

<b>Title: Serious Crime Bill: Proceeds of Crime Act Amendments</b>	<b>Impact Assessment (IA)</b>
IA No:	Date: 28/05/2014
Lead department or agency: Home Office	Stage: Final
Other departments or agencies: Ministry of Justice	Source of intervention: Domestic
	Type of measure: Primary legislation
	Contact for enquiries: John Woodthorpe John.woodthorpe@homeoffice.gsi.gov.uk 020 7035 1913

**Summary: Intervention and Options**      **RPC Opinion: RPC Opinion Status**

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as In/Out/zero net cost
na	na	£0m	no	In/Out/zero net cost

**What is the problem under consideration? Why is government intervention necessary?**  
Sustained legal challenges to the Proceeds of Crime Act 2002 (POCA) are frustrating attempts to further improve the recovery of assets attributable to criminal conduct. The asset recovery process is being delayed by criminals seeking to exploit POCA proceedings, in particular by using loopholes and weaknesses in the Act. Government intervention is necessary as legislation will be required to remedy the shortcomings identified in the Act.

**What are the policy objectives and the intended effects?**  
The Government seeks to improve the asset recovery system as part of the Serious and Organised Crime (SOC) Strategy. Implementation of identified measures to strengthen POCA will support those objectives by improving the enforcement of confiscation orders and reducing the gap between the confiscation orders that are made and those that are collected. Implementing these measures is a clear illustration of the UK's commitment to both recovering the proceeds of crime and reducing the harm caused by serious and organised crime.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**  
Option 1 – do nothing. The exploitation of POCA provisions is likely to continue with a corresponding failure to improve the recovery of criminal assets.  
Option 2 – implement the proposed measures by way of amendments to the Act. The Government is committed to closing loopholes in POCA which can be exploited by criminals and thereby improve the level of asset recovery. Although the value of criminal assets recovered has – with one exception – increased year-on-year since POCA was enacted, the stack of unenforced confiscation orders and the gap between the order value and assets recovered remains a significant issue.

<b>Will the policy be reviewed? It will be reviewed. If applicable, set review date: Autumn 2020</b>					
Does implementation go beyond minimum EU requirements?			na		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro no	< 20 no	Small no	Medium no	Large no
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			Traded:		Non-traded:

*I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.*

Signed by the responsible SELECT SIGNATORY: Kevin Bradley Date: 31/6/14

# Summary: Analysis & Evidence

# Policy Option 2

Description: Option 2

## FULL ECONOMIC ASSESSMENT

Price Base Year 13/14	PV Base Year 2033	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: na	High: na	Best Estimate: na

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	na	na	na
High	na	na	na
Best Estimate	0	1.78	17.8

### Description and scale of key monetised costs by 'main affected groups'

The proposed measures would mainly impact on the Crown Prosecution Service, HM Prison Service, HM Courts & Tribunals Service (HMCTS), and the Ministry of Justice (and their equivalents in Scotland and Northern Ireland). There would be a smaller impact on financial institutions, the National Crime Agency (NCA) and police forces. In the case of the NCA, there would be a minimal requirement to provide training to established financial investigators (FIs) to ensure familiarity with the new provisions.

### Other key non-monetised costs by 'main affected groups'

There will be an impact on financial investigation units (FIUs). FIUs will need to become familiar with the new measures and will need to adapt to the additional demands created by the extension of investigation powers.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	na	na	na
High	na	na	na
Best Estimate	na	na	na

### Description and scale of key monetised benefits by 'main affected groups'

The proposed measures are expected to increase the total value of criminal assets recovered, therefore the debt level will decrease. Recovered assets are reinvested in financial investigation and asset recovery, local projects, crime prevention schemes and policing generally. These assets can therefore be used to benefit communities, victims and witnesses.

It should be noted that this policy must cause a **7.9% increase** in high value assets recovered to break even.

