

Examining attrition in confiscating the proceeds of crime

Karen Bullock, David Mann, Robert Street, and Cris Coxon

This study sought to identify the extent of attrition (financial loss) in the confiscation order process and why it occurs.

The study found that although the majority of cases experience little or no attrition, there is significant monetary attrition in the confiscation order system. However, much of the overall 'loss' shown by the statistics is artificial and stems from the operation of the Proceeds of Crime Act (POCA) (2002) – in particular, the broad assumptions that can be applied in the calculation of criminal benefit. Policy makers should therefore be aware of the distinction between this 'procedural attrition' and attrition that represents a true loss – in particular that which occurs during enforcement of orders.

The study found positive evidence showing the value of POCA in recovering criminal assets. Nevertheless, there are areas where action could be taken to improve the confiscation process and the amount it recovers.

- *Greater clarity about the scope of POCA's use:* further consideration of how asset recovery resources are best used. The more numerous lower value cases suffer little collective attrition but contribute relatively modest amounts to the overall sums

recovered. In contrast, higher value cases suffer high rates of attrition but contribute most to the total recovered. Consideration should be given to the relative allocation of resources to cases targeted for confiscation.

- *A promotion of a more systematic and strategic approach to the use of confiscation:* more methodical and systematic sifting of cases to ensure that potential confiscation opportunities are not lost, and for strategies to be adopted for revisiting cases where the sums recovered have fallen short of expectations.
- *Improving co-ordination:* ensuring that the asset recovery system is joined up, and that all co-operation and communication opportunities between agencies are being taken.
- *The role of restraint orders:* developing best practice guidance for the effective application of restraint should be considered.
- *Enforcement:* attention should focus on enforcing the orders imposed on serious organised criminals. Doing so will help to recoup larger sums and symbolise that crime does not pay.

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Keywords

Asset Recovery
Attrition
Confiscation
Criminal assets
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Context

Recovering the proceeds of crime plays an increasingly important part in efforts to tackle the criminal economy and crime more generally. The principal tool for recovering crime proceeds is the confiscation order. Under the terms of the Proceeds of Crime Act (POCA) 2002, a convicted offender can be ordered by a court to repay a sum of money equivalent to the amount adjudged to have been made from crime – either from a specific offence, or, if deemed under POCA definitions to have a ‘criminal lifestyle’, from all criminal conduct in the past six years.

While the amount of criminal proceeds recovered in recent years has increased markedly – from approximately £25 million in 2001/02 to approximately £136 million in 2007/08 – concerns about the performance of the asset recovery system remain, particularly in relation to the level of attrition observed – defined as the amount lost during different stages of the confiscation process, from the initial assessment of offenders’ financial benefit from crime, through to the amount eventually recovered. This research was commissioned to examine that issue.

Approach

The principal aims of the research were:

- to identify the extent of attrition within the confiscation order process; and
- to provide an understanding of why attrition occurs.

To meet those aims the research involved:

- an analysis of 2006/07 confiscation data held on the central Joint Asset Recovery Database (JARD);
- an examination of a sample of 155 confiscation order cases from five police force areas;

- interviews with those involved at different stages of the confiscation order process.

Results

Extent of attrition

Analysis of the JARD data revealed a striking overall reduction between the value of criminal benefit initially assessed by Financial Investigators (FIs) and the amount eventually recovered – a total reduction of around 95 per cent. The attrition was particularly acute in high value cases, demonstrating the general point that attrition in overall financial terms is affected much more by a small number of high value cases than the large volume of low value ones. In contrast, only a minority of cases suffered attrition at different stages of the process. Overall, over two-thirds (68%) of 2006/07 confiscation order cases had neither their benefit figure nor available assets figure reduced at court.

There was also a considerable difference between the amount imposed in orders and the amount eventually recovered. While the case payment rate 10-14 months after imposition of orders made in 2006/07 was good (more than three-quarters of orders paid in full), the proportion of the total value paid off by this time was much lower (less than two-fifths). As with the imposition stages, the rate of attrition at enforcement became greater as the value of orders increased.

How and why does attrition occur?

Results from the detailed study of the sample of cases and interviews with practitioners suggested a number of reasons why attrition occurred at different stages in the process.

- (i) *Attrition during imposition of an order*
 - The latitude that the investigating authority is given by POCA when estimating the level of criminal benefit (especially for ‘criminal lifestyle’ cases)

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can create artificially high benefit figures which are unlikely to be recoverable. These are natural consequences of the process and do not necessarily represent failings by the investigating authorities.

- Negotiations between defence and prosecution reportedly feature in many confiscation order cases and provide an opportunity for reducing the value of both the initial assessment of criminal benefit and the value of recoverable assets held by an offender. There was some unease (on the part of police Financial Investigators especially) that the prosecution position was sometimes weakened by these negotiations.

(ii) *Attrition during enforcement of an order*

Attrition during the enforcement of orders is an area of greater concern as it represents a failure to recover the amount judged to be realisable from the offender. Reasons for this attrition included:

- shortfall between the expected value of assets when orders are made and the actual value they fetch when sold;
- difficulties faced by imprisoned offenders in selling assets to pay their orders;
- complications around the position of third parties in asset ownership, preventing the sale of property in particular;
- actions on part of some offenders to avoid recovery, e.g. hiding assets;
- offenders absconding, dying, or being deported.

Restraint orders (which enable the freezing of offenders' assets to prevent their dissipation) play an important part in enforcement but their use is complex. While the JARD data analysis showed some evidence that restraint was effective where applied, it often appeared to be used for smaller cases rather than the higher value cases where restraint might be expected. Certainly, respondents thought restraint a critical factor in ensuring recovery by preventing offenders covertly disposing of assets. However, they also stressed the need for careful use and, given the cost and effort of employing it, restraint was not seen as being cost-effective for smaller orders.

Conclusions

While the POCA legislation is viewed as a valuable and effective tool in the confiscation of criminal assets, a natural by-product of its provisions is that initial estimates of criminal benefit will often be subject to subsequent reduction. It is this fact that drives the large amounts of attrition observed in official figures. Narrowing the POCA assumptions might have the effect of reducing this procedural attrition but would be unlikely to result in more being recovered from criminals. It is the attrition resulting from the behaviour of offenders (in how they consume or hide crime proceeds) and inefficiencies in how the asset recovery process is administered that are key. This attrition is most tangible at the enforcement stage, as shortfalls in recovery at that stage represent the loss of proceeds that should be realisable.

The findings from this study suggest a number of steps that could be taken as part of an approach to improve the effectiveness of the confiscation process.

- *Greater clarity about the scope of POCA's use:* further consideration of how asset recovery resources are best used, and consideration should be given to the relative allocation of these to higher and lower value cases targeted for confiscation.
- *A promotion of a more systematic and strategic approach to the use of confiscation:* more methodical and systematic sifting of cases to ensure that potential confiscation opportunities are not being lost, and the adoption of strategies for revisiting cases where the sums recovered have fallen short of expectations.
- *Improving co-ordination:* ensuring that the asset recovery system is joined up and that all co-operation and communication opportunities between agencies are being taken.

Particular focus should therefore be placed on ensuring that enforcement opportunities are maximised, in particular for high value cases involving serious organised criminals. Making the best use of restraint should be a key part of this.

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I. Context

Background

It is a well-established principle of justice that criminals should not profit from their crimes. But without some means of recovering the financial proceeds of crime, many offenders would be in a position to do exactly that. Concern about the capacity of powers to recover criminal proceeds led to the introduction of statutory confiscation powers in the 1980s.¹ The confiscation of criminal assets by the courts now forms a key part of efforts to tackle the criminal economy and crime more generally. Seizing and confiscating proceeds of crime has a number of potential benefits:

- it deters would-be offenders by raising the actual and perceived risks of committing crime;
- it visibly deprives criminals of their profits, reducing their power and status within the community;
- it prevents profits from crime being reinvested into further criminality, or tainting the legitimate economy;
- justice is better served in that people are not allowed to profit from crime and this is seen to be the case.

Over recent years the Government has taken a number of steps to extend the application of asset recovery powers. The Assets Recovery Agency (now part of the Serious Organised Crime Agency) was set up specifically to disrupt organised criminal enterprises through the recovery of criminal assets, and the Proceeds of Crime Act 2002 (POCA) has extended and streamlined existing asset recovery legislation. The amount of criminal proceeds recovered has risen considerably over recent years, from

around £25 million in 2001/02 to approximately £135.7 million in 2007/08, and the current target is to increase recovery to £250 million by 2009/10. However, this still represents only a small proportion of the total criminal assets potentially available, and reviews of the asset recovery regime (e.g. HMIC, 2004) have raised concerns about the efficiency of the current system.

Proceeds of Crime Act and the confiscation process

POCA extended and simplified existing asset recovery legislation. The main powers of POCA cover:

- cash seizures;
- confiscation of criminal proceeds;
- action against money laundering; and
- the introduction of civil recovery and taxation.

Assets refer to any items of monetary value owned by the offender, which can be shown to have been obtained via illegal means. These can include property, cash, the value of bank balances, cars, jewellery, and any other goods which hold a releasable financial value.

Offenders' assets can be recovered in a number of ways, but the principal vehicle is a court-imposed confiscation order (in 2005/06, confiscation orders accounted for over sixty per cent of contributions to asset recovery receipts). It is important to note that the confiscation process seeks to recover the *value* of criminal proceeds and not the actual proceeds themselves. A confiscation order in effect creates a debt that the offender must settle, and which may be met by selling legitimately owned assets.

¹ Via the Magistrates Court Act 1980.

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Under POCA, confiscation orders can be made in the Crown Court following conviction, in addition to the sentence imposed for the offence. An investigation is carried out to determine whether a person has benefited financially from crime, the extent of that benefit and the amount that is available for confiscation. The way in which the level of criminal benefit is assessed depends on whether it is calculated just for a specific offence, or based on evidence of sustained criminal activity that points to a 'criminal lifestyle' as defined by POCA.²

It is for the court to then decide the value of any confiscation order. This must be to the value of the assessed criminal benefit *unless* the offender's available assets are shown to be less than the benefit, in which case, the order should equal the available assets. The size of the benefit figure remains important: if the amount available is lower than the benefit, the court can be empowered (on application by the prosecution) to recalculate the available amount if the offender is later shown to have further assets. This then increases the amount that the offender has to repay. The difference between the financial gain offenders may have made from crime and the assets they actually have available is a critical issue.

