

<b>Title:</b> Confiscation Under Part 2 of the Proceeds of Crime Act 2002 <b>IA No:</b> LAWCOM0077 <b>RPC Reference No:</b> <b>Lead department or agency:</b> Law Commission <b>Other departments or agencies:</b> Home Office	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> November 2022			
	<b>Stage:</b> Development/Options			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Primary legislation			
	<b>Contact for enquiries:</b> criminal@lawcommission.gov.uk			
<b>Summary: Intervention and Options</b>			<b>RPC Opinion:</b> RPC Opinion Status	

Cost of Preferred (or more likely) Option (in 2019 prices)			
Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status Qualifying provision
£72.86 m	£m	£m	

**What is the problem under consideration? Why is government action or intervention necessary?**

Part Two of the Proceeds of Crime Act is a quasi-civil legal process designed to deprive criminals of the benefit of their criminal acts. As at 31 March 2021, the value of outstanding confiscation orders was £2.35 billion. Confiscation orders are usually made by criminal judges in the Crown Court at the conclusion of criminal proceedings. The orders are made in relation to the purported benefit from criminal activity and the value of the defendant's assets at the time of the order. There is currently no standardised formula for calculating criminal benefit. When the enforcement order is remitted to the Magistrates Court there is very little information about the criminal matter or the basis for the confiscation order. The lack of efficient mechanisms for calculation and enforcement is a constraint to the smooth and effective operation. Government intervention is required to identify and legislate for an improved procedure.

**What are the policy objectives of the action or intervention and the intended effects?**

- To improve the efficiency of the process by which confiscation orders are made;
- To ensure the fairness of the confiscation regime and a more realistic assessment of a defendant's benefit from crime;
- To optimise the enforcement mechanisms for confiscation orders to improve the recovery rate;
- To simplify the regime so that it is more accessible and comprehensible.

We ultimately aim to reform the system such that that the law is simplified, clarified and modernised.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 0: Do Nothing  
 Option 1: Overhaul of existing regime to deliver more efficient, realistic and fair enforcement of confiscation orders.  
 The preferred Option 1 provides a proportionate and cost effective approach to the problem

<b>Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year</b>					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Is this measure likely to impact on international trade and investment?			Yes / No		
Are any of these organisations in scope?		<b>Micro</b> Yes/No	<b>Small</b> Yes/No	<b>Medium</b> Yes/No	<b>Large</b> Yes/No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b>		<b>Non-traded:</b>

# Summary: Analysis & Evidence

# Policy Option 1

## Description:

### FULL ECONOMIC ASSESSMENT

Price Base Year 2019	PV Base Year 2020	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £24.25	High: £121.25	Best Estimate: £72.86
COSTS (£m)		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)	
Low	N/A		0.02	0.20	
High	N/A		0.12	1.00	
Best Estimate	N/A		0.06	0.49	
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
On-going costs <sup>1</sup> : Lengthier Crown Court proceedings as hearings include third party interests earlier rather than later in proceedings Lengthier Crown Court hearings £32,400 [HMCTS]; Enforcement of complex cases previously heard in the Magistrates to remain in the Crown Court, £26,200 [HMCTS].					
<b>Other key non-monetised costs by 'main affected groups'</b>					
Transitional costs: New standardised forms and guidance expected to be negligible as most available on-line and design of such assumed to be part of existing duties; Enhanced training for judges – variable costs depending on whether a fee-paid or a salaried judge; Establishment of new industry Board to manage seized assets; As informal procedures such as pre-case negotiation are formalised there will be requisite administrative support. On-going costs: Judicial training for larger cohort;					
BENEFITS (£m)		Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)	
Low	0	0	2.94	14.45	
High	0		14.7	122.25	
Best Estimate	0		8.82	72.86	
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
Transitional benefits: None identified. On-going benefits <sup>2</sup> : Increased recoverable debt, Annual savings £8.82 million; Asset Management Board; Reduced number of Magistrate Court hearings; Reduced number of Crown Court hearings; Reduced recourse to the public purse through legal aid; Efficiency savings from provisionally discharging orders.					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
Improved asset management; Increased victim compensation; Enhanced court reputation for the retrieval of criminal benefit; Increased access to criminal assets as a result of early restraint of assets; Improved enforcement of confiscation orders when cases are moved to the Crown Court, Reduced number of Crown Court hearings where cases are agreed early through EROC; Reduced recourse to legal aid funds; Efficiency savings from provisionally discharging orders.					
<b>Key assumptions/sensitivities/risks</b>				<b>Discount rate (%)</b>	3.5

<sup>1</sup> Annual cost reference to best estimates

<sup>2</sup> Annual savings based on best estimates

Assumptions: 1) The introduction of an Early Resolution of Confiscation (ERO) process (comprising ERO meetings and ERO hearings) will reduce the number of Crown Court Hearings and reduce the length of Crown Court hearings which do proceed; 2) That orders £50K+ are generally 'complex' cases; 3) That payment of compensation will be prioritised when applications are made to uplift confiscation orders; 4) That the Crown Court will make contingent enforcement orders at the time the confiscation orders are made; 5) That the Crown Court will provisionally discharge confiscation orders where appropriate; 6) That prosecution agencies will make more early applications for restraint of assets.

**Risks:**

- 1) The ERO hearings do not facilitate the resolution of proceedings or narrow the issues. This risk is extremely low because we know anecdotally that these discussions are already taking place and settlements are being reached in an informal setting. We are seeking to formalise an existing process to limit the need to schedule hearings.
- 2) We have used £50K+ as a benchmark for when orders are likely to be more complex but there is a risk that there will be some orders for less than £50K that are also complex for various reasons (third party interests, hidden assets) which take longer to resolve and render our figures inaccurate. There is, of course, a margin for error here, but this is a limited risk because it is logical to assume that orders made for significant amounts of money will generally take longer for the court to resolve.
- 3) That despite having the power to do so, the court will not order priority payment of compensation when confiscation orders are uplifted. This is a risk, but it is not significant in relation to our calculations because while we have suggested that victims are likely to receive more compensation under our system, we have not sought to predict how much.
- 4) That despite having the power to do so, the court will decline to make contingent enforcement orders and that the enforcement of orders will continue to be left to the magistrates' court. This risk is moderate. When introducing vastly different processes, there is always a risk that judges will stick to what they know and avoid disrupting the system. However, the judges we have spoken to throughout the consultation process have demonstrated an encouraging level of support for this policy and the idea of front-loading enforcement more generally, so while we think the transition may not be immediate, we are confident that judges will come to use this power increasingly frequently.
- 5) There is a risk that there will be a disinclination to provisionally discharge confiscation orders for fear of negative public opinion. However, it is well understood that the current confiscation debt is large and growing and that there are very good public policy reasons to discharge some of the legacy debt which is not ever likely to be paid.
- 6) There is a risk that despite changes to the costs implications, prosecution agencies will continue to not seek restraint of assets early in the process and therefore assets may continue to be dissipated. However, this risk is likely to be slim because based on consultation responses, the primary reason for not seeking these applications early is the fear of adverse costs orders (and the lack of understanding of the risk of dissipation test which we are also recommending be codified).

**BUSINESS ASSESSMENT (Option 1)**

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

# Evidence Base

## Introduction

### *Covid-19 impact*

The impact of the covid-19 pandemic has been felt across the criminal justice system. Her Majesty's Courts and Tribunals Service's Trust Statement 2020-2021 details the impact this has had on the court system and the enforcement of financial orders including confiscation orders:

2020-21 has been an unprecedented year for Her Majesty's Courts and Tribunals Service (HMCTS), the Covid-19 pandemic has impacted every aspect of the organisation and has significantly changed the way that courts and tribunals are able to operate...

National restrictions and social distancing in place throughout 2020-21 resulted, temporarily, in both a lower number of hearings, that were able to be safely held, and a short-term curtailment of selected elements of enforcement activity resulting in a reduction in both impositions and collections.<sup>1</sup>

### *Background to the project*

Part 2 of POCA 2002 was brought into force on 24 March 2003. It sets out the regime under which a "confiscation order" can be made. Following a defendant's conviction, the Crown Court can determine the defendant's benefit from crime and make an order against the defendant that he or she repays a sum of money up to the value of that benefit from crime.

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

The legal power to deprive an offender of their ill-gotten gains from criminality is of both practical importance and symbolic significance:

However, academics, practitioners, financial investigators and many other groups of stakeholders have questioned whether the current strategy meets its stated objectives. As Bullock and Lister note,

*confiscation engenders a powerful rhetoric of control over acquisitive crime and, in symbolically embodying and reinforcing the assertion that 'crime should not pay,' injects a moral authority into the state's response to crime and criminality. Post-conviction confiscation as a strategy of crime control has also been rationalised and defended on the grounds of introducing greater efficiency and effectiveness into the criminal justice system.*<sup>2</sup>

The ineffectiveness of the current confiscation regime in practice is well documented, including, notably, in highly critical reports published by the National Audit Office ("NAO") in 2013 and the House of Commons Home Affairs Committee in 2016. As at 31 March 2021, the value of outstanding confiscation debt was £2.35 billion.<sup>3</sup>

It is for these reasons that the Home Office has asked the Law Commission to review the confiscation regime in Part 2 of the Proceeds of Crime Act 2002 ("POCA").

In reviewing Part 2 of POCA, the Law Commission has been asked to consider both potential amendments to the current legislative regime and recommendations for the creation of a new

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<sup>1</sup> HM Courts and Tribunals Service, "HM Courts and Tribunal Service Trust Statement 2020-21" (2020-21) HC 695 p 2.

