of POCA 2002 (also known as "uplift").

(5) Where a confiscation order was imposed and there is an application to reconsider the available amount by decreasing it, pursuant to section 23 of POCA 2002.

(6) Where the remaining amount to be paid is less than £1,000 and, owing to fluctuations in currency exchange rates, the defendant's realisable property (which must be foreign currency) means their available amount is now inadequate to satisfy the order, the order may be "discharged" pursuant to section 24 of POCA 2002.

1 Consultation question 87.
2 Consultation question 83.

(7) Where the remaining amount to be paid is £50 or less, the court may "discharge" the order pursuant to section 25 of POCA 2002.

(8) Where the defendant has died and it appears to the court that it is not possible to recover anything from the estate of the deceased, or make any further attempt to do so, the court may discharge the order pursuant to section 25A of POCA 2002.

15.5 In relation to reconsideration under section 22 of POCA 2002:

(1) we asked consultees whether there should be statutory restrictions on making an application to "uplift" a confiscation order;

(2) we provisionally proposed that a series of statutory indicative factors be introduced to assist the court in determining whether it would be "just" to grant an uplift; and

(3) we provisionally proposed that, when the court decides to uplift a confiscation order, the court may order that an uplifted available amount be paid either by a specified deadline or in instalments.

15.6 Having carefully evaluated the responses from consultees, we now consider that there should be statutory restrictions on making uplift applications to exclude after-acquired assets. We no longer propose that a series of indicative factors be introduced to assist the court in determining whether it would be "just" to grant an uplift. We recommend that where an uplift is granted, a deadline for payment should be set.

15.7 We also recommend that where an order to vary the available amount is made, the court should have the power to adjust the compensation element of the order to reflect the variation.

15.8 As to other reconsideration provisions, we received answers calling for attention to be given to:

(1) section 23 (downwards reconsideration of the available amount) and section 21 (reconsideration of the benefit figure). In this chapter we make recommendations in relation to these reconsideration provisions both to address consultees' concerns and to align these reconsideration provisions with our proposed changes to section 22.

(2) section 24 and 25 of POCA 2002 (reconsideration of whether the confiscation order should remain in force in specific circumstances). We recommend reforms to these sections in the next chapter[3] in the context of our provisional proposals on putting enforcement of confiscation orders into abeyance through "provisional discharge".[4]

[3] Chapter 16 – Provisional discharge.
[4] Consultation questions 77 to 79.

OVERVIEW OF POLICY

15.9 That:

(1) There be changes to the scope of section 22, to exclude the defendant's after-acquired assets from upwards reconsideration of the available amount.

(2) The court should have a power to give the defendant time to pay the reconsidered available amount by a specified deadline.

(3) When making orders to vary the available amount, the Crown Court should have the power to adjust the compensation element of the order to reflect the variation.

(4) There be changes to section 23, to permit downwards reconsideration of the available amount where assets (including tainted gifts) realised pursuant to the confiscation order generate less than their original valuation and to align the provision with our policy on section 22.

(5) The power to apply for a section 23 order should be extended to a designated officer of the magistrates' court.

(6) The calculation of the available amount after reconsideration of benefit under section 21 should exclude the defendant's after-acquired assets.

(7) Benefit may be reconsidered where a successful section 23 application is made to lower the available amount.

PROPOSAL 1 – RESTRICTING APPLICATIONS TO INCREASE THE AVAILABLE AMOUNT UNDER SECTION 22

15.10 The first issue that we raised with consultees was whether there ought to be statutory restrictions on the making of uplift applications.

15.11 Under section 22, the prosecution or a receiver can make an application to the court for a new calculation of the available amount. If the amount found under the new calculation exceeds the available amount as previously calculated by the court, the court may vary the order by substituting the amount required to be paid with an amount it believes is just but which does not exceed the defendant's benefit.

15.12 In determining what uplift is just, 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.[5] Outside this statutory requirement, the court has a broad discretion. Justice in this context has been held to include what is just to the defendant in terms of rehabilitation and fairness[6] as well as the broader public interest in

5 Proceeds of Crime Act 2002, s 22(5).

6 *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164 at [29].

confiscating the proceeds of crime,[7] which reflects the legislative policy of POCA 2002.[8]

15.13 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 as the introduction of POCA 2002 had removed any doubt as to the legislative intent and the scope of the power:[9] "after-acquired assets" can be included in the reconsidered available amount.[10]

15.14 Furthermore, in *R v Wood* the Court of Appeal (Criminal Division) affirmed that the "new calculation" performed pursuant to a successful application under section 22 must take into account, not only the "newly acquired assets" but all of the defendant's assets including those which had formed the basis of the original confiscation order, even if they were no longer held by the defendant.[11]

The consultation paper

15.15 In the consultation paper we discussed how the current reconsideration regime is perceived.[12] Some stakeholders, particularly police financial investigators, consider that the regime fulfils the key objective of POCA 2002 to require the defendant to pay an amount equivalent to their benefit from criminality, tempered by what is "just". Moreover, the regime does not encourage the hiding of assets (because reconsideration can be sought at any time after the order is made) and keeps pressure on the defendant to pay. In contrast, other stakeholders regard the regime as incompatible with reform and rehabilitation of offenders (two of the purposes of sentencing),[13] and general public policy interests. Additionally, the discretion to achieve what is "just" is viewed by some as leading to inconsistent results. In considering how we could best resolve these conflicting views, we discussed various options for reform.

15.16 We considered whether applications under section 22 should be limited in time.[14] We examined various possible time limits, but ultimately rejected each option. First, we considered that the rehabilitation periods under the Rehabilitation of Offenders Act 1974 (which determine when convictions are "spent") were not appropriate because they only apply to sentences of less than four years. Moreover, having different limitation periods for different offenders could be complicated, result in some very short time limits, and "encourage a tactical approach to sentencing" to avoid section 22 applications.[15]

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7 *R v Mundy* [2018] EWCA Crim 105, [2018] 4 WLR 130.
8 *R v Padda* [2013] EWCA 2230, [2014] 1 WLR 1920 at [49].
9 *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)).
10 Proceeds of Crime Act 2002, s 22(3) requires the court to determine the value of the defendant's property (in accordance with s 9) at the time of the new calculation, thus after-acquired assets are plainly caught. See also *Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5, [2012] 2 AC 164 at [29].
11 *R v Wood* [2022] EWCA Crim 1243.
12 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, paras 25.10 to 25.24.
13 Sentencing Code, s 57(2)(c); formerly, Criminal Justice Act 2003, s 142(1)(c).
14 CP 249, paras 25.28 to 25.39.
15 CP 249, paras 25.42 to 25.43.

15.17 Regarding single fixed time limits (as found in other areas of POCA 2002, such as the 20-year time limit on Part 5 civil recovery applications and the six-year time limit on section 21 reconsideration of benefit applications), we considered that this could inappropriately encourage the hiding of assets until the expiry of the time limit.[16]

15.18 Thirdly, we concluded that a conditional time limit with reference to the diligence of the prosecutor in making an application against discoverable assets would not be straightforward and may place an undue burden on the prosecution to keep the defendant under review.[17] Ultimately, we did not make a provisional proposal for a time limit on section 22 applications.

15.19 We also discussed limiting applications made pursuant to section 22 by excluding after-acquired assets.[18] This would have the attraction of finality (which encourages rehabilitation and legitimate employment), and a secondary benefit of cooperation (because the defendant is encouraged to disclose all assets at the time of the confiscation order to avoid potential future lengthy court proceedings). However, we rejected this option on two grounds.

(1) It "does not fully reflect the purpose of POCA 2002, which is to deprive a defendant of the benefit of their criminal conduct".[19]

(2) 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".[20]

15.20 Instead, we provisionally proposed an alternative way to regulate section 22 applications; namely, by articulating in a statutory provision factors which the court ought to be required to weigh when determining what is "just" (see further below).[21] We also proposed that the court should be able to specify a "time to pay" deadline for the reconsidered amount to be paid (rather than an immediate obligation to pay), or for the reconsidered amount to be paid in instalments.[22]

Consultation responses

15.21 In the consultation paper, we asked whether consultees considered that there should be statutory restrictions on making an application to "uplift" a confiscation order and, if so, what those restrictions should be.

15.22 Consultees were divided in their responses.[23] Reflecting that division, the Bar Council did not express a view, noting that there were "conflicting matters of public policy in play".

16 CP 249, paras 25.44 to 25.52.
17 CP 249, paras 25.53 to 25.60.
18 CP 249, paras 25.61 to 25.64.
19 CP 249, para 25.63.
20 CP 249, para 25.64.
21 Consultation question 85.
22 Consultation question 86.
23 Consultation question 84 (40 responses: 17 (Y), 22 (N), 4 (O); 22 did not answer) and summary consultation question 24 (31 responses: 15 (Y), 11 (N), 5 (O); 6 did not answer).

15.23 This question was also subject to extensive discussion in consultation meetings and events and garnered a number of additional submissions outside the format of the consultation survey (these views are included below).

In favour of statutory restrictions

15.24 Among consultees who responded in favour of statutory restrictions on section 22 applications, many gave suggestions for the type or form of limitation they envisaged as appropriate. This included suggestions for:

(1) limitation according to the type of asset targeted by reconsideration, including a restriction on after-acquired assets,[24] a restriction on legitimate assets,[25] or a restriction to "windfalls";[26]

(2) limitation in time;[27] and

(3) limitation on the amount recoverable by uplift.[28]

15.25 The primary reason given by consultees for restricting section 22 applications was rehabilitation. The harmful impact of the current section 22 provisions on rehabilitation was repeatedly raised with us throughout the consultation period.

15.26 Consultees described uplift applications as being detrimental to rehabilitation because of the limitations that they place on the ability of defendants to participate fully in society, disincentivising legitimate and gainful employment and encouraging defendants not to hold assets in their own names. Moreover, by damaging otherwise stabilising factors which help prevent recidivism – including work and family life – the prospect of an application for uplift can push defendants back towards crime:

> Whilst section [22] uplift applications are a useful way of targeting proceeds which were hidden from view at the time of the making of the confiscation order, there is also risk that their use could be, at best, contrary to rehabilitation principles and, at worse, result in recidivism as defendants return to criminality as the only means of paying the debt.[29]

15.27 We are grateful to Dr Craig Fletcher for sharing his extensive research in writing and in attendance at several of our consultation meetings. His PhD thesis, "*Double Punishment" – The Proceeds of Crime Act 2002 (POCA): A Qualitative Examination of Post-Conviction Confiscation Punishment in England and Wales*, includes interviews with confiscation defendants about the impact of lifelong confiscation liability and the prospect of uplift. According to his research, not only does this disincentivise legitimate employment but "future offending is rationalised in the hope it will provide

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24 Fraud Lawyers Association; BCL Solicitors LLP; Andrew Campbell-Tiech KC.
25 Personal response.
26 Fraud Lawyers Association.
27 Barnaby Hone, Drystone chambers; Financial Crime Practice Group, Three Raymond Buildings; Gary Pons, 5 St Andrew's Hill; David Winch, forensic accountant; Professor Johan Boucht; Davis LJ; personal response; Garden Court Chambers.
28 Garden Court Chambers; Mark Conway; discussed at the fairness roundtable (17 November 2020); judges' roundtable (8 December 2020); and at Webinar 6, 'Other court orders', co-hosted with 33 Chancery Lane (12 November 2020).
29 Royal United Services Institute.

them with a way out of their confiscation predicament".[30] He described the impact on one member of his research group as follows:

> [T]he sense of injustice that it elicits and the inescapability of the punishment forces him to conclude that the prospect of returning to crime is not an unintended consequence of the confiscation regime.

15.28 In his response, Andrew Campbell-Tiech KC said:

> The current system – a lifelong obligation to pay – does not merely fail to encourage rehabilitation. It actually prods those subject to it to set about disguising the legal ownership of their assets lest they are confiscated – i.e. money-laundering, itself a gateway to wider criminality. In short, the very fact of these provisions encourages criminality. This is absurd and plainly not in the public interest. […]
>
> My strong preference is for legitimate after-acquired assets to be excluded. Rehabilitation for those released from custody should trump every other consideration.

15.29 John McNally of Drystone Chambers described reconsideration provisions in the following terms:

> [They are] an unwelcome paradox. They are applied routinely to those who rehabilitate themselves, use bank accounts and become part of society. Those who remain "off grid" escape this.

15.30 The picture which emerged is that these provisions are regarded by many as one of the most unfair and disproportionately punitive parts of the POCA regime:

> It is fundamentally unfair for defendants to have the weight of possible uplifts hanging over them when they have paid the original confiscation order amount. This has the effect of going beyond the primary purpose of confiscation – to deprive criminals of the proceeds of their crimes – and disproportionately punishes those who make the conscious decision to become law-abiding citizens and begin to earn a legitimate income. Such perpetual measures impact the human rights of defendants and their families.[31]

15.31 The extension of this punishment and unfairness to the defendant's family was described to us at a consultation meeting by someone whose parent is subject to a confiscation order.[32] This echoes concerns voiced by barrister John Townsend at a public webinar on the consultation paper.[33] He raised the rights of a defendant's family members to respect for their private and family life under article 8 of the European Convention on Human Rights ("ECHR") and questioned whether they are interfered with by an uplift application made after a long time and against legitimately after-acquired assets.

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30 C Fletcher, *Double Punishment – The Proceeds of Crime Act 2002 (POCA): A Qualitative Examination of Post-Conviction Confiscation Punishment in England and Wales* (2019), Manchester Metropolitan University, p 235. See further Chapter 6, 'The Long-term Effects of the Confiscation Punishment'.

31 Kingsley Napley LLP.

32 Fairness roundtable meeting (17 November 2020).

33 Webinar 6, 'Other court orders', co-hosted with 33 Chancery Lane (12 November 2020).

15.32 We also read first-hand accounts of the serious impact that the unending liability and threat of uplift applications has on defendants and their families through comments made on an article by Dr Craig Fletcher about confiscation on the Russell Webster website.[34]

15.33 One consultee, law firm Kingsley Napley LLP, highlighted the contradiction between the punitive nature of reconsideration and the proposal to exclude punishment from the objectives of the regime:

> We would urge the Law Commission to consider introducing a longstop date to ensure that defendants are not disincentivised from progressing in life due to the threat of further confiscation liability hanging over them in perpetuity. It would be inconsistent for the Law Commission to advocate, for example, that punishment should be omitted as a statutory objective of confiscation and that there should be restrictions on interest accruing on confiscation orders whilst simultaneously proposing that a defendant may forever be subject to further liability.

15.34 Other considerations militating against an unlimited uplift power were also cited to us by consultees, including the practical difficulty of accessing information and documents a long time after the original order.[35]

15.35 The Asset Recovery Incentivisation Scheme ("ARIS") was also raised as a concern in terms of uplift applications. In our consultation paper we set out how ARIS has led to argument before the courts about whether confiscation has been improperly motivated by financial considerations.[36] This applies equally to uplift applications, where the combination of no limitation on uplift and ARIS was described in negative terms:

> As institutions are incentivized to pursue confiscation, they may make repeated applications for a very long time; if there is no time limit there is no obligation to act with even the minimum of due diligence.[37]

15.36 Other stakeholders agreed, including in consultation meetings where uplift was described as "a naked revenue collection exercise by prosecution authorities".[38] We also repeatedly heard about the recent "boom" of section 22 applications as part of a sweeping prosecutorial review of old confiscation orders.[39]

15.37 Consultees also observed that the question of uplift will be less important if the benefit figure is more accurate and hidden assets findings are more robust at the time of the original order.[40]

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34 C Fletcher, 'How Asset Confiscation Prevents Rehabilitation', 4 October 2017, https://www.russellwebster.com/how-asset-confiscation-prevents-rehabilitation/.

35 David Winch, forensic accountant.

36 CP 249, paras 4.22 to 4.28; we discuss ARIS in ch 21 of this report. See also *R (Kombou) v Wood Green Crown Court* [2020] EWHC 1529 (Admin), [2020] 2 Cr App R 28; *Hamilton v Post Office* [2021] EWCA Crim 577, [2021] 4 WLUK 227 at [136].

37 Garden Court Chambers.

38 Practitioners' second roundtable meeting (3 November 2020).

39 Policy roundtable meeting (6 October 2020); commentators' roundtable meeting (20 October 2020); judges' roundtable meeting (8 December 2020).

40 Practitioners' second roundtable meeting (3 November 2020).

Against statutory restrictions

15.38 Among consultees who considered that there should be no statutory restrictions on uplift applications, some considered the ability to pursue an uplift indefinitely was just, in light of the fact that the defendant ought not to benefit from their criminal conduct.

(1) In a personal response, one law enforcement practitioner stated:

> Benefit from crime is very useful as many people offend to spend, have had extremely cash rich lifestyles and often invest in nothing other than having a good time! They very often contribute nothing to society and have little by way of assets left. Therefore, their assessed "benefit" should loom over them forever, or until paid.

(2) In a consultation meeting with the Crown Prosecution Service ("CPS"), one participant did not think that returning to recoup the difference between the available amount and the benefit figure was unfair, because this is a "fault situation" on the part of the defendant.

15.39 During our symposium at the end of the consultation process, one participant described a confiscation order as a "criminal ASBO", because reconsideration was used as an "offender management tool" to keep tabs on people who are suspected to be involved in crime.[41] This approach was confirmed by other members of law enforcement, who said that suspected current involvement in crime is a factor relevant to the decision whether to seek reconsideration as a way to disrupt their activity.[42]

15.40 The ability to pursue the order indefinitely was said to be tempered by the fact that the court already has discretion to tailor an uplift order to individual circumstances, according to what is "just".[43] The City of London Police said:

> Each application to "uplift" is different and it should be left to the judge's discretion whether the "uplift" application is approved or not. The judge's decision should be shaped by case law authorities.

15.41 A number of law enforcement consultees sought to assist our understanding of the decision-making process which already takes place when considering an uplift application. We were pointed to the authority of *R v Mundy*, which provides guidance.[44] We were also shown an indicative list of factors which law enforcement officers take into account when considering whether to seek an uplift. The thrust of these submissions was to highlight that a statutory restriction on uplift applications is not necessary because of the existing decision-making process. As one member of Sussex Police said:

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41 Symposium, co-hosted with Northumbria University (30 November 2020).

42 Meeting with the NPCC (24 November 2020).

43 South East Confiscation Panel (East Kent Bench); City of London Police; Insolvency Service; practitioners in the NCA/NECC; FCA; three personal responses.

44 Eastern Region Special Operations Unit, RECU citing *R v Mundy* [2018] EWCA Crim 105, [2018] 4 WLR 130; this case was also cited as providing relevant guidance in a meeting with the NPCC (24 November 2020).

Financial investigators, CPS lawyers and judges are capable of making informed decisions taking into account the further amount identified, the circumstances of the offending and the consideration of rehabilitation.[45]

15.42 We also received confidential evidence of case studies from one Asset Confiscation & Enforcement (ACE) Team concerning 21 applications under section 22 which they had successfully pursued in 2020. This included nine applications made 0-6 years after the original order, five made 7-10 years after the original order, four after 11-12 years and three after 13-14 years.

15.43 The impact on recovering compensation for victims was also a concern raised by consultees in opposition to statutory restrictions on uplift orders.[46]

15.44 A principal cause for concern was that defendants would be encouraged to hide assets or hold them in another's name until the restriction applied.[47] For example, the Insolvency Service said that restrictions would "encourage defendants to ensure assets are hidden for a time period after which defendants can continue to benefit from their crimes". The CPS agreed, stating that "hidden asset cases are a common feature of confiscation, and this would encourage further behaviour to circumvent the process".

15.45 Some consultees were concerned that restrictions would be contrary to:

(1) the statutory objectives of confiscation.[48] According to the Financial Conduct Authority ("FCA"), "a legal impediment or restriction will run against the central objectives of the legislation and criminals will feel encouraged that there is a time limit".

(2) the nature of the confiscation regime. In a consultation meeting with the CPS one participant described how the nature of the confiscation regime – being *in personam* rather than *in rem* – meant that legitimately acquired assets may always be caught up in repaying an order. It was argued that statutory restrictions would potentially change the nature of the order after the date it is determined.[49]

15.46 During a policymakers' roundtable meeting, concern was also raised about making sure uplift provisions were capable of targeting assets which do not become realisable for a long time, such as pension plans or matrimonial homes with children living there who are under the age of 18.[50]

Recognising the counterarguments

15.47 Many consultees who supported the introduction of statutory restrictions recognised the counterargument that such restrictions may encourage the short-term hiding of assets by defendants. However, the absence of any restrictions appears to have

45 This largely mirrors views expressed to us by members of law enforcement in attendance at our symposium, co-hosted with Northumbria University (30 November 2020).
46 North East ACE and Confiscation Teams; Eastern Region Special Operations Unit, RECU.
47 SFO; CPS; Eastern Region Special Operations Unit, RECU; personal response.
48 FCA; R3; practitioner from the NCA/NECC; Insolvency Service.
49 Meeting with the CPS (24 November 2020).
50 Policy roundtable meeting (6 October 2020).

similar effects (defendants hide assets) which are equally detrimental to the purposes of the regime. According to the Criminal Law Solicitors' Association:

> Substantial benefit orders discourage defendants from disclosing income or property in the future. Properties are held by spouses and partners. There is a discouragement of individuals leading a proper and full life when there is the real prospect of an application to remove property acquired legitimately.

15.48 During a practitioners' roundtable meeting it was also suggested that the unlimited ability to renew an uplift application may run counter to the sentencing principle of finality and (with exceptions for those who hid assets) amount to "re-sentencing".[51]

15.49 Professor Johan Boucht argued:

> Indeterminate sanctions are generally problematic. There should therefore be a clear cut-off date after which the state is statutorily barred from claiming assets from the defendant. From this date the defendant should be able to fully dispose of their assets.

15.50 Consultees in favour of statutory restrictions also acknowledged the need for compensation to be paid for victims and were generally not opposed to compensation being paid through funds recovered by reconsideration. However, one practitioner cautioned against compensation being relevant to the discussion of uplift, arguing that whether the compensation regime "has teeth" is a separate question of law reform and the desirability of providing compensation should not be used to support an otherwise unjust interpretation of the law.[52]

15.51 Consultees at meetings and in their formal responses recognised that if statutory restrictions were introduced, they ought to be without prejudice to seeking assets which were hidden at the time of the original order.

(1) The Prisoners' Advice Service said:

> Where evidence is subsequently found that the defendant dishonestly hid assets then it should be open to the prosecution to seek to recover more of the benefit in future. However, where there has been no dishonesty in the confiscation proceedings it would be contrary to fairness and would discourage rehabilitation and future hard work and enterprise by the defendant (who, after all, has already been punished) if anything they gained in future was going to be at risk of being clawed back.

(2) An individual from the National Crime Agency ("NCA") stated that:

> There should be a time limit after which legitimately acquired assets, provided they were acquired after the event *and not hidden*,[53] cannot be recovered, otherwise there is little incentive for criminals to reform.

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51 Practitioners' second roundtable meeting (3 November 2020).
52 Practitioners' 2 roundtable meeting (3 November 2020).
53 Emphasis added.

(3) A partner from Clarke Kiernan Solicitors added:

> There should no time limit to being able to pursue an uplift if it can be shown that the defendant had the assets at the time of the making of the original order but failed to declare, and hid, them from the process. The point made about rehabilitation and the building up of assets through honest work is well made. At the present time, defendants with an outstanding benefit figure are probably advised that any assets that they acquire should be in the name of a third party in order to avoid being traced. It adds a level of deception to what may otherwise have been an honest business. That must get in the way of rehabilitation.

Analysis

15.52 Reconsideration under section 22 of POCA 2002 was one of the most controversial and hotly contested elements of our consultation. Despite this, there were several points of agreement among stakeholders.

(1) The defendant must not be encouraged to hide assets from the confiscation process, either at the time of making a confiscation order or thereafter.

(2) The unlimited ability to return for upwards reconsideration of the available amount is damaging to rehabilitation and encourages the defendant to hide assets.

(3) Compensation ought to be payable out of additional funds recovered through reconsideration.

15.53 In the consultation paper, we rejected various options for a statutory time limit on reconsideration applications. After consultation, we continue to be of the view that a statutory time limit would increase the incentive for the defendant to hide assets, both at the time of the confiscation order and until the expiry of the time limit.

15.54 Although we provisionally rejected a statutory restriction on including in the available amount assets acquired after the confiscation order was made, we now propose that such a restriction be introduced. Specifically, we recommend that an application for upwards reconsideration under section 22 should only be available where:

(1) assets have been identified as having been obtained by the defendant that should have been but were not identified at the time of confiscation; or

(2) assets that were identified as having been obtained by the defendant at the time of confiscation and were realised pursuant to the confiscation order have generated a value greater than their original valuation.

15.55 Uplift applications would therefore be restricted to cases in which new assets have come to light which were not declared at the time of confiscation. Uplifts would also be permitted where the value of identified assets which are realised pursuant to the confiscation order is greater than was anticipated. For example, if the defendant sells a car for £2,000 instead of £1,500, the full £2,000 can be put towards the confiscation order.

15.56 These two scenarios will act as "gateways" to access section 22, after which the current calculation of what is "just" pursuant to section 22(4)(a) will occur. This means that section 22 would continue to operate as it currently does whereby the court conducts a holistic assessment of matters such as the amount outstanding on the original order, whether any of the order has been paid, the value of the new assets and whether there are any other outstanding financial orders (see below); and determines whether an uplift would be "just" and what a "just" uplift would be, limited by the outstanding benefit figure.[54]

15.57 However, our recommendations would limit applications pursuant to section 22 to very specific circumstances (that is, where it is discovered that assets were undeclared at the time of the original order and/or where identified assets are realised for a greater value than anticipated). This means that prosecution agencies would not be able to use section 22 unless one of these "gateways" is met and the assessment undertaken by the court to determine what is "just" is limited to what is "just" in the context of assets identified through the gateways.

15.58 This approach is a significant departure from the current uplift provisions. However, we are convinced that the interests of finality, rehabilitation, enforcement, fairness and in turn, the POCA 2002 regime, are supported by this approach.

Justifying our new approach

15.59 We heard extensive and compelling evidence throughout the consultation period that the unlimited ability to increase the defendant's available amount stifles their rehabilitation, disincentivises legitimate employment, pushes the defendant to live "off grid" and, in some instances, encourages the commission of further offences. We also heard of the impact that these applications have on the families of defendants.[55]

15.60 Although we have not recommended that the "deterrence and disruption of crime" be an objective of POCA 2002, we acknowledge that it ought to be a *consequence* of a properly functioning confiscation regime. In its current form, section 22 can run counter to this intended consequence. A defendant may serve their substantive sentence, come out of prison and start a completely legitimate business through which they acquire assets. If the state then makes an application to uplift the confiscation order, pursuant to section 22, the defendant may be forced to sell their business and assets to pay towards the increased order. This process of stripping defendants of their legitimately acquired assets (up to the value of their original benefit figure) may lead some to the conclusion that there is no utility in acquiring assets legitimately, that they are better off hiding any future assets. This is a perverse consequence of the confiscation regime given that reform and rehabilitation are also purposes of the sentencing regime, of which POCA 2002 forms part.

15.61 We have recommended that "depriving defendants of their benefit from criminal conduct, within the limits of their means" should be the legislative objective of POCA 2002. Although our recommendation on section 22 will limit the extent to which newly acquired assets can be used to satisfy the outstanding benefit figure, it will nonetheless support this objective.

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

55 See paras 15.39 and 15.40 above.

(1) It encourages early and frank disclosure of assets rather than the hiding of assets, thereby facilitating both accurate identification of the amount which the defendant can afford to pay and effective enforcement of the confiscation order (because law enforcement agencies will be aware of the assets held by the defendant).

(2) It permits any increase in the value of assets between the time of confiscation and realisation towards the confiscation order to be included, thereby permitting the limits of the defendant's means as identified at confiscation to be revised in circumstances where it is fair to do so.

(3) It is likely that the value of certain assets (such as houses) will increase as time passes, and the later an asset is sold, the more likely it is that there will be an uplift application pursuant to (2). It is therefore in a defendant's interests to cooperate and to satisfy any confiscation order expeditiously.

(4) It upholds the principle that, when a confiscation order is made, the defendant is liable to satisfy the benefit figure by all available means.

15.62 First, under the current system, the defendant is encouraged to hide newly acquired assets indefinitely. While our recommendation will not improve the recovery of these assets – because they will be excluded from section 22 by virtue of having been acquired after the confiscation order – the detrimental effects on rehabilitation of not being able to pursue legitimate employment, earn money and hold property in one's own name will be removed.

15.63 Second, our recommendation on section 22 includes a new corollary to section 23. Section 23 allows the defendant to apply for downwards reconsideration of the available amount where an asset generates an amount *less* than its original valuation at the time of the confiscation order when it is subsequently realised in satisfaction of the order. Part (2) of our recommendation above (see paragraph 13.54) creates a similar provision for section 22: where an asset generates an amount greater than its original valuation at the time of the confiscation order when subsequently realised to satisfy the confiscation order, the newly calculated available amount may include this amount where it is in the interests of justice to do so.

15.64 Third, by virtue of part (2) of the recommendation above, it is in the defendant's interest to satisfy the order as quickly as possible using available assets, so that any increased value is not recoverable. If, for example, the asset is valued and then sold for that value, the defendant has satisfied the order. On the other hand, if the asset is valued and then increases in value prior to being sold, the defendant exposes themselves to a s 22 uplift application for the additional value. This recommendation therefore incentivises cooperation and quick satisfaction of confiscation orders.

15.65 Fourth, our recommendation on restricting section 22 orders from applying to "after-acquired assets" does not transform the nature of confiscation orders from *in personam* to *in rem* because this approach will involve consideration of all of a defendant's assets as known at the time of making the confiscation order and does not target specific assets linked to criminality. The "all assets" approach also reflects the general approach taken to calculating a defendant's means for the purposes of financial orders in the criminal courts.

15.66 A further secondary benefit is that our recommendation will encourage the defendant to disclose all of their assets at the time of the confiscation order which will also enable the determination of third party interests in property. There is no incentive to hide assets because there is no time limit on an application for reconsideration against previously undisclosed assets. Early disclosure supports the confiscation regime: enforcement action can be taken sooner and more easily against disclosed assets, increasing the likelihood of recovery and maximising quick compensation for victims.

15.67 Ultimately, our view is that having calculated the order with reference to all of the defendant's assets as known at the time of the making of the order, it is appropriate that any reconsideration application is limited to the scope of the original inquiry.

15.68 Assets are "after-acquired" if they were:

(1) obtained by the defendant after the making of the confiscation order; and

(2) paid for from funds which were obtained after the making of the confiscation order.

15.69 We envisage this being a fact-based assessment based on the assets held by the defendant.

15.70 This approach also complements the objective of the confiscation regime to deprive the defendant of the value of their benefit from criminal conduct (as opposed to depriving the defendant of illegitimate property, which is the purview of civil recovery under Part 5 of POCA 2002).

15.71 At the time the confiscation order is made, the defendant becomes liable to pay the proportion of the benefit figure they have assets available to meet (subject to any deductions for seized assets, fines or compensation orders paid).[56] This obligation persists regardless of whether the available amount includes legitimate or illegitimate funds. Moreover, the defendant is not obliged to use assets identified in the calculation of the original available amount to satisfy the order; they remain free to satisfy it in other ways. This remains the case under our recommended new regime and is reflected expressly through our "substitute assets" enforcement policy (discussed below).

15.72 Under our "substitute assets" enforcement policy, where, for example, a house is identified as an available asset but instead of realising it the defendant chooses to take out a loan and the loaned monies are paid towards the confiscation order, they cannot be pursued for the value of the house.

15.73 Similarly, our "uplift" policy does not involve reconsideration of all assets that the defendant holds at the time of the reconsideration (which may include assets that were considered as part of the available amount when the confiscation order was made), but solely reconsideration of assets that were either not declared at the time of

[56] See Chapter 12 – Recoverable amount, on outstanding benefit.

confiscation or which were realised for more than was anticipated at the time of the making of the confiscation order.[57]

15.74 By moving the focus away from all of the assets held by the defendant at the time of the reconsideration, our recommended revised section 22 regime prevents the *de facto* transformation of the current regime into an *in rem* regime for confiscating assets that appear to have a direct connection to crime, and refocuses on the value of the assets. In this regard, we draw attention to the concerning practice which was highlighted to us of using section 22 applications as a form of "criminal ASBO", to keep tabs on defendants who are suspected to be involved in criminality after their confiscation order is made. This is not the function of section 22. Illegitimate assets are recoverable via civil recovery in Part 5 of POCA and the use of section 22 should not be distorted into an "offender management tool".

Hidden assets and the burden of proof

15.75 In the consultation paper, we expressed concerns about the evidential complexity which might be created by entering into arguments over proof of when an asset was acquired. Throughout the confiscation regime there is recognition that information relating to the defendant's financial situation is peculiarly within the defendant's knowledge. We do not recommend that the prosecution would bear the burden of proving when an asset was acquired. Instead, where assets are identified after the confiscation order has been made, the court must uplift the available amount to include the value of newly identified assets unless the defendant can prove that the asset was acquired after the confiscation order was made.

15.76 A second scenario in which hidden assets and the burden of proof arise relates to cases in which there has been a "hidden assets finding" made by the court at the time of the original confiscation order. A "hidden assets finding" occurs when the benefit figure is greater than the alleged available amount and the defendant fails to satisfy the court that they have not retained any or more of their benefit from crime. The amount of any "hidden assets finding" is included in the available amount and the defendant has an immediate liability to pay it, along with the "non-hidden" available amount. We have made other recommendations in relation to the hidden assets regime in Chapter 12.

15.77 In some instances, an increase in the available amount under section 22 may foreseeably be sought before the defendant has paid off the entire original available amount. If the defendant also had a "hidden assets finding", the defendant may seek to rely on that finding to defend the section 22 application by saying, "these were my hidden assets" (that is, they have already been taken into account in the order). If the defendant were unable to make this argument, there would be a risk of double counting the asset: once in the "hidden assets finding" and again in the section 22 order.

15.78 For this reason, we recommend that in situations where the defendant also has a "hidden assets finding" made in relation to part of their available amount, section 22 reconsideration can only be sought where the entire original available amount has

[57] We have also extended these recommendations – which maintain the *in personam* nature of the order – to section 23, to ensure that the defendant is not penalised for the manner in which they choose to satisfy the confiscation order.

been satisfied. Where the original available amount has not been paid in full, enforcement action against the newly identified asset remains possible, with its value being paid towards the outstanding confiscation balance.

15.79 In contrast, this rule should not apply where there is no "hidden assets finding", in order that the defendant not be incentivised into failing to comply with the order. If this rule applied to defendants with no hidden assets finding, they could leave a small amount of their orders outstanding to preclude section 22 applications. The same considerations surrounding double counting do not apply where there was no "hidden assets finding". Therefore, in those cases the entire original available amount does not need to be satisfied before a section 22 application can be made.

Compensation

15.80 The question of compensation is addressed fully below and in Chapter 21. For the purposes of our policy on upwards reconsideration under section 22, we continue to propose that any additional funds obtained through a section 22 order should be capable of being used to satisfy an outstanding compensation order. This is not currently possible and has been highlighted to us as one of the major failings of section 22. To that extent, our recommendation on "uplift for compensation" (as it is sometimes described) complements our recommendation on section 22.

Conclusion

15.81 This recommendation may result in a smaller amount of the benefit figure being recovered because the open-ended liability to pay will no longer apply. However, in our view, this is a balanced approach to the serious concerns about rehabilitation and encouraging the hiding of assets. This recommendation retains the *in personam* nature of the order and ensures that POCA 2002 does not push defendants back into crime. Instead, this recommendation encourages the defendant to engage with the confiscation order through full disclosure and swift compliance because in so doing, they will have a degree of finality.

Recommendation 71.

15.82 We recommend that an application for upwards reconsideration under section 22 should only be available where:

(1) assets have been identified as having been obtained by the defendant that should have been but were not identified at the time of confiscation; or

(2) assets that were identified as having been obtained by the defendant at the time of confiscation and were realised pursuant to the confiscation order have generated an amount greater than their original valuation.

PROPOSAL 2 – DETERMINING WHAT IS "JUST"

15.83 The second issue that we raised with consultees was whether there ought to be a series of statutory indicative factors to guide the court as to when an uplift might be

just. As we did not propose any statutory restrictions on uplifts, the safety valve of the "justice" test was therefore of fundamental importance.

15.84 Under our revised recommendation, statutory restrictions will be imposed. Nevertheless, the "justice" test remains a live issue when considering whether to uplift for the increased value of an asset realised to satisfy the confiscation order . We envisage that the discretion to determine what is "just" in the context of assessing an uplift for increased value will be relevant in the following examples.

(1) The defendant has been using after acquired assets to pay off his mortgage and, upon doing so, the value of equity in his home has increased. It may not be "just" to seek upwards reconsideration for the increased value of equity in his home, given that it was attained through after-acquired assets. Such an uplift would not be supportive of the aims of section 22, to bring finality and incentivise legitimate earning.

(2) Where the defendant's confiscation order was made subject to provisional discharge (see Chapter 16), that provisional discharge was revoked, and the value of identified assets has increased. This may occur where the defendant cannot realise an asset (such as a family home with children living there who are aged under 18). Given that no enforcement action was taken in the intervening period, it may not be just to grant upwards reconsideration to include the increased value for the period during which the order was subject to provisional discharge.

The current law

15.85 As set out above, under section 22, the court has a broad discretion to increase the available amount according to what is "just". 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;[58]

(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;[59] and

(6) assistance provided to the authorities.[60]

15.86 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

58 *R v Padda* [2013] EWCA Crim 2330, [2014] 1 WLR 1920.
59 Points 2 to 5 are taken from *R v Bates* [2006] EWCA Crim 1015, [2007] 1 Cr App R (S) 2.
60 *R v S* [2019] EWCA Crim 569, [2019] Crim LR 883.

other matters which he rejects as being of little or no significance. Everything will depend on the circumstances of the case".[61]

The consultation paper

15.87 In the consultation paper, we proposed that more guidance was needed to achieve a balance in determining what is "just". We provisionally proposed that the court should weigh several factors, articulated in statute.[62] This included the statutory objectives we originally articulated at consultation question 1, as well as undue hardship and the diligence of the prosecution.

15.88 We proposed that in weighing up undue hardship the court should consider the use ordinarily made, or intended to be made, of any property, and the nature and extent of the defendant's interest in it.[63]

Consultation responses

15.89 Consultees were mostly in favour of the proposal to include a list of factors in statute,[64] and broadly supported our proposed factors of the legislative objectives,[65] undue hardship[66] and the diligence of the prosecution.[67]

Analysis of responses – the three indicative factors

15.90 Among those who responded positively, some consultees made general comments in support of the introduction of a list of indicative factors. For example, the Serious Fraud Office ("SFO") said:

> [This] will assist in providing a more uniform and consistent application of the "just" test in the context of uplifts and provides the factors that will need to be balanced by the court.

15.91 This was supported by other consultees, who agreed it would aid consistency. BCL Solicitors LLP added that tying the decision to the legislative objectives was "a sound starting point". One practitioner from the NCA/NECC joint response added that these factors are already "widely" considered by Crown Courts.

15.92 Although they responded positively overall, consultees made specific comments in relation to the each of the factors proposed.

15.93 In relation to factor 1 (the legislative objectives), the Environment Agency queried how "deterrence" was relevant to the consideration of whether an uplift was "just":

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61 *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].
62 CP 249, paras 25.65 to 25.76.
63 CP 249, para 25.71.
64 Consultation question 85, part 1 (40 responses: 26 (Y), 6 (N), 8 (O); 22 did not answer).
65 Summary consultation question 25(1) (24 selected factor (1), 6 (other), 7 did not select factor (2)).
66 Consultation question 85, part 2 (40 responses: 27 (Y), 4 (N), 9 (O); 22 did not answer) and summary consultation question 25(2) (19 selected factor (2), 6 (other), 12 did not select factor (2)).
67 Summary consultation question 25(3) (20 selected factor (3), 6 (other), 11 did not select factor (3)).

> If the subject is a career criminal / Organised Crime Group member involved in different areas of criminality, then this is not appropriate and should not be considered as it undermines the robust nature of the legislation.

15.94 One practitioner from the NCA/NECC response was opposed to compensation being relevant to the determination of a just uplift:

> [This] makes it likely that a former fraudster who reforms themselves and becomes an active member of the economy is a better person to pursue than other criminals.

15.95 In relation to factor 2 (undue hardship), the FCA did not consider that undue hardship should be on the list of factors:

> The effect of enforcement of a confiscation order may well cause hardship, but it will rarely be A1P1[68] disproportionate if the means (ie enforcement of an after acquired asset) has a reasonable relationship with the aim (to recover the value of financial benefit gained from crime).

15.96 Rudi Fortson KC queried whether, in the face of the objectives of recovering benefit and deterrence, "the challenge facing a defendant who seeks to resist an 'uplift', on grounds other than insufficient wealth, appears to be considerable if not almost insurmountable." He continued:

> The subtler message to the defendant to "stay legitimate or stray at your risk" only begins to be effective and meaningful if the courts give it the substantial weight that it deserves and which is sufficient to displace or to mitigate the so-called "legislative steer" (that is to say, of maximising the recovery of assets under an unforgiven confiscation order). How likely is that to happen?

15.97 In relation to factor 3 (diligence of the prosecutor), one practitioner from the Criminal Finance sub-group of the Organised Crime Task Force in Northern Ireland expressed "strong concerns" that:

> To include this within a statutory provision will imply that there is an ongoing duty on the prosecution [and financial investigators] to continually conduct financial investigations on convicted defendants. This is not practical as it is resource intensive and could potentially detract from new investigations.

"Other" responses

15.98 Among those who responded "other", the Bar Council agreed that "these are the types of factors that a court is likely to wish to consider when deciding whether to grant an application for uplift". Their response continued:

> We consider it important that the court's hands are not unduly tied, however, and again note the observations of the Court of Appeal in *R v Bates* that "there may be all sorts of circumstances to which a judge can properly have regard". We would therefore suggest that if the above factors are to be articulated in a statutory provision, it is made clear within that provision that this is a non-exhaustive list and

[68] Article 1 of Protocol 1 to the European Convention on Human Rights. See Chapter 2 – Objective of the Act for a more comprehensive discussion of the human rights framework.

that the court should take into account all the circumstances of the case which it considers to be relevant.

15.99 A personal response from someone in the Ministry of Justice considered that the introduction of "undue hardship" may overlap with the existing consideration of what is "just". However, he went on to say that:

> A statutory steer that "undue hardship" needs to be considered, particularly for the defendant's family, might serve to focus the minds of those involved. After all, undue hardship is an often run counter-argument to the section 22 application.

15.100 The Criminal Law Solicitors' Association called for recognition of third party and article 8 of the ECHR rights (as discussed earlier at 1.31) in the determination of what is just.

15.101 The Association of Chief Trading Standards Officers (ACTSO), supported by an individual response, thought that these provisions would be better expressed as guidance.

Negative responses

15.102 Two consultees considered that the listed factors would run counter to the purpose of the legislation.[69]

15.103 The CPS and the City of London Police objected to articulating factors in a statutory provision to the extent that this would fetter a judge's discretion. The City of London Police was not opposed to the court having "guidance" on what is "just". The CPS said:

> The fettering of discretion will not allow the judge to deal with the facts of specific cases. It will also result in criticism [of] the prosecutor for not knowing the full financial position of the criminal, in relation to hidden assets. This will lessen the overall deterrent effect of the reconsideration element of confiscation.

15.104 Other consultees were concerned about the impact these factors would have on the ability of the judge to consider matters on a case-by-case basis. Several individual law enforcement consultees said that these factors are already taken into account. Two also considered that undue hardship should not be relevant because the defendant chose to commit crime and therefore the consequences were borne fairly.

15.105 In response to the previous consultation question, but relevant here, the North East ACE and Confiscation Team provided us with following list of factors which they use to determine whether to bring a section 22 application:

(1) length of time since conviction;

(2) compensation;

(3) any further offending;

(4) size of disparity [between original available amount and benefit figure];

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69 West Yorkshire Trading Standards and one personal response.

(5) nature of the original offending;

(6) how much benefit has already been repaid?

(7) were there co-defendants?

(8) what are the [currently available] assets?

(9) are [the assets] held jointly?

(10) what is the total value of assets identified?

(11) public interest;

(12) Is the defendant declaring any income to His Majesty's Revenue and Customs?

15.106 A number of consultees suggested additional indicative factors which should be added to the list:

(1) the rehabilitation of the defendant;[70]

(2) public interest;[71] and

(3) third party rights.[72]

Analysis of responses – the meaning of "undue hardship"

15.107 We asked consultees whether they agreed with our proposal that the assessment of undue hardship should include consideration of the use ordinarily made, or intended to be made, of the property; and the nature and extent of the defendant's interest in the property.[73] This part of the question received fewer additional comments.

15.108 Among those who supported the proposal, Garden Court Chambers added that it should not only take into account "personal property" but also legitimate business property and investments, as well as "finances earmarked for responsibilities the offender has towards others" such as children and care for elderly relatives.

15.109 Dr Craig Fletcher added:

> Each case should be assessed on its individual merit. A defendant who has complied with an order to the extent that they are (financially) able to do so, perhaps by making payments out of their legitimate wages for several years, should be rewarded for their efforts, not further punished. Perhaps this would then incentivise others to follow suit. A system which is unrelenting and constantly "moves the goalposts" by increasing the amount of debt owed is likely to discourage compliance not increase it.

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70 Barnaby Hone, Drystone Chambers.
71 Royal United Services Institute.
72 Criminal Law Solicitors' Association.
73 Consultation question 85, part 2 (40 responses: 27 (Y), 4 (N), 9 (O); 22 did not answer) and summary consultation question 25(2) (19 selected factor (2), 6 (other), 12 did not select factor (2)).

15.110 During discussion at a consultation roundtable meeting, one barrister also queried whether this assessment should include the source of property (contrasting, for example, legitimate earnings to inherited assets).[74]

15.111 Some consultees were equivocal or thought these factors were "too obvious to require statutory codification".[75]

15.112 The negative responses to this part of the full consultation question largely mirror those above, with the exception of one comment made by John McNally, who objected to the proposal on the basis that it constituted a "repositioning of the same considerations in which factor 1(a) (depriving the defendant of the benefit of his criminal conduct) would act as a 'trump card'".

Analysis

15.113 Several issues emerge from the consultation responses above. First, among consultees with practical experience in this area there was no consensus on an exhaustive list of factors which are relevant to determining what is "just". Consultees had differing views about the appropriateness of the suggested factors, and highlighted others which should be taken into consideration. There was also no consensus about the appropriate weight to be given to different factors. In general, there was consensus that each case ought to be decided on its merits.

15.114 Secondly, consultees tended to favour indicative factors being articulated in guidance rather than in statute. This was because they did not want the court to be hindered in responding to the particular circumstances of the case at hand.

15.115 Given the much more limited application of the assessment of what is "just", in light of our recommended changes to section 22, we no longer consider it necessary to articulate indicative factors in statute. Furthermore, given the extensive number of factors which the court may consider in the circumstances of each case, we do not recommend listing them in non-statutory guidance.

15.116 The courts are well-accustomed to making determinations on the basis of what is "just". The statutory objective we recommend, as well as the clear legislative policy behind a reformed section 22, are sufficient to enable the court to weigh all relevant factors in each case and come to a just conclusion.

15.117 Accordingly, we do not recommend articulating a list of indicative factors to assist the determination of what is "just" in statute or non-statutory guidance.

PROPOSAL 3 – UPLIFT FOR COMPENSATION

The current law

15.118 Under the current law, compensation may be directed to be paid out of a confiscation order at the time the confiscation order is made.[76]

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74 Practitioners' first roundtable meeting (27 October 2020).

75 Financial Crime Practice Group at Three Raymond Buildings.

76 Consultation question 81 proposed 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

15.119 However, there is no power to increase the compensation element to be paid out of a confiscation order, even when the available amount under the confiscation order is increased under section 22. Similarly, there is no power to adjust downwards the compensation element of an order where the confiscation order is reduced under section 23.

The consultation paper

15.120 In the consultation paper, we described hearing from stakeholders during the pre-consultation period about the discrepancy between the powers to adjust confiscation orders, and the compensation elements of those orders. We concluded that "the inability to adjust one when the other is amended is undesirable".[77]

15.121 We made the comparison to other orders – in particular, slavery and trafficking reparation orders – which can be varied when a confiscation order is varied.[78] We said that "there is no apparent justification for the absence of a similar power in respect of compensation orders",[79] and we considered the disparity with other orders "unsatisfactory".[80]

15.122 We therefore provisionally proposed to "remove this anomaly", so that when making an order to vary the available amount, the Crown Court would have the power to adjust the compensation element of the confiscation order to reflect the variation.

Consultation responses

15.123 We asked consultees whether they agreed with our provisional proposal that when making an order to vary the available amount, the Crown Court should have the power to adjust the compensation element of the confiscation order to reflect the variation. This proposal was almost unanimously supported by consultees, with only one respondent disagreeing.[81]

15.124 Consultees supported this proposal on the basis that it corrected an indefensible anomaly between the confiscation and compensation regimes. The Criminal Law Solicitors' Association described the current position as "irreconcilable" and one individual supported this view, saying it was one of the "biggest problems" with section 22 applications. BCL Solicitors LLP agreed, saying that the present rules "may cause injustice to victims".

15.125 The Private Prosecutors' Association said:

> We can think of no justification for a court being able to vary amounts due under a confiscation order but not have the power to amend the compensation element. So long as there is clear guidance or legislation that makes it clear compensation is the

sums recovered under a confiscation order. See Chapter 21 – What happens when a confiscation order is paid?.

77 CP 249, para 24.70.

78 Modern Slavery Act 2015, ss 10(4) and (5).

79 CP 249, para 24.108.

80 CP 249, para 24.111.

81 Consultation question 83 (45 responses: 39 (Y), 1 (N), 5 (O); 17 did not answer) and summary consultation question 23(2) (32 responses: 30 (Y), 2 (O); 5 did not answer). This proposal was also positively commented on in responses to consultation questions 87 and 104, and these answers are incorporated into the analysis.

priority and compensation amounts should not be reduced to allow for greater confiscation payments.

15.126 The ACTSO agreed with the prioritisation of compensation, saying that "the public purse should not take precedence over compensating victims from money recovered from the defendant." The City of London Police noted that, as a general principle, "the compensation and confiscation regimes should be much more closely aligned".

15.127 The CPS supported the proposal but commented that the proposal will address a weakness in compensation law, rather than an issue at fault with the confiscation regime.

15.128 The Environment Agency wanted to take the proposal further, to ensure that when an order for downwards reconsideration was made under section 23, payment towards the compensation element of the order would be the last to be reduced.

15.129 The Eastern RECU noted that the proposal will need to be implemented with careful recording, to avoid double recovery.

15.130 The one response against the proposal – from practitioners in the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland – disagreed with the proposal if it was adopted alongside our provisional proposal in consultation question 81. That proposal was to require 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. They added that if uplift for compensation is permitted, it should "only apply in extreme circumstances".

15.131 The NCES (part of HM Courts and Tribunals Service responsible for enforcing court orders) commented that they would support this proposal if it applied to all priority orders. They noted that it is operationally very difficult when confiscation orders are adjusted, but other priority orders are not and that a consistent approach would be helpful. The NCES also noted that when confiscation orders are adjusted downwards, compensation orders are not automatically also adjusted downwards which can result in unpayable compensation orders.

15.132 The NCES and the Justices' Legal Advisers' and Court Officers' Service queried the practical implications of the proposal when paired with the proposal in relation to consolidated orders.

15.133 The Association of Business Recovery Professionals (R3) commented that compensatees ought to have the opportunity to be heard and participate in proceedings.

Analysis

15.134 Two changes have occurred since the consultation paper which affect this proposal. First, our recommendation on section 22 (to exclude after-acquired assets) will limit its impact, because uplift will be less frequent and most likely for smaller amounts. Second, we do not recommend making compensation of victims one of the secondary objectives of the confiscation regime. This reflects a decision that, while we intend to

prioritise compensation where possible, we should not compromise the confiscation regime by trying to use it to "fix" the compensation regime.

15.135 This proposal was one of the most widely supported during the consultation period. Consultees from across the spectrum of views on restricting section 22 applications regarded prioritising compensation for victims as important.

15.136 This was not a proposal to change the law of compensation, which is outside our remit. Therefore, we do not recommend that when dealing with reconsideration of a confiscation order, the courts should have the power to amend an existing compensation order.

15.137 However, in Chapter 21, we make a recommendation for priority of payment towards compensation orders. In every case where a compensation order is made at the same time as a confiscation order, the court must direct that monies recovered under the confiscation order are paid towards satisfying the compensation order first.

15.138 In line with that recommendation, we recommend that when a confiscation order is varied, either upwards under section 22 or downwards under section 23, the amount directed to be paid towards an unsatisfied compensation order should be adjusted accordingly. This achieves the dual aims of prioritising payment of compensation and preventing the defendant from facing an unpayable order. It also confirms that sections 22 and 23 continue to mirror each other which ensures fairness.

Recommendation 72.

15.139 We recommend that when making an order to vary the available amount, the Crown Court should have the power to adjust the compensation element of the order to reflect the variation.

PROPOSAL 4 – PAYING THE RECONSIDERED AMOUNT

15.140 The third issue that we raised with consultees was whether an uplifted confiscation order should be paid by a specified deadline or in instalments.

The current law

15.141 When a confiscation order is made, the defendant may be liable to pay immediately or be given "time to pay" the available amount. The time to pay period is usually three months and may be extended to a maximum of six months. There is no provision for a time to pay an amount ordered after reconsideration; the defendant becomes immediately liable to pay the new available amount.

The consultation paper

15.142 In the consultation paper, we discussed adding a "time to pay" period for the reconsidered available amount, as well as the option to pay in instalments.[82]

15.143 We gave two reasons for this proposal. First, that "prosecutors identified that a number of defendants had wished to enter into arrangements whereby they repaid their confiscation order by way of instalments".[83] Second, that "payment by instalments could soften any issue of rehabilitation or hardship by not requiring repayment in a lump sum".[84] We concluded that payment in instalments could be a "just compromise" between "making no order for an uplift and ordering an uplift in the full amount, payable within a short time."

15.144 A power to make attachment of earnings orders is already in existence under Schedule 5 to the Courts Act 2003 and such a power could facilitate payment in instalments.

15.145 We provisionally proposed that when an application for upwards reconsideration under section 22 is determined, the court may order the new available amount to be paid either by a specified deadline or in instalments.[85]

Consultation responses

15.146 We asked consultees whether they agreed with this provisional proposal.[86] Although most consultees supported this proposal, there was differing support for the proposals to permit the uplifted amount to be paid (1) by a specified deadline and (2) in instalments.

Payment by a specified deadline

15.147 It was relatively uncontroversial among consultees that, if such a power does not already exist, the court should be able to set a deadline by which the additional amount must be paid.

15.148 One tribunal judge and former specialist prosecutor in the CPS proceeds of crime team, submitting a personal response, did not think that such a power already existed:

> Currently, there is no statutory provision for granting a person time to satisfy an order that has been varied under section 22 as the drafting of section 11 does not provide for it. In practice defendants are generally given time to pay albeit there is no power to do so.

15.149 The CPS considered that payment by a specified deadline was consistent with the fact that reconsideration is ordered against "identified assets". The Government also preferred this option, saying, "Immediate payment or payment by a specified deadline soon after the uplift is determined is our preference."

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82 CP 249, paras 25.77 to 25.79.
83 CP 249, para 25.77.
84 CP 249, para 25.78.
85 CP 249, para 25.86.
86 Consultation question 86 (45 responses: 35 (Y), 2 (N), 8 (O); 17 did not answer).

15.150 The Bar Council did not consider that this provisional proposal deviated far from current practice. Another consultee thought setting a deadline for payments was "reasonable" and would prevent the "drift" which may set in with cases which have "no fixed end point".[87]

15.151 Only one consultee expressed views contrary to including a deadline for the payment of an uplift. The Prison Reform Trust said:

> We would argue against imposing a deadline for any uplifts. If a defendant is still paying the original confiscation order and/or interest, any deadline is immaterial and unnecessary.

Payment in instalments

15.152 The option to make payments in instalments was much more controversial. Among the consultees who responded "yes" and "other" to the overall question, many expressed misgivings about this part or qualified their support. Others explicitly disagreed with the proposal.[88]

15.153 First, consultees were concerned about the compatibility of payment in instalments with the nature of reconsideration, which targets identified assets.[89] In particular, one consultee was concerned that the value of the asset may change after the uplift hearing.[90]

15.154 Secondly, there was concern that the period of instalments "should not extend too far into the future".[91] This may amount to "encouragement to retain the asset".[92] Conversely, Gary Pons, barrister at 5 St Andrew's Hill, suggested that payment by instalments could enable a defendant to retain an asset but pay the value instead.

15.155 One practitioner from the NCA/NECC joint response argued that, "[i]f the order cannot be satisfied other remedies apply, such as a certificate of inadequacy [the pre-POCA version of a section 23 application]."

15.156 Thirdly, the Bar Council and others were concerned about the impact of long-term instalments on rehabilitation:

> Although some defendants may prefer to pay in instalments, the risk of that becoming normalised is that confiscation uplifts may be seen as a long-term tax on historic offending, which would militate against rehabilitation.

15.157 This was echoed by Dr Craig Fletcher, who responded "no" to the question. This may reflect some of the findings in his PhD research about the negative impact of unrealistic attachment of earnings orders. He described the deduction as asking for a "crippling amount of money" which can have "devastating consequences" and result in

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87 Wilsons Auctions.

88 One practitioner in the NCA/NECC joint response; North East RECU (ACE Team and Confiscation Unit); South East Confiscation Panel, East Kent Bench; one practitioner in the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland.

89 North East RECU (ACE Team and Confiscation Unit).

90 One practitioner from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland.

91 Garden Court Chambers.

92 One practitioner from the joint NCA/NECC response.

"financially disadvantaging [defendants] in such a way that disincentivises them from seeking legitimate employment".[93]

15.158 Fourthly, several consultees (including one who responded "no") highlighted the "anomaly" which this would create between the requirements of paying the original order (that is, that it must be paid within the prescribed "time to pay" period) and the requirements of paying the uplifted amount.[94] There is no automatic provision for paying the original order in instalments.

15.159 Fifthly, some consultees would limit access to payment by instalments. The Government response said:

> We accept that there may be some narrow circumstances under which it may be agreeable for a defendant to pay in instalments, if the court can be satisfied that future payments will be met and to require payment via other means would result in the recovery of lesser sums. In cases where there are identifiable victims, prompt payment of compensation must be a priority consideration.

15.160 The FCA suggested that repayment by instalments could be "subjected to a threshold amount, for example like student loans, where you don't pay anything until your income has reached a particular level."

15.161 Finally, consultees commented on whether interest should accrue on the amount of the order if it is being paid by instalments. Both the Association of Business Recovery Professionals (R3) and the Criminal Law Solicitors' Association agreed that interest should not accrue before the specified deadline for full payment or payment by instalment. This tension was also raised during a policy roundtable meeting.[95]

Analysis

15.162 This proposal was intended to achieve two objectives. First, to regularise the disparity between the original confiscation order and an order for reconsideration. Under the former, the defendant can be given "time to pay". Although, as we heard from consultees, in practice a defendant will often be given time to pay the reconsidered available amount under a section 22 order, there is currently no formal provision for this. The first aim of this proposal was therefore to ensure that on an application to uplift the available amount under section 22, the court would have the power to set a time to pay period during which the defendant must pay the value of the reconsidered available amount. This was uncontroversial among consultees and we make this recommendation.

15.163 Secondly, this proposal was intended to permit the defendant to pay the reconsidered available amount in instalments. There were two reasons given for this in the consultation paper: defendants sometimes asked for this; and it might "soften" the impact of reconsideration on rehabilitation.

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93 C Fletcher, *Double Punishment – The Proceeds of Crime Act 2002 (POCA): A Qualitative Examination of Post-Conviction Confiscation Punishment in England and Wales* (2019), Manchester Metropolitan University, p 225.

94 David Winch, forensic accountant; practitioners from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland.

95 Policy roundtable meeting (6 October 2020).

15.164 This proposal was met with a mixed response. We heard that payment by instalments may not always be supportive of rehabilitation, where the defendant remains liable for a long time. This is at odds with the purpose of our recommendation on the substance of upwards reconsideration, which aims to bring finality and prevent lifelong liability. We also note that the interests of rehabilitation are much better served by that recommendation, and therefore the need to seek a "just compromise" through the method of paying the reconsidered amount – which will now only comprise undisclosed assets or increased value – is greatly reduced.

15.165 We also note consultees' comments that this would create a disparity with the original order, and the Government's view that prompt payment must be a priority, especially where there is outstanding compensation owed to victims.

15.166 For these reasons, we are no longer convinced that providing an option to pay in instalments is necessary for an order to uplift the available amount under section 22. Instead, as with the original confiscation order, a defendant will be given time to pay the section 22 order.

Recommendation 73.

15.167 We recommend that, when an order to increase the available amount under section 22 of POCA 2002 is made, the court may order that the reconsidered available amount be paid by a specified deadline.

PROPOSAL 5 – OTHER PROBLEMS WITH RECONSIDERATION

15.168 As highlighted at the start of this chapter, section 22 is not the only provision under which a confiscation order can be reconsidered. In our consultation paper we did not evaluate other reconsideration provisions because our terms of reference asked us to consider the most pressing problems with Part 2 of POCA 2002, and section 22 was the exclusive focus of stakeholders at the pre-consultation stage. However, in the consultation paper we asked consultees to submit their views about problems with any of the other reconsideration provisions in Part 2 of POCA 2002.[96]

Section 23: Downwards reconsideration of the available amount

15.169 A significant number of consultees raised matters concerning section 23 of POCA 2002 which provides for variation of the available amount where the sum originally calculated is inadequate to meet the amount of the order.

15.170 These responses reveal several distinct issues.

(1) Who can apply for a section 23 order?

