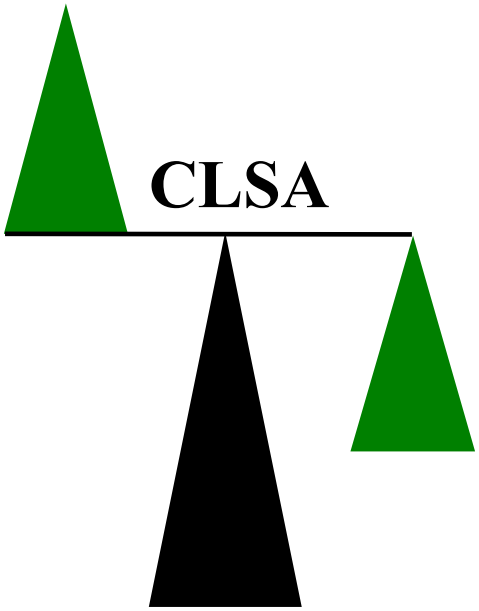

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CLSA response to Law Commission Confiscation Consultation

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding to the consultation on behalf of its members.

We have had the opportunity of reviewing the Royal Commission's findings and recommendations in respect of confiscation law.

We are disappointed that the response whilst starting with fine aims fails to address, in our view, the iniquities and failings of the confiscation regime.

The paper does not seek to address the clear financial incentivisation to the prosecution for seeking larger orders. If those prosecuting have a direct financial incentive to increase the take then orders both for benefit and available amounts with the inclusion of hidden assets become suspect. As the perception that orders are sought for greater amounts to line the pockets of the departments bringing these actions so the orders themselves and the rule of law is undermined.

There is very little within the paper to secure the rights of third parties. It has our members experience that in general a court will only pay lip service to those rights unless that third party is formally represented and has engaged fully with the process. The funding process for third party representation should be urgently reviewed. It is extremely rare, nigh on impossible, that a third party will receive public funding to protect their interests. Indeed third party is often treated by both the prosecution and the court as an extension of the defendant rather than an individual in their own right who have done nothing wrong and is merely trying to protect their own A1 P1 rights.

We fundamentally disagree with the approach of the Royal commission regarding hidden assets.

The commission identifies a significant amount of money in unpaid orders. In our experience a good proportion of that money outstanding is not being avoided but has never been available to the defendant to pay an order. It is rare in the generality of confiscation proceedings that defendants hide assets prior to arrest, salting them away for a rainy day. Most defendants do not have hidden bank accounts in the Cayman Islands, or complex trust structures to prevent property being taken by the state. It is, in our view, far too easy for the prosecution to raise the issue of hidden assets and far too difficult for a

defendant to rebut the same. As such there is a strong likelihood of injustice. We note that one of the aims of the project is "to avoid the frequent imposition of unrealistic confiscation orders". Our view is that without proper reform of the application of hidden assets within the confiscation regime this is an achievable.

Furthermore, the paper fails to address adequately the approach of the prosecution when starting out on confiscation proceedings. The proposed benefit figures are generally unrealistic. The consequence of this to the poorly advised defendant can be catastrophic for future rehabilitation. This of course feeds back into the fact that the prosecution have a financial incentive not to properly approach benefit figures, but instead to look to future gains under section 22 of the act. There needs to be a move away from the adversarial approach if the aim is as the Commission state in their pre-amble.

We also note that there is a failure to address disclosure issues. Confiscation proceedings should properly be bought under the CPIA regime. Once the criminal proceedings are finished and the conviction secured there is rarely, if at all, a review of documentation held by the prosecution on receipt of submissions within either a section 18 or a section 17 statement. It is unheard of for the prosecution to disclose documentation which either assists the defendant or undermines the prosecution without prompting. Often disclosure issues are left to financial investigators who are not legally qualified and take a stance that they will not disclose.

We are disappointed that the real emphasis of the change is on further penalising the defendant who cannot or will not pay.

We note with some alarm the proposals which further move the confiscation regime away from a civil jurisdiction within the criminal courts to employing a full range of criminal sanctions for unpaid debt. We note the proposal to imprison based upon interest as well as the principal sum is proposed. It will of course be beneficial to a defendant to be imprisoned earlier, thus reducing the potential days that he can serve and less time to make any efforts for payment. This will impact on the smaller orders left unpaid.

We note also that there is a proposal for a civil debtor to be released on licence and that continued non-payment can result in criminal sanctions such as community orders and orders which do not have a direct reflection upon their criminality or their ability to pay such as the removal of driving licences. Combine this with the failure to reform the prosecution's unfettered ability to claim hidden assets and it is clear that there will be an increase rather than a decrease of money owed.

Consultation Question 1.

29.1

We provisionally propose that any amended confiscation legislation should include the objectives of the regime.

29.2 Do consultees agree?

Yes

Consultation Question 2.

29.3 We provisionally propose that the principal objective of the regime should be "depriving defendants of their benefit from criminal conduct, within the limits of their means."

29.4 Do consultees agree?

Yes

Consultation Question 3.

29.5

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

29.6 Do consultees agree?

Yes

Consultation Question 4.

29.7

We provisionally propose that the statutory objectives of the confiscation regime should include:

(1) deterrence; and

(2) disruption of crime.

29.8

Do consultees agree?

We have no view

Consultation Question 5.

29.9 We provisionally propose that punishment is omitted from any statutory objectives of any amended confiscation legislation.

29.10 Do consultees agree?

Yes

Consultation Question 6.

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

29.12 Do consultees agree?

Yes

Consultation Question 7.

29.13 We provisionally propose that:

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

(2) Where a court imposes a financial, forfeiture or deprivation order prior to making a confiscation order, the court must take such an order into account when determining the confiscation order.

29.14 Do consultees agree?

Yes.

Consultation Question 8.

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

29.16 Do consultees agree?

No.

Consultation Question 9.

29.17

We provisionally propose that confiscation legislation should no longer refer to "postponement". Instead, "drift" in confiscation proceedings should be managed through:

(1) a statutory requirement that confiscation proceedings are started within a prescribed time; and
(2) active case management following the commencement of confiscation proceedings, pursuant to the Criminal Procedure Rules (as to which see Chapter 7).