<sup>2</sup> K Bullock & S Lister in C King & C Walker (Eds), *Post-conviction confiscation of assets in England and Wales: Rhetoric and Reality in dirty assets: new issues in the regulation of criminal and terrorism assets* (2014).

<sup>3</sup> <https://www.gov.uk/government/publications/hm-courts-tribunals-service-trust-statement-2020-to-2021> page 9. Last visited 26<sup>th</sup> November 2021.

confiscation regime through legislation. This examination has also included a review of the ways in which payment of compensation could be better prioritised by the confiscation system.

We published our consultation paper in September 2020 and subsequently held a three-month public consultation during which we met with stakeholders from across the criminal justice sector. We discuss the consultation process in more depth below.

Our consultation garnered over 100 consultation responses which were overwhelmingly positive and as a result of this comprehensive consultation we have been able to hone our policies and develop robust recommendations which form the basis of this final report.

## **Problem under consideration**

These problems include:

- Challenges in effectively preventing the dissipation of criminal assets;

A confiscation order can only be realistic and enforceable if an offender has assets left to confiscate. Once an offender knows that they are under investigation they have every incentive to put their assets beyond the reach of the authorities. However, judges report that, in many cases, applications for restraint are never made. During pre consultation we heard from prosecution authorities that there is a reluctance to pursue restraint applications prior to conviction because of the potential for adverse costs in the event of an acquittal or discharge of a restraint order.

- Frequent imposition of unrealistic confiscation orders;

The ineffectiveness of the confiscation regime in practice is well documented, including, notably, in highly critical reports published by the National Audit Office (“NAO”) in 2013 and the House of Commons Home Affairs Committee in 2016.

As at 31 March 2021, the value of outstanding confiscation orders was at £2.35 billion. There is no doubt that recovery rates could be improved and that the existing law contributes to unrealistic expectations regarding recovery.

Our review considers the current process for calculating confiscation orders including the ‘benefit’ and ‘recoverable’ amounts. It also considers the current enforcement mechanisms and how these could be bolstered.

- Ineffective incentives and sanctions of the confiscation regime.

The imposition of interest and default sentences are the major levers available to incentivise the satisfaction of confiscation orders. An interest rate of 8% applies to unsatisfied confiscation orders and offenders who default after the court ordered time to pay are liable to serve a period of imprisonment in addition to any sentence (custodial or otherwise) imposed for their substantive offending. Our review considers the effectiveness of these incentives and sanctions and whether there are alternatives that could be implemented.

Our review also considers the powers available to the magistrates’ court to enforce other types of financial orders and whether these could be better streamlined with the enforcement of confiscation orders.

- Compensation of victims in confiscation proceedings;

While the compensation regime is outside the terms of reference of this project, we have considered whether the confiscation regime may provide avenues by which compensation to victims could be better prioritised. For example, under section 22 of the Proceeds of Crime Act

2002 the court has a power to uplift the amount payable pursuant to a confiscation order. However, the section does not make any provision for payments made pursuant to this order to be directed towards unpaid compensation orders.

- Rehabilitation

Confiscation orders are not subject to limitation periods and remain in force until paid. They also accrue interest at a rate of 8%. This means that people who have insufficient means of paying their orders may be liable indefinitely. This review has also considered whether the confiscation framework encourages compliance and facilitates rehabilitation or whether it could be improved to promote fairness while attaining its objective (to disgorge the proceeds of crime).

### **Rationale for intervention**

- The conventional economic approach to Government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are failures in existing Government interventions (e.g. waste generated by misdirected rules). In both cases the proposed intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and re-distributional reasons (e.g. to reallocate goods and services to the more deprived groups in society).
- As the above discussion demonstrates, by making the proposed changes to Part 2 of the Proceeds of Crime Act 2002, there is scope for a significant increase in the amount that may be yielded from confiscation orders. By reforming the process by which orders are calculated and the mechanisms relating to restraint and realisation of assets, there will be a reduced reliance on defendants in relation to compliance. Put simply, the state will have the capacity to take assets in order to fulfil confiscation orders which will limit defendants' ability to frustrate the enforcement process. This means that the yield from these orders will be greater. Furthermore, by implementing a process which enables the realisation of assets, orders are likely to be satisfied earlier which supports the long-term rehabilitation of defendants.

### **Policy objectives**

1. To improve the efficiency of the process by which confiscation orders are made;
2. To ensure the fairness of the confiscation regime (including by ensuring that confiscation orders are realistic);
3. To optimise the enforcement of confiscation orders to improve the recovery rate;
4. To simplify the regime so that it is more accessible and comprehensible.

We ultimately aim to reform the system such that that the law is simplified, clarified and modernised.

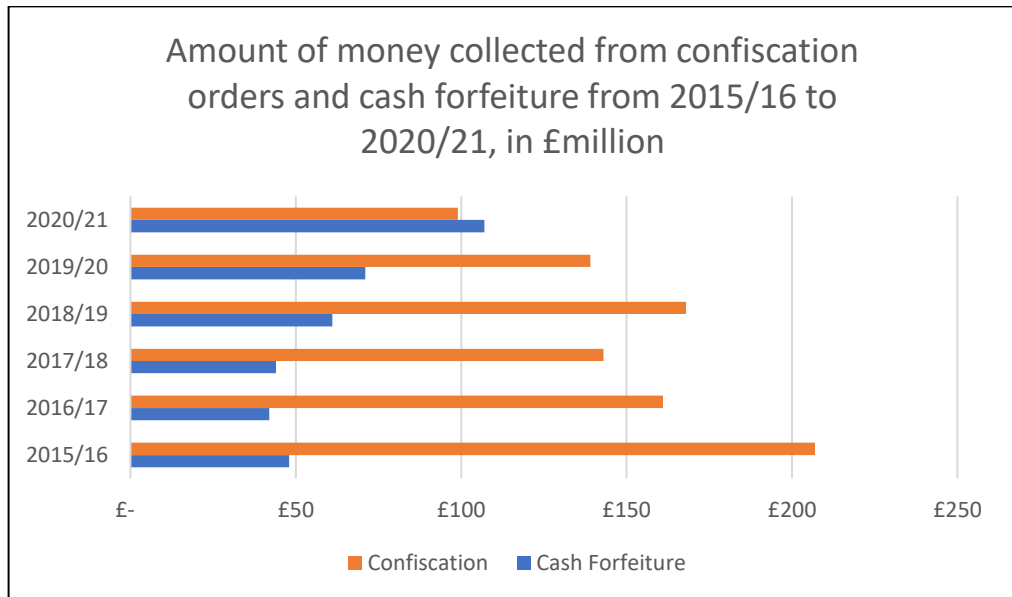
### **Scale and Scope**

- 1.1 Data on asset recovery performance under the Proceeds of Crime Act [POCA] 2002 is published annually by the Home Office. The Joint Asset Recovery Database<sup>4</sup> [JARD] provides asset recovery intelligence. The most recent report for 2020/21 covers the time when COVID-19 restrictions were in place. The restrictions impacted on every aspect of daily life including the entire law enforcement and asset recovery systems.

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<sup>4</sup> Database went live in 2004

- 1.2 The adverse impact on investigations, prosecutions and conviction capacity and capability is evident through the pronounced change in trend/magnitude of in 2020/21 relative to previous years. As a result any direct comparison of changes in asset recovery performance should not be made between the latest and previous releases of the Asset recovery Annual Statistics Bulletin.
- 1.3 For the 6 year period ending 31/03/2021 the average annual sum collected from confiscation orders and cash forfeiture was £99m and £107m<sup>5</sup>. See Chart 1 below.



Source: <https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2016-to-2021/asset-recovery-statistical-bulletin-financial-years-ending-2016-to-2021>

- 1.4 Criminal confiscation refers to the seizure of the proceeds of crime following a criminal conviction whereas cash forfeiture does not require a conviction and instead relies upon civil proceedings.

**The Procedure for Issuing Confiscation Orders**

- 1.5 When calculating a defendant’s benefit from crime, the Crown Court must first determine whether the offender has a ‘criminal lifestyle’. This is determined with reference to section 75 POCA 2002. If the person does not have a criminal lifestyle, the court will determine the offender’s benefit from crime by examining only the benefit from the offence(s) for which he or she was convicted (‘particular criminal conduct’). If the person does have a criminal lifestyle, the court will examine not only the ‘particular criminal conduct’, but apply statutory assumptions to every transaction undertaken by the offender and every asset held by him or her over a 6-year period. It is assumed that every asset held by an offender during that period is the proceeds of crime, unless he or she can show otherwise.
- 1.6 Having calculated the benefit from crime, the court will then determine what is actually recoverable from the defendant. The confiscation order is then made in the recoverable amount which may be the same or less than the benefit figure. It will be less than the benefit figure if the offender can satisfy the court that they have insufficient assets available to repay the benefit in full.
- 1.7 Having made the confiscation order the court must set a time period within which the order must be satisfied. The maximum total period permissible for satisfaction of a confiscation order is 6 months. Upon expiry of the ‘time to pay’ period, the offender is liable to imprisonment in default in the event of non-payment. The judge must therefore also set the period for the default sentence at the time of confiscation. Finally, the judge must consider making a ‘compliance order’. This can be any order that the court thinks is necessary to make enforcement of the confiscation order effective. In

