



Royal United Services Institute
for Defence and Security Studies

Occasional Paper

Reaching the Unreachable

Attacking the Assets of Serious and Organised
Criminality in the UK in the Absence of a
Conviction

Helena Wood



Reaching the Unreachable

Attacking the Assets of Serious and Organised
Criminality in the UK in the Absence of a
Conviction

Helena Wood

RUSI Occasional Paper, June 2019



Royal United Services Institute
for Defence and Security Studies

188 years of independent thinking on defence and security

The Royal United Services Institute (RUSI) is the world's oldest and the UK's leading defence and security think tank. Its mission is to inform, influence and enhance public debate on a safer and more stable world. RUSI is a research-led institute, producing independent, practical and innovative analysis to address today's complex challenges.

Since its foundation in 1831, RUSI has relied on its members to support its activities. Together with revenue from research, publications and conferences, RUSI has sustained its political independence for 188 years.

The views expressed in this publication are those of the author, and do not reflect the views of RUSI or any other institution.

Published in 2019 by the Royal United Services Institute for Defence and Security Studies.



This work is licensed under a Creative Commons Attribution – Non-Commercial – No-Derivatives 4.0 International Licence. For more information, see <<http://creativecommons.org/licenses/by-nc-nd/4.0/>>.

RUSI Occasional Paper, June 2019. ISSN 2397-0286.

Royal United Services Institute
for Defence and Security Studies
Whitehall
London SW1A 2ET
United Kingdom
+44 (0)20 7747 2600
www.rusi.org

RUSI is a registered charity (No. 210639)

Contents

Executive Summary	v
Introduction	1
Methodology	4
Limitations	4
Terminology	4
I. A History of the UK's Use of Non-Conviction-Based (NCB) Confiscation	5
What is NCB Confiscation?	5
A History of NCB Asset Confiscation in the UK	7
The Assets Recovery Agency: Rise and Fall	8
The Legacy	9
II. Operation of the NCB Confiscation Regime Today	11
National Crime Agency	12
CPS/UK Policing	15
Skills and Experience	16
Cost Risks	17
Impact of the Unexplained Wealth Order	17
Conclusion	19
III. Learning from International Examples	21
The Republic of Ireland	21
South Africa	25
The US Example	28
Findings – The International Perspective	31
Conclusion	33
About the Author	35

Executive Summary

The UK government's growing recognition that tackling the national security threat posed by the 37,317 nominals linked to the 4,542 organised crime groups (OCGs) mapped in the UK¹ cannot be achieved purely through traditional criminal justice outcomes was evident in its *Serious and Organised Crime Strategy 2018*. The increasingly hard-line rhetoric as regards the use of asset confiscation tools in the fight against serious organised crime – particularly since the introduction of the Unexplained Wealth Order (UWO) in 2017² – is a reflection of this.

This paper explores the extent to which this rhetoric has been matched by reality, with regards to greater use of the powers available under Part 5 of the Proceeds of Crime Act 2002 (POCA, of which the UWO is an investigatory tool), to allow for the confiscation of unlawfully obtained assets in the absence of a conviction – known as non-conviction-based (NCB) confiscation.

In understanding the operation of the NCB confiscation powers today, it is important to understand the history of their 16 years in operation. The high-profile demise of the original 'enforcement authority' – the Assets Recovery Agency (ARA) – in 2008³ cast a long shadow over the perception of the powers by prosecutors and law enforcement, who now approach them with some caution. This paper notes the need for meaningful leadership from the UK government under a new Asset Recovery Action Plan to give use of the powers renewed focus.

As regards the operational environment, on ARA's disbandment, the powers were dispersed across the Serious Organised Crime Agency (SOCA – now the National Crime Agency, NCA), the Crown Prosecution Service (CPS) and the Serious Fraud Office (SFO). Having gained the ARA's staffing contingent, the NCA had an advance on other agencies, but initially failed to capitalise on this, with annual returns from NCB confiscation languishing around the £5–6 million mark. A renewed focus in the past year on the 'high end of high risk' is welcome. However, there are concerns that a higher investigative burden, particularly of grand corruption cases, may overstretch the NCA's current capabilities.

The NCA's refocus has also exacerbated a gap in NCB confiscation capability and capability at the regional and local policing tiers. The CPS – in conjunction with UK policing – has not yet stepped into the breach in the decade since the powers were extended to it. The reasons for this may include the lack of investigative resource, an in-house skills deficit and concerns regarding cost risks. The attention brought to the wider NCB confiscation regime by the introduction of the UWO has provided much-needed impetus to the CPS and policing to develop a capability

-
1. National Crime Agency, 'National Strategic Assessment of Serious and Organised Crime 2019', May 2019, p. 9.
 2. An investigatory power available in NCB confiscation investigations.
 3. Originally the nationwide NCB confiscation capability for law enforcement.

at the regional policing tier. However, the funding model for this new contingent is fragile and its longer-term place in the Regional Organised Crime Unit (ROCU) structure is unconfirmed. This paper recommends formally adding NCB confiscation as a ROCU capability, providing long-term central funding to embed specialist CPS civil lawyers and dedicated NCB confiscation investigators within these units, and ensuring that central government provides contingency funding for prosecutors in the event of adverse costs.

These findings should be viewed in the context of the bold political discourse since the implementation of the UWO – a discourse that seems to suggest the new tool is the solution to wider problems of capacity and capability in the system. This is emphatically not the case; without dealing with the underlying issues highlighted above and some of the inherent limitations in the UWO legislation,⁴ the impact of NCB confiscation (including through UWOs) will remain limited.

Added together, the author finds in NCB confiscation a potentially highly potent tool – and in many cases the only means of targeting those who insulate themselves from the reach of criminal law – which is being woefully underexploited.

It is also evident that the UK has much to learn from jurisdictions (such as the Republic of Ireland, South Africa and the US) where NCB confiscation is a more mainstream part of the response.

The Irish Criminal Assets Bureau (CAB) model is frequently held up as an example of best practice, for the following reasons:

- **Broad public and political support:** Continuing cross-party and public support for the CAB from its introduction has insulated it from cuts in the broader public economy.
- **Lack of perverse incentives:** The lack of an ‘incentivisation scheme’⁵ has allowed the CAB to select cases on merit, unhampered by considerations as to the likely financial gain.
- **Multi-disciplinary approach:** The mix of police, revenue and social welfare powers and information is an essential component of the CAB’s success.
- **Deal-making:** A more flexible approach to deal-making and settlements allows for a pragmatic response to case management.

South Africa’s Asset Forfeiture Unit (AFU) model has established NCB confiscation as a more mainstream tool through the following measures:

- **Clear purpose and priorities:** The AFU was established with a clear mandate under law to tackle serious and organised crime, in a way the UK model was not.
- **Targeted outreach:** The AFU model is comprised of a central unit and individuals embedded in wider prosecutorial structures to aid case identification.

4. For example, the 60-day time limit for the filing of civil recovery claims following responses to the UWO.

5. In which a proportion of recovered proceeds are channelled back into law enforcement as a supposed incentive to carry out more asset forfeiture work.

- **Risk appetite:** The AFU was established with a clear mandate from government to fight test cases and establish jurisprudence, thus empowering it with a healthy risk appetite.

The US regime in many ways acts as a cautionary tale of the need to exercise NCB confiscation with appropriate restraint.⁶ However, aspects of the US regime merit consideration by UK policymakers:

- **Interoperability:** On investigating assets, the US regime does not presuppose either the criminal or civil route; evidence gathered can be used to pursue either.
- **Tools to reduce litigation:** The range of external tools to encourage cooperation and/or reduce litigation in NCB confiscation in the US is notable.

In conclusion, this paper finds that the original promise of NCB confiscation – to target those who insulate themselves from the reach of criminal law – has at best been only marginally fulfilled. Initial moves to resolve the fundamental capacity and capability issues in prosecutorial structures and create the necessary support function in policing are welcome, but do not provide a long-term, sustainable solution; the UK must follow the example of others to fully embed the powers into the response to serious and organised crime. Any suggestion that the implementation of UWOs solves these problems is misguided.

12 Recommendations for Policymakers

Recommendation 1: The government should deliver on its commitment to publish an Asset Recovery Action Plan. Under this it should commit to formulating a specific strategy for increasing the take-up of NCB confiscation as part of the response to serious and organised crime.

Recommendation 2: The NCA should commit to reviewing its NCB confiscation staffing to consider whether the team has in place all of the skills and experience needed to undertake the more complex cases it is now pursuing under its new NCB confiscation case adoption strategy.

Recommendation 3: NCB confiscation should be adopted as a formal ROCU capability.

Recommendation 4: The Home Office should provide additional funding to the CPS Proceeds of Crime Division and to the ROCU network to recruit and train a network of NCB confiscation specialists. This funding should run for a minimum of three years to aid recruitment.

Recommendation 5: The government should ring-fence a proportion of asset confiscation receipts each year to act as a contingency fund for unexpected litigation and costs associated with NCB confiscation.

6. Following the backlash against an over-zealous use of NCB confiscation, particularly at state level in the 1990s.

Recommendation 6: UWO provisions should be amended to allow enforcement authorities to apply to the courts for a moratorium of up to an additional 120 days following responses to a UWO to allow for further evidence gathering where necessary.

Recommendation 7: Under a refreshed Asset Recovery Action Plan the Home Office, working with enforcement authorities, should lead a strategic communications campaign to raise public and political awareness of NCB confiscation and its associated strengths.

Recommendation 8: The NCB settlement policies of enforcement agencies should consider the opportunity cost of a hardline approach to settlements alongside other factors.

Recommendation 9: The Serious Organised Crime Inter-Ministerial Group should mandate officials to mainstream NCB confiscation into the broader strategic response as part of the Serious Organised Crime Strategy 2018 response.

Recommendation 10: The roll-out of NCB confiscation to the ROCUs should be accompanied by a programme of awareness raising within policing (specifically to Chief Constables) and to Police and Crime Commissioners, led by the National Police Chiefs' Council Financial Crime Portfolio.

Recommendation 11: The government should remove the presumption of the primacy of the criminal confiscation route under Section 2(a) of POCA to mirror the more flexible approach of the US, the Republic of Ireland and South Africa.

Recommendation 12: The government should consult on whether fugitive disentitlement provisions are appropriate for adoption in the UK.

