



# **JOINT THEMATIC REPORT ON THE PROCEEDS OF CRIME ACT 2002**

**October 2009**

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## **INTRODUCTION**

### **REMIT**

- To inspect the arrangements in police forces and the Crown Office and Procurator Fiscal Service (COPFS) for implementing the Proceeds of Crime Act 2002 in Scotland.

The Lord Advocate has consented to this inspection including the review of the Civil Recovery Unit for which she has been delegated responsibility as a Scottish Minister as opposed to her independent role as head of the prosecution service.

And within that, to:

- review the processes and systems used by police forces and COPFS;
- examine compliance with police/Association of Chief Police Officers in Scotland (ACPOS) and COPFS policy;
- review inter-agency working arrangements between police, COPFS and other criminal justice partners; and
- identify and promote good practice, and make recommendations for improving the Services.

### **ROLE OF THE TWO INSPECTORATES**

#### **Her Majesty's Inspectorate of Constabulary for Scotland (HMICS)**

HMICS' purpose is to monitor and improve police services in Scotland. It does this primarily by:

- inspecting and advising police forces and services provided by the Scottish Police Services Authority (SPSA);
- carrying out 'thematic' Inspections; and
- providing advice to Scottish Ministers.

Although the organisation collaborates with forces, police authorities and the Scottish Government in carrying out its work, all final judgments are arrived at objectively and impartially. Similarly, even though HMICS is independent of the Scottish Government, Ministers can call upon the Inspectorate to undertake particular pieces of work.

HMICS discharges its duty primarily through an inspection programme that increasingly employs thematic inspections, including those carried out jointly with other inspectorates. Publications are available on the HMICS website at: [www.scotland.gov.uk/Topics/Justice/public-safety/Police/local/15403/publications](http://www.scotland.gov.uk/Topics/Justice/public-safety/Police/local/15403/publications).

#### **The Inspectorate of Prosecution in Scotland (IPS)**

IPS was created in December 2003. It serves as an independent inspectorate for the Crown Office and Procurator Fiscal Service (COPFS), the sole prosecuting

authority in Scotland and responsible for investigating sudden deaths and complaints of a criminal nature against the police. IPS's principal functions are to inspect the operation of COPFS and make recommendations for improvement. The Lord Advocate can call upon the Inspectorate to undertake a particular piece of work. It also examines the outcomes and results achieved by COPFS, and promotes good practice. By doing so the IPS makes COPFS more accountable and helps to raise public confidence in its service delivery. All reports are submitted to the Lord Advocate and are published on the IPS website at [www.scotland.gov.uk/Topics/Justice/ipis](http://www.scotland.gov.uk/Topics/Justice/ipis).

## **METHODOLOGY**

Our methodology included the following elements:

- consultation - we held scoping meetings with a number of key leaders and organisations;
- interviews - we conducted interviews with leaders and operational staff in police forces and COPFS;
- questionnaires - these were used to generate wider evidence on specific topics to emerge and supplement information gained at interviews;
- fieldwork - further in-depth interviews and focus groups were held with operational staff in two police forces, a number of Procurator Fiscal offices and National Casework Division;
- observations - we obtained minutes for and attended a number of partnership meetings, liaison meetings and multi-agency seminars to establish how partnership working was taking place; and
- benchmarking - we met with police forces in Derbyshire and London, representatives of the Crown Prosecution Service, and representatives of the Director of Public Prosecutions (DPP) and Criminal Assets Bureau (CAB) in Dublin, in order to compare policy and practice in other jurisdictions.

### **European Foundation for Quality Management (EFQM)**

Our inspection methodology is aligned with the Business Excellence Model of the European Foundation for Quality Management (EFQM). We have chosen to present our findings in the main body of the report under the following EFQM headings:

- Leadership
- Strategy
- Processes
- People
- Partnership
- Resources
- Results

## EXECUTIVE SUMMARY

### Introduction

- (i) The Proceeds of Crime Act 2002 (hereafter referred to as ‘the Act’ or ‘POCA’) was enacted to strengthen the legislation available to recover the financial benefits of crime. The Act extended the scope of criminal activity which could be considered for criminal confiscation from drug dealing and trafficking to a fuller range of acquisitive or financially motivated criminal activity. Furthermore the previous powers of investigation into financial affairs were also broadened and the mechanisms for removing the benefits of criminal activity strengthened. Finally new substantive offences regarding money laundering were also established. A synopsis of the main provisions of the Act can be found in Appendix 4 of this report.
- (ii) Within this report, Her Majesty’s Inspectorate of Constabulary for Scotland and the Inspectorate of Prosecution in Scotland (hereafter referred to as ‘the Inspectorates’) outline the findings of their joint inspection regarding the use of the Act’s provisions.

### The current picture

- (iii) Throughout our inspection we observed a largely effective recognition and use of the powers contained within the Act in relation to serious organised crime, particularly in the sphere of drug related crime. In COPFS, a specialist unit has been created to deal with the money laundering provisions of POCA and to tackle serious organised crime. This is mirrored in policing with the creation of the Scottish Money Laundering Unit within the Scottish Crime and Drug Enforcement Agency (SCDEA) and the specialist financial investigation units of the eight Scottish forces.
- (iv) Beyond the specialist units in both the police service and COPFS there is little evidence that consideration of POCA provisions is a common or mainstream activity for those dealing with lower level crime. At operational levels within police forces and COPFS there is a little awareness of how the provisions of POCA could be invoked to combat a wide range of offending. Reliance is placed on specialists to identify POCA opportunities, rather than these being recognised by operational officers and lawyers. In addition, in the main COPFS rely on police and other law enforcement partners to identify POCA opportunities.
- (v) In a criminal justice system focussed on prosecuting and convicting criminals, we believe that the civil recovery and taxation provisions of the Act have not been fully exploited. Specifically a process has been put in place which requires referral of cases to the Civil Recovery Unit only from National Casework Division. As a result only those cases reported for prosecution which either fail or are not proceeded with may be reported to the Civil Recovery Unit. There is no direct route for law enforcement agencies to report a case for civil recovery where it is clear that there is

insufficient evidence to reach a criminal standard of proof. In the absence of such a direct route we consider that the mindset of law enforcement agencies will inevitably be upon prosecution to potential exclusion of the civil recovery provisions.

- (vi) In summary, a lack of mainstream knowledge throughout police forces and COPFS has resulted in the powers contained within the Act not being used to their full potential. Lower level criminals, who may carry out a high volume of acquisitive crime, and whose benefits of crime may be most visible in communities, are not routinely the subject of financial investigation by law enforcement agencies. Moreover, not all appropriate cases (ie those where there is insufficient evidence for criminal prosecution but good grounds for civil recovery) are reaching the Civil Recovery Unit, due to the narrow referral route that currently exists.
- (vii) We conclude that there is far more scope to use POCA powers to redress the financial benefits of crime at all levels across Scotland than is currently recognised. We believe that this represents a significant opportunity for law enforcement agencies to disrupt a much wider range of criminality through financial investigation and the provisions contained within the Act than has been the case in Scotland to date.

### The way forward

- (viii) While recognising and endorsing the position of the Crown independently to consider the possibility of prosecuting cases reported by law enforcement agencies, a more focussed use of all three strands available under the Act could be made. Clear criteria should be agreed by COPFS, police and other reporting agencies to allow early decisions to be made to have cases reported for prosecution or for civil recovery (and for CRU referral to taxation).
- (ix) Further, in order to exploit fully the provisions within the Act a shift in culture is needed in both the police service and COPFS in order that the consideration of financial investigation opportunities becomes everyone's responsibility rather than the exclusive role of a small number of specialist staff across both organisations, which is currently the case. Consequently, from a police perspective the Inspectorates recommend in relation to **leadership** that ACPOS should consider the appointment of a chief officer (champion) to lead on the development and coordination of the mainstreaming of financial investigation arrangements within policing in Scotland. This should include the development of financial investigation capability and capacity at divisional level as well as at a force level.
- (x) In addition, forces in considering their approach to mainstreaming, may wish to review the structure of their current force-level fraud and financial investigative resources and also consider how best to support divisional commanders in their key role of making POCA and its related provisions part of everyday divisional operational policing. In considering this issue we recognise the budgetary constraints affecting forces and the

related need to use resources as effectively as possible. As a result we highlight the ‘Practice Advice on the Management and Use of Proceeds of Crime Legislation’ produced by the National Policing Improvement Agency (NPIA)<sup>1</sup>, which gives sound advice on developing competence at both force and divisional level. Although this guidance document was originally developed for the police service in England, Wales and Northern Ireland, it is informative from a Scottish perspective. We conclude that comparable advice in a Scottish context is needed and that such guidance should reflect the comments and recommendations contained in this report.

- (xi) In relation to the mainstreaming of POCA in COPFS we conclude that it is essential that leaders in COPFS are sighted on mainstreaming developments in law enforcement agencies as they occur in order to ensure that COPFS is able to respond to an anticipated increase in workload. In addition, in promoting their own mainstreaming agenda, a POCA portfolio owner or champion should also be appointed to produce a plan to mainstream arrangements throughout the service.
- (xii) Having considered the use of **strategy**, the report describes largely effective strategic approaches to serious organised crime at a national multi-agency level as well as within the police service and COPFS. In contrast we highlight significant room for improvement in relation to the use of these provisions against lower level criminality throughout Scotland. This is vital if the powers within the Act are to be used to their full potential to disrupt criminality. As a result we have recommended that a Scottish Proceeds of Crime Strategy be developed focusing upon:
- creating sufficient capability and capacity across partner agencies to address all levels of criminality and all crime types included within the provisions of the Act;
  - ensuring that the criminal, civil and taxation powers contained within the Act are used as effectively as possible; and
  - establishing a proactive rather than reactive approach to financial intelligence gathering and investigation in relation to all relevant crime.
- (xiii) The Inspectorates believe that the development of such a strategy will require effective cross-agency working. The mainstreaming of financial investigation to a local level, the full use of civil and taxation as well as criminal powers and the creation of proactive rather than the existing reactive arrangements collectively represent a significant change process affecting many agencies. Consequently, from our experience in conducting this inspection, we believe that the Scottish Proceeds of Crime Strategy needs to be led by a partnership group which has both direct Ministerial involvement and representation at the most senior levels across all agencies involved. Whilst the current partnership group, the Scottish Asset Recovery Group (SARG)<sup>2</sup> has some of these features it has neither ministerial involvement nor national profile. On balance, whilst another

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<sup>1</sup> ‘Practice Advice of the Management and Use of the Proceeds of Crime Legislation’. The National Policing Improvement Agency, 2008.

<sup>2</sup> See paragraph 206 in the partnership section of this report

similar group could be constituted, we believe that the Serious Organised Crime Taskforce (SOCT) is the appropriate forum to co-ordinate this work and should develop the strategy assisted by the ACPOS and COPFS champions.

- (xiv) Due to the complex nature of the **processes** that have been developed in relation to the use of the powers contained within the Act we conclude that good communication between parties both within their own organisations and with partners is a critical success factor. During our inspection we observed a number of situations in which better communication and feedback arrangements are needed. Within the relevant section of this report we have highlighted the process areas where mainstreaming could bring about greater awareness of the Act, its powers and the information required to exercise these powers to best effect. We have also described a number of measures that we believe will be helpful in order that each organisation knows and understands the challenges and requirements of the other in relation to this Act. Consequently we conclude that the overall effectiveness of **partnership** arrangements will increase as a result of the creation of the Scottish Proceeds of Crime Strategy and the mainstreaming of financial investigation in general. As a result of this progression we believe that the minor difficulties we observed, typically related to communication, will inevitably also improve.
- (xv) In order to support the development and mainstreaming of financial investigation capability and capacity we have made the case for increasing the **resources** available for financial investigation within policing. In doing so, we recognise that there will also be a need for an increase in resources within COPFS to deal with the anticipated subsequent increase in workload. Indeed we believe that the relative funding needs of other law enforcement agencies and the court service should also be examined in relation to the Scottish Proceeds of Crime Strategy.
- (xvi) We consider that there is a case for reinvesting a proportion of the proceeds of crime that are realised, as was envisaged when the Act was originally debated within the Scottish Parliament. It is also important that a balanced, strategic view of how this reinvestment is distributed across criminal justice agencies is taken. This is necessary to avoid a situation whereby a system that is already stretched in places becomes overwhelmed. This particular issue underpins our recommendation that the Serious Organised Crime Taskforce should develop and co-ordinate a Scottish Proceeds of Crime Strategy.
- (xvii) During this inspection we were struck by the widespread agreement that exists among those we spoke to within both the police service and COPFS that the focus of the use of the provisions contained within the Act should be on disrupting criminal activity, or dissuading potential offenders, by removing both the financial rewards of such activities and the funds for future criminal activity. In this way it is believed that the harm caused by crime in local communities will be reduced. The Inspectorates share this

view. At the same time we accept that there is a strong sense that communities also want to see criminals lose the trappings obtained through criminality.

- (xviii) We believe that the use of the provisions contained within the Act can and should play an important part in the wider efforts of partner agencies to reduce acquisitive crime. This is likely to have clear societal benefits in communities across Scotland. Furthermore, given the current economic climate it is increasingly important that the combined efforts of law enforcement agencies tackle criminal activity that threatens legitimate business. For these reasons it is vital that the powers contained in the Act are used equally well against both serious organised crime and lower level criminals. Within this context and recognising the need to maintain a balanced and objective overview of such matters, our report sets out a clear and straightforward route map to achieve the outcome that both professionals and communities want to achieve.

### **Summary of Recommendations**

- (xix) In order to improve the current arrangements in relation to the Act and financial investigation in general we have made four principal recommendations. These reflect the changes that we believe need to be made to mainstream financial investigation in order that the provisions contained within the Act are fully exploited against all levels of criminality.

**Recommendation 1.** That as a matter of routine, the use of the Proceeds of Crime Act be mainstreamed within the police service in Scotland and COPFS so that from intelligence gathering to investigation and prosecution:

- (a) all confiscation opportunities are considered and where appropriate brought into effect against the full spectrum of relevant crime as provided in the Proceeds of Crime Act 2002; and
- (b) where it is clear that criminal proceedings are not appropriate, that civil recovery (and taxation) provisions are considered at an early stage of investigations and that a direct route is made available to the Civil Recovery Unit in clearly defined circumstances.

**Recommendation 2.** That the Serious Organised Crime Taskforce broaden its focus in relation to proceeds of crime and develop a Scottish Proceeds of Crime Strategy in order to co-ordinate action among partner criminal justice agencies including but not limited to ACPOS and COPFS. In particular the Strategy should focus upon:

- (a) creating sufficient capability and capacity across partner agencies to address all levels of criminality and all crime types included within the provisions of the Act; and
- (b) establishing a proactive rather than reactive approach to financial intelligence gathering and investigation in relation to all relevant crime.

**Recommendation 3.** That ACPOS and COPFS appoint leads (champions) to focus on mainstreaming POCA throughout their respective organisations.

**Recommendation 4.** That the current processes used in both policing and COPFS are reviewed to ensure their effectiveness in all aspects of POCA work (as more fully detailed in the suggested action points below) and, that COPFS and ACPOS assure themselves that these activities are taking place through their normal performance management regimes.

- (xx) Whilst not underestimating the scale of the task at hand, we consider that the outcomes we describe above should be achievable within 3 years from the publication of this report and that considerable progress should be made within twelve months.
- (xxi) Equally whilst recognising that the relevant agencies have both the necessary skills and determination to develop a plan to achieve this outcome, our experience gained from conducting this inspection leads us to make the following suggestions for ACPOS and COPFS.

## **ACPOS**

**Suggestion 1.** That the ACPOS POCA champion:

- (a) be invited to join SARG and assist the Serious Organised Crime Taskforce in the development of the Scottish Proceeds of Crime Strategy;
- (b) lead on the development of practice advice, training and development opportunities for the Service on the use of financial investigation and intelligence management at force and local levels;
- (c) assist forces as appropriate in establishing optimum levels of resources to be put in place at force and divisional levels to fully use the powers contained within the Act;
- (d) liaise with the regulated sector, in conjunction with the Serious Organised Crime Agency (SOCA), in order to improve the quantity and quality of Suspicious Activity Reports (SARs) produced in Scotland; and
- (e) ensure that proactive opportunities related to SARs are fully exploited.

**Suggestion 2.** In reviewing current processes, forces should:

- (a) review force level Financial Investigation Unit structures;
- (b) develop plans to increase capability and capacity at divisional level assisted by the ACPOS POCA champion; and
- (c) ensure effective monitoring of any post-confiscation change in the financial circumstances of criminals.

## COPFS

### Suggestion 3. That the COPFS champion:

- (a) be invited to join SARG and assist the Serious Organised Crime Taskforce in the development of the Scottish Proceeds of Crime Strategy; and
- (b) in relation to mainstreaming arrangements regarding POCA, review case marking guidelines, and training and development opportunities.

### Suggestion 4

In reviewing existing processes, COPFS should:

- (a) ensure that effective communication exists between internal departments and units and with law enforcement and criminal justice agencies, including review/feedback arrangements; and
- (b) ensure that robust systems are in place to monitor compliance with settlement guidance.

## CHAPTER 1 - LEADERSHIP

### Introduction

1. In this section we outline the main leadership tasks to ensure what has emerged as our principal mainstreaming recommendation is achieved. We have broken these down into the following areas:
  - National partnership structures
  - Police
  - COPFS

### National partnership structures

#### Serious Organised Crime Task Force (SOCT)

2. The Serious Organised Crime Taskforce was established in October 2007 by the current Cabinet Secretary for Justice. Chaired by the Cabinet Secretary, the Taskforce brings together senior officials from a range of organisations and includes among its members the Lord Advocate, representatives of Serious Organised Crime Agency (SOCA), Her Majesty's Revenue and Customs (HMRC), the Association of Chief Police Officers (Scotland), Scottish Government officials, and representatives of a range of other law enforcement agencies. As its name suggests, the remit of the taskforce was to tackle, in a co-ordinated fashion, serious organised crime.

**SOCT remit:** to work with members to help realise the Scottish Government's commitment to tackling serious organised crime by:-

- identifying priorities for tackling serious organised crime in Scotland;
  - making recommendations to Scottish Ministers on setting strategic priorities for serious organised crime for the Scottish Crime and Drug Enforcement Agency (SCDEA);
  - sharing best practice and improving co-ordination between law enforcement agencies and others;
  - identifying innovative ways of working together and encouraging better ways of working together;
  - developing a coherent Scottish response on reserved and other serious organised crime matters; and
  - making proposals for legislation, research and other measures to tackle serious organised crime.
3. During this inspection it became clear from both political focus and media attention that there was a strong public interest in removing the visible trappings of crime from those who commit crime. In many cases the criminals who are visible in communities are not those operating at the most serious end of the crime spectrum. This view was supported by practitioners at all levels who could see the advantages of utilising fully

these options as part of a balanced approach to preventing, disrupting and prosecuting crime.

4. In June 2009 the SOCT published a multi-agency Serious Organised Crime Strategy<sup>3</sup>. We refer to the terms of this strategy in this report and make recommendations about how in achieving the recommendations of this report, the police and COPFS can contribute to it in their use of the Proceeds of Crime Act 2002. Indeed the strategy highlights the use of the proceeds of crime legislation as an essential tool in tackling serious organised crime.
5. The mainstreaming of POCA and related provisions will require effective cross agency working and from experience, we consider that this type of change which will affect many agencies needs to be led by a partnership group with the following qualities:
  - direct Ministerial involvement; and
  - representation at the most senior levels of the relevant agencies.
6. The SOCT has these qualities and already co-ordinates action in relation to serious organised crime. We believe that by widening the remit of the taskforce this will ensure that the provisions of the Proceeds of Crime Act are used to the fullest extent against criminals working at all levels and will contribute to the aims of the Taskforce. We therefore recommend in this report that the SOCT, in furtherance of its own strategy, develops a Proceeds of Crime Strategy in order to co-ordinate action among the criminal justice agencies. In addition we believe that, through the development of such a strategy, the SOCT will be well placed to inform future deliberations regarding resource allocation and deployment in relation to financial investigation.
7. Whilst in theory a separate group could be established to take a national lead for POCA, we believe the advantages in using effective existing structures far outweigh the disadvantages.

## **Police**

### **The Association of Chief Police Officers Scotland (ACPOS)**

8. At a national level in policing, the ACPOS Crime Business Area is responsible for developing policy and co-ordinating activity in relation to investigating crime on behalf of the Scottish Police Service. The Crime Business Area includes representatives of all of Scotland's forces and is supported by a number of sub-committees.
9. During this inspection we noted the extent to which law enforcement agencies and the Crown Prosecution Service in many parts of England and

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<sup>3</sup> "Letting our communities flourish" - The Serious Organised Crime Strategy - The Serious Organised Crime Taskforce, 2009

Wales have embraced financial investigation as a key tactic against all levels of criminality. We believe that the impetus and drive shown by the CPS POCA Champion, the ACPO lead for POCA and full-time ACPO POCA National Co-ordinator have been key factors behind the development and co-ordination of their financial investigation and POCA capability.

10. We believe that the Scottish police service must develop sufficient capability and capacity so that a routine proactive approach to financial investigation at divisional level can be established. It must also agree to use the full range of criminal, civil and taxation powers and apply these to all appropriate offences. Creating an appropriate infrastructure within and across agencies to facilitate this poses a significant challenge, not least because of current economic conditions.
11. Previous experience demonstrates that appointing a single lead at chief officer level is an effective way of achieving the type of change we are recommending. We therefore suggest that ACPOS appoint such an officer who would also co-ordinate the Service's contribution to and implementation of the related SOCT strategy. Since the principal existing gaps lie within forces we would suggest that this officer should come from one of the eight forces rather than the SCDEA.

#### **The Scottish Crime and Drug Enforcement Agency (SCDEA)**

12. Within the Scottish Crime and Drug Enforcement Agency (SCDEA) we observed effective arrangements for financial investigation and POCA. The Scottish Money Laundering Unit (SMLU) is central to the success of the Agency and has developed investigative expertise. In addition, the SMLU is the single point of contact for the Suspicious Activity Report (SAR) regime facilitated by the Serious Organised Crime Agency. The SMLU's effectiveness is undoubtedly assisted by the expertise developed by its staff, which includes seconded members of staff from Her Majesty's Revenue and Customs (HMRC) and the Department of Work and Pensions (DWP). Moreover, its structure highlights the benefits of co-located partnership working in an area where the importance of information sharing is recognised.

#### **The Scottish police forces - force level**

13. In contrast to the central position occupied by the SMLU in SCDEA, force financial investigation units (FIUs) were typically situated in peripheral positions in their forces. This seemed to reflect the peripheral position of financial investigation and POCA generally. In many forces we also observed complex chains of command and as a consequence, a lack of clarity about where senior officer leadership was coming from. There were some exceptions to this trend most notably in Dumfries and Galloway Constabulary and Strathclyde Police where we were impressed by the level of commitment to financial investigation shown, as demonstrated by the extent to which financial investigation techniques were used and the higher relative staffing levels of FIUs in these forces.

14. It is clear that a one-size-fits-all approach will not work in Scotland, given the differences in size and demand across the eight forces. As part of mainstreaming POCA we suggest that forces should assess the effectiveness of their current financial investigation structures. Rather than having independent FIUs and Fraud Squads, often situated in different geographical locations, we believe that those forces that have not done so already should consider the merits of creating Economic Crime Units containing discrete but complementary financial and fraud investigation capabilities. Fraud and POCA offences are often related, for example when the proceeds of fraud are 'laundered', or where confiscation potential arises. Furthermore, both crime types require effective financial investigation skills in order to secure successful results. We believe that a combined structure is likely to encourage greater synergy and improve investigative performance on both fronts.
15. Co-ordinating both disciplines in a single unit is likely to improve leadership arrangements as well. In particular, supervision of such a combined unit is likely to sit with a higher ranking officer than is currently the case, which will in turn increase the profile of both units as well as present a more effective leadership arrangement.