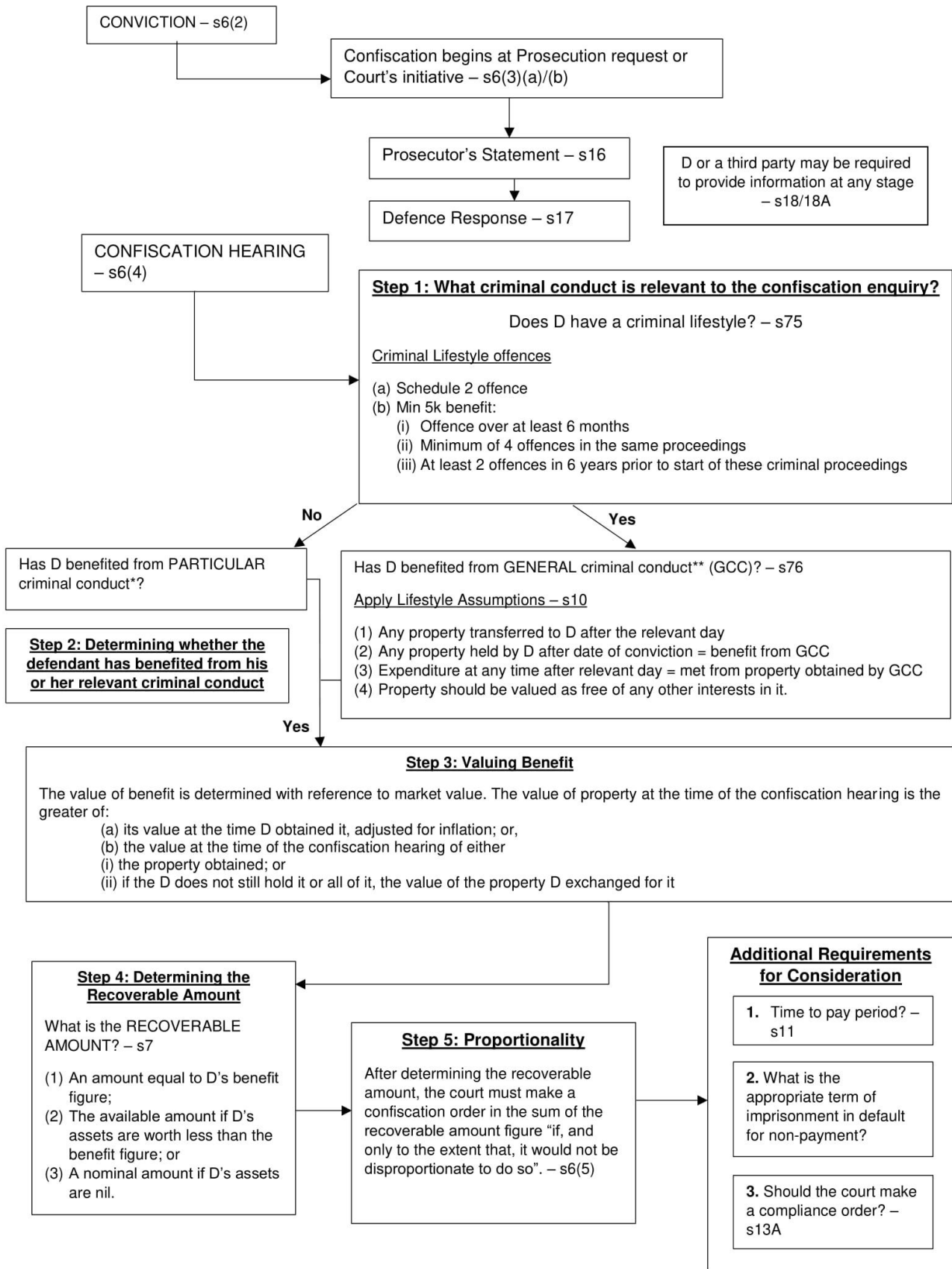
<sup>5</sup> Source: Asset recovery statistical bulletin, 2015/16 – 2020/21, Criminal Finances Team, Home Office

considering whether to make a compliance order, the court must always consider whether a travel ban is required.

- 1.8 Upon expiry of the time to pay period, in addition to the risk of imprisonment for non-payment, interest accrues on any unpaid amount. The interest rate is the Judgments Act rate (8% p.a.). See Chart 2.



**CONFISCATION UNDER POCA 2002**



1.9 Live data entries on confiscation orders are provided by:

- The police;
- Criminal Prosecution Service [CPS];
- Serious Fraud Operation [SFO]; and
- Local Authorities.

1.10 However, the problem with such data is that a single reference point to locate all relevant statistics does not exist. Enforcement data lacks the granular detail on how the law was applied to produce the outcome. This is problematic as cases are time sensitive. Six years is thought to be the maximum time period for which germane details of a confiscation order can be expected to remain intact. Beyond this time period it is difficult to enforce the order as the courts will often not have all the papers.

1.11 This Law Commission project seeks to improve the efficacy of the regime recovering the proceeds of crime from convicted offenders. As part of that process evidence is required to inform policy recommendations. In our previous consultation paper we drew upon primary research provided by Liverpool Crown Court in order to gain greater insight on observed national patterns. That data is retained in this report alongside updated national statistics.

1.12 Nightingale Courts provided increased court capacity during COVID-19 restrictions and aided court recovery particularly during the second lockdown. As a consequence confiscation orders collected for 2020/21 had a marginal decline of 2 percent [from the previous year's 44 percent collection level]. COVID-19 is not expected to have long term impact on the recovery of outstanding debt although it is likely that time extensions may be needed in the short to medium term.

1.13 The rest of this section describes the evidence gathering process is structured as follows:

- Section 3 identifies the national profile on key confiscation characteristics;
- Section 4 describes the evidence gathering exercise and presents findings; and
- Section 5, the summary, provides the sense-check for sample reliability.

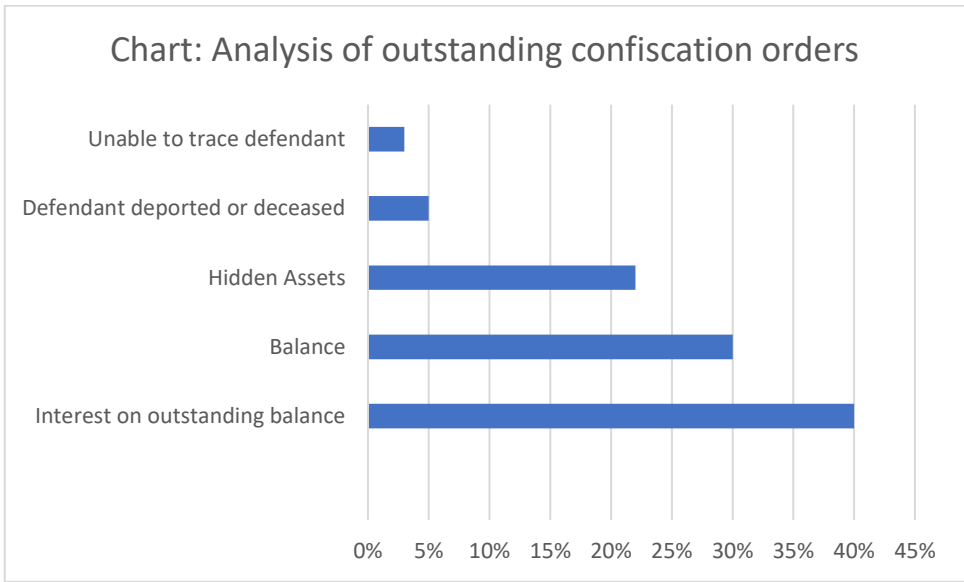
The section concludes with Home Office data on compensation allocated to victims from confiscation orders.

## **2. National profile of confiscation orders**

1.14 Data on outstanding confiscation orders is published annually by HMCTS as part of their trust statement. According to the latest available data the gross value of confiscation order debt as at 31 March 2021 is £2.35 billion<sup>6</sup>. See chart 1 below

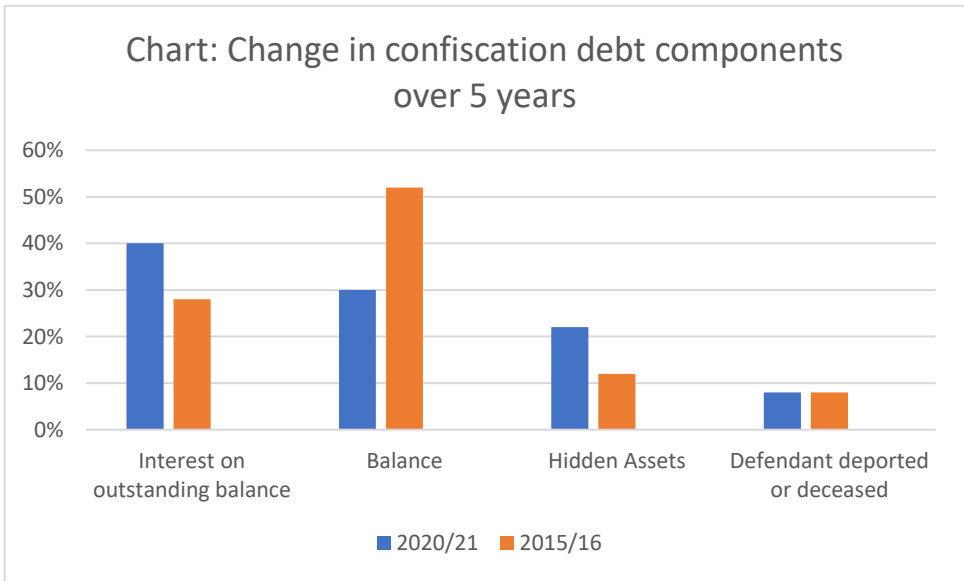
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<sup>6</sup> The gross value of confiscation order debt as at 31 March 2021 has been impaired for accounting purposes to a net present value of £143 million which is the estimate of the amount that is ultimately collectable.



