Law Commission
Reforming the law

Confiscation of the Proceeds of Crime After Conviction

Summary of Report

Introduction

In 2018, the Law Commission agreed with the Home Office to review the post-conviction confiscation regime contained within Part 2 of the Proceeds of Crime Act 2002 ("POCA 2002"). The review aimed to simplify, clarify and modernise the law on confiscation.

Work commenced on the project in November 2018. Since the project began, stakeholders have been nearly unanimous in the view that there are problems in both the wording and operation of Part 2 of POCA 2002.

On 17 September 2020, the **consultation paper** was published. The consultation paper contained over 100 provisional proposals and drew over 100 responses from stakeholders from across the criminal justice system including criminal barristers, professional bodies, members of the judiciary, prosecution agencies, law enforcement agencies, financial investigators, academics, defendants, solicitors, Her Majesty's Prison Service, court staff, auction houses and receivers.

Following the public consultation, we undertook a comprehensive analysis of the responses and in October 2022, we published our **final report**, which details our recommended reforms.

"The Proceeds of Crime Act 2002 (POCA) is widely regarded as a draconian piece of legislation and is in urgent need of reform … we welcome the review of this legislation as it impacts on the lives of so many, not only defendants but also their families"[1]

1 Prison Reform Trust in response to our consultation.

How to approach the summary

This summary is intended to provide an overview of our primary recommendations. Rather than reproducing the structure of the final report, this summary is organised around the main policy objectives that have guided our proposed reform of the confiscation regime, namely: **aim of the confiscation regime**, **efficiency**, **realistic orders**, **effective enforcement**, **flexibility**, **fairness**, **simplification**. Full details of our recommended regime, together with the discussion of the relevant policy issues, can be found in the **final report**. Our final report is divided into eight parts:

Introduction

Part 1 – Objective of the Act

Part 2 – Preparing for the Confiscation Hearing

Part 3 – Benefit

Part 4 – Recoverable Amount

Part 5 – Enforcement

Part 6 – Reconsideration

Part 7 – Preserving the Value of Assets

Part 8 – Post-Confiscation Order Issues

Aim of the confiscation regime

There is currently no overarching provision in Part 2 of POCA 2002 that specifies the aim of the confiscation regime. This has generated a myriad of conflicting authorities regarding what the aim of confiscation should be. Courts have variously described the legislation's aims as being the deprivation of criminal benefit, deterrence, the disruption of crime and even punishment.

We consider that placing the aim of the regime on a statutory footing would serve not only to ensure that courts exercise their powers under POCA 2002 with a view to achieving this aim but would also provide clarity and consistency as to the purpose of the regime. Clarifying the aim of the regime is also important to ensure that confiscation orders are **proportional to the pursued aim**. Since the proportionality of confiscation orders is measured in relation to the aim which the confiscation regime should attain, a lack of clarity regarding the aim complicates the assessment of whether a confiscation order is proportionate. Proportionality of confiscation orders is fundamental also to ensuring that interferences with **Article 1 of Protocol 1 (right to property)** and **Article 8 of the European Convention on Human Rights (right to private and family life, including right to a home)** are lawful. In that respect, placing the aim of the confiscation regime on a statutory footing helps ensure that confiscation proceedings are compliant with the human rights framework.

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

This will ensure that the confiscation regime will focus on the disgorgement of the proceeds of crime, thereby holding the defendant to account for their criminal gains. Confiscation orders are not intended to punish the defendant, thus we do not recommend that punishment should be an objective of the regime.

Efficiency

One of the principal themes of our proposed reform is to improve the efficiency of the confiscation regime. Confiscation proceedings are, by their very nature, lengthy and complex. We heard from consultees that POCA 2002 proceedings are plagued with inefficiencies. Therefore, we make some recommendations aimed at creating a more efficient regime, with a view to producing swifter proceedings which would ensure that confiscation orders are made in a timely manner. This is achieved through a framework that ensures active case management and cooperation between the parties by:

1. **Expediting the setting of a confiscation timetable.** We recommend that the defendant be sentenced before the confiscation proceedings are resolved, unless the court directs otherwise. To avoid "drift" in confiscation proceedings, which too often leaves defendants (and often compensatees) waiting for extended periods of time for the final resolution of the confiscation proceedings, we recommend that confiscation proceedings are started within a prescribed time and actively managed. To this end, we recommend that a timetable for confiscation proceedings must be raised as a matter before the court by the completion of the sentence hearing.