(2) How can section 23 be used when the defendant cannot satisfy their confiscation order to the amount originally determined (either because they are

[96] Consultation question 87 (20 responses) and summary consultation question 26 (14 responses).

later discovered not to have any interest in an asset, or because the asset realises less than its original valuation)?

(3) Can the relationship between section 23 and tainted gifts be improved?

(4) When should the court decline to make a section 23 order because there are hidden assets?

15.171 In addition to the issues raised by consultees, we address the relationship between section 22 and section 23 orders to ensure that our recommendations on reconsideration are consistent.

Who can apply to decrease the available amount under section 23?

Consultation responses

15.172 First, both the NCES and the Justices' Legal Advisers' and Court Officers' Service ("JLACOS", formerly the Justices' Clerks' Society) called for an extension of the powers of the designated officer of the magistrates' court to be able to apply to the Crown Court for the variation of a confiscation order [pursuant to] section 23. The JLACOS described the problem as follows:

> The power to apply has been extended so that now the defendant, prosecutor or receiver can apply for a variation, but not the designated officer. The defendant often assumes that if an asset has been sold then there is no need for them to pay anything further towards the order. This often results in unnecessary enforcement hearings in the magistrates' court, rather than an application to the Crown Court for a downwards variation under section 23 POCA 2002. Allowing the designated officer to apply in the same way that they can apply in sections 24 to 25A POCA 2002[97] would assist the operation of the regime by preventing the need for unrepresented defendants to make applications to the Crown Court.

15.173 NCES explained that the absence of this power causes "operational issues" and the extension of the power would help by "reducing the administrative burden on NCES, who has to continue to review and enforce these orders, and reduce the uncollectable debt figure."

Analysis

15.174 We are satisfied that the power to apply for a section 23 order should be expanded to the designated officer.

[97] Section 24, Proceeds of Crime Act 2002 allows for the discharge of a confiscation order if the defendant's available amount is inadequate to pay the order where the defendant's remaining assets consist of money held in a currency other than sterling and there have been fluctuations in the value of that currency; and where the amount remaining to be paid is less than £1000. Section 25 allows for the discharge of a confiscation order if the amount remaining to be paid is less than £50. Section 25A allows for the discharge of the order because the defendant is deceased and is not possible or reasonable to recover anything from the estate.

Recommendation 74.

15.175 We recommend that the power to apply for downwards reconsideration of the available amount under section 23 should be expanded to a designated officer of a magistrates' court.

Downwards reconsideration under section 23 and change in the value of assets or the extent of the defendant's interest

Consultation responses

15.176 We received several responses in relation to the use of section 23 when the defendant cannot satisfy the confiscation order because of a change which renders the value of what is available less than the original valuation at the time of the order.

15.177 The SFO raised the issue of whether section 23 applications may be made when the value of the property *itself* has not altered, rather the value *to the defendant* is in fact different from that ascribed at confiscation:

> It may be appropriate to clarify that section 23 may also be used to also deal with circumstances where after the making of a confiscation order, it is established that the defendant's interest is less than it was thought to be at the time that the order was made or that he did not actually have any interest in [an asset] at all (as these are usually matters that may come to light in the course of enforcement proceedings). The former of those positions is probably caught by section 23, but the latter is arguably not, whereas it should be.

Analysis

15.178 Our recommendations on reconsideration are intended to bring a greater degree of finality to the defendant's liability under a confiscation order. This is achieved in relation to upwards reconsideration under section 22 by excluding after-acquired assets. However, it is also important that finality is achieved in relation to downwards reconsideration under section 23; this is not a new route of appeal to challenge the inclusion of particular assets in the confiscation order, or the extent of a defendant's interest in an asset. Rather, its aim is to account for events which occur outside the defendant's control and which prevent the defendant from satisfying the confiscation order in the amount originally determined.

15.179 Taken to its logical conclusion, the proposition raised by the SFO would mean that section 23 could be used whenever it is contended that an asset should not have been included in the confiscation order, because if the defendant has no interest whatsoever in the property, its value to the defendant would be nil. Ultimately, if it is contended that the court erred in including property in the confiscation order at all, or the court incorrectly determined the extent of the defendant's interest an asset, that should be a matter for the Court of Appeal or (if within 56 days, the slip rule).[98] Every

[98] Sentencing Code, s 385.

encouragement should also be made to ensure that confiscation orders are accurately calculated in the first instance.

Downwards reconsideration under section 23 and tainted gifts

Consultation responses

15.180 During a consultation roundtable meeting,[99] practitioners discussed the application of section 23 to tainted gifts. In particular, where an amount was included in the available amount as a tainted gift at the time of the original order, but was subsequently not realisable, whether the defendant could apply to have the available amount reduced accordingly. Practitioners expressed concern about the "strangled" and "hostile" construction of section 23 in the case law preventing defendants from legitimately going back to court and explaining why they cannot fulfil the order.

Analysis

15.181 We have considered whether section 23 could be an appropriate mechanism to improve how tainted gifts are managed after the confiscation order is made.

15.182 Tainted gifts are assets which the defendant transfers to third parties after the commission of the relevant offence and without consideration. The value of tainted gifts is included in the available amount and the defendant is expected to recover the gift or pay the equivalent value to satisfy the confiscation order. Tainted gifts are considered in depth in Chapter 12 – Recoverable Amount.

15.183 There are two ways in which tainted gifts may interact with downwards reconsideration of the available amount under section 23:

(1) where the value of a tainted gift (in the hands of a third party) declines after the confiscation order is made; and

(2) where the defendant cannot recover the tainted gift and has no other means to satisfy the equivalent value for the confiscation order.

15.184 The first scenario can be ameliorated through application of our policy on section 23. Our recommendation below refers to "relevant assets", the changing value of which is relevant to section 23. We recommend that this includes both the defendant's identified assets as well as tainted gifts. Thus, where the value of a tainted gift declines (through no default of the defendant) after the confiscation order is made, the available amount can be reduced to reflect this where that gift is recovered and realised in satisfaction of the confiscation order.

15.185 Contrary to consultees' suggestions, the second scenario is less relevant to section 23. As highlighted above, section 23 should not be a mechanism through which to challenge the inclusion of tainted gifts in the confiscation order. Rather than concerning a change in the value of a tainted gift, this scenario concerns a defendant who alleges that they cannot recover a tainted gift at all. It is therefore dealt with through our recommendation on provisional discharge in Chapter 16. If the defendant

[99] Practitioners' second roundtable meeting (3 November 2020).

contends that the tainted gift should not have been included in the available amount at all, then the appropriate remedy is to appeal the original order.

Downwards reconsideration under section 23 and hidden assets

Consultation responses

15.186 Gary Pons, a barrister at 5 St Andrew's Hill, made general comments about section 23 being used to "relitigate issues [from] the confiscation hearing", that there was an "inaccurate understanding of the effect of a hidden assets finding on [section 23] applications" and that judges apply "the wrong test". More specifically, he identified the following two problems with section 23:

> The case law all relates to provisions under previous legislation. This leads to a lack of clarity about when it would be just to not vary the confiscation order.
>
> Guidance is needed in the form of a Practice Direction about when a court should decline to vary a confiscation order despite finding that a defendant's available amount is insufficient to pay the order.

Analysis

15.187 In Chapter 11, we consider various aspects of case law that might helpfully be codified (whether in statute or by or on behalf of the Criminal Procedure Rule Committee). It is correct that much of the case law on reconsideration pre-dates POCA 2002. Throughout our consultation, references were made to "certificates of inadequacy", which reflects the pre-POCA terminology. Accordingly, in Chapter 11 we recommend incorporating key principles from the case law on section 23 applications.

Aligning downwards reconsideration with our proposal for upwards reconsideration

15.188 Aside from issues raised by consultees, we consider that our revised regime for upwards reconsideration ought to be mirrored by the regime for downwards reconsideration.

15.189 We have recommended a regime for upwards reconsideration of the available amount which focusses on what the defendant had at the time of the original confiscation order, rather than recalculating the available amount in light of the defendant's assets at the time of a later application. We recommend a similar regime for the purposes of downwards reconsideration of the available amount, which mirrors our approach to upwards reconsideration.

(1) Where assets are not disclosed or are undervalued (ie they realise more than their original valuation), section 22 allows that difference to be added to the available amount.

(2) Where assets are disclosed, three scenarios may arise.

(a) The asset held by the defendant may have been overvalued (ie it realises less than its original valuation).

(b) The defendant may have good reason for not realising certain assets identified at the time of the original order (for example, a family home, sole mode of transport, item of sentimental value etc).

(c) The asset is a tainted gift.

Overvalued assets

15.190 Where the asset held by the defendant may have been overvalued, section 23 should operate to have the available amount reduced according to the lesser amount generated by realisation, provided this was not owing to some fault of the defendant.

15.191 Our recommendations on reconsideration ought to bring a greater degree of finality to the defendant's liability under a confiscation order. This is achieved in section 22 by excluding after-acquired assets. In relation to section 23, finality is achieved by making it clear that this is not a new route of appeal to challenge the inclusion of particular assets in the confiscation order. Rather, its purpose is to account for events which occur outside the defendant's control and which prevent the defendant from satisfying the confiscation order in the amount originally determined. Therefore, sections 22 and 23 should both be flexible, permitting changes which occur after the confiscation order is made to be taken into account to ensure that the defendant is held to account for what they had at the time of the order. Framing the reconsideration provisions with reference to what should have been disclosed at the time of confiscation is intended to support accurate confiscation orders being made and to incentivise full disclosure by the defendant of their assets at the time of the confiscation order.

Good reason for not realising particular assets

15.192 Our reconsideration policy is intended to reflect the *in personam* nature of the confiscation order. The defendant is free to satisfy the order using whatever assets they want. They are not bound to realise the assets identified for the purposes of determining the "available amount". In other words, the defendant may use alternative, "substitute assets" (such as a loan) to avoid having to realise the identified assets. This substitute asset should meet the value of the identified asset as determined in the original order. Paying the substitute asset towards the confiscation order ends the liability of the defendant for the value of the identified asset. This policy is recognised in our recommendation on section 22: where an identified asset, *which is also realised pursuant to the confiscation order*, realises an amount greater than its original valuation, that additional value can be added to the available amount.

15.193 However, if another identified asset subsequently realises less than its original valuation, the defendant should not necessarily be liable to pay the shortfall out of the identified asset which has been substituted. Instead, the defendant should be able to seek reconsideration under section 23, to have the available amount reduced. For example:

> The defendant has an order with an available amount of £100. He has three assets as originally valued: asset A (£20), asset B (£30), asset C (£50). The defendant does not want to realise asset C for good reason. He takes out a loan (substitute asset) and pays £50 towards his confiscation order. Asset A realises £20 and this is paid towards the order. Asset B, through no fault of the defendant, realises £20.

15.194 Under our provisions, the defendant should not necessarily have to realise asset C, which has been substituted and the value paid, in order to pay off the remaining £10 of the order. Instead, the defendant should be able to seek reconsideration under section 23 to have the available amount reduced by £10.

15.195 This mechanism highlights a tension within the nature of confiscation orders: in order to preserve the *in personam* nature of the order and the defendant's liability for the value of the order, some degree of asset-based assessment is required.

The asset is a tainted gift

15.196 The third scenario is that an asset is identified in the original order as a tainted gift. This is dealt with above.

Recommendation 75.

15.197 We recommend that section 23 of POCA 2002 should be amended to provide for the downwards reconsideration of the available amount where the value of an asset (including a tainted gift) identified in the original confiscation order realised in satisfaction of the confiscation order realises a lower amount than its original valuation through no fault of the defendant.

Recommendation 76.

15.198 We recommend that section 23 of POCA 2002 should be amended to recognise substitute assets and ensure that the defendant is not penalised for how they choose to satisfy the confiscation order.

Section 21: Reconsideration of benefit

The current law

15.199 Sections 19 and 20 relate to situations where no confiscation order has been made at all. The court may, up to six years after the date of conviction, make a confiscation order if (under section 19) no confiscation proceedings were commenced originally or if (under section 20) confiscation proceedings were commenced but no benefit finding was made. Both provisions require new evidence which was not available to the prosecutor at the time of the original proceedings.

15.200 Section 21 permits upwards reconsideration of the benefit figure in light of new evidence. This may occur up to six years after the date of conviction.

Consultation responses

15.201 Several consultees raised comments in relation to section 21, both in response to consultation question 87 (about other concerns in connection with reconsideration)

and consultation question 104 (about other concerns in relation to confiscation more generally). This provision also requires attention in light of our recommendations on sections 22 and 23.

15.202 The ACTSO and one trading standards officer said:

> Reconsideration of the available amount should trigger an automatic option for the prosecutor to introduce new evidence as to the benefit figure. Evidence of an increased benefit may have become available but not enough to make an application for reconsideration a viable option as it may be lower than the cost to the public purse of the process.

15.203 One practitioner cautioned against the impracticability of reconsidering the benefit figure in criminal lifestyle cases; she argued that if such an amendment is to be made it would need to include "provisions to preclude evidence that could have been deployed and/or was potentially available at the earlier hearing and also possibly the test of risk of serious injustice."[100]

15.204 A member of the NCA who submitted a personal response pointed to an "anomaly" in section 21:

> The time bar is based on the date of conviction, rather than the date the order was made. Some, or even all of that time in an extreme case will always be used up between conviction and order. It seems odd to impose a time bar [on] an order before it was even made.[101]

15.205 One judge suggested that there might be a role for an "equivalent of section 21" in joint liability cases, to allow "the jointly obtained benefit to be reduced in a co-defendant's order when it has been repaid by another co-defendant."

Analysis

15.206 Our recommended statutory aim of confiscation is to deprive defendants of their proceeds of crime within the limits of their means. Accurate calculation of a defendant's proceeds of crime and their means from which to repay it therefore will be crucial at the time of the making of the confiscation order.

15.207 Our policy on reconsideration of confiscation orders in general is intended to reinforce the need to provide complete and accurate information at a confiscation hearing. It also provides a mechanism to remediate the making of an inaccurate confiscation order if it transpires that the information provided was not complete or accurate.

15.208 Our policy on sections 22 and 23 achieves these aims and applies without a time limit. This is because the defendant should not obtain a financial advantage by delaying the realisation of their asset, nor an advantage by failing to disclose an asset for a particular period of time (until the limit expired). To encourage a defendant to hide an asset until it is beyond the reach of the courts would essentially encourage money laundering and run directly counter to our aim of full disclosure. Similarly, there is no time restriction on making an application pursuant to section 23 because a

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100 Penelope Small, 33 Chancery Lane.
101 Personal response [from a member of law enforcement].

defendant's liability under a confiscation order exists until the order is paid or discharged.

15.209 Ultimately, the absence of a time limit on applications to reconsider the available amount under sections 22 and 23 reflects the fact that, in those applications, reconsideration is within the confines of an order already set by the court and communicated to the defendant. Their purpose is to ensure continued accuracy and completeness after the confiscation order is made, but within the limits of that original order.

15.210 Conversely, sections 19 to 21 are subject to a six-year time limit. Section 21 currently allows for the Crown Court to reconsider benefit if a confiscation order was made and, before the end of the period of six years starting with the date of conviction, the prosecutor applies to the Crown Court to consider new evidence. During our consultation process we heard no criticism of the six-year period for reconsideration of benefit.

15.211 We do not, therefore, propose any change to the ability of the prosecution to bring an application for reconsideration of the benefit figure under sections 19 to 21, where there is new evidence that was not available at the time of the original proceedings. Although, to some extent, the possibility that the defendant's liability may change after the original confiscation proceedings is at odds with our policy on finality, these provisions are necessary to uphold the central objective that the defendant is deprived of their benefit from crime. Within the statutory time limit, the defendant should not be permitted to retain any benefit from crime which is subsequently discovered, where that evidence was not available at the time of the original proceedings.

Aligning section 21 with our policy on reconsideration

15.212 However, we do recommend a change to the calculation of the available amount consequent upon a successful section 21 application to increase the benefit figure, in line with our recommendations on sections 22 and 23.

15.213 Where the benefit figure is revised upwards because inaccurate or incomplete information was provided at the time of the original confiscation order, there is no conflict with our policy on section 22 in permit the available amount to be similarly increased. Both the section 21 and 22 applications rely on evidence which was not available at the time of the original order, but which relates to the state of affairs at the time of the original order. Defects from the initial confiscation hearing can be remedied both in relation to the benefit figure and the available amount.

15.214 However, where the benefit figure is revised upwards but there is no evidence to suggest that the available amount as calculated at the time of the original order is inaccurate or incomplete, the defendant will remain liable to satisfy the revised benefit figure according to the same available amount as calculated at the time of the original order.

15.215 Reconsideration of the available amount should only involve consideration of the current value of those assets available to the defendant at the time of the confiscation order. This might be assets identified at the time of the confiscation order or assets which have since been identified which would be subject to an uplift application.

Where the defendant realised an alternative asset in place of the asset identified at the time of confiscation in satisfaction of the confiscation order (a substitute asset), the original asset for which it was substituted should form no part of the calculation. Rather than requiring simultaneous applications (as suggested by one consultee above), the policy of section 22 is incorporated into the determination of the available amount under section 21. Simultaneous section 23 applications may, however, still be necessary and ought to be possible.

15.216 Knowledge of what has become of assets identified at the time of the original order is ultimately for the defendant. Therefore, the defendant should be required to account for those assets at the time of the reconsideration hearing through a disclosure order. The value of assets realised for the purposes of satisfying the confiscation order, where they realised more than the value of the order, may be traced into other assets for the purposes of the reconsideration of the available amount.

15.217 These calculations, while adding a degree of complexity to the current system, are necessary to ensure that:

(1) the defendant cannot escape liability for the value of assets which they held at the time of the original confiscation order; and

(2) after-acquired assets are not affected by upwards reconsideration of the benefit figure.

15.218 These considerations do not apply to sections 19 and 20, where no confiscation order was made. There is no issue of inaccurate or incomplete information about the extent of the defendant's available amount at the time of the original order, because there is no original order. Therefore, in accordance with our policy, the benefit and the recoverable amount should be determined for the first time at that hearing.

Recommendation 77.

15.219 We recommend that the calculation of the available amount after upwards reconsideration of the benefit figure under section 21 should exclude assets acquired after the original confiscation order is made, in accordance with recommendation 73.

15.220 We do not recommend any changes to the six-year time limit, or to sections 19 and 20 for two primary reasons. Firstly, because this was not an concern raised during the consultation period; and secondly, because the current provisions provide an appropriate limitation period which ensures that a fair and proportionate balance is struck between achieving the objective of the regime and finality in litigation.

Reconsidering benefit when a successful section 23 application is made

15.221 A tribunal judge (and former CPS prosecutor) calling for a provision which permits downwards reconsideration of the benefit figure said:

Section 21 only currently allows benefit to be increased and this has caused problems, particularly where assets have subsequently realised less than the value assigned to them at the confiscation stage.

15.222 The CPS commented on this scenario in a consultation meeting, saying that their practice was to credit the defendant with the amount of the asset as valued at the time of the confiscation order.

15.223 An asset which represents the defendant's entire proceeds of crime (for example, some jewellery) may be included in both the benefit figure and the available amount. If the jewellery is seized by the police, it will be accounted for in our policy on deducting seized assets to leave the outstanding benefit.[102] If the jewellery is not seized by the police, it will be available to satisfy the defendant's confiscation order and so its value will also be included in the available amount. Therefore, if the jewellery was valued at £500,000, the £500,000 figure would form both the benefit and the available amount. If the jewellery only sells for £100,000, the defendant can apply to reduce the available amount. However, the benefit figure (calculated using precisely the same asset) remains at £500,000. Accordingly, despite the defendant having repaid in full the value of the asset that made up the benefit, under the current law they might be subject to uplift applications for the remaining £400,000.

15.224 The CPS told us that in these circumstances, unless they have deliberately reduced the value of the sale, the defendant will be credited as though they paid the amount as originally valued.

Analysis

15.225 Our reconsideration policy means that the defendant should no longer be exposed to continuing liability to use after-acquired assets in order to repay a benefit figure which has already been satisfied. Accordingly, it might be argued that the situation described above generates no real need to reassess the benefit, once the available amount is reduced accordingly. However, the defendant in the example above:

(1) may still be subject to an application for reconsideration if their assets at the time of confiscation exceeded the benefit and so the erroneously calculated £400,000 of benefit could be recouped from other assets even after the jewellery is realised.

(2) will still have a £400,000 benefit figure which appears to be unrecovered, whereas in reality they have paid back all of the benefit actually obtained. This creates a misleading negative public perception that the confiscation regime has been ineffective, when in fact it has achieved its aim.

(3) may be subject to a "rectified" confiscation order only through what might be termed "creative accounting" as described above, rather than through an amended order which reflects reality.

15.226 We therefore recommend that when a defendant obtains an order for downwards reconsideration of the available amount under section 23 in connection with an asset

[102] See Chapter 12 – Recoverable amount.

which was realised for less than the value that was ascribed to it at the time of confiscation, the defendant's benefit figure may also be amended accordingly.

Recommendation 78.

15.227 We recommend that when a defendant obtains an order for downwards reconsideration of the available amount under section 23 in connection with an asset which was realised for less than the value that was ascribed to it at the time of confiscation, the defendant's benefit figure may also be amended accordingly.

Chapter 16: Provisional discharge

INTRODUCTION

16.1 This chapter concerns our recommendations on provisional discharge. There was no equivalent chapter in the consultation paper. This is because we have devised the concept of provisional discharge and our recommendations since publication of the consultation paper. These recommendations address consultation responses and provisional proposals from three areas of the consultation paper.

(1) Reconsideration: in the previous chapter, we made recommendations in relation to some of the reconsideration provisions in Part 2 of POCA 2002, namely reconsideration of benefit and the available amount under sections 21 to 23. In addressing some of the concerns raised by consultees, we are now considering discharge due to the inadequacy of the available amount or the small amount of the order under sections 24 and 25, which are also provisions under the reconsideration umbrella.

(2) Enforcement: in the consultation paper, we made three provisional proposals on abeyance, and two provisional proposals on pausing interest and recalculating the default term in Chapter 22 on enforcement.

(3) Tainted gifts: in the consultation paper, we made three provisional proposals on recalculating interest and adjusting the default term in Chapter 17 on tainted gifts.

16.2 During the policy development process, we realised that we could more efficiently address all three of these areas through a single policy: provisional discharge. This chapter contains the background, consultation responses and policy analysis in relation to all three areas above, leading towards one set of recommendations.

OVERVIEW OF POLICY

16.3 That:

(1) There should be a power for the court to make an order for the provisional discharge of a confiscation order, where:

(a) there are no reasonable enforcement measures available; or

(b) the only outstanding amount to be paid comprises interest and the court considers it just to discharge the order provisionally.

(2) The effect of provisional discharge should be that the order has no continuing force, unless the discharge order is revoked. Therefore, all potential enforcement measures end, including the accrual of interest and the possibility of activating the default term.

(3) An order for provisional discharge can be revoked where reasonable enforcement measures become available, or an order is made under to increase the defendant's benefit or available amount under sections 21 or 22.

(4) The provisional discharge provision should contain a power to require the defendant to provide information about their finances, to assist in the determination of (3).

(5) The provisions governing discharge due to the inadequacy of the available amount or the small amount of the order in sections 24 and 25 of POCA 2002 are no longer required.

PROPOSAL 1 – PROVISIONAL DISCHARGE

The current law

16.4 There are currently three provisions under which a defendant's confiscation order may be "discharged": sections 24, 25 and 25A of POCA 2002. These provisions sit under the "reconsideration" title of Part 2 because they represent situations where, although the confiscation order has not been satisfied in full, the defendant's liability is reconsidered for various reasons.

16.5 Section 24, titled "inadequacy of available amount: discharge of order", provides for the confiscation order to be discharged where the amount remaining to be paid is less than £1,000 and the defendant's available amount is inadequate to meet the amount remaining to be paid. It is a condition that this inadequacy is because the realisable property is foreign currency which has been devalued by fluctuations in currency exchange rates. This is a very narrow discharge provision.

16.6 Under section 25, the court may discharge the order where the remaining amount to be paid is £50 or less. There are no additional conditions, but the amount remaining to be paid is very small.

16.7 Under section 25A the court may discharge the order where the defendant has died and it appears to the court that it is not possible to recover anything from the estate of the deceased, or make any further attempt to do so.

16.8 Despite the sections being termed "discharge" provisions, sections 24(6) and 25(4) provide for an order to be revived where an application is sought to increase the defendant's benefit or available amount under section 21 or 22. To this effect, they are provisional rather than final or "absolute" discharge provisions. By contrast, section 25A has no revival provision.

The consultation paper

16.9 We did not explicitly consider sections 24 to 25A in the consultation paper in the context of reconsideration because no concerns about the sections were raised by stakeholders during the pre-consultation period. However, in Chapter 22, concerning the optimal enforcement regime, we made three provisional proposals regarding when a confiscation order ought to be put into "abeyance". We also made two provisional proposals concerning the pausing of interest and recalculating the default term.

16.10 Chapter 22 of the consultation paper concerned additional reforms to the enforcement regime which, in addition to our central proposal on contingent orders, we identified as helpful to address some of the problems with enforcing confiscation orders. We set out these enforcement problems, including: the large outstanding amount of unpaid confiscation orders; protracted enforcement proceedings; infrequent use of enforcement receivers; lack of reliable and current information on which to base enforcement decisions; the ineffectiveness of imprisonment in default; and unenforceable and disproportionate interest rates. We also said that "the mechanisms to write off orders that are deemed unenforceable are too restrictive".[1]

16.11 In setting out how we envisaged a reformed enforcement regime would operate, we provisionally proposed that there should be a power for the court to place enforcement of an order into "abeyance". We suggested that:

> 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.[2]

16.12 Elaborating on this proposal, we noted that "enforcement staff at His Majesty's Courts and Tribunal's Service ("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".[3] In this regard, we observed that although the outstanding

1 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, para 22.1.
2 CP 249, para 22.5.
3 CP 249, para 22.120.

confiscation debt stands at over £2 billion in gross terms, only £161 million is estimated by HMCTS as being recoverable. We therefore concluded that "resources should be targeted where there is a real likelihood of successfully enforcing an order"[4] and that consequently, where there is no real likelihood of enforcing an order, it ought to be placed into a new category of orders.

16.13 We rejected a blunt expansion of provisions to "write off" orders as offending the principal aim of the regime. Rather, we drew an analogy with the process in criminal cases where indictments, or counts on an indictment, are permitted to "lie on file". Where this occurs "there is no verdict, so the proceedings are not formally terminated" but also "there can be no further proceedings against the defendant on those matters, without the leave of the [court]".[5]

16.14 We came to the following conclusion:

> 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 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.[6]

16.15 We provisionally proposed that the Crown Court, of its own motion or on application by the prosecution or defendant, may direct that further enforcement action be held in abeyance until further order of the court. We proposed statutory limits on defence applications to prevent repeat unwarranted applications. We also proposed that this power should apply to all orders, including historic orders made under pre-POCA 2002 legislation.

16.16 We asked consultees about these proposals in three questions.

(1) We asked whether consultees agreed with our provisional proposal that the court should be able to direct that enforcement be placed in abeyance where it is satisfied that an order cannot be enforced.[7]

(2) We asked whether consultees agreed with our provisional proposal 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 their financial circumstances at periodic intervals as determined by the court.[8]

(3) We asked whether consultees agreed with our provisional proposal that legislation should set out indicative factors for the court to consider when

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4 CP 249, paras 22.121 to 22.125.

5 CP 249, para 22.128; citing Crown Prosecution Service, *Termination of proceedings (including discontinuance)* (November 2019) https://www.cps.gov.uk/legal-guidance/termination-proceedings-including-discontinuance.

6 CP 249, para 22.129.

7 Consultation question 77 and summary consultation question 21.

8 Consultation question 78.

determining whether to re-open enforcement of a confiscation order that has been placed in abeyance and that these indicative factors should mirror those proposed in connection with applications to increase the defendant's available amount under section 22 in consultation question 85.[9]

Consultation responses

16.17 We asked consultees whether they agreed with our provisional proposal that the court should be able to direct that enforcement be placed in abeyance where it is satisfied that an order cannot be enforced.[10] This proposal met strong support, accompanied by questions relating to the practical mechanisms and consequences of abeyance.

Responses in favour

16.18 Consultees in support of the proposal agreed that this would provide more for a more efficient use of resources, in favour of actively enforcing orders where possible and resolving historic orders where enforcement should no longer be pursued.

16.19 The Bar Council supported this proposal and noted that "many orders remain the subject of enforcement proceedings long after any realistic prospect of the order being satisfied has ceased." The Bar Council also considered that "enforcement of orders which can no longer realistically be satisfied represents a poor use of resources".

16.20 Kingsley Napley LLP thought that this proposal would significantly improve the collection rate of outstanding confiscation debt.

Responses against

16.21 Among those who were not in support of the proposal, concerns were expressed as to whether this proposal would restrict the opportunities available to review the order in the event that further assets are later identified.

16.22 The South East Confiscation Panel, East Kent Bench did not support the proposal and instead preferred the ability to adjourn the proceedings "sine die" (indefinitely) so that the matter can be relisted at regular intervals.

16.23 One consultee commented that confiscation orders should not get to a stage where this proposal is necessary. There ought to be mechanisms that ensure orders are paid promptly such as the automatic vesting of assets which would render this proposal redundant.

16.24 Another individual stakeholder commented that this proposal undermines the entire confiscation regime.

16.25 One stakeholder supported the proposal in principle but noted that it ought to be restricted to cases where it can be shown that "enforcement of an order is and forever will be completely impossible, as opposed to being unenforceable at any given time".

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9 Consultation question 79.

10 Consultation question 77 (46 responses: 44 (Y), 4 (N), 1 (O); 16 did not answer) and summary consultation question 21 (33 responses: 28 (Y), 2 (N), 3 (O); 4 did not answer).

Abeyance as an accounting mechanism

16.26 HMCTS also queried whether the intention is that orders held in abeyance will be accounted for differently and impaired by 100% for accounting purposes. During a consultation event, one consultee commented that this proposal appears to be a way to manipulate the statistics in relation to outstanding orders.

Interest

16.27 Several consultees commented on the impact of this proposal on interest. The Association of Chief Trading Standards Officers ("ACTSO") noted that this power would be particularly useful when there are low value orders accruing interest very quickly. R3 considered that interest ought to stop accruing unless it can be shown that the defendant had the assets at the time the order was placed into abeyance.

16.28 The National Compliance and Enforcement Service ("NCES", the organisation within HMCTS responsible for enforcing court orders) expressed concerns as to the practical implications of this proposal. They queried whether interest would continue to accrue while the order was in abeyance and whether any outstanding compensation orders would also be placed in abeyance. These concerns were echoed by the Justices' Legal Advisers' and Court Officers' Service ("JLACOS", formerly the Justices' Clerks' Society).

Suggested amendments

16.29 Several consultees made suggestions about how the proposal could be amended.

(1) The City of London Police supported the proposal but suggested that it should not be possible to place orders in abeyance until the default sentence has been served.

(2) The Fraud Lawyers Association suggested that this power apply to orders made pursuant to POCA 2002 and under previous legislation.

(3) Another consultee suggested that the wording of the provision ought to include orders which "should not" be enforced as well as those which "cannot" be enforced.

(4) RUSI commented that this proposal ought to be accompanied by further discretionary judicial powers to cancel in whole or in part unrealistic figures, where this accords with the spirit of the legislation.

(5) During a consultation event, there was a suggestion made of "presumptive abeyance" which could be rebutted if evidence of further wealth came to light.

Analysis

16.30 The thrust of our recommendations thus far has focused on ensuring that confiscation orders are made quickly, accurately and fairly. These orders are then enforced robustly, with the assistance of the spectrum of measures set out in later chapters.[11] Depriving the defendant of their benefit from crime is, and remains, the primary objective of Part 2 of POCA 2002. However, we know that complete enforcement of

[11] See Chapter 13 – Contingent orders and Chapter 14 – Enforcement.

every confiscation order is unrealistic. Not only is there a large legacy of outstanding debt, but as the preceding recommendations in Chapter 15 on reconsideration demonstrate, there is a degree to which a confiscation order must be flexible to accommodate future changes in circumstances.

16.31 Enforcing confiscation orders is not without cost. Although some of this cost may be met through recovery, it is also borne by the taxpayer. Unlimited enforcement action may not be viable for a number of reasons. For example, assets may be overseas, may be "hidden" and never (or later) discovered, or classified as "tainted gifts" which, despite every reasonable effort, the defendant has no prospect of recovering. Law enforcement agencies should not be under a continual obligation to chase such orders. Some allowance must be made for the fact that, through no fault of law enforcement authorities, the confiscation order simply cannot be enforced. In those circumstances, a form of "abeyance" is needed. POCA 2002 already has mechanisms for discharging confiscation orders in very particular circumstances.

16.32 In the consultation paper, we rejected the possibility that confiscation orders should be "written off", so that the defendant's liability is extinguished irrevocably. Instead, we proposed that, where an order cannot be enforced, the enforcement of that order should be placed in abeyance. Following consultation we have refined this mechanism to meet consultees' concerns and offer an efficient solution.

Provisional discharge

16.33 We recommend the creation of a "provisional discharge" provision. There is an analogy in the current section 25, which provides for the "discharge" of an order where there is £50 or less remaining of the outstanding amount to pay. The explanatory notes to section 25 say that it applies where "the recovery of the sum in question would not justify the expense required to recover it."

16.34 However, section 25, despite its name, is not a true discharge provision. The defendant's liability to pay under the order is only paused, and the order can be revived by a subsequent order to increase the defendant's benefit or available amount under sections 21 or 22. Operational stakeholders confirm that this "revival" is used, sometimes many years after the order was "discharged".

16.35 There is an element of intellectual dishonesty in having a "discharge" provision which does not really discharge the order. Indeed, until sections 24 and 25 were amended by the Criminal Finances Act 2017, they were true discharge provisions. Nevertheless, there may be good reason to make discharge susceptible to upwards reconsideration, especially if new information or a change in circumstance reveals undisclosed or undervalued assets, or previously undiscovered benefit. Therefore, even with our significant amendments to section 22, we do not recommend returning sections 24 and 25 to true discharge provisions.

16.36 Instead, we recommend a "provisional discharge" provision. Provisional discharge will be available, on application by the prosecutor, court officer, enforcement receiver or defendant, or on the court's motion, where, taking into account all enforcement measures that have been taken and any *reasonable* enforcement measures which could be taken, what could be recovered within a *reasonable* period from the date of the discharge hearing would be no more than minimal (whether in absolute terms, or

when compared to the value of the outstanding confiscation order). In other words, when enforcement is "no longer worth it".

16.37 Discharge is provisional in the sense that it is not final: a successful application to increase the defendant's benefit or available amount under section 21 or 22 may revive the order, as may a determination by the court at a later date that reasonable enforcement action could be taken to realise assets that were identified at the time of confiscation and which were not realised by the time of the discharge application.

16.38 A defendant who could not sell the family home might be discovered to have a bank account which was not declared at confiscation. If the confiscation order had been provisionally discharged because no reasonable enforcement action could be taken, the discovery of the new bank account could lead to an uplift application (under section 22). Alternatively, if the money in the bank account was derived from the original criminality and not the subject of a hidden assets finding, it could lead to a revision of benefit (under section 21). In both circumstances, the contingency on which the discharge could be revoked would have arisen.

16.39 The defendant could be required by the court, on provisional discharge of the confiscation order, to provide the court and prosecution with information periodically to enable them to assess whether the criteria for revoking the provisional discharge are met (see further the next recommendation).

16.40 We recommend that these powers should extend to orders made under pre-POCA 2002 legislation, as well as those made under POCA 2002. This will assist enforcement authorities who are currently faced with the prospect of expending valuable resources to enforce the approximately £2 billion confiscation debt which is likely to be largely unrecoverable (the legacy debt).

Assessing the reasonableness of future enforcement measures

16.41 We are clear about our policy in relation to provisional discharge: it is intended to bite where (in informal terms) enforcement is "no longer worth it". This requires an assessment of the reasonableness of future enforcement action, in the light of any previous enforcement measures taken. It is also a relative assessment, to the extent that it compares the amount of the order which could be recovered by future enforcement measures with the outstanding amount of that order. Recovering £100 per month for two years under an attachment of earnings order may be a much more reasonable enforcement measure for an outstanding order of £3,000 than it is for an outstanding order of £300,000 or £3 million. The former may be considered a "proportionate" response, while the latter may not (although we are keen to avoid use of the language of "proportionality", given its particular meaning in the confiscation context). Conversely, forcing the sale of a property might be more reasonable to satisfy an outstanding order of £300,000 or £3 million than for an outstanding order of £3,000. The assessment of reasonableness will depend on all the facts of the case.

16.42 The reasonableness assessment is also limited by time; it relates to the amount of the order which could be recovered in a reasonable period after the discharge hearing. This is similar to the assessment which a court makes when imposing a fine and assessing the amount which a defendant could be expected to pay in a "reasonable time".

16.43 There is a spectrum of enforceability of confiscation orders. There will be those for which something can be done, at reasonable cost, to recover in a reasonable time a reasonable amount of the outstanding confiscation order. This is not a suitable case for provisional discharge. Alternatively, there will cases in which the cost of taking enforcement action will either be exorbitant in comparison to the amount recovered, where the amount recovered will be a "drop in the ocean" in comparison to the outstanding amount, or where no conceivable enforcement action can be taken within a reasonable period. These are all cases suitable for provisional discharge.

16.44 While it may appear perverse to enable provisional discharge of a larger order that is unable to be paid while requiring the payment by instalments of a much smaller order, it is our view that a balance must be struck between achieving the objective of the legislation and finality of litigation. If the defendant is paying £100 a month towards a confiscation order of £300 000, it would take 250 years to pay off the order. This is without taking into account the interest, which is accruing on the order at 8% per annum. In effect, the defendant would be subject to a full lifetime liability in relation to the confiscation order.

16.45 This is at odds with other financial orders such as compensation and fines. The compensation regime does not, for instance, envisage that compensatees will receive a lifetime trickle of compensation.

16.46 Furthermore, when an order is paid over such a long period, there is no prospect of the defendant ever truly "moving on" with their life because the debt will always remain (and indeed be growing faster than it is being paid off due to interest).

16.47 Ultimately, we aim to encourage orders which can realistically be paid to be made in the first place (see Chapters 8 to 12) which will obviate the need for this provision. However, we recognise the need to address the outstanding pre-POCA order debt which continues to increase due to the accrual of interest. This provision will enable courts to take a position on the realistic prospect of enforcing these orders.

16.48 Whilst it is arguable that the legislative objective is not achieved through provisional discharge, it is also arguable that the objective is not being achieved by continuing to enforce these orders. In the example cited, the defendant's outstanding order will always continue to grow in light of interest accumulating. The amount paid off will not reflect a regime which is making an impact on recovering their proceeds of crime.

16.49 We also consider that the objective cannot be achieved at all costs (something which would be more akin to a punishment model). We consider that this recommendation strikes the appropriate balance by requiring an assessment of the reasonableness of continued enforcement on the facts of each case.

Preparing for a provisional discharge hearing

16.50 In order to assist decision-making, there ought to be clear powers to direct the provision of information in preparation for a provisional discharge hearing. This may include provision of evidence and information from third parties and, where relevant, the estate of a deceased defendant.

Recommendation 79.

16.51 We recommend that provisional discharge of a confiscation order should be available where, in light of any enforcement action taken and any reasonable enforcement measures which may be taken within a reasonable period from the date of the provisional discharge hearing, the amount recoverable would be no more than minimal (whether in absolute terms, or when compared to the value of the outstanding confiscation order).

Recommendation 80.

16.52 We recommend that the court should have the power in advance of a provisional discharge hearing, and after any order is made, to order the provision of information by the defendant to the prosecutor and the court.

16.53 We also consider that provisional discharge should be available where all that is outstanding is interest and the court considers that it is just to discharge the order provisionally. We discuss this further below.

PROPOSAL 2 – THE CONSEQUENCES OF PROVISIONAL DISCHARGE

Introduction

16.54 When a confiscation order is provisionally discharged, the order has no further effect unless it is revived. In the consultation paper, we made a number of provisional proposals relating to two key enforcement measures, interest and imprisonment for non-payment, which would be affected by our provisional discharge proposal. We provisionally proposed that:

(1) the court should have a 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 the order;[12]

(2) if the court is given discretion to pause interest, any credit against a term of imprisonment in default should be calculated by reference to the total outstanding sum, inclusive of interest;[13]

(3) in relation to tainted gifts, the case law on taking the recoverability of a tainted gift into account when calculating the default term should be set out in a confiscation practice direction;[14] and

(4) when the value of a tainted gift cannot be recovered through any reasonable enforcement means, interest should no longer accrue on the value of the

[12] Consultation question 74.
[13] Consultation question 75.
[14] Consultation question 59.

tainted gift[15] and any interest that has accrued on the tainted gift should be removed from the outstanding confiscation amount.[16]

16.55 Discussion of those provisional proposals and how they fit within the context of provisional discharge is broken down into two sections:

(1) interest; and

(2) enforcement in connection with tainted gifts.

Interest

The consultation paper

16.56 We discussed the perceived problems with the operation of interest as an enforcement tool in Chapters 19 and 22 of the consultation paper.[17] The main issue identified was that the high rate of interest (8%)[18] results in interest accruing on an unpaid confiscation balance faster than the defendant can pay the order off. The court has no discretion to alter the accrual or rate of interest.[19]

16.57 We were repeatedly told about cases where defendants paying off their order in instalments could not meet the rate of interest accruing.[20] We noted that "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".[21] We considered that the high rate of mandatory interest on confiscation orders may reflect the fact that, at the time of making the order, the defendant is found to have the means to satisfy the sum immediately, or in the time to pay period.[22] However, this rationale may conflict with the existing powers to reconsider the available amount downwards.[23]

16.58 We concluded that "the lack of discretion as to the application of interest could lead to unjust results", because the court has no discretion to alter the application of interest even where non-payment is not the defendant's fault.[24]

16.59 We did not provisionally propose that the courts should be able to vary the rate of interest charged on a confiscation order, as this "could lead to new complexity and uncertainty in the application of the law, and create new avenues of appeal."[25] However, we did provisionally propose that the court should have a discretion to pause interest accruing on the confiscation order where it is in the interests of justice to do so, and the court is satisfied that the defendant is (or has been) taking all reasonable steps to satisfy the order.[26]

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15 Consultation question 61.
16 Consultation question 62.
17 CP 249, paras 19.23 to 19.26 and 22.94 to 22.101.
18 This is the standard rate of interest across judgment debts, as set by section 17 of the Judgments Act 1838, albeit that for other judgment debts the court can vary the amount which accrues.
19 CP 249, para 22.94.
20 CP 249, para 22.95.
21 CP 249, para 22.97.
22 CP 249, para 22.98.
23 CP 249, para 22.99.
24 CP 249, para 22.100.
25 CP 249, para 22.102.
26 CP 249, para 22.103.

16.60 We then considered the implications of interest on the default term of imprisonment. In *R (Gibson) v Secretary of State for Justice*, the Supreme Court considered how credit against the default term of imprisonment should be calculated for part payment of the confiscation order, and in particular whether credit should be determined by reference to the outstanding sum inclusive or exclusive of interest which has accrued.[27] The court decided that any credit for part payment of the confiscation order (through a reduction in the default term) should be calculated by reference to the outstanding principal sum exclusive of interest.[28]

16.61 We provisionally proposed that this aspect of *Gibson* should be reversed. This was on the basis that if the enforcing court has a power to pause interest, the credit deducted from the default term for part payment should be calculated by reference to the total outstanding sum inclusive of interest.[29] This was because we considered that "interest will only accrue where the court deems it appropriate."[30]

Consultation responses

Pausing interest

16.62 We asked consultees whether they agreed with our provisional proposal that the court should have a discretion to pause interest accruing on the confiscation order where it is in the interests of justice to do so, and the court is satisfied that the defendant is (or has been) taking all reasonable steps to satisfy the order. This proposal received strong support.[31]

16.63 In support of the proposal, the Bar Council said that "the present system can cause real injustice to a defendant". However, they raised concerns that this power would need to be exercised carefully and any pause on interest kept under review. A defendant may appear to be taking all reasonable steps to satisfy an order until interest is paused, immediately after which they cease their efforts. The Serious Fraud Office similarly asked what would happen if the defendant subsequently failed to comply with the order.

16.64 Consultees noted that the continued accrual of interest (despite the defendant's efforts to satisfy the order) may affect their attitude towards compliance.

16.65 Dr Craig Fletcher noted that his PhD research revealed that when interest is accruing at a faster rate than a defendant is able to pay off the order, it can be "demoralising" and become a disincentive to work. Similarly, Members of the National Crime Agency ("NCA") and National Economic Crime Centre commented that when debt is increasing more quickly than the payments are being made this may act as a disincentive to continued compliance. This concern was repeated by consultees during several consultation events.

16.66 In a similar vein, the Northumbria University Financial Crime Compliance Group noted that the accrual of interest on the confiscation order can create "an enduring debt that

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

28 CP 249, para 22.107; citing *R (Gibson) v Secretary of State for Justice* [2018] UKSC 2, [2018] 1 WLR 629 at [23].

29 CP 249, paras 22.108 and 22.109.

30 CP 249, para 22.108.

31 Consultation question 74 (46 responses: 39 (Y), 4 (N), 3 (O); 16 did not answer) and summary consultation question 18 (34 responses: 28 (Y), 2 (N), 4 (O); 3 did not answer).

prevents the reformed individual from re-joining society due to adverse credit ratings and potential financial exclusion."[32] The Prison Reform Trust also said that "this added pressure of having to pay interest could lead to defendants reoffending upon release to try to pay it off."

16.67 Several consultees called for the proposal to go further. The Prisoners' Advice Service commented that the court should have a duty to consider whether the defendant has taken all reasonable steps to satisfy the order and if they have, the court should have a duty to pause interest.

16.68 Andrew Campbell-Tiech KC said that courts should be able to order that some or all interest be deleted. The Association of Business Recovery Professionals (R3) agreed and suggested that the court should be able to remove interest already accrued if the defendant has taken all reasonable steps to satisfy the order.

16.69 To supplement the proposal, the Association of Chief Trading Standards Officers said that guidance ought to be included as to what would constitute "reasonable steps". Similarly, the South East Confiscation Panel, East Kent Bench called for further guidance as to how and when the power could be exercised.

16.70 We also received comments from NCES and HMCTS calling for us to consider the practical implications of this proposal on the default term, and the difficulties it may pose accommodating changes in interest on their recording systems.

16.71 Commenting more generally on the rate of interest itself, the Environment Agency added that the interest rate of 8% ought to be revisited because it is very high and results in outstanding orders that will never be satisfied. This was echoed by the Prison Reform Trust, which noted that:

> For many prisoners, interest starts to accrue whilst they are still serving their sentences. It is unrealistic to believe that a prisoner can meet the interest on prison pay.

16.72 The Fraud Lawyers Association noted that at the time of consultation, the rate of interest was 80 times the base rate and far above the interest rates frequently ordered in civil judgments. This renders it punitive rather than an incentive for compliance.

16.73 The proposal may also impact historic orders: members of the Criminal Finance Sub-Group in the Organised Crime Task Force in Northern Ireland noted that it would "go a long way to solve problems of accrued interest in historical unpaid orders."

16.74 The Financial Conduct Authority ("FCA") commented that while this is an attractive idea in theory, it has the potential to cause further delay and confusion. Their submission noted that, to ensure fairness, the amount outstanding on a confiscation order and the interest accrued ought to be clearly identifiable at any given time. However, this proposal may render that information more difficult to extract.

[32] This view was also expressed by Kingsley Napley LLP and the Royal United Services Institute.

16.75 The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks' Society) did not support the proposal on the basis that it would add further complexity to a system which is already very difficult to apply.

Consequences for the default term

16.76 We asked consultees whether they agreed with our provisional proposal that if the enforcing court has a power to pause interest, the credit deducted from the default term for part payment should be calculated by reference to the total outstanding sum inclusive of interest. This proposal received strong support.[33]

16.77 The City of London Police noted that this proposal would act as a further deterrent to a defendant who is avoiding liability for their confiscation order. One member of the NCA agreed, saying that "the defendant cannot have it both ways".

16.78 Rudi Fortson KC had reservations about the proposal. He noted that given the high rate of interest, "some might argue that it is punitive". The Criminal Law Solicitors' Association also expressed misgivings, saying that "this will not lead to certainty for the defendant at the point of enforcement."

16.79 The NCES reiterated their concerns about the practicalities of this proposal, relating to who would make the determination and who would notify the defendant if they are already serving the default term. They were also concerned that the proposal could limit enforcement options. The Justices' Legal Advisers' and Court Officers' Service agreed that this proposal could pose significant difficulties in its application.

16.80 Other consultees were against the proposal. The Prisoners' Advice Service and R3 said that interest should be excluded when calculating the credit in these circumstances. Garden Court Chambers agreed, arguing that the high rate of interest was punitive.

Analysis

16.81 The policy analysis for these two proposals is dealt with below, together with the policy analysis for enforcement in connection with tainted gifts. This is because all of these provisional proposals are now addressed through our recommendations on provisional discharge.

Enforcement in connection with tainted gifts

16.82 The issue of interest arose again in the context of tainted gifts, alongside the issue of the default term for non-payment of the confiscation order.

The current law

16.83 In Chapter 12 of the consultation paper we set out how when a person gives away property which is traceable to criminal conduct or which could otherwise have been used to satisfy the confiscation order[34] that property is treated as a "tainted gift". The value of such a "tainted gift" is included in the amount that the defendant will be

[33] Consultation question 75 (44 responses: 37 (Y), 4 (N), 3 (O); 18 did not answer).
[34] Proceeds of Crime Act 2002, s 77.

ordered to pay towards the confiscation order because, as Mr Justice Edis noted in *R v Johnson*:

> [A defendant should] make good the losses they have caused… 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.[35]

16.84 Therefore, the tainted gift provisions provide an "effective measure […] so that the proceeds of crime cannot be hidden or salted away by an accomplice or relative and can be pursued".[36]

16.85 We observed that to give effect to the reasoning just articulated, the value of the tainted gift is included in the confiscation order even if the defendant cannot get that gift back from the recipient.[37] In the consultation paper we explained that:

> 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.[38]

The consultation paper

16.86 We noted the concerns of consultees from pre-consultation discussions that requiring the defendant to account for the value of a tainted gift where they have no means to recover it or pay the value may "cause injustice to the individual defendant through their imprisonment for non-payment" and "add to the outstanding confiscation debt".[39]

16.87 We considered that it was important to strike a balance between the severity of the regime and the just use of enforcement powers when the defendant has no means to pay the value of a tainted gift and no mechanism to recover that tainted gift from the recipient. We observed that the case law sought to strike this balance in relation to imprisonment in default. We provisionally proposed that case law principles to the following effect should be codified in a confiscation practice direction.

(1) Where the value of tainted gift is included in the defendant's confiscation order, the term of imprisonment imposed on the defendant for defaulting on payment be adjusted downwards if the court is satisfied that no enforcement measure (including appointment of an enforcement receiver)[40] would be effective in the recovery of the value of that tainted gift.[41]

(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.[42]

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35 *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57 at [26].
36 *Hansard* (HC), 30 October 2001, vol 373, col 846.
37 CP 249, para 7.4.
38 CP 249, para 17.48.
39 CP 249, para 17.57.
40 Consultation question 60.
41 Consultation question 59.
42 Consultation questions 59 and 60.

16.88 We noted that both the term of imprisonment in default and the accrual of interest are enforcement tools intended to "encourage repayment of the confiscation order"[43] and:

> 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.[44]

16.89 We provisionally proposed that, in the circumstances mentioned above, interest should no longer accrue on the value of the tainted gift.[45] We also proposed that if any interest had accrued in connection with a tainted gift and that gift could not be recovered through an enforcement receivership, the interest that had accrued on the tainted gift should be removed from the outstanding confiscation amount.[46]

Consultation responses

16.90 Our four provisional proposals on tempering the application of enforcement measures to account for tainted gifts which cannot be recovered were met with good support, both in relation to the adjusting default term[47] and with regards to stopping the accrual of and deducting interest.[48]

Default term

16.91 In relation to adjusting the default term downwards, one judge was supportive of the proposal as a sensible way to balance the policy reasons behind the tainted gifts regime with some of the "downsides" that regime created.[49] Consultees in support of the proposal nonetheless sought to emphasise that this policy should not encourage gifting assets to third parties[50] and that it should only apply where all means available to the defendant to pay the value of the tainted gift had been considered.[51] Two consultees asked whether it would be preferable to have the value of the tainted gift deducted from the confiscation order, rather than adjusting the default term.[52]

16.92 The Fraud Lawyers Association supported the proposal as in keeping with the authority of *R v Johnson.*[53] However, they said that there should also be a power to increase the default term later if it becomes apparent that the tainted gift could be recovered.

16.93 Among those not in favour of the proposal, the Crown Prosecution Service ("CPS") said that it would undermine the operation of the tainted gift principle. One solicitor from Blake Morgan LLP also considered that it would defeat the purpose of including

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43 CP 249, para 17.89.
44 CP 249, para 17.90.
45 Consultation question 61.
46 Consultation question 62.
47 Consultation question 59 (43 responses: 24 (Y), 5 (N), 14 (O); 19 did not answer); consultation question 60 (41 responses: 32 (Y), 4 (N), 5 (O); 21 did not answer) and summary consultation question 14(1) (32 responses: 22 (Y), 6 (N), 4 (O); 5 did not answer).
48 Consultation question 61 (44 responses: 33 (Y), 7 (N), 4 (O); 18 did not answer), consultation question 62 (43 responses: 33 (Y), 7 (N), 3 (O); 19 did not answer) and summary consultation question 14(2) (32 responses: 23 (Y), 6 (N), 3 (O); 5 did not answer).
49 A similar view was expressed by BCL Solicitors LLP.
50 One practitioner in the NCA.
51 City of London Police.
52 Kingsley Napley LLP; one practitioner from the NCA; one solicitor from Clarke Kiernan Solicitors LLP.
53 *R v Johnson* [2016] EWCA Crim 10, [2016] 4 WLR 57; the SFO agreed with this view.

the tainted gift in the confiscation order if it could later be abandoned. A personal response from a member of law enforcement argued that defendants deliberately made tainted gifts in order to prevent the enforcement of confiscation orders.

16.94 Several consultees made comments neither in support of nor opposed to the proposal. One ACE team response noted that if this was enacted the defence would claim a gift was irrecoverable in most cases. One practitioner at the NCA said that the standard should be whether the defendant could not pay the value of the gift because of "exceptional circumstances".

16.95 The Financial Crime Practice Group at Three Raymond Buildings asked by how much the default term could be reduced under this proposal and called for further guidance to make the power workable. The FCA warned that this may lead to more litigation on the recoverability of a tainted gift.

16.96 The Government did not object to the proposal but called for further consideration of victims' interests. The Government expressed reservations about whether this would encourage the gifting of assets to third parties.

16.97 One solicitor said that it may be difficult for defendants to argue that a tainted gift was irrecoverable at an enforcement hearing if they did not have legal aid. We note that we were told elsewhere that legal aid is available for enforcement proceedings until the default term has been activated.

Interest[54]

16.98 Consultees were supportive of not applying interest to a tainted gift which could not be recovered.

16.99 One practitioner from the NCA said that a more flexible application of interest was necessary to make the enforcement of confiscation orders more realistic. Another practitioner from the NCA said that this would reflect situations when the defendant could not recover the tainted gift for reasons outside their control. Dr Craig Fletcher said this would reduce the burden on defendants facing orders which they could not pay and prevent overall confiscation debt increasing beyond what represented the proceeds of crime.

16.100 Some consultees said that the value of a tainted gift which could not be recovered should not be included in the confiscation order at all.[55] Consistent with our proposal, consultees also noted that this should only apply when the court was satisfied that the gift could not be recovered.[56]

16.101 Several consultees made comments about the application of interest to confiscation orders generally. The Bar Council argued that the rate of interest on confiscation orders (8%) was too high and it was time for it to be reduced. They said that the rate should be one which encourages enforcement but also reflects "market realities".

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54 Combining responses to consultation questions 61 and 62, and summary consultation question 14(2).
55 One practitioner from the NCA; Criminal Law Solicitors' Association.
56 One practitioner from the NCA.

Professor Nicola Padfield described the accrual of interest as crippling, deeply unfair and oppressive.

16.102 An individual consultee from law enforcement said that interest should cease to accrue once the default term has been served.

16.103 Against the proposal, one individual consultee from the police said that removing interest would prevent the confiscation order reflecting changes in the value of money (on the basis that the accrual of interest is (in small part) intended to reflect inflation).

16.104 The primary concern of those against the proposal was that it would encourage the defendant to make more tainted gifts to place sums beyond the reach of confiscation.[57] Andrew Campbell-Tiech KC warned that this may encourage career criminals to hide gifts in more imaginative ways. The City of London Police said that the irrecoverability of a tainted gift was a situation of the defendant's own making.

16.105 The CPS commented that the confiscation order is an *in personam* order, made in a total value rather than by reference to particular assets.

16.106 In the government's response, the NCES and HMCTS raised questions about the practicalities of the proposal. In particular, HMCTS said that the Joint Asset Recovery Database ("JARD") (which records outstanding confiscation orders) could not accommodate the calculation of interest on part of a confiscation order only. They said that interest is not earmarked and calculated against specific assets or aspects of the confiscation order such as tainted gifts. HMCTS was also concerned about the difficulty of administering this proposal and accounting for it in the Annual Trust Statement.

16.107 The Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks' Society were also concerned about the complexity of these proposals on enforcement and the proper calculation of default terms and interest. One member of the police reiterated this, saying that it would be extremely difficult and confusing to have interest accruing on some parts of the order and not others.

Reconsidering inclusion of a tainted gift in the confiscation order

16.108 As we set out in Chapter 11, during a consultation roundtable meeting,[58] practitioners discussed the application of section 23 (to reduce the available amount) to tainted gifts. In particular, where an amount was included in the available amount as a tainted gift at the time of the original order, but was subsequently not realisable, practitioners queried whether the defendant could apply to have the available amount reduced accordingly. Practitioners expressed concern about the "strangled" and "hostile" construction of section 23 in the case law preventing defendants from legitimately going back to court and explaining why they cannot fulfil the order.

Analysis

16.109 We recognise that it would be difficult from a practical perspective (and out of line with the *in personam* nature of the order) to divide up the outstanding amount into different parts and treat tainted gifts differently. This may make it difficult to calculate interest

57 South East Confiscation Panel, East Kent Bench; CPS.
58 Practitioners' 2 roundtable meeting (3 November 2020).

relating to different parts, and to calculate the default term. As was emphasised by the NCES (who oversee confiscation enforcement), changing the amount ascribed to the order during its enforcement may prove problematic and create uncertainty. Instead, we propose that a balance is struck through the provisional discharge process.

16.110 Unlike our provisional proposal to pause interest in relation to particular assets, we envisage that the provisional discharge process would require the court to consider the whole of any outstanding order against the background of justice and recoverability.

16.111 Where the only part of an order that is outstanding is interest, the court should have the ability to discharge the confiscation order provisionally in the interests of justice. A court might make such an order where, for example, a court has previously ordered that the defendant cannot sell the matrimonial home until a child turns 18 or because a problem comes to light which means that the property is not mortgageable. In those circumstances, the defendant has done what was required under the confiscation order (by repaying it) and the interest has accrued in circumstances beyond the defendant's control.

16.112 Our recommendation on provisional discharge would mean that the decision of the Supreme Court in *R (Gibson) v Secretary of State for Justice*[59] need not be reversed, which our provisional proposal would have required. That decision was to the effect that a default term is calculated with reference to any outstanding principal sum owing under the confiscation order rather than any interest that had accrued on it.

16.113 Irrecoverable tainted gifts would still form part of the principal sum and so the fairness of including such gifts within the confiscation order must be addressed. We consider that this can be addressed through the second limb of our provisional discharge test, which looks at recoverability.

16.114 When considering changes to the downwards reconsideration of the available amount under section 23 in the previous chapter, we did not consider that it was appropriate to use section 23 to "write off" the value of the tainted gift. Section 23 is intended to deal with post-order changes in value of an asset rather than whether it should have been included in the order in the first place. However, we noted that our policy on provisional discharge might also be of use in this context.

16.115 Our recommendation on provisional discharge recognises that there may be some situations in which no reasonable enforcement action may be successful in recovering sums in satisfaction of a confiscation order. In essence, our provisional proposals regarding the enforcement of tainted gifts sought to achieve the same result. Those provisional proposals were about creating a mechanism to recognise when the defendant cannot recover a tainted gift or its value, and adapting the consequences of enforcement accordingly (namely, pausing interest and adjusting the default term).

16.116 We consider that this is more appropriate than codifying the case law to the effect that the defendant might have their default term adjusted at the outset by the trial judge

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

who sets that term on the basis of irrecoverability. As Mr Justice Edis (as he then was) commented:

> A substantial reduction in the default term will inevitably be a wholly exceptional course because the court will usually have limited confidence that an asset which has apparently been given away cannot be recovered by the offender or that the offender cannot satisfy the order by other means.[60]

16.117 Furthermore, the default term should not be activated whilst reasonable enforcement steps can be taken.[61]

16.118 Taking the position on default sentence and provisional discharge together, if the defendant has the value of a tainted gift outstanding on their confiscation order, the court would need to be satisfied that there was wilful refusal or culpable neglect in activating the default. If the court is satisfied that steps have been taken by the defendant and the gift is irrecoverable, then the default should not be activated because there is neither wilful refusal or culpable neglect, nor any reasonable enforcement action that can be taken. If the court is satisfied that no reasonable enforcement action can be taken and the tainted gift is the only outstanding asset, it follows that the order should be provisionally discharged.

16.119 Furthermore, we do not recommend that provisional discharge should be applicable in relation to only part of an order, because of the complexities identified in siphoning off parts of the order. Provisional discharge applies to the entire order or not at all. Where a tainted gift is only part of the outstanding available amount, or only part of the tainted gift is argued to be irrecoverable, it remains for the defendant to convince the court that the remaining available amount is also not susceptible to reasonable enforcement measures. Where this is not the case, the order will not be provisionally discharged because there is more which can be done to satisfy it.