29.18 Do consultees agree?

No. We do not believe there is the drift. Cases are managed properly by courts. Adding a further layer of rules and regulations with an already complex regime will not assist.

Consultation Question 10.

29.19

We provisionally propose that

(1) the maximum statutory period between the date of sentencing and the date on which a confiscation timetable is set or on which a confiscation timetable is formally dispensed with should be six months; and

(2) the period may be extended by the Crown Court in exceptional circumstances even if an application has not been made expiry of the six month period.

29.20 Do consultees agree?

No

Consultation Question 11.

29.21 We provisionally propose that the statutory scheme should provide that:

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

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

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

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

29.22 Do consultees agree?

No. The provision of timetables that the prosecution have to comply with is a safeguard for the defendant. The resources of the prosecution are infinitely greater than those of the defendant and his representatives. You propose that the failure of the defendant to provide documents should have significant implications with a judicial announcement yet there is a significant leeway given to them prosecution for their failure to comply with (even now) generous time limits.

The introduction of confiscation proceedings against the defendant can often mean that they are having to deal with transactions and events many years ago. Trying to obtain material that may support their contentions is difficult, nigh on impossible with the expiry of six years.

A simple example is that a defendant is prosecuted in 2020. The prosecution is delayed and no trial occurs until October 2021 when he is convicted. The defendant was first arrested in 2017. The prosecution pursue confiscation proceedings. It becomes apparent

at the beginning of 2023 that the prosecution do not accept deposits made into a bank account in 2015. No mention of this factor being made previously. It will not be possible for the defendant to obtain any banking information which may assist him. The likelihood of obtaining direct witness evidence diminishes with the delay. Under the current regime these proceedings can continue.

It cannot be correct that the prosecution are allowed to profit from their mistakes

Consultation Question 12.

29.23

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

29.24 Do consultees agree?

No. This will inevitably benefit the prosecution and penalised the defence. Within confiscation proceedings the prosecution already have a significant advantage. To place those representing the defendant and added time pressure is unfair we suggest.

Most courts and judges will regulate confiscation proceedings adequately. The use of the committee is, in our view, otiose.

Consultation Question 13.

29.25

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

29.26 Do consultees agree?

No. Defendants are often in custody. That adds complications in attendance, provision and review of documents. It needs to be borne in mind that the attendance at a prison and the material which can be provided to the defendant on any visit is changing. Indeed the provision of material is banned in a number of prisons. Documents have to be posted in prior to any attendance, there is no guarantee that those documents will be received or

bought to any consultation. There is no provision to allow access to electronic evidence for the client.

A complex case or complicating factors are not necessarily identified at the outset of a confiscation case. For example, an issue can become complicated in what may appear to be a simple case.

Courts should and will regulate confiscation timetables. Cases will self regulate. It is, in our view, fallacy to believe that confiscation cases just drift.

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

Consultation Question 14.

29.28

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

29.29 Do consultees agree?

No. If the matter is complicated the court will set out a timetable at a mention hearing. Setting a prescriptive arbitrary time limit adds pressure onto the defence and the defendant. When dealing with confiscation matters most defendants are in custody. Obtaining instructions can be difficult. Providing material to clients for them to properly review can be difficult. For example a number of prisons refuse to allow documents to be physically handed over to a client. Bearing in mind a client could have a significant amount of material to go through, with limited resources and a limited time to give instructions and arbitrary 56 days would appear to further penalised the defendant.

We believe that courts are able to regulate and that the Criminal Procedure Rules can be applied as they stand presently.

29.30

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

We do not think there should be a standard time

Consultation Question 15.

29.31

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

(1) The order is an order of the court and it must be complied with.
(2) It is in the defendant's best interests to comply with the requirement because the burden of proof relating to the assumptions and the available amount rests on him or her.
(3) The defendant will find it hard to discharge that burden without providing the information.
(4) The court can go further and use the failure to provide the information against the defendant when making its decisions in the confiscation hearing.
(5) That ultimately a failure to provide information may result in the defendant facing an order that is far larger than he or she might have expected, and that he or she may face imprisonment or forfeiture of specific assets if that order is not paid.

29.32

We provisionally propose that:
(1) the Criminal Procedure Rules Committee should consider including such a direction in a Criminal Practice Direction on confiscation; and

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

29.33 Do consultees agree?

We have no observations.

Consultation Question 16.

29.34

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

29.35 Do consultees agree?

Yes. We would also ask that there be proper consideration of the role of disclosure within Poca proceedings.

Consultation Question 17.

29.36

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

29.37 Do consultees agree?

The use of the DCS system is difficult to reconcile with the use in Poca proceedings. Poca proceedings are proceedings where they are against the individual rather than a collective.

We agree that the fullest amount of information that can be provided by the prosecution should be. We believe that the prosecution should provide proper disclosure of unused material. We are disappointed that this review does not consider the issue of disclosure from the defendant's point of view. We believe that the Poca regime should be bought within the ambit of the CPIA. Disclosure is, quite frankly, abysmal within Poca proceedings. The prosecution do not appear to review the material in the light of a section 17 statement. We would request that the prosecution provide a certificate upon receipt of the section 17 statement which certifies that they have fully reviewed the unused material in the light of the section 17 statement and confirm that there is no material which assists the defendant or undermines the prosecution's case.

We would request that a further MGC6 is provided and that there be proper disclosure of all business, banking and financial information obtained during the investigation of the case.

29.38 **Consultation Question 18.**

We invite consultees' views on:

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

(a) all cases;
(b) higher-value cases;
(c) cases of particular complexity; and/or
(d) some other category of cases; and if so which other category?

The section 16 statements are generally formulaic and do not address significant issues within the case. The benefit figure is usually far too high and unrealistic whilst issues over third party rights are not properly addressed and available assets are usually overvalued.