1.15 Interest accrued on overdue confiscation order balances accounts for some 40 percent of all outstanding debt. Of the remaining 60 percent in effect about 30 percent is available to be recouped as the other 30 percent is either in hidden assets or the defendant is untraceable, deported or deceased. It is highly likely that a portion of the available 30 percent will be difficult to access as it is tied up in complex litigation.

1.16 Confiscation debt components have noticeably changed over the recent ten year period, see chart 2 below.



1.17 Whilst confiscation debt is £2.35 billion as the available balance diminishes over time so does the impaired value. This is the amount expected to be recovered over a period of 15 years. For 2020/21 the impaired value is £143.3 million. The average impaired value over the three-year period, 2016/17 to 2018/19, is £147 million. The outstanding debt remains payable and can only be cancelled by a court using a judicial cancellation but accrues interest at a rate of 8 percent which increases the debt balance daily<sup>7</sup>.

<sup>7</sup> The impaired value is an accounting estimate of the amount that HMCTS believe can be recovered, it is based on individual assessments of accounts over £1m in value but for all other accounts it is based on using historical receipts as an indicator for future cash collections.

1.18 As previously indicated data for 2020/21 has been impacted by COVID-19 restrictions. However, the following provides an overview of developments during that period:

- (1) 1,725 confiscation orders [69 percent of all confiscation orders] were valued at £10,000 or less;
- (2) 62 percent [1,080 confiscation orders] have been issued and paid in full;
- (3) £37.6 million was the largest confiscation order;
- (4) 14 orders were for £1million or more; and
- (5) £21.7 million was collected from confiscation orders valued at £1 million or more.

1.19 JARD data on orders made from 2004 onwards, including any pre-2004 orders outstanding when the system went live, provides some insight into the value range of orders most likely to be completed or to have an outstanding balance. In general order amounts less than £10k had the highest completion rates between 98-94%. As the range increased the percentage completed decreases, see table 2 below.

Table 2: Breakdown of confiscation orders by value<sup>8</sup>, 2004 to 2018

	Imposed	Completed	Outstanding	Percentage completed
£0 to £1k	21,769	21,264	505	98%
>£1k to £10k	21,939	20,637	1,302	94%
>£10k to £50k	13,650	12,091	1,559	89%
>£50k to £100k	3,937	3,183	754	81%
>£100k to £500k	4,200	2,957	1,243	70%
>£500k to £1m	565	290	275	51%
>£1m to £10m	403	149	254	37%
>£10m	26	6	20	23%

Source: National Compliance and Enforcement Service

1.20 The collection of outstanding confiscation order debt varies dependent on the age and value of the confiscation order. The 2020/21 Trust Statement<sup>9</sup> identified confiscation orders aged 5 years or more and with a value in excess of £1 million as accounting for just over £1.5 billion of confiscation order debt. Much of the debt referred to hidden assets or assets held overseas that cannot be liquidated. The next closest category was orders valued at £500,000 to £1 million accounting for just under £250 million.

#### 4. The Law Commission's data gathering exercise

1.21 In order to gain greater insight on trends in confiscation orders the Law Commission embarked on a data gathering exercise using a version of cluster sampling based on data from the Liverpool Crown Court [CC].

1.22 We are grateful to Liverpool CC for access to confiscation orders for September 2015 to August 2016 inclusive. The time period satisfies two requirements:

- post-Serious Crime Act which came into effect in early 2015; and
- allows follow through from the hand-down of a confiscation order to cover maximum time extensions and default sentences where relevant.

<sup>8</sup> Excludes nominal orders. Reference to 'value' in e-mail correspondence – assumed to be equivalent to original order amount

<sup>9</sup> See HM Courts and Tribunal Service Statement 2020/21 at HMCTS\_Trust\_Statement\_2020-21-1.pdf

1.23 Liverpool Crown Court was selected as the most representative CC because it covers the full spectrum of cases in general. Specifically in relation to cases to do with confiscation orders it does not have a record of specialisation in complex cases. During the 35 month period ending February 2018 Liverpool CC consistently featured within the top three rankings of Crown Courts with respect to:

- the volume of POCA hearings;
- the duration of hearings; and
- the number of sitting days.

See Table 3 below.

Table 3: Crown Court POCA Hearings and the Sitting Days, January 2015 – February 2018<sup>10</sup>

Crown Court	No. of Hearings	Duration of Hearings [mins]	Sitting Days
Liverpool	1,056	15,443	60
Nottingham	655	n/a	n/a
Birmingham	599	24,041	93
Southwark	n/a	29,396	114

Source: Data provided by

1.24 Based on average data we identified the average case hearing time and the number of hearings per sitting day as about 30 mins and 10 hearings respectively.

1.25 Our interest is in collecting data across a range of variables and to extrapolate findings from our sample to confiscation orders in general. In some cases the proportion of the population [post-2015 confiscation orders] is known to have particular characteristics. For example data reveals the proportion of UTP-nominal orders [as a percentage of all confiscation orders].

1.26 But there is less certainty on the proportion of orders requiring a time extension in order to complete payment. However, even for those variables with which we are less certain we benefit from stakeholder insights and anecdotal evidence. On this basis we identified a minimum sample size.

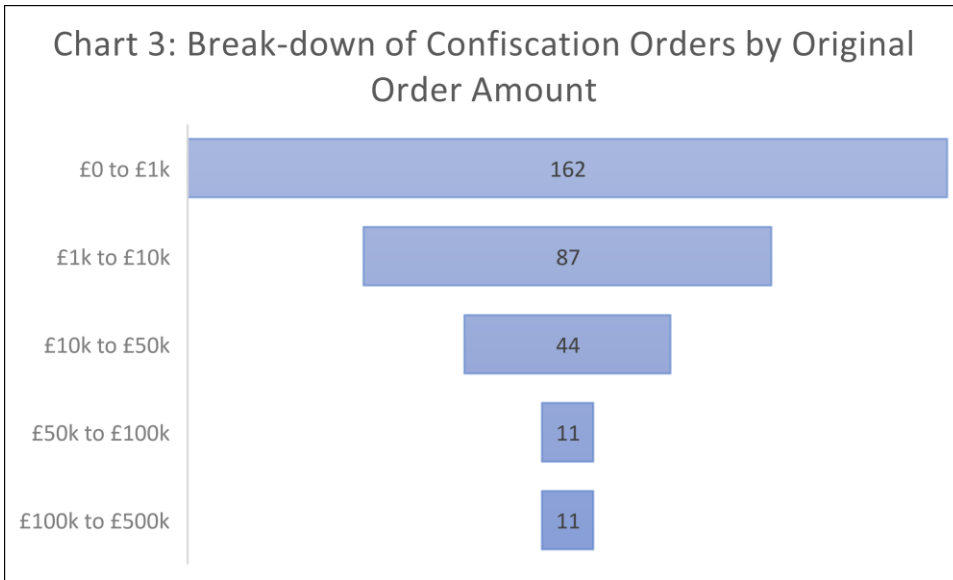
### Liverpool Crown Court data

1.27 During 03/09/2015 to 29/08/2016 Liverpool CC issued 315 confiscation orders<sup>11</sup>. The majority [75%] of orders issued were valued at less than £10k and a minority [8%] were valued above £50k<sup>12</sup>. See chart 3 below.

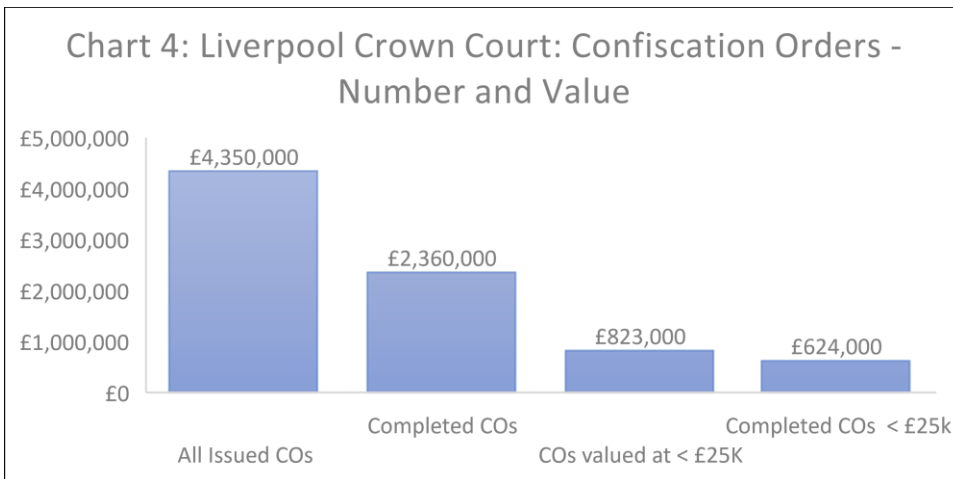
<sup>10</sup> Restricted to the top three ranking Crown Courts in each category. n/a means the Crown Court did not fall within one of the top three rankings

<sup>11</sup> Including UTPs

<sup>12</sup> Excluding nominal orders [50]



1.28 The total value<sup>13</sup> of all confiscation orders issued was £4.35 million. Completed payments accounted for about £2.36 million<sup>14</sup> [54%] of this amount. About 85% of all orders<sup>15</sup> had an original order amount of less than £25,000 and a total value of £823k. Just under 55%<sup>16</sup> of orders [with an original order amount less than £25k] were completed in full. See chart 4 below.



