Response to Law Commission Consultation on ‘Confiscation of the Proceeds of Crime After Conviction’ by Garden Court Chambers.

Garden Court Chambers

Garden Court Chambers are a multi-disciplinary set based in London but with national and international expertise in a range of areas of practice. We have been consistently recognised for our outstanding contribution to criminal defence, having acted in and won many of the landmark cases that have defined modern criminal law.

Our Fraud and Confiscation Team bring decades of expertise defending in some of the largest and most complex fraud and confiscation cases in the UK and abroad and we are ranked as a leading set of chambers for fraud cases in the Legal 500. Members of the team have authored the highly regarded Confiscation Manual, the ‘go-to’ guide for lawyers dealing with applications under the Proceeds of Crime Act 2002.

Preface

There is no doubt that the confiscation procedure is in need of drastic reform. A regime that proudly describes itself as 'draconian' has no place in a modern justice system. As such, we welcome to Law Commission's careful and thorough review of Part 2 of the Proceeds of Crime Act 2002. The changes proposed are in places radical and elsewhere more refined. In some instances we consider that the proposed reforms do not go far enough to alleviate the risk of injustice and we have set out our concerns.

We are grateful to the Law Commission for the steps taken as part of this consultation to seek greater involvement from the defence community, who have not always taken the opportunity to engage with and potentially shape reform, no doubt due to the demands of practice rather than satisfaction with the current system.

Although we practice solely on behalf of the defence, a fair system for the defendant is more likely to be an effective system and achieve better outcomes for prosecution and defence, victim and community. A defendant who is ordered to pay ten times what they actually have, and who has no prospect of avoiding a default sentence, has no incentive to further cooperate. A defendant who is ordered to pay only what they actually have is more likely to do so and bring proceedings to an end.

Too often, scepticism, suspicion and assumptions from the courts which may be justified in relation to the small number of individuals who sit at the top of an Organised Crime Group is brought to bear on low-level offenders caught up in the confiscation system. These are individuals who have not set up sophisticated systems to disguise or hide their assets, who cannot be said to have lived a 'criminal lifestyle' in the everyday meaning of those words and who have justifiably not considered for a moment that many years in the future they will need to account for every penny which passes through their hands.

Although outside the scope of this paper, we should also make it clear that any new system cannot hope to succeed without proper investment and remuneration to those involved. The majority of work carried out by advocates in relation to confiscation proceedings is effectively *pro bono*. Many counsel return cases after sentence rather than deal with the infinitely more complex and undeniably worse paid confiscation. Further engagement and preparation under these reforms will not take place without reasonable funding.

Among our key responses, we consider that:

- It should be made clear that punishment and deterrence form no part of the confiscation system;
- The system should focus on recovering the true benefit obtained and not funds which a defendant never really received;

- That relevant guidance and principles be provided in a similar form to the guidelines currently put together by the Sentencing Council;
- That if the prosecution consider that a defendant may have 'hidden assets' they be required to raise a *prima facie* case that is the position;
- That the 'tainted gift' regime be significantly restricted, particularly in relation to gifts made within the family and gift which are proved to be irrecoverable.

Overall, it is hoped that the outcome of this consultation will be a regime which incorporates a greater degree of fairness, common sense and proportion to the recovery of the proceeds of crime.

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Consultation Questions

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?

Paragraph 5.83

We agree.

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?

Paragraph 5.97

We agree. Although the reference to 'benefit' may need to reflect any clarification as to what that means, whether 'gain' or some other criterion, as determined by the final form of any reforms.

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?

Paragraph 5.109

We agree. It is important that there is clarity regarding the operation of compensation orders in the context of confiscation proceedings but that is addressed below.

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?

Paragraph 5.120

We disagree. It is difficult to see what such objectives add to the scheme. The issue of punishment is dealt with below, however, there is a danger that the term deterrence may be interpreted as incorporating punishment. As set out below, punishment clearly should not form part of the statutory objectives. There is no evidence that the intricacies of the confiscation regime have any bearing on an individual's decision to commit acquisitive offending. Disruption of crime may better be reflected as an effect rather than a purpose of the confiscation regime.

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?

Paragraph 5.131

We agree. It should be explicitly stated that punishment is *not* one of the objectives of confiscation. As the consultation paper recognises, there has been some dispute in appellant courts as to whether punishment is such an objective. Therefore, the issue should be firmly laid to rest. The reasons for this are set out in the consultation paper but it is clear that the decision to pursue confiscation in some proceedings but not others should not result in additional punishment. Such an approach would be arbitrary and remove the issue of punishment – which is the sole province of the court under our system – from its rightful place. In addition, clarity about this issue will help to change the erroneous public perception that criminals are 'getting away with it' if (often unrealistic) confiscation orders are not collected and ensure that it is purely sentencing in which the punitive element is determined. Default prison terms are obviously a separate matter as they do not represent a 'punishment' for the original offence.