Assessing criminal benefit

Once a case has been identified for potential confiscation, the keystone of the process is the initial financial investigation by the police. This work is typically undertaken by Financial Investigators (FIs), employed by police forces across the UK. FIs are usually police officers, although civilians may also be employed in this role.

The FI's task is to provide an assessment of the extent of an offender's benefit from their criminal conduct – information that the prosecution must then provide to the defence and to the court. The criminal benefit is the amount obtained from particular criminal conduct or criminal lifestyle. The distinction between *particular criminal conduct* and *criminal lifestyle* is an important one because it influences how the benefit figure is determined. If the case relates to particular criminal conduct, the calculation of the benefit amount can include the benefit only from crime(s) being prosecuted and any others taken into consideration. However, if the defendant is deemed to have a criminal lifestyle (as defined in POCA) then the benefit is calculated on the basis of all proceeds of alleged criminal conduct over the preceding six-year period. In addition, property obtained prior to the six-year period, which is held by the defendant after conviction can be taken into account.

In determining the benefit from a criminal lifestyle, an FI is entitled to calculate the amount on the basis of the assumptions set out in section 10 of POCA:

- that any property held by the offender was obtained through criminal conduct;
- that any expenditure by the offender was made using proceeds of criminal conduct;
- that the offender holds any property free of any other interests (e.g. mortgages or third-party interests in houses).

While not explicitly required by the wording of the Act, the investigation should also provide an inventory of the offender's available assets for the prosecution to supply to the court. This assessment, detailing what assets the offender holds and their value, has two purposes. Firstly and primarily, to enable the court to substantiate the above assumptions, but secondly, to enable a prosecution rebuttal of any defence claims that the offender's assets are less than the value of his/her benefit.

The onus is on the defence to prove that these assumptions do not apply, and that the offender does not have the assets to meet the sum alleged by the prosecution. If they fail to do this, the confiscation order must be made to the value of the

2 The criteria for determining whether an offender has a 'criminal lifestyle' is defined by POCA as:
four or more offences (of any type) heard at the same proceedings where the total benefit exceeds £5,000;
one continuing offence which has taken place over a period of at least six months where the benefit exceeds £5,000;
two or more similar convictions on separate occasions over the last six years where the total benefit exceeds £5,000; and,
the offence(s) in question are defined in schedule 2 of the Act as 'lifestyle' offences - drug trafficking, money laundering, human trafficking, arms trafficking, terrorism, pimping and other offences relating to brothels, blackmail, and intellectual property crimes.

benefit figure. If the defence does not respond to the prosecution's statement of alleged criminal benefit and available assets then the court is entitled to accept the prosecution case as fact. The court is instructed not to allow the assumptions to stand if (and only if) it is shown either that the assumptions are incorrect (as demonstrated by defence evidence), or there would be a 'serious risk of injustice' if the assumption stood. The latter refers to possible injustice arising from the way in which the assumptions are applied (e.g. allowing double-counting of an offender's income) rather than referring to the fairness of the order being imposed on any particular offender. It therefore excludes the extent of the hardship suffered by the offender if the confiscation order were made.

The problem of attrition

The level of 'attrition' within the asset recovery process has been an area of particular concern. Attrition in this context refers to the cumulative erosion in value between the initial police assessment of the value of the criminal benefit, and the amount that is eventually recovered from an offender. Attrition potentially has a two-fold detrimental effect on the process of asset recovery. Firstly, it can diminish the effectiveness of asset recovery in tackling crime (in particular it could reduce its potential deterrent effect). Secondly, it reduces the sums of money available to redistribute to front line criminal justice agencies under the asset recovery incentivisation scheme.³

Attrition can occur during many stages of the confiscation order process:

- an eligible suspect may not be targeted for financial investigation;
- for those cases that are targeted, the initial investigation may fail to uncover assets that could be subject to confiscation, thus underestimating the value of any confiscation order that could be granted;
- in court, the confiscation order may either not be granted or be made for a lesser value than that which was sought;
- the confiscation order may only be paid in part, or not paid at all.

Recent reviews of the asset recovery regime (e.g. HMIC, 2004) suggested that while the available powers had been utilised in a number of high profile cases, use was patchy and evidence of co-ordinated prioritisation of asset recovery was rare. Additional (internal) analysis has specifically indicated significant levels of attrition between the investigation and enforcement of confiscation orders.

In addition to these concerns, a number of studies that varied in scope, size and methodological approach have also looked at asset recovery in recent years (e.g. Levi and Osofsky, 1995; Weighall and Fleming, 2003; Fleming, 2006). Although there is not an extensive body of UK research on asset recovery, the existing research has all tended to identify similar difficulties in the asset recovery process, including:

- limitations in the investigation process caused by lack, and inadequate use, of resources available for investigations;
- the limited use made of restraint orders to prevent the disposal of assets before a confiscation order is made or enforced;
- a seeming reluctance on the part of the courts to use asset recovery powers to the full;
- offenders (or their counsel) being able to negotiate down the value of confiscation orders; and,
- shortcomings and problems in the enforcement of orders.

³ Under the asset recovery incentivisation scheme, more than 50 per cent of all asset recovery receipts are returned to frontline agencies, split between the investigation, prosecution, and enforcement agencies.

The focus of this study was on points of attrition that occur in the criminal justice system once a decision has been made to pursue a confiscation order. Note that the research does not specifically investigate the reasons why suspects are targeted or not targeted for financial investigation. However, this issue was raised by respondents in interviews and is discussed in general terms at the end of the report.

Purposes of this study

This study aims to quantify and explain some of the issues relating to attrition in more detail by analysing operational data on confiscation orders imposed, and conducting in-depth interviews with those involved in the confiscation order process. In summary, the study seeks to:

- identify the extent of attrition within the confiscation order process;
 - provide an explanation of why attrition occurs and suggest means by which it might be tackled.
-

2. Approach

The study used three approaches to investigate the amount of, and reasons for, attrition in the confiscation order process.

1. Examining overall levels of attrition in confiscation via a statistical investigation of the Joint Asset Recovery Database (JARD), which holds information on all cases where a confiscation order was granted. Cases where orders were issued during the financial year 2006/07 were used here.
2. Examining a sample of cases via in-depth interviews with the police FIs involved to assess the reasons for attrition in more detail.
3. Exploring issues relating to confiscation more generally via interviews with key practitioners.

Analysing the Joint Asset Recovery Database (JARD)

JARD is an operational database, maintained by the Serious Organised Crime Agency, populated and used by all agencies involved in the asset recovery process. The database contains detailed information on confiscation orders for England, Wales and Northern Ireland. Although some Scottish cases are entered onto the system, JARD is not widely used in Scotland. For the purposes of these analyses, only cases for England and Wales were included.

Among other variables, the following information about each case is contained on JARD:

- the initial assessed amount of criminal benefit;
- the amount of criminal benefit agreed by the court;
- the final confiscation order value;
- the amount eventually recovered in each case; and
- a range of details about the offender and type of offence.

The information allows each case to be traced through the asset recovery process, and levels of attrition can be examined at different points. All confiscation orders imposed during the financial year 2006/07 were examined.

Since JARD is an administrative database, used primarily for operational rather than statistical purposes, the data required extensive cleaning and validating before analysis could take place. Significant levels of error were detected, usually data entry errors such as decimal places being recorded in the wrong place, or omissions such as failure to enter financial figures. Cases which contained unambiguous errors were corrected where possible. Where it was not possible to identify the correct value, or which value was in error, the record was removed from the dataset before analysis. The purpose of this study was to examine attrition in the confiscation order process rather than provide precise and total quantification of attrition, and the number of records removed does not affect overall messages in this respect. It should be noted, however, that the case volume and financial totals quoted for this analysis may not equal headline figures published elsewhere. For this reason, figures are generally rounded to avoid implying a spurious level of precision. After data cleaning, the dataset consisted of **3,604 cases** in total.

Detailed examination of sub-sample of cases

More detailed information on the confiscation process was gathered through a series of interviews with FIs to examine reasons for attrition in 155 specific cases. The purpose of looking in detail at this sample was to focus discussions with FIs by using actual examples, and to explore the possible causes of attrition at various stages in more depth than was possible using JARD data alone.

Only cases prosecuted by the Crown Prosecution Service (CPS) were included in this detailed case examination. The majority of cases involving police Financial Investigators are prosecuted by the CPS (around 80 per cent in 2006/07) but other law enforcement agencies (particularly Her Majesty's Revenue and Customs) also conduct financial investigations. These cases are included in the JARD analysis. Specific cases were selected on the following criteria.

1. *Order type*: granted confiscation orders only.
2. *Police Force Areas*: Surrey, Kent, South Yorkshire, Merseyside, Greater Manchester Police (GMP), and the North West Regional Asset Recovery Team (RART).
3. *Legislation*: convictions secured under POCA legislation only.
4. *Years*: 2005 and January-June 2006 (inclusive).⁴
5. *Amount*: granted orders of £1,000 and upwards only.

The areas covered were purposively selected, following discussion with practitioners working in asset recovery and an assessment of JARD, to represent areas with differing characteristics and different levels of confiscation order use. They were intended to provide results that could be generalised with some degree of confidence. One of the five Regional Asset Recovery Teams (RARTs), based in the North West, was also included.

All orders which met the criteria in these areas were then initially identified.⁵ FIs involved in the cases were identified from the JARD database and contacted for interview. No police area or individual FI refused to take part but the rate of achieved interviews was influenced by (a) whether the FI was still employed by the organisation and (b) available on the days that the fieldwork was conducted. Around 70 per cent of these cases (107 out of 155) related to drugs offences. Other crime types included handling stolen goods, conspiracy, forms of acquisitive crime, selling counterfeit goods and, in small numbers, people smuggling.

4 Data for the detailed case examination were taken for an earlier period to allow more time for cases to have been completed before fieldwork took place.