### Other key non-monetised benefits by 'main affected groups'

The measures will address the issues contained within the SOC strategy. Improved financial investigation and recovery of assets will contribute to the disruption of organised crime groups and send a clear signal to those engaging in serious organised crime. The measures may discourage participation in organised acquisitive crime.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5%

The quantity and value of unenforced orders – together with intelligence - offers a strong indication that the potential for additional recovery of assets is strong; it is therefore assumed that there are outstanding monies to collect. The stock of unenforced orders is currently being analysed with a view to quantifying recoverable funds. Certain assumptions are made about offender behaviour. These assumptions are outlined in the risk section of the evidence base.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OITO?	Measure qualifies as
Costs: 0	no	na
Benefits: na		
Net: na		

# Evidence Base

## Problem under consideration

The Serious and Organised Crime (SOC) Strategy, published in October 2013, aims to prevent people getting involved in serious and organised crime, to strengthen our protection against and responses to it and to pursue criminals behind it, prosecuting them and disrupting their activities. Financial investigation, restraint and confiscation contribute towards the prosecution and disruption of organised criminals. The Proceeds of Crime Act (POCA) sets out the legislative scheme for the recovery of criminal assets with criminal confiscation being the most commonly used power. A confiscation order requires the defendant – following conviction for an offence - to pay an amount of money (the benefit) adjudged to have been made from crime. The criminal conduct that gives rise to such benefit can be either particular or general in nature.

Particular criminal conduct refers to offences that the defendant has been convicted of in the current proceedings. A simple example of this would be where a court is considering a confiscation order in relation to a single offence of theft.

General criminal conduct depends on the concept of 'criminal lifestyle'. If the prosecution is alleging general criminal conduct, it is suggesting that the defendant has been a career criminal and that assets enjoyed by him are obtained or tainted by criminality.

POCA has frequently come under pressure from criminals who have developed methods of frustrating the existing system. Recovery of criminal assets is central to the Government's SOC strategy and targeting those who do not pay is as an absolute priority. The National Audit Office (NAO) and Public Accounts Committee (PAC) have raised concerns regarding the effective recovery of criminal assets, including the inadequacy of sanctions<sup>1</sup> available in cases of non-compliance and the quantity and value of unenforced orders. These concerns – together with additional barriers identified through stakeholder consultation - have been expressed in the SOC strategy as follows:

- **Third party claims:** Engagement with partners involved in operations confirms that such claims delay proceedings and reduce the amount of funds available for confiscation. In many cases, third party claims are made at a relatively late stage in proceedings and are deliberately used to frustrate confiscation investigations.
- **Default sentences:** When the Crown Court makes a confiscation order, it will normally specify the term of a default sentence should the defendant fail to pay the amount due under the order. Evidence suggests that default sentences are less effective at the higher end of confiscation orders<sup>2</sup>.
- **Restraint orders:** whereby a defendant's assets can be frozen in order to satisfy a confiscation order – can only be sought where there is reasonable cause to *believe* (rather than suspect) that a person under investigation has benefited from criminal conduct. This can lead to assets being transferred or concealed by suspects during the early stages of an investigation.
- **Time to pay:** Confiscation orders are payable immediately unless the court grants an extension. The granting of extended periods for payment has been identified as an obstacle to the effective enforcement of confiscation orders.
- **Investigation powers:** After a confiscation order has been made, investigation powers can only be used to identify the amount and whereabouts of criminal benefit and not for the enforcement of a confiscation order. This has a significant adverse impact on efforts to enforce confiscation orders, as additional assets that could be used to satisfy an order remain undetected. New powers are needed so that additional assets can be identified.
- **Court procedure:** Currently, 50% of confiscation orders are for sums under £5,000 and 75% of orders are under £10,000. This places a considerable burden on Crown Courts as they are obliged to devote court time to relatively low value orders.

<sup>1</sup> NAO report on confiscation orders, December 2013. The report found that only 2% of orders are satisfied in full once the default sentence has been served. Current default sentences are a more effective incentive to payment in lower value orders, but less effective for higher value orders.

<sup>2</sup> NAO report as above.