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?

Paragraph 6.59

We agree. Although this already happens in the majority of cases, it is a sensible requirement to provide finality to all parties and may in some circumstances focus the minds of the parties in the conduct of confiscation proceedings.

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?

Paragraph 6.67

We agree. Given the overriding priority of compensation it makes sense to formalise the position.

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?

Paragraph 6.75

We agree.

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?

Paragraph 6.95

We agree.

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?

Paragraph 6.97

We agree.

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?

Paragraph 6.99

Broadly we agree. However, the welcome focus on unfairness to the defendant may in practice lead to a lax approach to the imposition of orders despite non-compliance with the 6 month limit. Judge's will often have an inconsistent and/or restrictive view of fairness when it comes to a defendant who has committed a (potentially) serious offence or series of offences. In addition to simple fairness to the defendant, a further requirement of exceptionality and/or requirement that the principle that the interests of justice are served by having finality and therefore a failure to comply with the 6 month limit should be subject to significant scrutiny.

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?

Paragraph 7.77

We agree.

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?

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

Paragraph 7.79

Whilst provision could be made as to the normal period, each case turns on its own facts and it is rare that 28 days is sufficient to obtain the defendant's instructions, gather all the necessary supporting material together, draft a detailed response and ensure that it is approved by the defendant. It is important to note with all time limits set for the defence in confiscation proceedings that there is a gross imbalance of resources between the prosecution and defence. Obtaining bank statements and old pay slips for example is, in our experience, often a time-consuming process. Where the offence for which someone was prosecuted did not by its nature involve a detailed look at the defendant's financial position then those representing are faced with starting the process from scratch at the conclusion of the main proceedings. Further, legal aid is insufficient, particularly in less complex cases, which necessarily places a squeeze on the already stretched resources of firms doing this work under public funding. It should also be borne in mind that many defendants subject to confiscation proceedings are held in non-remand prisons, often in another part of the country to their solicitors. Even following the current pandemic, visiting, videolink and postal facilities at these prisons remains poor.

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?

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

Paragraph 7.82

We disagree. We think that the standard timetable in complex cases should be 70 days with flexibility to extend where necessary. Complex cases invariably involve expert reports, the contents of which are vital to establishing the defence position in respect of the prosecution application. The reality is that most experts will require at least 8 weeks to prepare a report. Prior to that an appropriate expert must be identified and fees agreed (if legally aided this requires a number of additional administrative hurdles). Therefore, it is unrealistic to suggest that 8 weeks in total will be sufficient. It is likely that in many cases this timetable will need to be extended further but it is suggested that 70 days provides a more realistic baseline.

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?

Paragraph 7.88

We agree that clarity over the process is always beneficial.

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?

Paragraph 7.95

We agree.

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?

Paragraph 7.97

We agree.

Consultation Question 18.

29.38 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?

Paragraph 7.101

The absence of a lawyer's input can affect the quality and plausibility of the prosecutor's statement. In higher value or complex cases it should be required that a lawyer is involved in drafting in order to scrutinise the investigator's assertions and prepare a document that may have already given some thought to the likely issues in any confiscation. In more routine cases, at the very least, better training for investigators is required but whether a lawyer should have input may be a question better dealt with by prosecuting authorities.

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?

Paragraph 8.47

We agree, subject to proper funding for such hearings being provided. If the parties are not going to be remunerate for the preparation which would be required in order for such hearings to have the desired effect then they are unlikely to achieve a great deal.

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?

Paragraph 8.55

In principle, yes. It is not clear whether this proposal also incorporates a Part 36 style scheme with respect to costs. Such a scheme may require further consultation and the issue of third party interests is a complicating factor but we envision that a scheme for defendants to make 'without prejudice' Part 36 style offers would be a useful tool.

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?

Paragraph 9.62

The question presupposes that all property identified as part of the available amount is the proceeds of criminal conduct. The nature of the lifestyle assumptions regime means that inevitably legitimate property often gets counted as criminal. However, provided an emphasis is placed on the encouragement of realistic settlement offers as per the previous proposals then it is agreed that a scheme that explicitly allows retention of 'criminal' property is not appropriate. A scheme which disapplied the lifestyle assumptions in return for early cooperation in relation to particular criminal conduct could be considered.

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?

Paragraph 9.88

We agree. Whilst defendants would often welcome such a scheme, it contradicts the principle that punishment should play no part in the confiscation regime.

Consultation Question 23.