#### **The Scottish police forces - divisional level**

16. The general lack of financial investigation capability at divisional level in Scotland is likely to be a barrier to mainstreaming POCA. Financial investigation is generally viewed as a specialist force function with knowledge and awareness amongst senior and frontline divisional officers rarely extending beyond cash seizure arrangements. Consequently opportunities to disrupt criminality and to gather and record financial intelligence are not a priority and are therefore not exploited locally. Not only does this make it difficult to disrupt local criminals but it also detracts from the fight against serious organised crime affecting communities across Scotland.
17. At the time of this inspection, Strathclyde Police was the only force to have a financial investigator in each division. Although these officers were originally intended to be a proactive resource, their work is now almost exclusively reactive in nature. This is largely due to a marked increase in cash seizure cases in the years following the reduction of the minimum threshold figure to £1,000. At the time of this inspection a business case was being drawn up for an additional financial investigator in each division to complement the force's recently established proactive Money Laundering Unit. We will follow the progress of this business case with interest.
18. In order to exploit fully the powers contained within POCA and to make financial investigation a routine investigative tool, it is essential that awareness and capability and capacity are increased at divisional as well as force level.

19. Whilst performance information relating to POCA and its related provisions can be incomplete and difficult to interpret as we discuss later in this report, the Strathclyde experience and that of forces in England, Wales and Northern Ireland, leads us to believe that an increase in capability and capacity within police divisions will have a positive impact on disrupting divisional level criminality.
20. Whilst achieving this across all divisions in Scotland will require both a force and national focus, the commitment of divisional commanders and their management teams is key.

### **Police leadership issues - conclusion**

21. In this section we have highlighted that ACPOS should consider how best to mainstream POCA and its related provisions and in order to achieve that, should consider the appointment of a lead officer (champion). Further, that forces in considering their approach to mainstreaming, may wish to look at the structure of their current fraud and financial investigative resources. In addition forces should consider how best to support divisional commanders in their key role of making POCA and its related provisions part of everyday operational policing.
22. In achieving this, senior officers will clearly wish to make best use of existing support materials and to that end we would highlight that, although originally developed for the police service in England, Wales and Northern Ireland, the 'Practice Advice on the Management and Use of Proceeds of Crime Legislation' produced by the National Policing Improvement Agency (NPIA)<sup>4</sup>, gives sound advice on developing competence at both force and divisional level. It is vitally important that the Scottish police service produces comparable advice within a Scottish context. We further believe that this guidance should reflect the comments and recommendations contained in this report.

### **COPFS**

#### **Criminal prosecution**

23. Leadership on POCA within the Crown and Procurator Fiscal Service rests with the Deputy Crown Agent, assisted by the Head of Operations. Beneath the Head of Operations sit the specialist units of National Casework Division and Civil Recovery Unit. Each unit is lead by a head and deputy head of unit.<sup>5</sup>
24. In COPFS we observed effective arrangements for dealing with serious organised crime. As head of the prosecution service in Scotland, the Lord Advocate has prioritised the prosecution of serious organised crime cases. This is reflected in the stated strategic aims of the Service. The structure of

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<sup>4</sup> 'Practice Advice on the Management and Use of the Proceeds of Crime Legislation'. The National Policing Improvement Agency, 2008.

<sup>5</sup> See Appendix 1 for structure of COPFS specialist units

the central National Casework Division in Crown Office with its units dealing with financial crime and serious organised crime reflects that priority.

25. The proceeds of crime legislation is recognised by COPFS as a crucial tool in dealing with serious organised crime. The central unit for confiscation (Proceeds of Crime Unit - POCU) also sits within the National Casework Division (NCD). Being placed within the central NCD means that the Proceeds of Crime Unit is well positioned to support the work of these specialist units dealing with serious organised crime.
26. However, the work of POCU extends to confiscation work at all levels of crime and in relation to every jurisdiction in the country. Whilst there are some cases being referred to the confiscation unit in relation to lower level criminality, in a mainstreaming agenda, we suggest that greater awareness on the part of police and law enforcement partners will result in an increase in POCA workload for the Crown. In relation to confiscation work, we foresee an increase in cases in which this opportunity is identified. It is essential that leaders in COPFS are aware of these developments in law enforcement and have in place the capacity to deal with such an increased workload.
27. In each of the 11 Areas of COPFS POCA resource deputies carry out, on an agency basis, the work which must be carried out at local Sheriff Court level to support the work of the central specialist units. At present, those POCA resource deputies do not have visible leadership in relation to their POCA work. Leaders in their areas, with some exceptions, do not appear to be aware of the extent to which the proceeds of crime can be used routinely. Such a situation has come about due to the treatment of POCA as a specialist topic. In the meantime the recent creation by the Head of Operations, of a POCA forum to provide support for those POCA resource deputies may fill this vacuum.
28. When the Act came into force in England, Wales and Northern Ireland, the CPS put in place arrangements that allowed confiscation to be an integral part of a criminal case. As a result all aspects of the case, from preparing the criminal case to considering restraint and confiscation, are dealt with in one location. It would be a massive change for COPFS to change its current structures to this model. Nor would we necessarily advocate such a radical change, which could lead to a diminution in the quality of POCA work. Whilst the knowledge of POCA should be mainstreamed in COPFS there continues to be a role for specialisation in relation to some of the more complex processes. However we conclude that, in the long term, the inevitable consequence of a more mainstream agenda for POCA across all law enforcement agencies is an increase in the volume of confiscation. In this situation, leaders may well wish to review the size and structure of the confiscation unit.

## Civil recovery

29. The Civil Recovery Unit, although nominally a department of COPFS, carries out the functions of Scottish Ministers in relation to part 5 of POCA dealing with the civil recovery of unlawful assets. The Lord Advocate, as a Scottish Minister rather than as head of COPFS, has assumed responsibility for these functions. Thus the Lord Advocate, in two very separate constitutional roles, takes the lead in both criminal confiscation and civil recovery in Scotland. There is, in practice, no difficulty in such an arrangement, provided that the difference between functions continues to be clearly understood and acknowledged.
30. We have outlined our belief that the current strict and rigid system of referral of cases to Civil Recovery Unit may prevent relevant cases that meet the civil recovery criteria from ever being considered by CRU. If police and other law enforcement agencies simply look at offending in terms of who has committed a crime and whether a crime can be proved, the opportunity to tackle those who distance themselves from the commission of crime but who nevertheless own property which can be shown to have been acquired through unlawful conduct, is likely to be lost.
31. We have recommended that an early consideration of civil recovery be considered as an option where a criminal standard cannot be reached, and in doing so, that a direct route be established for law enforcement agencies to report such cases. We noted during our inspection that the volume of current referrals was already stretching the capacity of the CRU. If, as we suggest in this report, there is a greater role for CRU in the harm reduction and disruption of criminality strategy, then it will be necessary to review the size and structure of CRU also.

## Leading mainstreaming in COPFS

32. Towards the end of our inspection, Crown Office announced that portfolio owner posts for specific areas of work are to be created in COPFS. It is our understanding that under these arrangements the portfolio owners, all from the senior management team in COPFS, will champion particular areas of work. We suggest that such a role should be created mainstreaming POCA within COPFS. Therefore, as we have recommended for police forces so we recommend that COPFS too appoint a POCA champion who would also co-ordinate the COPFS contribution to and implementation of the SOCT strategy.

## Conclusion: COPFS

33. In conclusion it is essential that leaders in COPFS are aware of mainstreaming developments in law enforcement agencies as they occur to ensure that COPFS has the capacity to deal with the anticipated increased workload. In addition, in promoting their own mainstreaming agenda, a POCA portfolio owner or champion should be appointed to lead on delivering for COPFS a plan to mainstream POCA throughout the Service.

**Recommendation 2.** That the Serious Organised Crime Taskforce broaden its focus in relation to proceeds of crime and develop a Scottish Proceeds of Crime Strategy in order to co-ordinate action among partner criminal justice agencies including but not limited to ACPOS and COPFS. In particular the Strategy should focus upon:

- (a) creating sufficient capability and capacity across partner agencies to address all levels of criminality and all crime types included within the provisions of the Act; and
- (b) establishing a proactive rather than reactive approach to financial intelligence gathering and investigation in relation to all relevant crime.

**Recommendation 3.** That ACPOS and COPFS appoint leads (champions) to focus on mainstreaming POCA throughout their respective organisations.

**Suggestion 1.** That the ACPOS POCA champion:

- (a) be invited to join SARG and assist the Serious Organised Crime Taskforce in the development of the Scottish Proceeds of Crime Strategy;
- (b) lead on the development of practice advice, training and development opportunities for the Service on the use of financial investigation and intelligence management at force and local levels; and
- (c) assist forces as appropriate in establishing optimum levels of resources to be put in place at force and divisional levels to fully use the powers contained within the Act.

**Suggestion 2.** In reviewing current processes, forces should:

- (a) review force level Financial Investigation Unit structures.

**Suggestion 3.** That the COPFS champion:

- (a) be invited to join SARG and assist the Serious Organised Crime Taskforce in the development of the Scottish Proceeds of Crime Strategy; and
- (b) in relation to mainstreaming arrangements regarding POCA, review case marking guidelines, and training and development opportunities.

## CHAPTER 2 - STRATEGY

### Introduction

34. In this chapter we provide further detail on the existing strategic approach to serious organised crime, as well as further develop our recommendation for a Scottish Proceeds of Crime Strategy to mainstream the use of POCA.

### Serious Organised Crime Taskforce and Strategy

35. In the last chapter we commented on the Serious Organised Crime Taskforce, chaired by the Cabinet Secretary for Justice and noted the strong strategic leadership that has emerged here. During the course of this inspection the Taskforce launched its Serious Organised Crime Strategy which outlines a joint plan to divert, disrupt, deter and detect serious organised criminality. The Proceeds of Crime legislation was acknowledged to be an important tool in tackling serious organised crime. A genuine sense of joint ownership from the participants of the key criminal justice partners was seen to emerge during the development of the strategy. For this reason we have recommended that the Taskforce and its members adopt a similar approach to POCA.

### The Scottish Strategic Assessment

36. The Scottish Strategic Assessment, produced annually by ACPOS, provides an intelligence-led strategic profile of crime and disorder in Scottish communities. On the basis of this evidence it also sets out recommendations for prevention, intelligence and enforcement activities.
37. Having first appeared in the 2007 Scottish Strategic Assessment, serious organised crime has again been identified as one of a number of 'very high priority' areas in the Scottish Strategic Assessment for 2009/10<sup>6</sup>. To support this, a number of proposed intelligence and enforcement activities advocate the use of POCA powers. We are therefore satisfied that arrangements in the Scottish police service reflect, in general terms, the priority given to serious organised crime nationally through the Serious Organised Crime Taskforce.

### Mainstreaming financial investigation

38. If the true potential of POCA to remove the financial incentive to commit crime is to be realised, then financial investigation also needs to be a proactive rather than reactive tool. In other words, police officers need to gather intelligence on the assets and lifestyles of criminals at all levels as a matter of routine. This would overcome the current situation whereby financial investigations are only started after a predicate offence, typically of a serious nature, comes to light. At the present time there is little evidence of financial intelligence gathering or investigative techniques being used, beyond the small number of specialist investigators in force-level FIUs across Scotland. Consequently, financial

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<sup>6</sup> Scottish Strategic Assessment for 2009/10, The Association of Chief Police Officers Scotland, 2009

investigation remains for the time being a largely peripheral discipline rather than a generic investigative technique.

39. As we have already observed, effective arrangements have been developed in order to deal with POCA offences committed by Organised Crime Groups (OCGs). The Scottish Money Laundering unit (SMLU) within the SCDEA, and Strathclyde Police have developed significant competence and expertise in this area in particular. However it is clear to us that overall efforts are hampered by a lack of financial investigation capability and awareness at force and divisional level across the country. OCGs are active across Scotland, with criminal networks operating at national, regional and local levels simultaneously. In order to be effective local police forces and law enforcement agencies generally need to pursue the assets of the major criminal players as well as the assets of lower level criminals.

### **The range of crimes combated**

40. During the inspection it was clear to us that law enforcement agencies were focusing on drug offences and paying less attention to the POCA opportunities in particular in relation to acquisitive crime and more generally for the entire range of offences contained within the Act. Even within the reactive casework currently being dealt with, the scope of the Act was not being fully recognised and many offences which ought to attract the attention of financial investigation units were not being highlighted.
41. This situation is borne out by a review of all cases resulting in confiscation since 2003, an examination of which revealed the following:
- 440 confiscation orders were made in Scottish courts during the period April 2003 to March 2009;
  - 80% of confiscation orders were a result of offences under the Misuse of Drugs Act 1971;
  - fewer than ten per cent of all confiscation orders were for crimes of dishonesty: offences of fraud accounted for four per cent; embezzlement two per cent; theft one per cent; and reset 0.9%;
  - copyright and trademark offences and video recordings offences accounted for just under five per cent of confiscations;
  - other assorted crimes for which confiscation was ordered included brothel keeping (one per cent) and money laundering (one per cent), as well as offences of extortion, fisheries, insolvency, betting and gaming, money lending, and forgery; and

- VAT fraud accounted for only 0.9% of all confiscation orders, although the largest confiscation amount of over £1.2 million was recorded in 2006 for VAT offences.
42. Confiscation can apply to a wide and varied criminal casework as is shown in section 142 of the Act and in Schedule 4<sup>7</sup>. Whilst drug related offences appear in Schedule 4 of the Act, a wide variety of other offences are also listed. The criteria are wide enough to relate to common law offences of dishonesty of any type, such as robbery, housebreaking, theft, fraud, forgery, embezzlement, as well as to statutory offences such as breaching trademarks and copyright legislation, and brothel keeping (see Appendix 5). It is evident that greater awareness of this fact is needed if the full impact of the legislation is to be realised. Indeed the Scottish Serious Organised Crime Strategy proposals for reducing the ‘benefit of crime’ threshold from £5,000 to £1,000, and extending the range of offences covered in Schedule 4 of the Act indicates a willingness to broaden the impact of the legislation.
  43. Furthermore, the substantive law of money laundering, contained in sections 327 to 329<sup>8</sup> of the Act is also perceived as specialist and difficult. It appears to be the domain of financial investigators rather than of mainstream operational officers. This may be partly due to uncertainty over interpretation which is only now being clarified.<sup>9</sup> We believe that this substantive law could be used more widely than is currently the case.
  44. As part of the inspection we visited the Metropolitan Police Service in London and were particularly impressed with the way that financial investigation techniques were used alongside more traditional investigative tools across a broad range of crimes there. An example of this approach is given below. We believe that the police service in Scotland can achieve similar results by developing its POCA competence and capability at a local level across Scotland.

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<sup>7</sup> See Appendices 5 and 6

<sup>8</sup> Appendix 7

<sup>9</sup> See Appendix 4 for a fuller explanation of the case law relating to the interpretation of money laundering

### Neighbourhood Policing

**Problem: Anti-social behaviour and violence**

**Solution: Subject forced to sell house and then moved out of the area**

A recidivist criminal was responsible for a significant amount of anti-social behaviour in a housing estate. This had caused misery to the local community for many years. He was linked to theft, burglary, drugs and road traffic offences but local residents were reluctant to give evidence against him. As a result he was seldom convicted.

Financial investigation revealed that the criminal was unemployed yet had obtained a mortgage and several loans on the strength of false information provided to finance companies. It was also discovered that he was claiming benefits, including disability benefit, under false pretences.

Subsequently, sufficient evidence was obtained and the criminal was arrested and charged with four counts of obtaining and retaining wrongful credit. His details were then passed to Department of Work and Pensions investigators in relation to fraudulent benefit claims. Consequently the criminal was forced to sell his home and moved out of the area. Further investigation is continuing with a view to confiscate profits made from the sale of his house.

45. In conclusion we have observed that the Serious Organised Crime Taskforce (SOCT) has produced a comprehensive strategy to tackle serious organised crime, and has highlighted therein the importance of POCA as an essential tool in this regard. There is some evidence that the Scottish Strategic Assessment is providing effective arrangements in relation to serious organised crime. Below that level of criminality, we found no evidence of strategic thinking around using POCA.
46. For mainstreaming to occur in policing, every operational officer would need to have a basic understanding that any crime motivated by financial gain should be considered for POCA potential. Rather than the FIU trawling reports for potential it should be brought to their attention by reporting officers. Further, operations should be planned with a financial investigative angle, where appropriate so that proactive measures to identify assets for restraint are applied early and operational officers are alert to the possibility of money laundering offences.

### **COPFS**

47. In COPFS too, the prosecution of serious organised crimes are prioritised through strategic planning. The role of confiscation and asset recovery is highlighted in its latest strategic and business plans in support of this priority. This strategic focus ensures that the provisions of POCA are well used and understood by those regularly dealing with such cases in Crown Office.

48. COPFS strategy for POCA appears to support the use of the legislation at the serious crime level. The adoption of central specialist units to deal with all aspects of POCA follows a pattern that has emerged in recent years, towards creating specialist units to deal better with complex fields of law. The Proceeds of Crime Unit (POCU) in NCD is a specialist unit dealing centrally with all aspects of confiscation, restraint and investigative orders preceding confiscation. This is a central unit whose staff have accrued expertise and knowledge to ensure that considerations about investigative orders, restraint and ultimate confiscation are properly made. Money laundering offences are also, in the main, dealt with in NCD and are not widely understood or used outwith the specialist unit. Such a strategy has resulted in very patchy awareness of the Act among those who do not work in the units. Thus, while the police have been slow to recognise the full potential of acquisitive crime for confiscation, so COPFS has done little to challenge the situation.
49. Specialist units have the perhaps unintended additional consequence of de-skilling or under-skilling those working in the mainstream investigation or prosecution arena: if the message from the centre is that this is complicated work requiring expertise, then generalists tend not to get involved. The wider effect has therefore been to instil a perception among many legal staff that confiscation is a mysterious and complicated adjunct to conviction, rather than a tool which can and should be used widely. In addition, Procurators Fiscal, for the most part, have been content to wait for law enforcement to identify opportunities to use POCA rather than adopting a more proactive position.
50. Nevertheless we did find some exceptions to this general trend from staff who had previously worked in NCD. One former NCD depute told us of the under-noted example:

#### **Case Study**

C was reported to the local PF by the police for a number of offences relating to the theft of tractors and caravans. The crime report showed that he had previous convictions over the preceding six years. The case papers for his previous offending were examined by the marking depute and showed that these previous offences related to crimes of dishonesty. This was a time-consuming exercise for the marking depute as it required him to examine closed cases to ascertain the value of the items stolen.

The PF then contacted the local FIU. No financial investigation had been carried out on the accused. However, when the FIU began to probe the financial means of the accused, it became clear that there were substantial assets. A restraint report was submitted and C's estate was restrained.

51. This example underscores both our contention that POCA should be applied to more than just drug offences, and how the awareness of Procurators Fiscal can be vital in spotting omissions made by law enforcement agencies. Of course, COPFS rightly expects law enforcement agencies to identify such cases. After all, the information about the suspect's lifestyle and assets necessary to assess whether confiscation is appropriate or viable is the domain of those at the frontline of an investigation. However it is apparent that, aside from serious crime reported directly to NCD, COPFS has been content to leave such considerations almost exclusively to these law enforcement investigators.

### **Harm reduction - is prosecution the only option?**

52. Given that COPFS is a prosecution service, it is not surprising and indeed it is right that COPFS' strategy should focus on the conviction of an accused first and confiscation as an adjunct. But whilst acknowledging the policy of giving priority to the criminal investigation and prosecution of those suspected of committing criminal offences<sup>10</sup>, all parties recognise the need to review how this is implemented. Indeed it has become evident to those working in the area that such a policy could work against the stated aim of the law, i.e. to disrupt and deter financially-motivated criminality.

53. During this inspection we repeatedly encountered the view, both north and south of the border that the objective of POCA should be to disrupt criminality in order to reduce the harm caused to communities. Though we share this sentiment, we saw no evidence of it being translated into either explicit strategy or tangible reality; on the contrary, partner agencies were, by default, operating with an almost exclusively prosecution mindset. The civil and taxation provisions in particular did not appear to feature greatly in strategic thinking, suggesting to us that they are not being fully exploited in Scotland.

54. We do not suggest that the current approach is flawed. Rather, we would urge that the timing of decisions about which route to pursue be tightened, so that where prosecution is not viable other options including direct referral to CRU by the police (subject to guidance issued by COPFS) are considered more swiftly. The Act itself sets no such strict framework and we welcome the views of many senior officials in both the police and COPFS that a swifter, more strategic use of all the powers of the Act could and should be used to greater effect.

55. In adopting a prosecution-focussed strategy, COPFS created structures and processes to suit. The result is that the recovery of criminal assets by civil recovery is considered only following failed or abandoned prosecutions, where confiscation has been considered or where an accused has died. The time-lag that this inevitably causes can prejudice the civil investigation. In the present structure, case papers reach the CRU at a time when the information about assets is considerably out of date. It is accepted that

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<sup>10</sup>As a result of the Sewell Memorandum: Proceeds of Crime Bill Session 1999 - 2003

such a situation is inevitable in some circumstances, for example where prosecution has failed.

56. In cases where the Crown decides that no proceedings are appropriate because the evidence does not reach the criminal standard, a referral can also be made to the CRU. Again this system seems to cover only cases reported to NCD as substantive crimes such as money laundering or cases for potential confiscation. Referrals are not made to CRU by Procurators Fiscal around the country.
57. Anecdotal reports from some forces suggest that the system too can be subject to delays. Unfortunately, the absence of performance information meant that it was not possible to confirm the existence or the length of delays. In many cases we understand that there were good reasons for delays eg where further enquiries are needed before a proceedings decision can be made. Nevertheless, we believe that these matters could be resolved by more effective communication on a case-by-case basis between parties.
58. Although we heard of the willingness of all parties to give greater consideration to how they might use POCA more appropriately, encouraging initial discussions had yet to be formalised and acted upon. We understand that a draft Memorandum of Understanding (MOU) for referring cases from SCDEA for early CRU consideration has been prepared. It is our contention that such an arrangement should be open to all police forces and other relevant law enforcement agencies in Scotland.
59. The draft MOU retains the condition that the route for referral to CRU should be via NCD. Whilst such an arrangement would allow NCD to confirm that criminal proceedings are not appropriate, we are reassured by the current effective mechanisms in place in CRU to return cases for prosecution should sufficient evidence come to light. We believe that there is room for a more direct route to CRU for cases where there is no prospect of a criminal prosecution and that the route need not always be via NCD. In order for such a change to take place, law enforcement agencies would require clear guidelines as to the criteria and evidential standards required by CRU.
60. In the same way that local Procurators Fiscal need to have a better awareness of the criminal confiscation elements of POCA, there a need for similar awareness about civil recovery. In addition just as prosecutors taking criminal proceedings need to think about POCA opportunities, prosecutors marking cases 'no proceedings' should also consider the potential appropriateness of a civil recovery option and discuss this with the reporting agency.
61. Just before the start of our inspection, the head of the CRU initiated a scoping process requiring forces to review individuals known to them whose property might fall into the category of property obtained through unlawful conduct, for the purpose of civil recovery. Early indications were that

forces were able to identify a considerable number of individuals meeting these criteria. While it may not be possible to gather sufficient evidence to prosecute them, if their property has criminal links then civil recovery may offer an alternative route. At present there is no direct route to bring such cases to the attention of CRU. Indeed, they may never be reported to the Crown at all due to acknowledged lack of evidence. We suggest that the current strict referral procedure to CRU via NCD has perhaps unintentionally blinkered the approach of law enforcement agencies who have not been encouraged to consider the civil recovery option in a strategic way.

62. It is acknowledged that some activities involving the provisions of the Act are best left to specialists. That said, it is essential that those in general practice in COPFS know and understand how and when such provisions might affect their casework. Therefore we suggest that the strategy of COPFS relating to POCA should be to develop and maintain a mainstream understanding and awareness of the criminal and civil potential of POCA to support the law enforcement agencies who report cases to them. In this way, we suggest, the strategic aims of the Taskforce in relation to serious organised crime might be furthered and the provisions of the Act used.
63. In conclusion, we found that the strategic direction set by COPFS at the time that POCA was enacted was consistent with its prosecution focus. The processes and structures that were then put in place again reflect that focus. Over time the legislation has become embedded and perceptions have altered as to how the Act can, when utilised to its full extent and in partnership with other agencies, solve local community problems as well as delivering swift effective justice against serious organised criminals.
64. Many practitioners have come to a wider view that advocates full use of the Act to disrupt criminality. This is consistent with the intention of the Act. Therefore we believe that COPFS should broaden its strategic approach to POCA. In doing so it will better be able to:
  - support the broader intention of the legislation;
  - support the SOCTF strategy; and
  - support delivery of COPFS current draft strategic objectives.