1.29 The chart above indicates that a higher proportion of lower value confiscation orders are collected [76%] but such orders account for a lower proportion of total payments [35%] than do higher value confiscation orders.

1.30 Table 4 below provides headline details from Liverpool Crown Court data.

Table 4: Assets and Benefits, 2015-2016, [in £ million]

	In £ million
Total benefit assessed	£76.63
Original order amount	£4.35
Current order amount	£4.24
Total payments	£3.76

<sup>13</sup> Original order amount

<sup>14</sup> Refers to confiscation orders with zero balance outstanding but may have cumulative interest payments. 146 confiscation orders completed.

<sup>15</sup> Excludes UTP-Nominal Orders

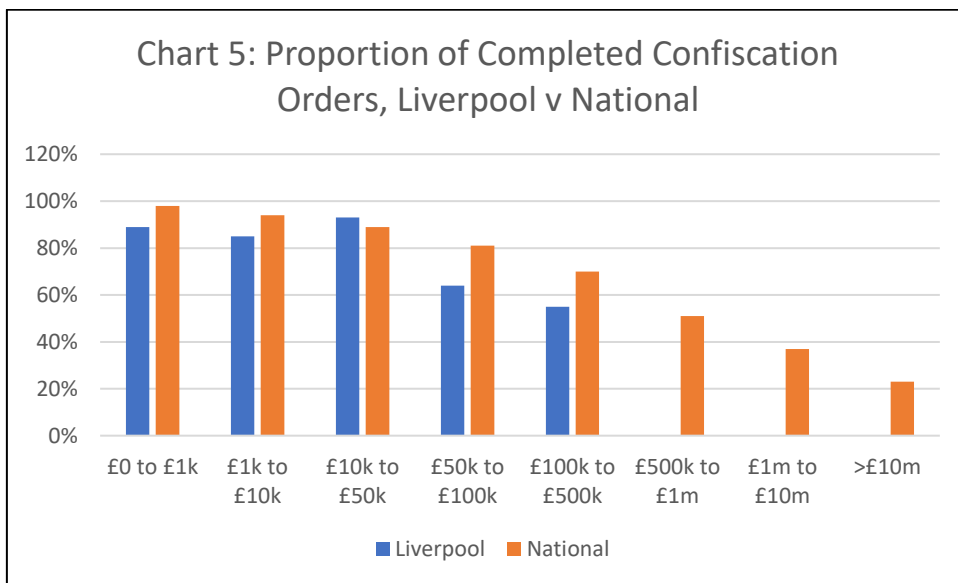
<sup>16</sup> 125 of 226 confiscation orders

Total asset value applied for	£9.64
Asset value assessed	£9.52
Asset value realised	£1.29
Total payments / total benefits assessed	5%
Asset value realised / asset value assessed	13%

1.31 There is quite a wide divergence [£2.47m] between total payments made and asset value realised. This is likely due to payments being made from sources other than the assets identified as belonging to the defendant at the time of confiscation. There is no obligation on a defendant to realise their identified assets to pay a confiscation order because the orders are made against the person and not against the assets.

Overview of Liverpool Crown Court v National data trends

1.32 There is compelling evidence that Liverpool CC data displays similar trends to the national picture. For example chart 5 below shows the proportion of confiscation orders completed across different value ranges in the case of all national confiscation orders and Liverpool CC data.



1.33 For confiscation orders with original order amounts less than £50k divergence between national and sample statistics is less than 10 percentage points ranging from -4% to 9%. One explanation for greater divergence in evidence beyond £50k is the limited sample size of just 22 confiscation orders which increases the ability of a few large orders to bias results.

1.34 A consistency check using the £25,000 threshold value adopted in the HMCTS Trust report produced a similar trend between Liverpool CC and the national picture. For both the sample and the national a higher proportion of lower value confiscation orders were completed [70% at the national level and 76% with respect to Liverpool CC.]

1.35 Further similarity between national and Liverpool data arises in relation to the proportion of nominal orders to total orders, 16% with respect to the national case and 14% with respect to Liverpool.

1.36 On the basis of the above there is a high level of certainty that the characteristics observed in the sample will likewise represent the characteristics of the total population.

1.37 Sample data identifies *Buildings/Land* as the most influential asset type accounting for the greatest estimated asset value [65% of total asset value], the greatest proportion of overseas assets [89%]

and the highest proportion of unrealised assets [70%]. The asset is the most illiquid and this impacts directly on payment period end dates.

1.38 Inferences that may be extrapolated from the sample to the national are as follows:

- (1) Overseas assets: Largely consist of *Buildings/Land* and account for a relatively small proportion of total asset value, less than 4%. On the national scale overseas assets were also of comparatively low value in relation to other national statistics, albeit significantly lower than our sample proportions;
- (2) Statutory Assumptions applied: Confiscation orders with a BAA greater than £50k are most likely to have had statutory assumptions applied. Sample data identifies 85% of confiscation orders with an original order amount of less than £50k. On this basis the number of applications is likely to be low.
- (3) Third party interests: Unsurprisingly *Buildings/Land* had the greatest identifiable instance of third party interests [9]. But this is likely to be an under-estimation potentially being as high as 50% of the asset category. Given the significant asset valuation of this category the impact could be significant;
- (4) Time to pay: In the 30 cases given time extensions, 23 confiscation orders were satisfied, 8 of which were in *Buildings/Land*, i.e. 35% of the total satisfied during the extended payment period - more than one-third; and.
- (5) Hidden assets: Only 4 of the 15 orders had an asset value greater than £50k [of which 3 were over £100k]. This is somewhat at odds with the national picture of significant hidden assets. Small sample size may have contributed as only a few large orders are required to inflate the value.

## Compensation to victims

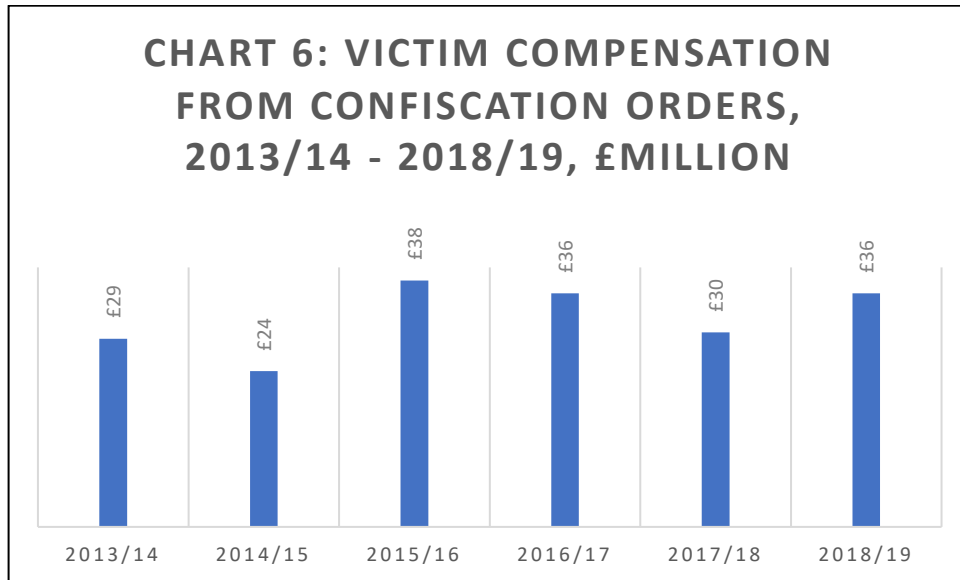
1.39 A court may order the offender to pay compensation to the victim of the crime. If both a compensation order and confiscation order are in place against the subject and they are unable to pay both – victim compensation will take priority.

1.40 In 2018-19 just over £36 million<sup>17</sup> was paid in compensation to victims from the proceeds of confiscation. See chart 6 below.

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<sup>17</sup> See Home Office Asset Recovery Bulletin at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/831394/asset-recovery-financial-years-2014-to-2019-hosb2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831394/asset-recovery-financial-years-2014-to-2019-hosb2019.pdf) last visited 26th May 2020





On average, over six years, victim received £32 million in compensation amounting to just over 20 percent of the average recovered.

## Cost of Crime

1.41 The Home Office provides estimates of the economic and social cost of crime<sup>18</sup> under the following three cost categories:

1. Costs in anticipation of crime;
2. Costs as a consequence of crime; and
3. Costs in response of crime.

1.42 Non-violent crimes are likely to dominate. For this reason we use the proxy of the average costs in response to all non-violent crimes. The costs in response to crime include police costs in dealing and investigating crime and the costs to the criminal justice system [CJS] covering 10 areas<sup>19</sup> [excluding the police]. The average across non-violent crime is indicated in table 5 below.

Table 5: Average unit cost of police resources and to the criminal justice system as a result of non-violent crimes.<sup>20</sup>

Response to crime	Non-violent average unit cost
Police costs	£410
Criminal Justice system costs	£590

## Confiscation order appeals

1.43 Appeals against the confiscation order can be made by the defence or the prosecution. The number of confiscation order appeals is indicated in table 6 below.