2. **Facilitating the exchange of information between the prosecution and the defence.** We believe that a more formalised process for the exchange of information will enhance the efficiency of confiscation proceedings. Therefore, we recommend that the Criminal Procedure Rule Committee should provide timetables for the provision of information. We believe that timetables should be tailored to the degree of complexity of cases. Therefore, we recommend different timetables, depending on whether the case is categorised as "complex" or "non-complex" on the basis of a list of criteria. We also recommend that the prosecution's statement of information have a specific structure (including a skeleton argument, a financial statement, evidence relied upon as well as the legal issues involved) and that the defence's response mirror, in part, this structure.
3. **Creating an Early Resolution of Confiscation (EROC) process.** There are currently no provisions in POCA 2002 to direct that parties attempt to reach an agreement on confiscation. We propose an EROC process to formalise the existing informal practice where courts encourage the reaching of an agreement between the parties before seeking judicial approval. Therefore, we recommend an EROC process made up of two stages: an **EROC meeting** (at which parties will try to reach an agreement) and an **EROC hearing** (at which the judge should consider approving the agreement or, in case of disagreement, case management will take place).
4. **Introducing a power to remit to the Crown Court.** We recommend that the Court of Appeal (Criminal Division) be given the power to remit confiscation orders to the Crown Court for redetermination in two additional circumstances: upon any successful prosecution appeal in connection with a confiscation order; and upon any defence appeal against conviction which is successful against some counts but not all, and the defendant is to be resentenced. This will ensure that the Court of Appeal is not burdened with additional work where the Crown Court is better placed to hear the proceedings and make the confiscation calculation. For the same reason, we also recommend that the Court of Appeal have the power to remit **a contingent enforcement order** to the Crown Court for reconsideration of its terms where an appeal against the order has been successful.

We also believe that **training of judges** is fundamental to increasing the efficiency of confiscation proceedings. Therefore, we recommend that appropriate training is offered to all judges hearing confiscation cases. Additional training for judges in confiscation will assist the Resident Judge in allocating complex confiscation cases by identifying a pool of judges with a higher level of training.

Realistic orders

Our recommended confiscation regime is designed to ensure that confiscation orders are realistic.

Ensuring that confiscation orders are realistic is a pivotal objective of our proposed reform; it helps ensure that the other aims of our recommended regime are achieved. First, realistic orders foster a better prospect of **enforcement**. Secondly, realistic orders ensure **fairness** to the defendant, who is more likely to be able to satisfy an order which more accurately reflects their benefit from crime. Thirdly, realistic orders contribute to more **efficient** confiscation proceedings, not only because a defendant is more likely to cooperate when facing a realistic order, but also because enforcement action can be more swiftly pursued.

To ensure that confiscation orders are more realistic, we make recommendations concerning:

1. **The determination of the defendant's benefit from crime.** We clarify the way the defendant's benefit is calculated by recommending a two-stage test.

Firstly, we define "gain" as: keeping what one has or getting what one does not have (including temporary and permanent gains). Secondly, the court must make an order that the defendant's benefit is equivalent to the gain as defined, unless it would be unjust to do so because the defendant intended to have only a limited power to dispose of or to control the gain, in which case the court may reduce the benefit to an amount which reflects that limited power.

We also clarify the way courts should approach **apportionment of benefit** between multiple defendants, recommending that the second stage of the test (whether the defendant intended to have only a limited power to dispose of or to control the gain) extends also to apportionment. If such a determination cannot be made, each defendant should be liable for an equal share of the whole of the benefit, unless it would be in the interests of justice to impose equal liability for the whole of the benefit. In the absence of explicit provisions on apportionment, courts often impose confiscation orders on the basis of equal liability for the whole benefit, without any reflection on what might in fact have been obtained by an individual defendant. As a result, defendants often delay satisfying a confiscation order in the hope a co-defendant will pay first.