We acknowledge that there will be implications in delivering this strategic intention in terms of changed processes and increased resourcing within the current COPFS structure. We return to these in more detail in the following sections of this report.

65. Our inspection also involved looking at other jurisdictions. We considered how the Irish had tackled criminality using their proceeds of crime legislation. We visited both the Criminal Assets Bureau and the Director of Public Prosecution (DPP) in Dublin to carry out our research. Our findings are particularly relevant in relation to the civil and taxation powers of our own legislation.

## The Irish Experience

During our inspection we met members of the Criminal Assets Bureau (CAB) in Ireland and the senior solicitor at the Office of the Director of Public Prosecution (DPP) heading the specialised proceeds of crime unit responsible for criminal confiscation. CAB is a multi-agency, multi-disciplinary body that applies non-conviction civil forfeiture and taxation and welfare sanctions.

Confiscation is an integral part of the criminal prosecution work carried on in the DPP. In 2007 a specialised Proceeds of crime unit was set up within the Office of the DPP to deal with all freezing orders and High Court proceedings arising from this work. It is a small unit, comprising one full-time senior solicitor and other legal staff on a part-time basis as required.

Where a case is prosecuted and criminal confiscation is appropriate, the DPP will seek confiscation. Such an order will take precedence over any civil recovery order. Good communication between the two organisations minimises any duplication of effort and, where both agencies have an interest a decision is taken after consultation as to the most appropriate method of dealing with a reported case.

Around 70 staff work in the CAB team in Dublin, and law enforcement agencies can report directly to the CAB. Often they will receive reports from members of the public concerning suspected criminals and such reports are encouraged by CAB. Some of those targeted by CAB have tended to distance themselves from direct involvement in criminal activity but nevertheless have substantial assets. An early decision is made as to whether civil recovery, taxation, or social welfare sanctions, or a combination of these, is appropriate. The decision is made by the head of the CAB in consultation with the bureau legal officer.

The CAB annual report of 2007 states that funds paid to the Minister for Finance in civil recovery cases amounted to nearly 255,000 euros, whilst taxation receipts accounted for just over ten million euros. Thus whilst the civil recovery option is used, it is taxation that accounts for the larger sums that are reclaimed. Interestingly though, the Irish government does not set monetary targets for the CAB. Nor is there any direct relation to funding the CAB from proceeds of crime receipts.

The recent experience of CAB showed that whilst the tactic of targeting the bigger criminal players had netted considerable sums of money, local communities had also felt the benefit of targeting some of the lower level criminals whose negative impact on local safety and wellbeing was more immediate to them.

Lastly, assets subject to Irish civil court order but held abroad were more difficult to seize, as many foreign legal systems have concerns about a

non-conviction asset recovery regime.

66. Potential lessons for Scotland from Ireland include the method of directly reporting potential civil cases, and the relationship with taxation where civil recovery is not feasible. This is not to detract from the current criminal confiscation process but rather to complement it.
67. In sum, with much of Scotland's prosecutorial capacity and capability centred in NCD, criminal offenders can be convicted, sentenced AND ordered to pay back their proceeds of crime. Where this is possible it is the right thing to do. However, the size and capability of the Irish CAB model shows that a multi-agency approach to civil recovery and taxation, which receives direct reports from law enforcement agencies and shares information effectively, can be very successful.

### **Taxation**

68. Although the scope of our inspection did not extend to the use of taxation powers under the Act, we observed a developing partnership working arrangement between CRU and the tax authorities, namely SOCA and HMRC. In some cases a dual approach was adopted by the CRU and tax authority so that both civil and taxation options were considered simultaneously to good effect.
69. The financial investigations carried out by tax authorities were in themselves a rich source of information that could assist law enforcement agencies in pursuing associated criminals. Moreover, the experiences of Ireland and England showed that taxing one member of a criminal gang often led to cash flow problems for the criminal enterprise as a whole, which in turn could lead to new criminality coming to light elsewhere in the structure of the enterprise. Therefore, the tactical use of taxation powers was a relevant consideration in strategic criminal investigations.
70. The CAB officers felt that their success was partly due to their co-location and partly to their ability to share information. In the UK, the merger of Customs and Excise with the Inland Revenue has created Her Majesty's Revenue and Customs (HMRC). Under section 20 of the Commissioners of Revenue and Customs Act 2006, information about taxpayers may not be shared with other government departments except through a recognised legal gateway. Concerns were expressed to us during the course of this inspection about the ability of HMRC to share information with its criminal justice partners. Activities such as information sharing between criminal justice agencies may require high level agreements and memoranda of understanding. We believe that these should be addressed by a Proceeds of Crime strategy group.

### **Conclusion**

71. In this chapter we have described effective strategic approaches to serious organised crime at a national multi-agency level as well as within the police service and COPFS. At the same time we have emphasised the need to

mainstream knowledge and awareness of the powers contained within the Proceeds of Crime Act fully in order to disrupt and reduce the harm caused by all the types of criminality to which the Act applies, and at all levels. In this regard we have recommended that a Scottish Proceeds of Crime Strategy be developed with mainstreaming as one of its main aims. We have also called for greater use, and earlier consideration of, civil (and taxation) powers.

72. We suggest that the Proceeds of Crime Strategy focuses on the following:

- creating sufficient capability and capacity across partner agencies;
- ensuring that criminal, civil and taxation powers contained in the act are used as effectively as possible; and
- establishing a proactive rather than reactive approach to financial intelligence gathering and investigation.

73. Although we make the following recommendation at this point in the report it is a common thread throughout:

**Recommendation 1. That as a matter of routine, the use of the Proceeds of Crime Act be mainstreamed within the police service in Scotland and COPFS so that from intelligence gathering to investigation and prosecution;**

- a) all confiscation opportunities are considered and where appropriate brought into effect against the full spectrum of relevant crime as provided in the Proceeds of Crime Act 2002; and
- b) where it is clear that criminal proceedings are not appropriate, that civil recovery (and taxation) provisions are considered at an early stage of investigations and that a direct route is made available to the Civil Recovery Unit in clearly defined circumstances.

## CHAPTER 3 - PROCESSES

74. In this section of our report, we look at the various processes in place to support the provisions of the Proceeds of Crime Act. From the police perspective we focus upon financial intelligence-gathering and development, the identification of cases with confiscation potential, investigative techniques and the Suspicious Activity Report (SARS) regime. Under COPFS, we examine communication between local Procurators Fiscal (PFs) and Crown Office staff, the processes in place both at local level and within Crown Office, how PFs identify potential confiscation cases, and other aspects of local work relating to POCA. In Crown Office we examine arrangements in the confiscation unit of National Casework Division relating to restraint, investigative orders, confiscation, and post-confiscation. We also consider money laundering processes and how this is considered by the Crown. And lastly, we examine the processes involved in the civil options of cash seizure through to forfeiture, and asset recovery.

### POLICE

#### Intelligence-gathering and development

75. Good financial intelligence is clearly vital to successful financial investigation. It also has value beyond activities relating to POCA. During the inspection we saw how intelligence about criminal finances and assets is valuable in many investigative settings and can lead directly or indirectly to operational success, as shown below.

#### **The benefits of financial intelligence at divisional level**

Financial intelligence can both instigate investigations and provide additional and new material in support of existing investigations. Consequently financial intelligence can assist at a force and divisional level in a number of ways:

- Financial intelligence can help to develop investigative strategies and make investigations more efficient.
- Financial intelligence can improve the effectiveness of National Intelligence Model (NIM) products such as subject and problem profiles.
- Financial investigators can obtain financial intelligence to assist divisional investigations and enquiries (including missing person enquiries) from a variety of open and closed sources that are not available to all officers.

76. Given how important financial intelligence can be, we were disappointed at how little is actually gathered, developed and entered on the Scottish Intelligence Database (SID). As we have already observed, each force in Scotland has recognised the need for a Financial Investigation Unit in order to carry out the specialist work required to support confiscation, money laundering cases and cash seizures. What is still lacking though, to the detriment of wider investigation, is an appreciation of the more general value and applicability of financial intelligence-gathering.

77. We urge that efforts be made to redress this intelligence shortfall across the police service as a matter of urgency and that this is done so through the proposed Scottish Proceeds of Crime Strategy. There are many, relatively easy ways to enhance the quantity and quality of intelligence in this area, such as when conducting searches of people, vehicles or premises or being more alert to visible cues of sudden or unexplained wealth such as expensive cars or exotic holidays. Recording such intelligence on SID makes it accessible to investigations throughout Scotland.
78. In the text box below we outline the approach developed in England, Wales and Northern Ireland to ensure that intelligence opportunities in the custody setting are fully exploited. We believe that such an approach has particular merit and should be considered in Scotland.

#### **Intelligence opportunities in custody and compliance**

In England the CPS in Greater Manchester devised a system whereby police were required to complete a form (MG17) designed to assess an offender's assets at the time of arrest. The form must be completed by the arresting officer and then passed to the appropriate CPS lawyer, together with all other relevant reports and associated paperwork. Thereafter the forms, which are treated as restricted documents, are passed to the FIU. This intelligence is pivotal in allowing prompt action on restraint for confiscation or a potential money laundering investigation.

In 2007 the National Police Improvement Agency (NPIA) conducted a review of POCA arrangements in England and Wales, based on their observations in eight pilot sites. They found that completion rates of MG17 forms were disappointing low - for example, only 12% of arrests for acquisitive crime resulted in a completed form. Recognising the importance of this intelligence, and of the early discussion between the police and the CPS that it prompts, one pilot has made improving performance in this area a priority. The 66% completion rate now achieved in the pilot area has been brought about by:

- the concerted efforts of custody staff, officers and CPS, who will not accept a case without a fully completed MG17 form; and
- making the assessment of compliance data for submitting MG17 forms an item for discussion at performance meetings.

The NPIA concludes that:

*“The information on the MG17, or equivalent, will determine the success of potential prosecution for money laundering offences, confiscation assessment, consideration of early use of restraint, and considerations concerning searches of premises for financial evidence and intelligence.”*

(Source: ‘Practice Advice on the Management and Use of Proceeds of Crime Legislation’, 2008. NPIA)

79. It is our view that a programme of awareness-raising is needed if the progress required in this area is to be made. Possible methods might include stressing the need for financial intelligence in force and divisional intelligence requirements, operational orders and briefings.
80. During the inspection, anecdotal concerns were raised regarding the storage of financial intelligence on the Scottish Intelligence Database. Specifically it was suggested that if and when financial intelligence is entered on SID, it may be weeded out by local intelligence officers who fail to recognise its potential worth or understand the need to keep financial intelligence for up to 12 years. We believe that the Service should review its guidelines for storing and weeding financial intelligence. This is particularly relevant given the fact that the criminal provisions in POCA cover the previous six-year period, while the civil provisions cover a 12-year period.

### Suspicious Activity Reports (SARs)

81. In our view, the SARs regime offers another rich source of financial intelligence that has yet to be fully exploited in Scotland. Part 7 of POCA established two distinct regimes for handling suspicions about criminal funds. The first requires institutions in the regulated sectors to disclose (as SARs) to the Serious Organised Crime Agency (SOCA), any suspicions that arise concerning criminal property. The second allows persons and businesses in general, and not just those in the regulated sectors, to defend themselves against complicity in money laundering charges by seeking the 'consent' of the authorities (via SOCA) to conduct a transaction or undertake other activity (a 'prohibited act') about which they have concerns.
82. The legislation provides the authorities with seven days in which to respond, and if consent to proceed is refused the transaction or activity must be frozen for a further 31 days. In addition, POCA makes it an offence, having made a disclosure, to reveal information that is likely to prejudice any resulting law enforcement investigation. It is worth noting that the definition of criminal property in the legislation is sufficiently broad to include property obtained in or following acquisitive crime and the proceeds of crime generated overseas, and not just serious organised crime and the proceeds of criminality obtained within the UK.
83. In 2005 Sir Stephen Lander reviewed the SARs regime and noted a perception that law enforcement agencies were not using SARs enough to detect and prevent crime and recover criminal proceeds<sup>11</sup>. This finding was subsequently reflected in a number of recommendations targeted at financial investigators. Progress against all 24 recommendations of the final report is documented in the SARs Annual Report produced by SOCA. In general terms, efforts by the UKFIU in SOCA to improve both the quantity and quality of Suspicious Activity Reports have enjoyed some success<sup>12</sup>.

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<sup>11</sup> Review of the Suspicious Activity Reports Regime (The SARS Review), 2006. Sir Stephen Lander. The Serious Organised Crime Agency.

<sup>12</sup> The Suspicious Activity Reports Regime Annual Report, 2007. The Serious Organised Crime Agency

84. For the purpose of this inspection, we were particularly interested in the objective to achieve a SARs regime that provides the best possible balance between:
- the costs to reporters and other regime participants;
  - addressing the threats to the UK from crime and terrorism; and
  - the reward that the regime potentially offers through reducing harm and recovering the proceeds of crime.
85. The scope of this inspection does not extend to SOCA or indeed the SARs regime, which are inspected by HMIC in England and Wales and the SARs Regime Committee respectively. However, it is appropriate for us to inspect the extent to which the Scottish police service is using the SARs regime as an intelligence source to reduce the harm caused to communities by crime and to recover the proceeds of crime in Scotland.
86. Here in Scotland the SMLU acts as a single point of contact with SOCA and receives in the region of 8,000 SARs every year. Each SAR is assessed and, where possible, enhanced by both open and closed sources of intelligence. In the region of eight per cent of SARs are subsequently enhanced before being forwarded on to the appropriate force. Due to the high volumes of SARs and the relatively small number of financial investigators available in each force to deal with them, the SMLU became concerned at the low level of response being achieved. Consequently a service level agreement (SLA) was agreed between ACPO(S) and the SMLU which commits forces to, at the minimum, investigating enhanced SARs passed to them by the SMLU.
87. During this inspection it became clear that in many cases forces are doing little more than investigating enhanced SARs, largely because of the low number of officers working in FIUs and a range of competing demands. This is a cause for concern, not least because of the efforts made by the regulated sector to report what they believe to be suspicious incidents and those of SOCA to further increase the quantity and quality of SARs. Furthermore, where forces have adopted a proactive approach and further developed a greater number and wider range of SARs, they report that this has led to positive identifications of criminality.
88. Two English case studies produced by SOCA are included below to illustrate the potential contribution of SARs.

#### **Case Study 1 - An apparently minor SAR**

A SAR relating to a relatively minor financial transaction led to the arrest of an individual for money laundering and drug trafficking. Enquiries into the subject of the SAR identified a property portfolio that was inconsistent with the subject's status. Production orders were obtained in order to obtain evidence to support the intelligence provided by the SAR. The subject was arrested and searches revealed suspected criminal property valued in excess of £1.5 million and several hundred thousand pounds worth of controlled drugs.

## Case Study 2 - SARs in support of ongoing investigations

A single SAR revealed a link between an individual and a well known criminal that pushed an existing financial investigation forward and assisted in the discovery of an underlying predicate offence - insurance fraud. The investigation resulted in one conviction for obtaining money transfers by deception and another for money laundering. In addition, over £250,000 was subject to confiscation. This illustrates the potential for a SAR to assist an ongoing investigation by identifying previously unknown details.

89. We therefore believe that, in line with our call for a more proactive approach to financial investigation in general, forces should consider reviewing current arrangements for developing and investigating SARs with a view to improving the use of SARs intelligence.
90. In January 2009, the SCDEA held its 'Risky Business' conference in conjunction with the Scottish Business Crime Centre. The conference, which was the first of its type in Scotland, was aimed at senior business leaders and sought to raise awareness of the risk caused by organised criminals and identify ways of protecting legitimate business. While we support this over-arching aim, further engagement with the regulated sectors in Scotland is needed to encourage compliance with the SARs regime and in turn enhance the quantity and quality of SARs reporting.
91. As part of the inspection we also attended the latest in a series of 'Payback' conferences held by the SOCA UKFIU across England and Wales. These events target small- and medium-sized regulated organisations in order to improve compliance with SARs requirements. Such an approach has not been adopted in Scotland but we believe that there is clear need to do so in the near future.

## Confiscation

92. The potential for confiscation in criminal cases was for the most part identified not by operational officers but by financial investigators post-arrest. In this reactive environment the officers based in force FIUs have systems in place to check the reports submitted by divisional officers. Everyone we interviewed referred to systems that identified cases with reference to the offences listed in Schedule 4 to the Act. Some financial investigators described identifying acquisitive crime in the same way.
93. However as we have already noted the majority of cases in which confiscation is obtained are drugs crimes. We were not persuaded that robust methods had been used to identify those cases falling into the 'criminal lifestyle' categories listed in s142(2). In particular, we found no evidence of systems to identify criminals who had a record of offences of dishonesty which might place them in the category listed in section 142(2)(b) (see Appendices 1 and 2 for details of Schedule 4 offences and the 'criminal lifestyle' categories).

94. We accept that some research into the previous convictions of the accused is needed in order to determine whether his or her offending in the preceding six years accrued a gain of £5,000. However, we believe that the benefits of fully using these provisions far outweigh the additional effort likely to be required and urge the Service to develop arrangements to address this matter as efficiently as possible. We believe that this is another matter that should be dealt with through the proposed joint Scottish Proceeds of Crime Strategy.
95. We observed little consideration of the wide-ranging provision of ‘particular criminal conduct’ in identifying possible cases for confiscation. We take the view that identifying confiscation opportunities will in the main rest with law enforcement agencies, as they have the means to obtain the financial information needed to determine whether confiscation is viable. However, we go on to acknowledge the part that COPFS can play (see paragraph 117 et seq).
96. Although our remit did not extend beyond the police service and COPFS, over the course of this inspection we observed the processes developed by the police service to support a number of law enforcement partners in Scotland. In terms of criminal confiscation, we found that, for example, the Department of Work and Pensions (DWP) had established a unit of financial Investigators in Scotland. However, there was no similar arrangement for Trading Standards departments.
97. Since offences under Schedule 4<sup>13</sup> of the Act include Copyright and Trade Marks offences, we were interested to learn how such cases were referred to NCD for potential confiscation. Some police forces have proactively developed good systems and procedures for working with their counterparts in local authority Trading Standards departments. For example, Dumfries and Galloway has developed an agreement backed up by a draft Memorandum of Understanding with its local Trading Standards department. Strathclyde Police maintain close links with a number of law enforcement agencies including Trading Standards, FACT (Federation Against Copyright Theft) and the Illegal Money Lending unit.
98. In other forces a more reactive situation exists. Since the local authority Trading Standards department reports crime directly to the Procurator Fiscal, the local Procurator Fiscal is relied upon to identify the confiscation potential. In such cases we are not convinced that identification is always being made. We suggest that there may be merit in reviewing current arrangements between police forces and partner agencies when drawing up the Scottish Proceeds of Crime Strategy, in order that a consistent approach can be developed across Scotland.
99. The Proceeds of Crime Act also contains provisions relating to circumstances, post-confiscation, in which new information comes to light that has an impact upon the assessment of the available amount at the

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<sup>13</sup> Appendix 5

time of confiscation. The case study outlined below illustrates one such circumstance.

In a 2007<sup>14</sup> case a late petition was made to the court for confiscation. The circumstances were that W pleaded guilty in July 2004 to a charge of contravening s4(3)(b) of the Misuse of Drugs Act 1971. Scottish police officers were aware in 2003 of his home address, which was in England, and an officer had checked the electronic database of the English Land Registry to find out if he was the owner of that property. The response to the electronic enquiry gave an inaccurate result which the officer relied upon without checking further. The officer who made the search believed in good faith that the information he obtained showed that W was probably living in a local authority house and had no assets. He therefore made no report of assets to Crown Office, and in the absence of any such report the Crown did not ask the court to make a confiscation order at the time of his conviction. The Crown later learned of W's proprietary interest in the house in question and was successful in petitioning the court for a confiscation order.

100. Where evidence comes to light after no confiscation order has been made, the Crown can ask the court to reconsider the case (s104), reconsider the benefit from new evidence (s105) or, where an order is made but evidence of a greater benefit comes to light, reconsider the benefit figure (s106). In order to preserve the integrity of the entire confiscation process it is vital that there are systems for reviewing a criminal's post-confiscation change of circumstance and for considering provisions concerning the benefit of crime. As a result, we urge forces to address the current lack of robust processes in FIUs for dealing with this.

### **Police financial investigation**

101. The largely reactive arrangements in place across Scotland and the lack of financial intelligence being gathered support our overall conclusion that the police service in Scotland has not yet fully embraced POCA. There is a need to improve the technical ability of those working in the financial investigation field. In fact, during the inspection financial investigators frequently called for more advanced financial investigation training in order to extend their skills to include, eg money laundering investigative considerations and techniques or to attend the financial investigators course at the Scottish Police College (we return to the subject of training in the People section).
102. On the other hand we believe that a cultural shift is needed if the Service is to begin to consider using other police assets in support of financial investigations. For example, in our opinion greater use of surveillance resources in money laundering cases and indeed for other aspects of POCA,

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<sup>14</sup> Wright v HMA 2007 SLT 597

is likely to yield positive results. At present surveillance resources are much more likely to be used for investigations focusing upon the supply of controlled drugs or the activities of particular potential sex offenders. We do not suggest that these surveillance resources be redeployed to focus on money laundering cases and general financial investigations as a matter of course. But we do feel that there is merit in police forces considering the use of surveillance techniques to support a more proactive approach to financial investigation.

103. As we argue elsewhere in this report, we believe that a more proactive approach to financial investigation across all levels of criminality has the potential to disrupt criminality significantly at all levels and disincentivise many individuals from embarking upon criminal activity. The use of surveillance is likely to prove a rich source of additional intelligence to assist this endeavour. It should therefore be given more consideration in Scotland than it currently receives.

