



## Law Commission consultation: Confiscation under Part 2 of the Proceeds of Crime Act 2002

*Response from insolvency and restructuring trade body R3 (December 2020)*

### About R3

- R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession.
- Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices. Our members have direct experience of insolvencies and their impact on individuals and businesses across the UK.
- R3 welcomes the opportunity to respond to this consultation, given the concerns expressed by our members regarding the efficacy of the Proceeds of Crime Act 2002 (POCA) in respect of confiscations. Indeed, our members have a unique and important perspective on the issues and questions raised in this consultation.
- The insolvency profession plays a key role in tackling fraud and ensuring that the UK remains a safe place to do business. Insolvency practitioners (IPs) have significant expertise and wide-ranging powers to investigate fraudulent activities, including under POCA, and are highly qualified and regulated professionals, who operate under a comprehensive framework of statutory duties. This response is based on feedback received from members of R3's Fraud Group, which is comprised of specialists in using the UK's insolvency framework to tackle, disrupt and provide redress for fraud.
- R3 welcomed the opportunity to discuss this consultation with Law Commission staff in May 2019, and we would be delighted to attend further meetings to discuss any points raised below in greater detail. If you would like to meet us or if you have any other queries, please contact R3's Head of Press, Policy and Public Affairs, James Jeffreys, at [james.jeffreys@r3.org.uk](mailto:james.jeffreys@r3.org.uk) or on 020 7566 4220.

### Chapter 5: Objectives of the Act

1. *We provisionally propose that any amended confiscation legislation should include the objectives of the regime. Do consultees agree?*

Agreed, providing that priority is given to fulfilment of the principal objective of "depriving defendants of their benefit from criminal conduct" and that the remaining objectives are treated as subordinate to this objective.

2. *We provisionally propose that the principal objective of the regime should be "depriving defendants of their benefit from criminal conduct, within the limits of their means." Do consultees agree?*

Agreed, but with the deletion of the words "within the limits of their means". Our concerns as to the inclusion of this wording are:

- (1) If this is included in the principal objective, it places too great an emphasis on the assessment of defendants' means, which is a question of the *application* of the legislation not an *objective* in itself.
- (2) The inclusion of the defendants means as a consideration in the primary objective is likely to lead to an emphasis on the defendant's rights in priority to those of victims and other stakeholders.
- (3) The proposed wording does not make reference to the provision of full disclosure by defendants or the question of hidden assets. These are equally a question of application (and a necessary counterbalance to limitation by reference to defendants' means) and better dealt with outside the statement of objectives.

3. *We provisionally propose that an objective of the regime should be ensuring the compensation of victims, where such compensation is to be met from confiscated funds. Do consultees agree?*

Agreed. There are questions as to how this objective will be applied (for instance deduction of the costs of recovery before release of funds to victims and overseas asset recovery) and these are addressed further below. Consistent with the answer to question 2 above, we suggest that the objectives should not be unduly complicated by reference to questions of their application, which can be addressed with greater specificity elsewhere.

4. *We provisionally propose that the statutory objectives of the confiscation regime should include: (1) deterrence; and (2) disruption of crime. Do consultees agree?*

Agreed. We suggest that the settlement of the confiscation order should be a factor in determining early release. The present default sentence which attaches to the confiscation order should not be removed.

5. *We provisionally propose that punishment is omitted from any statutory objectives of any amended confiscation legislation. Do consultees agree?*

Agreed, subject to the point above.

## **Chapter 6: Postponement**

6. *We provisionally propose that confiscation legislation should provide that a defendant must be sentenced before confiscation proceedings are resolved unless the court directs otherwise. Do consultees agree?*

We disagree. As noted in paragraph 6.58 of the consultation paper, there are situations where it is prudent to resolve confiscation prior to sentence. We do not agree that there is any benefit in creating a presumption that sentencing should precede confiscation proceedings. Paragraph 6.58 also emphasises the value of procedural flexibility, and we are concerned that the suggestion that "a defendant must be sentenced before confiscation proceedings are resolved unless the court directs otherwise" suggests that exceptional circumstances would have to be shown to order otherwise. This represents an unnecessary limitation.

7. *We provisionally propose that: (1) The absolute prohibition on financial, forfeiture and deprivation orders being imposed prior to the making of a confiscation order be removed; and (2) Where a court imposes a financial, forfeiture or deprivation order prior to making a confiscation order, the court must take such an order into account when determining the confiscation order. Do consultees agree?*

As to point (1) the position, if it is to change, should require Court sanction on notice to the prosecuting authority (akin to a variation of a restraint order).

Point (2) Agreed.

8. *We provisionally propose that the current 28-day period within which the Crown Court is permitted to vary a financial or forfeiture order be extended to 56 days from the date on which a confiscation order is imposed. Do consultees agree?*

Agreed.

9. *We provisionally propose that confiscation legislation should no longer refer to “postponement”. Instead, “drift” in confiscation proceedings should be managed through: (1) a statutory requirement that confiscation proceedings are started within a prescribed time; and (2) active case management following the commencement of confiscation proceedings, pursuant to the Criminal Procedure Rules (as to which see Chapter 7). Do consultees agree?*

Point (1) the statutory requirement should include a grading of the complexity of the case. The grading should be based on a number of facts for example, the number of third-party claims, location and type of asset and whether the defendant is one of a number of defendants. The grade determined should then provide the length of the prescribed time (similar to the default sentencing). Further, if a significant compensation order is likely to be granted and this order accounts for more than 75% of any confiscation order then the prosecuting authority should approach the victim(s) and offer them the opportunity to complete the process at their own cost.

Point (2) while agreeing with the idea we question if the Court and/or the prosecuting authority have the resources to deal with this additional significant workload.

10. *We provisionally propose that (1) the maximum statutory period between the date of sentencing and the date on which a confiscation timetable is set or on which a confiscation timetable is formally dispensed with should be six months; and (2) the period may be extended by the Crown Court in exceptional circumstances even if an application has not been made expiry of the six-month period. Do consultees agree?*

(1) See the answer to question 9 above regarding the suggested amendment to the six month timeframe.