5 For Greater Manchester Police (GMP) the high volume of orders resulted in a sample being selected: cases over £50,000 were automatically included. The remaining cases were selected at random.

Semi-structured interviews regarding the 155 cases were then conducted with the police FIs involved, during spring and summer 2007, to examine the confiscation order process from start to finish. Note that a single interview sometimes covered several cases, and included:

- how the case was selected for financial investigation;
- how the amount of the criminal benefit was assessed;
- whether a restraint order was sought and why;
- the relationship between the amount of benefit initially assessed, the amount awarded and eventually recovered;
- the relationship between investigation, imposition and enforcement of the confiscation order;
- an assessment of why the process of gaining the confiscation order was successful or unsuccessful;
- the barriers to the successful financial investigation, imposition and enforcement of the order; and,
- recommendations for improvements to the process.

It should be noted that the cases used for in-depth interviews are not a subset of the JARD dataset used here for quantitative analysis. While the JARD dataset covered the financial year 2006/07, the detailed case examination was based on data for January 2005-June 2006. This was to allow sufficient time for most cases to be completed by the time of fieldwork. Although this limits the extent to which associations can be made between the two sources, the type of cases was broadly similar. For example, around 62 per cent of cases in the JARD sample related to drugs offences, compared to 70 per cent of cases in the detailed examination. The average amount assessed as available for confiscation was around £66,000 for the JARD dataset, and £51,000 for the detailed case examination.

General interviews with key practitioners

Further interviews were conducted with a sample of practitioners involved in other areas of the confiscation processes. Those interviewed were mostly based in the geographical areas selected for the case sample. They were:

- CPS staff – both in regional offices and central branches (n=5);
- prosecution and defence counsel (n=3);
- judiciary (n=5);
- HM court service staff responsible for enforcement (n=7);
- the Enforcement Taskforce (ETF⁶) (n=2);
- senior police officers and RART managers (n=5).

These semi-structured interviews explored more generic themes, relating to:

- the process and structure of confiscation orders and asset recovery;

⁶ A multi-agency team formed in 2002, consisting of HM Customs & Excise, the Central Confiscation Branch of the Crown Prosecution Service, the Serious Organised Crime Agency and Metropolitan Police.

- the role played by each organisation in the process;
- the perceived barriers to successful financial investigation, imposition and enforcement of orders; and
- the perceived means through which the process could be improved.

Interview transcripts were coded and analysed thematically.

3. Results

Analysis of confiscation orders made in 2006/07

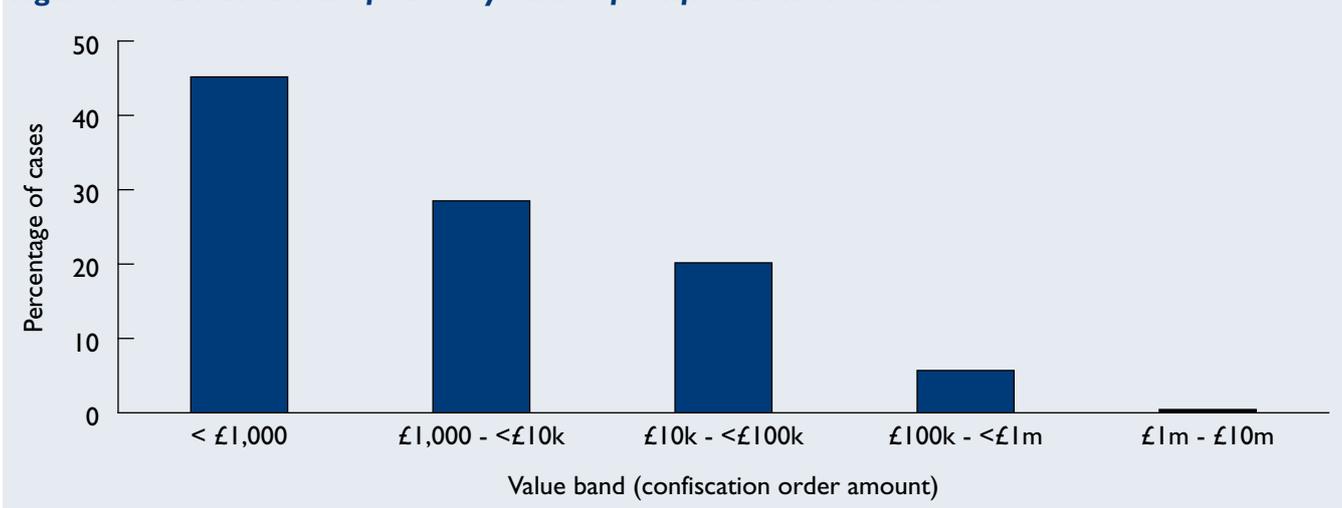
Attrition during imposition of orders

The analysis of 2006/07 confiscation order cases on JARD gives an overview of the extent of attrition and where it occurs. However, before examining attrition, it is first necessary to explain the distributions of the JARD sample, and how this affects analysis and interpretation.

The cases contained on the JARD database varied hugely in value. For example, Financial Investigators' assessments of criminal benefit ranged from as little as £1 in some cases, to almost £200 million in one instance.

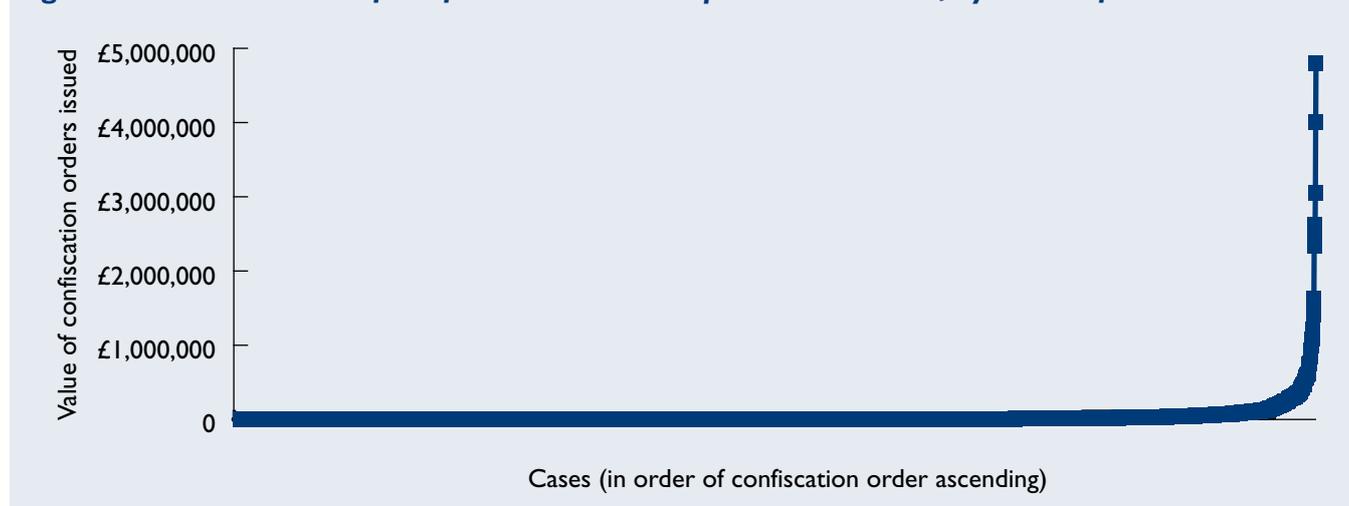
Figure 1 shows that the majority of orders issued (45%), were for less than £1,000. Only a very small proportion of orders (0.5%) were issued for more than £1 million.

Figure 1: Distribution of cases by value of confiscation order issued



Total number of cases = 3,604

However, although the majority of cases involved *relatively* small amounts of money, the overall financial amounts assessed, applied for, and awarded were heavily influenced by a small number of high value cases. This is illustrated in Figure 2, which shows the extreme skew in the data for confiscation orders issued (note that for presentational purposes, the largest confiscation order of around £28.5 million has been removed from the graph). Cases are sorted from lowest to highest, by confiscation order value.

Figure 2: Distribution of confiscation orders imposed in 2006/07, by value of order

Total number of cases = 3,604

This markedly asymmetric distribution has a significant effect on the results. The 33 highest value cases (one per cent of the total) made up 50 per cent of the total value of confiscation orders issued in 2006/07. In contrast, the 1,797 lowest value cases (50 per cent of all cases) made up just one per cent of the value of all confiscation orders issued.

Table I provides some summary statistics for order values at different stages of the confiscation order process in 2006/07, demonstrating a similar distribution of the data at each point. It should be noted that attrition also occurs between the amount imposed and the amount recovered from offenders. However, as analysis of this stage of attrition was conducted using a sub sample of 2006/07 cases⁷ the figures presented for this stage are scaled-up estimates to represent all cases.

Table I: Value of orders at different stages of the confiscation order process

Stage of process	Total value	Largest value for single case	Smallest value for single case	Mean case value	Median case value
Criminal benefit assessed by FI	£1.04 billion	£197.0 million	£1	£288,900	£13,500
Criminal benefit agreed by court	£866.0 million	£148.4 million	£1	£240,300	£9,800
Available assets assessed by FI	£237.8 million	£28.6 million	£0	£66,000	£2,300
Confiscation order imposed by court	£146.3 million	£28.6 million	£0	£40,600	£1,400
Amount recovered (estimated)*	£55.6 million	-	-	-	-

Total number of cases = 3,604

* Although offenders are generally given six months to pay orders, money may continue to be recovered past this time. The amount recovered against orders issued in 2006/07 is estimated based on a 38 per cent recovery rate of value via analysis of a subset of 2006/07 data (see later sections).

It can be seen for each stage that the mean is considerably higher than the median. The mean is heavily influenced by the effect of extreme, high value cases, whereas the median is calculated by arranging cases in order of value and taking the value of the middle (50th percentile) case. This difference between mean and median values reflects that the majority of cases involve relatively small sums of money.

⁷ Once a confiscation order has been imposed, the offender is usually given a period of up to six months to pay the amount of the order. When investigating enforcement information on the JARD database, only those orders imposed in the period April-August 2006 were examined. In order for the six-month period to have elapsed, their payment status was examined up to June 2007 (when the analysis was conducted).