## **CASH SEIZURES**

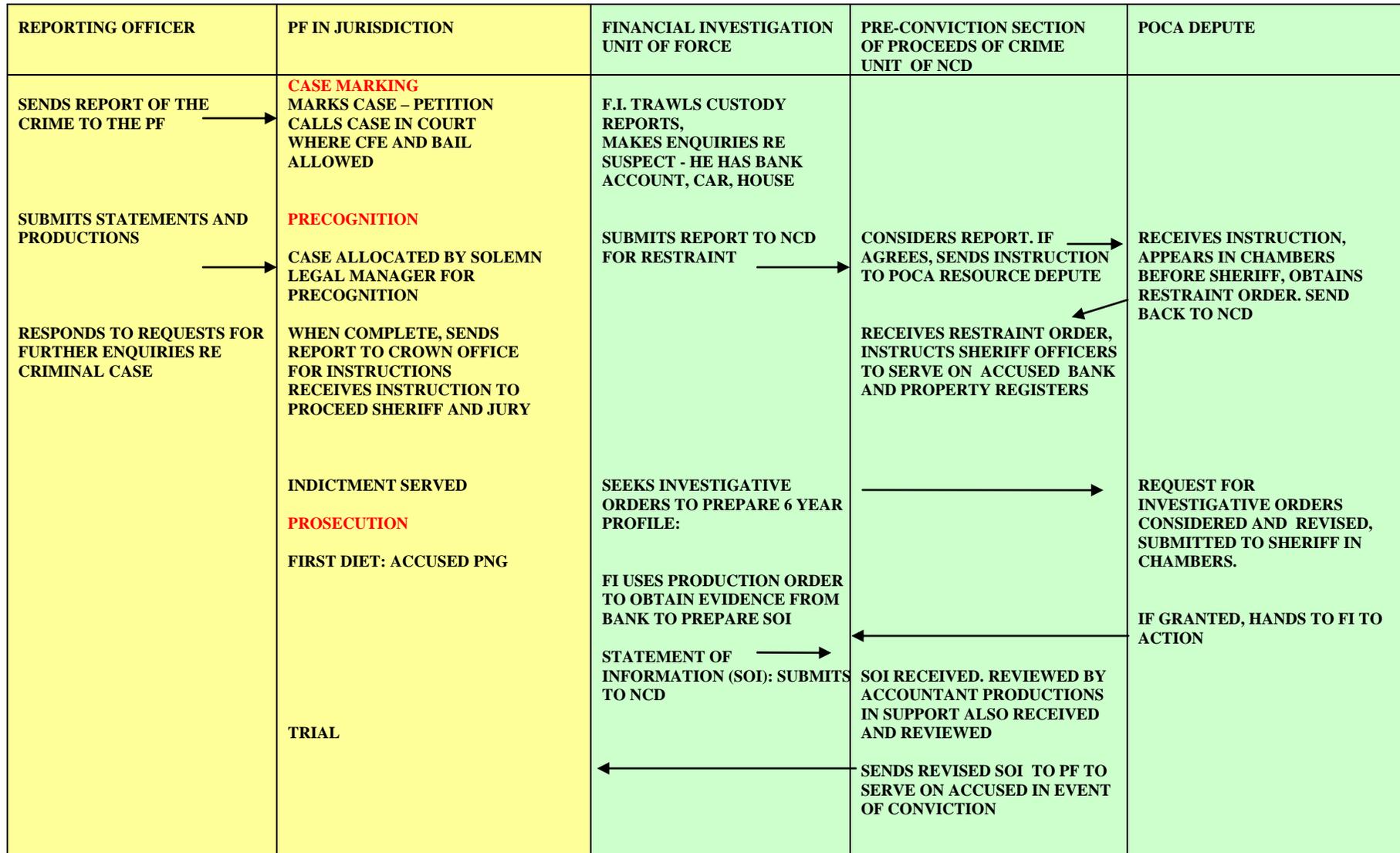
### **Police**

104. Throughout the Scottish police forces we found evidence of fairly widespread knowledge of cash seizure as a concept but, in some cases, less detailed awareness of the exact provisions of the Act. There were also clear and well developed processes relating to the cash seizure aspects of POCA.
105. All forces provide guidance to frontline officers, that is continuously available, often through an intranet application. This appears to work well. In addition, divisional financial investigators in Strathclyde Police offer local guidance and support on cash seizures to front-line officers. This further highlights the practice of mainstreaming financial investigation competence referred to elsewhere in this report. However, it was also noted that reacting to cash seizure cases is now taking up the majority of these divisional financial investigators' time and leaves little time for additional proactive activity.
106. FIU officers in a number of other forces, including Fife and Dumfries and Galloway constabularies, operated an out-of-hours on-call service providing round-the-clock expert advice on cash seizure cases. We highlight this as an example of good practice, whilst acknowledging the potential adverse impact on staff and the high costs associated with maintaining an on-call roster. For these reasons we are content to allow forces to make their own decisions rather than make a specific recommendation in this respect.
107. In one force, targets had been set for cash seizures which had contributed to an increase in the number of such seizures. However, anecdotal reports that this had led to a higher number of cases where the cash subsequently had to be returned through lack of sufficient grounds might suggest that further training is required. Concerns were also expressed that the drive to meet targets was having the unintended consequence of cash seizure being seen as an end in itself and that the

opportunity to use cash as an adminicle of evidence for, say, forensic analysis, in support of a conviction was lost.

108. In cases where the cash can be seized as a production to support a conviction, this should always be done. Such cash may be subject to forfeiture on conviction, and in the event of an acquittal or the case not proceeding to trial, the option to seize the cash under section 295 of the Act would still be available. During our visits it seemed that officers were consistently being advised to treat sums of money potentially linked to criminality as productions in the first instance whenever appropriate, rather than as a cash seizure.
109. Therefore, whilst police officers appear to be well versed in the law in terms of when and in what circumstances it might be appropriate to seize cash, this should not be at the expense of potentially obtaining a conviction. We would encourage those charged with developing the Scottish Proceeds of Crime Strategy to give due regard to this.

**COPFS  
PROCESS MAP 1 - CONFISCATION  
PRE CONVICTION**



## CONFISCATION PROCESS MAP 2 POST CONVICTION

PF IN JURISDICTION	FINANCIAL INVESTIGATION UNIT	POST CONVICTION SECTION OF POCU IN NCD	DEFENCE	SHERIFF/SHERIFF CLERK
<p>SOI SERVED ON ACCUSED</p> <p>APPEARS AT SENTENCING HEARING (MAY SEEK TO HAVE PRODUCTIONS, SUCH AS DRUGS/MONEY SEIZED, FORFEITED)</p> <p>CONTINUES TO REPRESENT THE CROWN AT CONTINUED DIETS WHEN, REVISED SOIs MAY BE SERVED.</p> <p>TAKES NO ACTIVE ROLE ACTS AS LOCAL AGENT FOR POCU.</p> <p>APPEARS FOR CROWN IF SETTLEMENT</p> <p>DOES NOT CONDUCT PROOF (THIS IS DONE BY POCU DEPUTE)</p>	<p>FI OR ANALYST REVIEWS DEFENCE ANSWERS</p> <p>MAY CARRY OUT FURTHER ENQUIRIES AS RESULT OF DEFENCE ANSWERS OR VOUCHING PRODUCED</p> <p>MAY BE ASKED FOR CURRENT VALUATION FIGURES</p>	<p>RECEIVE DEFENCE ANSWERS, COPY TO ACCOUNTANT FOR REVIEW, COPY TO FIU FOR INVESTIGATION/REVIEW</p> <p>PREPARES FOR PROOF</p> <p>AWAIT DETAILED DEFENCE ANSWERS INCLUDING VOUCHING</p> <p>SOI MAY UNDERGO A NUMBER OF REVISALS AS A RESULT OF DEFENCE ANSWERS OR FURTHER FINANCIAL INVESTIGATION BY FI.</p> <p>DEFENCE/CROWN ACCOUNTANTS MEET TO DISCUSS</p> <p>NEGOTIATED SETTLEMENT- INSTRUCTS PF TO APPEAR OR</p> <p>CONDUCTS PROOF</p> <p>RECEIVES NOTIFICATION OF MEANS COURT AND APPEARS</p> <p>MAY SEEK TO APPOINT ADMINISTRATOR IN EVENT OF NON PAYMENT, TO REALISE ASSETS IN SATISFACTION OF THE ORDER</p>	<p>MAY APPLY FOR LEGAL AID AFRESH</p> <p>SUBMITS ANSWERS TO SOI</p> <p>MAY INSTRUCT DEFENCE ACCOUNTANT</p> <p>NEGOTIATIONS? DEFENCE ACCOUNTANT VOUCHING</p> <p>CONDUCTS PROOF</p>	<p>SENTENCE AND FOREITURE OF ANY PRODUCTIONS</p> <p>FIXES CONTINUED DIETS FOR CONFISCATION</p> <p>PROOF HEARD OR EXTRA JUDICIAL AGREEMENT AUTHORISED</p> <p>CONFISCATION ORDER MADE</p> <p>COLLECTS MONEY OR CITES TO MEANS COURT - MAY GIVE LONGER TO PAY OR SEND TO PRISON AS ALTERNATIVE</p> <p>REMITTS MONIES COLLECTED TO SCOTTISH GOVERNMENT</p>

## Processes in Procurator Fiscal offices - The criminal case

110. Two process maps have been prepared which show a very simple, typically reactive case from arrest to confiscation and beyond. As can be seen from the confiscation process map 1 the process of confiscation runs parallel to a substantive criminal case. On the left hand side of the process map we have detailed the typical stages of a case involving, say, drug dealing. Whilst the reporting officer in the law enforcement agency reports the crime to the PF in the appropriate jurisdiction, the financial investigators within that reporting agency may consider that confiscation might be appropriate. As we have seen from the police processes, it is the financial investigators rather than the operational officers who look for POCA opportunities. Likewise, with a few exceptions, we found little evidence of Procurators Fiscal considering the substantive case contributing to this process.
111. In the current parallel confiscation process there are three main areas of their everyday work where Procurators Fiscal need to be more alert to opportunities to contribute to decisions around the POCA potential of cases. These are:
- case marking stage
  - precognition
  - prosecution

### Case-marking

112. A survey of legal managers involved in case marking revealed very few cases identified by them or their teams as potential confiscation cases in the last six months. This confirms our belief that in the main there is a reliance on the law enforcement agency to identify the potential for confiscation. We attribute this position to the lack of awareness of POCA generally among legal staff, with the exception of those with some experience of working in National Casework division (NCD). For example we found instances where legal staff who had previously worked within NCD, either as trainees or as qualified legal staff, had, at the marking stage, identified cases that had not been identified by law enforcement, but which had the potential for confiscation under POCA.
113. Reporting substantive criminal cases by the police and indeed all law enforcement agencies is now carried out electronically in a format called the Standard Police Report 2 (SPR2). This report is submitted to the Procurator Fiscal (PF) in the jurisdiction where the crime was committed. In the present system, the officer submitting the report (reporting officer) may not know of the existence or outcome of any financial investigation regarding the Proceeds of Crime. Even if he is aware, there is no field in the SPR2 to complete, indicating the position. Where the Financial Investigation Unit (FIU) has identified POCA potential, its report is submitted to the Proceeds of Crime Unit (POCU) in NCD. It falls to the confiscation unit at NCD to advise the local PF of the position.
114. Very often the first that the local PF will know of confiscation potential is when the Statement of Information (SOI) comes from NCD to be placed before the Sheriff in the event of a conviction. This is near the end of the process. The initial case

report is unlikely to contain any details of the POCA considerations, as these are reported by separate (financial investigation) officers not to the PF but to the central confiscation unit in Crown Office.

115. Some law enforcement agencies include in the remarks section of the SPR2 a reference to an ongoing POCA confiscation enquiry. We suggest that providing such information in the body of the substantive crime report is good practice. It serves to bring to the attention of the PF the fact that confiscation may be sought at the end of the case on conviction. For PFs marking cases, regular reference to POCA considerations would serve to increase their awareness of the type of cases that are being picked up for confiscation.
116. Whilst a note in the remarks section of a crime report is helpful this is only likely to be added if the reporting officer is aware of the POCA enquiry. We suggest that to take matters forward it might be helpful for the law enforcement agencies and COPFS to examine the compulsory fields for completion in SPR2. If the reporting officer was required to indicate that POCA had been considered, it would bring the question into sharp focus at an early stage and encourage discussion with financial investigators in the force or agency. Such a system would not only focus the mind of investigators about POCA and whether it should be considered, as well as alerting prosecutors to the criteria for confiscation too.
117. In addition, for the local PF to play his or her part in identifying potential cases for confiscation, some financial information about the means and assets of the accused would be essential. At present, the SPR2 format has some fields in which agencies can enter this kind of information. A fuller financial picture in police reports could enable PFs to assist in identifying potential confiscation cases. This might be similar to the form MG17 used in England and Wales which we have already reviewed<sup>15</sup>.
118. Essentially, the main aim should be to have both law enforcement agencies and prosecutors thinking of POCA whenever they report or mark charges where the crime alleged is one in which financial gain is the motivation or outcome.
119. For wider use of the confiscation provisions it is essential that operational officers and prosecutors are aware of how the Act applies not just in relation to the commonly known drugs cases but to a wide range of criminality. Case marking guidelines are available to all legal staff and are an excellent resource for legal staff for making informed decisions about if and how to take criminal proceedings. However we were disappointed to note that, with the exception of drug related cases, these guidelines contained no reference to the potential for confiscation post-conviction for the other offences listed in Schedule 4<sup>16</sup> of the Act. Nor was there any reference to POCA in the wide range of offences of dishonesty. Given the current focus in COPFS on outcomes in case marking we believe that POCA potential outcomes should be highlighted in these guidelines, in line with this approach. This gap in the content of case marking guidelines should be addressed through the mainstreaming of POCA.

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<sup>15</sup> See textbox at paragraph 78

<sup>16</sup> Appendix 5

## **Precognition**

120. Precognition is the process by which Procurators Fiscal investigate and prepare solemn cases for prosecution before a jury in either the Sheriff Court or High Court. At this point in the prosecution process we believe it is important for all legal staff to have some awareness of POCA. Our survey of legal managers in solemn units in the main offices across the country also revealed little general awareness or proactive consideration of the provisions of the Proceeds of Crime Act. Some responses acknowledged confusion between criminal confiscation and civil cash forfeiture. On the other hand, one legal manager with extensive knowledge and experience of working in the Proceeds of Crime Unit in NCD, reported that in her briefing guidance she routinely advised precognosers to check with the reporting officer whether the case had been considered for confiscation potential. She also regularly added charges for money laundering to draft charges in precognitions. This is good practice which, with additional training for legal managers, could be replicated across the country.
121. We heard also that precognosers should be alert to the fact that in carrying out investigations, financial investigators (FIs) might be able to provide some useful insight and information that could be of importance in the prosecution case. For this reason it is important that precognosers are aware of any ongoing financial investigations and are able to discuss this with the financial investigator involved.

## **Prosecution**

122. It is also vital that prosecutors are more fully aware of the provisions of the Act, so that cases where the intention is to seek confiscation post-conviction are not jeopardised by plea negotiation which removes the confiscation criteria. For example, in a 'criminal lifestyle' confiscation case (see Appendix 6), a conviction would be required for a minimum of four charges on one indictment or complaint where the accused had benefited from his crimes to the extent of £5,000 in cumulo. It would be crucial for the prosecutor in court to understand how a plea of guilty to a reduced number of charges on a complaint or indictment might affect this. Legal managers in solemn teams showed some awareness of the significance of accepting reduced pleas in substantive matters that might affect the confiscation position. Not surprisingly, this was often in connection with drug cases. However, our surveys and interviews suggested that more widespread knowledge and understanding were unlikely to extend beyond those who had worked in NCD previously.

## **Processes relating to confiscation**

123. On the right hand side of process map 1 we describe the processes for confiscation using an example where restraint was applied for post arrest. Restraint is not always applied for or obtained; much will depend on the circumstances as we outline below. The process is that the financial investigators in the Financial Investigation Units (FIUs) submit an application for restraint to the POCU unit in NCD. If this application is connected with a crime that has already been the subject of a report to the PF, then the restraint application must be submitted as soon as

possible. For pro-active investigations, the restraint report may precede any crime report.

## Restraint

124. The power to restrain a person's estate pending confiscation was widened by the 2002 Act to enable restraint to occur at a time before proceedings had begun. Whilst in many cases restraint was obtained swiftly and effectively, we were directed to some examples where practical problems and communication shortcomings resulted in a less favourable outcome in terms of what was restrained.
125. The Crown seeks to process urgent requests for restraint within 24 hours of receipt and for those classified as non-urgent, within seven days. These can be challenging targets and the Crown accepts that they are not met in all cases. However those we spoke with pointed to a significant proportion of such requests being refused in the first instance due insufficient information being provided. NCD advised us that it was setting up a system for recording and monitoring the quality of police reports for restraint in light of these difficulties. We welcome any such review.
126. The Act provides that restraint may be granted provided an investigation has commenced. As soon as a suspect is aware of a police investigation the risk of dissipation of assets increases. For cases in which the accused has not been charged and no prosecution report has been received, the Crown must be satisfied that there is a prima facie case of a crime having been committed and is provided with sufficient details of the assets to be able to make a professional judgment.
127. The Crown has previously been challenged<sup>17</sup> in connection with a restraint order obtained in a pro-active money laundering case and had to release the restrained assets. In this case, H was a company against which restraint was granted in 2004. By 2007 no criminal proceedings had been instituted, nor could the Crown satisfactorily explain if and when proceedings might eventually be brought. The court, on application by H, recalled the restraint.
128. This case illustrates the difficulties the Crown can face when considering whether restraint should be sought. On the one hand there is a need to act swiftly to prevent dissipation. On the other, particularly in pro-active investigations that have not yet reached a conclusion, a balance must be struck so that restraint is not sought or obtained prematurely.
129. It is clear that interpretation by the judiciary of the provisions of the Act influences the decision to seek restraint or not. The Crown must persuade the court of the likelihood of dissipation of assets. If the application to restrain assets is brought to court some weeks after the accused has been charged with an offence it can be more difficult to persuade the court of the need to restrain. This is not necessarily reflective of the risks of dissipation though, as we discovered on examining some of the examples cited to us.

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<sup>17</sup> Opinion of Lord Eassie in HMA v H [2007] CSOH 41

130. For the police and other law enforcement agencies the urgent requirement to provide accurate, full and detailed information within strict time frames is a challenge. In one case, an accused was remanded in custody and an urgent restraint request submitted to NCD. However, even here, where the urgent 24-hour timescale had been met, dissipation had already taken place. Clearly the law enforcement agency that drew this case to our attention was disappointed with this outcome in which, a substantial sum had disappeared by the time the restraint was granted and served on the bank (the same day the accused was liberated from custody).
131. Furthermore we learned that the restraint team in NCD had not been told of this outcome. We believe that it is only by communicating with each other when action does not go to plan will lessons be learned for the future. We would therefore encourage all parties involved to communicate with each other, particularly when difficulties arise, to ensure that solutions are found and if possible prevent a recurrence. A formal review or feedback system could be helpful in this respect.
132. It was also apparent to us that restraint applications sought post-arrest have less chance of restraining the maximum amount available to avoid dissipation. An analogy to this, in our opinion, would be disposing of drugs during a drugs raid. This led us to the conclusion that proactive investigations that include an intention to seek restraint, at the optimum time and with the fullest information to hand, were the most likely to be successful. This reinforces our earlier comments about the need to gather intelligence to inform pro-active operations.
133. Our investigations into the processes concerning restraint highlighted the importance of early restraint to the eventual sums that may be available for confiscation. They also demonstrate the need for constant two-way communication between the force and Crown Office to provide feedback when things do not go as planned so as to avoid the same problems recurring in future cases. We suggest that feedback be sought from the police on whether restraint has been effective so that lessons can be learned and such learning outcomes used to support the case for restraint when addressing the court in future cases.

### **Investigative orders**

134. We found that the processes involved were clear and posed no significant problem for COPFS aside from those relating to the availability of POCA resource deputies to carry out this work, as outlined above.
135. There are a number of investigative orders that can be obtained during the course of investigating a substantive case (e.g. a money laundering investigation) or a confiscation, in order to prepare a financial profile of an accused and a Statement of Information. The most common of these are production orders. Only confiscation production orders are dealt with locally by the POCA resource deputy (a deputy fiscal selected by Area Procurators Fiscal to provide advice and assistance in confiscation proceedings at local level) for the jurisdiction of the crime. Less common orders, such as customer information orders, disclosure orders, etc are obtained only through application to Crown Office because of their more intrusive nature. Money laundering production orders are dealt with by NCD

and search warrants in connection with money laundering and other proceeds of crime matters are always prepared by and mostly obtained by NCD rather than the Area resources.

136. The process for obtaining an investigative order involves the law enforcement agency submitting an application for an investigative order directly to the POCA resource depute in the PF office with jurisdiction for the crime. There the depute carries out revision of the draft application before submitting it to the Sheriff.
137. A number of police financial investigators told us that they found the process of obtaining these orders overly bureaucratic. South of the border senior officers grant some investigative orders. In Scotland, only the Procurator Fiscal has the power to ask the court for such orders. We are of the view that, on balance, the current law contains the necessary safeguards of legal revision by the Procurator Fiscal and of judicial decision, and conclude that current arrangements in Scotland should remain as they are. The law, as enacted, reflected the different legal systems in place north and south of the border and we see no reason to suggest a change to these provisions.

#### **COPFS internal processes for restraint and investigative orders**

138. The process for restraint application is not simple. The application is forwarded to NCD by the FIU. If the substantive criminal case is likely to be heard in the High Court, then restraint will be sought in the Court of Session. An application is then drafted in the POCU restraint section and an Advocate Depute represents the Crown in court. For Sheriff Court cases, the restraint application is drafted in POCU and then sent to the local PF office which has jurisdiction for the crime. There, specially appointed deputies designed as POCA resource deputies are tasked with presenting the application to the Sheriff.
139. Investigative orders are sought by law enforcement agencies directly from the POCA resource depute. These production orders or search warrants are considered by the depute and the application for court is prepared and submitted to the Sheriff.
140. The system of communication between the central POCU unit and the local resource deputies is via email to a list of named contacts. Consequently many whom we consulted were unclear about who was line-managing their POCA work. Such work is unpredictable and can take staff away from their core duties for lengthy periods. Some were not receiving the email instruction due to court commitments. In one office a managerial point of contact was also included in the email distribution list which appeared to be good practice.
141. These elements of POCA work are specialised in nature and can be complex and time consuming. The creation of specialist posts for this work is in keeping with COPFS strategy generally in favour of specialisms. There is a case for a small proportion of deputies to be allocated such work so that they can accrue a degree of expertise in this area. This was the reasoning behind the POCA resource deputies posts.

142. However in a mainstreaming agenda we suggest that one of the ways to extend POCA awareness in COPFS would be to bring all POCA work into one unit in the office. This would then remain part of the core function for those working in the unit for some time. We suggest that COPFS consider such a model, whilst retaining the posts of specialist POCA resource deputies to provide support and advise the members of the unit in particularly complex matters.

### Confiscation orders

143. The process post conviction is shown in map 2 on page 41. Following a conviction, a Statement of Information (SOI) is served on the accused. If restraint was obtained earlier, the accused will be aware of the impending confiscation. However, in some situations it may be the first notice to an accused that the Crown is seeking a confiscation order.

144. We noted a number of concerns expressed by practitioners on the law enforcement side about the process involved. These concerns were mainly about two core issues:

- perceived delays; and
- confiscation orders being for lower than anticipated values.

### Delays

145. Our findings suggest that there are indeed time delays between conviction and the eventual granting of a confiscation order that are inherent to the current system. The Act provides for a maximum period of two years between the request for a confiscation order and the eventual order, indicating that it was always envisaged that the process would take some time. In addition, where legal aid is being relied upon this must be applied for again because the confiscation process is separate from the criminal case. Up until now there has been no framework of timescales. The Crown cites the paucity of defence answers to the SOI in the early stages of the confiscation proceedings as a source of frustration for them.

146. During the inspection we were advised of a new Act of Adjournal<sup>18</sup>, following upon a review of the court process by the High Court Judge Lady Dorrian. This Act of Adjournal is due to come into effect on 5 August 2009. Contributions to the review from representatives of the Crown and defence have resulted in a new framework whereby the court will ensure that parties adhere to a timetable for answering the Statement of Information. However, we believe that this framework will only apply to confiscation cases in the High Court, although we understood that it had been intended to cover Sheriff Court proceedings too. Indeed the title of the statutory instrument refers to the Sheriff Court.

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<sup>18</sup> Act of Adjournal (Criminal Procedure Rules Amendment) (Confiscation Proceedings) 2009

147. Under the new framework disclosure of productions in support of the SOI must be available to the defence promptly once the SOI has been served. This is in order to give the defence time to provide answers within the proposed timeframe. Preparations for this requirement are underway in NCD. This will require the co-operation of police forces in submitting their SOI together with supporting evidence earlier so that these items can be checked by the NCD accountant prior to service of the SOI.
148. Thus with the new framework provided by the Act of Adjournal, and with revised systems in place to ensure that the Crown is able to disclose evidence in support of the Statement of Information, it is anticipated that some of the delays and adjournments that have been a feature of these types of proceedings in the High Court up until now will cease to occur.
149. It is disappointing that the new Act of Adjournal does not extend to Sheriff Court proceedings as initially envisaged, particularly when a considerable proportion of confiscation proceedings now take place in that forum. In these circumstances the present “churning” of procedural diets, of which practitioners have complained in the course of this inspection, will continue. This view is endorsed by the Council of the Sheriff’s Association, which observed that a common feature of Sheriff Court confiscation hearings was the excessive number of continued hearings before settlement was almost inevitably reached. It is our view too, that restricting the Act of Adjournal to the High Court is missing an opportunity, and we would urge those who represent COPFS at the Rules Council to press urgently for similar provisions for the Sheriff Court.