(2) Agreed.

11. *We provisionally propose that the statutory scheme should provide the following. Do consultees agree?*

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

*(2) in determining whether to proceed after the permitted period has expired, the court must consider whether any unfairness would be caused to the defendant;*

*(3) if there is unfairness, the court must consider whether measures short of declining to impose a confiscation order would be capable of remedying any unfairness; and*

*(4) in reaching a decision, the court must consider the statutory objectives of the regime (which we discuss at Chapter 5).*

Agreed subject to a suggested amendment to point (3): if a compensation order could be awarded the victims are allowed the opportunity to enforce the order in their own right.

## Chapter 7: Timetabling and case management

12. *We provisionally propose that the Criminal Procedure Rules Committee should consider providing timetables for the provision of information and service of statements of case in confiscation proceedings. Do consultees agree?*

Agreed.

13. *We provisionally propose that the Criminal Procedure Rules Committee should consider a timetable for a case where no complex factors have been identified which uses periods of 28 days for the service of statements regarding confiscation. Do consultees agree?*

*If not, what periods would consultees consider to be appropriate for the service of statements regarding non-complex confiscation cases?*

Agreed provided that both parties can seek an extension from the court where such an extension is justified.

14. *We provisionally propose that the Criminal Procedure Rules Committee should consider a timetable for a case where complex factors have been identified which uses periods of 56 days for the service of statements regarding confiscation. Do consultees agree?*

*If not, what periods would consultees consider to be appropriate for the service of statements regarding complex confiscation cases?*

Agreed with the suggested amendment that after the initial information exchange the time period should reduce back to 28 days.

15. *We provisionally propose that judges should be required to give a direction in every case when service of documents is ordered pursuant to a confiscation enquiry, according to the following proposals:*

*We provisionally propose that judges should be required to give a direction in every case when service of documents is ordered pursuant to a confiscation enquiry to the effect that:*

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

*(2) It is in the defendant's best interests to comply with the requirement because the burden of proof relating to the assumptions and the available amount rests on him or her.*

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

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

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

*Do consultees agree?*

Agreed.

*We provisionally propose that:*

*(1) the Criminal Procedure Rules Committee should consider including such a direction in a Criminal Practice Direction on confiscation; and*

*(2) that such a direction should be included in the Crown Court Compendium.*

*Do consultees agree?*

Agreed, subject to later comments (answer at question 23) concerning which court should deal with the hearing.

16. *We provisionally propose that the Criminal Procedure Rules Committee should consider prescribing the content and form of statements exchanged in confiscation proceedings to ensure that they assist the court in identifying issues in dispute. Do consultees agree?*

Agreed, with the addition that provision should be made for input from the victims in cases where compensation will be considered.

17. *We provisionally propose that a prosecutor's statement in confiscation proceedings should comprise concise pleadings, statements and exhibits which must be lodged as separate documents. Do consultees agree?*

Agreed.

18. *We invite consultees' views on the following:*

*(1) Whether the drafting of the prosecutor's statement has contributed to problems in confiscation proceedings.*

Problems arise where the FI's statement is amended by criminal practitioners whose expertise does not generally include an understanding of the commercial issues and background.

*(2) Whether consultees believe that it would be beneficial for a lawyer to have oversight or input into the drafting of the prosecutor's statement, and if so whether it would be beneficial to have a lawyer's oversight or input in:*

*(a) all cases;*

*(b) higher-value cases;*

*(c) cases of particular complexity; and/or*

*(d) some other category of cases; and if so which other category?*

The lawyer responsible for reviewing the statement should have a commercial background rather than a criminal one. The review should only apply for higher-value cases and complex cases. A further category to be included would be for material compensation orders.

## **Chapter 8: Early Resolution of Confiscation**

19. *We provisionally propose the following. Do consultees agree?*

*(1) A new stage of the confiscation process be introduced, known as the Early Resolution of Confiscation (EROC).*

*(2) The EROC process should comprise two stages:*

*(a) an EROC meeting, at which the parties should seek to settle the confiscation order, and in the event that the confiscation order cannot be settled, the issues for the confiscation hearing should be identified.*

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

Agreed, subject to input from a party who may materially benefit should a compensation order be sought.

20. *Do consultees consider that any criminal procedure rules and/or practice direction on confiscation should include a provision for “early offers to settle” to allow a defendant to supplement their response to a prosecutor’s statement with a written offer to resolve the matter of confiscation?*

Agreed.

## **Chapter 9: Incentivising the agreement and payment of orders**

21. *Do consultees agree that it would be wrong in principle to allow a defendant to retain a portion of the proceeds of his or her criminality as an incentive to agree and satisfy a confiscation order?*

While generally wrong in principle, we suggest that a recovery fee should not be ruled out where the assets are either hidden or in a “difficult” overseas jurisdiction. The alternatives are not to collect the funds, use of letters of request, asset sharing agreements with foreign jurisdictions or the appointment of an Enforcement Receiver. All of those alternatives come at a cost. The sum offered would need to be commercially acceptable compared to the sum likely to be “lost” using one of the alternatives.

22. *Do consultees agree that a scheme permitting a reduction to the substantive sentence imposed where a confiscation order is agreed and satisfied as directed is not desirable?*

We do not agree. The principal objective of depriving the defendant of the funds may make this option desirable. It should not be ruled out in every case.

## **Chapter 10: Forum**

23. *We provisionally propose that the Crown Court should retain jurisdiction for determining confiscation cases. Do consultees agree?*

The Crown Court should only retain straightforward cases. We suggest that complex cases should be sent to the Business and Property Court in the High Court, where the Judges already have considerable experience in asset tracing, preservation and remedies.

24. Do consultees consider that the Lord Chancellor should consult with the Lord Chief Justice to institute enhanced POCA 2002 training for judges eligible to sit in the Crown Court?