The same skewed distribution affects the results when attrition is examined between different stages of the confiscation order process. A small number of cases account for a large amount of attrition in overall terms. Table 2 summarises the overall attrition at each stage. Note that the percentage loss figure is cumulative, rather than the percentage reduction between each individual stage.

Table 2: Attrition at different stages of the confiscation order process

Stage	Total (millions)	Percentage loss (cumulative)	Maximum (millions)	Mean	Median
Difference between benefit assessed by the Financial Investigator and benefit agreed by court	£175.5	17%	£48.7	£47,000	£0
Difference between benefit agreed by court and FIs' assessment of the available assets	£628.9	77%	£148.2	£174,000	£600
Difference between FIs' assessment of available assets and confiscation order imposed by court	£91.4	86%	£23.1	£25,000	£0
Difference between confiscation order amount and sum recovered six months after order (estimated)*	£90.7	95%	-	-	-
Total difference (benefit assessed by FIs and sum recovered after six months [estimated])*	£995.9	95%	-	-	-

Total number of cases = 3,604

* Although offenders are generally given six months to pay orders, money may continue to be recovered past this time. The amount recovered against orders issued in 2006/07 is estimated based on a 38 per cent recovery rate of value via analysis of a subset of 2006/07 data (see later sections).

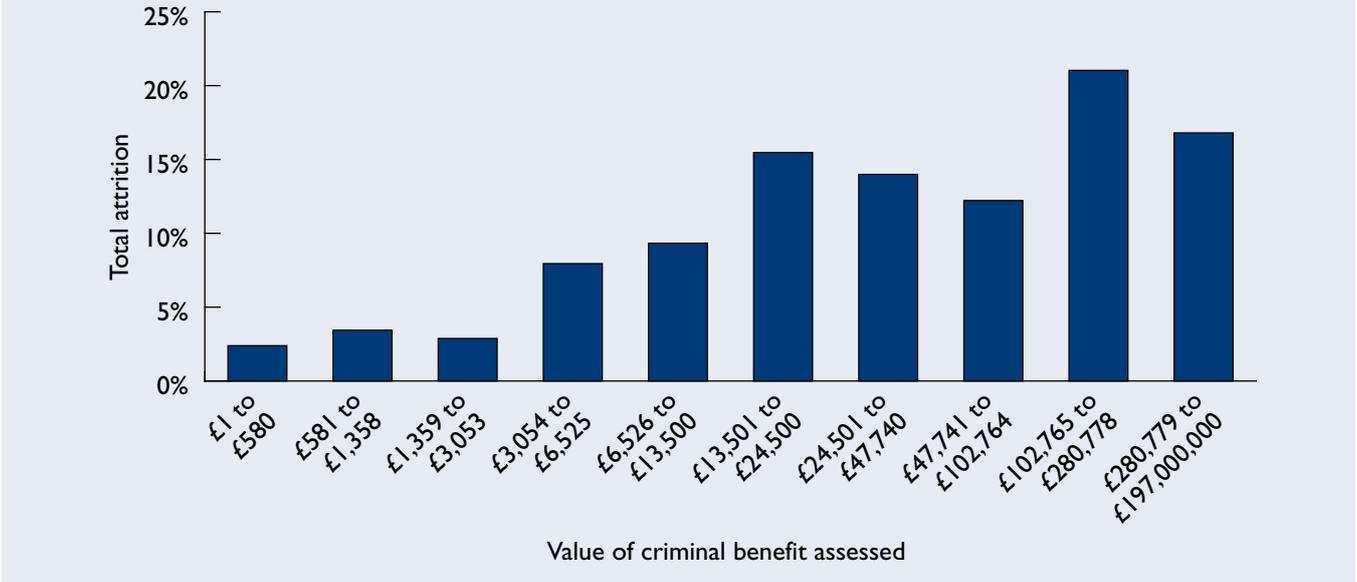
The implication of this skewing is that while overall amounts and means are useful for monitoring targets in absolute financial terms, changes in the median represent a more accurate indication of attrition in 'typical' cases. Nevertheless, the overall picture is of substantial attrition in financial terms.

However, looking at cases rather than monetary values gives a very different picture. In fact, the data show that in the majority of confiscation orders in 2006/07 there was little or no attrition at all. There was no attrition between the amount of benefit initially assessed by the FI, and that eventually agreed in 77 per cent of cases, and none between the initial assessment of available assets and the value of the order imposed in 74 per cent of cases. Overall, more than two-thirds of cases (68%) suffered no attrition at either stage.

Figure 3 shows the attrition between criminal benefit initially assessed by the police and criminal benefit agreed by the court, by value band. Cases have been ordered by value of benefit as initially assessed, and divided into ten parts (deciles) so that an approximately equal number (360) fall into each group. The horizontal axis shows the range of benefit amount assessed in cases in each group, and the bars show the attrition between the total amount of criminal benefit assessed and the total amount agreed (in percentage terms).

It can be seen that, generally, the greater the amount initially assessed the higher the degree of attrition. The average of the attrition for the first five deciles (where the assessed benefit value ranged from £1-£13,500) was just over five per cent, compared to a 22 per cent reduction among orders in decile nine (with an assessed benefit range of £102,764-£280,778 thousand), and a 17 per cent reduction among orders in decile ten (with a range of £280,779-£197 million). The average of the attrition for the second five deciles was 16 per cent.

Figure 3: Percentage attrition between criminal benefit assessed and criminal benefit agreed in court by value band (decile)



Total number of cases = 3,604

Figure 4 shows attrition between the assessed available assets and the amounts eventually ordered. In this case, the data have been arranged by confiscation order amount applied for, and again grouped into deciles. Again, it can be seen that the highest value orders experience greatest attrition. For example, amongst the ten per cent of orders which were lowest in value, total attrition was two per cent (where orders ranged from £0–£25). This compared to 41 per cent for the top ten per cent of orders (where orders ranged from £90,001–£28.6 million).

Figure 4: Attrition between assessed available assets and confiscation order amount issued by value band (decile)



Total number of cases = 3,604

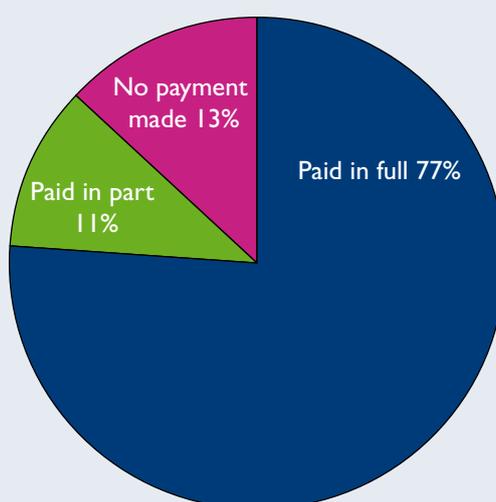
In summary then, the JARD analysis shows that while the proportion of cases experiencing attrition is relatively low, the attrition in overall financial terms is high. This is primarily due to the effect of a minority of high value cases, which have a significant impact on the overall figures. Attrition is generally far higher for cases of greater value, both in absolute and in percentage terms.

Attrition during the enforcement of orders

Once a confiscation order has been imposed by the courts, the offender is usually given a period of up to six months to pay the amount of the order (which can be extended, but not usually for more than another six months). When investigating enforcement information on the JARD database, only those (1,390) orders imposed in the period April–August 2006 were examined. Their payment status was examined up to June 2007 (when the analysis was conducted), meaning a potential payment period of at least nine months in each case. This does mean that the earlier the order was issued, the longer the period given to pay (for example, an offender issued with an order in April 2006 would have had around 14 months to pay, by June 2007). The analysis presented below suggests, in fact, that the majority of offenders who pay confiscation orders do so within six months but it should be noted that enforcement is an ongoing process; some of the orders (particularly the larger ones) which were not fully or even partly paid when the sub sample was drawn will have received subsequent payments.

Analysis indicates that the case payment rate is good. Figure 5 shows the proportion of cases that were fully paid, partly paid, and not paid at all. Of the 1,390 cases imposed between April and August 2006, 77 per cent (1,065) had been paid in full by the time the data were taken from JARD in June 2007, and a further 11 per cent paid in part. Of the 174 orders where no payment was made, 29 per cent (50) were for orders issued for very small amounts (less than £10).

Figure 5: Case repayment status in June 2007 for orders imposed between April–August 2006



Total number of cases = 1,390

Does not sum to 100% due to rounding

However, analysing repayment in terms of the value of orders imposed gives very different results. Between April 2006 and August 2006 approximately £42.9 million in confiscation orders was issued. By June 2007, only 38 per cent (£16.4 million) of the value of these cases had been repaid.

Thus, the JARD data show that although the majority of cases were paid in full, the total amount paid was less than 40 per cent of the value of all the orders issued. These data show that larger orders are less likely to be paid, supporting the earlier analysis that showed pre-enforcement attrition problems worsening as the size of orders increased. Figure 6 shows the relationship between order size and the payment rate (note that orders under £10 are not included).