Table 6: Annual number of Confiscation order appeals, June 2017 – June 2020

<sup>18</sup> All costs in 2025/26 prices

<sup>19</sup> The ten areas cover Prosecution [CPS], Magistrates Court, Crown Court, Jury service, Legal aid, Non-legal defence, Probation Service, Prison Service, National Offender Management Service and the Youth Justice Board

<sup>20</sup> In 2015/16 prices rounded to the nearest £10

	Confiscation Order - Defence	Confiscation Order - Prosecution		Confiscation Order – Prosecution Total	Grand Total
		Third Party	Prosecution		
Received					
Jul 17 - Jun 18	77	4	5	9	86
Jul 18 - Jun 19	86	3	3	6	92
Jul 19 - Jun 20	51	2	2	4	55
<b>Grand Total</b>	<b>214</b>	<b>9</b>	<b>10</b>	<b>19</b>	<b>233</b>

Source: Criminal Appeals Office

### *Crown Court and Magistrates Courts costs*

1.44 Both the Crown Court and Magistrates have 5 hour long sitting days where the average cost of judicial and staff salaries are indicated in table 7 below.<sup>21</sup>

Table 7: Crown Court / Magistrates Hourly staffing costs

	Crown Court	Magistrates
Judicial	£ 981.00	£ 130.00
Staff	£ 541.00	£ 981.00
Total	£ 1,522.00	£ 1,111.00
<b>Uprated 2020/21 prices</b>	<b>£ 1,800.07</b>	<b>£ 1,313.98</b>
Hourly cost <sup>22</sup>	£ 360	£ 260

<sup>21</sup> [Her Majesty's Courts and Tribunal Services Annual Report and Accounts 2013-14 (24 June 2014) page 7]

<sup>22</sup> Rounded to nearest £10

## Main Stakeholders

- Police
- HMCTS
- Legal practitioners – solicitors and the private Bar
- The Judiciary
- Magistrates
- The CPS
- Law academics
- The Home Office/government broadly
- Defendants
- Victims of crime
- Financial Investigators
- Private Receivers

## Description of options considered

1.45 This impact assessment compares Options 1 against the do nothing [option 0]:

- (1) Option 0 – Do nothing
- (2) Option 1 – Overhaul existing confiscation order regime.

### Option 0 – Do nothing

1.46 This option would be to retain existing arrangements. The Law Commission has rejected this option as it is clear from our discussions with stakeholders that the existing regime is not functioning optimally. It is inefficient in terms of the process and inefficient in terms of the yield from confiscation orders. The key features and associated problems of the current law are summarised in table 8 below.

Table 8: Option 0: Key features and associated problems

Key features	Associated problems
The current system makes orders in personam which relies on defendants to arrange payment.	- Often defendants resist payment and prefer to serve terms of imprisonment in default in order to hold onto their ill-gotten assets. While some assets may be confiscated and realised, defendants may divest their assets/hide them in order to avoid paying their order.

<p>Confiscation orders are made in the Crown Court but enforced in the magistrates' court</p>	<ul style="list-style-type: none"> <li>- The magistrates' court often does not receive adequate information about the associated criminal matter and basis of the order.</li> <li>- Defendants are able to frustrate the system by refusing to pay. Once a sentence of imprisonment in default has been served there is no scope for further enforcement.</li> </ul>
<p>Confiscation orders are often negotiated prior to the confiscation hearing. Benefit figures are not always subject to rigorous scrutiny because the focus in the agreed order is on the amount to be paid, rather than the benefit. The defendant may be unaware of the potential liability to repay the difference between the benefit figure and the sum ordered to be paid at a later date.</p>	<ul style="list-style-type: none"> <li>- These figures remain as outstanding sums and contribute to the £2 billion in outstanding orders.</li> <li>- Defendants are never able to fully rehabilitate because these orders expose them to subsequent applications to take any newly accumulated assets in satisfaction of the order.</li> </ul>
<p>Confiscation orders can be increased using s22 POCA 2002 but there is no discretion to direct funds towards outstanding compensation orders</p>	<ul style="list-style-type: none"> <li>- Compensation of victims is not prioritised and victims may be left out of pocket because all recoverable monies are distributed according to ARIS.</li> </ul>
<p>The process for determining the extent of a defendant's interest in an asset is not used consistently.</p>	<ul style="list-style-type: none"> <li>- Confiscation proceedings are often significantly delayed because of the need to determine third party interests in property/assets.</li> <li>- Judges who practice in criminal law are often hesitant to make determinations which may affect concurrent family law proceedings.</li> </ul>
<p>The powers that magistrates rely upon to enforce financial orders are inconsistently applied to confiscation orders which creates further delay and complexity.</p>	<ul style="list-style-type: none"> <li>- The fines-based powers of the magistrates' court and the powers available to enforce confiscation orders are not streamlined.</li> </ul>

## **Option 1 – Overhaul of existing regime [preferred option]**

The focus here is only on those proposals likely to have significant costs or savings or which are in the public interest. Nine policy areas are indicated as follows:

### 1. Objective of the act

- a) There should be a clearly articulated aim of the regime contained in the statute.
  - i) The aim of the regime should be to deprive defendants of their benefit from criminal conduct, within the limits of their means.

By identifying the explicit aim of the statute, there will be clarity with regards to the calculation of benefit and this will ensure that any order imposed is proportionate.

### 2. Preparing for the Confiscation Hearing

- a) We recommend a new process to ensure that timetables are appropriate and material is served. This will have some flow-on administrative costs.
- b) We recommend a new hearing (Early Resolution of Confiscation), preceded by a non-court based EROC meeting, to take place after the exchange of information and before a confiscation hearing is listed, to facilitate the early resolution of the confiscation proceedings. While this is likely to have administrative costs, it should save significant court costs later because it will facilitate the resolution of proceedings in lieu of a lengthy court hearing.
- c) Crown Court judges should be offered additional training to be eligible for the status of “complex confiscation judges” and this status should be considered when making allocation decisions. This training has potential costs which are discussed below.

### 3. Defining and valuing benefit and recoverable amount

- a) We recommend changing the way in which the benefit and recoverable amounts are calculated to ensure that orders are fairer and more realistic.
- b) In relation to offences which may trigger application of the criminal lifestyle assumptions, both offences from which there was benefit and offences from which there was an attempt to benefit will be considered. This will mean that more defendants will be subject to the criminal lifestyle assumptions and thus the amount recoverable may be higher.
- c) Where there are multiple convictions on the same occasion and convictions on multiple occasions, we recommend that the number of offences required to trigger the assumptions be harmonised to three offences.
- d) The financial threshold for triggering the lifestyle assumptions be raised from £5,000 to £5,000 adjusted for inflation.

### 4. Enforcement

- a) We recommend that the Crown Court should have the discretion to make an enforcement order that takes effect immediately or on a “contingent” basis if there are reasonable grounds to believe that the defendant will fail to satisfy the order through wilful refusal or culpable neglect, or that the defendant’s share of the asset will not be realised by the time to pay period. This will make enforcement significantly easier because it will enable the court to realise assets in the event of non-satisfaction of the confiscation order.
- b) When considering types of contingent enforcement order, the Crown Court should have the power to impose a vesting order, through which an asset, such as a property, will be vested in

a receiver. This mechanism will allow an order for the appointment of an enforcement receiver to be made significantly earlier in the process (immediately following the expiry of the time to pay period), rather than at the point at which it becomes clear that enforcement is not effective.

- c) We recommend that the Crown Court should have the power to order the provisional discharge of a confiscation order when reasonable enforcement actions have been exhausted and the recoverable amount would be minimal, or when only interest is outstanding and it is in the interests of justice to do so. If provisional discharge is granted, the confiscation order is no longer in force and no further enforcement can be taken, unless the discharge is revoked. This regime should apply to confiscation orders already made under POCA 2002 as well as those made pre-POCA. The recommended regime aims at ensuring some flexibility when there are changes in circumstances, as well as avoiding unlimited enforcement action when there is no prospect of recovering the available amount. This will serve also to prevent a debt from accumulating at the current rate.
- d) We recommend that where there are concurrent financial remedy proceedings that are complex 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, allocation should be to the High Court. Otherwise, proceedings should continue before an appropriate judge in the Financial Remedy Court. This proposal could mean that a limited number of confiscation cases proceed in the High Court where they would otherwise be in the Crown Court. However, it will also mitigate the burden on the courts by condensing two sets of proceedings into one.

## 5. Reconsideration

- a) We recommend a regime that will seek to induce the defendant to provide accurate information at a confiscation hearing, while providing the possibility to remediate the making of inaccurate confiscation orders. We recommend a power to vary upwards the available amount (section 22) when assets were not identified at the time the confiscation order was made or were realised for a greater amount than anticipated (up to the benefit figure). This is very different from the current position which enables an upwards variation whenever any new assets are identified and will reduce the money recoverable under ARIS. This recommendation will encourage rehabilitation because it enables defendants to acquire legitimate assets after the initial confiscation order has been paid.
- b) We also recommend a power to vary downwards the available amount (section 23) when assets were realised for a lower value. In addition, we recommend a power to vary the benefit figure accordingly when a section 23 order is made.
- c) We recommend that a designated officer of the magistrates' court should also have the power to apply for a downwards variation of a confiscation order (section 23), in order to reduce the need for defendants to apply to the Crown Court and avoid unnecessary enforcement hearings in the magistrates' court.

## 6. Compensation

- a) We recommend a power for the court to direct that any sums paid towards a confiscation order be redirected towards any outstanding compensation order.
- b) 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 aim of

prioritising payment of compensation and preventing the defendant from facing an unpayable order.