### **Confiscation settlements**

150. Given the importance of this issue for those whom we consulted during our inspection we have examined this matter in some detail. One of the concerns raised was the fact that the confiscation order was invariably made following a negotiated settlement, rather than at a court hearing. There was a perception among some officers in law enforcement that the Crown was too willing to settle rather than proceed to a court hearing. In contrast, the Crown’s view was that such negotiated settlements were evidence of its strong position, giving the defence no option but to settle rather than argue the case in court.
151. Of the cases specifically sought from forces in connection with this topic, we found that each one appeared to follow the Crown’s own settlement guidance. We also found some common problems. For example, restraint in many cases was obtained more than a year prior to the confiscation process. As outlined above, there is a need for speed in obtaining a list of assets that might be held by an individual at the point of seeking restraint. This can result in a different valuation of property at the confiscation stage of the process. In addition, the person’s whole estate is restrained, irrespective of their benefit of criminality.
152. The first step in determining the amount for confiscation is to calculate the “benefit of criminality”. In some cases, where the benefit is restricted to what has actually been gained from the crime itself (for example a fraud), the matter is simple. The benefit figure is the value of the crime itself. However, where it can

be shown that the accused has a 'criminal lifestyle' then certain assumptions come into play and his or her assets acquired over the preceding six years can be taken into account. These assumptions are that any property transferred to or obtained by the accused was done so through criminal conduct and that any expenditure by the accused was from property obtained by criminal conduct. Thus a person, who has been convicted of five housebreakings where the value of goods stolen exceeded £5,000 in cumulo, may have been involved in other criminality of which the Crown has no knowledge. These provisions allow for confiscation of the amount owned by the accused which cannot be shown by him to be legitimate income. One example quoted by the Crown Prosecution Service in England was of a habitual petrol pump thief whose previous convictions were used to bring him into the 'criminal lifestyle' category. Although the offences for which he was convicted related to the theft of a car and £250 of petrol, a confiscation order of just over £1 million was made (although subsequently overturned on appeal for other reasons).<sup>19</sup>

153. Once the benefit figure is established the second calculation to be made is the available amount. The restraint figure is the whole estate of the accused as known at the time of restraint. This does not allow for third parties who may have a claim on the property such as partners or spouses who may have rights under the Matrimonial Homes (Scotland) Act 1981. Other parties such as lenders or business partners may have legitimate claim to property held by the accused. In addition a whole host of other factors will come into play in this calculation such as depreciation, accuracy of valuations of property (which in the current climate are notoriously difficult), pensions and other policies. To complicate matters further, business accounts often have legitimate income which can make it difficult to distinguish what are criminal proceeds and what is legitimate income.
154. Indeed, even when the first Statement of Information is lodged by the Crown following conviction, this is only the first step in a long process. Financial investigators ascertain the financial status of the accused as it *appears to be*. However, explanations by the defence with accompanying vouching to support these explanations can give a very different picture. The procedures in place to ensure that vouching was provided by the defence and checked out by the police where appropriate seemed to us to be robust. However, NCD has identified some areas for further training in relation to the quality preparatory work by police analysts when drawing up SOIs and of legal staff dealing with such cases. We look at these in greater detail in the PEOPLE section of this report.
155. Nonetheless, the fact that the perception among law enforcement agencies was of a less than robust approach to confiscation by COPFS was of concern to us. On closer examination it became clear that communication or perhaps the lack of it, at crucial stages was a common underlying factor. Although defence answers were copied to the force FIU for the analyst to check or for further police enquiry, thereafter forces were not routinely kept informed as final discussions and vouching took place. Given the importance of this matter we were encouraged to hear of a new initiative by the confiscation unit in NCD to include the FIU's senior investigating officer and analyst in final settlement discussions. In this way the Unit

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<sup>19</sup> Rv Broadhead 2006 EWCA Crim 3062

hoped to minimise the risk of further misconceptions between the two organisations. Where such meetings are not possible, we recommend that feedback from NCD to FIU be an integral part of the process.

156. The matter is a significant one, affecting as it does relations between stakeholders in this important area of work. We found no formal system in place to monitor compliance with settlement guidance. Therefore in order to restore confidence we suggest that senior legal managers in NCD adopt a system of reviewing confiscation settlements to ensure their compliance with guidelines.

## Money laundering

157. The three offences of money laundering contained within the Act all relate to dealing either directly or indirectly with ‘criminal property’<sup>20</sup>. The textbox below gives an example of one of the most successful money laundering prosecutions to date in Scotland.

### Case Study - Operation Folklore

Operation Folklore was an intelligence-led SCDEA investigation which culminated in April 2007 with the sentencing of James Stevenson to twelve years and nine months at the High Court in Glasgow. Stevenson pled guilty to a series of charges relating to laundering around £1m from drug trafficking, including trafficking in Class A drugs. His stepson Gerard Carbin, from East Kilbride, was also imprisoned for five years and six months after an extensive undercover operation by the Agency.

Stevenson was jailed for the following offences: hiding £204,510 in cash; receiving £389,035 in cash; using criminal proceeds to buy watches worth £307,000; having criminal property worth £98,605; and using this money to buy ten Skoda Octavia cars. Carbin was jailed for his part in laundering cash through the purchase of luxury watches. The court was told that these watches could be worth up to £30,000 each.

Sentencing Stevenson, Lord Hodge described him as a major figure in the world of serious crime and said that money laundering was an “essential service and went hand-in-hand with the drug trade and contributed to its profitability”. He added: “This is a significant success for the police as all too frequently it is only the small players connected with the drugs trade that are punished.”

158. Due to some uncertainty about what constitutes ‘criminal property’ and how it might effectively be proved, money laundering is not a widely prosecuted offence in Scotland. Nevertheless the legislation has been successfully used in a small number of cases.
159. In this report we have outlined the money laundering offences enacted in the 2002 Act. The change from having to specify a particular predicate offence to an all-

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<sup>20</sup> See Appendix 4

crime basis for money laundering has sparked a flurry of case law north and south of the border. One matter at issue is how to prove that property is criminal without specifying the predicate offence. The appeal court decision in the Mohammed Ahmad case<sup>21</sup> should now clarify what was an uncertain aspect of the law in Scotland.

160. With regard to the processes involved in money laundering we must differentiate between reactive and proactive cases: in the former, the charge of money laundering will follow other charges, say in relation to drugs supply or embezzlement; in the latter, money laundering cases arise where the evidence comes from intelligence tending to show movement of money or assets without obvious legitimate means. In the first category, a charge of money laundering may be included in a police report to the Procurator Fiscal, and this is sent to the district Procurator Fiscal in the normal way. The second category of stand-alone money laundering case has, since the inception of the Act, been dealt with exclusively by NCD.
161. NCD has created a system for considering all stand-alone money laundering investigations. Very often the first information about money laundering coming to law enforcement agencies would be from intelligence, possibly initiated by a Suspicious Activity Report (SAR). An example might be a bank reporting a suspiciously large deposit or withdrawal. Such information on its own may not be enough to reach the required legal standard for an investigative order, such as a production order, to be sought. Therefore Crown Office requires all investigative orders for proactive money laundering investigations to be submitted to NCD for designation.
162. In effect the law enforcement agency has to satisfy the Crown that there are grounds for seeking the investigative order, before the Crown will agree to seek such an order from the court. This may be an argument for individual forces to use their resources for investigating money laundering suspicions, for example by the use of surveillance as discussed earlier in this chapter.
163. SCDEA detectives felt more confident about achieving the required standard for designation because they were able to use more sophisticated techniques. However, outwith SCDEA some officers found that the standard required for designation was too difficult to reach. It became apparent to us that the process of designating a money laundering case was simply an additional step introduced by Crown Office to ensure a consistent approach. The Crown requires to be satisfied that there are reasonable grounds for seeking investigative orders for money laundering investigations. At the point where law enforcement officers seek designation they are looking to secure investigative orders that will allow them to pursue further evidence to reinforce their case. After due consideration, we are satisfied that the process is appropriate, given that the designation aspect is simply a quality control mechanism to ensure that a legally required standard is reached.
164. In England, Wales and Northern Ireland there is no need for an enquiry to be designated a money laundering enquiry. There, investigative orders may be

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<sup>21</sup> [2009] HCJAC 60

authorised by a police superintendent rather than by the judiciary, as we have outlined earlier in this chapter. In England the Crown Prosecution Service (CPS) has never had the investigative function of a Procurator Fiscal in Scotland.

165. The current system for reporting such cases to COPFS given that case law is still uncertain is to involve the head or deputy head of NCD directly in the decision-making process. Once a decision is made either to proceed or to make further enquiries before making a decision, the work is allocated to a specialist unit in NCD. The size and complexity of some cases that have been prosecuted successfully shows that a dedicated unit, properly resourced and directing enquiries at an early stage, is the optimum approach.
166. As the law on money laundering becomes clearer, the hope is that there will be a better understanding of the money laundering provisions and a consequent rise in such cases being reported. We take the view that, as with other aspects of POCA, the need to mainstream money laundering prosecutions may become inevitable if their volume does increase. Whilst a central expert unit is best placed to handle the most complex of these cases, many could be dealt with at a more local level. Indeed there is evidence that such an approach has already been adopted in a select few cases. Thus our view is that gradual mainstreaming of money laundering is achievable and should be an aim of the proceeds of crime strategy.
167. The present structure of reporting stand-alone money laundering cases for the consideration of either the head or deputy head of NCD shows the level of importance that COPFS attaches to such cases. We were unable to verify anecdotal claims by some forces of delays in NCD in reaching these initial decisions because of a lack of performance information. However, assessing the evidence available or likely to be available to prove these cases is a critical issue; in complex cases such decisions are not taken lightly and are made only when it is clear that the fullest information available has been considered.
168. It is at this stage, particularly in money laundering cases, that tactical discussion about the range of options for civil recovery or taxation under the Proceeds of Crime Act can be very beneficial. We note encouraging developments to agree a framework for such discussion and possible referrals to civil recovery at serious organised crime level. In line with our main recommendation that all the provisions of POCA be mainstreamed, we recommend that money laundering should also be mainstreamed through training and awareness-raising. It therefore follows therefore that wider knowledge and awareness of the civil and taxation possibilities for money laundering cases that fail to meet the criminal test, are essential across COPFS.

### **Civil recovery - Cash seizures**

169. Cash seizure processes are straightforward. We found that for COPFS these processes were efficient and worked well. Published figures<sup>22</sup> show a continuous increase in cash seized and forfeited by the Civil Recovery Unit (CRU) in Crown Office. When the Act was passed in 2002, the minimum sum that could be the

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<sup>22</sup> See Results section of this report (Chapter 7)

subject of seizure and forfeiture was £10,000. This was subsequently reduced first to £5,000, and since 2006, to £1,000. We were advised of a recent rising trend in the number of cash seizures occurring but a corresponding drop in their average value. This may well be a result of the minimum threshold for cash seizure.

170. It was also apparent that the training provided by lawyers from CRU in relation to cash seizure was well received and understood by those involved in operational work both in COPFS and in forces. This had undoubtedly contributed to the increased awareness among all concerned.
171. In criminal prosecutions where the police have seized money a production for use as evidence in the criminal case but where no conviction has resulted, either because of a decision to abandon proceedings, or in the event of an acquittal, the provisions for cash seizure could be invoked. At this stage, it would be open to Scottish Ministers (the CRU) to make application to the court for forfeiture of the cash. In spite of a guidance note issued to all legal staff in 2007 we found that this was not an option that prosecutors always considered in these circumstances. During the course of this inspection a reminder was issued to all legal staff in COPFS about this. Mainstreaming POCA will require the issue of regular reminders until these considerations become a matter of routine in COPFS.
172. In forces, some FIUs were encouraging their divisional police production keepers to alert CRU to the possibility of cash seizure in cases where cash had been seized for criminal prosecutions but where a no proceedings decision or acquittal had led to a Procurator Fiscal instruction to return the cash to the owner. We believe that this 'safety net' is good practice and a good example of how partners can work together to identify opportunities to apply the POCA. We understand that this good practice was highlighted in the multi-agency Cash Seizure Working Group, to which we refer in the Partnership chapter of this report.

## Civil recovery - asset recovery

173. NCD has clear processes for referring cases to civil recovery where:

- a prosecution in which confiscation has been contemplated, has failed;
- a no proceedings or no further proceedings decision has been taken; and
- criminal property has been identified as belonging to someone who has died.

174. We have already discussed how some cases that are reported for prosecution to NCD are eventually referred to CRU because of evidential difficulties which may become apparent at early stages or later on during the trial. For civil practitioners in CRU the work of investigating and tracing assets over a 12-year period is made more difficult by any delay in cases being referred to them. This matter should be considered by those involved in formalising the framework for tactical referrals to CRU and in developing the Scottish Proceeds of Crime Strategy.

175. The process of asset recovery can be protracted particularly if it is commenced after a failed prosecution. Nonetheless, it can be an effective way to deprive criminals and their families of assets obtained through unlawful conduct, as is illustrated in the example below.

George Buchanan was acquitted in the High Court in July 2004 of supplying heroin. In May 2005 the Civil Recovery Unit raised an action in the Court of Session in the name of the Scottish Ministers, to recover property alleged to have been acquired through unlawful conduct. At a preliminary proof held in February 2006 the court held that Buchanan was a significant player in the trafficking of illegal drugs. Further court hearings examined claims raised by Buchanan that there had been a breach of the Human Rights Act in bringing the action against him. Finally, proof was held in October 2007 and in January 2008 the court decision ordered that assets be forfeited. These assets including a house, high value cars and money in bank accounts, were valued at approximately £200,000. They also included some assets transferred by Buchanan to other members of his family.

176. Whilst the above case proceeded to proof we learned that more often than not, civil cases were resolved by agreement. Although not cited to us as an issue during this inspection, nevertheless, in a similar vein to our comments concerning compliance mechanisms for confiscation settlements, we believe that CRU should ensure that its settlement guidance is being followed by a system of regular review.

## Conclusion

177. Due to the complex nature of POCA processes good communication between parties both within their own organisations and with partners is essential. In this section we have highlighted the process areas where mainstreaming could bring about greater awareness of the Act, its powers and the information required to exercise these powers to best effect. We have also described a number of measures that we

believe can help to bring this about so that each organisation knows and understands the challenges and requirements of the other in relation to this Act.

**Recommendation 2.** That the Serious Organised Crime Taskforce broaden its focus in relation to proceeds of crime and develop a Scottish Proceeds of Crime Strategy in order to co-ordinate action among partner criminal justice agencies including but not limited to ACPOS and COPFS. In particular the Strategy should focus upon:

- b) establishing a proactive rather than reactive approach to financial intelligence gathering and investigation in relation to all relevant crime.

**Recommendation 4.** That the current processes used in both policing and COPFS are reviewed to ensure their effectiveness in all aspects of POCA work (as more fully detailed in the suggested action points below) and, that COPFS and ACPOS assure themselves that these activities are taking place through their normal performance management regimes.

**Suggestion 1.** That the ACPOS POCA champion:

- d) liaise with the regulated sector, in conjunction with the Serious Organised Crime Agency (SOCA), in order to improve the quantity and quality of Suspicious Activity Reports (SARs) produced in Scotland; and
- e) ensure that proactive opportunities related to (SARs) are fully exploited.

**Suggestion 2.** In reviewing current processes, forces should:

- b) develop plans to increase capability and capacity at divisional level assisted by the ACPOS POCA champion; and
- c) ensure effective monitoring of any post-confiscation change in the financial circumstances of criminals.

**COPFS**

**Suggestion 3.** That the COPFS champion:

- b) in relation to mainstreaming arrangements regarding POCA, review case marking guidelines, and training and development opportunities.

**Suggestion 4**

In reviewing existing processes, COPFS should:

- a) ensure that effective communication exists between internal departments and units, and with law enforcement and criminal justice agencies, including review/feedback arrangements; and
- b) ensure that robust systems are in place to monitor compliance with settlement guidance.

## **CHAPTER 4 - PARTNERSHIPS**

### **Introduction**

178. In this chapter we turn our attention to relationships between the Scottish police service and its law enforcement partners. Thereafter we examine partnership working between police forces and central and local COPFS offices. Finally, we look at partnership working groups. We believe that effective partnership working is vitally important if POCA is to be applied effectively. This is reflected in the fact that the need to co-ordinate work between partner agencies, and specifically the need to develop a joint Scottish Proceeds of Crime Strategy are central themes of this report.

### **Police relationships with other law enforcement agencies**

179. We have referred to the many relationships that exist between the Scottish police service and other law enforcement agencies throughout this report. We have observed examples of good practice, such as the successful secondment of staff from both the DWP and HMRC to the Scottish Money Laundering Unit within the SCDEA. Beyond the SCDEA the strength of relationships between individual forces and other law enforcement agencies is variable. We highlighted earlier in this report how some forces could pro-actively engage with local authority trading standards departments to identify opportunities for confiscation when investigating trademarks and copyright offences. This further reinforces the case for our earlier recommendation that the Scottish Proceeds of Crime Strategy recognise the need to establish appropriate arrangements between police forces and criminal justice partner agencies. We believe that this will not only improve current working relationships between partners, but will also allow good practice to be shared across Scotland.

### **Police relationships with the regulated sector**

180. In the Processes section earlier in the report, we discussed the Suspicious Activity Report (SAR) regime administered by the Serious Organised Crime Agency (SOCA). We have also recommended that ACPOS and forces liaise with the regulated sector, in conjunction with the SOCA UKFIU, in order improve the quantity and quality of SARs produced in Scotland.

181. That is not to ignore improvements in joint working between forces and the regulated sector that have occurred in the last year. In particular we have mentioned the good work of the Interventions Unit of SCDEA in working with the business community through the Scottish Business Crime Centre. Whilst we welcome their recent initiatives in engaging with the regulated sector, we feel that a more direct approach to those in the sector less likely to attend such gatherings could complement this good work.

## **Police relationships with centralised Crown Office units**

182. During this inspection we observed close working relationships between staff in NCD and staff in the SCDEA. Given the focus on serious organised crime that has developed in both COPFS and the SCDEA this is perhaps not surprising. Time and effort have clearly been put into building these relationships, and despite a number of changes in personnel over a relatively short period of time they remain strong.
183. A similar relationship with NCD was not, however, apparent across the eight forces. Key themes from the police perspective were poor communication and a perceived lack of feedback from NCD staff. In our interviews with financial investigators it emerged that a number of unhelpful misconceptions had emerged, for example, in relation to settlement at confiscation as previously discussed.
184. Effective communication is an essential ingredient of good partnership working and the example above underscores the difficulties that can occur when it is absent. In this regard we welcome NCD's proposal to involve forces' financial investigators and financial analysts at the settlement stage of confiscation. We also note NCD's standing offer to contribute to training for law enforcement agencies on the subject of settlement. In the meantime, however, we urge forces and NCD to explore further ways to improve channels of communication.
185. Another area where we found strong working relationships was between local financial investigators in forces and members of staff on the cash seizure side of the civil recovery unit. In our view, these relationships and the shared understanding of cash seizure procedures that they generate, make a positive contribution to the success of this regime in Scotland. As we have already mentioned only a limited relationship exists between staff in other parts of the CRU and financial investigators because there is no direct reporting route for forces to CRU. We have recommended that the referral route to CRU be reviewed with the aim of establishing a more direct reporting route. We believe that the relationship between financial investigators and CRU staff that already exists bodes well for the future.

## **Relationships at a local level: Police/PF**

186. During our inspection we also examined relationships between police officers and POCA resource deutes in their local PF offices, in particular where relevant to obtaining investigative orders, restraint orders and civil cash seizures. Feelings were mixed on the question of how well partnerships were working with much appearing to depend on individual relationships. Specifically, where individuals had established personal contact with each other, commonly in the smaller offices, staff tended to report excellent relationships. Not surprisingly it was difficult to replicate such arrangements in the larger city offices, where there was more movement of staff and where relationships were less likely to be perceived well.
187. One problem cited by officers in some forces was of difficulty in speaking to a POCA resource depute, eg when seeking an urgent cash detention application or production order. At times this was because of the latter's court commitments and indeed police officers and POCA resource deutes expressed similar frustrations in

this regard. In the larger offices in particular this meant that at times non-designated legal staff carried out the work.

188. As we have outlined in the People chapter of this report we believe as a way of mainstreaming the work the role of POCA resource depute could be extended to a greater number of deputies in each office.
189. Given that such difficulties arise more commonly in the larger, city offices it is perhaps worth noting that the practice adopted by the Edinburgh PFs office. There, all deputies within the Initial Case Processing (ICP) unit deal with cash seizures as a matter of course. In addition, we were shown some excellent written guidance, made available in the ICP unit, which had been prepared by former NCD staff to support for those deputies, whether POCA resources or not, who were carrying out this work. Effectively cash seizure work has become a mainstream part of ICP function.
190. In addition there is a larger pool of experience of POCA in the office as a number of legal staff have spent some time in NCD. As we have observed with such a background, familiarity with the processes and legal considerations is very helpful. Thus whilst there are only two listed designated POCA resources in the Lothian and Borders area, in practice the availability of POCA resource deputies was not an issue for the other POCA work of restraint and investigative orders. A further advantage of positioning POCA work within a single unit, particularly in a large city office, is the presence there of a managerial point of contact.
191. In the longer term we conclude that one of the results of a mainstreaming strategy in COPFS should be that a greater proportion of deputies become sufficiently proficient in not only the cash seizure aspect of POCA but also the more complex restraint and investigative order work.

### **COPFS and other partners in POCA**

192. We consulted with HMRC, DWP and SOCA during our inspection. In general we received positive feedback from these agencies and all referred to the good working relationships fostered in the Scottish Asset Recovery Group (SARG) which we go on to describe below. Beyond this formal partnership group setting we saw evidence of fruitful partnerships between COPFS departments and SOCA, DWP and HMRC by way of recently signed Memoranda of Understanding (MOUs). We are aware of further informal meetings and discussions which lead us to conclude that partnership working is being promoted.

## Multi-agency partnership

193. The Scottish Asset Recovery Group (SARG) came into effect in January 2008 with the dissolution of the former Concerted Interagency Criminal Finances Action Group Scotland (CICFAS). The remit of the Group is:

*“to provide a strategic focal point for member agencies in their efforts to tackle criminal finances in Scotland and to identify and disseminate best practice in recovering criminal assets. In addition it is to act as a reference point for the Serious Organised Crime Taskforce in matters relating to asset recovery.”*

194. SARG is currently chaired by the Head of Operations in COPFS and its members include representatives of NCD, CRU, the Scottish Government, the SCDEA, the Serious Organised Crime Agency, Her Majesty’s Revenue and Customs, the Department of Work and Pensions, Local Authority Trading Standards Departments and the Scottish Court Service (SCS). In addition, a member of the practitioners forum, the Scottish Financial Investigators Practitioners Forum (SFIPF) attends SARG meetings on a rotational basis. All the organisations represented play a pivotal role in financial investigation and POCA and are collectively responsible for investigating, reporting and prosecuting cases and enforcement.
195. The fact that the eight Scottish police forces are not routinely represented as a matter of right suggests that SARG is heavily focused on the investigation and prosecution of the financial aspects of serious organised crime. It is our view that the chair of SARG should invite the ACPOS POCA champion to become a core member of the Group.
196. Notwithstanding the above, we believe that SARG is an effective multi-agency forum for POCA. We have also observed effective partnership working in the Scottish Financial Investigator Practitioners forum, and in the SARG sub-groups such as the Cash Seizure working group and the financial analysts group.
197. We especially welcome SARG’s intention to address the present lack of coherent performance data on key POCA activities in Scotland. The current system in use south of the border is the Joint Asset Recovery Database (JARD). JARD is used in England and Wales as a tool to record outcomes throughout the process, from investigation to enforcement. The figures recorded to date using this system in Scotland have been recorded only by the Crown at the end of the process and relate solely to information concerning confiscation orders obtained. For law enforcement partners contributing to the start of the process this has been unsatisfactory.
198. SARG created a sub-group in late 2008 to investigate and report on this matter. At present much needs to be done by all the partners involved to bring Scottish data recording in line with the English system. Only then will further discussions be possible to establish whether the two systems could be joined in a more meaningful way. We are of the firm opinion that coherent and comprehensive performance management arrangements are needed in Scotland as a matter of urgency.

Furthermore, we believe that the Serious Organised Crime Taskforce can play a part in co-ordinating this agenda in a joint Proceeds of Crime Strategy.