As such, the section 16 statement will result in a significant amount of work when proper investigation before issuing the statement could have resolved many of the issues identified. A recent example of the same is the prosecution serving a section 16 statement identifying in the region of £15 million of unidentified credits into a bank account. However, with a little investigation it could have been established that these payments had been made by cheque. As payment by cheque has an identifiable source of funds it should have been easy to establish that those funds had been received from a legitimate business. Such examples of simple checks using the powers that the prosecution have our numerous. The overvaluation of drugs together with an attempt to apply CPiH to the value is a regular issue. The valuation to Street dealing of 2 kg of cocaine for example when in fact it is clear that it is wholesale for valuation purposes again are legion.

In our experience generally the CPS are merely a post box for the FI. A proper lawyer preparing the matter would lead to earlier resolution of cases on a realistic level, thus increasing the funds received into the various prosecution bodies through the ARIS agreement. We do not know whether the incentivise station given by that agreement is driving a demand for higher benefit figures which can be dealt with subsequently under section 22 applications (and indeed the increase in section 22 applications recently) or not. However we formally raise the suspicions that this is the case.

We believe that all cases would benefit from input of a qualified lawyer when the case reaches confiscation.

Consultation Question 19.

29.39

We provisionally propose that:

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

(2) The EROC process should comprise two stages:

(a) an EROC meeting, at which the parties should seek to settle the confiscation order, and in the event that the confiscation order cannot be settled, the issues for the confiscation hearing should be identified.
(b) an EROC hearing, at which the judge should consider approving any agreement, or in the event of disagreement, at which case management would take place.

29.40 Do consultees agree?

We are of the view that properly conducted confiscation proceedings will inevitably have negotiations. The difficulty is that there is often a lack of movement from the prosecution until the final hearing. Engagement is unproductive. In the rare occasions when engagement is productive this usually stems from the responses to section 17 statements. However, because the litigation is effectively conducted by the FI on behalf in the prosecution who has not had conduct of this case from its inception through the prosecution of the matter there is little or no chance of compromise.

To add a new stage in will be to further delay confiscation proceedings. The reality as we stated above is that negotiations will take place at the final hearing. Unless or until there is a fundamental culture shift by the prosecution then it will remain thus.

Consultation Question 20.

29.41

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

No.

Consultation Question 21.

29.42

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

We have no view

Consultation Question 22.

29.43

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

This would be an extremely rare occurrence. From the defence point of view the prosecution usually over egg the pudding in respect of benefit figures. The prosecution have not usually considered the full issues surrounding Poca by the time of sentence.

It would be sensible and desirable in simple cases involving compensation being paid out of a confiscation order.

Consultation Question 23.

29.44

We provisionally propose that the Crown Court should retain jurisdiction for determining confiscation cases.

29.45 Do consultees agree?

Yes.

Consultation Question 24.

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

Yes.

Consultation Question 25.

29.47 We provisionally propose that:

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

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

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

29.48 Do consultees agree?

We do not think that it is possible in reality to identify potential complexities in the confiscation hearing at the plea and trial preparation hearing. A simple possession with intent to supply may be complicated by proper review of the defendants banking information. That is not something that will necessarily be addressed prior to PTP H. Certainly the work required to identify suspicious payments will not have been done. From the defence point of view it would be an added burden.

We have no objection to the identification of complex matters. We do not object to the ticketing opportunities.

Consultation Question 26.

29.49

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

29.50

Do consultees agree?

Yes. However, funding must be made available for proper training of any assessor. Any assessor must have relevant experience in order to assist the judge.

Consultation Question 27.

29.51

We therefore provisionally propose that, where the Crown Court considers that it is in the interests of justice to do so, it may refer an issue in confiscation proceedings to the High Court for a binding determination.

29.52

We provisionally propose that, in considering the interests of justice, the court should consider, amongst any other factors that it considers to be relevant:

(1) the value of the asset or interest that is subject to the dispute;
(2) the complexity of the issue; and
(3) the conduct of the parties.

29.53

Do consultees agree?

Yes. However, members for permission guaranteed funding for the defence and for third parties. By the very nature of High Court matters they are complex

Consultation Question 28.

29.54

We provisionally propose that in determining a defendant's "benefit" the court should:

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

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

29.55

Do consultees agree?

Yes

Consultation Question 29.

29.56 We provisionally propose that the test of "gain" under our preferred model for the calculation of benefit should reflect the general principles in relation to "gain" already in use in the criminal law, principally that "gain" includes:

(1) keeping what one has;
(2) getting what one does not have;
(3) gains that both are temporary and permanent.

29.57 Do consultees agree?

Yes

Consultation Question 30.

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

No.

Consultation Question 31.

29.59 Do consultees consider that the money laundering offence under section 329 of POCA 2002 should be either wholly or partially included in any schedule of offences that trigger a finding of a "criminal lifestyle"?

No.

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

Not applicable.

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

No.

Consultation Question 32.

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

29.63 Do consultees agree?

No. Any such offending will be caught by the trigger unless it is of a minor nature.

Consultation Question 33.

29.64 We provisionally propose that fraud is not included in in any schedule of offences that trigger a finding of a “criminal lifestyle.

29.65 Do consultees agree?

Yes. Fraud is such a wide ranging activity that there should be a trigger for the engagement of the Poca assumptions. For example, a single incident of a "cash for crash" claim where the defendant received £3000 should not be treated in the same way and require the same rebuttal evidence as an individual who has defrauded the insurance company of £100,000 over a number of months. The first is more likely to be an opportunist, the second a more sophisticated professional criminal. Bearing in mind the intention of the Act was to catch the latter rather than the former it would seem unjust to now incorporate the opportunist caught up in a larger, more sophisticated operation.

29.66 If consultees disagree, do consultees know of any cases in which the current law

has impeded effective confiscation where there predicate offence was fraud?

Consultation Question 34.

29.67 We provisionally propose that bribery is not included in in any schedule of offences that trigger a finding of a “criminal lifestyle".

29.68 Do consultees agree?

Yes.

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

Consultation Question 35.

29.70
Are there any offences that consultees consider should be added to any schedule of offences that trigger a finding of a “criminal lifestyle”? (Such offences are described in the explanatory notes to POCA 2002 as being offences “associated with professional criminals, organised crime and racketeering” or “of major public concern”.)

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

No.