16.120 *R v Waring*[62] provides a useful example of a situation in which an application for the provisional discharge of a confiscation order could be made. In this case the defendant stole a vehicle which he subsequently passed on to a third party ("Arfan"). The value of this car was treated as a tainted gift, pursuant to section 78 of POCA 2002. Lady Justice Simler described the position of the defendant at paragraph 3 of the judgment:

> It is this treatment of the car as a tainted gift for the purposes of the confiscation order that has led to this appeal. There was and remains no dispute that the appellant himself had no assets beyond a small amount in his bank account.

16.121 These are precisely the sort of circumstances we envisaged would afford a defendant the opportunity to apply for a provisional discharge because the only outstanding portion of the confiscation order is the tainted gift. However, crucially the defendant would also have to satisfy the recoverability aspect of the provisional discharge test

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60 *R v Johnson* [2018] EWCA Crim 10, [2018] 4 WLR 57 at [31].

61 Magistrates' Courts Act 1980, s 82(4); *Collins v DPP* [2021] EWHC 634 (Admin), [2021] 3 WLUK 320 citing with approval *R (Sanghera) v Birmingham Magistrates' Court* [2017] EWHC 3323 (Admin), [2017] 12 WLUK 185.

62 *R v Waring* [2021] EWCA Crim 1369.

which he would have been unlikely to be able to do successfully in *R v Waring* given that:

> he failed or refused to provide any details relating to Arfan beyond simply his first name, mentioning a surname for the very first time at the hearing itself. It is unsurprising in those circumstances that the judge was not satisfied by the appellant's evidence that he had made any effort to recover the vehicle, or indeed that he would be unable to do so.[63]

16.122 We consider that our recommendation on provisional discharge neatly responds to both concerns raised by consultees in response to our proposals on reconsideration and provides a different way of effecting the policy underlying our provisional proposals tainted gifts. Similar to other aspects of our policy on reconsideration, this recommendation takes a realistic approach, which seeks to make the best use of law enforcement resources, maximise and incentivise quick recovery where possible, and produce fair results.

16.123 If the defendant can satisfy the court that they cannot recover all or part of a tainted gift this may satisfy the requirement for provisional discharge that no reasonable enforcement action is worth taking to recover a particular asset. This may be the case whether the tainted gift is part of or the remainder of the outstanding available amount.

16.124 We are alive to the concerns expressed by consultees that our provisional proposals could have encouraged the making of tainted gifts. We also note the view of some consultees that irrecoverable tainted gifts should not be included in the confiscation order at all. We consider that provisional discharge is a middle ground between these two views. Tainted gifts will be considered in the same way as other outstanding sums in the confiscation order.

16.125 In developing this policy, we discussed with HMCTS the logistics of recording the status of provisionally discharged orders on the HMCTS Annual Trust Statement. It was noted that while it would be manageable to use the current system (Libra)[64] to record provisionally discharged orders, a modification would need to be made to JARD to stop interest from accruing.

Recommendation 81.

16.126 We recommend that where the only part of an order that is outstanding is accrued interest, the court should have the ability to discharge the confiscation order provisionally in the interests of justice.

63 *R v Waring* [2021] EWCA Crim 1369, para 31.

64 "These accounts are created on the accounting segment of the case management system known as Libra", HMCTS, *Trust Statement 2020/21* (2021), p 6.

Recommendation 82.

16.127 We recommend that the consequences of an order for provisional discharge be that the confiscation order is treated as no longer in force. Therefore, no further enforcement action (including accrual of interest and the activation of the default term) can be taken to recover sums under the confiscation order, unless the discharge order is revoked.

PROPOSAL 3 – REVOKING PROVISIONAL DISCHARGE

Consultation responses

16.128 We asked consultees whether they agreed with our provisional proposal that 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. We provisionally proposed that those indicative factors should mirror those proposed in connection with uplift applications. Consultees were supportive of this proposal.[65]

16.129 One consultee commented that "it is important that clear factors are set out for the Court and that this is standardised". The FCA repeated their query about which jurisdiction will bear responsibility for determining whether an order should be brought out of abeyance (now provisional discharge).

16.130 Andrew Campbell-Tiech KC did not support this proposal and commented that legitimately acquired assets should not be available to satisfy orders in abeyance. He repeated his concerns that a lifelong obligation to pay pushes defendants towards crime and is "absurd and plainly not in the public interest". We note that these concerns fall away in light of our recommendations to exclude after-acquired assets from applications to increase the available amount under section 22.

16.131 The CPS opposed this proposal but did not provide reasons. They simply commented that "continuing after-care is required."

16.132 One individual consultee commented that this proposal will have inconsistent and unfair effects in relation to different types of defendants. In particular, those who go "off grid" will be exempt from investigation, whereas those who rehabilitate and live legitimately will become easy "targets".

16.133 The Bar Council neither supported nor rejected this proposal but reiterated that, in their view, while indicative factors may be helpful for the court in deciding whether or not to recommence enforcement proceedings, there must be adequate resourcing for any evidence put forward by the defendant to be investigated and verified. They also noted that while the factors listed are appropriate, it ought to be made clear that this is a non-exhaustive list, so as not to restrict the court unduly.

[65] Consultation question 79 (41 responses: 33 (Y), 4 (N), 4 (O); 21 did not answer).

16.134 One individual consultee commented that:

> Powers to re-open a case which has previously been placed in abeyance should be reserved for cases in which assets appear which are suspected as being illegitimately acquired.

16.135 The Financial Practice Group at Three Raymond Buildings supported the proposal in principle but added that more information is needed for this proposal and it ought to be subjected to more rigorous and specific consultation.

Analysis

16.136 The first two of our proposals on provisional discharge have been incorporated into our central recommendation on provisional discharge. We now come to consider the third.

16.137 The first proposal being that provisional discharge ought to be available.

16.138 The second being that provisional discharge is not final: enforcement action can be revived if reasonable enforcement measures become available (that is, the conditions for provisional discharge are no longer satisfied) or because an order is made under section 21 or section 22 to increase the benefit figure or available amount.

16.139 This proposal considered a list of factors to assist the determination of when an order should be brought out of abeyance, which ought to mirror the list of factors used to determine whether an order for upwards reconsideration of the available amount under section 22 was just. In Chapter 15, we did not recommend that there ought to be a statutory list of factors to assist in the determination of a section 22 application, as the court is well-equipped to determine the interests of justice.

16.140 We now recommend that provisional discharge may be revoked when an order is made for upwards reconsideration under section 22 or when the conditions for provisional discharge no longer apply, and reasonable enforcement measures become available. Given that we have rejected a list of factors for determining section 22 applications, we consider that it is also not necessary to articulate a list of factors for when to revoke provisional discharge. The making of an order to increase the available amount under section 22 (or to increase the benefit figure under section 21) will satisfy the condition for revoking provisional discharge. As with our decision on section 22 applications, we are of the view that the court is well-equipped to determine what amounts to “reasonable enforcement measures”, taking account of all the relevant factors in any given case.

Recommendation 83.

16.141 We recommend that an order for provisional discharge may be revoked where:

(1) the conditions for provisional discharge no longer apply, and reasonable enforcement measures become available; or

(2) an order is made pursuant to section 21 to increase the benefit figure or section 22 to increase the available amount.

PROPOSAL 4 – PROVISION OF INFORMATION

Consultation responses

16.142 We asked whether consultees agreed with our provisional proposal 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 their financial circumstances at periodic intervals as determined by the court. Consultees were supportive of this proposal.[66]

16.143 The CPS supported the proposal and noted that "after-care" of an order is required by all parties concerned.

16.144 Practitioners from the NCA and National Economic Crime Centre noted that an application to reduce the available amount under section 23 already enables this process. Another consultee commented that while this is an attractive proposal in theory, it is redundant given that other reporting orders already exist.

16.145 Garden Court Chambers did not support this proposal and noted that a defendant ought not to be forced to appear before the court to make periodic updates as to their financial status indefinitely. They raised the principles of finality and proportionality and by comparison noted that Serious Crime Prevention Orders are limited to a maximum period of five years.

16.146 The Bar Council neither supported nor rejected the proposal but noted that while it is appropriate for the court to retain a discretion to re-commence enforcement proceedings "we consider that any system that is dependent on defendants providing financial information must have the resources to properly investigate and verify this information."

16.147 The Financial Crime Practice Group at Three Raymond Buildings neither supported nor rejected the proposal but suggested that there ought to be limits to the circumstances under which an order in abeyance can be reviewed. Their view was that a threshold should be imposed which ensures that reviews only take place if there is new information pertaining to newly identified assets or a material change in

[66] Consultation question 78 (44 responses: 34 (Y), 5 (N), 5 (O); 18 did not answer).

financial circumstances. This would avoid unnecessary and burdensome hearings and prevent courts from summoning defendants repeatedly and indefinitely.

16.148 The Government suggested that this proposal ought to be accompanied by sanctions which would be applied to a defendant who fails to provide accurate information.

16.149 The FCA queried which jurisdiction (magistrates' court or Crown Court) would bear responsibility for reviewing the orders.

Analysis

16.150 We consider that it is appropriate for the court to require the provision of information from the defendant in preparation for the discharge hearing, to facilitate that hearing and any decision being made on the basis of accurate and current information. As noted above, this information is peculiarly in the knowledge of the defendant.

16.151 Revoking provisional discharge will primarily be at the initiative of law enforcement. However, one of the purposes of provisional discharge is to allow law enforcement to focus their attention and resources on enforcing orders with a greater likelihood of recovery. Therefore, given that this information is within the knowledge of the defendant, we recommend that the court has a power to require the defendant to provide information about their assets to the court and prosecution.

16.152 Consultees' concerns about after-acquired assets being excluded from orders in relation to which provisional discharge is revoked are no longer applicable: even where provisional discharge is revoked because a section 22 application is made to uplift the confiscation order, the uplift will be limited by the parameters of section 22, that is, restricted to assets which were undeclared at the time of the original order or were realised for more than their estimated value.

Recommendation 84.

16.153 We recommend that when an order for provisional discharge is made, the court should have the power to order that the defendant provides financial information to the court and that the prosecution facilitate the assessment of the conditions for revoking the order for provisional discharge.

PROPOSAL 5 – REPEAL SECTIONS 24 AND 25

Relationship of provisional discharge recommendations with existing discharge provisions

Section 24 – Currency fluctuation

16.154 Section 24 permits discharge where the confiscation order has less than £1,000 outstanding and the reason for the outstanding balance is currency fluctuations. In such circumstances it is said to be reasonable to discharge the confiscation order. It is intended to be used, for example, where "currency [is] seized at an airport, and a shortfall in payment of the order arises later due entirely to a change in the value of

the currency concerned in the period between the order being made and payment".[67] The shortfall might also arise where the defendant fails to satisfy the order for a lengthy period, leading to the appointment of a receiver. In the period between the making of the confiscation order and the realisation of the property the value of the currency might change. In those circumstances the court might take the view that an uplift is appropriate if further assets come to light that were not disclosed at the time of confiscation.

16.155 We propose that this provision be subsumed within the power to revise the available amount downwards under section 23. If the defendant's means are insufficient to pay the available amount (whether due to currency fluctuations or otherwise) then the order must be redrawn accordingly. It may be redrawn to nil. Once redrawn to nil it would have the same effect as provisional discharge of the order – it would not be enforced save after a successful application for reconsideration of the benefit or the available amount.

Section 25 – Small amount outstanding

16.156 Where the amount outstanding under a confiscation order is £50 or less the designated officer of the magistrates' court may apply for discharge of the confiscation order. As above, this is subject to the ability to revive the order on a successful application for reconsideration of the benefit or available amount.

16.157 This provision can be subsumed into our recommendation on provisional discharge, thereby removing an arbitrary financial limit on when an order can be discharged because it is inappropriate to pursue enforcement.

Section 25A – Death of the defendant

16.158 Section 25A provides that a confiscation order can be discharged where a defendant dies prior to satisfaction of the confiscation order and it appears to the court that it is not possible to recover anything from the estate of the deceased for the purpose of satisfying the order to any extent, or it would not be reasonable to make any attempt, or further attempt, to recover anything from the estate of the deceased for that purpose.

16.159 This is the only provision that does not have the ability to revisit attached to it. To an extent, this falls within the ambit of our recommendation on provisional discharge, in that assessment of the reasonableness of making attempts of recovery is precisely what our recommendation envisages. However, arguably final disposal of the confiscation order is appropriate where all enquiries have been made into a defendant's estate and it has been determined that it is not appropriate to make any attempt or further attempt to recover anything. It is arguably not proportionate to put a continuing onus on the estate to provide information to the court about the defendant's assets. Accordingly, we recommend that section 25A remains.

16.160 Ultimately, the court may wish first to make a provisional discharge order and then make an order for final discharge if satisfied that it is appropriate to do so.

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[67] Proceeds of Crime Act 2002 explanatory notes, s 24.

Recommendation 85.

16.161 We recommend the removal of the power to discharge a confiscation order due to the inadequacy of the available amount or the small amount of the order under sections 24 and 25, POCA 2002.

Part 7: Preserving the Value of Assets

This Part comprises three chapters:

Restraint (Chapter 17)

Effective Asset Management (Chapter 18)

Digital Assets (Chapter 19)

In Part 7, we detail our policy and the related recommendations regarding the preservation of the value of assets in confiscation proceedings. Our recommendations aim to protect the value of assets against dissipation before a confiscation order is made and enforced, with a view to preventing defendants from frustrating the purpose of confiscation proceedings.

In Chapter 17 we consider the current restraint regime and make recommendations designed to balance the rights of the defendant with the need to preserve the value of assets which may be subject to a confiscation order. We make recommendations which are designed to assist the court which considering the release of restrained funds to allow the defendant to meet living expenses. We also recommend that the legislation should permit legal expenses connected with criminal proceedings and confiscation to be paid from restrained funds, subject restrictions. Finally we make recommendations as to the appropriate costs regime for restraint proceedings.

Chapter 18 discusses other steps which may be taken to manage or preserve the value of assets in addition to restraint and recommends a national asset management strategy and a Criminal Asset Recovery Board (“CARB”).

In Chapter 19 we observe that the value of cryptoassets may fluctuate significantly between the commencement of confiscation proceedings and its conclusion. We consider concerns relating to the restraint, secure storage and exchange of cryptoassets and ultimately recommend that any national asset management strategy developed by CARB should cover issues in connection with the storage and exchange of cryptoassets.

Chapter 17: Restraint

INTRODUCTION

17.1 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. It works by prohibiting any person from dealing with any realisable property specified in the order.[1]

17.2 A restraint order applies to "realisable property" which is any free property held by the defendant, or by the recipient of a tainted gift (where the defendant voluntarily transferred property to another and in return, the other person gave the defendant either nothing, or something which is far lower in value).[2]

17.3 The Crown Court may make a restraint order where a confiscation order, or the extension of a confiscation order, is anticipated. The Court must be satisfied that one of five possible statutory conditions are met. 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 their criminal conduct; or

(2) criminal proceedings for an offence have been started and there is reasonable cause to believe that the defendant has benefited from their criminal conduct.[3]

17.4 The courts have introduced an additional test that must be satisfied before a restraint order can be made. The prosecution must "establish that there is a real risk that assets will be dissipated which might otherwise meet a confiscation order".[4] This ensures that a restraint order will only interfere with the right to peaceful enjoyment of property when such interference is necessary.

17.5 The extent to which interference with a property right through restraint is necessary has been inferred by the courts through consideration of what has become known as the "legislative steer" in confiscation legislation.[5] Section 69(2)(a) of POCA 2002 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.[6]

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1 Proceeds of Crime Act 2002, s 41. See Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, ch 26.
2 Tainted Gifts are discussed comprehensively in Chapter 12 – Recoverable Amount.
3 Proceeds of Crime Act 2002, s 40.
4 *R v B* [2008] EWCA Crim 1374 at [9], [13], citing *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182
5 *Re Peters* [1988] QB 871; *Re S* [2010] EWHC 917 (Admin).
6 *Jennings v CPS* [2005] EWCA Civ 746, [2006] 1 WLR 182, citing *Re Peters* [1988] QB 871.

17.6 In our consultation paper we identified a number of areas for reform and made six provisional proposals in relation to restraint. We provisionally proposed:

(1) the introduction of a statutory list of factors relevant to the issue of whether there is a risk of dissipation;[7]

(2) that a system be introduced for the making of applications for restraint orders to a national duty judge without notice to the defendant or suspect;[8]

(3) the introduction of a statutory list of factors relevant to the issue of whether criminal proceedings are commenced within a reasonable time of obtaining a restraint order;[9]

(4) that an application to release funds for reasonable living expenses should be supported by a schedule of income and outgoings and include copies of evidence in support of assertions made within that schedule;[10]

(5) that the legislation should permit legal expenses connected with criminal proceedings and confiscation to be paid from restrained funds, subject to judicial approval of a cost budget, in accordance with a table of remuneration set out in a statutory instrument;[11]

(6) that in considering costs in connection with restraint proceedings:

(a) the court should decide if an application for restraint was reasonably brought. We provisionally proposed a list of indicative factors to assist the court in making its determination;[12]

(b) if the application was reasonably brought, costs should be capped at legal aid rates.[13]

17.7 We now make recommendations in line with (1), (3), (4), (5) and (6)(a). In light of consultees' views, we do not recommend the policies in (2) and 6(b). As set out below, we also make some additional recommendations.

7 Consultation questions 88 and 89.
8 Consultation question 90.
9 Consultation question 91.
10 Consultation question 92.
11 Consultation question 93.
12 Consultation question 94.
13 Consultation question 95.

OVERVIEW OF POLICY

17.8 That:

(1) The risk of dissipation test currently found in case law become a statutory test, the application of which should be guided by statutory indicative factors;

(2) Statutory indicative factors should also inform determinations as to whether criminal proceedings are commenced within a reasonable time of obtaining a restraint order;

(3) Applications for release of funds to meet reasonable living expenses should:

(a) be guided by the statutory objective of confiscation and by statutory indicative factors, drawn from the list suggested by the Court of Appeal in *R v Luckhurst* [2020] EWCA Crim 1579; and

(b) be supported by a schedule of income and outgoings (for which a new, standard form should be created) and include copies of evidence to support assertions made within that schedule;

(4) The legislation should permit legal expenses connected with criminal proceedings and confiscation to be paid from restrained funds, subject to judicial approval of a cost budget, in accordance with a table of remuneration set out in a statutory instrument;

(5) Costs in restraint proceedings:

(a) should be determined on an application-by-application basis;

(b) should be borne by each party in respect of their own costs if the prosecution brings a successful application; and

(c) are presumed to be payable by the prosecution in the event that it brings an unsuccessful application, unless the prosecution can demonstrate that the application was reasonably brought. Statutory indicative factors should inform such determinations.

PROPOSAL 1: A STATUTORY LIST OF FACTORS TO DETERMINE RISK OF DISSIPATION

The current law

17.9 Alongside the statutory test for the granting of restraint before 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, known as the risk of dissipation test.[14] The objective of this test is to determine that any interference with

[14] *R v B* [2008] EWCA Crim 1374 at [9].

property rights is necessary in order to preserve assets for confiscation, to ensure compliance with the right to peaceful enjoyment of property protected by Article 1 of the first protocol to the European Convention on Human Rights ("ECHR").

17.10 The extent to which interference with a property right through restraint is necessary has been inferred by the courts through consideration of what has become known as the "legislative steer" 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.

17.11 The primary concern with the test for restraint raised to us in the pre-consultation period has been with the risk of dissipation test. Some prosecutors reported that the test makes it difficult to obtain restraint orders. There are many cases in which a 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 Financial Action Task Force ("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.[15]

17.12 The risk of dissipation test has sometimes been a barrier to restraint in cases where assets were subsequently disposed of. One example we referred to in the consultation paper 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 bank 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.[16]

The consultation paper

17.13 We considered and rejected mandatory or presumptive restraint as a remedy, as the risk of dissipation test represented an important safeguard. We provisionally proposed to retain and refine the risk of dissipation test.

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

16 Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures, United Kingdom mutual evaluation report* (December 2018), box 13.

17.14 We provisionally proposed 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.[17]

(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.

17.15 We concluded that a statutory list of factors would be optimal for the following four reasons. First, it would provide prosecutors and the courts with clear guidance that multiple factors may be relevant, rather than the determination of the issue resting on whether there has been any dissipation to date. In turn this should avoid those situations described to us where investigators and prosecutors have had to let some assets be dissipated to establish the risk.

17.16 Second, because prosecutors and the courts would have a clear list of indicative factors to be taken into account, the reasonableness of the arguments on the risk of dissipation may be more readily established, leading to a reduced risk of an adverse costs order. We deal with costs in more detail below. This should give greater confidence to prosecuting authorities and encourage greater and responsible use of restraint powers.

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[17] If an offence falls within Schedule 2 to POCA 2002, it will trigger the application of the criminal lifestyle provisions which require the court to calculate the defendant's benefit on the basis of all property held by the defendant for a period of six years prior to proceedings commencing for the substantive criminal offence. For a full discussion of the criminal lifestyle provisions, see Chapter 9 – Benefit in Criminal Lifestyle Cases.

17.17 Third, the court would be assisted in performing its function of examining each application and this would align the approach adopted with consideration of deprivation of liberty, another fundamental right.

17.18 Fourth, by articulating factors to which the court and prosecutors should have regard, we considered that a better steer might be provided to parties in considering whether a prosecutor has complied with their duty of candour.

Consultation responses

17.19 There was a high degree of support for our provisional proposal.[18]

17.20 The Bar Council said:

> We agree that restraint should not be mandatory or even presumptive. Any exercise of the power over an individual's property should be proportionate to the risk of dissipation. This is a helpful (non-exhaustive) checklist. There is an advantage to enshrining this list in statute or a CrimPD as it renders the information more accessible.

17.21 The Serious Fraud Office ("SFO") agreed, saying:

> This does codify common risk factors which should assist in decision making when seeking a restraint order.

17.22 Although the Crown Prosecution Service ("CPS") agreed with the proposal, it questioned whether this proposal would solve the perceived problems with restraint:

> Does this really address the issue[?] The passage of time and legal risk are the barriers here. As is the defendant offering undertakings (subsequently broken) which result in no restraint order.

17.23 There were divergent views among consultees regarding the extent of the "problem" with the risk of dissipation test. The Eastern RECU described it as an "arduous task" to satisfy the high threshold of the test. Justifying the application with "solid proof" was difficult because this information is "not always obvious at the time of the application", or its use is limited by the stage of the investigation. On the other hand, one practitioner cautioned that problems with the requirement "should not be overstated".[19]

17.24 Practitioners in the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland were concerned about having a "prescriptive" or "definitive" list of factors:

> While it is good to have guidance for a court to take into account when considering the risk of dissipation, a concern arises with having a prescriptive list/test within the legislation because there will be factual circumstances/cases [where] the answer to each limb is no, but there may still be a high risk of dissipation.

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18 Consultation question 88 (41 responses: 34 (Y), 3 (N), 4 (O); 21 did not answer) and summary consultation question 27 (32 responses: 25 (Y), 7 (O); 5 did not answer).

19 Rudi Fortson KC.

17.25 Among those who responded negatively, the Financial Crime Practice Group at Three Raymond Buildings questioned the appropriateness of a statutory list of factors:

> As recognised in one of the consultation webinars,[20] it is incongruous to have a statutory list of factors in respect of a non-statutory test/concept (the risk of dissipation). There is a danger that too much emphasis will be placed on a listed factor. We do not see any purpose in codifying a list of what are relatively obvious points that may or may not be appropriate to advance in any particular case.

17.26 The Royal United Services Institute advocated against the risk of dissipation test itself, saying that it constitutes "one of a number of barriers to greater use of restraint" and it would be better to have "greater judicial discretion to consider the facts of the case on their merit".

Comments on specific factors

Indicative factor 1(c), The extent of compliance with court orders and directions

17.27 There was some uncertainty about the relevance and operation of this factor. One consultee commented:

> It would be interesting to see how any co-operation in the furtherance of the just disposal of the case would work with ex parte restraint order [proceedings].

17.28 Another practitioner added that "[factor] 1(c) is of no application when contested criminal proceedings are afoot".[21]

17.29 The Eastern Region Special Operations Unit RECU response also noted that the defendant's actions may change significantly pre- and post-charge, "therefore whilst their co-operation should be considered this should be tempered with the fact they may change their position once charged."

Indicative factor 2(a), The nature of the criminality alleged; including (but not limited to) whether the defendant is alleged to have committed an offence involving dishonesty

17.30 Solicitors' firm Kingsley Napley LLP challenged the inclusion of offences involving dishonesty as a factor in the list, saying:

> We take the view that this provides an attractively low threshold for prosecutors, who may well overuse this provision. We would suggest that this is amended to the "serious nature of the defendant's dishonesty / conduct being dishonest", to allow flexibility and eliminate the unnecessary blanket effect of this provision.

17.31 A similar view was expressed by barrister James Puzey, presenting at a consultation webinar. He was concerned that the list of factors should not be interpreted such that satisfaction of one factor – in particular that the offence was one of dishonesty – would be sufficient to demonstrate a real risk of dissipation. In his view, the test is far more

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20 This comment was initially made by barrister James Puzey in Webinar 7, Preserving assets (19 November 2020).

21 John McNally (Drystone Chambers).

stringent and therefore factors which would almost always be satisfied shouldn't be included in the list.[22]

Indicative factor 5, The person's capability to transfer assets overseas

17.32 In relation to this factor, Garden Court Chambers commented:

> We agree, although a person's capability to transfer assets overseas should not be based simply upon their nationality or place of birth as there is a danger of this criteria being used in a racially discriminatory fashion.

Indicative factor 9, Whether a surety or security could be provided

17.33 This factor received the most negative comments and was described as "problematic".[23]

17.34 One practitioner in the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland said:

> The relevance of adding a reference to a surety at [factor] 9 is unclear and it is considered that this would need to be further developed. A surety in a criminal case doesn't necessarily equate to the fact that an alleged offender would not dissipate assets.

17.35 Another practitioner from the National Crime Agency ("NCA")/NECC joint response said that all the listed factors were "valid and form part of the considerations at present with the exception of factor 9". The Environment Agency agreed, saying factor 9 should not be included on the list. The Financial Conduct Authority ("FCA") also queried whether this consideration was "fair or practical".

17.36 The Eastern Region Special Operations Unit RECU said:

> The consideration of a surety or security sounds interesting, and could be almost used as a form of restraint without an order? Properly managed it could be a useful alternative to restraint. But there are concerns around what the consequences would be if the asset is then dissipated.

17.37 A personal response from a member of law enforcement also raised the following consideration:

> If asset restraint is being considered there would be a substantial risk that any such surety or security would itself constitute the proceeds of crime which should rightfully be preserved for confiscation via the existing restraint mechanism.

Analysis

Risk of dissipation test itself

17.38 We considered that there is merit in the consultation responses to the effect that it is incongruous to specify factors in statute which are relevant to a non-statutory test. A key theme of our reforms is making the law as clear as possible. Therefore, we make

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22 Webinar 7, Preserving assets (19 November 2020).
23 Andrew Campbell-Tiech KC (Drystone Chambers).

a new recommendation that the risk of dissipation test itself should be set out in a statutory provision.

Statutory factors

17.39 In general, the statutory factors which we provisionally proposed were seen as appropriate indications of a risk of dissipation[24] and we recommend their inclusion, save for:

(1) compliance with court orders and directions (factor 1(c)); and

(2) the provision of a security or surety (factor 9).

17.40 The uncertainty about the inclusion of compliance with court orders and directions as an indicative factor primarily related to the adversarial nature of criminal proceedings. Irrespective of the adversarial nature of the proceedings, defendants are required to, for example, submit defence statements and comply with orders to provide responses to prosecutor's statements in the confiscation proceedings themselves. However, we recognise the point raised by consultees that the risk of dissipation test will often be applied at the outset of the proceedings, when the defendant will have had little or no opportunity to demonstrate compliance with any orders of the court. Accordingly, we have concluded that whilst compliance with court orders and directions might be a valid consideration, it will only be applicable in a limited set of cases. Therefore, we do not recommend its inclusion in a list of statutory factors.

17.41 Securities and sureties are of little utility in criminal lifestyle cases, where the defendant faces an extensive enquiry into general criminal conduct. In such cases, "all assets" restraint orders are common[25] and therefore the defendant or a third party would have to offer a vast security to avoid a restraint order being imposed. Furthermore, if all of the defendant's assets are restrained, they would have nothing additional to offer to the court as security.

17.42 A security or a surety would only be appropriate in cases in which the criminal lifestyle provisions are not applied, and then only if an asset of a comparable value could be identified. Even then, we accept that to eliminate any risk of dissipation by the defendant or any risk that there would be a default in the surety providing the amount promised would either:

(1) require the payment of cash (or an electronic payment) to the court. Whilst this may appear comparable to the payment of a security in relation to bail, because the payment is directly related to confiscation, that payment arguably needs to be subject to the same asset management regime that would otherwise be used for confiscation.

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24 In addition to the responses to consultation question 88, some of the responses to consultation question 89 (additional factors for inclusion as indicating a risk of dissipation) also reflected the factors outlined. For example: having a known history of transferring assets, the absence or existence of other property to satisfy order, outcome of any prior confiscation proceedings (we suggest that previous history of dissipation should be taken into account, although as we set out below, we now discount compliance with court orders more generally as a factor).

25 *Re K* [2005] EWCA Crim 619; *Millington and Sutherland Williams on the Proceeds of Crime* (5th Ed), 2.42.

(2) require the depositing of the asset itself with the authorities, in order that the indicative factors do not only benefit the cash rich. Again, such assets would need to be subject to the asset management regime.

17.43 The only other amendment to the factors provisionally proposed is in relation to factor 2, the nature of the criminality alleged. Consultees were concerned that specifying certain types of criminality (offences involving dishonesty and those in Schedule 2 to POCA 2002 which trigger the criminal lifestyle provisions) may result in undue reliance on the presence of these offences as sufficient to satisfy the risk of dissipation test. This is not the intention, and in response to these concerns we have removed the reference to specific offences, so that it now refers generally to the nature of the alleged criminal conduct.

Other factors

17.44 We asked consultees whether there are other factors which we had not identified that should be taken into account by a judge when determining a risk of dissipation.[26]

17.45 There were many additional factors proposed by consultees. Of those factors we consider that the following are relevant to the risk of dissipation:

(1) the nature of the asset (if it is movable or liquid; how easily it could be realised; whether it can be deliberately reduced in value).[27]

(2) the risk that the person whose assets are to be restrained will declare bankruptcy.[28]

(3) the person's ability to hide their identity when holding assets in cryptocurrencies (including by reference to their computer literacy and use of the dark web).[29] We provisionally proposed that the ability of defendants to distance themselves from assets through overseas transfers might be indicative of a risk of dissipation. The ability to use cryptoassets might be another example of how the defendant may obscure their connection to assets.

(4) the person's financial sophistication (including by reference to membership of professions which have particular knowledge or expertise).[30]

(5) access to assistance for dissipation through criminal organisations.[31]

(6) potential actions of a third party with an interest.[32] Ultimately, the restraint order may prevent any named person from dealing with assets, but we consider that there is little harm in setting out clearly that a third party devaluing that portion of the asset which can be ascribed to the defendant might be relevant to the issue of dissipation.

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26 Consultation question 89.
27 R3; SFO; HMRC; personal response from a member of HMRC; two personal responses from law enforcement officers.
28 The essence of a suggestion from R3.
29 Association of Chief Trading Standards Officer.
30 SFO; HMRC.
31 Personal response from a member of HMRC; personal response from member of law enforcement.
32 CPS; City of London Police.

17.46 The following factors suggested by consultees appeared to relate not to the risk of dissipation but rather to whether the particular asset should be excluded from the restraint order:

(1) whether restraint will have a detrimental impact on the value of the property available for satisfaction of future confiscation orders, or if the defendant is subsequently found not guilty;[33]

(2) undue hardship to third parties (especially innocent partners and children, and where the hardship or restraint will not impact the defendant because they are in prison);[34] and

(3) interests of (potential) victims.[35]

17.47 The court has discretion as to whether a restraint order should be granted, and if so whether specific assets should be included or not. Such discretion is separate from the risk of dissipation test. The exercise of discretion as to the scope of the order was not suggested as being problematic and we do not make any recommendation for indicative factors in that regard.

17.48 Further factors were raised which in our view are not indicative of a risk of dissipation:

(1) whether the defendant's control or possession of the asset derives from the relevant offending.[36] It might be argued that a defendant will be more inclined to dissipate assets derived from offending (for example to remove the evidence of offending or to commit money laundering). However, confiscation targets both legitimate and illegitimately acquired assets and either might be dissipated to put them beyond the reach of the restraint order. Creating a starting point that legitimate assets are not at risk of dissipation might have the effect of rendering confiscation ineffective by leaving such assets free to be dissipated.

(2) whether the asset is used in a business or represents a business interest (and its value may therefore fluctuate regardless of the actions of the defendant).[37] The mere fact that the value of an asset fluctuates does not mean that the asset is not at risk of dissipation. Furthermore, the mere fact that an asset is used in a business does not mean that it is not at risk of dissipation. Businesses are often used as vehicles for crime. Shell companies, unincorporated companies or companies run solely by the defendant and/or their family all pose potential risks. Even when money is held for others, an abuse of trust might occur – indeed that might be the nature of the criminality in question. Business assets may already be released from restraint pursuant to the business expense exception. The fact that the exception exists does not mean that business assets are not at risk of dissipation. Instead, it recognises that there are times when businesses need to draw on funds to preserve their value (for example by paying creditors). Such funds are not released without controls, and often the

33 Personal response.
34 Dr Craig Fletcher; Barnaby Hone (Drystone Chambers).
35 CPS.
36 Andrew Campbell-Tiech KC.
37 David Winch (forensic accountant).

defendant will be required both to provide *ex ante* justification and *ex post* accounting information in relation to the funds and their use.

(3) passage of time.[38] It was unclear precisely what was meant by this. The mere fact that time has passed since the offending without dissipation is not indicative of a level of risk. If the defendant did not perceive their assets to be at risk, dissipation may not have been a live issue. If time has passed since the defendant became aware that they were under investigation and there has been no dissipation this may indicate that there is a reduced risk of dissipation. However, at the outset of an investigation a defendant may not see conviction and confiscation as a realistic possibility. In the consultation paper we provisionally proposed that the stage of the proceedings is a relevant factor, to cover the situation where confiscation becomes a realistic possibility and so the risk of dissipation becomes heightened. We see no need for an additional indicative factor which refers to the passage of time.

Recommendation 86.

17.49 We recommend that the judicially interpreted test requiring that the prosecution establish that there is a real risk that assets will be dissipated which might otherwise meet a confiscation order, be articulated in a statutory provision.

[38] Crown Prosecution Service.

Recommendation 87.

17.50 We recommend that statute provides a non-exhaustive list of indicative factors relevant to the risk of dissipation, as follows:

(1) The actions of the person whose assets are to be restrained (whether the person under investigation or charged or a third party), including:

(a) any dissipation that has already taken place; and

(b) any steps preparatory to dissipation that have already taken place.

(2) The nature of the alleged criminal conduct.

(3) The nature of the asset.

(4) The value of the alleged benefit from criminal conduct.

(5) The stage of proceedings.

(6) The person's capability (whether gained through membership of a profession, through connections with an organised crime group or otherwise):

(a) to transfer assets overseas;

(b) to use trust arrangements, corporate structures and cryptocurrencies or otherwise to distance themselves from assets.

(7) The person's previous good or bad character.

(8) Other sources of finance available to the person.

PROPOSAL 2: PROCEDURE FOR WITHOUT NOTICE APPLICATIONS

The current law

17.51 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, they must be accommodated by the listing officer within the ordinary business of busy Crown Court centres. A restraint application requires proper scrutiny and sufficient time for the judge dealing with the application to consider it. Therefore, an authority seeking a restraint order is 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….[39]

17.52 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 busy workload of the court.

17.53 We considered that remote hearings could be a useful tool to ensure that without notice restraint applications are dealt with efficiently, fairly and proportionately in appropriate cases that do not require a face-to-face hearing.

The consultation paper

17.54 We provisionally proposed that Criminal Procedure Rules, rule 33.34 should continue to apply. However, the starting point should be that:

(1) both "paper" and oral applications should be dealt with by a nationally accessible "duty" confiscation judge (rather than at a specific court centre before a Crown Court judge or recorder), who would be able to sit in any court centre without using a courtroom; and

(2) where the duty confiscation judge considers that a hearing is necessary, the application should be dealt with at a virtual hearing conducted remotely rather than before a specific court centre.

17.55 We considered that the starting point would apply, for example, when an application for restraint is to be made without notice on a stand-alone basis. 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.

17.56 We concluded that permitting national access to the virtual confiscation judge using accessible audio-visual technology would allow the application to be dealt with efficiently and 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.

17.57 We provisionally proposed 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; and

(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.

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39 *Barnes v The Eastenders Group* [2014] UKSC 26, [2015] AC 1 at [119].

Consultation responses

17.58 There was a high degree of support for this proposal.[40]

17.59 Although responding positively, the FCA raised the following concern:

> We wondered, however, what the proposal would entail insofar as subsequent hearings, eg to vary the restraint order. It seems to us that this would involve at least two different judges, which seems to be a waste of resources. The initial judge, if possible, should retain the case.

17.60 Related to this, at a practitioner roundtable one attendee was concerned we had overlooked the need for equal processes to vary and discharge restraint orders.

17.61 Of the people who responded "other", several consultees (including members of law enforcement agencies) did not think there was currently a problem accessing courts for restraint orders and therefore "doubted the utility of this proposal". This echoes comments made in a roundtable meeting with operational stakeholders, where several attendees queried whether this proposal was necessary given that they did not currently experience much difficulty accessing a judge to make an application for restraint.[41] Instead, one participant at the symposium explained that limitations on who can apply for restraint, and the delay of having to go through the CPS, were a greater problem than accessing a judge.[42]

Analysis

17.62 In the pre-consultation phase of the project we were informed that there were difficulties in accessing judges for restraint applications. However, the responses during the formal consultation process did not bear this out. Although there was a high degree of support for the proposal amongst consultees, the impression created was that the addition of a duty judge for restraint applications would not be positively embraced as a solution to any particular problem that consultees faced on a day-to-day basis. Instead, it would be merely "not unwelcome". We do not consider that we should recommend a change which would require new working arrangements for restraint orders for little benefit. Accordingly, we do not recommend any changes to the current procedure for without notice applications for restraint.

PROPOSAL 3: A LIST OF FACTORS FOR CONSIDERATION IN DETERMINING WHETHER A RESTRAINT ORDER SHOULD BE DISCHARGED

The current law

17.63 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.

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40 Consultation question 90 (40 responses: 27 (Y), 1 (N), 12 (O); 22 did not answer) and summary consultation question 28 (30 responses: 22 (Y), 3 (N), 4 (O); 7 did not answer).

41 Operational roundtable meeting (13 October 2020).

42 Confiscation symposium (30 November 2020).

17.64 In *R v S*,[43] the Court of Appeal suggested that the following, non-exhaustive factors are likely to be relevant 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; and
>
> (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 their 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.[44]

The consultation paper

17.65 We that the guidance provided by the Court of Appeal in *R v S*[45] offers 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. We provisionally proposed that these indicative factors should be set out in any revised confiscation legislation. We considered that the list should remain non-exhaustive and the court may have regard to any other factors that it considers to be relevant.

17.66 We therefore provisionally proposed[46] that in considering whether criminal proceedings against a person who is under investigation are not 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;

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43 *R v S* [2019] EWCA Crim 1728, [2020] 1 WLR 109.
44 *R v S* [2019] EWCA Crim 1728, [2020] 1 WLR 109 at [39] to [40].
45 *R v S* [2019] EWCA Crim 1728, [2020] 1 WLR 109.
46 Consultation question 91.

(5) the nature and complexity of the investigation and of the potential proceedings; and

(6) the degree of assistance or of obstruction to the investigation.

Consultation responses

17.67 There was good support for this proposal.[47]

17.68 Among those who responded positively, there was general agreement that this was a codification of the decision in *R v S*. The Bar Council said:

> As noted in the consultation paper, the guidance in *R v S* provides a helpful (non-exhaustive) list of relevant factors to take into account. There is an advantage to enshrining this list in statute or a CrimPD as it renders the information more accessible.

17.69 Two consultees said that these are factors already taken into consideration by judges when reviewing pre-charge restraint orders during the consequent reporting and review mechanism.[48]

17.70 The CPS agreed with the proposal, and also recommended that the following factors should be included:

(1) international enquiries; and

(2) the impact of the restraint order on the defendant and his business.

17.71 Similarly, the City of London Police suggested that "the specific relevance of obtaining key evidence from foreign jurisdictions" could be added. They elaborated that "this is likely to be most relevant to protracted fraud and money laundering enquiries and therefore could be caveated to consider any such factors."

17.72 The FCA, responding "other", said:

> We have some reservation as to whether listing factors in a statute is useful as the above are really statements of the obvious set out in a vacuum. If there is to be such a list, it should be made clear that positive obstruction of an investigation (akin to perverting the course of justice) may be a factor held against the defendant but that a decision not to provide assistance must not be [so held].

17.73 Also responding "other", one consultee with the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland wanted to ensure that consideration was given to the ongoing risk of dissipation:

> It is also very important that the court takes into account what other options are available to it before discharging the order, given the real risk of dissipation once the order is discharged. It is essential that the legislation recognises that if the restraint order is discharged on the grounds of a failure to commence proceedings within a reasonable time, the risk of dissipation has not gone away (a risk that the court

47 Consultation question 91 (41 responses: 36 (Y), 5 (O); 21 did not answer).
48 One practitioner in the NCA/NECC joint response; personal response from NCA officer.

accepted at the time of making the order was real) and that there may still be a successful prosecution with confiscation proceedings following.

The [proposed] test set within the legislation does not recognise this and instead places an unrealistic burden on the Crown to commence proceedings, especially in complex multi-jurisdictional investigations, prematurely in order to avoid the restraint order being discharged. If the court is satisfied that there is a risk of dissipation then the test for discharge should be that that risk has diminished.

17.74 One consultee in the NCA/NECC joint response objected to the difference this proposal purportedly creates between suspects subject to restraint proceedings and those not. In their view:

The logical outcome of this is that those who have assets are investigated faster and have a fairer process than those who [do] not. The flip side to this of course is that those without assets can make stronger arguments for shorter sentences due to undue delays in the investigations process. The criminal investigations for each defendant should be the same. The restraint process should not influence it.

17.75 Regarding factor 1, the length of time elapsed, one practitioner in the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland said:

The passage of time from the order being made places often undue pressure on the prosecution to issue decisions in complex cases linked to restraint – the court does lose focus that there are impending confiscation proceedings which may be jeopardised by discharging an order. The court should recognise that it takes time for directing officers to get a decision right to safeguard the integrity of the decision and also for the confiscation proceedings.

Analysis

17.76 The overwhelming majority of consultees supported this proposal.

17.77 In relation to possible additional factors, we agree with both of the CPS's suggestions. First, the need to carry out international enquiries is relevant, particularly where such enquiries require mutual legal assistance pursuant to the Crime (International Cooperation) Act 2003. By way of example, incoming requests to the UK for mutual assistance take on average 144 days for full execution of the request.[49]

17.78 Second, the impact of restraint on a defendant and their business (and indeed any third party) appears to be a relevant additional consideration. Where all of a defendant's assets are restrained, a more expeditious approach to investigation may be required.

17.79 Regarding the factors elucidated in *R v S*, the main factor which caused concern among consultees was that of assistance to or obstruction of the investigation, and we accept that this requires careful consideration. No elaboration on this factor is provided in *R v S.* We consider that assistance or obstruction is relevant in the sense that if a defendant is asked to provide bank statements for an overseas bank account

[49] Financial Action Task Force*, Anti-money laundering and counter-terrorist financing measures United Kingdom Mutual Evaluation Report* (December 2018), para 470.

and they do not do so, the defendant cannot complain if a mutual assistance request is made and that request takes time to resolve. However, in our view (and contrary to the conclusion of the Court of Appeal in that case), the inclusion of this factor risks inappropriately imposing requirements on a defendant which go beyond those which could ordinarily be expected of them during a criminal investigation. A defendant cannot generally be obliged to provide information which might be incriminating[50] and, taking our example further, a defendant cannot be obliged to produce evidence held outside the jurisdiction.[51] On balance we consider that it is best omitted.

Recommendation 88.

17.80 We recommend that when 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) whether the investigation has involved international enquiries; and

(7) the impact of the restraint order on the defendant, any business or third parties.

PROPOSAL 4: VARIATIONS TO MEET REASONABLE LIVING EXPENSES

The current law

17.81 A judge has a discretion to release funds from restraint to meet:

(1) reasonable living expenses;

(2) reasonable legal expenses; and/or

50 Save in SFO investigations pursuant to a notice under section 2 of the Criminal Justice Act 1987.

51 This point is reinforced by the recent Supreme Court decision on the territorial limitations of the SFO's powers: *R (KBR) v Director of the Serious Fraud Office* [2021] UKSC 2.

(3) reasonable expenses for the carrying on of any trade, business, profession or occupation.[52]

17.82 During our pre-consultation discussions, stakeholders told us that the calculation of reasonable living expenses was problematic. We heard anecdotal evidence that what is intended to be a "rough and ready" starting point for the assessment of reasonable expenses is treated as a minimum entitlement, without adequate scrutiny as to the amount. This blanket approach leads to problems where there is a subsequent application to vary the order as any bills presented have been treated as an additional expense. We concluded that this approach does not reflect the required balance between permitting a defendant and their dependants to continue to lead a reasonable lifestyle and the statutory mandate to preserve assets for confiscation. Further, this practice leads to an unjustified diminution in the assets available to satisfy a confiscation order.

17.83 The starting position for reasonable living expenses and the limited basis upon which it is arrived at 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 be limited. He may not, for example, know the defendant's marital status, or whether he has any dependent 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.[53]

17.84 We explored the causes of this problem and observed that 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 perhaps understandable that the approach adopted has not always been aligned with the statutory objective of preserving assets for confiscation[54] in the absence of any requirement to evidence applications properly and any explicit guidance to judges.

17.85 We provisionally proposed in our consultation paper that no substantive variation be made to the general principle that a defendant should be permitted to draw reasonable living expenses from restrained funds. However, we were satisfied that a more detailed enquiry was needed when these applications are made.

17.86 We provisionally proposed 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 proposed that the court be guided by all of the circumstances of the case, as known at the time, such as the number of dependent children and their ages. This would help to ensure that any sum is proportionate to

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52 Proceeds of Crime Act 2002, s 41(3).

53 Sutherland Williams, Hopmeier and Jones, *Millington and Sutherland Williams on the Proceeds of Crime* (5th ed 2018), para 5.28.

54 Proceeds of Crime Act 2002, s 69.

both the needs of the person whose assets are restrained and their dependants and the need to preserve assets for confiscation.

17.87 We provisionally proposed a new Criminal Procedure Rule. This Rule would require that any application to release funds for reasonable living expenses must:

(1) be supported by a schedule of income and outgoings; and

(2) include copies of evidence to support assertions made within that schedule.

17.88 We provisionally proposed that the schedule of income and outgoings should be on a standard form contained within the Criminal Procedure Rules. This would ensure it was accessible and clear. The inclusion of a new Rule would provide judges with the tools to assess such applications rigorously and guide them in determining the proportionality of any award of living expenses.

The consultation paper

17.89 We provisionally proposed 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.

Consultation responses

17.90 This proposal received good support.[55]

17.91 Consultees who responded positively identified several benefits this proposal might bring. There was general agreement that it would support an "evidence-based approach",[56] and thereby amount to a "welcome step forward".[57] The Bar Council said the proposal "strikes a fair balance between the need to preserve assets and the ability of suspects and their dependents to live a reasonable lifestyle."

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55 Consultation question 92 (43 responses: 31 (Y), 3 (N), 9 (O); 19 did not answer).
56 One practitioner in the NCA/NECC response.
57 Association of Chief Trading Standards Officers.

17.92 However, in relation to other issues, consultees expressed competing views. These concerns relate both to our provisional proposal and more broadly to whether and to what extent reasonable living expenses should be released from restrained funds.

17.93 First, consultees were divided on whether this proposal addresses an existing problem. The CPS queried whether this was a problem. Similarly, the FCA said, "This happens anyway and therefore [we are] not sure whether this needs to be added into legislation/the CrimPR." Conversely, other consultees thought this proposal would improve the current system.

17.94 Secondly, regarding the proposal to amend the Criminal Procedure Rules to require particular evidence and create a standard form, the Bar Council was supportive:

> The introduction of a standard form is likely to assist in the making of appropriate orders and will aid consistency as between decisions.

17.95 However, other consultees disagreed. In particular, Andrew Campbell-Tiech KC described the proposal as "unnecessary and formalistic":

> It is also unrealistic in that it takes no account of the reaction of a bank or similar to the fact of a restraint order. Commonly the defendant will not be able to access any banking records. Nor will the bank even respond to his request.

17.96 Thirdly, some consultees were divided over the balance between allowing defendants to access reasonable living expenses and the need to preserve assets for confiscation.

17.97 One consultee expressed disappointment that where a restraint order operates for a long time, "restrained funds can diminish considerably, thus leaving less to compensate the victims".[58]

17.98 Alternatively, the Financial Crime Practice Group at Three Raymond Buildings argued:

> It is necessary to recognise that the release of funds for reasonable living expenses will always be inconsistent with the need to preserve assets for confiscation, but is nevertheless appropriate given the presumption of innocence. It is of limited assistance to the court therefore to repeat the general legislative steer which might suggest living expenses are not ordinarily appropriate. What is required is to direct the judge to make an assessment of what is reasonable and we agree that should be an evidence based assessment.

17.99 Fourth, a point of particular contention was whether there should be a certain starting point for reasonable expenses or if this should be an evidence-based assessment from the outset.

17.100 In its response, the Government said:

> We do not consider that £300 a week should be treated as a minimum starting point for the assessment of reasonable living expenses in all cases.

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58 City of London Police.

17.101 The Association of Chief Trading Standards Officers was in favour of a "zero starting point coupled with a requirement on all parties for a hearing within a matter of days for the court to agree an initial starting figure".

17.102 However, other consultees were in favour of a "minimum value". One practitioner from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland said:

> The Crown cannot be expected to know what reasonable living expenses are required for an individual when applying for a restraint order. It is appropriate to keep a base line figure in place initially and to then allow the defendant to demonstrate as suggested via a schedule of income and outgoings to the Crown so that if required the baseline figure can be adjusted by consent between the parties.

17.103 One consultee at a roundtable meeting on asset management considered it was inappropriate to prescribe a figure for living expenses because every case merits (and receives, in his view) a thorough analysis.[59]

17.104 Fifth, consultees did not agree on how to assess what is "reasonable", as well as on the reasonableness of specific expenses.

17.105 One consultee objected to reasonable living expenses including "private school fees or private health [care] fees, other than perhaps in the case of school fees to allow the completion of a particular school year". His comments continued:

> Care must also be taken to ensure that the assessment of reasonable living expenses is not taken as an assessment to allow a defendant to continue enjoying a lifestyle at a level well above that that most people are able to finance.[60]

17.106 This opinion was echoed by the South East Confiscation Panel (East Kent Bench), who said:

> "Reasonable living expenses" should be reasonable in the terms a member of the public would understand, not the expenses required to maintain the defendant's chosen lifestyle.

17.107 At the other end of the spectrum, one consultee expressed concern about reasonable living expenses being in excess of actual income for a defendant who receives benefits, saying they should not be entitled to any more than they currently receive.

17.108 Offering a different view, Dr Craig Fletcher suggested that there may need to be guidance for what amounts to "reasonable":

> For example, [what is reasonable] to meet the demands of paying the bills, clothing, Christmas presents etc? Is it reasonable for private school expenses to be paid if not paying them means the child's education will be disrupted (bearing in mind that at this stage their parent may not have been convicted of the offence in which they have been accused)?

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59 Asset management roundtable meeting (10 November 2020).
60 Martin Bentham (The Evening Standard).

17.109 One personal response from an individual at His Majesty's Revenue and Customs ("HMRC") cited inconsistency in different courts allowing expenses for different things.

Analysis

17.110 We have considered the responses to our provisional proposals and remain of the view that there ought to be a proper enquiry as to whether a defendant can meet expenses without using the restrained funds. Reform would assist in ensuring that there is a consistent evidence-based approach. While we acknowledge the practical concerns raised by Andrew Campbell-Tiech KC (that the defendant often cannot access their bank records when subject to a restraint order), we have concluded that this is an evidential issue not an argument against reform in principle. Defendants can reasonably be expected to have access to electronic copies of household bills and expenses and a general working knowledge of their own household finances. We consider it right in principle for defendants to provide evidence in support of their application for reasonable living expenses and that this does not offend the presumption of innocence. If evidence is not forthcoming, a judge will be able to evaluate the reasons why. Such a proper enquiry will ensure a balance between the defendant's interests and those of the state in preserving assets for confiscation.

17.111 Further, we envisage that the obligation will not be an onerous one and that it is fair to require the provision of information on an application to vary or discharge. Our proposal would not set a high evidential threshold. We have considered form MC100 which requires defendants to provide a statement of their assets and other financial circumstances to the court. It is an offence not to provide the court with a statement of assets and other financial circumstances following an official request, to make a false statement or knowingly to fail to disclose material facts. The existing MC100 form provides a useful starting point. We recommend that a more detailed statement of means be provided for enforcement purposes and we consider that the same detailed form can be used for restraint purposes.[61]

17.112 Since publication of the consultation paper, the Court of Appeal has provided useful guidance on reasonable living expenses in *R v Luckhurst*.[62] The Court set out non-exhaustive factors which are potentially relevant to the fact-sensitive decision in each case as to what living expenses are reasonable:

(1) Whether the payment is necessary or desirable to improve or maintain the value of assets available to meet a confiscation order.

(2) The defendant's assets in relation to the size of any likely confiscation order.

(3) The standard of living enjoyed by the defendant prior to the restraint order. Although not determinative, the Court said that "the living expenses which he is to be allowed must give some weight to the fact that if innocent of any offence he would be entitled to continue to maintain his existing lifestyle."

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61 See Chapter 14 – Enforcement.

62 *R v Luckhurst* [2020] EWCA Crim 1579, [2020] 1 WLR 1807. This case was appealed to the Supreme Court in 2021, but the issue on appeal was not related to the release of restrained funds for the payment of living expenses. The appeal was dismissed (*R v Luckhurst* [2022] UKSC 23).

(4) Affordability: the defendant's means at the time of the restraint order or variation application. The Court said that:

> "[s]ome objective assessment of what is reasonable can be made on the basis of what expenditure someone in those circumstances and with those resources might reasonably be expected to make. In other words affordability is a factor which can inform what is reasonable. A defendant may be in a position to make payments from capital, but a reasonably prudent person in his position, with his finances and uncertainties, would be expected to pare down spending rather than use up capital.

(5) The period of the restraint. The Court explained that "[a] reduction in living standards may be more reasonable for a short period than for a longer one."

(6) Whether there is a prima facie case that the existing standard of living is the result of criminal activity; and if so, what standard of living would be enjoyed but for such criminal activity.

(7) The amount of the expenditure sought: an absolute level of unreasonableness. The Court elaborated:

> We do not think epithets such as 'a Rolls Royce lifestyle' are helpful. What one is searching for by way of a cap is a level which is inconsistent with the statutory objective of preserving assets so far as possible for the purposes of enforcement of a confiscation order, taking into account the other factors which fall to be taken into account."[63]

17.113 In essence, the Court of Appeal's conclusion was that the defendant should be permitted to maintain their prior lifestyle because, if innocent, they would be entitled to continue with that lifestyle. This is subject to the observations that:

(1) The defendant should not be permitted to maintain a standard of living that is funded by criminal activity. Therefore, living expenses should be governed by a standard of living that would have been enjoyed but for criminal activity.

(2) The defendant should pare down spending rather than draw on capital to meet financial obligations.

(3) Expenses should be subject to an absolute cap at the point the expenditure becomes unreasonable in the case.

17.114 Unfortunately, the point at which reasonable spending becomes unreasonable is still ambiguous. School fees, for example, have been allowed in the past[64] but whether they are considered unreasonable may depend on whether the child could receive a comparable standard of education at a nearby state school.

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63 *R v Luckhurst* [2020] EWCA Crim 1579, [2020] 1 WLR 1807 at 33(7).

64 See, for example, *Re Peters* [1988] 1 QB 871.

17.115 Nevertheless, we consider that incorporating the factors in *R v Luckhurst* into a statutory list of indicative factors would provide greater clarity. This will also encourage investigators to do more to set expenses at a reasonable level from the outset.

Recommendation 89.

17.116 We recommend that:

(1) in determining whether funds should be released from restraint to meet reasonable living expenses, and if so, how much, the court should be guided by all of the circumstances of the case, as known at the time and by the need to preserve assets for confiscation; and

(2) to assist the judge in assessing the circumstances of the case, the legislation should include the list of indicative factors suggested by the Court of Appeal in *R v Luckhurst* [2020] EWCA Crim 1579:

(a) Whether the payment is necessary or desirable to improve or maintain the value of assets available to meet a confiscation order.

(b) The defendant's assets in relation to the size of any likely confiscation order.

(c) The standard of living enjoyed by the defendant prior to the restraint order.

(d) The defendant’s means at the time of the restraint order or variation application.

(e) The period of the restraint.

(f) Whether there is a prima facie case that the existing standard of living is the result of criminal activity; and if so, what standard of living would be enjoyed but for such criminal activity.

(g) Whether the amount of the expenditure sought is unreasonable.

Recommendation 90.

17.117 We recommend that the Criminal Procedure Rule Committee should in whatever way it considers most appropriate (either in rules or by some other means) consider:

(1) requiring that any application to release funds for reasonable living expenses be supported by a schedule of income and outgoings and include copies of evidence to support assertions made within that schedule; and

(2) providing a standard form for a schedule of income and outgoings.

PROPOSAL 5: VARIATIONS TO MEET LEGAL EXPENSES

The current law

17.118 Whilst POCA 2002 permits restraint orders to be varied to withdraw reasonable legal expenses, it does not permit a variation to the defendant (or the alleged recipient of a tainted gift) for legal expenses to challenge any matter related to the criminal offence or offences that they are suspected of having committed.[65] This includes funding to challenge restraint proceedings under Part 2 of POCA 2002.[66]

17.119 The restriction resulted from the Cabinet Office's Performance and Innovation Unit (PIU) report which described the "reckless dissipation of restrained assets in legal fees".[67] It cited three cases in support of this conclusion in which defence legal costs dwarfed those incurred by the prosecution. The report concluded that the payment of private legal fees was a cause of a "considerable drain on the assets recovered under confiscation orders".[68]

17.120 During our scoping exercise, the legal expenses exception was the subject of criticism on the grounds of unfairness and inconsistency. First, restraint orders operate to restrain both legitimately and illegitimately obtained assets for the purposes of confiscation. An order prevents a defendant using legitimately obtained money to fund their defence. This is in contrast with the position in civil recovery proceedings before the High Court in relation to illegitimately obtained property. Any property freezing order obtained in these proceedings freezes property alleged to have been obtained through illegitimate means but a defendant is permitted to draw from such funds for their defence. Secondly, third parties with an interest in the restrained funds, other than recipients of a tainted gift, may be permitted to draw on those funds for legal expenses.[69] This creates a disparity between the position in relation to civil and criminal proceedings and in respect of defendants and third parties.

17.121 This was not always the case. When POCA 2002 was originally enacted, the position with regard to civil and criminal asset recovery litigation funding was the same. Funds frozen in connection with civil recovery could not be used to meet legal expenses. However, this position was altered by the Serious Organised Crime and Police Act 2005.

17.122 As we explained in the consultation paper, at the time, the Government's preferred method to ensure representation in these cases was through the civil legal aid scheme. The rationale was explained clearly in the Explanatory Memorandum to the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005:

> At the time, the Government's preferred method to ensure representation in these cases was through the civil legal aid scheme. However, operational experience 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

65 Proceeds of Crime Act 2002, s 41(4).
66 In *Re S (Restraint Order: Release of Assets)* [2004] EWCA Crim 2374, [2005] 1 WLR 1338.
67 Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), p 72.
68 Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime* (June 2000), para 8.47.
69 Proceeds of Crime Act 2002, s 41. See CP 249, para 26.148.

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.[70]

17.123 The legal aid position in connection with criminal restraint orders is slightly different in that 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 makes it much simpler to assess 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 the suspect's means to meet legal expenses are therefore curtailed to the extent of the order. The assessment does not take into account that the defendant may be receiving a sum per week of "reasonable living expenses" as means-tested income.

17.124 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 in civil and criminal matters.[71]

17.125 With regard 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 whether they have alternative sources of funding. A third party who does not have access to other funds may be eligible for means-tested civil legal aid. The use of restrained funds will be a matter of last resort. Similarly, if a defendant has no alternative sources of funding, they will be eligible for either criminal or civil legal aid (depending on the stage of proceedings). Despite criticism, there is parity in the approach to defendants and third parties.[72]

17.126 However, during our pre-consultation discussions it was suggested that the current legal expense exception is unsatisfactory because it restricts the defendant in their choice of legal representation in both the criminal case and the confiscation proceedings.

17.127 While we made no observations about the adequacy of criminal legal aid funding in our consultation paper, we did note that 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. Therefore, a defendant's choice of legal representative may hang on a single decision of the prosecution agency to pursue civil or criminal proceedings.

17.128 We also observed that the absolute prohibition on funding a defence to confiscation proceedings from restrained funds places the burden on the state regardless of a defendant's apparent wealth. The impression that some wealthy criminals are

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70 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.

71 Legal Aid Agency, Criminal Legal Aid Manual, applying for legal aid in criminal cases in the magistrates' court and Crown Court, part 11.2.

72 Proceeds of Crime Act 2002, s 41. See CP 249, para 26.148.

recipients of public funds is one that has drawn considerable criticism from the media and the wider public.