- **Court Attendance:** Delays are occurring to the asset recovery process by defendants not attending court for confiscation hearings (currently, a defendant convicted *in absentia* cannot currently have a confiscation order made against them).
- **Retrial:** POCA currently requires the court to discharge any restraint order at the conclusion of proceedings. This can result in the dissipation of assets in the period between the quashing of a conviction and commencement of the proceedings for a retrial.

In addition, areas which adversely affect the overall effectiveness and efficiency of POCA have been identified. These are:

- Confusion over the meaning of 'appropriate officer' for the purposes of search powers under POCA.
- A gap in the legislation in that the UK is unable to assist overseas jurisdictions seeking to confiscate proceeds of crime in cases of pecuniary advantage. At present, the UK can only assist with cases where the benefit is actual property. Currently, POCA enables requests and orders made by courts in other jurisdictions to be given effect in the United Kingdom. One such type of order is an 'external order'. The scope of an external order is currently limited to the recovery of specified property or a specified sum of money; it is so limited because the scope of international agreements under which orders could be sent from a foreign court was similarly limited. In recent years, international law has recognised that 'proceeds' can include any economic advantage derived from criminal offences. This includes paying tax that is lawfully due.
- Victims of crime are not always appropriately compensated under POCA.

POCA is regarded as an effective piece of legislation, but it has revealed certain vulnerabilities in recent years. These vulnerabilities and barriers have frustrated attempts to recover assets attributable to criminal conduct. The stock of unenforced confiscation orders currently stands at approximately £1.5bn<sup>3</sup>. This figure is currently being analysed with a view to identifying the value of recoverable funds.

### Rationale for Intervention

Organised crime – and the profits made from it – is a threat to the well-being and security of our society. The Government has a role in protecting its citizens and ensuring law enforcement agencies have the necessary powers to recover criminal assets. The strengthening of powers to enforce confiscation orders contributes to the strategic objective of minimising the movement, concealment and use of the proceeds of crime.

The gap between the confiscation orders raised and the amount recovered is a matter of public concern; it is therefore incumbent on the Government to consider the most appropriate form of intervention.

### Policy objectives

The policy objective is to improve the effectiveness of the financial investigation system in disrupting organised crime, in particular the enforcement of confiscation orders. The policy seeks to ensure that effective legal powers are available to tackle specific areas of concern in order to satisfy the commitments given in the Serious and Organised Crime Strategy. The policy will also contribute to the central theme of the strategy, namely the relentless disruption of serious and organised crime.

### Description of options considered (including doing nothing)

**Option 1. Do nothing. Continue current arrangements under existing law.**

**Option 2. Legislate.**

<sup>3</sup> Analysis of Joint Asset Recovery Database on 1 November 2013

The preferred option is option 2, legislate. This option encompasses a range of proposed amendments to the Proceeds of Crime Act 2002 (detailed below) as contained in Part 1 of the Serious Crime Bill.

We propose to:

a) Ensure that criminal assets cannot be hidden with spouses, associates or other third parties. There will be a requirement for prosecutors to set out any known details of third party interests in the statement served at the start of confiscation proceedings (the prosecutor's statement). It will then be a requirement for the defendant to detail any known third party claims in their response to the prosecutor's statement. The court will have the power to determine the extent of any third party interests when making the confiscation order.

b) Increase prison sentences for failing to pay confiscation orders. This will be achieved by simplifying the current sentencing structure and increasing the maximum sentences where the confiscation order is for more than £500,000. The maximum length of a default sentence in respect of unpaid orders whose value is greater than £1m will rise from 10 years to 14 years. For unpaid orders whose value is £500,000 – £1m, the maximum default sentence will rise from 5 years to 7 years. In addition, it is proposed to end automatic early release for confiscation orders over £10m.

c) Enable assets to be restrained more quickly and earlier in investigations. Currently, the test for granting a restraint order is 'reason to believe' rather than 'reason to suspect'. The current test has the effect of delaying applications for restraint until a suspect is ready to be charged; under the proposed amendment the test will be lowered to 'reason to suspect'. This will enable applications for restraint to be made earlier in investigations, thus reducing scope for the dissipation of criminal assets.