Figure 6: Proportion of cases fully paid and total value paid, by order value

Total number of cases = 1,390

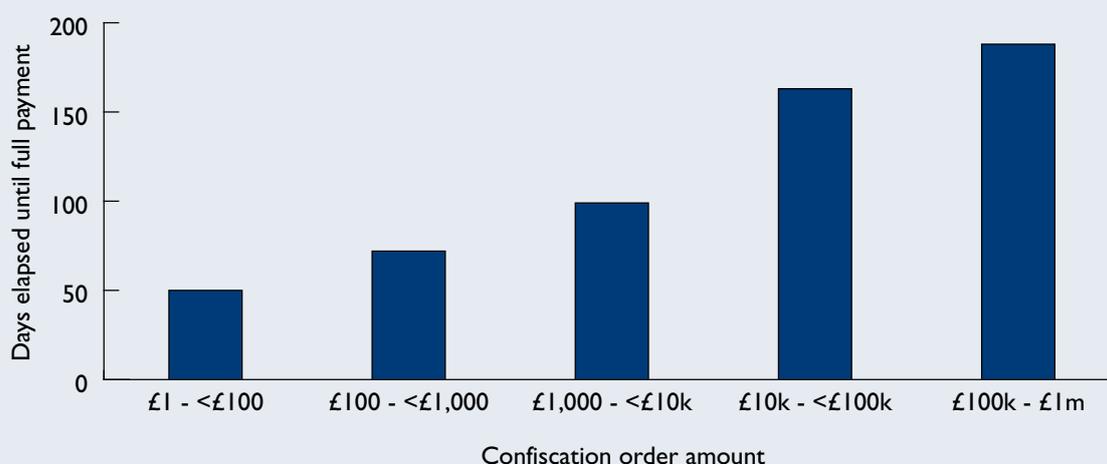
Orders between £10 and £100 were paid in 98 per cent of cases, but the figure steadily declines to only 35 per cent for orders between £100,000 and £1 million. Of all the orders which had not been paid, the mean outstanding amount was approximately £81,000. In addition, the graph shows that the value of total payments made (as a percentage of the total order amount issued for each band) decreased as the confiscation order amount became greater. Around 98 per cent of the total value of orders between £10 and £100 was paid within the period, whereas only around 40 per cent of the value of orders between £100,000 and £1 million was paid.

As with previous analyses, the aggregate figures are disproportionately influenced by the small number of highest-value cases: more than one-third of the total value still owed was due to eight cases above £1 million in value.

Time to payment

Of those orders paid in full, around 30 per cent were paid off within the first 30 days. After three months (90 days), the payment rate rose to 58 per cent, and by six months (180 days), 78 per cent of the fully-settled cases had been paid off.

As Figure 7 shows, it generally takes longer to pay off larger orders. Superficially this is not surprising, as it could be assumed it will take longer to liquidate larger, and greater numbers of assets. A car for example would be quicker to dispose of than a house. However, the confiscation order is placed against assets that are available, and it may not take as long to release these as judges allow time for (for example, three houses could in theory be sold almost as quickly as one house). In practical terms though – in particular for larger orders – the six-month ‘time to pay’ period is commonly exceeded and it can sometimes take many years to fully settle the balance. Analysis of time to payment rates over a longer period would show continuing receipts against many orders which are classed as ‘not paid at all’ or ‘partly paid’ here. Of the (1,065) orders paid in full between April and August 2006, those between £1 and £100 were paid within 50 days on average. This almost doubled to 99 days for orders between £1,000 and £10,000, and rose to 188 days for orders between £100,000 and £1 million.

Figure 7: Average time taken to fully pay confiscation orders by value of order issued

Total number of cases = 1,065

Further discussion of the levels of attrition at each stage, supplemented by results of the interviews, is included later in the study. The following section summarises the analyses in relation to offence type and geographic distribution.

Confiscation orders and overall attrition by offence type

The JARD data show that in 2006/07 almost two-thirds (62 per cent) of confiscation orders were made for offences of 'drug trafficking' (this is the offence category given on JARD but it covers all drug supply offences). The next largest offence category was fraud/deception, accounting for ten per cent of orders, followed then by burglary/theft accounting for nearly seven per cent. VAT fraud accounted for just 0.5 per cent of orders

Examining orders by value and offence type presents a different picture. The mean order value for 'drug trafficking' was approximately £20,000 (£22,000 excluding nominal orders – those under £1).⁸ This was comparable to mean average figures for burglary/theft (£14,500) and robbery (£21,500). In contrast, the mean value of orders for money laundering was £255,000 and for VAT fraud £336,000. For fraud/deception, the average value was £51,000.

Drug supply cases accounted for the greatest single share of recovered value in 2006/07: 35 per cent (£42 million) of the total value of confiscation orders recovered. Fraud/deception accounted for 16 per cent; the proportions for all other offence types were in single figures.

The attrition between value of orders sought and value of orders imposed was 38 per cent for drug supply cases (£71.5 million vs. £44 million), and 34 per cent for all non-drugs offences (£120 million vs. £79.1 million).

The JARD analysis also showed considerable regional variation between number of confiscation order cases, financial value of cases, and attrition during different stages in the confiscation order process. However, direct regional comparisons are not provided here because they are highly influenced by extreme cases, which are likely to vary in location from year to year. A handful of high-value cases had a large impact on financial totals and attrition levels in particular regions. For example, a single order in one region was applied for at a value of around £197 million lower than the amount of benefit initially assessed.

⁸ If the defendant is able to show that the amount available for confiscation is nil, the order will usually be issued for a nominal amount (generally £1). This enables the prosecution to revisit the confiscation order under the POCA reconsideration provisions if the defendant subsequently acquires more assets, even if legitimately (e.g. through a bequest).

How and why does attrition occur?

This section examines in more detail the points at which the attrition identified in the JARD analysis occurs, focusing on *how* and *why* it happens, based on interviews with FIs.

Attrition during the imposition of a confiscation order

I. Assessing benefit from crime and offenders' available assets

As the JARD data show, the difference between the assessment of benefit and the assessment of the available assets (what is termed under POCA as, "the available amount") is a significant source of attrition within the confiscation order process. This attrition is, in part, a consequence of the POCA legislation which allows FIs to make wide-reaching assumptions about criminal benefit in lifestyle cases. FIs illustrated the point in discussions:

We can make, as a Financial Investigator, a vast amount of assumptions, and we want to get a benefit figure over and above what the realisable assets are, obviously. Although you attempt to be as fair as you can be, there may be occasions when actually the benefit figure is somewhat more inflated, you know, and you can't help that because the legislation says you can do it, you can make the assumptions. You always know that once they send their response to you there is going to be a reduction...So it's very rare the actual benefit figure that we put down ever represents the true value of the order.

Financial Investigator

Other respondents, like prosecutors and judges, also commented on how the POCA assumptions allowed a liberal assessment of level of criminal benefit, including that the initial assessment was usually prepared without full knowledge of an offender's position. That said, some among them also noted that their inclination was to be more cautious in their assessment than the police FIs; some judges interviewed were of the view that the overvaluing of assets, and the inclusion of 'innocent' assets, were the primary causes of why the initial assessments of criminal benefit and available assets subsequently get reduced (see section on negotiation, below).

FIs recognised that the low value of assets most offenders had *available* (particularly after depreciation), coupled with their lifestyles and spending patterns, meant assessed levels of criminal benefit were unlikely to be recoverable:

That £38,000 went into his account over a six-year period....So the guy's been putting that money in his account, and spending it, taking it out, drawing it and buying drugs, living a lifestyle – because that's what the lower level ones seem to do with the proceeds of crime – just fund their own lavish lifestyle, spend it on plasma TVs, and dinners, and [designer brands], and things. So you could probably tell by looking at this one, actually he's not going to have a lot, he never really worked, he was often unemployed, he's divorced from his wife, she's got kids, so any money would be for that.

Financial Investigator

He was in debt of [...] about fourteen credit cards, and any money he was actually making from drug dealing was going on his lifestyle, day-to-day living. He was down the bookies every day and putting money in the fruit machine in the bookies. I think he had quite a high benefit figure [...] but his available amount was very minimal, because he was in debt with the credit card companies.

Financial Investigator

Another key factor affecting assessment of criminal benefit (given that the majority of confiscation orders are imposed in drug supply cases) is the issue of expenditure on drugs bought for sale or use. Benefit includes the value of any drugs seized but also the expenditure on drugs historically. This can result in high benefit figures. This expenditure on drugs is unlikely to be recoverable for two reasons. First, in the case of historical expenditure on drugs (whether for dealing, consumption, or both), the offender will commonly lack the available assets to repay this. FIs frequently gave examples of low-level drug dealer/users leading chaotic lifestyles and using any money made from dealing to fund their own drug habits but who had little that could be recovered. Second, any seized drugs, being an illegal commodity, cannot be included in the valuation of the offender's property.

A combination of these two factors can have a considerable impact. In almost half of the cases studied in detail that concerned drugs offences, FIs stated that the difference between their assessment of criminal benefit and their assessment of the amount available for recovery related in part to expenditure on drugs. For example, in one case explained in detail, a defendant's benefit from crime was estimated as the expenditure on £250,000 worth of recovered drugs. However, the available amount (and thus the value of order) was assessed as £72,424 which was the equity in a house.

Similar attrition can be seen in *particular criminal conduct cases*. Here, the calculation of benefit can usually be made with more precision than in *lifestyle* cases as they relate to one specific criminal offence where the offender has benefited, e.g. the value of a stolen car. However, again the available amount would typically be of a lower value than the benefit figure, unless the offender has other assets, as this benefit will not be legitimately available for confiscation. To illustrate: in one case an offender had been found guilty of conspiring to rob a Securicor van, from which £167,000 was stolen. Half an hour later, that money was recovered by the police and the person arrested. His level of criminal benefit was determined by the Financial Investigator to be £167,000 – albeit a benefit that was only enjoyed for about thirty minutes. However, the available amount was assessed as £1,710 which represented the defendant's only asset (money in a bank account). As the £167,000 had been recovered by police it was not held by the offender and not available for confiscation. In this case there was no failure by the authorities, but when taken superficially the figures indicate substantial attrition.

Finding offenders' assets

In some cases it is very difficult to trace an offender's assets for confiscation. An FI may have reason to believe that an offender has assets (perhaps from intelligence sources) but there may be no actual sign of them. Respondents noted that some criminals are clearly effective at dealing predominantly in cash and not leaving detectable trails of their expenditure, for example assets are moved abroad or put in other people's names. This makes it harder (although not impossible) to trace them for confiscation.

Some jobs are just so frustrating. I think a good criminal now is getting switched on to the fact, pay cash and don't leave an audit trail. I'm finding it more frustrating in the last 12 months to find stuff when I know it's there. But we are getting better and there're more tools, but you're never going to find something if somebody's never put anything in their name.

Financial Investigator

In some cases, FIs believed that assets had been transferred overseas, often to jurisdictions where they would be very difficult to trace or recover.

It was not disputed at all, this. We went into court, and they agreed it, then and there. There was no explanation, no fight, no... And probably no intent to pay, no. We never found where the money had gone, and it's obviously very difficult tracing funds that have left the United Kingdom.