2. **The determination of the benefit in criminal lifestyle cases.** Under POCA 2002, if a defendant is found to have a "criminal lifestyle", their benefit from crime will also include benefit from general criminal conduct. We make recommendations that are intended to clarify and simplify the way criminal lifestyle provisions operate. **Firstly,** we recommend adding some offences to the list of offences which trigger the criminal lifestyle assumption, namely keeping a brothel and some environmental offences. **Secondly,** we recommend that the number of offences required to satisfy the course of criminal activity trigger be three in any circumstances (currently, the course of criminal activity is triggered when the defendant has been convicted of at least four offences in the same proceeding; or the defendant has been convicted on at least two separate occasions in the period of six years prior to the start of the present proceedings). **Thirdly,** we recommend including also convictions for offences from which the defendant has attempted to benefit. **Fourthly,** we recommend increasing the financial threshold of the benefit which triggers criminal lifestyle assumptions to £5,000 + inflation (with the possibility for the Secretary of State to review the threshold every five years). We also introduce some discretion regarding the application of criminal lifestyle provisions. This discretion aims to inject some **flexibility** into the confiscation regime, as discussed below.

3. **The determination of the recoverable amount.** The recoverable amount is the amount that the defendant is required to pay towards a confiscation order. Under the current confiscation regime, orders are sometimes made in amounts that are nominal or significantly lower than the benefit from crime. Although this is not an anomaly, since such orders serve a legitimate purpose, they undermine public confidence in the confiscation regime and send the wrong message that crime does pay.

Therefore, we recommend that, where the confiscation order is made in an amount less than the outstanding benefit, the court should satisfy itself that the defendant understands what each figure means, why figures are different and that the prosecution might seek to recover more of the outstanding benefit in the future.

This will also ensure that the defendant and the general public are informed about the defendant's ongoing liability for the full outstanding benefit, increasing the overall transparency of the confiscation regime. We also make recommendations regarding hidden assets.

"**Hidden assets**" is a term that does not appear in POCA 2002, but it has been developed by judges and practitioners to describe any unexplained difference in value between the defendant's benefit and the value of their known assets. To make the law clearer and more accessible, we introduce provisions that are intended to codify the existing practice regarding hidden assets.

First, we clarify that courts should make determinations about hidden assets on the basis of all available evidence, and not only the evidence adduced by the defendant. Secondly, we recommend setting out in statute the factors to assist the court in making a finding of hidden assets: the court must consider whether any difference between the outstanding benefit and the defendant's apparent available amount is due to expenditure which is more likely than not to have been meet from the defendant's benefit, or is due to changes in the value of assets.

Effective enforcement

"[Confiscation] is not prioritised in the criminal justice system, it is an afterthought. There is no continuity and case ownership is a big issue. Counsel and others lose interest tying up the loose ends"[2]

As observed earlier, the objective of ensuring that confiscation orders are **realistic** contributes to the objective of ensuring that confiscation orders are **enforceable**.

Enforcement is a highly problematic aspect of the current confiscation regime. As of 31st March 2021, the outstanding debt of unrecovered confiscation orders amounts to more than £2 billion.

As a result, not only is the State often unable to recover the confiscated amount, but this also generates a negative public perception regarding the effectiveness of the enforcement of confiscation orders. We address this problem by making recommendations aimed at strengthening enforcement mechanisms:

2 Stakeholder member of the judiciary in response to our consultation

1. **Contingent orders.**

The Crown Court should be given power, upon imposing a confiscation order, to make an enforcement order that takes effect either 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 an asset will not be realisable.

To guide the Crown Court's discretion to make a contingent order, we recommend a list of non-exhaustive factors to consider, including: the use ordinarily made of the defendant's property; the needs and financial resources of the spouse or civil partner of the defendant, as well as of any child; or whether the asset in question is tainted by criminality. In addition, we recommend that the Crown Court should be able to impose, on a contingent basis, every type of enforcement order that can currently be made in the magistrates' court, including, for example, the forfeiture of funds held in a bank account, or the sale of seized property. This power is essential to avoid the possibility that defendants might try to exploit the inevitable delay between the making of a confiscation order and the enforcement hearing to frustrate enforcement.

