Bar Council response to the Law Commission consultation on "Confiscation of the Proceeds of Crime after Conviction"

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation paper on "Confiscation of the Proceeds of Crime after Conviction".[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

OVERVIEW

4. The project undertaken by the Law Commission is typically ambitious in scope and, equally typically, has resulted in a consultation paper that is both thorough and thoughtful. It is widely acknowledged that the confiscation regime introduced by POCA 2002 is ripe for an overhaul.

[1] https://www.lawcom.gov.uk/project/confiscation-under-part-2-of-the-proceeds-of-crime-act-2002/

5. The improvements suggested in this consultation are unlikely to represent the final word on the matter.[2] However, the proposed reforms do, by and large, constructively attempt to tackle what are generally perceived to be the most significant weaknesses of the present regime.

6. We welcome many of the proposals made. Where we agree, we have often kept the reasoning brief or referred back to the consultation paper itself; that reflects the strength of its content. Where we disagree with the proposals made, we set out our reasoning in full, in the hope of adding to the important conversation about how to improve this large and significant area of the law.

7. One thematic aspect of the consultation with which we have some difficulty is the suggestion that certain matters of substantive law should be incorporated into a Criminal Practice Direction. We should set out our thinking on this matter at the outset, as it informs a number of the responses and is best understood as a matter of principle rather than as an answer to the specific questions asked.

Observations in relation to Practice Directions

8. The Consultation at §1.121 advocates the insertion of principles of law relating to confiscation into a Criminal Practice Direction. Throughout the Consultation there are references to examples of those principles (for example, hidden assets and corporate benefit).

9. The current Criminal Practice Directions (2015) ([2015] EWCA Crim 1567) (see Part 1 General Matters A.1) are made by the Lord Chief Justice pursuant to:

Section 74(1) of the Court Act 2003, which provides that:

> [Directions may be given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005] as to the practice and procedure of the criminal courts.

Part 1 (para 1) of Schedule 2 to the Constitutional Reform Act 2005 provides for the mechanism for the making of such directions.

[2] For example, a potential topic for future discussion may be whether it would be appropriate – or even possible – to structure investigations and proceedings in such a way as to facilitate meaningful discussions around confiscation sums at the time at which plea is being considered.

CPD (2015) Part VIII is dedicated to confiscation and is currently empty.

The status of Criminal Practice Directions is that "they represent the current practice and bind the courts to which they are directed" (*per* Leveson P in *Valiati v DPP* [2019] 1 Cr App R 17).

10. The extent to which Criminal Practice Directions can contain binding statements of substantive law, as opposed to practice and procedure, is not clear; nor is the relationship between such statements and the appellate authorities from which they are derived. In any event, to the extent proposed in the Consultation, this would constitute a novel departure from the CPD as currently drafted. The Bar Council would caution against the inclusion of any summary of the law in a binding Practice Direction, as opposed to an alternative (and non-binding) guidance document such as the Crown Court Compendium or similar. The Law Commission's proposal to use a Practice Direction in this fashion deserves a wider consultation than that limited to the law of confiscation.

PURPOSE AND OBJECTIVES

Question 1

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

11. Yes. It is helpful to have what is sometimes described as the "legislative steer" included within the legislation itself, as a touchstone when finely balanced judgments are being made about the scope of the legislation.

12. Questions 2 to 5 seek to canvass opinion in relation to a range of possible objectives for the regime. We consider that others are likely to be better placed to comment on the pros and cons of these from a policy perspective.

13. That said, we are able to offer the following observations:

14. First, we consider it to be important that the confiscation regime does not cover ground which is already occupied by other aspects of the criminal justice system – it should be no more intrusive than is necessary to fill the gaps that would otherwise exist. Overlap between regimes risks giving rise to both confusion and unfairness (by way of double penalisation). Accordingly, while some overlap with the principles underpinning the sentencing regime may be inevitable, and while some outcomes will have a punitive effect on defendants, the confiscation regime should be structured so

that any punitive impact is (a) a necessary consequence of the proper operation of the regime and (b) kept to a minimum. Accordingly, if there is to be a provision in the legislation which sets out the objectives of the regime consideration ought to be given to whether that provision should expressly exclude punishment. This would have the advantage of providing clarity to judges, practitioners, defendants and the wider public.

15. Secondly, there ought to be a distinction drawn between the objectives of the regime and its possible effects. In the former category might sensibly be placed "depriving defendants of their benefit from criminal conduct, within the limits of their means" and "ensuring the compensation of victims, where such compensation is to be met from confiscated funds". However, "deterrence" and "disruption" seem to us to more properly be considered beneficial by-products of a regime that is only engaged upon conviction for one or more specified criminal offences. The mere existence of a confiscation regime may be thought to deter. And plainly any recouping of the proceeds of crime from e.g. an organised crime group will have the effect of causing a degree of disruption to the operations of that group. However, it is arguable that an order that could only be justified on the grounds of "deterrence" would inevitably equate to a punishment. It would be illogical and hence legally unsatisfactory for punishment to be expressly excluded from the objectives of the regime, only for the punishment principle to be part of the legislative steer under a different label. Further, other provisions in the criminal justice system are already targeted at disruption – for example the provisions covering cash seizure and forfeiture. We consider it to be important that lines between these regimes are not unnecessarily blurred.

16. Accordingly, to the extent that we seek to express a view on what are essentially questions of policy, we would:

i) Agree that "depriving defendants of their benefit from criminal conduct, within the limits of their means" and "ensuring the compensation of victims, where such compensation is to be met from confiscated funds" should be within the objectives of the regime;

ii) Disagree that deterrence and disruption should be objectives of the regime;

iii) Agree that punishment ought <u>not</u> to be an objective of the regime, and suggest that this is made clear on the face of the provision containing the legislative steer.

Question 2

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

17. We agree. This plainly deserves to be the central function of the confiscation regime.

Question 3

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

18. See above.

Question 4

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

(1) deterrence; and

(2) disruption of crime.

Do consultees agree?

19. See above.

Question 5

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

20. See above.

CHAPTER 6: POSTPONEMENT

Question 6

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

21. Yes. This reflects current practice and would at a stroke resolve the issues that have arisen from time to time around the postponement provisions of both POCA and the preceding legislation.

Question 7

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

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

Do consultees agree?

22. Yes, for two main reasons. First, there is an illogicality in the present position, in that while there is *prima facie* an absolute prohibition on the making of such orders prior to confiscation, a breach of that prohibition will not necessarily result in any confiscation order made thereafter being found to be invalid: *R. v. Guraj*. Accordingly, the prohibition serves little purpose beyond acting as a steer to the proper sequencing of the various financial orders that can be made following conviction.

23. Secondly, sums payable by way of compensation are typically deducted from sums paid by way of confiscation under s.13(5) POCA, with the practical effect that fulfilment of compensation orders takes priority. It therefore makes sense to bring this process forward, in some cases by a matter of years, which would plainly benefit victims without compromising the defendant's interests.

24. We would add that this may be a convenient place to make explicit reference to the availability of orders that the defendant pay a contribution to the costs of the prosecution.

Question 8

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

25. We agree, in the interests of harmonising this provision with that of s.155 PCC(S)A relating to variation of sentence generally.

Question 9

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

(1) a statutory requirement that confiscation proceedings are started within a prescribed time; and

(2) active case management following the commencement of confiscation proceedings, pursuant to the Criminal Procedure Rules (as to which see Chapter 7).

Do consultees agree?

Question 10

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

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

Do consultees agree?

Question 11

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).

Do consultees agree?

Answer to Qs 9-11:

26. We do not consider there to be any magic in the word "postponement", although "adjournment" might be preferable, to bring confiscation proceedings into line with the terminology used when adjourning cases for trial post-PTPH.

27. We consider that it would be appropriate in every case to require the setting of a timetable for confiscation proceedings by the date of sentence at the latest. That is for two reasons. First, our experience suggests that while confiscation proceedings might be complicated and protracted, that does not typically prevent a court from setting a timetable for their progression. Any timetable could be made subject to liberty to apply in the usual way. Secondly, the sentence hearing is the last occasion on which the parties will attend court, absent further order. Accordingly, that is the last realistic date for the court to receive informed input in real time from the parties, usually including trial counsel.