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

29.45 Do consultees agree?

Paragraph 10.72

We agree.

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?

Paragraph 10.89

We agree.

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?

Paragraph 10.115

(1) In our view it is inappropriate to make any enquiries of the defendant in this regard prior to an admission or finding of guilt. Aside from more substantial and complex cases it is likely to be difficult for defence practitioners to identify complexities in notional confiscation proceedings by the time of the PTPH. There is no harm in the prosecution being asked to identify any issues that may affect confiscation and some cases may be complex on their face.

(2) Yes.

(3) Yes, subject to a consideration of whether this would slow the resolution of cases through a lack of appropriate judges.

Consultation Question 26.

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

29.50 Do consultees agree?

Paragraph 10.133

We consider that the better approach, and one more familiar to criminal practitioners would be to allow each side to instruct an assessor where the court considers it appropriate to do so in relation to a niche or complex area of law.

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?

Paragraph 10.142

We agree.

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?

Paragraph 12.282

We disagree. It is difficult to see how 'gain' - as defined - is any different to the current test of 'obtain'. It is suggested in the paper that 'obtain' can be equated to 'appropriate' within the Theft Act 1968 and the fact that, under s.1(2) of that Act, appropriation may not be for 'gain' means that it is narrower.

The only suggested explanation (at 12.173) as to how 'gain' may be narrower is that 'the intention might be immediately to destroy the property'. However, as gain incudes temporary gain, then a person who obtains property and immediately destroys it has – in virtually every case – temporarily gained it.

We cannot think of an example in which rebranding the test from 'obtain' to 'gain' would exclude any of the unfair results produced by the current legislation. Indeed there is a risk that 'gain' as defined may broaden the scope of benefit. Gain has been defined very widely. In *Eden* (1971) 55 Cr. App. R. 193, the court held that there were various forms of temporary gain which could satisfy the definition under the Theft Act 1968, including a gain constituted by *'putting off the evil day of having to sort out the muddle and pay up what may have been in error kept within the sub-post office when it ought to have been sent to head office'*. It is not clear whether the same result would be reached under the current test for obtaining.

We suggest that the purpose of s.1(2) of the Theft Act 1968 is to make it clear that it does not matter whether or not the property which has been obtained was intended to be *retained*.

It is not suggested that the benefit figure should be limited to what has been permanently retained, but the example in the paper - of property which is obtained but immediately destroyed - indicates that some form of temporal factor should be built in to deciding whether a defendant has benefitted. The question of proportionality means that currently where property is recovered and returned to the owner, it is deducted from the benefit figure. There is no reason why the same could not apply to property which has been relatively quickly destroyed, or drugs which have been recovered by the police before they are sold or the proportion of the turnover which has been paid to suppliers or to co-conspirators or on essential expenses.

A focus on that which is retained supports the natural inclination towards a profit focussed model. Fears that such a model would be contrary to public policy and impractical are misplaced. Requiring a defendant to pay over the full turnover, requires them to pay more than they ever have had available and risks double recovery. Deductions could be limited to those intrinsic to the criminality, for example the cost of purchasing of the drugs would be considered an essential part of being able to sell them and the benefit limited to the profit received. The burden of proving that the intrinsic costs could be placed on the defendant. Monies spent by the defendant outside of the 'business' would not be deducted.

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?

Paragraph 12.284

We disagree for the reasons set out above.

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)?

Paragraph 13.51

See response to question 31 below.

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"?

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?

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?

Paragraph 13.69

We consider that the inclusion of s.327 and s.328 but not s.329 can lead to absurd results. For example, a person who allows a fraudster to transfer money into their bank account and then withdraws it to give to the fraudster, has converted criminal property, entered into an arrangement to facilitate the acquisition of criminal property by another and themselves acquired criminal property. They could therefore be charged with any of the three offences or with handling stolen goods. They could also be charged with fraud on a joint enterprise basis. The application of the assumptions should not depend upon arbitrary charging decisions.

We would suggest that all three offence be removed from Schedule 2. As the paper notes a person who carries out such activity as that described above may be a 'professional' money launderer. They may also be a person who has allowed another to pass £100 through their account on one occasion. Where there is evidence of repeat offending, the remaining tests within section 75 would still apply, meaning that repeat 'professional' launderers would still be caught.

Alternatively, we suggest that a minimum value be imposed so that a single offence is only caught if the amount involved is, for example, £10,000 or more.

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?

Paragraph 13.73

We would agree that the absence of this offence from Schedule 2 appears anomalous.

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?

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?

Paragraph 13.83

We agree.

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?

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?

Paragraph 13.91

We agree.

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?

