

Prison Reform Trust response to the Law Commission consultation on Confiscation under Part 2 of the Proceeds of Crime Act 2002 – December 2020

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

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Introduction

We are grateful for the opportunity to respond to this consultation. The Proceeds of Crime Act 2002 (POCA) is widely regarded as a draconian piece of legislation and is in urgent need of reform¹. We welcome the review of this legislation as it impacts on the lives of so many, not only defendants but also their families². POCA cases can continue for years, with criminal proceedings not ending until the confiscation orders are satisfied.

We welcome the Commission's scrutiny of benefit and criminal lifestyle as this could lead to a much fairer and more realistic starting point for a confiscation order. POCA is known as being a double punishment³ with defendants having served their sentence only to be pursued for funds which they simply do not have and being likely to serve a default sentence as a result. There is a preconception that defendants convicted of crimes which trigger POCA proceedings have benefited greatly from proceeds of crime. In fact, it is often the lower-level offender who is targeted by confiscation proceedings and whose 'benefit' simply does not match the amount that is pursued after they have served their sentence.⁴ Furthermore, the costs of the

¹*R v X [2007] EWCA Crim 2498, (2007) 151 SJLB 1434 at [9].*

² 'From the perspective of defence practitioners, meanwhile, the problems are about the regime's extreme harshness on defendants and their families, and the fact that it often operates in a way that is opaque and counter-intuitive.' *Confiscation: A Question of Judgment* (2019) Available at [Confiscation: A Question of Judgment? – BCL Solicitors LLP](#) (Accessed 8th December 2020)

³ This was a term which Dr Craig Fletcher noted multiple times during interviews for his research. *"Double Punishment" - The Proceeds of Crime Act 2002 (POCA): A Qualitative Examination of the Post-C conviction Confiscation Punishment in England and Wales.* Craig Philip Fletcher

⁴ The data we examined suggest that, in practice, seizing illicit wealth has not been the main priority for the government, rather, the POCA 2002, originally designed to target serious and organised crime, has

original criminal trial combined with POCA proceedings, and the costs of additional default prison terms are manifestly excessive.⁵

Prisoners with confiscation orders are frequently prevented from progressing through the prison system. They are often unable to downgrade their security category and move to open conditions. They are often denied release on temporary licence. Both of these significant aspects of a prisoner's sentence plan are essential to their reintegrating back into the community. The uncertainty the process creates also undermines the rehabilitative purpose of imprisonment, damaging the mental health of those affected and making it much harder both to plan for a crime free life following release, and to live a normal life thereafter while the threat of re-imprisonment hangs over someone.

Confiscation proceedings can have disastrous consequences for people who have already served a sentence being released into the community. They are often unable to move forward or progress because they can still be pursued for assets that were not available at the time the confiscation order was made, such as future earnings. Whilst we welcome the Law Commission's proposal to remove 'punishment' as a statutory objective of POCA, such an omission will not necessarily eradicate the legislation's punitive effect.

The burden of proof rests with the defendant to rebut the assumptions made by the prosecution.⁶ Legal aid is available but confiscation proceedings are lengthy and complex. As such, legal representatives are not always able to provide the resources and specialist representation needed.

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?

been streamlined to be used predominantly as a disciplining and symbolic tool against relatively low-level acquisitive crimes.' Chistyakova, Y., Wall, D.S. & Bonino, S. The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK. *Eur J Crim Policy Res* (2019) (Accessed 8th December 2020)

⁵ The National Audit Office (NAO) estimated the annual cost of confiscation proceedings in 2012-2013 to be £102 million, with 26p as the 'estimated amount confiscated for every £100 of criminal proceeds.' In addition, NAO estimated £18 million to be the cost of prisoners serving default prison sentences. National Audit Office, *Confiscation Orders*, HC 738, London, HMSO at pages 4 and 35. Available at [10318-001-Confiscation-Book.pdf \(nao.org.uk\)](#) (Accessed on 8th December 2020)