Yes, although our preference would be for complex matters to be transferred to the Business and Property Court which already has the relevant experience.

25. We provisionally propose the following (see below). Do consultees agree?

*(1) Potential complexities in the confiscation hearing should be identified through questions at the Plea and Trial Preparation Hearing, or when the complexity comes to light.*

Agreed.

*(2) A clear practice direction be issued that where there is added complexity in the confiscation hearing, the Crown Court judge should consult with the Resident Judge about allocation of the case to an appropriately experienced judge.*

We suggest that “trained” should be substituted for “experienced” in cases remaining in the Crown Court. This qualification would be unlikely to be necessary in the High Court.

*(3) The Lord Chief Justice considers the institution of “ticketing” of suitable judges to deal with complex confiscation cases.*

Our suggestion is for complex matters to be heard in the High Court. If this not acceptable then ticketing will be required; however this is not in our view a satisfactory substitute for civil courts.

26. We provisionally propose that when seeking to resolve a complex issue in confiscation proceedings the court should be permitted to use an assessor, subject to objections by the parties. Do consultees agree?

The assessor should be selected from an acceptable court list, which will avoid any delays or objections.

27. We therefore provisionally propose that, where the Crown Court considers that it is in the interests of justice to do so, it may refer an issue in confiscation proceedings to the High Court for a binding determination. We provisionally propose that, in considering the interests of justice, the court should consider, amongst any other factors that it considers to be relevant: (1) the value of the asset or interest that is subject to the dispute; (2) the complexity of the issue; and (3) the conduct of the parties. Do consultees agree?

Agreed although we would suggest that the relevant issues are expanded and defined so that all parties are clear on when that referral will occur (for instance, by setting a threshold value).

## **Chapter 12: Defining and valuing benefit**

28. We provisionally propose that in determining a defendant’s “benefit” the court should:

*(1) Determine what the defendant gained as a result of or in connection with the criminal conduct; and*

*(2) Make an order that defendant’s benefit is equivalent to that gain, unless the court is satisfied that it would be unjust to do so because of the defendant’s intention to have a limited power of control or disposition in connection with that gain.*

Do consultees agree?

See below answer to question 29.

29. *We provisionally propose that the test of “gain” under our preferred model for the calculation of benefit should reflect the general principles in relation to “gain” already in use in the criminal law, principally that “gain” includes: (1) keeping what one has; (2) getting what one does not have; (3) gains that both are temporary and permanent. Do consultees agree?*

The area of benefit consumes a significant amount of Court time and can require the FI to be examined at length. We are not exactly clear on the advantage of this approach, given that in most cases the confiscation order is set at the level of the defendant’s assets rather than benefit. We suggest that the focus should be on the defendant’s assets and if they wish to demonstrate to the court that this approach is unfair, in that if their benefit was less than the asset value, then they can demonstrate what their benefit was.

Given they have been convicted their evidence will not lead to self-incrimination.

### **Chapter 13: Benefit in "criminal lifestyle" cases**

30. *Are there any offences that consultees consider should be removed from the schedule offences that trigger a finding of a criminal lifestyle (currently schedule 2 of POCA 2002)?*

No.

31. *We invite consultees' views on the following:*

*(1) Do consultees consider that the money laundering offence under section 329 of POCA 2002 should be either wholly or partially included in any schedule of offences that trigger a finding of a “criminal lifestyle”?*

“Wholly”.

*(2) If section 329 of POCA 2002 should be partially included in the schedule of offences that trigger a finding of a “criminal lifestyle”, how should that partial inclusion be defined?*

Not applicable.

*(3) Do consultees know of any cases in which the current law has impeded effective confiscation where the predicate offence was a money laundering offence, contrary to section 329 of POCA 2002?*

No.

32. *We provisionally propose that the offence of “keeping a brothel used for prostitution”, contrary to section 33A of the Sexual Offences Act 1956, be added to any schedule of offences that trigger a finding of a “criminal lifestyle”. Do consultees agree?*

Yes.

33. *We provisionally propose that fraud is not included in in any schedule of offences that trigger a finding of a “criminal lifestyle”. Do consultees agree?*

No. Fraud is a serious offence and excluding it in this instance could weaken the armoury required for tackling these areas of criminal conduct.

*If consultees disagree, do consultees know of any cases in which the current law has impeded effective confiscation where there predicate offence was fraud?*

No.

34. *We provisionally propose that bribery is not included in in any schedule of offences that trigger a finding of a "criminal lifestyle". Do consultees agree?*

No. As above, bribery is a serious offence and excluding it in this instance could weaken the armoury required for tackling these areas of criminal conduct.

*If consultees disagree, do consultees know of any cases in which the current law has impeded effective confiscation where the predicate offence was bribery?*

No.

35. *Are there any offences that consultees consider should be added to any schedule of offences that trigger a finding of a "criminal lifestyle"? (Such offences are described in the explanatory notes to POCA 2002 as being offences "associated with professional criminals, organised crime and racketeering" or "of major public concern".)*

No comment.

*If so, do consultees know of any cases in which the omission of those offences from schedule 2 of POCA 2002 has impeded effective confiscation?*

Not applicable.

36. *We provisionally propose that the number of offences required under the course of criminal activity trigger for "criminal lifestyle" be harmonised to remove the discrepancy between cases where there are multiple convictions on the same occasion and convictions on multiple occasions. Do consultees agree?*

No, multiple convictions on the same occasion would indicate that the defendant is living from this activity and should therefore be subject to the criminal lifestyle provisions.

37. *Do consultees consider that the number of offences required under the course of criminal activity trigger should be: (1) two offences; (2) three offences; or (3) another number of offences (and if so, how many)?*

Two offences, unless the sum involved is material (over £10 million) or there are many members of the public (over 50) who have had the offence committed against them indicating that the level of criminality is well organised.

38. *We provisionally propose that the course of criminal activity trigger should be that a person has been dealt with by the court for a minimum number of offences, whether those offences comprise convictions or offences taken into consideration. Do consultees agree?*

Disagree; our position is as outlined above.