Paragraph 13.94

None. The list of offences within Schedule 2 should be kept to the minimum to avoid applying too broad brush an approach and capturing low level 'one-off' defendants.

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?

Paragraph 13.132

We agree.

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)?

Paragraph 13.134

We consider that the number of offences required should be at least three.

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?

Paragraph 13.147

We disagree. We consider that including offences taken into consideration will deter defendants from admitting such offences. Excluding TICs would not lead to a large number of additional offences having to be charged. Only the number required to trigger the lifestyle assumptions would be necessary.

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?

Paragraph 13.153

We agree.

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).

Paragraph 13.190

We agree that the financial threshold should be raised. We consider that it should be based upon the *annual* living wage which would currently amount to approximately £17,000.

We also consider that this should be subject to a proviso that this must be the amount obtained within a calendar year. As the consultation makes clear elsewhere, the aim is not to catch low-level repeat offenders such as shoplifters. Over a long period of time, repeat offending can quickly add up. Very often the issue arises in relation to landlords in breach of enforcement notices under the Town and Country Planning Act 1992. In such cases the rent obtained from, for example, unlawfully converted dwellings constitutes the benefit obtained. Criminal proceedings may not be brought until many years after the breach, by which point small rental payments of perhaps £100 per month will have accumulated to reach the threshold. This provides a perverse incentive to councils not to take action, or to delay the final confiscation hearing, until a significant period of time has passed in order to ensure that the lifestyle provisions are triggered.

As the consultation sets out as 13.184:

> ***We consider that a financial threshold at which it may become more worthwhile than not to commit crime should at least reflect the national living wage as a measure on which a person could subsist without reliance upon additional state support. As set out above, this is approximately £8,500.***

We agree with the principle but this figure reflects the living wage over a six month period. £8,500 accumulated at £100 pcm for seven years does not justify a finding of a criminal lifestyle.

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?

Paragraph 13.191

We agree.

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?

Paragraph 13.199

We agree.

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?

Paragraph 13.211

We agree.

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?

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?

Paragraph 13.225

We agree.

If the proposal above that the threshold amount should take into account the amount obtained per year, is not adopted then we would propose that it be considered as an indicative factor for the court to consider in exercising its discretion at this stage.

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?

Paragraph 13.247

We agree that the 'serious risk of injustice' test be clarified but that it should apply to all assumptions, otherwise arbitrary distinctions may arise. For example, a defendant may own a property which they rent out. The equity in the property is caught by the 'property held' assumption and the rent received is caught by the 'property transferred' assumption. In both cases the defendant has to demonstrate that the original house purchase was legitimate and the same test should apply to each item of proposed benefit. The 'property transferred' assumption is in reality no more time-limited than the 'property held' assumption. Monies received during the six year period from rental, dividends, sales and more all require that the defendant prove that the underlying purchase of property, stocks or goods was carried out using legitimate funds whether or not that purchase took place in the six year period.

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?

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

Paragraph 13.251

We agree.

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?

Paragraph 14.52

We agree. A focus on apportionment of the benefit figure emphasizes our point above that a fair confiscation procedure should concentrate on the amount *retained* or intended to be *retained* by each defendant. If expenses are not taken into account then unjust results will follow. For example, if the amount obtained is £100,000 between two defendants and there are £20,000 of expenses to be paid out the defendants may agree that each has a 50% share and each pays £10,000 toward expenses. Apportionment of the total amount would fix each with £50,000. However, if the defendants agree that D1 would receive £60,000 and pay the expenses and D2 would receive £40,000 then apportionment of the total would result in a 60/40 split even though the end result was the same.

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?

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?

Paragraph 14.73

We agree. A body similar to the Sentencing Council would be an appropriate forum for providing such guidance, particularly so as confiscation is part of the sentencing process. The format of sentencing guidelines, with clear statements of principle, lists of relevant factors and step-by-step guides to the procedure would lend itself well to confiscation proceedings.

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?

Paragraph 14.76

We agree with principles 1 and 3. However, requiring a court to consider whether an entire undertaking is 'tainted' by criminality is vague and unpredictable. A focus on the profit obtained from criminal conduct would instead achieve consistency and proportionality.

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?

Paragraph 14.86

We agree.

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?

Paragraph 14.98

We agree

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.

Paragraph 14.109

Guidelines provided in the form suggested above, by a body similar to the Sentencing Council, which can be clarified or made subject to more recent caselaw development and which provide a degree of flexibility, would be the appropriate guide.

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?

Paragraph 15.47

We agree entirely with the principle which would remove the unjustified distinction at present between when drugs are recovered as opposed to when cash derived from the sale of drugs are recovered. However, we consider that the clearer way of dealing with the situation would be to deduct the value of drugs seized from the benefit figure, rather than announcing a benefit figure, the 'amount of the benefit which is recoverable' figure and the amount which is actually available figure.