Financial Investigator

Assets exceeding criminal benefit

Whilst unusual, there were examples of the available assets exceeding the benefit amount. These tended to be particular criminal benefit cases (rather than criminal lifestyle cases where the level of benefit would typically be higher). In these cases, defendants had assets (particularly houses), where the equity was worth more than the benefit from their crimes. However, the size of the order imposed cannot exceed the agreed amount of criminal benefit.

2. At court: contesting and negotiating the value of criminal benefit and available assets

POCA states that the value of any confiscation order should equal the value of an offender's criminal benefit unless the defence are able to prove that the 'available amount' is less than the benefit figure. In these situations the order must be made to the value of the available assets. Nevertheless, the defence reportedly still commonly attempt to reduce the alleged criminal benefit figure, even if it does not always represent what the defendant has to pay. If the benefit figure is higher than the available amount, the court may revisit the case and require the defendant to pay more if new assets are discovered. By reducing the benefit figure, the defendant is protected against this happening. In addition, as the JARD results showed, there is a significant discrepancy between the prosecution's assessment of the criminal benefit (and the assets held by offenders) and the amounts actually imposed as confiscation orders. This indicates that the courts often decide that the legitimately recoverable amounts are lower than those alleged by the prosecution. How does this come about?

Pre-hearing negotiation and agreement

It was clear from interviews that a significant proportion of confiscation orders are effectively settled in advance of the court hearing, following negotiation between prosecution and defence.

In principle, the agreed amount of benefit and the available amount are determined in court, but in practice the benefit and the available amount are often negotiated behind the scenes by the defence and prosecution counsel and presented to the court for agreement. The operation of this process was discussed by most interviewees, across all the geographic areas covered.

Judges agreed that in their experience, many confiscation cases were effectively settled in advance, either fully or partly, by an agreement between prosecution and defence counsel. In their view, it was not for the judge to force a reopening of such a decision unless it looked abnormal in some way. Some remarked that the prosecution in particular had to be alert, to ensure the defence did not secure too great a compromise. One judge speculated whether offenders may be more likely to pay orders settled through negotiation and agreement rather than simply imposed on them, although recognised the answer was unlikely to be known.

The fact that so many confiscation cases were settled by agreements rather than contested hearings was viewed by the judges and others as a pragmatic and proper alternative to burdening the courts with too many full hearings, particularly given the relatively small sums involved in most confiscation cases (full hearings were seen as more likely in the larger cases). However, occasional reluctance on the part of counsel to proceed to full hearings was noted by some judges as possibly the result of relative unfamiliarity with this area of law, and possibly because the remuneration for confiscation work is seen as limited.

Some FIs commented more critically on this process – perhaps because it was their assessments that were subject to negotiation – and felt that negotiating in this way could put pressure on the prosecution to accept an undue compromise:

I'd like to think that every time I go to Crown Court, everything is up for grabs, and the decisions are made on that day. In reality that doesn't happen. In reality the barristers have often discussed it and sorted it out. Carved it up, as I like to call it, and you get there, and sometimes you are told, this is what's happening, and sometimes you've got to take a pragmatic approach to these things, especially with the benefit versus asset figure.

Financial Investigator

Yet, in the main, all respondents (judges, FIs and prosecutors included) saw this process of negotiation as a pragmatic and legitimate response to a situation where compromise is always likely. Indeed, the way the POCA assumptions operated were seen as necessitating compromise. These assumptions enabled the police to 'aim high' when estimating benefit and available assets (particularly in 'criminal lifestyle' cases) but allowed corresponding scope for challenge on issues of detail by the defence and perhaps even fostered an expectation that the defence would seek to reduce the prosecution's assessment.

Two principal factors underlying the diminution of the prosecution's assessments were identified in these negotiations: firstly, the initial counting of legitimately acquired or held assets as proceeds of crime, and secondly the contestable value of most assets.

Contesting the assumed illegality of assets and expenditure

Discussions with FIs showed that in many cases the defence were able to provide evidence that assets were the result of legitimate income, thereby limiting the application of the POCA assumptions. As a consequence, the overall benefit figure would then be reduced by the court. This happened in a number of ways.

- In some instances, offenders were able to show that previously unexplained credits in bank accounts were from legitimate work (or other provable sources, like betting) which may have been paid for in cash or by cheques.

- In other cases, the defence successfully argued that assets were legitimate gifts and as such did not constitute criminal benefits.
- Sometimes it was shown that assets assumed to belong to the offender were legitimately owned by third parties wholly or jointly.⁹ In these cases, both the benefit and available amount would be reduced.

Attrition which results from this process is of course legitimate and should be expected. However, some FIs raised concerns that defendants did not always have to provide much evidence to show that assets were legitimate. Judges countered these concerns, saying that the defence must produce documented, reliable evidence to prove such a point. They were mindful of the fact that it can be difficult for some offenders to prove legitimate origin, yet said they would usually look sceptically at the defence's attempts to do so, particularly if it relied upon the late production of previously unseen evidence.

Contesting the value of assets

A key issue emerging from interviews with practitioners was that because many types of asset have no fixed, incontestable market value, there was often scope for the defence to argue that prosecution assessments were too high.

In cases where assets were material goods, particularly if old and/or of poor quality, their second-hand value was difficult to ascertain. FIs thought it was common for the defence to argue that items included as benefit and available amount were not worth as much as FIs stated, and as such these figures were often reduced.

In valuing property, cars present a particular problem because they represent some offenders' principal assets, but they depreciate quickly and their ultimate value will depend on condition. FIs' valuations of cars were reportedly often challenged by the defence, and benefit and available amount figures reduced as a result.

The difficulties surrounding the inclusion of expenditure on drugs as part of criminal benefit has already been highlighted. Either at the confiscation hearing or in the run-up to it, FIs said that the defence and sometimes judges would query assessments based upon the value of illegal drugs. In some cases the alleged value of drugs was questioned. Estimates of the upper and lower wholesale and street value of drugs (obtained through police test-purchase exercises) are available to FIs to work out expenditure on drugs. However, drug prices vary considerably across the country, making proceeds estimation for national offenders difficult. The defence can challenge FIs' assessment of expenditure on drugs and consequently reduce the benefit figure.

Certainly some of it [the attrition] was around the value of the drugs. I worked out something at £3 a tablet, and it looks like they were perhaps saying they were only worth £2.50 a tablet, so well to be honest with you, if it is something like that, you wouldn't necessarily put it before the judge. If it was reasonable, you'd perhaps say, yeah. Then fair enough, there would have been some negotiation [about the value of the drugs].

Financial Investigator

FIs also estimate expenditure based on the length of time the defendant has been dealing or using drugs. These are often based on what the defendant admits to in interview. FIs thought it was quite common for this to be questioned by the defence and this too resulted in reductions in the benefit assessment.

Competing rights in property

Property represents many offenders' most valuable asset, and issues surrounding the value of homes were often critical to the outcome of confiscation cases. Financial Investigators are allowed to assume that property owned by a defendant is free from other interests, and in some cases benefit and available amount figures are assessed on the basis that a property is wholly owned by the defendant. However, in the case of houses, this is unlikely to be the case. Mortgage companies normally have interest in the property and any outstanding mortgage would have to be accounted for before equity in a house could be confiscated. Furthermore, properties are often jointly owned and the interests of innocent

⁹ Under section 77 of POCA, a gift (or a sale at a significant undervalue) made by an offender to a third party comprising property obtained through criminal conduct can be deemed a 'tainted gift' and would then remain included among assets liable for confiscation.

parties have to be taken into account. If FIs assume that a property is free from other interests (as they are allowed to do) then this is likely to be corrected resulting in attrition between FIs' assessments and amounts agreed.

FIs and other interviewees also commented on the tension apparent in some cases between two competing public interests: that of selling a house in order to pay a confiscation order, and that of protecting the home of an offender's family. Some FIs commented on the reluctance on the part of judges to make partners and children of offenders move from the family home. Cases where the offender part-owns a business were also described by FIs as potentially complicated because of the different ownership interests involved.

In some cases, subsequent action taken by the wife or husband of the defendant can result in the courts awarding spouses a 50 per cent equitable interest in joint matrimonial assets. For example, in *Gibson v RCPO (2008)*, Gibson was given – on appeal – half the equity in the matrimonial home despite admissions that the mortgage repayments had been met with proceeds from her husband's drug trafficking activities (for which he had been convicted).

In other cases, the level of criminal benefit was reduced in different ways, as discussed below.

'Basis of plea' limitations

Some respondents (particularly those from the CPS) commented on how defendants occasionally attempted, during the processing of their case, to evade or minimise subsequent liability under POCA. They would reportedly do this by either pleading guilty only to charges that took them out of the POCA 'criminal lifestyle' provisions, or by attempting to plead guilty on the basis of certain facts (for example, those that minimised their level of involvement in the alleged offence, and thus – they hoped – their level of assessed criminal benefit). Judges said they could alert the prosecution to the consequences of their accepting guilty pleas on the basis of such conditions, but it was up to the CPS to be responsive to such attempts. However, some judges stressed that if defendants were clearly trying to constrain the POCA process through basis of plea, they would seek to prevent this. CPS respondents recognised that attempts to better train police and Crown Prosecutors in charging issues relating to POCA were important in this respect.

Apportionment of benefit between multiple defendants

In particular criminal conduct cases, Financial Investigators sometimes split the benefit between offenders (where there is more than one), but they can also attribute the whole benefit to each offender. For example, in one robbery case discussed, the whole benefit of approximately £25,000 was attributed to each offender individually rather than being split between the four offenders who were arrested for the crime.

This approach is not always agreed in court and the benefit may ultimately be apportioned between the offenders (sometimes equally and sometimes differently, depending on their role in the offence). It was reported that courts have occasionally divided the benefit/available amount between all offenders involved, although a recent (post-fieldwork) judgement in the House of Lords (*R v May, 2008*) stated that where offenders jointly received criminally-obtained property, each was to be treated as though they had acted alone and held liable for the entire value.¹⁰

Attrition during the enforcement of confiscation orders

Once a confiscation order has been imposed by the courts, the offender is usually given a period of up to six months to pay the amount of the order.¹¹ Over recent years, enforcing court orders properly has been a major theme of criminal justice reform. POCA has provided a more streamlined enforcement process for confiscation, including shorter 'Time to Pay' periods (usually six months) and tougher penalties for non-payment. Her Majesty's Court Service (HMCS) Regional Centres of Excellence have also been rolled out for each court region to provide specialist expertise when dealing with asset recovery enforcement.