39. *We provisionally propose that when the court considers each offence relevant to the course of criminal activity trigger, the court should consider both offences from which there was benefit and offences from which there was an attempt to benefit. Do consultees agree?*

Agreed.

40. We invite consultees views about whether the financial threshold for triggering the lifestyle assumptions should be raised, and if so whether it should reflect: (1) the current £5,000 threshold, adjusted for inflation; (2) the national minimum living wage obtained over a period of six months, adjusted for inflation; (3) another amount (and if so, how much).

(3) over £50,000.

41. We provisionally propose that confiscation legislation should mandate that the financial threshold for triggering the lifestyle assumptions be reviewed by the Secretary of State every five years. Do consultees agree?

We suggest that the amount be adjusted in line with RPI, as well as being subject to five-yearly review.

42. If the triggers are satisfied, we do not propose that prosecutors should be required to pass an additional evidential threshold before the assumptions apply. Do consultees agree?

Yes.

43. We provisionally propose that prosecutors should be able to exercise discretion as to whether to seek application of the assumptions. Do consultees agree?

Yes.

44. We provisionally propose that: (1) if the court decides that the defendant has a "criminal lifestyle", the court may nevertheless determine that it is contrary to the interests of justice to apply the assumptions, taking into account the statutory purpose of confiscation. (2) If the court decides that it is contrary to the interests of justice to apply the assumptions, the court should determine benefit with reference to particular criminal conduct. Do consultees agree? (3) Do consultees consider that (in addition to considering the statutory purpose of confiscation) there are any particular indicative factors that could assist the court in making this determination?

Agreed with points (1) and (2) and no comment on point (3).

45. We provisionally propose that the "serious risk of injustice" test be clarified in its application to the property held assumption, to indicate that in determining whether there would be a serious risk of injustice if the assumption were applied, the court should consider: (1) Any oral or documentary evidence put before the court; and (2) If documentary evidence is not put before the court, the reason why documentary evidence was not put before the court and the validity of that reason. Do consultees agree?

Agreed.

46. We do not propose any reforms to the assumption that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he or she obtained it free of any other interests in it. Do consultees agree?

Agreed.

If consultees do not agree, what reforms to this assumption do consultees consider might be appropriate?

Not applicable.

## Chapter 14: Codifying case law on benefit

47. *In assessing benefit to multiple defendants, we provisionally propose that confiscation legislation should require the court to make findings as to apportionment of that benefit. Do consultees agree?*

Disagree. Where multiple defendants are involved and each is individually responsible the liability should be joint and several. The situation is the same as where, for instance, co-directors are both found liable for a loss to a company's creditors: they each individually caused the loss and are therefore each liable for the entire sum. Where multiple defendants are involved the court should be able to recover the sum from the defendant(s) most likely to have the funds/assets available. To the extent that one defendant pays more than a pro-rata share, the defendant is entitled to claim for a contribution from the co-defendant. The object is to deprive the defendant(s) of the criminal proceeds.

48. *We provisionally propose that guidance on the principles in connection with assets tainted by criminality should be provided. Do consultees agree?*

Yes.

*If yes, should this be provided in the form of: (1) non-statutory guidance on confiscation; or (2) a Criminal Practice Direction relating to confiscation?*

(2).

49. *We provisionally propose that the following principles of case law in connection with assets that have been obtained in part through criminality be incorporated either in non-statutory guidance or a Criminal Practice Direction:*

*(1) The court must consider whether any evidence suggests that the defendant had made contributions to the purchase price using property that has not come from crime.*

No.

*(2) When the alleged benefit is in connection with an undertaking, benefit should be calculated with reference to the extent to which criminality taints that undertaking. Only where the entire undertaking is founded on illegality should the court calculate benefit with reference to the entire turnover of the business.*

Apportionment between criminal and non-criminal benefit is not a useful principle to bring to the process and this could override the underlying principle.

*(3) When a mortgage is obtained over a property, the court should consider the principles from R v Waya [2012] UKSC 51, [2013] 1 AC 294 on calculating benefit with reference to the equity of redemption.*

Yes.

*Do consultees agree?*

As outlined above.

50. *We provisionally propose that the following principles of case law in connection with the evasion of tobacco import duty be incorporated either into non-statutory guidance or a Criminal Practice Direction:*

*(1) The principles relevant to evasion of duty as summarised in R v Tatham [2014] EWCA Crim 226, [2014] Crim LR 672.*

*(2) In calculating the benefit obtained from evading duties payable on tobacco, the duty evaded should be calculated in accordance with the Tobacco Products Duty Act 1979 section 2 and schedule 1.*

Yes.

*(3) For the purpose of applying the Tobacco Products Duty Act 1979, the retail price of counterfeit goods should be taken to be the recommended retail price of the genuine goods that the counterfeit goods sought to imitate.*

Yes, but it is accepted that this will overstate the amount as the goods are counterfeit and maybe inferior and therefore cheaper.

*Do consultees agree?*

As outlined above.

51. *We provisionally propose that the principles in connection with when benefit apparently accruing to a company may be treated as accruing to a defendant be incorporated, either in non-statutory guidance or a Criminal Practice Direction. Do consultees agree?*

Agreed, incorporated in a Criminal Practice Direction.

52. *We invite consultees' views about how best to guide judges dealing with cases involving issues as to common intention constructive trusts in confiscation proceedings.*

The matter should be passed to the High Court and this court can make the determination.

#### **Chapter 15: The "recoverable amount" and its place in the confiscation regime**

53. *We provisionally propose that the value of criminal assets seized from a defendant should be considered to be a component of the defendant's total benefit, but the order should reflect that some benefit has already been seized or disgorged to the state or to victims thus preventing double recovery. Do consultees agree?*

Agreed, the same principle should be applied to management receiver costs which have been drawn before the confiscation order has been made.

