

EXECUTIVE SUMMARY OF JOINT THEMATIC REVIEW OF ASSET RECOVERY: RESTRAINT AND CONFISCATION CASEWORK

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Introduction

1. This is the Executive Summary of the Report of the Chief Inspectors of Her Majesty's Crown Prosecution Service Inspectorate (HMCPsi), Her Majesty's Inspectorate of Constabulary (HMIC) and Her Majesty's Inspectorate of Court Administration (HMICA) into the handling of cases involving asset recovery under the Proceeds of Crime Act 2002 (POCA). It focussed on restraint and confiscation casework. This work has been undertaken as part of the Criminal Justice Chief Inspectors' joint inspection programme for 2009-10.
2. Although there has been substantial national focus on the outcomes and strategic issues relating to asset recovery, there has been no detailed analysis of the handling of asset recovery cases from investigation to enforcement, looking critically at the work of all the criminal justice agencies (that is, the police, the Crown Prosecution Service (CPS) and Her Majesty's Courts Service (HMCS), Her Majesty's Revenue and Customs (HMRC) and the Revenue and Customs Prosecutions Office¹ (RCPO)) at the same time. It was considered that this is where joint inspection would add most value at this stage, and the purpose of the joint review, therefore, was to carry out such analysis.
3. The findings of this review will be considered, along with the outcomes of other reviews, studies and action currently being undertaken across criminal justice agencies, to determine whether further joint inspection is warranted and if so where the focus should lie.
4. The three criminal justice inspectorates have worked jointly to examine a cross-section of the casework process from initial investigation through to enforcement. This approach has unique benefits in allowing inspectors to assess cases in the sample from beginning to end, by examining files held by the police, HMRC, CPS and HMCS, and by interviewing staff involved in the process.

Summary

5. The key message from the joint criminal justice inspectorate report "Payback Time" in 2004 was that POCA represents a powerful opportunity to disrupt and deter criminality, but only if it is used as a routine investigative process against a wide range of criminality. We found that this message has yet to become a reality in the criminal justice system, although our fieldwork has confirmed that the confiscation system is at least partially effective, insofar as it delivers large sums of cash from the hands of convicted defendants into the public purse, in a manner which is just to defendants, according to the POCA regime. There is also, clearly, value in the impact on criminal enterprises and reduction in harm.
6. In most of the cases we examined, an order was made that recovered some of the assets of the defendant, although there needs to be better quality assurance of the standard of the confiscation order, and the recording and documentation in support of it. However, there is considerable scope to increase the number and value of confiscation orders and to reduce the delay and wastage which is part of the system. This can be achieved, in part, by work on those blockages (drawn up at the start of this review and captured in the hypotheses) which were borne out to a lesser or greater degree. The one hypothesis which was only partially substantiated was that relating to the accuracy of orders and supporting documentation, where, in the cases we examined, inaccuracies did not impact on the ability to enforce. We also found less evidence than we expected of the impact of some attritional factors.

1 Now merged with the CPS.

7. Paragraph 4.3 in the report sets out the basis on which the Public Service Agreement (PSA) target to recover £250m of criminal assets in 2009-10 was established. This review of casework has identified two particular and connected reasons which mean that assets are not likely to be recovered at the optimum rate. It is apparent that the targets fixed do not have a direct correlation with what is achievable or what the system is resourced to deliver.
8. Firstly, not all cases with restraint and confiscation potential are identified as such, largely because issues are not mainstreamed into the daily work of frontline police investigators and CPS area prosecutors. This does not appear to be as a result of lack of training or awareness-raising. Rather, there is a feeling that the identification of, and exploitation of cases is a job best left to the specialists, because it is a separate complex area of law which should not impinge on the main job of prosecuting and sentencing criminals in the conventional way, or which can safely be left until post-conviction. That this was detrimental to the standard of casework was apparent from our file examination. There was greater awareness within HMRC, but more cases appear to be diverted into other recovery avenues, or cases were limited in their scope, reducing the potential for recovery of assets.
9. The main principles of restraint and confiscation are not complicated, and there is no reason why every investigator and prosecutor cannot play a part in maximising the number and value of confiscation orders. Asset recovery has a deterrent effect which itself plays a role in protecting the public from harm; which is why it features in PSA 24. The new CPS target seeks to draw the attention of area prosecutors to the scope for confiscation in cases other than drugs supply and fraud. Mandatory MG17 forms for investigators, and a requirement that duty prosecutors advise on restraint and confiscation at the pre-charge stage will help, but a significant investment in bringing about a cultural shift in the mind-set of frontline staff in all the agencies would be required to improve performance significantly, by further developing and incorporating asset recovery into their daily work patterns. Only then would asset recovery work begin to lose its 'ancillary' and 'specialist' tags. Until this happens, the number of confiscation orders will not increase to its full potential. However, there is clearly a resistance to mainstreaming, sometimes based on capacity, that has proved intractable, and we think consideration should be given to whether it is now time to recognise the need to tailor the degree of contribution expected from non-specialist staff to those factors that impact most on casework, and to focus more on value for money of the orders that can realistically be obtained and enforced.
10. Secondly, recoverable assets are not always identified or frozen in time or at all. There is some attrition in most asset recovery cases. Aside from the regime-based attrition, which averaged about £15,000 per case in our sample, and which cannot be reduced, the actual attrition is in the region of £105,000 per case. The degree of attrition due to costs, third party claims, and overseas assets was less than envisaged, though, in our hypothesis. Conversely, the degree to which there is an apparently incorrect application of the regime, or inappropriate settlement, was something not envisaged by our hypotheses.
11. More accurate and realistic assessment of recoverable assets, and more effective restraint of these assets, would serve to reduce the attrition and increase the amount recovered significantly. Police Financial Investigators (FIs) are often allocated to assist in the identification and categorisation of confiscation cases when the investigative officer first notifies the police Economic Crime Unit (ECU). Their role tends to be limited to this task and they then move on, to return later when the defendant is convicted, without having made any preliminary