199. SARG's role in seeking to develop performance management arrangements for POCA is a clear demonstration of partnership working in this area. We believe that SARG has a key role to play in leading this progress across partner agencies. Having recommended that the Taskforce play a national coordinating role we are confident that progress on this matter will receive the attention it requires at the highest level.

#### **For the future: co-location?**

200. We have observed a willingness among the partner agencies to use secondments as a way of promoting better understanding of each other's roles, for example with secondees in SCDEA and in the CRU. Within a joint strategy we would encourage agencies to consider how further co-location could support effective partnership working under POCA. During our visits to England and Ireland, we had the opportunity to hear from partners and observe how they worked in a co-located context.
201. In England we learned about the experiences of police and prosecutors working in the five Regional Asset Recovery Teams (RARTS). Led by police officers, RARTS include prosecutors who are able to give advice from the early stages of police operations right through to carrying out the legal processes for restraint and confiscation. Both organisations saw RARTS as a positive development that appeared to promote a better understanding of investigation and prosecution alike. Moreover, they seemed particularly helpful in urgent restraint situations.
202. We note COPFS' commitment in principle to co-location at the proposed multi-agency serious organised crime unit (at Gartcosh). We believe that such co-location is likely to support the financial investigation of serious organised crime further. It would also facilitate early decision-making and might allow swift recourse to civil or taxation POCA powers when appropriate.
203. In Ireland we observed the close working in multi-disciplinary teams of representatives of the police, civil recovery lawyers, tax inspectors and officials of the social security network in the Criminal Assets Bureau. There, two factors were considered fundamental to the excellent joint working arrangements in place: the first was the co-location of the various disciplines; the second was the statutory framework for information-sharing which allowed for rapid intelligence and information-gathering and early decisions.

#### **Conclusion**

204. In this section we have highlighted the range of partnership working arrangements that exist to secure the outcomes of POCA across Scotland. Partnerships are not an end in themselves rather they are mechanisms through which shared strategic intentions can be realised, assisted by sound communication between parties.

205. We have stated that the strategic intention for POCA should be expressed through a POCA strategy, co-ordinated the delivered by the SOCT. Within this context, we consider that the effectiveness of partnerships will undoubtedly continue to improve. As part of that progression those minor areas of difficulty which we did encounter, predominantly focused on communication, should also improve, as should any minor areas of difficulty predominately around communication that we encountered.

## CHAPTER 5 - PEOPLE

### Police training

206. It is the Scottish Police College's Crime Management Division that provides training on POCA, principally via its financial investigators course. Other aspects of the legislation are also addressed on its fraud, drugs and initial investigators courses. Our inspection visits revealed almost universal dissatisfaction with the quality and scope of what was provided among those working in financial investigation. For example, many members of these staff working argued that instead of the present generic system that requires all course attendees to cover all aspects, a modular one that allowed participants to select only those lessons that were relevant to them would be preferable. It was also repeatedly suggested that training from Crown accountants and Procurators Fiscal, particularly about money laundering, would be extremely beneficial. We would support such an approach, particularly given our recommendation on the need for a joint Scottish Proceeds of Crime Strategy.
207. We further believe that advanced financial investigation training would allow more experienced financial investigators to build on their skills. Staff themselves highlighted the need for more detailed training focusing upon complex areas such as money laundering investigative approaches, the SARs regime and the production of financial profiles (see Processes Chapter 3) Again we support this view. Whilst many referred to the English system of accredited courses, it would seem that the main benefit of such a system was the requirement to carry out continuous professional development in relation to their skills.
208. Throughout this report we have repeatedly expressed our belief that financial investigation must be mainstreamed throughout the Service if the powers contained within POCA are to be fully exploited. We believe that this has significant implications for the police training environment, specifically the need to provide effective training to staff over other than specialists working in FIUs. During our fieldwork we met members of staff from the National Police Improvement Agency (NPIA) and were particularly impressed by two developments south of the border in this regard.
209. In the first instance, rather than developing a single course, the NPIA has developed a suite of complementary courses focusing on the following elements:
- Financial investigation
  - Enhanced financial investigation skills
  - Criminal confiscation
  - Money laundering
  - Cash seizure
  - Financial investigation tutors
  - Internet research skills for financial investigators
  - Financial intelligence officer
  - Proceeds of crime management

210. In particular we believe that consideration should be given to the development of a Proceeds of Crime Management Course in Scotland to support the ongoing improvements in its specialist financial investigation training. The course should be targeted at middle and senior ranking officers and should focus on the strategic and tactical use of financial investigation powers in mainstream law enforcement and investigation, and on the benefit of this approach in achieving operational aims and objectives. In our opinion such a course is particularly necessary, given that something of a cultural shift will be required to move financial investigation from its current peripheral and specialist location into the mainstream. We further believe that the course should be developed in tandem with the ACPOS guidance to which we have already referred, and should cover the force and divisional structures and processes required for optimising the use of financial investigation techniques and the powers contained in POCA.
211. Second, building upon the need to support the mainstreaming of POCA further, NPIA is currently reviewing all its training courses in order to identify further opportunities for reinforcing POCA awareness. For example, during officer safety training arrest simulations, students were reminded of financial intelligence gathering opportunities when searching an arrested person.
212. In contrast awareness of financial investigation in the Scottish police service ranged from financial investigators who talked about learning core skills on the job through to a virtually complete lack of knowledge about the need for financial intelligence and the provisions of POCA beyond cash seizure arrangements amongst non-financial investigators. In addition, in our opinion the lack of progress beyond serious organised crime is indicative of a lack of understanding of the potential impact of POCA among senior officers. We therefore believe that it is essential that training provision in the Scottish police service be reviewed and dramatically improved.
213. At the time of our inspection the Service was reviewing its training for financial investigators in response to the recommendations of HMICS' inspection on Fraud<sup>23</sup>. We believe however that in the context of this report it should extend far beyond introductory financial investigation training, given that the mainstreamed proactive approach that we are advocating represents little short of a culture change.

### **Spreading the word**

214. For many FIUs their main methods of communications were the force intranet, posters and reminder cards. Typically these related to cash seizure. We learned of one law enforcement agency that published a quarterly newsletter highlighting the successful POCA outcomes of enquiries. This example of good practice is something that forces might like to consider as an aid to mainstreaming POCA.

### **Forensic accountancy**

215. Another finding to emerge during the inspection was that Scottish forces did not routinely seek specialist assistance from forensic accountants. While Strathclyde

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<sup>23</sup> [www.scotland.gov.uk/Publications/2008/05/09105454](http://www.scotland.gov.uk/Publications/2008/05/09105454)

Police has access to a forensic accountant on a regular basis, others have only sought these services on a small number of occasions. And although all agreed that regular assistance would be very useful, most felt that a permanent arrangement would be not be appropriate and would be cost-prohibitive. From what we have observed during this inspection we believe that additional specialist assistance is needed. We understand that ACPOS is considering setting up a Scottish Economic Crime Unit (SECU) in response to HMICS' thematic inspection on fraud and establishing a full-time forensic accountant's post within it. We welcome this line of thinking and suggest that, in the interests of Best Value, ACPOS consider making this accountant available free to force FIUs for consultation on any and all financial investigation matters.

## **Recruitment and retention**

216. It is important to pay tribute to staff working in FIUs across Scotland who we found to be enthusiastic and indeed almost evangelical about POCA. All were convinced that financial investigation and POCA works and is capable of significantly disrupting all types of criminality in Scotland, if adequate resources are put in place. That said, a common difficulty in filling FIU posts across Scotland suggests that these positions are not particularly attractive to staff. This is perhaps above all else an illustration of the generally peripheral nature of financial investigation across Scotland since POCA came into affect in 2002. It is our hope that the measures outlined in this report will resolve the situation in the medium term. In the longer term we are convinced that POCA should become a central feature of daily activity in police divisions across Scotland. The experience in England, Wales and Northern Ireland indicates that when this is achieved there will be a significant impact upon criminality at all levels.

## **COPFS**

217. Beyond the core legal staff in COPFS who might be described as general practitioners working in Procurator Fiscal's offices around the country there are two distinct groups who are engaged in POCA work as a specialism:

1. Crown Office specialists (NCD and CRU); and
2. Area resource deposes

## **Crown Office**

### **National Casework Division (NCD)**

218. Our focus here is on staff in the Proceeds of Crime Unit dealing with criminal confiscation. Anecdotal reports from some forces of staff shortages in the Unit were confirmed by evidence of regular staff turnover and frequent staff shortages. Despite the inevitable pressure this brought to bear on remaining staff, those we spoke with were, on the whole, well motivated. Here too we were struck by their evident enthusiasm for the work and the powers of the Act.

219. Recruitment to National Casework Division was often hampered by a shortage of applicants due to the perception of many within COPFS that the work of this

division compared with other operational work was somehow more complicated and difficult. Thus, whilst some staff had applied for specific posts within NCD, others had been selected on transfer from other offices.

220. COPFS' business plans in recent years have highlighted the key risk of not meeting its objectives through a shortage of suitably able and experienced staff. Attempts to address the problem have included regular awareness-raising presentations about their work from experienced NCD staff to other COPFS staff. There were also differing views as to whether working in NCD was a career development opportunity. As with all posts in COPFS deputies are expected to move when required to meet the needs of the Service. A move to NCD for one person might be seen as a good way to acquire a specialised skill set where another may view it with less enthusiasm.
221. Retention of experienced staff in NCD was equally problematic for a variety of personal and work reasons. COPFS recognises both the need for staff development and the fact that working in NCD for a prolonged period can mean that staff become de-skilled in other aspects of legal work. Constant staff moves due to promotion or transfer underscore the need for continuous staff training and work experience. To this end we felt that the training carried out in-house supplemented by desk instructions and handover training and support for new staff, was appropriate. Additional training to POCU staff by the consultant accountants in NCD has been proposed but had not yet to take place. We suggest that such additional training as can be provided to legal staff in NCD by the accountants would enhance skills and knowledge in what is unfamiliar ground for lawyers.

### **Accountants**

222. The Crown has been fortunate, over the years since confiscation was introduced, to secure the services of a range of experienced accountants. These professionals provide their services on a part-time basis and give evidence as independent experts in confiscation hearings. However over time it became clear that there was a need for a full-time in-house forensic accountant to carry out more systematic accountancy review procedures with all confiscation cases. Additional funding provided by some of the reinvested funds from the consolidated fund, enabled Crown Office to appoint a full-time forensic accountant in November 2008.
223. The skills and knowledge of these accountants is highly valued, not just for their work on confiscation cases but also in providing valuable guidance on large financial crime cases being investigated and precognosed in the Financial Crime Unit. We welcome the move to engage such expertise in National Casework Division and encourage the Division to explore more fully how these experts can continue to improve outcomes in all aspects of POCA work. Their offer to contribute to training both within NCD and to law enforcement agencies should be accepted.

### **Civil Recovery Unit (CRU)**

224. Two distinct teams work in civil recovery. The first deals with the high volume case work of cash seizure and forfeiture work. Staff working in this area reported a marked increase in the number of cash seizure cases being referred. Despite the

increase in workload, there had been no corresponding increase in staffing. In addition to carrying out operational duties they are regularly involved in providing training to COPFS in general and in particular to POCA resource deutes. Despite these difficulties we found staff to be well motivated and enthusiastic about the provisions of the Act.

225. Although the work is civil in nature and the present incumbents have previous experience in civil law, recruits to legal posts come from within COPFS. We consider this to be a satisfactory arrangement provided the applicants have the necessary skill set.
226. In the second team, dealing with civil asset recovery, we again noted that staff shortages have led to a backlog of cases. COPFS' draft business plan for 2008/09 acknowledges the difficulty of recruiting legal staff for this work. At the present time, legal staff in the civil recovery unit are seconded from Scottish Government. In addition to legal staff, the team of investigators comprises a number of former police officers and seconded personnel from police forces, HMRC and SOCA. A forensic accountant completes the team and provides the necessary expert advice and professional accountancy service in-house.

#### **Area resource deutes**

227. As shown on the process maps for confiscation and cash seizure work POCA deutes are allocated work from two sources: either directly via requests from law enforcement or via instruction from NCD. As deutes carry out these duties in addition to their core duties, they often face conflicting priorities or are simply unavailable for POCA work due to their court commitments. In these circumstances, of necessity, other deutes or legal managers have carried out any urgent work.
228. In addition, the nature of POCA work means that the volume of work they might have to deal with can vary considerably. One deute told us of one single case resulting in more than 200 production orders. Another referred to the work taking her away from operational duties for two full days. On other occasions very little POCA work might be required.
229. POCA resource deutes were either selected or volunteered for the post. Only some saw this as a development opportunity. That said we found no evidence the standard of work produced had suffered as a result.
230. As shown in the parallel processes in the confiscation process Map 1, a POCA resource deute might be required to seek restraint for a case which may or may not have been reported to their office as a criminal case. Similarly they may be required to prepare applications for a number of production orders so that financial investigators in law enforcement can prepare a Statement of Information of the financial position of the accused. In larger offices particularly it is unlikely that they will have had any dealings with the substantive criminal prosecution case. Thus their POCA work is carried out in something of a vacuum.

231. Due to the fragmented nature of what they do the POCA resource depute may gain some expertise in these specific tasks. As such we found that they were no more likely than other staff to have an understanding of the broader application of POCA which we advocate in this report. For example, of those resource deutes interviewed in the course of our inspection, the level of understanding and awareness of how and when confiscation might arise was patchy. We suggest that these findings are indicative of proceeds of crime being treated as a peripheral topic which has little bearing on the everyday work of a local prosecutor.
232. We noted that the lists of POCA resource deutes for each area currently published on the COPFS intranet were out of date. In COPFS, deutes are constantly moved between offices and posts as a result of promotion or other business reasons. Consequently, some offices we visited during our inspection did not have a POCA resource deute appointed. If lists are not regularly updated then staff and external agencies will find it difficult to identify their main point of contact.
233. The majority of POCA resource deutes had received some training to support them in their work. However, during our interviews it became apparent that some had received training only in relation to civil cash seizure work and not on the confiscation aspects of the Act. As our inspection continued however we learned that this situation was being addressed by a number of additional training courses on offer. We were also told of a proposal to establish a POCA resource deutes forum which would provide further support and we welcome such an initiative.
234. Training for the POCA resource deutes was provided by the experienced practitioners in both NCD and CRU. Given the impact that providing such training has on the resources of these small teams in Crown Office we suggest that the Scottish prosecution college could take on a role in delivering POCA training courses. We accept the need for experienced practitioners to contribute to such training and therefore suggest that consideration should be given to using alternative methods of delivery of their contribution such as e-learning modules where appropriate and possibly pre-recorded video presentations from the expert practitioners. Such methods have been used effectively in the recent sexual offences training at the prosecution college.
235. We concluded that the role of a POCA resource deute was sometimes difficult to balance with other core duties. In addition, due to frequent turnover of staff in some offices, the posts could remain vacant or be taken by deutes who had not received the full range of POCA training and these changes had not been reflected on the COPFS intranet. Whilst acknowledging the complex nature of some of the POCA work which would be best carried out by or with the support of someone with a degree of experience and expertise in the subject, the time was right for a culture change in the use of POCA and that it would make sense to broaden the expertise base by extending the work of POCA resource deutes to more legal staff.

#### **For the future - mainstreaming in COPFS**

236. We have argued in this report that until POCA becomes more widely known and understood it will never be used to its full potential. We have therefore advocated

that knowledge of the Proceeds of Crime be widened to all legal staff so that they are equipped to identify confiscation opportunities and the crime of money laundering. As with our comments in relation to the police, we advocate a culture change to bring POCA into a central position, recognising that this will involve considerable planning and effort to achieve. For this reason we have recommended that a POCA champion be appointed to lead on this matter.

237. We have recommended that in order to achieve mainstreaming of POCA in COPFS a multi-faceted approach should be adopted. Included in such an approach should be a review of all legal guidance and training.
238. To the same end, we have recommended that COPFS begin to mainstream the processes so that the work of POCA resource deposes is more widely carried out throughout the Service. While legal staff in some Initial Case Processing units, through necessity, already carry out cash seizure work as a regular part of their work, we would encourage further mainstreaming to be considered in a planned and structured way. Although we encourage such mainstreaming, we believe that a role remains for those who have accrued some expertise in this field as POCA resource deposes to provide the necessary support to their colleagues.
239. In general terms we found much greater awareness among those deposes who had spent time working in NCD or CRU, whether as trainees or fully qualified staff. Crown Office trainees serve a three-month spell in NCD or CRU as part of their first year's traineeship before spending their second year in various offices around the country. It was evident from our interviews with deposes in other offices that Crown Office trainees or former trainees and former NCD legal staff had knowledge and experience which stood them in good stead in identifying possible cases for confiscation and additional money laundering charges. Very often these people were selected to become area resource deposes. We believe that this knowledge and experience should be promoted and extended throughout COPFS.
240. Whilst training can to some extent offset the problems outlined above, a learning-by-doing approach may also be appropriate. Therefore we suggest that in addition a rolling programme of short secondments to NCD could contribute much to awareness among legal staff in COPFS.
241. Finally, we suggest that disseminating successful POCA outcomes as a regular feature of COPFS briefings or news publications, could also improve awareness. In the years immediately following the passing of the Act, COPFS used to publish a POCA news bulletin: "The Scottish Proceeds of Crime Act newsletter". We suggest that the inclusion of regular good news stories regarding POCA in COPFS communications to the whole service could also assist in the mainstreaming cause.

**Suggestion 3. That the COPFS champion:**

- b) in relation to mainstreaming arrangements regarding POCA, review case marking guidelines, and training and development opportunities.

## CHAPTER 6 - RESOURCES

### Police resources dedicated to financial investigation

242. In this report we have called for a more proactive approach to financial investigation that uses the powers contained within POCA to their full potential in order to disrupt criminality at all levels. In particular we have called for an increase in the capacity and capability of police divisions across Scotland. Clearly such a shift in approach will affect staff levels working in this discipline. It is of course virtually impossible for us to suggest an optimum number of financial investigators for each force and its divisions not least because of the huge variation in size and demand. We believe that the Scottish police service can usefully draw on the experience of the police services of England, Wales and Northern Ireland.
243. As we have already mentioned, the National Police Improvement Agency conducted a review of POCA arrangements in England, Wales and Northern Ireland in 2007, involving eight pilot sites. One outcome of the review was the production of a practice advice guidance document for the Service<sup>24</sup>. According to the data examined, the most effective ratio of financial investigators to other staff in a division was approximately 1:100. If financial investigator staffing levels were too low, these staff were unable to operate effectively. Conversely in situations where the ratio of financial investigators exceeded 1:100 the team was too large to be efficient.
244. In Scotland there are currently in the region of only 60 police officers and fewer than 20 members of support staff working in FIUs across the country. This includes staff within the SMLU in the SCDEA. (In assessing capacity it should be borne in mind that, unlike in England, Wales and Northern Ireland, there are certain financial investigation powers only open to constables and not civilians in Scotland.)
245. Given the lack of any divisional financial investigators in Scotland with the exception of Strathclyde Police there is little point in producing a comparable ratio in Scotland. Instead to illustrate the vastly differing levels of resources working in this field in Scotland compared to England, Wales and Northern Ireland we have calculated the ratio of financial investigators against total police numbers in Scotland, which is around 1:200. We believe that it would be overly simplistic and unhelpful to state how many additional financial investigators are needed to support the mainstreaming of financial investigation across the country. Consequently we believe that the Serious Organised Crime Taskforce and the ACPOS POCA champion will be best placed to help Chief Constables develop realistic, well-informed and phased resource plans supporting the deployment of divisional financial investigators over the next three years.

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<sup>24</sup> 'Practice Advice on the Management and Use of Proceeds of Crime Legislation', 2008. NPIA

## COPFS

246. The establishment of a confiscation unit in NCD reflects COPFS' decision to handle all confiscation cases centrally. As COPFS' involvement in these cases comes at the end of the process it must allocate resources on the basis of the workload it anticipates from law enforcement agencies. This has resulted in a gradual increase in the staffing levels of National Casework Division which deals with the substantive case work from serious organised crime, financial crime and the work of the confiscation unit. It follows that any increase in financial investigative capability will have a resultant effect on COPFS workload both within NCD and at area level for POCA resource deputes.
247. To date, the monies required to fund the increased workload have been met largely by existing budgets. In addition the sum of £400,000 was provided to COPFS by the Scottish Consolidated Fund in April 2008. This extra funding has been used to recruit full-time forensic accountants in NCD and CRU, a settlement negotiator in NCD and additional legal staff and analysts in both COPFS departments. Some of these appointments were only being made as our inspection was carried out and their impact was yet to be felt. This funding also allows for outsourcing some of the specialised CRU work on an ad hoc basis.
248. We noted a sharp increase in cash seizure referrals to the civil recovery unit from 231 in 2007 to 453 in 2008. This 96% increase in referrals took place at a time when staffing levels remained the same. The head of the Unit acknowledged that without the goodwill of the staff the total cash forfeiture for 2008 of £1.3 million would not have been achieved.
249. Elsewhere in this report we have called for greater awareness and use of the civil recovery options under POCA in relation to the civil recovery of assets (aside from cash forfeiture). There has been a year on year increase in referrals to CRU. In 2004, 26 cases were referred to CRU. This figure had risen to 73 in 2008. Staff in CRU reported that they were dealing with a backlog of referrals and they attributed this situation to some extent on a shortage of resources.
250. It is clear that the joint Scottish Proceeds of Crime Strategy will require a co-ordinated approach to resources if partners are to be in a position to exploit the legislation to its full potential. Recent experience of potential referrals from law enforcement agencies shows that investigative work for civil recovery is just as resource-intensive as that for criminal confiscation, a fact that is not always fully understood by law enforcement agencies. Nevertheless we believe that there is a need to monitor resources in this area of work particularly and to ensure that resources are in place to meet any anticipated demand.

## Funding arrangements

251. Although it is beyond our remit to recommend how additional posts should be funded, our observations both north and south of the border may help future deliberations. In the first instance we draw attention back to the debate in the Scottish Parliament prior to the introduction of POCA, when the then Justice Minister Jim Wallace stated that,

*“...a significant proportion of the receipts that are generated will be used in Scotland to improve performance in asset recovery and to fund schemes in support of crime prevention and our drugs strategy”.*<sup>25</sup>

252. At the outset of POCA, the Scottish police service received Government funding in the region of £3.5 million to fund financial investigator and financial analyst posts. Following the implementation of the Act Scottish Ministers initially decided to invest the money recovered from POCA to drug rehabilitation projects and then those communities hardest hit by serious and violent crime. More recently the money recovered has been directed for use in the Cashback for Communities scheme. Virtually none has been used to improve performance with the exception of £400,000 provided to Crown Office mentioned above.
253. During this inspection a number of senior police officers expressed the view that a portion of the recovered proceeds of crime should be returned to law enforcement agencies in order to improve performance in this area. Shortly before the end of the inspection the Cabinet Secretary for Justice indicated his agreement in principle with this proposition. However at the time of writing, details of how this process might work were not available.
254. We are supportive of this move but urge caution on two fronts. First, we believe that ‘Cashback for Communities’, which almost exclusively returns the proceeds of crime to Scotland’s communities by funding of appropriate projects, is and will remain the most deserving recipient of the majority of recovered assets. The scheme represents a virtuous circle in which money taken from communities in Scotland is returned to them. At the same time we accept that an initial injection of funding to raise the capability and capacity of law enforcement agencies will lead to more assets being recovered and ultimately returned to these communities.
255. Second, we believe that the ‘incentivisation’ scheme used in England, Wales and Northern Ireland is not the best way to proceed in Scotland. There, in broad terms 50% of monies recovered are allocated to the Home Office. The remainder of funds is distributed to law enforcement agencies calculated by a formula that is based upon their pro-rata input. In our visits in England we noted at best mixed views about incentivisation. On one hand, the scheme was acknowledged to have led to a significant increase in financial investigation capacity and capability. On the other, concern was raised about the potential of the scheme to skew law enforcement attention to the most asset-rich criminals and not necessarily those causing most harm to communities. Furthermore, the formula for determining the percentage due to one law enforcement agency as a result of a particular enquiry covering a number of jurisdictional areas can be problematic. The formula is also used to allocate a share of the proceeds of crime to prosecutors and the court service and as such can have a divisive effect in an area where good partnership working is essential.
256. It is clear that relevant parties in Scotland have the opportunity to learn from the experience gained elsewhere. For that reason we would favour a ‘reinvestment’

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<sup>25</sup> See Appendix 2

rather than an ‘incentivisation’ scheme in which a portion of the recovered proceeds of crime are returned to law enforcement agencies and COPFS according to need rather than being linked to targets or performance. However, we accept the need to pump-prime and as such we believe that this area requires additional investment. Properly used, an increase in capability and capacity will significantly increase the disruption of criminality and at the same time raise the level of assets recovered.