Introduction

‘SERIOUS AND ORGANISED crime is the most deadly national security threat faced by the UK’, according to the Home Secretary.¹ Despite years of playing second fiddle, in national security terms, to the terrorism threat, the UK’s growing understanding of the scale and impact of the problem in recent years has led to a recognition that ‘serious and organised crime affects more UK citizens, more often, than any other national security threat’.²

However, with 37,317 nominals linked to the 4,542 organised crime groups (OCGs) mapped in the UK in 2018,³ there is an emerging realisation that seeking to tackle this problem entirely through traditional criminal justice outcomes (such as criminal prosecutions) is unachievable, particularly in times of straitened police budgets and expanding policing priorities.⁴ In light of this, an approach that focuses less on the primacy of criminal justice outcomes and more on ‘relentless disruption’ is evident in the government’s *Serious and Organised Crime Strategy 2018*.⁵

It is in this context that we must view the growing governmental interest in the asset confiscation tools available in the UK’s Proceeds of Crime Act 2002 (POCA) – both criminal and civil⁶ – as a means of achieving this disruptive impact against serious and organised crime. As the strategy notes, ‘we will use new and improved powers and capabilities to identify, freeze, seize or otherwise deny criminals access to their finances’.⁷

This statement can be viewed as part of a well-established global policy imperative that advocates targeting not only the criminal perpetrator, but also their assets. This imperative forms part of an overall approach to crime and harm reduction, which recognises that prison is a blunt instrument, frequently seen as an ‘occupational hazard’ by offenders. It is far more

-
1. HM Government, *Serious and Organised Crime Strategy 2018*, Cm 9718 (London: The Stationery Office, November 2018), p. 3.
 2. National Crime Agency (NCA), ‘National Strategic Assessment of Serious and Organised Crime 2019’, May 2019, p. 9.
 3. *Ibid.*
 4. Including the rise in reports of historical child sexual exploitation cases being tackled by the police following the Jimmy Savile scandal. See Randeep Ramesh, ‘NSPCC Says Reports of Sexual Abuse Have Soared After Jimmy Savile Scandal’, *The Guardian*, 31 August 2013.
 5. HM Government, *Serious and Organised Crime Strategy 2018*, p. 6.
 6. The Proceeds of Crime Act 2002 (UK) (POCA) contains provisions that allow for the confiscation of proceeds following a conviction (criminal confiscation), in the absence of a conviction (non-conviction-based or NCB confiscation), of cash (cash forfeiture, the definition of which also now includes money held in bank accounts and some high-value goods) and taxation of criminal profits.
 7. HM Government, *Serious and Organised Crime Strategy 2018*, p. 6.

impactful, so the argument goes, to remove the proceeds of crime to reduce criminal capital, remove the incentives to commit further crimes and increase public confidence in the ability of the authorities to ensure that ‘crime doesn’t pay’.

The empirical evidence to support the assertions of advocates of this approach is lacking. However, a lack of empirical evidence is not evidence of an absence of impact; the argument that removing the very incentives for committing crime has an impact on the perpetrator has an intuitive merit, which has led to a global consensus that an asset-focused approach has a distinct value in the fight against organised crime. Furthermore, as Colin Atkinson, Simon Mackenzie and Niall Hamilton-Smith note, ‘the moral imperative upon which such approaches rest remains attractive, defensible and popular in the current climate’.⁸

The legislative embodiments of this consensus have been evident across the globe since the 1980s, with a raft of laws adopted, particularly within the criminal sphere of law, to allow for the confiscation of the proceeds of crime. However, as the legislation developed, so did the criminality; the more sophisticated criminals became increasingly adept at distancing themselves from ‘hands-on’ crimes and by doing so evaded conviction and consequently the reach of criminal confiscation provisions.

The growing awareness on the part of many policymakers of the limitations of the criminal sphere of law to reach and properly attack the upper echelons of criminality has led a limited (but growing) number of jurisdictions,⁹ including the UK, to adopt provisions in the civil law realm to target the proceeds of ‘unlawful conduct’¹⁰ in the absence of a criminal conviction.

Non-conviction-based (NCB) confiscation is viewed as controversial by some, who believe it reflects a creeping ‘civilising’ of the approach to tackling organised crime,¹¹ which allows law enforcement to mete out justice at the lower civil standard of proof¹² without the wider protections afforded to the individual by the criminal sphere of law.¹³

-
8. Colin Atkinson, Simon Mackenzie and Niall Hamilton-Smith, ‘A Systematic Review of the Effectiveness of Asset-Focussed Interventions Against Organised Crime’, *What Works: Crime Reduction Systematic Review Series No. 9*, April 2017, p. 6.
 9. Including Antigua and Barbuda, Australia, certain provinces of Canada, Colombia, Fiji, Guernsey, the Republic of Ireland, Italy, Malaysia, Mauritius, New Zealand, Peru, the Philippines, South Africa, the UK and the US.
 10. The terminology used in Part 5 of POCA 2002.
 11. Colin King and Jennifer Hendry, ‘How Far is Too Far? Theorising Non-Conviction-Based Asset Forfeiture’, *International Journal of Law in Context* (Vol. 11, No. 4, December 2015), pp. 398–411.
 12. On the ‘balance of probabilities’ rather than ‘beyond reasonable doubt’ in the UK, ‘on the preponderance of evidence’ in other jurisdictions.
 13. See, for example, Colin King, ‘Civil Forfeiture and Article 6 of the ECHR: Due Process Implications for England & Wales and Ireland’, *Cambridge University Press: Legal Studies Journal* (Vol. 34, No. 3, 2014), pp. 371–94.

However, proponents of NCB confiscation view the powers as serving both a moral imperative and tactical necessity to ensure that criminality is not left to propagate simply due to the limitations of criminal law to target high-level offenders.¹⁴ Supporters note that while the powers serve a criminal justice policy goal, the outcome – the confiscation of property gained through unlawful conduct – does not serve as a criminal punishment. Giving law enforcement the ability to tackle assets in the absence of a conviction, it is argued, serves to restore public faith in the justice system’s ability to protect the public good at the same time as removing criminal capital that would otherwise be reinvested in further criminality.¹⁵ Finally, while the standard of proof is lower, NCB confiscation still requires the gathering of evidence and the proving of a case before a court to a judge’s satisfaction.

With the nature of OCGs growing ever more complex, multi-jurisdictional and fluid in nature, using the full range of (human rights-compliant) criminal and civil tools available becomes, from a national security perspective, necessary rather than discretionary, as voiced ably by Anthony Kennedy: ‘While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that “half a loaf is better than no bread”’.¹⁶

The majority of academic studies on the use of NCB confiscation since the broader adoption of the powers in the mid-1990s¹⁷ have represented an oscillation between these two diametrically opposed positions. This paper, however, takes an agnostic view on the moral and jurisprudential implications of NCB confiscation, instead considering the powers from a public policy perspective, specifically the extent to which NCB confiscation is being fully deployed as part of the UK government’s approach to tackling serious and organised crime, as contained in the *Serious and Organised Crime Strategy 2018*.¹⁸

First, this paper looks at the origins of the UK’s NCB confiscation regime and its evolution to the present day, including the most recent extension of its investigative reach in the form of the Unexplained Wealth Order (UWO). In doing so, the paper seeks to evaluate whether its current deployment is both optimal in terms of its role in the response to serious and organised crime, and whether it serves the original intention of the legislation – that of opening up ‘a new route to tackling the assets of those currently beyond the reach of the law’.¹⁹

14. See Stefan D Cassella, ‘The Case for Civil Forfeiture’, *Journal of Money Laundering Control* (Vol. 11, 2008), pp. 8–14.

15. See Anthony Kennedy, ‘Justifying the Civil Recovery of Criminal Proceeds’, *Journal of Financial Crime* (Vol. 12, No. 1, 2004), pp. 8–23.

16. *Ibid.*

17. The powers first emerged in earnest under the US Racketeer Influenced and Corrupt Organizations Act in the 1970s, but adoption at a global level only really picked up pace from the 1990s onwards, with the Republic of Ireland and South Africa being early adopters of the concept.

18. HM Government, *Serious and Organised Crime Strategy 2018*.

19. Cabinet Office Performance and Innovation Unit (PIU), ‘Recovering the Proceeds of Crime’, June 2000, <<https://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf>>, accessed 2 May 2019.

Second, this paper looks to the experience of other jurisdictions with NCB confiscation regimes (the Republic of Ireland, South Africa and the US) to consider whether the UK can learn lessons from their deployment of the powers.

Methodology

The research included a review of the available academic, media and governmental literature relating to the use of the powers and semi-structured interviews with 15 serving and former policymakers, investigators and lawyers with specific experience in NCB confiscation, including those involved in the pre-POCA consultation exercise. The paper also drew on the experience of five practitioners from the Republic of Ireland, South Africa and the US.

Limitations

This study draws on a limited pool of academic research in this field and limited access to government data.²⁰ It is hoped that this paper will act as a spur for further academic research.

In the interests of focus, the research centres on the use of NCB confiscation by the larger bodies empowered to use NCB confiscation – the NCA and the Crown Prosecution Service (CPS) – rather than expanding the research focus to use of the powers by the Serious Fraud Office (SFO).

It does not fully assess the use of UWOs in this context, as it is too early to judge their impact, but comments on the initial views of practitioners as to their role in supporting the wider NCB confiscation regime in the UK as part of a long-term approach to extending its use.

Terminology

This paper refers to the powers as ‘non-conviction-based (NCB) confiscation’, which follows the terminology used in the Financial Action Task Force (FATF) Standards. It should be noted that the terminology used internationally to describe NCB confiscation varies. The powers are frequently referred to as ‘non-conviction-based asset forfeiture’ by other international bodies such as the World Bank, as ‘civil forfeiture’ in the US, and ‘civil recovery’ in the UK.

20. The main source of data on NCB confiscation in the UK is held by the NCA, which is exempt from the Freedom of Information Act.

I. A History of the UK's Use of Non-Conviction-Based (NCB) Confiscation

THIS CHAPTER PROVIDES a guide to the genesis of NCB confiscation in the global approach to tackling the finances of serious and organised criminality and gives a background to the UK's use of the tools since their introduction in the UK in 2003.

What is NCB Confiscation?

Although the wording of the law differs between jurisdictions, the fundamental principles of NCB confiscation remain largely the same – namely that, in the absence of a criminal conviction, an action is taken against the property (*in rem*) on the basis that the property is believed to have been obtained in connection with 'unlawful conduct'. This contrasts with criminal confiscation proceedings, which are actions taken against the person (*in personam*) following a conviction for a criminal offence.