judgments as to the potential recoverable assets. This investigative vacuum arises at the very point, known by some as “the golden hour”, when it might be most desirable and appropriate to identify, value, and freeze any assets in the hands of the defendant. Generally, it is envisaged that FIs should work throughout the life of the case with prosecutors and investigative officers. However, links between FIs and the criminal investigation are less than clear in some areas, and there is an apparent lack of synchronisation between them in most cases, within the police and HMRC. Therefore, assets are not always properly identified, some are not realistically valued, and few are restrained.

12. We found no evidence on files in the four areas we visited of use of the investigative tools provided for the first time by POCA. Such tools would normally be used to their best effect soon after identification of the case as suitable for restraint and confiscation. The FIs know about the available orders, but it may be thought that the time and resource needed to apply for them prohibits their use in all but the biggest of cases, at a time when police resources are subject to many competing priorities. HMRC FIs make more use of available databases, but are only slightly more likely to use the range of POCA tools. Equally, it is rare that concealed or overseas assets are fully identified and frozen by the police or HMRC teams. The CPS is not required to advise on the use of investigative tools, and it is doubtful whether all but the most specialised prosecutors would have the knowledge to do so. This also applied to lawyers within RCPO, but outside their Asset Forfeiture Division, prior to merger with the CPS. However, pre-charge advice rarely does more than identify the case as one suitable for asset recovery, and hardly ever does it advise (even in general terms) on the further investigation of assets. This is a weakness.
13. Conversely, the CPS is required to advise and represent the police on restraint matters. However, there is a lack of clear national guidance on this, which may be a contributor to the wide variation in usage of restraint from area to area. In turn this is a cause for concern, in that either some areas are allocating resource for no reason, or others are failing to restrain assets which could then be dissipated or concealed. Given that the specialist Regional Asset Recovery Teams apply for restraint as a matter of course, the occasions on which a restraint order would be pointless or counter-productive must be few indeed. Therefore, when such orders can be applied for and granted administratively, it is hard to see why they are used so sparingly in police forces or by HMRC.
14. Naturally there are other, subsidiary, causes of weak performance. One is the preponderance of nominal orders. They serve to undermine performance in that they take resource without adding to the public purse, or targets, in the short term. Each one requires a prosecutor’s statement, court hearings and enforcement, at least in principle. Very few result in re-visit and recovered assets. Greater effort to identify assets early on would help sift out those cases likely to end in a nominal order. Of these, sound decisions could then be made as to whether the order could serve any purpose. In the other cases, no order should be sought.
15. Delay and waste impact on performance in that they reduce the capability of the system generally. Aside from the lack of permanent involvement of the FI (see above), which would allow presentation of a finalised prosecutor’s statement on conviction in most cases, the main cause of delay is a lack of commitment by the parties to resolving the issues promptly. Confiscation proceedings are subject to the Criminal Procedure Rules, but there is a lack of experience and know-how among generalist caseworkers in the CPS and the courts, and the parties are not

being held to account for delays, which are considerable. Even allowing for their primary duty to their clients, defence lawyers are slow to react, and often lack detailed knowledge of the regime. There are funding issues, and access to defendants invariably becomes much harder post-conviction. As a result, orders which could be made by agreement within days of the final hearing are often delayed for months.