54. *We provisionally propose that:*

*(1) the Criminal Procedure Rules Committee considers incorporating into the Criminal Practice Direction a provision to the effect that: where a confiscation order is made in an amount less than the defendant's benefit, judges should explain why the two figures are different and that it will be open to the prosecution to seek to recover more of the benefit in future, until it is repaid in full.*

*(2) consideration be given to including a direction to this effect in the Crown Court Compendium.*

*Do consultees agree?*

Agreed.

## Chapter 16: Hidden assets

55. *We do not propose that the prosecution should bear either a legal or evidential burden to satisfy the court that assets have been hidden by a defendant. Do consultees agree?*

Agreed.

56. *We provisionally propose that legislation should provide that the court must impose an order in a sum less than the defendant's benefit where, having regard to all the circumstances of the case, the defendant shows or the court is otherwise satisfied that the available amount is less than the defendant's benefit. Do consultees agree?*

Agreed.

57. *We provisionally propose that the law in relation to hidden assets is codified and clarified through an articulation of relevant principles in a Criminal Practice Direction. Do consultees agree?*

Agreed, we also suggest that the amount of any hidden asset sum is separated from the total confiscation orders and there are two reported numbers for confiscation orders, i.e. the amount of hidden assets (which are in the defendants power to address) and all other orders. This would provide a better KPI to judge performance against.

58. *We provisionally propose that, in relation to hidden assets, a Criminal Practice Direction should contain the following principles:*

*(1) Where there is a difference between the amount available to the defendant to repay the confiscation order and the defendant's benefit, the court may find that the defendant has "hidden" assets representing that difference, either in whole or in part.*

*(2) In determining whether to make a "hidden assets" finding, the court should consider (amongst any other matters that it considers relevant):*

*(a) The facts of the case taken as a whole, whether derived from*

*(i) evidence given by the defendant; or*

*(ii) sources of evidence other than the defendant*

*(b) Any expenditure incurred by the defendant which is more likely than not to have been met from the defendant's benefit.*

*(c) Representations made by the parties.*

*(d) The potential risk of injustice if a "hidden assets finding" inappropriately increases the "available amount".*

*(3) When assessing the evidence, if any, given by the defendant, the court should consider (amongst any other matters that it considers relevant):*

*(a) the merits of any explanation for the absence of positive evidence in connection with the defendant's assets;*

*(b) that the defendant is not obliged to give evidence; and*

*(c) that the quality of any evidence given to the court may be affected by the fact that the defendant is giving evidence in a post-conviction hearing.*

*Do consultees agree with the principles suggested in the provisional proposal?*

Agreed.

## **Chapter 17: Tainted gifts**

59. *We provisionally propose that the following principle connected to “tainted gifts” and the default sentence for non-payment of the confiscation order is incorporated in a confiscation Criminal Practice Direction:*

*(1) Where the value of a tainted gift is included in the defendant’s confiscation order, the term of imprisonment imposed on the defendant for defaulting on payment may be adjusted downwards if the court is satisfied that no enforcement measure would be effective in the recovery of the value of that tainted gift.*

*(2) In making such a determination the court must consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.*

*Do consultees agree?*

Suggested amendment: the court must consider the appointment a receiver before the adjustment downwards occurs. The Receiver will provide a written report to the Court to confirm if any recovery will be possible.

60. *We provisionally propose that if a determination is made that a tainted gift should not be included in an enforcement receivership, the court should:*

*(1) consider whether it is satisfied that the value of the tainted gift cannot be recovered either:*

*(a) by the defendant; or*

*(b) by the realisation of other assets; and if so*

*(2) adjust downwards the term of imprisonment for defaulting on payment of the confiscation order.*

*We provisionally propose that when making such a determination the court should consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.*

*Do consultees agree?*

We disagree with the starting proposal, however, if the Receiver determines no economic recovery the court should act as outlined.

61. *We provisionally propose that the court may order that interest should not accrue on the value of a tainted gift included in a confiscation order in the event that:*

*(1) the value of that tainted gift is not paid towards the confiscation order; and*

*(2) the court is satisfied that the value of the tainted gift cannot be recovered either:*

*(a) by the defendant; or*

*(b) by the realisation of other assets.*

*We provisionally propose that when making such a determination the court should consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.*

*Do consultees agree?*

*Agreed, provided the receivership step is included.*

*62. We provisionally propose that if a determination is made that a tainted gift should not be included in an enforcement receivership, the court should:*

*(1) consider whether it is satisfied that the value of the tainted gift cannot be recovered either:*

*(a) by the defendant; or*

*(b) by the realisation of other assets; and if so*

*(2) order that interest should not accrue on that tainted gift; and*

*(3) that any interest previously accrued on that tainted gift be removed from any outstanding confiscation amount.*

*We provisionally propose that when making such a determination the court should consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.*

*Do consultees agree?*

*Disagree, the tainted gift should be included and the Receiver who is required to act commercial and proportionately can advise the court and this can be addressed as part of any certificate of inadequacy.*

*63. We provisionally propose the following principle articulated in R v Hayes [2018] EWCA Crim 682, [2018] 1 WLR 5060 be incorporated in an amended confiscation Practice Direction:*

*Where the consideration which is asserted to have been provided by the recipient of property is other than a direct financial contribution (whether by way of services or otherwise) the court must consider:*

*(1) Whether that consideration is capable of being assessed as consideration of value; and if so,*

*(2) to what extent.*

*Do consultees agree?*

*Agreed.*

64. *We provisionally propose that the wording currently found in section 77(5)(a) of POCA 2002 be amended in any revised confiscation legislation to provide that a gift is tainted if it was made by the defendant at any time after “the commission of the offence” rather than “the date on which the offence was committed”. Do consultees agree?*

Agreed.