In NCB confiscation cases, the applicant²¹ does not seek to prove the criminal liability of the respondent,²² but to prove that the property was obtained through unlawful conduct. The standard of proof required in these cases is the lower civil standard of the 'balance of probabilities'²³ rather than the higher criminal standard of 'beyond reasonable doubt'. The end result is that, if the applicant (the state) is successful, the property is forfeited with the individual remaining at liberty.

Despite continuing debate as to whether the powers are a punitive *in personam* criminal sanction dressed up as a civil *in rem* action, they have survived successive legal challenges of this nature across the globe. For example, in initial challenges in the UK courts (Walsh vs. Director of the Assets Recovery Agency) the court found that:

The purpose of the legislation is essentially preventative in that it seeks to reduce crime by removing from circulation property which can be shown to have been obtained by unlawful conduct thereby diminishing the productive efficiency of such conduct and rendering less attractive the 'untouchable' image of those who have resorted to it for the purpose of accumulating wealth and status.²⁴

21. As opposed to the prosecutor in criminal proceedings.

22. As opposed to the defendant in criminal proceedings.

23. Terms used in other jurisdictions differ, including 'on the preponderance of evidence'.

24. Walsh vs. Director of the Assets Recovery Agency, Court of Appeal, Northern Ireland, 2005.

Legal rulings in other jurisdictions have also judged the powers to not be a means of punishment,²⁵ but a means of ‘requiring a return to the way things were, the status quo ante, so as to restore the position of an injured party’ and to provide ‘a remedy to compensate an injured party for harm done to him’.²⁶ In the case of NCB confiscation, the ‘injured party’ could be seen to be the state and, by extension, society at large.

Public Policy Versus the Court of Public Opinion

There has been intense debate about NCB confiscation and the balance to be had between civil liberties on the one hand, and the state’s need to protect the public on the other; the argument being that, if the state is to infringe the right of an individual to peaceful enjoyment of their property, then this ought to invoke the procedural protections afforded by criminal law.²⁷

However, in the limited jurisdictions in which the powers have been enacted to date,²⁸ the policy argument in their favour has sought to illustrate the need for the powers by setting out instances in which the state’s ability to act against criminal proceeds is limited or non-existent within the criminal law realm (see Box 1).

While still only operational in a minority of jurisdictions, an increasing number of countries, particularly common-law jurisdictions, have adopted the powers in the last decade in response to the growing procedural and evidential difficulties of tackling organised criminality and the associated proceeds of crime through traditional criminal law routes. This is particularly the case in situations where the crime takes place in one jurisdiction, the assets are sequestered in another, and the routes for gathering evidence across those borders are hampered by legal or procedural difficulties.²⁹

Support at the international level for adopting the powers as a means of tackling cross-border criminal asset sequestration, particularly in grand corruption cases, is growing. For example, FATF recommends that ‘countries should consider adopting measures that allow laundered property, proceeds or instrumentalities to be confiscated without requiring a criminal conviction ... to the extent that such a requirement is consistent with the principles of their domestic law’.³⁰

25. See, for example, *Gilligan vs. Criminal Assets Bureau*, IESC 82, Ireland, 2001.

26. Kennedy, ‘Justifying the Civil Recovery of Criminal Proceeds’.

27. See, for example, Liz Campbell, ‘The Recovery of “Criminal” Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm’, *Victoria University of Wellington Law Review* (Vol. 41, No. 1, 2010), pp. 15–36.

28. See footnote 9.

29. This is particularly the case in relation to crimes committed in failed or failing states or in relation to grand corruption where the ability to gather – and rely on – evidence from a separate jurisdiction is limited.

30. Financial Action Task Force (FATF), ‘Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery’, October 2012, <<https://bit.ly/2KLCKSZ>>, accessed 2 May 2019.

Box 1: Common Examples of Cases Cited as Justification for NCB Confiscation

- The only known criminality is overseas, but there is no jurisdiction or ability to prosecute the individual in the state in which the assets are sequestered.
- A prosecution has been undertaken outside the jurisdiction in which the assets sit, but the prosecuting authority is not pursuing confiscation of the assets.
- The defendant in a criminal case in which assets have been identified has died during proceedings, leaving unlawfully obtained assets behind.
- The suspect is overseas and the requested state refuses to extradite the individual for trial.
- A criminal prosecution has failed due to a technicality or a paucity of admissible evidence rather than the underlying merits of the case.
- Proceeds of crime have come to the attention of law enforcement but there is no identifiable offender or offence.
- The public interest is not best served by the pursuit of a criminal conviction of peripheral figures in a criminal case, but assets exist which represent the proceeds of crime, which public policy dictates should be pursued.

Source: Practitioner feedback and Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds', pp. 8–23.

Legal points of argument regarding the extent to which the powers are compatible with constitutional principles in a number of jurisdictions aside,³¹ there appears to be a tacit acceptance of a place for NCB confiscation in the global response to tackling serious and organised crime. Rather than being viewed as a novel domestic quirk of a handful of jurisdictions – as they were in the 1990s – the powers have gained a foothold of acceptance at the supranational institutional level, albeit begrudgingly by those who view the powers as an affront to the norms of criminal law.

A History of NCB Asset Confiscation in the UK

The legal basis for the UK's NCB confiscation regime can be found in Part 5 of POCA, which makes provision for 'the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct'.³²

The introduction of POCA in 2002 contributed to a considerable shift in the scope and scale of asset confiscation activity as part of the UK's response to serious and organised crime, with a broadening of existing criminal confiscation and cash seizure powers, as well as the enactment of the NCB confiscation regime.

31. Despite this, NCB confiscation is viewed with suspicion by many jurisdictions, which see the powers as incompatible with their constitutional principles, leading to difficulties in gaining cooperation in evidence-gathering enforcement across borders.

32. Proceeds of Crime Act 2002 (UK), Section 240 (a).

The genesis of this shift can be traced back to an influential report from former Prime Minister Tony Blair's Performance and Innovation Unit (PIU)³³ in 2000, 'Recovering the Proceeds of Crime'³⁴ (known as 'the PIU report'), which noted that 'there is also much to be gained from an approach to law enforcement that focuses on treating criminal organisations as profit-making businesses. And removing assets from those living off the proceeds of crime is a valuable end in itself in a just society'.³⁵

By drawing on the examples of existing NCB confiscation regimes, such as those enacted in the Republic of Ireland and South Africa in the mid-1990s (which are explored in more detail in Chapter III), the report offered the rationale for adopting analogous powers in the UK – which it recognised as controversial³⁶ – as a means of reinforcing the rule of law by demonstrating that the justice system was well placed to remove illegal gains.³⁷

The Assets Recovery Agency: Rise and Fall

As well as laying the foundations for POCA, the PIU report, drawing on the Irish Criminal Assets Bureau (CAB) model, laid the groundwork for the establishment of the now-defunct Assets Recovery Agency (ARA).

The ARA, a non-ministerial executive government agency, was established in 2003 to act as a national NCB confiscation capability for England, Wales and Northern Ireland.³⁸ The ARA was not able to self-generate cases, but relied on referrals from police and other enforcement bodies. However, the PIU report set unrealistic expectations as to both the scale of criminal proceeds available for recovery and the speed and cost at which the ARA could recover them, noting that '[o]ther countries' experience of pursuing asset recovery more rigorously, including the establishment of a dedicated agency for that purpose, suggests that such initiatives rapidly cover their costs and begin generating an operating surplus, typically within three to five years of start-up'.³⁹

The optimism created by the PIU report led the ARA to adopt the (in hindsight) unrealistic target of becoming self-funded within three years. In retrospect, this could be viewed as an act of self-sabotage; the ARA failed to foresee either the raft of unforeseen legislative faults requiring

33. The PIU (now defunct) was based within the Cabinet Office.

34. PIU, 'Recovering the Proceeds of Crime'.

35. *Ibid.*, p. 5.

36. *Ibid.*, p. 35.

37. *Ibid.*, p. 38.

38. The Scottish NCB confiscation regime is led by the Civil Recovery Unit.

39. PIU, 'Recovering the Proceeds of Crime', p. 23.

retrospective amendment,⁴⁰ or the levels of litigation it would face in its early years, as the powers established their human rights compliance.⁴¹

Political pressure surrounding the ARA's failure to meet the self-funding target reached a climax with a critical report by the National Audit Office (NAO) in 2007,⁴² which noted that the ARA had collected £23 million against a cumulative cost of £65 million. Among the reasons given for this were the poor quality of referrals to the ARA in its early years of operation,⁴³ a problem compounded by a lack of awareness of the powers within policing and the lack of a properly developed case referral process. This was followed by a Public Accounts Committee inquiry that criticised the Home Office for lacking a credible business case for the ARA at the point of set-up, and setting unrealistic expectations regarding the speed at which assets could be recovered.⁴⁴

Despite this, the prevailing political discourse around the failure to meet the self-funding target led to the agency being disbanded in April 2008 by the Serious Crime Act 2007, after just five years in operation. The ARA's powers were extended to the Serious Organised Crime Agency (SOCA),⁴⁵ the CPS and the SFO.⁴⁶ Its investigative and litigation staff were transferred to SOCA.

The Legacy

Examining the history of NCB confiscation in the UK is not merely an interesting academic exercise – it is in this context that its operation today must be viewed. The legacy of the ARA's high-profile demise⁴⁷ has cast a long shadow over the regime in three important ways.

First, the ARA's experience of litigating difficult and expensive cases, along with its public demise, did much – at least in the minds of those agencies empowered to use the provisions today – to

-
40. For example, the inability, as per the original enactment of the legislation, for respondents to access the funds to meet their legal costs from frozen assets led to delays in litigation. Furthermore, the original legislation only allowed for the freezing of property by use of a receiver, the costs implications of which soon became clear. Both of these issues were resolved by amendments made to POCA by the Serious Crime and Police Act 2005.
41. See *Walsh vs. Director of the Assets Recovery Agency*.
42. National Audit Office (NAO), 'The Assets Recovery Agency', report by the Comptroller and Auditor General, HC 253 2006-2007, 21 February 2007, <<https://www.nao.org.uk/report/the-assets-recovery-agency/>>, accessed 8 May 2019.
43. The ARA did not have the power to self-generate cases, but relied on referrals from police forces and other public enforcement agencies. Research interviews from March 2019 with a former senior law enforcement official suggests that referral pathways were inadequately established.
44. House of Commons Public Accounts Committee, 'Assets Recovery Agency', HC 391, Fiftieth Report of Session 2006–07, July 2007.
45. SOCA disbanded in 2013 and its functions were largely subsumed into the NCA.
46. Not formally covered in this research for reasons of focus, as stated in the Introduction.
47. See, for example, *BBC News*, 'Crime Assets Agency "Ill Planned"', 11 October 2007.

counter the opinion⁴⁸ that the powers are a cheap and easy route to tackling criminality. In fact, the ARA found that most cases were heavily contested, expensive to litigate, and the assets costly to manage – issues which remain true to NCB confiscation today.