28. We do not see any advantage in delaying the setting of that timetable for up to six months from sentence in a standard case (with the option of extending that timetable). It is not generally our experience that the prosecution has any real difficulty in reaching a decision whether to seek confiscation, so the provision for a possible six month (plus) delay post-sentence before even a timetable is set for confiscation is in our view unnecessary. While we agree that the present presumptive

sequencing of confiscation and sentence (for financial orders) should be reversed (see Q6 above), the one advantage of the present structure (confiscation before sentence, subject to an application to postpone) is that is focuses minds. Our experience is that this has rarely, if ever, presented a problem. That said, there will always be exceptional cases, for example those in which evidence that has emerged during the trial requires a reconsideration on the part of the prosecution of the question whether to proceed to confiscation. In such circumstances it would be appropriate to permit a short delay between conviction and the setting of a confiscation timetable.

CHAPTER 7

Question 12

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

29. Whilst not officially set down in writing, a standard confiscation timetable (as set out in the consultation document) is presently routinely applied as a 'starting point', which is then adapted to the case as issues arise. The involvement of the Criminal Procedure Rules Committee may well simply formalise what is already in practice, rather than make any substantive changes.

30. However, opinion is divided on the value of such a course. While in many cases a standard timetable would be of assistance, in line with the setting of stage dates for e.g. service of evidence and defence statements at the pre-trial stage of proceedings, a one-size-fits-all approach would be inappropriate. There are a considerable number of variables that may affect what is a reasonable timetable for confiscation proceedings, and we consider it to be important that, if a standard timetable is to be devised, it incorporates the possibility of deviation informed by proper judicial oversight.

Question 13

We provisionally propose that the Criminal Procedure Rules Committee should consider a timetable for a case where no complex factors have been identified which uses periods of 28 days for the services of statements regarding confiscation. Do consultees agree? If no, what periods would consultees consider to be appropriate for the service of statements regarding non-complex confiscation cases?

31. We agree with a minimum of 28 days for the provision of a s18 response – where this is needed. It is not unknown for a defendant (in particular a corporate defendant) to have available to them sums which far exceed any criminal benefit. But this situation is rare and should be reflected in a general discretion to set the timetable to the needs of the case rather than a set formula.

32. The minimum 28 day period is of greater importance where a defendant is remanded into custody. Where a defendant is remanded into custody for the first time upon conviction obtaining information in respect of the financial situation can be difficult, largely because defendants are not thinking about their financial position

having just received a custodial sentence. If they have been in custody throughout, obtaining financial information is even more difficult, for obvious reasons.

33. It is of great assistance to defendants if the prosecution identify the intention to proceed to confiscation as early as possible (see the answers to Q9-11 above) (albeit it is acknowledged this may change over the life of a case). This will allow the advice given by both counsel and solicitors to give confiscation more prominence, and therefore allow defendants to start compiling information in readiness for these proceedings at an earlier stage (for example where the indication of a guilty plea is forthcoming, or as the conclusion of the trial gets closer). An indication at an earlier stage (even informally) from the prosecution would assist in longer term preparation in getting the process moving. The expectation of such an indication could be included in the new Practice Direction.

34. In relation to the rest of the timetable, 28 days should be sufficient in straightforward cases for the prosecution section 16 and defence section 17 statements. In the most straightforward cases the level of benefit will be obvious, and the extent of the defendant's available amount will be highlighted from the section 18 statement.

Question 14

We provisionally propose that the Criminal Procedure Rules Committee should consider a timetable for a case where complex factors have been identified which uses periods of 56 days for the service of statements regarding confiscation. Do consultees agree? If not, what periods would consultees consider to be appropriate for the service of statements regarding complex confiscation cases?

35. Complex factors relevant to confiscation can often by identified by the Crown from an early stage. However, complex factors can only properly be explored with the defence when notification of intent to proceed to confiscation is given early enough. For this reason notification of intent to proceed to confiscation upon conviction, should be given by the Crown as early as possible so this issue can be properly explored from an early stage.

36. In complex cases, where there is no restraint, the costs (both in manpower and money) are too great for the police to investigate prior to verdict (especially as there may be an acquittal). Most production orders have a 28 day time limit for return of information. The financial investigators may then have to serve further orders. In complex cases, 56 days from conviction will frequently be insufficient. We suggest that

a longer period, such as "up to 12 weeks, subject to further application", should be considered.

Question 15

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

(1) 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:

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

(b) 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.

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

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

(e) 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.

(2) We provisionally propose that:

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

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

37. Whilst in principle we would agree to a judicial direction in relation to the importance of complying with court orders in relation to confiscation, it should be a

stronger direction than 'best interests to comply' if the consequence of failing to comply is that the defendant will have adverse inferences made against them (which may result in a finding of a confiscation amount that they are unable to satisfy, and consequently activation of a default prison sentence).

38. We agree that this direction should be included in the Crown Court compendium so it is accessible to all, and defendants can be advised of it well in advance, in the same way that defendants would be advised about credit for guilty plea, trial in absence etc.

Question 16

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

39. In our experience prosecution statements will follow a routine structure, which in our view clearly sets out what the benefit is, how it has been calculated, what the proposed available amount is, and how that has been calculated.

40. What can be less obvious is the evidence relied upon. The section 16 statement is often used as a vehicle for exhibiting documents which are to be relied upon, albeit the financial investigator may (in some instances) be able to speak about the truth of these (exhibiting statements from HMRC officials etc). A clear distinction between evidence relied upon in proving the submissions and conclusions in the s16 statement would be welcomed.

41. The defence document should be a response, and therefore follow the structure of the prosecution statement. However, where appropriate, clear calculations should equally be provided by the defence highlighting the figures proposed to counter the prosecution case as to the benefit and the realisable amount. Where the defence do not respond in the same way, stronger use of the adverse inference may result in tightening up of the structure of the response.

Question 17

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

42. Having outlined above that prosecutor's statements under s16 follow a regular format we agree that the division between pleadings (an outline of the confiscation position) and evidence (statements and exhibits) should be made clearer. Generally the evidence relied upon will be written into the statement (thereby merging the two and making it unclear how the evidence can be challenged – through the financial investigator who has written the statement, or through a witness from which the evidence has been taken?) which can cause problems, for example by failing to identify the source of the evidence that needs to be challenged. We take the view that a clear distinction between submissions and evidence should be formalised.

Question 18

We invite consultees' views on the following:

(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?

43. It is acknowledged that very often financial investigators are extremely well versed in the requirements of confiscation. However there will be cases in which a lawyer's oversight in respect of the prosecutor's statement would assist.

44. An element of oversight can ensure any legal issues are identified at an early stage. Further issues over the presentation of the case (assuming the case will be contested) can be identified and addressed from the outset (through clear reference to any underlying evidence relied upon). It may be that the identification of cases in which a lawyer's insight would be appropriate could be left to the prosecuting

authority; alternatively it could be a decision made by the judge with control of the proceedings when the timetable is set.

Question 19

We provisionally propose the following. Do consultees agree?

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

(2) The EROC process should comprise two stages:

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

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

45. The early resolution of confiscation is something to be encouraged. The consultation paper gives the impression that the first opportunity that the parties have to engage in early resolution is at the door of the court prior to the final confiscation hearing. This does not reflect our experience of confiscation hearings of any complexity.

46. In virtually all confiscation proceedings a mention hearing will take place at some point during the process. This mention hearing will be most beneficial at the stage where statements of case have been exchanged and the issues have been identified. Where this has not been done in a timely fashion there will almost certainly be a further mention hearing, the purpose of which is to identify the issues, resolve any matters arising from the exchange of statements and set a date for a final confiscation hearing. However these hearings are best utilised when the instructed advocates (as opposed to advocates 'holding the brief') attend and communicate with each other outside the courtroom. It is at this point that effective negotiation can take place, with the potential for resolution in an informal setting.

47. The knowledge and awareness of the advocate instructed at the mention hearing of the issues in the case, and the willingness of the parties to engage in constructive debate surrounding the resolution of the order, are crucial factors

affecting the prospect of early resolution. Where an advocate 'steps in', whilst not the fault of the advocate instructed, this is unlikely to result in the resolution of the order.

48. In those circumstances we would welcome the formulation of a formal process involving engagement of both sides seeking the resolution of confiscation orders. We consider an advocates' conference (where the defendant, the financial investigator, and the CPS lawyer are all available even if not in attendance) a positive thing. Practical issues will arise as to how these are to be held – with the current lack of suitable rooms at court it is unlikely that this sort of meeting can take the form of a 'mediation' with a number of rooms being utilised to allow 'back and forth' discussions. In those circumstances, from a pragmatic perspective, this can only really take place remotely, by telephone or video call. It is suggested that these calls should be formalised, with an agreed time and date, the advocates paid for their attendance, and all parties (financial investigator, CPS, defendant) making themselves available to ensure instructions could be taken and decisions made.