2. **Confiscation assistance orders.** We recommend that the Crown Court and the magistrates' court have the power to make confiscation assistance orders, by which an appropriately qualified person is appointed to assist defendants in satisfying their confiscation order.
3. **Collection orders.** We recommend making explicit that collection orders can be applied to confiscation orders. Collection orders give a fines officer powers to manage the arrangements for a defendant to pay a financial order imposed by the court, without necessarily reverting to the court. Therefore, the work of fines officers will save court time in confiscation proceedings.
4. **Other orders.** First, we recommend that the court should have a bespoke power to direct a defendant to provide information and documents as to their financial circumstances. Secondly, we recommend that the magistrates' court should have the power to compel defendants to attend court at any stage of enforcement proceedings (under the current regime, this power is available only when the magistrates' court contemplates activating the term of imprisonment in default of payment).

Our policy on **restraint** is also relevant in connection with enforcement. Our recommended regime intends to protect the value of assets against dissipation before a confiscation order is made and enforced, with a view to preventing defendants from frustrating the purpose of confiscation proceedings. It is evident that enforcement will be meaningless if defendants are able to dissipate their assets prior to the commencement of enforcement proceedings. Therefore, we make the following recommendations:

1. **Strengthening restraint orders.** A restraint order works by prohibiting any person from dealing with any realisable property specified in the order. We recommend placing on a statutory footing the **"risk of dissipation" test** currently applied by courts, but not explicitly mentioned in Part 2 of POCA 2002, as one of the requirements to be satisfied when making a restraint order. We recommend introducing a list of non-exhaustive factors relevant to the risk of dissipation, including: the actions of the person whose assets are to be restrained; the nature of the criminality alleged; the nature of the assets; the value of the alleged benefit from criminality; the stage of proceedings; and the person's previous good or bad character. In addition, we deal with the discharge of restraint orders. Under the current confiscation regime, a restraint order must be discharged if criminal proceedings are not started within reasonable time. We recommend introducing a list of non-exhaustive factors that courts should consider when determining whether criminal proceedings are commenced within reasonable time, including: the length of time that has elapsed since the restraint order was made; the reasons for such lapse of time; the length (and depth) of the investigation; the nature of the restraint order made; the complexity of the investigation and of the potential proceedings; whether the investigation has involved international enquiries; and the impact of the restraint order on the defendant, any business or third parties.
2. **Strengthening law enforcement agencies' response.** Law enforcement agencies play a fundamental role in ensuring that the value of assets is preserved and managed so that confiscation orders are satisfied. We make some recommendations that are intended to provide law enforcement agencies with adequate tools to efficiently support confiscation proceedings. First, we recommend that the National Police Chiefs' Council reconsider the **training needs** of all police officers in connection with confiscation, and in particular those who may need to exercise or oversee the powers of search and seizure in connection with confiscation. Second, we recommend that the Government consider establishing a **Criminal Asset Recovery Board (CARB)** in order to facilitate the development of a **national asset management strategy**. This strategy will involve generating guidance in relation to the management of assets. The strategy developed by CARB should also address the challenges posed by emerging technologies such as cryptoassets (concerning, for example, their storage and exchange, as well as their often-extraterritorial nature).

Our recommendations on **appeals** are also designed to ensure that enforcement action is pursued effectively. We recommend a statutory bar on appeals against **contingent enforcement orders** once those orders have been activated by way of a further order of the Crown Court. This will prevent a frustration of enforcement due to multiple concurrent appeals. In addition, we recommend that enforcement steps ought to be stayed in the following circumstances:

(1) when an application for leave to appeal either a confiscation or contingent enforcement order is lodged;

(2) where an application to appeal is refused by the single Judge but renewed in-time to the full Court;

(3) where leave to appeal to the Court of Appeal (Criminal Division) is granted out of time;

(4) where the activation of a contingent enforcement order is challenged in the High Court out of time; and

(5) where an appeal is lodged along with an application for an extension of time.

Flexibility

Another overarching objective that we seek to achieve with our recommended confiscation regime is flexibility. Devising a flexible regime in some areas has beneficial effects also for the achievement of our other objectives. If some degree of flexibility is afforded, confiscation orders are likely to be more **realistic**, increasing in turn the likelihood of their **enforcement**. In addition, flexibility contributes to the **fairness** of the regime (discussed below).