Second, the issue of ‘cost effectiveness’ has largely become entrenched in the political and media discourse surrounding NCB confiscation (and wider confiscation tools) in the UK.⁴⁹ In the absence of a firmer evidence base for asset-based interventions in general,⁵⁰ public debate has continued to focus on the value of NCB confiscation in balance-sheet terms rather than on its merits as a tool in the armoury to counter serious and organised crime. In short, NCB confiscation, and to an extent the wider POCA confiscation regime, remains beleaguered by a sense that it must ‘pay for itself’.

Third, while this paper does not advocate re-establishing a central agency for NCB confiscation, there is no doubt that dispersal of the powers led to a reduced policy focus on the role of NCB confiscation in the fight against organised crime. The continuing absence of an overarching government Asset Recovery Action Plan does little to remedy this situation; the lack of specificity in the government’s *Serious and Organised Crime Strategy 2018* also does little to further the operational use of the powers in this context.⁵¹

Recommendation 1: The government should deliver on its commitment to publish an Asset Recovery Action Plan. Under this it should commit to formulating a specific strategy for increasing the take-up of NCB confiscation as part of the response to serious and organised crime.

48. Mainly from those in academic circles, who view NCB confiscation as a quick and easy way of achieving criminal justice outcomes, see King and Hendry, ‘How Far is Too Far?’, pp. 398–411.

49. PAC inquiry chairman Edward Leigh MP noted: ‘It was ill-planned and only recovered about a third of its expenditure’. See *BBC News*, ‘Crime Assets Agency “Ill Planned”’.

50. See footnote 8.

51. The government committed to publishing a new Asset Recovery Action Plan in September 2017. See Home Office in the Media, ‘Asset Recovery Statistics – Response and Fact Sheet’, 12 September 2017, <<https://homeofficemedia.blog.gov.uk/2017/09/12/asset-recovery-statistics-response-and-fact-sheet/>>, accessed 2 May 2019. This remains unpublished at the time of writing (May 2019).

II. Operation of the NCB Confiscation Regime Today

DESPITE THE LEGAL extension of the powers to a wider set of agencies in 2008, there has not been the expected expansion in their use, either in terms of the number of cases in which they are deployed or in the value of assets retrieved under the NCB confiscation regime as a whole. While the powers have been used a handful of times by the SFO,⁵² research interviews suggest that the CPS has deployed the powers only once in 11 years,⁵³ despite being the lead prosecuting agency for the police and Regional Organised Crime Units (ROCU), which undertake the bulk of serious and organised crime investigations in the UK.

Furthermore (noting the limitations of viewing ‘success’ through a financial prism), the reported NCB confiscation results of the NCA, as indicated in Table 1, demonstrate the lack of significant expansion of the use of the tools since 2010.

Table 1: Civil Recovery Receipts Accrued by the NCA

Year	Value of Recovered Assets (Millions of £)
2010–11	6.22*
2011–12	3.90*
2012–13	1.86*
2013–14	2.29
2014–15	8.09
2015–16	5.96
2016–17	5.56
2017–18	5.74

Source: NCA and SOCA Annual Reports and Statements of Accounts.⁵⁴ See NCA, ‘Publications’, <<https://nationalcrimeagency.gov.uk/who-we-are/publications>>, accessed 29 May 2019.

*Results from the SOCA Annual Report (a precursor agency to the NCA).

52. As would be expected in an organisation with a smaller number of higher-value cases. For an example of how the SFO uses the powers, see SFO, ‘SFO Recovers £4.4m from Corrupt Diplomats in “Chad Oil” Share Deal’, 22 March 2018, <<https://www.sfo.gov.uk/2018/03/22/sfo-recovers-4-4m-from-corrupt-diplomats-in-chad-oil-share-deal/>>, accessed 23 April 2019.

53. Author interviews with former public prosecutor, London, December and February 2019. Official statistics are not publicly available.

54. These figures were taken from the ‘Recovered Assets’ statements in the financial accounts.

It should be noted that these figures reflect the value of property sold during the financial year, rather than the estimated value of assets subject to a Civil Recovery Order (CRO) gained in the same year but yet to be enforced; these figures are unavailable as the NCA is exempt from the Freedom of Information Act 2000. Figures relating to the volume (as opposed to value) of CROs are also lacking. This reflects a more general paucity of public data relating to the use of NCB confiscation in the UK, exacerbated by the fact that the Home Office does not include NCB confiscation in its reported figures.⁵⁵

Paucity of data aside, benchmarking the UK against its international peers in this regard is difficult, partly due to a lack of reliable statistics as to the scale of the criminal economy in each nation. However, by way of comparison, the Irish Criminal Assets Bureau notes in its Annual Reports (2016 and 2017) that it remitted €1.4 million to the exchequer in 2016 from NCB confiscation and €1.6 million in 2017,⁵⁶ despite having a population a tenth of the size of the UK's.

Although the legacy of the high-profile closure of the ARA is one potential reason behind the limited use of NCB confiscation in the UK, this research points to varying explanations. This section explores the use of the powers by the two main agencies dealing with the bulk of serious and organised crime investigations,⁵⁷ the NCA and the CPS, and looks at the potential impacts of the Unexplained Wealth Order (UWO) on their future use.

National Crime Agency

The transfer of the powers from the ARA to SOCA (and its successor agency the NCA) brought with it the transfer of the ARA's cadre of investigators and civil litigators who were experienced in using NCB confiscation powers, thus giving SOCA a head start over other agencies in the use of NCB confiscation.⁵⁸

However, the transfer also brought with it several legacy cases, which still needed to be litigated. This meant in practice that several low-level and low-quality cases were subsequently transferred to SOCA. Along with this, a continued lack of understanding within the wider organisation and across UK policing of the potential of NCB confiscation (and of wider POCA

55. Home Office, *Asset Recovery Statistical Bulletin 2012/13–2017/18* (London: The Stationery Office, September 2018).

56. Criminal Assets Bureau (CAB), 'Annual Reports 2016', <<http://www.cab.ie/en/CAB/CABAnnualRep2016.pdf/Files/CABAnnualRep2016.pdf>>, accessed 8 May 2019; Criminal Assets Bureau, 'Annual Report 2017', <<http://www.cab.ie/en/CAB/CAB-AnnualReport2017.pdf/Files/CAB-AnnualReport2017.pdf>>, accessed 8 May 2019.

57. This paper does not explore the use of the powers by the SFO, it being assessed that its use of the powers will be naturally limited by the smaller number of higher-value cases its remit charges it with investigating.

58. It should be noted that the extension of the powers to the SFO and CPS did not bring with it the extension of any trained investigators or staff.

tools more generally) meant that for a period of time the use of NCB confiscation within SOCA remained underexploited.

Now, over a decade since they were extended to SOCA/NCA, this position has changed. Within the NCA, high-quality cases – relating to national-level organised crime threats or the so-called ‘high end of risk’⁵⁹ – are now becoming the norm. There is also a greater focus, particularly following the enactment of UWOs, on using NCB confiscation as a means of tackling the proceeds of grand corruption, leading to a concentration of cases around high-value assets, particularly in London and southeast England.⁶⁰

From the NCA’s perspective, this broad shift in the use of the powers to combat higher-level criminality is entirely fitting for its wider organisational strategy. However, refocusing the NCA’s approach to NCB confiscation has wider implications which merit consideration.

First, from an anti-corruption policy perspective, the shift towards using the NCA’s NCB confiscation resources represents a valuable deployment of the range of powers available to tackle corruption. However, this rebalancing of the NCA’s NCB confiscation case profile has implications for the proportion of resources left available to tackle the serious and organised crime groups that are more fully and directly embedded in UK society. These groups are likely to have a more direct impact on the UK from both a community cohesion and national security perspective.⁶¹

Second, as the NCA takes on a greater number of corruption cases, its returns under the Asset Recovery Incentivisation Scheme (ARIS)⁶² are likely to diminish, due to the policy imperative of seeking to return looted wealth to the state of origin (see Box 2). Although this is a well-justified policy, it has ramifications for the levels of funding returned to the NCA, thus impacting on the levels of funding available to reinvest in future NCB asset confiscation work. While this research does not find evidence of ARIS returns skewing case adoption decisions in corruption cases, its potential to undermine the wider NCB confiscation resourcing model for the NCA should be considered.

Third, the move to target national-level threats, while a policy choice entirely in line with the NCA’s remit, has significant implications for resourcing of the NCA’s response. These cases are,

59. Although not specifically defined as a term, the NCA’s Annual Plan 2019–20 notes that its operational work will target the ‘high end of high risk’. This model extends to its NCB confiscation strategy. See NCA, ‘Leading the UK’s Fight to Cut Serious and Organised Crime: Annual Plan 2019–20’, <<https://nationalcrimeagency.gov.uk/news/nca-publishes-annual-plan-2019-20>>, accessed 8 May 2019.

60. For example, see Hugo Cox, ‘NCA Focuses on Knightsbridge’s Unexplained Wealth’, *Financial Times*, 22 November 2018.

61. Such as drug trafficking, human trafficking and organised tax fraud.

62. For more information about the current scope of the ARIS regime, see Home Office, ‘Asset Recovery Incentivisation Scheme Review’, February 2015.

by their nature, more resource-intensive, more time-consuming and more heavily contested than cases previously fought by the NCA.⁶³ While they may result, if successful, in higher gains from a financial perspective, they represent a considerable step-up in terms of complexity for the financial investigators tasked with their pursuit. While pockets of long-term experience in the NCA's NCB confiscation cadre exist, these cannot be relied upon in the long term. With the adoption of more complex cases comes the need for reconsideration of the skills and experience mix.

Box 2: Recovery of Corruption Proceeds and ARIS

Under the ARIS scheme, law enforcement agencies and prosecutors are returned a percentage of the monies they recoup from offenders as an inducement to reinvest in further asset-confiscation activity. The amount they receive is dependent on the amount returned to the exchequer at the conclusion of the case.