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?

Paragraph 15.56

We agree. The potential for a s.22 application appears not to have been explained or understood by defendants in the past.

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?

Paragraph 16.43

We disagree.

Hidden assets are perhaps the most fundamental problem with the current regime. The assertion made by financial investigators as recorded at paragraph 16.15 that they 'rarely' pursue a finding of hidden assets unless it is realistic to do so does not accord with our experience. The vast majority of section 16 statements include reference to *R v Walbrook and Martin* (1994) 15 Cr. App.R . (S.) 783, that a defendant must discharge the burden of proving that he does not have assets in the sum of the full benefit figure:

> ***'by producing clear and cogent evidence; vague and generalised assertions unsupported by evidence will rarely if ever be sufficient to discharge the burden on the defendant'***

but rarely refer to cases such as *R v McIntosh and Marsden* [2011] EWCA Crim 1501 which emphasise the importance of looking at the evidence as a whole.

Placing the entire burden of proving a negative on the defendant, requiring him to prove that he has no other assets anywhere in the world, raises an insurmountable hurdle for the majority of defendants – particularly in light of evidential considerations which we set out below. In our experience, justice has been better achieved in cases where the prosecution have set out the basis for their contention that there are hidden assets. For example, in some cases the prosecution will set out the amounts which have been withdrawn in cash or transferred out of the jurisdiction and require the defendant to account for only those sums as potentially hidden. There would be no injustice in requiring the prosecution to set out at least a *prima facie* case, which would give the defendant something to aim at, rather than a constantly moving target.

As the consultation paper notes at 16.61

> ***'the court would no doubt be assisted by an indication from the prosecution as to whether it considers that a hidden assets finding should be made in light of the evidence'***

It is difficult to see why requiring the Crown to set out a *prima facie* case by reference to the evidence would be any more onerous, other than simply requiring them to properly consider the position.

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?

Paragraph 16.53

We agree.

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?

Paragraph 16.64

We agree in principle but consider that such codification should be provided by way of guidelines as set out above.

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?

Paragraph 16.66

We agree.

There should be a clarification that *R v Walbrook* does not require a defendant to provide independent written evidence of their expenditure and that a defendant's oral evidence or assertions in their section 17 statement may be sufficient to demonstrate that they have dissipated any assets they received.

The idea that a defendant is always able to provide clear and cogent evidence of their assets is fundamentally unrealistic and risks unfair conclusions being reached. Whilst middle-class professionals are more likely to conduct their financial transactions by card and bank transfer, leaving a recoverable audit trail, it is wrong to assume that everyone can or does conduct their daily business in the same way. Legitimate transactions take place using cash and receipts are rarely retained for long periods of time.

Where unlawful transactions have taken place by way of cash payments, it is currently extremely difficult for a defendant who wishes to 'come clean' and show the court that his available amount is less than the benefit figure, to do so. A defendant who has spent their money on a heavy drug habit, escorts or other such unlawful excess, is unlikely to have obtained receipts. Nor are they likely to be able to itemize the precise amounts spent and when. There is rarely going to be any other evidence they could realistically call other than their own 'vague and generalised assertions' and it should be possible, as a matter of common sense, for them to be able to defeat the assumption in this way.

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?

Paragraph 17.77

We do not consider that the proposal goes far enough to deal with the unfairness which flows from the tainted gifts regime.

At present, in criminal lifestyle cases, any gifts made by the defendant in the six years prior to the beginning of proceedings are considered tainted. This follows even if the funds are proved to be legitimate and it is proved that the defendant had no involvement in crime other than the offence for which they were convicted. There is no justification for finding either the defendant or the innocent third party liable for those funds in those circumstances.

The present regime creates unjustified distinctions. Where a defendant dissipates their money by spending it on food and drink for themself, it is not included in the amount to be repaid. Where a defendant dissipates their money by giving it to their partner, who then spends it on food and drink for the two of them it is included in the amount to be repaid. See, by way of example, *R v Canty-Shepherd* [2017] EWCA 1689 (Crim).

If the concern is that 'defendants should not benefit from any attempt to put assets beyond the ambit of the calculation of their available amount by disguising true ownership', then the courts are well versed in determining whether purportedly genuine transactions are in fact a sham. In such cases, the court can look behind the veneer and find that in reality the assets remain the property of the defendant and should be included in their available amount.