49. Remote working during the pandemic has demonstrated the benefits of multiple parties being able to meet without needing to attend a physical court location. Participants in the criminal justice system are now very used to remote conferences. We consider that EROC meetings are likely to be more effective and better supported by the prosecution lawyer and defence solicitor if they take place virtually.

50. The discussion between the parties often leads to a pragmatic proposal to resolve the confiscation proceedings, for example in the context of conspiracies and joint benefit. Any procedural formality which recognises this fact is to be encouraged.

Question 20

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

51. If the focus of this question is whether offers to settle (i.e. compromise) are desirable, and whether there should be costs consequences attached to them akin to the civil regime (see paras 8.49-8.54), we consider that there may be risks associated with this approach. If there is a perception that convicted defendants can put pressure on prosecutors to accept an "offer" that may be lower than a proper confiscation order

it will not engender public confidence in the regime. Further and in any event, while costs sanctions have a place in the criminal justice system (see below re: restraint), their utility is generally considered to be somewhat lower here than in the civil regime.

52. Notwithstanding the observation above, we do not see the need for a written offer to resolve matters being submitted with the s17 response. Negotiations surrounding confiscation can be appropriately undertaken without the need for this document. Communication is more important than another form – the early identification of a person with authority to speak to about these matters should be of greater importance. That said, it may assist if the Practice Direction required that any offer to settle confiscation proceedings be put in writing.

CHAPTER 9 – INCENTIVES

Question 21

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

53. Yes, the Bar Council agrees that it would be wrong in principle. The Commission is correct that the primary aim of the confiscation regime would be undermined by allowing a defendant to retain a proportion of their criminality, and that it would undermine public confidence in the justice system.

Question 22

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

54. Yes, the Bar Council agrees that it is not desirable for all of the reasons that the Commission sets out. Furthermore, it is already possible for defendants to make voluntary reparation prior to sentence and for that to be taken into account by the sentencing judge as (often substantial) mitigation.

CHAPTER 10 – FORUM

Question 23

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

Do consultees agree?

55. Yes. Whilst there are undoubtedly some confiscation cases that pose substantial challenges for the criminal justice system, the majority are relatively simple once the underlying facts are understood and ought therefore ideally to be dealt with by the trial judge or the judge who passes sentence on a defendant who has pleaded guilty. The Bar Council agrees in relation to the potential difficulties and additional complexities that arise with a specialist court, or giving jurisdiction to the High Court and/or magistrates courts.

Question 24

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

56. Yes, particularly given the likely changes to the law that would result from the acceptance of other proposals within the consultation – it would be an ideal time to ensure that the judiciary were given comprehensive training to ensure a smooth transition and effective implementation.

Question 25

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.**

Do consultees agree?

57. There is no reason why the PTPH form should not include a question for the prosecution in relation to the potential complexity of confiscation proceedings, which can then be taken into account when allocating a trial or sentencing judge.

58. Whilst there would be no practical obstacle to judges attending additional training and becoming 'ticketed', there would be real difficulty in the allocation of cases to those judges. The principle relies on there being a clearly definable classification of what degree of complexity requires the allocation of a ticketed judge.

59. The system currently in place (e.g. for serious sexual offences) is easily applied as it refers to specific criminal offences which, if indicted, require a ticketed judge to try the case. In the confiscation context there would be far greater ambiguity as to whether a case required a ticketed judge, begging the questions of what are the criteria and who applies them.

60. Furthermore, is the requirement to be sufficiently stringent that where a case develops the requisite level of complexity during the course of the confiscation proceedings (e.g. following compliance with ss16 and 17) the trial judge, if not

ticketed, has to surrender the case to a ticketed judge? This would clearly be undesirable in a marginal case.

61. There may also be difficulties in implementation in smaller court centres.

A more flexible solution would appear to be that all judges that sit in the Crown Court receive the comprehensive training identified above and that Resident Judges are encouraged to identify judges best equipped to deal with cases that are identified as being unusually complex.

Question 26

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

Do consultees agree?

62. Opinion is divided on this proposal, which is not explained at length in the consultation paper (no doubt because the idea of introducing assessors is very much at a preliminary stage). The appointment of someone to assist the court with matters of law or practice would represent something of a move away from the present position, in which evidence and submissions are presented by the parties and the judge is the sole decision-maker. While we can see its attraction, we have some reservations.

63. The closest analogy with the present position in criminal proceedings would be with a court-appointed psychiatrist, tasked with assisting on questions of fitness to plead and/or relevant mental health-focused disposals. Such an appointment provides a mechanism by which the court can receive expert evidence other than that introduced by the parties. It remains however very much the norm that such evidence is in practice adduced by either the prosecution or defence teams (and often both).

64. It may be that any reservations we have can be overcome, and we can well understand the need for expert assistance in a variety of situations that may arise during the confiscation process. However, we consider that it is important to emphasise the following.

65. First, orders of the court – and the decisions which inform these – should be both made and seen to be made by judges. It is the judicial decisions that will be the subject of any appeals. It is not clear whether the proposal to introduce an "assessor"

into the procedure would in practice mean that decisions on key matters are being taken by those other than the judiciary, and then merely adopted by judges. We presume that the proposal does not go this far. However, even the appearance of such a process would be undesirable in our view.

66. Secondly, assistance on complex matters of, for example, taxation or accounting practice can presently be provided in the form of expert evidence marshalled by the parties. It is not clear whether this would be supplemented by input from an assessor – in which case it is difficult to see what advantage the assessor would add – or replaced by it. If the latter, it is hard to see how a court could fairly prevent a party from instructing their own expert if they sought to challenge the views expressed by the assessor. That may result in unnecessary further expense and duplication of effort. As noted above, despite the power of the court to appoint a psychiatrist to assist with issues of fitness to plead and mental health-focused disposals, it remains typical for parties to instruct their own experts on these issues.

67. Finally, if specialised non-criminal legal expertise were required to properly determine an issue in confiscation proceedings, that may be a factor tending to indicate that the matter should be transferred to the High Court for a ruling on that issue (see Q27 below).

68. Accordingly, on balance we are not persuaded, on the basis of the matters set out in the consultation paper, or from our own experience, that the introduction of assessors into the confiscation process is necessary.

Question 27

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

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

(1) the value of the asset or interest that is subject to the dispute;

(2) the complexity of the issue; and

(3) the conduct of the parties.

Do consultees agree?

69. Yes. It is a power that should be used sparingly, but in a very small minority of cases there would be a clear advantage to determining an issue in this way. For example, when victims have launched civil proceedings against the defendant and similar issues of property and trust law arise in both the criminal and civil jurisdictions.

BENEFIT

Question 28

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

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

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

Do consultees agree?

70. Yes. This would provide significant protection against the risk of extremely large orders being made against those who are only in temporary possession of any proceeds of crime, do not have any real power of disposition or control over those sums, and cannot in any conventional sense be understood to have "benefitted" to the full amount passing through their hands.

Question 29.

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

(1) keeping what one has;

(2) getting what one does not have;

(3) gains that both are temporary and permanent.

Do consultees agree?

71. Yes. This has the virtue of aligning the confiscation exercise with the regime under which the defendant will have been convicted, for example s.5(3) of the Fraud Act 2006 or s.34 of the Theft Act 1968.

Question 30

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

72. The schedule contains some apparent illogicalities – for example the inclusion of offences reflecting potentially minor copyright / Trade Mark infringements, but the exclusion of key Fraud Act offences, conspiracy to defraud and conspiracy to cheat, which might all be thought to be more likely indicators of what a layman would consider to be a criminal lifestyle. However, we consider that this is essentially a question of policy upon which we do not express a view.

Question 31

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"?

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?

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?

73. Subject to the observations re: Q30 above, we would say as follows. It has not generally been our experience that the lack of inclusion of s.329 POCA within the lifestyle regime has caused significant problems, given that the offence does not tend to form part of a pattern of offending such as might merit a wider historic enquiry into the defendant's finances.

Question 32

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

Do consultees agree?

74. See answer to Q30 above.

Question 33

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

Do consultees agree?

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

75. See answer to Q30 above.

Question 34

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

Do consultees agree?

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

76. See answer to Q30 above.

Question 35

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

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?

77. See answer to Q30 above.

Question 36

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

Do consultees agree?