Whereas in, for example, drug-trafficking cases, the entirety of the monies would be returned to the exchequer, in grand corruption cases, under the terms of the UN Convention Against Corruption (UNCAC), states must seek to return stolen assets to the country of origin. While this is a sound and moral policy imperative, its implications for the amounts available to reinvest in further asset recovery work, under the terms of the UK's ARIS scheme, may be significant.

Source: Author's interview with practitioner, London, March 2019.

Recommendation 2: The NCA should commit to reviewing its NCB confiscation staffing to consider whether the team has in place all of the skills and experience needed to undertake the more complex cases it is now pursuing under its new NCB confiscation case adoption strategy.

Fourth, the NCA's refocus on national and international serious and organised criminality, in line with its remit, leaves a distinct layer of serious and organised criminality untouched by the reach of the powers, particularly OCGs with a regional (rather than national) impact, or those groups which the NCA's limited resourcing preclude them from targeting. These offenders are often the very individuals causing direct and visible harm to the communities in which they live and operate, and against which the powers are often viewed to have the most tangible impact.

Whereas at the inception of the powers the ARA provided a national NCB confiscation function for the whole of law enforcement, this is not the case for its analogous function within the NCA, which increasingly focuses its resources on NCA criminal targets, rather than proactively seeking referrals from the police and other agencies.⁶⁴ This policy is easily justified now that the powers are not solely designated to a single agency. However, in the absence of the CPS

63. And its successor agencies.

64. Author interview with law enforcement official, London, December 2018.

stepping in to fill the gap, this leaves a significant proportion of criminal wealth beyond the reach of NCB confiscation powers.⁶⁵ In short, powers exist to tackle criminal wealth sequestered in the UK economy, however there is minimal capacity to target and confiscate this wealth.

CPS/UK Policing

The Serious Crime Act 2007 extended NCB confiscation to the Director of Public Prosecutions (the head of the CPS) in 2008.⁶⁶ However, in the decade following the extension of the powers, interviews suggest that they have been used in only one case.⁶⁷ The full reasons behind this lack of take-up are unclear. However, the factors explored below – the police–prosecutor divide, the skills gap and cost-risk concerns – go some way to explaining the lack of activity.

The Police–Prosecutor Divide

The police–prosecutor divide inherent in the UK’s policing model today is not a historic legacy but a modern innovation resulting from the 1981 ‘Philips Commission’ report, which lay the groundwork for the creation of the CPS in 1986.⁶⁸

However, this investigator–prosecutor split is no longer the default within the wider economic crime law enforcement landscape, following an influential 1986 report by the Fraud Trials Committee, led by Lord Roskill, which recognised the limitations of this split, particularly in fraud trials,⁶⁹ and made the case for a joint lawyer–investigator investigative process, known as the ‘Roskill model’.⁷⁰

65. The ARA accepted referrals from a broad range of agencies such as the police, HMRC, trading standards, local authorities, and others. Although the NCA does not specifically turn away referrals, in practice this is now a seldom-used route. Author interview with former senior law enforcement official, London, March 2018.

66. Any financial investigator is empowered to use the investigatory tools in Part 8 of POCA to support a civil recovery investigation.

67. Interview with former public prosecutor, London, December 2017 and February 2018.

68. A 1981 report by the Royal Commission on Criminal Procedure (‘Philips Commission’, <<https://discovery.nationalarchives.gov.uk/details/r/C3028>>, accessed 29 May 2019) laid the groundwork for the split of police investigation from the prosecuting arms of the state, ultimately laying the foundations for the establishment of the CPS in 1986. The report noted that it was ‘undesirable’ for police to continue to both investigate and prosecute crime. The Prosecution of Offences Act 1985 therefore established the CPS to take forward prosecutions, with investigations and charging decisions remaining with the police.

69. See SFO, ‘SFO Historical Background and Powers’, <<https://www.sfo.gov.uk/publications/corporate-information/sfo-historical-background-powers/>>, accessed 3 May 2019.

70. Along with the SFO, the Financial Conduct Authority and the Competition and Markets Authority have adopted aspects of the Roskill model within their operating structures.

Elements of the Roskill model were adopted as the operating model for the ARA and continue in its successor function in the NCA. The litigation-heavy nature of NCB confiscation means that a joint lawyer–investigator model for leading investigations is essential.

The need to adopt a lawyer–investigator model to drive forward CPS adoption of NCB confiscation is even more clear: while the CPS is legislatively empowered to use NCB confiscation powers, it does not have investigative resources of its own to carry out the underlying investigation and would be reliant on police financial investigators to undertake the underlying investigative work in support of a civil recovery claim.

A solution to this may be self-evident. ROCUs, of which there are nine, formally entered the policing landscape in 2013 (subsuming the Regional Asset Recovery Teams that had existed since 2004), heralding a new range of collaborative, multi-force and multi-agency specialist capabilities at the regional policing tier.⁷¹ CPS proceeds of crime lawyers are already co-located with police counterparts within these structures.

ROCUs have continually developed new capabilities, new technology and a better understanding of investigative methodologies and opportunities in line with the emerging threat. Following renewed interest in NCB confiscation following the implementation of UWOs, the Home Office has approved the funding of a short-term pilot project to implement NCB confiscation at the ROCU level.⁷² However, short-term pilot funding does little to embed a long-term sustainable capability at the regional level.

Recommendation 3: NCB confiscation should be adopted as a formal ROCU capability.

Skills and Experience

Structural reforms in isolation are not the solution, however. Although the investigative tools used by criminal and civil confiscation financial investigators are largely analogous,⁷³ it is here that the similarity ends. The norms of the civil sphere of law and rules of evidence can feel like an alien world to the seasoned criminal prosecutors of the CPS and police financial investigators.

This research finds a renewed appetite for NCB confiscation in both the police and CPS, driven in part by the increased awareness of NCB confiscation following the implementation of the UWOs, but also by a recognition that the scale of organised criminality requires a disruption-focused approach rather than one focused solely on criminal prosecution.⁷⁴ Nonetheless, there is a considerable skills gap as regards civil litigation, which means that embedding the powers

71. For more information on ROCU capabilities, see HM Inspectorate of Constabulary, *Regional Organised Crime Units: A Review of Capability and Effectiveness* (London: HMIC, November 2015).

72. Author telephone interview with law enforcement official, May 2019.

73. The investigative tools housed in Part 8 of POCA can be used for both criminal and civil investigations.

74. Author interview with ex-senior police officer, London, March 2019.

into the broader response to tackling serious and organised criminality will not be easy. The recruitment of experienced private sector civil litigators will be essential.

Recommendation 4: The Home Office should provide additional funding to the CPS Proceeds of Crime Division and to the ROCU network to recruit and train a network of NCB confiscation specialists. This funding should run for a minimum of three years to aid recruitment.

Cost Risks

Finally, although difficult to prove on an empirical level, at a time of extreme constraints on the public purse – cuts that have fallen particularly hard on the CPS budget⁷⁵ – it is intuitive to assume that prosecutors may be less willing to actively pursue the use of a notoriously litigious tool to avoid taking on the considerable cost risks should the case fail. Whereas in a criminal case the CPS is not liable to pay the defendant's costs where the defence prevails,⁷⁶ in NCB confiscation 'enforcement authorities' (including the CPS) are subject to potentially substantial costs orders in cases in which they are unsuccessful in gaining a CRO. Offering some comfort to enforcement authorities around cost risk may go some way towards supporting greater use of the powers.

Recommendation 5: The government should ring-fence a proportion of asset confiscation receipts each year to act as a contingency fund for unexpected litigation and costs associated with NCB confiscation.

Impact of the Unexplained Wealth Order

The government has expended a large amount of political capital in publicising the UWO as a means of supporting the expansion of an asset-focused approach to tackling serious criminality.⁷⁷ Introduced by the Criminal Finances Act 2017, UWOs act as an additional investigative tool available to the NCB confiscation investigator, who can apply to the High Court for a UWO in relation to property over the value of £50,000 where the respondent is a politically exposed person (PEP) or suspected to be involved in serious criminality, and there are 'reasonable grounds for suspecting that the known sources of the respondent's income would have been insufficient for the purposes of enabling the respondent to obtain the property'.⁷⁸

75. Owen Bowcott, 'Further CPS Cuts Impossible as Workload Grows, Says New Boss', *The Guardian*, 4 December 2018.

76. In these cases the defendant has recourse to 'central funds', see UK Government, 'Guidance: Claims Made out of Central Funds', last updated 15 June 2018, <<https://www.gov.uk/guidance/claim-back-costs-from-cases-in-the-criminal-courts>>, accessed 8 May 2019.

77. Home Office and Ben Wallace, 'UK at the Forefront of International Efforts to Tackle Corruption', 12 December 2018, <<https://www.gov.uk/government/news/uk-at-the-forefront-of-international-efforts-to-tackle-corruption>>, accessed 21 March 2019.

78. POCA, Section 362B(3), as inserted by the Criminal Finances Act 2017 (UK).

Discussing the relative value of the UWO in detail sits outside the scope of this paper.⁷⁹ However, its role in prompting the wider use of NCB confiscation as a tool in the UK's fight against serious and organised crime merits consideration.

Practitioners interviewed for this research have found that, although a useful additional tool to the investigator (particularly in overseas corruption investigations), and a useful lever to promote respondent cooperation in NCB confiscation,⁸⁰ UWOs are likely to remain a niche tool only suitable for a handful of cases.⁸¹ There are a number of reasons for this.

First, the necessarily strict parameters of the legislation mean that only a limited subset of cases meet the evidential threshold to apply for a UWO.⁸² Whereas it may be relatively straightforward to demonstrate a disconnect between a PEP's salary and the value of their assets, this is not always the case for organised criminality, which is frequently mingled with legitimate (or ostensibly legitimate) business and where the intelligence case to prove a disparity may come from covert sources.

Second, the value of the UWO, as opposed to other investigatory orders, such as the Disclosure Order,⁸³ was raised by interviewees in this research. Whereas both compel the respondent to hand evidence to the investigator, compliance with the UWO compels the enforcement authority to submit its claim to the High Court within 60 days of compliance, where there is a freezing order in place.⁸⁴ This places an onerous and possibly unrealistic time burden on the enforcement authority where there is a need to gather evidence to refute a claim set out in a response, particularly where the necessary evidence lies overseas. As such, it limits the instances in which the UWO is the most appropriate investigatory tool in an NCB confiscation investigation.