16. The initial conclusion, that the restraint and confiscation system is at least partially effective, is due in large part to the commitment and skill of the specialists who make the system work. In fact, the quality of the work overall is adequate only because much of it is done by specialists. Accredited FIs take on the critical tasks in POCA case preparation, and most CPS areas make heavy use of champions, many of whom do a lot of the work as well as providing advice to others. Most Crown Court centres allocate POCA applications to specialist judges, and enforcement proceedings are often brought by specialist Regional Confiscation Units (RCUs) before dedicated enforcement courts where a District Judge or specialist legal adviser sits. All are agreed that the presence of the specialists in the other agencies is crucial to their work; the impact of losing a key member of staff would be felt across the system, and the work would suffer.
17. There is a dichotomy between the need to mainstream asset recovery if the value recovered from confiscation is to grow significantly, and the risk that a move away from specialisation could dilute skills, knowledge and experience, and prejudice performance if it is not done in a carefully planned manner. One route out of the conflict would involve a significant commitment to training and performance management over a sustained period, in order to achieve the necessary shift in thinking amongst frontline staff in all agencies. Alternatively, the way forward is to recognise that mainstreaming is unlikely to provide value for money, and focus resources where they will be most cost-effective, such as in expanded specialist units. There is also an argument for making the statutory process leading to a confiscation order more streamlined, so that orders take less time, and there are fewer procedural steps to take; this could improve the cost-effectiveness and the commitment to asset recovery at the same time.

Future activity

18. The findings of this review suggest that agencies need to give further consideration to policy and the strategic issues which affect the recovery of criminally gained assets, in particular: how to ensure asset recovery represents value for money i.e. the cost of the process against what is gained and how that equation should affect the cases in which assets are pursued; whether adjustments to the incentivisation scheme are necessary; whether mainstreaming, while apparently desirable, is in fact truly achievable or cost effective; and whether targets are realistic.

Issues to address

19. The work being by way of an extended scoping exercise, we did not feel it appropriate to make recommendations or identify aspects for improvement. However, we have been able to reach preliminary conclusions on our key hypotheses, and have also determined that restraint and confiscation would benefit from discussion or review of how some parts of the work are carried out. We have identified these in the text as issues to address (ITAs), of which there are 22, and we list them here. The relevant paragraph number is cited after each ITA. We have also identified eight instances of good practice, which we list here and in the appropriate sections of the report.

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1. NPIA should continue to explore potential electronic capture of relevant data and encourage higher standards in relation to the completion of the form MG17. Any developments or amendments to the MG17 should be undertaken by the prosecution team (paragraph 5.16).

 2. The CPS should ensure that flagging of cases, and accurate recording on CMS of hearings and tasks, is improved (paragraph 5.17).

 3. HMRC should consider the scope of their work, in conjunction with the findings of the review of their activity by HMIC (yet to be concluded), and determine how best to ensure that confiscation is considered, and maximised in criminal investigations (paragraph 5.19).

 4. The extent and limitations of the FI role should be made clear to frontline staff by police managers, and the links between intelligence management and the role of the FI should be explored further (paragraph 5.20).

 5. Within HMRC, there is a need for better consideration of, and liaison with the CPS and RCPO on, strategy and planning at early stages and throughout (paragraph 5.23).

 6. There needs to be further investigation by police forces into the consideration and use of additional powers under POCA by FIs and the possible reasons for their apparent lack of use with the involvement of the NPIA where appropriate (paragraph 5.28).

 7. There is scope for the police and HMRC to develop further the investigation of assets held by suspects in some cases (paragraph 5.30).

 8. Police forces should, in discussion with their CPS area, review policies on restraint to ensure they are not unnecessarily cautious (paragraph 5.44).

 9. The prosecution team should, in each case assessed as a candidate for confiscation, carry out a proper and systematic consideration of restraint at the earliest possible stage, preferably before the suspect is made aware of the investigation. There should be a written record of the reasons for making or not making the application (paragraph 5.50).

 10. The magnitude of delay in obtaining a confiscation order is a significant concern, and merits further investigation by the police, CPS and HMCS, and appropriate action to progress orders more effectively (paragraph 5.65).