78. Yes. As pointed out in the consultation paper, there is no rationale for the distinction.

Question 37

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

(1) two offences;

(2) three offences; or

(3) another number of offences (and if so, how many)?

79. This is essentially a question of policy, upon which we do not express a view. As set out in the consultation paper, there are competing advantages and disadvantages to each option under consideration.

Question 38

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

Do consultees agree?

80. No. In our experience, there is a marked difference in the approach taken by defendants to offences for which they have been charged and TICs. Defendants facing a number of proposed TIC offences are more likely to accept the commission of these offences than those of which they are charged, even in the absence of reliable evidence and sometimes without any acknowledged memory of the events underpinning the

TIC schedule. At present there must be a possibility that defendants facing a number of burglaries, several of which are listed on a TIC schedule, will accept burglaries which they do not recall and may not have committed. That risk – even taken in the face of advice – presently does not expose defendants to sanctions which are likely to be much more serious than the sentence(s) that they would have received for the indicted offence(s). Accordingly, the TIC schedule is a convenient, pragmatic way of delivering a robust form of justice for police, public and defendants. However, were its consequences to become more significant because the offences on the TIC schedule could be taken into account to trigger the criminal lifestyle provisions of the confiscation regime, the risks are twofold: (i) an increase in defendants refusing to accept TICs; or (ii) the bringing within the lifestyle provisions of those who may for reasons of pragmatism when it comes to weighing up likely sentences accept offences which they may not in fact have committed. Accordingly, we consider that the potentially severe consequences of the lifestyle provisions justify requiring the formality of a criminal conviction to trigger their effects. We note that this ought not to be especially onerous if the multiple offence provisions are reformed in the way proposed by the Law Commission, and that in any event if the offence does not exist to prosecute, the prosecuting authorities ought not to complain if a defendant refuses without more to accept his guilt.

81. All that said, it is worth bearing in mind that, in our experience, those who commit burglaries do not tend to amass assets. Accordingly the significance of any reform in this area (which is rightly identified by the Law Commission as likely to be relevant primarily to habitual burglars) may in practice be marginal.

Question 39

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

Do consultees agree?

82. No. The focus of the lifestyle provisions is on income that has in fact been derived illegitimately. Accordingly, it is illogical and potentially unfair to trigger these provisions in circumstances in which this has not taken place. We consider that it is important to remember that while the criminal lifestyle provisions have their place, the focus of the criminal justice system as a whole ought to be on investigating and

prosecuting offending to conviction (and beyond), and so the use of the lifestyle provisions ought to be seen as exceptional rather than a primary tool of resort.

Question 40

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

(1) the current £5,000 threshold, adjusted for inflation;

(2) the national minimum living wage obtained over a period of six months, adjusted for inflation;

(3) another amount (and if so, how much)

83. To a certain extent this is a question of policy, so our views are necessarily subject to the caveats expressed elsewhere. However, our experience is that on occasion significant amounts of time and public money are expended on confiscation lifestyle investigations and proceedings against defendants who are caught by the present threshold. Accordingly, from the practical perspective of managing the flow of cases through the courts, and with a view to ensuring that public funds are focused where they are likely to do most good, we can see a strong argument for increasing the threshold by a considerable amount.

Question 41

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

Do consultees agree?

84. Yes. This is a sensible proposal which will enable the necessary political calculations to be made in light of the regime as it operates in practice.

Question 42

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

Do consultees agree?

85. Yes. Any reform should be to the triggers themselves. The process of identifying whether someone is likely to fall within the lifestyle provisions should be made as straightforward as possible, in order to assist (among other things) with the giving of advice to defendants who might be caught by these provisions. As noted by the Law Commission, there are a numberof "safety valves" in the lifestyle provisions themselves which provide that they may be disapplied if shown to be incorrect or if there would be a risk serious risk of injustice if they were applied.

Question 43

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

Do consultees agree?

86. Yes. That reflects current practice to a certain extent (where the prosecutor may indicate that the reason why lifestyle provisions are not being invoked is due to a serious risk of unfairness or a concession that they would not reflect the correct picture), and is in any event consistent with the discretion afforded to prosecutors at most other stages of criminal proceedings.

Question 44

We provisionally propose that:

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

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

Do consultees agree?

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?

87. We agree. However, we consider that for this to be an effective safety valve, the factors to be considered would need to be wider than merely the legislative steer itself. Other factors that might properly come into play at this stage are:

i) The extent of the likely investigation, including its duration;
ii) The present prospect of recovery of significant sums;
iii) The means and ability of the defendant to contest the confiscation proceedings;
iv) The defendant's A1P1 rights;
v) Potential impact on third parties.

Question 45

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

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

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

88. We agree. While we consider that in practice the test has generally been operated in this way, this is a helpful clarification.

Question 46

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

Do consultees agree?

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

89. We agree. It will usually be relatively clear whether a defendant has obtained a property in circumstances where other parties do or may have an interest in it, and the regime (at present and as proposed) contains provisions that provide for such situations.

Question 47

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

Do consultees agree?

90. We agree, where this is possible. The present situation, in which confiscation orders in the full sum obtained can be made against two or more defendants, but not enforced in full against both, is a somewhat unsatisfactory compromise which directly results from the inability of the courts at present to reach conclusions on apportionment at the benefit stage.

91. However, in most large frauds it is very difficult, years after the event, to say how the benefit was apportioned between multiple defendants, and it would obviously be wrong to make no finding of benefit if the judge cannot be satisfied as to apportionment. Accordingly, it would perhaps be preferable if instead of a requirement this were to be a permissive provision.

92. While the discussion around this topic at §§14.41-14.51 covers a number of possible options for reform, it is not entirely clear whether the final proposal at Q47 from the Law Commission would require:

a) the judge to be satisfied on evidence as to apportionment (and if so to what standard and by whom);
b) a judgment to be exercised in broad terms (for example the principal organiser of a fraud might be held to benefit in the sum of 2/3 of the whole, while his accomplice might be liable for only 1/3 of the whole);
c) a simple pro rata calculation as between convicted defendants.

93. We consider that if judges are to be enjoined to consider apportionment, it would be of considerable assistance for them to be provided with some guidance as to which of the three approaches set out above is to be preferred. We also consider that if the possibility of a finding that the benefit ought not to be apportioned is to be left open to judges, that should be made explicit.

Question 48

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

Do consultees agree?

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?

94. We agree, and consider that this can most appropriately be achieved through non-statutory guidance. The advantage of that method is that the guidance can be amended in a straightforward manner to reflect developments in the common law in this area. Practice Directions are well suited to identify procedure, but we consider non-statutory guidance to be a better method of reflecting an area of the law in which there are competing principles and matters of nuance. In this regard, we refer back to our observations in the Overview section at the beginning of this response.

Question 49

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

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

(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.

Do consultees agree?

95. Yes, and as noted above we consider that this is suited to non-statutory guidance rather than a Practice Direction. In this regard, we refer back to our observations in the Overview section at the beginning of this response.

Question 50

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

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

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

(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.

Do consultees agree?

96. Yes, and as noted above we consider that this is suited to non-statutory guidance rather than a Practice Direction. In this regard, we refer back to our observations in the Overview section at the beginning of this response. We consider that many of the unsatisfactory aspects of the present position can be rectified by the Law Commission's proposals relating to benefit as set out in Q28 above, and the introduction of a power to apportion joint benefit (Q47).

Question 51

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

Do consultees agree?

97. Yes, and as noted above we consider that this is suited to non-statutory guidance rather than a Practice Direction. In this regard, we refer back to our observations in the Overview section at the beginning of this response.

98. We note that the Consultation does not invite stakeholders to draft the text of the guidance (wherever it is to be published). We agree that any text should be based on the principles set out by Lord Sumption on *Prest v Petrodel Resources* as applied to the confiscation caselaw which is referred to in part at §14.88 et seq.

Question 52.

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

99. We consider that non-statutory guidance incorporating the principles set out in §§14.100-14.107 should be provided. Beyond that, however, the question is likely to need to be argued on its facts on a case by case basis. It is therefore difficult to see to what extent further clarification can be given.

CHAPTER 15: THE RECOVERABLE AMOUNT

Question 53

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

Do consultees agree?

100. Yes. The approach proposed has the benefit of making confiscation orders more transparent, in that it will be clear on the face of the order that the seized assets have already been disgorged by the defendant and are (usually) in the hands of the state. It is also likely to encourage precision in the calculation of the value of the seized or disgorged assets, which goes towards redressing the issue highlighted by the Law Commission at §15.27 (namely that the perceived irrelevance of the benefit figure where the offender is unable to meet it leads to a lack of focus on its accuracy).