¹⁰ *R v May (2008)* UKHL 28. The wider implication of this case and other recent ones where the House of Lords have considered the issue of criminal benefit (e.g. *CPS v Jennings (2008)* UKHL 29) are that the criminal benefit figure should properly represent what an offender has actually obtained from crime.

¹¹ This period may be extended further, but not normally by more than an additional six months.

A focus on enforcement is not surprising. Attrition at this stage is the most visible, and – because money not recouped here represents an actual loss – the most tangible shortfall on the part of the confiscation system. However, the analysis above has already shown that the case payment rate was good (77 per cent of confiscation orders had been fully paid over the time period studied). Whilst the *value* payment rate was not so satisfactory, the amount lost at this stage is still much smaller than the sums ‘lost’ during imposition.

The majority of the cases studied in detail where the payment outcome was known had also been paid off, either in full or in part. The FIs involved in those cases thought that the two most common reasons for an order being paid were:

- because the offender’s assets were already held by police (or customs) – usually in the form of cash; and
- because a restraint order was in place – this was seen as particularly useful when the key asset was money held in bank accounts.

In addition, FIs also mentioned:

- the offender being prepared to co-operate, possibly because he/she wished to avoid the default sentence; and
- any issues, queries, or sticking points between the prosecution and defence all having been resolved by the time the order was made.

More generally, FIs also listed what they saw as the main factors preventing or obstructing payment in the cases studied.

- Shortfall between the expected value of assets when orders are made and the actual value they fetch when sold; jewellery, electrical equipment and cars (especially) were cited as particularly problematic in this respect.
- Difficulties faced by imprisoned offenders in selling assets to pay their orders (although this also sometimes reportedly served as a good excuse for offenders determined to drag their heels).
- Deductions made from the value of assets to meet either other orders (e.g. compensation orders, fines) or costs (e.g. of appointing receivers).
- Complications around the position or stake of third parties in assets, preventing the selling of property in particular.
- Assets hidden or moved abroad.
- Clear determination on the part of some offenders not to pay. This was seen as particularly the case with offenders serving prison sentences, especially lengthy ones for whom the confiscation default sentence held little leverage.
- Offenders absconding, dying, or being deported also hindered payment.

It was reportedly not common for offenders to have in-depth knowledge of the confiscation order process, or understand how to move and dissipate assets to avoid payment. However, examples were given of attempts to sell or transfer ownership of property before court proceedings, and in a few cases there were examples of organised criminals moving money abroad. There were also isolated examples of offenders absconding to other countries to avoid payment.

...he was bailed by [police service name] and had six months to pay his £1.4m and has absconded... [police service name] are hoping to get extradition proceedings. In this case, he was a habitual criminal and knew how the confiscation regime worked and set up methods to avoid his assets being found and he dissipated assets... Going to be very expensive to enforce this, they are looking at getting restraint etc, but really need to get him back and get him serving the default because don't think will ever get this money.

Financial Investigator

Similar factors were raised by other practitioners in interview. Court enforcement team staff mentioned the following.

- The problems that hidden assets posed to enforcement. Their view was that if the FIs were unable to locate a hidden asset, it was very unlikely that the court enforcement team would be able to.
- The problems caused by the overvaluing of assets, involvement of third parties, and the fact that offenders cannot be forced to use particular assets to pay off their orders.
- More generally, the importance of FIs providing a good-quality schedule of assets to the enforcement team was stressed, although respondents acknowledged that the protracted nature of some confiscation cases meant that what had been a current list of assets at time of investigation could be markedly out of date by the time of enforcement.

Enforcement staff were not surprised that so many offenders did not co-operate in paying their orders, or held off until the last possible moment. They were sure offenders did not like confiscation, many of them reportedly believing that they had already 'paid back' for their offence by serving their sentence. Some respondents commented on how there was little incentive for offenders to comply (other than avoiding the default sentence, or paying interest on their overdue order), although of course they recognised it was hard to argue that there should be an incentive for compliance (as opposed to a penalty for non-compliance).

The default sentence

POCA provides that the court must, when imposing a confiscation order, set a term of default imprisonment to be served if the offender fails to pay his/her order within the time period allowed. This default sentence is served consecutively to any prison sentence for the crime. Serving the default sentence does not extinguish the debt created by the order. The size of the default sentence varies according to the size of the confiscation: from seven days for orders not exceeding £200, up to ten years for orders exceeding £1 million.

The default sentence, while a crucial weapon in the enforcement armoury, was not seen by respondents as a panacea. Court enforcement staff thought that the threat seemed to work with some offenders, particularly those serving relatively short sentences who were keen to get out of custody as quickly as possible. However, it was seen as less useful in the case of offenders serving longer sentences as the default sentence then posed little proportionate risk to them. Once the default sentence has been imposed, there are few enforcement tools left – although offenders do continue to accrue interest on orders unpaid after the 'Time to Pay' period expires – unless or until the defendant obtains a court agreement (via a Certificate of Inadequacy under section 23 of POCA) that the order must be reduced.

The deterrent effect of default sentencing can also be diminished by Release on Temporary Licence provisions, enabling early release of prisoners serving a default sentence (as set out in the Criminal Justice Act 1991, and 2003). These include the power to reduce the default sentence by one third or up to one-half (depending on the length of sentence). Consequently, the sentence may not necessarily be served in full. Prisoners with longer default sentences would clearly benefit more from this circumstance.

Shortfalls in value of assets

The difficulties in accurately estimating the market value of assets, compounded by the low prices that some assets (especially cars and electrical equipment) achieved on resale, led to situations where an offender disposed of all his/her assets but the amount generated was not enough to pay off the order in full. In other instances, third parties with a stake in assets (usually houses) refused to allow their sale. This often left to situations where orders remained open (and remain on JARD), attracting interest and still showing as debt even though there was very little chance they would ever be paid. This frustrated some FIs.

Restraint orders

A restraint order freezes the assets of the suspect (orders can be made even before charge) or offender to prevent them from being dissipated. Under POCA (section 40), the prosecution may apply for a restraint order, which can be limited to specified assets but can also be widely drawn to encompass all assets.

The JARD analysis showed that a restraint order was put in place in 689 cases (19%) where a confiscation order was issued in 2006/07. Of those, 659 (96%) had been fully paid at the time the data were extracted from JARD for analysis. This compared to only 55 per cent (1,609) for the 2,915 orders that were not subject to restraint. When the data were analysed based on the value of cases, it was found that the average order issued where restraint was applied was around £15,600, compared to around £56,500 where no restraining order was put in place. This large difference was unexpected given that restraint would potentially be most useful in larger orders, to prevent dissipation. However, the average amount *paid* where a restraint order was put in place was around £15,400, compared to only £8,400 where no restraint was issued.

Although the averages are influenced by the highest value cases, there are some broad indications from the JARD analysis that restraint is an effective tool where applied. There is also some evidence that restraint is not always applied consistently to high value cases; those cases where asset dissipation – and its impact on the amount recoverable – might typically be of greatest concern. Of the 316 (10%) highest value confiscation orders issued in 2006/07, only 44 (14%) were subject to a restraint order. However, of those 14 per cent where a restraint order was issued, the average amount paid – at the time the data were extracted for analysis – was £144,000 compared to only £53,000 where no restraint was in place.

In the detailed case examination, cases with restraint orders applied were more likely to be paid than those without; this probably explains why FIs interviewed saw restraint as a key factor in enabling enforcement. However, *attrition* can still be higher in cases where restraint orders are applied compared to those where restraint is not used. This is not surprising since under POCA a restraint order can only be applied where there is a significant risk that the defendant will attempt to dissipate assets before the trial. Although the counterfactual cannot be known, it is likely that if restraint had not been used in these cases, recovery rates could have been significantly lower.

Most confiscation orders do not involve the application of restraint. Historically, some FIs and CPS respondents thought the lack of experience among police and CPS staff had limited the numbers of restraint orders sought and obtained. But as familiarity with the POCA legislation increases, this was felt to be becoming less of an issue and CPS policy is to apply for restraint in all appropriate cases where there is a risk of dissipation, leading to a marked recent increase in the use of the powers.¹² Nevertheless respondents still noted a number of factors seen as restricting use of restraint.

Police FIs thought that balanced against the effort and cost involved in obtaining such orders, restraint was not an efficient tool to be used when confiscating smaller sums. In many cases the offender's primary assets – already seized by the police – were so minimal that restraint was not thought necessary. Some respondents were of the view that restraint was unlikely to be cost-effective in orders below a certain value; although opinions differed as to the figure, a value of around £15,000 was commonly mentioned.

Cases where the key assets were money in bank accounts, or homes, were regarded as the likeliest candidates for restraint, although in some cases vehicles and other property such as businesses were also restrained. In a number of the cases examined in detail, a restraint order had been put into place because the defendant owned property. Even if the defendant did not fully own the house (i.e. had a mortgage to pay) the equity built up was substantial and there was a risk this could be moved or hidden if the property was sold before trial.

[A restraining order was] applied because the defendant's main asset was a house which he was in the process of selling. This was restrained to prevent the dissipation of assets. Once his equity was in cash form it would easily have been dissipated.

Financial Investigator

Some FIs thought that houses could not be dissipated quickly and that monitoring the situation (e.g. through checks with the Land Registry) was sufficient. Others, however, gave examples of cases where offenders had sold houses quickly and covertly, perhaps to friends or associates.

¹² CPS figures (since the research was conducted) show that the number of restraint orders issued has risen from about 70 in 2002 to 1,190 in 2007/08. The use of restraint orders is now covered in the Best Practice Guide to Confiscation Order Enforcement (initially issued by the Home Office in 2004) and also in NPIA guidance.

Respondents gave examples of how they took account of the offender's character, situation, and the nature of the offences involved when considering the need for restraint. For example, where an offender had co-offenders or criminal associates (perhaps with a track record of non-payment of financial orders themselves), dissipation of assets was often seen as more likely and so restraint more likely to be sought.