Consultation Question 36.

29.72 We provisionally propose that the number of offences required under the course of criminal activity trigger for “criminal lifestyle” be harmonised to remove the discrepancy between cases where there are multiple convictions on the same occasion and convictions on multiple occasions.

29.73 Do consultees agree?

No.

Consultation Question 37.

29.74 Do consultees consider that the number of offences required under the course of criminal activity trigger should be:

(1) two offences;
(2) three offences; or
(3) another number of offences (and if so, how many)?

A series of offences should be four or more completed offences. This will help avoid catching the "non career" criminal within the regime thus reducing the prospect of injustice.

Consultation Question 38.

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

29.76 Do consultees agree?

No. The confiscation regime is not considered when dealing with TIC's. The financial consequences [and the effect on liberty with a call for "hidden assets"] could be catastrophic. It will lead to advice to not accept the TIC's by more "savvy" practitioners leading to the prospect of more prosecution and greater cost.

Consultation Question 39.

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

29.78 Do consultees agree?

No. The trigger should be on completed offences.

Consultation Question 40.

29.79

We invite consultees views about whether the financial threshold for triggering the lifestyle assumptions should be raised, and if so whether it should reflect:

(1) the current £5,000 threshold, adjusted for inflation;
(2) the national minimum living wage obtained over a period of six months, adjusted for inflation;
(3) another amount (and if so, how much).

Yes. It is in our view clear that the intention was that this should be a figure to prevent less criminality becoming subject to Poca proceedings. We would suggest a figure of £10,000 increasing by the measure of inflation every five years.

Consultation Question 41.

29.80

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

29.81 Do consultees agree?

Yes.

Consultation Question 42.

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

29.83 Do consultees agree?

We feel that there should be guidance given to the prosecution in respect of when the assumptions should apply.

Consultation Question 43.

29.84 We provisionally propose that prosecutors should be able to exercise discretion as to whether to seek application of the assumptions.

29.85 Do consultees agree?

We do agree. However, there is a necessity to reform the CPS in respect of Poca proceedings. From the defendant's perspective it appears all too often that the driving force behind any Poca proceedings is the FI and not the CPS lawyer. It is noted that often documents will be filed and served on the CPS and the response is we will pass this on to the FI for them to review. All too often the FI is not involved in the original criminal proceedings, with the inherent issues therein.

Clear guidance should be given for the application of the assumptions to the CPS, such guidance should be available for the defence.

Consultation Question 44.

29.86

We provisionally propose that:

(1) if the court decides that the defendant has a "criminal lifestyle", the court may nevertheless determine that it is contrary to the interests of justice to apply the assumptions, taking into account the statutory purpose of confiscation.

(2) if the court decides that it is contrary to the interests of justice to apply the assumptions, the court should determine benefit with reference to particular criminal conduct.

29.87 Do consultees agree?

Yes

29.88 Do consultees consider that (in addition to considering the statutory purpose of confiscation) there are any particular indicative factors that could assist the court in making this determination?

Consultation Question 45.

29.89 We provisionally propose that the "serious risk of injustice" test be clarified in its application to the property held assumption, to indicate that in determining whether there would be a serious risk of injustice if the assumption were applied, the court

should consider:

(1) Any oral or documentary evidence put before the court; and

(2) If documentary evidence is not put before the court, the reason why documentary evidence was not put before the court and the validity of that reason.

29.90 Do consultees agree?

Yes. However, it would be seen that this would be raised

Consultation Question 46.

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

29.92 Do consultees agree?

Yes

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

Consultation Question 47.

29.94

In assessing benefit to multiple defendants, we provisionally propose that confiscation legislation should require the court to make findings as to apportionment of that benefit.

29.95

Do consultees agree?

Yes. However, what should be contained within the direction should be the subject of a further review.

Consultation Question 48.

29.96 We provisionally propose that guidance on the principles in connection with assets tainted by criminality should be provided.

29.97 Do consultees agree?

Yes

29.98 If yes, should this be provided in the form of:

(1) non-statutory guidance on confiscation; or
(2) a Criminal Practice Direction relating to confiscation?

Non-statutory guidance.

Consultation Question 49

29.99

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

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

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

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

29.100 Do consultees agree?

Yes

Consultation Question 50.

29.101

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

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

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

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

29.102 Do consultees agree?

Yes.

Consultation Question 51.

29.103

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

29.104

Do consultees agree?

Yes. The issue of corporate veil should be set out in detail.

Consultation Question 52.

29.105

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

A practice direction should be issued setting out the law - Something Like:

Lord Justice May at paragraph 17 of Gibson v RCPO[2008] EWCA Civ 645 outlines

"if Mrs Gibson's beneficial interests are not subject to gifts caught by the Act,…and if they are not otherwise within the confiscatory ambit of the legislation, they do not fall to be confiscated. Furthermore, as is acknowledged, Mrs Gibson does not have to rely on illegality to establish her beneficial entitlement (as to which see Tinsley –v- Milligan [1994] 1 AC 340)."

The case of Jones v Kernott [2011] UKSC 53 at paragraph 80 makes reference to Lord Diplock's comments in Pettitt v Pettitt [1970] AC 777 at p 823F-G:

"Unless it is possible to infer from the conduct of the spouses at the time of their concerted action in relation to acquisition or improvement of the family asset that they did form an actual common intention as to the legal consequences of their acts upon the proprietary rights in the asset the court must impute to them a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses."

The submissions made by Lord Kerr at paragraph 68 of Jones v Kernott [2011] UKSC 53 comments that

"the common intention, if it can be inferred, is to be deduced objectively from the parties' conduct and where the intention as to the division of the property cannot be inferred, each is entitled to that share which the court considers fair. In considering the question of what is fair the court should have regard to the whole course of dealing between the parties".

Further Lord Kerr also comments at paragraph 70 that

" where it is not possible to ascertain what the actual intention of the parties was as to the shares in which they would own the property, each is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property".