#### **Chapter 21: Contingent orders**

65. *We provisionally propose that the Crown Court should have the discretion, upon imposing a confiscation order, to make an enforcement order that takes effect either (i) immediately; or (ii) on a “contingent” basis (subject to a further confirmatory court hearing) if:*

*(1) there are reasonable grounds to believe that the defendant will fail to satisfy the order through wilful refusal or culpable neglect; or*

*(2) in light of any third party interests, whether established through a declaration or otherwise, there are reasonable grounds to believe that, without a contingent order, it is more likely than not that the defendant’s share of the asset will not be made available for realisation by the expiry of the time to pay period.*

*Do consultees agree?*

Agreed, however we suggest that the further confirmatory hearing is not required instead that there is a specified date which can be varied by agreement of both parties.

66. *We provisionally propose that when imposing a contingent enforcement order, the Crown Court should be able to order that if the order is not satisfied as directed:*

*(1) an asset, such as a property, will vest in a trustee for confiscation;*

*(2) funds held in a bank account will be forfeited;*

*(3) seized property will be sold; or*

*(4) a warrant of control will take effect.*

*Do consultees agree?*

Agreed.

67. *We provisionally propose a non-exhaustive list of statutory factors for the court to consider when exercising its discretion to make a contingent order, including:*

*(1) the use ordinarily made, or intended to be made, of the property;*

*(2) the nature and extent of the defendant’s interest in the property;*

*(3) the needs and financial resources of the spouse, civil partner, former spouse or former civil partner of the defendant;*

*(4) the needs and financial resources of any child of the family;*

*(5) (if applicable) the length of the period during which the family home has been used as a residence by a spouse, civil partner, former spouse, former civil partner or child of the family;*

*(6) whether the asset in question is tainted by criminality; and*

*(7) the extent of an interested party's knowledge of the same.*

*Do consultees agree?*

Agreed.

*68. We provisionally propose that, in addition to any ability to claim an interest in property during the confiscation hearing itself, a third party who claims an interest in property may be permitted to raise such an interest in the Crown Court after the making of the confiscation order and before either the automatic vesting of assets or the activation of a contingent order if:*

*(1) the third party was not given a reasonable opportunity to make representations at an earlier stage of the confiscation proceedings; or*

*(2) the third party had a good reason for not making the application earlier in the confiscation proceedings; and*

*(3) it appears to the court that there would be a serious risk of injustice to the third party if the court was not to hear the application.*

*Do consultees agree?*

Agreed, subject to the third party not being connected to the defendant.

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

Agreed.

## **Chapter 22: Provisional proposals for an optimal enforcement regime**

*70. We provisionally propose that the Crown Court and the magistrates' courts should have flexible powers to transfer enforcement proceedings between them to best enforce a confiscation order on the facts of each case. Do consultees agree?*

Agreed, the Courts (HMCTS) should also be able to appoint enforcement receivers without referring the matter back to the CPS.

*71. We provisionally propose that: (1) defendants subject to confiscation orders of £10 million or less should no longer be released unconditionally after serving half a term of imprisonment in default; and (2) during the second half of the term of imprisonment the defendant should be released subject to licence conditions that facilitate the enforcement of the confiscation order. Do consultees agree?*

(1) In order to provide an optimal enforcement regime, this should apply to defendants subject to confiscation orders over £1,000,000. If a compensation order is involved it is suggested that the number should be reduced to £100,000.

(2) “may be” should be substituted for “should be” *and* provided there is no hidden asset element to the confiscation order, there has been no contempt of court action brought against the defendant, no overseas trips are required, and the defendant has provided power of attorney when requested. Further the defendant must provide a reasonable realisation plan, including time frames, which is agreed and against which they can be monitored.

72. *We provisionally propose that new sanctions short of imprisonment in default, such as disqualifying a defaulter from driving or imposing a curfew or period of unpaid work should not be introduced. Do consultees agree?*

Agreed, providing that the sanctions fit the seriousness of the default.

73. *We provisionally propose that: (1) the court should have a bespoke power to direct a defendant to provide information and documents as to his or her financial circumstances; and (2) a failure to provide such information should be punishable by a range of sanctions including community penalties and imprisonment. Do consultees agree?*

This should already occur at the confiscation hearing? The court already has the power to deal with noncompliance. This proposal potentially waters down the seriousness with which default will be taken.

74. *We provisionally propose that the court should have discretion to pause interest on a confiscation order in the interests of justice, where it is satisfied that a defendant has taken all reasonable steps to satisfy an order. Do consultees agree?*

Agreed. We suggest going further and permitting the Court to remove interest already accrued if the defendant has met the reasonable steps test.

75. *We provisionally propose that if the court has discretion to pause interest, any credit against a term of imprisonment in default for part payment should be calculated by reference to the total outstanding sum, inclusive of interest. Do consultees agree?*

No; interest should be excluded from any imprisonment term in default.

76. *We provisionally propose that where a confiscation order is not satisfied as directed, the fact should be recorded in the Register of Judgments as a matter of course. Do consultees agree?*

Agreed.

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

Agreed, interest should also stop accruing unless it can be shown that the defendant had the assets at the time the order was placed in abeyance.

78. *We provisionally propose that where enforcement is placed in abeyance, the court should have discretion to list the matter for review and direct a defendant to provide an update as to his or her financial circumstances at periodic intervals as determined by the court. Do consultees agree?*

Agreed. If the defendant can demonstrate that the funds they have acquired in the intervening time are from legitimate sources and the appropriate tax, if any, has been paid, and the defendant does not have a hidden asset order then these sums should not be available to meet the sum held in abeyance.

79. *We provisionally propose that: (1) Legislation should set out indicative factors for the court to consider when determining whether to re-open enforcement of a confiscation order that has been placed in abeyance. (2) Those indicative factors should mirror those proposed in connection with uplift applications (see consultation question 85). Do consultees agree?*

Agreed.