d) Clarify that a confiscation order must be payable immediately unless the court is satisfied that the defendant is unable to pay the full amount due on the day the order was made. This includes a restriction on the use of extensions of time to pay, limiting it to circumstances where additional time is necessary in order to realise funds from a specific asset, e.g. the sale of a vehicle or house. In addition, the maximum time allowed to pay an order will be reduced from twelve months to six months.

e) Extend investigative powers so that they are available to trace assets once a confiscation order is made. The proposed amendment will give officers appropriate powers for the purposes of identifying realisable property that might be used to satisfy a confiscation order.

f) Add victim surcharge orders to the excluded orders under section 13 of POCA (i.e. payments to victims to take priority over confiscation orders).

g) Add pecuniary advantage to external orders (i.e. provide for the recovery of unpaid tax when requested by other countries). This will enable the UK to assist overseas authorities where the criminal benefit is pecuniary advantage rather than actual property.

h) Ensure that individuals who abscond and are convicted in their absence can be subject to confiscation. Amending Part 2 of POCA will remove a loophole that prevents a defendant who absconds before the conclusion of his or her trial (and subsequently convicted *in absentia*) from having a confiscation order made against them. The period in which a confiscation may be commenced after absconding will be reduced from two years to three months. Three months will provide sufficient time to confirm that a defendant has absconded as well as allow time to try and trace the individual. Ideally, a defendant would be present at the confiscation hearing so that assumptions – i.e. assumptions as to his or her criminal lifestyle – can be appropriately applied.

i) Ensure restraint orders can be maintained in the event of a re-trial. A proposed amendment will provide that a restraint order can remain in place against a defendant for a reasonable period between the quashing of a conviction and the start of proceedings for the retrial.

j) Simplify confiscation for lower value orders. We are working with the Ministry of Justice on secondary legislation which would allow confiscation orders to be heard in the magistrates' court rather than the Crown Court. The intention is to commence the necessary legislation under SOCPA but also add an enabling provision so that the limit restricting magistrates to confiscation orders of up to £10,000 may be revised in future. It is more cost effective for hearings to be held in the magistrates' courts. Where a

magistrates' court hears a case where there has been criminal benefit, it is not cost effective to refer the matter to the crown court for a confiscation hearing. The proposal provides for a possible future revision of the £10,000 limit – which also corresponds to a 6 month default sentence – so that magistrates can hear cases where the benefit is greater than £10,000.

k) Amend the meaning of "appropriate officer" in POCA, thus allowing NCA officers to exercise POCA search and seizure powers. This will provide those officers with the power to secure property which may subsequently be required to settle a confiscation order.

l) Under section 67 of POCA a magistrates' court can issue an order to a bank to pay over funds to satisfy a confiscation order. The necessity for a restraint order to be in place and the requirement for the time to pay to have expired (for cash in an account) will be removed from the requirements from this order. The provision has also been extended to cover bank accounts maintained on behalf of a person in prison, young offender institute or a secure training centre.

m) POCA will enable confiscation orders to be discharged in cases where the defendant has died and it is not feasible to seek payment of the order from the defendant's estate (for example, because there are no assets remaining in the estate).

n) It is proposed to legislate to require judges to consider applying an overseas travel ban in every confiscation case. Where there is reasonable cause to believe that the defendant will continue to fail to pay his or her confiscation order or will take steps to dissipate assets through travel out of the UK, a travel ban would be imposed until the order was paid.

In addition to the above changes to POCA, we propose a package of three measures specific to the POCA legislation in Scotland, namely:

p) Creation of management administrators for Prohibitory Property Orders (PPO). A PPO is an order that specifies or describes property to which it applies and prohibits any person to whose property the order applies from dealing with it in any way;

q) Serving a default sentence will not prevent the sum due from being collected; i.e. liability to pay the confiscation order will not be discharged as if it were a fine (as is already the case in England and Wales);

r) Creation of an offence of breaching a PPO or Interim Administration Order (IAO). An IAO is an order that freezes property during a civil recovery investigation.