17.129 In answer to this, section 46 of the Crime and Courts Act 2013 was intended to alleviate some of the burden on the public purse. It requires restraint orders to be subject to a "legal aid exception", to provide for the repayment of legal aid by a defendant once a confiscation order is satisfied. However, 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" which is of little comfort when considering the vast amount (over £2 billion) outstanding in unpaid confiscation orders.[73]

The consultation paper

17.130 We provisionally proposed 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 identified two important benefits. First, it would allow defendants to have equality of access to a range of legal practitioners. Secondly, it would remove the burden on the state to provide legal aid for defendants when they had sufficient means to pay legal fees.

17.131 We made this proposal having considered the risk of diversion of restrained funds which could undermine the POCA scheme. However, we identified three significant safeguards which mitigated the risk of unreasonable dissipation.

(1) The use of restrained assets would be overseen by the courts through the submission and approval of a costs budget, comparable to civil recovery proceedings.

(2) Any legal fees exception ought to ringfence funds equal to the amount needed to compensate alleged victims.

(3) A defendant who uses restrained funds in this way is restricted as to their use and cannot finance a "criminal lifestyle" directly. Ultimately, the money is not placed into the hands of the alleged criminal.

17.132 We drew upon the statutory instrument applicable to funding in civil recovery proceedings which sets out a table of rates of remuneration based on seniority of fee earner and the complexity and location of the case.[74] We provisionally proposed that such a statutory instrument be considered although the rate of payment to be applied would be a matter for separate consideration by stakeholders.

17.133 We 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.

17.134 We 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

[73] HMCTS, Trust Statement 2021-22 (2022), p 12.
[74] SI 2005 No 3882, explanatory memorandum, para 7.11.

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 proceedings. If costs were incurred at an early stage and a lawyer could not expect payment until confiscation proceedings were concluded and the order paid, lawyers might be reluctant to act. Such a provision may therefore be counterproductive in seeking to broaden access to legal representation.

17.135 In summary, we provisionally proposed that:

(1) 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.

(2) Legal expenses should be subject to:

(a) approval of a costs budget by the judge dealing with the case; and

(b) [the terms of] a table of remuneration, set out in a statutory instrument.

Consultation responses

17.136 On balance, consultees were supportive of permitting the payment of legal expenses connected with criminal proceedings and confiscation from restrained funds, although there was not overwhelming support.[75] Consultees also supported the proposal for judicial oversight and approval of a costs budget and consideration of a statutory instrument regarding remuneration.[76]

17.137 We received positive responses from the Bar Council and HMRC. The SFO, Insolvency Service and CPS responded "no", although the CPS caveated this answer with a request to "see the detail".

17.138 The Government response was equivocal: "This proposal is subject to further consideration, we welcome the views of other consultees."

17.139 The Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland called for further consultation with devolved administrations on "future policy considerations in respect of legal expenses". The Scottish Government also commented that they "would need to consider the desirability of this proposal and if [it should be] applicable in Scotland."

17.140 This analysis of consultation responses is divided into comments on, first, the base proposal of releasing restrained funds for legal expenses connected with criminal and

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75 Consultation question 93(1) (48 responses: 29 (Y), 10 (N), 9 (O); 14 did not answer). Summary consultation question 29(1) asked consultees whether they agreed with legal expenses being payable from restrained funds subject to the two safeguards listed. Unlike consultation question 93, consultees' responses were sought in relation to the two safeguards separately, but not to the underlying question. See below for their responses.

76 Consultation question 93(2) (42 responses: 24 (Y), 4 (N), 14 (O); 20 did not answer). Summary consultation question 29(1) (approval of a costs budget by the judge) (28 responses (16 (Y), 7 (N), 5 (O); 9 did not answer) and summary consultation question 29(2) (table of remuneration) (28 responses (17 (Y), 5 (N), 6 (O); 9 did not answer).

confiscation proceedings and, second, the two proposed conditions (cost budget approval and table of remuneration).

Releasing funds for legal expenses connected with criminal proceedings

17.141 The Bar Council said:

> While this is essentially a question of policy, we agree. Harmonisation of the various POCA regimes relating to the release of restrained funds for legal expenses would have the advantages identified in the consultation paper, principally (a) broadening access to specialist representation and (b) the preservation of public funds which would otherwise be spent on legal aid fees for lawyers of wealthy defendants who (absent restraint) would be quite able to pay themselves.

17.142 Martin Bentham, a journalist with The Evening Standard whose report was cited in the consultation paper, and is critical of current policy, said the following:

> The practical reality is that in some cases the sums theoretically being preserved for confiscation by the grant of legal aid are never in fact recovered. In cases where the victim of the defendant's crime is the public purse (eg with VAT fraud) that means that public money is spent via legal aid with the aim of preserving assets for confiscation which will simply reimburse the state at the end of the confiscation process (if it is successful). In effect, it means paying money out in the hope of recovering the same money later, which, when the victim is the public purse, brings no gain and only the potential of loss.

17.143 Solicitors' firm Kingsley Napley LLP said:

> We believe this will go some way to alleviating pressure on the legal aid budget by allowing more defendants to privately fund their representation. It may also reduce the likelihood of self-representing defendants, whose cases place a significantly greater case management burden on the court.

17.144 Similarly, BCL Solicitors LLP argued that the current restriction is "unsatisfactory" given that it restrains "both legitimate and illegitimate assets for confiscation and restrict[s] defendants' right to choose their representation." They continued:

> These rules can cause a real risk of injustice. Permitting the withdrawal of legal expenses connected with confiscation, and the substantive criminal cases from which the restraint arises, would be a fair step, and would allow defendants a range of practitioners to instruct, and would also that ensure legal aid is not expended unnecessarily.

17.145 At one consultation webinar, Richard Atkins KC, head of chambers at St Philips, was particularly supportive of the proposal to allow the release of restrained funds to pay legal expenses in criminal confiscation proceedings. He viewed the proposal as an opportunity to ease some of the burden on legal aid.[77]

[77] Webinar 7, Preserving assets (19 November 2020).

17.146 Other consultees responding positively noted the parity this would bring with the position in civil proceedings.[78] However, the value (and extent) of this consistency was questioned by one practitioner in the NCA/NECC joint response, who commented that:

> There are, and would remain, disparities between the provisions in Part 2 [civil recovery of the proceeds of unlawful conduct], Part 5 Chapter 2 [Civil recovery in the High Court], Chapter 3 (cash) and Chapter 3A (listed assets) ([which make] no provision [for legal expenses]), and Chapter 3B (frozen funds) where there is provision for legal expenses.
>
> It seems accepted that there is "no inherent injustice" in the current arrangements which begs the question as to why such a radical change is proposed. The contrasting position between civil recovery and criminal confiscation is that, self-evidently, there are two different regimes which serve different purposes.

17.147 Similarly, the SFO (responding negatively) considered the comparison with civil recovery to be "unhelpful", given the differing availability of legal aid in those proceedings and the fact that civil recovery "does not seek to directly compensate victims".

17.148 The Fraud Lawyers Association contested the assertion in the consultation paper (at paragraph 26.147), arguing that civil legal aid "does not appear to be available for the suspect of a criminal investigation who is made subject to a pre-charge restraint order to apply to discharge or vary their restraint order." They continued:

> Our research suggests that there is therefore currently no, or very limited, funding available for suspects in an investigation, which is contrary to the interests of justice.
>
> Legal costs incurred in dealing with a restraint order for defendants who have been charged are covered under the defendant's representation order. In non-VHCC[79] cases, this leads to a situation where lawyers are effectively undertaking at times substantial extra work for no additional remuneration as the fee from the Legal Aid Agency is fixed irrespective of whether lawyers need to deal with restraint orders in addition to the criminal charges themselves. Previously, it was possible to make an additional claim for POCA-related work undertaken during the criminal proceedings themselves, but this is no longer possible.
>
> We therefore strongly support allowing suspects to use restrained funds to fund legal expenses.

17.149 There were a number of concerns raised by consultees, including whether this would give rise to increased litigation and whether "an amount of compensation should be preserved".[80] This was also raised by one practitioner in the NECC/NCA response who said that, "[i]t is not appropriate to effectively usurp the Court's power to award compensation long before sentencing."

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78 City of London Police.

79 Very High Cost (Criminal) Cases ("VHCC") are cases with a trial estimate in excess of 60 days, for which lawyers are paid under a different remuneration scheme.

80 City of London Police.

17.150 The same practitioner in the NECC/NCA response commented that the current legal aid rates for confiscation work "are undoubtedly unsatisfactory", but they questioned whether the solution was to allow release of legal expenses from restrained funds:

> Surely the cure to that issue is to improve the rates, possibly controlled by a Statutory Instrument […]. Whilst this would add to the [Legal Aid Agency's] budget this could be back filled by the Treasury from ARIS receipts. Whilst this may appear to be a "money go round" it is impossible, or at least very difficult, to preserve the position of victims whilst at the same time reducing the available amount for legal fees.

17.151 The SFO did not agree regarding the adequacy of legal aid: "The availability of legal aid to those whose assets are subject to restraint provides adequate cover." However, the SFO did agree that the solution, if there is a problem, is not to permit release of restrained funds for legal fees, but that "the availability of legal aid funding is a separate area which requires review".

17.152 Richard Atkins KC urged that the drawing of expenses from restrained funds should not be limited to legal aid rates, which are "derisory" and deter good lawyers from taking on difficult cases. In his view, the result is that these cases last longer, more mistakes are made and overall cost is increased. He called for, at a minimum, bringing criminal rates legal aid rates up to civil rates.[81]

17.153 One member of the National Police Chiefs' Council agreed that in the trade-off between better representation resulting in better orders which were enforceable and reducing the restrained amount to pay for legal expenses, he could see the value in allowing restrained funds to be used in this way.

17.154 Among those who responded "other", Spotlight on Corruption, Transparency International and the UK Anti-Corruption Coalition all said:

> We have concerns in relation to wealthy defendants particularly in the corruption sphere that any allowance for legal expenses should not be abused to bring unreasonable and vexatious litigation which places an enormous burden on the public sector.

17.155 Several consultees sought to distinguish between the use of "untainted" restrained funds and "funds representing criminal proceeds", arguing that the use of the former to pay for legal expenses was "fine", but not the latter.[82] This approach was supported by one practitioner in the NCA/NECC joint response, who said that "the provenance of the funds needs to be identified to ensure they are not derived from criminal property." However, another practitioner in the same response questioned the efficiency of making this enquiry: "Establishing what is or isn't legitimately acquired would require a level of investigation which is not currently needed." Undertaking this enquiry (and making any preliminary determination) might also infringe the defendant's right to be presumed innocent, given that this is pre-trial (and sometimes pre-charge) restraint.

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81 Webinar 7, Preserving assets (19 November 2020).

82 Individual response from member of the Metropolitan Police.

17.156 A number of consultees argued that a defendant whose assets have been restrained should be entitled to legal aid for related proceedings and the criminal proceedings, and if they are acquitted this can be repaid from legitimate assets. One practitioner from the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland explained:

> In the event that a prosecution is not commenced or the defendant is found not guilty, the expenses incurred by legal aid can be recouped from the assets frozen (the [restraint] order may even stay in place until these are reimbursed).

17.157 In favour of all defendants accessing legal aid, one consultee made the important point that this would prevent any unfairness in the representation as "between defendants in the same case".[83]

17.158 The SFO and CPS were generally opposed to the proposal. The CPS said:

> The use of the proceeds of crime is counter-intuitive to the public policy goal of confiscation. And in operational terms, this is just reducing the confiscated amount to protect the legal aid budget, ie no real saving.

17.159 The SFO, in addition to the comments above, said:

> It will also lead to considerable and unnecessary litigation about release of funds for legal fees.

17.160 Among others who responded negatively, most were concerned about the impact this would have on remaining funds for confiscation, pointing to "the position previously experienced before POCA",[84] and the impact of dissipation on reducing available compensation for victims. In agreeing with this view, one consultee pointed to "the clear risk of dissipation identified by the PIU".[85] Releasing funds for legal expenses was considered to "undermine" the very reason for restraint, to "prevent the dissipation of funds".[86]

17.161 Taking an alternative view of the Performance and Innovation Unit (PIU) report, but coming to a similar conclusion, one practitioner in the joint NCA/NECC response, commented:

> The quotes from the PIU report are highly selective and based on 5 high value cases. In low value cases, which are the majority numerically, not mentioned in the PIU report at all, where there is no identifiable victim, the entirety of the available amount could be used in legal fees, leaving nothing to confiscate and an almost pointless restraint order whose only purpose is to administer those fees, an expensive process in itself.

17.162 Another reason for opposing this proposal was given by Dr Craig Fletcher:

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83 Personal response from a member of the North East RECU.
84 R3; view supported by Insolvency Service and West Yorkshire Trading Standards.
85 Personal response.
86 Personal response from a member of Devon and Cornwall Police.

> If our confiscation system wishes to apply its confiscation laws equitably then all confiscation defendants should have equal access to competent legal representation. By allowing those who have the funds to commission the best lawyers to defend their case – the people which this legislation was introduced and legitimised upon targeting (the "Mr and Mrs Bigs") – we have a two tier system which allows the rich to (in effect) buy their way out of prison whilst the poor face the full might of the law.
>
> Allowing the payment of legal expenses is a method of dissipating assets, which undermines the efforts of the regime to preserve assets for confiscation.

Conditions for release of legal expenses

17.163 In general, consultees who responded positively agreed that the proposed conditions "of judicial scrutiny of defence costs appear to offer adequate safeguard against the counter-risk of reckless dissipation of assets."[87]

17.164 The Bar Council commented on the viability of the proposed conditions by reference to other similar regimes:

> Control of any such expenses has been demonstrated to be manageable in the civil courts and there is no reason to believe the management of fees in criminal cases would present any particular difficulty. In a slightly different context, cost controls are already operated in larger cases, under the VHCC regime, by which (legal aid) fees can be controlled (albeit not by a judge) before they are incurred.

17.165 Other possible conditions suggested by consultees included a requirement for evidence of expense from the legal firm involved and a prohibition on fees being paid in advance.[88]

17.166 At a meeting with the Bar Council, one representative suggested that judicial oversight of withdrawal of funds should be done by a specialist costs judge. This individual would prefer to take the matter out of the criminal sphere to avoid over-burdening Crown Court judges and make use of the specialist expertise which exists elsewhere.[89]

17.167 Spotlight on Corruption, Transparency International and the UK Anti-Corruption Coalition said:

> Consideration should be given to adding a "reasonableness" test by the judge for legal expenses particularly in complex cases involving wealthy defendants.

17.168 The Criminal Law Solicitors' Association agreed with the proposal but added that the judicial determination ought to be, "subject to consultation in respect of the table of remuneration on behalf of solicitors."

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87 Martin Bentham (The Evening Standard).
88 Individual response from a member of the Metropolitan Police.
89 Meeting with the Bar Council (5 October 2020).

17.169 Similarly, the Private Prosecutors' Association called for "careful consideration" when determining the rates in the table of remuneration, "to ensure that they are proportionate and reasonable":

> Rates need to take into account that many victims of crime, especially financial crime, have little choice but to pursue criminal proceedings themselves through private prosecutions. The reality is that these victims cannot access the courts at rates comparable to public funding and these victims should not be penalised because of this (as rates recoverable currently are capped at legal aid rates).

17.170 BCL Solicitors' LLP also commented:

> Any costs budget and rates of remuneration must be flexible enough and must be set at an appropriate level so as to allow defendants to select skilled legal representation of their choice, who in turn are not fettered in their ability to defend their clients' interests to the maximum by inappropriate costs/remuneration regimes.

17.171 In a meeting, representatives from the CPS were concerned that oversight and controls on releasing funds must be robust to prevent extensive dissipation of restrained assets.[90]

17.172 Ian Smith, a barrister at 33 Chancery Lane, commented on the need to factor legal professional privilege into the process:

> If an approval process is put in place, it would be important that any approval process should not be carried out by the judge dealing with the case in question. To do so may risk revealing privileged matters which accused persons may want to keep confidential from the court trying the case. Legal professional privilege would need to be preserved in an approval process.

17.173 Similarly, regarding prosecutors, the SFO said:

> The reasonableness of expenses should be adjudicated by the department that administers legal aid or some other independent body. If this were to fall to prosecutors, there will be a number [of] difficulties surrounding privilege with prosecutors being requested to release funds for legal expenses which might lead to premature disclosure of a legal strategy being deployed which could be perceived as prejudicial.

17.174 Penelope Small, a barrister at 33 Chancery Lane, also argued that "a Crown Court judge should not be asked to deal with costs budgets", as this "would be outside the normal experience of most Crown Court judges".

17.175 There was disagreement among consultees on the amount of legal expenses permitted to be released, and whether it should be capped at legal aid rates.

17.176 Garden Court Chambers said:

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90 Meeting with the CPS (24 November 2020).

> Such expenses should not be limited to the figures available for legal aid, unless there is a vast improvement in remuneration for such work, but should reflect the value of the necessary work to be done.

17.177 Similarly, the Financial Crime Practice Group at Three Raymond Buildings said:

> Whether this is workable will of course depend upon the table of remuneration. We would not endorse the use of legal aid rates as the benchmark – restrained funds prima facie belong to a defendant and there is an argument that if he has the funds he should be able to select his representatives of choice, subject to judicial scrutiny of the cost. Therefore, a balance is required which recognises that legal aid rates are not considered sufficient by many practitioners, particularly in complex cases.

17.178 Penelope Small, a barrister at 33 Chancery Lane, considered that there would be negative consequences to capping at "nominal criminal remuneration":

> [This] will lead to poor determinations being made in the Crown Court which will undermine existing caselaw and other civil jurisprudence and ultimately lead to a proliferation of appeal work but only accessible by those who have the means to do so.

17.179 The SFO submitted, in the alternative to their objection to the release of funds at all, that "[a]ny legal expenses should be capped at legal aid rates".

17.180 One consultee in the NCA/NECC response commented on the manner in which legal aid rates are determined:

> Expenses should not be determined by page count. There should be a standard fee paid to a barrister and those involved which is not simply page based. Defendants who generate a lot of financial records are represented better than those with relatively few as the barristers involved are paid more.

Analysis

17.181 This is a difficult and finely balanced issue but it is our recommendation that restrained funds ought to be able to be released for the payment of legal expenses.

17.182 The principal argument for this recommendation is that it ensures equality of access to justice between defendants. Restrained funds prima facie belong to the defendant where it has yet to be demonstrated to the required standard of proof that they are the proceeds of crime. It follows that if defendants have the funds to pay for their legal representation, they should be able to select their representatives of choice, subject to judicial scrutiny of legal costs. This would broaden the pool of legal representation and ensure defendants have a genuinely free choice of who they wish to instruct, rather than being limited by legal aid.

17.183 Furthermore, it is arguable that as a matter of public policy, defendants should not receive public funds to defend their substantive criminal and confiscation proceedings where these defendants have sufficient funds to arrange for their own representation.

17.184 Proper checks and safeguards can allay concerns about the unreasonable or excessive dissipation of restrained funds. The use of restrained funds would be

overseen by a judge based on rates of remuneration set out in a statutory instrument. Advocates could not simply set their own rate and would have to justify work required and completed. Judges have the requisite skills and experience to provide suitable oversight. Further, provision could be made to ringfence any sum equivalent to the value of compensation likely to be ordered at the conclusion of the case if convicted. This would ensure that the amount of restrained funds could not dip below the amount required to compensate victims adequately. It would redress the fundamental disparity between using restrained funds for legal representation in criminal and civil recovery proceedings.

17.185 In fact, save for compensation paid to victims, it could be argued that the issue of releasing restrained funds to pay for legal expenses is about the dissipation of public money on legal expenses, whether it is paid by the Legal Aid Agency and later recouped, or paid out of restrained funds prior to any finding that the funds are criminal. The only real difference is that the rates payable under Legal Aid leave defendants without a free choice as to representation and limit the work that can be done on their behalf.

17.186 We have ultimately concluded, that any concerns about the potential for confiscation funds to be dissipated through payment of legal expenses can be mitigated with appropriate safeguards and consequently recommend that such payment from restrained funds be permitted.

Recommendation 91.

17.187 We recommend that confiscation legislation should permit legal expenses connected with criminal and confiscation proceedings to be paid from restrained funds, subject to judicial approval of a cost budget, in accordance with a table of remuneration set out in a statutory instrument.

PROPOSAL 6: REASONABLE COSTS IN RESTRAINT PROCEEDINGS

The current law

17.188 In our consultation paper, we observed that there are three separate and distinct costs regimes that apply in restraint, cash forfeiture and criminal proceedings which all operate on different and conflicting principles.

17.189 The general rule in restraint proceedings is that the unsuccessful party will be ordered to pay the costs of the successful party.[91] The reason for adopting the civil costs regime appears to result from the position prior to POCA 2002 coming into force. Then, applications for restraint orders were dealt with by the High Court. Following the enactment of POCA 2002, jurisdiction over restraint was transferred to the Crown Court along with civil costs rules.[92]

[91] Criminal Procedure Rules, r 33.47(5)(a), Criminal Practice Direction X: Costs, Part 7.1.1.
[92] SI 2003 No 421, explanatory note. 597.

17.190 In deciding what order (if any) to make about costs in restraint proceedings, in addition to a consideration of which part was successful, 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;

(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.[93]

17.191 This does not mean that a prosecution authority that acted reasonably in making an application for restraint will be immune from an order to pay the defendant's costs. 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.[94]

17.192 Due to the complexity of these cases there is a risk that a proportionate costs order may still be relatively high and the risk of a substantial costs order has been cited as a disincentive to the making of applications for restraint.[95]

17.193 An alternative approach is taken in civil asset forfeiture cases before the magistrates' court. The court has a broad discretion to award such costs as it thinks just and reasonable[96] and this principle extends to determining the party who is to pay costs (*City of Bradford v Booth*).[97] In the case of *R (Perinpanathan) v City of Westminster Magistrates' Court*,[98] the Court of Appeal (Civil Division) found that no costs should be awarded against an unsuccessful applicant for forfeiture of assets allegedly connected

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93 Criminal Procedure Rules, r 33.48(5) and Criminal Practice Directions (Costs in Criminal Proceedings) 2015, Parts 7.1.3 and 7.2.4 to 7.2.5. *In the matter of Olden v Crown Prosecution Service* [2010] EWCA Civ 961. Criminal Practice Direction (Costs in Criminal Proceedings) 2015, para 7.2.6. 178 179 SI 2002 No 2998, r 11(2).598. Section 52, Senior Courts Act 1981 affords the Criminal Procedure Rule Committee the power to make rules in relation to costs.

94 *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.

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

96 Magistrates' Courts Act 1980, s 64.

97 *City of Bradford v Booth* (2000) 164 JP 485.

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

to criminality, as long as the application was brought "honestly, reasonably, properly and on grounds that are sound".[99] 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.[100]

17.194 Notably, in May 2022 the judgment in the case of *Competition and Markets Authority v Flynn Pharma*[101] narrowed the principle derived from *Booth* and *Perinpanathan* and concluded that:

> Whether there is a real risk of such a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending – it cannot be assumed to exist…the assessment as to whether a chilling effect is sufficiently plausible to justify a starting point of no order as to costs in a particular jurisdiction is an assessment best made by the court or tribunal in question, subject to the supervisory jurisdiction of the appellate courts.

17.195 This shift from a soft presumption in favour of the public authorities who make these applications to a firmly neutral case-by-case analysis is significant, given that we heard from stakeholders in the pre-consultation period that a concern about potential adverse costs orders makes them less likely to pursue early restraint applications.[102]

17.196 In criminal cases, the Crown Court has the power to make a "defendant's costs order" in the event that a defendant is acquitted or a case is not proceeded with and costs ordinarily follow the event even if the case was properly brought. As we discussed in our consultation paper, there are two important differences between costs in criminal proceedings and in restraint proceedings. First, costs in ordinary criminal proceedings are drawn from what are known as "Central Funds", which means from the Ministry of Justice budget and not from the budgets of individual prosecution authorities. Secondly, costs in ordinary criminal proceedings are capped at criminal legal aid rates even if a defence counsel's rate of remuneration was higher. This preserves public funds and provides a measure of certainty.

17.197 As mentioned above, during our pre-consultation discussions we heard that the risk of incurring high costs inhibits applications for restraint orders. We concluded that the fact that costs incurred must be met by the prosecution in the event that they are the "losing" party, regardless of the prosecution's good faith or the reasonableness of the application was unfair and that it was in the public interest for prosecuting authorities

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99 *R (Perinpanathan) v City of Westminster Magistrates' Court*, above at [33].

100 *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).

101 *Competition and Markets Authority v Flynn Pharma* [2022] UKSC 14, [2022] 1 WLR 2972.

102 See CP 249, para 26.172.

to make restraint applications where it was reasonable and appropriate to do so without fear of undue financial prejudice.

The consultation paper

17.198 We concluded that reform was needed in relation to costs in restraint proceedings. We provisionally proposed[103] 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.

Consultation responses

17.199 There was good support for this proposal.[104]

17.200 The Bar Council said:

> We agree that the court should begin by determining whether an application has been reasonably brought. The factors listed above seem appropriate, but need not be exhaustive. We agree that where an application is not reasonably made, costs should follow the event. There is no legal or policy reason that we can identify to provide costs protection against unreasonable applications which may involve considerable interference with suspects' property rights and result in significant cost to defend.

17.201 The Government was also supportive:

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103 Consultation question 94.
104 Consultation question 94 (39 responses: 31 (Y), 7 (N), 1 (O); 23 did not answer).

> We support this proposal, it would ensure prosecution authorities make reasonable applications for restraint, thereby ensuring fairness and preserving the integrity of the confiscation regime.

17.202 The Environment Agency, responding positively, added that it is only "reasonably incurred costs" which should follow the event.

17.203 Commenting on the list of factors, those proposed were generally considered "appropriate". The FCA said that they assumed "that the judge would be given a non-exhaustive list to accommodate other matters which may be relevant." Garden Court Chambers suggested an additional criterion of "whether or not the prosecution operated expeditiously, given the impact of restraint on individuals and their work or businesses."

17.204 Several consultees responded negatively to this proposal. One practitioner in the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland said:

> If the court has properly considered the application for a restraint order and has granted [the] same, it is contradictory to those functions of the court to then start to question again whether or not the application for restraint was reasonably brought.

17.205 This consultee continued that restraint is an ongoing process which should be continually re-assessed, with the court playing an "active role" in proceedings, including through reporting requirements:

> If further information comes to light that questions the risk of dissipation then there is a duty on the Crown to bring this to the attention of the court, [and] in doing so it does not mean that the original application for an order was unreasonably brought. […]
>
> Little regard seems to be given at present that there may have been legitimate grounds for making an order which was properly in place up until the point of any discharge.

17.206 If the position were codified in statute, this practitioner in the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland proposed the addition of the following factors for consideration:

> The conduct of the alleged offenders during the time an order was in place [and] the fact that restraint proceedings are inextricably linked to criminal proceedings which are not concluded.

17.207 Disagreeing that costs should be awarded against the prosecution for restraint applications, R3 considered that "the above provisions could be used if a variation to the restraint order is sought".

17.208 The Criminal Law Solicitors' Association objected to the proposal on the grounds that costs should "always" follow the event (rather than being limited to the reasonableness of the application):

> Whether the application is bought by the Crown or by a private prosecutor there must be a sanction for the prosecutor wrongly interfering with the A1P1[105] rights of the defendant leading to proper consideration regarding an application to interfere with those rights. If the only thing that is prohibitive is the fear of increased costs for "getting it wrong" then that is a burden the prosecution should bear for the unsuccessful attempt to restrain an individual's property.

17.209 This view was supported by Andrew Campbell-Tiech KC and John McNally of Drystone Chambers, the former saying:

> It is true that the risk of a costs order acts as a deterrent to the prosecutor. This is a good thing. Given the calamitous consequences to many an unconvicted defendant of the fact of a restraint order, there should be no encouragement to embark upon a speculative or borderline application. Despite the existing deterrent, the ill-conceived, ill-drafted application is far from unknown. To lower the bar in advance of raising standards would be a mistake. When – if – the system is adequately resourced, then this proposal might be looked at anew.

Analysis

17.210 Our proposals were intended to encourage the bringing of reasonable applications for restraint orders. The majority of stakeholders agreed that reform was required to remove the disincentive effect of the current position. There was also broad agreement that it was in the public interest for prosecuting authorities to be encouraged to act reasonably and proportionately in bringing proceedings. Requiring an assessment of reasonableness would ensure rigorous scrutiny is applied to the conduct of the prosecuting authority if a speculative application were brought. It would also encourage full, frank and early disclosure.

17.211 During the consultation period, the CPS raised a question about the relevant “event” for determining costs if they are awarded, given the potential impact it could have on liability for costs in cases where restraint has been sought at an early stage in the investigation. In lengthy cases, there could be multiple possible “events”, such as the original application for restraint, variations, attempts to discharge the order, as well as any eventual discharge on acquittal. The CPS was concerned about facing large costs orders at the end of criminal proceedings where, in their view, restraint was reasonably sought or upheld at each stage but ultimately discharged at the end of the proceedings.

17.212 We agree that it would be undesirable simply to focus on the final result since this would likely have a chilling effect on applications. Such an approach would fail to take into account the organic development of a case and the conduct of the parties at each stage. We have reassessed our provisional proposals in light of these comments. We concluded that our “reasonable costs” proposal could address these concerns if costs were limited to each application rather than assessed as a whole at the conclusion of proceedings. We concluded that this approach would produce fairer and more proportionate outcomes.

[105] Article 1 of the First Protocol to the European Convention on Human Rights.

Recommendation 92.

17.213 We recommend that the Criminal Procedure Rule Committee consider adopting the following procedure for the assessment of costs in restraint proceedings:

(1) Costs should be limited to each application.

(2) Costs orders should not be made against the defendant.

(3) If the prosecution brings a successful application, each party should bear their own costs.

(4) If the prosecution brings an unsuccessful application or discharged application, there should be a presumption that costs follow the event (that is, that the prosecuting authority pays the defence costs) unless the prosecution can demonstrate that the application was reasonably brought, in which case each party will bear their own costs.

(5) In deciding whether the application was reasonably brought, the fact that the application was previously successful should not necessarily mean it was reasonably brought.

17.214 We envisage situations where an application would be unsuccessful but nonetheless reasonably brought might include:

(1) Where the prosecution has been diligent but the defence has raised evidence at the last minute without good cause demonstrating that the risk of dissipation does not exist or can be mitigated. This approach encourages early disclosure by the defence.

(2) Where the restraint order is no longer pursued because of something outside the prosecution's control (for example, a foreign authority decides to pursue civil proceedings instead).

17.215 In the next section we consider the quantum of costs, particularly in relation to circumstances in which the prosecution has made an unsuccessful restraint application that was not reasonable.

PROPOSAL 7: CAPPING COSTS AT LEGAL AID RATES

The current law

17.216 As we described above, the current costs regime for restraint applications does not limit costs to legal aid rates.

The consultation paper

17.217 We provisionally proposed[106] 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. If consultees did not agree, we asked for their views on alternatives and in particular whether:

(1) No costs should be awarded.

(2) Costs should be awarded subject to a pre-determined discount to reflect the reasonableness of the application; if so, we welcomed consultees' views as to what discount might be appropriate.

(3) Costs of applications reasonably brought should be awarded in all of the circumstances of the case, not capped at legal aid rates.

(4) Costs be awarded in some other formula?

Consultation responses

17.218 There was a mixed response to this question.[107]

17.219 Comments from consultees were divided among three general positions.

(1) Costs should be awarded but capped at legal aid rates.

(2) Reasonable costs should be awarded and not capped at legal aid rates.

(3) No costs should be awarded where an application was reasonably brought.

17.220 In support of the first position, that costs should be awarded but capped at legal aid rates, the Government said:

> We strongly support the proposal for costs to be capped at legal aid rates; excessive costs should not be available to wealthy defendants to use as a tactic to subvert justice.

17.221 The CPS, FCA and Insolvency Service were in agreement, as were other operational stakeholders including the Association of Chief Trading Standards Officers, the City of London Police, HMRC and the South East Confiscation Panel (East Kent Bench).

17.222 The SFO agreed, although their preferred position was that costs should not be awarded at all:

> However, in relation to costs being capped at legal aid rates, this could be an appropriate compromise in the event that the SFO's response does not find favour. In this situation, the SFO recommends that the costs should be paid from central funds. This would more closely mirror the position that exists in criminal

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106 Consultation question 95 and summary consultation question 30.

107 Consultation question 95(1) (41 responses: 22 (Y), 17 (N), 2 (O); 21 did not answer); in relation to the second part of the question, choosing between options (1) to (4): 10 (option 1), 7 (option 3), 3 (option 4). Summary consultation question 30 (28 responses: 14 (Y), 9 (N), 2 (O); 9 did not answer).

prosecutions, where acquitted defendants are entitled to costs from central funds and capped at legal aid rates.

17.223 In support of the second position, that reasonable costs should be awarded and *not* capped at legal aid rates, the Bar Council said:

> We do not agree that costs recoverable in restraint proceedings should be capped at legal aid rates. We consider there to be a real risk that adopting the proposal in the consultation paper may restrict access to those with true specialism in this practice area. Experience has shown that restraint can be a complex jurisdiction, often requiring the assistance of one of a relatively limited pool of expert practitioners who may be unavailable (or less available) at legal aid rates.
>
> We would suggest that, where an application is reasonably made, the ability to recover "reasonable costs" would be sufficient to ensure proper representation and should be the model adopted. As noted in the consultation paper, the capping of costs recovery in criminal proceedings has been much criticised and does not in our view provide a template which should be adopted.

17.224 The Financial Crime Practice Group at Three Raymond Buildings, the Criminal Law Solicitors' Association and Garden Court Chambers were in support of this position, (reflected in option 3 of consultation question 95).

17.225 According to BCL Solicitors LLP:

> Notwithstanding the argument that this would represent a move towards certainty and consistency, cost-capping at legal aid rates can also cause great injustice. The rationale that respondents could have obtained representation on legal aid is based on a false assumption (particularly for suspects pre-charge and third parties) and disregards the respondent's right to choose their representation.

17.226 Penelope Small, a barrister at 33 Chancery Lane, agreed:

> Legal aid rates can only be used where the parties have relied on them. Most cases brought by third parties require expertise which cannot be found on the funds provided by criminal legal aid.

17.227 In a roundtable on asset management, one practitioner agreed and commented that this proposal would encourage public authorities to bring and stand by the decisions they make on restraint.[108] He also pointed by example to the "sensible" drafting of section 64 of the Courts Act 1971, which sets out a determination of what is a reasonable amount of costs in the magistrates' court.

17.228 The view was also expressed at the judges' roundtable meeting that being able to recover costs at a reasonable amount was important to ensure proper representation and equality of arms.[109]

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108 Asset management roundtable meeting (10 November 2020).
109 Judges' roundtable meeting (8 December 2020).

17.229 Three consultees selected option (4), that costs should be awarded according to some other formula. Their suggestions were for "risk in costs [to] remain as is for the time being"[110] or for a "maximum limit" to be set.[111]

17.230 Several consultees expressed support for adopting a costs regime mirroring that in civil proceedings. The Fraud Lawyers Association said:

> POCA proceedings are quasi-civil proceedings and a similar costs regime should apply as civil proceedings. We would be content for costs against the prosecution to be capped at the guideline hourly rates [for those proceedings].

17.231 In support of the third position, that no costs should be awarded at all, the SFO said:

> The SFO considers that the rule in *Perinpanathan* should be followed – where the prosecution was acting reasonably and in good faith, no costs should be awarded.

17.232 Other consultees agreed, including R3 and several personal responses from members of law enforcement.

17.233 Spotlight on Corruption, Transparency International and the UK Anti-Corruption Coalition said:

> Costs have frequently operated as a downward pressure on risk appetite within law enforcement bodies to pursue confiscation cases. The reasonableness test applied by the judge is already an important check on law enforcement pursuing cases that have no merit. If the UK is serious about increasing confiscation rates it needs to seriously consider adopting a similar costs regime to that which operates in other spheres (particularly the civil sphere) on this issue.

17.234 One respondent within the Criminal Finance sub-group of the Organised Crime Task Force Northern Ireland said:

> Costs should only be awarded where an unsuccessful application is deemed to have been wholly without merit. Where orders are granted and subsequently discharged, costs should only be awarded where the court making the original order was misled as to the grounds for making it.
>
> […]
>
> If a defendant is legally aided, applications for costs should be discouraged as the public purse is already paying for the legal assistance given.
>
> There is concern that costs become an impediment to the prosecution in applying for orders in some cases if it is common practice that the rule that the unsuccessful party pays the costs of the other party.

Analysis

17.235 Consultees were divided about the most appropriate option in relation to the quantum of costs, but common amongst the themes was a desire to see the defendant

[110] Andrew Campbell-Tiech KC.
[111] Personal response from a member of the NCA.

adequately recompensed for costs which are incurred when successfully defending an application, set against the need to tackle risk aversion amongst prosecutors, who are performing a public role in seeking restraint.

17.236 Because of the way this consultation question was framed, consultees made several comments related to the importance of an assessment of reasonableness when considering the issue of costs. We have examined the notion of "reasonableness" above in relation to the awarding of costs. For this reason, we do not make any recommendations with regard to reasonableness as it relates directly to the quantum of costs orders.

17.237 As discussed above, if the prosecution loses the application it must be determined whether it was nonetheless reasonable for them to have brought the application. If the application was not reasonably brought, costs will be awarded against them with the quantum determined according to the normal rules, limited to the costs incurred in connection with the specific application before the court. If the application was unsuccessful but reasonably brought, each party will bear their own costs.

17.238 We do not propose to adopt any of the provisional proposals in relation to quantum as we consider that the assessment of reasonableness in relation to the awarding of costs in our recommendation above addresses the concerns raised by consultees.

PROPOSAL 8: THIRD PARTY INTERESTS

The current law

17.239 A third party may seek to assert an interest in property at the confiscation hearing itself and any determination is conclusive, pursuant to section 10A of POCA 2002. 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.

17.240 At the restraint stage the objective is preservation and the court will not normally make binding findings of fact regarding ownership or third party interests in property. Nevertheless, as we explained in our consultation paper, third parties are affected by restraint orders due to their breadth and the court must hear applications to vary or discharge a restraint order brought by "any person affected by the order". A court may therefore be required to consider the nature and extent of third-party interests at the restraint stage.

17.241 Although the Crown Court may consider third-party interests at the restraint stage, there is no provision for a "binding" determination to be made at the restraint stage. During our pre-consultation discussions, prosecution authorities suggested that the court should be permitted to make binding determinations of third-party interests as early as the restraint stage. The reason for doing so was to expedite the confiscation process by identifying and resolving issues efficiently.

17.242 We therefore provisionally proposed that the ability of the court to make a conclusive determination on third-party interests be extended to any stage of the confiscation process, thus permitting the court to make determinations as and when appropriate.

17.243 We considered 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.

The consultation paper

17.244 We provisionally proposed 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); and

(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.

Consultation responses

17.245 There was good support for this proposal.[112]

17.246 The Government responded "other", saying:

> While we agree it is necessary for the court to resolve third party issues as early as practicably possible, it is unclear whether the prosecution would have enough evidence at the restraint stage of proceedings to enable the court to make a binding determination of interests in property. Nevertheless, we support this approach provided consultees can illustrate that it would be advantageous.

17.247 Among those who responded positively, consultees cited potential benefits including "to prevent an issue being re-litigated",[113] to prevent an asset losing value and to expedite payment of the order once it is made without "delay due to the determination of third-party interests".[114]

17.248 However, several consultees who responded positively also expressed concerns about the proposal. One practitioner in the NCA/NECC response would not apply the proposal to the restraint stage as "invariably the court will not have sufficient information at this point to make a judgement".

17.249 The FCA also had concerns about "empowering the court to make binding determinations on an ex parte hearing." Their response continued:

> The provision as currently expressed would enable the judge to make such a determination albeit that it would not be binding (as the affected party would not have been given an opportunity to make representations). This is not a satisfactory

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112 Consultation question 96(1) (39 responses: 23 (Y), 6 (N), 10 (O); 23 did not answer); consultation question 96(2) (37 responses: 25 (Y), 6 (N), 6 (O); 25 did not answer).

113 Gary Pons (5 St Andrew's Hill)

114 A solicitor from Blake Morgan LLP.

position; there should be no power to make the determination in the first place, or at least it should be more limited.

17.250 At the first public consultation webinar, Deborah Naughton from His Majesty's Courts and Tribunals Service expressed support for the ability to resolve third-party interests earlier in the process. In her view, this would assist with the enforcement process in the magistrates' court.[115] At the same webinar, panellists commented on what they saw as an increase in the use by judges of section 10A (the power to make determinations of third-party interests), especially following guidance from higher courts about its proper use. Panellist Barnaby Hone suggested this would start to produce gains for enforcement as the cases filtered through the system.

17.251 Among those who gave "other" responses, there was also some recognition of the benefit to resolving third-party interests earlier in proceedings as "advantageous to all parties".[116]

17.252 Several consultees made additional suggestions. Andrew Campbell-Tiech KC suggested that the determination should be "only on the application of a third party and restricted to a determination of the extent of his interest". The Financial Crime Practice Group at Three Raymond Buildings agreed "subject to a right of interim appeal". One trading standards officer said there would need to be provision for a "revisit" if "further evidence comes to light as enquiries progress".

17.253 Garden Court Chambers was not convinced of the necessity of this proposal:

> It is rarely likely to be in the interests of justice to make a binding determination at such an early stage of proceedings, where all relevant parties may not have been identified, legally represented and able to make full submissions.

17.254 The Criminal Law Solicitors' Association ("CLSA") expressed serious concerns about the right to representation for third parties:

> In respect of such applications as they currently stand those who assert third-party interests in properties do not have an automatic right to a representation order and have to pay privately. Whilst provision does exist it is as rare as hens' teeth for an individual to be granted a representation order to participate as third party within such applications.
>
> This can lead to injustices. […]
>
> The earlier the determination being sought by the prosecution the more chance of injustice. […] To make a determination as to the full extent of ownership of the property at this point will lead to injustices and the breach of A1 P1 rights of the third party.

17.255 The CLSA response continued that "determination of the rights within the property should take place within the confiscation proceedings themselves and not as a

[115] Webinar 1, Preparation for a confiscation hearing and forum (8 October 2020).
[116] West Yorkshire Trading Standards.

separate entity". They considered that at this point the "court can assess the overall position".

17.256 At a meeting, representatives from the CPS expressed similar concerns about the right to representation for third parties.[117] In their view, the arbitrariness with which third parties receive a right to make representations may result in them not receiving a fair hearing. In particular, one lawyer commented that third parties only have rights at confiscation proceedings if they hold an asset with the defendant. Section 10A is not engaged by tainted gifts and the only way to engage that right later is at the enforcement stage through the use of an enforcement receiver.

17.257 Several consultees did not agree with this proposal, considering it "premature" and "inappropriate" for determinations to be made at an earlier stage.[118]

17.258 The Bar Council was not supportive and gave the following response:

> We do not agree. Such determinations can already be made at the confiscation stage, which is early enough to facilitate the making of a contingent vesting order. We do not consider that there is any real advantage to bringing forward the stage at which binding determinations of interests in property can be made. As noted at paragraph 26.208 of the consultation paper, this risks wasting both judicial and prosecutorial resources. It further risks distracting from the investigation and progress of the prosecution.
>
> Further, as third party interests can be protected to a certain extent through the variation mechanism, there would not appear to be any significant advantage to a third party in litigating the issue to a possible "binding" determination. Firstly, such a course would be likely to involve greater cost than a simple variation. Secondly, if the defendant were acquitted in due course, such a determination would have been unnecessary. Finally, the possibility of the determination being subsequently departed from (on the "serious risk of injustice" test) would not in any event provide the third party with finality. It would be a waste of court resources to argue the same point twice. And the hearing to determine whether there were "reasonable opportunities to make representations" will itself take time and money. Defendants may see it, wrongly, as a chance of an appeal.

17.259 The SFO agreed with this view, that it would not be "an effective use of resources or the court's time to make a binding determination" earlier than the conviction:

> This could lead to extensive work being carried out in a matter where the suspect is subsequently acquitted. The issues that arise when dealing with third party interests at the confiscation stage can be dealt with by effective case management by the court. The mischief that this is intended to deal with is no mischief at all. In the present circumstances, if the prosecutor restrains an asset and a third party argues that they have an interest in that assets, such that the court is satisfied of this and releases the asset (or part of it) from the restraint order, then the prosecutor will

[117] Meeting with the CPS (24 November 2020).
[118] David Winch (forensic accountant); John McNally (Drystone chambers).

obviously feel bound by this and will not seek to argue the contrary at the confiscation stage (unless compelling fresh evidence comes to light).

17.260 One practitioner in the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland was concerned about determinations being made at the restraint stage, followed by a lengthy delay until trial and potential confiscation proceedings: "A binding determination of third-party interests at the restraint stage may not reflect the factual position at the confiscation/enforcement stage".

17.261 One consultee was also concerned that the Crown Court "is not the right venue for all such determinations".[119]

Analysis

17.262 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".[120]

17.263 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. However, the consultation process identified significant difficulties with binding determinations at an early stage of the proceedings. We have been persuaded that early determinations risk expending unnecessary cost and resources and may require reopening in any event. We agree that it may not be an effective use of resources or the court's time to make a binding determination earlier than at the conviction stage. Third parties may be disadvantaged by an early determination should they not be able to secure legal representation. Further, it is unclear whether the prosecution would have enough evidence to assist the court to make such a determination at an early stage. There is a risk of diverting resources away from the investigation at an early stage to deal with such an application. As the risks outweigh the possible benefits, we are persuaded that reform is undesirable.

119 Personal response.

120 Lewis Nedas Law, "Confiscation proceedings and third party interests" (October 2019), https://lewisnedas.co.uk/newsroom/blog/financial-crime/confiscation-proceedings-and-third-party-interests.html.

Chapter 18: Effective asset management

INTRODUCTION

18.1 Recovery of sums for confiscation requires that the value of assets held by the defendant, which may be used to satisfy the confiscation order, is preserved. Certain steps may be taken to achieve this, sometimes referred to as "asset management" steps.[1] These steps may include seizure, detention and realisation by investigatory authorities, and management receivership.

18.2 In the previous chapter, we discussed our recommendations for reforming the regime under which a defendant's assets may be restrained. However, restraint is not a guarantee that assets will not be dissipated, although sanctions for breaching a restraint order reduce that risk.[2] This chapter considers our provisional proposals for other steps which may be taken to manage or preserve the value of assets.

18.3 In the consultation paper, we made five provisional proposals in relation to effective asset management. We will now make three recommendations.

OVERVIEW OF POLICY

18.4 That:

(1) The National Police Chiefs' Council should 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 powers of search and seizure in connection with confiscation.

(2) 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).

(3) The Government should consider developing a national asset management strategy, which may include establishment of a Criminal Asset Recovery Board.

PROPOSALS 1 AND 2 – POLICE TRAINING AND GUIDANCE ON SEARCH AND SEIZURE POWERS

Consultation paper

18.5 In the consultation paper, we noted that section 47S of POCA 2002 provides for the Secretary of State to issue a code of practice in connection with the power to search

1 Confiscation of the proceedings of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, para 27.1.

2 CP 249, para 27.3.

for and seize assets in confiscation cases to preserve their value. The code first came into operation in June 2015.

18.6 Despite the existence of the code, we cited a report from the House of Commons Home Affairs Committee which suggested that "poor collection performance could be improved through better training at investigation level." Their reasons included that "often investigators did not know that they could and should seize or restrain criminal assets", and that as "criminals are becoming more sophisticated at concealing the proceeds of their crimes", it should become an early priority to ensure recovery, rather than waiting for conviction.[3] The Committee recommended training for all police officers upon entry into the service, and additional training for detectives.[4]

18.7 During pre-consultation discussions, we heard from a group of trainee detectives that they did receive initial and detective training on confiscation, but no training in between. We noted that:

> 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.[5]

18.8 We also cited a Home Office report on the role of financial investigators from 2018, which noted that FIs considered a perceived lack of understanding about financial investigation among key partners and non-FI colleagues had "a detrimental effect on the success and efficiency of their investigations".[6] The report recommended that guidance should be issued on the use of financial investigation and appropriate use of powers, to assist those working with FIs.[7]

18.9 We therefore made two provisional proposals:

(1) The National Police Chiefs' Council ("NPCC") ought to reconsider the training needs of all police officers in addressing the concerns raised, including "front-line" officers who conduct searches of property.[8]

(2) If non-statutory guidance is produced on confiscation pursuant to other parts of the consultation paper, it ought 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.[9]

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3 CP 249, para 27.54; citing Proceeds of Crime, Report of the House of Commons Home Affairs Committee (2016-17) HC 25, para 14.
4 Proceeds of Crime, Report of the House of Commons Home Affairs Committee (2016-17) HC 25, para 15.
5 CP 249, para 27.56.
6 E Gale and J Kelly, Home Office Research Report 104, "Exploring the Role of the Financial Investigator", p 27.
7 E Gale and J Kelly, Home Office Research Report 104, "Exploring the Role of the Financial Investigator", p 35.
8 CP 249, para 27.59.
9 CP 249, para 27.60.

Consultation responses

18.10 Consultees strongly supported our proposal for the NPCC to consider additional training,[10] as well as our proposal for non-statutory guidance to refer to search and seizure powers in connection with confiscation.[11]

Additional police training

18.11 Among consultees who responded positively, several provided comments on the benefit of additional training. One practitioner in the National Crime Agency ("NCA") response noted that improved training would help to "mainstream" confiscation and increase awareness of how it "impacts on all aspects of policing".

18.12 The Financial Conduct Authority ("FCA") suggested that this proposal should not be limited to the police but widened to include all law enforcement agencies and officers who can undertake POCA investigations.[12]

18.13 Others, including the City of London Police and one practitioner in the NCA/NECC response, limited their support for additional training to financial investigators (FIs). The Association of Chief Trading Standards Officers ("ACTSO") also said:

> The training is more properly directed at financial investigators in all agencies because they are likely to be either present during search and seize or available as points of expertise (as they are already).

18.14 The ACTSO suggested that training should be centralised and delivered through one provider (for example, "a properly resourced Proceeds of Crime Centre in the NCA") to ensure consistency in interpretation and approach.

18.15 Regarding improved training on search and seizure, the Association of Business Recovery Professionals (R3) suggested that:

> As an alternative you may wish that the member of the [Regional Asset Recovery Team] team attends with or shortly after the police have secured access to the property to be searched.

18.16 Responding negatively, West Yorkshire Trading Standards said:

> POCA awareness is already part of initial training. If it is to do with confiscation it is too specialised for normal police officers and out of their remit. In most cases only police officers on specialised POCA teams deal with POCA seizures. The FIs do and can give assistance and, if there is going to be confiscation, they should know about it and be able to advise.

18.17 Andrew Campbell-Tiech KC and John McNally also responded negatively, both citing resource concerns. On search and seizure, Andrew Campbell-Tiech KC suggested that "deployment of a suitable trained team of Crown Prosecution Service ("CPS")

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10 Consultation question 97 (40 responses: 35 (Y), 4 (N), 1 (O); 22 did not answer).
11 Consultation question 98 (35 responses: 30 (Y), 3 (N), 2 (O); 27 did not answer).
12 This echoes a comment made by a representative of the NPCC at a meeting we held with the NPCC (24 November 2020).

lawyers" could assist instead. John McNally considered that appropriate training would follow naturally from any legislative amendments.

18.18 A member of the NPCC, with whom we engaged during the consultation period, submitted a personal response, reproduced here in full:

> Personally, I would have liked to have seen more emphasis on the training and awareness requirements for chief officers and senior leaders in this business area to help bring about change and influence some of the recommendations. In my opinion there is a level of understanding at chief officer level to this business sector, but there is definitely room for improvement and consideration of alternative strategies to support existing problems.
>
> The training and awareness of front-line investigators from all law enforcement agencies is a constant consideration and policing continually reviews current processes. At the point of recruitment student police officers are subject to an intense training and knowledge environment and the agenda is significant. Introducing specific specialist elements would be extremely challenging given the bandwidth of the topics they have to undertake.
>
> These officers do receive input in this area and during their operational activity are supported by specialist staff within their force and given access to dedicated learning material on internal intranets. As part of the ongoing review of [financial investigator (FI)] training and in response to the recently published [Proceeds of Crime Centre] review, policing will continue to engage with the NCA and monitor the effectiveness of the training and training requirements in this business sector. Policing is also committed to increasing the availability of front-line access to specialist FI staff.
>
> In relation to detective training, as part of their development, detectives attend several distinct courses many of which have an FI module of learning that includes confiscation. Most forces will also have internal training events which are supported by force economic crime unit staff who attend and present relevant elements from the business area. This content and the support to these courses/training days to ensure they remain fit for purpose is continually reviewed to identify best practice.

Guidance on search and seizure powers

18.19 Few consultees made additional comments on the provisional proposal for guidance on search and seizure powers in relation to confiscation.[13]

18.20 The Government provided the following comment:

> If the Law Commission were inclined to recommend non-statutory guidance to this effect, we agree that it should refer stakeholders to the Search, Seizure and Detention of Property Code of Practice issued under section 47S of the Proceeds of Crime Act 2002.

[13] Those in support included the SFO; Environment Agency; FCA; and practitioners from the NCA. The Bar Council and CPS said that this was not within their remit.

18.21 There were two negative comments. Andrew Campbell-Tiech KC referred back to his answer to a previous question, in which he made the following comments:

> [If] legislative provisions […] are not fit for purpose then they should be amended. If the case law is contradictory, unworkable or otherwise impenetrable, it should be revisited. Instead you are proposing something more akin to a Nutshell Guide to POCA. I don't think [non-statutory guidance] is an appropriate means through which to supply a digest, still less a roadmap, of complex and contested principles of criminal law.

18.22 One response from an individual said that we should not "mix guidance on the exercise of search and seizure powers with the proposed non-statutory guidance on how to apply the law on confiscation".

18.23 One practitioner in the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland made the following observation:

> Statutory guidance is also issued by the Department of Justice and Scottish Ministers in respect of the exercise of the relevant powers in the devolved administrations.

Analysis

Additional police training

18.24 This proposal was intended to invite the NPCC to reconsider the training needs of all police officers with regards to search and seizure powers which may be exercised in connection with confiscation.

18.25 Consultees expressed a range of views about the most appropriate recipients of additional training but were agreed that training would be helpful.

18.26 We welcome the detailed response from an individual member of the NPCC and understand his views that there are many competing demands for enhanced training. We also appreciate that he, and other members of the NPCC, may have different views as to the most appropriate recipients of additional training. We have amended the wording of our recommendation to reflect our appreciation that the NPCC is best placed to assess training needs.

Guidance on search and seizure powers

18.27 This proposal was intended to respond to an identified need that those working in confiscation may require additional guidance to access and apply relevant provisions and material on search and seizure powers in relation to confiscation. There is some force in the argument that non-statutory guidance on the application of principles of confiscation in court should not refer to police search and seizure powers. This is reinforced by the view of the Criminal Procedure Rule Committee that it is best placed to promulgate any non-statutory guidance.

18.28 Furthermore, comprehensive guidance provided under section 47S of POCA 2002, coupled with additional training, ought to be sufficient to guide police officers. We therefore do not recommend that non-statutory guidance be produced in this regard.

18.29 We note that the section 47S guidance was withdrawn on 28 June 2021, along with other guidance produced pursuant to other parts of POCA. No replacement guidance has yet been issued. In the event that it is not, we would recommend that updated guidance be issued.

Recommendation 93.

18.30 We recommend that the National Police Chiefs' Council reconsider the training needs of all police officers in connection with confiscation, and in particular those who may need to exercise or oversee the powers of search and seizure in connection with confiscation.

PROPOSAL 3 – POWER TO APPOINT A MANAGEMENT RECEIVER OVER ASSETS DETAINED UNDER SECTION 47M OF POCA 2002

Consultation paper

18.31 Amendments to POCA 2002,[14] which came into force on 1 June 2015, provided for new powers of seizure, detention and realisation of assets which, alongside the restraint regime, aim to preserve their value for confiscation.[15]

18.32 Section 47M provides for an extension of the period of detention of property which is detained under section 47J. The conditions for granting further detention are similar to restraint: (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.[16]

18.33 After a confiscation order is made, assets detained under this section may be sold on application to the magistrates' court.[17] However, before a confiscation order is made, no comparable power exists to sell assets in order to preserve their value. Instead, *both* a restraint order and a management receivership order must be obtained to effect the sale of any property (in the absence of the owner's consent). This is despite the conditions for satisfying section 47M closely resembling those for restraint. Additionally, before any property could be seized, the person suspected of having benefited from conduct constituting an offence must have been arrested for that offence.[18] The order for detention is subject to appeal to the Crown Court.[19]

18.34 In the consultation paper, we concluded that we could see no reason why a Crown Court judge should not be permitted to appoint a management receiver (who may in turn sell the property) without additionally having to restrain the property subject to further detention under section 47M. This would be subject to the normal routes of appeal against any receivership order. We said that "we consider that this balances

14 Introduced by the Policing and Crime Act 2009, s 55.
15 Proceeds of Crime Act 2002, ss 47A to 47S.
16 Proceeds of Crime Act 2002, s 47M(1)(c).
17 Proceeds of Crime Act 2002, s 67A.
18 Proceeds of Crime Act 2002, s 47B(2)(b).
19 Proceeds of Crime Act 2002, s 47O.

the need for proper consideration of a person's A1P1 [article 1 of Protocol 1 (A1P1) to the European Convention on Human Rights] rights in relation to the property against the need to preserve the value of the property for confiscation though active asset management measures."[20]

18.35 This proposal was intended to respond to an operational demand which arose after the police were given greater seizure powers under the amendments to POCA 2002 highlighted above. In order to preserve the value of seized assets, it may be necessary to sell them. Assets may be sold where there is a management receivership order. Rather than create a new power for the police to apply to a magistrates' court for an order for sale directly, we proposed to extend the ability of the police to apply to the Crown Court for a management receivership order. The advantage of extending an existing power is that its use is already familiar and there are established routes of appeal.

18.36 We therefore provisionally proposed 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).

Consultation responses

18.37 There was strong support for this provisional proposal.[21] Consultees agreed with the reasoning given in the consultation paper.[22] There was also good support among operational stakeholders.[23]

18.38 Several consultees raised concerns about or sought to clarify the proposal. The Financial Crime Practice Group at Three Raymond Buildings said:

> It is important to recognise this will give rise to litigation (challenges to management receiver action/inaction) and costs which will reduce the available amount – the power should therefore be used sparingly.

18.39 The response from Garden Court Chambers said, "The extent of liability for negligent management of assets if the assets are eventually returned should be clarified." The Criminal Law Solicitors' Association agreed, adding that the power "should be subject to an on notice full application with right of appeal".

18.40 A solicitor at Blake Morgan LLP agreed, and noted:

> It is important that a management receiver be appointed at an early enough stage to make the appointment worthwhile. If the seized assets are left to depreciate for a long time the management receiver will not be able to realise any value and the exercise will be pointless.

18.41 She continued that she had heard of situations where the value of properties has deteriorated during the time it takes to secure a conviction and confiscation order, with

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20 CP 249, para 27.67.
21 Consultation question 99 (42 responses: 39 (Y), 2 (N), 1 (O); 20 did not answer).
22 Bar Council.
23 CPS; SFO; Environment Agency; FCA; practitioners from HMRC and the NCA.

the prosecution considering it too expensive to appoint a management receiver. In her view:

> This illustrates that the focus is too often just on getting a conviction without considering the fact that the assets need to be preserved if a confiscation order is to be satisfied. If a management receiver were appointed to manage those properties (to rent them out and generate an income to pay the mortgages) the value could be preserved to satisfy the confiscation order.

18.42 Offering another view, Wilsons Auctions said:

> The appointment of a management receiver is extremely costly to either the state or victims of crime as the available amount is severely demised by fees. In addition, the costs of realising assets will still need to be taken into consideration, so the costs of the process will increase dramatically. […]
>
> A further consideration is where a defendant is acquitted of their charge or their case is discontinued. The costs of a management receiver would need to be covered – most likely by the state – resulting in an even greater financial loss at the loss of a case.

18.43 Andrew Campbell-Tiech KC was opposed to the proposal. He said:

> I do not share the rosy view of management receivers advanced by *Millington & Sutherland Williams*. I know of no defence practitioner who does. The proposition that the defendant may actually benefit thereby is fanciful. Receivership, whether management or enforcement, should be a very last resort.

18.44 John McNally agreed, saying that management receivership is "rare" and "should remain thus" because "the costs of receivership have to be borne".

Analysis

18.45 As described above, this proposal was intended to respond to an operational demand to sell seized assets by extending an existing power rather than creating a new one.

18.46 This option also avoids the currently protracted (and, in our view, unnecessary) process of seeking both a restraint order and a management receivership order for assets detained under section 47M. Perversely, the court may be much less likely to make an order for restraint for assets already detained under section 47M (despite the conditions for restraint and section 47M being very similar) because assets detained under section 47M are usually removed from the defendant's control, meaning the risk of dissipation is much lower.

18.47 Once assets are detained under section 47M, the application for a management receivership can be expedited. The process remains under the scrutiny of the Crown Court.

18.48 We acknowledge consultees' divergent views on the merits and weaknesses of management receivership more generally. While this proposal may make it more likely that management receivership is sought as a mechanism to sell detained assets, it does not substantively affect that regime, about which we make no recommendation.

Recommendation 94.