The rationale that defendants 'should make good the losses they have caused by all means at their disposal.' does not currently require them to raise loans to pay back money spent on goods and services. It only requires that they pay back that which they have or have given away as gifts. The recipient of the funds may be unable or unwilling to return the monies. It is rare that a defendant is in a position to take formal civil action. The suggestion that a defendant will be able to obtain a commercial loan or will have family who have enough money to loan them the funds will not always apply. The scepticism of Edis J in *R v Johnson*, arising out of the particular circumstances of that case, should not be translated into general principle and findings that a defendant cannot recover a gift should be determine on the facts of the case and not considered 'wholly exceptional'.

Any period in default should be set by excluding the amount attributable to a genuine and irrecoverable gift. Where the innocent recipient of the gift is genuinely unable to repay the defendant and the defendant has no other way to pay their order, the defendant should not serve *any* period of imprisonment in default. Otherwise the order acts as a punishment for giving the money away.

It is our experience that if in *Re L* [2010] EWHC 1531 (Admin) it was *'heavily implied that where no effort is made to appoint a receiver over the asset or assets held by the third party, the magistrates' court should be slow to activate the warrant of commitment'* the hint has not been taken by the majority of magistrates' courts.

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?

Paragraph 17.86

We agree, on the basis that the question be approached on a realistic, case-by-case basis and that where the value of the tainted gift cannot be recovered the defendant should not serve any term in imprisonment in default attributable to that gift.

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?

Paragraph 17.93

We agree.

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?

Paragraph 17.97

We agree.

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?

Paragraph 17.111

The principle articulated in *Hayes* arose in the context of contributions to family life and followed on from the Court of Appeal's determination that in assessing whether these amount to adequate consideration, the court should:

> **(1) place a value upon the property transferred, at the time of transfer;**
>
> **(2) assess whether consideration has been provided by the recipient of the property. Any consideration which is asserted to have been provided must be attributable to the transfer of property in question.**
>
> **(3) assess the value of the consideration provided. The consideration must, therefore, be capable of being ascribed a value in monetary terms.**

The difficulty with *Hayes* is in determining how it would actually apply in a real life scenario. For example, if one partner transfers to the other a regular allowance or contributes more to a joint pot, it is unlikely that there is explicit discussion as to the household services to which it relates.

More fundamentally, how is the value of the consideration to be determined in monetary terms? Is the value of a partner to be reduced to the roles they perform? Are the court required to consider the cost of paying for a household cleaner, childminder, counsellor and any other service that a partner may otherwise fulfil? Is the partner's contribution to be assessed, so that a court can determine whether they did a good job looking after the household and raising the children such that they deserve the amount they received?

The decision in Hayes is too artificial when applied to the family context. As noted above, the defendant who spends with nothing to show for it is not required to pay that money back, a defendant's partner who spends that same money is required to account for it and may lose their legitimately acquired property.

We suggest that genuine transfers within the family unit which are dissipated in the course of the relationship should not be considered 'gifts'.

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?

Paragraph 17.118

We agree.

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?

Paragraph 21.106

See response to Question 69 below.

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?

Paragraph 21.108

See response to Question 69 below.

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?

Paragraph 21.110

See response to Question 69 below.

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 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?

Paragraph 21.112

See response to Question 69 below.

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?

Paragraph 21.113

We agree with the proposals relating to contingent orders. We would consider that in relation to timing, there should ordinarily be a reasonable period of time in which to allow defendants to satisfy the order 'under their own steam', unless the parties would prefer and agree that, for example, property be transferred immediately.

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?

Paragraph 22.22

We agree, subject to clear guidance as to when such transfers should take place.

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?

Paragraph 22.57

Such a proposal would need to be subject to very clear and limited licence requirements and a fundamental change in approach by magistrates who regularly set unrealistic goals for defendants and find them guilty of culpable neglect when they are not met. We are concern that, whilst the proposal seems reasonable in principle, in practice it will lead to many more defendants serving much longer in custody for matters which are beyond their control.

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?

Paragraph 22.62

We agree. Disqualification from driving, a curfew or unpaid work would be no more effective and would only serve to hinder a defendant's ability to obtain legitimate work and potentially pay off any outstanding balance.

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?

Paragraph 22.87

We are concerned that an order, similar to a form N316 relating to a judgment debtor, requiring a defendant to produce all 'pay slips, bank statements, building society books, share certificates, rent book, mortgage statement, hire purchase and similar agreements, court orders, any other outstanding bills, electricity, gas, water and council tax bills for the past year' overlooks the reality of a great many confiscation defendants. Those who have engaged in drug dealing are likely to have drug addiction problems themselves. Many defendants have chaotic and disorganised lifestyles. Many have mental health issues. Certainly a significant number would be unable to comply with detailed orders without the assistance of a legal representative and yet funding for enforcement proceedings is meagre at best.