101. This approach also means that matters will be clearer and simpler in the event of applications to increase the recoverable amount under s.22 POCA 2002. The initial order will have been explicit about how much of the benefit amount has already been disgorged and is therefore no longer recoverable.

102. There is, of course, a potential for this approach to lead to an increase in orders made for nominal amounts. In cases where the only assets attributable to the defendant are the same assets which have been seized or disgorged (for example, a stolen car, or jewellery), there will remain nothing available and a nominal order will be made. This contrasts with the position now, where the value of those assets would form part of the available amount. If not explained in careful terms, this has the potential to damage public perception of the confiscation regime.

103. It is therefore our view that this approach should be adopted, but that guidance should be provided in the form of a Practice Direction or similar as to how the fact that a portion of the benefit amount is already seized/disgorged and is therefore not recoverable should be set out in the body of the confiscation order, and how it ought to be explained by the Judge making the order, especially in cases where it leads to an order for a nominal sum. Any reasons for making such an order ought to be clearly articulated.

Question 54

We provisionally propose that:

> **(1) the Criminal Procedure Rules Committee considers incorporating into the Criminal Practice Direction a provision to the effect that: where a confiscation order is made in an amount less than the defendant's benefit, judges should explain why the two figures are different and that it will be open to the prosecution to seek to recover more of the benefit in future, until it is repaid in full.**
>
> **(2) consideration be given to including a direction to this effect in the Crown Court Compendium.**

Do consultees agree?

104. Yes. This proposal appears mainly aimed at correcting any public misunderstanding of the meaning of confiscation orders. It is less likely to make a difference to defendants who are represented, as they will have been advised about the meaning of the order made and the possibility of a future application to increase the available amount. However, to the extent that one of the purposes of reforming the confiscation system is to promote greater understanding and transparency, it may achieve that in many cases. It may be particularly useful in cases where final orders are agreed (rather than contested) in a nominal sum or low available amount, as it may assist public perception of the state's commitment to the confiscation process. We do have some doubts as to whether adding such a direction will change the nature of reporting about orders made in nominal sums, but it ought to reduce the risk of such reporting arising as a result of a mistake as to what the court has done.

105. It makes practical sense to put this into a Practice Direction, and within the Crown Court Compendium. This is in line with practice in relation to sentencing. We agree that it would be disproportionate and unnecessary to impose a statutory requirement.

HIDDEN ASSETS

Consultation Question 55

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

Do consultees agree?

106. We agree. To require the prosecution to meet the criminal standard on this issue would be inconsistent with other aspects of the confiscation regime. Merely to shift the burden on the civil standard from the defence to the prosecution is unlikely to have any material impact in our view. There is an evident value in the ability to make orders covering unidentified assets, and we consider that there are other ways in which any potential unfairness to a defendant can be mitigated.

Question 56

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

Do consultees agree?

107. We agree. While this may in fact reflect current practice (in which submissions would be made by defence counsel on all the evidence in the case, not merely on their own client's evidence) it is a helpful clarification. It would also cover cases in which, for example, a defendant has absconded, the court proceeds to confiscation, and is satisfied that the recoverable amount is lower than the defendant's benefit. For the avoidance of doubt, we consider that this type of provision would appropriately be contained in primary legislation.

Question 57

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

Do consultees agree?

108. No. We consider that the significance of this aspect of the regime, and its lack of susceptibility to development through caselaw, makes this suitable for primary legislation. Matters of substantive law do not fit comfortably within a Practice Direction, which for reasons explained above we consider to be better suited to matters of procedure. In this regard, we refer back to our observations in the Overview section at the beginning of this response.

Question 58

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

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

— **(2) In determining whether to make a "hidden assets" finding, the court should consider (amongst any other matters that it considers relevant): (a) The facts of the case taken as a whole, whether derived from (i) evidence given by the defendant; or**

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

—

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

— **(c) Representations made by the parties.**

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

—

(3) When assessing the evidence, if any, given by the defendant, the court should consider (amongst any other matters that it considers relevant): (a) the merits of any explanation for the absence of positive evidence in connection with the defendant's assets;

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

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

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

109. Yes, essentially for the reasons given in the consultation paper. However, we consider that the place for provisions such as this is in primary legislation rather than a Practice Direction. In this regard, we refer back to our observations in the Overview section at the beginning of this response.

CHAPTER 17: TAINTED GIFTS

Preamble

110. We note the criticism of the way in which tainted gifts are treated under the existing regime, highlighted at §17.57 of the consultation:

During our pre-consultation discussions, practitioners suggested that findings of tainted gifts have led to orders being made against defendants which require them to account for tainted gifts, even though they have no means from which to do so. Including such figures has the potential to: (1) cause injustice to the individual defendant through their imprisonment for non-payment; (2) add to the outstanding confiscation debt.

This accords with our experience.

111. There is an argument that the concept of "tainted gifts" requires more comprehensive revision than that proposed in this consultation. For example, an alternative approach could require the court to order that genuine gifts (as opposed to arrangements giving rise to a resulting trust) are not taken into account towards the available amount. While there are downsides to such an approach, notably that genuine gifts (e.g. a car purchased with the proceeds of crime, given absolutely to an adult child of the defendant) would no longer be recoverable through the criminal confiscation regime, such assets could be traced and recovered by means of civil recovery, albeit that this exercise may be more complex and expensive from the perspective of the state.

112. One of the disadvantages of the approach suggested by the Law Commission is that it will remain the position that orders are made in sums which are unlikely to be realised. And while we understand and approve of the measures proposed in order to minimise any risk of imprisonment in default of payment of an order where the fulfilment of that order is impossible, it is arguable that a better starting point would be if such orders were not made in the first place. Rather than permitting the court to make an impossible order which it then undertakes not to fully enforce, the aim of the confiscation regime should be for the courts to make realistic orders which are capable of enforcement.

113. We have answered the consultation questions on the basis that such a reform is not proposed. Accordingly, our answers below are in response to reforms from the present unsatisfactory position. We do however consider that the Law Commission

might spend some time digesting the above and considering whether wider reform would be desirable.

Question 59

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

> **(1) Where the value of a tainted gift is included in the defendant's confiscation order, the term of imprisonment imposed on the defendant for defaulting on payment may be adjusted downwards if the court is satisfied that no enforcement measure would be effective in the recovery of the value of that tainted gift.**
>
> **(2) In making such a determination the court must consider all means open to the defendant from which the value of the tainted gift could be paid towards the satisfaction of the confiscation order.**

Do consultees agree?

114. We agree with the principle, but for reasons explained above consider that this ought to be the subject of primary legislation rather than a Practice Direction.

115. As for the principles, such an approach would align with the approach suggested in *R. v. Johnson* [2016] EWCA Crim 10, i.e. that "where the court is affirmatively satisfied that enforcement is impossible that may be a reason to make a substantial reduction in the term imposed in default."

116. It is suggested that a similar approach to that proposed in Consultation Question 54 should be taken here, to explain clearly what could be perceived as leniency or inconsistency in the confiscation regime. Where a downwards adjustment to the term of imprisonment is made, Judges should explain in open court the reason(s) why an adjustment has been made at the point when the term is imposed on the defendant.

117. If, at a later date by which the confiscation order has not yet been paid, an enforcement mechanism becomes available which would be effective in recovering the value of the tainted gift, it should be open to the prosecution to apply to the Crown Court to adjust upwards the term of imprisonment (towards or up to the maximum

term) previously imposed on the defendant, so long as the court is satisfied that that enforcement measure would be effective in recovering the value of the tainted gift.

118. We should however point out one potentially significant adverse consequence of the proposed reform. If the proportion of a default term that is attributable to a tainted gift is adjusted downwards, that rather reduces the imperative on the defendant to fulfil that part of the confiscation order. Accordingly, situations such as that in Johnson, in which the money was eventually paid (through a previously unidentified mechanism) may in future result in that sum not being recovered. However, our experience is that this is a relatively rare example of such funds becoming available and on balance the proposed reform is preferable to the legislative status quo.

Question 60

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

> **(1) consider whether it is satisfied that the value of the tainted gift cannot be recovered either:**
>
> > **(a) by the defendant; or**
> >
> > **(b) by the realisation of other assets; and if so**
>
> **(2) adjust downwards the term of imprisonment for defaulting on payment of the confiscation order.**

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

Do consultees agree?