Given the nature of criminal activity, it is essential to tackle the confiscation and recovery of proceeds of crime on a coherent, United Kingdom-wide basis. Therefore, similar provisions apply to Scotland whilst fully reflecting the differences in law, procedure and the institutions of justice in that particular jurisdiction.

### **Monetised and non-monetised costs and benefits of each option (including administrative burden)**

#### **Option 1: Do nothing**

There are no additional costs or benefits if there is no policy change.

#### **Option 2: Legislate**

#### **Groups affected**

The main groups affected by the policy would be:

**Ministry of Justice (MOJ)** – increased default sentences – if they did not lead to changes in offenders' behaviour - would result in an increase in prison population and would therefore have budgetary implications for MOJ. Enforcement of unpaid confiscation orders will also have cost implications for MOJ.

**HM Courts and Tribunals Service** – The measure proposed in (j), above, may result in additional proceedings in magistrates' courts. This would increase the administrative burden on HMCTS, but would be offset by reduced costs of proceedings in crown courts. The increase in enforceable orders would also impact on HMCTS.

### Monetised Costs:

Due to time and data constraints we have not done a sensitivity analysis on the costs. The Criminal Justice Costs would grow year on year until they hit the maximum annual cost in 2033. The costs below represent the maximum annual costs.

#### Business Costs

Extending investigative powers may create an additional burden on financial institutions. However, these institutions have well developed processes in place and the additional work created by enforcement investigations will be limited compared with the total volume of financial investigations. Therefore this cost is believed to be negligible.

#### Public Sector Training Costs

The National Crime Agency ensures that amendments to POCA are incorporated into financial investigator (FI) training through continuing professional development<sup>4</sup>. Investigators using the new powers will, in the main, already be trained and accredited. The additional cost created by this policy is therefore expected to be limited. The Process of Crime Centre (POCC – NCA) has advised that the measures could be disseminated to the FI community by means of e-learning and conferences. POCC have not reported on the estimated cost of this training but have advised that this would be in the region of **£10 - £20,000**.

#### Potential Impact of Default Sentences

MOJ has carried out initial analytical work on the potential impact of proposed policy changes to default sentences resulting from a failure to pay confiscation orders.

MOJ in their analysis assumed that there will be no change in offender behaviour. With no information as to how offenders might respond to the changes in default sentences, no changes have been assumed. However, the increase in maximum sentences is intended to have a deterrent effect<sup>5</sup>. Early repayment due to any deterrent effect of default sentences will result in prison population numbers that are lower than the quoted figures.

Additional assumptions:

- Criminals receiving high value confiscation orders are likely to be serious criminals who receive long sentences for their crimes. Default sentences are served consecutively (not concurrently) to any sentence imposed on conviction.
- Each offender has been tried and sentenced for only one crime. In reality, some offenders may have been tried on multiple counts.

<sup>4</sup> Recruitment of additional FIs is not envisaged. However, the cost of initial training for an FI is £2,020 plus £640 residential supplement. For additional training in confiscation, the cost is £950 plus £356 residential supplement (source: NCA (FISS); cost as at 1/4/14).

<sup>5</sup> The deterrent effect does not form part of the MOJ analysis.

- Offenders receive a default sentence which is the same percentage of the maximum as they would receive under the current system.

With these assumptions in mind, MOJ have offered the following estimated impact:

**1) Raising the maximum possible default sentence for amounts over £1m from 10 to 14 years:**

This is estimated to cause a maximum increase in the prison population of approximately 30 by 2026 (assuming the new sentencing provisions come into effect in 2015) **costing an estimated £900,000 per year;**

**2) Introducing a new band for amounts greater than £500k but less than £1m for which the sentence would be 7 years:**

This is estimated to cause a maximum increase in the prison population of approximately 20 by 2026, **costing an estimated £600,000 per year.**<sup>6</sup>

**3) Ending early release for orders over £10m:**

This is estimated to cause a maximum increase in the prison population of approximately 10 by 2033, **costing an estimated £280,000 per year.**

The total estimated cost to the Criminal Justice System of the combined measures is, therefore, **£1.78 million per year by 2033.**

Best Estimate (millions)		
	Cost	Present Cost
Year 1	£1.795	£1.795
Year 2	£1.780	£1.720
Year 3	£1.780	£1.662
Year 4	£1.780	£1.605
Year 5	£1.780	£1.551
Year 6	£1.780	£1.499
Year 7	£1.780	£1.448
Year 8	£1.780	£1.399
Year 9	£1.780	£1.352
Year 10	£1.780	£1.306
<b>Total</b>	<b>£17.815</b>	<b>£15.337</b>

The costs will have year-on-year increases until they reach a steady state level at the given year. At these points they remain flat at the quoted amounts.