### **Chapter 23: Multiple confiscation orders**

80. *We provisionally propose the following. Do consultees agree?*

*(1) Where there are multiple confiscation orders sought against the same defendant, the court should have the power to consolidate the applications for confiscation.*

*(2) Where a defendant already has a confiscation order made against him or her, the court should have the power to amend any earlier confiscation order and to consolidate any amount outstanding under it into the new confiscation order.*

*(3) Payments from money obtained pursuant to a consolidated confiscation order should reflect the following priority:*

*(a) compensation of victims (when such compensation is ordered to be paid from confiscated funds); followed by*

*(b) each confiscation order in the order in which it was obtained.*

Care will need to be taken to ensure that “relevant date” of the criminal offenses are reflected correctly so that the reach for tainted gifts is not extended by consolidation.

The issue of costs of enforcement needs to be addressed.

### **Chapter 24: The interrelationship between compensation and confiscation orders**

81. *We provisionally propose that, where a compensation order is imposed at the same time as a confiscation order, the Crown Court should be required to direct that compensation should be paid from sums recovered under a confiscation order, irrespective of a defendant’s means. Do consultees agree?*

Agreed, subject to the deduction and settlement of Receiver’s costs, if one has been appointed.

82. *We do not propose that a central compensation scheme, funded from sums collected pursuant to confiscation orders, be created. Do consultees agree?*

Agreed.

83. *We provisionally propose that when making orders to vary the amount that the defendant is required to pay under a confiscation order, the Crown Court should have the power to adjust the compensation element of the order to reflect the variation. Do consultees agree?*

Provided the party(ies) who benefit from the compensation order have the opportunity to be heard and/or participate in the proceedings.

#### **Chapter 25: Reconsideration**

84. *Do consultees consider that there should be statutory restrictions on making an application to “uplift” a confiscation order? If so, what should such restrictions be?*

No; the primary purpose is to deprive the defendant of their criminal proceeds and this should not be limited.

85. *We provisionally propose that, to assist the court in determining a “just” uplift of a confiscation order, the court should be required to weigh factors articulated in a statutory provision, including:*

*(1) The legislative priorities of:*

*(a) depriving a defendant of his or her benefit from criminal conduct*

*(b) any need to compensate victims from confiscated funds;*

*(c) deterrence from criminality by encouraging the pursuit of a legitimate lifestyle;*

*(d) disruption of criminality, whether through assistance provided to the authorities or otherwise.*

*(2) Undue hardship that would be caused through the granting of the uplift.*

*(3) Diligence of the prosecution in applying for an uplift.*

*Do consultees agree?*

Agreed, it is suggested that in cases where a Receiver is appointed that they, rather than the prosecution authority can apply for an uplift.

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

*(1) The use ordinarily made, or intended to be made, of the property; and*

*(2) The nature and extent of the defendant’s interest in the property.*

*Do consultees agree?*

Agreed.

86. *We provisionally propose that, when an uplift is determined, the court may order that an uplifted available amount be paid either: (1) by a specified deadline; (2) in instalments. Do consultees agree?*

Agreed, interest should accrue after the deadline or instalment date has expired.

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

No comment.

## **Chapter 26: Restraint orders**

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

*(1) The actions of the person whose assets are to be restrained, including:*

*(a) any dissipation that has already taken place;*

*(b) any steps preparatory to dissipation that have already taken place; and*

*(c) any co-operation in the furtherance of the just disposal of the case.*

*(2) The nature of the criminality alleged; including (but not limited to) whether the defendant is alleged to have committed an offence:*

*(a) involving dishonesty; or*

*(b) which falls within schedule 2.*

*(3) The value of the alleged benefit from criminality.*

*(4) The stage of proceedings.*

*(5) The person's capability to transfer assets overseas.*

*(6) The person's capability to use trust arrangements and corporate structures to distance themselves from assets.*

*(7) The person's previous good or bad character.*

*(8) Other sources of finance available to the person.*

*(9) Whether a surety or security could be provided.*

*Do consultees agree?*

Agreed.

89. *Are there any other factors not identified in Consultation Question 5 that consultees consider should be taken into account by a judge when determining a risk of dissipation?*

What the asset is and how movable or liquid it is?

Ranking: if a restraint order is granted this is the date from which the sum available for confiscation/compensation is protected should the defendant subsequently become bankrupt.

Insurance: does the defendant's insurer know the present situation, and have they confirmed that this has not invalidated the existing insurance policy, if any.

90. *We provisionally propose that:*

*(1) Applications for without notice restraint orders should be made to a duty judge, accessible nationally.*

*(2) The application should be dealt with by the judge on the papers where possible.*

*(3) If the judge requires further information, that judge should be permitted to hold a hearing remotely.*

*(4) Should the judge decide that there is a need for an inter partes hearing, the hearing should be listed at a court centre local to the parties.*

*Do consultees agree?*

Agreed.

91. *We provisionally propose that in considering whether criminal proceedings against a person who is under investigation are commenced within a reasonable time for the purposes of determining whether a restraint order should be discharged, the court must have regard to the following factors (and to any others that it considers relevant in all of the circumstances of the case):*

*(1) The length of time that has elapsed since the Restraint Order was made.*

*(2) The reasons and explanations advanced for such lapse of time.*

*(3) The length (and depth) of the investigation before the restraint order was made.*

*(4) The nature and extent of the restraint order made.*

*(5) The nature and complexity of the investigation and of the potential proceedings.*

*(6) The degree of assistance or of obstruction to the investigation.*

*Do consultees agree?*

Agreed.

92. *We provisionally propose that:*

*(1) any amended legislation provides that:*

*(a) when an application is made for a restraint order, the order may provide for the release of a sum that the court deems to be appropriate for meeting reasonable living expenses*

*(b) in coming to its conclusion about what might be appropriate, the court be guided by all of the circumstances of the case, as known at the time and by the need to preserve assets for confiscation.*

*(2) the Criminal Procedure rules be amended to include:*

*(a) a rule to the effect that any application to release funds for reasonable living expenses must be supported by a schedule of income and outgoings and include copies of evidence to support assertions made within that schedule.*

*(b) a standard form for a schedule of income and outgoings.*

*Do consultees agree?*

Agreed.

