
New confiscation recommendations: a price worth paying?

JULY 26, 2016

On 15 July 2016, the Home Affairs Committee published a report on the Proceeds of Crime. The [report](#) identifies a number of systemic problems with the current confiscation order system and makes several recommendations designed to improve the system's effectiveness.

The headline figures of the report are certainly concerning. For example, it estimates that at least £100 billion is laundered through the UK each year. It also states that, in 2014-15, less than 1% of convictions led to a confiscation order and that the enforcement rate for orders made above £1 million was just 22%. Further, despite a reduction in the number of confiscation orders being made, it found that the total debt figure outstanding from confiscation orders continues to increase at an alarming pace, and currently stands at £1.61 billion. Of this figure, it is estimated that only 10% can realistically be collected.

Such shortcomings have led Keith Vaz MP, chair of the committee, to go so far as to conclude that "Proceeds of Crime legislation has failed to achieve its purpose".¹

However, while the system is clearly in need of reform, some of the proposals contained in the report are concerning for a number of reasons and therefore warrant close scrutiny.

Background

The Proceeds of Crime Act 2002 ("POCA") sets out the powers under which the Government can seize the proceeds of criminal conduct. One of its aims was to bring together the various pieces of legislation that enabled law-enforcement bodies to pursue the proceeds of crime.² According to the Home Office, "the aim of the asset recovery scheme in POCA is to deny criminals the use of their assets, recover the proceeds of crime, and deter and disrupt criminality".³

The latest Home Affairs Committee report follows previous scrutiny from the National Audit Office ("NAO") and the Committee of Public Accounts ("PAC"). In March 2014, the PAC made six recommendations designed to improve the confiscation regime. The Government accepted all of the PAC's recommendations in June 2014 and agreed to implement them by 2015. However, in 2016, the NAO published its confiscation progress review which found that "the criminal justice bodies have not met five of the Committee's six recommendations... As a result, many of the fundamental weaknesses in the system identified two years ago remain".⁴ This led to an inquiry by

the PAC, which agreed that the recommendations had not been implemented and which also found that certain failings of the system sent out the message to taxpayers, victims and criminals that “crime pays”.⁵

Recommendations

In light of these findings, the Home Affairs Committee announced its own inquiry in January 2016. After considering the evidence, the Home Affairs Committee called for a number of actions in order to improve the system. These included, amongst others:

- Improved financial investigative training of police officers and specialised financial investigators. The training of specialised financial investigators should emphasise the importance of initiating asset freezing at the earliest stage of an investigation.
- The creation of specialist confiscation courts to handle serious and/or complex confiscation hearings.
- The Government to apply a new formula which ensures that at least 10% of the criminal assets recovered are returned or donated to the communities which have suffered at the hands of criminals, for example through charities.
- Outstanding confiscation orders to be put onto the Police National Computer database.
- The Government to create a market for the private enforcement and collection of unpaid confiscation orders once they enter arrears.
- The courts to be given the power to compel the convicted defendant’s attendance at a confiscation hearing.
- The non-payment of a confiscation order to be made a separate criminal offence. To enforce this, no criminal is to be allowed to leave prison without either paying their confiscation order in full, or engaging with the courts to convince a judge that their debt to society is squared.
- The confiscation of the passport of any criminal subject to a confiscation order.

Proportionate, fair and necessary?

Some of the recommendations made by the Home Affairs Committee are to be welcomed. For instance, it is hoped that the improved financial training of police forces—designed to improve the levels of understanding that police officers have of the impact of charges, offences and pleas on asset recovery—will result in a more consistent approach to confiscation across police forces. Likewise, recording outstanding confiscation orders on the Police National Computer (rather than on a separate Joint Asset Recovery Database, as currently) should assist relevant authorities to join up the dots. As the Home Affairs Committee pointed out in its report, “it is ludicrous that the PNC can tell a police officer that a suspect owns a dog but not that they are evading payment of a criminal confiscation order”.⁶ The return of at least 10% of criminal assets back to affected communities is also unlikely to be controversial.