CPS and court enforcement respondents stressed that over use of restraint could not be justified (given the requirement to persuade the court of the risk of asset dissipation), and risked reducing its value. They commented on how erroneous use of restraint could expose the CPS to potential claims for damages (e.g. for the losses caused by restraining a legitimate business). This, understandably, made the CPS want to be sure that confiscation proceedings would go ahead before applying for restraint. Some respondents gave examples of difficulties in using restraint to protect assets while still maintaining their value, in particular cars, which depreciate quickly in value.

When restraint orders are granted, considerable time can elapse before the case is charged, tried, convicted, and a restraint order eventually put into place. During this period, the defendant is able to spend assets on 'reasonable' living expenses and legal fees granted as part of the restraint process. Over time, these expenses can erode the amount available for confiscation, even after conviction, until a confiscation order is made (in some cases even when the defendant is in prison).

Judges saw restraint as a very important tool. They thought that, for the most part, the police and CPS used it appropriately and were increasingly alert to the need for restraint in cases. They stressed how restraint needed to be used carefully, particularly given the potential severity of its impact on defendants/offenders (by restricting their businesses or living allowances) and its potential consequences for police and CPS if used wrongly (for example, possible claims for damages, alerting previously unwitting offenders to the fact that they are under financial investigation).

The scope of POCA and asset recovery generally

Many respondents expressed general views about POCA and asset recovery. The principle of recovering criminal proceeds attracted widespread support. Opinion was, however, more divided on the scope of its application. Many respondents commented on how they saw asset recovery being directed predominantly at relatively minor criminals with limited assets – what one judge referred to as “subsistence-level offenders”. Some were of the view that asset recovery should be applied across the board to all offenders, there being no good justification in principle for having an arbitrary minimum value below which the recovery of criminal proceeds would not be sought. Other interviewees took a more pragmatic view, seeing the use of full confiscation in smaller cases as an inefficient use of public funds. They thought, given limited resources, the asset recovery regime should be targeted much more on middle and high level offenders. CPS respondents in particular commended approaches where the police employed more systematic approaches to assessing the scope of offences for confiscation.¹³

Most respondents – particularly FIs and CPS lawyers – thought POCA was effective and well-regarded legislation. POCA provisions mentioned with particular approval included the power to secure earlier restraint, reduction of the 'Time to Pay' period, and extension of Financial Investigators' powers. One criticism raised was the range of 'criminal lifestyle offences' included in POCA; a CPS respondent queried why blackmail was the only theft/deception-related offence, and why fraud was excluded.

Many respondents said they thought offenders found confiscation hard to take. As one court enforcement manager put it:

They [offenders] can't believe it sometimes. They think they've 'paid back' by serving their prison sentence. It [confiscation] really hits them where it hurts.

Court Enforcement Manager

¹³ Police forces are encouraged to use a MG17 form to do this. The form is designed to help police officers make an early assessment of an offender's assets at the time of arrest. The form is completed by officers in conjunction with the CPS caseworker and then forwarded to the Financial Investigation Unit for assessment for confiscation. Note that since the study was conducted, use of the MG17 form has been endorsed by the National Policing Improvement Agency.

Yet while some respondents said they thought confiscation must have some deterrent effect on offenders, others acknowledged that the effect of POCA on offenders' behaviour was unproven. Indeed, some respondents thought that criminals were simply responding to the threat of confiscation by becoming smarter at moving and hiding assets.

Some respondents were also troubled by the breadth and prescriptive nature of the confiscation provisions. They thought these could often produce harsh outcomes, even if not amounting to "serious injustice" as defined under the Act. In such instances, judges thought they should not be blamed for trying to minimise obviously inequitable impact. Also, while judges saw the assumptions set out in POCA as making Parliament's intentions plain, some nevertheless felt that the police and CPS did not always make sensible decisions in terms of seeking genuinely realisable amounts for confiscation.

A particular area of concern was 'lifestyle' cases, where the amount of criminal benefit would often greatly exceed the proceeds of the offence(s) for which the offender had actually been convicted. The disproportionate size of confiscation orders in such cases troubled one judge in particular, who felt that it was tantamount to a second sentence for the index offence. The fact that confiscation was being imposed for previous, possibly unprosecuted, offending on a civil rather than criminal standard of proof only heightened disquiet.

Lastly, respondents from all professions expressed concern about the lack of co-ordination and inter-agency working across the confiscation system, with no one organisation having an overview across the whole process. The link between FIs and court enforcement teams was one such area of worry. Contact between the two was reportedly largely on an ad hoc basis, if taking place at all. Court enforcement staff greatly valued the skills and intelligence that FIs could offer on offenders, and lamented (but understood) that most FIs do not have the time or capacity to consistently involve themselves in enforcement. RART staff thought their inter-agency model improved matters but still thought that a lack of continuity and sharing of intelligence contributed to attrition.

This lack of co-ordination, together with a perceived lack of resources and strategic planning, was identified by some respondents as hindering efforts to revisit old confiscation cases in a systematic way. Revisiting could allow the ongoing targeting of significant criminals, using POCA provisions to seek increases in order value if new assets are uncovered.

4. Conclusions and implications

The landscape of asset recovery has changed substantially since the last major Home Office research study into confiscation (Levi and Osofsky, 1995). A sharper focus on asset recovery in recent years has led to a significant increase in the amount recouped. Yet some of the problems highlighted by that earlier study have persisted. Finding, valuing and realising offenders' assets can still be problematic, as can resolving the issue of third-party rights in property, and there are still clear limits to the capabilities of enforcement. These factors, and others, contribute towards a significant degree of attrition, from the initial assessment of the value of criminal benefit through to the amounts eventually recovered.

Previous analysis of the confiscation process had already indicated the substantial amount of attrition within the system. This report has gone further by firstly setting out the extent of that attrition in more detail, and secondly by identifying reasons for its occurrence based on examination of actual cases.

The work has shown that much of the attrition stems from the way that POCA assumptions operate. These assumptions permit the calculation of criminal benefit estimates that many practitioners view as high, with little chance of ever being recovered. From a law enforcement perspective, this is not necessarily an unwelcome position; by allowing the assessment to err on the high side, pressure can be put on offenders and, arguably, in doing so, more criminal proceeds may be exposed for recovery.

This type of attrition – which might be called ‘procedural attrition’ – was seen by practitioners as an inevitable part of the POCA process. It accounts for the largest proportion of the total attrition (the difference between the police/court assessment of criminal benefit, and the amount actually imposed as confiscation orders). While these figures are high, attrition at this stage is perhaps less important than it might seem, as the benefit figure can have little bearing on the amount actually available for recovery. To reduce this attrition significantly would require revising the POCA definition of ‘criminal lifestyle’, restricting the scope of the initial criminal benefit assumptions that can be made by FIs, or stipulating that FIs should apply assumptions at their lowest rather than highest levels to reduce attrition. The potential cost is giving ground to offenders unchallenged, leading to fewer assets being put before the court for consideration. Nevertheless, as a principle of good practice, assessments of benefit should surely be as realistic as possible.

The second type of attrition stems from the way in which the confiscation process currently operates. This can be termed ‘administrative attrition’. It is significant in accounting for the difference between the prosecution’s assessment of criminal benefit/available assets, and that agreed by the court. It occurs primarily as a result of confiscation cases being settled by negotiation, and the way in which the defence often challenges and reduces the prosecution’s assessment of available assets. There appears to be some scope to reduce administrative attrition, for example through close working between FIs, CPS, and prosecution barristers to minimise inappropriate compromises with the defence. Fuller hearings might also reduce attrition at this point but at the likely price of greater procedural cost and delay. Assessing criminal benefit at realistic levels (see above) could also reduce the need for such negotiation.

Lastly, there is ‘behavioural attrition’ caused by the way offenders act, in particular their spending habits. Since confiscation orders cannot exceed the amount offenders have available to pay, consumption-oriented spending by offenders (especially on items that retain no or relatively little value) will always place a major limit on what is recoverable. Other behaviours by offenders, such as wilful attempts to avoid payment, will increase this type of attrition but less significantly so. It remains to be seen whether offenders become more adept at evasion as their experience of POCA grows, and whether this can be balanced by the development of methods to counter it, e.g. maximising the identification and recovery of assets moved abroad. Also relevant is consideration of the ‘incentives’ for offenders to pay (or not), for example whether the sanctions for non-payment, especially on larger orders, are sufficient.

This study suggests that a number of actions could be taken to improve the operation of the confiscation process and the amount recovered.

Firstly, greater clarity about the scope of POCA’s use. Recovering the proceeds of crime should be a universal principle, applicable whatever the size of those proceeds. However, resources for asset recovery will never be unlimited so it is always likely that some degree of targeting will be required. This necessitates consideration of how asset recovery resources are best used. Lower-value cases are large in number and tend to suffer little collective attrition but contribute relatively modest amounts to the overall sums recovered; the smaller number of higher-value cases suffer high rates of attrition but potentially can contribute most.

Secondly, the promotion of a more systematic and strategic approach to the use of confiscation. This should include more methodical sifting of cases to ensure potential confiscation opportunities are not being lost (for example consistent use of the police MG17 form when making an initial assessment of assets at the time of arrest), and strategies for revisiting cases where the initial sums recovered have fallen short of expectations and the benefits of revisiting would justify the use of resources on this.

Thirdly, ensuring that the asset recovery system is joined up, and that all co-operation and communication opportunities between agencies are taken. This could help ensure that the prosecution is well-prepared, and that efforts to locate and liquidate assets are as effective as possible. Ensuring good communication between departments and agencies would also help prevent attrition due to actions of offenders before trial, avoiding unnecessary surprises in court.

This study sought to identify the extent of attrition in the confiscation order process, why it occurs, and to suggest means by which it might be tackled. As a final point, it is worth noting that this study has focused on financial attrition

in confiscation. Removing assets like cars from offenders may not always recoup much in monetary terms, but may still contribute to the wider symbolic and deterrent effects of asset recovery. These latter issues are among a number of topics relating to asset recovery and the criminal economy generally that would benefit from further research.

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