119. Yes, essentially for the reasons given in the response to Question 59.

Question 61

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

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

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

(a) by the defendant; or

(b) by the realisation of other assets.

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

Do consultees agree?

120. Yes. In line with the Law Commission's proposals to maximise transparency and retain public confidence, when the available amount is announced (and our suggestion along similar lines in relation to downwards adjustments to terms of imprisonment in default in our response to Question 59) the court should give reasons as to why it has come to the conclusion that interest should not accrue on the value of a tainted gift.

121. In addition, although we agree that there should not be a power given to the criminal courts to vary interest rates on a case-by-case basis, it is submitted that it is no longer appropriate that the "default" interest rate should be set at 8% in line with section 17(1) Judgments Act 1838. As the Consultation Paper highlights, civil courts have a broad discretion as to interest and are not compelled to order civil debtors to pay 8% interest on judgments. Civil debtors frequently pay far lower rates of interest.

122. Offenders subject to a confiscation order may find that 8% interest accrues dramatically on the recoverable amount (whether or not the value of a tainted gift is included), such as *in Re G* [2019] EWHC 1737 (Admin). Sums due on some large confiscation orders may quickly become overwhelming and simply unpayable due to the accrual of interest. In these cases, the application of an 8% interest rate does not encourage enforcement, and instead appears punitive. The 8% interest rate undermines the careful assessment of the recoverable amount before an order is made.

123. Given that the current base interest rate is 0.1%, and it has not been above 1% since 2009, the time has arguably come to impose a lower fixed interest rate for confiscation orders, at a rate which will encourage enforcement whilst reflecting market realities. Section 12(2) POCA 2002 could be amended to enable the Secretary of State to fix, via secondary legislation, an appropriate interest rate at set intervals

(which, for example, may not exceed a particular number of points above the base rate, and/or may not exceed a particular percentage where the recoverable amount is notably high). The detail of such a provision is beyond the scope of this response, but as a matter of principle we consider this to be a potentially important reform that should be considered by the legislature.

Question 62

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

> **(1) consider whether it is satisfied that the value of the tainted gift cannot be recovered either:**
>
> > **(a) by the defendant; or**
> >
> > **(b) by the realisation of other assets; and if so**
>
> **(2) order that interest should not accrue on that tainted gift; and**
>
> **(3) that any interest previously accrued on that tainted gift be removed from any outstanding confiscation amount.**

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

Do consultees agree?

124. Yes. These are logical orders to make where it is recognised that the value of a tainted gift cannot be recovered, and will prevent unnecessary additions to the outstanding confiscation debt figure. The removal of previously-accrued interest on the value of the tainted gift is a fair approach to take.

125. See the response to Question 61 as to the appropriate interest rate to impose on defendants.

Question 63

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

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

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

(2) to what extent.

Do consultees agree?

126. First, we do not agree that such matters are the proper terrain of a Practice Direction, for reasons set out above; they are better suited to primary legislation. In this regard, we refer back to our observations in the Overview section at the beginning of this response.

127. As to the principles, we agree that clarification of the relevant principles in this area is to be welcomed. Opinion is however divided as to what those principles should be.

128. The Law Commission's proposal reflects the current state of the law. However, as set out in the preamble to this section, it is arguable that the tainted gifts regime might sensibly be aligned with trust principles more generally. In such a case the family home in *Hayes* would not be recoverable under a confiscation order, but would be potentially subject to civil recovery. While this might seem a pyrrhic reform from the perspective of the third party, it would have the advantage of not exposing the defendant to criminal enforcement sanctions.

129. Further, while we acknowledge that this represents the state of the law at present, the dominant focus in *Hayes* on financially quantifiable consideration as "value at the time of the transfer" suffers from a number of disadvantages which perhaps illustrate why the proper forum for resolving such issues lies outside the criminal confiscation regime:

a. It is inconsistent with jurisprudence and the approach in other areas of law (as identified in the Consultation Paper);

b. The precise factual matrix giving rise to the principle in *Hayes*, coupled with the primary focus on precisely quantifiable financial value, is potentially discriminatory. It is susceptible to criticism as reflecting outdated assumptions that historically de-

value the contribution of primary caregivers in the home, who tend disproportionately to be women working for no direct compensation or for lower rates of pay. Further, the focus on precise consideration "at the time of transfer" ignores the reality of life and the long-term contribution that is primary caregiving. A robust confiscation regime should not be at the expense of progress made in acknowledging the significance of the contribution of primary care givers. That is all the more so when the interference with the rights of the third party (A1P1) applies to unconvicted individuals.

130. Accordingly, it is arguable that while clarification on the proper approach in this area in some form would be welcome, that should take the form of a codification of the *Stack v Dowden* [2007] UKHL 17, pre-*Hayes* approach following the earlier line of case-law. This would have the effect of assisting in the re-alignment of the proper approach in the various areas of law as well as addressing concerns about potential discrimination. Where a party has significant assets transferred to them for the apparent purpose of avoiding confiscation, with the requisite mens rea, it would be open to the authorities to consider charging them with a money laundering offence under POCA 2002 in relation to any such transfer or proceeding against the property itself under the civil recovery provisions of POCA.

Question 64

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

Do consultees agree?

131. We agree with this proposal: it codifies what is already the practice following the purposive approach adopted in *R. v. Lehair* [2015] EWCA Crim 1324, and is in keeping with the aims of the confiscation regime.

CHAPTER 21: "CONTINGENT ORDERS"

Question 65

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

> **(1) there are reasonable grounds to believe that the defendant will fail to satisfy the order through wilful refusal or culpable neglect; or**
>
> **(2) in light of any third party interests, whether established through a declaration or otherwise, there are reasonable grounds to believe that, without a contingent order, it is more likely than not that the defendant's share of the asset will not be made available for realisation by the expiry of the time to pay period.**

Do consultees agree?

132. Yes. This proposal would help to close the gap between proceedings leading to the imposition of confiscation orders, and proceedings for their enforcement. If such an order were made, presumably it would also serve as an incentive for compliance (over and above the threat of imprisonment). However, unlike the sanction of imprisonment, this type of order would also have the benefit of making it more likely that the proceeds of crime would in fact be recovered. The circumstances in which it is suggested such an order could be made seem appropriate.

133. There is a possibility of opening the way for satellite litigation which might ultimately serve to delay confiscation proceedings: if, for example, the parties reached agreement about the benefit figure and the available amount, but could not agree to the making of an enforcement order. Although presumably some applications for enforcement orders would be able to be dealt with fairly swiftly, in other cases the issues may be more complex, and may necessitate a contested hearing with evidence.

134. We do consider that this possible disadvantage is mitigated by the advantage of potentially avoiding, or at least curtailing, enforcement proceedings further down the line. However, the corresponding impact on the Crown Court case load must be considered: although there is a benefit in having the same court which makes the confiscation order playing a greater role in its enforcement, currently the fact that enforcement proceedings are largely managed in the magistrates' courts eases the

burden on Crown Courts. Contingent orders, which would require a further confirmatory hearing, would pose an additional burden. There is also a potential advantage to having such issues considered when the matter is reasonably fresh in the minds of the lawyers and judge dealing with the case. The maximum length of the period between the contingent order and the confirmatory hearing could be prescribed in the CPR.

135. Requiring "reasonable grounds to believe" rather than a lower test should in theory deter the routine making of applications for these types of orders, although in practice we have some doubt as to whether it will do so. We consider it likely, if the proposal is accepted, that applications for enforcement orders will be made alongside a large number of confiscation proceedings, because of the correspondingly increased likelihood of recovery. However, should that in fact result in an increase in the proportion of sums recovered, that would of course be beneficial. Such an outcome would also reduce the pressure on the enforcement court.

Question 66

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

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

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

(3) seized property will be sold; or

(4) a warrant of control will take effect.

Do consultees agree?

136. We repeat the points we have made in response to Question 65 in relation to the making of contingent enforcement orders in the Crown Court generally. If such orders are able to be made, however, we would agree that they ought to encompass the types of order proposed here. This would serve the dual purpose of incentivising compliance whilst also increasing the likelihood that the proceeds of crime are actually recovered. We do consider, though, that the list of possible types of contingent enforcement order should not be a closed list, and the Crown Court should maintain some discretion to tailor enforcement orders to the facts of the case (as proposed at paragraph 21.104).

Question 67

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

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

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

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

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

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

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

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

Do consultees agree?