The primary area in which our recommendations will ensure more flexibility is **reconsideration of the available amount and benefit**. The need to reconsider confiscation orders arises when there are changes of circumstances which require a confiscation order to be varied. Reconsideration permits some degree of flexibility to accommodate such changes after a confiscation order has been made. We make recommendations regarding:

1. **Upwards variation of the available amount.** Under POCA 2002, the unlimited ability to increase the defendant's available amount stifles their rehabilitation, encourages the commission of further offences and provides an incentive to hide assets. Therefore, we recommend that an application for upwards reconsideration should only be available where:

   (1) assets have been identified as having been obtained by the defendant that should have been but were not identified at the time of the original confiscation order; or

   (2) assets that were identified as having been obtained by the defendant at the time of the original confiscation order and were realised pursuant to the confiscation order have generated an amount greater than their original valuation. This recommendation encourages the defendant to engage with the confiscation order through full disclosure and swift compliance.

2. **Downwards variation of the available amount.** We recommend that downwards reconsideration should be available when:

   (1) the value of an asset (including a **tainted gift**) identified in the original confiscation order realises a lower amount than its original valuation; and

   (2) it is possible to recognise substitute assets, ensuring that defendants are not penalised for how they choose to satisfy the confiscation order.

   This recommendation aims to avoid penalising defendants for events that were outside their control and that would prevent the satisfaction of the original confiscation order. This could happen when assets have been overvalued, or there are good reasons for not realising certain assets (for example, a family home), or the asset is a tainted gift.

3. **Variation of the benefit figure.** We recommend that the calculation of the available amount after upwards reconsideration of the benefit figure should exclude after-acquired assets and be limited to reconsideration of the available amount. This recommendation aims to ensure that the defendant does not escape liability for the value of assets which they held at the time of the original confiscation order and that after-acquired assets are not affected by upwards reconsideration of the benefit figure. In addition, we recommend that when a defendant obtains a downwards variation in connection with an asset which was realised for less than the value ascribed to it at the time of confiscation, the defendant's benefit figure may also be amended accordingly. This recommendation is in line with our policy of preventing the defendant being exposed to continuing liability even when they have already satisfied the confiscation order.

4. **Provisional discharge.**

The aim of the provisional discharge of a confiscation order is to ensure some degree of flexibility to accommodate future changes in circumstances, on the basis of the consideration that complete enforcement of every confiscation order is in practice unrealistic. The recommended system is intended to avoid unlimited enforcement actions when there is no realistic prospect of recovering the available amount, despite the reasonable efforts of enforcement authorities.

Therefore, provisional discharge contributes to the objective of ensuring effective enforcement. Regarding the reasons justifying provisional discharge, we recommend that provisional discharge should be available where:

(1) in light of any enforcement action taken and any reasonable enforcement measures which may be taken within a reasonable period from the date of the provisional discharge hearing, the amount recoverable would be no more than minimal; or

(2) the only part of an order that is outstanding is interest and it is in the interests of justice to do so.

When provisional discharge is ordered, a confiscation order is treated as no longer in force and no further enforcement action can be taken, unless the discharge is revoked. Discharge is "provisional" because a confiscation order may be revived after having been discharged. We set out two alternative conditions on the basis of which the revocation of a provisional discharge may be ordered, namely where:

(1) the conditions for provisional discharge no longer apply, and reasonable enforcement measures become available; or

(2) an order is made to increase the benefit figure or the available amount.

In addition to reconsideration, we aim to achieve a degree of flexibility more generally throughout our recommended reforms by introducing some areas of discretion. For example:

1. **Prosecutorial discretion not to rely on criminal lifestyle assumptions.** Under POCA 2002, the application of **criminal lifestyle assumptions** is mandatory (provided that the conditions are met). Instead, we recommend that the prosecution should have discretion not to rely on the assumptions.
2. **Crown Court's discretion to make a contingent order.** As explained **above**, we recommend some non-exhaustive factors that the Crown Court should consider when exercising this discretion.
3. **Venue for enforcement proceedings.** Under the current confiscation regime, enforcement proceedings are heard in the magistrates' court. We recommend that the Crown Court and the magistrates' court should have flexible powers to transfer enforcement proceedings between them to achieve the best enforcement of the confiscation order on the facts of each case.