18.49 We recommend 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).

PROPOSAL 4 – NATIONAL ASSET MANAGEMENT STRATEGY

Consultation paper

18.50 In the consultation paper, we considered whether there should be a national strategy for asset management. We noted that this may have several objectives and benefits:

(1) generating national policies and economies of scale in relation to who should manage assets and how assets should be managed;

(2) streamlining the allocation of assets and having overarching standards for their maintenance, so that investigative and prosecution bodies will no longer have to spend time seeking out private asset managers and negotiating rates;

(3) setting clear guidelines to determine who the appropriate receiver should be (whether private or public) in any given case;[24] and

(4) developing a national procurement process, which may lead to a more consistent rate of return on the sale of assets.[25]

18.51 We took the provisional view that a national asset management strategy was desirable and that "a Criminal Asset Recovery Board [("CARB")] is the appropriate and proportionate way to deliver such a strategy". Further, we argued that "a Board structure comprised of relevant stakeholders would be a more efficient approach than to construct an entirely new asset management body."[26]

18.52 Regarding which stakeholders would be relevant to populate CARB, we considered that CARB could include "representatives of the principal agencies that undertake confiscation", "law enforcement representatives (including heads of ACE Teams" and His Majesty's Courts and Tribunals Service , as well as relevant specialists from the private sector.[27] We said:

> 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

24 CP 249, para 27.100.
25 CP 249, para 27.101.
26 CP 249, para 27.105.
27 CP 249, paras 27.107 and 27.108.

subject of a confiscation order. CARB would also function as an advisory body in relation to the application of this policy.[28]

18.53 Ultimately, we concluded that the decision of how CARB "might fit into existing organisational structures… is an operational one".[29]

18.54 We therefore made two provisional proposals: (1) that a national asset management strategy is desirable, to determine by whom and how assets should be managed; and (2) that to develop any national asset management strategy, a new CARB be established, comprising stakeholders from the public and private sector.

Consultation responses

18.55 Consultees strongly agreed that it was desirable to establish a national asset management strategy, to determine how and by whom assets should be managed.[30] They were also strongly supportive of creating a CARB to develop that strategy.[31]

Establishing a national strategy

18.56 Among those who responded positively, consultees cited the benefits of a consistent approach.[32] The City of London Police said:

> This appears to be a more cohesive approach that will simplify the current situation which is extremely ad hoc and relies on individual officers making local decisions with little uniformity as well as being forced to go along with private industry/market led economic factors.

18.57 The FCA "strongly" agreed with this proposal but added that "much more work will need to be done to establish whether it is in fact viable." The Financial Crime Practice Group at Three Raymond Buildings agreed, saying "all will depend on the detail of the scheme and how it is carried out."

18.58 The CPS raised the issues of "cost" and "prosecutor liability".

18.59 The Serious Fraud Office ("SFO") made the following comments:

> Whilst we query what value this might have on the work of the SFO, we can see the value that this might bring to small agencies with less experience in proceeds of crime work. As such, while we support the idea and would certainly seek to engage with such a strategy, we would suggest that specialist prosecutors such as the SFO should maintain the capacity to "opt out" of this.

18.60 The Eastern Region Special Operations Unit (Regional Economic Crime Unit) was particularly supportive, describing a national strategy as "a significant step in the right direction". Given that there is currently "a plethora of different policies and approaches

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28 CP 249, para 27.109.
29 CP 249, para 27.115.
30 Consultation question 100 (43 responses: 37 (Y), 4 (N), 2 (O); 19 did not answer) and summary consultation question 31(1) (27 responses: 21 (Y), 3 (N), 3 (O); 10 did not answer).
31 Consultation question 101 (42 responses: 31 (Y), 4 (N), 7 (O); 20 did not answer) and summary consultation question 31(2) (27 responses: 19 (Y), 5 (N), 3 (O); 10 did not answer).
32 Criminal Law Solicitors' Association; West Midlands ROCU.

to asset management [and] enforcement", they described "consistent guidance" as "hugely beneficial".

18.61 Giving the perspective of a private sector organisation, Wilsons Auctions said:

> The present system sees each police force and law enforcement agency responsible for their own asset recovery strategy and procurement process (with the exception of a handful of regions who work together), including [for] the procurement of private sector assistance for services such as asset management and disposal. This leads to inconsistencies across the country […].
>
> One symptom of this system is the wildly different policies on what type of asset is seized from defendants and what happens to those assets. In some parts of the country a progressive and thorough policy of asset recovery is in place whereas in other parts, assets are left in the possession of defendants because either the financial investigator does not fully understand what powers they have, or they do not understand that assistance is available from the private sector that will enable them to effectively seize any category of asset. A set national policy – with clear avenues to access assistance – would assist in avoiding such scenarios.

18.62 Another private sector organisation, Asset Reality, also considered that a national asset management strategy could help avoid the current "postcode lottery" in asset seizure decisions across different regions.

18.63 Professor Johan Boucht argued that a national asset management strategy could also have important implications for compliance with article 1, Protocol 1 of the ECHR. This applies both "from the perspective of the state", so that it can secure claims over seized assets or avoid compensation for "mismanagement", as well as from the perspective of the individual whose assets are seized:

> There is a reasonable expectation (in light of [A1P1]) that the state adequately maintains the property so that no unreasonable decline in its value occurs. This is particularly important in cases where the criminal charges are finally dropped and the property is returned to the owner.

18.64 Responding negatively, the South East Confiscation Panel (East Kent Bench) said that this proposal would "just place another layer of administration over the existing structure" and it would be "better to improve the existing arrangements". Andrew Campbell-Tiech KC called the proposal "grandiose and unrealistic", and John McNally described the need for it as "negligible".

18.65 An individual response from a member of Sussex Police argued that:

> Any such strategy can be drawn up by existing forums, such as the regional and national financial investigation working groups that all parties associated with the POCA legislation can contribute to.

Content of a national strategy

18.66 Two individual consultees cited measures in the 2014 EU Directive on asset management[33] as potentially helpful.

18.67 Wilsons Auctions called for the strategy to focus on "obtaining the consent of property owners for the sale of their assets soon after they have been seized" to avoid depreciation. They continued:

> There are no losers if consent to sell or a court order to sell assets is obtained early in the process – there is more money to be paid towards the available amount on a confiscation order, more to be paid towards a compensation order and in the event of assets being returned, a defendant is put back in the position they were in financially instead of incurring the loss of being reunited with assets that have been held for potentially a number of years.

Criminal Asset Recovery Board

18.68 The FCA commented that it is "particularly pertinent in the context of management of complex assets" to ensure that "those with actual grass roots experience are afforded with significant input in this exercise."

18.69 The Eastern Region Special Operations Unit, RECU was particularly supportive. They highlighted how a single body could "provide more credibility to the process and would create a centre of expertise on both management and enforcement of criminal assets". They were also in favour of the "significant savings" which could be rendered from "economies of scale" and the "substantial bargaining power of a single organisation" compared to local police forces which "are not equipped to necessarily obtain best value for money in these procurement exercises."

18.70 Consultees had questions about the "scope, remit and authority"[34] of CARB, as well as the "cost".[35] During the consultation, the CPS also stated that they would not want to be directly involved with realising, managing or storing assets. They considered that the liability and expense was too great.

18.71 Spotlight on Corruption, Transparency International and the UK Anti-Corruption Coalition all said:

> We welcome this idea but would urge the Law Commission to go broader in its thinking on this and not limit the Board to criminal assets but include assets confiscated by civil means. We think any Board must be fully transparent and provide detailed break downs on asset recovery.

18.72 Asset Reality noted the "common practice" in other countries to have a "governing board or committee to improve asset management performance and take a national view on important matters". At a consultation webinar, barrister Ben Close commented

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33 European Parliament and of the Council, *Directive 2014/42/EU* (3 April 2014).
34 Serious Fraud Office.
35 Crown Prosecution Service.

that the creation of a central oversight body seemed "sensible" and would benefit from knowledge sharing and encouraging more competitive rates nationwide.[36]

18.73 Lucy Edwards, a solicitor at Blake Morgan LLP, was concerned about the authority of any Board. She considered that "there is a high probability that a Board with no control will largely be ignored".

18.74 It was recognised by participants at a policy roundtable meeting that the establishment of CARB would not be a "panacea", although guidance and sharing best practice might be helpful.[37] The proposal was also discussed at the asset management roundtable meeting, during which attendees did not express a definitive view and repeated concerns about whether CARB would be effective and make any positive impact.[38]

18.75 Among those who responded negatively, consultees expressed concerns about the efficacy and cost of creating a Board.

18.76 Several consultees, including R3, highlighted previous iterations of national asset management organisations, including the Asset Recovery Agency and its subsequent "rebranding". One personal response from a member of Devon and Cornwall Police was concerned about "simply reinventing the wheel and creating another useless quango".

18.77 Andrew Campbell-Tiech KC said:

> The fate of the predecessor agencies is instructive. All set themselves unrealistic targets reflecting a lack of understanding of the reality of confiscation. Inevitably, the inflated confiscation orders that were obtained ended up unpaid, leading to a massive shortfall between aspiration and reality. The designation of a new body as having "oversight" will not save it from the same political and media pressure to "get results".
>
> The confiscatory landscape requires root and branch reform of its underpinning legal framework. The superimposition of yet another bureaucratic structure upon these crumbling foundations would not only be a mistake, but one destined to fail.

Membership of CARB

18.78 The Criminal Law Solicitors' Association expressed concern about what they perceived as the exclusion of defence practitioners from the membership of a proposed Board:

> As we are generally the ones who have to deal with the approach of the authorities overall in respect of how matters are managed it would seem to us sensible that if the proposal is moved forward then there is input from solicitors who regularly deal with such matters.

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36 Webinar 7, Preserving assets co-hosted with St Philips chambers (19 November 2020).
37 Policy roundtable meeting (6 October 2020).
38 Asset management roundtable meeting (10 November 2020).

18.79 This view was also expressed by BCL Solicitors LLP who, although responding positively and calling this a "positive step towards uniformity across the country", called for "a fair balance of stakeholders (including defence lawyers)" on any Board.

18.80 Several consultees expressed concerns about private sector involvement on the board. One personal response from a member of the North East RECU was concerned about the "vested interest" of private sector involvement. Penelope Small, a barrister at 33 Chancery Lane, also cautioned that "care must be taken not to commercialise the process" of confiscation, as this would risk losing public confidence. She commented:

> If the focus is placed on asset recovery with private sector input the result must be that only assets that are profitable to be recovered will be recovered. The profitability of criminal confiscation recovery should not be treated like, for example, trustee in bankruptcy actions.

Alternative suggestions

18.81 Several consultees did not think the proposal went far enough and advocated in favour of a national asset management office which would have responsibility for managing seized assets.

18.82 In particular, an individual from the NPCC argued that the functions of a national agency already take place in isolation across the country, through a combination of Regional Asset Recovery Teams (RARTs), Regional Economic Crime Units (RECUs) and Asset Confiscation Enforcement teams (ACE teams). He would "go the whole way and have an operational dedicated national agency". He asked:

> If there was a collective will, how difficult would it really be to corral the existing law enforcement agencies' capability into some kind of national agency?

18.83 He also considered that a "national independent agency" could be "self-funding" and take away some of the emphasis on "accountability for performance".

18.84 Some consultees provided examples which a national agency could draw from. Helena Wood, on behalf of the Royal United Services Institute, said:

> Consideration should be given to the establishment of an Asset Management Office, learning from the example of the NCA's civil asset confiscation asset management team and drawing on the 'BOOM' example in the Netherlands, in order to avoid unnecessarily high receivership costs.

18.85 Asset Reality also commented that "the UK suffers substantially by its lack of a dedicated Asset Management Office" and pointed to the 2014 EU Directive,[39] which prompted many European countries to establish one.

18.86 A solicitor at Blake Morgan LLP also considered that a national bureau "would have a better chance of making a genuine improvement to the proceeds of crime regime":

[39] European Parliament and of the Council, *Directive 2014/42/EU* (3 April 2014).

> If a bureau had the responsibility for managing assets pre-conviction and recovering assets once a confiscation order is made, I think this would have more impact than an intangible board which meets occasionally and suggests ways of doing things which may not be followed. The Law Commission says that it would disrupt the current model of enforcement, but the current model does not work that well. […] A bureau could manage the whole process.

18.87 An alternative suggestion was made by barrister Ben Close during a consultation webinar.[40] He suggested that police and financial investigators could manage assets, assisted by a central specialised body with access to qualified individuals. He considered this would remove some need for management receivers and thereby avoid the question of who should bear that cost.

Territorial application

18.88 The Scottish Government and the Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland called for consideration of the territorial extension of these policies.

Analysis

18.89 Consultees were generally supportive of both the need for a more consistent national approach and the benefits of a central body with oversight. Unsurprisingly, there were outstanding concerns and questions about the cost and likelihood of success for both of these proposals.

18.90 The evidence from stakeholders demonstrates a convincing need for closer consideration to be given to developing a national strategy. This may promote sharing of best practice, result in more efficient processes and encourage economies of scale.

18.91 Regarding the CARB, we invite the Government to consider our proposal, as well as those of consultees who favoured a different format.

18.92 We understand the concerns of some consultees regarding membership of private sector stakeholders on CARB, given that we envisage CARB advising on procurement processes. This may give rise to a conflict of interest. We also recognise the wealth of experience which private sector stakeholders have developed and consider that this should not be missed when building any strategy. Ultimately, we invite the Government to consider the appropriate membership of any body, and how best to engage with stakeholders from all sectors.

Recommendation 95.

18.93 We recommend that the Government consider establishing a Criminal Asset Recovery Board in order to facilitate the development of a national asset management strategy.

[40] Webinar 7, Preserving assets co-hosted with St Philips chambers (19 November 2020).

Chapter 19: Digital Assets

INTRODUCTION

19.1 Cryptocurrencies and cryptoassets are types of digital assets[1] which may be used in place of other traditional currencies to buy and sell goods and services or as investment vehicles.

19.2 In Chapter 28 of the consultation paper, we considered whether specific reforms of the confiscation regime are required in connection with cryptoassets, given that such assets have only emerged since POCA 2002 was enacted.[2]

19.3 In particular, we considered the impact of cryptoassets on the way in which benefit is calculated and on how restraint and seizure are effected. We also considered the implications of the extraterritoriality of the virtual space.

19.4 This chapter did not make any policy proposals, but rather sought views on the following:

(1) Whether consultees considered that prosecutors should be protected from having to compensate acquitted defendants in relation to losses arising when cryptoassets are restrained and converted into sterling and then subsequently lose value as a result and if so, in what circumstances this ought to arise.[3]

(2) Whether consultees have any concerns about the interrelationship between cryptoassets and the confiscation regime.[4]

19.5 Having considered the views of consultees, we have concluded that compensation for losses arising when cryptoassets are restrained and converted into sterling and subsequently lose value as result should be subject to the same test of reasonableness that applies to costs liability more generally. We do not consider that a bespoke provision for cryptoassets is needed.

19.6 We also recommend that any national asset management strategy developed by the Government should cover issues in connection with the storage and conversion of cryptoassets.[5]

19.7 We further note that as at October 2022, several amendments have been proposed to POCA 2002, via the Economic Crime and Transparency Bill 154 2022-23, which seek to amend (primarily) the search and seizure powers in Part 2, POCA 2002. These amendments create special powers for the seizure, storage and realisation of "cryptoassets-related items". These clauses, if enacted, will limit the discretion the

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1 The Law Commission is currently undertaking a project to review the law on Digital Assets, https://www.lawcom.gov.uk/project/digital-assets/.
2 Confiscation of the Proceeds of Crime after Conviction: A Consultation Paper (2020) Law Commission Consultation Paper No 249, p 636.
3 Consultation question 102.
4 Consultation question 103.
5 See Chapter 18 – Effective asset management.

CARB has to develop strategies for the storage and exchange of cryptoassets because they refer to

OVERVIEW OF POLICY

19.8 That:

(1) When determining whether an order for compensation ought to be made in favour of an acquitted defendant in relation to the restraint and exchange of cryptoassets to sterling which subsequently loses value, the court must apply the same test of reasonableness that we recommend apply in relation to costs liability more generally.

(2) Any national asset management strategy developed by the Criminal Asset Recovery Board ("CARB") should cover issues in connection with the storage and exchange of digital assets.

PROSECUTORIAL PROTECTION FROM LIABILITY

The current law

19.9 In the consultation paper[6] we highlighted the volatility of cryptoassets and the difficulties in valuing the currencies: "Cryptocurrencies are characterised by extreme high and persistent volatility that exceeds the volatility of other assets like equities and gold".[7]

19.10 The Bank of England has noted that:

> From 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.[8]

19.11 In addition to general external factors that may affect volatility (including social media influence),[9] the values of cryptocurrencies are vulnerable to manipulation due to the unregulated nature of the trades which can take place. Importantly, the permissioned nature of the system has no direct influence on this. Rates of trade can be falsified to give the appearance of frequency and popularity. In this way, permissionless cryptoasset markets differ significantly from other markets, such as the stock exchange, which are heavily regulated.

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6 CP 249, p 636.

7 *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/.

8 *Ruscoe and Moore v Cytopia Limited* [2020] NZHC 728, at [102]-[124].

9 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.

19.12 During our pre-consultation discussions, some prosecutors noted that the valuation of a cryptoasset at the start of a lengthy confiscation hearing may be different from its valuation at the end of the confiscation hearing.

19.13 In Chapter 26 of the consultation paper,[10] we considered the court's power to restrain a person from dealing with their 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".

19.14 Cryptoassets present four 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;

(3) the ability of holders of cryptoassets to use pseudonyms makes it very difficult to determine their true identities; and

(4) the lack of regulation of cryptocurrency markets including the absence of a requirement to present proof of identity when engaging in trading.

19.15 In 2016, the Crown Prosecution Service ("CPS") provided written evidence[11] in response to the Home Affairs Committee Report on the Proceeds of Crime.[12] In this evidence the CPS warned that "the use of virtual currencies is increasingly a feature of serious and organised crime". 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."

19.16 POCA 2002 already contains a number of provisions that could be used to this end, including:

(1) section 41(7) which enables a court to make ancillary orders in conjunction with a restraint order in order to ensure the restraint order is effective; and

(2) sections 47A to 47S which confer powers in relation to the search and seizure of property in confiscation matters, post-conviction.

The consultation paper

19.17 In the consultation paper[13] we described pre-consultation discussions in which the issue was raised as to whether, in circumstances where there has been a successful application for exchange of a cryptoasset into sterling and its payment into an interest-bearing account, the prosecution ought to be indemnified in relation to any claim

10 CP 249, p 561.

11 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.

12 House of Commons, Home Affairs Committee, Report on the Proceeds of Crime, Fifth Report of Session (2016-17) HC 25.

13 CP 249, p 644.

against it for compensation in the event of an acquittal where the 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.

19.18 In Chapter 26 of the consultation paper,[14] we also discussed 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. In that chapter[15] we proposed a costs regime for restraint orders based around reasonableness of prosecution action, and we considered that any decision about compensation arising from the exchange of cryptoassets ought to be subject to a test of reasonableness in the same way.

Consultation responses

19.19 Consultees generally considered 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,[16] but only if it is reasonable to do so in all of the circumstances.

19.20 Although some consultees saw cryptoassets as being in a special category which requires prosecutors to have a particular indemnification,[17] others considered that all assets which fluctuate in value should be treated in the same way.[18]

19.21 The Serious Fraud Office ("SFO") noted that cryptoassets are not the only type of assets which are susceptible to fluctuations in value. They argued that if there is a mechanism which ensures that an application must be made to the court before such assets are realised and converted this would provide a sufficient safeguard and compensation should be precluded.

19.22 Irrespective of the view taken about whether cryptoassets were unique, there was a large degree of support for determining whether the prosecution authority's decision to require exchange of the cryptocurrency was reasonable when assessing the extent of the prosecution authority's liability for losses.[19] This essentially reflects the position of consultees who considered that exchange should not be the default position[20] or that blanket immunity was inappropriate[21] – ultimately the question is one of whether the prosecution authority's actions were reasonable.

Analysis

19.23 As noted by consultees, although the value of cryptoassets is volatile, cryptoassets are not the only volatile assets. Therefore, they should not be singled out for special

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14 CP 249, p 561.
15 CP 249, p 561.
16 Consultation question 102 (40 responses: 28 (Y), 5 (N), 7 (O); 22 did not answer); summary consultation question 32 (29 responses: 20 (Y), 4 (N), 5 (O); 8 did not answer).
17 Environment Agency; HMRC.
18 Kingsley Napley LLP; Serious Fraud Office; Wilsons Auctions.
19 Association of Chief Trading Standards Officers; Bar Council; Environment Agency; Andrew Campbell-Tiech KC. Consultees who considered that losses should be compensated irrespective of reasonableness included BCL Solicitors LLP; Matrix Legal & Forensic Services Ltd; and the Criminal Law Solicitors' Association.
20 Financial Crime Practice Group at Three Raymond Buildings; Kingsley Napley LLP.
21 Garden Court Chambers.

treatment. As to general protections for prosecutors, in developing the policy as to when costs may be awarded in restraint proceedings, it was determined that cost orders ought to be limited to each discrete application to ensure that the prosecution is not hesitant to bring restraint applications early in the proceedings for fear of an adverse costs order later. We have ultimately determined that the court ought to apply a specific framework when considering whether to award costs.[22]

19.24 We consider that this framework, which is of general applicability to restraint, would also be apt to deal with compensation and any potential risk aversion by prosecutors in connection with cryptoassets. It would also meet such concerns in relation to other digital assets which are similarly volatile. Blanket immunity from liability for compensation would not be granted and prosecution authorities would have to, quite properly, consider carefully whether exchange is appropriate in all of the circumstances of the case. Therefore, we do not recommend that a specific indemnification be introduced in relation to cryptoassets or other digital assets.

Recommendation 96.

19.25 We recommend that when determining whether an order for compensation ought to be made in favour of an acquitted defendant in relation to the restraint and exchange of cryptoassets to sterling which subsequently lose value, the court must apply the same test of reasonableness as to prosecution liability for costs as would apply to all other assets subject to early restraint.

ANY OTHER PERCEIVED PROBLEMS WITH CRYPTOASSETS AND PART 2 OF POCA 2002

The consultation paper

19.26 In the consultation paper, we considered other ways in which cryptoassets interact with Part 2 of POCA 2002. We considered extraterritoriality and the issues encountered by law enforcement agencies when seeking to seize cryptoassets held on overseas servers.[23] This is also an issue being considered by the Law Commission in its project *Digital Assets: which law? which court?*[24]

19.27 This discussion raised broader policy issues about the seizure of overseas assets which are outside the scope of a review of Part 2 of POCA 2002. Consequently, we did not make proposals on this area of policy.

19.28 We also considered the issue of cryptoassets as hidden assets given their ability to be easily anonymised and concealed.[25] Cryptoassets can be transferred multiple times through online wallets which render them difficult to track. It is exceptionally difficult to trace cryptoassets, particularly if they are stored in private wallets on permissionless

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22 See Chapter 17 – Restraint.

23 CP 249, pp 648 to 650.

24 Law Commission of England and Wales, https://www.lawcom.gov.uk/project/digital-assets-which-law-which-court/.

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.

19.29 We noted that while tracing cryptoassets poses significant difficulty for investigative bodies, developing strategies for this is beyond the scope of this review. (Indeed, the National Crime Agency ("NCA") and SFO have both raised cryptoassets and the criminal law as a potential project for the Law Commission's 14th programme of law reform). We therefore highlighted the use of cryptoassets as a means to conceal assets because it is increasingly done by organised crime networks and was raised as a concern by financial investigators during our pre-consultation discussions. We did not, however, consult on how better to trace cryptoassets. Instead, we relied on our policy position in Chapter 16 of the consultation paper[26] in relation to how the courts should address the prospect of hidden assets (including hidden cryptoassets) generally.

19.30 While we did not make proposals in relation to extraterritoriality or cryptoassets as a form of hidden asset, we invited consultees to raise any further areas of policy in the context of cryptoassets which ought to be considered as part of this review.

Consultation responses

19.31 The consultees who responded in the affirmative to this question (that they do indeed perceive additional problems) identified the following concerns.[27]

19.32 Matrix Legal & Forensic Services Ltd raised a concern with the inability to quantify and value the assets at the time of confiscation and the resultant unrealistic calculation which is then used to assess the defendant's benefit and available amount.

19.33 One individual consultee raised the issue that cryptoassets are still a relatively new concept and as such are unregulated and volatile. This means that consideration must be given to how these assets are included in a confiscation statement. This stakeholder suggested that their value could be ascribed based on the purchase price or their value on the day the order is made.

19.34 Another individual consultee noted that the value of cryptocurrency is so volatile that it ought to be converted to fiat currency (that is, sterling) at the earliest possible opportunity.

19.35 The Association of Chief Trading Standards Officers ("ACTSO") discussed issues regarding restraint. They noted that:

> The jurisdiction as to where assets are held is unclear when dealing with matters at an investigation stage and considering restraint. That also creates issues over repatriation if the defendant is uncooperative or flees.

19.36 The ACTSO also commented that there are potential liability issues which arise from restraint if a confiscation order does not follow. They noted that valuation is difficult and that guidance as to the timing of valuation would greatly assist prosecution

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26 CP 249, pp 369 to 380.

27 Consultation question 103 (37 responses: 17 (Y), 17 (N), 3 (O); 25 did not answer).

agencies. Finally, the ACTSO suggested that the identification and valuation of cryptocurrency could be improved by appropriately worded compliance orders and sanctions.

19.37 His Majesty's Courts and Tribunals Service also observed that the main concern is the valuation of cryptoassets which are to be allocated as payment against the order. Relatedly, the Criminal Law Solicitors' Association noted that the value and ownership of cryptoassets is difficult to establish and this can lead to inflated benefit figures with lower available assets. They commented that the court ought to recognise this volatility.

19.38 The South East Confiscation Panel, East Kent Bench commented that sanctions for not providing keys where cryptoassets are known to exist would be welcomed.

19.39 The Environment Agency commented that training in this area for financial investigators and prosecutors would be welcomed.

19.40 His Majesty's Revenue and Customs ("HMRC") commented that "the treatment of cryptoassets in confiscation cases therefore needs to be considered in relation to the way in which such items are dealt with by HMRC for tax purposes." They also noted that any new legislative proposals may need to consider the number and different types of cryptoassets that exist in order to capture all possible available assets adequately.

19.41 The CPS did not identify any additional concerns and commented that POCA 2002 deals with other intangible and hidden assets and there should be no special provisions for cryptoassets. This view was echoed by the Financial Crime Practice Group at Three Raymond Buildings.

19.42 The Bar Council did not identify any additional concerns beyond those set out in the consultation paper. However, they noted that the fact that cryptoassets are difficult to trace is a matter with which investors will grapple but to which they will invariably develop a solution. They noted that:

> Bitcoin is theoretically traceable using the blockchain technology that records every action taken in relation to that cryptocurrency. It may be that over time the hidden nature of cryptocurrency becomes less of a feature.

19.43 The Financial Conduct Authority ("FCA") noted that the consultation paper covered the issues with cryptocurrencies but commented that there is generally a lack of knowledge and experience in dealing with cryptoassets. The common difficulties identified by the FCA are calculating the benefit figure if it is in cryptocurrencies, at what point it ought to be assessed and converted and who the legal owner is. The FCA noted the difficulties with tracing and attribution of cryptoassets.

19.44 Finally, the FCA noted that:

> It may also be useful to note that they do not fall into the definition of cash (either in physical form or in a bank account), nor are a listed asset under section 303B [of] POCA (nor are they tangible so capable of being included by order of the Secretary of State) so civil powers are limited to civil recovery in the High Court. This may be

disproportionate and also is highly uncertain, as the value of such assets fluctuates considerably over time.

19.45 The NCA and National Economic Crime Centre ("NECC") supported the concerns raised in the consultation paper with regard to cryptoassets as hidden assets and acknowledged that there is a broader issue of policy and practice regarding extraterritoriality (although they noted that they would argue that data held in a location overseas by a UK registered entity should not block the application of confiscation powers). The NCA and NECC also raised the issue of Account Freezing Orders which they suggested should be available as an option to be applied to cryptoassets held in custodian or hosted wallets with UK providers.

Analysis

19.46 The primary concern articulated by several consultees was that cryptoassets are an emerging technology and as a result, law enforcement agencies struggle to grapple with how to adapt their traditional powers and processes to manage them. Several law enforcement agencies suggested that they would benefit from guidance on how most effectively to use these powers in the context of cryptoassets.

19.47 Because digital assets, including cryptoassets, are so difficult to trace, there are challenges with regard to restraining the assets. Following restraint, consultees noted the further challenges with regard to their secure storage and the consequent decision as to if/when it is appropriate to convert the cryptoassets into sterling.

19.48 It was generally agreed that the existing powers in Part 2 of POCA 2002 are broad enough to encompass intangible property such as digital assets and that it is not necessary for specific provisions to be created to manage digital assets, including cryptoassets. However, these powers are exercised differently by different law enforcement agencies with no consistent approach or industry guidance. While *Teresko* provides some indication of what common practice may be,[28] the FCA, for example, commented that they have very little experience of managing cryptoassets and would welcome some indications on how and when to value cryptoassets for the purposes of the benefit figure and confiscation order.

19.49 In Chapter 18, we recommend that the Government consider developing a national asset management strategy including a CARB. To meet the concerns of consultees, we consider that any national management strategy should cover issues in connection with the storage and exchange of digital assets including cryptoassets.

19.50 Notably, if the clauses of the Economic Crime and Transparency Bill 154 2022-23, are enacted, they may limit the discretion the CARB has to develop specific strategies for the storage and exchange of cryptoassets. These clauses refer, for example, to

[28] *R v Teresko* [2018] 10 WLUK 225, [2018] Crim LR 81 in which 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 bitcoin and its vulnerability to attack, even when held in a dedicated police bitcoin wallet.

seized cryptoassets being transferred into a "crypto wallet controlled by the appropriate officer".[29]

19.51 However, we continue to be of the view that digital assets, specifically cryptoassets, are a category of asset which a CARB ought to consider when developing strategies around national asset management.

Recommendation 97.

19.52 We recommend that any national asset management strategy developed by the Criminal Asset Recovery Board should cover issues in connection with the storage and exchange of digital assets including cryptoassets.

[29] Economic Crime and Transparency Bill 154 2022-23, Sch 6, Part 1.

Part 8: Post-Confiscation Order Issues

Part 8 comprises three chapters:

Multiple Confiscation Orders (Chapter 20)

What Happens When a Confiscation Order is Paid? (Chapter 21)

Appeals (Chapter 22)

In Part 8, we discuss issues arising after a confiscation order is made, covering aspects such as multiple confiscation orders, the interaction between a confiscation order and a compensation order, as well as the routes to appeal confiscation orders and other orders made in confiscation proceedings.

Chapter 20 makes recommendations regarding multiple confiscation orders (a situation arising when a defendant is subject to more than one order).

Chapter 21 discusses the Asset Recovery Incetivisation Scheme (ARIS) and where the funds collected from confiscation orders go. In this chapter we also discuss the interaction between confiscation and compensation and make recommendations on how to best prioritise compensation where it arises in the context of confiscation.

In Chapter 22 we consider the appeals structure of Part 2 of POCA and in particular the impact of our recommendations on the existing routes of appeal. We make a series of recommendations which, in some instances, seek to clarify the existing rights and routes of appeal and in other instances, establish new routes of appeal which correspond to new aspects of the confiscation process.

Chapter 20: Multiple confiscation orders

INTRODUCTION

20.1 In Chapter 23 of the consultation paper, we explored how Part 2 of POCA 2002 operates in relation to defendants who become subject to more than one confiscation order.

20.2 We considered ways to simplify this process by creating "consolidated" orders which could arise in two contexts:

(1) consolidation of a new order with an earlier confiscation order; and

(2) consolidation of concurrent confiscation proceedings into a single order.

20.3 We then made a provisional proposal in three parts.

(1) Where there are multiple confiscation orders sought against the same defendant, the court should have the power to consolidate the applications for confiscation.[1]

(2) Where a defendant already has a confiscation order made against them, 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.[2]

(3) Payments from money obtained pursuant to a consolidated confiscation order should reflect the following priority:[3]

(a) compensation of victims (when a compensation order is ordered to be paid from confiscated funds – where there are multiple compensation orders, in chronological order); followed by

(b) each confiscation order in the order in which it was obtained.

1 Consultation question 80(1) and summary consultation question 22(1).
2 Consultation question 80(2).
3 Consultation question 80(3) and summary consultation question 22(2).

OVERVIEW OF POLICY

20.4 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, the court should have the power to amend the benefit calculation and consolidate any amount outstanding under it into the new confiscation order.

(3) Payments obtained pursuant to a consolidated confiscation order should be prioritised in favour of compensatees and subsequently in chronological order.

CURRENT LAW

20.5 Sections 8, 9 and 10 of POCA 2002 govern how a confiscation order is to be determined when a defendant is made subject to more than one order.

20.6 Section 8 deals with the calculation of the defendant's "benefit" (with different considerations depending on whether benefit in the previous order was determined by reference to "general" or "particular" criminal conduct). Section 9 deals with the calculation of the available amount for the second confiscation order, and section 10 deals with the criminal lifestyle assumptions.

20.7 The effect of these provisions where there are multiple confiscation orders based on *particular* criminal conduct is that:

(1) for the calculation of benefit, each order is based on the benefit from the offences with which those proceedings are concerned;[4] and

(2) for the calculation of the available amount, assets are only counted once and priority obligations (including any outstanding amount to be paid under the first confiscation order) are deducted.[5]

20.8 The effect of the provisions where there are multiple confiscation orders based on *general* criminal conduct is that for the calculation of benefit, the "relevant day" from which the assumptions apply in the second confiscation order is the date on which the first confiscation order was made.[6] In the consultation paper we provided examples of how this allows a "running total" of benefit from general criminal conduct to be calculated across sequential orders.[7]

4 Proceeds of Crime Act 2002, s 8.
5 Proceeds of Crime Act 2002, s 9.
6 Proceeds of Crime Act 2002, s 10(9).
7 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, paras 23.18 to 23.21.

CONSULTATION PAPER

20.9 We described two particular problems which stakeholders identified with the multiple orders regime during pre-consultation.

20.10 The first problem is that section 8, while being effective at preventing double counting and building a "cumulative picture" of a defendant's liability, may not account for the realities of obtaining and enforcing multiple confiscation orders against a defendant.[8] In particular, it does not reflect that "different branches of a prosecution authority or different prosecution authorities" may seek confiscation orders against the same defendant and that "confiscation orders may be sought to achieve different ends."[9]

20.11 We noted that "a proper application of section 8 requires strategic thinking on the part of a prosecution authority or multiple prosecution authorities", which "may mean exploring the possibility of a single joint application for a confiscation order."[10] However this may not always happen.

20.12 As described in the case of *Chahal*, the policy underpinning these provisions is to prevent double counting.[11] However, without strategic thinking, their application may not always result in defendants disgorging "anything like the true proceeds of their serious criminality".[12]

20.13 Moreover, in some cases, "confiscation orders may have to be sought strategically to ensure that victims are compensated."[13] This may cause a "race to be the first to confiscation judgment", where an earlier confiscation order will take priority and prevent victims who would receive money under a second confiscation order from being paid compensation.[14] We noted how this "race" may also take place in the context of section 22 applications for upwards reconsideration of the available amount, causing difficulties for the determination of what is "just", leading to challenges against the proportionality of an order, and ultimately requiring the court to decide priority.[15]

20.14 The second main problem identified by stakeholders was the complexity of the provisions. We said:[16]

> Section 8 of POCA 2002 has been described as "a particularly convoluted provision",[17] 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".[18]

8 CP 249, paras 23.22 and 23.23.
9 CP 249, para 23.23.
10 CP 249, para 23.28.
11 *R v Chahal* [2014] EWCA Crim 101, [2014] 2 Cr App R (S) 35 at [28].
12 *R v Chahal* [2014] EWCA Crim 101, [2014] 2 Cr App R (S) 35 at [46].
13 CP 249, para 23.29.
14 CP 249, paras 23.32 to 23.33.
15 CP 249, paras 23.34 to 23.45.
16 CP 249, para 23.46.
17 Rudi Fortson KC, *Misuse of Drugs and Drug Trafficking Offences* (6th ed) p 13-136.
18 *R v Barnett* [2011] EWCA Crim 2936, [2011] 12 WLUK 812 at [65].

20.15 We considered two options for reform: keeping confiscation orders entirely separate; and introducing a power to amend and consolidate confiscation orders. We provisionally concluded that the first option was not appropriate, because although it would result in a clearer division of liability in cases where benefit was calculated from general criminal conduct, it would not prevent a "race to judgment" and not resolve issues of priority.[19]

20.16 We therefore explored whether there could be a "power to amend an earlier confiscation order and to consolidate any amount outstanding under it into the new confiscation order".[20] We anticipated that this would have several advantages because the 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: to reveal 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.[21]

20.17 We noted that reconsideration of benefit is already available under section 21 where there is new evidence that was not available to the prosecutor at the time of the order. Therefore, "an amendment and consolidation provision could be considered an extension of section 21."[22] This would also result in a single available amount, from which the defendant could repay the confiscation order.[23]

20.18 We considered that this would prevent a "race to judgment" with regards to uplift applications, because applications would be combined in one order.[24] In relation to priority of allocation of funds paid in satisfaction of the confiscation order, we envisaged a provision which prioritised payment of compensation to victims first, and in the absence of any victims with a claim in compensation, priority would be chronological.[25]

20.19 We acknowledged that consolidation "is not without its problems", especially where confiscation orders "may have been obtained by different prosecution authorities", resulting in multiple agencies having an interest in and responsibility for enforcement.[26] However, we argued that this "should not be insurmountable": the distribution of ARIS funding is beyond the scope of our paper and can be addressed

19 CP 249, paras 23.49 to 23.51.
20 CP 249, para 23.52.
21 CP 249, para 23.53.
22 CP 249, para 23.55.
23 CP 249, para 24.57.
24 CP 249, para 23.58.
25 CP 249, para 23.59.
26 CP 249, para 23.60.

as part of broader governmental policy considerations;[27] and cooperation between agencies may be facilitated by a more centralised approach to enforcement.[28]

20.20 We therefore made the following provisional proposals.

(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 them, 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.

CONSULTATION RESPONSES

General comments

20.21 There was good support for these proposals, both generally and in relation to each part.

20.22 The Bar Council supported the proposals and noted that:

> The court should have the power to consolidate multiple applications for confiscation orders, and to amend and consolidate earlier orders, and this ought not to be frustrated by potential concerns as to the competing incentives for prosecuting authorities.

20.23 The City of London Police supported this proposal and agreed that it would provide greater clarity for enforcement agencies, the courts and defendants.

20.24 Garden Court Chambers also supported the proposal but added a caveat that double-counting must not occur in the consolidation process. The example they provided was where the defendant has committed two distinct "criminal lifestyle" offences and their income over 6 years is counted. They emphasised that this income must not be counted twice.

20.25 West Yorkshire Trading Standards opposed this proposal on the basis that it overcomplicates matters by conflating sets of facts and monies owed.

20.26 The Association of Business Recovery Professionals (R3) neither supported nor rejected the proposal but noted that care will need to be taken to ensure that the

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27 See Chapter 21 – What happens when a confiscation order is paid?, which discusses the Asset Recovery Incentivisation Scheme ("ARIS").

28 CP 249, para 23.63.

"relevant date" of the criminal offence is reflected correctly so that the reach of tainted gifts is not extended by the consolidation process.[29]

20.27 The Government raised concerns in the context of section 22 applications for reconsideration of the defendant's available amount, where amending earlier confiscation orders may have the consequence that earlier benefit figures are also amended. The Government response also included comments from the National Compliance and Enforcement Service ("NCES") who noted that these proposals may add a layer of practical complexity for enforcement, for example when the default term has already been activated. The NCES raised the issue of potential implications where money has been paid, but the order is later consolidated and there are victims who are awaiting compensation. These concerns were echoed by the Justices' Legal Advisers' and Court Officers' Service.

A power to consolidate multiple applications made the same time

20.28 Consultees were strongly supportive of part (1) of the proposal, for the court to have a power to consolidate confiscation order applications sought at the same time.[30]

20.29 The main reason for supporting this proposal was that it would improve clarity (for defendants and enforcement agencies) about precisely how much a defendant is due to pay in confiscation.[31] Rudi Fortson KC noted that the current relevant provisions are "deceptively complex and often misunderstood." In his view, reform and simplification are warranted.

20.30 BCL Solicitors LLP thought that this proposal would more accurately reflect the purpose of section 8 and "fit within the existing framework of powers to review determinations and allow the court to take account of new information in that consolidation."

20.31 Consultees who supported the proposal nonetheless raised two concerns. First, that provision must be properly made for the compensation of victims.[32] Second, that practical issues may arise in requiring prosecution and enforcement agencies to cooperate.[33]

20.32 One consultee who did not support the proposal commented that "separate orders for separate criminality is needed." The Eastern Region Special Operations Unit, Regional Economic Crime Unit opposed this proposal on the basis that it may be unjust to consolidate an historic order with a new one due to the need to account for inflation and the changing value of money. This concern was echoed by the North East ACE and Confiscation Teams.

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29 The argument appears to be that section 77(9) of the Proceeds of Crime Act 2002 defines the relevant date for the purposes of determining whether a transfer of property by the defendant to a third party is a tainted gift. This concern is that if two orders are consolidated, the criminal activity covered by the earlier order may be incorrectly deemed to be the relevant date for determining whether property associated with the second later order is a tainted gift.

30 Consultation question 80(1) (46 responses: 41 (Y), 1 (N), 4 (O); 16 did not answer) and summary consultation question 22(1) (34 responses: 29 (Y), 2 (N), 3 (O); 3 did not answer).

31 Kingsley Napley LLP; personal response.

32 Association of Chief Trading Standards Officers.

33 Fraud Lawyers' Association; Financial Conduct Authority; Environment Agency.

20.33 Individual consultees made general comments about practical measures which may assist this proposal, such as for consolidated orders to be set out clearly in section 16 statements and form 5050 (which records a confiscation order).

20.34 Another individual questioned how this proposal would interact with agreed orders, where the calculation of benefit may be "vague".

A power to consolidate previous orders into new orders

20.35 Consultees were strongly supportive of part (2) of the proposal, for the court to have a power to consolidate earlier confiscation orders into any new confiscation order.[34]

20.36 However, they asked various practical questions about how the consolidation of orders would operate with regards to the time to pay period, default term and payment of interest. In particular, the South East Confiscation Panel, East Kent Bench queried how a sentence in default would be calculated where there are two separate orders with different default sentences which would otherwise be served consecutively. If two orders are consolidated, this might push the figure into a higher default sentence category, but this might be a shorter default sentence than the two consecutive orders would have amounted to.

Priority of allocation

20.37 Consultees were strongly supportive of part (3) of the proposal, for the priority of allocation of funds paid in satisfaction of a consolidated order to go, first, to victims entitled to compensation, and second, chronologically according to the date of the order.[35] In particular, they supported the priority given to compensation of victims, but noted that a mechanism would be required to allocate ARIS funding where multiple agencies were involved.

20.38 The South East Confiscation Panel, East Kent Bench noted that there ought to be ranking provisions so that the victims are compensated in chronological order in relation to the timing of the orders.

20.39 The City of London Police commented that where there was a dispute between prosecution agencies over the allocation of ARIS funding, the default position ought to be equal distribution unless evidence to the contrary is provided to the Criminal Asset Recovery Board ("CARB")[36] who would then adjudicate the claim. We note that adjudication of ARIS claims is not a function we envisaged for CARB.

20.40 Financial Crime Practice Group, Three Raymond Buildings supported the proposal contingent on the addition of a provision which states that "where the defendant has no further assets, prosecution costs are to be paid from the money obtained pursuant to the order, following compensation in the order of priority."

20.41 One individual was concerned that consolidating old orders would risk relitigating matters which had been settled.

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34 Consultation question 80(2) (45 responses: 38 (Y), 2 (N), 5 (O); 17 did not answer).

35 Consultation question 80(3) (45 responses: 37 (Y), 1 (N), 7 (O); 17 did not answer) and summary consultation question 22(2) (34 responses: 32 (Y), 2 (O); 3 did not answer).

36 See Chapter 18 – Effective Asset Management for a full discussion of CARB.

20.42 Another individual suggested that a practical measure which may assist would be if financial investigators contacted the other relevant prosecution agency when they become aware of an existing confiscation order.

ANALYSIS

20.43 Consultees gave strong support for this proposal, in particular because it may improve clarity about how much a defendant has to pay under a confiscation order. Enforcing against a single amount may also be easier.

20.44 In considering how the consolidation can best be effected, our approach to multiple confiscation orders aims to balance several policy objectives:

(1) The aim of preventing double counting which drives section 8 of POCA 2002.

(2) The principles of finality and proportionality. To this end, it would be wrong to permit a court of comparable jurisdiction (ie another Crown Court) to act in an appellate capacity and overturn an earlier order even if it is wrong. This is the function of the Court of Appeal.

(3) The practical implications of this policy, in particular in relation to credit for sums already paid, the default term, interest and provisional discharge.

(4) The aim of simplifying the process by which multiple orders are consolidated.

Practical issues that arise

20.45 There are several relevant practical issues which may arise:

(1) calculation of a single consolidated default term and credit for any time served and sums paid;

(2) prioritisation of payments received under a consolidated order;

(3) record keeping;

(4) effect of consolidation on contingent enforcement orders; and

(5) appeals.

20.46 We discuss each of these issues below, and we consider that each issue can be dealt with in a way which does not undermine the drive to simplify multiple order cases.

Default term and credit for time served and sums paid.

20.47 If a default term has not been served under an earlier order, the process ought to be simple: the court will fix an appropriate default term in the usual way by reference to the amount ordered to be paid under the consolidated order.

20.48 If a default term has been served, a defendant must be given credit for that time. We consider that the approach to be taken should be as follows:

(1) If the original default term has not been served the default term should be fixed by reference to the amount ordered to be paid under the consolidated order in the usual way.

(2) If some or all of the original term in default has been served, the court must fix the default term by reference to the amount ordered to be paid under the consolidated order (that is, the balance under the original order + the amount of the new order) and then deduct any time served in default of payment of the original order. If the amount to be paid under the original order was for £10 million or less, any time served must be doubled. This is because a defendant serves only half of the default term unless the order is for more than £10 million.[37]

20.49 Section 35(2A) of POCA contains the maximum default term by reference to the amount to be paid under an order as follows:

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

20.50 A consultee noted: "If two orders are consolidated, this might push the figure into a higher default sentence category, but this might be a lower default than the two consecutive orders would have amounted to."

20.51 We note the possibility, but a judge consolidating two orders will be mindful of the chronology of the case, will fix a term in default by reference to all the available information applying established principles and after giving credit for sums paid and any time served.

20.52 In order to undertake this exercise, the court will require up to date accounts and information from the Prison Service which the prosecuting authority must ensure are available. This information will also be essential in determining the amount outstanding under the earlier order and must detail sums due by way of interest, compensation and under the original confiscation order itself.

20.53 Accurate record keeping is essential and applies equally to the order itself. We deal with the issue below.

[37] Serious Crime Act 2015, s 10(3), inserting s 258(2B) into the Criminal Justice Act 2003. We note that similar doubling exercise is undertaken when the court imposes a Detention and Training Order. Unlike other determinate sentences, remand time is not credited automatically by the prison authorities therefore the court must take into account any period a defendant spent on remand in fixing the appropriate term which is doubled to ensure that the regime aligns with adult offenders – see *R v Eagles* [2006] EWCA Crim 2368.

Priority of payments

20.54 Our view remains that payments should be prioritised to meet compensation orders and should be paid in chronological order, according to the date of the original orders.

20.55 We recognise that the prioritisation of compensatees by reference to the date the order was imposed could be considered somewhat blunt. The alternative is to permit the judge consolidating two orders to determine priority. This would present a real risk of civil litigation between compensatees being conducted before the Crown Court and would add a layer of complexity. The judge may well have detailed knowledge of the current proceedings having heard the trial and/or imposed sentence. The judge is unlikely to have presided over the earlier proceedings and thus the danger identified by consultees of reopening concluded litigation is very real, as to make a decision a judge would have to consider evidence and/or permit compensatees a right to be heard. Furthermore, compensation in criminal proceedings is a simple, summary procedure. Victims do not have a right of audience and retain the right to pursue civil proceedings. Consolidating orders is designed to simplify the enforcement process and is not intended to provide a forum before the Crown Court for civil litigation.

20.56 If two separate orders imposed at different times fall to be consolidated there will be a bright line as to which compensation order was made first in time.

20.57 The logic of prioritising compensatees in the order in which the confiscation orders were made is evident when one considers the position had the earlier compensation order been paid. Compensatees in the subsequent proceedings could not argue for priority status; they would be paid in the order in which the confiscation orders were made. We therefore recommend that priority is determined by the date the order was made.

Record keeping

20.58 Consultees made helpful suggestions regarding form 5050 (on which the confiscation order is recorded). Where orders are consolidated, we therefore recommend that the consolidated order must:

(1) record the fact that an earlier order has been consolidated (and a copy of the original order must be annexed to the consolidated order which will be stored on the Crown Court Digital Case System ("CCDCS"));

(2) record, if necessary, the "relevant date" for the purpose of the criminal lifestyle assumptions;

(3) record the amount due under the previous order which was consolidated with the account history annexed to the order;

(4) record the total amount due under the consolidated order;

(5) note whether a previous term in default has been served and the amount of credit given; and

(6) if compensation orders have been made, record the date each order was made and the name of the compensatee.

20.59 The form of the order will ensure that all relevant matters are considered as well as assisting the appellate process and prioritisation of payments made under the consolidated order.

Effect of consolidation on contingent enforcement orders[38]

20.60 We envisage that in most cases a contingent enforcement order will be imposed when a confiscation order is made.

20.61 By the time a second confiscation order is made, and the issue of consolidation arises, the original enforcement directions imposed will likely have taken effect or will have proved to be ineffective. We do not recommend that consolidation should rescind any previous enforcement direction given, but the judge directing consolidation will have new and up to date information and will be best placed to make further enforcement directions as they see fit.

Appeals

20.62 We discuss the confiscation appeals structure comprehensively in Chapter 22 of this report.

Types of consolidated order

20.63 As noted above, consolidated orders will arise in two contexts:

(1) consolidation of a new order with an earlier confiscation order; and

(2) consolidation of concurrent confiscation proceedings into a single order.

Consolidation of a new order with an earlier confiscation order

20.64 There will be cases where a subsequent confiscation order is made which is consolidated within an earlier order. These types of case fall into two categories:

(1) where the benefit figure of an earlier order is amended (category 1); and

(2) where the benefit figure of an earlier order is not amended (category 2).

Category 1 cases (consolidation and amendment of the earlier benefit figure)

20.65 In *Chahal*[39] there were two sets of criminal proceedings that culminated in two separate orders being made. No thought was given to the practical implications of dealing with the matters separately, resulting in orders that did not accurately reflect the defendant's benefit from crime. *Chahal* demonstrates that there will be cases where, in subsequent proceedings, it emerges that an earlier order imposed was wrong and does not properly reflect the total benefit obtained.

20.66 It is contrary to the objective of the regime to permit a defendant to retain the benefit of crime. Equally, however, the principle of finality is important as recognised by the fact that the slip rule is exercisable only for a period of 56 days. It is also inappropriate

38 See Chapter 13 – Contingent Orders for full discussion of contingent enforcement orders.
39 *R v Chahal* [2015] EWCA Crim 816, [2015] 5 WLUK 624.

for the Crown Court to sit in an appellate capacity to quash and reconsider an earlier decision of the Crown Court.

20.67 The potential remedy under the current law is for the Crown Court to use its power under section 21 of POCA 2002 to reconsider the benefit determined under an earlier confiscation order. The power can be exercised on application to the Crown Court by the prosecution within six years of the relevant conviction, where there is evidence which was not available to the prosecution at the relevant time. The limitation period of six years appears to be designed to balance the competing interests of finality and depriving the defendant of the proceeds of criminality (the objective of the regime).

20.68 Where new evidence emerges in subsequent proceedings within six years of the conviction, then there is potentially scope for an application to be made under section 21. In *Chahal*, the court noted the potential relevance of section 21 as follows:

> No subsequent court of co-ordinate jurisdiction would be empowered to reopen those orders in order to assess the merits of such orders. In the absence of any appeal to the Court of Appeal (Criminal Division) – and there never has been such an appeal…*or application by the Crown to set aside or to vary under s 21* – and there never has been such an application – those orders are conclusive as to benefit from general criminal conduct as of 4 August 2010.[40]

20.69 The importance of identifying whether a section 21 application is appropriate at an early stage is imperative. With this in mind we recommend that when preparing for the confiscation hearing, the parties are required to turn their minds to the possibility of a section 21 application being made at the same time as substantive confiscation proceedings; and to identify the issue in the prosecutor's confiscation statement (currently pursuant to section 16 of POCA 2002) and during case management.

20.70 This recommendation will not alter the current position but will ensure that appropriate orders are imposed to achieve the objective of the regime providing any such application is made within the limitation period.

Category 2 cases (consolidation without amendment of the earlier benefit figure).

20.71 As the benefit figure is not being revisited in this category of case, no issue will arise as to double counting nor will there be any ambiguity about the "relevant date" for the purpose of the criminal lifestyle assumptions.

Concurrent ongoing criminal proceedings

20.72 If there are concurrent ongoing criminal proceedings, we recommend that any confiscation proceedings be joined to enable a single confiscation order to be imposed. Such consolidation avoids the type of problem that occurred in *Chahal*. This category of case is, in reality, a single confiscation order: there will be no issues regarding credit for payments made or time served in default as a single order will be made on the same date.

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40 *R v Chahal* [2015] EWCA Crim 816, [2015] 5 WLUK 624 at [36] (emphasis added).

CONCLUSION

20.73 We recommend the use of three mechanisms to consolidate confiscation proceedings and existing orders:

(1) case management;

(2) section 21 of POCA 2002; and

(3) a new power to consolidate orders.

20.74 We envisage that our recommendations will operate as follows.

(1) Parties will be required to consider at the earliest opportunity whether (a) there are concurrent confiscation proceedings and (b) there are existing confiscation orders against the defendant.

(2) If there are concurrent proceedings, they should be consolidated.

(3) If there are no concurrent proceedings, parties should be asked whether there are any existing outstanding confiscation orders from the last six years.

(a) If there is an existing confiscation order from the last six years, the parties must consider whether benefit was appropriately calculated in that order.

(i) If benefit was appropriately calculated, the two orders should be consolidated without reconsidering benefit.

(ii) If benefit was not correctly calculated, and there is new evidence which demonstrates this, the prosecution should use section 21 to seek to correct the benefit figure and then consolidate the orders.

(4) If there is no existing outstanding confiscation order from within six years, but there is an existing outstanding confiscation order from more than six years ago, the two orders should be consolidated without reconsidering benefit.

Recommendation 98.

20.75 We recommend 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, the court should have the power to:

(a) amend the benefit calculation for the earlier confiscation order within six years of the date of conviction (pursuant to what is currently section 21 of POCA 2002); and

(b) consolidate any amount outstanding under it into the new confiscation order.

(3) Payments obtained pursuant to a consolidated confiscation order should reflect the following priority:

(a) compensation of victims (when a compensation order is ordered to be paid from confiscated funds – where there are multiple compensation orders, in chronological order); followed by

(b) each confiscation order in the order in which it was obtained.

Recommendation 99.

20.76 We recommend that the section 5050 form on which confiscation orders are recorded be amended such that in the event that a consolidated confiscation order is made, the following information is accurately recorded:

(1) the fact that an earlier order has been consolidated (and a copy of the original order must be annexed to the consolidated order which will be stored on the Crown Court Digital Case System ("CCDCS"));

(2) if necessary, the "relevant date" for the purpose of the criminal lifestyle assumptions;

(3) the amount due under the previous order which was consolidated with the account history annexed to the order;

(4) the total amount due under the consolidated order;

(5) whether a previous term in default had been served and the amount of credit given; and

(6) if compensation orders have been made, the date each order was made and the name of the compensatee.

Chapter 21: What happens when a confiscation order is paid?

INTRODUCTION

21.1 This chapter discusses what happens when a defendant pays sums towards their confiscation order. We deal with two issues in particular:

(1) the asset recovery incentivisation scheme ("ARIS"); and

(2) compensation.

21.2 With regard to ARIS, we provide an update on the case law.

21.3 With regard to compensation, in Chapter 12 we recommended reducing a defendant's outstanding benefit to reflect an amount paid to compensatees, either pursuant to compensation orders or through voluntary compensation. This chapter concerns two provisional proposals we made in Chapter 24 of the consultation paper concerning compensation.[1]

(1) We provisionally proposed 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 the confiscation order, irrespective of a defendant's means.[2]

(2) We did not provisionally propose that a central compensation scheme, funded from sums collected pursuant to confiscation orders, be created.[3]

21.4 As will be seen below, we recommend (1) and remain of the view that no recommendation should be made in relation to (2).

OVERVIEW OF POLICY

21.5 When 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 the confiscation order.

THE ASSET RECOVERY INCENTIVISATION SCHEME

21.6 The Asset Recovery Incentivisation Scheme was established in 2006 and provides that operational agencies which investigate, prosecute and enforce confiscation

1 Consultation question 83 (concerning compensation and reconsideration) is dealt with in Chapter 15 – Reconsideration. Compensation is also discussed in Chapter 2 - Objective of the Act.
2 Consultation question 81.
3 Consultation question 82.

orders receive a proportion of funds recovered at the conclusion of proceedings. 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."[4]

21.7 As we stated in the consultation paper, ARIS is outside the scope of our review.[5] However, we described it as important contextual information without which it would be "impossible to consider the confiscation framework" or to understand one factor influencing stakeholders in their operational decisions and their responses to the project.[6]

21.8 In the consultation paper we cited various critiques of ARIS, in particular that it may distort the objectives of confiscation, by focusing on recovery of money to the state, rather than deprivation from the defendant.[7] The most potent concern is that ARIS creates a conflict of interests, with law enforcement agencies responsible for confiscation being incentivised by financial gain for their organisations.[8]

21.9 The courts have commented on ARIS,[9] and have made clear that the decision to prosecute should in no way be influenced by the prospect of financial gain to the prosecuting authority.[10] Two recent cases are also relevant (the first from before publication of the consultation paper, and the second from after).

21.10 In *R (Kombou) v Wood Green Crown Court*, the High Court refused an application for judicial review which was based in part on whether ARIS inappropriately influenced a decision to prosecute.[11] The Court noted that "ARIS is capable of giving rise to a serious conflict of interest on the part of a prosecuting authority, or to the appearance of such a conflict."[12] However, the Court concluded that, provided the prosecuting authority is "scrupulous to ensure that a decision to prosecute is not motivated, and does not appear to be motivated, by the prospect of financial gain" then it is not susceptible to challenge:

> It is not however the case that a decision to prosecute will inevitably be open to successful challenge if it might eventually lead to a confiscation order from which the prosecuting authority will benefit. It will often be necessary, before a decision to prosecute is taken, for someone within the authority to consider the possibility that confiscation proceedings might be brought: it may for example be necessary to consider an application for a restraint order pursuant to section 40(2) of POCA during the investigation, and it may be necessary to consider the allocation of limited resources as between a number of investigations. There is a crucial distinction

4 Home Office, *Asset Recovery Incentivisation Scheme Review* (February 2015).
5 Confiscation of the proceeds of crime after conviction: A consultation paper (2020) Law Commission Consultation Paper No 249, para 4.3.
6 CP 249, para 4.3.
7 CP 249, paras 4.13 to 4.15.
8 CP 249, paras 4.18 to 4.21.
9 *R v Innospec* [2010] 3 WLUK 784, [2010] Crim LR 665.
10 *Wokingham Borough Council v Scott* [2019] EWCA Crim 205, [2020] 4 WLR 2 at [63] – [67]. See also *R v Zinga* [2014] EWCA Crim 52, [2014] 3 All ER 90; *R v The Knightland Foundation* [2018] EWCA Crim 1860, [2018] 7 WLUK 905; discussed in CP 249, paras 4.24 to 4.30.
11 *R (Kombou) v Wood Green Crown Court* [2020] EWHC 1529 (Admin), [2020] 2 Cr App R 28; albeit that the substance of the judicial review was to challenge a Crown Court judge's decision to refuse to vacate the defendant's guilty plea.
12 *R (Kombou) v Wood Green Crown Court* [2020] EWHC 1529 (Admin), [2020] 2 Cr App R 28 at [84].

between investigators legitimately considering the possibility of confiscation proceedings, and the decision-maker being improperly motivated to decide in favour of prosecution by the prospect of financial gain to the authority.[13]

21.11 This extract of *Kombou* was cited by the respondent in one of the Horizon appeals, *Hamilton v Post Office*, to support its claim that it was not financially motivated in its decisions to prosecute.[14] The Court of Appeal accepted the Post Office's arguments, concluding that they were not persuaded that the respondent "had an improper financial motivation for pursuing prosecutions with a view to obtaining confiscation or compensation orders".[15]

21.12 These cases demonstrate that ARIS, and the potential for a conflict of interest which arises from it, remains a real concern. Unless there is reform, it is likely to remain a ground which is used to challenge confiscation, adding to the scope of litigation and the potential for delay. We reiterate that the potential for conflicts of interest is a matter for the Home Office to consider during its review of ARIS.

PRIORITISING COMPENSATION

Current law

21.13 When a victim suffers loss as a result of a crime, the court may make a compensation order.[16] The court has emphasised that compensation orders should only be imposed in simple and straightforward cases; more complex matters should be determined by the civil courts.[17] A compensation order is dependent on the defendant's means and may therefore not always be made, or not represent the full amount of loss.[18]

21.14 POCA 2002 already makes some provision for the interaction between compensation orders and confiscation orders.[19] Section 13 provides for a court making a confiscation order to take account of a compensation order. Where a confiscation order and a compensation order are made against the same person in the same proceedings, and the defendant has insufficient means to satisfy both orders in full, sums recovered under the confiscation order are retained by the state unless the court directs that compensation is to be paid from sums recovered under the confiscation order.[20]

21.15 In the year 2019-2020, £31 million in compensation was paid to victims from confiscation orders in England, Wales and Northern Ireland (of a total £139 million collected against confiscation orders).[21]

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13 *R (Kombou) v Wood Green Crown Court* [2020] EWHC 1529 (Admin), [2020] 2 Cr App R 28 at [85].
14 *Hamilton v Post Office* [2021] EWCA Crim 577, [2021] 4 WLUK 227 at [111].
15 *Hamilton v Post Office* [2021] EWCA Crim 577, [2021] 4 WLUK 227 at [136].
16 Sentencing Code, s 134.
17 See, for example, *R v Sheehan* [2009] EWCA Crim 1260, [2009] 6 WLUK 89.
18 Sentencing Code, s 135.
19 See Chapter 3 – Timetabling, for postponement, confiscation and compensation orders.
20 CP 249, para 24.7; POCA 2002, ss 13(5) and (6).
21 Home Office, *Asset Recovery Statistical Bulletin 2014/15 – 2019/20* (March 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923194/asset-recovery-financial-years-2015-to-2020-hosb2320.pdf, p 9.