**Non-monetised costs:**

Greater scope for investigating assets post-confiscation could place an additional demand on resources. Financial investigators may need to devote additional time to investigating unenforced orders, possibly resulting in the establishment of new sub-teams on a permanent or temporary basis. However, FIs working with the new measures would have already been trained in the confiscation regime and would not, therefore, require comprehensive re-training.

Similarly, the Crown Prosecution Service may need to devote additional time to the management and review of post-confiscation investigations. In both cases the costs would be difficult to quantify and would more likely be an opportunity cost of displaced activity.

<sup>6</sup> MOJ analysis of default sentence policy proposals. An average cost of £28k per prison place per year is assumed. The cost of additional prison places is also dependent on the existing prison population, as if there is spare capacity in terms of prison places then the marginal cost of accommodating more offenders will be low due to existing large fixed costs and low variable costs. Conversely, if the current prison population is running at or over capacity then marginal costs may be significantly higher as contingency measures will have to be found. Sums shown are rounded estimates.



## Monetised benefits:

The principal aim of the proposed policy is to improve the asset recovery process and reduce the stock of unenforced confiscation orders. A renewed emphasis on enforcement of unpaid orders is planned through the proposed extension of investigation powers and the identification of priority cases for enforcement activity.

It is intended that the increase in default sentences and ending of early release will lead to an increase in the number of offenders paying their confiscation orders. The latest available data (2012/13) shows that the value of paid receipts due to confiscation orders was **£105m**. Please note this is the amount paid, not the amount owing. Of this total, the following figures are attributable to high value orders:

<u>Order range</u>	<u>Value</u>
£500k - £1m	£10.27m
£1m +	£12.3m
<b>Total</b>	<b>£22.57m<sup>7</sup></b> (representing 21.5% of the total net receipts)

Although there is insufficient data to predict the likely effect of increased default sentences, it should be noted that this policy must cause a **7.9% increase** in the payment of high value ARIS<sup>8</sup> receipts annually to break even.

Currently there are 14 outstanding confiscation orders valued at £10m or more. Clearly a single success attributable to this measure would yield receipts in excess of **£10m**. If this intervention led to just two of the £10m+ orders being paid in ten years, the policy would have a positive net present value.

## Non-monetised benefits:

The proposed measures would send a clear signal to those considering participation in organised acquisitive crime. In particular, renewed emphasis on enforcement of unpaid orders and the proposed increase in default sentences will contribute to the relentless disruption of organised crime.

## Risks and Sensitivities

There is a risk that longer sentence lengths will not have the desired deterrence effect.

## Summary and preferred option with description of implementation plan

In summary, we have identified weaknesses in POCA that allow criminals to exploit proceedings and frustrate attempts to recover the proceeds of criminal activity. The proposed amendments will provide additional tools for law enforcement and facilitate a concentrated effort on unenforced orders.

The Government has made its ambitions clear in the Serious and Organised Crime Strategy. Legislation in the form of the proposed amendments represents the best means of meeting the objectives set out in the strategy.

## Implementation Plan

The Government plans to implement these changes through the Serious Crime Bill which will be introduced in Parliament in the 2014/15 session. Subject to Parliamentary approval of the Bill, commencement would be in summer/autumn 2015.

<sup>7</sup> Source: JARD database. Net receipts are gross figures less funds paid out in compensation.

<sup>8</sup> Asset Recovery Incentivisation Scheme. Gross receipts as described above are commonly referred to as ARIS receipts.