137. Yes, for the reasons set out in the Consultation Paper and in keeping with the context and general lines of reasoning set out in our answers to Questions 65 and 66.

Question 68

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

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

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

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

Do consultees agree?

138. Yes, for the reasoning set out in the Consultation Paper.

Question 69

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

Do consultees agree?

139. Yes, though please note what is at present an unhappy tension between the areas of law, which we touch upon in our response to Question 63.

CHAPTER 22: ENFORCEMENT

Question 70

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

140. We agree with the proposal that the Crown Court should have the power to retain enforcement proceedings in appropriate cases.

141. The Crown Court previously had the power to enforce a sub-set of POCA confiscation orders (those cases in which the proceedings were brought by the Assets Recovery Agency prior to 2008, including those enforced after that date by SOCA and the NCA, pursuant to sections 36 and 37 POCA). Experience of cases enforced in that way suggests that they were given a low priority by the Crown Court. While understandable when set against the competing interests for Court time, and in particular criminal trials, for enforcement to be effective in the Crown Court it must be given an appropriate degree of priority. Without this, additional delays to the enforcement process will be caused.

142. In addition, while we endorse the suggestion that the judge with in-depth knowledge of the original confiscation case is best placed to enforce those orders, the same can be said of the advocates engaged in the original proceedings. While we appreciate that this is beyond the scope of the Law Commission's remit, it is important to recognise that in order to maximise the effectiveness of the regime, the conduct of enforcement proceedings in the Crown Court should be appropriately remunerated and diarised to ensure that, so far as possible, the advocates who conducted the original proceedings can be retained to conduct the enforcement proceedings. Without that, any benefit to enforcement proceedings intended to flow from retained knowledge will be lessened.

Question 71

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

143. In relation to the proposal that a defendant be released on licence during the second half of any default term, we agree that it may be appropriate for conditions to be imposed on release, in particular to provide further information to the Court to facilitate enforcement (although this may be unnecessary in light of the further powers proposed for the Court to direct disclosure).

144. We would be concerned about the likely effectiveness of any recall to prison, however, and of more general licence conditions (such as the requirement to make "all reasonable efforts to realise identified assets"). If a defendant has not paid the amount due under the confiscation order, has been committed to prison, has served half of the default period and has still not satisfied the order, we respectfully doubt that the prospect of recall would have a significant impact on the satisfaction of orders.

145. In the circumstances, we therefore consider that the available licence conditions should be carefully prescribed rather than being left at the discretion of the relevant authorities.

146. We note that the proposal that a defendant released on licence having served half of their term of imprisonment in default would not also apply to those subject to confiscation orders exceeding £10 million. If the proposed regime is thought likely to be effective for orders of £10 million or less, it is unclear to us why it should not also apply to those ordered to pay more than £10 million. The distinction is arbitrary, and appears to us unnecessary if the Court has adequate powers to set a default term of a length referable to the amount due.

Question 72

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

147. We agree. Such sanctions are likely to be punitive rather than coercive. If a defendant has available assets which can be realised, and committal in default does not compel payment, lesser sanctions are unlikely to be effective. Where the default term has been served (and particularly if changes are made to the release provisions) and payment has still not been made, continuing lesser sanctions are unlikely to compel payment. Furthermore, such sanctions would militate against any prospect of rehabilitation (both financial and in a wider sense).

Question 73

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

148. We agree that the current MC100 form is inadequate for the purposes of enforcing a confiscation order. In our experience, the information provided in this way at enforcement hearings is rarely of assistance absent supporting evidence.

149. In that regard, we support the suggestion that the Court should have powers to direct the provision of information and documents as to a defendant's financial circumstances.

150. From a practical perspective, it seems to us that any such powers should be used in a targeted fashion. Appropriate support should be provided, recognising that (in cases where defendants are represented) the task of collating and submitting what may be extensive material may be time consuming for a defendant's representatives. In relation to unrepresented defendants, which tends to be the position once the period of imprisonment has been served, the means of submitting documents to the Court should be easily accessible to defendants. There would be a real risk of unfairness if defendants, having been released from what may be a lengthy term of imprisonment, were then returned to prison merely for non-compliance with a direction to provide documents.

151. Prior to the imposition of the default term, we would query whether a stand-alone power to punish a defendant is necessary. If a defendant declines to provide disclosure, the Court can draw appropriate inferences when deciding whether or not to commit the defendant in default (as with a failure to provide information as directed in confiscation proceedings pursuant to section 18 POCA).

Question 74

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

152. We agree that the Court should have the power to amend the interest accrued on a confiscation order. The present system can cause real injustice to a defendant.

153. The Court's powers would need to be carefully exercised however, and any pause on interest accruing would have to be kept under review. That a defendant has taken all reasonable steps to satisfy an order may be true at the time interest is paused, but there would be no guarantee that all reasonable steps would continue to be taken in the period for which interest has been paused.

154. An alternative may be for the Court to make any appropriate adjustments to interest payments retrospectively. That would also have the advantage of ensuring full recovery in a scenario where assets have increased in value during the period of realisation, but an uplift application is not available (albeit we accept such circumstances are likely to be relatively rare). As the consultation paper recognises, the purpose of interest is not punitive but is to prevent a defendant retaining any accruing fruits of their assets. Pausing interest before realisation of particular assets risks moving away from that purpose.

155. See also our response to Question 61 above re: the rate of interest.

Question 75

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

156. We agree with this proposal. In terms of how the term of imprisonment in default is to be calculated, the approach of the Divisional Court in *Regina (Emu) v Westminster Magistrates' Court* [2016] EWHC 2561 (Admin) is to be preferred to that in *Regina (CPS) v City of London Magistrates' Court* [2007] EWHC 1924 (Admin). The latter removed any real incentive for a defendant to make payments towards the confiscation order in cases where substantial interest had accrued.

Question 76

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

157. While we do not oppose this proposal, there would need to be appropriate engagement from the Court in the process of removing or updating the record on payment.

Question 77

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

158. We agree with this proposal. Experience indicates that many orders remain the subject of enforcement proceedings long after any realistic prospect of the order being satisfied has ceased. Enforcement of orders which can no longer realistically be satisfied represents a poor use of resources (and our experience is such cases involve little more than intermittent enforcement hearings and weekly or monthly payments of a nominal amount).

Question 78

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

159. While it is appropriate for the Court to retain a discretion to re-commence enforcement proceedings, we consider that any system, whereby this is dependent on defendants providing an update as to their financial circumstances, depends on appropriate resources being allocated for such updates to be investigated.

Question 79

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

160. As set out in our answer to question 78, while indicative factors may be helpful for the Court in deciding whether or not to re-commence enforcement proceedings, such factors are only likely to be helpful if the Court has sufficient powers and resources to obtain information to satisfy itself as to whether those factors are engaged.

161. We agree that the types of factors listed in Question 85 (below) are those that a court is likely to wish to consider when deciding whether to grant an application for an uplift. We consider it important that the court's hands are not unduly tied,

however, and note the observations of the Court of Appeal in *R. v. Bates* that "there may be all sorts of circumstances to which a judge can properly have regard". We would therefore suggest that if the above factors are to be articulated in a statutory provision, it is made clear within that provision that this is a non-exhaustive list and that the court should take into account all the circumstances of the case which it considers to be relevant.

CHAPTER 23 – MULTIPLE CONFISCATION ORDERS

Question 80

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.**

Do consultees agree?

162. For the beneficial reasons identified by the Commission the Court should have the power to consolidate multiple applications for confiscation orders, and to amend and consolidate earlier orders, and this ought not to be frustrated by potential concerns as to the competing incentives for prosecuting authorities.

163. In terms of the order of priority from payments made towards the order, it may be beneficial for the judge to retain a discretion (subject to a presumption in the absence of any specific order to the contrary) to direct the priority of payments.

164. It may be, for instance, that a later confiscation order gives rise to compensation to a vulnerable victim whilst an earlier order compensates a large company or local authority to such an extent that the vulnerable victim would be far less likely to ever be compensated.

165. Competing claims between prosecuting authorities in a consolidated application could also potentially be resolved through the judge directing a proportion of the recoverable amount to be paid to each authority with the authority

receiving the larger share also bearing the burden of enforcement in the absence of agreement.

CHAPTER 24 – INTERRELATIONSHIP WITH COMPENSATION

Question 81

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

Do consultees agree?

166. Yes. This minimises the risk of the confiscation order having the effect of a penalty.

Question 82

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

167. Yes, for the reasons identified by the Commission.

Question 83

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

Do consultees agree?