 11. The prosecutor should thoroughly review the contents and structure of the Section 16 statement to ensure that it is clear and concise, and correctly covers all relevant matters (paragraph 5.66).
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12. There needs to be better understanding across the prosecution team of the relevant issues at all stages, including the pre-charge decision, selection of charges, and acceptance of pleas or a basis of plea (paragraph 5.67).
13. The prosecution team should consider measures to ensure that staff at all levels of the organisation, not just champions or specialists, and any counsel instructed, have the experience and expertise, or awareness relevant to their level of involvement, and to enable them to manage cases as effectively as possible so that the specialists (whilst remaining the key resource) are not the only people in the organisation regularly considering POCA powers. Contingency planning for the loss or absence of specialists is also essential (paragraph 5.71).
14. HMCS needs to ensure that its administrative casework quality assurance mechanisms are effective, and to enable the RCUs to feed back on errors found, and the impact on their work (paragraph 5.75).
15. There need to be processes in place within police forces to ensure that the review of nominal orders is systematic and that applications to revise orders are made in all cases when it is appropriate to do so (paragraph 5.78).
16. All HMCS staff involved in asset recovery need the training best suited to their role, and training should be held jointly where appropriate. For example, joint training for police, CPS area staff and court staff on JARD would enhance each agency's appreciation of the role each needs to take to manage the restraint and enforcement processes jointly (paragraph 5.83).
17. HMCS should satisfy itself that when recognised good practice has not been adopted in a region or area, there are sound business reasons for the decision not to adopt the good practice (paragraph 5.84).
18. HMCS should ensure that specialist legal advisors have sufficient time allocated for the proper and effective discharge of their duties (paragraph 5.88).
19. The inclusion by HMCS of asset recovery templates on Libra or JARD would enable these to be standardised, and for each to reflect best practice (paragraph 5.99).
20. There would be merit in the Home Office revisiting the ARIS generally, and the question of whether the current ARIS creates some inappropriate incentives, in particular consideration should be given to how it impacts on compensation funds (paragraph 6.2).
21. Consideration needs to be given by the prosecution team to the possibly divisive effects of policies on cash seizures (paragraph 6.7).
22. There should be consideration by the police, CPS and HMCS of ring-fencing ARIS funds, so that money recovered from POCA is ploughed back into the same work; this ought to incentivise staff further, and improve performance and public confidence (paragraph 6.8).

Good practice

1. In CPS Northumbria, the business manager for the complex casework unit works with the specialist lawyer and administrator to check pre-charge logs to ensure that, in all acquisitive crime cases, the case has been identified by the police, and that the CPS lawyer giving advice has referred the case to a Financial Investigator (paragraph 5.11).

 2. It was encouraging to find that areas had identified the lack of an MG17 as an issue and had implemented plans for improvement. In Northumbria and parts of Nottinghamshire, agreement has been reached between the police and CPS that no charging decision will be given on acquisitive offences unless an MG17 is provided (paragraph 5.15).

 3. In the North East RCU, as it is co-located with the Regional Asset Recovery Team, staff were able to identify appropriate values for assets prior to the application being made for the confiscation order. This meant that assets were valued more realistically and orders were more enforceable. Working with the police FIs, and presenting them with data of how much the RCU had had to write off when varying orders, the RCU was able to persuade the police of the benefits of accurate asset valuations, and of including RCU staff at the earlier stage of the proceeding (paragraph 5.37).

 4. Kent Police reviews annually all orders where the difference between the benefit and order is greater than £5,000 (paragraph 5.78).

 5. In CPS Kent, the specialist enforcement lawyer proactively assists defendants to realise assets when they are not in a position to do so for themselves, whether because they are serving a custodial sentence, or lack the knowledge of how to go about it (paragraph 5.82).

 6. In the North East RCU, a month before the time to pay is due to expire, the unit sends a letter outlining the consequence of non-payment and giving a default hearing date, which the defendant should attend unless the order has been paid by then. This is an improvement on the practice elsewhere in England and Wales of waiting until after the time to pay has expired before setting dates for hearing, which potentially allows the defendant an extra six weeks before enforcement action begins (paragraph 5.86).

 7. In Merseyside, staff from the RCU attend the enforcement hearing to ensure that the court has the fullest information (paragraph 5.87).

 8. The North East RCU area has three locations for hearings, and at each, a designated person is sent a scanned copy of the RCU's papers, and acts as a proxy or agent for the RCU at the enforcement hearing, with a specialist legal advisor present. This ensures that a full set of papers is available in good time, and that no delay is occasioned in returning them to the RCU. The RCU liaise in advance with the specialist legal advisor to ensure that all issues are known and addressed (paragraph 5.89).
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