Recommendation 6: UWO provisions should be amended to allow enforcement authorities to apply to the courts for a moratorium of up to an additional 120 days following responses to a UWO to allow for further evidence gathering where necessary.

79. For more information on UWOs, see Florence Keen, 'Unexplained Wealth Orders: Lessons for the UK', *RUSI Occasional Papers* (September 2017).

80. Since the imposition of the UWO, NCB confiscation investigators are finding that some respondents are more willing to hand over requested information voluntarily to avoid the spectre of a UWO and the media attention this brings.

81. Author interview with senior law enforcement practitioner, London, December 2018.

82. Under UWO provisions in the Criminal Finances Act 2017, the court must be satisfied that there are 'reasonable grounds to suspect' that the subject of the UWO is either a 'politically exposed person' or is involved in 'serious crime'. As of May 2019 only two individuals had been issued with UWOs, author interview with senior law enforcement practitioner, London, April 2019 and NCA, 'NCA Secures Unexplained Wealth Orders for Prime London Property Worth Tens of Millions', 29 May 2019, <<https://www.nationalcrimeagency.gov.uk/news/nca-secures-unexplained-wealth-orders-for-prime-london-property-worth-tens-of-millions>>, accessed 5 June 2019.

83. POCA, Section 357.

84. *Ibid.*, Section 362D(3).

Conclusion

Rolling out NCB confiscation powers to a broader constituency of prosecuting authorities in 2008 was intended to ensure that they became part of the mainstream toolkit available to tackle serious and organised crime in the UK.

However, this research finds that the intention has not been meted out in practice, with a lack of CPS (and police) uptake of the powers. This has left a considerable gap in the NCB confiscation capability available to tackle regionally and locally impacting criminality. The government has frequently lauded the UWO in the discourse around serious and organised criminality as a solution, appearing to imply that the new tools fix the broader problems of capacity and capability in the system. In doing so, they are misguided.

Whereas as yet unimplemented pilot projects are a move in the right direction, they do not create the long-term sustainable capacity needed to bring the powers to bear against a broader range of organised criminality operating in the UK. This paper strongly advocates for a new strategy for NCB confiscation which includes a plan for building a longer-term sustainable capacity and a joint police–prosecutor model at the ROCU level.

III. Learning from International Examples

THE FINDINGS ABOVE reveal the fundamental capacity and capability barriers to deploying NCB confiscation on even the most rudimentary scale in the UK. However, this research notes that many other jurisdictions have taken their use of the powers beyond the rudimentary into the mainstream. Looking at the models adopted by others provides useful lessons for the UK. This research selected three countries for consideration – the Republic of Ireland, South Africa and the US – all fellow common-law jurisdictions, two of which were chosen as comparison jurisdictions in the original PIU report in 2000⁸⁵ and which are well documented in the available academic literature as examples of mainstream users of NCB confiscation.⁸⁶

This chapter aims to stimulate discussion between policymakers and practitioners on ways to prime the UK response. It does not seek to provide a definitive guide to the NCB confiscation regimes of the countries in question, this being outside of the scope of this paper and already well covered by others.⁸⁷

The Republic of Ireland

The Irish model of NCB confiscation is frequently used as an example of best practice; in fact, the Irish experience was cited by a number of interviewees as a catalyst for the UK's adoption of the powers.⁸⁸ The following factors may be key to the central role played by NCB confiscation in the Irish strategy for tackling serious and organised criminality.

85. PIU, 'Recovering the Proceeds of Crime', p. 35.

86. Simon N M Young (ed.), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Cheltenham: Edward Elgar Publishing, 2009).

87. This research recognises that none of the NCB confiscation regimes examined are without flaws. For a comprehensive legal analysis of the differing models of NCB confiscation, see Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders: Prepared for the US Department of Justice, National Institute of Justice', 31 October 2011, <<https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf>>, accessed 3 May 2019.

88. Author telephone interview with ex-ARA staff member, January 2018; author telephone interview with ex-ARA lawyer, February 2018.

Broad Public and Political Support

The catalyst for the implementation of the Irish regime was the high-profile murder of journalist Veronica Guerin and an Irish Garda officer by organised criminals in the early 1990s.⁸⁹ The subsequent public outcry at the perceived impunity of the Irish organised crime fraternity led to a broad base of public and political support for the implementation of the Proceeds of Crime Act 1996 and the establishment of the Criminal Assets Bureau (CAB).

This support, which continues broadly to this day, is deemed to be one of the factors behind the success of the CAB; whereas the average person in the UK is largely unaware of NCB confiscation, the CAB is a known and feared brand in the Republic of Ireland, with support across political divides. An interviewee has suggested that this has contributed to a stability of resourcing since the CAB's establishment, insulating it from broader public sector cuts.⁹⁰

Removal of Perverse Incentives

Linked to the level of public legitimacy afforded to the CAB is its case selection. The lack of an 'incentivisation' scheme⁹¹ in the Irish model means that case decisions are based upon risk and threat and uninfluenced by the budgetary implications of pursuing low-value/high-community impact cases.

This case selection process means that the CAB is as likely to target a drug dealer's £50,000 home as their £1 million bank account, and indeed interviews suggest⁹² that much of the CAB's work is focused on targeting the assets of criminals plaguing a local community, to visibly demonstrate to the wider community that 'crime doesn't pay'.

The Multi-Agency and Multi-Disciplinary Approach

The CAB's success is frequently attributed to its multi-agency approach, which co-locates officers from the police, revenue and social welfare authorities. All CAB officers have the powers of all three agencies,⁹³ and all cases are investigated from an NCB confiscation, tax and social welfare perspective from the start (rather than in a hierarchical fashion), with no presumption as to which route will eventually be used to target the asset.

This approach has facilitated greater collaboration, a default assumption of information sharing and fewer issues regarding admissibility or evidence. The ease of inter-agency information

89. Harrison Tenpas, 'The Incredible and Tragic Story of Veronica Guerin, the Journalist Murdered by Irish Drug Lords', *The Ranker*, undated, <<https://www.ranker.com/list/story-of-murdered-irish-journalist-veronica-guerin/harrison-tenpas?page=2>>, accessed 9 May 2019.

90. Author telephone interview with CAB official, January 2019.

91. All funds are returned directly to the exchequer.

92. Author telephone interview with CAB official, January 2019.

93. Criminal Assets Bureau Act 1996 (UK), Section 8 (6)(a).

sharing under this model in particular is frequently cited as core to the CAB's success, including access to social welfare data, which is often key to establishing familial and locational links within crime groups. Furthermore, the CAB has trained a cadre of asset profilers sitting outside the agency within Irish policing to identify new cases for CAB attention.

The Art of the Deal

Linked to the Republic of Ireland's multi-agency approach is a greater role in the Irish system for deal-making. The ability to gather evidence to support three separate interventions against the same asset/individual gives the CAB a strong hand in approaching the respondent with several levers to increase cooperation.

For example, the respondent may consent to paying a substantial tax bill from cash in the bank if the CAB agrees to stay the proceedings against the property (thus saving the CAB investigatory time) or to drop a social welfare fraud case if the respondent agrees to a consent order against the property.⁹⁴

This deal-making approach allows the CAB more flexibility in cases that have less direct community impact, freeing up resources to target and litigate a more hardline approach against the more publicly visible wealth of a community-based criminal. The lack of strict hierarchical guidance (as compared to the UK)⁹⁵ on the relative merits of pursuing criminal wealth via criminal, civil or other routes is a key facilitator of this more flexible approach.

Lessons to Learn for the UK

Although this research accepts the difficulty in translating an operating model fit for purpose in a country with a population of 5 million to a more populous and financially complex system, such as the UK's, it finds much to be learned from the Irish example.

Political and Public Support

Clear ongoing public support for the use of NCB confiscation in the Republic of Ireland can be, in some ways, linked to the CAB's proactive and highly public promotion of the powers in the media. This public support has, in turn, translated into cross-party political awareness and support, thus protecting CAB budgets and staffing levels.

94. Under the Proceeds of Crime Act 1996 (Ireland) an 'interlocutory order' freezes property for a minimum of seven years before the property can be forfeited, unless the respondent consents to its confiscation.

95. The use of asset-confiscation powers by UK prosecuting authorities in the round is dictated by the Attorney General's guidance under Section 2A of POCA (commonly known as the 'hierarchy of powers'), which, although becoming ever more flexible, gives a distinct preference to the use of criminal over civil interventions.

Recommendation 7: Under a refreshed Asset Recovery Action Plan the Home Office, working with enforcement authorities, should lead a strategic communications campaign to raise public and political awareness of NCB confiscation and its associated strengths.

Multidisciplinary Approaches

To an extent, the NCA's model for NCB confiscation has replicated the Irish model, with embedded tax inspectors and hybrid tax and NCB confiscation settlements a strong feature. The NCA also houses the multi-agency National Economic Crime Centre (NECC),⁹⁶ which offers the NCA's NCB confiscation team access to a range of cross-government information on a needs basis.

However, the rolling out of NCB confiscation to the ROCU network, as proposed in this paper, cannot assume the same levels of information access. In particular, policing interviewees in this research cited difficulties in obtaining access to Department for Work and Pensions data due to data-sharing restrictions. Given that the NECC benefits from a multi-agency approach, has been charged by ministers with promoting the use of UWOs,⁹⁷ and can avail itself of the NCA's wide information-sharing gateways,⁹⁸ it is potentially well-placed to support the ROCUs in information-gathering in relation to NCB confiscation.⁹⁹

Deal Making

In contrast to the Irish model, the UK's approach to NCB confiscation has traditionally been to pursue a high-minded policy of litigating up to the court steps rather than taking a more commercially minded and flexible approach to settlement. While the policy rationale for this is well argued – a hardline approach sends a tough message to wider criminality – it brings with it a significant opportunity cost in terms of cases not pursued due to the resource burden of fighting on.

Recommendation 8: The NCB settlement policies of enforcement agencies should consider the opportunity cost of a hardline approach to settlements alongside other factors.

Perverse Incentives

Evident in the mindset of the CAB officer is the focus on community impact and harm reduction over revenue implications. It is clear that the absence of a financial incentivisation system

96. The NECC is a multi-agency unit based within the NCA. It was established in December 2018 to coordinate the law enforcement response to economic crime.