168. Yes.

CHAPTER 25: RECONSIDERATION

Question 84.

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

If so, what should such restrictions be?

169. As noted in the consultation paper at 25.2, there are conflicting matters of public policy in play here. We do not consider there to be any cogent legal (as opposed to policy) considerations which militate clearly either in favour of or against the introduction of restrictions on the circumstances in which an application to "uplift" a confiscation order may be made.

Question 85

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

(1) the legislative priorities of

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

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

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

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

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

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

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

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

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

Do consultees agree?

170. We agree that these are the types of factors that a court is likely to wish to consider when deciding whether to grant an application for an uplift, subject to the eventual content of the legislative steer (see Question 1 above).

171. We consider it important that the court's hands are not unduly tied, however, and again note the observations of the Court of Appeal in *R. v. Bates* that "there may be all sorts of circumstances to which a judge can properly have regard". We would therefore suggest that if the above factors are to be articulated in a statutory provision, it is made clear within that provision that this is a non-exhaustive list and that the court should take into account all the circumstances of the case which it considers to be relevant.

Question 86

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

(1) by a specified deadline;

(2) in instalments.

Do consultees agree?

172. While this is to some extent a question of policy, we consider that it would be preferable to maintain the present position, which requires a court first to identify the free property available to fulfil any order made, and then to allow time to realise those. Although some defendants may prefer to pay in instalments, the risk of that becoming normalised is that confiscation uplifts may be seen as a long-term tax on historic offending, which would militate against rehabilitation.

Question 87

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

173. None identified.

CHAPTER 26: RESTRAINT ORDERS

Question 88

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

(1) The actions of the person whose assets are to be restrained, including: (a) any dissipation that has already taken place;

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

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

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

(b) which falls within schedule 2.

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

(4) The stage of proceedings.

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

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

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

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

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

Do consultees agree?

174. Yes. We agree that restraint should not be mandatory or even presumptive. Any exercise of the power over an individual's property should be proportionate to the risk of dissipation. This is a helpful (non-exhaustive) checklist. There is an advantage to enshrining this list in statute or a CrimPD as it renders the information more accessible.

Question 89

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

175. No.

Question 90

We provisionally propose that:

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

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

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

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

Do consultees agree?

176. We cautiously approve of the proposal for a national duty judge. Others will be better placed to express a view on whether this would present too significant a burden on one judge.

177. While we can see advantages to "ticketing", on balance we take the view that the better course would be comprehensive training for all Crown Court judges, for the reasons set out in our response to Q25 above. Such training should include a focus on restraint as well as the post-conviction confiscation process.

178. As for the proposal that a remote hearing be available if considered appropriate, we agree. While some cases would require the attendance of the applicant – due for example to the complexity of the application, or the sensitivity of the material relied upon – that could be determined by the judge at or before any remote listing.

179. We agree that *inter partes* hearings should be listed at a court centre local to the parties. The burden and cost on defendants and witnesses of travelling to remote court centres is sometimes easy to overlook, and it is reassuring to see that this has been considered here.

Question 91

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

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

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

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

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

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

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

Do consultees agree?

180. We agree. As noted in the consultation paper, the guidance in R. v. S. provides a helpful (non-exhaustive) list of relevant factors to take into account. There is an advantage to enshrining this list in statute or a CrimPD as it renders the information more accessible.

Question 92

We provisionally propose that:

(1) any amended legislation provides that:

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

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

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

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

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

Do consultees agree?

181. We agree. This proposal strikes a fair balance between the need to preserve assets and the ability of suspects and their dependents to live a reasonable lifestyle. The introduction of a standard form is likely to assist in the making of appropriate orders, and will aid consistency as between decisions.

Question 93

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.

Do consultees agree?

182. While this is essentially a question of policy, we agree. Harmonisation of the various POCA regimes relating to the release of restrained funds for legal expenses would have the advantages identified in the consultation paper, principally (a) broadening access to specialist representation and (b) the preservation of public funds which would otherwise be spent on legal aid fees for lawyers of wealthy defendants who (absent restraint) would be quite able to pay themselves. Control of any such expenses has been demonstrated to be manageable in the civil courts and there is no reason to believe the management of fees in criminal cases would present any particular difficulty. In a slightly different context, cost controls are already operated in larger cases, under the VHCC regime, by which (legal aid) fees can be controlled (albeit not by a judge) before they are incurred.

Question 94

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

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

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

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

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

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

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

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

Do consultees agree?

183. We agree that the court should begin by determining whether an application has been reasonably brought. The factors listed above seem appropriate, but need not be exhaustive. We agree that where an application is not reasonably made, costs should follow the event. There is no legal or policy reason that we can identify to provide costs protection against unreasonable applications which may involve considerable interference with suspects' property rights and result in significant cost to defend.

Question 95

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

Do consultees agree?

If consultees do not agree, should:

(1) No costs be awarded.

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

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

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

184. We do not agree that costs recoverable in restraint proceedings should be capped at legal aid rates. We consider there to be a real risk that adopting the proposal in the consultation paper may restrict access to those with true specialism in this practice area. Experience has shown that restraint can be a complex jurisdiction, often requiring the assistance of one of a relatively limited pool of expert practitioners who may be unavailable (or less available) at legal aid rates.

185. We would suggest that, where an application is reasonably made, the ability to recover "reasonable costs" would be sufficient to ensure proper representation, and should be the model adopted. As noted in the consultation paper, the capping of costs recovery in criminal proceedings has been much criticised, and does not in our view provide a template which should be adopted.

Question 96

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.

186. We do not agree. Such determinations can already be made at confiscation stage, which is early enough to facilitate the making of a contingent vesting order. We do not consider that there is any real advantage to bringing forward the stage at which binding determinations of interests in property can be made. As noted at 26.208, this risks wasting both judicial and prosecutorial resources. It further risks distracting from the investigation and progress of the prosecution.

187. Further, as third party interests can be protected to a certain extent through the variation mechanism, there would not appear to be any significant advantage to a third party in litigating the issue to a possible "binding" determination. First, such a course would be likely to involve greater cost than a simple variation. Secondly, if the defendant were acquitted in due course, such a determination would have been unnecessary. Finally, the possibility of the determination being subsequently departed from (on the "serious risk of injustice" test) would not in any event provide the third party with finality. It would be a waste of court resources to argue the same point twice. And the hearing to determine whether there were 'reasonable opportunities to make representations" will itself take time and money. Defendants may see it, wrongly, as a chance of an appeal.

CHAPTER 27: EFFECTIVE ASSET MANAGEMENT

188. We consider that Qs 97, 98, 100 & 101 are matters upon which others are better placed to comment.

Question 99

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

Do consultees agree?

189. We agree, essentially for the reasons given in the consultation paper.

SECTION 28: CRYPTOASSETS

Question 102

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

190. The fluidity in value of crypto-assets appears to be far greater than any other forms of asset. Where a restraint order over crypto assets is obtained in good faith for proper purposes the prosecution should not subsequently be penalised for any change of value resulting from that act. Inevitably the liquidation of the asset from crypto currency into other forms of currency that do not have the same volatility in market value will result in either a loss (where the market has increased in value) or preservation from a loss (when the value of the market falls). Where it was considered reasonable to restrain and convert the crypto asset we would support protections from claims of compensation. In those circumstances we agree that prosecutors should be protected from having to compensate defendants in relation to losses arising from the loss of value of crypto assets. Reasonableness of the actions (as highlighted in Chapter 26) should be the appropriate test.

Question 103

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

191. None beyond those set out in the consultation paper.

192. We agree that cryptocurrency appears to meet the test for being property for the purposes of POCA. Accordingly it can be the subject of both the benefit and available amount calculations in the confiscation process.

193. While it is clear that cryptocurrency appears easy to hide and difficult to trace, that is simply a fact that will need to be grappled with by prosecutors and investigators (and of course defendants seeking to explain how they do not any longer possess these assets). It is also worth noting that much cryptocurrency (in particular Bitcoin) is theoretically traceable using the blockchain technology that records every action taken in relation to that cryptocurrency. It may be that over time the hidden nature of cryptocurrency becomes less of a feature.

Consultation Question 104

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

If so, (1) what are they; and

(2) how should they be reformed?

194. No. As noted in the overview to this response, the consultation paper is typically thoroughly and carefully reasoned. To a great extent we agree with and approve of the proposed reforms to this vexed regime.

Bar Council[3]

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For further information please contact

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[3] Prepared by the Law Reform Committee