Consultation paper

21.16 In the consultation paper, we set out the legal regime governing compensation and confiscation orders.[22] We then described several perceived problems with the current law which we had identified during the pre-consultation period, including:

(1) the lack of victim involvement;[23]

(2) compensation is only ordered in "clear cases";[24]

(3) compensation orders are delayed in every case where confiscation orders are postponed;[25]

(4) imposing compensation and confiscation orders in the same proceedings is complex, and prioritises confiscation orders where there are insufficient funds to satisfy both;[26]

(5) further complexity is added by the interaction with other orders, such as slavery and trafficking orders, reparation orders, restitution orders and forfeiture orders;[27]

(6) there is a disconnect between the principle and practice with regards to prioritising the compensation of victims;[28]

(7) "sentencing traps" lead to delays;[29]

(8) the inability to reopen compensation when a confiscation order is reconsidered;[30] and

(9) funds recovered under a confiscation order are retained by the state unless a direction is made to pay compensation out of funds received under the confiscation order.[31]

21.17 We noted that to reform some of these matters would go beyond making changes to the confiscation regime, and therefore they are beyond the remit of our project. Instead, we focused on how to afford better priority to victims of crime in receiving compensation when both a compensation and confiscation order are made.[32]

21.18 In particular, we provisionally proposed 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.

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22 CP 249, paras 24.5 to 24.14.
23 CP 249, paras 24.23 to 24.30.
24 CP 249, paras 24.31 to 24.33.
25 CP 249, paras 24.34 to 24.38; this is addressed in Chapter 3 – Timetabling, on postponement.
26 CP 249, paras 24.39 to 24.48.
27 CP 249, paras 24.49 to 24.55.
28 CP 249, paras 24.56 to 24.64.
29 CP 249, paras to 24.65 to 24.67; this is addressed in Chapter 3 – Timetabling, on postponement.
30 CP 249, 24.68 to 24.70; this is addressed in Chapter 15 – Reconsideration.
31 CP 249, paras 24.71 to 24.73.
32 CP 249, paras 24.74 to 24.76; other proposals are addressed elsewhere, as indicated above.

Consultation responses

21.19 This proposal received very strong support.[33]

In favour of the proposal

21.20 Consultees supported the proposal as improving the priority for victims. In particular, one individual said it would ameliorate the problems caused by the "rigidity" of section 13 of POCA 2002. The Government supported the proposal as a "sensible proposition".

21.21 The UK Anti-Corruption Coalition supported the proposal but noted that:

> There will be cases where it may be appropriate for a compensation order to be paid separately and not solely from funds recovered under a confiscation order. We believe some flexibility should be allowed for such situations. This would particularly apply where the defendant is of significant means and the harm done by their behaviour may not entirely overlap with the benefit from the crime.

21.22 The Financial Conduct Authority ("FCA") agreed that this proposal does not address the situation where the defendant has the means to pay both a confiscation order and a compensation order. If both orders are made separately, in their view they ought to be collected separately, and there is no issue of double counting.

21.23 Alternatively, the Fraud Lawyers' Association considered that in any case where both a compensation order and a confiscation order are made, any amount paid in compensation must be deducted from the amount payable under the confiscation order to prevent double counting.

21.24 Garden Court Chambers raised queries about the phrase "irrespective of a defendant's means". They said:

> "Irrespective of a defendant's means" refers to the fact that in determining a compensation order a defendant's means are considered while the determination of a confiscation order is based, without significant distinction, on their available assets.
>
> However, if the orders are merged and the money for a compensation order are taken from a confiscation order then the specific determination of means are no longer relevant.
>
> The courts should ensure that the process for determining benefits and available assets under a confiscation order remains a circumscribed and discrete process, and that there is no interference in the assessment by the court's concern to obtain compensation for the victim.

21.25 The Crown Prosecution Service ("CPS") was in favour of the proposal, but noted that not every compensation case is straightforward, and there may be multiple victims vying for compensation.

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[33] Consultation question 81 (48 responses: 44 (Y), 3 (N), 1 (O); 14 did not answer) and summary consultation question 23(1) (32 responses: 30 (Y), 2 (O); 5 did not answer).

Against the proposal

21.26 Consultees in opposition to the proposal considered that it inappropriately ties the compensation and confiscation processes together. One individual said that this fails to take account of civil and ancillary proceedings initiated by the victim. They also considered that confiscation orders should not be increased to accommodate the payment of compensation where compensation could be paid by other mechanisms.

21.27 One respondent from the National Crime Agency and National Economic Crime Centre did not support the proposal on the basis that compensation orders should not be tied to a single confiscation process and that compensation ought to be awarded on the basis of a victim's means and not the means of the defendant.

21.28 The Justices' Legal Advisers' and Courts Officers' Service did not support the proposal, and raised practical issues, including how this proposal would operate in cases of joint and several liability; how compensation through confiscation would be enforced (especially with regards to the default term); what the impact of orders to decrease the available amount under section 23 would be; how multiple victims would be catered for; and whether receivers fees would be paid off first.

Other comments

21.29 We received other consultation responses which commented on compensation more generally.

21.30 Spotlight on Corruption and Transparency International UK submitted the following response with regard to compensation:

> We are disappointed that the consultation does not address current and very serious problems with how the compensation regime in the courts is failing victims. We urge the Law Commission to recommend a full review of this.
>
> In particular, from our experience, we are concerned that case law has developed with regard to compensation which means that it is automatically discounted in complex cases. That means in effect, the greater the harm done (as is potentially the case with complex cases certainly in corruption) the less likelihood there is that compensation will be ordered.
>
> We are also of the view that a clear statutory footing should be given to whistle-blowers to be recognised as victims of a crime, and for them to be eligible for compensation and that this could and should be done within the context of reform of Part 2 of POCA.

21.31 The National Compliance and Enforcement Service raised queries about the scope of this proposal, and whether it relates only to compensation orders, or to all priority orders.

21.32 Barrister Ian Smith made a series of recommendations to us regarding how victims could better participate in the process. This included calling for an extension of the rights of participation to direct victims in every economic crime case where confiscation proceedings are instituted; prioritisation of compensation under every confiscation order; and guarantees that sums confiscated by the state are held

"provisionally" in case victims come forward later and may claim satisfaction through sums paid to the confiscation order.

Analysis

21.33 This recommendation is about changing the priority of payment where confiscation and compensation orders are made at the same time.

21.34 At the moment, priority may only be afforded to compensation under section 13 where the defendant does not have the means to pay both orders. Our proposal was that regardless of whether or not the defendant has the means to pay both orders, compensation must be ordered to be paid out of confiscated funds.[34]

21.35 By prioritising compensation, the payment of compensation in those cases would be made subject to the raft of enforcement mechanisms available for confiscation orders. We note the comments by consultees that this only improves enforcement for those victims whose compensation is directed to be paid out of confiscated funds. We acknowledge that this is the case and make two observations in this regard.

(1) A compensation order may be made prior to the imposition of a confiscation order to expedite payment, but that is subject to the trade-off that enforcement mechanisms might be less robust.

(2) We note the concerns raised, in particular by Spotlight on Corruption, that we have not addressed "how the compensation regime in the courts is failing victims" and calling for "a full review" of this. We heard similar calls for a review of the compensation regime throughout the consultation period, and it has also been raised as a potential project for the Law Commission's 14th programme of law reform by the CPS and Law Society. Such a review is outside of the terms of reference of this project, but we are speaking to the Government about the possibility of including a review of compensation in criminal cases in our 14th programme of law reform.

Recommendation 100.

21.36 We recommend 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 the confiscation order.

A CENTRAL COMPENSATION FUND

Consultation paper

21.37 In the consultation paper, we rejected the idea of establishing a centralised compensation scheme, funded from sums collected pursuant to confiscation orders.

[34] This was expressed in the provisional proposal as "irrespective of the defendant's means", when more accurately it may be "irrespective of the defendant's means to pay *more*" (ie both the confiscation and compensation order.

21.38 We noted that "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 report which led to the enactment of the first confiscation regime."[35] We also described the evolution of the Criminal Injuries Compensation Authority ("CICA") (as it is now known), which compensates victims of violent crime.[36] We noted that "there is no similar scheme for victims of economic crime" but if one existed, it would have to operate like CICA, as a "measure of last resort".[37]

21.39 We considered that a centralised compensation scheme made available to all victims of economic crime would have insufficient revenue from confiscation to meet demand. It would also be costly to administer, taking further funds from victims.[38]

21.40 We therefore concluded that our new regime would ensure victims receive compensation, where ordered in conjunction with confiscation, more quickly and more often than currently, and therefore we did not provisionally propose the establishment of a centralised compensation fund derived from confiscated funds.

Consultation responses

21.41 Consultees mostly agreed that a central compensation scheme derived from confiscated funds should not be established.[39] This was largely for the reasons cited in the consultation paper,[40] including that there would not be enough resources.[41] The Government was not in favour of the central scheme, saying it "would not be feasible" and "it would be very difficult for HMCTS to account for orders [that] had been paid using the scheme". The FCA agreed but called for consideration of whether such a scheme could be useful for civil recovery under Part 5 of POCA 2002.

21.42 Five consultees were in favour of a central compensation scheme. One individual noted that "this would be a good and legitimate use of ill-gotten gains which would help build support for the confiscation regime with the public." Another individual consultee thought that a central scheme would result in quicker compensation for victims.

21.43 The City of London Police supported the establishment of a centralised compensation scheme on the basis that police officers do occasionally prioritise non-victim-based crimes in order to maximise their ARIS returns. A central scheme which removes this incentive was perceived as being beneficial for victims.

21.44 The Private Prosecutors' Association said that the challenges outlined in the consultation paper could be overcome if such a scheme was limited to victims of crime where a conviction had been secured, which is different from the manner in which the Criminal Injuries Compensation Scheme operates. Additionally, in their view, compensating victims is a better use of confiscated funds than using them to fund HM Treasury or Government generally.

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35 CP 249, para 24.97; citing Sir Derek Hodgson, *Profits of Crime and their Recovery* (1984) p 63.
36 CP 249, para 24.98 to 24.99.
37 CP 249, para 24.100.
38 CP 249, paras 24.101 to 24.103.
39 Consultation question 82 (45 responses: 37 (Y), 5 (N), 3 (O); 17 did not answer).
40 Bar Council.
41 Members of the Criminal finance sub group of the Organised Crime Task Force in Northern Ireland.

21.45 Garden Court Chambers stated that:

> Money obtained through a pool of confiscated funds should first and foremost go to the victims as the loss has directly affected them, rather than into a central pool to support “community projects” (often for police forces) and from which the victims may not benefit.

21.46 Spotlight on Corruption and Transparency International UK reiterated their disappointment at the lack of a full review of the compensation scheme.

Analysis

21.47 We remain of the view that a central compensation scheme derived from confiscated funds should not be created. We understand the views from consultees who favoured the creation of such a fund, however our other recommendations will assist in prioritising victims and facilitating the payment of compensation more quickly. We note that the Government considered a central scheme to be unfeasible. As we noted above, we are speaking to the Government about the possibility of including a review of compensation in criminal cases in our 14th programme of law reform.

21.48 Therefore, we do not recommend the creation of a central compensation scheme, funded from sums collected pursuant to confiscation orders.

Chapter 22: Appeals

INTRODUCTION

22.1 In this chapter, we discuss the rights of appeal that should be available to defendants, affected third parties and prosecutors pursuant to our recommended regime. Our consultation paper detailed our broad policy proposals and did not address the intricacies of how the appeals system would operate in practice. Accordingly, consultees did not have the opportunity to respond to the detailed issues considered in this chapter. We have, though, consulted with key stakeholders about the recommendations we make in this chapter, including the Criminal Appeal Office, the Crown Prosecution Service, His Majesty's Courts and Tribunals Service and a number of senior practitioners (defence and prosecution). At some points in the chapter we provide our view on the need for a particular reform without making a formal recommendation, because we have not formally consulted on the potential reform.

22.2 Finally, we note that the Law Commission has now been asked to undertake a review of criminal appeals more generally.[1] The terms of reference of that project include consideration of "[w]hether consolidation of rights to appeal, which are currently spread across a number of statutes, may make the law clearer and more consistent." We make our recommendations here in the light of the current statutory provisions governing confiscation appeals, which are found in both POCA 2002 and the Criminal Appeal Act 1968 ("CAA 1968"). We do so recognising that we may, in future, recommend further wholesale reform of appeals in criminal cases including confiscation appeals.

22.3 In this chapter we:

(1) provide an overview of rights of appeal currently available;

(2) discuss potential lacunas in the current regime and our recommendations for reform; and

(3) detail rights of appeal we recommend ought to be available to defendants, prosecutors and affected third parties.

[1] More information on the Criminal Appeals project can be found here https://www.lawcom.gov.uk/project/criminal-appeals/.

OVERVIEW OF POLICY

22.4 That:

(1) It should be made explicit in POCA 2002 that section 50(1) of CAA 1968 affords a right of appeal against confiscation orders made pursuant to section 6 of POCA 2002 and that these appeals are to be treated as appeals against sentence.

(2) A summary of all relevant routes of appeal and appeal rights should be included in POCA 2002, including cross-references to CAA 1968 where relevant.

(3) POCA 2002 should clearly set out a defendant's right to appeal a determination made in respect of interests in property under section 10A of POCA 2002 (pursuant to section 50(1)(ca) of CAA 1968).

(4) Part 2 of POCA 2002 should set out a clear right of appeal for defendants in connection with compliance orders.

(5) Prosecution and defence rights to appeal in connection with an application for reconsideration pursuant to section 22 should be set out clearly in POCA 2002.

(6) The current provision for appealing against an enforcement receivership order (found in section 65 of POCA 2002) should be extended to appeals against contingent orders for the appointment of a receiver.

(7) Defendants should not be afforded a right to appeal against contingent orders under section 67 of POCA 2002 (which relate to funds held in bank accounts or seized cash) to the CACD.

(8) Defendants should not be afforded a right to appeal against contingent orders under section 67A of POCA 2002 (which relate to property seized by police) to the CACD.

(9) Affected third parties should not be afforded a right to appeal contingent orders under section 67 of POCA 2002 (which relate to funds held in bank accounts or seized cash) to the CACD.

(10) Affected third parties should be afforded a right to appeal orders in relation to seized or produced personal property under section 67A of POCA 2002 if

(a) no determination has been made in respect of interests in property under section 10A of POCA 2002; and

(b) the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.

(11) Appeals by third parties against orders in relation to seized or produced personal property under section 67A should be:

(a) to the Crown Court where the section 67A order is made in the magistrates' court;

(b) to the CACD where a contingent section 67A order is made in the Crown Court.

(12) The prosecution should be permitted to appeal to the CACD against

(a) a refusal to make a contingent section 67A order; and

(b) a section 67A order which includes some but not all assets

in accordance with their general right of appeal against the confiscation order pursuant to section 31 of POCA 2002.

(13) The CACD should have the power to remit the contingent enforcement order to the Crown Court for reconsideration of its terms where an appeal against the order has been successful.

(14) There ought to be a statutory bar on appeals against contingent enforcement orders once those orders have been activated by way of a further order of the Crown Court.

(15) Enforcement steps should be stayed both when an application for leave to appeal either a confiscation or contingent enforcement order is lodged *and* where an application to appeal is refused by the single Judge but renewed in-time to the full CACD.

(16) Where leave to appeal to the CACD is granted out of time, enforcement steps must be stayed.

(17) Where the activation of a contingent enforcement order is challenged in the High Court out of time, enforcement steps must be stayed.

(18) Where an appeal is lodged along with an application for an extension of time, enforcement steps must be stayed pending determination of both matters by the full CACD.

22.5 On the basis of the limited consultation we have undertaken, we also make the following policy suggestions:

(1) For the prosecution to be given a right to appeal against the length of any sentence to be served in default of payment of a confiscation order for confiscation orders of £50,000 or more.

(2) For the defence to be afforded the right to appeal in connection with an application for reconsideration pursuant to section 23 of POCA 2002.

(3) For the Court of Appeal (Criminal Division) ("CACD") to be granted the power to remit a confiscation order to the Crown Court upon any successful prosecution appeal in connection with a confiscation order.

(4) For the CACD to be granted the power to remit a confiscation order to the Crown Court upon any appeal against conviction which is partially successful, and the defendant is to be resentenced.

THE CURRENT LAW

(1) – Appealing against decisions taken during the confiscation hearing

22.6 In discussing the current law, we consider appeal routes at each stage of the confiscation process. We first consider the routes of appeal from decisions taken during the confiscation hearing.

22.7 The table below sets out the appeal routes that arise in connection with the making of a confiscation order.

Stage	Defence appeal	Prosecution appeal	Third-party appeal
(1) If the Crown Court decides not to make a confiscation order		s 31(2) POCA 2002	
(2) If the Crown Court makes a confiscation order	s 50(1)(ca) Criminal Appeal Act (CAA) 1968	s 31(1) POCA 2002	
(3) Making a determination re interests in property	s 31(5)(b) POCA 2002	s 31(5)(a) POCA 2002	s 31(5)(b) POCA 2002
(4) Setting a default term	s 50(1)(ca) CAA 1968*		
(5) Making a compliance order	*Either:* s 50(1)(ca) CAA 1968 *or* s 13B(2)(b) POCA 2002**	s 13B(2)(a) POCA 2002	s 13B (2)(b) POCA 2002

* although the provision refers to appeal of a confiscation order and does not expressly state that the default term may be appealed.

** the position is unclear. See the discussion below.

(1) Appealing against a decision not to make a confiscation order

22.8 The Crown Court may decide not to make a confiscation order. The prosecution may appeal such a determination pursuant to section 31(2) of POCA 2002.

(2) Appealing against a confiscation order

22.9 Both the prosecution and the defence have a right to appeal if a confiscation order is made, although the statutory source of this right to appeal is different:

(1) defence appeals against the making of a confiscation order are treated as an appeal against sentence, pursuant to section 50(1)(ca) of the Criminal Appeal Act 1968 (CAA 1968).

(2) prosecution appeals against the making of a confiscation order are made not pursuant to CAA 1968, but pursuant to section 31(1) of POCA 2002 itself.

(3) Appealing against determinations made in relation to interests in property

22.10 The prosecution may appeal against a determination made in respect of interests in property under section 10A of POCA 2002.[2]

22.11 A third party, defined as "any person who the Court of Appeal thinks is or may be a person holding an interest in the property,"[3] may appeal against such a determination 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.[4]

22.12 A third party's right of appeal against a section 10A determination is not available where:

(1) the Court of Appeal believes that an application is to be made by the prosecutor for the appointment of a receiver;

(2) such an application has been made but has not yet been determined; or

(3) a receiver has been appointed.[5]

22.13 The rationale behind the restriction on appealing a section 10A determination when a receiver is to be appointed or has been appointed is set out in the explanatory notes to the Serious Crime Act 2015, which introduced section 10A into POCA 2002:

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2 Proceeds of Crime Act 2002, s 31(5)(a).
3 Proceeds of Crime Act 2002, s 31(5)(b).
4 Proceeds of Crime Act 2002, ss 31(4) to (5).
5 Proceeds of Crime Act 2002, s 31(8).

(1) "the court appointing a receiver will be able to reconsider interests in relevant property where there would be a serious risk of injustice if the Crown Court's determination under new section 10A were to be adhered to";[6]

(2) an affected third party has a right of appeal to the Court of Appeal where a receiver is appointed.[7]

22.14 It was suggested in *R v Ghulam*[8] that the two statutes which provide routes of appeal from a Crown Court decision in confiscation proceedings (CAA 1968 and POCA 2002) exclude a defendant from appealing against a determination made in respect of interests in property under section 10A of POCA 2002:

(1) section 50(1)(ca) of CAA 1968, which defines the ambit of a defendant's right to appeal against sentence, expressly excludes a determination made in respect of interests in property under section 10A of POCA 2002. Therefore, the general right to appeal against sentence (and with it against a confiscation order) cannot provide a defendant with a right to appeal against a determination of interests in property;

(2) section 31(5) of POCA 2002 (as discussed above) gives a right to appeal against section 10A determinations to the prosecutor and to "any person who the Court of Appeal thinks is or may be a person holding an interest in the property". The Court of Appeal considered that "any person" did not include the defendant.

22.15 The Court of Appeal recognised that its decision implied that there was a "tension" between the two statutory provisions "in a case in which the confiscation order is made solely on the basis that the offender, contrary to the assertions of the offender and of the interested party, did have a particular interest in property".[9] In such circumstances, an appeal against the confiscation order pursuant to section 50(1)(ca) of CAA 1968, which is permitted, would effectively be a challenge to a section 10A determination, which is prohibited. However, the Court declined to address the issue because it did not arise on the facts of the case.

22.16 The Court of Appeal gave further consideration to section 31(5) of POCA 2002 in *R v Ryder*.[10] The Court of Appeal held that "there would be a serious risk of injustice to [the defendant] if the determination was given effect without a right of challenge available to him".[11] Accordingly, it construed the definition of a "person holding an interest in the property" (pursuant to section 31(5) of POCA 2002) widely to include a defendant:

> we see no reason to delimit the wording of s.31(5) of the 2002 Act, which is broad. Further, there can be no obvious reasons of sense which would apply so as to deprive a defendant, where he has an interest in property, of all right of challenge to a s.10A determination. Mr Talbot in this regard also helpfully drew our attention to

6 Serious Crime Act 2015, explanatory note 28.
7 Serious Crime Act 2015, explanatory note 28; POCA 2002, s 65.
8 *R v Ghulam* [2018] EWCA Crim 1691, [2019] 1 WLR 534.
9 *R v Ghulam* above at [87].
10 *R v Ryder* [2020] EWCA Crim 1110.
11 *R v Ryder* above at [44].

the explanatory notes to the Serious Crime Act 2015 (which introduced, by amendment, s.10A into the 2002 Act); those expressly contemplate that a defendant may have a right of appeal against a s.10A determination.[12]

(4) Appealing against the term of imprisonment set for default in payment.

22.17 When making a confiscation order, a term of imprisonment in default of payment must be fixed by the Crown Court:[13]

(1) defendants have a right of appeal to the CACD against the term imposed even prior to it taking effect following non-payment of the order in the time to pay period;[14]

(2) the prosecution does not have a right of appeal if a term of imprisonment in default of payment (which is mandatory) is, in error, not imposed at all or if the term imposed is wrong (for example, unduly lenient in the context of the statutory maximum terms).[15]

22.18 It has been determined that a confiscation order and the default term are separate and distinct orders and thus the term in default falls outside the scope of the prosecution's right of appeal pursuant to section 31, POCA 2002.[16]

22.19 Like section 31 of POCA 2002, section 50 of CAA 1968 (which provides the defence with a route of appeal against the default term) only refers to appeals against the confiscation order and not against the default term. However, providing the defence with a route of appeal against the both the confiscation order and the default term is not entirely anomalous. Section 50 of CAA 1968 is arguably broader than section 31 of POCA 2002, and the reference to confiscation orders appears in a non-exhaustive list of aspects of sentencing that might form part of sentencing for the purposes of an appeal.[17]

(5) Appealing against a compliance order

22.20 The power to make a compliance order allows the Crown Court to make such order as it believes is appropriate for the purpose of ensuring that the confiscation order is effective. This includes a power to prevent travel outside the jurisdiction.[18] Express rights of appeal are available (to the CACD) for an affected party against the

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12 *R v Ryder* above at [46].
13 Proceeds of Crime Act 2002, s 35 (which applies s 129 of the Sentencing Code).
14 For example, see *R v Plummer* [2006] EWCA Crim 948; *R v Howard* [2007] EWCA Crim 1489;
15 Proceeds of Crime Act 2002, s 35 (which applies s 129 of the Sentencing Code); *R v Mills (Graham Alan)* [2018] EWCA Crim 944; [2019] 1 WLR 192.
16 Following *R v Ellis (Gary)* [1996] 2 Cr App R (S) 403, in which the judge did not set a term of imprisonment in default. The defendant argued that the failure to fix a default term – a mandatory requirement – made the confiscation order invalid and any variation of sentence was out of time. The Court of Appeal held that the confiscation order and the default term were separate orders, and thus failure to set the default term did not invalidate the original order. The confiscation order remained lawful and capable of enforcement and was not quashed.
17 CAA 1968, s 50(1)(ca) reads: "In this Act "sentence", in relation to an offence, includes *any order made by a court when dealing with an offender including*, in particular…a confiscation order under Part 2 of the Proceeds of Crime Act 2002" (emphasis added).
18 Proceeds of Crime Act 2002, s 13A.

imposition of a compliance order and to the prosecutor where the Crown Court declines to make such an order.[19]

Appeals have been brought by defendants against compliance orders.[20] However, it is not clear whether these appeals have been brought pursuant to the broad appellate power in connection with sentence (section 50 of CAA 1968), or pursuant to the appeal route open to "anyone affected" by a compliance order (a route that would be analogous to the route that facilitates defence appeals against section 10A determinations, as set out above).

(2) – Appealing against enforcement decisions taken in the Crown Court

22.21 The table below sets out the appeal routes that arise in connection with the enforcement of a confiscation order in the Crown Court.

Application	Defence appeal	Prosecution appeal	Third-party appeal
(1) The appointment and powers of a management receiver	s 65(2)(b) POCA 2002	s 65(2)(a) POCA 2002	s 65(2)(b) POCA 2002
(2) The appointment and powers of an enforcement receiver	s 65(2)(b) POCA 2002	s 65(2)(a) POCA 2002	s 65(2)(b) POCA 2002

22.22 Where a management or enforcement receiver[21] is appointed by the Crown Court, any person affected by the order (i.e. a person with an interest in the asset) has a right of appeal to the CACD.[22] This would appear to encompass the defendant.

22.23 The prosecution (or any other person who applied for the order) may also appeal.[23]

22.24 If a subsequent order is sought for directions as to the exercise of the receiver's powers, the making of or refusal to make such an order may be appealed by the person who applied for the order, by any person affected by the order or by the receiver.[24]

(3) – Challenging enforcement decisions taken in the magistrates' court

22.25 The table below sets out the ways in which decisions in relation to enforcement of a confiscation order in the magistrates' court can be challenged.

Application	Defence	Prosecution	Third-party
(1) activation of the default term	Judicial review		N/A

19 Proceeds of Crime Act 2002, s 13B.
20 *R v Pritchard* [2017] EWCA Crim 1267; *R v Dixon* [2019] EWCA Crim 483.
21 An enforcement receiver is an officer of the court appointed primarily to enforce the confiscation order, that is, to realise the defendant's assets in satisfaction of the confiscation order.
22 Proceeds of Crime Act 2002, s 65(2)(b).
23 Proceeds of Crime Act 2002, s 65(2)(a).
24 Proceeds of Crime Act 2002, s 65(3) and (4).

(2) payment of cash or funds held in a bank account towards a confiscation order (s 67 POCA 2002)	Judicial review		Judicial review
(3) realisation of seized property, to be paid towards a confiscation order (s 67A POCA 2002)	Judicial review	s 67C(4) POCA 2002 – to the Crown Court	s 67C(2) POCA 2002 – to the Crown Court
(4) collection order to enable appointment of fines officer to manage the order	Judicial review		N/A
(5) warrants of control pursuant to s 76, Magistrates' Courts Act 1980	Judicial Review		N/A
(6) attachment of earnings orders and deduction from benefits orders pursuant to Courts Act 2003, s 97 and sch 5, Part 3	Judicial Review		N/A

(1) Activation of the default term

22.26 Enforcement of confiscation orders, including activation of some or all of the default term, is presently undertaken in the magistrates' court.[25] Ordinarily a defendant may, without the need for leave or permission, appeal to the Crown Court against a sentence imposed by the magistrates' court. This right of appeal applies where a defendant has been convicted and sentenced before a magistrates' court.[26] Because default terms are imposed by the Crown Court and can be challenged by way of appeal to the CACD, any challenge to the activation of a default term by a magistrates' court in the event of non-payment is dealt with by the High Court through judicial review.[27]

(2) Payment of cash or funds held into an account towards a confiscation order

22.27 Magistrates' courts (but not the Crown Court) may make orders under section 67 of POCA 2002,[28] which allows cash or funds in a bank account to be paid towards the outstanding balance of a confiscation order.

22.28 An order may be made only if:

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25 Our recommendation on enforcement contained in Chapter 14 of this report will alter this and therefore the routes of appeal will change depending on which court activates the term.

26 Magistrates' Courts Act 1980, s 108.

27 See *R v Harrow Justices ex parte Director of Public Prosecutions* [1991] 1 WLR 395 for an example of such a challenge.

28 This section applies to money that is held by a person or in a bank account, or money held by a person which has been seized or is being detained.

(1) a receiver has not been appointed;[29] and

(2) when the funds are held in a bank account that does not belong to the defendant, the Crown Court has determined the extent of the defendant's interest in that property, pursuant to section 10A of POCA 2002.[30]

22.29 Section 67 of POCA 2002 applies only to "free property" as defined in section 82 of POCA 2002, which broadly provides that property is free unless a listed order (including forfeiture under the Misuse of Drugs Act 1971 or a deprivation order under the Sentencing Code) has been made in respect to it.

22.30 Section 67 also applies to cash that has been seized under relevant seizure powers (including the Police and Criminal Evidence Act 1984).

22.31 There is no right of appeal to the Crown Court where an order is made under section 67, although a challenge to such an order by way of judicial review is available.[31] The absence of a right to appeal extends to third parties where funds taken are from the third party's account. Since a determination in respect of interests in property under section 10A of POCA 2002 must have been made before an order can be made under section 67, an affected third party has a right of appeal against the section 10A determination and thus a further right of appeal is not necessary.

(3) Realisation of seized property towards a confiscation order

22.32 Magistrates' courts (but not the Crown Court) may also make orders under section 67A of POCA 2002, which allows seized or produced personal property to be sold to meet a confiscation order.

22.33 Section 67A applies to property which has been seized or produced under a relevant power.[32] It does not apply to cash seized pursuant to the Police and Criminal Evidence Act 1984, which does not require realisation prior to payment towards the confiscation order. Such cash may instead fall within the ambit of section 67, that allows the cash to be paid directly towards the confiscation order.[33]

22.34 An order under section 67A may only be made:

(1) after the time given to a defendant to pay a confiscation order has expired;[34] and

(2) if a receiver has not been appointed.[35]

22.35 A right of appeal to the Crown Court is provided to persons affected by a section 67A order. The prosecution also has a right of appeal where a magistrates' court declines

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29 Proceeds of Crime Act 2002, s 67(5)(b).
30 Proceeds of Crime Act 2002, s 67 (5B).
31 *R (on the application of Ludlam) v Hinckley Magistrates' Court* [2019] EWHC 1884 (Admin).
32 Proceeds of Crime Act 2002, s 67A(1); Policing and Crime Act 2009, explanatory note 312.
33 Proceeds of Crime Act 2002, s 67(2).
34 A similar requirement applied to s 67 as originally enacted but was removed by s 14 of the Serious Crime Act 2015, which also removed the requirement that a restraint order must be in place in order to confer jurisdiction to make an order.
35 Proceeds of Crime Act 2002, s 67(A)(2).

to make an order. Appeals by a defendant are expressly excluded.[36] However, it is arguable that a right to challenge the determination by way of judicial review still arises.

(4) Collection orders

22.36 Collection orders were introduced by the Courts Act 2003[37] which created the role of a "fines officer" who may take certain enforcement steps without the involvement of a magistrates' court.[38] The Courts Act 2003 provides that, when enforcing a sum due to it, a magistrates' court must make a collection order "unless it appears to the court that it is impractical or inappropriate to make the order".[39] While this is framed as a duty, it functions as a discretion. Once a collection order is in force, the powers of a fines officer comprise the power to do the following:[40]

(1) Vary the terms of an existing attachment of earnings order or make such an order on the application of the defendant.[41]

(2) Make an attachment of earnings order.[42]

(3) Make an application for a deduction from benefits.[43]

(4) Make a request for information about the defendant's finances (their assets, other financial circumstances or both). Refer the case to the magistrates' court.[44]

(5) Issue a warrant of control.[45]

(6) Make a transfer of fine order.[46]

(7) Take enforcement action in the county court or High Court.[47]

(8) Apply to the magistrates' court for a summons to compel the defendant to attend.[48]

(9) Apply to the magistrates' court to:

(a) Register the confiscation order as a debt on the Register of Judgments, Orders and Fines.

(b) Make a clamping order.

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36 Proceeds of Crime Act 2002, s 67C.
37 Courts Act 2003, s 97, sch 5, para 12.
38 Courts Act 2003, sch 5, para 13(2).
39 Courts Act 2003, s 97, sch 5, para 12
40 Courts Act 2003, sch 4, para 38.
41 Courts Act 2003, sch 5, para 22.
42 Courts Act 2003, sch 5, paras 26, 38.
43 Courts Act 2003, sch 5, paras 26, 38.
44 Courts Act 2003, sch 5, paras 37, 42.
45 Courts Act 2003, sch 5, para 38.
46 Magistrates' Courts Act 1980, ss 89, 90.
47 Magistrates' Courts Act 1980, ss 87(1A) and (3A).
48 Courts Act 2003, sch 5, para 42. Fines Collection Regulations 2006 (SI 2006 No 51), reg 4.

22.37 A magistrates' court may vary or rescind a sentence or other order imposed or made by it, if it appears to the court to be in the interests of justice to do so.[49] Defendants can ask the court to do so if, for example, the court did not give reasons for its decision or if they believe the court did not apply the law correctly.[50] This process requires the defendant to write to the magistrates' court where the decision was made, providing details as to why the decision reached was incorrect. The magistrates' court must then determine whether further action is needed.[51]

22.38 Other than through this process, there are no general routes of appeal which enable the challenge of a magistrates' court order if it does not fall neatly into either sentence or conviction for which there is a right of appeal to the Crown Court. Instead, certain types of magistrates' court orders have a bespoke statutory right of appeal (see the discussion of section 67A orders above).

22.39 There is no such bespoke statutory right of appeal against collection orders. Instead, parties are able to exercise their common law right to make an application for judicial review of the imposition of a collection order (and any relevant consequential orders).

(5) Warrants of control

22.40 Warrants of control pursuant to section 76 of the Magistrates' Courts Act 1980 permit 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.[52] They are one of a suite of enforcement powers magistrates' courts are able to exercise in relation to fines (and confiscation orders). Like collection orders, their imposition can be reviewed by the magistrates' court itself upon request by the defendant. Otherwise, they can be challenged by way of judicial review.

(6) Attachment of earnings and deduction of benefits orders

22.41 Attachment of earnings orders and deduction from benefits orders are made 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.[53] These types of orders are also part of the suite of enforcement powers available to the magistrates' court in relation to fines (and confiscation orders). Like collection orders and warrants of control, their imposition can be reviewed by the magistrates' court itself upon request by the defendant. Otherwise, they can be challenged by way of judicial review.

(4) – Appealing against decisions in connection with reconsideration of the confiscation order

22.42 The table below sets out the appeal routes that arise in connection with the reconsideration of a confiscation order.

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49 Magistrates' Courts Act 1980, s 142.

50 GOV.UK, *Appeal a Magistrates' Court Decision,* https://www.gov.uk/appeal-magistrates-court-decision/ask-the-court-to-reconsider-a-decision.

51 GOV.UK, *Appeal a Magistrates' Court Decision,* https://www.gov.uk/appeal-magistrates-court-decision/ask-the-court-to-reconsider-a-decision.

52 Tribunals, Courts and Enforcement Act 2007, Part 3.

53 Courts Act 2003, s 97 and sch 5, Part 3.

Issue	Defence appeal	Prosecution appeal
(1) No confiscation hearing held: reconsideration of case (s 19 POCA 2002)	Excluded by s 50(1)(cb) CAA 1968	Excluded by s 31(3) POCA 2002
(2) Confiscation hearing held but no order made: reconsideration of benefit (s 20 POCA 2002)	Excluded by s 50(1)(cb) CAA 1968	Excluded by s 31(3) POCA 2002
(3) Confiscation order made: reconsideration of benefit (s 21 POCA 2002)	s 50(1)(cb) CAA 1968	s 31(1) and (3) POCA 2002
(4) Confiscation order made: upwards reconsideration of available amount (s 22 POCA 2002)	s 50(1)(cb) CAA 1968	s 31(1) and (3) POCA 2002
(5) Confiscation order made: downwards reconsideration of available amount (s 23 POCA 2002)	Excluded by s 50(1)(cb) CAA 1968	s 31(1) and (3) POCA 2002

(1) Appeals following applications under sections 19 and 20 POCA 2002

22.43 The prosecution has no right to appeal against a decision of the court pursuant to an application for reconsideration where no confiscation order was made.[54] The policy rationale is explained in the Explanatory Notes to the Act which state:

> These sections…grant the Crown Court a wide degree of discretion and it would be possible to give the prosecutor and the Director [of Public Prosecutions] an appeal on the merits in such a case. The target of their appeal rights in this Act, however, is not the court's exercise of a discretion but its application of the mandatory confiscation procedures.[55]

22.44 Equally, the defence has no right to appeal under these provisions. However, the defence is unlikely to wish to appeal a decision in its favour (i.e. not to make a confiscation order).

(2) Appeals following applications under sections 21 to 22 POCA 2002

22.45 Sections 19 and 20 govern applications which seek to have the making of a confiscation order reconsidered. Sections 21 and 22 of POCA 2002 are different, in that their essence is that they concern applications to reconsider (that is, to vary) an existing confiscation order.[56]

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54 Proceeds of Crime Act 2002, ss 19 and 20.
55 Proceeds of Crime Act 2002, Explanatory note 69.
56 These sections of the Proceeds of Crime Act 2002 are discussed in depth in Chapter 15 – Reconsideration.

22.46 Applications to vary a confiscation order under sections 21 and 22 of POCA 2002 are made subject to a defence right to appeal, pursuant to the express wording of section 50(1)(cb) of CAA 1968.

22.47 It is arguable that there should be no prosecution right of appeal against a decision on reconsideration pursuant to sections 21 or 22 of POCA 2002. Prosecution rights of appeal are governed by section 31 of POCA 2002, which provides that:

(1) if the Crown Court makes a confiscation order, the prosecution may appeal the order to the Court of Appeal;

(2) if the Crown Court decides not to make a confiscation order, the prosecution may appeal to the Court of Appeal against the decision;

(3) subsections (1) and (2) do not apply to an order or decision made by virtue of sections 10A, 19, 20, 27 or 28.[57]

22.48 Section 31(1) is clear in so far as it provides a prosecution right of appeal when a confiscation order is "made". Arguably, there is a distinction between appealing the "making" of a confiscation order, pursuant to section 31(1), and "varying" the confiscation order. This distinction is clear from CAA 1968, which sets out separate gateways for appealing the making of a confiscation order (section 50(1)(ca)) and the variation of a confiscation order (section 50(1)(cb)). The subsections referred to in section 31(3) all relate to the "making" of the confiscation order and at no point does section 31 deal with the statutory provisions which, in the strictest sense, regulate a "variation" to an existing confiscation order (sections 21 to 22 POCA 2002).

22.49 Furthermore, sections 21 and 22 both involve the exercise of discretion (with the court having the power to substitute the original order with such an amount as it considers "just"). As set out above, section 31 is not intended to provide an avenue through which appeals can be brought in connection with the exercise of discretion. Accordingly, it is arguable that sections 21 and 22 are excluded from any prosecution right of appeal.

22.50 However, it is conversely also arguable that sections 21 and 22 do confer a prosecution right of appeal:

(1) section 31(3) specifies that sections 19 and 20 reconsideration decisions are excluded from appeals. Sections 21 and 22 also fall under the broad umbrella of reconsideration decisions.[58] It is arguable that because sections 21 and 22 are not expressly *excluded* by section 31(3), the current regime does confer jurisdiction;[59]

(2) We note that *R v Mundy (Ian James)*[60] concerned a prosecution appeal against a decision of the Crown Court to refuse a reconsideration application under

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57 Sections 27 and 28 of the Proceeds of Crime Act 2002 relate to the making of confiscation orders in respect of absconders.

58 Although they are concerned with a variation of a confiscation order, rather than the making of a confiscation order.

59 This is reinforced by the old maxim which invites the court to consider what is expressly included when determining what is excluded from the ambit of a provision or clause ("expressio unius est exclusio alterius").

60 *R v Mundy (Ian James)* [2018] EWCA 108; [2018] 4 WLR 130.

section 22. No issue was raised as to the court's jurisdiction to hear the appeal and leave to appeal was granted. It does not appear that an issue has ever arisen as to whether section 31(1) applies to section 22.

(3) Appeals following applications under section 23 POCA 2002

22.51 The defence has no right to appeal a decision of the court in respect of an application to vary downwards the available amount, pursuant to section 23 POCA 2002.[61] In *R v Ward* the Court of Appeal sought to "hazard a guess"[62] as to why:

> Some orders of criminal courts, such as a typical sentence of imprisonment, can be the subject of one appeal to this court and then the defendant has reached the end of the road subject to invoking the mechanism provided by the establishment of the Criminal Cases Review Commission.
>
> With a confiscation order, which has been…the subject of an unsuccessful appeal to this court, the defendant has not quite reached the end of the road, because if the provisions of section 23 are satisfied he has the opportunity of applying to the Crown Court for a variation of the order in his favour there. We see no reason why Parliament should not come to the conclusion that the concession to defendants should only extend as far as the opportunity to make an application to the Crown Court (preferably no doubt listed before the judge who made the original order) but should not be the subject, in the event the defendant is dissatisfied with the result, of an appeal to this court.[63]

(4) Remission to the Crown Court

22.52 The CACD recently noted[64] that, when a prosecution appeal is determined pursuant to section 31(1) (an order is made in the Crown Court and is appealed to the CACD), it has no power to remit the matter to the Crown Court for a new determination to be made. The CACD does, however, have power to remit the matter when the Crown Court did not make an order at all.[65]

ISSUES FOR CONSIDERATION

22.53 The following issues arise for consideration:

(1) problems with the existing law;

(2) reform of the law – rights of appeal in connection with "contingent enforcement orders";

(3) reform of the law – rights of appeal in connection with "provisional discharge".

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61 CAA 1968, s 50(1)(cb).
62 *R v Ward* [2010] EWCA Crim 1932 at [13].
63 *R v Ward* above at [13] to [14].
64 *Barnet LBC v Kamyab* [2021] EWCA Crim 543; [2021] 4 WLUK 63 at [60].
65 Proceeds of Crime Act 2002, s 32(2).

PROBLEMS WITH THE EXISTING LAW

Appeals in connection with the confiscation order itself

22.54 As set out above, both the prosecution and the defence have a right to appeal if a confiscation order is made, although the statutory source of the right to appeal is different:

(1) defence appeals against the making of a confiscation order are treated as appeals against sentence, pursuant to section 50(1)(ca) of CAA 1968. The CACD exercises a wide discretion when determining whether to grant leave to appeal. Section 11(3) of the CAA provides some direction as to when an appeal against sentence is appropriate: "On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently…"

(2) prosecution appeals against the making of a confiscation order are made pursuant to section 31(1) of POCA 2002.

22.55 POCA 2002 does not include an express provision for defence appeals against a confiscation order. The CACD has instead relied upon the sentence appeals structure afforded by section 50(1)(ca) of CAA 1968 to determine defence appeals against confiscation orders.

22.56 The omission of a provision for defence appeals against confiscation orders in POCA 2002 itself creates a convoluted process for practitioners who are left to locate routes of appeal without guidance. This framework relies on practitioners being aware of the cross-reference in CAA 1968 despite there being no reciprocal cross-reference in POCA 2002.

22.57 In order to clarify that defence appeals against confiscation orders are treated as appeals against sentence pursuant to section 50(1)(ca) of CAA 1968 we recommend explicitly signposting this in Part 2 of POCA 2002.

22.58 This signposting approach mirrors that taken by the Sentencing Code wherein several provisions signpost other pieces of relevant legislation. For example, section 155(3)(a) of the Sentencing Code refers to section 13(2) of POCA 2002 which describes when the court has the power to make a deprivation order. This cross-reference to POCA 2002 enables the reader to find the relevant provision easily and efficiently.

Recommendation 101.

22.59 We recommend that it be made explicit in POCA 2002 that section 50(1) of the Criminal Appeal Act 1968 affords a right of appeal against confiscation orders made pursuant to section 6 of POCA 2002 and that these appeals are to be treated as appeals against sentence.

Signposting all appeal rights in POCA 2002

22.60 As highlighted in the table below, there are some appeal rights contained within POCA 2002 itself, while others are in CAA 1968. In order to make these parallel provisions

clear and easy to navigate we recommend signposting all routes of appeal in Part 2 of POCA 2002. This would also serve one of the primary purposes of this reform exercise, that is, to clarify the confiscation framework.

22.61 A summary of all of the appeal rights in one place would provide a guide to the various sections of POCA 2002 and CAA 1968 which can be engaged to appeal different aspects of the confiscation order. It would also provide a logical place to insert the new rights of appeal we recommend (discussed further below).

Recommendation 102.

22.62 We recommend that a summary of all relevant routes of appeal and appeal rights be included in POCA 2002, including cross-references to the Criminal Appeal Act 1968 where relevant.

Appeals in connection with a determination made in respect of interests in property under section 10A

22.63 As set out above, pursuant to *R v Ryder*[66] defendants have been afforded a right to appeal against section 10A determinations. We consider that the statute should make that position clear.

Recommendation 103.

22.64 We recommend that POCA 2002 clearly sets out a defendant's right to appeal a determination made in respect of interests in property under section 10A of POCA 2002 (pursuant to section 50(1)(ca) of the Criminal Appeal Act 1968).

Prosecution right of appeal against the imposition of a default term

22.65 As we set out above, the defence has a right to appeal against the imposition of a default term, whereas the prosecution does not.

22.66 In *R v Mills*[67] the Court of Appeal confirmed that the prosecution did not have a right to appeal against matters relating to the imposition of the default sentence. *R v Mills* concerned a prosecution appeal against the default term of imprisonment imposed in relation to a confiscation order. The confiscation order comprised a recoverable amount of £661,027. A default term of 18 months' imprisonment was imposed. The prosecution sought leave to appeal on the basis that the default term was too low, given that the bracket of £500,000 to £1m had a maximum term of seven years. The Court of Appeal suggested that in such a case it may be desirable to grant the prosecution the possibility to challenge the default term.[68]

66 *R v Ryder* [2020] EWCA Crim 1110.
67 *R v Mills* [2018] EWCA Crim 944, [2019] 1 WLR 192.
68 *R v Mills* above at [36] to [38].

22.67 We note that the "slip rule"[69] is intended to rectify errors in the sentencing process and may be exercised within 56 days. If an error is made (for example, a failure to impose a mandatory default term), the slip rule could be used and there is no need for a right to appeal in these circumstances. However, where a judge refuses to set a default term, or sets one which is clearly outside of the guidance provided by the statutory framework, a route of appeal is needed in order to provide a remedy.

22.68 The principle of finality is important and prosecution rights of appeal against sentence are not available in all cases. The Attorney General's Reference Scheme only allows the Court of Appeal to increase a sentence imposed in the Crown Court if it is found to be unduly lenient, provided that the application is made within 28 days. Additionally, only a limited category of (serious) offences are within the scope of the scheme.

22.69 Section 35 of POCA 2002 details as follows the maximum term in default that may be imposed by reference to the amount payable under the order:

£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

22.70 A general prosecution right of appeal would bring what could be classified as low-level sentences within the scope of the scheme. As we note in our consultation paper,[70] many low-level orders are satisfied in any event.

22.71 Providing the prosecution with a right of appeal only in connection with orders of £50,000 or more will ensure that a prosecution right of appeal is available only in more serious cases. This figure has been chosen because it represents, in general terms, defendants who have higher levels of criminality who are better able to hide their assets and thwart enforcement, or have criminal lifestyles. It is also indicative of high value criminal proceeds.

22.72 In addition, it would align the power with the Attorney General's Reference Scheme by reserving the right of appeal to more serious cases (higher value orders). We consider this to be a proportionate interference with the principle of finality, with the purpose of targeting high value orders that historically are less likely to be satisfied.[71]

69 Sentencing Code, s 385.
70 CP 249, paras 19.21 and 20.74.
71 Law Commission of England and Wales, *Consultation Paper Confiscation Impact Assessment*, para 1.25, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Confiscation-IA-Final.pdf.

22.73 Therefore, on the basis of the limited consultation we have undertaken, we are of the view that the prosecution ought to be given a right to appeal against the length of any sentence to be served in default of payment of a confiscation order for confiscation orders of £50,000 or more.

Compliance orders

22.74 As set out above, appeals have been brought by defendants against compliance orders.[72] However, it is not clear whether this has occurred pursuant to the broad appellate power in connection with sentence (section 50 of CAA 1968) or pursuant to the appeal route open to "anyone affected" by a compliance order (a route which would be analogous to the one that facilitates defence appeals against determinations made in respect of interests in property under section 10A of POCA 2002, as set out above).

22.75 Given that we recommend establishing a clear route of appeal for defendants against section 10A determinations, we also consider that the right of appeal for defendants in connection with compliance orders should be clearly established.

Recommendation 104.

22.76 We recommend that Part 2 of POCA 2002 should set out an explicit right of appeal for defendants in connection with compliance orders.

Prosecution appeals in connection with applications for upwards reconsideration of the available amount under section 22

22.77 As set out above, there are arguments for and against a prosecution right to appeal section 22 applications. We note that one key argument in favour of excluding the prosecution right of appeal is that POCA 2002 was not intended to confer appeal rights against the broad exercise of discretion. Under our recommendations,[73] prior to an assessment as to whether it is "just" to increase the available amount, the court must determine whether the assets identified since the order was made were acquired prior to the order being made and were not taken into account and/or were realised for more than their estimated value.

22.78 In light of this restriction on applications, and hence the court's discretion, we consider that the argument against a prosecution right of appeal in relation to the court's discretion falls away. Furthermore, we consider that there is a public interest in prosecuting authorities being able to challenge a decision not to treat certain assets as representing the proceeds of crime. Accordingly, we consider that there should be a power for the prosecution to appeal in connection with section 22 applications, and that this right of appeal should be set out clearly.

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72 *R v Pritchard* [2017] EWCA Crim 1267; *R v Dixon* [2019] EWCA Crim 483.

73 We discuss these recommendations in depth in Chapter 15 – Reconsideration.

22.79 For the sake of clarity and simplicity, we consider that all rights of appeal in connection with a section 22 application should be signposted in the confiscation legislation.

Recommendation 105.

22.80 We recommend that a prosecution right to appeal a decision not to vary a confiscation order upwards following an application for reconsideration pursuant to section 22 should be set out clearly in POCA 2002.

Recommendation 106.

22.81 We recommend that the defence right to appeal a decision to vary a confiscation order upwards following an application for reconsideration pursuant to section 22 should be set out clearly in POCA 2002.

Defence appeals in connection with applications for downwards reconsideration of the available amount under section 23

22.82 Having recommended that the prosecution should have a right to appeal against a refusal of the court to vary a confiscation order upwards, we consider that justice requires that the defence should be afforded a right to appeal against a refusal of the court to vary downwards a confiscation order.

22.83 A refusal of the court to vary downwards a confiscation order exposes a defendant to an ongoing liability to pay an amount that they may not be able to pay, as well as to potential enforcement action, including imprisonment in default and the transfer of assets to the state.

22.84 Therefore On the basis of the limited consultation we have undertaken, we are of the view that the defence be afforded the right to appeal in connection with an application for downwards reconsideration of the available amount pursuant to section 23 of POCA 2002 because such serious consequences require some route of appeal.

Consequential powers available to the Court of Appeal (Criminal Division): power of remittal

Prosecution appeals

22.85 In *Barnet LBC v Kamyab*,[74] the court observed that the case raised two important issues. The first related to whether an offence that pertained to ongoing non-compliance but was charged as a "single instance offence" could be considered "continuing" for the purposes of the calculation of benefit. The second issue concerned the remittal powers of the CACD, particularly:

[74] *Barnet LBC v Kamyab* [2021] EWCA Crim 543; [2021] 4 WLUK 63.

> the powers of this court when determining a prosecutor's appeal against a confiscation order made in the lower court. These are a matter of statute, and there is currently a Law Commission Consultation in progress considering the current provisions, see *Confiscation of the Proceeds of Crime After Conviction, Consultation Paper 249*, published September 2020. We consider that there is a lacuna in these powers which requires consideration, and this is an opportune moment at which to analyse the current prosecutor's appeal.[75]

22.86 In broad terms, it was held that there is no power to remit when the prosecution appeal relates to a case in which a confiscation order was made in the Crown Court (section 32(1) of POCA 2002), whereas there is power to remit if no confiscation order was made at all by the Crown Court (section 32(2) of POCA 2002).

22.87 The Court of Appeal rejected counsel's submission that this must "amount to a drafting error", stating that "far from being an obvious error, the provisions appear to have been carefully crafted, although why they should have been drawn as they were is a mystery…".[76]

22.88 Upon close examination, we respectfully agree that the differing consequential powers cannot be attributed to a drafting error. A possible policy rationale might be that where a confiscation order has been made, the lower court has made findings as to the defendant's benefit and the available amount, giving reasons for so finding. Consequently, in the majority of cases, the order imposed is capable of amendment by the CACD and a power to remit to the Crown Court for a full enquiry is not necessary.

22.89 Conversely, if no order is made at all, a full hearing will often be required in order to establish the benefit figure and the available amount, and therefore a power to remit to the Crown Court for that enquiry to be undertaken is provided.

22.90 Indeed, the court in *Kamyab* observed that, had the judge conducted a full confiscation hearing, the Court of Appeal would have made findings concerning the benefit and the available amount. Accordingly:

> It would have been an easy matter to vary the order by starting from the figures found by the judge for the benefit and the available amount. If some error in that process were identified, those figures could be varied on appeal as required. We do not have these figures. We are faced with a confiscation order which is based on a benefit figure which is far too low.[77]

22.91 The distinction between the court's powers in sections 32(1) and (2) is perhaps therefore explicable.

22.92 In *Kamyab* the court reminded judges and practitioners alike that proceeding by way of a preliminary issue was not appropriate and that judges should make findings as to

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75 *Barnet LBC v Kamyab* above at [2].
76 *Barnet LBC v Kamyab* above at [60].
77 *Barnet LBC v Kamyab* above at [62].

the benefit and the available amount.[78] If this guidance is adhered to, it is arguable that providing a power to remit is not necessary.

22.93 Although there is no power to remit, as happened in *Kamyab* the CACD can conduct the confiscation enquiry and therefore the defendant will not retain their benefit from crime. The remedy is not, however, an efficient use of judicial resources (as the court itself observed in its judgment[79]); such resources could be better deployed for the hearing of other appeals, rather than on conducting a hearing that should have taken place in the Crown Court.

22.94 We have considered the case law to understand whether the lack of a formal power to remit has caused problems in other cases. The Court of Appeal has had no difficulty in varying orders where a full enquiry has been undertaken in the Crown Court: see, for example, *R v Craft*[80] and *R v Morrison*.[81] There are, however, also examples where the CACD has been unable to reach a satisfactory outcome due to the lack of a power to remit, and has thus allowed a prosecution appeal. In *R v Bajaj*[82] the Court concluded that it was not able to resolve the issue, due to its limited powers under section 32:

> This being an application for permission to appeal on the part of the prosecution, this court, under s.32(1) of the 2002 Act, can only on appeal confirm, quash or vary the confiscation order. It cannot, as was agreed before us, remit to the Crown Court for further consideration. Since this court itself has no sufficient evidential basis for making the valuation, and cannot just pluck a figure out of the air, this point also has to fall away.[83]
>
> One cannot view such a result with any satisfaction. It means that the respondent has a confiscation order fixed by reference to one day's rental receipts. But it is not open to this court to put right the incorrect drafting (as conceded) of the charges. Nor should this court permit an artificial approach as to benefit to prevail over the correct approach simply in order to mark disapproval of the respondent's conduct.[84]

22.95 In *R v Williams*[85] it appears that the court remitted the matter back to the Crown Court for a fresh enquiry, despite the lack of a power to do so. The case concerned a prosecution appeal under section 31(1) against findings of the Crown Court regarding the defendant's benefit (in particular, regarding the evidence about his income and the evidence employed to rebut the criminal lifestyle assumptions in relation to certain property). The Court of Appeal concluded that it would not attempt to vary the order itself, and thus it remitted the case to a new judge:

> We have considered whether or not it would be appropriate for this court to attempt to vary the order. Tempted as we may be to delve into the minutiae of the

78 *Barnet LBC v Kamyab* above at [62].
79 *Barnet LBC v Kamyab* above at [66].
80 *R v Craft* [20120] EWCA Crim 1356; [2012] 5 WLUK 198.
81 *R v Morrison* [2019] EWCA Crim 351; [2019] 3 WLUK 124.
82 *R v Bajaj* [2020] EWCA Crim 1111; [2020] 8 WLUK 177.
83 *R v Bajaj* above at [36].
84 *R v Bajaj* above at [38].
85 *R v Williams* [2007] EWCA Crim 1768; [2007] 7 WLUK 611.

schedules, this is a task which we fear we must delegate to a crown court judge who can hear the evidence afresh and detailed submissions upon it.

In conclusion we believe the ruling below was wrong. We quash it and we remit it for re-hearing on the aspects upon which we have intervened and as we have indicated in the course of this judgment.[86]

22.96 In *R v Bakewell*[87] the court appeared mistakenly to believe that it would have been able to remit to the Crown Court, and perhaps ought to have done so had the additional benefit not been agreed and the available amount been contested. The Court allowed the prosecutor's appeal, increasing the order by some £400,000, and made the following comments about the disposal of the case:

> In the event, to obviate the need for any remission to the Crown Court (see s.31(2)), it has been agreed that the relevant sum of the pecuniary advantage is £393,959.67. To this must be added the sum of £10,000 representing the value of the tyres which were in any event property which, as Mr Bakewell concedes, he obtained as a result of or in connection with his criminal conduct. The total sum of the confiscation order must therefore be £403,959.67. There is no problem in this case about available assets. For these reasons this appeal was allowed and the confiscation order varied so as to stand in the amount of £403,959.67.[88]

22.97 As it can be seen, the issue identified in *Kamyab* has made it difficult to reach a satisfactory outcome. Whilst in the vast majority of cases the policy rationale underpinning the differing consequential powers available may be sound, under the present regime there appears to be a need for a power to remit in cases where the Court of Appeal is unable to vary an order because it lacks sufficient information.

22.98 We also note that our recommendations for reform will involve significant changes to the regime, including a revised test to calculate benefit as well as matters that may require findings of fact, such as contingent enforcement orders, apportionment and significant revisions to applications for upwards reconsideration of the available amount under section 22 (which will involve determinations as to when an asset was acquired by a defendant). In the event of a successful prosecution appeal, it may be the case that a fresh enquiry before the Crown Court is the most appropriate disposal.

22.99 We anticipate that the use of this power will be the exception rather than the norm, particularly if the guidance in *Kamyab* is adhered to. However, the case law we have detailed above shows that there is a need for this power, in light also of the changes we recommend to the regime as a whole.

22.100 Therefore, on the basis of the limited consultation we have undertaken, we are of the view that upon a successful prosecution appeal in connection with a confiscation order, the court should have power to remit the order to the Crown Court in all circumstances.

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86 *R v Williams* above at [23] to [24].
87 *R v Bakewell* [2006] EWCA Crim 2; [2006] 1 WLUK 61.
88 *R v Bakewell* above at [40].

Defence appeals against conviction

22.101 During consultation on our provisional proposals we were also alerted to the fact that there is currently no power for the CACD to remit cases to the Crown Court where, on a defence appeal against conviction, the defendant's convictions are quashed on some counts and not others and consequently the confiscation order may need to be varied.

22.102 Section 4 of CAA 1968 affords the CACD a power to re-sentence the defendant where, on appeal against conviction, convictions are quashed on some counts but not others. While this power would likely extend to confiscation orders, this is not a straightforward exercise due to the complex nature of confiscation findings. It is our view that it would be preferable, in such circumstances, for the Court to be able to remit the confiscation order to the Crown Court to be considered in accordance with the new sentence.

22.103 In the case of *R v Zeroual*, the applicant sought leave to appeal both their conviction on one count only and their confiscation order.[89] In this case the Court determined that there were arguable grounds of appeal in respect of the conviction but that there was no merit in the grounds of appeal against the confiscation order.

22.104 Irrespective of this, the Court referred the application to appeal the confiscation order to the full Court because of the potential consequences for the confiscation order if the appeal were allowed against conviction on one count (while another remained):

> although the referring court could not detect any arguable grounds of appeal in relation to renewed applications for permission to appeal against sentence, for permission to appeal against the confiscation order and for permission to appeal against a costs order, these were formally referred to this court in case issues of sentence, confiscation amounts and costs needed to be reviewed in the light of any decision on the renewed application for permission to appeal against conviction.

22.105 If there had been a power to remit the case following a successful conviction appeal, the court would arguably not have needed to refer an unmeritorious confiscation application to the full Court.

22.106 The current situation also means that in circumstances where there is no appeal lodged against the confiscation order, but there has been an appeal lodged against conviction, the Court would have no power to remit the confiscation order if the appeal were allowed on some counts but not all.

22.107 Enabling the CACD to remit the confiscation order for reconsideration by the Crown Court where the CACD has considered the appeal against conviction and re-sentenced the offender would alleviate significant pressure on the CACD. The Crown Court is considerably better placed to grapple with the complexities of the order and make a redetermination efficiently.