257. We understand the attraction of funding the necessary increases in resources entirely from existing recovered monies not least because of the current economic climate. However, even leaving aside the impact that this would have on ‘Cashback for Communities’ we believe that current returns are not large enough to fund the kind of increase needed in the short or indeed medium term. In addition, given the success of ‘Cashback for Communities’ it is our view that an increase in resources should not be funded exclusively from recovered assets but should be part-funded by existing police budgets.
258. During the inspection we met with the ACPO lead for POCA. His view was that the police service should be striving to remove assets from criminals in order to disincentivise potential criminals because it is the right thing to do. The notion of potential cost would not prevent a force from investigating, for example, an allegation of rape and therefore arguably the potential cost of increasing financial investigation capability should not prevent forces doing so. We share this view. We therefore believe that the Scottish Government and chief constables should agree a funding formula that will lead to a phased increase in capacity, based upon reinvestment of criminal assets and redeployment of a portion of existing police budget.
259. In this section we have made the case for increasing the resources available for policing activity under POCA. In doing so, we recognise that there will be a need to increase in resources in COPFS to deal with the anticipated subsequent rise in workload. Indeed we believe that the relative funding needs of other law enforcement agencies, prosecutors and the court service should be examined in relation to the Scottish Proceeds of Crime Strategy so that each organisation is funded to the appropriate level.

## Conclusion

260. We consider that there is a case for reinvesting a proportion of the proceeds of crime that are realised as was envisaged when the Act was originally debated. It is also important that a balanced, strategic view of how this reinvestment is distributed across criminal justice agencies is taken. This is necessary to avoid a situation whereby a system that is already stretched in places becomes overwhelmed. This particular concern underpins our recommendation that the SOCT through coordinating a POCA strategy prevents this situation from occurring.

**Recommendation 2. That the Serious Organised Crime Taskforce broaden its focus in relation to proceeds of crime and develop a Scottish Proceeds of Crime Strategy in order to co-ordinate action among partner criminal justice**

agencies including but not limited to ACPOS and COPFS. In particular the Strategy should focus upon:

- a) creating sufficient capability and capacity across partner agencies to address all levels of criminality and all crime types included within the provisions of the Act.

Suggestion 1. That the ACPOS POCA champion:

- c) assist forces as appropriate in establishing optimum levels of resources to be put in place at force and divisional levels to fully utilise the powers contained within the Act.

Suggestion 2. In reviewing current processes, forces should:

- b) develop plans to increase capability and capacity at divisional level assisted by the ACPOS POCA champion.

## CHAPTER 7 - RESULTS

261. As outlined earlier in this report, we share the view encountered throughout this inspection that first and foremost the principal aim of financial investigation techniques and the powers contained within POCA should be to disrupt criminals and to reduce the harm they inflict on Scottish communities. We have also articulated our belief that this objective should be central to the recommended Scottish Proceeds of Crime Strategy.
262. In making these comments we are aware that there are currently no performance indicators relating to harm reduction. We also accept that deriving the kinds of qualitative indicator needed poses a significant challenge for the police service and COPFS. A possible solution may be found in the ongoing work of the Serious Organised Crime Agency which is looking at ways of measuring and quantifying the impact of harm reduction interventions. We would encourage criminal justice partners in Scotland to liaise with SOCA with a view to considering the introduction of similar performance indicators in due course.
263. The difficulty for those working with POCA in Scotland is that the systems for recording performance from the start of the process through to whatever monies are seized being paid into the Scottish Consolidated fund are poor. This is acknowledged by all with whom we consulted.
264. The current system shared among partners records data under the following headings:
- the value of assets identified and restrained;
  - the value of assets confiscated at both force level and nationally;
  - the value of assets recovered by civil means; and
  - the value of cash forfeitures.
265. There are a number of significant gaps in the current system. For example, whilst the value of confiscation orders is recorded, the number of orders and the range of crimes to which they relate is not. Therefore no comparative analysis has been carried out between patterns of offending in particular crimes and the confiscation opportunities identified. At the end of the process, confiscation orders are treated as a monetary penalty in the same way as a fine. Only since 2007 have confiscation orders been recorded separately. Even now, although the Scottish Court Service reports annually to the Scottish Government a figure which represents confiscation orders paid that year, there is no recording system linking the paid amounts with individual orders.
266. As we noted earlier the Scottish Asset Recovery Group is currently working to develop a more comprehensive performance management framework than the current unsatisfactory system. The subgroup of SARG has brought forward proposals to the Group that it should make representation to change current arrangements in order to make provision for Scottish figures to be included in the UK JARD database. Much work is required to assess the feasibility of this proposal and identify what other implications this may have, not least cost to the Scottish

partner agencies. Such work is vital to supporting and guiding activity in this field. This again underpins our recommendation that the SOCT take a co-ordinating role in relation to proceeds of crime.

267. We were interested to note the findings of a recent Home Office survey<sup>26</sup> (into the causes of attrition in confiscating the proceeds of crime) which highlighted the perceived lack of overview across the whole process and the lack of strategic planning. This survey relates to the position in England, Wales and Northern Ireland but is informative from a Scottish context.
268. In the absence of qualitative data on harm reduction in Scotland, we turn our attention to the performance data that is available. In doing so we accept that this is at best a measure of activity and output rather than of outcomes achieved. We have reproduced below the data provided to us under the current recording arrangements. The following commentary is based on our analysis of these data.

### **Assets identified and restrained**

269. We examined the value of assets identified for restraint by the eight Scottish forces and the SCDEA, reported to COPFS annually since 2003 and ultimately restrained. We have already commented on the widespread concern amongst police officers regarding the difference between the restraint figures and the value of assets ultimately confiscated. However, as we have suggested previously, we believe that a lack of effective communication and feedback between COPFS and the police forces on the 'benefit of criminality' and 'available amount' figures has led to an unrealistic expectation about potential confiscation outcomes in certain quarters of policing. Similar concerns were expressed by law enforcement officers in the Home Office survey referred to above. The conclusions of that survey mirror our own conclusions about this topic.
270. As discussed earlier in this report<sup>27</sup> the initial identification of assets figure is often eventually amended in light of a number of factors such as legitimate third party interests, legitimate sources of income, depreciation, accuracy of property valuations, pensions and business interests. In addition it should be borne in mind that assets restrained in one year may not lead to confiscation in that same year, so the respective figures for the same year should not be compared. We accept that the difference between these two sets of values in those cases brought to our attention is entirely explicable. We are also confident that renewed efforts to improve communication and feedback will remove unhelpful misunderstandings.

### **Confiscation orders**

271. The two tables below show the value of confiscation orders achieved since 2003 at force level and also nationally, as collated and published by COPFS in June 2009. As can be seen, the total value of confiscation orders granted in Scotland since the inception of the Act is £17,091,601. When the force figures are examined, a

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<sup>26</sup> The Research Development and Statistics Directorate Research Report 17, published July 2009

<sup>27</sup> Paragraphs 129 to 138

predictable difference in the level of confiscation orders achieved between the bigger and smaller forces can be observed.

272. The difficulty with assessing performance simply by reference to the sums ordered to be confiscated is that this does not necessarily reflect the number of cases investigated and processed by each financial investigation unit nor the work involved in each one. One high value confiscation order can make for impressive monetary results and conversely comparing this with lower value confiscation orders can devalue what are nevertheless good outcomes for individual cases.

### Confiscation orders in Scotland, shown on a force by force basis

Year	Central	Dumfries & Galloway	Fife	Grampian	Lothian & Borders	Northern	Strathclyde	Tayside	HMRC & DWP	SCDEA	Total
Mar-03	Not recorded	Not recorded	Not recorded	Not recorded	Not recorded	Not recorded	Not recorded	Not recorded	Not recorded	Not recorded	£21,466
2003-04	£1,500	£18,205	£11,099	£186,072	£438,200	£64,700	£383,181	£39,541	£93,578	£236,823	£1,472,899
2004-05	£10,040	£54,688	£104,831	£319,060	£107,917	£17,546	£521,176	£37,030	£87,018	£88,294	£1,347,599
2005-06	£153,517	£125,731	£113,903	£441,700	£384,669	£1,031,354	£599,899	£66,644	£177,000	£375,323	£3,469,739
2006-07	£113,890	£173,039	£207,372	£275,036	£494,083	£64,149	£995,115	£126,568	£1,647,556	£327,506	£4,424,313
2007-2008	£47,000	£437,446	£41,397	£4,000	£655,173	£18,023	£946,936	£321,185	£78,997	£296,880	£2,847,037
2008-2009	£5,5234	£7,000	£77,632	£225,389	£278,111	£99,000	£1,335,792	£0	£148,094	£1,332,007	£3,508,548

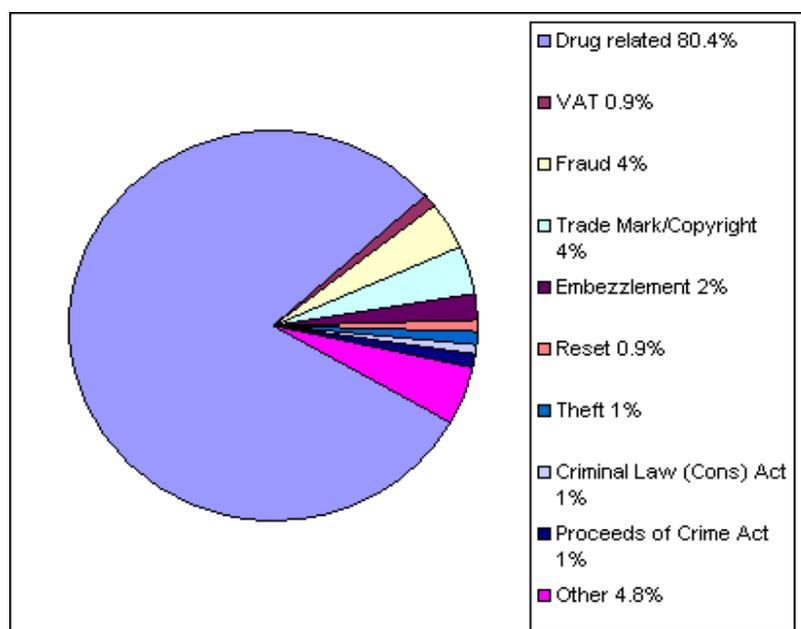
## Focus on drugs

273. In the table below we have broken down the value of confiscation order data further in order to illustrate the overwhelming focus on drug offences since the inception of the Act.

Year	Drugs offences	Other offences	Amount
2003 - 2004	55	2	£1,494,365
2004 - 2005	61	10	£1,347,599
2005 - 2006	109	13	£3,469,739
2006 - 2007	105	17	£4,424,313
2007 - 2008	82	25	£2,847,037
2008 - 2009	49	29	£3,508,548

274. This focus on drug crime is further illustrated in the chart below, which illustrates all drug and non drug cases resulting in confiscation orders. We accept that it is vitally important that the powers contained within the Act are used in tackling the supply of controlled drugs. Such crimes undoubtedly cause a great deal of harm to individuals, families and whole communities. That said, we believe that these powers should also be used against criminal profiting from the wide variety of offending which the Act allows. Only then will the Act fulfil its potential to disrupt criminality at all levels across Scotland. We asked Crown Office to provide a breakdown of the non drugs cases which resulted in confiscation orders and the table below shows the information in a pie chart.

## ANALYSIS OF CRIMINAL CONVICTIONS IN WHICH CONFISCATION ORDERS HAVE BEEN MADE - 2003 TO 2009



275. Analysis of this information shows the overwhelming emphasis on drugs offending attracting the confiscation provisions of the Act. Our experience of the criminal justice system leads us to believe that there is further scope to explore crimes of dishonesty such as robbery, theft, fraud and embezzlement. In addition, because of the variation in contact between local authority trading standards departments and FIUs around the country, we have concluded that there is greater scope for POCA to be applied to copyright and trademarks offences.

### Civil Recovery

276. The value of assets recovered through civil means and the value of cash forfeited on a national level are shown on a year-by-year basis in the table below. Not surprisingly given both the current processes for referring cases to the CRU and the relative size of the CRU compared to NCD, the value of assets recovered and cash forfeited through civil means (£10,284,489) is significantly lower than the value of confiscation orders granted (£17,091,601). As we have stated, we believe that there is an opportunity to increase the contribution made by civil recovery, and we expect to see larger amounts of assets being recovered by civil means in Scotland in the future.

	Asset Recovery	Cash Forfeitures	Total
2003-2004	£23,986	£672,824	£696,810
2004-2005	£203,408	£797,839	£1,001,247
2005-2006	£761,602	£604,200	£1,365,802
2006-2007	£496,215	£1,200,427	£1,696,642
2007-2008	£1,365,267	£1,335,188	£2,700,455
2008-2009	£790,155	£2,033,378	£2,823,533
<b>Totals</b>	<b>£3,640,633</b>	<b>£6,643,856</b>	<b>£10,284,489</b>

277. Looking at the value of cash seizures it is clear that the reduction of the threshold for seizure from £10,000 to £5,000 and then to £1,000 in 2006 has contributed to greater year-on-year returns. In addition during our interviews and focus groups, cash seizure was the feature of the Act with which most practitioners in both the police and Procurator Fiscal Service were most familiar. We believe that this mainstreaming has contributed to the increase in referrals, as the following table shows.

## NUMBER OF CASH SEIZURE CASES

Year ending	Referrals	Forfeited
2004	57	£672,823.71
2005	77	£797,839.33
2006	75	£604,199.67
2007	231	£1,200,427.29
2008	453	£1,319,963.94

278. Looking at performance at a force level, even allowing for the relative size of Strathclyde Police compared with the other forces it is apparent that Strathclyde has performed particularly well. We believe that the presence of a financial investigator in each of the force's division has been a significant contributory factor. We also acknowledge the value of cash forfeitures consistently reported by Dumfries and Galloway Constabulary, Scotland's smallest force.

## CASH SEIZURES

Year	Central	Dumfries & Galloway	Fife	Grampian	Lothian & Borders	Northern	Strathclyde	Tayside	SCDEA
Mar-03	Not recorded	£238,580	Not recorded	Not recorded	Not recorded	Not recorded	Not recorded	Not recorded	Not recorded
03-04	Not recorded	£217,403	Not recorded	£108,490	Not recorded	Not recorded	£319,724	£25,975	Not recorded
04-05	£278,590	£182,704	£17,076	£10,199	£9,942	£0	£477,557	£125,437	£6,369
05-06	£42,649	£88,164	£21,633	£29,009	£85,144	£19,900	£624,945	£31,198	£33,615
06-07	£21,238	£325,288	£66,300	£14,866	£211,018	£12,100	£847,997	£108,255	£20,000
07-08	£37,505	£177,065	£116,952	£16,937	£167,824	£17,800	£1,123,053	£134,211	£0
2008-2009	£31,628	£113,427	£106,101	£14,371	£155,046	£28,400	£1,880,441	£149,009	£116,713

## Analysis of results

279. Given the relatively small number of police officers, members of police staff and prosecutors working in financial investigation in Scotland we acknowledge the considerable effort and hard work that has gone into achieving the results shown above. Equally we believe that much more could be achieved with the increased resources by implementing the recommendations we have made in this report.
280. As our inspection was nearing its end the Cabinet Secretary for Justice announced additional funding of £4 million for fund 80 new posts in SCDEA, some of which will be financial investigators. We welcome this move to tackle serious organised crime. However, as have argued there is a need to increase financial investigation capacity not just in SCDEA but throughout Scotland. We also believe that it is important that the results of POCA activity are communicated as effectively as possible in order to convey the message to the public that crime does not pay. In this regard we would encourage those involved in the creation of the Scottish Proceeds of Crime Strategy to give due consideration to this matter when developing the strategy.

## Comparison of performance with England and Wales

281. We have already acknowledged our view that the values of confiscation orders and civil recoveries represents a significant achievement, particularly given the small number of police officers and prosecutors working in this field in Scotland. Given that POCA applies both north and south of the border, it was inevitable that comparisons with results achieved in England, Wales and Northern Ireland would be made. For example, in 2003/04 £54.5 million was secured<sup>28</sup> in England, Wales and Northern Ireland under POCA (compared to £2.2 million in Scotland). This rose to £135.7 million in 2008 (compared to £6.3 million in Scotland). Over the years from 2003 to 2008 a total of £496.86 million<sup>29</sup> was secured in England under POCA compared with a sum in the region of £27.3 million in Scotland).
282. However, it must be stressed that direct comparisons are not straightforward as there are a number of factors that must be taken into account. These include differences in population, demography, crime trends and legal processes. Furthermore, we are also aware of the different approach to calculating the criminal benefit figure for confiscation in England and Wales. Such an approach can lead to a significantly higher figure being recorded but not necessarily recovered. The causes of this attrition are more fully examined in the RDS survey.(op cit)
283. In the main, though, we reiterate our conclusion that in general terms financial investigation has been resourced to a much greater extent south of the border than it has in Scotland. The incentivisation scheme operating in

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<sup>28</sup> The term 'secured' reflects the combined value of confiscation orders made by the courts, and the value of civil cash forfeitures and civil asset recoveries

<sup>29</sup> Home Office

England and Wales has also undoubtedly raised the profile of financial investigation there. As a result policing and prosecution arrangements for POCA in England, Wales and Northern Ireland are much more mainstreamed already compared with the specialised and peripheral position they occupy in Scotland. Therefore despite some misgivings about making direct comparisons, we suggest that the relative figures indicate that there is significant room for improvement in Scotland.

284. Notwithstanding the above, we stress again our belief that financial returns achieved must not be viewed as the ultimate indicator of success or failure of financial investigation. On the contrary, the primary objective of financial investigation must remain to disrupt criminality at all levels. Consequently, efforts must be made to develop more appropriate indicators for assessing this aspect of performance.

### **Cash-back for Communities**

285. The Cash-back for Communities project was established in January 2008. Since then it has provided funding for a range of youth projects such as skate parks and youth cafes, as well as for sports such as rugby, football, and basket-ball. The Arts too have received funding for ‘creative identities’ workshops for children and young carers. In all £13 million has been committed to such activities.
286. We have already outlined our belief that this scheme represents a virtuous circle in which the proceeds of crime are returned to communities. Furthermore, we have also noted a number of positive media reports during this inspection which have outlined the positive aspects of this approach. Consequently we believe that with the exception of a finite stream of reinvestment to fund an increase in resource levels in partner agencies, thereby increasing the effectiveness of the overall process, the recovered proceeds of crime should continue to be returned to communities through this scheme in the years ahead.

### **Conclusions**

287. In this section we have discussed data relating to POCA activity. We would reiterate the caveat that these data are incomplete. Furthermore, measures of the monetary value of recovered assets alone are in particular an inadequate measure of success in relation to POCA. This further illustrates the need for adequate measures to articulate harm reduction the current absence of which represents a significant barrier to improving effectiveness.
288. Despite the shortcomings of the measures available we conclude that the case for investing in additional resources to support mainstreaming is still strong. As we have asserted throughout this report we believe that additional capability and capacity in law enforcement and prosecution services will result in criminality being disrupted to a much greater degree than is currently the case. Furthermore we believe that the Serious Organised Crime Taskforce assisted by the Scottish Proceeds of Crime Strategy and the

respective ACPOS and COPFS POCA champions will be well placed to ensure that any additional funding in this area is both proportionate and necessary.

## APPENDIX 1 - STRUCTURES OF CROWN OFFICE AND PROCURATOR FISCAL SERVICE FOR POCA

Figure 1. National Casework Division - Criminal Process

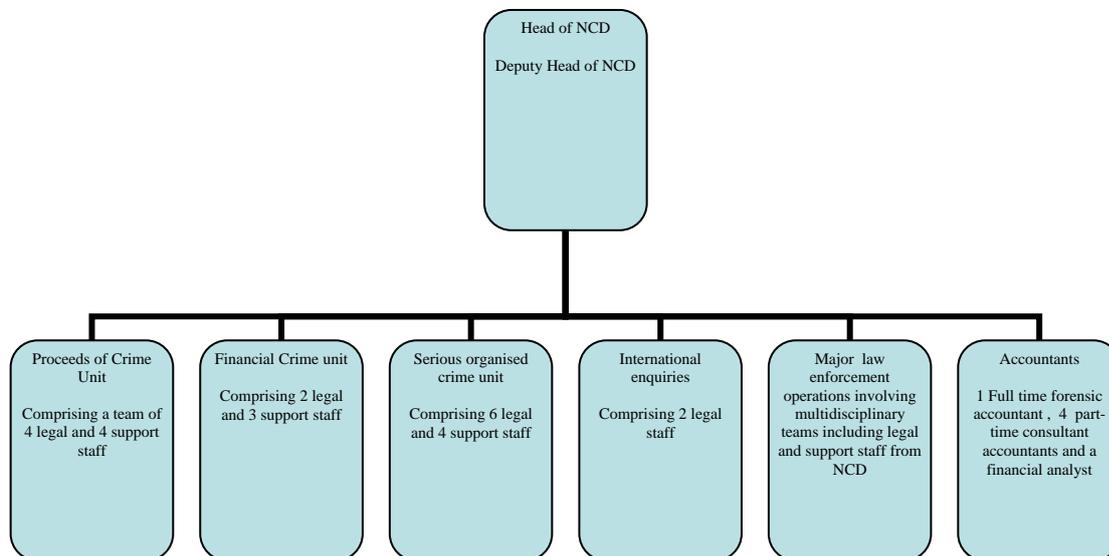
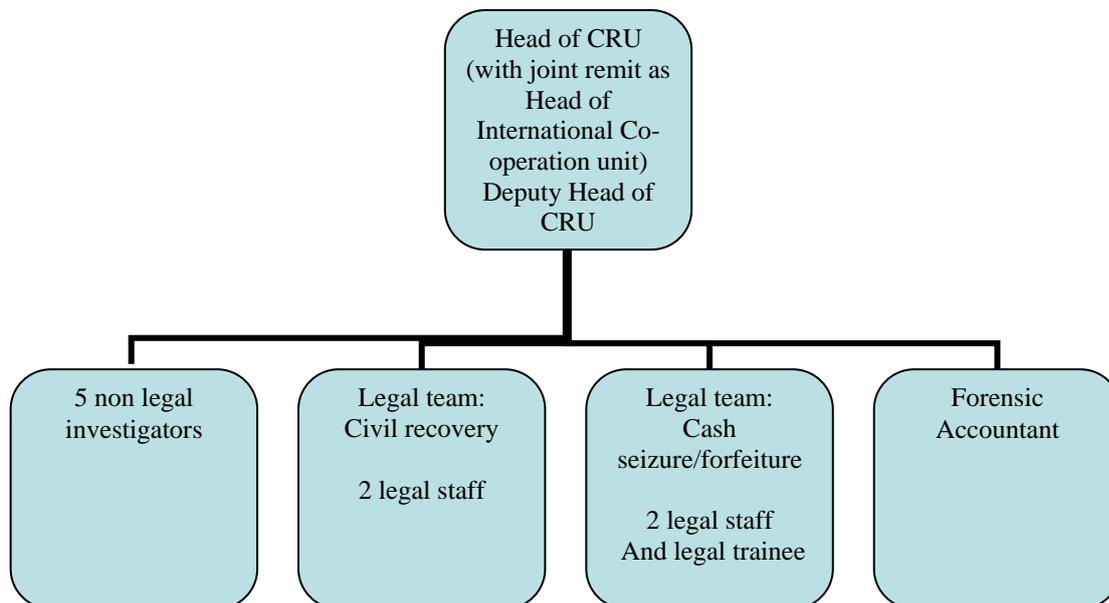


Figure 2. Civil Recovery Unit - Civil Process



The Civil Recovery Unit, although nominally a department of COPFS, carries out the functions of Scottish Ministers in relation to Part 5 of POCA dealing with the civil recovery of unlawful assets. The Lord Advocate, as a Scottish Minister rather than as head of COPFS, has assumed responsibility for these functions. Thus the Lord Advocate, in two very separate constitutional roles, takes the lead in both criminal confiscation and civil recovery in Scotland.