It is open to the defendant and X to establish a beneficial interest in the ownership of the property. [See Stack v Dowden UKHL [2007] at para.17

Baroness Hale in her judgement in Stack v Dowden [supra] at paragraph 68 stated

“The onus is on the person seeking to show that the beneficial ownership is different from the legal ownership. So in non-owner cases, it is upon the non-owner to show that he had any interest at all.”
To establish such a beneficial interest the defendant and Ms P must satisfy the “dual hurdle” test as set out in Lloyds Bank v Rosset [[1991] 1 AC 107, House of Lords] Lord Bridge identifying the tests to be applied within his judgement as
"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel.
"In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

This can be summarised that defendant and Ms P can establish a beneficial interest by demonstrating either:-

a. By express discussions evidencing an agreement or understanding between the parties.
b. Alternatively, by drawing inferences from the conduct of the parties.

If the court finds that there is a beneficial interest established then the court should then go on to consider what that beneficial interest actually is.

Stack v Dowden set out the criteria when considering beneficial entitlement which, it is submitted can be summarised as:

a. any advice or discussions at the time of transfer which cast light on their intentions;
b. the reason why the home was acquired in joint names (or sole name);
c. the reason why the survivor was authorised to give receipt for capital monies;
d. the purpose for which properties were acquired;
e. the nature of the parties relationship;
f. whether they had children to whom they both had responsibility to provide a home;
g. how the purchase was financed, both initially and subsequently;
h. how the parties arranged their finances,;
i. how they discharged the outgoings on the property and their other household expenses.
j. The reason for the property not being bought in joint names at the time of the purchase

Consultation Question 53.

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

29.107 Do consultees agree?

Yes.

Consultation Question 54.

29.108 We provisionally propose that:

(1) the Criminal Procedure Rules Committee considers incorporating into the Criminal Practice Direction a provision to the effect that:

where a confiscation order is made in an amount less than the defendant's benefit, judges should explain why the two figures are different and that it will be open to the prosecution to seek to recover more of the benefit in
future, until it is repaid in full.

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

29.109 Do consultees agree?

Yes, although in reality judges do this in any event.

Consultation Question 55.

29.110 We do not propose that the prosecution should bear either a legal or evidential burden to satisfy the court that assets have been hidden by a defendant.

29.111 Do consultees agree?

No. What the Royal commission is suggesting is that just raising the issue of hidden assets is good enough. The defendant has to prove a negative. There has to be some critical perspective in raising the issue of hidden assets. The consequences are, usually, the loss of the defendant's liberty.

Most defendants where there is a finding of hidden assets do not generally have the money or property alleged. The money has generally been disposed of and is no longer available. However, there is a lack of an audit trail because of the lifestyle defendant's lead. We have yet to see a receipt given by a cocaine dealer. To allow the prosecution carte blanche in calling hidden assets is unfair bearing in mind the accepted difficulties and ultimately the consequences of a failure to rebut an allegation.

Consultation Question 56.

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

29.113 Do consultees agree?

Yes

Consultation Question 57.

29.114 We provisionally propose that the law in relation to hidden assets is codified and clarified through an articulation of relevant principles in a Criminal Practice Direction.

29.115 Do consultees agree?

Hidden assets in confiscation cases are the most pernicious and challenging issue facing a defendant on many occasions. A prosecutor only has to raise the issue of hidden assets and it is for the defendant to rebut this suggestion. Regularly the prosecution will raise the issue where the proposed benefit figure devolves from being part of a drugs gang. The raising of hidden assets in such circumstances often goes along the lines of "…The defendant was part of an organised crime group and the benefit is £2 million . It is inconceivable that the defendant does not have him assets bearing in mind the high value of the benefit figure." At that point hidden assets are raised and it is for the defendant to rebut. A defendant will say that he does not have those hidden assets, that the money that he raised was spent buying other drugs or alternatively spent on drugs for his own personal use. Of course, there is no audit trail for such expenditure and the defendant is therefore, in many cases, unfairly penalised as having him assets.

It is incorrect to believe that prosecutors are less likely to call for hidden assets. There, of course, is a financial incentive for the prosecution parties to try and collect as much money as possible, the cry of him assets is often heard. It is, regularly, used as a tool to force the defendant to agree to a deal. If the prosecution are arguing that there is a benefit order significantly higher than the established available assets then it is usual that the Crown will place an argument for him assets. A defendant will recognise that should the hidden assets argument be lost (and of course it is for him to show on the balance that he does not have the assets the prosecution allege) then he will be serving a significantly longer time in custody.

That has knock-on implications for the proposals further on in this consultation. If, for example, a defendant is found to have a benefit order of, say, £900,000 of which £600,000 is deemed to be hidden assets a default sentence of six years will be imposed by the court. There is no prospect that the defendant will pay £600,000. The reason for that is either that he does not have it (which is usual in many practitioners experience), or will take the time in lieu. The reason being, of course, is that it is actually comparatively rare for defendants to have access to the hidden assets the Crown say they do. However, because they have been convicted evidence alone is unlikely to assuage the judge who has taken a view of the defendant within the course of the proceedings. The defendant may have been unwilling or unable, or advised against cooperation within the proceedings. This is taken as an expression that the defendant must have something to

hide. From the later proposals in this document the defendant who has £600,000 outstanding on him assets will serve two years of his four-year sentence. He will then be released on licence. He will be unable to pay the hidden asset element (because he never had the money in the first place) and he will then be recalled. Interest will accrue and the defendant will end up serving a greater punishment than the four years.

We believe that there should be some basis for any application regarding hidden assets. It should not just be on the fact that a large amount of money passed through the defendant's accounts or that in mythical benefit calculations a significant amount of money appears to have been obtained. There should be a more critical eye on any application. We stated at the beginning that the prosecution hold all the cards already this, we would suggest, is their strongest card.

Hidden assets are, after all, the prosecution saying they do not believe a word the defendant is saying. Our view is that there should be a reluctance on the part of the judiciary to find him assets and a more critical analysis in respect of the finding of the same.

Consultation Question 58.

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

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

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

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

(i) evidence given by the defendant; or
(ii) sources of evidence other than the defendant

(b) Any expenditure incurred by the defendant which is more likely than not to have been met from the defendant's benefit.
(c) Representations made by the parties.
(d) The potential risk of injustice if a "hidden assets finding" inappropriately increases the "available amount".