93. *We provisionally propose the following. Do consultees agree?*

*(1) The current test for release of funds for legal expenses is varied to permit the payment of legal expenses connected with criminal proceedings and confiscation.*

Disagree, with the exception of the repayment of any legal aid awarded.

*(2) Legal expenses should be subject to:*

*(a) Approval of a costs budget by the judge dealing with the case.*

*(b) The terms of a table of remuneration, set out in a statutory instrument.*

Legal expenses should not be permitted as this will just revert to the position previously experienced before POCA. The defendants chose to spend all of their funds on legal costs as their view was the funds were lost anyway.

94. *We provisionally propose that, in an application for costs in connection with restraint proceedings:*

*(1) The court should decide whether the application for restraint was reasonably brought.*

*(2) In doing so, the court should consider the extent to which the prosecution applied its mind to the "indicative factors" in connection with a risk of dissipation. In addition, the court should consider a series of indicative factors, including:*

*(a) The stage of an investigation or prosecution. At an early stage it is likely that less information will be available to prosecutors.*

*(b) The urgency of proceedings. The more urgent the application the less likely it is that each indicative factor may have been considered in detail.*

*(c) Whether all reasonable lines of enquiry have been followed, particularly in light of (a) and (b).*

*(d) Whether there has been full and frank disclosure of matters known to the prosecution that may assist the defence or undermine the prosecution.*

*(3) If the court concludes that the application was not reasonably brought, costs should follow the event.*

*Do consultees agree?*

Disagree, costs should not be awarded against the prosecution authority for securing restraint orders, however, the above provisions could be used if a variation to the restraint order is sought and this is not addressed.

95. *We provisionally propose that a rule be adopted to the effect that, if the court considers an unsuccessful or discharged application for restraint was reasonably brought, costs should be capped at legal aid rates. Do consultees agree?*

*If consultees do not agree, should:*

*(1) No costs be awarded.*

*(2) Costs be awarded subject to a pre-determined discount to reflect the reasonableness of the application; if so, we would welcome consultees' views as to what discount might be appropriate.*

*(3) Reasonable costs be awarded in all of the circumstances of the case, not capped at legal aid rates.*

*(4) Costs be awarded in some other formula? If so, we would welcome consultees' view as to what formula might be appropriate.*

We do not agree, unless it can be shown that there was a material breach of process, no costs should be awarded.

96. *We provisionally propose the following. Do consultees agree?*

*(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).*

Agreed that the Court can order the sale of the property and possession of the same. The County Court should accept that this determination is an appropriate authority for them to act.

*(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.*

Agreed.

## **Chapter 27: Effective asset management**

97. *We provisionally propose that the National Police Chiefs' Council reconsider the training needs of all police officers in connection with confiscation, and in particular those front-line police officers who may need to exercise the powers of search and seizure in connection with confiscation. Do consultees agree?*

Agreed, as an alternative you may wish that the member of the RART team attends with or shortly after the police have secured access to the property to be searched.

98. *We provisionally propose that the non-statutory guidance provisionally proposed in Chapter 14 ought to deal with any specific search and seizure powers connected with confiscation and refer stakeholders to the statutory code of practice issued by the Secretary of State in this regard. Do consultees agree?*

Agreed.

99. *We provisionally propose that the power to appoint a management receiver should be extended to cover assets which are seized and then subject to an order that they may be detained (currently found in section 47M of POCA 2002). Do consultees agree?*

Agreed.

100. *We consider that a national asset management strategy is desirable, to determine who and how assets should be managed. Do consultees agree?*

Agreed.

101. *We provisionally propose the following to develop any national asset management strategy. Do consultees agree?*

*(1) A new Criminal Asset Recovery Board be established.*

We disagree and see little benefit in creating a new board. When this occurred previously (moving from the Assets Recovery Agency to the National Crime Agency), there was a significant delay while the new authority was established, staff recruited and trained. Unfortunately this amounted to little more than a rebranding exercise and we would be keen to avoid any similar scenario in future.

The strategy should be controlled by the Ministry of Justice with input from the HMCTS, NCA, CPA, SFO and POCLA.

*(2) The new board should comprise stakeholders from the public and private sector.*

See comments immediately above.

## **Chapter 28: Confiscation and cryptoassets**

102. *Do consultees consider that prosecutors should be protected from having to compensate defendants in relation to losses arising when cryptoassets are restrained and converted into sterling and then subsequently lose value as a result?*

Yes, however this protection should be expanded to include receivers and agents providing that the realisation occurred shortly after the restraint and the defendant has provided the required key. This is consistent with the primary objective of depriving the defendant of an asset.

103. *Do consultees have any concerns about the interrelationship between cryptoassets and the confiscation regime?*

No comment.

## **Further reform**

104. *Do consultees consider that there are any matters connected to Part 2 of the Proceeds of Crime Act 2002 that are not covered in this consultation paper that require reform? If so, (1) what are they; and (2) how should they be reformed?*

(1) Private Prosecutions

Given that private prosecutions are now being undertaken the Act should be worded to reflect this and options included to permit victims to run the management of cases where they are likely to receive compensation.

(2) Transfer commercial matters to civil courts

More use of the civil court should be made in dealing with commercial issues in more complex cases as the Judges have the experience and understanding required to address these issues.

(3) Benefit

As mentioned, the use of the benefit number should be removed and the approach adopted should be the same as that used in an unexplained wealth order, i.e. it is for the defendant to explain why their assets should not be confiscated.

(4) Foreign Assets

There should be an amendment to enable assets in foreign jurisdictions to be moved into a bankruptcy style process which would enable these assets to be recovered as the letter of request route and asset sharing can impact on the sums physically recovered and therefore the amounts recovered for the victims of crime.

(5) Corporate Assets

The process for piercing the corporate veil needs to be defined by:

- a) The appointment and control of Enforcement Receivers;
- b) The collection of confiscation orders is a matter for the HMCTS, they should therefore have the power to appoint a receiver and should be responsible for their control.