97. NCA, 'National Economic Crime Centre Launched', <<https://www.nationalcrimeagency.gov.uk/news/national-economic-crime-centre-launched?highlight=WyJuZWNjIl0=>>, accessed 23 April 2019.

98. Section 7 of the Crime and Courts Act 2013 gives NCA officers broad permission to disclose information in furtherance of the NCA's permitted purposes.

99. Author interview with ex-senior police officer, London, March 2019.

and a historic lack of financial performance targets is key to this.¹⁰⁰ This cannot be said for the UK system, where, particularly since the onset of police austerity, there is potential for consideration of ARIS returns to impact on case selection¹⁰¹ in both the criminal and civil realms. Government officials¹⁰² note an intention to review the operation of the ARIS scheme, which this paper urges should include consideration of the potential to scrap the scheme in favour of a more systemic use of returned funds to fund broader capacity-building programmes of activity across the system as a whole.

South Africa

The factors attracting business and tourism to South Africa in the immediate post-apartheid period from the mid-1990s onwards were the same as those attracting OCGs, who quickly availed themselves of the favourable business and shipping infrastructure, language and climate.¹⁰³

In response, the South African government introduced the Prevention of Organised Crime Act 1998 which, among other things, introduced NCB confiscation and laid the groundwork for the establishment of the Asset Forfeiture Unit (AFU) within the National Prosecuting Authority of South Africa (NPA) office in 1999.

NCB confiscation was quickly embedded into the response to serious and organised crime. Research interviews suggest that NCB confiscation is frequently the confiscation tool of choice in South Africa,¹⁰⁴ partly due to wider weaknesses in the criminal justice system, but also due to the factors set out below.

Clear Purpose and Priorities

It is notable that NCB confiscation was legislated for under the Prevention of Organised Crime Act 1998. Whether intentional or not, this legislative ‘badging’ of NCB confiscation as an organised

100. At the outset, POCA performance was led by financial targets, in both the criminal and civil realms. The unintended consequences of a target-driven system for a criminal justice response soon became clear and targets were scrapped in the late 2000s.

101. The inference being that the police, in a time of financial crisis, are more likely to take on easy-to-win, high-value cases, which return them a higher proportion of ARIS funding, rather than higher-impact but lower-value cases. There is currently no empirical data to support this theory. However, author interviews with police officers in January 2019 in London suggest that this may be happening in practice.

102. Author interview with government policy officials, London, May 2019.

103. For further information on the growth of organised crime in South Africa, see Kholofelo A Mothibi, Cornelius J Roelofse and Atlas H Maluleke, ‘Organised Crime in South Africa Since Transition to Democracy’, *Sociology and Anthropology* (Vol. 3, No. 12, 2015), pp. 649–55.

104. Author telephone interview with South African AFU official, January 2019.

crime tool (as opposed to a proceeds of crime tool)¹⁰⁵ placed the powers firmly in the minds of prosecutors as a mainstream tool in the fight against organised crime, rather than being viewed (as it frequently is in the UK) as a tool merely for dealing with financial crimes such as money laundering and fraud.

Furthermore, the AFU was established with a clear mandate and purpose to 'build the capacity to ensure that asset forfeiture is used as widely as possible to make a real impact in the fight against crime'.¹⁰⁶ This allowed the AFU to focus its resources against the major crime figures on the NPA's 'most wanted' list.

This immediate focus on targeting the powers at the top tier of criminality ensured that limited resources were targeted effectively towards the criminal networks against which they would have the most visible impact.

Targeted Outreach

Identifying appropriate cases to take forward for NCB confiscation can be a challenge in the initial stages of identification and case implementation.¹⁰⁷ Siting the AFU within the wider prosecutorial structures is said to have had a distinct advantage in this regard; whereas standalone NCB forfeiture units are forced to rely on the willing cooperation of others, embedding the powers within a wider structure means cooperation is mandated from above.

To enhance the mainstreaming of the powers into the wider prosecutorial response, the AFU established a dispersed (rather than fully centralised) model, with AFU officers sitting alongside officers in regional NPA offices. Interviewees suggest that this targeted outreach model also helps to increase knowledge and understanding of the powers among non-specialist staff.¹⁰⁸

Furthermore, in recent years the AFU has commenced a programme of seconding members of the South African police service into the unit on a rolling basis to ensure cases are identified at an earlier stage and information is more routinely shared between police and prosecutors.

Acceptance of Risk

South Africa entered its NCB confiscation journey with its eyes open – it accepted from the start that NCB confiscation would, by its nature, court a legal war of attrition as cases pushed the

105. In the UK, POCA tools writ large have suffered from a perception that they are solely a tool for use in financial crime, fraud, money laundering and asset recovery, rather than a broader tool for tackling serious and organised crime.

106. National Prosecuting Authority of South Africa (NPA), 'Asset Forfeiture Unit', <www.npa.gov.za/node/13>, accessed 9 May 2019.

107. This was an initial challenge for ARA, who were dependent on case referrals from UK law enforcement partners.

108. Author telephone interview with South African AFU official, January 2019.

boundaries of conventional legal practice. On this basis, far from setting unrealistic, politically driven financial targets (as the UK did), the AFU was created with a mandate ‘to develop the law by taking test cases to court and creating the legal precedents that are necessary to allow the effective use of the law’,¹⁰⁹ thus giving the AFU the political backing it needed to accept risk and tackle it head on.

Lessons to Learn for the UK

Clear Purpose

From the beginning, NCB confiscation in South Africa had a clear place in the fight against serious and organised crime. While the NCA is now directing these powers against its top targets, the lack of a clear UK-wide strategy for the powers’ use in other agencies is evident. It is notable that the *Serious and Organised Crime Strategy 2018* only mentions NCB confiscation powers in the context of newly implemented powers, such as UWOs. The creation of the Serious and Organised Crime Inter-Ministerial Group in 2018¹¹⁰ offers an opportunity to give cross-departmental focus to the role of NCB confiscation in the broader response to serious and organised crime.

Recommendation 9: The Serious Organised Crime Inter-Ministerial Group should mandate officials to mainstream NCB confiscation into the broader strategic response as part of the *Serious and Organised Crime Strategy 2018* response.

Targeted Outreach

Research suggests that knowledge of NCB confiscation remains limited in the wider policing community, even within specialist units.¹¹¹ The lack of a concerted outreach plan is evident, thus limiting the powers’ potential as a tool against serious organised criminality. The suggested roll-out of NCB confiscation into the ROCU network provides an opportunity to increase awareness.

Recommendation 10: The roll-out of NCB confiscation to the ROCUs should be accompanied by a programme of awareness raising within policing (specifically to Chief Constables) and to Police and Crime Commissioners, led by the National Police Chiefs’ Council Financial Crime Portfolio.

Acceptance of Risk

The inherently litigious nature of NCB confiscation means that any case adoption carries an unquantified level of risk. As such, as noted above, without contingency budgetary support, case adoption by the CPS is likely to be tempered, at least on a subconscious level, by concerns about potential costs orders should cases be unsuccessful. Offering contingency budgetary

109. NPA, ‘Asset Forfeiture Unit’.

110. The Serious and Organised Crime Inter-Ministerial Group involves secretaries of state from the National Security Council and the Social Reform Committee.

111. Author interview with ex-senior police officer, London, March 2019.

support, as recommended earlier in this paper, will allow the CPS to increase its risk appetite to take on cases of merit.

The US Example

The US has traditionally been viewed as the ‘driver’ of NCB confiscation globally and is certainly its most prolific user; a 2018 paper notes that NCB confiscation accounts for roughly half of the assets confiscated under the US federal asset forfeiture programme.¹¹² This is, in part, due to the country’s long and established history and culture of NCB confiscation, stemming from 18th-century powers implemented to protect the US from piracy.¹¹³ This strong history has embedded NCB confiscation as a mainstream part of the US asset-confiscation approach – interviewees even suggest that NCB confiscation is often the tool of choice even where a criminal conviction has been obtained, based on the fact that legal skills and experience in US asset confiscation have traditionally coalesced around the civil, rather than the criminal, sphere of law.¹¹⁴

A Tale of Controversy

Despite its prolific and established use, the use of NCB confiscation in the US is not without controversy; the perceived disproportionate use of the tools from the 1990s onwards, particularly at state (as opposed to federal) level, led to widespread public and political criticism and ensuing legislation in the form of the Civil Asset Forfeiture Reform Act 2000 (CAFRA), which, among other things, raised the evidentiary bar for NCB confiscation in the US.¹¹⁵

112. Stefan D Cassella, ‘Nature and Basic Problems of Non-Conviction Based Confiscation in the United States’, 20 May 2018, <<https://assetforfeiturelaw.us/?p=1641>>, accessed 4 April 2019. In 2018, \$1.4 billion was deposited into the US Department of Justice’s Asset Forfeiture Fund – it is not clear what exact proportion of this was related to NCB confiscation, but by Casella’s estimates it would be around half. See US Department of Justice, ‘FY2018 Asset Forfeiture Fund Reports to Congress’, <<https://www.justice.gov/afp/fy2018-asset-forfeiture-fund-reports-congress>>, accessed 3 May 2019.

113. Jeffrey Simser, ‘Perspectives on Civil Forfeiture’, University of Hong Kong, 2008, <http://siteresources.worldbank.org/INTTHAILAND/Resources/333200-1089943634036/475256-1201245199159/2008Mar-asset_recovery-civil-forfeiture.pdf>, accessed 3 May 2019. Although it should be noted that these laws originally focused on the instrumentalities of crime. Amendments to legislation in the 1970s and 1980s extended NCB confiscation to proceeds.

114. Author telephone interview with Stefan D Cassella, US asset forfeiture law expert, January 2019.

115. The Civil Asset Forfeiture Reform Act 2000 amended chapter 46, title 18 of the United States code to insert Section 983, which raised the required level of proof from ‘probable cause’ to the higher level of ‘preponderance of evidence’.

The continuing political and public controversy surrounding the US NCB confiscation experience¹¹⁶ serves as a sobering lesson on the need to ensure the proportionate use of the powers. Nevertheless, this research identifies a number of positive aspects of the US system, which have supported its use as a mainstream tool when used in a proportionate fashion.

Flexibility of Legal Pathway

One of the key strengths identified in the US system is the flexibility and interoperability of the criminal and civil confiscation regimes, whereby the investigator need not decide at the outset whether the eventual case will be handled through the criminal or civil jurisdiction.