The creation of specialist confiscation courts, which would encourage the specialisation of judges and allow one judge to deal with the financial aspect of a serious and/or complex case from “cradle to grave”, would lead to greater consistency in the application of the law. On a broader note, the

creation of such courts should also free up time in the Crown Courts to focus on substantive criminal trials—surely a welcome development given the time that cases involving financial crime are currently taking to come to trial.

Such courts would of course have to be appropriately resourced if they were to be fit for purpose, especially as they would be expected to hear cases featuring cross-border financial transactions, the use of corporate vehicles or very high value proceeds (i.e. serious and/or complex cases).

However, a number of the Committee's recommendations are a cause for concern.

The creation of a separate criminal offence of failing to pay a confiscation order is unnecessary. The Serious Crime Act 2015 has already increased the maximum default term available for failing to pay a confiscation order to fourteen years and has ended the automatic release halfway through terms relating to non-payment of confiscation orders over £10 million.⁷ Given the existence of these already severe "default" provisions, it is difficult to see the case for a separate criminal offence.

Moreover, the proposal that this new offence be enforced by not allowing criminals to leave prison without having satisfied their confiscation order is draconian in the extreme, offending against basic legal principles⁸ and potentially violating human rights.⁹ Since there is no de minimis confiscation order value proposed in the report, the implementation of this recommendation as drafted could result in individuals remaining behind bars for extended periods for failure to pay low value orders. Not only would this be disproportionate, it would also create an additional burden on the Prison Service, which is difficult to reconcile with one of the report's overall aims of improving the value-for-money of confiscation.

The confiscation of the passport of *any* criminal subject to a confiscation order is also disproportionately heavy-handed. If implemented as drafted, there would be no scope for consideration as to whether the subject of the order represented a genuine flight risk and therefore whether confiscation of their passport was necessary and proportionate.

Another of the more questionable recommendations, albeit primarily in terms of its effectiveness, is that the courts be given a power to compel an individual to attend their confiscation hearing. This is apparently required because, if a convicted defendant does not participate in their confiscation proceedings, the judge is left with no option but to demand the full amount sought - possibly in relation to assets that have never even existed - rather than the prosecution and defence agreeing the actual collectible amount. This, in turn, feeds into the exponentially growing debt figure outstanding from confiscation orders. However, if a convicted defendant is currently not engaging in the confiscation process (and is thereby risking an order being made for the full amount and, potentially, extra jail time due to the amount sought being unrealistically high), it seems unlikely that the threat of further punishment under any new regime is going to move them from that position. The acknowledgement in the report that confiscation orders are often set unrealistically high also undermines its own subsequent recommendation that prisoners be kept in custody until their confiscation order is settled.

That the confiscation order system is in need of reform is beyond question. However, while there are

some sensible, pragmatic ideas in the Home Affairs Committee report, there are also some that overstep the mark in terms of proportionality and fairness. It will be interesting to see whether, and to what extent, the Government implements any or all of the recommendations contained in the report.

The Serious Fraud Office (SFO), which recovered £19.6 million between 1 April 2015 and 31 March 2016 (a figure which represents 11% of the total recovered by UK law enforcement)¹⁰ will be keeping a close eye on the progress of the recommendations, particularly the creation of specialised confiscation courts, which are likely to handle confiscation proceedings for the majority of the agency's cases if introduced.

Although no formal deadline for a response to the report has been set, the Government has indicated that it is considering the recommendations and that it will report back in due course.

¹ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news-parliament-2015/proceeds-of-crime-report-published-16-17/>.

² For example, s. 27 of the Misuse of Drugs Act (1971) was one of the first instances of asset-forfeiture in the UK.

³ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/proceeds-of-crime/written/29812.html>.

⁴ <https://www.nao.org.uk/wp-content/uploads/2016/03/Confiscation-orders-progress-review.pdf>.

⁵ Stated in relation to the statistic that estimates that only 10% of confiscation order debt is realistically collectable.

⁶ <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/2502.htm>.

⁷ S. 10 Serious Crime Act 2015.

⁸ Indeterminate sentences in the UK are currently only permissible in relation to a narrow range of crimes, usually of a serious violent or sexual nature.

⁹ Art. 5(1) of the European Convention on Human Rights—the right to liberty and protection from arbitrary detention.

¹⁰ According to their latest [annual report](#).