## 7. Restraint

- a) We recommend that the current rule which prohibits the release of a defendant's restrained funds for the payment of legal expenses should be altered to permit the payment of legal fees in confiscation proceedings and related criminal proceedings. This will reduce reliance on legal aid but could reduce the final yield from confiscation orders if funds are dissipated on legal expenses. To mitigate this risk, we recommend that certain conditions be satisfied before the funds are released.

## 8. Effective asset management

- a) We recommend that where assets are seized due to a risk of dissipation, an application may be made to appoint a management receiver over the seized assets. A management receiver's remuneration and expenses are paid from the assets over which he or she is appointed. This may reduce the amount recoverable under a confiscation order.
- b) We recommend that the National Police Chiefs' Council gives renewed consideration to the training needs of all police officers in connection with POCA 2002, and in particular of those who exercise or oversee powers of search and seizure. This may require additional funding.
- c) We recommend the creation of a Criminal Asset Recovery Board ("CARB") with responsibility for developing a national strategy for asset management and realisation. This may have some low administrative costs but we envisage it will be a voluntary professional body such as the Financial Investigators' working group where participation is unpaid.

## 9. Appeals

- a) We recommend maintaining the existing appeals structure whereby defence appeals against confiscation orders are made pursuant to the Criminal Appeal Act 1968. This route of appeal will include appeals against contingent enforcement orders. This may increase the number of appeals made to the Court of Appeal if appeals are made in relation to the contingent enforcement order where the order itself is agreed. However, we expect this sort of appeal to be rare.
- b) We recommend that the prohibition which prevents defendant appeals against section 10A property determinations be removed which may lead to a marginal increase in appeals to the Court of Appeal.
- c) We recommend that it be made explicit that compliance orders can be appealed by the defence which may also increase the number of appeals made to the Court of Appeal. However, we believe this is unlikely given that this is already technically possible and occurs rarely.

## Public Consultation Exercise

In September 2020 we commenced a 3 month public consultation during which we invited responses to the provisional proposals made in our consultation paper.

Because the consultation took place during the covid-19 pandemic, it involved a combination of online webinars, themed online roundtable events and individual online meetings with stakeholders. The events each centred on different aspects of the confiscation process and were designed to elicit a broad range of views and diverse perspectives.

We were particularly eager to engage with stakeholders who had personal experiences of the confiscation process and for this reason we held a ‘fairness’ roundtable. This roundtable was attended primarily by people who had either had a confiscation order made against them personally or who had a family member with an order against them.

We were also careful to ensure that we had spoken to stakeholders from all aspects of criminal practice including defence, prosecution and judiciary. We engaged with defence barristers and solicitors as well as with investigative and prosecution agencies (Crown Prosecution Service, the National Crime Agency, the Serious Fraud Office, the Environment Agency, among others). We also met with judges and magistrates.

Operational stakeholders were also a key focus and we spoke to Her Majesty’s Courts and Tribunals Service several times during the consultation.

As a result of this consultation process we received 99 consultation responses through our online consultation tool and several written responses by way of email and post. This strong level of engagement with the consultation has ensured that our final recommendations are robust and credible because we have been able to weigh and analyse a large volume of evidence.

## Monetised and non-monetised costs and benefits of each option

This Impact Assessment identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the “do nothing” option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects that cannot sensibly be monetised. These might include how the recommendation impacts differently on particular groups of society or produces changes in equity and fairness, either positive or negative.

When calculating the net present social value (“NPSV”) for the impact assessment we have used a time frame of ten years, with the present being year 0. We have assumed that the transitional costs and benefits occur in year 0, the current year, unless otherwise indicated. Ongoing costs and benefits accrue in years 1 to 10. We have used a discount rate of 3.5%, in accordance with HM Treasury guidance. Unless stated all figures are in 2019/20 prices, and have been updated using the GDP deflator to adjust for inflation.

### Option 0: Do nothing [base case]

Because the “do nothing” option is compared against itself its costs and benefits are necessarily zero, as is its NPSV.<sup>23</sup>

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<sup>23</sup> The NPSV shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPSV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.



## Option 1:

### Costs

#### *Transitional Costs*

##### 1. New forms and guidance

New standardised forms will be required across a number of policy areas. For example pre-order case management is likely to require separate court dates/listings for half-day hearings. New compliance orders, as part of the enforcement process, will also require new forms. Most, if not all new forms will be on-line, as will guidance. The cost will be in terms of time taken to draft new guidance and to the extent it fits within the remit of existing staff duties we anticipate negligible cost impact.

##### 2. Enhanced training for judges

Confiscation cases draw upon both civil and criminal law and require specialist training. We encourage all judges who sit in the Crown Court to undertake some training on confiscation. While we do not recommend that additional training be mandatory to oversee complex confiscation cases, we recommend that those judges who are likely or inclined to oversee more complex confiscation cases are able to access further training to become “complex confiscation judges”.

It is important to note that the costs for delivery of training vary depending on whether the training is delivered to salaried judges or daily fee-paid judges. It is cheaper to deliver training to salaried judges because the cost is built into their salary and not an additional expense, whereas fee-paid judges would have to be paid for their time. The judicial college has indicated that the cost for a fee-paid judge to attend one day of training is approximately £1,000.

The Judicial College also indicated that there is scope for training to be delivered either online or in person, but there are advantages and disadvantages (and costs) associated with each of these options. Whilst facilitating training virtually will save the cost of venue hire, transport and catering, training is less efficient in this format. Training undertaken virtually may ultimately take significantly longer than training which is undertaken in person and this should be considered.

The key factor in determining the way in which any confiscation training would be implemented is the Judicial College budget. The Judicial College training budget comes out of the MoJ budget and is currently tied to existing training projects. If the Judicial College received further funding, they would be able to expand their confiscation training options.

##### 3. Establishment of the Criminal Asset Recovery Board (CARB)

This recommendation entails the establishment of an industry body which would set policy and procedure for the standardised management of restrained and/or seized assets. We invite the Government to consider the appropriate membership of CARB and how to engage

with stakeholders from all sectors. There should only be costs associated with the establishment of this body.

#### 4. New procedures requiring administrative support

As informal procedures such as the Early Resolution of Confiscation Meeting are formalised administrative support is likely to be required. The extent to which this can be incorporated within existing duties and responsibilities largely depends on the scope and scale.

### **On-going Costs**

#### 1. Recalculation of the Recoverable Amount

In simple terms the recoverable amount is currently determined to be the lesser of either the available amount or benefit figure. Our new policy enables the subtraction of various sums (for compensation already paid, assets seized by the state) from the total benefit in order to come to the 'outstanding benefit' and the recoverable amount is the lesser of either the outstanding benefit or the available amount. Our policy renders the defendant liable for the outstanding benefit figure rather than the total benefit which means that the subtraction of these sums will have implications for the amount able to be collected.

#### 2. Lengthier Crown Court proceedings

Crown Court hearings in connection with confiscation orders will often include assessment of third party interests. It is recommended that the determination of such interests (including appeals) should occur early in the process. Effectively front-loading the system will mean longer hearings but with better recovery.

Additionally, due to our recommendations in relation to Early Resolution of Confiscation hearings, we anticipate that fewer confiscation applications will require a full Crown Court Hearing. (See paragraph entitled 'Reduced number of Crown Court hearings' below)

The limitations we have placed on applications to increase the available amount under section 22 are also likely to lead to a reduction in Crown Court hearings.

See table 9 below

Table 9: Increased Court costs for longer hearings [Volume and £]

	Low estimate	Central estimate	High estimate
Average No. of outstanding confiscation orders valued >£50k	180	180	180
Percentage increase in hearings	15%	25%	35%
Average hourly Crown Court sitting cost <sup>24</sup>	£360	£360	£360
Lengthier hearings @ 1 hour each	1	2	3
Total cost <sup>25</sup>	£9,700	£32,400	£68,000

Assumptions:

<sup>24</sup> Rounded to nearest £10 for presentation

<sup>25</sup> Rounded to nearest £100

- High value confiscation orders [£50k or more]<sup>26</sup> most likely to be complex;
- Average number of hearings based on average number of outstanding confiscation orders valued more than £50k. Of this number [about 180] between 15 - 35 percent assumed to require additional hearings;
- Additional one-hour long hearings required: 1 hearing<sup>27</sup> [low estimate] - 2 [best estimate] 3 [high estimate]; and
- In the absence of a detailed order breakdown we apply proportions indicated in table 2 using a simple average.

**Estimated annual cost = £32,400 [central estimate]**

**Present value over 10 years = £ [central estimate]**

### 3. Judicial training on confiscation

Recommendations for enhanced training on confiscation have additional cost implications for the existing cohort and potentially for future cohorts if the time allocation for training also increases.

### 4. Crown Court to maintain jurisdiction over enforcement

Currently, enforcement of confiscation orders occurs within the magistrates' court. Our recommendation-calls for more complex cases including those involving third party interests to remain within the Crown Court. More Crown Court resources will be required to facilitate these hearings. This includes the new provisional discharge provision which requires a Crown Court hearing.