Fairness

In line with the Law Commission's statutory aim of ensuring that the law is fair, we designed a confiscation regime that would enhance fairness of confiscation proceedings. A fairer regime helps ensure that confiscation proceedings are **efficient**, because defendants are more likely to cooperate if they perceive that they are subject to fair confiscation orders and treated fairly throughout the proceedings. As Dr Craig Fletcher told us:

> **"The best way to encourage compliance is to make the whole process more fair…"**

We aim to achieve a fairer regime in respect of all parties involved in (or affected by) confiscation proceedings:

1. **Defendants.** Our overarching objective of ensuring that confiscation orders are realistic is driven by the premise that a confiscation regime must be fair to the defendant. In addition to achieving fairness through realistic orders, our confiscation regime is intended to **prevent double counting** of the benefit figure and the recoverable amount. We recommend that the court should identify any property that was seized by or disgorged to the state or repaid to victims by the defendant pursuant to the case and reduce the benefit figure by that amount to arrive at the outstanding

benefit. This recommendation aims to correct the shortcoming of the current regime, in which defendants whose assets have been seized are not treated as having repaid the corresponding portion of the benefit and, as a result, are subject to a double deprivation because they must account to the state a second time for that benefit. We also clarify the "**serious risk of injustice**" test. Under POCA 2002, courts should not apply criminal lifestyle assumptions if there would be a "serious risk of injustice". We recommend that the "serious risk of injustice" test should not be limited to preventing a risk of double counting, but instead should consider any relevant factors which would cause a serious risk of injustice if an assumption were made.

2. **Prosecution.** When considering fairness in the context of the prosecution, the issue of **costs in restraint proceedings arises**. The general rule in restraint proceedings is that the unsuccessful party will be ordered to pay the costs of the successful party. This inhibits applications for restraint orders, since the "losing" prosecution incurs defence costs regardless of its good faith and the reasonableness of the application. In turn, this might have a chilling effect on applications. For this reason, we recommend that a power to award costs should be included in POCA 2002. The assessment of costs should be guided by some principles, such as: costs orders should not be made against the defendant; if the prosecution brings a successful application, each party should bear their own costs; if the prosecution brings an unsuccessful application, there is a presumption that it will pay the defence costs, unless the prosecution can demonstrate that the application was reasonably brought.
3. **Third parties.** Confiscation orders might have an impact not only on the defendant, but also on third parties (for example, because a third party holds a share of a property together with the defendant). Our recommended regime ensures that third-party interests are effectively safeguarded, by allowing third parties to make representations at different stages of the proceedings. Giving the opportunity to third parties to defend their interests in confiscation proceedings is essential because it ensures that our policy properly protects third parties' rights and as such complies with the European Convention on Human Rights (in particular, right to private and family life and right to property). Therefore, we recommend that a third party who claims an interest in property may raise such an interest in the Crown Court after the making of the confiscation order and before either the automatic vesting of assets or the activation of a **contingent order** if the third party was not given a reasonable opportunity to make representations at an earlier stage of the confiscation proceedings, or there was a good reason for not making an application earlier, and there would be a serious risk of injustice to the third party if the court was not to hear the application. In addition, the **EROC process** is also intended to facilitate the participation of third parties in order to identify their interest in property and allow them to make representations at an early stage of confiscation proceedings. Finally, we recommend third parties having the right to appeal orders in relation to seized property or produced personal property if no determination has been made in respect of interests in property and the third party did not have a reasonable opportunity to make representations at the confiscation hearing or there is an arguable risk of serious injustice.

4. **Victims.** Victims of crime are not involved in confiscation proceedings, but they might be indirectly affected when a compensation order is made against the defendant in their favour. Compensation law is outside the remit of our review of the confiscation regime. However, there are many instances where confiscation orders and compensation orders intersect.