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

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

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

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

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

Please see above.

Consultation Question 59.

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

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

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

29.119 Do consultees agree?

Yes

Consultation Question 60.

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

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

(a) by the defendant; or
(b) by the realisation of other assets; and if so
(2) adjust downwards the term of imprisonment for defaulting on payment of the confiscation order.

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

29.122 Do consultees agree?

Yes

Consultation Question 61.

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

(1) the value of that tainted gift is not paid towards the confiscation order; and
(2) the court is satisfied that the value of the tainted gift cannot be recovered either:
(a) by the defendant; or
(b) by the realisation of other assets.

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

29.125 Do consultees agree?

Yes

Consultation Question 62.

29.126

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

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

(a) by the defendant; or
(b) by the realisation of other assets; and if so
(2) order that interest should not accrue on that tainted gift; and
(3) that any interest previously accrued on that tainted gift be removed from any outstanding confiscation amount.

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

29.128 Do consultees agree?

Yes. This is not an addition but occurs on a regular basis currently. In respect of tainted gifts the court should consider whether they are, in fact, available to the defendant. If, for example, the tainted gift has been sold on at arms length by the original recipient of the tainted gift then it would appear unfair and unjust to incorporate the same in a defendant's available amount.

Consultation Question 63.

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

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

(1) Whether that consideration is capable of being assessed as consideration of value; and if so,
(2) to what extent.

29.130 Do consultees agree?

Yes

Consultation Question 64.

29.131

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

29.132 Do consultees agree?

We have no comment to make save that we would request that there be certainty in the wording.

Consultation Question 65.

29.133

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

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

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

29.134 Do consultees agree?

No.

The defendant should be given opportunity to pay the order. It is not unusual for a defendant to be belligerent in the face of the court. The commission have identified

difficulties in engaging with the defendant throughout the process. An immediate threat of an enforcement order will merely lead to the defendant further withdrawing in the proceedings and to more contested applications.

As we have stated, third party interests are not properly protected within the Poca regime.

Consultation Question 66.

29.135

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

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

29.136

Do consultees agree?

If it is the proposal that the prosecution and courts should have further powers in relation to real property at the disposal of the same then it is important that there are proper and significant safeguards for the interests of third parties. It is not unusual that confiscation orders are paid out of other funds, be that borrowed money from friends and relatives or other property the family may hold.

The third party issues should not only include people with a legal or equitable interest in the property but also those who have acquired a licence to reside in the property.

It is not unusual for those with those who have an arguable equitable interest in a property to be unaware of the proceedings within the Crown Court. To have a statutory body than sell the property without warning or reference is, in our view, inequitable.

The court, the present, in general pay lip service to third-party applications. There are difficulties in obtaining funding and therefore proper representation within the proceedings. They are reliant upon service of documents by the Crown and/or the defendant. The Crown are reliant upon the defendant disclosing third-party interests. They defendant may not wish to do this, or have been badly advised.

Consultation Question 67.

29.137

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

(1) the use ordinarily made, or intended to be made, of the property;
(2) the nature and extent of the defendant's interest in the property;
(3) the needs and financial resources of the spouse, civil partner, former spouse or former civil partner of the defendant;
(4) the needs and financial resources of any child of the family;
(5) (if applicable) the length of the period during which the family home has been used as a residence by a spouse, civil partner, former spouse, former civil partner or child of the family;
(6) whether the asset in question is tainted by criminality; and
(7) the extent of an interested party's knowledge of the same.

29.138 Do consultees agree?

Subject to the making of such an order and the concerns expressed above then we would suggest that the court adopts an approach commensurate with section 23 of the matrimonial causes act 1973 where there is a spouse, civil partner, former partner or former civil partner or children of the defendant.

Consultation Question 68.

29.139

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

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

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

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

29.140 Do consultees agree?

Yes. However the third party should have the benefit of a representation order from the outset. The funding of third-party applications and representation within Poca proceedings is something that needs to be reviewed as a matter of urgency. Funding is extremely rare and there are often conflicts of interest necessitating separate representation from the defendant.

Consultation Question 69.

29.141

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

29.142

Do consultees agree?

Yes. Subject to representation order being extended to cover the High Court proceedings.

Consultation Question 70.

29.143

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

29.144 Do consultees agree?

Yes, subject to the defendant receiving a representation order. Enforcement proceedings necessitate a fresh application for a representation order. But representation order is

means tested and if the defendant does not meet the limited means for representation within the magistrates court then the defendant will be unrepresented.

As the issue is one of liberty of the defendant there will be a significant number of unrepresented defendants before the Crown Court if the legal aid situation stays as it is currently for enforcement proceedings. Within the magistrates court a defendant who does not have the benefit of a representation order can have the duty solicitor, but of course this will not be available in the Crown Court.

Consultation Question 71.

29.145

We provisionally propose that:

(1) defendants subject to confiscation orders of £10 million or less should no longer be released unconditionally after serving half a term of imprisonment in default; and

(2) during the second half of the term of imprisonment the defendant should be released subject to licence conditions that facilitate the enforcement of the confiscation order.

29.146 Do consultees agree?

No. Licence conditions demand supervision this is a significant increase in cost. Furthermore it is restriction on liberty in respect of what is in essence a civil debt. It would appear unjust.

Consultation Question 72.

29.147

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

29.148 Do consultees agree?

In essence the proposal reinforces the idea that confiscation is indeed a criminal rather than a civil matter. If criminal sanctions are to be imposed then it would appear unfair

that this can be done on the basis of the prosecution proving their case on the balance of probabilities.

Clearly defendants would rather retain their liberty. However it would appear that we are moving into criminal sanctions being applied to the breach of a civil order.

Consultation Question 73.

29.149 We provisionally propose that:

(1) the court should have a bespoke power to direct a defendant to provide information and documents as to his or her financial circumstances; and

(2) a failure to provide such information should be punishable by a range of sanctions including community penalties and imprisonment.