22.108 Consequently, on the basis of the limited consultation we have undertaken, we are of the view that in cases where there is a defence appeal against conviction that is successful on some counts but not all, and where sentence and confiscation will need

[89] *R v Zeroual* [2021] EWCA Crim 1687.

to be reconsidered, the CACD ought to have the power to remit the confiscation order to the Crown Court for reconsideration.

RIGHTS OF APPEAL IN CONNECTION WITH "CONTINGENT ORDERS"

What is a contingent enforcement order?

22.109 In Chapter 13 of this report, we recommend that the Crown Court should have the power to impose a contingent enforcement order at the same time as a confiscation order is made.[90] The rationale underpinning this policy is to ensure that enforcement decisions are made far earlier in the process (that is, when an order is imposed) and by the judge imposing the order who is fully appraised of all the circumstances of the case. This approach will ensure that enforcement action is taken more timeously, resulting in improved rates of satisfaction of orders.

22.110 A further benefit of the discretionary power to make a contingent enforcement order is that the consequences of non-payment are made clear at the time an order is imposed and enforcement will then be proactive as opposed to reactive.

What difficulties do such orders present?

22.111 This significant change, which enables the Crown Court to make enforcement orders previously reserved to magistrates' courts,[91] raises difficult questions because routes of appeal to the CACD are potentially altered. Furthermore, because enforcement decisions can be taken (albeit on a contingent basis) at the same time a confiscation order is made, the time limit by which to seek leave to appeal against the making of a confiscation order and enforcement order begins at the same time. Under the current regime, enforcement decisions are ordinarily taken after the time limit by which an appeal should be made has elapsed.

22.112 Questions therefore arise regarding:

(1) whether a right of appeal should be available when a contingent enforcement order is imposed; or whether a right of appeal should be available only when an order takes effect; or whether a right of appeal should be available both in relation to the making and activation of the order;

(2) the competent court to hear such an appeal and what test should be applied by the appellate court to decide the appeal;

(3) what rights of appeal an affected third party should have;

(4) the effect of an appeal (against a contingent enforcement order or the confiscation order itself) on future enforcement; and

(5) whether there should be separate rights of appeal against the making of a confiscation order, the making of a contingent enforcement order and the activation of a contingent enforcement order.

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90 Chapter 13 – Contingent Orders, recommendations 57 and 59.

91 Such as orders under ss 67 and 67A of Proceeds of Crime Act 2002.

Is a right of appeal against the making of a contingent enforcement order necessary?

22.113 In the consultation paper we categorised the contingent enforcement order as a type of compliance order.[92] The court may make any such compliance order it believes is appropriate for the purpose of ensuring that the confiscation order is effective. Such order might include a power to prevent travel outside the jurisdiction.[93]

22.114 As set out above, defendants and those affected by the order have a right of appeal against the making of a compliance order. The prosecutor may appeal against a refusal to make an order.[94] Thus if a contingent enforcement order is categorised as a type of compliance order, it stands to reason that a right of appeal ought to be provided.

22.115 Most compliance orders take effect immediately; there is no separate activation of the order. In contrast, a contingent enforcement order has a separate activation. Because the contingent enforcement order has not yet taken effect, no assets will be realised pursuant to the order. Accordingly, it might be queried whether a right of appeal should be provided against the imposition of the order, as opposed to its activation.

22.116 We consider that there are some significant advantages to permitting a right of appeal against the imposition of the contingent enforcement order.

22.117 First, a contingent enforcement order should be imposed by the Crown Court at the conclusion of the confiscation hearing. Therefore, if a right of appeal were permitted in connection with the making of a contingent enforcement order, such a right would likely arise at or around the same time as the right to appeal the confiscation order. There would be considerable benefits in terms of time and costs, as well as certainty, if both the confiscation and contingent enforcement orders could be appealed together, since almost all decisions regarding the making of a confiscation order and its subsequent enforcement are taken at the same time and rights of appeal (for defendants, affected third parties and prosecutors) crystallise at the same time.

22.118 Second, excluding a right of appeal against the making of the contingent enforcement order creates uncertainty that may disadvantage affected third parties. For example, a contingent enforcement order may be made in respect of the family home. It would be wrong in principle to preclude an affected third party a right of appeal against the making of a contingent order unless and until the defendant defaults and the order takes effect. The third party may have no control over whether the defendant will satisfy the order. As a result, there would be an extended period of uncertainty for third parties, during which they would have no control, since it would be unclear whether a right of appeal would arise. Third parties ought to be afforded some certainty concerning the assets in which they claim to have some interest (in the legal or more general sense of the term). If third parties have a clear right of appeal arising from the moment a contingent enforcement order is made, such certainty would be afforded.

22.119 Third, such certainty ought to be afforded to defendants:

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92 Consultation Paper, Chapter 21, para 21.3.
93 Proceeds of Crime Act 2002, s 13A.
94 Proceeds of Crime Act 2002, s 13B.

(1) a defendant should not be required to take steps to comply with their confiscation order under the threat of an enforcement order that might eventually be quashed by the CACD;

(2) if a defendant knows that a court has ordered the contingent appointment of an enforcement receiver and the CACD has upheld that appointment, then the defendant has certainty that if they default, the appointment will take effect.

22.120 Fourth, certainty as to whether an order was properly imposed is also beneficial to the prosecution. As we discussed in Chapter 1 of this report, confiscation orders are made *in personam* rather than *in rem*. Therefore, if a defendant successfully exercises a right of appeal against the imposition of a contingent enforcement order, the defendant's obligation to satisfy the order will not be extinguished and it will be open to the prosecution to identify and undertake further enforcement action in an expeditious way.

22.121 Fifth, parallels can be drawn between permitting appeals against the imposition of a contingent enforcement order and appeals from the imposition of other "two-part" orders, namely:

(1) (in connection with confiscation specifically) imprisonment in default. The imposition of a term of imprisonment in default is capable of appeal to the CACD notwithstanding the fact that it has not taken effect. A term of imprisonment in default is a tool to encourage compliance, as is a contingent enforcement order;[95]

(2) (in connection with sentencing more generally) a suspended sentence of imprisonment. An appeal may be brought against both the imposition of a suspended sentence and its subsequent activation in case of breach.[96]

22.122 However, creating an appeal against the imposition of a contingent enforcement order may have disadvantages, including:

(1) because the order has not taken effect, no assets will have been realised pursuant to the order (and may never be); and

(2) unmeritorious applications may be made to delay and frustrate the process and increase the time to pay period.

22.123 In relation to (1), the defendant may have every intention to pay the order within the time to pay period and therefore may not seek to appeal the imposition of the order at the time it is made. At this stage no assets have been realised and the defendant may intend to source funds from assets not identified pursuant to the contingent enforcement order, thereby rendering the contingent order moot. However, if the defendant is then unable to source the funds as intended and the time to pay period expires, the defendant may at the point of activation wish to appeal the contingent enforcement order. If a right of appeal is only allowed at the point of imposition of the order, it would potentially create unfairness for defendants who intend to pay the order

95 Although setting a term of imprisonment in default is mandatory whereas making a contingent enforcement order will be discretionary.

96 CAA 1968, s 50(1).

at the point it is imposed but subsequently fail to and wish to appeal its activation. However, we consider that the best way to afford defendants this flexibility is via an application for judicial review, as we discuss below.

22.124 Additionally, in relation to (2), if a right of appeal is afforded at both the time the order is imposed and its activation, this may lead to significant delay. Multiple routes of appeal could enable defendants to frustrate the process and undermine the purpose of contingent enforcement orders (that is, to increase the efficiency of the enforcement of confiscation orders).

22.125 It is our view that while these disadvantages are noteworthy, they do not outweigh the compelling parallels which can be drawn between contingent enforcement orders and other types of compliance orders for which the right of appeal arises at the point the order is made. Similarly, these disadvantages do not outweigh the significant advantage afforded by having all rights of appeal against the confiscation order crystallise at the same time, at the time the order is made.

Is a right to appeal against the imposition of a contingent enforcement order appropriate for all types of contingent order?

22.126 Contingent orders may take many forms. Having considered general advantages and disadvantages of permitting a right of appeal against the imposition of a contingent order, we now consider the merits of a right of appeal against the imposition of different forms of contingent order.

(1) Contingent enforcement receivership orders

22.127 A contingent enforcement order, in some circumstances, will be similar to the Crown Court's current power to appoint a receiver to realise assets.[97] There are currently rights of appeal afforded to defendants and affected third parties (when the court makes an enforcement receivership order) and to the prosecutor (when the court refuses to make an enforcement receivership order).[98]

22.128 Currently, in broad terms, a receiver cannot be appointed whilst an application for leave to appeal against a confiscation order is outstanding.[99] The policy rationale is that assets should not be taken out of a person's hands until the possibility that the confiscation order might be quashed on appeal no longer exists. Accordingly, there might be inevitable delays (for example, a defendant may appeal against the imposition of the confiscation order and subsequently appeal against the making of an enforcement receivership order).

22.129 Our proposed regime allows for enforcement decisions to be taken in advance of a failure to pay the order in the time specified and before any application for leave to appeal has been made. Therefore, contrary to the current law, appeals could be brought against the confiscation and enforcement receivership orders at the same time, thus expediting the enforcement process.[100]

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97 Proceeds of Crime Act 2002, ss 50 and 51.
98 Proceeds of Crime Act 2002, s 65.
99 Proceeds of Crime Act 2002, s 50(1)(c).
100 We also recommend a residual discretionary power to stay enforcement of a contingent order of this type if leave to appeal is granted out of time.

22.130 The appointment of a receiver is usually made in relation to the realisation of assets of substantial value and such an appointment, even on a contingent basis, is a significant step. That appointment may affect others with an interest in the asset(s) and therefore it may require the determination of third-party interests.

22.131 A third party may not be aware of confiscation proceedings and may suffer serious prejudice as a result of the order made. This risk is expressly recognised by the right of appeal afforded to affected third parties when a determination is made in respect of interests in property under section 10A of POCA 2002. A right of appeal is available if the affected third party was not given a reasonable opportunity to make representations when the determination was made, or if it is arguable that giving effect to the determination would result in a serious risk of injustice to the person.[101]

22.132 As we have noted, affected third parties also have a right of appeal against the appointment of a receiver or when they are affected by a compliance order.[102]

22.133 Given the existing rights of appeal and the consequences of a contingent enforcement receivership order, we are of the view that an affected third party should be allowed a right of appeal to challenge such a contingent order when it is imposed, rather than having to wait for a defendant's default and the subsequent activation of the order.

22.134 Since we have concluded that an affected third party's right of appeal should be allowed when a contingent order is made, it is preferable that a defendant's right of appeal arises at the same time in order to ensure that the appellate system is simple and coherent, and to avoid rights of appeal (against the same order) arising at different times for different categories of appellants.

Recommendation 107.

22.135 We recommend that the current provision for appealing against an enforcement receivership order (found in section 65 of POCA 2002) be extended to appeals against contingent orders for the appointment of a receiver.

(2) Contingent orders pursuant to sections 67 and 67A of the Proceeds of Crime Act 2002

22.136 As described at paragraph 22.26 above, section 67 orders enable cash or funds in a bank account to be paid towards the outstanding balance of a confiscation order.

22.137 Section 67A orders, described at paragraph 22.31 above, enable seized or produced personal property to be sold to meet a confiscation order.

22.138 Our recommendation to introduce contingent enforcement orders will entail that powers currently available only to a magistrates' court (such as section 67 and section 67A orders) will be available in the Crown Court and contingent enforcement orders

101 Proceeds of Crime Act 2002, s 31(5)(b), (6), (7).
102 Proceeds of Crime Act 2002, s 65(2)(b).

will be made at the same time a confiscation order is imposed. This is significant because:

(1) appeals against section 67A orders made by the magistrates' court are heard by the Crown Court. If any such order were to be imposed by the Crown Court, the appellate route from the Crown Court would inevitably have to be different from the one used when the same order is imposed by the magistrates' court;

(2) whilst third parties and the prosecution can appeal against a section 67A order imposed by the magistrates' court, there is currently no right of appeal for defendants to the Crown Court against such an order imposed by a magistrates' court;

(3) challenges to section 67 orders and by defendants to section 67A orders remain available by way of [the common law right of] judicial review.

22.139 Simplicity would require that a right of appeal to the CACD ought to be afforded to all parties against the making of any form of contingent order. Such a regime would be simple and coherent. This would, however, involve:

(1) extending current rights of appeal for defendants who currently cannot appeal to the Crown Court against a section 67 or 67A order imposed by a magistrates' court, but may challenge an order by way of judicial review;

(2) potentially increasing the scope for defendants to use the appellate process improperly to delay enforcement;

(3) appeals currently heard in the Crown Court (for affected third parties and prosecutors) being heard instead in the CACD, taking up the resources of the CACD.

22.140 The alternative is, as far as possible, to maintain the existing rights and routes of appeal. We have sought to do so whenever we consider that it would be in the interests of justice.

Defendants' rights of appeal in relation to section 67 and section 67A orders

22.141 When determining a confiscation order, the Crown Court must consider the value of the defendant's "free property".[103] An order pursuant to section 67 of POCA 2002 to transfer funds applies only to such "free property".[104] Property seized or produced which is subject to section 67A also appears to be encompassed by the definition of "free property".[105] If the Crown Court erroneously concluded that cash, funds in a bank account or seized personal property should be taken into account in determining the available amount, the CACD has the power to vary the confiscation order. Consequently, a defendant has an adequate remedy by way of appeal against the confiscation order.

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103 Proceeds of Crime Act 2002, s 9(1).
104 Proceeds of Crime Act 2002, s 67(2A).
105 Proceeds of Crime Act 2002, s 82.

22.142 The contingent enforcement order implies that, if the defendant fails to satisfy the *in personam* confiscation order in a way that they see fit, then the court will do so for them. Therefore, even if a right of appeal were afforded to defendants against section 67 or section 67A orders, it would be difficult to imagine the possibility for an appeal to be successful.

22.143 Furthermore, bringing an application for judicial review is currently the only way for defendants to challenge a section 67 or section 67A order imposed by a magistrates' court. Therefore, if we were to recommend a power of appeal against a contingent section 67 or 67A order (made in the Crown Court), whether the defendant could challenge this order would depend on where the order was made. This does not amount to a simplification of the routes of appeal.

22.144 On balance, we recommend maintaining the existing position and do not recommend extending the rights of a defendant to appeal against section 67 and section 67A orders. Defendants will continue to be able to challenge such decisions by way of judicial review.

Recommendation 108.

22.145 We recommend that defendants should not be afforded a right to appeal against contingent orders under section 67 of POCA 2002 (which relate to funds held in bank accounts or seized cash) to the Court of Appeal (Criminal Division).

Recommendation 109.

22.146 We recommend that defendants should not be afforded a right to appeal against contingent orders under section 67A of POCA 2002 (which relate to property seized by police) to the Court of Appeal (Criminal Division).

Third parties' rights of appeal in relation to section 67 orders

22.147 As we have observed, third parties do not have a statutory right of appeal against a section 67 order. Instead, an affected third party has a right of appeal against a section 10A determination in respect of interests in property (para 22.129 above). Such a determination is a prerequisite before a section 67 order can be made where the funds in question are held in an account belonging to a third-party.

22.148 A third party affected by a receivership may challenge a section 10A determination. We have recommended that a third party affected by a receivership ought to be afforded the right to challenge both the section 10A determination and the contingent receivership order. We consider that there is a distinction to be drawn when considering appeals against contingent receivership orders and against contingent section 67 orders:

(1) third parties affected by an enforcement receivership order are already afforded a right to challenge the order. To deprive them of that right would diminish the protection afforded by the existing regime. No such right is currently available to challenge a section 67 order and therefore there would be no diminution in the existing rights of appeal;

(2) assets subject to a section 67 order are likely to be less valuable than those subject to an enforcement receivership order, which usually involves high costs and therefore it is used only when costs associated with an appeal are proportionate;

(3) a receivership order (contingent or otherwise) can only be made in the Crown Court and therefore only one avenue is available for appeals (to the CACD). A contingent section 67 order may be made in the magistrates' court or in the Crown Court and therefore different avenues for challenging the order are available, depending on where the section 67 order is made.

22.149 Accordingly, we do not consider it appropriate to extend the rights of appeal of third parties beyond section 10A determinations to including a section 67 order. We note that under our recommended contingent order regime, if a contingent section 67 order is made and an application for leave to appeal a section 10A determination is made (in time) by a third-party, the enforcement of the order should be stayed pending resolution of those proceedings.

Recommendation 110.

22.150 We recommend that affected third parties should not be afforded a right to appeal contingent orders under section 67 of POCA 2002 (which relate to funds held in bank accounts or seized cash) to the Court of Appeal (Criminal Division).

Third parties' rights of appeal in relation to section 67A orders

22.151 Concerning section 67A orders, an affected third party has a right of appeal to the Crown Court. Whilst we do not consider it desirable to permit a route of appeal to the Crown Court against a section 67A order made in the magistrates' court and a separate route of appeal to the CACD against a contingent section 67A order made in the Crown Court, such a split route of appeal appears necessary in these instances for the following reasons:

(1) as with the enforcement receivership, affected third parties are already afforded a right of appeal with regard to section 67A orders. To deprive them of that right would mean to diminish the existing rights afforded to third parties;

(2) to create a single route of appeal would require all section 67A determinations to be heard in the Crown Court, in order for all such determinations (contingent or otherwise) to be appealed to the CACD. This would create an additional burden of work for the Crown Court and for the CACD, when there is no

indication that it is problematic for the orders to be made in the magistrates' court and to be appealed to the Crown Court.

22.152 If a determination of a third party's interest (under section 10A of POCA 2002) is required prior to the making of a section 67 order, it is unclear why a similar requirement does not apply to section 67A. As with section 67, a third party's interest in the property will have to be determined prior to its realisation. Interests in the property should have been considered when determining the defendant's "free property" for the purposes of calculating the confiscation order and the third party should have been notified that a section 10A determination was likely to be made at the confiscation hearing. Section 67A is engaged only when the property in question has been seized or produced via a production order. Therefore, in most cases, the affected third party should have had sufficient notice and made their position known during confiscation proceedings, during which a section 10A determination should have been made.

22.153 Given that the right to appeal is not restricted, it would be undesirable to reduce the protection afforded by the existing regime. Therefore, we consider that such a right to appeal should remain. We do not recommend that section 10A determinations become mandatory[106] but instead consider that the right to appeal should reflect the fact that a section 10A determination can (and should) have been made in cases where a section 67A order is sought and where a third party's rights are at issue.

22.154 We have therefore concluded that an affected third party should have a right of appeal in connection with a section 67A determination:

(1) to the Crown Court when a section 67A order is made in the magistrates' court and no section 10A determination has been made; and

(2) to the CACD when a contingent section 67A enforcement order is made in the Crown Court and no section 10A determination has been made.

22.155 When a determination in respect of interests in property under section 10A has been made, as with orders made under section 67, the third party would be able to challenge the section 10A determination in the CACD.

Preventing manipulation by third parties

22.156 There is a risk that a party intent on delaying matters could wait until the confiscation proceedings have concluded before lodging an appeal. For this reason, we recommend that the right of appeal against a contingent section 67A order should arise only when a third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice (the test that applies when challenging a section 10A determination).

[106] No issues with s 67A were raised during our extensive consultation and no suggestion has been made that it is desirable for a mandatory resolution of third-party interests in connection with s 67A. Such determinations would inevitably add to the workload of the Crown Court and the CACD.

Recommendation 111.

22.157 We recommend that affected third parties should be afforded a right to appeal orders in relation to seized or produced personal property under section 67A of POCA 2002 if:

(1) no determination has been made in respect of interests in property under section 10A of POCA 2002; and

(2) the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.

Recommendation 112.

22.158 We recommend that appeals by third parties against orders in relation to seized or produced personal property under section 67A should be:

(1) to the Crown Court where the section 67A order is made in the magistrates' court;

(2) to the Court of Appeal (Criminal Division) where a contingent section 67A order is made in the Crown Court.

Prosecution's rights of appeal

22.159 Prosecutors may appeal against a confiscation order or against the Crown Court's refusal to make an order. This right will include appeals against the Crown Court's failure to take into account property that falls within the scope of section 67 and section 67A. A prosecutor may also appeal against a section 10A determination.

22.160 The prosecution right to appeal against a decision not to make a section 67A order is contained in section 67C. We consider that a similar prosecution right of appeal is necessary in respect of a decision not to make a *contingent* section 67A order. We note that this right of appeal ought to extend to a decision to make a section 67A order in respect of some but not all assets and that this extension ought to also apply to section 67A orders made by the magistrates' court.

22.161 However, in order to maintain consistency with the existing appeal rights, we do not consider that there ought to be a right of appeal against a decision not to make a contingent section 67 order. Challenges to section 67 orders, contingent or otherwise, ought to remain exclusively by way of the common law right of judicial review upon their activation, which is discussed further below.

Recommendation 113.

22.162 We recommend that the prosecution be afforded the right to appeal against a refusal to make a contingent section 67A order and a section 67A order which includes some but not all assets to the Court of Appeal (Criminal Division), in accordance with their general right of appeal against the confiscation order pursuant to section 31 of POCA 2002.

Will contingent section 67 and section 67A orders be amenable to challenge by judicial review?

22.163 Final section 67 and section 67A orders made by a magistrates' court may not be appealed but may be challenged by way of judicial review. An issue arises as to whether this right arises for defendants and affected third parties when such orders are made on a contingent basis. Final section 67 and section 67A orders are made *after* a confiscation order has been made and are imposed by magistrates' courts. Our recommendations involve the making of a contingent order by the Crown Court at the same time a confiscation order is made, thus the position is different. As we have stated:

(1) a defendant will have a right of appeal to the CACD against the confiscation order and the CACD is able to vary an order if the Crown Court has erred by taking some assets into account (which precludes the need to appeal against section 67 and section 67A orders);

(2) an affected third party may appeal to the CACD against a section 10A determination (which precludes the need for an appeal against a section 67 order made by the magistrates' court);

(3) in the case of section 67A orders, if no section 10A determination has been made, an affected third party may appeal to the CACD against a contingent section 67A order made by the Crown Court, or to the Crown Court against a section 67A order made by the magistrates' court.

(4) a prosecutor will be able to appeal against a decision not to make a contingent section 67A order; or a decision to make a section 67A order in respect of some but not all assets.

22.164 Consequently, we recommend that the formal routes of appeal be pursued at the point contingent section 67 and section 67A orders are made in the Crown Court rather than an application for judicial review. However, challenge by way of judicial review would remain possible in order to review a decision to *activate* a contingent order (where other routes of appeal are unavailable). We discuss this further below.

22.165 We note that currently a right to challenge section 67 (by all parties) and section 67A (by defendants) orders made in the magistrates' court by way of judicial review arises at the point they are made. This appears at odds with our position when these orders are made on a contingent basis in the Crown Court (because this right arises primarily at the point the orders are *activated* not at the point when they are made). However, it

is our view that the right to challenge section 67 and section 67A orders by way of judicial review at the point they are made in the magistrates' court is not inconsistent with our position in relation to contingent section 67 and section 67A orders made and then activated in the Crown Court because when these orders are made in the magistrates' court, the making of the order and its activation coincide.

(3) Collection orders; warrants of control; and attachment of earnings and deduction of benefits orders (contingent and immediate)

22.166 As discussed at para 1.146 above, our recommendations to introduce contingent enforcement orders and to enable the Crown Court to retain responsibility for the order for the purposes of enforcement (where appropriate) will afford the Crown Court enforcement powers which are currently available only to a magistrates' court.

22.167 Whether these orders are made in the Crown Court on a contingent basis or as standard enforcement orders, we do not propose creating new rights of appeal against orders for which there is no current right when they are made in the magistrates' court.

22.168 Consequently, collection orders, warrants of control and attachment of earnings and deduction of benefits orders will continue to only be amenable to challenge by way of judicial review when made in the Crown Court.

(4) Warrants of commitment/activation of the default term

22.169 While the default term will not be a contingent enforcement order, it is useful to note that where enforcement of the order is retained by the Crown Court and the default term is activated, this decision will not be appealable. This is because we have sought to replicate the current appeal rights from the magistrates' court wherever possible for consistency and simplicity. Instead, the default term itself will be appealable per the existing appeal rights[107] and the activation of the default term will only be amenable to challenge by way of judicial review.

Power to remit contingent enforcement orders to the Crown Court after an appeal

22.170 Having determined that in general there ought to be a right to appeal contingent enforcement orders to the CACD, we have considered the efficacy of requiring the CACD to redetermine the terms of such orders where an appeal is successful. The Crown Court, having made the confiscation order and the original contingent enforcement order, is arguably much better placed to reconsider the terms of the contingent enforcement order if it is determined by the CACD that the appeal against the original terms has merit. While we anticipate that the CACD will be able to resolve matters of law or straightforward fact in relation to the order, there may be instances where the Crown Court is better equipped to reconsider the terms of the order in a more efficient manner. For this reason, we also recommend that the CACD have the power to remit the contingent enforcement order to the Crown Court for reconsideration of its terms where an appeal against the order has been successful.

[107] The defence right of appeal is found at s 50(1)(ca) of the CAA 1968. The prosecution can seek to correct a failure to set a default term or an incorrect default term using the 'slip rule'.

Recommendation 114.

22.171 We recommend that the Court of Appeal (Criminal Division) have the power to remit a contingent enforcement order to the Crown Court for reconsideration of its terms where an appeal against the order has been successful.

Right to appeal against the activation of a contingent enforcement order

22.172 Having considered whether a right of appeal should arise against the making of a contingent order, the issue arises as to whether there should be an additional right of appeal to the CACD against the activation of a contingent enforcement order.

22.173 To a certain extent, any such right would seem to replicate the right of appeal against the imposition of the contingent order and could lead to the CACD dealing with multiple appeals on the same, or very similar, grounds.

22.174 It would, however, be wrong in principle to preclude any form of challenge to the activation of a contingent order. A judge may, for example, unreasonably refuse to grant a defendant further time to realise an asset and as a result activate a contingent order. In our view, judicial review is an appropriate avenue by which to challenge such an activation. Limiting challenge to judicial review of the court's decision to activate the order strikes the appropriate balance between ensuring procedural fairness to the defendant without creating concurrent rights and routes of appeal.

22.175 We therefore recommend that any such challenge (whether by a defendant or an affected third party) should be heard by the High Court by way of judicial review and there ought to be an explicit prohibition on appealing a contingent order once that order has been activated by way of a further order of the Crown Court.

22.176 Under our recommendations, such challenges to the High Court will be rare, because a defendant or an affected third party must exhaust all avenues of appeal before making an application for judicial review.[108]

Recommendation 115.

22.177 We recommend that there ought to be a statutory bar on appeals against contingent enforcement orders once those orders have been activated by way of a further order of the Crown Court.

[108] As we have discussed, an affected third party would also have a right of appeal to the CACD against the making of a contingent enforcement order that is analogous to the appointment of a receiver or a contingent s 67A order where no s 10A determination has been made. If an appeal has been lodged in time, it will not be possible to activate an order, since enforcement pursuant to the order challenged will be stayed pending determination of the appeal.

Effect of an application for leave to appeal

22.178 We provisionally proposed in Chapter 21 of the consultation paper that if an application for leave to appeal the making of either a confiscation or contingent enforcement order is lodged in time, any contingent enforcement order will be stayed pending resolution of the application for leave to appeal.

22.179 We now make this recommendation and further recommend that these enforcement orders be stayed where an application to appeal is refused by the single Judge but renewed in-time to the full Court.

22.180 We were also alerted during consultation to circumstances where a lengthy extension of time is required but a Judge determines that there are arguable grounds of appeal and thus refers both the extension application and substantive appeal to the full Court for consideration simultaneously. We consequently also recommend that where an appeal is lodged along with an application for an extension of time, that enforcement steps be stayed pending determination of both matters by the full Court.

22.181 These recommendations ensure not only that enforcement decisions are taken at the time an order is imposed, but also that any application for leave to appeal must be lodged in time in order for the enforcement to be stayed at the point the application is made. This strikes the appropriate balance between the need for swift and effective enforcement whilst preserving rights of appeal and the need to safeguard the fundamental rights of defendants and affected third parties to lodge an appeal prior to the realisation of the assets.

22.182 As our recommendations conflate the time by which an application for leave to appeal may be brought with the time enforcement decisions are taken, we also recommend that where leave to appeal is granted out of time, enforcement steps be stayed from the point leave is granted.

22.183 We also recommend that enforcement steps be stayed if leave to challenge the activation of a contingent order is granted by the High Court.

22.184 We envisage that these powers will be particularly useful in respect of third parties who are not involved in the confiscation proceedings, are not convicted and may have good grounds for lodging an appeal out of time. There may also be good grounds for a defendant to lodge an appeal out of time. These recommendations therefore strike the appropriate balance between encouraging appeals in time (because enforcement will be immediately stayed at the point the application is lodged) and not being unduly punitive where meritorious appeals are made out of time.

Recommendation 116.

22.185 We recommend that enforcement steps be stayed both when an application for leave to appeal either a confiscation or contingent enforcement order is lodged and where an application to appeal is refused by the single Judge but renewed in-time to the full Court of Appeal (Criminal Division).

Recommendation 117.

22.186 We recommend that where leave to appeal to the Court of Appeal (Criminal Division) is granted out of time, enforcement steps must be stayed.

Recommendation 118.

22.187 We recommend that where the activation of a contingent enforcement order is challenged in the High Court out of time, enforcement steps must be stayed.

Recommendation 119.

22.188 We recommend that where an appeal is lodged along with an application for an extension of time, enforcement steps be stayed pending determination of both matters by the full Court of Appeal (Criminal Division).

RIGHTS OF APPEAL IN CONNECTION WITH PROVISIONAL DISCHARGE OF AN ORDER

22.189 In Chapter 16 of this report, we recommend that the court should have the power to discharge orders provisionally (with a residual right to seek variation under sections 21 or 22) when the court is satisfied that there is no reasonable prospect of successfully enforcing the order.[109]

22.190 As with section 23 variation applications, we recognise that a refusal of the court to vary downwards a confiscation order exposes a defendant to the ongoing liability to pay an amount that the defendant may not be able to pay, and with it, to potential enforcement action (including imprisonment in default and the transfer of assets to the state). However, since we do not propose to limit the number of applications a defendant may make for a conditional discharge order, we have deemed a route of appeal unnecessary in this context.

22.191 Similarly, due to the safety valve in our proposal on provisional discharge, which enables the prosecution to apply to have the order reopened if enforcement mechanisms become effective or to apply for reconsideration of the order pursuant to section 21 or 22,[110] we do not believe a route of appeal is necessary for the prosecution after an order for provisional discharge is made.

109 Chapter 16 – Provisional Discharge, recommendation 78.
110 Chapter 16 – provisional Discharge, recommendation 82.

SUMMARY OF RECOMMENDATIONS

22.192 The table below sets out a summary of our recommendations on rights of appeal and other challenges to confiscation decisions. Where "no right of appeal" appears, this does not affect the parties' common law right to seek judicial review of these decisions.

Order	Where order made	Defence	Prosecution	Third parties	Change in law
Confiscation orders					
Confiscation orders	Crown Court	Appeal to CACD	Appeal to CACD		Explicit reference to s 50(1)(ca) CAA 1968.
S 10A determinations	Crown Court	Appeal to CACD	Appeal to CACD	CACD if the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	Removing the prohibition in s 50(1)(ca) CAA 1968 against section 10A appeals by the defendant.
Orders (other than contingent orders) upon making the confiscation order					

Default term	Crown Court	Appeal to CACD	Appeal to CACD where the confiscation order is for £50,000 or more.		Explicit reference to this being encompassed by any defence appeal pursuant to section 50(1)(ca) CAA 1968. New provision in s 31 POCA 2002 that enables prosecution appeals where the confiscation order is for £50,000 or more pursuant to the general sentence appeal.
Compliance orders	Crown Court	Appeal to CACD	Appeal to CACD	Appeal to CACD	Amend s 13B POCA 2002 to include an express right of appeal for the defendant.
Contingent orders					
Contingent receivership order	Crown Court	Appeal to CACD	Appeal to CACD	Appeal to CACD	Amend s 65 POCA 2002 to state that the same rights of appeal apply where the order is made on a contingent basis (if a defence/prosecution appeal, this is appealable in accordance with the general right to appeal the order).

Contingent order (s 67)	Crown Court	No right of appeal (but can appeal the s 10A determination which may have preceded the order).	No right of appeal (but can appeal the s 10A determination which will have preceded the order).	No right of appeal (but can appeal the s 10A determination which will have preceded the order).	Make explicit that where this order is made on a contingent basis, this is appealable under s 31 POCA 2002 in accordance with a general right to appeal the order.
Contingent order (s 67A)	Crown Court	No right of appeal (but can appeal the s 10A determination which may have preceded the order).	Appeal to CACD	Appeal to CACD if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	Make explicit that this is appealable per s 31 POCA 2002 in accordance with a general right to appeal the order. Make the third-party rights explicit in s 67A.
Collection orders; warrants of control; and attachment of earnings and deduction of benefits orders	Crown Court	No right of appeal	No right of appeal	Appeal to CACD if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	

Any other contingent order	Crown Court	Appeal to CACD	Appeal to CACD	Appeal to CACD if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	Make explicit that these are appealable per s 50(1)(ca) CAA 1968 and s 31 POCA.
Enforcement orders					
Activation of a contingent order	Crown Court	No right of appeal	No right of appeal	No right of appeal	New provision, which includes express wording to ensure that activation of a contingent order is not treated as a matter related to "trial on indictment".
S 67 order	Magistrates' Court (or Crown Court if the judge retains enforcement power).	No right of appeal (but can appeal the s 10A determination which may have preceded the order).	No right of appeal (but can appeal the s 10A determination which will have preceded the order).	No right of appeal (but can appeal the s 10A determination which will have preceded the order).	No change in law.

S 67A order	Magistrates' Court (or Crown Court if the judge retains enforcement power)	No right of appeal (but can appeal the s 10A determination which led to the order).	Appeal to the Crown Court or CACD (depending on where the original order was refused).	Appeal to Crown Court (or CACD if the order is made in the Crown Court) if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	Amendment of s 67C POCA 2002 for appeal to the CACD (pursuant to either s 31 POCA 2002 or s 50 CAA 1968 if prosecution/defence). Also amend s 67C to restrict the third-party appeal rights in the CACD to cases when no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.
Collection orders; warrants of control; and attachment of earnings and deduction of benefits orders	Magistrates' Court (or Crown Court if the judge retains enforcement power)	No right of appeal	No right of appeal	Appeal to Crown Court (or CACD if the order is made in the Crown Court) if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	New provisions affording the Crown Court the right to make these orders and clarifying the third-party appeal rights.
Orders (other than contingent orders) upon making the confiscation order					

Default term	Crown Court	Appeal to CACD	Appeal to CACD where the confiscation order is for £50,000 or more.		Explicit reference to this being encompassed by any defence appeal pursuant to section 50(1)(ca) CAA 1968. New provision in s 31 POCA 2002 that enables prosecution appeals where the confiscation order is for £50,000 or more pursuant to the general sentence appeal.
Compliance orders	Crown Court	Appeal to CACD	Appeal to CACD	Appeal to CACD	Amend s 13B POCA 2002 to include an express right of appeal for the defendant.
Contingent orders					
Contingent receivership order	Crown Court	Appeal to CACD	Appeal to CACD	Appeal to CACD	Amend s 65 POCA 2002 to state that the same rights of appeal apply where the order is made on a contingent basis (if a defence/prosecution appeal, this is appealable in accordance with the general right to appeal the order).

Contingent order (s 67)	Crown Court	No right of appeal (but can appeal the s 10A determination which may have preceded the order).	No right of appeal (but can appeal the s 10A determination which will have preceded the order).	No right of appeal (but can appeal the s 10A determination which will have preceded the order).	Make explicit that where this order is made on a contingent basis, this is appealable under s 31 POCA 2002 in accordance with a general right to appeal the order.
Contingent order (s 67A)	Crown Court	No right of appeal (but can appeal the s 10A determination which may have preceded the order).	Appeal to CACD	Appeal to CACD if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	Make explicit that this is appealable per s 31 POCA 2002 in accordance with a general right to appeal the order. Make the third-party rights explicit in s 67A.
Collection orders; warrants of control; and attachment of earnings and deduction of benefits orders	Crown Court	No right of appeal	No right of appeal	Appeal to CACD if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	

Any other contingent order	Crown Court	Appeal to CACD	Appeal to CACD	Appeal to CACD if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	Make explicit that these are appealable per s 50(1)(ca) CAA 1968 and s 31 POCA.
Enforcement orders					
Activation of a contingent order	Crown Court	No right of appeal	No right of appeal	No right of appeal	New provision, which includes express wording to ensure that activation of a contingent order is not treated as a matter related to "trial on indictment".
S 67 order	Magistrates' Court (or Crown Court if the judge retains enforcement power).	No right of appeal (but can appeal the s 10A determination which may have preceded the order).	No right of appeal (but can appeal the s 10A determination which will have preceded the order).	No right of appeal (but can appeal the s 10A determination which will have preceded the order).	No change in law.

S 67A order	Magistrates' Court (or Crown Court if the judge retains enforcement power)	No right of appeal (but can appeal the s 10A determination which led to the order).	Appeal to the Crown Court or CACD (depending on where the original order was refused).	Appeal to Crown Court (or CACD if the order is made in the Crown Court) if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	Amendment of s 67C POCA 2002 for appeal to the CACD (pursuant to either s 31 POCA 2002 or s 50 CAA 1968 if prosecution/defence). Also amend s 67C to restrict the third-party appeal rights in the CACD to cases when no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.
Collection orders; warrants of control; and attachment of earnings and deduction of benefits orders	Magistrates' Court (or Crown Court if the judge retains enforcement power)	No right of appeal	No right of appeal	Appeal to Crown Court (or CACD if the order is made in the Crown Court) if no s 10A determination and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.	New provisions affording the Crown Court the right to make these orders and clarifying the third-party appeal rights.
Variation applications					

S 22	Crown Court	Appeal to CACD	Appeal to CACD		Amendment to POCA 2002 setting out express prosecution right to appeal.
S 23	Crown Court	Appeal to CACD	Appeal to CACD		Amend CAA 1968 and cross-reference in POCA 2002.
Provisional discharge	Crown Court	No right of appeal	No right of appeal		N/A

Chapter 23: Recommendations

Recommendation 1.

23.1 We recommend that any amended confiscation legislation should include the objective of the regime.

Paragraph 2.72

Recommendation 2.

23.2 We recommend that the stated objective of the regime should be depriving defendants of their benefit from criminal conduct, within the limits of their means.

Paragraph 2.92

Recommendation 3.

23.3 We recommend that bodies which exercise powers under Part 2 of POCA 2002, must pursue the stated objective of the regime.

Paragraph 2.93

Recommendation 4.

23.4 We recommend that punishment should not be a statutory objective of the confiscation regime.

Paragraph 2.141

Recommendation 5.

23.5 We recommend that confiscation legislation should provide that a defendant must be sentenced before confiscation proceedings are resolved unless the court directs otherwise.

Paragraph 3.17

Recommendation 6.

23.6 We recommend 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 has imposed 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.

Paragraph 3.38

Recommendation 7.

23.7 We recommend that the current 28-day period within which the Crown Court is permitted to vary a financial, forfeiture or deprivation order, pursuant to section 15(4) POCA 2002, be extended to 56 days from the date on which a confiscation order is imposed.

Paragraph 3.47

Recommendation 8.

23.8 We recommend 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.

Paragraph 3.60

Recommendation 9.

23.9 We recommend that the prosecution must raise the timetable for confiscation proceedings as a matter before the court by the completion of the sentence hearing.

3.80 We recommend that errors or amendment be addressed (respectively) by applying the slip rule within 56 days of sentencing or through amendment of the timetable.

Paragraph 3.79

Recommendation 10.

23.10 We recommend that the Criminal Procedure Rule Committee should provide standard timetables for the provision of information and service of statements of case in confiscation proceedings. The court should have discretion to amend these timetables on application of one or more of the parties based on the facts of the case.

Paragraph 4.17

Recommendation 11.

23.11 We recommend that the Criminal Procedure Rule Committee should consider prescribing different timetables for "complex" and "non-complex" cases.

4.50 In non-complex cases, we recommend that those timetables should be:

(1) 15 working days for service of the defendant's provision of information under section 18 of POCA 2002;

(2) 30 working days for service of the prosecutor's statement of information under section 16 of POCA 2002; and

(3) 30 working days for service of the defence response to the prosecutor's statement of information under section 17 of POCA 2002.

4.51 In complex cases, we recommend that those timetables should be:

(1) 15 working days for service of the defendant's provision of information under section 18 of POCA 2002;

(2) 45 working days for service of any interested party's statement under section 18A of POCA 2002;

(3) 60 working days for service of the prosecutor's statement of information under section 16 of POCA 2002; and

(4) 60 working days for service of the defence response to the prosecutor's statement of information under section 17 of POCA 2002.

4.52 We recommend that these revised timetables be subject to a judicial discretion to disapply them based on the circumstances of a particular case.

4.53 We further recommend that to determine whether a case is complex or non-complex, the court should consider whether the case involves:

(1) complex asset structures;

(2) complex income structures;

(3) assets that are or were held through offshore trusts or settlements or otherwise held offshore or overseas;

(4) assets that are or were held through family or unquoted corporate entities;

(5) expert evidence;

(6) a statement from one or more interested parties; or

(7) complex or novel legal arguments.

Paragraph 4.49

Recommendation 12.

23.12 We recommend that the Criminal Procedure Rule Committee should implement a requirement that the court must satisfy itself that the defendant understands the following matters in order that the defendant is able to participate effectively in confiscation proceedings.

(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 them.

(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 they might have expected, and that they may face imprisonment or forfeiture of specific assets if that order is not paid.

Paragraph 4.66

Recommendation 13.

23.13 We recommend that the Criminal Procedure Rule Committee consider requiring that the prosecution "statement of information" comprises a single bundle made up of:

(1) a prosecution skeleton argument;

(2) a table which clearly identifies key assertions "at a glance" – (a "Scott Schedule");

(3) the financial investigator's statement; and

(4) any witness statements or evidence relied upon by the financial investigator or prosecutor to support the conclusions that were reached.

Paragraph 4.105

Recommendation 14.

23.14 We recommend that the Criminal Procedure Rule Committee should consider amending Criminal Procedure rule 33.13 as to the content of the prosecution statement of information to:

(1) separate out issues of law, which are relevant to the prosecution skeleton argument, and issues of evidence, which are relevant to the financial investigator's statement;

(2) prescribe the outline content of the prosecution skeleton argument and financial investigator's statement;

(3) include a declaration that unused material (if any) has been reviewed and that:

(a) there is no such material;

(b) there is no material that requires disclosure; or

(c) material has been disclosed; and

(4) We also recommend that the Criminal Procedure Rule Committee should consider requiring that following receipt of the defence response to the statement of information under section 17 of POCA 2002, the prosecution must review disclosure and update the defence about the outcome of that new review.

Paragraph 4.106

Recommendation 15.

23.15 We recommend that the Criminal Procedure Rule Committee should consider amending the Criminal Procedure Rules as to the content of the defence response to the prosecutor's statement of information to reflect the need to respond to the skeleton argument and the "Scott Schedule".

Paragraph 4.107

Recommendation 16.

23.16 We recommend that an Early Resolution of Confiscation process ought to be implemented to formalise the existing practice of agreeing confiscation orders.

Paragraph 5.22

Recommendation 17.

23.17 We recommend that the timetable for the preparation of a confiscation hearing should include the Early Resolution of Confiscation (EROC) process, unless the court is satisfied that it will serve no useful purpose to do so.

Paragraph 5.23

Recommendation 18.

23.18 We recommend that in addition to the prosecution, defendant and instructed advocate, the following parties ought to attend the EROC meeting and hearing:

(1) the financial investigator; and

(2) any third parties who would have standing in contested proceedings, particularly those who hold an interest in any of the property deemed to belong to the defendant.

Paragraph 5.48

Recommendation 19.

23.19 We recommend that the EROC process comprise two stages:

(1) An EROC meeting, at which the parties should seek to settle the confiscation order, and in the event that the confiscation order cannot be settled, the issues for the confiscation hearing should be identified.

(2) An EROC hearing, at which the judge should consider approving any agreement, or in the event of disagreement, at which case management would take place.

Paragraph 5.59

Recommendation 20.

23.20 We recommend that the Criminal Procedure Rule Committee should consider prescribing the conduct of the EROC process.

Paragraph 5.60

Recommendation 21.

23.21 We recommend that HMCTS update the 5050 and 5050A forms to account for the EROC process.

Paragraph 5.61

Recommendation 22.

23.22 We recommend that the new category for confiscation material on the Crown Court Digital Case System should include agreed orders.

Paragraph 5.62

Recommendation 23.

23.23 We recommend that any confiscation practice direction requires that agreements reached outside the EROC process should be subject to a process which is comparable to the EROC hearing.

Paragraph 5.76

Recommendation 24.

23.24 We recommend that the Crown Court retains jurisdiction for confiscation proceedings.

Paragraph 7.20

Recommendation 25.

23.25 We recommend that the Lord Chancellor should consult with the Lord Chief Justice to institute enhanced confiscation training for judges eligible to sit in the Crown Court.

Paragraph 7.31

Recommendation 26.

23.26 We recommend that the prosecution should be required to make a non-binding indication on the Plea and Trial Preparation Hearing Form and at the Plea and Trial Preparation Hearing as to whether they envisage any complexities if the case progresses to confiscation.

Paragraph 7.43

Recommendation 27.

23.27 We recommend that the Criminal Practice Direction on allocation is amended such that where complex confiscation proceedings are identified at the PTPH stage, this is taken into account during the allocation process.

Paragraph 7.53

Recommendation 28.

23.28 We recommend that Crown Court judges ought to be offered additional training in confiscation (including enhanced training) and whether this has been undertaken should be considered when making allocation decisions.

Paragraph 7.62

Recommendation 29.

23.29 We recommend that the defendant's benefit should be calculated according to the following rules:

(1) a defendant's total benefit is equivalent to what the defendant "gained" as a result of or in connection with the criminal conduct for which they were convicted; unless

(2) the defendant proves or the court is otherwise satisfied that it would be unjust to make an order that the defendant's benefit is equivalent to the gain, because the defendant has intended to have only a limited power to dispose of or to control the gain, the court may reduce the total benefit figure to an amount which reflects the limited power to dispose of or to control the gain.

Paragraph 8.65

Recommendation 30.

23.30 We recommend that "gain" is defined as:

(a) keeping what one has;

(b) getting what one does not have; and

(c) gains that both are temporary and permanent.

Paragraph 8.66

Recommendation 31.

23.31 We recommend that the court must consider the apportionment of the gain between the defendant and others when determining whether the defendant intended to have only a limited power to dispose of or to control the gain.

Paragraph 8.90

Recommendation 32.

23.32 We recommend that in the event that the court is not able to apportion benefit based on defined shares, the court must make an order that each defendant is liable for an equal share of the whole of the benefit unless the court is satisfied that it would be in the interests of justice to impose equal liability for the whole of the benefit.

Paragraph 8.91

Recommendation 33.

23.33 We recommend that the Criminal Procedure Rule Committee should in whatever way it considers most appropriate (either in rules or by some other means) provide that the defendant should be required to raise any assertions relevant to determining whether the defendant intended to have only a limited power to dispose of or to control the gain in their response to the prosecutor's statement.

Paragraph 8.93

Recommendation 34.

23.34 We recommend that form [5050], on which confiscation orders are recorded, allows for the recording of any finding as to apportionment.

Paragraph 8.94

Recommendation 35.

23.35 We recommend that the following offences are added to Schedule 2 to POCA 2002:

(1) The offence of keeping a brothel used for prostitution contrary to section 33A of the Sexual Offences Act 1956; and

(2) Offences related to the illegal dumping of waste contrary to section 33(1)(a) of the Environmental Protection Act 1990 and regulation 38(1)(a) of the Environmental Permitting (England & Wales) Regulations 2016.

Paragraph 9.120

Recommendation 36.

23.36 We recommend that section 75(3) POCA 2002 be amended such that the number of offences required to satisfy the course of criminal activity trigger be three offences.

Paragraph 9.147

Recommendation 37.

23.37 We recommend that where a defendant has convictions for offences from which they have attempted to benefit, these should be included as relevant offences for the purpose of satisfying the course of criminal activity trigger in section 75(3) POCA 2002.

Paragraph 9.184

Recommendation 38.

23.38 We recommend that the financial threshold for triggering the criminal lifestyle assumptions pursuant to section 75(4) POCA 2002 is increased to £5,000 adjusted to account for inflation on the day in which the provision is enacted.

Paragraph 9.229

Recommendation 39.

23.39 We recommend that the legislation mandates that the financial threshold for triggering the criminal lifestyle assumptions pursuant to section 75(4) POCA 2002 is reviewed by the Secretary of State every five years in order to account for inflation.

Paragraph 9.230

Recommendation 40.

23.40 We recommend that the prosecution should have a discretion not to rely on the criminal lifestyle assumptions. This decision should be made at the earliest opportunity and the discretion should be exercised according to published guidance.

Paragraph 10.58

Recommendation 41.

23.41 We recommend that the Director of Public Prosecutions consider publishing guidance to assist prosecutors when deciding whether to rely on the criminal lifestyle assumptions.

Paragraph 10.59

Recommendation 42.

23.42 We recommend that the serious risk of injustice test in section 10(6)(b) POCA 2002 is clarified (in its application to all of the assumptions) to ensure that when 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.

Paragraph 10.143

Recommendation 43.

23.43 We recommend that in determining whether there is a serious risk of injustice, the court should not be limited to determining whether there would be a risk of double counting the defendant's benefit, but instead should determine whether any relevant factor or factors would result in a serious risk of injustice if an assumption were made.

Paragraph 10.144

Recommendation 44.

23.44 We recommend that the primary legislation include provisions to the effect that the defendant's total benefit is limited where property was:

(1) part-purchased with the proceeds of crime, to the value of that part of the property which was derived from criminal conduct; and

(2) purchased subject to credit, to that part of the property which would be payable to the defendant following the repayment of the creditor or creditors in connection with that purchase.

Paragraph 11.20

Recommendation 45.

23.45 We recommend that the Criminal Procedure Rule Committee should in whatever way it considers most appropriate (either in rules or by some other means) consider inclusion of the relevant cases as guidance in the following matters:

(1) In determining whether benefit apparently accruing to a company may be treated as benefit accruing to a company.

(2) Whether there are common intention constructive trusts.

(3) The issue of alleged benefit when a business (whether incorporated or otherwise) is alleged to be part-tainted by criminality.

(4) In relation to tobacco importation cases:

(a) a summary of principles relevant to benefit in tobacco importation;

(b) in calculating the benefit obtained from evading duties payable on tobacco; and

(c) the relevant retail price of counterfeit goods.

(5) 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).

Paragraph 11.21

Recommendation 46.

23.46 We recommend that if a person is deemed to have benefited from criminal conduct their total benefit is the value of the property obtained.

Paragraph 12.20

Recommendation 47.

23.47 We recommend that, having calculated the defendant's total benefit, the court should identify any property that was seized by or disgorged to the state or repaid to victims by the defendant pursuant to the case and reduce the total benefit figure by that amount to arrive at the outstanding benefit.

Paragraph 12.21

Recommendation 48.

23.48 We recommend that the Criminal Procedure Rule Committee considers incorporating (whether in rules or as it sees fit) a provision to the effect that where:

(1) a defendant's outstanding benefit is lower than their total benefit; and/or

(2) a confiscation order is made in an amount less than the recoverable amount

the court should satisfy itself that the defendant understands:

(a) what each figure means;

(b) why the figures are different; and

(c) that it will be open to the prosecution to seek to recover more of the outstanding benefit in future, until it is repaid in full.

Paragraph 12.34

Recommendation 49.

23.49 We recommend that the Judicial College consider including an example direction in the Crown Court Compendium to assist the judge in satisfying themselves that all of the matters set out by the Criminal Procedure Rule Committee in respect of the confiscation order have been understood by the defendant.

Paragraph 12.35

Recommendation 50.

23.50 We recommend that His Majesty's Courts and Tribunals Service consider including in the form 5050 on which confiscation orders are recorded a brief explanation of the consequences of the order being made in an amount lower than the outstanding benefit figure.

Paragraph 12.36

Recommendation 51.

23.51 We recommend that the court must make a confiscation order in a sum less than the outstanding benefit where, having regard to all the circumstances of the case, the defendant proves or the court is otherwise satisfied that the available amount is less than the outstanding benefit.

Paragraph 12.48

Recommendation 52.

23.52 We recommend that POCA 2002 be amended to include a provision to the effect that where the value of the defendant's available amount appears to be lower than the value of the outstanding benefit the court may treat the difference between the values as assets which have been hidden by or on behalf of the defendant, and which are available to satisfy the confiscation order.

Paragraph 12.55

Recommendation 53.

23.53 We recommend that factors to assist the court in determining whether there are hidden assets be set out in POCA 2002.

Paragraph 12.56

Recommendation 54.

23.54 We recommend that legislation should set out that, in considering whether to make a hidden assets finding, the court must consider whether any difference between the outstanding benefit and the defendant's apparent available amount is due to:

(1) Personal expenditure incurred by the defendant (unrelated to the criminal conduct) which has been met from the defendant's benefit; or

(2) changes in the value of assets.

Paragraph 12.65

Recommendation 55.

23.55 We recommend that the Criminal Procedure Rule Committee should in whatever way it considers most appropriate (either in rules or by some other means) consider a provision to the following effect:

(1) 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 should consider the guidance given in R v Hayes [2018] EWCA Crim 682, [2018] 1 WLR 5060, namely:

(a) whether that consideration is capable of being assessed as consideration of value; and

(b) if so, to what extent.

Paragraph 12.76

Recommendation 56.

23.56 We recommend that the definition of a tainted gift 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".

Paragraph 12.85

Recommendation 57.

23.57 We recommend 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 hearing to activate the order) 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, the defendant's share of the asset will not be made available for realisation by the expiry of the time to pay period.

Paragraph 13.47

Recommendation 58.

23.58 We recommend 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 defendant's 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.

Paragraph 13.58

Recommendation 59.

23.59 We recommend that the Crown Court should be able to impose, on a contingent basis, every type of enforcement order that can currently be made in the magistrates' court. The contingent enforcement order would take effect if the confiscation order is not satisfied as directed. Such orders could include:

(1) vesting an asset, such as a property in a receiver;

(2) forfeiting funds held in a bank account;

(3) selling seized property;

(4) effecting a warrant of control;

(5) making an attachment of earnings order or deduction from benefits order; or

(6) making a collection order.

Paragraph 13.78

Recommendation 60.

23.60 We recommend that where a contingent enforcement order has been made, the Crown Court must list an enforcement hearing in the Crown Court to determine whether the contingent order ought to be "activated".

Paragraph 13.89

Recommendation 61.

23.61 We recommend 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 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 the third party had a good reason for not making the application earlier in the confiscation proceedings; and

(2) 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.

Paragraph 13.104

Recommendation 62.

23.62 We recommend that confiscation proceedings be referred to the High Court where:

(1) the intervention of the prosecution authority in financial remedy proceedings is likely to represent an increase in complexity such that the High Court may be a more appropriate venue for concurrent disposition of confiscation and financial remedy proceedings; or

(2) it is otherwise in the interests of justice for concurrent disposition of the proceedings to take place.

Paragraph 13.164

Recommendation 63.

23.63 We recommend that the first enforcement hearing should take place in the Crown Court where:

(1) a contingent order has been made with the confiscation order; or

(2) the case has been identified as "complex", unless at the time of making the order the court decides this is not necessary.

Paragraph 14.26

Recommendation 64.

23.64 We recommend that the Crown Court and a magistrates' court should have flexible powers to transfer enforcement proceedings between them to achieve the best enforcement of the confiscation order on the facts of each case.

Paragraph 14.30

Recommendation 65.

23.65 We recommend that the following enforcement powers of magistrates' courts be extended to the Crown Court to facilitate enforcement action being undertaken by the Crown Court (where appropriate):

(1) warrants of control;

(2) attachment of earnings orders and deduction from benefits orders;

(3) orders in relation to money seized from the defendant pursuant to section 67 of POCA 2002;

(4) orders in relation to property seized from the defendant pursuant to section 67A of POCA 2002;

(5) collection orders; and

(6) warrants of commitment.

Paragraph 14.33

Recommendation 66.

23.66 We recommend that the Crown Court and the magistrates' courts have the power to make confiscation assistance orders, which appoint an appropriately qualified person to assist a defendant in satisfying their confiscation order.

Paragraph 14.77

Recommendation 67.

23.67 We recommend that the court should have a bespoke power to direct a defendant to provide information and documents as to their financial circumstances.

14.114 A new confiscation enforcement financial information form should be introduced to facilitate the provision of such information, which should warn the defendant of the consequences of failing to provide any, or accurate, information.

Paragraph 14.113

Recommendation 68.

23.68 We recommend that it is made explicit that collection orders can be applied to confiscation orders pursuant to section 97 of and Schedule 5, paragraph 12 to the Courts Act 2003, save for the power for fines officers to vary the payment terms of a confiscation order.

14.155 We also recommend that the power to make these orders ought also to be available to Crown Courts where they retain the order for the purposes of enforcement.

Paragraph 14.154

Recommendation 69.

23.69 We recommend that when a fines officer applies for a civil enforcement order in the county court or High Court to enforce a collection order which has been made in relation to a confiscation order, there should be no requirement to conduct a means enquiry under section 87(3A) of the Magistrates' Court Act 1980.

Paragraph 14.162

Recommendation 70.

23.70 We recommend that the power of the magistrates' court to issue a summons (and a warrant in the event of non-compliance) pursuant to section 83 of the Magistrates' Courts Act 1980 be extended so that defendants can be compelled to attend court at any stage of enforcement proceedings, including once the sentence in default has been served and that this power ought also to be available to the Crown Court.

Paragraph 14.170

Recommendation 71.

23.71 We recommend that an application for upwards reconsideration under section 22 should only be available where:

(1) assets have been identified as having been obtained by the defendant that should have been but were not identified at the time of confiscation; or

(2) assets that were identified as having been obtained by the defendant at the time of confiscation and were realised pursuant to the confiscation order have generated an amount greater than their original valuation.

Paragraph 15.82

Recommendation 72.

23.72 We recommend that when making an order to vary the available amount, the Crown Court should have the power to adjust the compensation element of the order to reflect the variation.

Paragraph 15.139

Recommendation 73.

23.73 We recommend that, when an order to increase the available amount under section 22 of POCA 2002 is made, the court may order that the reconsidered available amount be paid by a specified deadline.

Paragraph 15.167

Recommendation 74.

23.74 We recommend that the power to apply for downwards reconsideration of the available amount under section 23 should be expanded to a designated officer of a magistrates' court.

Paragraph 15.175

Recommendation 75.

23.75 We recommend that section 23 of POCA 2002 should be amended to provide for the downwards reconsideration of the available amount where the value of an asset (including a tainted gift) identified in the original confiscation order realised in satisfaction of the confiscation order realises a lower amount than its original valuation through no fault of the defendant.

Paragraph 15.197

Recommendation 76.

23.76 We recommend that section 23 of POCA 2002 should be amended to recognise substitute assets and ensure that the defendant is not penalised for how they choose to satisfy the confiscation order.

Paragraph 15.198

Recommendation 77.

23.77 We recommend that the calculation of the available amount after upwards reconsideration of the benefit figure under section 21 should exclude assets acquired after the original confiscation order is made, in accordance with recommendation 73.

Paragraph 15.219

Recommendation 78.

23.78 We recommend that when a defendant obtains an order for downwards reconsideration of the available amount under section 23 in connection with an asset which was realised for less than the value that was ascribed to it at the time of confiscation, the defendant's benefit figure may also be amended accordingly.

Paragraph 15.227

Recommendation 79.

23.79 We recommend that provisional discharge of a confiscation order should be available where, in light of any enforcement action taken and any reasonable enforcement measures which may be taken within a reasonable period from the date of the provisional discharge hearing, the amount recoverable would be no more than minimal (whether in absolute terms, or when compared to the value of the outstanding confiscation order).

Paragraph 16.51

Recommendation 80.

23.80 We recommend that the court should have the power in advance of a provisional discharge hearing, and after any order is made, to order the provision of information by the defendant to the prosecutor and the court.

Paragraph 16.52

Recommendation 81.

23.81 We recommend that where the only part of an order that is outstanding is accrued interest, the court should have the ability to discharge the confiscation order provisionally in the interests of justice.

Paragraph 16.126

Recommendation 82.

23.82 We recommend that the consequences of an order for provisional discharge be that the confiscation order is treated as no longer in force. Therefore, no further enforcement action (including accrual of interest and the activation of the default term) can be taken to recover sums under the confiscation order, unless the discharge order is revoked.

Paragraph 16.127

Recommendation 83.

23.83 We recommend that an order for provisional discharge may be revoked where:

(1) the conditions for provisional discharge no longer apply, and reasonable enforcement measures become available; or

(2) an order is made pursuant to section 21 to increase the benefit figure or section 22 to increase the available amount.

Paragraph 16.141

Recommendation 84.

23.84 We recommend that when an order for provisional discharge is made, the court should have the power to order that the defendant provides financial information to the court and that the prosecution facilitate the assessment of the conditions for revoking the order for provisional discharge.

Paragraph 16.153

Recommendation 85.

23.85 We recommend the removal of the power to discharge a confiscation order due to the inadequacy of the available amount or the small amount of the order under sections 24 and 25, POCA 2002.

Paragraph 16.161

Recommendation 86.

23.86 We recommend that the judicially interpreted test requiring that the prosecution establish that there is a real risk that assets will be dissipated which might otherwise meet a confiscation order, be articulated in a statutory provision.

Paragraph 17.49

Recommendation 87.

23.87 We recommend that statute provides a non-exhaustive list of indicative factors relevant to the risk of dissipation, as follows:

(1) The actions of the person whose assets are to be restrained (whether the person under investigation or charged or a third party), including:

(a) any dissipation that has already taken place; and

(b) any steps preparatory to dissipation that have already taken place.

(2) The nature of the alleged criminal conduct.

(3) The nature of the asset.