Some of our recommendations on confiscation are designed to have a positive impact also on compensation in order to ensure some degree of satisfaction to the victims of crime. Our policy gives **priority to the payment of compensation**.

We recommend that where a compensation order is imposed at the same time as a confiscation order, the Crown Court should be required to direct that compensation should be paid from sums recovered under the confiscation order (under the current regime, priority to compensation is accorded only when the defendant does not have the means to pay both orders). Similarly, when multiple confiscation orders are imposed, priority should be given to the payment of compensation and, thereafter, to each confiscation order in the order it was made. We also recommend a power for the Crown Court to adjust the compensation element to be paid out of a confiscation order when the confiscation order is varied either upwards or downwards. This will achieve the dual aims of prioritising payment of compensation (fairness for victims) and preventing the defendant from facing unpayable orders (fairness for defendants).

Simplification

With our recommended reform, we intend to simplify the confiscation regime, in line with the Law Commission's statutory aim to ensure that the law is simple. Professor Jackie Harvey told us that:

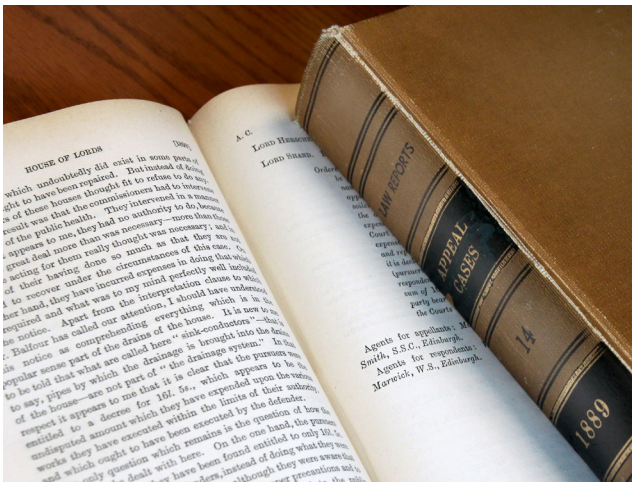
> **"The legislation tries to deal with a wide array of aspects of criminality, perhaps too wide. We need to make things simpler…"**

Simplification is important in that it helps ensure that confiscation proceedings are **efficient**: if powers of the parties are clear and the proceedings are simple, the need for parties to challenge confiscation orders and other decisions made during confiscation proceedings is reduced. As a result, simplicity contributes also to the achievement of another statutory aim of the Law Commission: to make the law cost-effective.

Many of our recommendations are conceived to enhance simplicity, for example by placing the **aim of confiscation** on a statutory footing, clarifying the way **criminal lifestyle provisions** should be applied, codifying the existing practice regarding **hidden assets**, codifying the **"risk of dissipation" test** as currently applied by courts in relation to restraint orders and clarifying **reconsideration** issues (discussed above). In addition, we aim to enhance simplicity in other ways:

1. **Consolidation of multiple confiscation orders.** The current regime does not account for the realities of obtaining and enforcing multiple confiscation orders, especially when different prosecution authorities seek confiscation orders against the same defendant. Therefore, we have devised a new regime that would enhance simplicity for the defendants and the courts when making and enforcing multiple confiscation orders, while preserving the original rationale of preventing double counting. To do so, we recommend that where there are multiple confiscation orders sought against the same defendant, the court should have the power to consolidate the applications for confiscation. Where a defendant already has a confiscation order, the court should have the power to amend the benefit calculation for the earlier confiscation order within six years of the date of conviction and consolidate any amount outstanding under it into the new confiscation order.
2. **Codification of case law.** The ever-expanding body of case law developed since POCA 2002 was introduced (including over 100 appellate decisions regarding the calculation of benefit) has created uncertainty in the law. We believe that principles developed in the case law should be incorporated into statutory provisions in order to make the law clearer and more accessible. Therefore, we recommend the inclusion of the relevant cases regarding **tainted gifts** as guidance in the Criminal Procedure Rules and Practice Directions and in POCA 2002.
3. **Appeals.** Our recommended regime in relation to **appeals** against confiscation orders and other orders made in confiscation proceedings will clarify the existing rights and routes of appeal. We recommend that all routes of appeal be made explicit within Part 2 of POCA 2002, including signposting other legislation (and in particular the Criminal Appeal Act 1968) where relevant in order to ensure that practitioners have the relevant information easily accessible.