29.150 Do consultees agree?

No. A confiscation order is a civil cause not a criminal one although coming from criminal proceedings. To criminalise the enforcement over and above the ability to remove the liberty of an individual because they have failed to comply with production of documents appears to be unjust. It is adding a further criminal sanction into the arena. Often individuals who are dealing with confiscation are not organised. The engagement, which is supposedly sort will not be afforded by threats of further sanctions on the individual.

Consultation Question 74.

29.151

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

29.152 Do consultees agree?

Yes.

Consultation Question 75.

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

29.154 Do consultees agree?

No. This will not lead to certainty for the defendant at the point of enforcement.

Consultation Question 76.

29.155

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

29.156 Do consultees agree?

No. Whilst it is accepted that an order should be paid there are significant reasons often why that order cannot be met. That may be out of the control of the defendant. It further alerts institutions that there is a confiscation order in place in respect of the defendant and will lead to inevitable consequences when borrowing and is potentially disclosure of a criminal conviction by the back door. A credit institution does not necessarily have to be aware of a defendant's conviction for a drugs matter. Institutions will be alerted by entry onto the register of judgements. This could have further knock-on effects the rehabilitation of the offender as well as limitations on future abilities to pay.

Consultation Question 77.

29.157

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

29.158

Do consultees agree?

Yes

Consultation Question 78.

29.159

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

29.160 Do consultees agree?

Subject to funding for the defendant in respect of representation we do not object

Consultation Question 79.

29.161 We provisionally propose that:

(1) Legislation should set out indicative factors for the court to consider when determining whether to re-open enforcement of a confiscation order that has been placed in abeyance.

(2) Those indicative factors should mirror those proposed in connection with uplift applications (see consultation question 85).

29.162 Do consultees agree?

Yes

Consultation Question 80

29.163 We provisionally propose that:

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

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

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

(a) compensation of victims (when such compensation is ordered to be paid from confiscated funds); followed by
(b) each confiscation order in the order in which it was obtained.

29.164 Do consultees agree?

Yes

Consultation Question 81.

29.165

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

29.166

Do consultees agree?

Yes

Consultation Question 82.

29.167

We do not propose that a central compensation scheme, funded from sums collected pursuant to confiscation orders, be created.

Do consultees agree?

We express no view.

Consultation Question 83.

29.168

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

29.169

Do consultees agree?

Yes. The anomaly that a compensation order cannot be varied but a confiscation order can is, in our view, irreconcilable. Clearly any application under section 22 (prosecution uplift) should have the compensation limited to the loss of the victim. Any reduction in the amount to be paid, under section 23 of the act should be mirrored by a reduction in compensation payable. Clearly the compensate T is protected in the section 23 application because should the defendant have further money later on then an application can be made by the Crown with the compensation being adjusted.

Consultation Question 84.

29.170

Do consultees consider that there should be statutory restrictions on making an application to "uplift" a confiscation order?

Substantial benefit orders discourage defendants from disclosing income or property in the future. Properties are held by spouses and partners. There is a discouragement of individuals leading a proper and full life when there is the real prospect of an application to remove property acquired legitimately.

29.171

If so, what should such restrictions be?

Consultation Question 85.

29.172

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

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

29.173

In weighing up undue hardship, we provisionally propose that the court should consider factors including:
(1) The use ordinarily made, or intended to be made, of the property; and
(2) The nature and extent of the defendant's interest in the property.

29.174 Do consultees agree?

There should be recognition of third-party acquired rights and article 8 rights within the legislation. Bearing in mind the nature of the legislation and the limitless time it is not unusual for defendants to have moved on in their life, got married or have a long-term partner and have children. Careful consideration should be given to applications relating to domestic properties which are family homes where individuals have acquired an interest in the property post order.

Consultation Question 86.

29.175

We provisionally propose that, when an uplift is determined, the court may order that an uplifted available amount be paid either:

(1) by a specified deadline;
(2) in instalments.

29.176

Do consultees agree?

Yes, save that there is provision that interest does not run on instalments paid on time all the outstanding balance thereon.

Consultation Question 87.

29.177

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

We have no comments to make

Consultation Question 88.

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

(1) The actions of the person whose assets are to be restrained, including:
(a) any dissipation that has already taken place;
(b) any steps preparatory to dissipation that have already taken place;
and
(c) any co-operation in the furtherance of the just disposal of the case.

(2) The nature of the criminality alleged; including (but not limited to) whether the defendant is alleged to have committed an offence:
(a) involving dishonesty; or
(b) which falls within schedule 2.

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

(4) The stage of proceedings.

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

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

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

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

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

29.179 Do consultees agree?

No observations

Consultation Question 89.

29.180

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

No

Consultation Question 90.

29.181 We provisionally propose that:

(1) Applications for without notice restraint orders should be made to a duty judge, accessible nationally.
(2) The application should be dealt with by the judge on the papers where possible.
(3) If the judge requires further information, that judge should be permitted to hold a hearing remotely.
(4) Should the judge decide that there is a need for an inter partes hearing, the hearing should be listed at a court centre local to the parties.

29.182 Do consultees agree?

Yes.

Consultation Question 91.

29.183

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

(1) The length of time that has elapsed since the Restraint Order was made.
(2) The reasons and explanations advanced for such lapse of time.
(3) The length (and depth) of the investigation before the restraint order was made.
(4) The nature and extent of the restraint order made.
(5) The nature and complexity of the investigation and of the potential proceedings.
(6) The degree of assistance or of obstruction to the investigation.

29.184 Do consultees agree?

The restraint of assets and the restriction by the state of the use or disposal of those assets is a significant step against the individual. A time limit for a proper review of any restraint proceedings should be imposed on all pre-charge restraint proceedings. There should be an inter parte hearing where the respondent to the proceedings should be entitled to have publicly funded representation.

A reasonable time should, on any ex parte application should have a return date within a specified short time limit, similar to injunction proceedings.

Consultation Question 92.

29.185

We provisionally propose that:

(1) any amended legislation provides that:

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

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

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

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

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

29.186

Do consultees agree?

Yes. However this should be subject to the respondent/defendant receiving a separate representation order to fund the work outlined. Funding is not available for a respondent/defendant to deal with restraint proceedings per se. Should this proposal be accepted then funding must also be allowed for the respondent to file any schedule of income and outgoings.