The flexibility inherent in the US confiscation model is, in large part, a facet of the US's combined criminal and civil court structure¹¹⁷ and asset-based criminal confiscation regime,¹¹⁸ which is in stark contrast to the UK, where criminal and civil courts are separate and have distinct cultures and rules of evidence. However, in common with the other jurisdictions examined, this flexibility is also based on the lack of presupposition of the primacy of the criminal confiscation route, in contrast to the UK's more rigid approach set out in primary legislation and the Attorney General's guidance.¹¹⁹

Tools to Reduce Litigation

Deal Cutting

The US criminal justice approach, writ large, has a strong culture of deal cutting, with plea bargaining being an established and central feature.¹²⁰ This culture extends to the NCB confiscation realm, whereby the regime's more aggressive use of deal making and external levers encourages settlement rather than protracted litigation. For example, there are some limited examples of the use of Deferred Prosecution Agreements (DPAs) in which one of the terms is the non-contesting of a civil forfeiture claim.¹²¹

116. Nick Sibilla, 'Congressman Slams Civil Forfeiture as "A Series of Government Shakedowns"', *Forbes*, 11 January 2019.

117. US courts hear both criminal and civil cases.

118. Whereas the UK criminal confiscation regime is a debt-based system, which does not confiscate assets per se.

119. Section 2(a) of POCA makes statutory provision for the issuing of guidance regarding the use of the powers by the Attorney General in England and Wales or the Advocate General in Northern Ireland. Section 2(a) (4) notes that the guidance 'must indicate that the reduction of crime is in general best secured by means of criminal investigation and criminal proceedings'.

120. See *The Economist*, 'The Troubling Spread of Plea-Bargaining from America to the World', 9 November 2017.

121. For example, see US Department of Justice, 'Deferred Prosecution Agreement with Science Applications International Corporation', 8 March 2012, <<https://www.sec.gov/Archives/edgar/data/353394/000119312512114121/d315165dex101.htm>>, accessed 29 May 2019.

Fugitive Disentitlement Provisions

Proponents of NCB confiscation often support their position by appealing to the need for a tool to deal with the assets of defendants whose absence from the jurisdiction prevents a criminal prosecution from proceeding. To support cases of this nature, the US has gone further under CAFRA in implementing provisions that ‘disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action’¹²² in cases where individuals refuse to return to face criminal charges in US courts. In effect, these provisions allow the state to put its case to the courts without having to face protracted litigation from a respondent who has fled the jurisdiction to avoid criminal charges. This both limits litigation from this category of respondents and offers levers to persuade offenders to return to the jurisdiction to defend their case.¹²³

Lessons to Learn for the UK

Flexibility of Pathway

The continuing presupposition of the criminal route within the UK’s POCA legislation, following through into the Attorney General’s guidance,¹²⁴ in part conspires to keep NCB confiscation as a niche and under-used tool. Although this guidance has become more flexible over time,¹²⁵ the inherent inflexibility contained in the enabling legislation impacts on both decision making and the prosecutorial mindset as regards NCB confiscation.

Recommendation 11: The government should remove the presumption of the primacy of the criminal confiscation route under Section 2(a) of POCA to mirror the more flexible approach of the US, the Republic of Ireland and South Africa.

122. Cornell Law School Legal Information Institute, ‘US Code 28, Part VI, Chap. 163, Section 2466. Fugitive Disentitlement’, <<https://www.law.cornell.edu/uscode/text/28/2466>>, accessed 3 May 2019.

123. Notable cases in which these provisions have been invoked include the Camelot Cancer Care Inc. case, see *United States of America vs. Real Property Commonly Known as 7208 East 65th Place, Tulsa, Oklahoma, et al.*, ‘Motion to Dismiss Claims and Answers Filed by Maureen Long and Camelot Cancer Care, Inc.’, United States District Court for the Northern District of Oklahoma, 15-CV-324-GKF-TLW, 17 March 2016.

124. Attorney General’s Office, ‘The Proceeds of Crime Act 2002, Guidance under Section 2(a)’, January 2018, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678293/2018_01_s2A_Guidance.pdf>, accessed 9 May 2019.

125. Previous iterations of the guidance in 2009 and 2012 held more firmly to the notion that the criminal route should have primacy.

Tools to Reduce Litigation

Making a deal with the opposition on the court steps is not entirely anathema to the UK's prosecutorial traditions, but is perhaps less culturally ingrained and more strictly governed in the UK system than in the US.¹²⁶ That said, the formalisation of assisting offenders' provisions under the Serious Organised Crime and Police Act (SOCPA) 2005,¹²⁷ and the introduction of DPAs against corporate persons in the Crime and Courts Act 2013, demonstrate a greater acceptance of deal making as part of the mainstream criminal justice response.

Extending this shift to the NCB confiscation realm and learning from a more pragmatic approach to deal making from the US example would do much to limit litigation and thus increase capacity to take on a greater number of cases. As previously noted, greater flexibility in enforcement authority settlement policies may be a way of achieving this.

Furthermore, although only applicable to a minority of cases, there is an argument to be made that the UK should consider replicating the US's fugitive disentitlement provisions.¹²⁸

Recommendation 12: The government should consult on whether fugitive disentitlement provisions are appropriate for adoption in the UK.

Findings – The International Perspective

With well-established systems in place in many other countries, it is within the UK government's gift to cherry-pick from the experience of others to prime and significantly grow their NCB confiscation response. This short study identifies several themes, the most important of which are distilled below.

First, communication is key. The UK government, the NCA, national agencies and the NPCC could do more to highlight the use of NCB confiscation to a public, parliamentary and policing audience as a means of increasing awareness and support for its use.

Second, strategy is essential. The UK government needs to place the tools within their rightful context – that of a tool for tackling serious organised crime – through advocating for their greater use in a meaningful Asset Recovery Action Plan and through greater ministerial engagement.

126. See Attorney General's Office, 'The Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise', 30 November 2012, <<https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise>>, accessed 14 March 2019.

127. SOCPA served to extend and formalise the common-law concept of 'turning Queen's evidence'.

128. Although this research recognises that these powers will only be applicable in a limited number of cases.

Third, collaboration is vital. The future roll-out of the powers within UK policing should include a multi-agency response within its scope and ensure that outreach structures to police forces are included in the plan.

Fourth, flexibility is necessary, whether in terms of the approach to deal making, the primacy afforded to criminal routes or the inter-operability of the criminal and civil approach to tackling dirty assets. Rigidity in the use of the powers will only serve to keep the powers in their (currently limited) place.

Conclusion

THE EXTENT TO which serious and organised criminals are increasingly using borders, corporate vehicles and complex money-laundering schemes to distance themselves from their day-to-day operations means that there is a stronger need to adopt an approach that focuses on undermining a criminal business model, rather than simply tackling an individual in isolation. In line with this, an asset-focused approach has merit as a means of reducing the criminal capital available to continue doing business.

Furthermore, given the necessary constraints¹²⁹ of a prosecution-focused approach, growing awareness of the scale of organised criminality and continuing policing and prosecutorial austerity, adopting approaches that make the best use of resources via a disruption-focused approach are a necessity. In short, given the limited ability of law enforcement to arrest its way out of the problem, NCB confiscation is a means of demonstrating to a frustrated public that these individuals remain within the reach of the law.

For this reason, this paper makes the case for a more defined place for NCB confiscation in the fight against organised crime in the UK. That the powers have failed to take their place in this response to date, at least on any great scale, undermines the justification given to Parliament in the passage of the POCA – the argument that the powers were a necessary response to the growing problem of organised crime.

At a strategic level, this unfulfilled promise can be traced back to a lack of leadership from the Home Office since the disbandment of the ARA in 2008, the continued absence of a meaningful Asset Recovery Action Plan and the lack of specificity on the role of NCB confiscation in the *Serious and Organised Crime Strategy 2018*.

At an operational level, it can be traced back to the lack of capacity and capability in the law enforcement and criminal justice response. Although it has been a long time coming, the NCA's deployment of its own NCB confiscation resources against the 'high end of high risk' marks a step-change in its deployment of these tools. However, this refocusing on nationally and internationally impacting criminality (that which is within the NCA's purview) leaves questions regarding the ability of the NCA to deal with this more complex caseload. It also further exacerbates the considerable capacity and capability gap left by the ARA in relation to the deployment of the powers against ROCU and local policing targets.

129. The extent to which the criminal law necessarily protects the individual from miscarriages of justice and wrongful removal of liberty, through the higher burden of proof and the criminal law disclosure regime.

This paper does not propose reinventing an ARA-style central body, but recommends that ROCUs formally fill this gap. This can be achieved through adding NCB confiscation as a formal ROCU capability, providing long-term sustainable funding and training specialist CPS and financial investigators in NCB confiscation. To do this requires central government investment and budgetary comfort to increase CPS risk appetite.

Building sufficient capacity and capability, however, will not solve the problem; more is needed to ensure NCB confiscation is embedded as a core tool in the fight against serious and organised crime. The experiences of other countries offer ample examples of ways in which the powers have been deployed to greater scale and effect, through political support and strategic focusing, increased multi-agency working and greater flexibility and pragmatism as regards target selection and deal making.

In summary, ensuring the tools are used to optimal effect will take focus, time and resources. Any inference that UWOs alone provide a shortcut to expanding the use of the broader NCB confiscation toolbox are misguided. Bringing the use of the powers to bear against the full range of UK and overseas criminality impacting on the UK's national security requires a significant shift in thinking if the tool is to become the feared sanction that it has become in Ireland.

In the next few years, a more visible use of the tools by the NCA is likely, as it targets high-profile figures and corrupt elites via its cadre of trained NCB confiscation specialists. If they are successful, a higher level of financial returns via this route may be observed. However, the government should exercise caution in conflating increased revenue with increased impact. Without a central plan for expanding both capacity and capability and a strategy to ensure that they are deployed against the most dangerous echelons of serious and organised criminality, the tools' impact will remain limited.

In short, as noted by Kennedy, 'the effectiveness of civil recovery must also be considered in terms of not just how much money it removes but from whom it is removed'.¹³⁰

130. Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds', pp. 8–23.

About the Author

Helena Wood is an independent consultant in financial crime and asset confiscation and an Associate Fellow at RUSI, with research interests in the UK's activity under the Proceeds of Crime Act 2002 as a means of tackling serious and organised crime. Prior to moving into consultancy in 2015, she held a number of roles in UK government and law enforcement, including at the National Crime Agency, Assets Recovery Agency, HM Treasury, and the Charity Commission.