## **APPENDIX 2 - SEWELL DEBATE**

**24 OCTOBER 2001**

The Sewell Convention requires that where the UK Parliament wishes to legislate on a matter devolved to the Scottish Parliament the consent of the Scottish Parliament is necessary.

Such a debate took place in the Scottish Parliament on 24 October 2001 to allow the UK Parliament to pass the Proceeds of Crime Act 2002.

The then Justice Minister outlined the proposed provisions of the UK Bill including new powers of investigation and enforcement, facilitation of criminal confiscation by putting drug trafficking and other crimes on a new all crimes basis, introduction of a new civil recovery scheme and taxation arrangements and strengthening of money laundering provisions.

Priority was to be given to criminal investigations and the Crown would apply its normal evidential and public interest tests without regard to whether civil recovery or taxation proceedings might be available under the Act.

To see the full text of the debate go to:-

[www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-01/sor1024-01.htm](http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-01/sor1024-01.htm)

### APPENDIX 3 - HISTORY OF THE LEGISLATION

Taking or confiscating the proceeds of crime from criminals is not a new idea. Despite the fact that the current Proceeds of Crime Act 2002 is only seven years old, some of its principles have been around for a much longer time.

Part I of the Criminal Justice (Scotland) Act 1987 made provision for Scotland in relation to confiscating the proceeds of drug trafficking. Thereafter, the Criminal Justice (International Co-operation) Act 1990, which extended to the whole of the UK, empowered the court to forfeit any cash that had been seized while being imported into or exported from the UK, if the court was satisfied that the cash directly or indirectly represented the proceeds of drug trafficking or was intended for use in drug trafficking. In addition, the Prevention of Terrorism (Temporary Provisions) Act 1989, which also applies to the UK as a whole, made provision for the forfeiture on conviction of money or property related to certain offences concerned with financing terrorism. It also provided for the forfeiture of money or property which was at the time of the offence in the accused's possession or control for the use or benefit of a proscribed organisation.

In 1994 the Hon Lord Davidson, on behalf of the Scottish Law Commission, chaired a review of the proceeds of crime legislation in order to consider the adequacy of the law and its provisions. Its resulting discussion paper on forfeiture and confiscation made a number of provisional proposals for reform.

For example, in the opinion of the Commission the confiscation provisions in the UK, the Commonwealth and certain European States were modest in scope in comparison with confiscation legislation in the USA which made provision for both criminal forfeiture and civil forfeiture. The principal statutes on the subject of criminal forfeiture, both passed in 1970 and later amended, were the Racketeer Influenced and Corrupt Organizations Act (known as RICO) aimed at organised crime, and the Controlled Substances Act, Continuing Criminal Enterprise Offense (CCE) aimed at major drug traffickers. Each contained comprehensive and “draconian”<sup>30</sup> provisions for the mandatory forfeiture of defendants’ assets. Civil forfeiture permitted the seizure and confiscation of the assets of persons who had not been convicted of any crime. The procedure was described as “a prosecutor’s dream and a defense (*sic*) attorney’s nightmare”<sup>31</sup>. The proceedings were against the property itself rather than the person, the burden of proof was lower than in a criminal case and the property owner’s innocence, even his acquittal in prior criminal proceedings, was generally no defence.

These developments in American law attracted criticism, and the Commission took the view that to copy them in Britain “would be a serious mistake”. Nonetheless similar provisions were to be enacted by UK statute in part 5 of the Proceeds of Crime Act 2002. Despite these initial concerns, we suggest that the civil recovery provisions have proved effective.

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<sup>30</sup> DB Smith “Prosecution and Defence of forfeiture cases”

<sup>31</sup> DB Smith *supra*

As to the confiscation of the proceeds of crime, the Commission noted that while schemes were in place in the UK for drug trafficking and terrorism and in England and Wales for serious crime, Scotland had no additional ones. Many of the changes subsequently proposed for Scotland by the Commission were intended to plug this gap, and certainly when it was passed in 1995 the Proceeds of Crime (Scotland) Act 1995 brought into force a number of its recommendations. Essentially it brought in similar confiscation provisions to those already legislated for terrorism and drug trafficking and applied these to other listed types of serious crime. However, in practice this led to difficulties in court for prosecutors who now had to establish the type of crime to which confiscation would apply, ie which type of criminal conduct had led to the assets in question. This was one of the main reasons for the new Proceeds of Crime Act in 2002.

In October 1998, the Prime Minister Tony Blair tasked the Performance and Innovation Unit (PIU) of the Cabinet Office with examining asset recovery arrangements. The PIU reported in 2000, with a number of recommendations, many of which were incorporated in the Proceeds of Crime Act 2002.

## APPENDIX 4 - THE MAIN PROVISIONS OF THE PROCEEDS OF CRIME ACT 2002

The Act is a UK Act of parliament, but in recognition of the fact that two different legal systems were to implement this law, separate sections relate to Scotland.

Essentially there are three distinct tools for law enforcement to tackle financially motivated crime:

- criminal confiscation
- civil recovery
- taxation

In addition, the Act made provision for three new substantive law offences concerning money laundering.

### Part 3 - Confiscation

Section 92 of the Act lays out the method for the court to confiscate a **sum of money** from the accused, **once convicted**, which represents either his benefit from **general criminal conduct** or his **specific benefit from the crime** of which he has been convicted. For a confiscation order representing general criminal conduct, the court must find that the accused has a **criminal lifestyle**.

‘Criminal lifestyle’ is defined in s142 of the Act. (See Appendix 6) This is where the accused has committed one or more of the specific offences in Schedule 4 of the Act. This schedule lists the offences such as money laundering; drug trafficking; directing terrorism; people trafficking; arms trafficking; counterfeiting; breaching copyright and trademarks legislation; living off immoral earnings; and trafficking in prostitution. (See Appendix 5 where Schedule 4 is reproduced in full.)

In addition to the listed offences which specifically bring the offenders within the ambit of the Act, there are more general provisions. These relate to those who have committed a continuing offence of at least six months duration and have made a benefit of £5,000 or more as well as those who have committed at least four offences which appear on one indictment or complaint, or in the previous six years have been convicted on at least two occasions of an offence from which he or she has benefited to the extent of £5,000 in cumulo<sup>32</sup>. These general provisions are designed to include the criminal who has gained financially from repeat or continuing offending in the “acquisitive” area of criminality.

If the court finds that the accused has indeed made a financial benefit from a criminal lifestyle, or has made a benefit from the particular crime libelled, the court must then decide what the **recoverable amount** is and make an order for this amount.

The standard of proof required for the Crown to show the criminal lifestyle, criminal benefit and recoverable amount are on the balance of probabilities. The

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<sup>32</sup> This was confirmed in the recent decision of *Pollock and Kenmure v PF Hamilton* 2009 HCJAC 34

Act provides that certain assumptions should be made by the court in deciding how to calculate the benefit. This entitles the court to look at the income and expenditure of the accused over a 6-year period starting from the date on which proceedings were commenced. Any income which is unaccounted for is deemed to be from criminal conduct and liable to confiscation. In practice, the Crown presents a Statement of Information to the accused, on his conviction, which, if unchallenged, is taken to be accurate. It is for the accused to rebut the presumptions raised in that Statement. In short a reverse burden of proof exists with regard to the financial information submitted to the court by the Crown.

In addition provision is made in the Act for property in the hands of others which can be described as a “tainted gift” where it can be linked to the criminal conduct.<sup>33</sup>

## **Restraint**

There is provision in the Act for restraint of assets, to prevent dissipation of these while the criminal case proceeds towards its conclusion. Such provisions were first enacted in the 1980s in legislation concerning drug trafficking and have been brought forward into the current legislation as a vital tool in ensuring that the opportunity to confiscate post conviction is not lost.

The effect of a restraint order is that it freezes the estate of the person against whom the action is taken. It forbids the person from dealing with or disposing of the property, and effectively holds the property in abeyance until the question of confiscation is dealt with. A common misconception is that such assets are immediately removed from criminals. Effectively the assets remain with the person who continues to have the use of them, but which may not be disposed of once restraint is in place.

Restraint can be sought by the Crown where a criminal investigation has been instituted, or criminal proceedings have been commenced. Thus, even at the earliest stage, before a suspect has been charged, it is possible to move to restrain, where it is considered appropriate. It also applies to later stages of proceedings, where, for example, post-conviction and post-confiscation, assets have been identified which were not known at the time of confiscation, allowing for freezing of these additional assets with a view to seeking a variation of the confiscation order.

## **Investigative orders**

There are a number of specific court orders which can be sought by investigators in the course of their endeavours in establishing proof of money laundering or in obtaining information for potential confiscation. The following can be obtained, on reasonable grounds being shown, at Sheriff Court level:

- search warrants;
- production orders (self-explanatory order to produce material);

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<sup>33</sup> Section 144 Proceeds of Crime Act 2002

- customer information orders (these require the financial institution or body to provide details of the identity of the customer); and
- account monitoring orders (this typically might be an order to require a bank to produce details of transactions in an account within a 90 day period, but the court might require justification for such a request, where a production order might suffice.)

Also, on application to the High Court:

- disclosure orders (these are only available from the High Court and were described in the guidance notes to the Act as “invasive” and anticipated to be used rarely.

### Civil recovery

There are two aspects to civil recovery within the Proceeds of Crime Act. The enforcement authority has power to:-

1. Recover **property** which is or represents property obtained **through unlawful conduct**.
2. Seek forfeiture of **cash** which is or represents property **obtained through unlawful conduct** or which was **intended to be used in unlawful conduct**.

Civil recovery/cash forfeiture can be sought whether or not a criminal prosecution has occurred in the first instance. Where no criminal proceedings have been brought, this might be because of a lack of sufficient evidence to the criminal standard, or because of the death of a suspect. However, even where prosecution has taken place, civil recovery is possible on acquittal or where conviction did not result in confiscation. The time limit for bringing a civil action for recovery of property obtained through unlawful conduct is twelve years from the date of acquisition.

As will be discussed further in this report, in Scotland, the enforcement authority for civil recovery is the Scottish Ministers. However, the responsibilities of the Scottish Ministers are in fact discharged by the Lord Advocate, not as head of the system of prosecution in Scotland, but in an entirely separate function. In practice, the Civil Recovery Unit (CRU) a specialised unit in Crown Office carries out this work which is entirely civil in nature.

### Property

With regard to recovery of assets there are similar provisions to those in the confiscation regime regarding freezing of property called property prohibition orders. In addition there are provisions allowing an interim receiver to secure and preserve the property involved to ensure that the property remains in good condition in order that it can be eventually realised. There is a minimum value of such property to avoid trivial actions (currently £10,000).

The provisions of the Act for investigative orders, such as production orders, search warrants, disclosure orders, customer information orders and account monitoring orders all apply to the civil recovery regime on reasonable grounds being shown for such applications.

Following upon extensive investigation the Scottish Ministers may seek a recovery order for the property concerned. The court, if satisfied, must make a recovery order for the relevant property and appoints a trustee (this can be an internal appointment (so the accountant within CRU can carry out this role) to secure the property and amount for realisation. The trustee accounts to the Scottish Ministers who, in turn, pay the proceeds of the realised property to the Scottish consolidated fund.

### **Cash seizure and forfeiture**

A constable or customs officer has power to seize cash if he has reasonable grounds for believing that it is recoverable property or intended for use in unlawful conduct. Initially the minimum amount was fixed at £10,000 in the 2002 Act. The current minimum was lowered to £1,000 in July 2006. The cash may be detained for up to 48 hours before an application must be made to a Sheriff for the continued detention of the cash for up to three months. There is provision for further requests to the Sheriff to continue to detain the cash for a period not exceeding 2 years. At any point during the cash detention period an application can be made by the Scottish ministers (in practice, the CRU) to the Sheriff, to forfeit the cash. Such forfeited cash is remitted directly to the Scottish Consolidated Fund, administered by the Scottish Government. Again, the standard of proof is on the balance of probabilities.

There are two essential differences between the criminal and civil regimes instituted by the Act:

1. Whilst confiscation can only follow on from a criminal conviction, for which the standard of proof is “beyond reasonable doubt”, the standard of proof for a civil action to recover property or to forfeit cash is “on the balance of probabilities”.
2. The criminal confiscation order is a monetary order for value, against a **person**, whereas the civil remedy attaches not to the person, but to the **property**.

### **Taxation**

Part 6 of the Act provides that the Director of the Assets Recovery Agency (functions now taken over by the Serious Organised Crime Agency) has revenue functions. If there are reasonable grounds to suspect that income, profits or gains accrued to a person or company as a result of that person’s or another’s criminal conduct, then the Director can assume taxation powers. No source for the income need be identified. The powers include inter alia those to tax income, capital gains, corporation tax, and inheritance tax (on criminal property). Criminal conduct is widely defined as conduct which constitutes an offence in any part of

the UK, but **not** tax offences themselves. Property is viewed as criminal property if it is linked with criminal conduct.

### **Money laundering**

Three new provisions were enacted in the 2002 Act, designed to simplify and strengthen the law against “money laundering”. (The term “money laundering” is derived from the Mafia’s ownership of laundromats during the prohibition years, when they mixed legitimate income with their income from bootlegging, gambling and prostitution.) It is recognised that money laundering can have various stages: placement of funds to disguise their provenance; layering the funds by changing the form of asset and/or location; and integration when the proceeds are returned to the direct control of the criminal, having acquired an apparently legitimate source. It was recognised in passing these provisions that differentiating, for money laundering charges, between drugs offenders and others was artificial. For the first time in the UK, money laundering offences related to all criminal property, rather than separating the drug related crime from other forms of criminality. In addition, the distinction was removed, between laundering one’s own criminal property as opposed to that of another.

The offences include:

- concealing, disguising, converting, transferring and removing criminal property. (section 327)
- The Act also strikes at facilitators who know or suspect that the property is criminal. (section 328)
- Lastly, acquiring or possessing criminal property. (section 329)

For the first time, it became possible to convict for money laundering without specifying the predicate (underlying) criminal offence. (for example, drug trafficking) However, in order to show that the property is “criminal” property, it is still necessary to establish, to a criminal standard of proof (ie beyond reasonable doubt) that the property is derived from criminal conduct of one sort or another. Since the passing of the Act in 2002 this definition of what constitutes criminal property and how it can be proved has been the subject of much deliberation in appeal courts both north and south of the border.

It is clear from recent court decisions that although the Act was framed in such a way as to allow a conviction for money laundering without specifying the **type** of criminal conduct which led to the criminal property in question, it is, in practice, very difficult to establish beyond reasonable doubt that the property is criminal without some evidence to show the **type** of conduct, or, **circumstantial** evidence which tends to show criminal conduct. In recent times, there have been two important decisions in the English Courts which have been followed with interest in Scotland.

### **In R v NW (R v NW, SW, RC and CC [2008]EWCA Crim 2**

The court of appeal in England said that there had to be some particulars of the criminal conduct relied upon. This seemed to contradict the wording of the Act

and the explanatory notes. However, another English case in 2008 on the same matter, R v Anwoir , McIntosh, Meghrabi and Elmoghrabi [2008] EWCA Crim 1354, provides a more helpful interpretation of the law, finding that there were two ways in which the Crown could prove that property derived from crime:

1. by showing that it derived from specific crime, or
2. by proving circumstances that give rise to an **irresistible inference** that the property can only be derived from crime.

In Scotland, these decisions have some bearing on how the law is interpreted. At the time of writing this report, the Appeal Court decision in the case of Zohaib Assad and Mohammad Ahmed was awaited. This appeal rests on the very issue of whether money laundering can be established in a situation where large sums of money were being transferred abroad by a money service bureau in incriminating circumstances.

On 24 June 2009, the court of appeal issued a judgement in relation to some of the grounds of the appeal by Mohammad Ahmad. In this judgement the court adopted the rational in the *Anwoir* case (supra). The court confirmed that circumstantial evidence leading to an irresistible inference that the property was obtained through criminal means, even when it was not possible to establish the exact nature of those criminal means, could be relied upon to establish a money laundering charge. Such a clarification of the interpretation of the money laundering provisions will be of great assistance to all in law enforcement and prosecution striving to prove such cases.

## APPENDIX 5

### Schedule 4

#### Money laundering

1 An offence under either of the following provisions of this Act—

- (a) section 327 (concealing etc. criminal property);
- (b) section 328 (assisting another person to retain criminal property).

#### Drug trafficking

2 (1) An offence under any of the following provisions of the Misuse of Drugs Act 1971 (c. 38)—

- (a) section 4(2) or (3) (unlawful production or supply of controlled drugs);
- (b) section 5(3) (possession of controlled drug with intent to supply);
- (c) section 8 (permitting certain activities relating to controlled drugs);
- (d) section 20 (assisting in or inducing the commission outside the UK of an offence punishable under a corresponding law).

(2) An offence under any of the following provisions of the Customs and Excise Management Act 1979 (c. 2) if it is committed in connection with a prohibition or restriction on importation or exportation which has effect by virtue of section 3 of the Misuse of Drugs Act 1971—

- (a) section 50(2) or (3) (improper importation of goods);
- (b) section 68(2) (exploration of prohibited or restricted goods);
- (c) section 170 (fraudulent evasion).

(3) An offence under either of the following provisions of the Criminal Justice (International Co-operation) Act [1990 \(c. 5\)](#)—

- (a) section 12 (manufacture or supply of a substance for the time being specified in Schedule 2 to that Act);
- (b) section 19 (using a ship for illicit traffic in controlled drugs).

#### Directing terrorism

3 An offence under section 56 of the Terrorism Act [2000 \(c. 11\)](#) (directing the activities of a terrorist organisation).

#### People trafficking

4 An offence under section 25(1) of the Immigration Act 1971 (c. 77) (assisting illegal entry etc) or under section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (exploitation)

#### Arms trafficking

5 (1) An offence under either of the following provisions of the Customs and Excise Management Act 1979 if it is committed in connection with a firearm or ammunition—

- (a) section 68(2) (exportation of prohibited goods);
- (b) section 170 (fraudulent evasion).

(2) An offence under section 3(1) of the Firearms Act 1968 (c. 27) (dealing in firearms or ammunition by way of trade or business).

(3) In this paragraph “firearm” and “ammunition” have the same meanings as in section 57 of the Firearms Act 1968 (c. 27).

## Counterfeiting

6 An offence under any of the following provisions of the Forgery and Counterfeiting Act 1981 (c. 45)–

- (a) section 14 (making counterfeit notes or coins);
- (b) section 15 (passing etc counterfeit notes or coins);
- (c) section 16 (having counterfeit notes or coins);
- (d) section 17 (making or possessing materials or equipment for counterfeiting).

## Intellectual property

7 (1) An offence under any of the following provisions of the Copyright, Designs and Patents Act [1988 \(c. 48\)](#)–

- (a) section 107(1) (making or dealing in an article which infringes copyright);
- (b) section 107(2) (making or possessing an article designed or adapted for making a copy of a copyright work);
- (c) section 198(1) (making or dealing in an illicit recording);
- (d) section 297A (making or dealing in unauthorised decoders).

(2) An offence under section 92(1), (2), or (3) of the Trade Marks Act [1994 \(c. 26\)](#) (unauthorised use etc of trade mark).

## Pimps and brothels

8 An offence under either of the following provisions of the Criminal Law (Consolidation) (Scotland) Act [1995 \(c. 39\)](#)–

- (a) section 11(1) (living on earnings of prostitution or soliciting for immoral purposes);
- (b) section 11(5) (running of brothels).

8A An offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution etc)

## Blackmail

9 An offence of blackmail or extortion.

9A An offence under section 12(1) or (2) of the Gangmasters (Licensing) Act 2004 (acting as a gangmaster other than under the authority of a licence, possession of false documents etc)

## Inchoate offences

10 (1) An offence of conspiring or inciting the commission of an offence specified in this Schedule.

(2) An offence of aiding, abetting, counselling or procuring the commission of such an offence.

## APPENDIX 6 - S142

### 142 Criminal lifestyle

(1) An accused has a criminal lifestyle if (and only if) the offence (or any of the offences) concerned satisfies any of these tests—

(a) it is specified in Schedule 4;

(b) it constitutes conduct forming part of a course of criminal activity;

(c) it is an offence committed over a period of at least six months and the accused has benefited from the conduct which constitutes the offence.

(2) Conduct forms part of a course of criminal activity if the accused has benefited from the conduct and —

(a) in the proceedings in which he was convicted he was convicted of three or more other offences, each of three or more of them constituting conduct from which he has benefited, or

(b) in the period of six years ending with the day when those proceedings were instituted (or, if there is more than one such day, the earliest day) he was convicted on at least two separate occasions of an offence constituting conduct from which he has benefited.

(3) But an offence does not satisfy the test in subsection (1)(b) or (c) unless the accused obtains relevant benefit of not less than £5,000.

(4) Relevant benefit for the purposes of subsection (1)(b) is —

(a) benefit from conduct which constitutes the offence;

(b) benefit from any other conduct which forms part of the course of criminal activity and which constitutes an offence of which the accused has been convicted.

(5) Relevant benefit for the purposes of subsection (1)(c) is benefit from conduct which constitutes the offence.

(6) The Scottish Ministers may by order amend Schedule 4.

(7) The Scottish Ministers may by order vary the amount for the time being specified in subsection (3).

## APPENDIX 7

### PART 7 MONEY LAUNDERING

#### *Offences*

#### 327 Concealing etc

(1) A person commits an offence if he—

- (a) Conceals criminal property;
- (b) disguises criminal property;
- (c) converts criminal property;
- (d) transfers criminal property;
- (e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.

(2) But a person does not commit such an offence if—

- (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
- (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
- (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(3) Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.

#### 328 Arrangements

(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

(2) But a person does not commit such an offence if—

- (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
- (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
- (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

### 329 Acquisition, use and possession

(1) A person commits an offence if he—

- (a) acquires criminal property;
- (b) uses criminal property;
- (c) has possession of criminal property.

(2) But a person does not commit such an offence if—

- (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;
- (b) he intended to make such a disclosure but had a reasonable excuse for not doing so;
- (c) he acquired or used or had possession of the property for adequate consideration;
- (d) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.

(3) For the purposes of this section—

- (a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;
- (b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession;
- (c) the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.

These provisions have been updated by sections 102 and 103 of the Serious Organised Crime and Police Act 2005.

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Scottish Police Training College

Strathclyde Police

Tayside Police

The Sheriffs' Association

## GLOSSARY

ACPOS	Association of Chief Police Officers in Scotland
CAB	Criminal Assets Bureau
COPFS	Crown Office and Procurator Fiscal Service
CPS	Crown Prosecution Service
CRU	Civil Recovery Unit
DWP	Department of work and Pensions
FIU	Financial Investigation Unit
HMICS	Her Majesty's Inspectorate of Constabulary in Scotland
HMRC	Her Majesty's Revenue and Customs
IPS	Inspectorate of Prosecution in Scotland
NCD	National Casework Division
NIM	National Intelligence Model
NPIA	National Policing Improvement Agency
PF	Procurator Fiscal
POCA	Proceeds of Crime Act 2002
POCU	Proceeds of Crime Unit (within NCD)
RART	Regional Asset Recovery Team
SAR	Suspicious Activity Report
SARG	Scottish Asset Recovery Group
SCDEA	Scottish Crime and Drug Enforcement Agency
SECU	Scottish Economic Crime Unit
SID	Scottish Intelligence Database
SMLU	Scottish Money Laundering Unit
SOCA	Serious Organised Crime Agency
SOCT	Serious Organised Crime Taskforce
SOI	Statement of Information
SPR2	Standard Police Report
SPSA	Scottish Police Services Agency
UKFIU	United Kingdom Financial Investigation Unit (of SOCA)