Punishment by way of breach is a blunt and ineffectual tool in such circumstances.

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?

Paragraph 22.106

We agree.

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?

Paragraph 22.111

We disagree whilst interest payable remains at 8%. There is no reason why interest could not be calculated by reference to the base rate in existence at the time. The current figure is punitive and leads to sums accumulating which rapidly exceed that which a defendant could realistically be expected to pay off within their lifetime, taking away the incentive to make any repayment.

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?

Paragraph 22.119

We disagree. There is no basis for suggesting that the adverse effect on a defendant's credit rating may provide an incentive to satisfy the order which would be more effective than the threat of imprisonment in default. Such an entry in the Register of Judgments may also impede a defendant's ability to rehabilitate themselves.

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?

Paragraph 22.142

We agree.

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?

Paragraph 22.144

We disagree that a defendant should be ordered to be regularly brought back before the courts and make periodic updates as to their financial circumstances for an undetermined period. There must be consideration of finality and proportionality. Similar requirements made as part of a Serious Crime Prevention Order are limited to a maximum period of five years.

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?

Paragraph 22.146

We agree subject to the factors set out in response to question 85 below.

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?

Paragraph 23.63

We agree, though it must be explicit that any changes must not result in double counting. For example, for orders for which a Defendant is found to have had a criminal lifestyle over a period of the preceding six years, if separate orders are consolidated then they must ensure that the calculation of benefit for the period of a criminal lifestyle is not double counted.

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?

Paragraph 24.97

We agree. And to clarify 'irrespective of a defendant's means' refers to the fact that in determining a compensation order a defendant's means are considered while the determination of a confiscation order is based, without significant distinction, on their available assets. However, if the orders are merged and the money for a compensation order are taken from a confiscation order then the specific determination of means are no longer relevant. The Courts should ensure that the process for determining benefits and available assets under a confiscation order remains a circumscribed and discrete process, and that there is no interference in the assessment by the Court's concern to obtain compensation for the victim.

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?

Paragraph 24.107

While the concerns regarding the costs of a central compensation scheme are acknowledged, nonetheless, in principle, this point is not agreed. Money obtained through a pool of confiscated funds should first and foremost go to the victims as the loss has directly affected them, rather than into a central pool to support 'community projects' (often for police forces) and from which the victims may not benefit. Additionally, in many cases shortfall in restitution for victims, such as from compensation, will fall on the state. As such, why not that any money obtained be directed first to the victims, instead of their having to rely on the state; correspondingly, why are 'community projects' not supported by the state? There is no reason, in principle, to prioritise this differently (i.e. money not to the victim but to community projects/ needs).

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?

Paragraph 24.114

We agree.

Consultation Question 84.

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

29.171 If so, what should such restrictions be?

Paragraph 25.81

There should be a distinction between an application for an uplift for the purposes of confiscation or compensation.

For confiscation, it should be limited at six years post the order. The reason is that there must be some end to the proceedings for the sake of rehabilitation. Otherwise, as institutions are incentivized to pursue confiscation, they may make repeated applications for a very long time; if there is no time limit there is no obligation to act with even the minimum of due diligence.

However, for compensation, as it goes directly to a victim, there should be a longer time limit, perhaps 12 years, though it should eventually come to an end, also because there must be some point at which the offender can be 'rehabilitated' which includes bringing the consequences of the offence to an end. Additionally, the longer period is justified because the needs for which the compensation is sought will otherwise, often, be paid for by the state and other taxpayers, which is unfair if the offender can pay.

However, the application for an uplift for compensation should be subject to requirements, including: that the applying party acted with due diligence; and that there is a limit to the amount of the offenders assets that can be taken, for example, similar to the test in Scotland, in order not to deprive them of meeting basic living requirements in terms of property, costs such as education etc.

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?

Paragraph 25.83

Yes, though the criteria for 'undue hardship' should not only focus on personal property, and so if the offender has partial/ ownership of a business in which there are assets or investment, and that business if a benefit as it provides a service, generates tax revenue, or provides employment, that this should be taken into consideration to precluded from confiscation. Unless, of course, it is proven to be a sham business or trust set-up to hide assets and avoid liability.

Also, it should exclude investments or finances earmarked for responsibilities the offender has towards others, such as children's education or care for elderly relatives, otherwise these costs may be not met or if they are would be met by the State.

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?

Paragraph 25.86

We agree. Given that the uplift is ordered based on identified available assets then whether it is by a deadline or installments would like depend on whether the asset is readily available or has to be liquidated through a process/ over a period. Any instalments should not extend too far into the future.

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.

Paragraph 25.89

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?

Paragraph 26.110

We agree, although a person's capability to transfer assets overseas should not be based simply upon their nationality or place of birth as there is a danger of this criteria being used in a racially discriminatory fashion.