(4) The value of the alleged benefit from criminal conduct.

(5) The stage of proceedings.

(6) The person's capability (whether gained through membership of a profession, through connections with an organised crime group or otherwise):

(a) to transfer assets overseas;

(b) to use trust arrangements, corporate structures and cryptocurrencies or otherwise to distance themselves from assets.

(7) The person's previous good or bad character.

(8) Other sources of finance available to the person.

Paragraph 17.50

Recommendation 88.

23.88 We recommend that when 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) whether the investigation has involved international enquiries; and

(7) the impact of the restraint order on the defendant, any business or third parties.

Paragraph 17.80

Recommendation 89.

23.89 We recommend that:

(1) in determining whether funds should be released from restraint to meet reasonable living expenses, and if so, how much, the court should be guided by all of the circumstances of the case, as known at the time and by the need to preserve assets for confiscation; and

(2) to assist the judge in assessing the circumstances of the case, the legislation should include the list of indicative factors suggested by the Court of Appeal in R v Luckhurst [2020] EWCA Crim 1579:

(a) Whether the payment is necessary or desirable to improve or maintain the value of assets available to meet a confiscation order.

(b) The defendant's assets in relation to the size of any likely confiscation order.

(c) The standard of living enjoyed by the defendant prior to the restraint order.

(d) The defendant's means at the time of the restraint order or variation application.

(e) The period of the restraint.

(f) Whether there is a prima facie case that the existing standard of living is the result of criminal activity; and if so, what standard of living would be enjoyed but for such criminal activity.

(g) Whether the amount of the expenditure sought is unreasonable.

Paragraph 17.116

Recommendation 90.

23.90 We recommend that the Criminal Procedure Rule Committee should in whatever way it considers most appropriate (either in rules or by some other means) consider:

(1) requiring that any application to release funds for reasonable living expenses be supported by a schedule of income and outgoings and include copies of evidence to support assertions made within that schedule; and

(2) providing a standard form for a schedule of income and outgoings.

Paragraph 17.117

Recommendation 91.

23.91 We recommend that confiscation legislation should permit legal expenses connected with criminal and confiscation proceedings to be paid from restrained funds, subject to judicial approval of a cost budget, in accordance with a table of remuneration set out in a statutory instrument.

Paragraph 17.187

Recommendation 92.

23.92 We recommend that the Criminal Procedure Rule Committee consider adopting the following procedure for the assessment of costs in restraint proceedings:

(1) Costs should be limited to each application.

(2) Costs orders should not be made against the defendant.

(3) If the prosecution brings a successful application, each party should bear their own costs.

(4) If the prosecution brings an unsuccessful application or discharged application, there should be a presumption that costs follow the event (that is, that the prosecuting authority pays the defence costs) unless the prosecution can demonstrate that the application was reasonably brought, in which case each party will bear their own costs.

(5) In deciding whether the application was reasonably brought, the fact that the application was previously successful should not necessarily mean it was reasonably brought.

Paragraph 17.213

Recommendation 93.

23.93 We recommend that the National Police Chiefs' Council reconsider the training needs of all police officers in connection with confiscation, and in particular those who may need to exercise or oversee the powers of search and seizure in connection with confiscation.

Paragraph 18.30

Recommendation 94.

23.94 We recommend 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).

Paragraph 18.49

Recommendation 95.

23.95 We recommend that the Government consider establishing a Criminal Asset Recovery Board in order to facilitate the development of a national asset management strategy.

Paragraph 18.93

Recommendation 96.

23.96 We recommend that when determining whether an order for compensation ought to be made in favour of an acquitted defendant in relation to the restraint and exchange of cryptoassets to sterling which subsequently lose value, the court must apply the same test of reasonableness as to prosecution liability for costs as would apply to all other assets subject to early restraint.

Paragraph 19.25

Recommendation 97.

23.97 We recommend that any national asset management strategy developed by the Criminal Asset Recovery Board should cover issues in connection with the storage and exchange of digital assets including cryptoassets.

Paragraph 19.52

Recommendation 98.

23.98 We recommend 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, the court should have the power to:

(a) amend the benefit calculation for the earlier confiscation order within six years of the date of conviction (pursuant to what is currently section 21 of POCA 2002); and

(b) consolidate any amount outstanding under it into the new confiscation order.

(3) Payments obtained pursuant to a consolidated confiscation order should reflect the following priority:

(a) compensation of victims (when a compensation order is ordered to be paid from confiscated funds – where there are multiple compensation orders, in chronological order); followed by

(b) each confiscation order in the order in which it was obtained.

Paragraph 20.75

Recommendation 99.

23.99 We recommend that the section 5050 form on which confiscation orders are recorded be amended such that in the event that a consolidated confiscation order is made, the following information is accurately recorded:

(1) the fact that an earlier order has been consolidated (and a copy of the original order must be annexed to the consolidated order which will be stored on the Crown Court Digital Case System ("CCDCS"));

(2) if necessary, the "relevant date" for the purpose of the criminal lifestyle assumptions;

(3) the amount due under the previous order which was consolidated with the account history annexed to the order;

(4) the total amount due under the consolidated order;

(5) whether a previous term in default had been served and the amount of credit given; and

(6) if compensation orders have been made, the date each order was made and the name of the compensatee.

Paragraph 20.76

Recommendation 100.

23.100 We recommend 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 the confiscation order.

Paragraph 21.36

Recommendation 101.

23.101 We recommend that it be made explicit in POCA 2002 that section 50(1) of the Criminal Appeal Act 1968 affords a right of appeal against confiscation orders made pursuant to section 6 of POCA 2002 and that these appeals are to be treated as appeals against sentence.

Paragraph 22.59

Recommendation 102.

23.102 We recommend that a summary of all relevant routes of appeal and appeal rights be included in POCA 2002, including cross-references to the Criminal Appeal Act 1968 where relevant.

Paragraph 22.62

Recommendation 103.

23.103 We recommend that POCA 2002 clearly sets out a defendant's right to appeal a determination made in respect of interests in property under section 10A of POCA 2002 (pursuant to section 50(1)(ca) of the Criminal Appeal Act 1968).

Paragraph 22.64

Recommendation 104.

23.104 We recommend that Part 2 of POCA 2002 should set out an explicit right of appeal for defendants in connection with compliance orders.

Paragraph 22.76

Recommendation 105.

23.105 We recommend that a prosecution right to appeal a decision not to vary a confiscation order upwards following an application for reconsideration pursuant to section 22 should be set out clearly in POCA 2002.

Paragraph 22.80

Recommendation 106.

23.106 We recommend that the defence right to appeal a decision to vary a confiscation order upwards following an application for reconsideration pursuant to section 22 should be set out clearly in POCA 2002.

Paragraph 22.81

Recommendation 107.

23.107 We recommend that the current provision for appealing against an enforcement receivership order (found in section 65 of POCA 2002) be extended to appeals against contingent orders for the appointment of a receiver.

Paragraph 22.135

Recommendation 108.

23.108 We recommend that defendants should not be afforded a right to appeal against contingent orders under section 67 of POCA 2002 (which relate to funds held in bank accounts or seized cash) to the Court of Appeal (Criminal Division).

Paragraph 22.145

Recommendation 109.

23.109 We recommend that defendants should not be afforded a right to appeal against contingent orders under section 67A of POCA 2002 (which relate to property seized by police) to the Court of Appeal (Criminal Division).

Paragraph 22.146

Recommendation 110.

23.110 We recommend that affected third parties should not be afforded a right to appeal contingent orders under section 67 of POCA 2002 (which relate to funds held in bank accounts or seized cash) to the Court of Appeal (Criminal Division).

Paragraph 22.150

Recommendation 111.

23.111 We recommend that affected third parties should be afforded a right to appeal orders in relation to seized or produced personal property under section 67A of POCA 2002 if:

(1) no determination has been made in respect of interests in property under section 10A of POCA 2002; and

(2) the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.

Paragraph 22.157

Recommendation 112.

23.112 We recommend that appeals by third parties against orders in relation to seized or produced personal property under section 67A should be:

(1) to the Crown Court where the section 67A order is made in the magistrates' court;

(2) to the Court of Appeal (Criminal Division) where a contingent section 67A order is made in the Crown Court.

Paragraph 22.158

Recommendation 113.

23.113 We recommend that the prosecution be afforded the right to appeal against a refusal to make a contingent section 67A order and a section 67A order which includes some but not all assets to the Court of Appeal (Criminal Division), in accordance with their general right of appeal against the confiscation order pursuant to section 31 of POCA 2002.

Paragraph 22.162

Recommendation 114.

23.114 We recommend that the Court of Appeal (Criminal Division) have the power to remit a contingent enforcement order to the Crown Court for reconsideration of its terms where an appeal against the order has been successful.

Paragraph 22.171

Recommendation 115.

23.115 We recommend that there ought to be a statutory bar on appeals against contingent enforcement orders once those orders have been activated by way of a further order of the Crown Court.

Paragraph 22.177

Recommendation 116.

23.116 We recommend that enforcement steps be stayed both when an application for leave to appeal either a confiscation or contingent enforcement order is lodged and where an application to appeal is refused by the single Judge but renewed in-time to the full Court of Appeal (Criminal Division).

Paragraph 22.185

Recommendation 117.

23.117 We recommend that where leave to appeal to the Court of Appeal (Criminal Division) is granted out of time, enforcement steps must be stayed.

Paragraph 22.186

Recommendation 118.

23.118 We recommend that where the activation of a contingent enforcement order is challenged in the High Court out of time, enforcement steps must be stayed.

Paragraph 22.187

Recommendation 119.

23.119 We recommend that where an appeal is lodged along with an application for an extension of time, enforcement steps be stayed pending determination of both matters by the full Court of Appeal (Criminal Division).

Paragraph 22.188

Appendix 1: 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 2: List of Consultees

ORGANISATIONS, AGENCIES AND FORUMS

Organisations/Agencies/Forums
Asset Reality
Association of Chief Trading Standards Officers (ACTSO)
Bar Council
BCL Solicitors LLP
City of London Police
Criminal Appeal Office
Criminal Finance sub group of the Organised Crime Task Force in Northern Ireland. The current membership of the sub group is: (1) Police Service of Northern Ireland (2) Northern Ireland Environment Agency (3) Department for Communities (4) National Crime Agency (5) HM Revenue and Customs (6) Serious Fraud Office (7) Public Prosecution Service (8) Northern Ireland Courts and Tribunals Service (9) Department of Justice (10) Department of Finance
Criminal Law Solicitors' Association
Crown Prosecution Service
Eastern Region Special Operations Unit, Regional Economic Crime Unit
Financial Conduct Authority

Financial Crime Practice Group, Three Raymond Buildings
Fraud Lawyers Association
Gamvisory
Garden Court Chambers
His Majesty’s Courts and Tribunals Service Trust Statement team
His Majesty’s Prisons and Probation Service
His Majesty’s Revenue & Customs
Home Office
Howard League for Penal Reform
Insolvency Service
Justices' Legal Advisers' and Court Officers' Service (formerly the Justices' Clerks' Society)
Kingsley Napley LLP
Magistrates Association
Matrix Legal & Forensic Services Ltd
McGuire Woods
Ministry of Justice
National Compliance and Enforcement Service (NCES)
National Crime Agency and National Economic Crime Centre
NHS Counter Fraud Service Wales
North East ACE and Confiscation Teams
North East Regional Economic Crime Unit - ACE Team and also responding on behalf of the Confiscation Team
Northumbria University Financial Crime Compliance Group
Prison Reform Trust
Prisoners’ Advice Service
Private Prosecutors’ Association

R3 Association of Business Recovery Professionals
Regional Organised Crime Unit for West Midlands - Regional Economic Crime Unit, Financial Investigation Team
Richard Long & Co (a trading name of HS Alpha Limited)
Royal United Services Institute
Scottish Government, in consultation with the Crown Office and Procurator Fiscal Service (COPFS)
Serious Fraud Office
South East Confiscation Panel, East Kent Bench
South West Regional Economic Crime Unit, part of the South West Regional Organised Crime Unit
Spotlight on Corruption
The Environment Agency
Transparency International UK
UK Anti-Corruption Coalition
West Yorkshire Trading Standards
Wilsons Auctions

INDIVIDUALS

Name	Organisation
Officer	Devon & Cornwall Police
Officer	Hampshire Constabulary
Employee	His Majesty's Courts and Tribunals Service
Officer	Kent Police
Officer	Metropolitan Police Service
Member	North East Regional Economic Crime Unit
Officer	Surrey Police

Officer	Sussex Police
Officer	Tarian ROCU, South Wales Police
Officer	Thames Valley Police
Officer	Thames Valley Police, South East Regional Organised Crime Unit
Officer	West Mercia Police
Officer	Wiltshire Police
Solicitor	Thompson & Co Solicitors Ltd
Employee	Ministry of Justice
Employee	National Crime Agency
Andrew Campbell-Tiech KC	Drystone Chambers
Andrew Evans, Legal Advisor	West Midlands and Warwickshire Region, HMCTS
Andrew King	Hampshire County Council Trading Standards
Anne Richardson	North East Regional Economic Crime Unit - ACE Team and also responding on behalf of the Confiscation Team
Barnaby Hone	Drystone Chambers
Colin Briggs	
Daniel Michael Kirsta	East Sussex Trading Standards
David Winch	Bartfields Forensic Accountants
Dennis Clarke	Clarke Kiernan Solicitors LLP
DJ(MC) Andrew Shaw	
DJ(MC) Shamim Qureshi	
Dr Craig Fletcher	The Manchester Metropolitan University
Eileen Dowling	
Ethu Crorie	12CP Barristers
FT Judge Curtis	
Gary Pons	5 St Andrews Hill

HHJ Bernard Lever	
HHJ Michael Hopmeier	
HHJ Murray Shanks	
HHJ Rupert Lowe	
Ian Foxley	University of York
Ian Smith	33 Chancery Lane
Jason Aldridge	London Regional Asset Recovery Team (RART) - Asset Confiscation Enforcement (ACE)
John McNally	Drystone Chambers
John Rushton	National Crime Agency
Julian Sorrell, Principal Trading Standards Officer	Redcar and Cleveland Borough Council
Katherine Wells	
Kevin Thompson	West Berkshire District Council
Lord Justice Davis	
Lucy Edwards	Blake Morgan LLP
Mark Bentham	The Evening Standard
Mark Conway	
Michael Beattie	National Police Chiefs' Council (NPCC)
Michael Devaney	
Mike Levi	Cardiff University
Mrs Justice Emma Arbuthnot	
Mrs Justice Mary Stacey	
Naureen Shariff	Blackfords LLP
Nicola Padfield	Cambridge University
Penelope Small	33 Chancery Lane
Peter Alldridge	Queen Mary University of London

Phil Eaton JP	
Professor Johan Boucht	University of Oslo
Recorder Richard Mawhinney	
Rudi Fortson KC	
Sir Anthony Hooper	Matrix Chambers
Susan Rumford	National Trading Standards
Tristram Hicks	Tristram Hicks Associates Ltd

Appendix 3: Other Schedule 2 offences

INTRODUCTION

3.1 In Chapter 9, on criminal lifestyle cases, we made recommendations for two offences to be added to Schedule 2 to POCA 2002. In this appendix, we consider the case for other offences which consultees suggested should be considered as additions to Schedule 2, but which we ultimately rejected.

3.2 The main reason for rejecting the addition of the offences below was that they do not, in our view, align with the purposes of Schedule 2. Namely, they do not usually arise in situations of a knowledge disparity between the prosecution and defence; they are not commonly linked with notions of "living off crime"; and they are not sufficiently related to serious and organised crime to merit the automatic application of the criminal lifestyle assumptions. Any of these offences may still attract the application of the criminal lifestyle assumptions if one of the other triggers are satisfied. However, we are not convinced that a single instance of one of these offences is sufficient to merit that application.[1]

Overview of offences

3.3 This appendix considers the addition of nine offences or groups of offences which were proposed by consultees.[2]

(1) Offences under the Housing Act 2004, in particular sections 72 and 95 (offences related to licensing of houses in multiple occupancy ("HMOs")), and offences under regulations made pursuant to section 234 (regulations for the standards of management for HMOs).[3]

(2) Offences under the Money Laundering, Terrorist Finance and Transfer of Funds (Information on the Payer) Regulations 2017, regulations 86 to 88.[4]

(3) Financial sanctions offences under the Sanctions and Anti-Money Laundering Act 2018 and related legislation.[5]

(4) Section 9 of the Fraud Act 2006 and section 993 of the Companies Act 2006.[6]

(5) Offences relating to the illegal importation of dogs, contrary to articles 4, 16 and 17 of the Rabies (Importation of Dogs, Cats and Other Mammals) Order 1974 (pursuant to the Diseases of Animals Act 1950); sections 73 and 75 of the Animal Health Act 1981; regulation 39 of the Trading in Animals and Related

1 For more detail, see our reasoning at paras 9.95 to 9.103.
2 Consultation question 35.
3 Proposed by the Association of Chief Trading Standards Officers.
4 Personal response from a member of the Metropolitan Police.
5 Personal response from a member of the NCA.
6 Proposed by Insolvency Service.

Products (England) Regulations 2011 as amended; and article 16 of the Non-commercial Movement of Pets Order 2011.[7]

(6) Robbery.[8]

(7) Cultivation of cannabis contrary to section 6 of the Misuse of Drugs Act 1971.[9]

(8) Conspiracy.[10]

(9) Offences of illegal importation of cigarettes, tobacco and alcohol contrary to section 170 of the Customs and Excise Management Act 1979.[11]

OFFENCES RELATING TO HOUSES OF MULTIPLE OCCUPANCY (HMOS)

Consultation response

3.4 The Association of Chief Trading Standards Officers said:

> There is evidence of an increasing amount of laundered money going into property acquisition or renting out. The experience of Local Authorities is that this can often be accompanied by cases involving "rogue" landlords who alter properties for increased multiple occupation without the necessary planning consent. The benefit to the landlord can be very significant, and the conduct can sometimes also involve mortgage fraud and occupation by those caught in modern day slavery. Inclusion of Housing Act offences as lifestyle would be beneficial as an area of major public concern.

Legislative provisions

3.5 Section 72 of the Housing Act 2004 creates offences related to the licensing of HMOs. This includes the following.

(1) The offence of having control of or managing an HMO which is required to be licensed under section 61(1) but is not so licensed (section 72(1)). Liable on summary conviction; up to £20,000 fine.

(2) The offence of having control of or managing a licensed HMO and knowingly permitting another person to occupy the house resulting in more occupants than authorised under the license (section 72(2)). Liable on summary conviction; up to £20,000 fine.

(3) The offence of failing to comply with any conditions of the licence (section 72(3)). Liable on summary conviction; up to level 5 fine (£5000).

3.6 Similar offences can also be committed under sections 95(1) and (2) of the Housing Act 2004.

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7 Proposed by the Association of Chief Trading Standards Officers.
8 Personal response from a member of the North East RECU ACE Team.
9 Personal response from a member of the Metropolitan Police; David Winch (forensic accountant).
10 Proposed by the Financial Conduct Authority.
11 Proposed by HM Revenue and Customs; Association of Chief Trading Standards Officers; two personal responses from trading standards officers.

3.7 Section 234 of the Housing Act 2004 authorises the making of regulations for the management of HMOs. Under section 234(3) it is an offence to fail to comply with those regulations (liable on summary conviction; up to level 5 fine). The applicable regulations are currently the Management of HMOs (England) Regulations 2006.

3.8 There are instances where these offences are committed alongside the offence of breaching an enforcement notice under the Town and County Planning 1990.

Confiscation case law related to HMOs

3.9 Government guidance for local authorities on rogue landlord enforcement includes the power to seek a confiscation order under POCA 2002 as one of a range of enforcement powers. The guidance provides that POCA 2002 can assist with the "freezing of assets" and "civil recovery in the High Court". The powers of enforcement are described as:

> Landlord's property can form part of a confiscation order where the landlord has been convicted of a listed serious offence.[12]

3.10 The guidance includes one example of a case in which a confiscation order was made to the value of £55,372.96 against landlords who were convicted of negligent and dangerous management of flats. The case appears to have been a test case for using POCA 2002 to tackle rogue landlords. The notes on the case say:

> Due to the extensive history and lack of compliance it was decided to use this case as a test for the Proceeds of Crime Act (POCA) and how to tackle rogue landlords with a multidisciplinary approach. A joint prosecution with Trading Standards took place and there has been close working amongst colleagues across the council as part of Southwark's Rogue Landlords Multidisciplinary Team. This involves information sharing and the identification of rogue landlords who have committed offences relevant to other teams including Tenancy Relations, Planning, and Council Tax & Benefits.
>
> In July 2017 the landlords pleaded guilty. The application for POCA was made and in December 2018 they were sentenced and ordered to pay under proceeds of crime. The information required by the notice under section 235 was provided and it proved useful in terms of calculating the benefit under the POCA as it included tenancy agreements dating back for a number of years. Officers in Southwark now serve notices requiring similar information on a regular basis in order to establish occupation.[13]

3.11 In *R (LB of Newham) v Sumal & Sons (Properites) Ltd*[14], a corporate defendant was found guilty under section 95(1) of the Housing Act 2004 for being the owner or a rented property without a licence. The case was committed to the Crown Court for a confiscation order under section 70 POCA. The defendant was fined, ordered to pay costs and made subject of a confiscation order in the sum of £6450.83. On appeal, the Court of Appeal found that the continued receipt of rent was not "benefit" within the

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12 *Rogue Landlord Enforcement:Guidance for Local Authorities* p 79, https://www.gov.uk/government/publications/rogue-landlord-enforcement-guidance-for-local-authorities.

13 As above, p 58.

14 *R (LB of Newham) v Sumal & Sons (Properites) Ltd* [2013] EWCA Crim 1840, [2013] 1 WLR 2078.

meaning of property because it was not obtained as a result or in connection with the criminal conduct.

3.12 This case can be contrasted with *Brent LBC v Shah and others* (unreported, Harrow Crown Court 2018) where a confiscation order was made relating to property obtained by breaching an HMO licence (rather than failing to obtain one).[15] This case was described by the council as "racketeering".

3.13 There have been several cases involving large confiscation orders where the criminal lifestyle assumptions have applied to defendants convicted of offences relating to the illegal conversion and renting of properties. For example:

(1) *R v Salah Ali*.[16]The defendant was convicted in 2010 of failing to comply with an enforcement notice contrary to section 179(2) of the Town and County Planning Act 1990 for converting a large house into flats without planning permission and failing to comply with an enforcement notice served in 2008. In 2012, a confiscation order was made against him in the sum of £1,438,180.59. The confiscation order engaged the criminal lifestyle assumptions. The available amount exceeded the benefit figure, so an order was made for the full amount. On appeal, the amount of the confiscation order was reduced to £544,358 because housing benefit and rent received prior to the serving of an enforcement notice was found not to constitute benefit from criminal conduct.

(2) *R v Mohamed Medhi Ali* (2021, not yet reported). A confiscation order of £730,000 was made against the son of the defendant in the case above for continuing to rent out the illegally converted properties. He was convicted in April 2018 at Willesden Magistrates Court after an investigation by Brent council. It is not clear whether criminal lifestyle assumptions were used.

(3) In November 2019, the defendant, Gurdeep Kaur was ordered to repay £430,000 by a confiscation order for continuing to rent out an illegally converted HMO.[17] It is not clear whether criminal lifestyle assumptions were used.

(4) *R (LB of Haringey) v Roth.*[18] The defendant was convicted of Failure to Comply with Enforcement Notice under Town and County Planning Act 1990 and a confiscation order of £527,887.55 was made against him. The benefit figure was agreed. The amount of benefit was calculated as financial benefit from breach of the enforcement notice for 53 months. Criminal lifestyle assumptions were not relied upon. The order was upheld on appeal. The following challenges were dismissed: the summons only mentioned offending on one day, therefore a confiscation order relating to four years of non-compliance was invalid; obtaining property in breach of enforcement notice was not sufficiently

15 *Nearly Legal: Housing Law News and Comment, "Breaching licensing and proceeds of crime"* https://nearlylegal.co.uk/2018/02/breaching/.

16 *R v Salah Ali* [2014] EWCA Crim 1658, [2015] 1 WLR 84.

17 Local Government Lawyer, "Council secures £400k+ confiscation order against landlord over house in multiple occupation with 15 tenants (2)" https://www.localgovernmentlawyer.co.uk/regulatory-and-enforcement/406-regulatory-news/42103-council-secures-400k-confiscation-order-against-landlord-over-house-in-multiple-occupation-with-15-tenants-2.

18 *R (LB of Haringey) v Roth* [2020] EWCA Crim 967, [2020] 4 WLR 130.

causative; considering the calculation in terms of gross profits was disproportionate.

Compatibility with the purpose of criminal lifestyle assumptions

3.14 Unlicensed HMOs are potentially harmful because they might breach housing regulations on maintenance, have safety failures, insufficient gas/electricity supply and inadequate waste disposal (all of these are required by the HMO regulations). They might also be linked to insurance, mortgage and council tax fraud. There is some evidence of a link between unlicensed HMOs and organised crime, including modern slavery.[19] Operation Pheasant, a multi-agency partnership run by Fenland District Council, targets illegal HMOs owing to their link to human trafficking, organised crime and modern slavery.[20]

3.15 Research by the Local Government Association in 2014 suggests that prosecution of landlords under these offences is "a final resort".[21] Prosecution usually led to the imposition of a fine and "most landlords complied with the relevant legislation following conviction." However,

> In the worst cases where the landlord has a number of convictions, a confiscation order can be applied for under the Proceeds of Crime Act (POCA) 2002.[22]

3.16 There are other applicable financial penalties: failure to licence an HMO can lead to a Rent Repayment Order (RRO), requiring the landlord to repay up to 12 months' rent – section 73, Housing Act 2004.

3.17 There are several factors in favour of adding these offences to Schedule 2 to POCA 2002, including their link to serious and organised crime and the often-vulnerable position of victims, which may result in the first offence being more difficult to detect (although subsequent offences are more likely to be detected).

3.18 However, there are also significant factors which weigh against the addition of HMO offences to Schedule 2 include:

(1) that this offending is not associated with a serious knowledge disparity (between defendants who may be concealing their assets and prosecution agencies);

(2) there is a large range of severity of offending, the majority of which will be dealt with through local authority compliance and enforcement; and

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19 Inside Housing, "Housing's fight against modern slavery", https://www.insidehousing.co.uk/insight/insight/housings-fight-against-modern-slavery-60790; Landlord Today, "Policy appeal to landlords to help clampdown on organised crime gangs" Landlord Today, "Police appeal to landlords to help clampdown on organised crime gangs", https://www.landlordtoday.co.uk/breaking-news/2019/8/police-appeal-to-landlords-to-help-clampdown-on-organised-crime-gangs.

20 Fenland District Council, "Operation Pheasant – tackling houses of multiple occupation", https://fenland.gov.uk/media/8714/Operation-Pheasant/pdf/Operation_Pheasant.pdf.

21 Local Government Association, "Private sector housing research: Prosecuting landlords for poor property conditions", https://www.local.gov.uk/sites/default/files/documents/prosecution-costs-pdf-989.pdf, p 3.

22 Local Government Association, "Private sector housing research: Prosecuting landlords for poor property conditions" https://www.local.gov.uk/sites/default/files/documents/prosecution-costs-pdf-989.pdf, p 19.

(3) serious offending is likely to meet other triggers rendering their inclusion redundant.

Conclusion

3.19 Although there are some cases which demonstrate a link between HMO offending and more serious criminal conduct, overall, it is our view that there is such variation in cases involving this type of offending that to include these offences in Schedule 2 could lead to the criminal lifestyle provisions inappropriately capturing low-level offenders. Where the offending is indicative of a criminal lifestyle, it will be captured by the other criminal lifestyle triggers, evidenced by the several cases in which the assumptions have been successfully applied. Consequently, we do not recommend adding offences relating to HMOs to POCA 2002, Schedule 2.

OFFENCES UNDER THE MONEY LAUNDERING REGULATIONS 2017

Consultation response

3.20 These offences were proposed by a member of the Metropolitan Police, without supporting reasons.

Legislative provisions

3.21 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force on 26 June 2017. The Regulations apply to financial institutions, including money service businesses, and to those sectors that are seen as "gatekeepers" to the financial system including auditors, legal advisers, insolvency practitioners, external accountants, tax advisers, estate agents, casinos, high value dealers (HVDs) and trust or company service providers (TCSPs) (paragraph 7.5).

3.22 The Regulations place duties on these institutions to apply due diligence regarding their customers, retention of records, transparency in beneficial ownership, and a duty to cooperate with supervisory authorities.

3.23 Part 9, Chapter 3 regulates the criminal offences created by the Regulations. These include the following offences.

(1) Contravening a relevant requirement under the Regulations (subject to due diligence defence) (triable either way; max 2 years) – section 86(1).

(2) Prejudicing an investigation into a potential contravention of a relevant requirement (subject to six defences) (triable either way; max 2 years) – sections 87(1) and (2).

(3) Providing false or misleading information in purported compliance with any requirement imposed by the Regulations (triable either way; max 2 years) – section 88(1).

(4) Disclosing information in contravention of a relevant requirement (triable either way; max 2 years) – section 88(3).

3.24 Individuals or bodies corporate can be liable (subject to section 92).

Confiscation case law

3.25 As of 11 November 2020, the FCA had not yet brought a prosecution under the 2017 Regulations.[23] There appear to be a number of ongoing investigations.

Compatibility with the purpose of criminal lifestyle assumptions

3.26 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 were introduced to implement the Fourth Money Laundering Directive (4MLD) and the Funds Transfer Regulation to:

> Give effect to the updated Financial Action Task Force (FATF) global standards which promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.[24]

3.27 The Explanatory Notes also describe the problem of money laundering which can "undermine the integrity and stability of our financial markets and institutions" and is also "a key enabler of serious organised crime" (paragraph 7.3).

3.28 The Regulations apply to over 100,000 businesses and "require that these businesses know their customers and manage their risks". The Regulations are "deliberately not prescriptive, providing flexibility in order to promote a proportionate and effective risk-based approach" (paragraph 7.4).

3.29 In favour of addition to Schedule 2, these offences have some links to organised crime and prosecution of individuals is likely to encounter a knowledge disparity between the prosecution and defence as to the source of the defendant's funds.

3.30 There are also several arguments which weigh against the addition of these offences to Schedule 2, POCA 2002:

(1) the offences are regulatory in nature;

(2) it is a significant burden to conduct a six-year financial investigation into large financial institutions;

(3) there does not appear to be an immediate need given the lack of prosecutions;

(4) there is no confiscation case law to assess the workability of the current triggers;

(5) substantive money laundering offences are already included in Schedule 2.

Conclusion

3.31 On the basis of the analysis above, we do not recommend adding offences contrary to the Money Laundering Regulations 2017 to Schedule 2 of POCA 2002

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23 Eversheds Sutherlands, "FCA discontinues half of its investigations into criminal breaches of UK money laundering regulations since January 2020", https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Financial-services-and-dispute-investigation/FCA_discontinues_half_of_its_investigations_into_criminal_breaches.

24 Explanatory notes, para 3.2.

FINANCIAL SANCTIONS OFFENCES UNDER THE SANCTIONS AND ANTI-MONEY LAUNDERING ACT 2018

Consultation response

3.32 These offences were proposed by a member of the National Crime Agency, without supporting reasons.

Legislative provisions

3.33 The Sanctions and Anti-Money Laundering Act 2018 provides for:

(1) powers to create sanctions regimes and review procedures; and

(2) powers to create AML and counter-terrorist financing regulations.

3.34 It creates a new legislative framework to provide powers to impose sanctions and comply with the UK's international obligations. It establishes the powers and procedures needed to continue implementing sanctions after Brexit (as the power to do so was previously derived largely from the ECA 1972). It also created a power to amend the MLR 2017 after Brexit. The Act also responded to a 2010 Supreme Court judgment on the impact of the United Nations Act 1946 relating to open-ended asset freezes.

3.35 The Act does not create offences, but section 17 makes provision for the enforcement of sanctions through offences, which may be set out in regulations. These offences can also be subject to DPAs and Serious Crime Prevention Orders.

3.36 Section 3 of the Sanctions Act 2018 defines "financial sanctions" and designates the Office of Financial Sanctions Implementation (OFSI) (part of HMT) as the responsible body for implementing and administering international financial sanctions in the UK.

3.37 The main financial sanctions offences are as follows:

(1) Terrorist Asset Freezing etc Act 2010

(a) Section 11 – dealing with funds or economic resources owned, held or controlled by a designated person.

(b) Section 12 – making funds or financial services available to designated persons (or for the benefit of a designated person, section 13).

(c) Sections 14 and 15 – as above, for "economic resources".

(d) Failing to comply with reporting obligations (section 19); providing false information to obtain a licence or to fail to comply with conditions of a licence (section 17).

(2) Anti-Terrorism Crime and Security Act 2001, Schedule 3 (Freezing orders) – Paragraph 7, offences relating to freezing orders:

(a) Sub-paragraph (2) makes it an offence to fail to comply with a prohibition imposed by a freezing order

(b) Sub-paragraph (3) makes it an offence to engage in an activity which enables or facilitates the commission of an offence by another person under sub-paragraph 2.

(c) Sub-paragraph (4) contains offences in relation to failing to provide information in response to a requirement in an order, and providing false or misleading information in response to a requirement or in order to obtain a licence under the order.

(3) Counter-Terrorism Act 2008, Schedule 7 (Terrorist financing and money laundering):

(a) Paragraph 30 – the offence of failing to comply with a requirement imposed by a direction under Schedule 7.

(b) Paragraph 30A – the offence of intentionally participating in activities knowing that the objective or effect of them is (whether directly or indirectly) to circumvent a requirement imposed by a direction under Schedule 7.

(c) Paragraph 31 – the offence of providing false material to obtain a license.

Confiscation case law

3.38 There are several cases which have involved breaches of sanctions and confiscation orders. Two are cases against corporations, both of which were also bribery cases. The third is a breach of a trade sanction and involved particular criminal conduct only.

(1) *Mabey & Johnson.* In 2009, the defendants were prosecuted for bribery and breaches of sanctions by the SFO and plead guilty to the charges. They paid the fines, including £2m in respect of the sanction breaches, and were ordered to pay £1.1m in confiscation.[25] Civil recovery proceedings were subsequently bought to seize the dividends.

(2) *Weir Group Plc*. In 2010, Weir Group Plc was fined £3m and made subject to a £13.9m confiscation order for paying bribes for contracts from Saddam Hussein's government in contravention of sanctions.[26]

(3) *R v McDowell*.[27] The defendant was an arm dealer convicted in 2013 of supplying controlled goods. He was found to have benefitted by £2,557,826.30 and a confiscation order was made in the available amount of £292,499.60. This was benefit from particular criminal conduct.[28]

Compatibility with the purpose of the criminal lifestyle provisions

3.39 The OFSI guidance on financial sanctions includes four types of penalty for breaches of financial sanctions: custodial sentences, DPAs, Serious Crime Prevention Orders

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25 BBC News, "British firm fined for corruption", http://news.bbc.co.uk/1/hi/uk/8275626.stm.
26 BBC News, "Weir Group Iraq cash to fund humanitarian projects", https://www.bbc.co.uk/news/uk-scotland-12439531.
27 *R v McDowell and Singh* [2015] EWCA Crim 173, [2015] WLR (D) 84.
28 *R v McDowell and Singh* [2015] EWCA Crim 173, [2015] WLR (D) 84.

(SCPOs) and monetary penalties.[29] These powers are derived from the Policing and Crime Act 2017. The compliance and enforcement approach of the financial sanction regime seems relatively self-contained. It follows a clearly defined scheme of "promote, enable, respond and change".[30] Although OFSI is responsible for enforcement, it may refer cases to prosecutorial agencies for prosecution.

3.40 In favour of adding these offences to Schedule 2, POCA 2002, is the argument that this offending may be difficult to detect and related to serious and organised crime.

3.41 However, there are several arguments against their addition, including that many of these offences are facilitation offences which are not necessarily carried out for financial gain. Furthermore, they are largely governed by a regulatory and compliance enforcement approach, which suggests that the criminal lifestyle provisions are not appropriate.

Conclusion

3.42 We consequently do not recommend adding the financial sanctions offences to Schedule 2, POCA 2002.

OFFENCES CONTRARY TO SECTION 9 OF THE FRAUD ACT 2006 AND SECTION 993 OF THE COMPANIES ACT 2006

Consultation response

3.43 One practitioner at the NCA said:

> We consider that fraudulent trading offences should be included to trigger a finding of a criminal lifestyle, this should include both the incorporated and sole trader offending (Companies Act 2006 Section 993 and Fraud Act 2006 Section 9). In our area of work these offences are repeated in the form of serial offending and making a living at the expense of other businesses and individuals. It is a form of organised crime in many cases with businesses starting and ending quickly, moving on to new ventures and linked to organised crime. The repeated nature of this conduct does result in a disparity of knowledge between the prosecution and defence in evidencing the previous conduct.

Legislative provisions

3.44 Section 993 of the Companies Act 2006:

> If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits an offence.

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29 Office of Financial Sanctions Implementation, HM Treasury, "UK financial sanctions: General guidance", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961516/General_Guidance_-_UK_Financial_Sanctions.pdf, pp 38-39.

30 Office of Financial Sanctions Implementation, HM Treasury, "UK financial sanctions: General guidance", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961516/General_Guidance_-_UK_Financial_Sanctions.pdf, p 37.

3.45 Section 9 of the Fraud Act 2006 applies to persons and businesses who are "outside the reach" of the offence of fraudulent trading in section 993 of the Companies Act 2006 and makes it an offence to carry on a business with intent to defraud creditors of any person or for any other fraudulent purpose. It applies to sole traders, partnerships and trusts and other non-corporate entities.

3.46 Section 993 CA 2006 and section 9 FA 2006 are triable either way and punishable on indictment by max 10 years imprisonment.

Confiscation case law

3.47 Convictions under section 993 CA 2006 and section 9 FA 2006 appear to lead to confiscation orders with relative frequency.

3.48 A high-profile example includes the SFO prosecution of six individuals in relation to the fraudulent sale of tickets by Xclusive Companies, three of whom were convicted in 2011. In November 2011 and October 2012, confiscation orders were made against them in the sums of £19,855, £1,250,000 (of which £1,036,872.13 was to be paid in compensation) and £500,000.[31]

3.49 Section 993 cases may raise particular difficulties regarding restraint of assets owed to creditors.[32]

3.50 Cases which have reached the Court of Appeal under these provisions include:

(1) *R v Mark Robertson.* The defendant was convicted of fraudulent trading under old legislation (section 458 Companies Act 1985). A confiscation order was made for £507,483 (under old legislation, s71 CJA 1988). The criminal lifestyle assumptions appear to have applied.[33]

(2) *R v Grainger*[34] and *R v Staughan*,[35] are both confiscation cases which refer to legislation which predates POCA 2002 and therefore does not apply the criminal lifestyle assumptions.

Compatibility with the purpose of the criminal lifestyle provisions

3.51 One article from barristers at Carmelite Chambers says the following:

> The Law Commission proposes that money laundering offences, fraud, bribery, and corruption should not be included in the schedule of offences that trigger a finding of a criminal lifestyle. (Consultation Questions 30, 31, 33, and 34).
>
> It may be sensible to go further and to disapply the criminal lifestyle provisions altogether in the case of a corporate defendant. The underlying idea – that offending of a particular type suggests a criminal personality and that the innocent exceptions can easily rebut that suggestion – was always flawed. Only companies created for the purposes of the crime are remotely comparable: they are rarely the subject of useful corporate prosecution and, if they hold assets, these can nearly always be

31 SFO, "Xclusive Tickets Ltd", https://www.sfo.gov.uk/cases/xclusive-tickets-limited/.
32 See, for example, *SFO v Lexi Holdings Plc* [2008] EWCA Crim 1443, [2009] QB 376.
33 *R v Mark Robertson* [2006] EWCA Crim 1289, [2006] 5 WLUK 344, at [39].
34 *R v Grainger* [2008] EWCA Crim 2506, [2008] 10 WLUK 316.
35 *R v Staughan* [2009] EWCA Crim 955, [2009] 4 WLUK 496.

attributed to the people behind them using existing principles of law. In our view, the application of the criminal lifestyle provision to companies is generally counter-productive and will make orders of corporate confiscation – already under-utilised by the courts – less likely in the future.[36]

Conclusion

3.52 We have not recommended adding fraud to Schedule 2. In light of that decision, and in view of the particular difficulties which may arise from applying the criminal lifestyle provisions to companies automatically through Schedule 2, we do not believe that these fraud offences should be treated differently.

OFFENCES RELATED TO THE ILLEGAL IMPORTATION OF DOGS

Consultation response

3.53 The Association of Chief Trading Standards Officers proposed the addition of these offences. Although they did not provide reasons in their formal response, we sought their views after the consultation period.

3.54 We asked whether these offences tend to be linked to organised crime, are on a large scale, tend to take place over several years or involve multiple offences. They said:

> In Greater London a high percentage of illegal imported dogs are discovered once they have been purchased by the end user (new owner) and the traceability back to the seller is challenging. Local Authority officers faces barriers to enforcement with resources and limited training. Investigations often link over departments and boundaries with inconsistent use of intelligent sharing. Police support is also sporadic dependant on the area.

3.55 We asked whether these offences regularly result in large confiscation orders. They were unsure.

Legislative provisions

3.56 The relevant offences are:

(1) Articles 4, 16 and 17, Rabies (Importation of Dogs, Cats and Other Mammals) Order 1974 (pursuant to the Diseases of Animals Act 1950); sections 73 and 75, Animal Health Act 1981;

(2) Section 39, Trading in Animals and Related Products (England) Regulations 2011 as amended; and

(3) Section 16, the Non-commercial Movement of Pets Order 2011.

Confiscation case law

3.57 We were not able to identify cases which involved prosecution under these provisions and confiscation proceedings.

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[36] Charles Bott QC and Vanessa Reid, "Corporate Confiscation: Time for a Closer Look", https://www.carmelitechambers.co.uk/blog/blog-corporate-confiscation-time-closer-look.

Compatibility with the purpose of the criminal lifestyle provisions

3.58 There is insufficient information to suggest whether these offences regularly lead to confiscation proceedings or are suitable for the application of the criminal lifestyle provisions. These offences do not seem to engage the sorts of considerations which would merit inclusion in Schedule 2, POCA 2002.

Conclusion

3.59 We consequently do not recommend adding offences relating to the illegal importation of dogs to Schedule 2, POCA 2002.

ROBBERY

Consultation response

3.60 This offence was proposed in a personal response from a member of the North East RECU ACE Team, without additional explanation.

Legislative provisions

3.61 Robbery is an offence contrary to section 8 of the Theft Act 1968.

Confiscation case law

3.62 As an acquisitive offence, robbery may attract confiscation proceedings. However, we did not identify particular cases where robbery offences resulted in confiscation orders, or which suggested that the absence of the offence in Schedule 2 inappropriately limited the confiscation order made.

Compatibility with the purpose of the criminal lifestyle provisions

3.63 We do not believe that robbery is an appropriate offence to be added to Schedule 2. It can be committed in a diverse range of ways, and repeat offending will likely be caught by the other triggers.

Conclusion

3.64 We do not recommend adding robbery to Schedule 2.

CULTIVATION OF CANNABIS CONTRARY TO SECTION 6 OF THE MISUSE OF DRUGS ACT 1971

Consultation responses

3.65 An individual member of the Metropolitan Police Service said:

> Often cultivating cannabis is charged with the officers not knowing it may not permit an effective confiscation. I acknowledge that this is the same activity as “producing drugs” which is a lifestyle offence, so it is bizarre that the same activity is either a Lifestyle offence or not depending on the charge.

3.66 Another individual (David Winch) said:

> It appears anomalous that section 6 Misuse of Drugs Act 1971 (cultivation of cannabis plant) is not included in Schedule 2. In consequence cultivation offences

may be charged as production offences under section 4 MDA 1971 in order to bring them within Schedule 2.

Legislative provisions

3.67 Section 6, Drug Misuse Act states:

> Restriction of cultivation of cannabis plant.
>
> (1) Subject to any regulations under section 7 of this Act for the time being in force, it shall not be lawful for a person to cultivate any plant of the genus Cannabis.
>
> (2) Subject to section 28 of this Act, it is an offence to cultivate any such plant in contravention subsection (1) above.

Confiscation case law

3.68 The majority of cases involving section 6 Misuse of Drugs Act 1971 offences are first instance decisions in which minor sanctions were applied. The below cases, instead, are those which involve appeal matters regarding large confiscation orders and will skew the picture with regard to this offence as indicative of criminal lifestyle. The main drug offence recorded in 2019/20 was "possession of cannabis" (63%)[37] and it is noted in relation to the sentencing guidelines that offences involving a low number of cannabis plants cultivated for the purposes of personal use will fall into the lowest category.

3.69 The following cases involve cultivation offences and confiscation orders.

(1) The case of *R v Benos (Gavin Vasiouos)*[38] involved a decision as to whether assets in which the defendant held an equitable interest ought to be counted towards his benefit figure. The substantive charges were two counts of the cultivation of cannabis and the confiscation order was made in the sum of £43,344.01.

(2) The case of *R v Darren Smith*[39] involved a large-scale cultivation of cannabis and a confiscation order was made in the sum of £26,964.01.

(3) The case of *R v Stephen Henry Berry*[40] involved charges of cannabis cultivation relating to 80 plants. The yield from this crop depended on how the cannabis was to be sold but the court heard that a single crop, sold in bulk, had a minimum value of £9,632. On the basis of three yields a year and if sold in small amounts, a crop could yield up to £80,000, for a total of some £240,000 per year. Notably, the confiscation order made was nominal (£1).

(4) The case of *R v Smith (Solly Joseph)*[41] involved the cultivation of cannabis worth £7,415.

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37 House of Commons Library,: *Drug Crime: Statistics for England and Wales*, Briefing paper No 9029, 26 October 2020.
38 *R v Benos (Gavin Vasiouos)* [2019] EWCA Crim 1093, [2019] 6 WLUK 392.
39 *R v Darren Smith* [2016] EWCA Crim 240, [2016] 2 WLUK 140.
40 *R v Berry (Stephen Henry)* [2014] EWCA Crim 1943, [2014] 8 WLUK 192.
41 *R v Smith (Solly Joseph)* [2012] EWCA Crim 1954, [2012] 6 WLUK 706.

(5) In the case of *R v Pascal Peter Owens, Wendy Elizabeth Rutter*,[42] Mr Owens was convicted of conspiracy to produce cannabis (among other charges) and a confiscation order was made in the sum of £33,456.85.

3.70 The amounts above suggest that where confiscation orders are made in conjunction with section 6 MDA offences, they tend to be in large amounts. However, as noted previously, this does not indicate conclusively that this is inherently an offence which is connected with a criminal lifestyle.

Compatibility with the purpose of the criminal lifestyle provisions

3.71 Offences contrary to section 6 of the Misuse of Drugs Act 1971 tend to be low-level. An offence may be committed by cultivating a single plant for personal use. Although section 6 of the Misuse of Drugs Act 1971 may be used to target large scale cultivation, this will be captured by other triggers. Low-level offending does not engage concerns surrounding a knowledge disparity and is not inherently linked to organised crime.

3.72 Given the inclusion of other Misuse of Drugs Act offences in Schedule 2, POCA 2002 exclusion of section 6 may be deliberate, given its association with low-level offending. We also considered that there may be convincing reasons to remove low-level instances of the Misuse of Drugs Act offences already in the schedule.

3.73 A study undertaken by the University of Central Lancashire considered trends in cannabis use and cultivation and suggested that:

> The study highlights a UK pattern in domestic cultivation, that is moving away from large scale commercial cultivation, at times co-ordinated by South East Asian organised crime groups, to increased cultivation within residential premises by British citizens. Offenders range from those who have no prior criminal history to those who are serious and persistent offenders.[43]

3.74 This article also notes that UK "growers" can be categorised as follows:

(1) The sole-use grower: cultivating cannabis for personal use and use with friends.

(2) The medical grower: individual and other use, purely for medical reasons.

(3) The social grower: cultivation to ensure good quality and good value cannabis for themselves and friends.

(4) The social/commercial grower: growing for themselves and friends but with an element of profit.

(5) The commercial grower: growing to make money, with anyone as a possible customer.[44]

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42 *R v Owens (Pascal Peter) and Rutter (Wendy Elizabeth)* [2006] EWCA Crim 1061, [2006] 4 WLUK 246.

43 Stuart Kirby and Katie Peal, *The changing pattern of domestic cannabis cultivation in the UK and its impact on the cannabis market*, http://clok.uclan.ac.uk/12376/1/12376_kirby.pdf.

44 As above, p 4.

3.75 Arguably, categories (4) and (5) would be subject to confiscation proceedings, but the final category is the only one that could reasonably be considered to be indicative of a criminal lifestyle. Including section 6 of the Misuse of Drugs Act would capture everyone in categories (4) and (5) but, at the same time, over-capture lower level offenders.

Conclusion

3.76 We consequently do not recommend adding section 6 of the Misuse of Drugs Act 1971 to Schedule 2, POCA 2002.

CONSPIRACY (INCLUDING CONSPIRACY TO DEFRAUD AND CONSPIRACY TO CHEAT)

Consultation response

3.77 The Financial Conduct Authority said:

> Conspiracy should be as the nature of it is organised, premeditated design to commit a crime. Conspiracy to commit Schedule 2 offences are included but not conspiracy in and of itself isn't?

Legislative provisions

3.78 Section 1 of the Criminal Law Act 1977 makes conspiracy an offence:

> (6) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—
>
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
>
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,
>
> he is guilty of conspiracy to commit the offence or offences in question.

Common law offences

3.79 The definition of conspiracy to defraud can be found in *Scott v Metropolitan Police Commissioner*.[45] It reads:

> [A]n agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.

3.80 Conspiracy to cheat is a common law offence of tax evasion. It is a remnant of the common law offences of "cheating" and is only retained to the extent that it applies to

[45] *Scott v Metropolitan Police Commissioner* [1975] AC 819.

public revenue. Jonathan Lennon and Aziz Rahman, in an article in Inside Time,[46] discuss the reasoning behind retaining this as a separate offence to those captured by the Theft Act 1968 and the Fraud Act 2006:

> There is only one reason for this – Parliament simply did not want to take the risk of abolishing and replacing an offence aimed at tax evaders in case the new law presented problems.

Confiscation case law

3.81 We did not identify any confiscation case in relation to these conspiracy offences.

Compatibility with the purpose of the criminal lifestyle provisions

Conspiracy

3.82 The offence of conspiracy is extremely broad and relates to offences which are not acquisitive and therefore not relevant for the purposes of confiscation proceedings.

3.83 Given that inchoate offences which are connected to the other Schedule 2 offences are already accounted for in Schedule 2, inclusion of such a broad offence is arguably unhelpful. Conspiracy to commit even the most minor offence may be captured by this provision which would unduly widen the scope of Schedule 2.

Conspiracy to defraud

3.84 In 2002, the Law Commission recommended that the offence of "conspiracy to defraud" be replaced by a comprehensive set of fraud offences which resulted in the Fraud Act 2006. While the government adopted the Law Commission proposals with regard to the widening and simplification of offences in the Act, it opted to retain the common law offence of conspiracy to defraud which is arguably wider and more generalised than any of the offences in the Act. This was retained as a fall-back and catch-all offence if prosecutors were concerned that they may not be able to make out the elements of the more specific offences in the Act.[47]

3.85 It is necessary to note that at paragraph 12 of the Government's advice on prosecuting this offence it is outlined when this offence may be a preferable option to the statutory offences. It is suggested that there might be situations which involve an allegation of a larger conspiracy that is unlikely to be captured by discrete charges.

3.86 However, in relation to whether this is a persuasive argument for inclusion in Schedule 2, it is likely that in such cases this offending would be captured by the other criminal lifestyle triggers.

3.87 Given that we have determined that fraud offences are in themselves too wide to be included in Schedule 2, it is incongruous to suggest that this broader (and arguably outdated) common law offence would be appropriately included.

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46 Jonathan Lennon and Aziz Rahman, *Conspiracy to defraud and conspiracy to cheat,* https://insidetime.org/conspiracy-to-defraud-conspiracy-to-cheat-2/.

47 *Use of the common law offence of conspiracy to defraud*, https://www.gov.uk/guidance/use-of-the-common-law-offence-of-conspiracy-to-defraud--6.

Conspiracy to cheat

3.88 Like conspiracy to defraud, conspiracy to cheat appears to be a catch-all offence for cases which cannot be captured by the Fraud Act 2006. It is articulated as such in the CPS guidance on inchoate offences:

> In cases involving serious revenue fraud, it may, however, be proper to charge the alleged offenders with conspiracy to cheat the revenue (for which the maximum penalty is at large) rather than with conspiracy to commit individual offences under the Fraud Act 2006.[48]

3.89 This may provide an argument for inclusion of "conspiracy to cheat" in Schedule 2 since offending of this scale is likely to be more indicative of a criminal lifestyle. However, if the offending is of a scale such as to require a charge as broad as the common law offence, it is likely to be caught by the other triggers.

Conclusion

3.90 We consequently do not recommend adding conspiracy, conspiracy to defraud or conspiracy to cheat to Schedule 2.

ILLEGAL IMPORTATION OF CIGARETTES, TOBACCO AND ALCOHOL CONTRARY TO SECTION 170 OF THE CUSTOMS AND EXCISE MANAGEMENT ACT 1979

Consultation response

3.91 An individual at HMRC submitted the following response:

> Section 170 of the Customs and Excise Management Act 1979 where the importation offence involves cigarettes, Hand Rolling Tobacco (HRT) or alcohol upon which duty has been fraudulently evaded.
>
> Organised criminal gangs (OCG's) are actively involved in the illicit importation of alcohol, HRT and cigarettes. The offence of conspiracy to cheat the public revenue of Excise Duty payable on alcohol and tobacco products should be considered to be a serious offence. For example, it is estimated that at least a sum of £600m per year across wines, beers and spirits is lost through duty fraud. Additionally, other offences such as human trafficking and modern slavery are often associated with excise duty fraud relating to cigarettes, HRT and alcohol.
>
> Such offences result in significant tax losses to the exchequer, undermine the legitimate trade of such items and result in risks to public health especially where products are imported which are not permitted for sale within the UK or are counterfeit goods.
>
> Evidence revealed within the investigation of such cases shows the OCG's involved in such offences are highly organised and have experience in the distribution of illicit alcohol, tobacco and HRT to customers. Such groups are often sophisticated, work across international borders, are resilient to law enforcement interventions and actively seek to frustrate law enforcement activity to disrupt their illicit activities.

[48] Citing *R v Dosanjh (Sandeep)* [2013] EWCA Crim 2366, [2014] 1 WLR 1780.

Consequently, this means the detection of such offences can be very difficult. The Law Commission confiscation consultation full paper at 13:43 states that 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”. This statement can equally be applied to excise duty fraud involving organized criminals groups. Such groups include people who could be termed “career criminals”. They are professional criminals involved in organised crime whose business is founded upon the commission of such offences. Limited prison sentences in relation to excise duty fraud offences do not deter such people from committing repeat offences. Additionally, it is not uncommon to see other family members and friends being involved in the illicit activity associated with excise duty fraud.

Similarly, the scale and volume of such offences which are often transacted in the criminal economy make excise duty fraud very similar in many aspects to the drugs trade. For these reasons, excise duty fraud in relation to cigarettes, HRT and alcohol should be included within the list of Schedule 2 offences. Inclusion of the schedule would enable law enforcement to be able to take a robust approach to robustly tackle those organised gangs which are involved in such offences and to enable the effective recovery of the proceeds of crime which are generated by such offences.

3.92 A trading standards officer said:

Offences concerning the importation or wholesale distribution of tobacco and alcohol products are of major public concern on the public health agenda and at wholesale level are notoriously difficult to present to a Court to attract the appropriate level of punishment. Removal of the attractive “risk” in this area of crime would have a valuable public impact.

3.93 Another trading standards officer said:

Offences concerning the importation or wholesale distribution of tobacco and alcohol. These sorts of offences are often committed by organised crime groups and the benefit can be significant.

Legislative provisions

3.94 Section 170, Customs and Excise Management Act 1979 states:

170.— Penalty for fraudulent evasion of duty, etc.

(7) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person—

(a) knowingly acquires possession of any of the following goods, that is to say—

(i) goods which have been unlawfully removed from a warehouse or Queen's warehouse;

(ii) goods which are chargeable with a duty which has not been paid;

(iii) goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment; or

(b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods,

and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this section and may be arrested.

(8) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion—

(a) of any duty chargeable on the goods;

(b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or

(c) of any provision of the Customs and Excise Acts 1979 [, or Part 1 or section 40A or 40B of the Taxation (Cross-border Trade) Act 2018][2][, or Part 1 of the Taxation (Cross-border Trade) Act 2018,][3] applicable to the goods,

he shall be guilty of an offence under this section and may be arrested.

(9) Subject to subsection (4), (4A), (4AA), (4B) or (4C) below, a person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a penalty of £20,000 or of three times the value of the goods, whichever is the greater, or to imprisonment for a term not exceeding 6 months, or to both; or

(b) on conviction on indictment, to a penalty of any amount, or to imprisonment for a term not exceeding 7 years, or to both.

(10) In the case of an offence under this section in connection with prohibition or restriction on importation or exportation having effect by virtue of section 3 of the Misuse of Drugs Act 1971, subsection (3) above shall have effect subject to the modifications specified in Schedule 1 to this Act.

(4A) In the case of—

(a) an offence under subsection (1) or (2) above committed in Great Britain in connection with a prohibition or restriction on the importation or exportation of any weapon or ammunition that is of a kind mentioned in section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) or (c) or (1A)(a) of the Firearms Act 1968, or

(b) any such offence committed in Northern Ireland in connection with a prohibition or restriction on the importation or exportation of any weapon or ammunition that is of a kind mentioned in Article 6(1)(a), (ab), (ac), (ad), (ae) or (c) or (1A)(a) of the Firearms (Northern Ireland) Order 1981,

subsection (3)(b) above shall have effect as if for the words "imprisonment for a term not exceeding 7 years" there were substituted the words "imprisonment for life".

(4AA) In the case of an offence under subsection (1) or (2) above committed in connection with the prohibitions contained in sections 20 and 21 of the Forgery and Counterfeiting Act 1981, subsection (3)(b) above shall have effect as if for the words "7 years" there were substituted the words "10 years".

(4B) In the case of an offence under subsection (1) or (2) above in connection with the prohibition contained in regulation 2 of the Import of Seal Skins Regulations 1996, subsection (3) above shall have effect as if-

(c) for paragraph (a) there were substituted the following-

"(a) on summary conviction, to a fine not exceeding [£20,000][18] or to imprisonment for a term not exceeding three months, or to both"

; and

(b) in paragraph (b) for the words "7 years" there were substituted the words "2 years".

(4C) In the case of an offence under subsection (1) or (2) above in connection with a prohibition or restriction relating to the importation, exportation or shipment as stores of nuclear material, subsection (3)(b) above shall have effect as if for the words "7 years" there were substituted the words "14 years".

(5) In any case where a person would, apart from this subsection, be guilty of—

(a) an offence under this section in connection with a prohibition or restriction; and

(b) a corresponding offence under the enactment or other instrument imposing the prohibition or restriction, being an offence for which a fine or other penalty is expressly provided by that enactment or other instrument,

he shall not be guilty of the offence mentioned in paragraph (a) of this subsection.

(6) Where any person is guilty of an offence under this section, the goods in respect of which the offence was committed shall be liable to forfeiture

Confiscation case law

3.95 The case of *Revenue and Customs Prosecutions Office v M*[49] relates to section 170 of the Customs and Excise Management Act 1979 and confiscation orders. In this case the prosecution did not rely on the criminal lifestyle provisions. However, they submitted that the defendant was liable for the full amount of the tobacco being imported and the full amount of the excise duty payable on the tobacco. The defendant asserted that he was paid £100 for loading the lorry but was otherwise not involved in the importation and did not obtain any further benefit. It was held that the defendant did not in fact obtain any benefit beyond the £100. The Court of Appeal commented that while there were suspicious withdrawals and deposits into the defendant's account, these were not decisively attributable to the calculated benefit figure (£304,123.71) and because the criminal lifestyle assumptions were not applied, they could not be considered as part of his criminal lifestyle.

3.96 This case involved a single instance of criminal conduct; therefore, it was not captured by the other triggers. Had Schedule 2 been triggered, financial investigators would have been able to consider his finances more broadly and potentially increase his benefit figure substantially.

3.97 In the case of *R v Mackle,*[50] it was similarly concluded that the defendants did not have criminal lifestyles and confiscation proceedings were pursued on the basis of particular criminal conduct. This case involved 3 defendants who were convicted of the fraudulent evasion of duty and confiscation orders were made in the sums £518,387.00, £259,193.00 and £259,193.00.

3.98 In the case of *R v Abrar Hussain*,[51] on the other hand, the defendant was found to have a criminal lifestyle, but the prosecution invited the court not to apply the assumptions on the basis that the conduct was particular criminal conduct for which the defendant had available assets to pay the order sought. This case involved the non-payment of duties on cigarettes and tobacco. This case is an example in which the assumptions were triggered despite the offence not being listed in Schedule 2.

Compatibility with the purpose of the criminal lifestyle provisions

3.99 While there may be some instances of offending under section 170 of the Customs and Excise Management Act 1970 which appropriately attract the criminal lifestyle provisions, and some offending may be related to serious and organised crime, the provisions should not be automatically applied to any other cases. We have previously discounted partial inclusion of offences in Schedule 2 on the basis of how they are committed. The lifestyle provisions may be applied (and the case law suggests that they are) when other triggers are satisfied.

Conclusion

3.100 We consequently do not recommend adding section 170 of the Customs and Excise Management Act 1979 to Schedule 2, POCA 2002.

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49 *R v M* [2009] EWCA Crim 214, [2009] 1 WLUK 348.
50 *R v Mackle* [2014] UKSC 5, [2014] AC 678.
51 *Regina v Abrar Hussain* [2014] EWCA Crim 1181, [2014] 5 WLUK 714.