See table 10 below

Table 10: Increased number of Crown Court cases [Volume and £]

	Low estimate	Central estimate	High estimate
Average No. of outstanding confiscation orders valued >£50k	180	180	180
Percentage with complex hearings	40%	50%	60%
Average hourly Crown Court sitting cost	£360	£360	£ 360
Average hourly magistrates' court cost	£260	£260	£260
Additional No of hearings @ 1 hour	2	3	5
Total cost <sup>28</sup>	£14,000	£26,200	£52,500

#### Assumptions:

- High value confiscation order [£50k or more] most likely to be complex;
- Average number of hearings based on average number of outstanding confiscation orders valued more than £50k

<sup>26</sup> We have used £50k as a threshold for "high value" cases because based on the data from Liverpool Crown Court (below) a tipping point at which the risk of dissipation may speak for itself is in cases where the criminal benefit is greater than £50,000. This data also shows that where the recoverable amount is less than £50,000, the rate of completion is at its greatest. One reason for this is the increased prevalence of "hidden assets findings" made in orders over £50,000. This is discussed in the Consultation Paper at 26.72 – 26.76.

<sup>27</sup> Drawing on a comprehensive breakdown provided by table 2 sets the percentage completion at much higher 90+%

<sup>28</sup> Rounded to nearest £100

- Additional one hour long hearings required: 2 hearing<sup>29</sup> [low estimate] - 3 [best estimate] 5 [high estimate]
- In the absence of a detailed order breakdown we apply proportions indicated in table 2 using a simple average.

**Estimated annual cost = £26,200 [central estimate]**

**Present value over 10 years = £0million [central estimate]**

## 5. Appeals

Our recommendations on appeals may lead to an increase in appeals to the Court of Appeal which may have ongoing cost implications. While our recommendations afford new rights of appeal connected with new types of orders including ‘contingent enforcement orders’, these rights crystallise at the same time as the existing right to appeal a confiscation order. For this reason, we anticipate only marginal cost implications based on a potential increase in the complexity and duration of appeals (if the party appeals both the order and the contingent enforcement order) and the slight expansion of third-party rights of appeal against Crown Court enforcement orders.

## 6. Reconsideration and provisional discharge

Our recommendations on reconsideration are designed to considerably reduce the number of applications that can be made in respect of section 22 uplifts. Currently an application can be made by the prosecution to have the confiscation order increased if the prosecution identifies that the defendant has any further assets (and the court determines that it is ‘just’). Our recommendations limit these applications to assets which were not disclosed at the time of the confiscation hearing or were realised for more than anticipated. This means that newly acquired legitimate assets can no longer be the subject of uplift applications which will reduce the yield from these applications significantly. This was a policy shift made on the basis of consultation responses and balances the objective of the Act with the need for finality of litigation and rehabilitation.

The provisional discharge recommendations enable the court to provisionally discharge confiscation orders where there is no longer any realistic or reasonable prospect of enforcement. While they may have ‘cost’ implications in the sense that the orders are no longer being enforced and this represents a loss to the government, these recommendations are premised on the idea that these orders were not able to be enforced in any event and therefore there is no actual ‘cost’ implication.

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<sup>29</sup> Drawing on a comprehensive breakdown provided by table 2 sets the percentage completion at much higher 90+%

## Benefits

### *Transitional benefits*

None identified

### *On-going benefits*

#### 1. Increased recoverable debt

There are a number of policy proposals that will facilitate an increase in the recoverable debt. Firstly, we hope to encourage early restraint of assets with our revised costs recommendations which do not expose prosecution agencies to adverse legal costs in the event that the defendant is acquitted or the confiscation application is unsuccessful.

Secondly, our contingent enforcement orders are designed to ensure that assets are identified at the point the confiscation order is made and measures can be put in place which enable realisation of the assets at the point the time to pay period expires.

The enhanced powers of the magistrates' court to require defendants to provide full financial statements and to attend court will better facilitate the enforcement of orders and hopefully avoid the activation of the terms of imprisonment in default which is costly. These powers will also be available after the term of imprisonment in default has been served in order to encourage ongoing defendant compliance and increase yield.

Furthermore, changes to the criminal lifestyle provisions, namely the addition of offences to Schedule 2, POCA 2002, which means that there will be additional types of offences to which the criminal lifestyle assumptions automatically apply; and the inclusion of 'attempts' as a component of the criminal lifestyle triggers, will increase the confiscation cases caught by the assumptions and thus the potential asset pool.

In attempting to monetise the potential for an increased recoverable yield we rely on the average recoverable value over a three-year period and assume a percentage uplift. See table 11 below.

Table 11: Increased recoverable amount

	Low estimate	Central estimate	High estimate
Average recoverable debt	£147 million	£147 million	£147 million
Percentage uplift	2%	6%	10%
Annual recovered debt	£2.94 million	£8.82 million	£14.70 million

#### Assumptions:

- Annual average recoverable debt based on pre-covid available three-year average: £147 million;
- Uplift range of 2% [low], 6% [best], 10% [high]. The applied range is based on forensic identification and discussion of all policy proposals likely to impact on recoverable debt and an assessment of the likely scale of impact.
- No behaviour change on the part of those served with confiscation orders.

**Estimated annual cost = £8.82 million [central estimate]**

**Present value over 10 years = £73.35 million [central estimate]**

2. Improved asset management

The establishment of a Criminal Asset Recovery Board allows for more robust asset management and with it the potential for a greater yield over time. Currently the realisation of assets is undertaken in an incoherent and inconsistent way. Different regional law enforcement agencies have individual relationships with management receivers (auction houses) without any oversight. As a result assets can be poorly looked after and then sold for too much or too little. The costs of this service are also determined on an ad hoc basis. A Criminal Asset Recovery Board would comprise industry professionals who could develop streamlined policies to govern the consistent and appropriate management and realisation of assets.

3. Increased victim compensation

One of our recommendations is to give the court the power to direct that the sums payable under any confiscation order be directed towards any outstanding compensation orders. This policy extends to applications pursuant to section 22 whereby any funds collected pursuant to an uplifted confiscation order can be directed towards unpaid compensation orders. This means that all of our measures to increase confiscation yield (better restraint and asset management measures, contingent orders etc) would also increase the amount able to be obtained under compensation orders.

4. Reduced number of magistrates' court hearings

We anticipate that there will be some marginal savings for the magistrates' court where confiscation matters are resolved by way of EROC proceedings and where the Crown Court retains the cases for the purposes of enforcement.

We also recommend that it be made explicit that collection orders apply to confiscation orders in order to enable fines officers to enforce confiscation orders. This will enable some appropriately delegated enforcement measures to be taken outside of court.

5. Reduced number of Crown Court hearings

We anticipate that the introduction of an Early Resolution of Confiscation process will reduce the number of Crown Court hearings by providing a forum in which the parties may negotiate an early settlement. By mandating early discussions, we hope that even where hearings cannot be avoided, the issues will be able to be narrowed such that the length of hearings will be significantly reduced. While we recognise that by allowing the Crown Court to retain enforcement of some orders this may increase the time some cases spend in the Crown Court, we anticipate that this will be a limited number of complex cases and that the net effect of these policies will be a reduction in court time.

6. Reduced recourse to the legal aid purse

The proposal to allow for the release of reasonable legal expenses from restrained funds provides savings for legal aid which would otherwise have financed the defence. This is a saving for legal aid budget as funds can be re-directed to other areas.

7. Enhanced court reputation to retrieve ill-gotten gains

The more realistic benefit and recoverable amount calculations provide for a far greater prospect for asset recovery as a proportion of outstanding claims. Current estimates are based on an assumed criminal lifestyle, hidden assets findings and some duplication in calculation. They have the unintended consequence of inflating the benefit and recoverable

amount sums significantly beyond that likely to be retrieved and policy becomes anchored to that inflated figure.

#### 8. Improved enforcement when cases moved to Crown Court

Currently when cases move from the Crown Court to the magistrates' court for enforcement purposes, it is common for defendants to attempt to frustrate the process by providing inadequate supporting material and taking advantage of the magistrates' ignorance of the case history. This issue is particularly stark in complex cases involving third party property rights and large sums of money. It is our view that enabling the Crown Court to choose to retain jurisdiction for the enforcement of these cases will increase the efficiency of enforcement measures and ultimately the confiscation yield because the defendant will be faced with the same judge who has an intimate knowledge of their financial situation.

#### 9. Efficiency savings from ordering the provisional discharge of confiscation orders

By allowing courts to order provisional discharge of a confiscation order (but with a mechanism to revoke the provisional discharge if need be), repetitive enforcement hearings are avoided in circumstances when the recoverable amount is minimal or when only interest is outstanding (if it is in the interests of justice to order discharge).

### **Wider impacts**

- Equality impact assessment

Our proposals seek to overhaul the existing system.

We believe the recommendations set out in Option 1 will have no adverse impact in terms of the protected characteristics. On this basis we are not required to complete a full equality impact assessment.

- Justice impact assessment.

The impact on the justice system of our proposals is considered throughout this impact assessment. In summary, as we detail above, we expect there to be some moderate savings to the criminal justice system due to fewer confiscation hearings (due to the early resolution of confiscation process) and fewer enforcement hearings (due to the realistic benefit and recoverable amount calculations and reduced section 22 uplift applications).

- Health impact assessment

Our recommendations are expected to have a positive impact on health and well-being.

Firstly, in relation to defendants, our proposals seek to front-load the system so that issues which may have previously caused matters to be significantly delayed (such as the determination of third party interests in property) occur earlier in the process. This means that matters are finalised sooner and defendants have certainty of outcomes and can move on with their lives. Having a clear outcome will lessen the anxiety which may otherwise be caused by the delays in the confiscation process.

A further way in which our proposals will contribute to the health and well-being of the community is through the prioritisation of compensation as an objective of Part 2, POCA 2002. The more regular and consistent compensation of victims will increase public confidence in the confiscation process.