⁶ 'The situation is worse for people who are held to have had a 'criminal lifestyle', which again is defined by POCA in a very particular way, rather than by its literal meaning. Essentially anyone whose crime was of a certain type or committed over a certain period is subject to assumptions that absolutely everything he has owned, received or paid out in the six years prior to charge comes from crime, and the onus is on him to show that this is wrong or unfair.' *Confiscation under the Proceeds of Crime Act 2002 (POCA): a Prosecutor's Wonderland?* John Binns, Proceeds of Crime Lawyers' Association, 11th July 2016 available at [Confiscation under the Proceeds of Crime Act 2002 \(POCA\): a Prosecutor's Wonderland? \(pocla.org\)](#) (Accessed on 8th December 2020)

We are extremely concerned about this proposal. The current system already provides for a default sentence if a defendant is unable to pay a confiscation order.⁷ We understand that this proposal stems from difficulties in enforcing payment of confiscation orders. However, if a defendant is recalled to prison for a licence breach relating to non-payment of a confiscation order, they could effectively serve three prison sentences stemming from one original criminal matter. In an overstretched, overcrowded and under resourced prison system, this is not only impractical, but inhumane. The comparison with prisoners released to supervision from other custodial sentences is a false one – the people to whom this proposal relates will already have served such a sentence. Far from reducing the use of confiscation process as punishment, this proposal will have the effect of increasing it.

In addition, we note that recall rates for all forms of post release supervision as of 2019 had increased by 29% for men and 166% for women. It is apparent both that released prisoners are not getting the help they need and that the threat of recall is not in itself effective in preventing further behaviour of concern. This proposal will inevitably lead to a further rise in recalls.⁸

We support the Law Commission's view that sanctions short of imprisonment in default should not be introduced, as they would encumber a defendant further. The same logic undermines this proposal for a period on licence, which would inevitably end up as punitive in its impact rather than facilitative in the way the Commission supposes.

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?

We do not agree with this proposal. Although we are not opposed to a Court having the power to direct a defendant to provide documents, we do not agree that the Court should have powers to impose a community order or a prison sentence.

There must be detailed guidance as to which documents are to be expected. It is not practical or realistic to believe that a defendant who has served a prison sentence will necessarily have all their financial paperwork in their possession years later.

We believe that the power to impose a community order or a custodial sentence is an additional punishment that is disproportionate, unnecessary and unjustified. This impedes upon progression in the community.

⁷ 'When a prisoner is released on license, the objective is twofold: to monitor and reintegrate the offender into the community and to prevent reoffending. But to use this as a tool in order to ensure the payment of a confiscation order fails to take into account that there is already provision for those who do not pay to be sent to prison.' *Law Commission's New Idea For Confiscation Orders Is Unfair*, Brian Swan, 16th October 2020 available at [Law Commission's New Idea For Confiscation Orders Is Unfair - Law360](#) (Accessed on 13th December 2020).

⁸ Comment by Mark Day on the HMPPS report on post-release supervision for prisoners- [Prison Reform Trust > Press & Policy > News](#)

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?

We welcome this proposal. Defendants have usually only six months to pay a confiscation order in full before interest begins to accrue at a rate of 8%, clearly designed to be punitive in its impact. We are disappointed that the Commission is not proposing to review this rate. It is evident that interest does not work as an effective sanction.⁹

For many prisoners, interest starts to accrue whilst they are still serving their sentences. It is unrealistic to believe that a prisoner can meet the interest on prison pay.¹⁰ This added pressure of having to pay interest could lead to defendants reoffending upon release to try to pay it off. The addition of interest reinforces a view widely held among prisoners subject to confiscation proceedings that they are an inescapable punishment, a cycle of the most vicious kind.

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?

We welcome the proposal to introduce payment by instalments. There is no such current mechanism in place.

We would argue against imposing a deadline for any uplifts. If a defendant is still paying the original confiscation order and / or interest, any deadline is immaterial and unnecessary.

⁹ 'We received strong evidence that basing a view of the performance of POCA on the figure of uncollected debt was misleading, not least because approximately one third of the debt is actually made up of interest and penalties for non-payment... Given that the vast majority of that debt will never be collected, but still accrues a mandatory 8% interest per annum, it is unlikely that debt will ever be cleared.' House of Commons Home Affairs Committee (2016a) *Proceeds of Crime, Fifth Report of Session 2016–17*, HC 25, London: HMSO.

¹⁰ PSO 4460 Prisoner's Pay- Minimum unemployed wage of £2.50 weekly and minimum employed wage of £4.00, at Annex B