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?

Paragraph 26.112

None.

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?

Paragraph 26.125

Yes, though, practically, it should also be possible to conduct inter partes hearings remotely so that Judges consider this a more practical possibility and do not side in favour of applications without notice and ex parte hearings because they can be conducted quickly and remotely, and, conversely, decided against inter partes hearings because they cannot be conducted remotely.

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?

Paragraph 26.131

We agree.

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?

Paragraph 26.141

Yes, though, there should also be an exemption for reasonable expenses for business operations such as paying rent for facilities, supplies and employees, otherwise restraint can have long-term consequences, even if it is later discharged, if in the meantime a business, which is a going concern, suffers. Such expenses can be evidenced before the court by business documents or witnesses – contracts and accounts, and accountants.

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?

Paragraph 26.160

We agree. Such expenses should not be limited to the figures available for legal aid, unless there is a vast improvement in remuneration for such work, but should reflect the value of the necessary work to be done.

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?

Paragraph 26.181

We agree, though an additional criterion should be whether or not the prosecution operated expeditiously, given the impact of restraint on individuals and their work or businesses.

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?

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.

Paragraph 26.193

Certainly the defendant should be able to recover their reasonable costs. These should be awarded based on all the circumstances of the case, not capped at legal aid rates. Counsel who are sufficiently experienced to respond to restraint orders are rarely willing to do so at the poor legal aid rates available, particularly given that reasonably brought applications may still be complex. The defendant should not lose out in those circumstances.

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 binding determination of interests in property at any stage of proceedings (including at the restraint stage);

(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.

Paragraph 26.213

It is rarely likely to be in the interests of justice to make a binding determination at such an early stage of proceedings, where all relevant parties may not have been identified, legally represented and able to make full submissions.

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?

Paragraph 27.61

Yes. Though there should also be more experienced FIs recruited including those with CMAs etc.

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?

Paragraph 27.63

Agreed.

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?

Paragraph 27.68

Agreed. The extent of liability for negligent management of assets if the assets are eventually returned should be clarified.

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?

Paragraph 27.116

No observations.

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?

Paragraph 27.118

No observations.

Consultation Question 102.

29.205 Do consultees consider that prosecutors should be protected from having to compensate defendants in relation to losses arising when cryptoassets are restrained and converted into sterling and then subsequently lose value as a result? If so, in what circumstances?

Paragraph 28.50

A blanket immunity would be unjust and would carry no incentive for prosecutors to act reasonably and expeditiously. Whether compensation should be awarded should take into such factors amongst others.

Consultation Question 103.

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

Paragraph 28.72

None.

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?

Paragraph 28.73

As with any criminal justice reform the prospects of success depend primarily on two factors:

1. **The fees involved incentivizing early detailed preparation; and,**
2. **Effective sanctions being in place for non-cooperation.**

In relation to the first, we appreciate this is outside the scope of this paper. However, unless advocates are sufficiently remunerated to prepare for EROC hearings and to ensure that sufficiently senior and qualified advocates remain post-sentence to deal with confiscation proceedings, bold reforms will wither on the vine. At present, by way of example, if the prosecution decide to discontinue confiscation proceedings without a hearing the defence advocate may not receive any fee at all. Where confiscation proceedings do take place, the daily rate for junior counsel acting alone (£240) is just over half that they would receive for conducting a trial for the least serious criminal offence in the Crown Court (£400) despite the former being potentially and ordinarily vastly more complex.

So far as effective sanctions are concerned, the paper deals with sanctions to be imposed on defendants for obstruction and non-cooperation but there is little mention of sanctions upon the prosecution for a failure to engage and cooperate. In our experience there are cases in which prosecutors have taken an intractable and unreasonable approach to confiscation proceedings, pursuing particular assumptions because they can and not because they should. The problem arises most commonly with local authorities and private prosecutors but is by no means limited to them. In some cases, the prosecutor has been provided with clear and unassailable evidence that particular funds came from legitimate conduct or were double-counted but have refused to concede the point and simply responded that they would leave it to the court to determine which it ultimately did

in the defence favour. In one case the prosecution stuck by their proposed benefit figure of £3m, the ultimate order finally being made for £30,000. Such a tactic makes negotiation impossible but with the odds and assumptions so heavily stacked against the defendant there is little incentive for the prosecution to agree anything.

The issue arises primarily with local authorities because of the ARIS scheme which provides them with a proportion of that recovered and because of their relative lack of experience in the criminal courts. Unless a degree of restraint and common sense can be imposed then time and resources will continue to be wasted on resolving unnecessary, if not ludicrous, applications.