"In 2009 the Case List contained 177 Cases. The 2020 Case list contains some 507 cases. Few areas of law have seen such a volume of litigation within such a short period; it is perhaps reflective not only of the importance of this particular area of law but also of its legislative complexity".[3]



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

Recommended Confiscation Regime

KEY
D = Defendant

Investigation commences

NOTE: Third-party interests in assets can be determined at any stage of the process from 'restraint' onwards.

Restraint application (can happen any time from now)

The prosecution should indicate on the Plea and Trial Preparation Hearing form that a confiscation application may be brought at the conclusion of the substantive criminal proceedings and whether the application is likely to be 'complex' or not.

Conviction and sentence

Confiscation begins at prosecution request or court's initiative

Prosecutor's statement

Defence response

Early Resolution of Confiscation (EROC) Meeting

EROC Hearing at which the agreed order will be presented to the court or the issues in dispute will be identified in preparation for the confiscation hearing.

Order agreed → Enforcement

NOTE: Prosecutorial discretion to not apply the criminal lifestyle provisions.

Order not agreed

Confiscation hearing

Step 1: What criminal conduct is relevant to the confiscation enquiry?
Does D have a criminal lifestyle?
Criminal lifestyle offences:
- schedule 2 offence
- a minimum £5000 (+ inflation) total benefit:
  - offence over at least 6 months
  - three offences in the same proceedings or three offences over multiple proceedings
  - where multiple offences are being considered, relevant convicted 'attempt' offences should also be considered

Step 2: Determining a D's total benefit from their relevant criminal conduct:
- the D's total benefit is equivalent to what the D 'gained' as a result of or in connection with the criminal conduct for which they were convicted; unless
- the court is satisfied that it would be unjust to make an order in this amount because of D's intention to have a limited power of control or disposition in connection with that gain

Has D benefited from PARTICULAR criminal conduct?

Has D benefited from GENERAL criminal conduct (GCC)?

Application of criminal lifestyle assumptions
- Any property transferred to D after the relevant day.
- Any property held by D after date of conviction obtained as a result of GCC.
- Expenditure at any time after relevant day is met from property obtained by GCC.
- Property should be valued as free of any other interests in it.

Enforcement (in Crown or magistrates' court)
- If order not paid within 'time to pay' period, list for enforcement hearing in Crown Court to consider activating any contingent orders and to decide venue for enforcement.
- If order still not satisfied – consider imprisonment in default as a last resort.
- If order still not paid, consider periodic summons for D to provide updated financial information.

Step 3: Valuing benefit
The value of benefit is determined with reference to market value. The value of property at the time of the confiscation hearing is the greater of:
- its value at the time D obtained it, adjusted for inflation; or
- the value at the time of the confiscation hearing of either:
  - the property obtained; or
  - if D does not still hold it or all of it, the value of the property D exchanged for it.

Step 4: Determining the recoverable amount
- the D's outstanding benefit if D's assets (available amount) are equal to the outstanding benefit; or
- the available amount if D's assets are worth less than the outstanding benefit figure; or
- a nominal amount if D's assets are nil.

Step 5: Proportionality
The court must make a confiscation order in the sum of the determined recoverable amount "if, and only to the extent that, it would not be disproportionate to do so". Duplicate recovery will be disproportionate.

Additional requirements for consideration
- If the order is not made in the benefit figure, explain why and confirm D's liability for full benefit figure.
- Period of time to pay.
- What is the appropriate term of imprisonment in default?
- Consider any other orders to be paid (e.g compensation orders).
- Consider whether any contingent enforcement orders would be appropriate.

Reconsideration and provisional discharge
- An application may be made to 'uplift' a confiscation order pursuant to s 22, POCA 2002 if assets were undeclared at the time of the original order and/or were realised for a greater value.
- An application may be made to reduce a confiscation order pursuant to s 23, POCA 2002, if an asset realises a lower amount than its original valuation.
- An application may be made to provisionally discharge the order in circumstances where enforcement is no longer practical or economical. This can be revoked.