Consultation Question 93.

29.187

We provisionally propose that:

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

(2) Legal expenses should be subject to:

(a) Approval of a costs budget by the judge dealing with the case.
(b) The terms of a table of remuneration, set out in a statutory instrument.

29.188

Do consultees agree?

Yes, subject to consultation in respect of the table of remuneration on behalf of solicitors.

Consultation Question 94.

29.189

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

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

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

(a) The stage of an investigation or prosecution. At an early stage it is likely that less information will be available to prosecutors.
(b) The urgency of proceedings. The more urgent the application the less likely it is that each indicative factor may have been considered in detail.
(c) Whether all reasonable lines of enquiry have been followed, particularly in light of (a) and (b).
(d) Whether there has been full and frank disclosure of matters known to the prosecution that may assist the defence or undermine the prosecution.
(3) If the court concludes that the application was not reasonably brought, costs should follow the event.

29.190

Do consultees agree?

No. Costs should always follow the events in these matters. Whether the application be bought by the Crown all my private prosecutor there must be a sanction for the prosecutor wrongly interfering with the A1 P1 rights of the defendant leading to proper consideration regarding an application to interfere with those rights. If the only thing that is prohibitive is the fear of increased costs for "getting it wrong" then that is a burden the prosecution should bear for the unsuccessful attempt to restrain an individual's property

Consultation Question 95.

29.191

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

29.192

Do consultees agree?

No.

29.193

If consultees do not agree, should:

(1) No costs be awarded.
(2) Costs be awarded subject to a pre-determined discount to reflect the reasonableness of the application; if so, we would welcome consultees' views as to what discount might be appropriate.
(3) Reasonable costs be awarded in all of the circumstances of the case, not capped at legal aid rates.
(4) Costs be awarded in some other formula? If so, we would welcome consultees' view as to what formula might be appropriate.

Reasonable costs be awarded in all the circumstances of the case, not capped at legal aid rates

Consultation Question 96.

29.194

We provisionally propose that:

(1) where it is in the interests of justice to do so, the Crown Court may make a bindng determination of interests in property at any stage of proceedings (including at the restraint stage);

In respect of such applications as they currently stand those who assert third-party interests in properties do not have an automatic right to a representation order and have to pay privately. Whilst provision does exist it is as rare as hens teeth for an individual to be granted a representation order to participate as 1/3 party within such applications.

This can lead to injustices. For example, an individual may have accepted a beneficial interest in a property whilst having no legal title. The legal title is held by the individuals partner. This may have been done in different proceedings. However, that individual could be of benefit. The defendant may have paid off the original order by other means. In new proceedings the prosecutor will assert that the mortgaged value of the property is half of the defendants.

Clearly in those circumstances the individual should have representation separate from that of the offender.

The earlier the determination being sought by the prosecution the more chance of injustice. When restraint proceedings are issued pre-charge there is no funding available for the defendant to challenge any restraint. Because of the imposition of the restraint proceedings the defendant will have no access to pay his legal team. It is not unusual for restraint proceedings to be issued in excess of six months prior to the instituting of criminal proceedings.

After advice on restraint proceedings is done pro bono in order to later secure the criminal case. The extent of representation will consist of letters written allowing mortgages to be paid and bills to be met. To make a determination as to the full extent of ownership of the property at this point will lead to injustices and the breach of A1 P1 rights of the third party.

(2) such a determination should be conclusive in relation to the confiscation proceedings, unless the court is satisfied that a party did not have a reasonable opportunity to make representations at the hearing when the
determination was made, or it appears to the court that there would be a serious risk of injustice if the court was bound by the determination.

The determination of the rights within the property should take place within the confiscation proceedings themselves and not as a separate entity within the proceedings. It is at that point that the court can assess the overall position.

Consultation Question 97.

29.195

We provisionally propose that the National Police Chiefs' Council reconsider the training needs of all police officers in connection with confiscation, and in particular those front-

line police officers who may need to exercise the powers of search and seizure in connection with confiscation.

29.196

Do consultees agree?

We have no comment to make

Consultation Question 98.

29.197

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

29.198

Do consultees agree?

Consultation Question 99.

29.199

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

29.200

Do consultees agree?

Yes. This should be subject to and on notice full application with a right of appeal.

Consultation Question 100.

29.201

We consider that a national asset management strategy is desirable, to determine who and how assets should be managed.

29.202

Do consultees agree?

Yes. Consistency will assist the defence and allow a focal point to be approached.

Consultation Question 101.

29.203

We provisionally propose that to develop any national asset management strategy:

(1) a new Criminal Asset Recovery Board be established;

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

29.204

Do consultees agree?

It is noted from the consultation document that the establishment and the operation of such a board will not include defence practitioners. As we are generally the ones who have to deal with the approach of the authorities overall in respect of how matters are managed it would seem to us sensible that if the proposal is moved forward then there is input from solicitors who regularly deal with such matters.

C**onsultation Question 102**
29.205

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

If so, in what circumstances?

It would seem unfair on the defendant that because the prosecution have acted in a way that has prevented him from utilising his assets and the subsequent assets have decreased in value that is then further penalised by statutory protection of the prosecution preventing him from seeking to be put back in a position he would have been should the prosecution not have happened.

Consultation Question 103.

29.206

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

Both the value and the ownership of crypto assets difficult to establish because of the very nature of them. In the increasing world of cybercrime crypto currencies may significantly increase the value of any benefit order whilst their volatile nature decrease the value of available assets. The court needs to be in a position to recognise this. There is of course a mechanism under section 23 of the act to allow defendants to reduce the value. As time progresses and there is a maturity and acceptance by the establishment it is likely that these fluctuations will decrease as the value and type of currency become more mainstream. The question in reality is do we need a sticking plaster for what may be a short-term problem.

Consultation Question 104.

29.207

Do consultees consider that there are any matters connected to Part 2 of the Proceeds of Crime Act 2002 that are not covered in this consultation paper that require reform?

29.208 If so,

(1) what are they; and

(2) how should they be reformed?